



## NEWS

### **Wake up call - a failure to comply with your obligations in respect of Electronic Disclosure could prove extremely costly**

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**As part of our periodic series of updates on legal developments on the use of electronic evidence, [Michael Axe](#) looks at a recent High Court decision that will have far reaching consequences for all parties involved in litigation**

The provisions on electronic disclosure introduced in October 2005 fundamentally changed the way in which parties involved in litigation needed to approach the disclosure and use of electronic documents. Two of the key changes were the obligation on the parties to co-operate at an early stage in relation to electronic disclosure issues, and the way in which the Courts will consider what constitutes a "reasonable search" for electronic documents. Both of these issues were addressed by the Chancery Division of the High Court in the recent case of *Digicel v Cable & Wireless*, where a failure to comply with these obligations proved to be extremely costly for Cable & Wireless, both in terms of time and money. The Court's decision in this case will act as a warning to all parties involved in litigation that the Court will strictly enforce compliance with the new provisions.

#### **Early Co-operation between the Parties**

Despite the requirement under the new provisions that the parties should attempt to co-operate in agreeing the scope of electronic disclosure at an early stage in proceedings, *Digicel* and *Cable & Wireless* both failed to discuss how they would structure their searches for relevant electronic documents. In the end, both parties carried out keyword searches, but neither agreed with the other side what words should be used for these keyword searches.

After the parties had exchanged their electronic disclosure, *Digicel* protested that *Cable & Wireless* had not carried out a reasonable search for electronic documents. *Digicel* then applied to the Court for an order that *Cable & Wireless* make further specific disclosure of certain classes of electronic documents.

In considering the application, the Court highlighted that by failing to comply with the requirement to attempt to agree the scope of electronic disclosure with *Digicel* at an early stage in the proceedings, *Cable & Wireless* had left itself vulnerable to the risk that the Court would subsequently find that its search for electronic documents had been inadequate. Had *Cable & Wireless* attempted to agree the scope of its reasonable search beforehand with *Digicel*, any disagreement over the scope of electronic disclosure would have come to light at that early stage.

The Court reiterated that the purpose of the new provisions was to resolve such disagreements before disclosure was exchanged, and that if the parties are not able to reach agreement themselves during their early

discussions, they are expected to refer the issue to the Court before exchange was due to take place.

### **What is a “Reasonable Search” for Electronic Documents?**

After finding that Cable & Wireless had acted unilaterally in deciding what words would be used in its keyword search for relevant electronic documents, the Court then had to consider whether the scope of the search had been reasonable or not. Cable & Wireless argued that its search had been reasonable, especially given that it had cost Cable & Wireless over £2million to complete, and it had identified 1,140,000 potentially relevant documents (which was eventually whittled down by manual review and other techniques to the 5,000 documents which were exchanged).

Despite the cost of Cable & Wireless' search and the number of documents it identified, Digicel argued that the search was inadequate because Cable & Wireless had only used 6 “stem words” in its keyword search. Digicel argued that a further 34 keywords were relevant and should have been included.

The Court did not accept that all 34 additional keywords should have been used (especially as the majority of them were too common to be included in a reasonable search). However, it did decide that Cable & Wireless' search had been unreasonable, and ordered that several additional keywords (such as “delay”, “obstruct”, “impede” and “frustrate”) should have been included in the keyword search, given the subject matter of the dispute.

Given that Cable & Wireless had already incurred £2million in carrying out their original disclosure exercise, the Court's decision that they must undertake a second search for electronic disclosure documents was certainly a very costly one for Cable & Wireless. As well as the significant further costs and time that the second disclosure exercise will involve, Cable & Wireless no doubt also incurred substantial legal costs in unsuccessfully opposing Digicel's application for further electronic disclosure, which could have been avoided had they provided adequate electronic disclosure in the first place.

### **A Wake Up Call**

Had Cable & Wireless complied with the new provisions and made Digicel aware of the scope of their intended keyword searches before commencing their search exercise, Digicel would have had the opportunity to protest at that early stage. If the parties still could not agree, the issue could have been referred to the Court for a decision at an early Case Management Conference. This would have saved Cable & Wireless significant costs, as the extent of the required search would have been established prior to carrying out the disclosure exercise.

The Court's decision in this case should therefore act as a warning to any other parties involved in litigation that are considering making unilateral decisions regarding the scope of their searches for electronic documents.

### **Back-Up Tapes – when is disclosure reasonable?**

An additional issue that arose in this case was whether it was reasonable for Digicel to demand that Cable & Wireless restored its back-up tapes in relation to the email accounts of key former employees. The restoration of back-up tapes can be an extremely expensive and time-consuming process, and for that reason parties will often attempt to avoid providing such disclosure. In this case, the Court was not persuaded by Cable & Wireless' arguments that the restoration exercise would be disproportionate, and it ordered the parties to meet to discuss how the restoration exercise would be carrying out.

However, it is interesting to note that the Court also considered in principle whether it would be appropriate in some cases to shift the burden of the restoration costs from the disclosing party to the requesting party. This could be appropriate where the disclosing party had already provided reasonable disclosure, and so if the requesting party wanted the back-up tapes restored, the Court may order it to pay the costs of the exercise. In this case, this option had not been relevant as Cable & Wireless' disclosure had been found to be inadequate.

However, whilst as a tactical consideration such an option may appear to be financially attractive to the disclosing party, serious consideration would need to be given to the legal and practical repercussions of handing over back-up tapes containing potentially sensitive, confidential and/or privileged material to the other

side. As ever, legal advice should be sought.

For further information on this or any other issue relating to electronic disclosure, please contact [Michael Axe](#) by emailing [Michael](#) or by calling him on 08450 990045, or speak to your usual contact in the [Commercial Disputes Team](#).

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