Discovery of electronic documents and attorneys' obligations

By Joe van Dorsten

'Over 93% of all documents are initially created and stored in an electronic format and over 30% of those documents are never printed.'*

The object of discovery is to ensure that both parties are made aware of all the available documentary evidence before the trial commences in order to narrow the issues and eliminate incontrovertible points of debate (*Hall v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 195 (C) at 199I – J). In this computer age, the available documentary evidence is largely in electronic form and discovery will be incomplete if it does not include electronic documents.

The purpose of this article is to briefly examine what steps have been taken in foreign jurisdictions, as well as in South Africa, to adapt the rules of court to provide for the discovery of information that has been created and stored in electronic form. Such electronically stored information is generally referred to by the abbreviation ESI.

Specific provision for the discovery of ESI has been made in foreign jurisdictions by issuing practice directions or by amending the rules of court. Such amendments have been introduced either by expanding the definition of 'document' to include electronic information (as was done in the United Kingdom (UK), Ireland, Australia and Ontario) or by inserting specific provisions for the discovery of electronic information (as was done in Nova Scotia and the United States (US)).

UK Civil Procedure Rules

The UK Civil Procedure Rules provide, in part 31, for the disclosure and inspection of documents. In r 31.4 the word 'document' is defined to mean 'anything in which information of any description is recorded'. A detailed explanation of what the definition of 'document' covers is contained in para 2A.1 of Practice Direction 31, which states:

'Rule 31.4 contains a broad definition of a document. This extends to electronic documents, including e-mail and other electronic communications, word processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media, the definition covers those documents that are stored on servers and back-up systems and electronic documents that have been "deleted". It also extends to additional information stored and associated with electronic documents known as metadata.'

The English courts have warned that a failure to comply with the rules relating to electronic disclosure constitutes gross incompetence. In *Earles v Barclays Bank Plc* [2009] EWHC 1 (Mercantile Court), for example, Brown J stated at para 71:

'It might be contended that CPR 31PD 2A and electronic disclosure are little known or practised outside the Admiralty and Commercial Court. If so, such myth needs to be swiftly dispelled when over 90% of business documentation is electronic in form. The practice direction is in the Civil Procedure Rules and those practising in civil courts are expected to know the rules and practise them; it is gross incompetence not to.'

Ireland

The Rules of the Superior Courts of Ireland were amended in 2009 to provide for the discovery or disclosure of ESI in the new r 12 of Order 31 (Statutory Instrument no 93 of 2009: Rules of the Superior Courts (Discovery) 2009). The word 'documents' is defined in r 12(13) as follows:

‘“[D]ocuments”, for the purposes of this rule and rule 29, includes all electronically stored information, and the reference to “business documents” in rule 20 shall be construed accordingly.’

Australia

The Chief Justice of the Federal Court of Australia issued Practice Note CM 6 – Electronic technology in litigation on 25 September 2009. The practice note is applicable in proceedings where the court has ordered that ‘discovery be given of documents in an electronic format’ or that the hearing must be conducted ‘using documents in an electronic format’ (Practice Note CM 6, para 1.1).

When regard is had to the following extracts from Practice Note CM 6 and the Federal Court Rules, it is clear that the word ‘document’ must be interpreted to include ESI.

Paragraph 1.4 of Practice Note CM 6 provides:
‘Technical expressions used in this practice note and related materials are defined in the glossary.’

In the glossary to Practice Note CM 6 the definition of ‘document’ refers to Order 1 rule 4 of the Federal Court Rules, which defines a ‘document’ as:
‘[A]ny record of information which is a document within the definition contained in the dictionary in the Evidence Act 1995 and any other material data or information stored or recorded by mechanical or electronic means.’

Canada: Ontario

The Ontario Rules of Civil Procedure contain two definitions of the word ‘document’. In r 1.03(1) ‘document’ is defined to include ‘data and information in electronic form’. The following, more detailed, definition appears in r 30.01(1)(a):

‘“[D]ocument” includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form.’

The word ‘electronic’ is widely defined in r 1.03(1) as:
‘“[E]lectronic” includes created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means, and “electronically” has a corresponding meaning.’

Canada: Nova Scotia

The Nova Scotia Civil Procedure Rules distinguish between a ‘document’ and ‘electronic information’. In r 14.02(1) a ‘document’ is defined to mean ‘a document that is not electronic information’. The expression ‘electronic information’ is comprehensively defined as follows:
‘“[E]lectronic information” means a digital record that is perceived with the assistance of a computer as a text, spreadsheet, image, sound, or other intelligible thing and it includes metadata associated with the record and a record produced by a computer processing data, and all of the following are examples of electronic information –
(i) an e-mail, including an attachment and the metadata in the header fields showing such information as the message’s history and information about a blind copy;
(ii) a word processing file, including the metadata such as metadata showing creation date, modification date, access date, printing information, and the pre-edit data from earlier drafts;
(iii) a sound file including the metadata, such as the date of recording;
(iv) new information to be produced by a database capable of processing its data so as to produce the information … .’

Rule 16 makes specific provision for the disclosure of ‘electronic information’.

US Federal Rules of Civil Procedure

The discovery of ESI is specifically provided for in the US Federal Rules of Civil Procedure. In terms of the general provisions of r 34(a), a party may request the production of any designated electronically stored information stored in any medium from which information can be obtained either directly or after it has been translated into a reasonably usable form by the responding party.

Rule 34(a)(1)(A) of the rules provides:
‘(a) In general. A party may serve on any other party a request within the scope of rule 26(b) –
(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party’s possession, custody, or control –
(A) any designated documents or electronically stored information – including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations – stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.’

South Africa: Magistrates’ courts

The discovery of electronic and digital forms of recordings is provided for in r 23 of the Rules Regulating the Conduct of the Proceedings of the Magistrates’ Courts of South Africa, which came into operation during 2010. Rule 23(1)(a) states:

‘Any party to any action may require any other party thereto, by notice in writing, to make discovery on oath within 20 days of all documents and tape, *electronic*, *digital* or other *forms of recordings* relating to any matter in question in such action, whether such matter is one arising between the party requiring discovery and the party required to make discovery or not, which are or have at any time been in the possession or control of such other party’ (my emphasis).

Rule 23 is a step in the right direction but I submit that it does not adequately provide for the discovery of ESI. Unlike in the amended foreign rules of court, there is no provision for the discovery of electronically ‘stored’ information, only for electronic and digital forms of ‘recordings’. A ‘recording’ is defined as a ‘recorded broadcast or performance’ or ‘a disc or tape on which sounds or visual images have been recorded’ (http://oxforddictionaries.com/definition/english/recording?q=recording, accessed 20-9-2012). This focuses primarily on the storage medium instead of the electronic information itself. It would have been preferable to use the word ‘stored’, which in relation to information is defined to mean retained or entered ‘for future electronic retrieval’ (http://oxforddictionaries.com/definition/english/store?q=stored#store__9, accessed 20-9-2012).

There is no material difference between the words ‘electronic’ and ‘digital’ – they have a common meaning. ‘Digital’ is defined to mean ‘involving or relating to the use of computer technology’ and ‘electronic’ to mean ‘carried out … using a computer’ (http://oxforddictionaries.com/definition/english/digital?q=digital; http://oxforddictionaries.com/definition/english/electronic?q=electronic, accessed 20-9-2012).

Greater clarity could have been provided by giving examples of the electronic documents that are discoverable, for example e-mails with their attachments, databases, word processing files, spreadsheets, the metadata of electronic documents as well as information on servers and back-up systems (as was done in the UK and Nova Scotia).

South Africa: High Court

The Uniform Rules of Court do not contain any specific provision for the discovery of electronically stored information in High Court litigation. Rule 35(1) provides for the discovery of 'documents and tape recordings'. The word 'document' is not defined in the rules and, accordingly, bears its ordinary meaning. This was considered in *Le Roux and Others v Viana NO and Others* 2008 (2) SA 173 (SCA), at para 10, in which Mlambo JA stated:
'The *Concise Oxford English Dictionary* (10th edition, revised) defines … a document as "a piece of written, printed or electronic matter that provides information or evidence or that serves as an official record".'

The meaning of 'document' was interpreted in the context of s 69(3) of the Insolvency Act 24 of 1936, which provides for the seizure of books and documents. The court found that books and documents stored on a computer hard drive are susceptible to seizure under a warrant in terms of that section. The same extended meaning of 'document' is also applicable where discovery is concerned. Also of relevance for discovery purposes are the following remarks by Mlambo JA:
'It can hardly be suggested, as counsel for the appellants submitted, that we should not take judicial notice of the technological advancements regarding electronic data creation, recording and storage because this was unheard of in 1936 when the Insolvency Act was passed.'

The expression ‘tape recordings’ is defined in r 35(15) to include ‘a sound track, film, magnetic tape, record or any other material on which visual images, sound or other information can be recorded’. In their commentary on r 35(15), the authors of *Erasmus: Superior Court Practice* point out that:

‘The definition of “tape recording” is wide enough to encompass all the different kinds of material on which visual images, sound and other information can be stored. However, since the definition renders the material on which the information is recorded susceptible to discovery, it does not cover the information contained in a computer database’ (P Farlam & DE van Loggerenberg *Erasmus: Superior Court Practice* (Cape Town: Juta 2011) at B1 – 262B).

In this regard, tapes on which a company backed up its electronic information were found to be discoverable in *Metropolitan Health Corporate (Pty) Ltd v Neil Harvey and Associates (Pty) Ltd and Another* (WCC) (unreported case no 10264/10, 19-8-2011) (Baartman J).

When compared with foreign developments, it can be seen that the current wording of r 35(1) does not adequately provide for discovery of information that has primarily been created, stored and retrieved in electronic form and it is clear that amendments are necessary to remedy this.

Where discovery rules are unclear or inadequate the courts have exercised their inherent powers to ensure that proper discovery takes place. The need to move with the times was mentioned by Fennelly J in the Irish Supreme Court case of *Dome Telecom v Eircom* [2007] IESC 59:

‘The rules of court have not been adapted so as to make their objectives conformable to modern technology. The courts have, nonetheless, been astute to ensure that genuine discovery can be ordered even when advances in technology have the effect that discovery takes a very different form from that of documents as traditionally understood. In former times, there would have been a written record of every commercial transaction. Old methods of record-keeping could not have coped with the sheer volume of traffic generated by the new means of communications. I accept that failure by the courts to move with the times by adapting the rules to new technology might encourage unscrupulous businesses to keep their records in a form which would defeat the ends of justice.’

Until such time as the rules are amended, the discovery of electronic documents must be requested in terms of the extended meaning of ‘document’ as interpreted by the courts. The parties can also request the court to direct the discovery of ESI. In *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) at 41F – 42B, Moseneke DCJ remarked:
‘Ordinarily courts would look favourably on a claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one’s case is a time-honoured part of a litigating party’s right to a fair trial.’

Conclusion

As mentioned, the purpose of discovery is to ensure that both parties are made aware of all the documentary evidence that is available before the start of a trial. Proper discovery is also important for the administration of justice, as was pointed out by Fannin J in *Durban City Council v Minister of Justice* 1966 (3) SA 529 (D) at 531C: 'Serious consequences can flow from an improper discovery of documents and disruption of the administration of justice often follows from it.'

Given that most modern communications and business documentation are created and stored in electronic form, discovery will in most cases be incomplete if it does not include ESI. Attorneys who fail to ensure that full and proper discovery has been made lay themselves open to being accused of 'gross incompetence' (as in the *Earles* case).

Joe van Dorsten *BA LLM MBA PGrad Dip Tax (UCT)* is an advocate in Cape Town.

• Readers should also take note of the South African Law Reform Commission *Review of the law of evidence (Electronic evidence in criminal and civil proceedings: Admissibility and related issues* (Issue Paper 27, Project 126) 2010 (www.justice.gov.za/salrc/ipapers/ip27_pr126_2010.pdf, accessed 27-9-2012) – *Editor*.

Footnotes:

***** Justice BT Granger 'Using litigation support software in the courtroom – better lawyer, better judge, better justice – the need for judicial leadership', as cited in Glenn Smith 'The Tao of e-data use and presentation' (2005) vol 4 issue 2 *LAWPRO Magazine e-Discovery* 16 at 18 (www.practicepro.ca/practice/PDF/UsingLitigationSupportSoftwareinCourtroom.pdf, accessed 19-6-2012).