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DISCLOSURE: PREDICTIVE CODING IN CIVIL LITIGATION & IMPLICATIONS FOR CRIMINAL FRAUD PRACTITIONERS

PYRRHO and Anr –v- MWB Property Limited and Ors [2016] EWHC 256 (Ch)

Summary of ruling

In a 'landmark decision', the use of predictive coding in electronic disclosure has been judicially approved for the first time in a reported UK decision. This heralds the increased use of advanced analytical techniques in litigation disclosure.

Civil Procedure Rules, Part 31 AND Practice Direction B (Electronic disclosure)

Standard disclosure

31.6 Standard disclosure requires a party to disclose only:

(a) the documents on which he relies; and

(b) the documents which (i) adversely affect his own case;(ii) adversely affect another party's case; or(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction.

The search under 31.6

31.7 (20) 'the extent of the reasonable search required by 31.7 ... for the purposes of standard disclosure is affected by the existence of Electronic Disclosure. The extent of the search which must be made will depend on the circumstances of the case .... The parties should bear in mind that the overriding objective includes dealing with a case in a way which is proportionate.

(21) ...factors in deciding 'reasonableness' of the search include (but are not limited to);

- The number of documents involved
- Nature and complexity of the proceedings
- The ease and expense of retrieval...
- The availability of documents from other sources
- The significance of any document which is likely to be located

(25) It may be reasonable to search for Electronic Documents by means of Keyword Searches or other automated method of searching if a full review of every document would be unreasonable.

(26) It will often be insufficient to use Keyword Searches alone or other automated method of searching alone.

(27) Parties should consider supplementing the above with other techniques such as individual review of certain documents or categories of documents....

Predictive coding

Computer software, rather than human is undertaking most of the review

- Protocol agreed – data set, sample size, batches, control set, reviewers, confidence level and margin for error
- Custodians and date range agreed between the parties ("Global Document Pool") (incompatible documents excluded – creates "Document Universe")
- 1,600-1,800 randomly drawn, but statistically valid sample taken ("Sample Set") which is manually reviewed by a subject expert, documents are selected as relevant or not relevant
- This set is analysed by the software to identify common concepts within documents improve the accuracy.
- The software then reviews the Document Universe
- A further 1,600-1,800 documents are selected by the software with its improved "intelligence". This process continues until the level of accuracy is within the pre-determined margin (normally around 5%).
- Normally takes between 8-12 review processes
- Additionally a blind quality assurance review is undertaken. A subject expert will review a batch of documents which have been manually reviewed but the software disagrees with the human.
- Finally a review is undertaken of around 15% of the computer reviewed documents selected as relevant (which have not yet been reviewed by the human.

Conclusions and lessons for litigation practitioners

1. Limitation on CPR31.6
2. E Disclosure Questionnaire
3. Quality of litigation support.
4. Costs of data management and storage
5. Costs budgeting at the outset of litigation
6. Court hosting of e disclosure platform
7. Privileged documents

Further Reading

http://www.lawgazette.co.uk/law/practice-points/e-disclosure-predictive-coding/5054119.article

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Observations for criminal lawyers

R v R Judgment at para 50 *'there is no reason why lessons cannot be learnt for advances in disclosure in civil procedure'*:

As set out above In civil cases disclosure is usually 'standard disclosure (CPR 31.6 see link below) which is limited to 'all material on which a party relies (to support his case) or which adversely affects his own case or adversely affects another party's case or supports another party's case'. In civil law the search must be proportionate and cost effective and Practice Direction 31B para 21 sets out the factors which make it so.

The duty in criminal law is disclosure of 'any (*my emphasis*) prosecution material within para 3 CIPA 1996, although limited by the 2011 and 2013 Guidelines and the Judicial Protocol on Disclosure '(the Protocol') which talks about 'unrealistic and disproportionate demands on the prosecutor' and not overburdening the trial process' material.

The process

In criminal law (para 11 of the judgment in R V R) **'the legislation does not prescribe the method of disclosure or the process to be adopted by the prosecution, rather it is focused on the end result'**

In civil procedure that process is more closely prescribed (CPR Practice Direction 31A paras 3 And 4) and then supervised, since the parties have to complete a disclosure list and an electronic documents questionnaire (CPR PD 31B para 10) with searching technical questions, often requiring liaison with an IT provider to complete. In Pyrrho, **the Master noted that what matters most in the disclosure process is the *scope and quality* of the search itself, as opposed to the listing and production for inspection of the relevant documents discovered.**

In contrast in criminal law the use of a disclosure management document prepared by the prosecution is mentioned only in the most general of terms in the protocol (para 39), although referred to with approval in the R v R judgment.

There does not appear to be anything stopping the parties agreeing to use predictive coding or other electronic sampling methods in criminal law going forward, as is clear from para 20-21,23 of the R v R judgment, provided that the parties are able to agree search terms.

R v R (para 20) referred to 2005 AG Guidelines para 27 (now replaced by 2013 Guidelines)...*'exceptionally the extent and manner of inspecting, viewing or listening will depend on the nature of material and its form, for example it might be reasonable to examine digital material by using software search tools, or to establish the contents of large volumes of material by dip sampling...'*. Judge in R V R continued...*'be that as it may, it is plain that the 2013 guidelines contemplate the prosecutor at the stage of initial disclosure, making use of appropriate sampling or the use of appropriate search tools'.*

Since the primary disclosure obligation falls on the prosecution only this may be impractical, although in R v R court emphasised the (2011) guidelines confirm the important role of the defence

statement, *'the defence will be expected to play their part in defining the real issue sin the case...defining the scope of the reasonable searches that may be made ...'* (R v R para 22)

8. Timing/case management of the disclosure process

The important difference between civil and criminal is that civil disclosure takes place at the court managed mandatory Case Management Conference (CMC), before which time all parties must complete their relevant disclosure lists, meet and try to agree the disclosure process and E questionnaire, and in a large and complex disclosure case, as Pyrrho was, this may result in a separate disclosure CMC. Further, it is possible to do this in the civil arena because the CMC takes place at the close of pleadings when **all of the issues between the parties have been set out**. In the Pyrrho case, the Claim was issued in March 2013 and pleadings closed early in 2016, so the matters had been well rehearsed by the parties before they came before the Master at the CMC.

In criminal cases **primary disclosure takes place before the defence statement has been prepared,** para 47 of the R v R judgment, 'with initial disclosure...the true issues in the case may as yet be unclear'. **This is a critical difference between civil and criminal disclosure.**

Costs

In civil cases there are serious cost consequences for non-compliance and at the CMC the parties have to have costs estimates prepared for all aspects of the case but particularly for disclosure, and these will be critically examined by the court. If a party's costs exceeds the estimate he will not recover his costs on an assessment even if he is successful, so civil practitioners are highly motivated to put in the necessary work on disclosure and narrowing/refining the issues (such as search terms and date ranges etc) at this stage of the proceedings, and to define what is actually necessary and reasonably likely to assist their client's case.

In criminal law the State is bearing the costs of primary disclosure and the defendant has no incentive to co-operate to reduce the scope of disclosure.

In R v R the judge nevertheless considered a preparatory hearing as to procedure on disclosure might be appropriate in exceptional cases (para 58).

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