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Electronic discovery

Inaccessible documents: disclosure, preservation, and
cost shifting under the proposed new High Court Rules

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Introduction

1. The area of electronic discovery that has generated the most litigation is discovery of inaccessible documents. These are documents that are not in a readily retrievable form. For example, documents that have been deleted from the active computer system and now reside on disaster recovery storage media such as back-up tapes. Once a paper document has been shredded or otherwise destroyed, it is gone. There is no way to restore it. Deletion of an electronic document does not get rid of it. The document may still be recoverable from back-up media, or the computer hard drive. The continuing existence of deleted documents provides a tempting target for further discovery, often in pursuit of the elusive smoking gun deleted email. How far should electronic discovery go?
2. In the early days of electronic discovery, particularly in the US, the possibility of accessing an opposing party's deleted documents was seen as a great opportunity to uncover new evidence, leading to intrusive and oppressive discovery requests. However, the trend now in most jurisdictions is towards reigning in this dark side of electronic discovery. Experience indicates that often the huge cost and burden of restoring inaccessible documents is not justified by the number of responsive documents found. As it turns out, there rarely is a smoking gun.
3. The final draft Rules¹ reflect this trend. Draft Rule 8.14(3) affirms that disclosure, and hence a reasonable search, does not normally extend to inaccessible documents. The obligation to preserve documents in a readily retrievable form in draft Rule 8.3 is intended to ensure that relevant electronic documents do not become inaccessible. Draft Rule 8.22 expressly provides for cost-shifting - a party who seeks an order for discovery of inaccessible documents may have to foot the bill.
4. These proposed new Rules do not effect a significant change. Rather, they largely codify principles that the Courts have slowly been developing for dealing with electronic documents under the existing general discovery rules. However their introduction does signal a clear message that discovery of inaccessible documents should be the exception rather than the rule.

Inaccessible documents

5. If managed appropriately, electronic discovery can often be an efficient and economic exercise². However, it can also result in huge inefficiencies and costs, particularly where the scope of discovery is extended to inaccessible electronic documents.
6. Accessible documents are commonly understood as being documents that are stored in a readily retrievable form. That is, they comprise primary data, namely:
 - Active data. documents on a party's online computer system; or

¹ Final Draft High Court Amendment Rules (No. 2) 2011, v 1.18, issued by the Rules Committee on 13 July 2011. It is understood that the new Rules were approved by the Rules Committee on 22 August 2011, with some slight changes, but have not yet been made by Order in Council or publicly released.

² Advances in e-discovery software can analyze documents in a fraction of the time for a fraction of the cost. Markoff Armies of Expensive Lawyers Replaced by Cheaper Software, *New York Times*, 4 March 2011.

- **Nearline archival data+** . documents stored in a manner that anticipates future business use and is readily retrievable and permits efficient searching. This includes portable data devices (such as CDs, DVDs, USB flash drives, and portable hard drives), and other locations that can be accessed automatically through the network.
7. **Inaccessible** documents, by contrast, typically have to be restored or otherwise manipulated to be readable. Examples include:
- **Offline archival data+** . documents stored on archival media that require special equipment or software to access.
 - **Back-up data+** - documents that are stored on back-up tapes or other back-up media for disaster recovery purposes. Back-up tapes contain a **snapshot** of documents on a computer at a point in time, and any documents that have been deleted from the computer or server after the back-up was made would remain on tape. However, because back-up tapes store data in a random way, often without indexes, their restoration into a readable form can be expensive.
 - **Residual data+** - deleted, fragmented or damaged documents. Data that is deleted from the active computer system may remain somewhere on the free space of the computer hard drive until overwritten. To the extent that it has not been overwritten the deleted data may be recoverable using special forensic methods.
 - **Legacy data+** - documents that have become unreadable because they were created on now obsolete computer systems, with obsolete hardware or software components. To access the documents the former IT environment must be reconstructed.
8. The restoration of inaccessible data will usually be time-consuming and expensive, often involving the intervention of specialist computer experts. In addition, many hours may need to be spent searching non-indexed data for relevant documents.
9. The search and retrieval of *accessible* or *primary* documents can of course also become costly and burdensome, as where the sheer volume of documents is disproportionate to the amount in issue. Proportionality can be achieved by tailored discovery orders³. The focus of this paper is on *inaccessible* documents . documents that are inherently unable to be readily retrieved. What do the new Rules say about when those documents should be discovered?

The normal scope of discovery

10. The original draft Rules⁴ did not contain a rule recording a party's positive obligation to conduct a reasonable search for relevant documents. The Bar Association, in its March submission to the Rules Committee⁵, recommended that

³ Draft Rules 8.5 and 8.12(1)(c).

⁴ Draft High Court Amendment Rules (No 1) 2011, v1.7.

⁵ New Zealand Bar Association submission dated 14 March 2011.

this obligation should be expressly stated⁶ This recommendation has been adopted in Draft Rule 8.14(1).

11. The Bar Association also submitted that the normal or default rule should be that a discovery order, and hence a reasonable search, does not extend to inaccessible data. The producing party should not normally be required to attempt to search back-up media, to retrieve deleted files or to re-establish obsolete systems. This recommendation has also been adopted, and draft Rule 8.14(3) now provides:

(3) Subject to the terms of the discovery order-

- (a) the primary source of electronic documents for discovery is normally active data and readily retrievable archival data; and
- (b) in the absence of agreement, a party requesting discovery or particular discovery of electronic documents that are not readily retrievable must demonstrate that the need for, and the relevance and materiality of, those documents justify the cost and burden of retrieving and producing that data.

12. Much of the litigation about electronic discovery, both in New Zealand and overseas, relates to discovery of inaccessible data. Experience suggests that whilst an occasional smoking gun may emerge, more often the level of responsive documents is wholly disproportionate to the cost and time involved. For example, restored back-up tapes may contain massive amounts of irrelevant information and few relevant and previously undisclosed documents. As stated above, the tide has been turning against intrusive discovery requests for inaccessible documents. It is now recognized that requests of this kind frequently impose an onerous burden, often for limited return

13. In other jurisdictions the principle that discovery is normally confined to accessible documents is also now expressly stated in the relevant rules or practice notes. For example, paragraph 24 of Practice Direction 31B (UK)⁷ addresses the extent of disclosure required by Rule 37.1 of CPR Part 31. It states:

The primary source of disclosure of Electronic Documents is normally reasonably accessible data. A party requesting under rule 31.12 specific disclosure of Electronic Documents which are not reasonably accessible must demonstrate that the relevance and materiality justify the cost and burden of retrieving and producing it.

14. Similarly, Rule 26(b)(2)(B)⁸ of the US Federal Rules of Civil Procedure (“**FRCP**”) states that a responding party need not produce electronically stored data from sources it identifies as not reasonably accessible. If the requesting party applies for an order compelling discovery of such data, the responding party must show that the information is not reasonably accessible because of undue burden or cost. Once that showing is made, the Court may order discovery only for good cause. Similar principles have recently been adopted in Australian and Canadian discovery rules.

⁶ The obligation is expressly stated in other jurisdictions, for example, Rule 31.7 of the UK Civil Procedure Rules (**CPR**), Part 31, and in paragraphs 20 to 24 of the accompanying Practice Direction 31B. A similar obligation appears in Rule 20.14(3) of the Australian Federal Court Rules (**FCR**), and in paragraph 3 of the pre-discovery conference checklist contained in **Practice Note CM6**. The Canadian rules also state an obligation to undertake a reasonable search.

⁷ Practice Direction 31B came into effect on 1 October 2010.

⁸ The Federal Rules of Civil Procedure were significantly amended on 1 December 2006 to address numerous electronic discovery issues.

Discovery ordinarily extends only to accessible data

15. Under draft Rule 8.14(3)(a) discovery, and hence a reasonable search, will ordinarily extend only to ~~active data~~ and ~~readily retrievable archival data~~, namely what is described in paragraph 6 above as *accessible* or *primary* data. It does not extend to documents that are ~~not readily retrievable~~. That phrase clearly covers inaccessible data as described in paragraph 7 above, namely data that is not in a readily retrievable form⁹. That includes all of the categories of inaccessible data in paragraph 7 above¹⁰. Draft Rule 8.14(3)(b) provides that in the absence of agreement, a party will not be required to make discovery of inaccessible documents unless ordered to do so.

When will discovery of inaccessible documents be justified?

16. Where (as will normally be the case) the parties do not agree to extend their search to inaccessible documents, the requesting party will need to apply for an order for tailored discovery under draft Rules 8.5 and 8.12 or for particular discovery under draft Rule 8.19. In either case the overriding balancing/proportionality test in Rule 8.14(3)(b) will need to be demonstrated by the requesting party. The ~~need~~ for, and the relevance and materiality of, those documents ~~must justify~~ the cost and burden of retrieving and producing that data.
17. Discovery of inaccessible documents may be *needed* where a key document or class of documents is known to reside *only in inaccessible form*, and there is no other, more accessible, source. That will frequently be the case where, for example, emails have been deleted. But demonstrating need will not be enough on its own. The onus will be on the requesting party to satisfy the Court that the exercise is also likely to yield sufficient documents of probative value to justify the estimated cost/timing of the exercise. The parties will usually need to file affidavits (including from computer or forensics experts) setting out the technical restoration and search processes required, and the time and cost estimates for those processes. That will often be a contentious issue. In addition, an evidential basis will need to be established by the requesting party indicating that relevant documents are likely to be recovered.
18. The proportionality test in Rule 8.14(3)(b) reflects the principles the Courts have already been evolving in this area. For example:
- *NGC New Zealand Ltd v Todd Petroleum Mining Company Ltd*¹¹. Todd applied for an order for further discovery requiring NGC to review its back-up tapes (for a 2 ½ year period) to recover the emails of current and former NGC staff. When NGC had moved premises and changed its email system all emails prior to that date were deleted and stored on back-up tapes. NGC opposed the order on the grounds that retrieval of the emails would involve an oppressive financial burden, estimated at between \$15,000 and \$45,000. The High Court (Associate Judge Gendall) granted the order on the grounds that

⁹ The words ~~not readily retrievable~~ could arguably also extend to documents that, although in a retrievable *format* are not readily retrievable because of other difficulties of collection due to, for example, sheer volume. But when paragraphs (a) and (b) are read together it seems clear that clause (b) is intended to apply only to documents that are not in a retrievable format.

¹⁰ In a recent case involving ~~extreme discovery~~, *Optus Networks Pty Ltd v Telstra Corporation Ltd (No 4)* [2011] FCA 485 (18 May 2011), the Court was prompted to note, para (23), that ~~information~~ dating back 17 years and stored away in archives which must be searched or on unrestored back-up tape or matters which require expert opinion cannot constitute ~~readily available information~~.

¹¹ HC, Wellington, CIV-2004-485-1753, 29 March 2006, Associate Judge Gendall, paras [70] to [84].

relevant emails were likely to be found and the cost of retrieval was modest in comparison with the amount at stake in the litigation (\$5m - \$8m). This order was subsequently confirmed on review by Simon France J¹² (although a cost-shifting order made by the Associate Judge was set aside - discussed in paragraph 49 below).

- *Commerce Commission v Telecom Corporation of New Zealand Ltd*¹³ Telecom was ordered by the High Court to restore an initial test sample of back-up tapes for the 1999 year to recover deleted emails. The case also involved important preservation and cost-shifting issues, which are discussed below.
- *Slick v Westpac Banking Corporation (No 2)*¹⁴. Westpac's email system had been decommissioned and replaced in 02/03. At the time of decommissioning a snapshot-back-up was taken for the sole purpose of disaster recovery. In order to access the back-up tapes it would be necessary to rebuild the legacy system, a process that was estimated to take at least three months and cost over \$600,000. In addition, Westpac's document servers were replaced in 03/04 when a new operating system was introduced, and that legacy server environment would also have to be rebuilt. The additional cost estimate was at least \$500,000. The Court declined the application for further discovery. There was only a theoretical possibility that something relevant might turn up, and this was well and truly outweighed¹⁵ by the cost and burden to Westpac of rebuilding the former electronic environments.
- *Leighton Contractors Pty Ltd v Public Transport Authority of Western Australia*¹⁶. The plaintiff sought further discovery of deleted emails covering a 2½ year period to be recovered from back-up tapes. The defendant had already voluntarily taken steps to recover five months worth of deleted emails. The Court stated that if the defendant had not embarked on the course of recovering the deleted emails it may have been appropriate to relieve the defendant from the obligation of discovering those documents¹⁷. That was because the burden of giving the discovery was disproportionate to the potential probative value¹⁸ of the electronic information sought. However, because the defendant had already started the process the Court ordered the defendant to search the restored back-up tapes and, depending on the rate of responsive documents found, left open the possibility of further discovery of documents from the remaining back-up tapes. The likely utility of the documents obtained from the restored back-up tapes would enable the Court to assess the potential probative value of documents on the remaining tapes.

¹² HC Wellington, CIV-2004-485-1753, 22 September 2006, Simon France J, paras [27] to [34].

¹³ *Commerce Commission v Telecom Corporation of New Zealand Limited* (unreported, High Court, Wellington, CIV 2000 485 673, 23 August 2005, Wild J). Wild J also made a cost-shifting order, directing that the costs of the test sample be shared 50/50 between the Commission and Telecom, but that order was overturned on appeal in (2006) 18 PRNZ 251 (CA), so that the costs of the sample discovery were to be borne by Telecom in the normal way.

¹⁴ [2006] FCA 1712 (8 December 2006).

¹⁵ *Supra*, paras [37] to [45], Jacobson J.

¹⁶ [2007] WASC 65 (22 March 2007); see also *BT Australasia Pty Ltd v State of New South Wales* (unreported, Sackville J, 9 April 1998) where the Court ordered Telstra to discover emails for back-up tapes for certain identified personnel, and *NT Power Generation PTY Ltd v Power & Water Authority* [1999] FCA 1669 where the Court ordered the respondents to restore and search back-up tapes.

¹⁷ *Supra*, para [27].

¹⁸ *Supra*, paras [27]-[29].

This case also indicates the danger of ~~doing~~ doing too much. If the defendant had not already (and needlessly) plunged into restoring back-up tapes the Court likely would have declined to make the order¹⁹.

- *Digicell (St Lucia) Ltd v Cable & Wireless Plc*²⁰. There the Court ordered the defendants to restore back-up tapes and conduct a search of the email

accounts of seven of the defendants' former employees. Their email accounts had been deleted from the relevant server after their employment ended, but likely existed on back-up tapes. The defendants claimed that the cost of restoration would be prohibitive (700 tapes at £100 per tape for grouping and cataloguing, and £225 per tape for the restoration) and unlikely to yield many relevant documents. The Court considered that the tapes were likely to yield relevant emails of ~~great~~ great significance, and ordered that the search be done.

19. Many cases would not of course be able to sustain the added expense of discovery of inaccessible data, which can push discovery costs well beyond the norm, to prohibitive levels. The new draft Rule 8.14(3) sends a clear message that the scope of electronic discovery should normally not extend beyond accessible documents, and that an application for discovery of inaccessible data will be robustly scrutinized by the Court.

A word of caution

20. Parties also need to ~~be~~ be careful what they wish for. If an application for discovery of inaccessible documents *is* granted that could still potentially have negative consequences for the requesting party:
 - (a) The restoration and search process may prove to be more time-consuming than expected. If disputes arise between the parties as to the proper scope of that process once it is under way that may disrupt or delay the progress of the litigation. The process may even be uncompleted by the time of the hearing.
 - (b) The very nature of inaccessible documents, such as disaster recovery back-up tapes, means their precise contents cannot be known in advance. The discovery exercise necessarily involves an unknown, speculative element. The yield of responsive documents may be much lower than anticipated. It may turn out to have been a fruitless exercise.
 - (c) An application for discovery of inaccessible documents may be countered with an application by the producing party for a cost-shifting order (under draft Rule 8.22(1), discussed in paragraphs 41-50 below. If such an order is made the requesting party may have to pay significant costs up front.
 - (d) Even if no cost-shifting order is made, if the requesting party is ultimately unsuccessful in the substantive proceeding, some of the costs of restoration and search may be included in a final costs award against it²¹.

¹⁹ *Blinder and Elliot, Satisfying your e-discovery obligations: how much and when to do enough but not too much* (2008) 5(3) CPNN 30; *McGrath E-discovery war stories on home soil* (2009) 47(4) LSJ 34.

²⁰ [2009] 2 All ER 1094.

²¹ *Commerce Commission v Telecom Corporation of New Zealand* (2006) 18 PRNZ 251 (CA), para [18], Robertson J: ~~the~~ the costs schedule is predicated on the premise that the winning party can normally expect a contribution from the losing party towards every step it has been required to take. Discovery is one of those steps for which a contribution can be expected in due course by the winning party.

21. All of this adds to the responsibility on the requesting party to be satisfied, in advance, of the likely overall utility of any application.

The obligation to preserve documents

22. In the original draft Rules the question of preservation of electronic documents was not addressed other than in the discovery checklist in the new Schedule 9. The Bar Association recommended in its March submission to the Rules Committee

that the Rules include an express obligation to preserve all documents, including electronic documents. That recommendation was adopted and draft Rule 8.3 now provides as follows:

8.3 Preservation of documents

- (1) A person who knows that a document is or is reasonably likely to be discoverable in a legal proceeding, whether or not that proceeding has commenced, must take all reasonable steps to preserve that document.
 - (2) Without limiting the generality of subclause (1), documents in electronic form which are potentially discoverable must be preserved in readily retrievable form even if they would otherwise be deleted in the ordinary course of business.
23. The need to preserve relevant documents has particular importance for electronically stored information, for the following reasons:
- (a) Electronic documents are stored on a wide variety of devices and in multiple locations, often under the immediate control of many different custodians. Sources of electronic documents extend well beyond a party's main servers and computer hard drives including, for example, storage media such as floppy discs, optical discs (DVDs and CDs), and memory sticks; mobile phones; laptops; home computers, voicemail, websites, archival and back-up media, and so on.
 - (b) The dynamic nature of electronic documents means that they can inadvertently be altered, deleted, or destroyed far more easily than paper documents. For example, computer systems automatically recycle and reuse memory space, altering potentially relevant information, even if no deliberate modifications are made. Merely opening a digital file changes information about that file. In addition, most companies have document retention policies under which electronic documents (including emails) are routinely deleted and back-up tapes are routinely recycled.
24. Unless steps are taken actively to locate and to preserve electronic data it may be deleted and removed from the active online computer system, and back-up media may be overwritten, in the ordinary course of business. In short, accessible data may be rendered inaccessible and inaccessible data may be lost altogether.

When is the obligation to preserve triggered?

25. The draft Rule does not expressly state when the preservation obligation arises. It applies ~~whether or not [a legal] proceeding has commenced~~. If the proceeding has not been commenced, does the obligation arise when it is threatened? Or when it is reasonably contemplated? It is assumed that a threshold of *reasonable*

contemplation is intended, and the Bar Association has recommended in its August submission to the Rules Committee²² that this be made express.

26. The New Zealand Courts have already accepted in principle that an obligation to preserve is triggered when a proceeding is in contemplation. In *Commerce Commission v Telecom*²³, the Court of Appeal accepted that Telecom's obligation to preserve relevant documents was triggered from the time the proceeding was reasonably contemplated. This occurred when the Commission began its investigation and issued s 98 notices under the Commerce Act in mid-1999²⁴. Proceedings were not commenced by the Commission until 31 July 2000.
27. The US Courts have also held that there is a duty to preserve once litigation is reasonably contemplated: *Zubulake v USB Warburg LLC (Zubulake IV)*²⁵. In that case the duty to preserve was held to attach some four months before the plaintiff filed a complaint with the Equal Opportunity Commission and some ten months before the Court proceedings were filed.
28. In the UK and Australia the Courts have been less enthusiastic about recognising a duty to preserve documents prior to the commencement of proceedings, although adverse inferences might be able to be drawn from a failure to preserve²⁶. However, a duty to preserve as soon as litigation is contemplated has now been expressly recognised in the UK in paragraph 7 of Practice Direction 31B²⁷:

As soon as litigation is contemplated, the parties' legal representatives must notify their clients of the need to preserve disclosable documents. The documents to be preserved include Electronic Documents which would otherwise be deleted in accordance with a document retention policy or otherwise deleted in the ordinary course of business.

29. On the assumption that the new draft Rule similarly intends a test of *reasonable contemplation*, that places an onerous responsibility on parties, and their legal advisers. Given the rapidity with which electronic documents can be deleted or altered in the ordinary course of business, legal advisers will often need to hit the ground running when first instructed, to ensure that parties are advised of this obligation and how to meet it.

What steps does a party need to take to preserve documents?

30. Draft Rule 8.3 imposes the preservation obligation on a person who knows that a document is reasonably likely to be discoverable. The Bar Association has, in its August submission to the Rules Committee, recommended that the obligation

²² New Zealand Bar Association Submission to Rules Committee dated 9 August 2011.

²³ (2006) 18 PRNZ 251 (CA).

²⁴ *Supra*, paras [33] to [51] and [56]. Telecom also acknowledged that the proceeding was in contemplation by no later than early June 2009; *supra*, para [42]. In para [49] the Court stated that by the middle of 1999 Telecom knew that proceedings were on foot. It is clear from the context that the Court meant 'in contemplation', as that was the test they were addressing, and the Court recorded the dates when the proceedings were commenced in para [41].

²⁵ 220 F.R.D. 212; 2003 US Dist. LEXIS 18711 (SDNY October 22, 2003).

²⁶ *Earles v Barclays Bank PLC* [2009] EWHC 2500 (QB), para [28]; *British American Tobacco Australia Services Ltd v Cowell* [2002] VSCA 197.

²⁷ The Practice Note (effective from 1 October 2010) was preceded by the Cresswell Report. The authors of that Report preferred the US approach and noted that it was the general practice of solicitors practising in the Commercial Court to advise clients to preserve documents which may be relevant once litigation is contemplated. That is also the practice in Canada.

should be that of the *party*²⁸ This would be more consistent with the approach of the Court of Appeal in *Commerce Commission v Telecom* and with other jurisdictions.

31. The obligation is to take ~~all~~ reasonable steps to preserve the document. It is possible that not all parties or legal advisers may appreciate what practical steps this requires of them in relation to electronic documents. The Bar Association therefore recommended in its initial submission to the Rules Committee that in addition to an express statement of this obligation in the draft Rules, consideration should be given to including in Schedule 9 Part A a check list of the practical steps that may need to be taken by a party to preserve documents. That suggestion was not adopted, so it is left to the Courts to develop guidelines as cases come before them.
32. The kind of steps that should be taken will depend on the precise circumstances, but in general terms, will likely include²⁹:
 - (a) putting in place an immediate ~~litigation hold~~. This should be issued to all key personnel, and re-issued periodically during the case, so that new employees are aware of it. Compliance with the hold may need to be monitored. The hold is essentially an instruction to staff to cease or suspend personal document management practices and activities that could result in the modification of relevant documents in the ordinary course of business, such as the deletion of email box entries. If the party has an existing document retention policy that will usually need to be modified or suspended to achieve this;
 - (b) ensuring that any relevant online documents of key personnel, whether created before or after the duty to preserve attaches, are not deleted from the active computer system but are preserved in a separate electronic file, or readily retrievable archive;
 - (c) if necessary, creating litigation copies of potentially relevant data sources, for example, by means of forensic copies or ~~mirror images~~ so as to preserve potentially relevant metadata, or to preserve database information;
 - (d) ensuring that existing back-up tapes and other back-up media storing the documents of key personnel are preserved, if the data is not otherwise available. For example, any such back-up media should be segregated so that it is not recycled and overwritten;
 - (e) documenting the preservation process that has been followed.
33. The documents should, so far as practicable, be preserved in *electronic* form, and if necessary in native format, to ensure that subsequent inspection and production obligations are met. The draft Rules now require that all discovery and inspection be given electronically (in image form³⁰), unless a party obtains an exemption. However some electronic documents do not lend themselves to image form, and

²⁸ Otherwise a party may be able to rely on a failure by an employee to preserve. Parties should be expected to ensure that all relevant employees are aware of the duty to preserve. A ~~person~~ could also extend to a legal adviser, which presumably is not intended.

²⁹ The decisions in *Zubulake IV* and in *Zubulake v UBS Warburg LLC*, 2004, US Dist. LEXIS 13574 (SDNY July 2004) ("*Zubulake V*") usefully set out the steps a party must take once litigation is contemplated to preserve electronic documents, and the obligations of the party's legal advisers.

³⁰ Paragraph 1.2 of Schedule 9 Part B.

will need to be preserved in native format³¹ unless otherwise agreed. Obvious examples are databases or complex dynamic spreadsheets. The preservation of metadata, in cases where it is likely to be relevant, must also be preserved.³² In addition, draft Rule 8.27(4) may require a party to produce the "original document" for inspection. In the case of an electronic document that means the native electronic version.

34. Electronic documents must be preserved in "readily retrievable form". All of the potentially relevant documents discussed in paragraph 32(a) to (c) above must be stored in a readable format. But the obligation would not normally extend to converting data that is already inaccessible into a readable format, for example by restoring back-up tapes. If back-up tapes are known to contain documents of key personnel it is sufficient to segregate them so they are not overwritten and are available for later restoration if required during the proceeding. An exception to this may be where a party makes changes to its IT system that will render the tapes unable to be restored (as occurred in *Commerce Commission v Telecom*), in which event the party may need to restore the back-up tapes, or make other provision for the migration of data, before the IT changes are made.
35. The obligation is to take "all reasonable" steps, not to "leave no stone unturned". A party cannot be expected to take every conceivable step to preserve all documents that may potentially be relevant. It is a matter of achieving a proper balance between the need to preserve relevant information and the need to continue routine computer operations critical to a party's activities. Again, this places an onerous responsibility on legal advisers to ensure that the party is aware of the need to take appropriate steps, and what that may involve³³.
36. The *Commerce Commission v Telecom*³⁴ decision provides a striking example of a failure to preserve³⁵. Telecom's failure was two-fold:
 - First, even though a legal proceeding was in contemplation from June 1999, Telecom did not put in place a litigation hold or modify its document retention policy. Instead Telecom continued after that date to delete the emails of key personnel from its active computer system, so that those emails were not preserved in a readily retrievable format but only resided on back-up tapes; and
 - After the legal proceeding had commenced Telecom made changes to its IT environment, knowing that the changes would cause difficulties in restoring the back-up tapes containing the deleted emails. Telecom did not restore the back-up tapes prior to the change to the system, or make adequate provision for the migration of data. That meant the back-up tapes could not be accessed by the current operating system³⁶.
37. Restoration of the back-up tapes therefore required the re-establishment of the disused IT environments in which the documents were created. Telecom was ordered by the Court to restore a sample of the back-up tapes at its own cost, estimated at as much as \$800,000 (although the Court of Appeal thought that it was more likely to be nearer \$200,000 to \$300,000).

³¹ Paragraph 3.5 of Schedule 9 Part B.

³² Paragraph 6.4 of Schedule 9 Part B.

³³ In the US the Courts have imposed heavy responsibilities on legal advisers.

³⁴ *Supra*, n 21.

³⁵ There was no suggestion that the failure was deliberate.

³⁶ *Supra*, paras [33] to [37].

Does the preservation obligation extend to inaccessible documents?

38. The preservation obligation extends to inaccessible documents. If they are not preserved they will become more inaccessible,³⁷ or may be lost altogether.
39. Even though the reasonable search obligation in draft Rule 8.14 will not ordinarily extend to inaccessible documents, that judgment may not always be able to be made at the outset of litigation. A justification for seeking an order for discovery of inaccessible data may emerge only as the case progresses. Therefore, if a party is aware that relevant information can *only* be obtained from a source other than the active or archived electronic information, that source should also be considered for preservation. If the emails of key personnel reside only on back-up tapes those back-up tapes should (subject to a reasonableness standard) be retained and segregated so they cannot be overwritten, as discussed in paragraph 34 above.
40. If documents are not preserved and become inaccessible (or more inaccessible), then if an order for particular discovery is later obtained the failure to preserve will be a relevant factor counting against the making of any cost-shifting order, as discussed below.

“Show me the money” – cost shifting

41. Cost-shifting refers to the shifting of costs from the producing party to the requesting party. It reverses the usual producer pays rule. Where discovery of inaccessible documents is sought, costs will likely be high. A specialist computer expert or computer forensics expert may need to be retained. The usual presumption that the *producing* party bears the costs may impose an unfair burden on that party.
42. The US Courts have led the way in developing principles for shifting all or part of the cost to the requesting party in cases involving inaccessible documents³⁸. Normally, only the costs of restoration and searching are shifted in this way. The responding party still bears the cost of reviewing and producing electronic data once it has been converted into an accessible form
43. Draft Rule 8.22 will introduce a new rule expressly permitting cost-shifting. Cost-shifting is a concept that has, however, already been recognized by our Courts. In the absence of an express rule, the Courts have relied on the general power contained in Rule 7.45 (formerly Rule 236), which permits the Court to make an interlocutory order subject to any just terms or conditions. In *Commerce Commission v Telecom*³⁹ the Court of Appeal held that there was jurisdiction under then Rule 236 to make a cost-shifting order, but reversed an order made by the High Court requiring the Commission to pay 50% of Telecom's costs of restoring back-up tapes. It was Telecom's own default in failing to preserve relevant documents on its active computer system that had rendered the documents inaccessible. Telecom was therefore required to restore the back-up tapes entirely at its own cost. In *NGC New Zealand Ltd v Todd Petroleum Mining Company Ltd*⁴⁰, the High Court (Simon France J) accepted it had jurisdiction to make a cost-

³⁷ In the sense that they will become even more difficult and expensive to restore than formerly, as in the *Telecom* case where the deleted emails on back-up tapes became more costly to restore once Telecom changed its IT system.

³⁸ Jurisdiction to make a cost-shifting order is contained in the US Federal Rules of Civil Procedure, Rules 26(b)(2)(B) and (C).

³⁹ *Commerce Commission v Telecom Corporation of New Zealand Ltd* (2006) 18 PRNZ 251 (CA).

⁴⁰ HC, Wellington, CIV-2004-485-1753, 16 December 2005.

shifting order but (on review) set aside an earlier 50/50 costs shifting order made by an Associate Judge.

44. Draft Rule 8.22 provides, in so far as relevant, as follows:

8.22 Costs of discovery

- (1) If it is manifestly unjust for a party to have to meet the costs of complying with an order made under this subpart, a Judge may order that another party meet those costs either in whole or in part, in advance or after the party has complied.
- (2) Despite subclause (1), the court may subsequently discharge or vary an order made under that subclause if satisfied that a different allocation of those costs would be just^o

When will cost-shifting be ordered?

45. The Bar Association has, in its August submission to the Rules Committee, recommended that the word ~~manifestly~~ be omitted from subclause (1). That appears to impose an unnecessarily high standard, and appears inconsistent with subclause (2) which permits a cost-shifting order to be varied or discharged if that is ~~just~~. If the Rule is passed in this form it will impose a high threshold test.
46. The Rule is expressed in general terms, and does not expressly record the circumstances when cost-shifting may be appropriate. Rather it is left to the discretion of the Court. It is therefore likely that, in relation to inaccessible documents⁴¹, the cost-shifting principles that the Courts have already been developing will continue to provide guidance, and to evolve, under the new Rule.
47. In *Commerce Commission v Telecom* the Court of Appeal accepted that the multifactor balancing test recognized by the US Courts in *Zubulake v USB Warburg LLC* (*Zubulake I*)⁴² and *Wiginton v CD Richard Ellis Inc*⁴³ was ~~of value~~ until the Rules Committee deals with the matter in this country. These factors⁴⁴ are as follows:
- (a) the extent to which the discovery is specifically tailored to discover relevant information;
 - (b) the availability of such information from other sources;
 - (c) the total cost of discovery compared with the amount in issue;
 - (d) the total cost of discovery compared with the resources available to each party;
 - (e) the relative ability of each party to control costs and its incentive to do so;
 - (f) the importance of the issues at stake in the litigation;
 - (g) the relative benefits to the parties of obtaining the information; and
 - (h) the importance of the requested discovery in resolving issues in the litigation

⁴¹ The cost-shifting power in Rule 8.22(1) is not limited to situations involving inaccessible documents, although that is when it is most likely to be invoked.

⁴² 217 F.R.D. 309; 2003 U.S. Dist. LEXIS 7939 (SDNY, May 13, 2003).

⁴³ 2004 U.S. Dist. LEXIS 15722.

⁴⁴ The first 7 balancing factors were formulated by the Court in *Zubulake I* and the 8th factor in *Wiginton*

48. The Court of Appeal held that the *Zubulake/Wigginton* test was not, however, exhaustive. The Court accepted the Commission's submission that an additional relevant factor, was ~~the failure to preserve potentially discoverable documents~~. If a producing party has by its own wrongful conduct caused or contributed to the data being inaccessible . by not complying with its preservation obligations . then that will count against cost-shifting⁴⁵. Telecom was the author of its own misfortune. Its failure to preserve the relevant emails had brought about the need to recreate the former IT system and the consequent high cost of retrieval, estimated at \$200,000 to \$300,000. The Court of Appeal therefore allowed the appeal from the High Court's cost-shifting order and directed that Telecom undertake the discovery at its own expense in the normal manner.

We are satisfied that Telecom should have archived, stored and maintained in an accessible form, information of the sought which is now sought. Its failure to do so must be laid at its door.

49. Subsequently, in *NGC New Zealand Ltd* the High Court (Simon France J) followed the *Telecom* decision in setting aside an earlier costs-sharing order made by an Associate Judge. The Court seems to have based its decision in part on the fact that NGC failed to preserve emails at a time when it was ~~aware~~ of a possible significant breach of the contract⁴⁶.
50. Now that the obligation to preserve has been expressly stated in the Rules, a failure to preserve documents in an accessible format is likely to continue to have prominence as a relevant factor in a cost-sharing context.

A further word of caution

51. If a requesting party successfully resists a cost sharing order, that may not necessarily be the end of the matter. For example:
- If the discovery exercise does prove to be of little utility, the producing party might then seek a new or varied order for cost-shifting under draft Rules 8.22(1) and (2)
 - If the requesting party is ultimately unsuccessful in the substantive hearing, the costs of restoration may come back to bite in the form of a significant disbursement recoverable as part of a costs award. Of course, where the additional discovery costs are the result of a failure by the producing party to preserve data they should not normally be recoverable in a costs award, whatever the outcome of the litigation.
52. As stated above, parties need to be careful what they wish for. The full implications of pursuing discovery of inaccessible documents, and pursuing or resisting cost-shifting, need to be carefully weighed.

⁴⁵ Rule 26(b)(2)(B) of the US Federal Court Rules was amended on 1 December 2006. The Advisory Committee's guidelines accompanying the amended rules reflect the *Zubulake* formulation, but added as a new factor the likelihood that the producing party may have rendered responsive information inaccessible. This was referred to by the Court of Appeal. *supra*, para [46].

⁴⁶ *Supra*, at para [41]. Presumably the Court must have considered that a proceeding was in contemplation in deciding that the emails should have been preserved. However that is not entirely clear as the Court stated, at para [38], that NGC was on notice of a problem but ~~there is nothing to suggest it appreciated at that stage that litigation might ensue~~. It is difficult to see why merely being on notice of a problem (which would not of itself trigger a preservation obligation) should count against cost-shifting

Conclusion

53. The draft Rules contain a clear and welcome presumption against discovery of inaccessible documents. Parties wishing to access deleted documents will need to make a compelling case, and will need to be confident of the ultimate utility of the exercise. Discovery in most cases will therefore be about disclosure of accessible or primary documents. But that is not the end of the story. Preservation will be of the utmost importance in this electronic era. It is an onerous obligation, and important and difficult judgment calls will need to be made by parties and their legal advisers in order to ensure compliance. If reasonable steps are not taken to preserve documents the Courts will more readily entertain an application for discovery of the deleted documents and decline to shift the costs of retrieval.
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