Contempt of Court

Challenges ahead for e-disclosure and electronic communications?

The law of contempt is an area being refined by case law and requires updating in an era of advancing technology. Recognising this, the Government has recently reviewed contempt laws and the legal profession can expect the full consultation in 2014.

What's clear is that procedural, legal and regulatory requirements in the litigation process need to be considered carefully in light of today's information technology complexities to minimise falling foul of existing contempt laws. E-disclosure obligations in particular must take into account the latest technological and social media advances, and potentially extensive digital communications.

Shula de Jersey, a solicitor in the business crime and regulation department at Slater & Gordon (UK) LLP, says: *"Of major concern for the law of contempt overall is the part which social media and technology can and does play in the justice process. Jurors now have increased access to information and online opinion, which has led to some high-profile cases being put under threat."*

And this extends to civil proceedings. As de Jersey explains: *"The new, cost-conscious overriding principle of proportionality will inevitably have a knock on effect on all aspects of civil and criminal procedure."*

Twitter users, for instance, who tweet information that is banned from publication by the courts could be found in contempt of court if they deliberately breach the terms of so-called 'super-injunctions' banning the media from naming individuals.

Litigation risks

In this modern age of advanced technology - with instant social networking and the increasing use of mobile devices - there are clear potential risks for parties to litigation to be found in contempt of court.

A US case, for instance, illustrates the point: one of South Carolina's largest law firms was ordered to pay a US$12,000 fine for misconduct in electronic discovery. The action involved alleged malpractice and breach of fiduciary duty. The firm was found to be in contempt and ordered it to allow the plaintiff's computer forensics expert to search its computer system for e-mails. The defendant's deliberate misconduct had caused delay increasing the time and costs of the litigation. In this case, the defendants' practice of deleting emails was singled out for the judge's criticism.

Law firms and chambers that are party to litigation, or advising and representing a party to litigation or potential litigation, should ensure all individuals dealing with documents and other material (including digital files, mobile communications and communications made across social networking sites) - preserve all potential material that might be disclosable under the CPR.

Deleting emails, or posts made on social media can, for instance, amount to contempt of court. Last year, Twitter faced the prospect of contempt proceedings because of tweets made by a twitter account holder in relation to the Occupy Wall Street movement. The 'tweeter' – a protestor – deleted the tweets and Twitter had failed to disclose them.

And litigators and their clients should note that an order could be made for deleted emails to be disclosed. Similar orders could also be made where relevant digital files have been deleted – and failure to comply with such orders is highly likely to amount to contempt of court.

The *JSC BTA Bank v Ablyazov*[1] case is a case in point: the Court of Appeal held that it was clear one of the parties had not fully complied with disclosure orders and to that extent he could "properly" be treated as in contempt.

What's certain is that there is a clear duty to securely preserve all documents (including digital): failure to disclose electronic documents which the other party knows (or suspects) exists could lead to a court order for disclosure - with costs penalties and the reality that adverse inferences from any destruction of documents could be reasonably drawn.

Breach of a court order

Practice Direction 31B on electronic disclosure requires litigators to consider e-disclosure matters before proceedings have commenced. The parties must each complete and exchange e-disclosure questionnaires in order to comply with Rule 31.5.

The Court also has discretion in relation to disclosure orders depending on the specific circumstances of the case. Breaching, and even assisting a breach, of the CPR (or an order under the CPR) could amount to contempt and attract heavy sanctions.

> Of major concern for the law of contempt overall is the part which social media and technology can and does play in the justice process. Jurors now have increased access to information and online opinion, which has led to some high-profile cases being put under threat."

The proportionality test

The new proportionality rules under CPR 44.3(5) will have an impact on contempt proceedings. As de Jersey says, pursuing an action for contempt prior to substantive legal wrangling might not be considered by either side to be 'value for money.' She adds: *"Practitioners will be wary, in general, about expending resources which it is not guaranteed will provide a satisfactory return."*

With the Jackson reforms encouraging proportionality, the onus is on firms to ensure prompt compliance with CPR requirements and any orders for e-disclosure to minimise any risks of an action for contempt.

Minimise the risk: Implement an effective policy

Organisations need to ensure they implement effective social media and digital policies to ensure all digital communications are adequately maintained both for legal and regulatory purposes. This will also assist in reducing cost inefficiencies should e-disclosure become necessary. Keeping their policies under regular review is just as vital as technology continues to develop.

Written and digital records are commonly held for a number of years to satisfy the relevant regulatory bodies and it is likely to be only a matter of time before such regulatory requirements are extended to communications made across social media and mobile devices.

How can Legastat help you?

Legastat is at the forefront of helping organisations with their e-disclosure challenges. We have the tools and resources and, critically, the technology to help you with the challenges to litigation presented by BYOD. We are proud to be part of the Government framework for Electronic Disclosure Services and Hard Copy review services for government (RM924). In addition, we have access to expert computer forensic experts who keep pace with the fast-moving developments in the dynamic mobile device market and how mobile devices work

Whether your requirements relate to small e-disclosure projects or large-scale electronic evidence involving multiple mobile and other devices, we have the technological strength to work on your behalf within the CPR and within budgetary restraints.

[1]http://www.ico.org.uk/for_organisations/data_protection/topic_guides/online/~/media/documents/library/Data_Protection/Practical_application/ico_bring_your_own_device_byod_guidance.ashx

[2]http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part31/pd_part31b

About us

Legastat are experts in reprographics and specialist litigation support for the legal sector.

Located in the heart of legal London we've been trusted to deliver a professional and efficient service since 1953.

Top law firms, corporations, government agencies, small law firms and sole practitioners rely on us to meet their litigation support and disclosure obligations on time, accurately and cost-efficiently.

At Legastat we put our customers' needs, quality and confidentiality at the heart of everything we do.

We are proud to be part of the government framework for Electronic Disclosure Services and Hard Copy review services for government (RM924).

Contact

Carey Street office
57 Carey Street,
London, WC2A 2JB

Telephone
0800 064 0204

Email
info@legastat.co.uk