

Article

Electronic Disclosure in Bermuda and the Cayman Islands: A Voyage of Discovery

The Rules of the Supreme Court of Bermuda 1985 and the Grand Court Rules of the Cayman Islands 1995 do not yet contain any detailed rules, practice directions, or guidance specifically dealing with electronic discovery in civil and commercial litigation (as opposed to discovery of documents more generally under Order 24 and Order 29).

There is, in particular, no local electronic disclosure protocol of the sort contained in CPR Practice Direction 31B in England and Wales, Practice Direction 3 in Singapore, Practice Direction SL1.2 in Hong Kong, Practice Direction RC17/08 in Jersey, or the “Technology and the Court” General Practice Note in Australia.

In the absence of a specific local Practice Direction¹, the Supreme Court of Bermuda and the Grand Court of the Cayman Islands clearly have the jurisdiction to give tailored directions to the parties, on an *ad hoc* basis, as to the manner in which they should conduct their discovery exercises (including electronic discovery). The Courts also have the inherent jurisdiction to decide how best to enforce compliance with those discovery obligations, in the event of non-compliance.

The Court’s power to provide tailored, or bespoke, discovery directions to the parties before the discovery exercise is conducted is part of the Court’s inherent jurisdiction to regulate the conduct of civil litigation. This power is only qualified to the limited extent that the exercise of any particular power might be in direct contravention of any other primary or secondary legislation, or other specific provisions of the rules, relating, for example, to issues of legal professional privilege².

Although there is no prescribed form of electronic discovery protocol in either the Cayman Islands or Bermuda, it is common practice for parties to substantial litigation to agree, through their attorneys, a detailed protocol, which is often then appended to a Court Order for directions at a relatively early stage in proceedings. This practice can avoid unnecessary interlocutory skirmishes at a later date.

The Court of Appeal for Bermuda has now confirmed, in the recent case of *Credit Suisse Life (Bermuda) Ltd v. Bidzina Ivanishvili* [2020] CA Bda 13 Civ, that the Supreme Court of Bermuda (like the Grand Court of the Cayman Islands and the BVI High Court) has the inherent jurisdiction to make exceptional orders relating to discovery, with a view to enforcing a litigant’s discovery obligations. Such orders can require a litigant to provide information, on affidavit under oath, describing its discovery methodology (i.e. the nature of its document management and document retention practices, the nature and extent of its search for documents, and the nature of its document review process), both with respect to hard copy and electronic documents. Such orders can even extend, in exceptional circumstances, to the more intrusive supervision, search or review of a party’s discovery exercise by an opponent’s lawyers or by independent forensic experts.

If any support is needed for the proposition that the Bermuda and Cayman Islands Courts’ power to regulate discovery is within the scope of the Court’s inherent jurisdiction, the UK Supreme Court has confirmed that “*the remedy of discovery (now known as disclosure) was adopted by the courts of equity in order to aid the administration of justice*”, and that it was only subsequently codified in rules of court: “*the scope of disclosure has long been seen as a matter on which the court has jurisdiction to decide*”³. This passage has now been expressly followed and applied by the Court of Appeal for Bermuda in *Credit Suisse Life (Bermuda) Ltd v. Bidzina Ivanishvili* [2020] CA Bda 13 Civ, per Gloster JA at paragraph 33. This supports the well-established proposition that the jurisdiction to order discovery is part of the Court’s inherent jurisdiction, and that it is not limited by any codification in the rules of court.

¹ The Grand Court of the Cayman Islands has issued a Practice Direction, No 1. Of 2019, that provides standard directions for section 238 minority shareholder appraisal actions, but, so far as electronic discovery is concerned, this simply directs that the Company should provide for “the opening and population of, and access to, an indexed electronic data room (or other proposal) for maintaining documents relevant to the fair value of the subject company as of the relevant valuation date”. The Practice Direction does not attempt to descend into the detail as to how an indexed electronic data room should be set up or managed.

² See *Moore v. Assignment Courier Ltd* [1977], *Langley v. North West Water Authority* [1991], *Raja v. Van Hoogstraten* [2009], and *Al Rawi v. Security Service* [2012], per Lord Dyson at paragraphs 18 and 20.

³ See *Al Rawi v. Security Service* [2012], per Lord Dyson at Paragraph 20.

This proposition has also been adopted and applied in the British Virgin Islands, in the recent case of *Kathryn Ma Wai Fong v. Incredible Power Limited & Ors*, Eastern Caribbean Supreme Court, 30 January 2020. In that case, Wallbank J exercised the BVI High Court's power to order a party to search for and produce certain documents, and the manner in which to conduct such searches.

The existence of such an inherent jurisdiction is also consistent with, and supported by the following:

1. The Bermuda, the Cayman Islands, the BVI, and the English case law that has recognised that, for the purposes of discovery under Order 24 and Order 29 (or analogous procedural rules in other jurisdictions) discoverable documents include electronic documents and electronic information storage media⁴.
2. The Bermuda case law and the Cayman Islands case law that has recognised the importance and effect of the overriding objective and the Court's duty of active case management⁵.
3. The English case law that has recognised the English Court's power to tailor directions relating to electronic discovery according to the particular circumstances of the case⁶.

The English courts have also used their inherent powers to regulate disclosure in a developing line of authorities⁷ whereby, in certain exceptional circumstances, a party whose disclosure is demonstrably inadequate or non-compliant is required to make further disclosure either under the supervision of their opponents' lawyers or with the assistance of independent forensic experts (notwithstanding the absence of a specific procedural rule providing for such intrusive directions).

This line of English authorities has also been acknowledged, and followed, in the Grand Court and the Court of Appeal of the Cayman Islands, particularly in the context of minority shareholder appraisal actions requiring extensive disclosure of company and shareholder documents, information, and data that is said to be relevant to share valuation issues⁸.

These cases, brought under section 238 of the Cayman Islands' Companies Act, have often resulted in extensive (and expensive) arguments on discovery issues, given:

- the nature, and value, of the sums in dispute,
- the complexities associated with the valuation of international company shares, and
- the various cross-border legal, commercial, and cultural issues associated with the discovery of data and information that is not located within the Cayman Islands (but, more often than not, is located in the People's Republic of China or Hong Kong), is not always recorded in the English language (but often in Mandarin or Cantonese), and is not always held, or archived, on readily accessible software or IT applications.

The broad scope of the Court's inherent jurisdiction with respect to discovery in section 238 cases can be illustrated by a recent Cayman Islands judgment in the case of *eHi Car Services Limited*, unreported, 24 February 2020. In that case, the Grand Court rejected arguments that the Court did not have the inherent jurisdiction to order 'management meetings' to take place, as between management and valuation experts, in the context of information-gathering requests for the purpose of conducting a share valuation exercise under section 238, pursuant to the Court's power to make procedural orders to achieve justice (despite the absence of an express rule of court to that effect). As Mr Justice Parker noted, "*the existence of the inherent jurisdiction to make effective procedural orders beyond the specific confines of the GCR has been frequently recognized in the Cayman Islands, including by the Chief Justice in Phoenix Meridian [2009] CILR 342 at paragraphs 13 to 14, applied by Kawaley J in Nord Anglia [2018] CILR 164 at paragraph 23*".

⁴ See, for example, *Grant v. Southwestern and County Properties Ltd* [1978], *Derby & Co Ltd v. Weldon (No. 9)* [1991], *Sony Music Entertainment (Australia) Limited v. University of Tasmania* [2003], and *Re Lehman Re Ltd* [2011]. There is no reported Bermuda case addressing issues of electronic discovery in any detail. However, in *Re Lehman Re Ltd* [2011], Kawaley J confirmed that, as a matter of Bermuda law, "the term 'documents' in the modern era clearly includes electronic data as well": see also the notes to the 1999 Supreme Court Practice at 24/2/3, and the authorities there cited. Addressing electronic documents in a different context, Ward CJ varied an *ex parte* Anton Piller order in *Crane v Booker* [1999] granting the plaintiff the right to seize various emails, electronic documents and computer discs held by the Defendants.

⁵ See, for example, *Ribaroff v. Williams* [2014], per Kawaley CJ at paragraphs 13 and 14: "*The essence of modern judicial case management, applying the principles embodied in Order 1A of the Rules to the application and interpretation of the other Rules, is pragmatism and bringing tailor-made decision-making to bear which takes into account the particular factual and legal circumstances of each case ... it is well settled that the dominant aim of case management is to make civil proceedings more efficient by avoiding the wastage of costs. Wasted costs in the past often flowed from the fact that the parties themselves were largely allowed to dictate the course of litigation, with the Court not required to make any decisions of substance until trial*".

⁶ See, for example: *Digicel St Lucia Limited v. Cable & Wireless Plc* [2008]; *Goodale & Ors v. The Ministry of Justice & Ors* [2009]; *Vector Investments v. Williams* [2009]; *Fiddes v Channel 4 TV Corporation* [2010]; *West African Gas Pipeline Company Ltd v Willbros Global Holdings Inc* [2012]; *Mueller Europe Ltd v Central Roofing (South Wales) Ltd* [2012]; *Montpelier Estates Ltd v. Leeds City Council* [2012]; and *Re Atrium Training Services Ltd, Smailes & Anor v. McNally & Ors* [2013].

⁷ See, for example, *Marlton v. Tectronix* [2003] EWHC 383, *Mueller Europe Ltd v. Central Roofing (South Wales) Ltd* [2012] EWHC 3417 (TCC), *Nolan Family Partnership v. Walsh* [2011] EWHC 535 (Comm), *Patel v. Unite the Union* [2012] EWHC 92, *CBS Butler Ltd v. Brown* [2013] EWHC 3944, and *Hunter Worldwide Premium Sourcing Ltd v. Lawless* [2016] EWHC 1031.

⁸ See, for example, *In the matter of Shanda Games Limited*, 25 April 2017, *In the matter of Qihoo 360 Technology Co. Ltd*, 27 July 2017, *In the matter of Qunar Cayman Islands Ltd*, Grand Court, 20 July 2017, and Cayman Islands Court of Appeal, 10 April 2018. .

Furthermore, both the Court of Appeal for Bermuda and the Supreme Court of Bermuda have recognised that there are various other circumstances in which the court is entitled to regulate its procedure as a matter of its inherent jurisdiction, notwithstanding a lacuna in the rules⁹.

Experience from jurisdictions such as England and Wales¹⁰, Bermuda, and the Cayman Islands¹¹, suggests that it is highly beneficial for the parties and the Court to consider and address the issue of electronic discovery at an early stage, *before* the parties have each embarked substantially on the discovery process unilaterally, with a view to resolving any contentious issues before (a) they interfere with the procedural timetable at a later stage or (b) result in costs being wasted unnecessarily. Regrettably, while common in substantial litigation (as mentioned above), this does not always occur in practice (sometimes inadvertently, sometimes for lack of resources, and sometimes for tactical reasons) in the absence of a universally applicable Practice Direction or specific rules of Court.

In an ideal world, with a view to promoting greater certainty and reducing the scope for satellite disputes regarding the parties' compliance (or alleged non-compliance) with their discovery obligations, the rule-makers in both Bermuda and the Cayman Islands would introduce specific rules relating to electronic discovery, either by way of further amendments to the local Rules or by way of Practice Direction. These rules or Practice Directions would ideally be sufficiently flexible to be appropriate for all of the different sorts of local and international disputes litigated in the Courts of international financial centres such as Bermuda and the Cayman Islands. This would, potentially, require some amendments to Order 24 and Order 29 in each jurisdiction, including, in particular, refinement of the current automatic requirement to give disclosure of Peruvian Guano '*train of inquiry*' documents in every case¹².

At present, the Courts will not permit speculative requests for documents that amount to a 'fishing expedition'¹³ and it may also be helpful for any amendments to provide clearer guidance as to what may, or may not, constitute an impermissible 'fishing expedition' for discovery purposes.

At present, the English CPR PD 31B, dealing with Disclosure of Electronic Documents, provides some useful guidance for the Bermuda and Cayman Islands Courts, in the absence of a specific local rule or Practice Direction. While the English Court's Practice Direction may be a helpful starting point, however, any law reformers in Bermuda and the Cayman Islands could usefully take into account the rules, practice directions, and experiences of other common law jurisdictions such as Hong Kong, Singapore, Canada, and Australia, as well as the discovery practices applicable in Jersey, the USA, and in international arbitration.

For the time being, the extent to which the English CPR PD 31B should be followed or applied in Bermuda or the Cayman Islands in any particular case must still be subject to the exercise of the Court's discretion, taking into account the circumstances of the particular case before the court, and bearing in mind the differences between (a) general automatic 'discovery' under Order 24 (which still includes *Peruvian Guano* 'train of inquiry' documents), and (b) 'standard disclosure' in England under CPR Part 31 (which does not)¹⁴.

⁹ See, for example, *Phoenix Global and Phoenix Capital v Citigroup and Bank of Bermuda* [2007], per Kawaley J at paragraph 90: "A gap in the civil procedural rules as a matter of broader principle should not be regarded as an impediment to giving effect to applicable constitutional, statutory or international obligations. In *New Skies Satellite BV v FG Hemisphere Associates LLC* [2005], Evans JA gave the Judgment of the Court of Appeal for Bermuda in a case where a statute conferred a positive right to enforce foreign arbitration rules but there was a "lacuna" in the Rules. On one construction, the fact that the Rules were silent as to the applicable procedure interfered with the positive statutory right. The Court of Appeal's primary finding was that the "lacuna" was no impediment to enforcement proceedings being commenced. Evans JA observed (at Pages 8–9): "If it be a case of ambiguity, we should prefer the construction which enables Bermuda to perform the international treaty obligations undertaken on its behalf".

¹⁰ See, for example, *Goodale & Ors v The Ministry of Justice & Ors* [2009], *Vector Investments v Williams* [2009], *West African Gas Pipeline Company Ltd v. Willbros Global Holdings Inc* [2012], and *Re Atrium Training Services Ltd, Smailes & Anor v McNally & Ors* [2013].

¹¹ See, for example, *Great Simplicity Investment Corporation v. Bitmain Technologies Holding Company*, unreported judgment, 3 August 2020, as well as the section 238 cases mentioned above.

¹² *Peruvian Guano* principles were applied in the Cayman Islands, for example, in *Renova Resources Private Equity Limited v. Gilbertson* [2011] (2) CILR 148.

¹³ See, for example, *In re C* [1994-95] CILR 254.

¹⁴ See, in this context: *Nichia v Argos* [2007], in which the English Court of Appeal referred to standard disclosure and the reasonable search, and emphasised the difference between this approach to disclosure under the CPR and the former approach to discovery under the *Peruvian Guano* approach.

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