So Much For Cheap Technology

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Producing electronic records in the course of litigation can be an expensive process. On top of the normal discovery costs are those incurred to retrieve the electronic information, sift out the relevant content and convert it into a format required by the requesting party. Australian litigants have some comfort from the costs order that follows the conclusion of the litigation. US litigants however do not have such an advantage, as each party must pay its own costs regardless of the outcome.

The recent decision of the United States District Court (Southern District of New York) of *Laura Zubulake v UBS Warburg*[1] (Zubulake I) dealt with a large request for electronic discovery by the plaintiff Zubulake by "cost-shifting" some of UBS' costs of compliance to the plaintiff.

In *Zubulake I,* Judge Scheindlin held that UBS' electronic records in the form of back-up tapes should be produced to the plaintiff and in doing so established a new test for determining which party should bear the cost of complying with orders for electronic document production ("eDiscovery").

In *Zubulake v UBS Warburg*[2] (Zubulake II) that test was applied and Laura Zubulake was ordered to pay 25% of UBS' costs of recovering the archived emails from the back up tape.

Cost-Shifting: Zubulake I

The general rule in the United States is that each party pays its own document production costs. Given the rise of discoverable information held electronically, understandably, corporations are particularly vocal in criticising the legal system in relation to the costs they incur in eDiscovery

The notion of cost-shifting, which forces the requesting party rather than the answering party to bear all or a portion of the cost of eDiscovery, should be used sparingly. Judge Scheindlin said:

> *"Courts must remember that cost-shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations... thus, cost-shifting should be considered only when electronic discovery imposes an 'undue burden or expense' on the responding parties."*[3]

In Judge Scheindlin's opinion electronic evidence is frequently cheaper and easier to produce than paper evidence, criticising those courts that have automatically assumed that an undue burden or expense may arise simply because electronic evidence is involved. Scheindlin said:

> *"The question of whether electronic document production is unduly burdensome or expensive ... turns primarily on whether it is kept in an accessible or inaccessible format."*[4]

By "format", Judge Scheindlin was referring to a storage medium. A server's hard disks is relatively accessible, but back up tapes, which are usually kept off-site and require additional user intervention to restore, are by their nature more difficult to access and fall within Judge Scheindlin's definition of inaccessible.

The Zubulake cost-shifting notion, then turns on the idea of accessible or inaccessible electronic data. Data considered inaccessible includes backup tapes and erased, fragmented or damaged data. The basis for this is that these types of data are not readily usable and require some type of restoration, reconstruction or manipulation before they are usable.[5] However, there are further complications, which the Judge addressed in a three-stage test to apply the cost-shifting analysis.

In the first part of the three-stage test for deciding disputes regarding the scope and cost of eDiscovery, Judge Scheindlin proposed:

> *"For data that is kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data. The Court should consider cost-shifting only when electronic data is relatively inaccessible, such as in back up tapes."*[6]

The second part of Judge Scheindlin's test attempts to avoid producing voluminous amounts of data and concentrate on a small sample to ascertain relevance. The Judge said:

> *"Because the cost-shifting analysis is so fact intensive, it is necessary to determine what data may be found on the inaccessible media. Requiring the responding party to restore and produce responsive documents from a small sample of the requested back up tapes is a sensible approach in most cases."*[7]

The idea proposed by Judge Scheindlin might be sensible but hardly can be said to produce an accurate representation. There were 77 backup tapes that were identified as containing "responsive" data. UBS was ordered to restore only 5 of these in the sample. The net result was 600 unique emails responsive to Zubulake's request that were produced. Of that number Zubulake presented only 68 of those as highly relevant to the case. Of that 68, none provided any direct evidence of Zubulake's discrimination allegations. What evidence, if any, was on the remaining 71 backup tapes remains a mystery.

Lastly, a seven-factor test was set out as the third limb of the approach to dealing with eDiscovery. This test was based on a similar one proposed in *Rowe Entertainment, Inc v William Morris Agency, Inc:*[8]

"Third, and finally, in conducting the cost-shifting analysis the following factors should be considered, weighted more or less in the following order:

1. *the extent to which the request is specifically tailored to discover relevant information;*
2. *the availability of such information from other sources;*
3. *the total cost of production, compared to the amount in controversy;*
4. *the total cost of production, compared to the resources available to each party;*
5. *the relative ability of each party to control costs and its incentive to do so;*
6. *the importance of the issues at stake in the litigation; and*
7. *the relative benefits to the parties of obtaining the information."*[9]

Scheindlin emphasised the importance of the first two factors in applying the test.[10]

Zubulake II

The court in Zubulake II concluded that:

"Documents stored on backup tapes can be likened to paper records locked inside a sophisticated safe to which no one has the key or combination. The cost of accessing those documents may be onerous, and in some cases the parties should split the cost of breaking into the safe. But once the safe is opened, the production of the documents found inside is the sole responsibility of the responding party. The point is simple: technology may increasingly permit litigants to reconstruct lost or inaccessible information, but once restored to an accessible form, the usual rules of discovery apply."[11]

Australian Implications

Rule 23.3 of the Supreme Court Rules (NSW) provides a relevancy test for discoverable documents in New South Wales litigation. The document or class of documents to be produced by a discovery order in New South Wales must be:

1. relevant to one or more of the facts in issue;
2. described by the nature of the document and set out the period with which it was brought into existence; and
3. subject to any other manner or specification that may be deemed appropriate by the court in the circumstances.

The relevancy test was explained in *Commonwealth v Northern Land Council*[12] in which it was held that any document is discoverable if it may allow a party to a litigious matter to advance the case or to damage the adversary's case. Speculative discovery is not sufficient to give rise to the obligation on a party to discover the document.

Rule 26 of the United States Federal Rules of Procedure states that a party to a US law suit can be required to produce any information which is not only directly relevant to the claim, but which may also lead or possibly lead, to relevant information. Though the words are different, the outcome in relation to what is discoverable is the same in the US and Australia.

With such broad scope for potential eDiscovery, there is merit in the arguments for cost-shifting during and not after litigation in Australia.

Australian parties and US litigation

If an Australian party is involved in United States litigation, knowing how to apply the Zubulake principles could be an effective strategy in cost-shifting some of the eDiscovery costs.

A party should be aware of whether electronic information is kept in accessible or inaccessible form. The media on which the data is stored is the threshold for practical consideration of whether cost-shifting is appropriate and is considered in the context of the Zubulake I Seven-Step test.

It is also important that the party communicate any onerous procedures for retrieving electronic data to their legal representatives in order to facilitate the eDiscovery process in a beneficial way.

Applying Zubulake to Australian litigation

Sony Music Entertainment (Australia) Ltd v University of Tasmania[13] ("***Sony v UTas***") can be used to overlay the Zubulake principles into an Australian case.

Sony v UTAS concerned the issue of restoring back up tapes to obtain relevant discoverable information. Tamberlin J, in the Federal Court of Australia, dealt with Sony Music's application for the University of Tasmania to produce its back up tapes, by appointing an IT expert to review the tapes on site at the University of Tasmania. The expert used software called EnCase to sift through the electronic documents and retrieve those that were relevant to the case.

Tamberlin J declined to make any order for costs of these procedures as they had yet to be carried out and there was no detailed indication as to the nature and extent of the material which would be provided. His Honour said that when the discovery process is completed he will hear submissions in relation to the costs involved in carrying out the eDiscovery.

The Zubulake principles could have been applied in favour of the University of Tasmania had they been an option available to the Australian courts. The outcome would not have changed, but the timing of payment could have acted as an incentive to a requesting party to tailor an eDiscovery request accurately and precisely.

Regardless of the outcome and which party is ordered to bear the cost of the eDiscovery exercise, almost certainly the unsuccessful party will pay some or all of the costs upon conclusion of the case. As at 24 November 2003 the matter of costs had not been remitted to his Honour for determination.

Zubulake Mate

Some Australian litigants are now seeking, in a commercial context, to ask a requesting party to bear some of the costs of eDiscovery up front but have stopped short of asking a court to make an order that the costs be shifted.[14]

Large eDiscovery requests can place a serious drain on a party's cashflow should the party be subject to lengthy and voluminous eDiscovery. In this regard perhaps legislators (and the courts) can consider the Zubulake principles as a way to manage eDiscovery costs in litigation.

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1 Zubulake I, 2003 U.S. Dist. LEXIS 7939, 2003 WL 21087884.

2 Zubulake II, 216 F.R.D. 280; 200 3 U.S. Dist. LEXIS 12643.

3 Zubulake I *7.

4 Zubulake I *22.

5 Zubulake I *23-25.

6 Zubulake I *12 .

7 Zubulake I *37.

8 205 FRD 421, 429 (SDNY).

9 Zubulake I *37.

10 The Judge referred back to Zubulake I *11.

11 Zubulake II *36.

12 (1991) 30 FCR 1; 103 ALR 267 at 290.

13 [2003] FCA 724.

14 Conversation with Stephen Klotz regarding his clients.

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