Guidance by the commercial judges on the recovery of documents in commercial actions

1. The court expects the parties to a commercial action and their legal representatives to co-operate in identifying documents which are relevant to the dispute. All those involved should adopt a co-operative, constructive and sensible approach. In so far as possible relevant documents should be produced voluntarily to the party seeking recovery.

2. The recovery of documents should be reasonable and proportionate having regard to the issues in the action which are truly contentious. Both the party seeking recovery and the party in possession of the documents should strive to avoid unnecessary or disproportionate expense being incurred. Equally, where recovery of documents is sought from a non-party haver the party seeking recovery and the non-party haver should strive to avoid unnecessary or disproportionate expense being incurred.

3. As soon as litigation is contemplated the parties' legal representatives must notify their clients of the need to preserve documents which may be relevant to the litigation. Documents to be preserved include electronic data which would otherwise be deleted in accordance with a document retention policy or in the ordinary course of business. The documents concerned include documents held by a third party on a party's behalf.

4. Where a party believes that relevant documents are held by a third party (on the third party's own behalf or for another non-party) it should inform the third party of the need to preserve those documents.

5. It will not generally be appropriate for a party to seek recovery of documents if copies of the documents are already in its possession (for instance, because it has many of the documents in common from the parties' previous dealings, or if informal disclosure and inspection of documents has already been provided); or if the documents are readily available to it from other sources. Where specifications of documents seek recovery of all documents relating to every issue in the litigation, or a plethora of issues, the party seeking recovery will require to satisfy the court that such a wide scale approach is essential, and that the possibility of a more discriminating approach has been properly explored but is not appropriate.

6. Discussions concerning the recovery of documents should be commenced as early as possible by the parties' legal advisers (ordinarily in conjunction with the

pre-action protocol). It is likely to be desirable to focus matters by framing a draft specification or an equivalent document at an early stage. As already indicated, the recovery of documents should be reasonable and proportionate having regard to the issues in the action which are truly contentious. The appropriate search method or methods and the scope of the search should be discussed with that objective in mind. In the case of electronic documents the discussion should include consideration of the use of technology, including whether data sampling, or keyword or other automated search methods, ought to be used, and, if so, the parameters of such searches.

7. Unless otherwise agreed, or unless the court otherwise directs, the haver should identify all possible repositories of relevant documents. It should also distinguish between documents (including electronic data) which are reasonably accessible and those which are not. Where electronic data is not reasonably accessible the party seeking its recovery should demonstrate that its relevance and materiality justify the expense and burden of retrieving and producing it. Parties should seek to agree the appropriate search method(s) and the scope and extent of the search(es). In some cases a staged approach may be the appropriate way forward.

8. It is desirable that by the time of the preliminary hearing discussions have taken place and agreement has been reached as to the documents which require to be recovered. In the event that discussions have not produced agreement by that time the court will expect to be advised of the stage the discussions have reached, the matters outstanding, and the timescale within which it is anticipated that agreement may be reached. If by the preliminary hearing a dispute concerning recovery has been focussed the court may determine the dispute at that hearing or fix a further hearing for that purpose. Where parties disagree as to the appropriate search method for electronic documents the party proposing a particular method should be in a position to advise the court of the merits of the method in the circumstances and the estimated cost of using it.

9. Unless otherwise agreed, or unless the court otherwise directs, party havers and third party havers should provide the party seeking recovery with details of the reasonable searches for relevant documents which they have carried out. The details provided should describe (i) the repositories searched; (ii) the nature of the searches and by whom they were carried out; (iii) any limitations or restrictions in those searches and the reasons for them; (iv) any relevant repositories not searched which may contain further relevant documents, and the reasons for not searching them.

10. Unless otherwise agreed, or unless the court otherwise directs, electronic documents should generally be made available in a form which allows the party receiving them the same ability to access, search, review and display the documents as the haver had. This will normally involve documents being provided in their native format (i.e. in the original form in which the document was created by a computer software programme) together with any available searchable optical character recognition ("OCR") versions. Where OCR versions are provided the court recognises that provision may require to be on an "as is" basis with no assurance to the party obtaining recovery that those versions are complete or accurate.

11. Havers should do their best to avoid producing duplicate documents or documents which are of no relevance to the proceedings. Indiscriminate "dumping" of documents (including electronic data) in response to a specification should be eschewed because it is liable to place excessive and unacceptable time and expense burdens on the party seeking recovery.

12. This guidance has effect from 4 February 2019.

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