

## Legal Briefing

### Should the court intervene to correct alleged deficiencies in electronic disclosure?

*Triumph Controls UK Ltd & Anor v Primus International*

*Holding Co & Ors [2018] EWHC 176 (TCC)*

Before The Hon Mr Justice Coulson

In the Technology and Construction Court

Judgement delivered 7 February 2018

#### The facts

During 2013 Triumph purchased Primus' aerospace manufacturing business including facilities at Farnborough in England and at Rayong in Thailand. In 2016 Triumph subsequently alleged breaches of warranty and commenced proceedings against Primus claiming US\$65m damages.

Standard disclosure was ordered and the parties agreed a list of key words. Triumph's key word searches indicated some 450,000 responsive documents. Triumph reviewed around 230,000 documents using manual searches aided by a Computer Assisted Review. A sampling exercise on 1% of the remaining 220,000 suggested only 0.38% would be relevant so Triumph decided that it would be disproportionate to continue the manual searches. This approach was not agreed or discussed with Primus and was contrary to Triumph's Electronic Documents Questionnaire which indicated that all responsive documents would be manually reviewed.

During July 2016 Triumph served its first list of documents which identified 12,476 documents. Triumph subsequently served 11 supplemental lists which encompassed over 7,000 further documents, including around 2,000 that had been responsive to the key word searches agreed with Primus.

In its first list Triumph had explained that in relation to a database known as the "Farnborough shared drive" it had asked the document custodians (listed in Appendix A of the list) to identify which of around 860,000 folders or file paths - representing over 20 million documents - were likely to contain relevant material. Triumph's solicitors had then carried out a further cross check which reduced the amount of data by around two thirds.

During December 2017 Primus issued an application for: (i) an

order that the list of 860,000 folders and file paths should be provided to them so that they could see whether or not any folders or file paths should be searched; and, (ii) an order that Triumph undertake a manual review of the 220,000 documents that had not been manually reviewed following the initial keyword search.

#### The issue

Was Primus entitled to the orders sought?

#### The decision

The judge said that whilst Triumph should have tried to agree its approach to the Farnborough shared drive with Primus he considered that the explanation provided in the list of documents was sensible and proportionate given amongst other things that Primus had been unable to identify any folders or file paths which were obviously missing. Furthermore, where Primus had taken some 17 months to raise a complaint, the judge considered it would be neither reasonable nor proportionate to order Triumph to disclose the full list of folders and file paths.

The judge considered that Triumph's approach to the 220,000 documents was unsatisfactory. Triumph had not carried out the manual review promised in its Electronic Documents Questionnaire nor had it made clear in its list of documents the nature of the sampling exercise undertaken, for example by reference to tolerances or rounds of sampling. It appeared that no senior lawyer had been involved in supervising the exercise and there was no explanation offered of how Triumph's Computer Assisted Review had been undertaken. The judge therefore concluded that Triumph's approach had been neither transparent nor independently verifiable and this was material where the total number of documents disclosed was modest and where some of Triumph's further disclosure included documents that should have been disclosed first time around and/or were of sufficient relevance to have been referred to by Triumph's witnesses.

The judge therefore made an order that the parties should forthwith agree a methodology by which a sample of 25% of the 220,000 documents was to be manually searched, such search to take no longer than three weeks and the results to be put into an agreed letter to be shown and explained to the court at the next hearing on 22 February 2018.

#### Commentary

Albeit a rare example of a judge directly intervening into the

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practicalities of disclosure this decision highlights several points of general application: first, the parties should try to agree upon the approaches they intend to take towards electronic disclosure and the court will usually be unsympathetic to a party who has acted unilaterally; second, the explanation of the approach to electronic disclosure set out in the Electronic Disclosure Questionnaire and/or the list of documents should be sufficiently detailed to enable the adequacy of this approach to be gauged by the opposition; third, do not deviate from the approach explained in the Electronic Disclosure Questionnaire and/or the list of documents; and, fourth, any doubts about the sufficiency of the opposition's disclosure should be raised promptly.

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