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## English High Court Approves the Use of Predictive Coding

The English High Court decision of Master Matthews (February 16, 2016) approved the use of predictive coding to satisfy the disclosure requirement under the Civil Procedure Rules (CPR) Part 31. *See Pyrrho Investments Ltd v. MWB Property Ltd* [2016] EWHC 256 (Ch). This marks the first case where an English court has discussed in detail the use of predictive coding.

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The facts of the case are as follows: Pyrrho Investments Limited and MWB Business Exchange Limited brought a breach of shareholder's fiduciary duty cause of action against five defendants. On February 2, 2016, the parties attended a hearing concerning their obligations for electronic disclosure of a large volume of documents on back-up tapes (originally estimated to be more than 17.6 million, but later reduced to 3.1 million by process of electronic de-duplication).

Under the CPR, parties are obligated to make a reasonable search for disclosable documents. Factors sets forth in CPR 31.7 for determining the reasonableness of a search include: "(a) the number of documents involved; (b) the nature and complexity of the proceedings; (c) the ease and expense of retrieval of any particular document; and (d) the significance of any document which is likely to be located during the search." Rule 31 is supplemented by two Practice Directions, one of which (Practice Direction 31.B) outlines factors in determining the scope of electronic disclosure. While the Rule and guidelines were useful in determining the search's scope and quality, the court found that neither the CPR nor the Practice Directions answered the question as to how to conduct the search. The court found that while keyword and other automated searching methods may be enough to satisfy the reasonableness standard under Rule 31, parties should apply additional techniques and take other necessary steps as deemed justifiable by the court.

In its decision, this court cited a U.S. Federal Court case where the magistrate judge described its decision to allow predictive coding as "*relatively easy*" [but noting that it] "*is not a magic, Staples-easy Button, solution appropriate for all cases.*" *See Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 189 (S.D.N.Y., February 24, 2012). The Court also cited another case where an Irish Court endorsed the use of predictive coding. In *Irish Bank Resolution Corporation Ltd v. Quinn* [2015] IEHC 175, the Irish High Court stated: "[t]he evidence establishes, that in discovery of large data sets, technology assisted review using predictive coding is at least as accurate as, and, probably more accurate than, the manual or linear method in identifying relevant documents." In addition, the court suggested the use of appropriate "checks and balances" should be implemented to ensure the transparency and reliability of the disclosure process.

In approving the use of predictive coding, this Court provided a list of key factors, including:

- Predictive coding is useful in appropriate cases.
- No evidence showing the use of predictive coding leads to less accurate disclosure, as compared to manual review and/or keyword searches.

- Greater consistency in review approach.
- CPR and Practice Directions do not prohibit the use of predictive coding.
- Large number of electronic documents (over 3 million documents in this case) to be reviewed for relevancy and possible disclosure.
- Appropriate where a suitable alternative exists, and the cost of a manual review would be enormous and “unreasonable” within paragraph 25 of the Practice Direction B to CPR Rule 31.
- The cost of using predictive coding is proportionate to the value of the litigated claims.

While this is the first case reported which discusses the use of predictive coding, it is not uncommon for predictive coding to be sought at case management conferences in appropriate situations. Senior Master Whitaker (prior to his resignation) was a keen advocate of using technology in disclosure and chaired the working committee which drafted CPR Practice Direction 31B. Although Case Management Conferences are rarely reported, it was common for him to order technology assisted reviews or question parties on whether technology could be better utilized in the case. *See*, for example, *Goodale & Ors v Ministry of Justice & Ors* [2009] EWHC 3834 (QB).

Jackson LJ in his review of costs in civil litigation tested three e-disclosure platforms, including technology assisted review and predictive coding and commented that he was “bound to say that the systems developed by each of those specialist providers are extremely impressive. I am sure that it would assist other members of the judiciary to know what technological help is available to the parties, to enable them to manage the disclosure process.” *See* Review of Civil Litigation Costs: Final Report at 2.2, page 365.

Ropes & Gray is a leader in the use of Technology Assisted Review (predictive coding and analytics). E-Discovery Counsel co-wrote a critical chapter on Technology Assisted Review in the 2015 Federal Judges’ Guide to Discovery. Our group has used technology to design numerous investigative and production reviews, saving time and money and completing defensible reviews. Please contact Shannon Capone Kirk, E-Discovery Counsel, at 617-951-7218 or [Shannon.Kirk@ropesgray.com](mailto:Shannon.Kirk@ropesgray.com) with any questions.