

David Hodson on International Family Law Anton Pillering in the clouds

How do you carry out a search and find (Anton Piller) order when the documentation to be discovered and the purpose of the search, especially electronic information, is held not at the premises being searched but elsewhere, perhaps on a server in another continent? This issue will increasingly face international family lawyers and make discovery through search orders much harder. It was addressed at the Canberra conference in October 2010 by Andrew Davies, one of Australia's leading family lawyers at O'Sullivan Davies (www.osullivandavies.com.au), Perth. Andrew has had several cases where this issue has arisen and his experience is invaluable for us elsewhere in the world.

Cloud computing and technology is the movement from the 1980s onwards from mainframe-based computing to client server provision. In essence, instead of software programs and data being held on a server owned by and operated locally by a person or business, it is held remotely by a third party on a very large server, often abroad. Naturally it saves the cost of purchasing, maintaining and safeguarding a server as this is done by others. It has a particular attraction for those frequently working away from an office as it makes access to data much easier, avoiding cumbersome VPN and other connections. Amazon, Microsoft and Google are amongst the service providers. There are still residual concerns about security. However many large multinational corporations now operate through cloud computing, with many offices and employees having remote access to corporate data. It will be a crucial element in our IT usage in the future.

But what does one do when implementing a search order if the data is not at the premises and simply controlled by a password? I have written elsewhere about the IT aspects of search orders, especially following *Imerman* (2010) when the Court of Appeal told us that we should be using search orders more frequently. In *Imerman* access gained to the husband's server held in a jointly occupied office and from which up to 2.5 million pages of documents were extracted on behalf of the wife. What if that husband had held his data remotely? It might be possible to seize a computer on a search order implementation if the other party does not give the password. IT experts could then gain access in most cases. But this is impossible if the data is held remotely, in the clouds. What can be done? If the person concerned will not disclose the password, and as water boarding is not yet used in most family courts to secure disclosure, access to the remote data is impossible. Or is it?

These IT aspects of search orders were dealt with by Andrew Davies including an excellent paper in which he sets out recommended precedent orders. He deals with forensic computer imaging, electronic cataloguing of disclosed data and appropriate use of IT experts. National court rules and judicial pronouncements can barely keep pace with developments in IT. Within the international family law community we need more openly to share our experiences and solutions in gaining full disclosure against a reluctant spouse hiding their assets internationally, even if that disclosure is in the clouds!

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