JUDICIARY OF
ENGLAND AND WALES

DISCLOSURE

LECTURE BY LORD JUSTICE JACKSON AT THE LAW SOCIETY's COMMERCIAL LITIGATION CONFERENCE ON 10 OCTOBER 2016

1. INTRODUCTION

This lecture. This lecture addresses disclosure issues and considers whether more effective use should be made of the 'new' rules which have been in place since 2013.

A driver of high costs. Disclosure is one of the big costs drivers of commercial litigation. It is not only the process of identifying and handing over appropriate documents which is expensive. The resultant bundle, whether electronic or in hard copy, then has to be considered by the other side. Finally counsel, solicitors, experts and others all set to work on the documents and may devote many expensive hours to the process. Therefore, getting a grip on disclosure is one of the keys to controlling litigation costs.

2. THE NEW RULES AND HOW THEY ARE BEING USED

New rule 31.5. The new rule 31.5 of the CPR came into force on 1st April 2013. It provides:

> "(2) Unless the court otherwise orders, paragraphs (3) to (8) apply to all multi-track claims, other than those which include a claim for personal injuries.
>
> (3) Not less than 14 days before the first case management conference each party must file and serve a report verified by a statement of truth, which –
>
> (a) describes briefly what documents exist or may exist that are or may be relevant to the matters in issue in the case;
>
> (b) describes where and with whom those documents are or may be located;

(c) in the case of electronic documents, describes how those documents are stored;

(d) estimates the broad range of costs that could be involved in giving standard disclosure in the case, including the costs of searching for and disclosing any electronically stored documents; and

(e) states which of the directions under paragraphs (7) or (8) are to be sought.

(4) In cases where the Electronic Documents Questionnaire has been exchanged, the Questionnaire should be filed with the report required by paragraph (3).

(5) Not less than seven days before the first case management conference, and on any other occasion as the court may direct, the parties must, at a meeting or by telephone, discuss and seek to agree a proposal in relation to disclosure that meets the overriding objective.

(6) If –

(a) the parties agree proposals for the scope of disclosure; and

(b) the court considers that the proposals are appropriate in all the circumstances,

the court may approve them without a hearing and give directions in the terms proposed.

(7) At the first or any subsequent case management conference, the court will decide, having regard to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly, which of the following orders to make in relation to disclosure –

(a) an order dispensing with disclosure;

(b) an order that a party disclose the documents on which it relies, and at the same time request any specific disclosure it requires from any other party;

(c) an order that directs, where practicable, the disclosure to be given by each party on an issue by issue basis;

(d) an order that each party disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences;

(e) an order that a party give standard disclosure;

(f) any other order in relation to disclosure that the court considers appropriate."

The menu. Rule 31.5 (7) contains the "menu" of different possible disclosure orders. One possible form of order, which is not expressly set out but which is sometimes made under rule 31.6 (7) (f), runs along the following lines: by consent each party gives to the other free access to all its documents (other than privileged documents), so that they can pick out whichever ones they want. Although this might reduce the costs of the producing party, it does little to reduce the overall costs of the action.

Available guidance on e-disclosure. There are now many excellent textbooks available giving guidance on how to conduct e-disclosure, for example *The Electronic Evidence and E-disclosure Handbook*.[1] On occasions, a staged approach to e-disclosure is the best way forwards, as in *Goodale v MoJ* [2009] EWHC B41 (QB) and *Daniel Alfredo Condori Vilca v Xstrata Ltd* [2016] EWHC 389 (QBD).

Predictive coding. 'Predictive coding' means the use of special computer software to assess the likely relevance of documents. Lawyers review samples of the documents and pick out what is relevant, thereby training the computer to do the same. Once the software is sufficiently well trained, they let the computer (a) apply the logic to the entire set of documents and (b) suggest the likely relevance of each document, based on its understanding. The first reported[2] case in which this was ordered was *Pyrrho Investments Ltd v MWB Property Ltd* [2016] EWHC 256 (Ch). Master Matthews gave a clear explanation of the process at paragraphs 17-24. He set out ten cogent reasons for ordering its use in that case at paragraph 33. Mr Registrar Jones made similar order in *Re Tradeouts Limited, Brown v BCA Trading Ltd*, petition no. 997 of 2016 on 17 May 2016. Although the 'training' process is expensive, in cases where the electronically stored information is vast predictive coding can achieve huge savings. In *Re Tradeouts* the parties estimated that predictive coding would cost £120,000, whereas the cost would be nearer £250,000 if paralegals made the search using keywords.

Technology Assisted Review. In additions to predictive coding, many other technologies fall under the general heading of Technology Assisted Review ("TAR"). Tools are available which assist with tasks such as email threading, near de-duplication, concept searching and clustering.

Foreign language. In some commercial cases there are many documents in foreign languages. Unless the legal team has the requisite capabilities, it is likely that the documents will need to be translated before any legal analysis can begin. This, of course, adds a new layer of costs. Where predictive coding or other TAR products (such as language detection software) are used successfully, this should (a) identify the material in foreign languages and (b) reduce the number of documents needing to be translated.

[1] By Peter Hibbert, Sweet & Maxwell, 2015
[2] Courts have approved the use of predictive coding on occasions before 2016.

TeCSA/SCL/TECBAR protocol. In relation to TCC litigation TeCSA, TECBAR and the SCL[3] have produced a very helpful e-disclosure protocol. This protocol guides the parties through the process. In particular, it encourages them to consider all the possible forms of order in the menu option, rather than mechanistically agree 'standard disclosure'.

The role of the judge in relation to disclosure. If the court is going to make effective use of rule 31.5, the judge must do more than simply adjudicate upon the parties' competing submissions. It is necessary to test the opposing arguments. One judge comments:
"When disclosure is an issue during case management it is not uncommon to find that the parties' counsel cannot describe the documents which they expect to be relevant, why they might exist or why they will benefit determination of the issues concerned. This is particularly the case for electronic documents when requests for practical descriptions and examples are usually met with bluster. This and the fact that disclosure issues are relatively rare suggests the fault lies with a failure to properly address the issues either internally or with the other side before the hearing. That conclusion is sustained by the fact that I usually find a general discussion of the need for the disclosure sought, about the practicalities of effecting disclosure and inspection and over the resulting cost produces a solution by agreement without the need for a decision."

Is everyone now using the new rules properly? Unfortunately, no. In large commercial actions and other substantial cases too often people are treating standard disclosure as the default option. Parties frequently agree standard disclosure, seemingly without considering whether other options may be preferable, and the courts accept their agreements. It would be to the public benefit if all involved in the disclosure process gave more attention to the full range of options before simply proposing or agreeing to 'standard disclosure'.

Survey by London Solicitors Litigation Association. In June 2016 the London Solicitors Litigation Association ('LSLA') carried out a survey of their members. This revealed that neither practitioners nor courts were making proper use of the available disclosure orders contained in CPR rule 31.5 (7). Commenting on the survey findings, the president of the LSLA stated:
"the onus must surely be not only on the parties and their advisers to explore and agree a proportionate approach to disclosure in advance of the case management conference (CMC), but also on the courts proactively to challenge parties where they have failed to do so. A more robust and challenging case management approach to disclosure by the courts would be welcomed by many."
The LSLA's June 2016 Litigation Trends Survey went on to criticise lawyers for not making proper use of the new disclosure rules, since proper use of those rules could lead to substantial costs savings.

[3] Technology and Construction Solicitors Association; Society of Construction Law; Technology and Construction Bar Association. Version 0.2 of the protocol is dated 9th January 2015.

The GC100 disclosure seminar on 27th April 2016. The GC 100 Group,[4] as regular users of the Commercial Court, raised the growing concerns about disclosure with the Commercial Court. The upshot was a seminar on disclosure in which judges (from the Commercial Court, Chancery Division and TCC), practitioners and court users took part. Principal points emerging from the seminar were:

(i) There was a general recognition that the tools for controlling disclosure have been in place since April 2013, but the parties and the courts are not making sufficient use of them.

(ii) In particular, more use ought to be made of option (b), namely disclosure limited to specific issues. In Commercial Court cases the parties usually succeed in agreeing a list of issues for the first CMC.

(iii) In patent litigation there is an established practice of making restricted disclosure orders. This is because the Patents Court and the Intellectual Property Enterprise Court are competing against Continental courts, which have very little disclosure. The litigants have a choice of forum. Parties are generally satisfied with the restrictive approach to disclosure in these cases.

(iv) The use of predictive coding in *Pyrrho* was generally welcomed, but it was accepted that predictive coding was not a panacea to be used in every case.

(v) The new procedure for Shorter and Flexible Trials currently being piloted under Practice Direction 51N has very restrictive rules for disclosure. These were generally welcomed.

So where are we now? It is hoped that, as a result of the seminar on 27th April 2016, both practitioners and the courts will make fuller and more effective use of the menu option. A working group ("the disclosure working group") was set up at the end of the seminar to take these matters further.

Matters for the disclosure working group. The disclosure working group may care to consider whether what is needed is culture change rather than rule change. In particular, (dare I say it?) perhaps the working group might encourage:

- practitioners to think twice before agreeing standard disclosure (however profitable that may be for the lawyers), and
- judges to be more proactive, by pressing counsel as to what documents are needed and why, rather than approving any agreed directions for standard disclosure.

If by any chance the working group report is along these lines, it would certainly chime with the sentiments expressed at the GC100 April 2016 disclosure seminar, but this is entirely a matter for them.

Link with case management reforms. The new disclosure rules obviously fit with the other case management reforms introduced in 2013.[5] Tailoring disclosure to the real issues in the case obviously goes hand in hand with directions governing the scope of expert reports and factual evidence.

[4] This comprises the general counsel and company secretaries of the FTSE 100 companies.
[5] As to which, see *The reform of civil litigation*, published by Sweet & Maxwell in September 2016.

Link with costs management. The new disclosure rules were carefully designed to mesh in with (a) the new rules on proportionality and (b) costs management. The intention is that the court should make a disclosure order which is proportionate in all the circumstances of the case. Absent an allegation of fraud, it would be inappropriate to order the parties spend £1 million on disclosure, if the sum at issue is only £1million. The court should, so far as possible, make disclosure orders which are consistent with the approved/agreed budgets. Since the court should be doing case management and costs management together, it can (a) adjust the level of disclosure to fit with the budgets and/or (b) set the budgets to take account of the level of disclosure ordered.

3. SOME OVERSEAS DEVELOPMENTS

The same problems everywhere. All common law jurisdictions are now grappling with the problems of disclosure and how to control that process in the digital age. Legislators and rule-makers are constantly catching up with developments in technology.

Australia. The Australian Law Commission produced an excellent report in 2011, entitled *Managing Discovery – Discovery of Documents in Federal Courts*.[6] Australia is moving in the same direction as the UK, with an emphasis on (a) controlling discovery through judicial case management and (b) limiting the costs of the process.

The Australian Federal Court substantially adopted the recommendations of the Australian Law Commission in 2011. The court promulgated new rules and practice notes to give effect to the recommendations. McKerracher J stated in *Alanco Australia Pty Ltd v Higgins* (No 2) [2011] FCA 1063 that those rules were "designed to ensure that the Court controls the discovery process to ensure that the parties are not crippled with the cost and delay of that process. The objective is to ensure that discovery will be provided only when necessary for the just resolution of the proceedings as quickly, inexpensively and efficiently as possible".

New Zealand. The New Zealand courts, have been engaged in similar reform. The New Zealand High Court Rules – also amended in 2011 – adopted the 'menu' approach that was then under consideration in England and Wales. A discovery order 'must be made at the first case management conference that is held for the proceeding, unless there is good reason for making the order later': rule 8.5(2). The Court can consider standard or tailored discovery (or making no discovery order at all). Importantly, the parties are under an obligation to "not less than 10 working days before the first case management conference, discuss and endeavour to agree on an appropriate discovery order, and the manner in which inspection will subsequently take place": rule 8.11(1).

[6] ALRC Report 115 (2011)

4. CONCLUSION

No more rule change needed here. Practitioners may be relieved to note that this lecture does not recommend any further reforms. It merely suggests (echoing the views of many senior practitioners) that greater use might be made of the existing rules.

Rupert Jackson 10th October 2016