Professional Negligence Bar Association Seminar

Large Pension Room, Gray’s Inn

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PROCEDURAL ISSUES RELATING TO DISCLOSURE, WITH PARTICULAR REFERENCE TO THE PERMANENT ADOPTION OF THE “DISCLOSURE PILOT”

Sir Marcus Smith[1]

The relevant provisions are:

CPR 31 (on disclosure generally)

CPR 31 PD (on disclosure of electronic documents generally)

CPR 57AD (on disclosure in the Business and Property Courts)

Introduction

1. Disclosure is both a huge strength of the UK litigation system, and one of its Achilles’ heels. It is worth considering these two points, a little in the abstract.

2. It is important that we do not lose sight of the fact that disclosure is one of the procedural innovations of the Anglo-Saxon procedural school that is highly attractive to claimants in certain types of litigation, particularly fraud, asset tracing, most commercial cases involving some dishonesty; “illicit” cartels under the Chapter I prohibition (to name a few). And – not least, given my audience tonight – most professional negligence cases, where (as in cartel cases) there is likely to be an imbalance of information and knowledge between claimant and defendant, and where the claimant is likely to value a (by civilian standards) potentially intrusive right to disclosure of the defendant’s documents.

3. It is also important that we recognise that our disclosure system really only works because we have legal professions who “get it”. I once had the pleasure of addressing about 50

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European Judges on the disclosure regime in the EU Damages Directive. This Directive introduces a disclosure regime into EU private competition litigation. It was quite obvious that even with careful introduction of disclosure rules, those rules would only work if embedded in a proper professional ethos, which will have to evolve (more or less out of nothing) in systems with no experience of disclosure rules like ours. In our jurisdiction, every junior lawyer has been through the process of telling their surprised and outraged client: "This adverse document must be disclosed…you have no choice…these are the rules". In short, we have the professional infrastructure to make disclosure work – and that is not to be underestimated or undervalued.

4. The Achilles' heel, of course, is cost. Disclosure has probably always been expensive, but costs have risen significantly, and out of proportion with other (significant) litigation costs. This is obviously bad on many levels – access to justice; encouragement of foreign litigation here; efficiency of legal process.

Good points

5. I am going to touch upon a number of problems – which the new regime seeks to tackle, but probably does not do so perfectly – but before I do, I want to mention the unequivocally "good bits". It seems to me that Judges ought to be critical of the regime that they administer, and I am going to focus on what I perceive as the problems. But I would not want that focus to distract from the essentially good and helpful approaches laid down in PD57AD.

6. So:

    a. The emphasis on disclosure of known adverse documents and "initial disclosure" is really helpful.

    b. The statement of general principles (duties; preservation of documents, etc), whilst perhaps not necessary, is surely a good thing.

    c. The articulation of models of disclosure – different ways of doing things, and a move away from a "one-size fits all" approach, together with the Disclosure Review Document or DRD, is to be given a qualified welcome.

d. It is certainly helpful to have an early articulation of likely areas of dispute between the parties. I appreciate that a great deal of what the PD does can be done – if the effort is taken – under CPR 31. The point is that CPR 31 does not oblige the parties to ask these questions of themselves; and so one proceeds down a "one size fits all" route. If the PD is seen as a successful, there is really no reason why is cannot be suggested for use (by the parties or the court) in none Business and Property Courts litigation.

e. The problem – I will now be moving on to problems – and the reason for my qualification, is actually the same as the advantage. Namely, that the process of articulating these disputes is itself high in cost. The question, I suppose, is whether it is worthwhile.

7. Let me move on to what are – or may be – problems in a little greater detail.

Risk of too much procedural expense?

8. It is very hard for a Judge to gauge the general success of any regime. I have referred to the costs of this one. If the DRD process is a material cost in most cases, then I think the process may need re-thinking. PD57AD/10.2 makes clear that the DRD process can be shortened. If it is the case that the PD makes clear what is expected, such that most disclosure questions are agreed and not contentious, then I have no difficulty in the courts dealing with – and spending time on – the contentious cases. But if we are not encouraging a low-cost, and sensible approach to disclosure in most cases, then we have a problem. That is something on which I do not have enough of a feel, but I think it is a point of some importance. In short, if we have created a step in the process that generally involves the incurring of costs which were previously not incurred, then we have a problem, and not a solution. These are problems – if they exist – on which we, the judges, are dependent on feedback from the professions.

Procedural "arbitrage"

9. Another way of testing success is the extent of procedural "arbitrage". Professional negligence claims – as we all know – can plausibly be given a number of procedural or jurisdictional homes, some of which lie within the Business and Property Courts orbit (and

so subject to the PD) and some outside the B+PC orbit (and so not subject to the PD). Is the PD a reason for jurisdictional choice?

Factoring in electronic disclosure

10. I have a concern that our disclosure approach – our mindset – remains too tied to the paper document and not the electronic document. Let me be clear that I include in the latter camp paper documents that have been rendered electronically. The point about electronic documents is that they are (or can be) readily searchable, and not necessarily by human eyes. The DRD is emphatically tied to the notion of a human brain applying different search criteria to different classes of document as set out in the DRD. This is entirely sensible when considering a search by people. But I do think we need to embed an early delta in our process between "by people" searches "by machine" searches.

11. There are quite clearly access to justice questions here. Whilst many documents are electronically held – email, word processed documents, etc – many will not be, and the process of rendering paper documents into electronic documents is not one that a court process should compel without very careful consideration. There are large costs here, to which parties should not – without careful consideration – be involuntarily exposed.

12. So I am not advocating an electronic search default. But we do need to keep an eye on the extent to which paper remains a proper source of disclosable material in the future. Because if it becomes the exception, and not the rule, we need to change the orientation of our rules.

"Over-inclusive" disclosure

13. You probably all have looked at my ruling in *Genius Sport*, [2022] EWHC 2637 (Ch), where I imposed a regime of "over-inclusive" disclosure, the thesis being that it was better for the producing party to disclose a broadly selected universe of relevant documents (i.e. excluding only the clearly irrelevant), leaving the receiving party to search how they wish.

14. It must be stressed that "over-inclusive" disclosure is actually an inapt term (which I rather regret using in the judgment). The point is, of course, only to disclose relevant documents, excluding only those that are clearly irrelevant (and, of course, all privileged documents). The point is that whilst everyone trusts an "eyeball" review by a professional and professionally regulated team, no-one trusts the other side's electronic search processes.

And for good reason: the algorithmic “black boxes” that exist now (AI; concept grouping; etc – keywords are so passé!) are robust in different ways in terms of the generosity or otherwise of their relevant document production, and the party receiving disclosure is entitled to understand how well the process has worked. That implies the receiving party second-guessing the process. If that is going to happen, as the price of confidence in the process, then why not less the receiving party run the process themselves in the first instance – as many times as they like; and at whatever cost they are prepared to incur (on the understanding that excessive costs will not be recoverable).

15. Clearly, this is not a one size solution – and some would say it is not a solution at all. But *Genius Sport* does ask an otherwise unarticulated question regarding the manner in which searches are conducted, how they are conducted, and who they are conducted by.

Disclosure and data distinguished

16. Another area that I feel that needs to embedded in our consideration is the distinction between disclosure and data. Disclosure involves the production of documents, and these may – very often will – contain data. But sometimes – and I am here demonstrating my present competition law interests – what we want is the data without the disclosure. Probably collated by experts, from materials held by the parties, but using a non-disclosure-based process. That is something we are certainly trialling in the Competition Appeal Tribunal – are there cases in the professional negligence sphere that would benefit?

17. If so, then ought we to be thinking about ways of incorporating that question into our B+PC case management?