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Cards on the table (or the Judge will make you) – Sanctions and remedies for inadequate disclosure in the English Courts

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Disclosure in litigation before the English Courts is the process by which each party provides the other with documents that both support their own case, but also – importantly – with any documents that undermine its own case, or support the case of the other party.

In this article, we look what happens when parties fail to give full and proper disclosure. What are the duties of the client and the solicitors acting in the litigation? What are the potential pitfalls when dealing with frequently very large amounts of electronic data? In particular, we look briefly at the recent reforms in the Business and Property Courts, consider cases where disclosure went wrong because documents were not collected in the first place, improperly withheld or improperly redacted in breach of the disclosure duties that apply to both solicitors and parties to litigation, and, finally, review the decision of the Commercial Court in *Terre Neuve SARL* v *Yewdale Limited* [2023] EWHC 677, where the High Court appointed an independent solicitor to take over the entire document collection and review exercise from a party who had proven itself unable to perform the task properly.

Recent reforms

Any discussion of disclosure should mention the recent reforms in the 'Business and Property Courts', which include the Commercial Court and the Technology and Construction Court. These courts, where complex, high-value and document heavy cases are heard operated a pilot scheme from 1 January 2019 to 1 October 2022 to road test proposed new disclosure reforms. That pilot scheme has now become permanent, enshrined in a new Practice Direction 57AD to the Civil Procedure Rules ("**CPR**"). The intention behind the new rules was to bring about a cultural change, putting the guiding principles of co-operation and proportionality upfront. The aim is to have the parties focus on the key issues on which disclosure is really needed to determine the claim.

In advance of the first Case Management Conference, the parties need to fill a Disclosure Review Document. This has two parts. In the first part, the parties are meant to identify the 'Issues for Disclosure' which will guide subsequent search and review of documents. Ideally, those issues should be focused and as narrow as possible (and thus lead to fewer disclosable documents). The second part is a questionnaire where each party describes the proposed extent of its searches for documents, identifying individuals who have relevant documents ('custodians'), locations that will be searched, and gives detailed information about what it will do to locate electronic documents -the preponderance of electronic data and the need to deal with this efficiently being a key driver behind the reforms. The form also asks the parties to give specific thought to the use of technology in their document review exercise, and makes provision for agreement on search terms, the use of AI-assisted review software, deduplication of emails and so on. All this is meant to be agreed before the Case Management Conference, with the judge deciding any issues left over. It is also worth noting that the parties are already meant to have given initial disclosure – providing each other with all the key documents relied on in the pleadings, unless this is excessively onerous.

While a more detailed review of Practice Direction 57AD (and the various ‘models’ of disclosure that are on offer) is beyond the scope of this article, a speech by the Chancellor of the High Court, Sir Julian Flaux in January 2023 serves to give a flavour of how the new disclosure system is meant to operate:

- The focus on cooperation does not mean that litigation is no longer adversarial. Rather, it is meant to help narrow the battlefield and highlight the key objectives.
- Disclosure is for life, not just for trial. It should be considered at the outset of the claim. Why would a party with a genuine claim not want the other side to have sight of, and (hopefully) be convinced by, the key documents relied on as soon as pleadings are served.
- Call, don’t write. Solicitors’ correspondence may not be as conducive as picking up the phone to the other side.
- The much closer scrutiny of the Court exercising its new supervisory function (and the risk of costs penalties for those who fail to engage with the other side) should be a further motivating factor towards reaching agreement.
- Issue for disclosure should be drafted on the basis of the mantra ‘short and concise’ – the list of issues is meant to be a practical document that helps the review teams.
- The list of questions in the second half of the Disclosure Review Document is deliberately detailed, so as to flush out any problems at an early stage.

What is a reasonable search?

The underlying principle, which has not changed at all with the recent reforms, is that litigation is a game where all cards should ideally be on the table. However, litigation does not proceed in an ideal world, and so there have to be some limits to the scope of documents that have to be searched for and reviewed – otherwise, litigants and their lawyers risk being crushed by the amount of documents that a complex transaction or project generates. The parties are thus required to carry out a ‘reasonable search’ for documents. What is reasonable depends (as it always does) on the circumstances of the case, the amount in dispute and the ‘overriding objective’ of the CPR – to deal with cases justly and at proportionate cost (CPR 1.1(1). Factors that a Court will have regard to when assessing the reasonableness of a search include (i) the number of documents involved, (ii) nature and complexity of the proceedings, (iii) ease and expense of retrieval of any particular document, and (iv) the significance of any document likely to be located during the search. Coming back to PD57A, the Disclosure Review Document and the detailed questions it requires both parties to address as to where and how they will look for documents helps a great deal in practice to establish what will be a reasonable search.

What is a document anyway?

A document is “*… anything in which information of any description is recorded*”. The vast majority of documents that are being disclosed in litigation before the English Courts are electronic, and much of the work that has to be done by the legal teams relates to locating, collecting / retrieving electronic documents. Emails, word processed documents, database files and spreadsheets are all included, as are instant messages – but the guidance given in Practice Directions to the CPR (PD 31A.2A1) goes further than files that are stored and accessible from any computer system or other device, and expressly includes “... *documents that are stored on servers and back-up systems* ...” and “ *... additional information stored and associated with electronic documents known as metadata*.”.

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The new PD57AD and the Disclosure Review Documents emphasised that point, and specifically describes sources of electronic documents as including "*Cloud based data storage, Webmail accounts e.g. Gmail, Hotmail, Back-up systems and Social media accounts.*" Think twice, therefore, before tweeting 'See you in Court!'.

What documents are within someone's possession or control?'

The parties must only search for and disclose documents that are within their 'possession or control' – or which could be brought within such possession or control by the party exercising a right to call for the documents. One point of interest is whether documents held by a company in the same group as a corporate litigant are caught. A right for a company to call for documents held by an affiliate may exist by reason of the corporate structure, but it may also be found to exist as a matter of fact. In *Lonrho Ltd* v *Shell Petroleum Ltd* [1980] 1 WLR 627, the House of Lords held that documents are within the parent company's control if the parent company has a current legal right to inspect or take copies of the subsidiary's documents irrespective of whether the subsidiary agrees or if the relationship between the companies is in fact such that they should be treated as being one and the same.

In *Schlumberger Holdings Ltd* v *Electromagnetic Geoservices* [2008] EWHC 56, the Court concluded that documents in the possession of an affiliate were caught because the company that was a party to the litigation had "*already enjoyed, and continues to enjoy, the co-operation and consent of the third party to inspect his documents and take copies*". Other documents that are within a party's possession or control are those held by an agent, consultant, or professional adviser, where the terms of engagement often provide for access by the ultimate client to (at least some of the) documents.

It is also worth remembering that the Civil Procedure Rules (Rule 31.17) allow a litigant to apply for disclosure of documents held by an independent third party, so someone who is also obliged to deliver up documents to the opponent in the litigation. The threshold is that disclosure of documents held by a non-party which support or detract from the cases made must either be "*necessary*" to dispose of the claim, or to save costs. That is a high bar, and orders for third party disclosure remain the exception rather than the norm (*Frankson* v *Home Office* [2003] EWCA Civ 655).

Disclosure is no laughing matter

In *Cabo Concepts Ltd* v *MGA Entertainment (UK) Ltd* [2022] EWHC 2024, a serious problem with the defendant's disclosure exercise came to light just four weeks before trial. The defendants had to inform the court that, regrettably, some 84,000 electronic documents had been missed in their collection exercise, and had thus never been reviewed. The judge saw no alternative to postponing the trial, and ordered the defendant to serve evidence explaining just what had gone wrong, and give reasons why the defendant should not have to pay for the claimant's costs of preparing for the adjourned trial.

In July 2022, the matter came before Smith J. The underlying case concerned alleged infringement of intellectual property. The defendants were the manufacturers of a line of dolls marketed under the brand name "*L.O.L. Surprise!*", which was very successful. These dolls had the characteristic feature of being sold with a "*spherical ball container*" (presumably the roundest kind) that, when opened, revealed a surprise collectible accessory for the doll. The claimants were a start-up company preparing to launch their own line of toys, called "*Worldeez*". These also came with a ball container, also containing a surprise. As part of their launch campaign, the claimants arranged for a very well-known child influencer to unbox a "*Worldeez*" toy set in a You Tube video. They also entered into negotiations with leading toy retailers in the United Kingdom to buy substantial launch stock of "*Worldeez*". The claimants asserted that those negotiations led to orders being placed.

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The defendants learnt of this competing product line. They were surprised but did not LOL. Instead, the defendants sent a letter of complaint, alleging patent infringement (primarily aimed at the round container that the child had to open). According to the claimants, individuals employed by the defendants then embarked on a campaign to dissuade UK retailers from stocking "*Worldeez*". In the court proceedings, the claimants argued that these communications led to a complete failure of the "*Worldeez*" launch in the United Kingdom and spelled financial ruin for them as a business. They argued that the defendant's communications amounted to unjustified threats under Section 70 of the Patents Act, and also relied on breaches of the Competition Act. The defendants denied this, and in turn alleged patent infringement and passing off.

The claimants' case was that very senior executives of the defendant, MGA, had personally participated in a secretive anti-competitive campaign, and had sent emails which by their content constituted (of themselves) statutory breaches which could only be proven through obtaining MGA's documents. Against that background, Smith J noted that "… *it was inevitable that the proper conduct of the disclosure process by MGA would be of the utmost importance.*"

A litany of technical failures

Any disclosure exercise should begin with the harvesting of electronic documents, and that was what MGA set out to do. It sought to collect all Microsoft Outlook emails, but of the 1.8 million emails that should have been collected, 800,000 were missed. For one particular custodian, against whom key allegations of having personally communicated with the retailers were made, the initial collection exercise returned 204,950 documents. When this error became apparent barely a month before trial and the exercise was re-run, 657,996 emails were found. The trial collapsed at the eleventh hour.

The evidence of what had gone wrong led by the defendants before Smith J showed, as the judge noted, that the disclosure exercise "… *took the wrong course from the outset*". MGA, headquartered in the US, had no experience of litigation in the English Courts. It had fairly recently taken the decision that it would handle electronic disclosure exercises (presumably for US matters) in-house. MGA's IT team did ask its English solicitors how to go about collecting emails prior to uploading the documents to an electronic disclosure database, but then ignored that advice. The solicitors warned that any extensive culling or searching should not be carried out in Microsoft 365 or Microsoft Outlook, both very widely used online cloud-storage and email programmes. This was because these were end-user products that did not have the forensic clout (to use a technical term) to handle large searches or indexing. To make matters worse, MGA's IT team decided to use cut-off date search in MS Outlook, but used the 'creation date' for any emails for that purpose – instead of the 'sent or received' date. This was a 'rookie error' as the court noted (based on evidence from the claimant's e-disclosure expert). They also applied further filters before data harvesting in an attempt to limit the amount of information that would be imported into the e-disclosure platform (and then hosted at a cost to MGA). Again, the court noted that this was inadvisable – especially since there was also evidence that Microsoft's own guidance as to how to carry out searches had not been heeded. Smith J rejected:

> "*… MGA's attempts to characterise its failings as purely a series of inadvertent technical defects. To my mind that is to ignore the omissions made early in the process which left MGA's insufficiently experienced, unsupervised, in-house team to conduct the disclosure exercise, using inappropriate and ill-advised methods which did not accord with, or apply, best practice. Insofar as may be necessary, I also consider that this conduct was unreasonable to a high degree.*"

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While the technical failures were inadvertent, they would not have occurred if the defendant had approached the disclosure exercise with due care and attention. Smith J found that these errors had been of such magnitude as to the case out of the norm, opening the door to an award of indemnity costs.

Indemnity costs

In so doing, Smith J applied the test restated in *Nooraini* v *Calver* [2009] EWHC 592 (QB) per Coulson J (as he then was) at [8]:

> "*Indemnity costs are no longer limited to cases where the court wishes to express disapproval of the way in which litigation has been conducted. An order for indemnity costs can be made even when the conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation … However, such conduct must be unreasonable to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight …*"

In addition to the technical failings, the judge noted that MGA's solicitors had not followed up a number of 'red flags' that would have brought the problems with the initial collection to light much earlier. To give one example, a particular email by one of MGA's executives that the claimants knew had been sent, and which they referred to expressly in the Particulars of Claim, could not be found in the documents that ended up on the e-disclosure database that the solicitors were using for the review. The solicitors, who gave evidence before Smith J, did not feel unduly alarmed by this because they took the view that "… *disclosure is an imperfect process and errors occur*" and one missing email "*… did not set ringing alarm bells that the entire harvesting process was flawed*". The judge concluded that they should have pressed further, and asked for the data to be collected again – especially since MGA had in fact placed a 'litigation hold' on all relevant emails, so that this one message should have been preserved (as it indeed had been). The executive in question later on sent some further emails that he thought relevant to the solicitors. They did not, however, check to see whether these emails (which were properly disclosable) had been captured in the data collection exercise – they had not, as subsequently transpired. All these red flags taken together meant that the defendant's conduct was entirely outside of the norm, and unreasonably to a high degree. As such, the judge concluded that it was appropriate to order the defendants to pay the claimant's costs on an indemnity basis.

The duty of the solicitor

As *Cabot* v *MGA* illustrates, disclosure depends on the legal representatives for a party diligently carrying out reasonable searches, or ensuring that this is done, and disclosing all documents – including those that undermine their client's case. Their overriding duty is of course to the court, and withholding disclosable documents can lead to the imposition of harsh sanctions. The duty cannot be delegated to the client. In *Hedrich* v *Standard Bank London Ltd* [2008] EWCA Civ 905, the Court of Appeal explained that the solicitor's duty was to 'investigate the position' – so very much a proactive approach. The solicitor's task ordinarily begins with explaining to the client the existence and precise scope of the disclosure obligation and the need to preserve documents, and continues to the overall responsibility and supervision in the disclosure process, culminating in the review and selection of disclosable documents – including of course all harmful material that ought to be out in the open. None of this can be left to the client. Usually, the best approach is for the legal team to take possession of all documents as early as possible (see *Cabo* v *MGA*). In some cases, the risk that full and proper disclosure is not given arises not as a consequence of unintended though regrettable technical errors, but because a client appears to be withholding documents from the solicitors. In *Myers* v*. Elman* [1940] A.C. 282, Lord Atkin addressed that scenario, noting that:

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> "*What is the duty of the solicitor? He is at the early stage of the proceedings engaged in putting before the court on the oath of his client information which may afford evidence at the trial. Obviously he must explain to his client what is the meaning of relevance: and equally obviously he must not necessarily be satisfied by the statement of his client that he has no documents or not more than he chooses to disclose. If he has reasonable ground for supposing that that there are others, he must investigate the matter; but he need not go beyond taking reasonable steps to ascertain the truth.*"

The divorce case in *CMCS Common Market Commercial Services* v *Taylor* [2011] EWHC 324 (Ch) illustrates this. Following separation from her husband, the wife sought to claim joint beneficial ownership of the matrimonial home. The property was owned by a company, ultimately controlled by the husband. The company had recently sold the property to a new purchaser in circumstances which the wife believed were suspicious, and which suggested that the husband was trying to hide his assets. The wife joined the new purchaser to the proceedings. Documents relating to the transfer of the property from the husband's company to the new purchaser fell squarely within the disclosure obligations of the new purchaser, having become a party to the litigation. The new purchaser's solicitors did disclose financial records and bank statements relating to the provenance of the funds used to acquire the property, but they had been redacted by the client rather than by the solicitors. The client's redaction proved enthusiastic and overly broad.

When this became apparent, the solicitors duly raised this, in accordance with their overriding duty to the court. Briggs J ordered the new purchaser to disclose the unredacted records. As such disclosure was not forthcoming, the judge held that the new purchaser was barred from defending the claim that the wife retained an equitable interest in the property notwithstanding the transfer - illustrating how a serious failure to give full disclosure can lead to the case being lost. The judgment in *CMCS* v *Taylor* also shows that the lengths to which a solicitor may have to go in questioning their own client depends on the circumstances of the case. At its heart, the wife's claim was one of fraud: she alleged that the new purchaser had been a willing party to her husband's scheme to conceal the true beneficial ownership. As Lord Atkin had noted in *Myers* v *Elman*, the solicitor's duty in relation to disclosure:

> "*… is especially incumbent on the solicitor where there is a charge of fraud; for a wilful omission to perform his duty in such a case may well amount to conduct which is aiding and abetting a criminal in concealing his crime, and in preventing restitution.*"

Where the solicitor suspects that the client is less than forthcoming with evidence in a fraud claim, the stakes are, therefore, high. While aiding and abetting (and thus criminal liability) may be very much at the extreme end of the spectrum, a more likely sanction is that a solicitor who breaches their duty to the court may be found liable for wasted costs - meaning that they (or rather their firm) are personally liable for the additional costs to which their misconduct has put the other side. That is what happened in *Myers* v *Elman*, where the solicitor had not looked behind the client's reassurance that certain sealed pages in a bank passbook (a notebook recording all the transactions in a bank account, held by the account holder) were not at all relevant. Those sealed pages proved to be extremely relevant, and the solicitor was penalised in costs for having relied on the client's assertions as to relevance, and the solicitor had also given the other side (and the court) the impression that he had supervised the sealing up of the passbook, and had satisfied himself that the information on those pages was properly irrelevant – when he had done no such thing, and could not explain his failing to the court.

To redact, or not redact?

Sealing up of a document like the passbook in *Myers* v *Elman* was an old practice akin to redaction. In the context of disclosure, a distinction falls to be drawn between 'disclosing' a document (telling the other side that it exists, through the list of documents that is exchanged between the parties) and withholding the document from 'inspection' (not allowing the other side to see or take copies of the document). Documents that are legally privileged, so which (in short) were prepared for giving or receiving legal advice, or for the purpose of conducting litigation, can be withheld. Redacting a document can be permissible on certain limited grounds. The first is that parts of the document are not relevant: a party may for instance choose to redact passages that are not disclosable, but are commercially sensitive. On this point, PD57AD now specifically deals with redactions in paragraph 16, permitting them where the redacted information is both "*irrelevant to any issue in the proceedings, and confidential*" or privileged. Where a redaction is made, this must be accompanied by a statement by the solicitor explaining the basis on which the redaction is made. PD57AD also sets out a procedure whereby the other party can apply to the court to have the redaction challenged.

In *JSC Commercial Bank Privatbank* v *Kolomoisky* [2022] EWHC 868, a party disclosed 6,000 WhatsApp messages in very heavily redacted form (often making it impossible to even see who the message was sent to), leaving only 272 unredacted. This was challenged by the other side. The Court noted that, in the ordinary course, considerable weight would be given to a statement made by a solicitor explaining the redaction. However:

> "*… the court is justified in adopting greater vigilance to ensure that the right to redact is not being abused or too liberally interpreted, recognising all the while that the burden is on the applicant to make out a case for inspection.*"

The explanation given by the solicitor for wielding the black pen so extensively was that the messages contained information about unrelated commercial transactions, or other commercial information that was not relevant to the issues in the case. The dispute concerned ownership and control over assets said to have formed part of a joint venture. Earlier in the proceedings, orders had been made under the pilot scheme version of the new disclosure regime, including a specific, wider-than-usual "Model D" order requiring disclosure of narrative documents which "… *are relevant only to the background or context of material facts or events and not directly relevant to the Issues for Disclosure themselves*."

The party questioning the redaction submitted that the WhatsApp messages were key individuals who must have been discussing the manner in which various assets in the alleged joint venture were to be dealt with, or what transactions were to be pursued and how. The Court agreed – the description of the content given ('commercial information') and the sheer extent of the messages suggested that they might very well throw some light on how the parties conducted their affairs. The problem was what order to make. Trower J felt that it would be disproportionate and unjustified to order wholesale disclosure of the entire chat log. He also considered that this was not a case for ordering a 'confidentiality club' review – this is a mechanism whereby potentially sensitive material can be disclosed to selected, named members of the other side's legal team, for all those having seen the unredacted documents to then see if they can agree a way forward, or come back to court and ask for further directions. Neither did the judge think that it would help for him to trawl through the messages and form a view (although court inspection is a potential remedy in principle). Instead, he ordered a further review of all messages by the solicitors for the disclosing party, and directed them to prepare a table of all messages showing sender and recipient, together with a neutral description of the subject matter. Despite this being a time-consuming exercise, the judge felt it was proportionate and necessary in the circumstances. Trower J's decision is a good illustration of the more proactive, supervisory approach that the Courts will take under the new disclosure regime.

Can the Court take matters into its own hands?

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There may be situations where a party conducts a disclosure exercise in such an unsatisfactory manner that the other party wishes the court to step and take over the process. Of course, if at trial it becomes apparent that potentially material documents have not been disclosed, it is open to a party to ask the court to draw adverse inferences. For example, if a witness contests statements they are said to have made at a meeting but also claims to have 'lost' the contemporaneous minutes of that meeting, the opposing party may ask the court to infer that the witness is not telling the truth about what he said at the meeting in question. But it may be better yet for the opposing party to get hold of these minutes, and prove matters once and for all. There may be other circumstances where convincing the Court to draw adverse inference is not an appropriate remedy.

It is clear that the English Courts do have the power to order that a court-appointed solicitor conducts the disclosure exercise for a party which is manifestly unable or unwilling to perform the task properly itself. In *The Nolan Family Partnership* v *Walsh* [2011] EWHC 535, the High Court confirmed that it "… *does have inherent jurisdiction to appoint a supervising solicitor to enable discharge of the […] defendant's disclosure obligation*." That case arose out of a major fraud which the claimant alleged had been perpetrated against them by the defendant using a web of offshore companies. The claimants sought to recover €18 million and had obtained a worldwide freezing order. The defendant's offshore companies had gone into administration, but were believed to hold records showing where these funds had been transferred. The defendant himself took no part in the proceedings, and the administrator was not forthcoming with the records. Teare J therefore made an order, which he described as novel, that an independent solicitor be appointed by the court to carry out disclosure on the first defendant's behalf, and be given access to documents held by the non-party company for this purpose. In this case, the claimants needed information about what had happened to their funds to enable them to seek to recover them. Simply obtaining judgment against the first defendant would have been a hollow victory.

In *Terre Neuve SARL* v *Yewdale Ltd* [2023] EWHC 677, Foxton J recently reviewed the case law relating to the Court's exercise of this power, and restated the applicable principle. The litigation arose out of a 'tax optimisation' scheme that proved to be fraudulent, and ultimately led to a police raid in France and investigations in Switzerland. Because some of the corporate defendants were incorporated in the United Kingdom, the English Courts had jurisdiction over contract and tort claims that were brought pursuant to French and Swiss law. The litigation proved protracted, and the disclosure exercise was no exception. The claimants applied to the Court to have all the defendants' documents collected by a specialist electronic disclosure provider, and for this data then to be made available for review by a court-appointed independent solicitor. They applied on the basis that there had been a complete failure by the defendants to conduct a disclosure exercise, important data sources had not been reviewed, and the defendants had failed to appreciate their obligation to disclose documents that were harmful to their case. The claimants also made the point that without the 'tax optimisation' scheme's internal records, they had no way of finding out what had happened to the funds that they had paid in.

Foxton J noted that the Court's powers to make a supervisory disclosure order were not limited to circumstances where the defendant just would not engage (as in *Nolan* v *Nash*). The Commercial Court could, and had previously, ordered a participating party to hand over all their electronic devices (including mobile phones) to an imaging specialist, so that their content would be preserved, and then provide the data to a third-party specialist for inspection (*JD Classics Limited* v *Hood* [2021] EWHC 3193 (Comm)), with due provision for the protection of personal information that is likely to be present on mobile devices. If a party deliberately failed to comply with or obstructed the collection of its data by a court-appointed provider, that might lead to a finding of contempt of court.

Orders of this kind are by their nature intrusive, because they would (as the Court held in *CBS Butler Ltd* v *Brown* [2013] EWHC 3944 (QB)):

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> "*… deprive the defendants of the opportunity of considering whether or not they shall make any disclosure … It is contrary to normal principles of justice, and can only be done when there is a paramount need to prevent a denial of justice to the claimant. The need to avoid such a denial of justice may be shown after the defendant has failed to comply with his disclosure obligations, having been given the opportunity to do so.*"

Any order for an independent review will also inevitably introduce additional costs (the party in default will have to pay for this exercise) and creates the potential for satellite disputes. The judge also pointed out that before a supervisory or independent review order would be made, the opposing party might seek to apply for specific disclosure – asking the other side to search for and review specific documents relating to a particular issue (usually more limited in volume), or for an order that an entire class or category of documents be disclosed without any review for relevance.

With all that in mind, Foxton identified six factors that would be relevant when the court is considering whether to make such orders. Firstly, whether disclosure was sought so that the Court could properly decide a dispute (the adjudicative jurisdiction). In that case, it might be possible to draw adverse inferences against the non-disclosing party, to "*make good some of the adverse effects of inadequate disclosure*". As noted, this will not be possible where the applicant is seeking documents to assist them in recovering assets or enforcing a judgment – in that scenario, the order is more likely to be made if a wholesale failure to give disclosure can be shown. Secondly, in the context of the adjudicative jurisdiction, how significant the documents are and whether there are alternative means by which the issue to which they relate could be addressed. Thirdly, whether the documents have not been reviewed at all, or whether "*… one party believes (as is frequently the case) that the job has not been done as well as it should have been. … the usual remedy in the latter case will usually stop far short of the order sought here.*" Fourthly, how intrusive the order would be. Fifthly, whether there is a compelling case that a party has not lived up to its disclosure obligations in a widespread and significant manner. Sixthly, how the cost of an independent review exercise would compare to the value of the claim. On the facts of the case, he was satisfied that an independent review order should be made, though he limited it to particular document archives.

Conclusion

A serious failure to give disclosure brings into play the full range of sanctions that the English Courts can impose in civil proceedings, such as indemnity costs orders, wasted costs orders against legal representatives, contempt of court, parties being barred from making their case at trial (an automatic loss) and also to more novel or proactive remedies, such as the appointment of an independent disclosure review lawyer. Those remedies fit in neatly with Court's expanded supervisory role under the new disclosure regime in the Commercial Court and the Technology and Construction Court.

In all cases where a party alleges that the other side has been woefully remiss in how it has dealt with disclosure, there is however a practical issue for the Judge who is asked to make an order. Foxton J highlighted this when discussing the fifth factor - how compelling the case is that the relevant party has failed properly to conduct the disclosure exercise, and how widespread or significant the apparent failure is. As he noted:

> "*… parties will frequently disbelieve another party's protestations that relevant searches have been done and no relevant documents located. However, at the pre-trial stage of the proceedings, it is not generally possible for the court to reach a concluded view on what has happened, nor proportionate to make the attempt, and it may well be unwise to express one given the potential impact of such a finding at trial. Courts very frequently state that they cannot "go behind" such*

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assertions, leaving it to the complaining party to pursue the issue at trial, when the court can make the appropriate finding and give effect to its consequences."

To state the obvious, an application that has the parties alleging 'Oh Yes you did' and 'Oh No I didn't' will not succeed. A party considering pursuing a breach of disclosure obligations needs to be able to persuade the judge by pointing to concrete and discrete evidence that documents are missing that really ought to be disclosed. Carefully drawing up Issues for Disclosure under PD57AD can assist here: if the Issues are easy to understand for the judge hearing the application at the pre-trial stage (who will inevitably be further removed from the detail of the case than the parties are), and if the Issues immediately bring to mind what documents they are concerned with, this ought to make matters easier for the applicant.

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