DISCLOSURE AND E-DISCLOSURE ISSUES IN FRAUD CASES – FORENSIC, TECHNOLOGY AND COSTS MANAGEMENT

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INTRODUCTION

1. Disclosure and e-disclosure are key case management issues in any commercial litigation, the latter especially so following the introduction of the Practice Direction 31B on Electronic Disclosure from 1 October 2010 to multi-track cases. Forensic management of disclosure now requires consideration of e-disclosure issues before proceedings have commenced and the e-disclosure questionnaire which now has to be completed under PD 31B is acting as a signal of things to come for all commercial practitioners, particularly having regard to the rule changes to CPR 31.5 due to be introduced in April 2013 as part of the implementation of the Jackson reforms. April 2013 is also the time when the costs management budgeting pilot is likely to become firmly entrenched in all commercial courts. A holistic approach to disclosure and e-disclosure, including early consideration of the approach technologies available is likely to assist litigators in complying with the costs budgeting regime too.

2. This paper is to be read with the following documents, which are enclosed with it:

   (1) E-disclosure - Skeleton Notes In Ten Paragraphs;
   (2) Millnet blog entitled "Big Bang: The new rules in April 2013 (CPR 31.5A);
   (3) Practice Direction 31B on Electronic Disclosure;
   (4) Relevant extracts from the Mercantile Court Guide on E-Disclosure (pp18-19) & the Specimen Directions (Appendix C);
   (5) Cost budget - Precedent H.

3. The oral presentation at the seminar is intended to focus on a case scenario and draw out some of the issues referred to in this paper and the documents enclosed with it.

4. What follows in this paper, and in discussion at the seminar, is intended to help those advising parties in commercial fraud cases as to how to best position themselves on the following battlegrounds:

   (1) Preservation of documents – duties and technology considerations;
   (2) Extent of disclosure – the first CMC;
   (3) Targeted disclosure;
   (4) Technology use to keep on budget pre-trial;
   (5) Technology use to present the case.

5. Before considering those points however it is worth, briefly, considering disclosure and e-disclosure from a historical perspective.

DISCLOSURE & E-DISCLOSURE – A BRIEF HISTORY IN TIME[1]

6. The onerous nature of pre-CPR discovery obligations was one of the key drivers for the Woolf reforms in 1998, which led to the introduction of the CPR. Whilst the headline grabbing story emerging from the Jackson reforms is the abolition of recovery of CFA uplifts and ATE premiums, the reform of the disclosure process continues. In many respects the disclosure and e-disclosure reforms could be the more significant reforms in the long term, albeit they probably are only facilitative of the orders the Court can already make under its wide case management powers under the CPR.

7. The CPR emphasised the primacy of the necessity principle, and introduced standard disclosure under CPR 31.5 as the default rule for disclosure.

[1] Not, *A Brief History of Time*, From the Big Bang to Black Holes, Stephen Hawking

8. The introduction of the requirement to provide electronic disclosure, and Practice Direction 31B, did not purport to substantially change the disclosure obligations under CPR 31. The default rule remains standard disclosure, as the specific directions in Appendix C to the Mercantile Court Guide make clear. However, as appears below, Practice Direction 31B may have, almost un-noticed, moved us closer to the US judicial disclosure model and process. The Jackson reforms are likely to see a continuation of that process.

PRESERVATION OF DOCUMENTS

9. The duties in relation to preservation of documents were historically viewed as only commencing after litigation had commenced.

10. In *Earles v Barclays Bank Plc* [2009] EWHC 2500 (Mercantile) HHJ Simon Brown QC stated as follows:

> *28. However, in this jurisdiction as in Australia, there is no duty to preserve documents prior to the commencement of proceedings: British American Tobacco Australia Services Limited v. Cowell [2002] V.S.C.A. 197, a decision approved in this country by Morritt V.C. in Douglas v. Hello [2003] EWHC 55 at [86]. However, the leading text book in this area – Documentary Evidence by Charles Hollander QC- suggests in paragraph 10-06 of the 10th edition that "there might be cases where it was appropriate to draw adverse inferences from a party's conduct before the commencement of proceedings." In my judgment there would have to be some clear evidence of deliberate spoliation in anticipation of litigation before one could legitimately draw evidential "adverse inferences" in those circumstances. There is no such evidential basis in this case.*
>
> *29. After the commencement of proceedings the situation is radically different. In Woods v. Martins Bank Ltd [1959] 1 Q.B. 55 at 60, Salmon J. said "It cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court to make sure, as far as possible, that no relevant documents have been omitted from their client's list".*
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> *30. In the case of documents not preserved after the commencement of proceedings then the defaulting party risk "adverse inferences" being drawn for such "spoliation": Infabricks Ltd v. Jaytex Ltd [1985] FSR 75.*
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> *38. In India Oil Corporation v. Greenstone Shipping SA [1988] 1 QB 345 per Staughton J. The court discussed the modern meaning of the rule of evidence known in Latin as 'omnia praesumuntur contra spoliatorem' (everything is presumed against a destroyer (of evidence) – "spoliation" as it is termed in US and which the rule of "litigation hold" is designed to combat:*
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> > *"If the wrongdoer prevents the innocent party proving how much of his property has been taken, then the wrongdoer is liable to the greatest extent possible in the circumstances"*
>
> *39. This presumption was used in the case of Infabrics Ltd v. Jaytex Ltd [supra].* [2]

11. This now has to be read in the light of the duty under para 7 of PD31B, headed preservation of documents, which provides as follows:

"*As soon as litigation is contemplated, the parties' legal representatives must notify their clients of the need to preserve disclosable documents. The documents to be preserved*

[2] The Judge went on in the same judgment to be critical of the Bank's disclosure failures, with the result that a substantial discount was applied to what would otherwise have been awarded to it in costs.

include Electronic Documents which would otherwise be deleted in accordance with a document retention policy or otherwise deleted in the ordinary course of business."

12. Almost under the radar this appears to have introduced a comprehensive obligation on the parties' legal representations to notify their clients of the need to preserve disclosable documents "as soon as litigation is contemplated". This appears to mark a departure from the historical English approach (as referred to in the case law above) to the US discovery model. Whilst it is contained within the e-disclosure PD it is drafted in wide terms suggesting the duty extends to hard copy documentation too.

13. The reason and need for such a policy in relation to electronic documents is obvious and sensible from a policy perspective. And what is brought in for electronic disclosure tends to sweep through into hard copy disclosure obligations.

14. So the current position appears to be that there is a positive duty, at least on legal advisors, to ensure that the parties preserve documents, and in particular electronic documents, as soon as litigation is contemplated. This needs to become standard wording in precedent documentation if it not already is in them.

15. The technology considerations as to how to preserve the integrity of electronic data in commercial fraud cases is considered further in the enclosed Skeleton Notes In Ten Paragraphs.

EXTENT OF DISCLOSURE – THE FIRST CMC

16. CPR 31.5 provides that standard disclosure is the default rule, unless the Court orders otherwise. Historically fraud cases would have involved disclosure beyond standard disclosure documents, and included "train of enquiry" documents. There remain good arguments for "train of enquiry" disclosure to be ordered in fraud cases. However given the increased prevalence of relevant documents being held electronically new thinking is required across the spectrum.

17. The new CPR 31.5A, to be introduced in April 2013, encourages the parties to think much more about the options available to them (arguably already available, without the need for rule changes, under CPR 31.5(2) which enables the court to dispense with or limit standard disclosure). It states as follows:

"*With effect from the general implementation date, rule 31.5 will be amended to read as follows:*

31.5

(1) In all claims to which rule 31.5(2) does not apply:

(a) An order to give disclosure is an order to give standard disclosure unless the court directs otherwise.

(b) The court may dispense with or limit standard disclosure.

(c) The parties may agree in writing to dispense with or to limit standard disclosure.

(2) Unless the court otherwise orders, the rules at (3)-(6) below apply to all multi track claims, other than those which include a claim for personal injuries.

(3)(a) 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:

(i) describes briefly what documents exist or may exist that are or may be relevant to the matters in issue in the case;

(ii) describes where and with whom those documents are or may be located (and in the case of electronic documents how the same are stored; in cases where the Electronic Documents Questionnaire has been exchanged, the Questionnaire should be filed with the report);

(iii) 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;

(iv) states which of the directions under (4) or (5) below are to be sought.

(b) Not less than 7 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.

(c) If –

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

(ii) 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.

(4) At the first or any subsequent case management conference, the court shall 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.

(5) The court may at any point give directions as to how disclosure is to be given, and in particular:

(a) what searches are to be undertaken, of where, for what, in respect of which time periods and by whom and the extent of any search for electronically stored documents;

(b) whether lists of documents are required;

(c) how and when the disclosure statement is to be given;

(d) in what format documents are to be disclosed (and whether any identification is required);

(e) what is required in relation to documents that once existed but no longer exist; and

(f) whether disclosure shall take place in stages.

(6) To the extent that the documents to be disclosed are electronic, the provisions of PD 31B will apply in addition to rules (3) – (5) above."

18. In particular, as noted in the Millnet blog entitled "Big Bang: The new rules in April 2013 (CPR 31.5A)", enclosed with this paper, the parties will encouraged, amongst other things, to give consideration to staged disclosure orders, and the Court will be much more inclined to make a "key to the warehouse" order under (f).

19. With e-disclosure providers providing a one stop solution to litigation management this type of order has advantages to the party seeking extensive disclosure and is quite difficult to resist from the perspective of a defendant.

20. Equally, however, care needs to be taken to ensure that such orders do not operate unfairly where there is not equality of arms.

TARGETED DISCLOSURE

21. The concept of targeted disclosure gives rise to the thought of specific disclosure under CPR 31.12.

22. The traditional route under the CPR is to order standard disclosure under CPR 31.5, and then allow further specific disclosure obligations under 31.12.

23. But is this necessarily the best or most cost effective route in commercial fraud cases and cases which are heavy on electronic documents?

24. The concept of predictive coding (used in the US, a court approved process which combines people, technology and workflow to find key documents quickly, not tied into the process of keyword searches) may have a part to play here.

25. For example, in fraud cases a party may take the view that the first step required in a disclosure exercise is to obtain full disclosure of all meta-data. Following disclosure of that documentation the disclosure trail might lead in a very different direction from the usual standard disclosure process.

26. The technology considerations in relation to metadata in commercial fraud cases is considered further in the enclosed Skeleton Notes In Ten Paragraphs.

TECHNOLOGY & BUDGET MANAGEMENT

27. The costs budgeting process using Court approved precedent spreadsheets is becoming familiar to Bristol Mercantile Court users. After April 2013 this approach is likely to become universal in all multi-track cases. See further the Millnet blog entitled "Big Bang: The new rules in April 2013 (CPR 31.5A)", which includes extracts from the new rules on this point.

28. A copy of the Precedent H which it is understood may be introduced in April 2013 is enclosed with these notes.

29. It is likely that e-disclosure solutions may assist in identifying how much a disclosure exercise might cost, especially if disclosure is limited (or substantially limited) to an electronic process.

30. It remains an open question as to whether lawyers and e-disclosure providers can work effectively together to provide a cost effective solution in this respect.

31. In fraud cases, of course, costs budgeting may be very difficult to predict. However e-disclosure solutions may enable costs to be kept down whilst simultaneously allowing volumes to be maintained or even increased.

32. The risks to lawyers in failing to ensure they have effective warning mechanisms in place where they exceed their approved costs budget and do not seek to update the Court and obtain a revised approved budget is illustrated in the recent decision of *Henry v News Group Newspapers Ltd* [2012] EWHC 90218 (Costs). In that case Senior Costs Judge Hurst disallowed on an assessment costs in excess of the approved budget notwithstanding that increased costs had been properly incurred, because the party in question had not gone back to the Court to seek an increase in the budget. It is understood this case is the subject of an appeal, but irrespective of the outcome of the appeal the message the case sends is loud and clear. The warning notice for a limitation period expiry of a cause of action has long been an automated process in well run office management systems. A similar electronic warning bell is now required where a costs budget is or is about to be over-run.

33. The technology considerations in relation to costs and volumes in commercial fraud cases is also considered in the enclosed Skeleton Notes In Ten Paragraphs.

TECHNOLOGY IN THE PRESENTATION OF THE CASE

34. The increased use of electronic storage of documents and e-disclosure has also led to the increased use of electronic presentation of files at trial, though that practice remains piecemeal.

35. Trial bundles often become over-sized and unwieldy due to the concern of solicitors and counsel that relevant documents will be omitted, and might need to be touched on (albeit briefly). However if the parties make greater use of electronic presentation of documentation at trial, the greater use of smaller core document files might find greater favour.

36. In fraud cases where large suites of data need to be included in the evidence sampling and presentation of example cases work well with electronic disclosure and the use or partial use of electronic bundles.

37. But does the new thinking need to stop with electronic disclosure and bundles…

    (1) How difficult would it be to create a web page for case management purposes for each case, as the CMC file, to be added to as necessary;
    (2) Could that become the start of the trial bundle?
    (3) Do counsel need to send through and prepare hard copy files of authorities or can electronic links be created?
    (4) Would skeleton arguments work more effectively if they contained data links to the relevant parts of the electronic CMC file, e-disclosure documentation?
    (5) Will electronic assistance be a continuing requirement throughout the disclosure process and up to and including trial?

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