

Stick to the Rules - an article on disclosure published in Insurance Day

One of the most expensive aspects of litigation in England and Wales is the process of Disclosure.

Disclosure is the obligation placed upon litigants (and, separately, their solicitors) to bring forth - in terms - non-privileged documents that might help or hinder either side's arguments.

Once upon time (and indeed not so long ago) the word "document" was easy to understand, as the word document meant paper. It then came to mean paper and other media, but there was not much "other media", so it was still paper that counted.

At first, the Internet age did not have that great an impact on Disclosure, as deals being litigated had been entered into a few years previously and had been done in the paper age.

Now however, even if facts in issue are five or six years old (six years marking limitation of action in most cases), most records are likely to be in people's email folders, not committed to paper.

The whole dynamic of how to go about the Disclosure exercise has therefore had to change.

Guidance on what to do is in Civil Procedure Rule (CPR) Part 31.

CPR Part 31 was introduced in an attempt to lessen the burden on litigants. So called "standard disclosure" is limited in terms, to documents that help or hinder, as we have seen. There is also a limit to how much digging around a litigant must do. The duty is to make only a "reasonable search" (CPR, Part 31.7).

"Reasonable", though, is not defined anywhere - and is where difficulties can arise.

The leading decision in this area (in which I must confess an interest as my Firm was involved) is [Digicel \(St. Lucia\) Limited -v- Cable & Wireless Plc \[2008\] EWHC 2522](#). This is a large piece of litigation involving a lot of (electronic) documentation. It is still before the Courts.

The particular issue involved on the Disclosure application, however, was whether the Defendants' targeted keyword electronic searches in their electronic documents had discharged their duty to conduct a "reasonable search" in the circumstances which prevailed.

The judge did not think so.

Specifically, the archived records of former employees had not been picked up in the targeted keyword electronic searches as back-up tapes had not been included.

The Defendants were to discuss with the Claimants how best this might be achieved (without incurring utterly prohibitive costs) so that they might be restored as soon as reasonably practicable. His Lordship exhorted litigants and their representatives in future to have such

discussions ahead of time as it was then more likely, he opined, that a "reasonable search" would result.

So the Defendants lost and were obliged to incur additional costs.

A recent case seems to go further.

The case is the October 2009 decision of Simon Browne QC in Earles -v- Barclays Bank Plc. Noting that 90% of business documentation is now, seemingly, in electronic form, and stressing the need for document preservation once litigation is in prospect, the learned judge found for the Defendants in this dispute between the bank and its customer.

Ordinarily costs would follow such event and the luckless Claimant would find himself having to pay the majority at least of the costs incurred by the successful Defendant. Such an order has always been discretionary, however. In this case the discretion was not exercised in full.

The learned judge penalised the victorious party by awarding it a mere 25% of its costs, in part because of issues concerning adequacy of disclosure of relevant electronic material. (There was also criticism of the expense incurred through choice of defence Counsel). A "reasonable search" it seems had not been carried out.

In the Earles' case the Learned Judge remarked that the parties should have managed their approach better in terms of costs being incurred and there should have been discussion at least at the case management conference.

In that way, he felt, the Defendant might have been more likely to have discharged its obligation to make a "reasonable search" as the parties would have talked about it and hopefully agreed.

So to quote the address Maureen Lipman, "It's good to talk", even to the extent - in the context of civil litigation - of it perhaps being expensive not to!

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