JUDICIARY OF ENGLAND AND WALES

LORD JUSTICE JACKSON

CONTROLLING THE COSTS OF DISCLOSURE

SEVENTH LECTURE IN THE IMPLEMENTATION PROGRAMME

THE LEXISNEXIS CONFERENCE ON AVOIDING AND RESOLVING CONSTRUCTION DISPUTES

24 NOVEMBER 2011

"Age, and ages of prose, have uncoiled
His talking whirlwind, abated his excessive temper
When words, like locusts, drummed the darkening air"[1]

1. INTRODUCTION

1.1 The text of this lecture is being distributed at the start of this conference. The paragraphs of this lecture are numbered for ease of reference during any discussion which may follow my presentation.

1.2 Terms of reference. It will be recalled that my terms of reference for the Costs Review included a requirement to:
"Establish the effect case management procedures have on costs and consider whether changes in process and/or procedure could bring about more proportionate costs."

1.3 Role in implementation. I have subsequently been asked to take a proactive role[2] in relation to the implementation of the Costs Review recommendations, following their endorsement by the Judicial Executive Board and their broad acceptance by the Government. This role includes (a) assisting with the drafting of rule amendments and (b) helping to explain the forthcoming reforms to court users.

1.4 Current reform programme. Some recommendations in the Civil Litigation Costs Review Final Report ("FR") require primary legislation. The necessary Bill is now before Parliament. If approved by Parliament, it may come into force in October 2012 or perhaps somewhat later. Other recommendations in the FR require rule changes, rather than primary legislation. It is intended that these rule changes will

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[1] Sylvia Plath, *Ouija*, 1957

[2] This is subject to the supervision of the Judicial Steering Group, which meets fortnightly and to which I report. The Judicial Steering Group comprises the Master of the Rolls (Head of Civil Justice), Maurice Kay LJ (Vice-President of the Civil Division of the Court of Appeal), Moore-Bick LJ (Deputy Head of Civil Justice) and myself.

come into force on the same date as the Act. The rule amendments are currently being drafted, then presented to the Rule Committee for approval and then held in escrow until the "big bang" date.

1.5 It is not possible to address the entire reform programme in a single lecture. I am therefore choosing specific topics to focus on in individual lectures. I have chosen disclosure as the subject for today's lecture, because disclosure of documents is one of the drivers of high costs in construction litigation.

2. COSTS REVIEW RECOMMENDATIONS RE DISCLOSURE

2.1 Relevant chapters in Final Report. Disclosure of documents is dealt with in relation to large commercial actions in chapter 27[3] and more generally in chapter 37.

2.2 The problem. Even in medium sized actions where all the documents are in paper form, disclosure can be a major exercise which generates disproportionate costs. It can also result in a formidable bundle, most of which is never looked at during the trial. In larger actions where the relevant documents are electronic, the problem is multiplied many times over. That problem is accentuated because relatively few solicitors and even fewer barristers really understand how to undertake e-disclosure in an effective way.

2.3 Recommendations in the Final Report. Two recommendations are made at the end of chapter 37, which become recommendations 77 and 78 in the list at the end of the report:

"(i) E-disclosure as a topic should form a substantial part of (a) CPD for solicitors and barristers who will have to deal with e-disclosure in practice and (b) the training of judges who will have to deal with e-disclosure on the bench.

(ii) A new CPR rule 31.5A should be drafted to adopt the menu option in relation to (a) large commercial and similar claims and (b) any case where the costs of standard disclosure are likely to be disproportionate. Personal injury claims and clinical negligence claims should be excluded from the provisions of rule 31.5A."

2.4 A first draft of the menu option rule was set out in FR chapter 37. This rule sets out a menu of possible disclosure orders from which the court should choose, without a specific steer towards standard disclosure.

2.5 E-disclosure practice direction. At the time of the Costs Review there was no practice direction governing the disclosure of electronic documents. However, such a practice direction was in draft and it was anticipated that it would be adopted by the Rule Committee after suitable amendment. Accordingly paragraph 2.5 of chapter 37 stated:
"In my view, the substance of this practice direction is excellent and it makes appropriate provision for e-disclosure. On the assumption that this practice direction will be approved in substantially its present form by the Rule Committee, I do not make any recommendation for procedural reform in relation to e-disclosure."

3. ELECTRONIC DISCLOSURE

[3] See paras 2.1 to 2.8.

3.1 Practice Direction 31B. After some amendments had been made by the Rule Committee, the proposed practice direction on electronic disclosure was duly introduced in October 2010. Practice Direction 31B ("PD31B") is entitled "Disclosure of Electronic Documents". It provides that in any case where relevant documentation is stored electronically, at an early stage the parties must consider and discuss how disclosure should be carried out. All relevant electronic documents should have been preserved from the time when litigation was first contemplated. The electronic documents questionnaire annexed to PD 31B is an extremely useful tool for a party investigating what electronic material it possesses. It is also an extremely convenient vehicle for exchanging information with other parties before the first case management conference.

3.2 Use of consultants. Many firms of consultants offer their services in this field. They understand their own software systems, but it is the solicitors and counsel involved who best understand the case. Close and continuing liaison between the legal team and any consultants employed is essential. Disclosure is not an activity which can be outsourced in its entirety to external consultants. No existing software programme is capable of achieving standard discovery.

3.3 It should be borne in mind that some custodians (senior employees, decision makers etc) are more important than others and their inboxes etc may require much closer scrutiny. The original file structure should be retained when electronic material is being investigated or collated.

3.4 E-disclosure training. Effective training in e-disclosure for judges, counsel and solicitors is essential if PD31B is going to be operated effectively. Such training can be delivered by practitioners who are IT literate and have detailed experience of dealing with e-disclosure successfully at the coalface. They can explain the pitfalls to avoid, the techniques for de-duplication, the new tools which are available etc etc. I attended such a lecture[4] recently at a Continuing Professional Development ("CPD") day for practitioners. This event illustrated the benefits of a training session dedicated to the nuts and bolts of searching and disclosing electronic material.

3.5 Commercial Court judges have already undertaken e-disclosure training. The Judicial College will provide training in e-disclosure for civil judges next year. I hope that providers of CPD will provide similar training for all solicitors and counsel who have to deal with e-disclosure issues at case management conferences. If electronic disclosure is tackled in the wrong way or if inappropriate orders are made by the court, huge sums of costs will be thrown away.

4. IMPLEMENTATION OF MENU OPTION

4.1 New Zealand. Interestingly New Zealand is ahead of us here. The New Zealand Rule Committee has recently adopted a variant of the menu option. New Zealand's *High Court Amendment Rules (No. 2) 2011* will come into force on 1st January 2012. These rules provide that in any substantial case the court will not automatically order standard discovery. Instead it will choose between a range of options, including no discovery, standard discovery and "tailored discovery".

4.2 Rule amendments adopted in England and Wales. In 2010 the Rule Committee set up a sub-committee chaired by Mr Justice Coulson to prepare the necessary rule

[4] By Alex Charlton QC

amendments to implement the menu option. After considerable debate within both the sub-committee and the Rule Committee the following rule amendment has now been approved and is being held in escrow. Instead of adding a new rule 31.5A (as originally proposed in the FR), the existing rule 31.5 will be re-written.

4.3 New rule 31.5. 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."

4.4 Attendance at first case management conference. It will be recalled from FR chapter 37 para 3.11 that the working party which produced a first draft of the menu option rule included the following in their draft rule:

"The solicitor or other person who will have conduct of giving disclosure for a party should be present at the first case management conference."

The Rule Committee has decided to omit this provision, as it is more a matter of professional conduct than a matter for the rules. However, in relation to electronic disclosure, a similar provision is included at paragraph 16 of PD 31B.

4.5 Despite the absence from rule 31.5 of any provision as set out above, I hope that solicitors will take seriously the need to have the relevant person present at the first CMC. Fundamental decisions are likely be made about disclosure. If the person who is responsible for disclosure and understands what material exists does not attend,

inappropriate costs orders may be made with drastic costs consequences for the client. I also express the hope that those who deliver professional training will draw attention to this duty.

4.6 Decision made at the first case management conference. The order made at the first CMC concerning disclosure will have a profound impact on the future course of the case and also upon the final costs of the litigation. Therefore this issue merits careful thought and analysis when the parties initially and the court ultimately are making their selection from the menu of possible disclosure orders.

4.7 One possible order under sub-para (f) – the key to the warehouse. One possible order which could be made under rule 31.5 (4) (f) is that each side (after removing privileged documents) should simply hand over the "key to the warehouse". In other words, each party hands over all its documents and the other side can choose which ones it wishes to use. This means that each party devotes its resources to selecting what it regards as helpful from other side's store of documents. That is the opposite of standard disclosure, which requires each party to examine its own documents and (in effect) to pick out the ones that it thinks will help the other side. I am aware of one recent case in which a "key to the warehouse" order was made by the Technology and Construction Court.

4.8 If an order is made as set out in the previous paragraph, it may be appropriate to include a provision along the following lines:
"Any disclosure of privileged documents shall not amount to waiver of privilege in the documents concerned."

5. COMBINING THE MENU OPTION WITH PRACTICE DIRECTION 31B

5.1 Big bang date. The new rule 31.5 will come into force at the same time as the other Costs Review reforms. As from that date the menu option will have to be operated in conjunction with PD 31B.

5.2 The two provisions will fit neatly together. Rule 31.5 (6) provides for the rule and the practice direction to be operated together. Paragraphs 8 to 18 of PD 31B complement rule 31.5 (3). The completion and exchange of e-disclosure questionnaires will assist the parties in complying with their obligations under rule 31.5 (3). The information resulting from this exercise will enable both the parties and the court to select from the menu the most appropriate disclosure order for the circumstances of the particular case.

5.3 The wider picture. The new disclosure rule is part of a package of case management reforms which will be coming into force on big bang date. Some of these reforms have been explained in earlier lectures in the present series. See in particular lecture 4 on expert evidence[5] and lecture 5 on case management.[6] All lectures in this series can be found on the Judiciary website. One theme which runs through the reforms is that the first case management conference should be a real event at which the court takes hold of the case and gives directions which will focus the factual evidence, the expert evidence and the disclosed documents on the real issues between the parties.

[5] http://www.judiciary.gov.uk/media/speeches/2011/lj-jackson-lecture-focusing-expert-evidence-controlling-costs-11112011
[6] http://www.judiciary.gov.uk/media/speeches/2011/lj-jackson-speech-22112011