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

October 9, 2023 Markus Esly

PRACTICES Litigation, International Arbitration

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.

Read the full article here.