TACTICS ON DISCLOSURE AND REQUESTS FOR INFORMATION

INTRODUCTION

Standard disclosure

1. CPR Part 31 sets out rules about disclosure and inspection of documents applicable to all claims, except a claim on the small claims track (CPR rule 31.1(2)). However the rules may be modified, eg:
   - CPR Part 63.8 and paragraph 5 of the Part 63 PD in intellectual property proceedings; and
   - paragraph 11.2 of the Technology and Construction Court Guide.

2. CPR rule 31.4 defines a "document" widely as:

   > "anything in which information of any description is recorded"

   and a "copy" as

   > "in relation to a document, anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly."

3. Under CPR rule 31.6 "standard disclosure" requires a party to disclose only
   - the documents on which he relies
   - the documents which adversely affect his own case
   - the documents which adversely affect another party's case
   - the documents which support another party's case
   - the documents which he is required to disclose by a relevant practice direction.

   In ***Abela v Hammond Suddards (a firm), 2.12.08,*** the defendant solicitors listed 100 boxes of files by file rather than by document. Paul Girolami QC refused an application that the documents be listed individually "so that the Claimants (who had their own views on the matter) could ascertain what the Defendants considered to be the relevant documents falling within CPR 31.6". He limited standard disclosure to disclosure by file.

4. Under CPR rule 31.5, the normal order for disclosure is an order for standard disclosure, unless the court directs otherwise. The Court or the parties by written agreement may dispense with or limit standard disclosure. Under CPR rule 31.13, the parties may agree in writing or the Court may direct that disclosure or inspection shall take place in stages (ie where there is a split trial). Paragraph 1.4 of the Practice Direction provides that any written agreement between the parties should be lodged at Court.

5. A party's duty to disclose documents is to limited to documents which are or have been in his control (CPR rule 31.8), meaning:

   - is or was in his physical possession

- has or has had a right to possession of it or
- has or had had a right to inspect or take copies of it.

6. Under CPR rule 31.7, a party is required to make a reasonable search for adverse documents when giving standard disclosure. The factors relevant in deciding the reasonableness of a search include:
   - the number of documents involved
   - the nature and complexity of the proceedings
   - the ease and expense of retrieval of any particular document
   - the significance of any document which is likely to be located during the search.

   A party that has not searched for a category or class of documents on the grounds that to do so would be unreasonable, must state this in his disclosure statement and identify the category or class of document. Paragraph 2 of the Practice Direction states that the parties must bear in mind the principle of proportionality and may decide that it would not be reasonable to search for documents coming into existence before a particular date or to limit the search to a particular place or places or to documents falling into particular categories.

7. In ***Al Fayed v The Commissioner of Police of the Metropolis [2001] EWCA Civ 780 (2002) 99(3)) LSG 39***, at paragraph 46, Clarke LJ said:

   > "Standard disclosure is an important aspect of any action. It is an important part of the duty of any solicitor to put in place a system which ensures that it is carried out properly and with care."

   All solicitors will have procedures for standard disclosure both when acting for the disclosing party and when acting for the receiving party. This talk is aimed at the difficult decisions that face a solicitor on disclosure that are not covered by standard procedures and systems, namely:
   - exposing the weaknesses in the other side's case through requests for specific disclosure/requests for information
   - dealing with documents/information that are borderline to standard disclosure
   - dealing with documents that tend to incriminate or expose to a penalty
   - applying to the Court to withhold inspection of a document
   - preventing confidential information from being disclosed
   - using disclosed documents for other purposes
   - dealing with inadvertently disclosed documents

EXPOSING THE WEAKNESSES IN THE OTHER SIDE'S CASE THROUGH REQUESTS FOR SPECIFIC DISCLOSURE/REQUESTS FOR INFORMATION

Specific disclosure or inspection

8. Under CPR rule 31.12, the Court may make an order for specific disclosure or inspection requiring a party to:
   - disclose documents or classes of documents specified in the order;
   - carry out a search to the extent stated in the order;
   - disclose any documents located in the search.

   Paragraph 5 of the Practice Direction requires an application notice to specify the order for specific disclosure sought and to be supported by evidence. The grounds for the application must be set out in the application notice or in the evidence. The court will take into account all the circumstances of the case and, in particular, the overriding objective. If the court concludes that the party from whom specific disclosure is sought has failed adequately to comply with the obligations imposed by an order for disclosure the court will usually make such order as is necessary to ensure that those obligations are properly complied with, subject always to proportionality. An order for specific disclosure may direct a party to:

   - carry out a search for any documents which it is reasonable to suppose may contain information which may enable the party applying for disclosure either to advance his own case or to damage that of the party giving disclosure or lead to a train of enquiry that has either of these consequences; and
   - disclose any documents found as a result of that search.

   This last provision (paragraph 5.5 of the Practice Direction) was introduced by amendment in 2002 into the CPR and the underlined words reintroduce the wider ***Peruvian Guano*** test (see paragraph 18 below) under the RSC, which Lord Woolf had intended to abandon in the CPR.

9. In notes 31.0.3 and 31.0.4 of the 2009 White Book, the editors suggest that:
   - The overriding principle is that disclosure should be restricted to that which is necessary in the individual case.
   - Disclosure in multi track cases will normally be wider than on fast track cases.
   - The parties may initiate disclosure before it is ordered, subject to review by the court at the first cmc.

   In my experience, none of this happens in practice.

10. Further guidance can be found on applications for specific disclosure in the following:

    - Paragraphs 3.10, 4.3, 4.4 and 4.5 of the Chancery Guide: attempt to reach agreement, order not readily made, proportionality, limiting specific disclosure eg by stages or by sample documents and use Part 18 request instead.
    - Paragraphs 7.8.3, 7.8.4 and 7.8.5 of the Queen's Bench Guide: necessity, proportionality, not over burdening a disclosing party, not routinely dealt with at a cmc, limiting specific disclosure and use Part 18 request.
    - Paragraphs E4.3 and E4.4 of the Admiralty and Commercial Courts Guide: factors for specific disclosure of electronic documents.

11. In ***Digicel (St Lucia) Ltd v Cable & Wireless plc [2008] EWHC 2522 (Ch)***, Morgan J made it clear at para 36 that "an order for specific disclosure … is not confined to a

case where the respondent is in breach of an obligation to give standard disclosure. The court can make an order for specific disclosure even where the respondent has properly complied with its obligations to give standard disclosure but the applicant satisfies the court that such disclosure is "inadequate" or that the case is one where something more than standard disclosure is called for".

Part 18 information requests

12. Under CPR rule 18.1, the court may at any time order a party to clarify any matter which is in dispute in the proceedings or give additional information in relation to any such matter whether or not the matter is contained or referred to in a statement of case by filing and serving a response within the time specified by the court. The response must be verified by a statement of truth (CPR rule 22.1(1)(b)). CPR rule 18 does not apply to small claims (CPR 27.2(1)(f)), but in a small claim the Court of its own initiative may order a party to provide further information if it considers it appropriate to do so (CPR 27.2(3)). CPR rule 18.1 is subject to CPR 53.3, which protects the identity of the defendant's sources of information in defamation claims, unless the court orders otherwise.

13. Under CPR rule 18.2, the court may direct that information provided by a party to another party (whether given voluntarily or following an order made under rule 18.1) must not be used for any purpose except for that of the proceedings in which it is given. Contrast this provision with the automatic provision, subject to exceptions, under CPR rule 31.22, barring use of disclosed documents for purposes other than the proceedings in which the documents are disclosed. The editors of the 2009 White Book suggest that if the request for information is in the nature of what used to be called further and better particulars of a pleading, then no restriction should be made. They also suggest that it may be appropriate to limit the use of information to part of proceedings, ie to an interim remedy but not for use at trial.

14. Before making an application to the court for an order under Part 18, the party seeking clarification or information should first serve on the party from whom it is sought a written request stating a date, allowing a reasonable time, by which the response should be made (paragraph 1.1 of Part 18PD). The request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the requesting party to prepare his own case or understand the case he has to meet (paragraph 1.2 of Part 18PD). Part 18 requests are usually one of the following:

    - Request for further and better particulars of a statement of case.
    - Eliciting facts (eg in lieu of disclosure of documents or in advance of instruction of an expert).
    - Equivalent of RSC interrogatories after exchange of witness statements.

15. In ***King v Telegraph Group plc (Practice Note) [2004] EWCA Civ 613 [2005] 1 WLR 2282*** at paragraph 63, Brooke LJ observed that "the emphasis, as always in the CPR, is on confining this part of any litigation (in which costs tended to get out of control in the pre-CPR regime) 'strictly' to what is necessary and proportionate and to the avoidance of disproportionate expense". In ***McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775***, Lord Woolf MR said at page 792j:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged…
>
> As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification. In addition, after disclosure and the exchange of witness statements, pleadings frequently become of only historic interest… Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged. In this case the distinct impression was given by the parties that both sides were engaged in a battle of tactics…"

In ***Delos Ltd v CAE Electronics Ltd, unreported 21.2.01***, Eady J said at page 8 of the transcript:

> "It is clear that …. sometimes a witness statement can supplement a pleaded case by putting flesh on the bones, and that is often a preferable course to ordering further information by way of pleading. But that is very different from saying that a claimant can leave a defective pleading on the record such that a defendant cannot identify the case he has to meet, and then serve a 479 page written statement, leaving the Defendant to find his way through it without map or compass. There is … no warrant for such an approach under the CPR. Indeed, it is the very reverse of clarity and efficiency in litigation they were intended to promote…"

16. There is an interesting clash of first instance decisions on the issue of whether a party can request further information about another side's insurance cover:

    (1) In ***Harcourt v Griffin [2007] EWHC 1500 (QB)*** a Part 18 request was made on behalf of a seriously injured claimant (75% liability had been agreed) to an unincorporated association defendant directed to establishing the nature and extent of insurance cover enjoyed by the defendant. Irwin J said at paragraph 10:

    > "The nature and extent of the Defendants' insurance cover is not itself a 'matter in dispute in the proceedings' between the Parties, in the sense that the proper quantum of damages payable to the Claimant could be determined without determining whether the Defendants can actually pay those damages. However, it appears to me that the wording of CPR r 18 requires to be interpreted reasonably liberally. The purpose of the jurisdiction must be taken to ensure that the Parties have all the information they need to deal efficiently and justly with the matters which are in dispute between them. Moreover, the

wording need not be taken to imply that there must be a live disagreement about the relevant issue, since on very many occasions parties are properly required to furnish information pursuant to CPR r 18 precisely to discover whether there is or is not a live disagreement between the parties on a given point. The whole thrust of the new approach to civil litigation enshrined in the Civil Procedure Rules is to avoid a waste of time and cost and to ensure swift and, as far as possible, proportionate and economical litigation. Therefore, I have no hesitation in finding that there is no rule of law or significant rule of practice to the contrary, that the wording of CPR r 18 is broad enough to cover information of this kind."

The judge qualified this general statement by stating that:

- The court would consider any prejudice likely to be suffered by the responding party.
- The court should discourage a general practice of requesting disclosure of insurance details.
- An order should only be made where a claimant can demonstrate that there is a real basis for concern that a realistic award in the case may not be satisfied.
- The exercise of the jurisdiction will be approached with caution.
- There must be some real basis for suggesting that disclosure is necessary in order to determine whether further litigation will be useful or simply a waste of time and money.

(2) In ***West London Pipeline & Storage Ltd v Total UK Ltd* [*2008] EWHC 1296 (Comm)***, David Steel J declined to follow ***Harcourt*** and decided that the court had no jurisdiction to order another party to give information in respect of their insurance arrangements. He said at paragraph 30:

"… The trend is strongly towards a more open approach to litigation. Albeit the potential for prejudice to the defendant and his insurers must be borne in mind, in the modern age of "cards on the table" the question is readily posed why should not one factor which may be a key to the claimant's view of the merit of pursuing a claim, namely what is the limit of cover and will the costs eat it up anyway, be known? By the same token, concerns as to the appropriate share of court resources to be allocated to a case ought to include allowance for the prospects of an effective recovery. But I am not persuaded that the provisions of the CPR, however liberally interpreted, have led to a significant change in law or practice…"

However, in costs proceedings, the insurance arrangements of a claimant may be " a matter in dispute in the proceedings".

17. The Admiralty and Commercial Courts Guide provides:

> D15.1 (a) If a party declines to provide further information requested under Part 18, the solicitors or counsel who are to appear at the application for the parties concerned must communicate directly with each other in an attempt to reach agreement before any application is made to the court.
>
> (b) No application for an order that a party provide further information will normally be listed for hearing without prior written confirmation from the applicant that the requirements of D.15.1(a) have been complied with.

D.15.1(a) is good practice in any court or tribunal, being part of the parties' duty to help the court to further the overriding objective (CPR rule 1.3) and failure to co-operate may have costs' consequences (CPR rule 44.3(4)(a) and (5)).

Target shooting or fishing expedition

18. The pre-CPR test as to relevance was stated in ***Compagnie Financiere du Pacifique v Peruvian Guano Co (1882) 11 QBD 55*** at page 63:

> "It seem to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences…"

This is known as the ***Peruvian Guano*** test.

19. In **Nichia *Corporation v Argos Ltd [2007] EWCA Civ 741***, Jacob LJ in a dissenting (on the disposal of the case, not the law) judgment had the following to say about the ***Peruvian Guano*** test and overdisclosure at paragraphs 46 and 47:

> "It is manifest that this is a much wider test than that for "standard disclosure." I have a feeling that the legal profession has been slow to appreciate this. What is now required is that, following only "a reasonable search" (CPR 31.7(1)), the disclosing party should, before making disclosure, consider each document to see whether it adversely affects his own or another party's case or supports another party's case. It is wrong just to disclose a mass of background documents which do not really take the case one way or another. And there is a real vice in doing so: it compels the mass reading by the lawyers on the other side, and is followed usually by the importation of the documents into the whole case thereafter – hence trial bundles most of which are never looked at.
>
> Now it might be suggested that it is cheaper to make this sort of mass disclosure than to consider the documents with some care to decide whether they should be disclosed. And at that stage it might be cheaper – just run it all

> through the photocopier or CD maker- especially since doing so is an allowable cost. But that is not the point. For it is the downstream costs caused by overdisclosure which so often are so substantial and so pointless. It can even be said, in cases of massive overdisclosure, that there is a real risk that the really important documents will get overlooked – where does a wise man hide a leaf?" (presumably in a pile of leaves)

Endorsing what Jacob LJ said in ***Nichia***, Morgan J said in ***Digicel*** at para 46:

> "… in litigation … it may only take one revealing statement in a document, perhaps in an e-mail, to show clearly what people really thought or what people really were intending to achieve, a matter that might not have been revealed in tens of thousands of other documents in the trial bundles. As against that, it must be remembered that what is generally required by an order for standard disclosure is a "reasonable search" for relevant documents. Thus, the rules do not require that no stone should be left unturned. This may mean that a relevant document, even "a smoking gun" is not found. This attitude is justified by considerations of proportionality…"

This was said in the context of litigation involving allegations of conspiracy, but it has a wider application, eg *Abela* (claim for solicitors' negligence, breach of fiduciary duty and deceit).

20. If the words of Jacob LJ in ***Nichia*** are put strictly into practice and each document is assessed as to which side of the standard disclosure line it falls, then there is clearly scope for genuine misjudgement by those acting for the disclosing party, where key documents are not disclosed on the grounds that they are not strictly within the standard disclosure test. The same applies to decisions taken as to the extent of a reasonable search. The problem is even more acute with a litigant in person not understanding his obligations on disclosure or the (hopefully rare) case of a party seeking to conceal a damaging document. In ***Digicel***, Morgan J said at para 51:

> "It is right that the decision as to a reasonable search rests in the first instance with the solicitor in charge of the disclosure exercise. However the Practice Direction makes it clear that some parts at least of the process ought to be discussed with the opposing solicitor with a view to achieving agreement so as to eliminate, or at any rate reduce, the risk of later dispute. If a solicitor, whose decision as to what is a reasonable search is later challenged on a specific disclosure application, the Court may well be influenced, in the solicitor's favour, if it sees that the solicitor was very fully informed as to the issues arising in the case, and had made a fully considered decision applying all the factors in Rule 31.7 and paragraph 2A.4 of the Practice Direction. However, even if the Court can, in a proper case, be influenced by the diligence and conscientiousness of an individual solicitor, in my judgment, the task of deciding what is required by a reasonable search is a task given to the Court by the wording. This task can be carried out by the Court either in advance of the search being done or with hindsight, where a search has been carried out and its extent is challenged by the other party…"

21. Under the CPR, the intention is that cases should be resolved at the earliest stage through pre-action protocols and/or ADR and/or costs' sanctions for unreasonable conduct. See, for example, the aims of the Practice Direction on Pre-Action Conduct in paragraph 1.1:

    - to enable parties to settle the issues between them without the need to start proceedings
    - to support the efficient management by the court and the parties of proceedings that cannot be avoided.

    These aims are to be achieved by encouraging the parties to exchange information about the issue and by considering ADR. To that end, a letter of claim should

    - list the essential documents on which the claimants intend to rely
    - identify and ask for copies of any relevant documents which the claimant wishes to see.

    The letter of response should

    - enclose copies of documents requested by the claimant or explain why they will not be provided
    - identify and ask for copies of any further relevant documents, not in the defendant's possession, and which the defendant wishes to see.

    The claimant's reply will provide the documents requested by the defendant within as short a period of time as is practicable or explain in writing why the documents will not be provided.

    These documents cannot be used for any other purpose than resolving the matter, unless the disclosing party agrees in writing. The claimant is now required to state in a claim form or particulars of claim whether the Practice Direction or any relevant protocol has been complied with. Sanctions include staying proceedings, costs and interest penalties.

22. Once a case has been pleaded, the parties will have put forward their respective cases on the strongest possible basis and often will have constructed a complicated web of issues, sub-issues and fall back positions. This gordian knot can be cut by a well-targeted request for documents or further information that exposes a fundamental weakness in the other side's case before the expense of exchanging witness statements and obtaining experts' reports has been incurred.

23. It is money and time well spent to analyse the case after the statements of case are complete and standard disclosure has been given to see whether a weakness can be exposed in the other side's case. Wide-ranging requests will be counter productive. Applications at this stage are risky in the sense that a lost application will almost inevitably involve an adverse costs' order with an immediate costs' liability to the other side. For this reason, the request for specific disclosure or further information should

be pursued in correspondence as far as that will go. An unreasonable refusal by the other side to deal with such issues in correspondence will help on the costs of any future application.

24. Train of enquiry documents (ie bank statements, itemised telephone records) fell within the ***Peruvian Guano*** test and are specifically referred to in paragraph 5.5 of CPR 31 PD as being the subject matter of a specific disclosure order. These documents are not part of standard disclosure, but are very much within the realm of specific disclosure if a good case for them can be developed, particularly in cases involving fraud, dishonesty, constructive trust, knowledge or misrepresentation. The old rule that documents going solely to credit were not disclosable is not as clear cut as it used to be, but such an application, unless well-focused, may fall foul of the necessity test. In ***Digicel*** at paragraph 15, Morgan J accepted a submission that "because the tendency of conspirators is to conceal rather than to reveal, proper disclosure is all the more important in a conspiracy claim". Again, this applies to all claims involving dishonesty.

25. Part 18 requests for information can be used as a shortcut to obtain information that is contained in documents. Paragraph 7.8.5 of the Queen's Bench Guide provides:

> "The parties should … consider whether the need for disclosure could be reduced or eliminated by a request for further information."

There is a similar statement in paragraph 4.5 of the Chancery Guide. Part 18 requests are more flexible in that they can be made at any time and are often best left until after exchange of witness statements (as with RSC interrogatories) and can be more wide ranging.

26. The keys to a successful application for specific disclosure are:

- clear and well particularised statements of case
- demonstration that the disclosing party has not fulfilled its standard disclosure obligations
- allegations of fraud etc (where there is a proper evidential basis for making the allegation).

In ***M.M.I. Research Ltd v Cellxion Ltd [2007] EWHC 2611 (Pat)***, Warren J said at paragraph 14:

> "The pleadings, of course, play an important part in the disclosure exercise because it is only through the pleadings that the issues in the case to which disclosure is directed can be identified. In an ordinary case, a claimant may find that he is unable properly to particularise his case prior to disclosure being given, only being able to specify the nature of his case in broad terms. There is nothing wrong with that, although where the pleadings is not well particularised, the claimant may be more open to accusation of "fishing" than if he has a focused pleading."

Once the court becomes suspicious that the disclosing party has not fulfilled its standard disclosure obligations, the door is open for an order that identifies precisely the categories or classes of documents that the disclosing party is required to disclose. This takes control of the process out of the hands of the disclosing party's solicitors and into the hands of the receiving party's solicitors.

27. If a Court concludes that a party has not conducted a reasonable search, it will "usually" make an order for specific disclosure. However, it might decide that a second search would be disproportionate in costs and the likelihood of revealing anything worthwhile: see ***Digicel*** at paragraph 53.

28. An example of an unsuccessful fishing expedition was ***Mortgage Express v S. Newman & Co (a firm), Court of Appeal, 7th July 1998***. In that case, a solicitor's telephone message pad had been redacted and disclosed. Disclosure was sought of the whole messagepad on the grounds that "it may be relevant in establishing dates or timings of relevant events, or establishing the presence or absence of persons in the office of the defendant, or establishing what was written when and by whom and in affording an *aide-memoire* for questions to be put to witnesses at trial". This was castigated by the Court of Appeal as being "not easy to imagine more vague or ill-defined or speculative grounds for an order for particular discovery of a document or documents".

29. In ***Martin v Triggs Turner Barton (a firm) [2008] EWHC 89 (Ch) The Times, 5th February 2008***, Ms Susan Prevezer QC (sitting as a Deputy High Court Judge) was not prepared to interfere with a deputy master's "pragmatic middle way through the then opposing positions of the parties, focusing on the relevance of the documents and safeguarding any claim for privilege". The claimant sought disclosure of the defendant solicitors' files of the administration of her late husband's estate in a claim for negligence and breach of trust. At the outset of the hearing, the claimant had indicated an intention to amend the particulars of claim, but no amendment was produced. During the hearing, the deputy master indicated that he would order disclosure of the files, subject to the question of privilege, but not confidentiality, *because of a real and legitimate concern that the defendant firm had not complied with its disclosure obligations*. The defendant firm offered to serve on the claimant photocopies of the files save for documents (if any) in respect of which privilege was claimed and to indicate whether privilege had been claimed in respect of any document on the files, whereupon the claimant would serve on the defendant firm a draft supplemental list of relevant documents and the defendant would serve on the claimant an amended version. The claimant agreed to this and an order was made in those terms. The deputy judge found that this agreement was not a consent order or a contract that precluded the court from reviewing the order made and, on review, upheld it.

DEALING WITH DOCUMENTS THAT ARE BORDELINE TO STANDARD DISCLOSURE

Transparency and openness

30. This topic is the obverse of the previous topic in that it is looking at the same issue but from the perspective of the disclosing party. In this area, everything is to be said for openness and transparency. Legitimate decisions to not search in places for documents or to not disclose categories of documents on grounds of relevance or

proportionality can arouse suspicion if the decision and reasons behind the decision are not made clear at an early stage. It is very important that the court should see that a disclosing party has been made fully aware of its obligations by those advising that party and that any decision not to search for documents or disclose documents has been made in good faith, even if it is the wrong decision. If not, the court's suspicion is aroused and the door is open for a more rigorous and costly disclosure exercise. Cases at trial can take a different shape from at the disclosure stage. If documents have not been disclosed earlier that seem, by trial, to be clearly discloseable. An explanation at the time of disclosure by the solicitor for the disclosing party (particularly if not challenged) will absolve the disclosing party and its solicitor from adverse inference/blame at trial.

31. The key to a trouble free standard disclosure exercise is to put the wheels in motion as early as possible. The gathering together and ordering of documents at a pre-issue stage can save altering of a case and amendments of statements of case. In the ***Nichia*** case, Rix LJ, who was in the majority, said at paragraph 77:

> "I am concerned above all to emphasise that the switch from *Peruvian Guano* discovery to CPR standard disclosure should be properly taken on board by litigants and their advisers. Once attention is focused on the rationale of standard disclosure in the context of any relevant issue, it is possible to appreciate that it is those parties and their advisers who are in the best position to adopt procedures which are both commensurate and proportionate. Indeed, it is hard to think that even before launching proceedings such as these, a claimant has not carried out, in its own interests, such a review of its own documents as will in all probability have already met, or all but met, the requirements of a reasonable search for the purposes of standard disclosure."

32. In ***Nichia***, Rix LJ said, in relation to documents in a foreign language, at paragraphs 72 and 74:

> "There is no need to translate everything in advance, if the cost of such translation is disproportionately high. Indeed, there may be no need to translate anything, other than what requires to be disclosed.
> I do not see why a reasonable search cannot be conducted without any initial need for translating."

That might work for documents in recognisable European languages, but in other languages and scripts the solicitor is very dependent on client. There are translation machines.

Continuing duty of disclosure

33. This is probably a convenient point to emphasise the continuing duty of disclosure until the proceedings have been concluded (CPR rule 3.11(1)). If documents to which the duty of disclosure extends come to a party's notice at any time during the proceedings, he must immediately notify every other party (CPR 3.11(2)). In ***Digicel***, Morgan J said at paragraph 52:

> "A solicitor might reasonably think at an early stage in the process that a certain search will suffice. However, later events may require the solicitor to think the matter through again and form a different view and conduct a wider search."

34. ***Vernon v Bosley (No 2) [1999] QB 18*** was a pre-CPR case, which emphasised:

- The continuing duty of disclosure until the conclusion of the proceedings, which was not clear under the RSC.
- The form of subsequent disclosure, by list or letter, depends on the amount of documents involved.
- The danger of the court being misled if documents acquired after a list has been served are not disclosed.
- The prejudice of late disclosure to both parties.
- Counsel's duty to ensure that disclosure has been made.

35. A difficult issue is the obligation to disclose a document acquired as the case is about to settle, but it is clear that such a document should be disclosed immediately, even if it has the potential to disrupt a proposed settlement

36. The following are suggestions:
    - Be open and frank with decisions about disclosure with the other side.
    - Explain your reasons for non-disclosure.
    - Be receptive to and not dismissive of counter arguments from the other side.
    - Avoid redaction of documents to be disclosed unless absolutely necessary and give clear explanations for redaction.
    - Make written agreements with other parties, limiting disclosure or defining disclosure or disclosing in stages, but make sure that the written agreements are lodged at court.
    - Make sure that the client is aware of his continuing duty of disclosure.

DEALING WITH DOCUMENTS THAT TEND TO INCRIMINATE OR EXPOSE TO A PENALTY

37. The privilege against self-incrimination ("PSI") is deeply rooted in the common law and Article 6 of European Convention on Human Rights encompasses the same protection: ***R v S [2008] EWCA Crim 2177 [2009] 1 All ER 716*** at paragraph 16. PSI is subject to numerous statutory exceptions which limit, amend or abrogate it in specified circumstances: ***R v S*** at paragraph 17.

38. PSI in a civil context is set out is section 14 of the Civil Evidence Act 1968, as amended by the Civil Partnership Act 2004:

> "(1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any questions or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty:
> (a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and
> (b) shall include a right to refuse to answer any questions or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence or for the recovery of a penalty."

It is established practice that any person who wishes to rely on PSI must do so on oath (***Downie v Coe (1997) Times 28th November***). But, even if that technical requirement is waived, PSI must be raised as an issue by the party claiming to rely on it by reference to an offence for which that person might be at risk of being prosecuted: ***R (Malik) v Manchester Crown Court [2008] EWHC 1362 (Admin) [2008] 4 All ER 403*** at paragraph 66).

39. The danger of self-incrimination must be real and appreciable (***R v Boyes [1861] 1 B&S 311***). If the risk already existed, it must be materially increased by the disclosure (***Sociedade Nacional de Combustiveis de Angloa UEE v Lundqvist [1991] 2 QB 310*** at pages 324 and 352).The privilege can be claimed by a company (***Triplex Safety Glass v Lancegaye Safety Glass [1939] 2 KB 395***), but not on the ground that disclosure risked incriminating office-holders or controlling shareholders (***Tate Access Inc v Boswell [1991] Ch 512*** at pages 531 and 532). In ***Kensington International Ltd v Republic of Congo [2007] EWHC 1632 (2007) 2 Lloyd's Rep 382*** Gross J, at paragraphs 39 to 47, considered the position of whether company directors, servants and agents could be required to provide information and disclose documents that might incriminate a company and formed a provisional view that, apart from one-man or alter ego companies, they could.

40. PSI may be overridden where statute expressly or by necessary implication provides. An example is section 13 of the Fraud Act 2006 which abrogates PSI in "proceedings relating to property", but answers are not admissible in evidence in criminal proceedings under the Act "or a related offence, eg conspiracy to defraud or any other offence involving any form of fraudulent conduct or purpose". This is a balance struck by Parliament and does not require the statute to be construed restrictively against abrogation of PSI: ***Kensington International Ltd v Republic of Congo [2007] EWCA Civ 1128 [2008] 1 WLR 1144*** at paragraph 36.

41. In ***C plc v P (Attorney General intervening) [2007] EWCA Civ 493 [2008] Ch 1***, P asserted PSI in respect of any material disclosed pursuant to a search and seizure order. P's computers were imaged and revealed child pornography. The computer expert, who had obtained the images, sought directions from the court. The court ordered that the offending material be handed to the police, but stayed the order pending an appeal (but the police seized the material anyway before the appeal was heard). P asserted an unawareness of the presence of the offending material on his computer. The standard search order provides for a period of up to two hours (or longer if the supervising solicitor agrees) for documents that may be privileged to be handed to the supervising solicitor to assess whether they are privileged. The Court of Appeal suggested that the correct way to claim PSI would be to identify the particular computer which contained potentially incriminating material and argue the privilege question while the computer was in the custody of the supervising solicitor before it was passed on to a computer expert for imaging. The Court of Appeal decided that the offending material was independent evidence ("material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant…" (***Saunders v United Kingdom 23 EHRR 313*** at paragraph 69)). PSI was no different in civil proceedings from criminal proceedings and the Court of Appeal in ***Attorney General's Reference (No 7 of 2000) [2001] 1 WLR 1879*** had already decided in criminal proceedings that PSI did not extend to documents which were independent evidence. This decision is subject to an appeal to the House of Lords.

42. PSI does not warrant non-disclosure of documents, but it is a ground to refuse inspection. CPR rule 31.10(4)(a) requires that a list of documents must indicate those documents in respect of which a party claims a right or duty to withhold inspection. See also the procedure under CPR rule 31.19 to withhold inspection of a document, dealt with immediately below.

APPLYING TO THE COURT TO WITHHOLD INSPECTION OF A DOCUMENT

43. CPR rule 31.19(1), (2) and (7) deal with a party's right to apply without notice supported by evidence permitting him to withhold disclosure on the ground that it would damage the public interest. The order is not served or open to inspection, unless the Court orders.

44. CPR 31.19(3) to (7) deal with a party's right or duty to withhold inspection of a document or part of a document. The person claiming the right or duty must state in writing the right and duty and grounds for it in his list of documents or, if there is no list, to the person seeking inspection. An application to uphold such a claim must be supported by evidence. The court may require the document to be produced to the court and may invite any party or non-party to make representation.

45. In relation to withholding inspection of part of a document (redaction), in ***G.E. Capital Corporate Finance Group Ltd v Bankers Trust Co [1995] 1 WLR 172*** Hoffman LJ said at page 174B:

> "It has long been the practice that a party is entitled to seal up or cover up parts of a document which he claims to be irrelevant… The oath of the party giving discovery is conclusive, "unless the court can be satisfied – not on a conflict of affidavits, but either from the documents produced or from anything in the affidavit made by the defendant, or by any admission by him in the pleadings, or necessarily from the circumstances of the case – that the affidavit does not truly state that which it ought to state:" per Cotton LJ in *Jones v Andrews* (1888) 58 L.T. 601, 604."

and at page 175H:

> "Provided that the irrelevant part can be covered without destroying the sense of the rest or making it misleading, a party is permitted to do so."

and at page 176A:

> "The fact that the blanked-out part deals with the same subject matter as the part admitted to be relevant may mean that the former is also likely to be relevant. On the other hand it may not. The link between the two pieces of information which makes it appropriate to say that the subject matter is the same may be irrelevant to any issue in the action."

Leggatt LJ said at page 176H:

> "For over a century litigants have been permitted to cover up or blank out irrelevant parts of documents. The court will not ordinarily disregard the oath of the party that the parts concealed do not relate to the matters in question."

Dillon LJ said at page 177G:

> "The history over the last 100 years of the practice of sealing up or covering over parts of documents which are disclosed on discovery on the ground that those parts are irrelevant is strongly against the other party having an automatic right to see the whole of the document in order to determine for himself whether the parts covered up are indeed irrelevant to the issues in the action. Indeed the established practice of sealing up or covering over parts of documents would hardly have developed if the other party could immediately break the seal or tear away the cover to see the contents for himself."

46. In ***Mortgage Express Ltd v S. Newman & Co (a firm)***, above, the Court of Appeal emphasised:

- the importance of the duty lying on counsel and solicitors acting for the disclosing parties
- counsel and the solicitor had considered the relevance of the redacted parts of the telephone message pad
- the solicitor had gone on oath that the message pad, apart from that which had been disclosed, contained no relevant matter.

47. In ***Toussaint v Mattis [2001] CP Rep 61***, the claimant, an art retrieval consultant, made a contract with the defendant for the recovery of a stolen Magritte painting. There was an implied term of the agreement that he would be entitled to keep secret the identity of those through whom he dealt. The claim included the recovery of a sum that had been paid by the claimant, through an intermediary, to the possessor of the stolen painting. The defendant pleaded illegality and sought the disclosure of the intermediary's identity in order to establish that the possessor was not a purchaser in good faith and that the claimant knew so. The claimant objected on grounds that the identity of the intermediary was confidential information, disclosure of it would ruin his business and endanger the life of the intermediary and would be a breach of the implied term of the contract. The Court of Appeal said:
    - The defendant could not assert illegality and then rely on interrogation of the claimant to establish the facts that would enable that defence to succeed.
    - It would prima facie be unjust to order disclosure that might force the claimant to abandon an otherwise good claim because of the fear of danger to the intermediary.
    - The court should, as a case management exercise, consider the issues (if necessary, based on assumptions) that needed to be tried and the order in which those issues should be heard on the basis that there were issues which did not require disclosure and the issues that did require disclosure needed to be identified precisely.
    - If a judge exercising his case management powers was satisfied that disclosure would involve great risk to the claimant's business and/or the intermediary's safety, disclosure should only be ordered if it was necessary to do justice to the parties.
    - Even if a court decided to try all the issues together, the issue of disclosure should be considered at trial in the light of the evidence as to the contract and the strength of the parties' respective cases.

48. In ***Paddick v Associated Newspapers [2003] EWHC 2991 (QB)***, Tugendhat J accepted a submission, based on the ***GE Capital*** case, above, that a party's statement as to the relevance of the document is conclusive. That states the position much too strongly.

49. In ***Clarke v Donaldson [2003] EWHC 2898 (Ch)*** at paragraph 34, HH Judge Howarth (sitting as a Deputy High Court Judge) emphasised that, with redaction of documents, the continuing duty of disclosure meant that if a part of a document redacted on the grounds of relevance became potentially relevant because of the way the case developed, the disclosing party was under a duty to give disclosure of the document with the redaction removed.

50. In ***National Westminster Bank plc v Rabobank Nederland [2006] EWHC 2332 (Comm)***, Simon J decided that a threshold had been crossed that allowed a court properly to be invited to look at specific documents, for which privilege was claimed,

and, in the exercise of his discretion, ordered the disclosing party to make good its claim for privilege by an appropriate affidavit and said at paragraph 60:

> "Whilst not wishing to set out an exclusive list, in my view the court should not inspect documents unless there is credible evidence that the lawyers have either misunderstood their duty or are not to be trusted, and where there is no reasonably practicable alternative."

In that case, the judge stated that the need for submissions by one party in the absence of another party in relation to documents being inspected by a judge was another objection for a judge to inspect documents.

51. In ***Atos Consulting Ltd v Avis plc [2007] EWHC 323 (TCC)***, Ramsey J accepted a principle that the court looking at documents that are sought to be withheld should be a matter of last resort and suggested the following procedure, where the right being relied on is privilege or irrelevance:
    - The court has to consider the evidence produced on the application.
    - If the court is satisfied that the right to withhold inspection of a document is established by evidence and there are no sufficient grounds for challenging the correctness of the right asserted, the court will uphold the right.
    - If the court is not satisfied that the right to withhold inspection is established because, for instance, the evidence does not establish a legal right to withhold inspection then the court will order inspection of the documents.
    - If sufficient grounds are shown for challenging the correctness of the asserted right then the court may order further evidence to be produced on oath or, if there is no other appropriate method of properly deciding whether the right to withhold inspection should be upheld, it may decide to inspect the document.
    - If it decides to inspect, then having inspected the documents, the court may invite representations.

52. In ***Brennan v Sunderland City Council (2009) ICR 479***, the EAT held that redactions at disclosure stage also applied at trial.

PREVENTING CONFIDENTIAL INFORMATION FROM BEING DISCLOSED

53. The leading case on the disclosure of confidential information is the decision of the House of Lords in ***Science Research Council v Nasse [1980] AC 1028***, in which it was held that:
    - There was no principle of English law by which documents were protected from disclosure by reason of confidentiality alone.
    - In the exercise of its discretion to order disclosure, the court or tribunal would have regard to the fact that the documents were confidential and that to order disclosure would involve a breach of confidence.
    - Relevance is a necessary, but not automatically sufficient, ingredient for disclosure.
    - The ultimate test is whether disclosure is necessary for disposing fairly of proceedings.
    - The court should inspect the documents and, if it is impressed with the need to preserve confidentiality, it should consider carefully whether the necessary information has been or can be obtained by other means, not involving a breach of confidence.
    - The court will consider whether justice can be done by special measures such as redaction, anonymising or, in rare cases, hearing in camera.

- The court should decide this by adopting a process avoiding delay and unnecessary applications.

These principles are echoed by the Court of Appeal in ***Wallace Smith Trust Co Ltd (in liquidation) v Deloitte Haskins & Sells (a firm) [1997] 1 WLR 257*** at pp 266 to 268.

54. In ***Tullett Prebon Group Ltd v Davis [2007] EWHC 2739 (QBD)***, the claimant sought damages, declarations and a final injunction restraining the first defendant employee from taking up a job with the second defendant until the employee's notice period had expired. The claimant's CEO described the first defendant as "a disloyal twat that should be made to suffer". However, the claimant had itself "raided" the second defendant for staff, including three employees known as "the Three Amigos". The claimant's CEO had a "hostage exchange" in mind, ie releasing the claimant from his contract if the Three Amigos were released from theirs and such negotiations took place. The second defendant then dismissed the Three Amigos, who were soliciting other employees to join the claimant, and released them to work for the claimant immediately. The claimant obtained an interim injunction preventing the first defendant from starting work for the second defendant. The second defendant sought disclosure of the contracts of employment of the Three Amigos by the claimant. The claimant originally objected to disclosure, but then disclosed the contracts with all remuneration details redacted. The claimant then conceded that the Three Amigos were being paid significantly in excess of Mr Davis' remuneration (this was deprecated by the judge as an attempt to control the evidence by making concessions by a bland formula of words). HH Judge Peter Coulson QC (sitting as a Deputy High Court Judge) added a gloss to the test in **SRC v Nasse**, namely that if a document is both relevant and confidential, disclosure should be ordered if its disclosure is in accordance with the overriding objective and, in particular, if disclosure is proportionate and necessary to ensure that the case is dealt with fairly. He held that the redacted remuneration details were relevant to issues in the case and were not confidential because all three Amigos had been required by the claimant to present claims in the employment tribunal against the second defendant and had disclosed their earnings in the ET1 and because there was evidence that they had been boasting about their remuneration. If the remuneration details were confidential, the judge decided that their probative value outweighed the alleged confidentiality.

USING DISCLOSED DOCUMENTS FOR OTHER PURPOSES

55. CPR rule 31.22 states that a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed. There are three exceptions to the rule:
    - The document has been read to or by the court, or referred to, at a hearing which has been held in public, but the court may make an order restricting or prohibiting the use of a disclosed document in these circumstances on application by a party or by any person to whom the document belongs.
    - The court gives permission.
    - The party who disclosed the document and the person to whom the document belongs agrees.

    These exceptions applied under the RSC.

56. Rule 31.22(1) supersedes the common law implied undertaking not to use documents disclosed in the course of civil litigation save for the purpose of the proceedings in which they were disclosed, save with the permission of the court or the consent of the

document owner (***Home Office v Harman [1983] 1 AC 280*** and ***Marlwood Commercial Inc v Kozeny [2004] EWCA Civ 798 [2005] 1 WLR 104***). Like the previous implied undertaking, this rule involves an obligation owed to the court, not to the disclosing party, protecting not just the confidentiality of the litigant's documents, but also the due administration of justice. It was said in ***SmithKline Beecham plc v Generics (UK) Ltd [2003] EWCA Civ 1109 [2004] 1 WLR 1479*** to be a complete code. It protects not only the disclosed documents, but also information derived from those documents, whether copied or stored in the mind: ***Sybron Corporation Ltd v Barclays Bank [1985] Ch 299*** and ***Crest Homes plc v Marks [1987] AC 829*** at page 854.

57. In ***Crest Homes***, the House of Lords held that the court would not give permission to use disclosed documents for an ulterior purpose save in special circumstances and where the release or modification would not occasion injustice to the disclosing party, but that each case would turn on its own facts. Permission can be obtained to use material disclosed under search and seizure orders and under the disclosure provisions in a freezing order to launch proceedings against third parties involved in misuse of the claimant's name or commercial property or in fraud (eg ***Sony Corp v Anand [1981] FSR 398*** and ***Omar v Omar [1995] 1 WLR 1428***). In ***Miller v Scorey [1996] 1 WLR 1122,*** it was held that retrospective permission would be granted rarely. In ***A v A (Ancillary Relief) [2000] 1 FLR 701***, it was held that permission could be granted in the public interest and that there is a strong public interest that all tax, and revenue penalties due, should be paid and that evaders of tax should be convicted and sentenced.

58. CPR 31.22(2) provides that a Court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public. Any application for such an order may be made by a party or by any person to whom the document belongs (rule 31.22(3)).

59. In ***Lilly Icos Ltd v Pfizer Ltd (No 2) [2002] EWCA Civ 2 [2002] 1 WLR 2253***, the Court of Appeal set out considerations that had guided it in granting a partial order under CPR 31.22(2):

- The court should start from the position that very good reasons are required for departing from the normal rule of publicity at trial.
- When considering an application in respect of a particular document, the court should take into account the role that the document has played or will play at trial.
- In dealing with issues of confidentiality between the parties, the court must have in mind any "chilling" effect of an order upon the interests of third parties.
- Simple assertions of confidentiality and of damage that will be done by publication, even if supported by both parties, should not prevail. The court will require specific reasons why a party would be damaged by the publication of a document.
- It is highly desirable, both in the general public interest and for simple convenience, to avoid the holding of trials in private, or partially in private.
- Patent cases are subject to the same general rules as any other cases, but they do present some particular problems and are subject to some particular considerations. Patent litigation is of peculiar public importance. This means that the public must be properly informed; but it means at the same time that the issues must be properly explored, in the sense that the parties should not feel

constrained to hold back from relevant or potentially relevant issues because of (legitimate) fears of the effect of publicity.

DEALING WITH INADVERTENTLY DISCLOSED DOCUMENTS

60. CPR rule 31.20 provides that where a party inadvertently allows a privileged document to be inspected, the party who has inspected it may use it or its contents only with the permission of the court. "Privilege" is defined in the glossary to the CPR (Section F of the White Book) as:

> "The right of a party to refuse to disclose a document or produce a document or to refuse to answer questions on the ground of some special interest recognised by law."

The question of whether injunctive relief should be granted to the disclosing party will be the same exercise as whether to grant the receiving party permission under rule 32.20.

61. In ***Al-Fayed v Commissioner of Police of the Metropolis (No 1) [2002] EWCA Civ 780 (2002) 99(30) LSG 39***, the Court of Appeal set out the following principles derived from previous cases, which apply to the grant or refusal of an injunction and to the exercise of the power under rule 31.20, whether the situation involves legal professional privilege or public interest immunity:

- A party giving inspection of documents must decide before doing so what privileged documents he wishes to allow the other party to see and what he does not.
- Although the privilege is that of the client and not the solicitor, a party clothes his solicitor with ostensible authority (if not implied or express authority) to waive privilege in respect of relevant documents.
- A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived.
- In these circumstances, where a party has given inspection of documents, including privileged documents, which he has allowed the other party to inspect by mistake, it will in general be too late for him to claim privilege in order to attempt to correct the mistake by obtaining injunctive relief.
- However, the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires, as for example in the case of inspection procured by fraud.
- In the absence of fraud, all will depend upon the circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake.
- A mistake is likely to be held to be obvious and an injunction granted where the documents are received by the solicitor and:
  a) the solicitor appreciates that a mistake has been made before making some use of the documents; or
  b) it would be obvious to a reasonable solicitor in his position that a mistake has been made;

  and, in either case, there are no circumstances which would make it unjust or inequitable to grant relief (there are many circumstances in which it may nevertheless be held to be inequitable or unjust to grant relief, but all will depend upon the particular circumstances).

- Where a solicitor gives detailed consideration to the question whether the documents have been made available for inspection by mistake and honestly concludes that they have not, that fact will be a relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made, but is not conclusive; the decision remains a matter for the court.
- Since the court is exercising an equitable jurisdiction, there are no rigid rules. In making its decision, the court should have regard to all the circumstances of the case including the extent of the privilege claimed, the nature of the disclosed documents, the complexity of the disclosure and the way in which disclosure was made.

62. The facts in the ***Al-Fayed*** case were that Mohamed Al-Fayed and others were arrested in connection with the alleged breaking into Tiny Rowland's safety deposit box at Harrods. No charges were brought, but the police and the CPS sought written opinions from senior treasury counsel. Mr Al-Fayed and others sued the police for false arrest and wrongful imprisonment. Copies of counsel's opinions that had been obtained by the CPS and sent to the police were mistakenly sent to Mr Al-Fayed's solicitors, who were not aware that a mistake had been made. The mistake was only pointed out by counsel before a cmc, by which time the judge hearing the cmc had read the opinions. The Court of Appeal reversed the decision of the judge and refused an injunction and granted permission under CPR 31.20.

63. The Court of Appeal, in the ***Al-Fayed*** case, suggested that where the receiving party's solicitor has sent the documents to the receiving party before the solicitor has considered them and the receiving party learns a fact from a document, which it would be unjust to prevent him from using in the litigation, an injunction might not be granted even though on consideration by the receiving party's solicitor the mistake was apparent.

64. In ***International Business Machines Corp v Phoenix International (Computers) Ltd [1995] 1 All ER 413***, Aldous J made the distinction between mistakes in a large volume of disclosure where it was clear that there had been no proper review of documents and a situation where disclosure had been clearly been carried out meticulously or disclosure was slight. In the former case, it is more likely that the reasonable solicitor would regard disclosure of a privileged document as being a mistake. The Court of Appeal in ***Breeze v John Stacy & Sons Ltd, 21st June 1999*** agreed with this. In the ***IBM*** case, the inadvertently disclosed documents were legal bills, counsel's fee notes and an advisory document called the "road map". The discovery had taken place on a tight timetable and on a large scale. The Court granted injunctive relief even though the mistakes had occurred because of blatant disregard of the rules of discovery.

65. In the ***Breeze*** case, the inadvertently disclosed documents were over 100 pages of an exhibit to an affidavit sworn by the defendant's solicitor in support of an application to strike out for want of prosecution. The affidavit had been settled by counsel and the exhibit had been prepared by the solicitor's secretary without being checked by the solicitor. The judge and the Court of Appeal refused an injunction. There was prejudice to the receiving party in that case because their counsel and solicitor might have found it difficult to continue to act, having formed the view that the inadvertently disclosed material was damaging to the disclosing party's case.

CONCLUSION

66. The following take home points can be made:

- Marshall documents pre-action as early as possible (this may even meet or nearly meet standard disclosure search requirements).

- Identify key documents to include in letter of claim: no requirement to disclose adverse documents at this stage.

- Identification of adverse documents at this stage is important so that merits can be assessed accurately.

- Request key documents from the other side pre-action.

- Accurate pleading and particularisation makes identification of discloseable documents easier and accurate pleading aided by step 1 above

- Following statements of case consider whether case as pleaded suitable for:
  - standard disclosure
  - more limited disclosure
  - more extensive than standard disclosure
  - no disclosure
  - disclosure & inspection together
  - disclosure in stages
  - disclosure by sample documents

- Make agreements with other side on disclosure and lodge agreements at court.

- Be open and transparent with the other side on disclosure and decisions on disclosure. Be receptive to, not dismissive of, suggestions from other side.

- Following inspection, consider whether a weakness can be exposed in other side by pressing for specific disclosure (inadequate search/disclosure) and/or requesting further information.

- Following exchange of witness statements, consider whether an "interrogatory" Part 18 request is justified.

- Keep extent of standard disclosure search and disclosure under review as case develops.

Julian Gun Cuninghame
Gough Square Chambers
6/ 7 Gough Square
London EC4A 3DE
jgc@goughsq.co.uk
Tel: 020 7353 0924
Fax: 020 7353 2221
21st May 2009