Case management: documents (script)

This is one of a series of elements looking at the management of a dispute in a little more detail. In this element, we consider documents.

You will have focused on documentary evidence earlier in your studies when you considered the disclosure and inspection stage of proceedings. At this stage, there is a particularly intensive focus on documents. However, the issue of documentary evidence is relevant throughout the litigation and impacts on the overall case strategy and the ongoing management of the case.

**Disclosure in the Business and Property Courts**

To understand this element, it is important to note that in the Business and Property Courts there are alternative rules for disclosure to those in CPR 31. They are set out in Practice Direction 57AD. These rules fundamentally alter not only the scope of, and approach to, disclosure orders, but also the way in which the court reaches a decision on the appropriate disclosure order(s). The rules affect the way parties deal with documentary evidence from the outset of the matter. Practice Direction 57AD is covered later in this knowledge stream, but we refer to relevant parts of it in this element too.

**An early consideration is how are you going to prove your client’s case in relation to disputed facts? By documentary evidence?**

Identifying available documentary evidence is a crucial part of case analysis.

- at the outset of the matter, it is likely that your client will draw to your attention helpful documents. But are there other documents that your client has not thought of that might be relevant?

- you also need to consider what documents might exist that are potentially adverse to your client's case. These may need to be disclosed at a later stage. The extent to which it is appropriate at an early stage in the dispute to search for documents that may be adverse to your client's case requires careful consideration. It can be time consuming to search for documents. The court may in due course make a disclosure order that requires the parties to search for documents, and if adverse documents will likely be revealed by those searches, it is probably better to know about them from the outset. On the other hand, you do not want to incur time and cost in searching for, and ultimately be required to disclose, adverse documents that would otherwise not have come to light, perhaps because they would not have been captured by the terms of the disclosure order and related searches.

- Remember also to consider what documents your client’s opponent will have.

**At the outset of a matter you must consider the preservation of documents**

Your client is required to preserve documents that are potentially relevant to the case. The CPR imposes obligations on solicitors to explain these duties to clients. It can also be a contempt of court to allow documents (helpful or otherwise) to be destroyed in the face of litigation. You must advise your client on the steps to take to prevent the destruction of documents. This includes the suspension of any routine document destruction policy. For example, if it is your client's normal policy to destroy documents after six years, it should ensure that this policy does not apply to documents that might be relevant to the litigation. You will also need to consider what instructions should be given to your client’s employees and any relevant ex-employees and agents regarding the preservation of potentially relevant documents.

When you complete the directions questionnaire, you will need to confirm that your client has been advised of its obligation to preserve relevant documents, as there is a question to this effect in the questionnaire.

Perhaps a less obvious point is to advise your client that it should avoid creating new, unhelpful documents relevant to the case as these will likely be captured by its disclosure obligations. For example, if your client is facing an allegation that it has been manufacturing and selling a defective product, you may want to control the extent to which reports or correspondence about the allegedly defective product are created by your client, in case such reports or correspondence contain admissions of defects or other statements unhelpful to your client's position. Such a report or correspondence might attract litigation privilege if created for the dominant purpose of preparing evidence or obtaining advice in connection with the litigation. However, a report or correspondence which has a different dominant purpose, such as remedying defects in the product or improving the manufacturing process, is unlikely to be privileged and may need to be disclosed to the opponent at the appropriate stage.

**You will be aware that you need to try and agree the scope of disclosure with your opponent at the time of filing a directions questionnaire and in preparation for a case management conference. But the obligation to discuss disclosure could fall much earlier than this.**

Parties must discuss the disclosure of electronic documents before the first case management conference, but in some cases (for example heavy and complex cases) it may be appropriate to begin discussions before proceedings are commenced. There are rules to this effect in the disclosure rules which apply in the Business and Property Courts set out in 57AD PD which you will study in detail later in this knowledge stream. There are also similar rules for claims outside of the Business and Property Courts in 31B PD 9. In order to have a fruitful conversation about disclosure, each party needs to have an understanding of the issues in dispute and consider a range of factors relating to the documents. These include the types of documents each party has in their control, the potential relevance of those documents, the way in which they are stored, any difficulties in retrieving them, what search terms might be appropriate to use for an electronic search, how best to provide electronic documents or access to them to the other parties etc. Such is the complexity of this analysis that it can take months to carry out.

**A final early consideration is what documents should be shown to someone who might be a witness.**

This was covered in the element relating to case management and witnesses. You need to consider what documents a witness can provide to you, but also which documents you should allow a witness to see and the latter topic in particular is something you will return to later in this knowledge stream.

**Parties generally have a right to inspect documents referred to in a statement of case – see 57AD PD 21 and CPR 31.14.**

This has two implications. The first is that you need to be careful which documents are referred to in your client’s statement of case as the other side may request to inspect them. The second is that you can request to inspect documents referred to in the opponent's statements of case. Such a request can be made immediately, it is not necessary to wait until the disclosure / inspection stage of proceedings. What happens if you refer, in a statement of case, to a document which would ordinarily be privileged? Is the opponent then entitled to inspect it? The courts have held that the entitlement in the CPR to inspect a document referred to in a statement of case does not override the principles of privilege, so it may still be possible to refuse inspection on the basis of privilege. However, if the manner in which the document is referred to in the statement of case means the party is relying on the document rather than simply referring to it, the party may be deemed to have waived privilege over the document. In this case, the party will be required to permit inspection. Perhaps the key learning point is that it is prudent not to refer to any document in a statement of case unless you are content for the opponent to inspect it.

The same principles apply to a document referred to in a witness statement, witness summary or affidavit.

**Directions questionnaires**

By the time directions questionnaires are filed, the parties need to have a good understanding of the issues surrounding the disclosure of documents. In a directions questionnaire for a claim on the multi-track, the parties need to inform the court whether they have reached agreement in relation to the scope and extent of electronic disclosure, and if no such agreement is likely, the issues that the court needs to address. Parties also need to make proposals for disclosure of non-electronic documents.

**Case management conference**

In most multi-track cases parties will be required to file and serve costs budgets at least 21 days before the first case management conference. The budget will include projected costs in relation to the disclosure and inspection of documents.

In addition, in cases in the Business and Property Courts, parties are required to give indications of the type of disclosure order sought in relation to issues in dispute and to try and agree the same with the opponent in the period of time between service of the last statement of case and the first case management conference (57AD paras 7-10).

In multi-track claims outside of the Business and Property Courts, as you have already studied, a disclosure report may need to be filed at least 14 days before the first case management conference.

Either way, a party needs to have an understanding of the types of documents that exist, their relevance for the claim and how they are stored, as well as the estimated costs of giving disclosure.

**Disclosure and CPR 32.19**

Whatever disclosure order is made, the parties are required to comply with it. While disclosure and inspection of most documents takes place at a particular stage in the proceedings, do not forget that disclosure may have been given earlier (for example, initial disclosure served with statements of case under the provisions of PD 57AD, or pre-action disclosure in claims generally) and disclosure is a continuing obligation throughout the litigation.

In terms of the opponent's documents, one provision of the CPR relatively easily missed is CPR 32.19. This provides that a party shall be deemed to admit the authenticity of a document disclosed to them under Part 31 (disclosure and inspection of documents - it would be prudent to assume this also applies to documents disclosed pursuant to 57AD PD) unless they serve notice that they wish the document to be proved at trial. Such a notice must be served –

(a) by the latest date for serving witness statements; or

(b) within 7 days of disclosure of the document, whichever is later.

This issue should be considered soon after receipt of the opponent's documents. If you have any concerns about the authenticity of any of the opponent’s documents, the appropriate notice should be served.

**How can you help the court to understand the complex documentation?**

Many cases involve a large volume of often complex documents - this is particularly the case in high value commercial claims. The courts wish to avoid a witness providing a lengthy narrative or 'walk through' of the documents. A witness's role is essentially to convey matters within their own experience, not to construct a narrative or explain documents. Who will help explain to the court how the documents fit together, if not a witness? There is no single right answer, and it is something to explore with the intended advocate for a particular hearing. Skeleton arguments provide one opportunity to do this. An alternative may be to seek a direction from the court to allow such an explanation or narrative to be provided by one or more of the parties (outside of a witness statement). This would be unusual, but perhaps will become more common in the future as the courts seek to confine witness statements to their true purpose.

**Trial bundle**

Finally, a party will focus on the documents when preparing the trial bundle. You should consider carefully which documents to include in a trial bundle, and the parties should try to reach agreement. Failing to include relevant documents could prejudice your client’s case. Including an excessive number of documents which have little relevance risks the judge being distracted or failing to give proper emphasis to what is important. Excessively long trial bundles may also attract judicial criticism and delay the progress of a trial.

Pursuant to 32 PD 27.11, if a document to be included in the trial bundle is illegible, a typed copy should be included in the bundle next to it, suitably cross referenced. A translation of any foreign language document should also be included in the bundle. These matters will need to be addressed some weeks or months in advance of the deadline for filing trial bundles.