CLAN AUTUMN CONFERENCE, 14 NOVEMBER 2016 – SOME RECENT DISCLOSURE DEVELOPMENTS

PREDICTIVE CODING

Pyrrho

In *Pyrrho Investments Limited and another v MWB Property Limited and others [2016] EWHC 256 (Ch)*, the High Court considered whether to permit the use of predictive coding in an electronic disclosure exercise.

This was the first reported English High Court decision on this issue (although predictive coding is well-established in the US and has previously been approved by the Irish High Court (*Irish Bank Resolution Corporation Limited and others v Sean Quinn and others [2015] IEHC 175*)).

Predictive coding is a type of search technology used to identify relevant documents within a volume of electronic documents: a sample data set is reviewed by lawyers familiar with a case and coded accordingly; that coded dataset is then used by complex software to predict the degree of relevance of the remaining documents in the whole data set. (See also the more detailed description of the process at paragraphs 19-24 of the judgment.)

This was a multimillion pound case with 3.1 million electronic documents to review. The parties had agreed on the use of predictive coding between themselves, subject to the court's approval. The Master referred to the references to automated electronic disclosure in *Goodale v Ministry of Justice [2009] EWHC B41 (QB*), and to statements in practitioner texts. He also considered some of the US authorities and the *Irish Bank* case where the use of predictive coding had been contested (paragraphs 25-31, judgment). He approved the use of predictive coding because:

- Experience in other jurisdictions suggested that predictive coding is useful in appropriate cases. There was nothing to suggest it was less reliable than manual and keyword review (and it may be more reliable).
- It brings consistency, and could allow the electronic documents in this case to be reviewed at proportionate cost. A full manual review would be unreasonable.
- It was not contrary to the CPR (see PD 31B.25), the parties had agreed that it should be used and trial was some way off so there was scope to use other methods if need be. (See paragraph 33, judgment for the full list of 10 factors.)
  There were no factors of any weight pointing in the opposite direction.

Brown v BCA Trading Ltd

At a case management hearing ***in Brown v BCA Trading Ltd [2016] EWHC 1464 (Ch),*** the Companies Court considered the use of predictive coding in electronic disclosure in proceedings under section 994 of the Companies Act 2006.

The petitioner was seeking to recover more than £20 million. The case management issues included whether the respondents should provide electronic disclosure which, they asserted, would cost around £132,000, or use a more traditional keyword approach, which was estimated to cost approximately £250,000.

Mr Registrar Jones considered that the majority of factors identified in *Pyrrho Investments Ltd v MWB Property Ltd [2016] EWHC 256 (Ch)* in favour of predictive coding applied here (*see Legal update, Electronic disclosure: High Court approves use of predictive coding*). He gave the following directions:

- The parties were to identify the issues to narrow down the search borders and reduce costs, and prepare a schedule identifying the relevant issues and related documents.
- The protocol set out by the Technology and Construction Court was instructive for the process of electronic disclosure, and it was important to comply with *CPR PD 31B*.

Although cost was not the only factor, the respondents' information suggested that predictive coding would be considerably cheaper than a keyword search and just as effective. The parties were directed to discuss the process and criteria for predictive coding so as to identify any problems. If necessary, they could seek further directions.

INDEPENDENT REVIEW OF ANOTHER PARTY'S DISCLOSURE – VILCA

In ***Vilca and others v Xstrata Ltd and another [2016] EWHC 1824 (QB),*** the court considered various issues arising out of the e-disclosure in the case, notably the claimants' application for an order requiring the defendants to procure "an appropriate re-review of their disclosure" by a lawyer independent of the firm representing them.

Foskett J considered the claimants' application for an order requiring the defendants to procure "an appropriate re-review of their disclosure" by a lawyer independent of the defendants' solicitors (L). The order was sought, primarily, on the basis that L's failure to disclose a "relevant and disclosable" email exchange raised concerns about the integrity of the disclosure process.

The judge held that the failure to disclose had been an error, albeit in good faith. That, and arguments put forward to justify the non-disclosure, raised the question of whether too narrow a view was being taken of the parameters for standard disclosure. He emphasised the need to disclose any documents, wherever generated, as described in paragraph 32 of his judgment.

Considering whether this was sufficient to justify the order sought, Foskett J drew the following conclusions:

- He did not doubt that he could direct a review by another firm of solicitors (or independent counsel), even if that was unprecedented (in line with Teare J's thinking in *Nolan Family Partnership v Walsh [2011] EWHC 535 (Comm)*: see further *Legal update, Novel disclosure order for appointment of supervising solicitor to conduct standard disclosure on a party's behalf (Commercial Court)*).
- An order in these terms would be "most unusual", as it would impose a costs burden on the client whose solicitor's conduct was the subject of the review.
- Strong grounds would be required.

The judge did not consider that what was "in reality, one erroneous (albeit significant) decision" justified an order requiring re-review of the disclosure. The error had been corrected quickly and, in view of L's standing, he was confident that they would put forward a "sensible formula" for reviewing their e-disclosure to ensure that no documents had been unjustifiably excluded. Foskett J asked L to submit, within 14 days, a plan for achieving the necessary result, which the claimants could comment on. He would then consider if it was acceptable.

It is noteworthy, though, that it appears that there might be circumstances where the court might order an independent review. This highlights the need for robust quality control mechanisms in the context of conducting disclosure exercises.

LECTURE BY JACKSON LJ AT THE LAW SOCIETY'S COMMERCIAL LITIGATION CONFERENCE ON 10 OCTOBER 2016

Speaking at this event (https://www.judiciary.gov.uk/wp-content/uploads/2016/10/lj-jackson-speech-disclosure-10102016.pdf) Jackson noted that disclosure is a big costs driver, and called for more effective use of the "new" rules (that is the new approach for multi-track claims, which was introduced back in 2013 (CPR 31.5)).

His speech included the following observations:

> "Is everyone now using the new rules properly? Unfortunately, no. In large commercial actions and other substantial cases too often people are treating standard disclosure as the default option. Parties frequently agree standard disclosure, seemingly without considering whether other options may be preferable, and the courts accept their agreements. It would be to the public benefit if all involved in the disclosure process gave more attention to the full range of options before simply proposing or agreeing to 'standard disclosure'."

Jackson LJ also provided a reminder of how the disclosure reforms interconnect with other procedural changes:

> "Link with costs management. The new disclosure rules were carefully designed to mesh in with (a) the new rules on proportionality and (b) costs management. The intention is that the court should make a disclosure order which is proportionate in all the circumstances of the case. Absent an allegation of fraud, it would be inappropriate to order the parties spend £1 million on disclosure, if the sum at issue is only £1million. The court should, so far as possible, make disclosure orders which are consistent with the approved/agreed budgets. Since the court should be doing case management and costs management together, it can (a) adjust the level of disclosure to fit with the budgets and/or (b) set the budgets to take account of the level of disclosure ordered."

Interestingly, he concluded that the tools that allow a proportionate approach to disclosure in each case, are already in place. What is required is a change of culture: by law firms and judges:

> "No more rule change needed here. Practitioners may be relieved to note that this lecture does not recommend any further reforms. It merely suggests (echoing the views of many senior practitioners) that greater use might be made of the existing rules."

DISCLOSURE WORKING GROUP CHAIRED BY LADY JUSTICE GLOSTER

Jackson LJ also referred, in his speech, to the fact that a working group has been established to consider potential ways of achieving a culture change, and ensuring that the disclosure process is not disproportionately expensive. This evolved directly out of concerns voiced by the GC100 Group (comprising general counsel of the FTSE 100 companies), a very influential organisation.

> "**The GC100 disclosure seminar on 27th April 2016**. The GC 100 Group, as regular users of the Commercial Court, raised the growing concerns about disclosure with the Commercial Court. The upshot was a seminar on disclosure in which judges (from the Commercial Court, Chancery Division and TCC), practitioners and court users took part.

Principal points emerging from the seminar were:

1. There was a general recognition that the tools for controlling disclosure have been in place since April 2013, but the parties and the courts are not making sufficient use of them.
2. In particular, more use ought to be made of option (b), namely disclosure limited to specific issues. In Commercial Court cases the parties usually succeed in agreeing a list of issues for the first CMC.
3. In patent litigation there is an established practice of making restricted disclosure orders. This is because the Patents Court and the Intellectual Property Enterprise Court are competing against Continental courts, which have very little disclosure. The litigants have a choice of forum. Parties are generally satisfied with the restrictive approach to disclosure in these cases.
4. The use of predictive coding in Pyrrho was generally welcomed, but it was accepted that predictive coding was not a panacea to be used in every case.
5. The new procedure for Shorter and Flexible Trials currently being piloted under Practice Direction 51N has very restrictive rules for disclosure. These were generally welcomed.

So where are we now? It is hoped that, as a result of the seminar on 27th April 2016, both practitioners and the courts will make fuller and more effective use of the menu option. A working group ("the disclosure working group") was set up at the end of the seminar to take these matters further.

Matters for the disclosure working group. The disclosure working group may care to consider whether what is needed is culture change rather than rule change. In particular, (dare I say it?) perhaps the working group might encourage:

- practitioners to think twice before agreeing standard disclosure (however profitable that may be for the lawyers), and

- judges to be more proactive, by pressing counsel as to what documents are needed and why, rather than approving any agreed directions for standard disclosure.

If by any chance the working group report is along these lines, it would certainly chime with the sentiments expressed at the GC100 April 2016 disclosure seminar, but this is entirely a matter for them."

Disclosure is very much in the spotlight at the moment, and corporates are still concerned about the costs generated by the process.

Practitioners are encouraged to think creatively, and to take advantage of the flexibility provided by the menu of options in CPR 31.5(7).

If the costs of disclosure are not brought under control, it is not beyond the realms of possibility that much more draconian measures might be introduced: possibly, even a move to a more "civil code" approach to disclosure.

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