'Massive overdisclosure' ordered in departure from Business and Property Courts disclosure regime

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***GENIUS SPORTS TECHNOLOGIES LTD v SOFT CONSTRUCT (MALTA) LTD* [2022] EWHC 2637 (Ch)**

Marcus Smith J recently ordered the adoption of a process of "massive overdisclosure" in a substantial claim concerning database rights and competition law. Following the claim's second case management conference he set out the conditions which justify this approach, the detail of how it might work, and the reasons why it should be imposed in this case.

Background

The Judge had previously directed that disclosure be conducted in accordance with the CPR Practice Direction 51U Disclosure Pilot Scheme, which was introduced in 2019 and was made permanent this month as CPR PD 57AD. The parties had done considerable work to compile two Disclosure Review Documents ("DRDs") under the Disclosure Pilot Scheme, but significant issues remained unresolved. The Judge considered that an effective disclosure regime could be put in place without resolving those disputes, while taking advantage of the work that had gone into framing the DRDs.

The starting point for the new process was an inversion of the normal approach: it would not prioritise the identification and production of relevant documents, but instead would seek to exclude unequivocally irrelevant and privileged documents, with everything else disclosable to the receiving party. The review for relevance, which is a key factor in the admissibility of evidence, would be conducted not by the disclosing party but by the receiving party.

Disclosure then and now

The Judge reviewed *Nichia Corporation v Argos Limited*,[1] which concerned the scope of disclosure in a claim for patent infringement. The Court of Appeal had noted that the test for "standard disclosure" in the Civil Procedure Rules was narrower than the previously applicable "very wide" test for discoverability in *Peruvian Guano*.[2] In the Court's judgment it was wrong for parties to disclose excessive amounts of background documents, as this caused downstream costs from 'mass reading' by lawyers on the opposing side and created a risk that really important documents will be overlooked (*Nichia Corporation* at [46]-[47]).

However, disclosure processes today have changed from those described in *Nichia Corporation*. Most documents are now produced for inspection in electronic form and are generally searchable by means of sophisticated disclosure platforms. "Eyeball" reviews of documents have become marginalised. Large numbers of documents are discarded during electronic disclosure filtering processes without ever being reviewed by a qualifying individual (*Genius* at [9]).

In cases like the instant case, where one cannot be confident that an electronic filter will not discard relevant material, the use of disclosure models intended to find documents relevant to listed issues (as envisaged in the PD 57AD scheme) is "a fatally flawed process" (at [9(iii)]). The mischief of "dumping" enormous volumes of electronic documentation on a receiving party no longer arises, because the receiving party can conduct targeted electronic searches for key documents without requiring the costs of "eyeball" review.

Conditions for "massive overdisclosure"

This led the Judge to a conclusion that a process of "massive overdisclosure" ought to be adopted, provided the following conditions are satisfied (at [11]):

> *i) There is a real risk that if a standard process of disclosure is adopted, using disclosure models to identify documents responsive to particular issues, relevant documents will be missed.*
>
> *ii) There is no danger of the process being used to oppress any of the parties to the litigation. There will be cases where the Receiving Party is not in a position to review significant electronic disclosure in the manner I have described.*

[1] [2007] EWCA Civ 741.
[2] (1882) 11 QBD 55.

iii) *The risk of disclosing privileged material is contained to the levels of any "standard" process of disclosure. Inadvertent disclosure of privileged material is a risk whatever process of disclosure is adopted. The risk cannot be eliminated, it can only be contained.*

iv) *Confidential material – whether relevant or irrelevant – is appropriately protected.*

Mechanics of a "massive overdisclosure" regime

The Judge went on to consider step-by-step the detail of how such a process might work (at [14]-[22]).

In the first step, each party identifies to the other party precisely what documents will be subject to an electronic search. Each "producing party" should swear an affidavit or witness statement identifying custodians, repositories and collections of documents to be searched, specifying date ranges to be applied. They should err on the side of over-inclusion. This statement, which should be updated as necessary as circumstances change, would replace the other forms of documentation ordinarily produced in the disclosure process.

Next, the producing party reviews the resulting universe of documents electronically to filter out documents which are irrelevant on the *Peruvian Guano* test. This is not to be a process of identifying relevant documents, but of removing irrelevant ones. In this filtering process the parties are informed by the pleadings, and also (in this case) by the existing DRDs which act as "valuable, but informal, guides". Each receiving party should be fully informed as to the nature of the electronic review being conducted. "Eyeball" review should not take place at this stage.

The producing party then undertakes a final review specifically and solely to identify and remove privileged material. The party is expected to put in place a robust process for this review as a separate stage in the disclosure process. This is likely to involve an electronic search reviewed by a human agent to check that the material resulting is actually privileged and so excluded from disclosure.

The resulting material should not be filtered on grounds of confidentiality. The Judge expressly envisages that confidential material will be produced to the receiving party, subject to two tiers of protection. The first tier is a 'reinforcement' of the CPR r.31.22 obligation to use such material only for the purpose of the proceedings in which it is disclosed, with which external counsel and experts can be expected to comply. This obligation is reinforced by all disclosable material being produced for inspection onto a platform with an auditable record capable of identifying when and

by whom each document is accessed. The second tier, which applies to all other persons, would involve a special regime of undertakings and approvals which would effectively subject every document to a confidentiality ring buttressed by a penal notice. Applications for a further "inner" confidentiality ring may be entertained but would have to be clearly justified.

Justification for "massive overdisclosure" in this case

The Judge considered that this "bespoke" disclosure regime should be imposed in the instant action, giving reasons at [24].

Firstly, in this case the standard regime would either not work satisfactorily or would only do so at excessive and disproportionate cost.

Secondly, in the Judge's view the "bespoke" process properly protects both privileged and confidential material at proportionate cost.

Thirdly, there was no concern about "changing horses in mid-stream" as this was not a case where a "standard" process of disclosure was well underway. Production of disclosure review documents had begun, but a number of disputes remained outstanding and would need to be resolved if the "standard" process was to continue.

Fourthly, the Judge was satisfied that he had jurisdiction to make an order along these lines. Standard disclosure is the norm, but the Court can "direct otherwise" (CPR r.31.5(1)(a)).

Fifthly, the "bespoke" process avoids the risk of over-inclusive exclusion of documents from production by each producing party.

Comment

The Business and Property Courts Disclosure Pilot Scheme has recently been made permanent, but the options for disclosure have not ossified as a result. This judgment introduces a new and detailed regime which deliberately swings the pendulum away from the narrow disclosure envisaged by Models A-D of that Scheme, and towards "over-inclusion". This is a counterpoint to the emphasis in *McParland & Partners Ltd v Whitehead* [2020] EWHC 298 (Ch) upon reasonableness and proportionality of disclosure. It reiterates that the Courts can and will be flexible in ordering a "bespoke" disclosure regime if the case justifies it.

By acknowledging that "massive overdisclosure" does not impose the same burden on litigants today as it did fifteen years ago, this judgment gives something of a reality check for the age of

digital working. Such a bespoke regime may be a useful tool in the arsenal for document-heavy actions between substantial commercial entities, where there is a real risk of a standard disclosure process missing relevant documents but where there is little risk of "oppressive" use of such a process.

Disclosing parties will be alive to the requirement to produce confidential material whether relevant or irrelevant, but may take some comfort from what amounts to an automatic confidentiality ring covering all disclosed material, removing the need to negotiate confidentiality club arrangements or to justify confidential status document by document.

Either way, a new template has been presented. What remains to be seen is if and how far similar ideas are taken up in other cases.

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