DISCLOSURE IN THE TCC AFTER THE JACKSON REFORMS

THE CURRENT CPR 31.5
Rule CPR 31.5 in its current form provides: **(1) An order to give disclosure is an order to give standard disclosure unless the court directs otherwise.** **(2) The court may dispense with or limit standard disclosure.** **(3) The parties may agree in writing to dispense with or to limit standard disclosure.** Therefore, although the court had powers to depart from or limit standard disclosure, the general assumption was that standard disclosure will be followed.
THE NEW CPR 31.5
Under the reforms it is intended that a "menu option" of alternative disclosure provisions shall be available for any case where the costs of standard disclosure are likely to be disproportionate. This intention is implemented by way of a Statutory Instrument (SI 2013 No 262 (L1)) which inserts the alternative set of disclosure provisions into CPR 31.5. The default position being that the new alternative provisions should apply to all multi track cases. The current standard disclosure provisions set out in CPR 31.5(1)-(3) will be included in their entirety within the New CPR at paragraphs 31.5 (1)(a)-(c). CPR 31.5 will then contain new paragraphs from 31.5(2)–(9) in the following terms:

New CPR 31.5 paragraphs	Comment
(2) Unless the court otherwise orders, paragraphs (3) to (8) apply to all multi-track claims, other than those which include a claim for personal injuries.	Cases are invariably allocated to the multi-track where they are valued at more than £25,000. Although the court is given discretion to order otherwise, the intention to ensure that the new provisions will be the default rules for multi-track cases.
(3) Not less than 14 days before the first case management conference each party must file and serve a report verified by a statement of truth, which — *(a) describes briefly what documents exist or may exist that are or may be relevant to the matters in issue in the case;* *(b) describes where and with whom those documents are or may be located;* *(c) in the case of electronic documents, describes how those documents are stored;* *(d) estimates the broad range of costs that could be involved in giving standard disclosure in the case, including the costs of searching for and disclosing any electronically stored documents; and* *(e) states which of the directions under paragraphs (7) or (8) are to be sought.*	The purpose of this provision is to ensure that the parties consider the nature and extent of disclosure required at the earliest possible time. The report that each party is required to produce under CPR 31.5(3) is akin to an early summary disclosure statement, and should give all parties a clearer picture of the magnitude of the disclosure task. This of itself may encourage settlement between the parties. It also gives the court the opportunity to minimise costs by directing disclosure obligations that are less onerous than those in standard disclosure. BUT NOTE: Parties still need to do their costs estimates on the basis of standard disclosure at this early stage, even if a different form of disclosure is subsequently ordered. However, it is unclear as to the duties of search that are required of the parties at this early stage. An honestly submitted statement of truth of the believed state of affairs, which later turns out to be inaccurate could have a negative effect on costs later in proceedings: this could lead to overly conservative estimates of the potential scope of disclosure to minimise the risk of later negative cost orders.

New CPR 31.5 paragraphs	Comment
	Where the new costs management rules do apply in the TCC, this could have a serious impact on the accuracy of cost estimates for disclosure. It is also noted that the production of the report is likely to increase legal costs at the outset of proceedings.
(4) In cases where the Electronic Documents Questionnaire has been exchanged, the Questionnaire should be filed with the report required by paragraph (3).	It would appear that this provision applies only to cases where the Electronic Documents Questionnaire (form N264) has been already exchanged between the parties. Inclusion of the N264 form with both parties disclosure reports is certainly encouraged. The N264 form requires detailed submissions to be made as to the magnitude and location of electronic documents. The form includes sections detailing any key word searches that may be required, and the technical names for the search algorithms that will be applied by these searches. To fulfil these requirements, in depth analysis of the case issues and evidence is often required. Given the Pre- Action Protocol requirements, a good initial stab at this should be possible. Whilst the early investigation of documents could rarely be considered bad practice, the new provisions again encourage the parties to incur costs at an early stage. Where the expertise of electronic disclosure consultants are required, these costs are likely to be significant.

New CPR 31.5 paragraphs	Comment
(5) Not less than seven days before the first case management conference, and on any other occasion as the court may direct, the parties must, at a meeting or by telephone, discuss and seek to agree a proposal in relation to disclosure that meets the overriding objective.	The parties are obliged to discuss and seek to agree a disclosure strategy at least 7 days prior to the first CMC. Again early contact (preferably leading to agreement) with the opposing party can hugely benefit the efficient running of disclosure, but in turn finalising an agreed disclosure proposal can involve lengthy negotiations between solicitors: 7 days may not be long enough.
(6) If — *(a) the parties agree proposals for the scope of disclosure; and* *(b) the court considers that the proposals are appropriate in all the circumstances,* *the court may approve them without a hearing and give directions in the terms proposed.*	Where parties agree an appropriate set of disclosure directions, the court can approve them and order accordingly. This of course could occur under the old CPR 31.5, but rarely happened prior to the first CMC. The challenge for solicitors is being well briefed and informed about the extent of their client's documents at this early stage, and the likely costs of different forms of disclosure options, in order to complete the Disclosure Report and cost budget in advance of the first CMC and are in a position to agree a full set of disclosure directions. Whilst solicitors acting for Claimants are likely to be well briefed at this stage, solicitors for the Defendant may not be, although having gone through the Pre Action Protocol they are more likely to be.
(7) At the first or any subsequent case management conference, the court will decide, having regard to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly, which of the following orders to make	The disclosure report that the parties are required to submit under CPR 31.5(3) must include which directions under CPR 31.5(7) and CPR 31.5(8) are sought.

New CPR 31.5 paragraphs	Comment
in relation to disclosure—	The list of disclosure options in CPR 31.5(7) gives the court a very broad discretion as to the limit or extent of the documents that should be disclosed. Orders range from dispensing with disclosure entirely, to standard disclosure, and beyond. It is the breadth and flexibility of CPR 31.5(7) that may cause difficulty. The menu of disclosure options is varied, and the level of disclosure that is ordered is likely to affect the costs, and even the outcome of a case. Parties could attempt to engineer a disclosure solution that best suits their client, or causes maximum difficulty to their opponent. The Court will have to take an active role in ensuring this "tactical" use of disclosure is controlled. This is likely to attract disagreement between the parties, lengthy submissions, and further costs.
(a) an order dispensing with disclosure;	Paragraph (a) allows the court to dispense with disclosure entirely. Although in principle this will drastically reduce the cost of proceedings, it unlikely that such an order will be appropriate for many TCC cases. Where cases rely entirely on points of law, parties will usually opt for part 8 proceedings to resolve these issues. This leaves only the extremely rare instances where both sides are satisfied that they have all relevant documents to the case and therefore don not require disclosure.

New CPR 31.5 paragraphs	Comment
(b) an order that a party disclose the documents on which it relies, and at the same time request any specific disclosure it requires from any other party;	Paragraph (b) is similar to disclosure procedures under the International Bar Association "production" procedure, which is often adopted in arbitration proceedings. If this order is sought it seems unlikely that the parties will know the full extent of which documents they are each relying on at the first CMC stage. During arbitration proceedings, the parties typically have until close of pleadings before making document production requests often having served the documents witness statements and experts' reports they rely on with their "Pleading". In this regard parties may seek this order where appropriate, but also request that specific disclosures do not have to be requested until after pleadings are exchanged. In addition, in international arbitrations where specific documents or categories of documents are requested, this is done often in a "Redfern" schedule (ordered by the Tribunal), and thereafter negotiating the nature and extent of the specific disclosure can take weeks. It is often the case that intervention from the tribunal to decide the nature and extent of the disclosure is required thereafter in any event and so applications to the Court would similarly be expected to follow.
(c) an order that directs, where practicable, the disclosure to be given by each party on an issue by issue basis;	Paragraph (c) provides for an "issue by issue" approach, which could work well when using key word searches to categorise documents. However it assumes that the parties will know by the 1st CMC that they will be able to agree on a set of mutual issues: experience suggests this is easier said than done.

New CPR 31.5 paragraphs	Comment
	Furthermore, parties often need to be further into the pleadings process in order to agree on the relevant issues (although the Commercial Court can require a list of issues at the first CMC). Even after close of pleadings, agreeing a set list of issues is likely to involve lengthy negotiations. As with the order under (b) intervention by the court is likely to be required in any event. Duplication of documents can also be a factor under an issue based order. Typically in construction cases, certain documents such as progress reports, programmes, payment applications etc will be relevant across many issues and will therefore be duplicated if disclosed issue by issue.
(d) an order that each party disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences;	Paragraph (d) imposes a duty that is more document inclusive than standard disclosure although reflects the way many parties actually in reality do standard disclosure. The words "*which it is reasonable to suppose may contain information"* is based on the train of enquiry test laid down in the Peruvian Guano, whereas standards disclosure requires disclosure of documents that are actually relied upon or (do actually) adversely affect either side's case. This order may be appropriate where cases contain such vast sources of information, such that the review process will be undertaken by running key word and date range searches across an electronic database. It requires each party to undertake a full review/search unlike the "key to the warehouse" type of disclosure (see below (f)). However, it appears that this option also opens the door for "fishing expeditions" to occur.

New CPR 31.5 paragraphs	Comment
(e) an order that a party give standard disclosure;	Standard disclosure remains an available option by virtue of paragraph (e). Inevitably some parties (and perhaps the judiciary) will prefer opting for what is tested and familiar in the early stages of a new regime.
(f) any other order in relation to disclosure that the court considers appropriate.	Paragraph (f) allows other appropriate orders. Jackson has commented on this provision saying a "key to the warehouse" order could be imposed under this paragraph. This is where privileged materials are removed and then each party is given access to the entirety of the opposing party's documents. Such an order is not an uncommon when dealing with disclosure for large cases in the TCC, especially where e-disclosure software is used to store and manage the documents. This approach will however incur significant data handling and storage costs and puts the onus and cost of undertaking the document review on the opponent.
(8) The court may at any point give directions as to how disclosure is to be given, and in particular— *(a) what searches are to be undertaken, of where, for what, in respect of which time periods and by whom and the extent of any search for electronically stored documents;* *(b) whether lists of documents are required;*	The powers given to the court in CPR 31.5(8) relate to the logistics of how disclosure will take place, and are again broad in nature. The provisions appear to have electronic disclosure in mind, and accordingly solicitors and judges will need to understand the electronic processes that are undertaken during e-disclosure. Paragraph (b) allows the court to consider if lists are required. Where e-disclosure software is used the need for manual list

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(c) how and when the disclosure statement is to be given; *(d) in what format documents are to be disclosed (and whether any identification is required);* *(e) what is required in relation to documents that once existed but no longer exist; and* *(f) whether disclosure shall take place in stages.*	creation is often negated by metadata. Similarly in a "key to the warehouse" type order the costs of producing a list are likely to be disproportionate. Use of the "traditional" disclosure list may therefore decline under the new rules, but could be replaced with orders for "Redfern" schedule. Disclosure in stages is also presented as an option. Although this in theory eases the burden of document review, it can also protract the proceedings. But again this gives scope to order disclosure in stages as is done in international arbitration with disclosure of documents that a party relies on, followed by Redferns schedules and further disclosure.
(9) To the extent that the documents to be disclosed are electronic, the provisions of Practice Direction 31B – Disclosure of Electronic Documents will apply in addition to paragraphs (3) to (8).	The Practice Direction 31B is noted to apply to this section. Parties are therefore still required to consider and use technology for disclosure in accordance with the overriding objective. This provision endorses the content of the Practice Direction, although Practice Director 316 and the EDC are not yet mandatory. In relation to actions encouraged to take place prior to the first CMC, it would appear so.