eDisclosure case notes

1. *Nichia Corporation v Argos Ltd*

[2007] EWCA Civ 741

FACTS

This case concerned an alleged patent infringement regarding white LEDs featuring in a chain of Christmas lights sold by Argos in 2005/2006. Nichia claimed the chains infringed two of its patents. One of the issues in patent cases is the *obviousness* of the invention, and the extent of disclosure that the inventor is required to give relating to this issue is often debated. There was a dispute as to the extent of disclosure and Pumfrey J (at first instance) refused Argos' application for Nichia to disclose documents about the making of its invention. Argos appealed Pumfrey J's first instance decision.

HELD

The Court of Appeal compared and contrasted older authorities on 19th century disclosure in patent cases and Jacob LJ held that *"standard disclosure no longer requires automatic wholesale disclosure of all the inventor's work."*

He specifically concentrated on the standard of disclosure generally (i.e. not simply confined to patent cases) and said that "perfect justice" is sacrificed for the more pragmatic "standard disclosure" and "reasonable search" rules (see paragraphs 49 to 52 of the judgment). Proportionality requires that the procedure to be adopted be tailored to the size of the dispute. Rix LJ (agreeing with Jacob LJ's analysis but reaching a different decision) held that what a reasonable search entails will *"depend inter alia on the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieval, and the significance of any document which is likely to be located during the search… A reasonable search should be tailor-made to the value and significance of the likely product of such a search. If the value of such "secondary evidence" is not likely to be high, then the reasonable search should be correspondingly limited."*

The Court of Appeal allowed Argos' appeal.

2. *Digicel (St Lucia) v Cable and Wireless*

[2008] EWHC 2522 (Ch) (23 October 2008)

FACTS

Digicel sued Cable and Wireless (C&W) because of the latter's delay in allowing Digicel to "interconnect" with its telecommunications networks in 7 Caribbean countries (an obligation for C&W following liberalisation of the telecoms market). Digicel claimed that C&W's failure to search a number of back-up tapes containing emails of former employees and C&W's use of only 10 key words as search terms did not constitute a "reasonable search" pursuant to CPR 31.7. C&W contended that it would be extremely difficult to restore the back-up tapes and that the costs of each step requested by Digicel would be disproportionate compared to the likelihood of finding relevant documents. C&W had already reviewed 197,000 documents for relevance and disclosed 5,212 documents (making up 83 lever arch files) at a cost of £2 million. Digicel disclosed 29,000 documents (making up 860 lever arch files), over half of which C&W said were made up of either irrelevant documents or duplicates. The test for assessing what constituted a "reasonable search" was debated.

HELD

Morgan J held that the decision as to what is a reasonable search rests, in the first instance, with the solicitor in charge of the disclosure exercise. However, if this is challenged the task of deciding what is required for "a reasonable search" is one given entirely to the court. The court might be favourably influenced by the diligence and conscientiousness of the solicitor, however it is not bound by the judicial review standard of irrationality or the standard of an appellate court reviewing the exercise of a discretion (i.e. only interfere where the solicitor exceeded the generous ambit within which a reasonable disagreement is possible). The court should take account of all the factors with the benefit of hindsight by examining the solicitor's decisions at an earlier time. Morgan J had in mind that disclosure is a continuing duty and the solicitor's mindset could change over time, which would force the court to consider several decisions taken at different stages.

The correct question is whether it was reasonable for the defendants to have carried out an extended search in the first place (as opposed to whether it is now reasonable to order them to carry out a second search). The court would usually order a second search in these circumstances, however it is possible the court will decide, on the facts, that a second search would be disproportionate to the benefit to be obtained. It will usually be wrong in principle to adopt the "leave no stone unturned" approach; one has to consider the proportionality of adding a keyword and form a view as to the possible benefit to the claimants and the possible burden to the defendants.

Morgan J ordered C&W to search its back-up tapes and add some more keywords to its searches.

3. *Abela and ors v Hammonds Suddards (a firm) and ors*

[2008] EWHC 3153 (Ch)

FACTS

Mr. Abela alleged that Hammonds Suddards were negligent, in breach of fiduciary duty and deceit regarding dealings with shares in a company called Gama, which had been acquired by one of the other claimants. The first, second and third defendants were Hammonds' various predecessor firms of solicitors (it had gone through a number of mergers during the relevant period). Mr. Abela and the other claimants (originally largely owned by Mr. Abela) had retained Hammonds since 1999.

The partner (and later consultant) in charge of Mr. Abela's matters was Mr Haan, who died in 2007. The remaining defendants were his personal representatives.

The claimants applied for further information and disclosure from the defendants and sought an affidavit in respect of Mr. Haan's personal computer, a list identifying each individual document contained in the files listed in the current disclosure list and a supplemental list for Hammonds' emails and electronic documents.

HELD

The judge, Paul Girolami QC, ordered the fifth defendant to produce a witness statement explaining, among other matters, what had been done to a personal computer before it was destroyed and the manner in which it was destroyed, despite the fact he made it clear that he did not think there was anything suspicious about its destruction.

Mr. Abela's application for the defendants to itemise all of the documents contained in files which they had included on their list of documents was rejected. The judge was doubtful whether it was part of the purpose of the disclosure requirements under CPR 31 to enable one party to obtain some insight into another party's thinking as to the documents upon which he wished to rely or which he considered adversely affected his case or supported another party's case. Anyway, he could not see how itemised listing could serve that purpose, since it did not have to be done by reference to each of the sub-paragraphs (a) to (c) in CPR 31.6.

The judge said he was minded to order some form of electronic search and he invited the parties to consider and discuss the position further, with appropriate IT assistance on both sides. He said he would want to have such assistance from the parties as would enable him to make his decisions in this regard at a further hearing. The judge emphasised that it was important that parties avoided overstating any difficulties which they may face in processing the data and to provide clear and specific evidence of the challenges of carrying out a search for electronic documents.

4. *Earles v Barclays Bank Plc*

[2009] EWHC 2500 (Mercantile) (8 October 2009)

FACTS

Mr. Earles sold beauty products and aimed to develop premises for a beauty salon. Mr. Earles took out a number of loans from Barclays for capital expenditure on the business. The company went into administration and Mr. Earles alleged that unauthorised transfers of his monies into the company account had occurred, which it sought to recover from Barclays as well as consequential loss and damage. Barclays claimed Mr. Earles had given oral authorisation over the telephone. Mr. Earles represented himself in the matter (with assistance from a small law firm for trial). Disclosure was clearly key to the factual issues in dispute, but neither party made a sufficient attempt to preserve contemporaneous electronic records.

HELD

The judge, His Honour Simon Brown QC, held that there was no duty to preserve documentation prior to the commencement of proceedings, however after the commencement of proceedings, the position is radically different. Solicitors owe a duty to the court, as officers of the court, to make sure as far as possible that no relevant documents have been omitted from their client's list. Non-preservation of documents ("spoliation") results in the risk of adverse inferences being drawn against the defaulting party. The court noted that where there is a deliberate void of evidence, this negativity can be used as a weapon in adversarial litigation to fill the evidential gap and establish a positive case. However, because it was not suggested that Barclays or Mr. Earles deliberately engaged in spoliation of the evidence the court did not draw any adverse inferences on that point (even though the bank was better placed to preserve evidence because of its technological processes, sophistication and use of in-house and external counsel). There was no procedural duty to take account of non-disclosure of electronic data in the disclosure statement. However the judge said that it could be taken into account in dealing with costs, which is precisely what he did.

The court held that the transactions Barclays made had been orally authorised by Mr. Earles. Therefore, in usual circumstances, Barclays would be entitled to its costs. However, the court reduced Barclays' costs significantly to reflect its significant failures concerning its e-disclosure obligations. The judge said that it was "gross incompetence" for those practicing in the civil courts to not know the rules.

5. *Vector Investments v J D Williams*

[2009] EWHC 3601 (TCC) Ramsey J (November 2009)

FACTS

Vector was a developer which redeveloped Victoria Station in Manchester. Part of this redevelopment included construction of a call centre. J D Williams (a catalogue and internet retailer) agreed to lease the call centre. Works were needed and Vector agreed to bear the costs of the landlord's works and J D Willaims the costs of the fit-out. A dispute arose as to liability for delays which occurred and sums owed to a contractor and Vector sued J D Williams for £6 million. The proceedings were settled shortly before trial for £750,000 plus VAT (excluding costs).

In a hearing to determine costs, J D Williams claimed wasted costs for dealing with Vector's disclosure, and argued that Vector should be deprived of the costs it claimed for that exercise.

HELD

The judge, Ramsey J, noted the vice in disclosing a mass of background documents which do not take the case one way or the other. Vector's solicitors disclosed complete files on a relevance test, but these files contained irrelevant and duplicated documents and there were problems with the way they were organised. If major problems arise on inspection, parties should apply to the court so that issues are dealt with at the time instead of dealing with them in lengthy correspondence. CPR 31.9 deals with what copy documents should be disclosed but consideration had not been given to that rule.

Vector's approach led to unnecessary costs by the defendant in carrying out the inspection. The judge was influenced by the fact that the trial bundle contained 70 bundles compared to over 800 produced by Vector, which indicated that a significant number of irrelevant documents/documents not necessary for standard disclosure were included. The judge estimated that Vector should pay J D Williams £20,000 in respect of the additional costs. The judge assessed a lower figure because some of the difficulties would have been avoided if meetings had been held (which Vector had requested), or an application made to the court. Vector's costs of disclosure were lower because they did not carry out the work of excluding unnecessary documents, therefore no reduction to the claimant's costs needed to be made.

6. *Al-Sweady & Ors, R (on the application of) v Secretary of State for Defence*

[2009] EWHC 2387 (Admin)

FACTS

This was a judicial review judgment on a number of procedural issues arising out of the question of whether members of the British Army killed or ill-treated Iraqis whom they had taken prisoner after a battle in Iraq in May 2004. The claimant alleged that a number of Iraqis were killed, tortured, ill-treated or unlawfully detained following the battle and sought an adequate and independent investigation.

HELD

The Court of Appeal found that the Secretary of State failed to disclose many relevant documents prior to the commencement of the hearing, which meant that the hearing could not be concluded within the original timeframe. Due to the unusual nature of the case, the court held that cross-examination should be allowed, and accordingly disclosure was needed to enable effective and proper cross-examination (contrary to the conventional approach in judicial review cases).

The duty of disclosure is heightened in cases where important and basic rights under the ECHR are involved. The claimants were forced to make a number of requests for disclosure to the Secretary of State and having provided a witness statement explaining that a proper search for relevant material had been made and that the search had included the communications in question, the Secretary later asserted that due to the sheer volume of material and technical difficulties, it would be impractical and disproportionate to conduct broad-based searches. The court concluded that the Secretary's agents had failed, for no good reason, to carry out critically important and obviously highly relevant searches, which was a serious breach of their duty to give proper disclosure. This resulted in a further stay and an interim costs order being made against the Secretary assessed at £1 million (against an itemised bill in excess of £2 million) for the *"lamentable disclosure failures".*

7. *Gavin Goodale & Ors v The Ministry of Justice & Ors (Opiate Dependant Prisoners Group Litigation)* [2009] EWHC 2387 (Admin)

FACTS

The claimants were all prisoners addicted to some form of opiate at the time of their imprisonment. They alleged that the Ministry's policy of subjecting them to a one-size-fits-all detoxification regime resulted in unnecessary pain and suffering and, in one case, death.

HELD

The judge, Senior Master Whittaker, held that standard disclosure was appropriate in this case, but that this did not mean that the extent of the search was open. It was held that the court should use its case management powers to make disclosure proportionate to the issues at stake. This can be done initially in relation to categories of document relevant to the issues and in relation to key custodians of those documents and within a sensible date range outside of which it will be unlikely that relevant documents will be found. There is no legal difference in the disclosure test to be applied to electronic versus paper documents, however the costs of a search of electronic documents is likely to be much higher unless sensible provisions for management of the disclosure are put in place; a staged approach is required. The court refused to order reconstruction and disclosure of back-up tapes at this stage, however a limited amount of electronic disclosure (not just paper based) had to be undertaken (in the least expensive and most proportionate way possible).

There was a proposal for 31 key search terms to be used. It was proposed that these terms should be used across the system in a simple or crude way to get a potential figure for the number of documents involved. Only then (if the numbers were within reason) should a service provider be agreed between the parties and instructed to look at what the next stage of the exercise should involve and how much it would cost. The judge also ordered the parties to complete the e-disclosure questionnaire (which was in draft at the time).

8. *Rybak & Ors v Langbar International Ltd*

[2010] EWHC 2015 (Ch) (9 July 2010)

FACTS

This case concerned a settlement agreement reached under previous proceedings between the parties concerning the potential sale of a property in Monaco. The terms of the settlement agreement were disputed and were the subject of this dispute. There were a number of issues before the court, including whether Rybak was in breach of an unless order and, if so, the consequences of that breach. Rybak's compliance with its disclosure obligations was one of the issues the court considered in reaching its decision.

HELD

The judge, Morgan J, said that it was clear that Rybak had withheld documents until the last minute or until they could no longer resist the handing over of those documents to be used as material against them. Morgan J interpreted one of the court's orders to mean that it covered data contained on the computer after the date of the order. He said that the alternative interpretation of the order - that Rybak was free to destroy data following the date of the order - was an astonishing one.

The court found that Rybak had used a Secure Erase function on one of the computers which effectively prevented deleted files from being recovered by overwriting them. Rybak contended that when the software was run, there were no deleted files, therefore there was no destruction of data. The judge found this wholly improbable. Rybak also used CleanMyMac software prior to the date of the order and so any relevant files would already have been overwritten. However, the judge found, on expert evidence, that CleanMyMac deletes and overwrites active files, whereas Secure Erase only overwrites *deleted* files. Therefore any files overwritten by Secure Erase after the date of the order would have been different to any files which might have been deleted and overwritten by CleanMyMac prior to the date of the order. The judge said that "You cannot destroy data twice."

The judge also found (based on expert evidence) that the function of the Secure Erase software was to delete files and make them irretrievable - it did not serve to improve computer performance, nor did the claimant genuinely believe it to (the judge found the claimant was not a credible witness on the whole).

As a result, the court found a deliberate and grievous destruction of electronic data in breach of the court order, the consequence of which was that the claim and defence to counterclaim were struck out. The judge concluded that *"The court will not assist a litigant in destroying data and will not assist a litigant to fight a case on the limited material that that litigant chooses to make available, suppressing other material which would be material to the decision of the court."*

9. *West African Gas Pipeline Company Limited v Willbros Global Holdings Inc*

[2012] EWHC 396 (TCC) (27 February 2012)

FACTS

The defendant acted as guarantor for a contractor engaged by West African Gas for on-shore work on a gas pipeline in West Africa. West African Gas terminated its contract with the contractor and used alternative contractors to complete the works at a cost of $273 million and claimed the guarantee from the defendant.

Willbros' solicitors raised a number of concerns with West African Gas' disclosure and made an application seeking to change the order as to costs.

HELD

The judge, Ramsey J, found that West African Gas' disclosure in the litigation had caused a number of additional problems, the errors resulting in a waste of time and costs.

Generally, only in cases where there has been mistake or error resulting in significant time and cost consequences will the court make an order for wasted costs. The judge found this to be justified in relation to three of the problems: serious failure to de-duplicate documents (which, while complex, can be achieved with appropriate software); failure to 'harvest' a consistent and complete set of electronic data resulting in an inadequate initial review; and failure to review documents which were located in the searches of the electronic database.

The judge ordered that 80% of Willbros' costs should be borne by West African Gas in relation to the first two relevant failures, and 50% in relation to the third.

10. *Phaestos and another v Ho*

[2012] EWHC 1996 (TCC)

FACTS

This case concerned a substantial claim against the defendant, Ho, for alleged negligence arising out of its appointment to provide services to a hedge fund. The case involved complex computer engineering and management issues and covered a period of about 14 or more years. Phaestos applied for an extension to the deadline for disclosure including extensive electronic disclosure. The court granted a short extension to the disclosure deadline but was extremely critical of Phaestos' approach to e-disclosure.

HELD

The judge, Akenhead J, made it clear that the overwhelming burden of disclosure fell on the claimants. He ordered the parties to agree the scope of the disclosure exercise and said that disclosure was to take place in stages.

The parties were unable to agree the scope and mechanics of the disclosure exercise, and further court hearings were required. At the second hearing, Akenhead J ordered indemnity costs against Phaestos on the basis that they had already had more than enough time to deal with matters relating to disclosure. Phaestos later made an application to extend the time for disclosure, however Akenhead J ordered that it must complete its electronic disclosure two weeks sooner and that if disclosure had not been completed by that date, then its claims would be struck out and judgment entered for the full amount of the defendant's counterclaims.

Akenhead J stressed that parties to litigation must be aware that they are bound by the overriding objective and the courts are "seriously hindered" in dealing with cases justly unless the parties act in a way that enables them to do so. Phaestos should have been considering the scope and mechanics of electronic disclosure at an early stage and there was nothing to suggest that the disclosure exercise actually embarked upon was significantly or unforeseeably greater than could have been anticipated. The number of documents to be reviewed (350,000) was "not exceptional". Despite having been provided with Ho's proposals for disclosure and having been ordered to cooperate in agreeing the scope of the disclosure exercise, Phaestos made *"little or no effective preparation"* for e-disclosure. There appeared to be a total lack of urgency on the claimants' part in releasing documents to their document management consultants and agreeing to subsequently release documents to the lawyers for review. The deployment of a team of 20 document reviewers (subsequently increased to 35) suggested an underestimate of the size of the review exercise but this did not appear to be the fault of Phaestos' lawyers as it is unclear what, if anything, they were advised by Phaestos as to the likely scope of the review exercise. It seemed probable that Phaestos had been vetting its own documentation before releasing it to the consultants, who then had to upload, process and de-duplicate the documents before releasing them to the lawyers for review. This was an "avoidably slow" process which must have been capable of being speeded up.

11. *Elliot Group v GECC UK*

[2010] EWHC 409 (TCC)

FACTS

This was an application for adjournment of a trial relating to breach of warranties following the collapse of a number of portable modular units which the defendant, GECC UK, sold to the claimant, Elliot Group. The sum claimed was in the region of £12 million. One of Elliot Group's reasons for seeking the adjournment was the unexpected amount of electronic disclosure.

HELD

The judge, Coulson J, refused the application. He held that it would require a *"very strong case"* for a trial to be adjourned simply because a party's disclosure exercise was more extensive than originally contemplated. The court noted that the claimants were aware that preparing disclosure was going to be an extensive exercise, even if they underestimated the volume of documents to be processed. Disclosure is a resource-driven process and any delays can be ameliorated by the devotion of greater resources to the task.

In a comment specific to construction cases, the court stated that, unlike allegations about delay or repudiation, *"disputes about defects do not often require any detailed consideration of contemporaneous evidence, whether written or oral, because the process by which the defective design or construction was achieved usually does not matter at all to either side."*

12. *Wyche v Careforce Group plc*

Queen's Bench Division (Commercial Court), 25 July 2013 (unreported)

FACTS

Careforce had failed to comply with an unless order regarding e-disclosure. Although Careforce later attempted to comply with that order, it admitted that it had failed to fully comply with its e-disclosure obligations, which had been carried out through a consultant. Its breaches of the order were twofold:

1. The misuse of disjunctive rather than conjunctive keyword searches, which meant that it had disclosed some irrelevant documents;

2. A failure to perform one of the ordered electronic searches, which meant that 24 documents had been omitted and a further 65 had been miscategorised as privileged.

Careforce corrected these errors after they were brought to its attention, albeit that this caused some delay. Wyche claimed that those and several other errors constituted material breaches of the order and submitted that Careforce had failed to give proper consideration to its disclosure obligations. Careforce applied for relief from sanctions under CPR 3.9(1) citing inadvertent human error. Wyche sought to strike out Careforce's defence on the basis of non-compliance with the order. It argued that whether the mistakes were inadvertent or deliberate was irrelevant.

HELD

The court granted Careforce's application for relief, holding that although the combination of delay and non-compliance was unacceptable, that did not mean that the court would make no allowance for human error (see *Fred Perry (Holdings) Ltd v Brands Plaza Trading Ltd (t/a Brands Plaza)* [2012] EWCA Civ 224, [2012] 6 Costs L.R. 1007). The fact that the errors were inadvertent, had been remedied relatively quickly, and did not affect trial date, were clearly important factors in the judge's decision to grant relief.

Although the case report and official transcript were not available at the time of writing, the limited information available about this judgment suggests that the court acknowledged that e-disclosure is often a difficult and complex task and would not simply apply the rules as if it were a martinet/automaton.