Disclosure in Contract Proceedings: The Combined Effect of CPR R31.6 and the Common Law in Cases of Written Contracts

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Disclosure is a crucial stage in every case. Everyone involved in litigation can recall a time when they have uncovered the 'smoking gun' which has defined a case. The test for disclosure has been widely understood to be one of 'relevance' but is it being applied more on assumption than on a proper understanding of the CPR?

The test for disclosure in civil proceedings is governed by CPR r31.6 which reads:

31.6 Standard disclosure requires a party to disclose only–

(a) the documents on which he relies; and

(b) the documents which –

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction.

The test is colloquially, and perhaps inaccurately, referred to as the 'relevance' test. Whilst it is true that there is a general concept of relevance which veils CPR r31.6, it is one of summarised inference as opposed to an explicit rule of procedure. This much was made clear in the recent case of *Shah & Another v HSBC Private Bank (UK) Ltd*[1].

In *Shah* what was 'relevant', according to the Claimant, was the disclosure of the names of the Defendants' employees who had been responsible for disclosing transaction details (involving the Claimant) pursuant to the Bank's anti-money laundering procedures which they were required to ensure compliance with under the Proceeds of Crime Act 2002. The Defendants' view was that the actual names were irrelevant and accordingly had redacted out the employees' names in documents which they had disclosed under r31.6.

In deciding the matter, the Court of Appeal, through a leading judgment of Lord Justice Lewison, stated:

> *"While it may be convenient to use "relevant" as a shorthand for documents that must be disclosed, in cases of dispute it is important to stick with the carefully chosen wording of the rule."*[2]

[1] [2011] EWCA Civ 1154
[2] Para 25

CPR r31.6 lists the categories which can render a document disclosable in civil proceedings. The test seems, at first blush, to be relatively straightforward in application in that assessing the status of a document under it essentially involves a general assessment within the context of the pleadings in a case and the parties respective positions.

Whilst that all seems straightforward enough, it is in fact easy to be lulled into a false sense of security when assessing material to be disclosed. This comes from persistent focus on the general feeling of 'relevance' as opposed to heeding to the Court of Appeals plea to focus on the actual wording of r31.6 and particularly, it is submitted, on the word "case". None more so is this false sense of security evident than in proceedings for breach of contract where the contract terms have been committed into writing.

CPR r31.6 uses the word "case" three times. Whilst this must refer to the pleaded case of a party, it is only one limb of the meaning. What CPR r31.6 does not say, but which must undoubtedly be included, is that in addition to the contextual positions stated in the parties pleadings, the actual legal principles which underpin the action need to be considered as well - this is the second limb of the reference to the word "case".

Taking contract proceedings as an example where the dispute is one of interpretation of a particular term of a written contract in which the Claimant alleges interpretation A and consequently breach of the said term, and the Defendant is alleging interpretation B and therefore denying the alleged breach. In these circumstances, one could be forgiven for applying the so-called 'relevance' test and in so doing classifying pre-contractual documents which provide for the genesis of the disputed terms wording as being disclosable.

However, this is not the correct course of action. In a recent extra-judicial speech Lord Neuberger made a valuable summary of the courts approach in disputes as to contractual interpretation[3]. In his speech he stated:

> *"In English law, the following cannot be taken into account when interpreting a contract: (i) what either party says that they meant, (ii) what either party believe that they intended; (iii) facts known to one party but not to the other; (iv) what was stated in negotiations, including earlier drafts of the contract; (v) what the parties did or said after the contract was entered into."*[4]

This passage, and the case law from which it stems, is an example of the legal context which represents the second limb of the word 'case' in r31.6 and it is a clear example of where the so-called 'relevance test', if literally followed, could lead to documents being disclosed which are actually not disclosable under a strict and literal application of the test. It may well seem relevant to disclose documents which reflect the genesis of a particular term now in dispute - it is arguable that they are 'relevant' in that they go to the parties' respective understandings of what the term meant. But as Lord Neuberger made clear above, such documents do not actually form a part of a "case" for actions based on contractual interpretation since they fall within category (iv):

[3] 'The Impact of pre- and post-contractual conduct on contractual interpretation' at Banking Services and Finance Law Association Conference, Queenstown, 11th August 2014
[4] Ibid para 5

> *"…there are good practical reasons for not allowing into evidence, when interpreting a written contract, the pre-contractual negotiations, the subsequent acts and statements of the parties (as well as evidence from the parties as to what they intended). In a nutshell, those reasons are four fold. First, it is more trouble than it is worth to admit these matters into evidence – the game's not worth the candle. Secondly, they will distract from the centrally important matter of the words the parties have used. Thirdly, there are third party interests to consider…Fourthly, is a judge a reliable assessor of commercial common sense?"*

When interpreting written contractual terms the court is applying an objective standard. As Lord Clarke stated in *Rainy Sky SA v Kookmin Bank*[5]:

> *"…determining what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant…"*[6]

The 'relevance' test in this instance is therefore a red herring for litigants and can lead down a dangerous path of unnecessary and superfluous disclosure which increases costs, may well cause consequential fishing expeditions and, most importantly, may compromise a party's commercial position.

Disclosure in contract proceedings involving interpretation of a written term is therefore a delicate process and one which should not be underestimated but carefully and rationally considered even more so than in other proceedings. Actions based on contractual interpretation effectively have their own common law rules of disclosure as Lord Neuberger has identified above. The focus of the court is on what the parties actually agreed upon and the steps by which the parties got to that agreement are not to be considered.

It should be noted of course that in different circumstances (i.e. where the contractual term is oral, or where the claim is one for rectification) these rules of common law disclosure do not apply and pre-contractual material may well be disclosable. But in cases where these rules do apply (i.e. written contracts), litigants need to be cautious as to how they proceed in the disclosure stage.

The chief warning here is not due to concern about legal principles being correctly applied. In the context of the legal proceedings the significance of disclosing pre-contractual documents may well not be too much of a risk given that the court would probably disregard them in due course, but there is a commercial risk to consider which clients will rightly be concerned about.

This is particularly true in circumstances where the parties have been involved in a prolonged relationship or are contractual parties in separate, concurrent contracts. The classic example is where one party, A, had been tendering with other parties prior to deciding to contract with B, and in so doing had discussed terms and conditions including the term in dispute - if B were to find out about this then it could lead to significant commercial

[5] [2011] 1 WLR 2900
[6] Ibid para 14

ramifications for A, not least because it creates an atmosphere of distrust between the parties which could impinge on other contracts or the way the parties do business together in the future.

The point to be taken therefore is that CPR r31.6 is wider in ambit than just 'relevance' to the particular parties arguments, it has to take into account the legal principles engaged with the particular action being brought insofar as such principles relate to disclosure - it is all of these points which represent a parties "case" for the purposes of the rule. In cases where there is a written contract and interpretation of a term is in issue, parties need to also factor in the commercial context which may also be affected by unnecessary disclosure. It is of course necessary to be thorough in order to fulfil one's duty under CPR r31.6, but everything is relative to the legal and commercial backdrop of a case and careful consideration needs to be had to both of these factors before material is disclosed. Against this background, each piece of material needs to be assessed on its own merits and proper instructions and advice taken. The standard 'relevance' test should not, therefore, be blindly followed.

Finally, a further point needs to be made with regards to costs. A proper and construction and understanding of CPR r31.6 as argued for herein will inevitably be useful when assessing the costs of the other side, particularly in cases concerning the interpretation of a written term of a contract. For example, in such a case, because the focus of the court is on the actual wording of the term and what it means objectively, without any reference to the pre- or post-contractual negotiations or actions of the parties, litigators should not be submitting large numbers of hours for document analysis in the disclosure section of their Precedent H or final costs schedule. This point should be taken at the costs and case management stage of the proceedings where on the multi-track and should most certainly be a point to focus on in written submissions for the purposes of detailed assessment.

Of course this is not to say that there is never going to be the need for a solicitor to examine some documentation in such cases, it will obviously depend on the particular case, but nonetheless it is something to look out for as it may well save the client some costs in the long-run. This is a further example of where the relevance test would inadequately deal with such matters and could lead to erroneous outcomes and why a proper understanding of rule 31.6 should be adopted.

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