

## **DISCOVERY**

### **Putting Cards on the Table**

“Discovery” and “inspection” are an integral part of the way litigation is conducted in England and Wales. The purpose is to ensure that parties put their cards “face up” on the table in order to do justice. This will be required even if it means providing the opponent with the means of defeating the claim.

The pre-action protocols laid down in the Civil Procedure Rules typically require that parties who are about to commence litigation to share certain information. There is no general obligation to show an opponent the contents of documents and in particular documents which are adverse to one's position prior to the commencement of litigation. A document will include any information that is recorded so that it would include written documents, audio tapes, video tapes and computer based material.

Once litigation commences, (by issue of a claim form), the Civil Procedure Rules involve the Court/Court offices in case management. As part of this process, the Court will make usually a standard order for disclosure of documents. This ensures that parties are not taken by surprise at trial and that settlements are promoted thereby saving costs. There are however, restrictions on the documentation that must be disclosed.

### **Standard Disclosure Order**

The standard order requires disclosure of the documents upon which the claimant relies and also documents which are adverse to his own case, adverse to a third party's case or support another parties case. This duty of disclosure applies to documents which are or have been in the party's possession.

Disclosure requires that the party must disclose the documentation concerned (save for limited exceptions) and must make it available for inspection to his opponent. The parties have to reveal to each other any documents which have a bearing on the case.

In order to comply with the standard disclosure obligations, a party must make reasonable searches for all documents which could reasonably affect his own case or the other party's case or would support the other party's case. What is reasonable, will depend on the amount of documentation, the complexity of the proceedings, the ease of retrieval and the significance of the documents. If the party has limited his search, he must disclose this.

Where the standard disclosure order has been made, each party must make and exchange a list of documents in the prescribed format. The list sets out documents within the party's control for which he does not object to inspection, the documents which the party has control over but in respect of which he objects to inspection and the documents which are no longer in his control. In this last case, their absence must be explained.

There is a duty for a party to comply fully and honestly with the requirements of disclosure. This matter is taken very seriously and each party must fully certify that he has carried out the necessary searches for information. The obligations of disclosure are continuous until the proceedings are concluded. If documents are obtained or arise for the first time after disclosure is made, they must be immediately notified to the other person. Where a document has been disclosed, the other party has a right to inspect it unless it is no longer in the control of the party disclosing it.

Inspection can be withheld on certain limited grounds. One ground is "legal professional privilege". This would cover documentation between parties and their legal advisers for the purpose of obtaining legal advice. It also covers correspondence between the solicitor and third party in the context of litigation such as correspondence with witnesses and experts etc. It could also apply to communications between the claimant and a third party, the main purpose of which was to obtain legal advice or take other steps in contemplation of litigation.

### **Other aspects of Disclosure**

If a party is dissatisfied with the disclosure made by the other party under a standard disclosure and believes it is inadequate, he can make an interim application to court for specific disclosure. Generally, a voluntary disclosure must be sought before making a specific application. The Court makes such order as is necessary to ensure that the disclosure obligations are properly complied with.

It is possible to obtain disclosure before commencement of litigation. This is available where a party is unsure whether he has a good case against another party and does not know whether to issue proceedings. A court application will be required.

It is also possible when proceedings are in existence to apply for disclosure against a third party not involved in the litigation. A specific application must be made to court, supported by evidence. A Court will only allow this where the documents in question are likely to support the applicant's case or adversely affect the other party's case.

The Court Order will specify the documents or class of documents which the third party is required to disclose and require the third party to specify which documents he controls and does not disclose. It may order a time and place for disclosure and inspection and require the non-party to indicate what has happened to the documentation no longer available. This would commonly arise where documents were formerly in the control of one party but are now no longer held.

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This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.