

# TOOLS FOR OBTAINING EVIDENCE IN THE ENGLISH COURTS

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**(1) Disclosure of Documents**

**(2) Witness (and expert) evidence**

**(3) Interim orders for *inter alia* Search Orders and Preservation of Evidence.**

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## **I. DISCLOSURE OF DOCUMENTS (Civil Procedure Rules – Part 31)**

### **A. What is disclosure?**

- Disclosure means formally stating that documents or classes of documents exist or have existed (*r.31.2*).
- Your opponent, subject to some very important exceptions, has the right to inspect and/or take copies of disclosed documents.
- A "document" includes all media on which information is recorded - it includes electronic information.
- All parties to civil proceedings in England and Wales must give disclosure, subject to some very narrow exceptions.
- Parties must provide a list of documents, divided into three sections, namely:
  - inspection permitted,
  - inspection withheld,
  - inspection impossible - documents no longer in the party's control.
- The list of documents must also contain a "disclosure statement". The disclosure statement must:
  - set out the extent of the search for documents;
  - confirm that the client understands his disclosure obligations; and
  - confirm that the client has complied with his disclosure obligations.
- Inspection of the opponent's documents usually takes place by way of exchange of copy documents.

### **C. What should be disclosed?**

- Standard Disclosure (*r. 31.6*): In fast track claims and multi-track claims, the parties will usually be required to give “standard disclosure”. This means disclosure of documents which assist or harm the case of any of the parties to the dispute:
  - Documents upon which a party relies;
  - Documents which adversely affect their own case, or adversely affect another’s case or which support another party’s case;
- Documents subject to legal professional privilege should be identified in the disclosure list, but clearly state party has the right to withhold inspection of it (*r. 31.3(b)*)
  - Legal professional privilege (*R v. Derby Magistrates’ Court Ex p. B [1996] A.C. 487*)
  - Public policy considerations
  - Without prejudice correspondence

### **D. General Principles:**

- The parties must carry out a reasonable search for documents, bearing in mind all of the circumstances of the case, the value of the dispute and the overriding objective of dealing with cases justly (*r. 31.7*).
- The obligation is to search for, and disclose, documents currently or formerly in a party’s control (*r. 31.8*):
  - Physical possession.
  - The right to obtain a document from another party.
  - The right to inspect or take copies of a document in the hands of another party.
- The duty of disclosure continues until judgment or settlement (*r.31.11*)
- Factors which are relevant to the reasonableness of a search include the (*r. 31.7.2*):
  - Number of documents involved.
  - Nature and complexity of the proceedings.
  - Ease and expense of retrieval of any particular document.
  - Significance of any document which is likely to be located during the search....

### **E. When does disclosure occur?**

- The Court will order when disclosure will take place, or the parties will agree. The Court has discretion over the timing, nature and extent of disclosure.
- Disclosure is not automatic. It will take place when an order for disclosure has been made. This is usually at the first Case Management Conference (CMC)
- Disclosure will usually take place after statements of case have been served.
- Specific Disclosure – at any stage after proceedings start, under *CPR 31.12* the court may order a party which has given inadequate disclosure to:

- Disclose additional documents or classes of documents.
- Carry out a search for additional specified documents, and disclose any documents located as a result of that search.
- Disclosure before commencement of proceedings (“*pre-action disclosure*”): A party may consider applying for an order for pre-action disclosure under *CPR 31.16*, where:
  - There are documents within the control of a person who is likely to become a party to proceedings
  - If proceedings had started the documents would fall within the ambit of standard disclosure
  - Disclosure of those documents before proceedings have started is desirable in order to:
    - dispose fairly of the anticipated proceedings;
    - assist the resolution of the dispute without proceedings; or
    - save costs.

#### **F. Who must give disclosure?**

- Parties to the litigation
- 3rd parties (*r. 31.17*):
  - An application may be made to the Court for an order for disclosure against a 3<sup>rd</sup> party under *CPR 31.17*.
  - The court **may** make an order for disclosure by a **non-party** (see *CPR 31.17(3)*). Do not forget that, even if the jurisdictional tests in *CPR 31.17* are satisfied, the court has a discretion whether or not to grant the order.
  - A non-party disclosure order may be made where the documents of which disclosure is sought are **likely** to:
    - Support the case of the applicant, or:
    - Adversely affect the case of one of the other parties to the proceedings; **and**
    - Disclosure is **necessary** in order to:
      - Dispose fairly of the claim, or
      - Save costs.

### III. WITNESS EVIDENCE (Civil Procedure Rules Parts 32 and 34)

- General Rule (CPR 32.2):
  - (1) .... any fact which needs to be proved by the evidence of witnesses is to be proved –
    - (a) At trial, by their oral evidence given in public; and
    - (b) at any other hearing, by their evidence in writing.
  - (2) This is subject –
    - (a) to any provision to the contrary contained in these Rules or elsewhere;
    - or
    - (b) to any order of the Court.
  
- Rule – oral evidence at trial; written statement before trial.
- The function of the witness statement is to set out in writing the evidence in chief of the witness.
- Usually, the statement stands as evidence in chief (CPR 32.5(2)).
- Actual oral evidence from the witness will generally be limited to the replies given under cross-examination by the opposing party at trial.
  
- As to substance, the witness statements should cover all of the facts which must be proved at the interlocutory hearing or at trial.
- Each paragraph should contain one or more statements of fact within the first-hand knowledge of the witness, usually set out in the chronological order of the matters or events dealt with.
- The witness will not be able to give evidence in court about matters not referred to in his or her statement without permission of the court. The court will not give permission unless there is a good reason why the evidence was not dealt with in the statement (CPR 32.5(3) and (4)).
  
- Witnesses of fact are not permitted to give opinion evidence.
- The witness statement must be fully understood by, and in the words used by, the witness. Beware of any drafting which takes that ownership away from the witness!

#### Depositions

- CPR 34.8 allows any party to apply for an order for a person to be examined before the trial. Where allowed, the evidence obtained from that person is referred to as a deposition.
- The primary purpose is to obtain evidence from a witness whom it would be impossible to bring to the trial (*Barratt v Shaw and Ashton* [2001] EWCA Civ 137).

- Depositions are the Exception, not the Rule.
- The court has a discretion and there is no general rule as to when it should be exercised. The starting point is always the overriding objective of enabling the court to deal with cases justly and at proportionate cost. Note that depositions are not for the purpose of obtaining pre-trial discovery – a Court will not allow a fishing expedition.
- The order will provide for examination before a judge, or an examiner of the court. It must be conducted in the same way as if the witness were giving evidence in court, and will therefore normally include cross examination. The deposition may then be given in evidence at the trial.
- Where the witness is in a foreign country, CPR 34.13 provides for the court to issue a letter of request to the judicial authority of the foreign country to arrange for the examination. However if the foreign government allows, the English court may appoint an examiner to take the evidence in the foreign country. The examiner may be the judge who is hearing the case in England (*Peer International Corp v Taermidor Music Publishers Limited (No 3)* [2005] EWHC 1048 (Ch)).

#### **IV. INTERIM ORDERS (Civil Procedure Rules Part 25)**

##### **A. CPR 25.1:**

(1) The court may grant the following interim remedies—

- (a) an interim injunction<sup>(GL)</sup>;
- (b) an interim declaration;
- (c) an order—**
  - (i) for the detention, custody or preservation of relevant property;**
  - (ii) for the inspection of relevant property;**
  - (iii) for the taking of a sample of relevant property;**
  - (iv) for the carrying out of an experiment on or with relevant property;**
  - (v) ...**
  - (vi) ...**
- (d) an order authorising a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under subparagraph (c);
- (e) ...
- (f) ...
- (g) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction<sup>(GL)</sup>;

- (h) an order (referred to as a 'search order') under section 7 of the Civil Procedure Act 1997<sup>2</sup>(order requiring a party to admit another party to premises for the purpose of preserving evidence etc.);
- (i) an order under section 33 of the Supreme Court Act 1981<sup>3</sup> or section 52 of the County Courts Act 1984<sup>4</sup> (order for disclosure of documents or inspection of property before a claim has been made),
- (j) an order under section 34 of the Supreme Court Act 1981<sup>5</sup> or section 53 of the County Courts Act 1984<sup>6</sup> (order in certain proceedings for disclosure of documents or inspection of property against a non-party)

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(2) In paragraph (1)(c) and (g), 'relevant property' means property (including land) which is the subject of a claim or as to which any question may arise on a claim.

#### **B. Search orders and other orders for the preservation of evidence:**

- While *CPR 25.1* allows the court to grant orders or injunctions for the inspection, or preservation, of property, any order must be "both necessary and proportionate", consistent with the overriding objective (*M3 Property Ltd v Zedhomes Ltd [2012] EWHC 780 (TCC)* and *Patel v Unite [2012] EWHC 92 (QB)*).
- The question for the Court in deciding to grant an order is whether the order sought is necessary and proportionate having regard to the pleaded causes of action and the relief claimed.
- Where an application is granted, the court should usually require confidentiality undertakings from the person given access.
- Orders under *CPR 25 (1)* are not intended to be a way of obtaining evidence (as opposed to preserving it) or enforcing a party's obligations to give standard disclosure.