

Disclosure Now
Stephen Chessher and Nick Gillies, July 2007

Fancy being cross-examined about disclosure?

That happened to the claimant's solicitor in *Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup and Partners* [2007] EWHC 918 (TCC). And in a subsequent costs judgment (unreported), the defendant was awarded indemnity costs for disclosure. If ever there was a lesson in the importance of complying with disclosure obligations, this is it.

Mirant was a claim for delay costs for late completion of a power station in the Philippines. The project documentation was voluminous. Disclosure issues featured prominently in the trial and were dealt with at length in the judgment. *Mirant* used two firms of lawyers: its usual Australian solicitors, Mallesons, and an English firm as solicitors on the record. Disclosure was conducted by the Australian firm. *Mirant* was ordered to provide various disclosure affidavits but such were the judge's concerns that he asked the solicitor with conduct of the matter to give oral evidence. The judge found his evidence '*far from convincing*'.

The court was invited by the defendant to draw adverse inferences from *Mirant*'s inadequate disclosure in accordance with principles outlined by the Court of Appeal in *Malhotra v Dhawan* [1997] EWCA Civ 1096. . The judge found it unnecessary to draw such inferences but nonetheless made adverse findings which led him to award indemnity costs to the defendant for disclosure.

So, what went wrong?

Mirant's general counsel had considered making a claim against the defendant as early as December 1998 and instructed external lawyers. However, no steps were taken to preserve or retain access to project documents and no formal preservation policy was ever put in place.

Email back-up tapes were not sought until 2004, more than five years after the claim was first considered, by which time electronic documents had been lost. Formal requests of potential witnesses were not made until immediately before the trial. Further, the group of companies of which *Mirant* was a member had been sold by its erstwhile parent in 2001. A formal letter before action had been sent by that time but no steps were taken to retain access to documents in the control of the parent group.

The court found that both the external lawyers and *Mirant*'s general counsel '*could and should have made greater efforts to ensure the preservation of documents which were clearly relevant*'.

The Australian lawyers and *Mirant*'s general counsel failed to co-operate sufficiently with the English solicitors in complying with English procedures and orders of the court. The court noted that solicitors on the record remain responsible for the whole of the litigation process including disclosure and those responsibilities cannot be delegated.

An electronic database had been used for document management. A database can be a useful tool to help manage large-scale disclosure but it increases the need for careful supervision of the disclosure process by experienced solicitors. When documents were first reviewed and loaded onto the database, quantum issues had not been fully developed. Documents which were originally coded as 'not relevant' were not reconsidered as the litigation progressed.

Mirant's legal team '*took an unreasonably narrow view of the claimant's disclosure obligations*'. Documents that were quite obviously relevant to the issues in dispute were not disclosed until very late in the proceedings and in some instances during the trial itself.

Mirant's search for documents in response to specific requests made by the defendant during interlocutory proceedings was inadequate. The response was in some cases that no documents existed only for further documents in that category to be produced much later. The judge indicated that this *'may have occurred because of Mallesons' limited view of relevance or because it required the expenditure of significant time and resources to carry out the necessary searches fully and conscientiously'*.

It also transpired that Mirant's programming expert had undertaken some aspects of the disclosure process without the supervision of lawyers. The expert had also had unfettered access to the solicitor's database. He referred in his report to documents in the database which had not been disclosed. The judge noted that *'this was improper'* and that *'experts should be careful to check that documents on which their opinions are based have been disclosed to the opposing parties'*.

Skirmishes over disclosure may be inevitable in hard fought litigation but they can prove both expensive and potentially damaging to your client's case as Mirant illustrates.

For practitioners, the lessons are:

- As soon as a claim is contemplated, take steps to preserve documents. This is especially important for electronic documents given the requirement in the disclosure statement to identify the extent of the search for such documents. Clients should be advised about document retention.
- Maintain a clear and precise audit trail in order to be able to track documents and explain and justify steps taken.
- Consider what steps may need to be taken to safeguard access to documents as a result of corporate reorganisation.
- Where lawyers in different jurisdictions are involved, the solicitors on the record must take ultimate responsibility for supervising the disclosure process.
- Formally request documents from potential witnesses as early as possible and follow up as necessary.
- Consider whether documents ought to be revisited for relevance, particularly where issues have evolved and/or considerable time has passed since the documents were first reviewed. Be wary of taking an unduly narrow view of relevance.

Editor's Note:

Beale and Company Solicitors LLP acted for the defendant.

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