Disclosure – Damaging Documents

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Following the introduction of the Disclosure Pilot Scheme in the Business and Property Courts, the disclosure obligations on parties in litigation are now more focussed, but require careful attention to ensure that the specific requirements are being met.

One aspect of this scheme has recently been clarified by the High Court in the case of *Castle Water Limited v Thames Water Utilities Ltd* [2020] EWHC 1374 (TCC) which concerned the disclosure of *"known adverse documents"* pursuant to the duties under PD51U.

"Known adverse documents" are those items of which a party is actually aware (without further search) are or were previously within its control, over which privilege cannot be claimed, and which damage the disclosing party's case, or else support that of the opposition. 'Awareness' attaches to any person with accountability or responsibility for the events which are the subject of the claim, or for the conduct of the proceedings. Importantly, it includes those that have since left the relevant firm or business.

The question addressed by the Court in the *Castle Water* case was the extent to which the disclosure obligations meant that a party had to attempt to harm its own case by actively tracking down the existence of such adverse documents.

Mr Justice Smith determined that the requirement was for the disclosing party to have taken *"reasonable steps to check"*, albeit what that meant in practice would be fact specific. It would, though, invariably mean that a degree of specificity about the precise issues in the case was necessary, rather than simply asking generalised questions, and going further than just the senior figures or controlling mind of the entity. It does mean involving individuals who would actually have connected with the underlying events and who are best placed and/or most likely to have relevant information.

The Court then drew a distinction between the concepts of 'checking' and 'searching'. The Practice Direction itself confirms that awareness of *"known adverse documents"* does not require the performance of further searches, but the Court noted that there must be a requirement to at least look for known adverse documents of which the party was aware, in order for the obligation to have any impact or significance.

The overall conclusion was that the disclosure of *"known adverse documents"* must encapsulate the all-pervading requirements of reasonableness and proportionality in checking for such documents in the first place, supplemented by reasonable and proportionate steps to then locate them. Further, whilst this remains a continuing obligation, the Court took the view that by definition these checks ought to take place before the closure of pleadings and so it was not something that needed to be repeated in order to comply. However, additional checks may well become necessary if something in the litigation materially changed, new issues became relevant or a party later became aware of known adverse documents after the initial checks had been completed.

So what does this mean from a practical perspective? The contrast between a search and a check is not necessarily obvious, but it this decision is a reminder of the need to think carefully about what could fall to be disclosed, where those items may exist, and in whose possession and control such items may sit. Professional firms need to continue to preserve comprehensive records, but also to give careful consideration when a claim is made to the key issues in the case and which individuals may have had relevant information. Whilst the Disclosure Pilot does not dictate that a party doggedly hunts down anything which could be harmful to its position, the checks which are made have to be reasonable, going to the right questions and directed to the relevant people. It would also be prudent for those investigations to be fully documented in the event of question or challenge.

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