Time for change

Andrew Hogan on the need to embrace value-based charging in disclosure and beyond

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Nearly 30 years ago, I decided it would be a good idea one summer to spend three weeks of my life undertaking a vacation placement at a mid-size City firm - its identity now long since lost beneath the sundering seas of mergers and acquisitions over the decades.

A significant proportion of that time was spent in a windowless room assisting in what was then termed discovery: opening dusty binders of papers and listing what was contained within them, for the furtherance of some long-forgotten construction dispute. When I emerged blinking into the daylight, I had resolved that a solicitor's life was not for me. Much, however, has changed in the last 30 years.

In particular, the internet has arrived, and with it a digital economy, leading to the cessation of documents made of paper and their replacement with documents made out of code. Most 'documents' these days will never be printed out, and exist as ethereal creations on a server somewhere. Yet for the purposes of litigation, they are as much documents as any paper creation, and in many cases, the information they contain will prove crucial to the resolution of a dispute or piece of litigation. How does the civil justice system require disclosure of such documents to be given?

Practice Direction 31A of the CPR 1998 contemplates specifically that disclosure of electronic documents may be carried out by using keyword or other automated searches:

'25 It may be reasonable to search for Electronic Documents by means of Key-word Searches or other automated methods of searching if a full review of each and every document would be unreasonable.

'26 However, it will often be insufficient to use simple Keyword Searches or other automated methods of searching alone. The injudicious use of Keyword Searches and other automated search techniques –

'(1) may result in failure to find important documents which ought to be disclosed, and / or

'(2) may find excessive quantities of irrelevant documents, which if disclosed would place an excessive burden in time and cost on the party to whom disclosure is given.

'27 The parties should consider supplementing Keyword Searches and other automated searches with additional techniques such as individually reviewing certain documents or categories of documents (for example important documents generated by key personnel) and taking such other steps as may be required in order to justify the selection to the court.'

It will be noted that this Practice Direction is now nearly a decade old: the pace of change and the increase of digitisation has been relentless since 2010, and there have been further procedural innovations. Under Practice Direction 51U, the Disclosure Pilot in the Business and Property courts, the acceptance of computer aided recognition of documents for the purposes of disclosure is extended beyond simple key word searches:

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‘9.6 Where the Disclosure Model requires searches to be undertaken, the parties must discuss and seek to agree, and the court may give directions, on the following matters with a view to reducing the burden and cost of the disclosure exercise –
‘(1) that the scope of the searches which the disclosing parties are required to undertake be limited to –
‘(a) particular date ranges and custodians of documents;
‘(b) particular classes of documents and / or file types;
‘(c) specific document repositories and / or geographical locations;
‘(d) specific computer systems or electronic storage devices;
‘(e) documents responsive to specific keyword searches, or other automated searches (by reference, if appropriate, to individual custodians, creators, repositories, file types and / or date ranges, concepts);
‘(2) if Narrative Documents are to be excluded, how that is to be achieved in a reasonable and proportionate way;
‘(3) the use of –
‘(a) software or analytical tools, including technology assisted review software and techniques;
‘(b) coding strategies, including to reduce duplication.
‘(4) prioritisation and workflows.
‘9.7 In making an order for Extended Disclosure, the court may include any provision that is appropriate including provision for all or any of the following –
‘(1) requiring the use of specified software or analytical tools;
‘(2) identifying the methods to be used to identify duplicate or near-duplicate documents and remove or reduce duplicate documents;
‘(3) requiring the use of data sampling;
‘(4) specifying the format in which documents are to be disclosed;
‘(5) identifying the methods that the court regards as sufficient to be used to identify privileged documents and other non-disclosable documents;
‘(6) the use of a staged approach to the disclosure of electronic documents;
‘(7) excluding certain classes of document from the disclosure ordered.’

This latter set of provisions is meant to facilitate to a greater or lesser degree, in the Business and Property Courts, the use of machines to carry out the disclosure process formerly carried out by humans: the practice of predictive coding or computer assisted review of documents through the use of software, keywords and algorithms, dispensing with the trainee solicitor scrutinising millions of pages of documents by hand. Instead the computer, with parameters set by a skilled hand, and agreed with the other party to litigation and using transparent methodology, will ‘read’ the documents subject to an electronic search, and indicate to the lawyers which are relevant, or which might be relevant and are worth a manual review.

The spirit of these provisions is reflected in interlocutory decisions such as *Pyrrho Investments Ltd v MWB Property Ltd* [2016] EWHC 256 (Ch); *Brown v BCA Trading Ltd & Ors* [2016] EWHC 1464 (Ch) and *Triumph Controls UK Ltd & Ors v Primus International Holding Co & Ors* [2018] EWHC 176 (TCC). Particularly interesting is this latter decision, which indicates that where discrete jurisdictions such as the TCC have further protocols on the scope of e-disclosure and computer aided review (see TeCSA / SCL / TECBAR eDisclosure Protocol version 0.2) the obligations to approach predictive coding or computer assisted review can be particularly rigorous: with the court anticipating that the parties will cooperate in a transparent way to demonstrate the methodology and reasonableness of the approach they have taken to computer aided review, and sanctioning them if they have not adopted this approach.

CHARGING FOR DISCLOSURE

The use of computer aided review of disclosable documents with keyword searches and algorithms is inevitable and can only grow. Although seen as a feature of heavy commercial litigation, where there may be millions of pages of documents to potentially review, a catastrophic personal injury case may also generate thousands of pages of medical records and other documents potentially relevant to quantification of financial loss, which historically might be reviewed entirely manually; but with the increasing digitisation of all documents in all contexts, will become apt for computer aided review.

But how is a solicitor, or indeed a barrister going to charge for the work that will still have to be done, either through devising the scope of a reasonable search, or through combining computer aided review with a manual review which may be more or less limited in scope?

The question is pertinent, because historically in a document-heavy case, much of the solicitor’s fees will be grounded in a painstaking disclosure exercise, which is predicated on charging the time for manually reviewing every document, hour by hour. Echoes of this approach can be discerned in the scheme of payments made by the public authorities for reviewing Crown disclosure (or prosecution evidence as it is called) in criminal cases: although the Crown Court Fee Guidance (June 2019) issued by the Legal Aid Agency does not depend on the accumulation of six minute units reading each and every page, but rather provides for a fee calculated by way of formula based on the number of qualifying pages, it assumes that a manual review of even electronic documents will be carried out.

But the day is already here I suspect, where solicitors are – through the use of technology to apply predictive coding techniques, which significantly reduce the amount of time they spend undertaking disclosure – not charging the full value of the work that they do. This is because the reduction in time spent can only benefit the client, although it may be the solicitors’ firm which has invested in the software and incurred the overheads, or which may be using third-party technology companies to carry out the search and charging their fees as a disbursement at cost.

Yet the value of the disclosure exercise remains undiminished by the use of time-saving software. In commercial cases – which, since the invention of the ubiquitous email which has supplanted the telephone call as a means of communication, are always going to turn on the documents, rather than the hazy recollection of a witness who will often simply only be speaking to the documents – a robust disclosure exercise can be decisive in winning or losing a piece of litigation. So, what should a solicitor do to avoid swinging reductions in their fees through the use of the products of the digital revolution?

My own view is that they may be well advised to choose to charge for the disclosure exercise they will carry out on a value charged basis, as distinct from a time charged basis. There is ample scope to do so. There are in fact twin drivers in the Civil Procedure Rules pointing to the utility of doing so. The first relates to the budgeting process, which informs the making of a costs management order. As Practice Direction 3E notes:
‘7.3 If the budgeted costs or incurred costs are agreed between all

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parties, the court will record the extent of such agreement. In so far as the budgeted costs are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgeted costs.

'The court's approval will relate only to the total figures for budgeted costs of each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.'

The court is not concerned with hourly rates, or even the number of hours spent of actual or hypothetical fee-earners; it is for a litigant to choose to spend their budget as they may. All the court is concerned to do is set a figure which represents a reasonable and proportionate amount for a paying party to pay for the disclosure phase of a piece of litigation. It follows that if the sum is calculated on the basis of a lump sum fee value charge, provided it is reasonable and proportionate, it should be allowed as the phase total.

At the other end of the case, the court, when assessing costs, must have regard to the rejigged Eight Pillars of Wisdom contained in rule 44.4 CPR:

'(3) The court will also have regard to –
'(a) the conduct of all the parties, including in particular –
'(i) conduct before, as well as during, the proceedings; and
'(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
'(b) the amount or value of any money or property involved;
'(c) the importance of the matter to all the parties;
'(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
'(e) the skill, effort, specialised knowledge and responsibility involved;
'(f) the time spent on the case;
'(g) the place where and the circumstances in which work or any part of it was done; and
'(h) the receiving party's last approved or agreed budget.'

It will be noted that of the Eight Pillars, only one, that of (f), is expressly stated to be the time spent on a case. All the other factors focus on other aspects of the work done (and value provided) by the solicitor.

A WIDER THEME

There is, however, a wider theme developing beyond disclosure. I would suggest that with the imminent introduction, perhaps by 2021, of a scheme of fixed costs which apply to all varieties of case, not just personal injury claims, with a value of up to £100,000 and which can be tried in up to three days of court time, the current focus on time spent and hours recorded in an assessment of costs will fracture.

If the fixed costs scheme were extended to cases worth up to £250,000, then time-based charging becomes very much a minority pursuit. If fixed costs are suitable for inter partes costs awards, why should they not become the norm for solicitor-own client charges too? Particularly as lawtech plays a greater and greater role in practice, serving to automate routine functions and making redundant the notion that each piece of litigation – like a motor car, in the days before Henry Ford – must be painstakingly assembled on a bespoke basis over many hours with consequent cost. The aim of the lawyers in such a world would be to capture some of the value created by lawtech, rather than watching the value they provide leak away from their fees.

Looking at it another way, if a case settles for £1m, why should a solicitor not be able to submit a two-page bill of costs seeking a fixed fee of £300,000 charged expressly on a value rendered basis, perhaps staged in six increments of £50,000 by reference to the phases of a case, or the point in the litigation at which it settles? How could that be unreasonable or disproportionate when measured against the value of the claim, the sums in dispute and the stage at which the case settles? I am reasonably confident that, although the day of the billable hour has not yet passed, already on the horizon are factors that will make it a method of charging for the minority of cases, rather than a majority pursuit.

Andrew Hogan is a barrister at Ropewalk Chambers. His blog on costs and litigation funding can be found at www.costsbarrister.co.uk

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