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You've Failed to Disclose a Document within the Time Given for Disclosure: What Happens Next?

by

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MCTEAR AND ANOTHER v. ENGELHARD AND OTHERS [2016] EWCA CIV 487

Introduction

You've had a CMC or CCMC and directions for trial have been given. You have been given a deadline by which disclosure and inspection should be completed. A few months later, perhaps coming up to trial, your client tells you they have further documents they have just found which are helpful to their case. You want to rely on them, you have a duty to disclose them, but the other side opposes their inclusion in the trial bundles. CPR rule 31.21 states "*A party may not rely on any document which he fails to disclose or in respect of which he fails to permit inspection unless the court gives permission.*" What do you do?

Rather surprisingly for such an extensive text, the White Book provides no guidance under CPR rule 31.21 as to the approach that a court must take in relation to failures to disclose documents within the required time period. Many lawyers would probably however say, "it must be a straightforward relief from sanctions case, see Denton v. TH White & Ors [2014] 1 WLR 3926[1] for the test".

Not so fast lawyers. The Court of Appeal has recently provided some guidance in the context of failures to comply with disclosure deadlines, and it is not, arguably, as straightforward as Denton only.

Background

After deadlines for trial had been set down, the defendants, who had failed to comply with orders for service of witness statements and documents, applied for an extension of time of one hour to serve the witness statements and/or relief from sanction under CPR r 3.9. They made a second application for extension of time and/or relief from sanction in relation to documents lately discovered which were exhibited to a witness statement. Some of those documents were earlier emails between the parties. The judge considered both applications

[1] At paragraphs 24 to 38

together and having inferred that the method chosen to disclose the new documents was intended to disrupt the litigation process and as such was sufficient reason to exclude all the defendants' evidence, refused both applications.

On the defendants' appeal, it was held that the documents could be relied upon.

Court of Appeal - Judgment

The relevant parts of the judgement, due to their easy-read nature and insofar as they are relevant, are set out below:

"45. The defendants ought, as I have said, to have made the documents available to the claimants as soon as they were found… The documents ought to have been disclosed in the original list, but it is not as if the defendants failed to serve any list in response to the original order. All they failed to do was to include documents in their possession which they had not then found…

47. The judge relied on CPR 31.21 which only provides that a "party may not rely on any document which he fails to disclose… unless the court gives permission", but by the time of the hearing the defendants had not failed to disclose the new documents; the had served a list in respect of them.

48. The question, therefore, is whether the judge was right to treat the application in relation to the new documents as purely one for relief from sanctions. I do not think that he was. The important question was whether in all the circumstances, the defendants were to be permitted to rely upon them at the forthcoming trial. That depended, amongst other things, on considerations including whether the claimants would have wished to rely on them, the circumstances in which they had not been disclosed before, and their relevance to the issues.

49. I accept also that the failure to produce the documents at the initial disclosure stage was a significant breach. Parties must take seriously the need to conduct proper searches for documents in response to an order for standard disclosure by a fixed date. But here there was an excuse… The documents had been thought to have been destroyed, but were discovered when new counsel emphasised the need to look for them. In these circumstances, the most important question was whether the claimants could properly deal with them at the forthcoming trial. In my judgment, they could have done so. They were not very important, had already been for the most part in the possession of the claimants, and did not require any significant work for accountants to digest. In my judgment, the documents ought to have been admitted." [emphasis added]

The court also stated at paragraph 34:

"34. The Second point that needs to be underlined in this case is that one cannot see every aspect of each case in terms of only relief from sanctions. Disclosure of documents is a case in point. CPR r 32.11 provides that "(1) any duty of disclosure continues until the proceedings are concluded" and "(2) if documents to which that duty extends come to a party's notice at any time during the proceedings, he must immediately notify every other party". These obligations do not excuse the breach of an order for disclosure that is limited in time, but in considering the extent of any permitted usage of documents that are found after such an order has expired, the court does have to take these duties into account." [emphasis added]

Analysis

One could argue from the above that the test in Denton for relief from sanctions has been moulded into a new test specifically where the issue of late disclosure arises. As Vos LJ stated at paragraph 49, the important question was whether the claimants could properly deal with the documents at trial. In addition, Vos LJ appeared, at least at first glance, to be of the view that in light of the ongoing nature of the disclosure obligations, the test was not simply a straightforward relief from sanction application.

The question, therefore, is whether McTear has actually done away with the Denton three stage test for applications of this nature, and if so the approach in McTear is more lenient?

It is submitted that McTear has not done away with Denton. Although the learned judge did state that the issue is not simply an 'application for relief from sanctions', the court applied the three stage test in Denton, finding first that the breach was serious and significant (see paragraph 49), and then looked at whether there was a good reason for the breach (i.e. 'excuse'). The question in relation to whether or not the claimants were able to deal with the documents at trial is, in my submission, a question that addresses itself to the third stage of the Denton test, namely considering all of the circumstances of the case in order to deal with the application "justly", including (a) the need for litigation to be conducted efficiently and at proportionate cost and (b) the need to enforce compliance with rules, directions and court orders. The same applies to the consideration of the ongoing disclosure obligations that parties to litigation have.

It is submitted that the approach in McTear does show, however, a more lenient attitude towards relief from sanctions in the context of non-compliance with late disclosure obligations where the non-disclosing party is the party seeking to rely on the documents. However it is submitted that this arises not from a change of test, but from the circumstances that arise from failure to disclose documents then sought to be relied upon; if a party in breach of its disclosure obligations is seeking to rely on the undisclosed documents at trial, arguably the failure to adduce the documents earlier, on balance of prejudice, weighs against the relying party; the earlier the documents that assist its case are out there, arguably the higher the chances of e.g. an early settlement; not disclosing them earlier, however, runs the risk of the sanction in CPR 31.21 being imposed.

Furthermore, what would be the point of having on-going disclosure obligations in respect of all relevant documents, if parties were not then able to rely on the disclosed documents which come out in their favour? The ongoing disclosure obligation is, in my submission, specifically not limited to documents which assist the other party's case for the very reason that every party is entitled to know the case against them, one way of another, and also the purpose of the court proceedings is to find the truth, so far as it can do so.

On the other hand, there is clearly prejudice to the opposing party in not having been able to consider the documents in advance, and prepare its case accordingly. However, it is submitted that the test put forward by Vos LJ looks specifically at that issue and asks the question, can the opposing party properly deal with the documents at trial? As was touched upon at paragraph 36 of the judgment, the balance of prejudice is potentially far less in favour of the opposing party where some of the documents are emails between the parties, where the obvious question any court is going to ask itself (and indeed a point that was looked at by Vos LJ), is why the opposing party did not adduce those documents in *its* disclosure?

Conclusion

The approach in McTear does not, in my submission, create a different test for undisclosed documents. The Denton principles are clearly embedded within the judgment and were at the forefront of the learned judge's mind. The judgment does, however, provide excellent and specific guidance on the factors that should be taken into account in the context of failure to comply with disclosure obligations and the automatic sanction applied under CPR 31.21.

The judgment can be found at: http://www.bailii.org/ew/cases/EWCA/Civ/2016/487.html

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