CONSTRUCTIVE CRITICISM: WHY THE PRE-ACTION DISCLOSURE RULES ARE DAMAGING TO THE CONSTRUCTION INDUSTRY

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Introduction

The construction industry is contentious and our disputes are often technical and both legally and factually complex. In negotiating and litigating disputes we often rely on large volumes of documentary evidence, some of which is in our possession and some of which must be obtained from our opponents through disclosure.

Disclosure is an expensive exercise and following Lord Justice Jacksons' 2009 report, costs are a hot topic.[1] The report made sensible and reasoned recommendations in relation to disclosure generally that go some way to addressing the high cost of litigation, but it made no comment or recommendation in relation to pre-action disclosure costs.

This paper proposes that the general rule as to the cost of pre-action disclosure applications, contained in the Civil Procedure Rules 48.1, fails to reduce the overall costs of civil litigation as intended, which is particularly damaging to the construction industry as regular court users.[2]

It goes on to suggest a change to the way pre-action disclosure costs are dealt with that would better benefit our litigious and document reliant industry by upholding the costs reducing ambitions of Lord Justice Jackson and his predecessor, Lord Woolf.

Pre-action disclosure

Pre-action disclosure was introduced to help reduce the prevalence of litigation by facilitating pre-action settlement and in doing so saving time and cost for all involved.

In his 1995 *Access to Justice* report, having been charged with examining what changes to the civil justice system might bring about swifter and more cost effective dispute resolution, Lord Woolf recommended that pre-action discovery (as it was originally called) should be widened from contemplated

1 Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (TSO, December 2009).

2 Civil Procedure Rules, Part 48 Costs – Special Cases, Rule 48.1 Pre-commencement disclosure and orders for disclosure against a person who is not a party.

personal injury and wrongful death proceedings (as it was restricted to at that time) to all types of civil claim.[3]

Lord Woolf's justification for doing so was that it would encourage parties to adopt a sensible and co-operative approach from the earliest stages of dispute resolution, so ensuring cost effective activity from the outset. His Lordship considered that the key elements of such an approach included early notification of claims coupled with sensible exchange of information.

The new set of procedural rules that followed – the Civil Procedure Rules (CPR) – was heavily influenced by Lord Woolf's recommendations and came into effect in April 1999. Pre-action discovery was available thereafter to would-be parties in all type of civil claim.

There was apprehension at the time that the widening of the scope of pre-action discovery would mean that parties new to it would misunderstand its purpose (or understand it perfectly well and abuse it regardless), making applications that in fact hampered the sensible and co-operative approach Lord Woolf had sought to encourage and in doing so increase rather than decrease costs.

The general rule and the exception

It was contended, however, that CPR 48.1 – the general rule as to costs – would suffice to prevent unnecessary and unmeritorious applications being made. The general rule states:

> 'The general rule is that the court will award the person against whom the order is sought his costs of the application and of complying with any order made on the application.
>
> The court may however make a different order, having regard to all the circumstances, including: the extent to which it was reasonable for the person against whom the order was sought to oppose the application; and whether the parties to the application have complied with any relevant pre-action protocols.'

The rationale behind that contention, and therefore behind the general rule, appears to be two-fold: first, the frivolous or vexatious applicant is dissuaded from making unnecessary, unjustified or unreasonable applications by the knowledge that he will likely be ordered to pay not only his own costs, but the respondent's costs and the costs of disclosure. Secondly, where an application is made, the respondent can fund his response (and where the application is successful, the process of pre-action disclosure) knowing that his expenditure will likely be reimbursed in the short term. The respondent need not be concerned that the application might never give rise to a claim, as the costs are not left to be dealt with as costs in the case.

3 The Rt Hon the Lord Woolf, *Access to Justice*: Interim Report to the Lord Chancellor on the civil justice system in England and Wales (HMSO, June 1995), Section V, para 41.

Application of the general rule would certainly appear to support the objectives which motivated Lords Woolf and Jackson, but it has an ancillary effect which is discordant with those objectives: one which actually discourages parties from engaging in pre-action disclosure, encouraging them instead to begin a claim without knowing the extent of its evidential merits and one which, as a result, is particularly detrimental to the resolution of disputes generally, and construction disputes in particular.

Suppose, for example, that despite the general rule a party is not dissuaded from making a pre-action disclosure application. The application is made and is unsuccessfully (but reasonably) opposed by the other side. The applicant therefore obtains an order for pre-action disclosure and with it, in accordance with the general rule, comes an order that the applicant pays the costs of both the application and of the disclosure itself.

Subsequently, a claim is brought. Both sides rely heavily on the pre-disclosed material. The applicant is, eventually, successful at trial and is awarded his costs from issue of proceedings as costs in the case.

Unfortunately for the claimant, the costs paid for the pre-action disclosure will not form part of the costs in the case as they are already the subject of the previous order. The result is that the claimant has paid a potentially large costs bill that, if he had waited until after issue (for standard disclosure), would have otherwise likely been costs in the case and so would have been awarded to him on his success.

He is, in this not uncommon scenario, in a worse position for having sought pre-action disclosure than if he had waited for standard disclosure. If the intention of allowing pre-action disclosure is to save time and cost, the general rule is failing litigants in the construction industry whenever they go on to be successful at trial.

A would-be litigant savvy enough to think ahead might, rather than being encouraged by the option of pre-action disclosure to act in a way that saves time and cost, actually be encouraged by the general rule to issue his claim and fudge his way through to standard disclosure in order to provide himself with the opportunity of recovering his costs following trial.

In addition to bringing about the costs of standard procedural stages, such fudging may well give rise to applications which would otherwise not have been necessary – for summary judgment, strike out or for wasted costs – and will undoubtedly lead to voluminous inter-parties correspondence which will harm any opportunity of sensible commercial settlement.

The net result is an inevitable increase, rather than decrease, in court time and party cost associated with the dispute. This is justifiable, perhaps, in the would-be applicant's eyes by reference to the fact that if he opts for pre-action disclosure he almost certainly has to foot the bill, whereas if he can hang on until standard disclosure he may avoid it.

Unfortunately, the exception provided by the general rule cannot assist. It provides that the court may take account of all the circumstances when making the order, but the circumstances cannot at that stage include the result of the subsequent substantive hearing, or how helpful and relevant the disclosed information proved to be. These are, of course, future (and uncertain) events.

Proposed solutions

Commentary on the shortfalls of the general rule is scarce but in his book *Documentary Evidence* Charles Hollander QC has suggested that the problems presented by the general rule might be overcome by a conditional costs order:

> 'Given that if litigation commences costs of disclosure will otherwise be costs in the case, why should the court not make an order that the defendant should have his costs: 'unless a claim form be served within 90 days of disclosure, in which case the costs are to be costs in the case.'[4]

This was suggested in a previous edition of the book, but it is not clear that the idea has borne fruit, or whether it would be consistent with CPR r.48.1. Indeed, the pendulum seems if anything to have swung the other way.[5]

One problem with this suggestion is that applicants, whether successful in the application or otherwise, might be encouraged to issue proceedings purely to obtain an order of costs in the case for the pre-action disclosure costs, rather than focussing their efforts on amicable settlement or alternative (cheaper) dispute resolution without issuing proceedings. As such, with respect to Charles Hollander, this suggestion may do little to prevent the objectives of Lords Woolf and Jackson being achieved and so may be of little assistance to the construction litigant.

It is submitted that if, instead, the courts continued to employ the general rule but were willing to allow for the inclusion of pre-action disclosure costs in any subsequent costs in the case order following trial (allowing, in effect, for the reversal of the general rule in appropriate circumstances after it is applied and complied with) the objectives of their Lordships could be met.

In such a scenario, the general rule would be applied to the pre-action disclosure application and the applicant would be required and expected to promptly pay the costs as a result. However, because those costs could potentially be repaid to the applicant following trial (where he is successful and awarded costs in the case) it would provide against applicants electing to issue proceedings and hang on until standard disclosure, as doing so would provide no greater chance of recovering the disclosure costs than making a pre-action disclosure application.

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4 Charles Hollander, *Documentary Evidence* (9th edition Sweet and Maxwell, 2006), para 2-41.

5 See, for example, *Totalise plc v The Motley Fool Ltd* [2001] EWCA Civ 1897 (also [2002] 1 WLR 1233, [2003] 2 All ER 872) where an unsuccessful respondent to a Norwich Pharmacal application nevertheless recovered his costs of losing the application.

This would, as a result, allow pre-action disclosure to achieve Lord Woolf's objectives whilst preventing its abuse: first, applicants would be discouraged from issuing proceedings simply in order to ensure that the pre-action disclosure costs are dealt with as costs in the case (as risked by Charles Hollander's suggestion) because the issue of proceedings will not of itself bring a costs in the case order in relation to the pre-action disclosure costs. Instead, the general rule would be applied and must be followed until (and in some cases following) the determination of the substantive issues at which point the court could, if it thought fit, allow the pre-action disclosure costs to form part of a subsequent order for costs in the case.

Secondly, applicants would be discouraged from waiting for standard disclosure as it would offer no advantage (other than perhaps to cash flow) over pre-action disclosure.

If this is accepted as a viable solution, the relevant question becomes whether such an approach is within the courts' jurisdiction. No reported cases exist where the court has reversed a pre-action disclosure costs order made in accordance with the general rule, following the determination of a substantive claim at trial. As such, it is difficult to say with any certainty whether the courts do have jurisdiction.

Nevertheless, there are three points which, it is submitted, exist in support of the court having jurisdiction:

- first, there is nothing expressed in the CPR to suggest that, even after application of the general rule, the courts are prevented from including, in an order for costs in the case, the costs of pre-action disclosure;
- secondly, other types of pre-action costs are considered capable of being costs in the case (and, by analogy, so might pre-action disclosure costs); and
- thirdly – perhaps more persuasively – the courts have expressed the view that it is not objectionable in principle for costs in the case to include pre-action disclosure costs.

The discretion of the court as to costs in the civil division of the High Court and Court of Appeal is at section 51 of the Supreme Court Act 1981 ('the 1981 Act'). It states:

> 'Subject to the provisions of this or any other Act and to rules of court, the costs of and incidental to all proceedings in the civil division of the Court of Appeal and in the High Appeal and Court, including the administration of estates and trusts, shall be in the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs are to be paid.'

Where a pre-action disclosure application has been successful and the documentation disclosed has come to be relied on not only by the applicant but also the other parties, it is difficult not to conclude that the cost of obtaining that documentation is 'incidental to' the proceedings.

The case law

In *Re Gibson's Settlement Trusts*, Sir Robert Megarry VC refused to prevent an order for costs in the case including costs incurred before the proceedings commenced, solely on account of them having been pre-action costs, stating:

> '… on an order for taxation of costs, costs that otherwise would be recoverable are not to be disallowed by reason only that they were incurred before action brought.' [6]

The Vice Chancellor felt that the words 'incidental to' in section 51 of the 1981 Act extended, rather than reduced, the ambit of any order made thereunder.

Further support is offered by the Court of Appeal's decision in *Callery v Gray*, in which the then Lord Chief Justrice, Lord Woolf, stated:

> '… where an action is commenced and a costs order is then obtained, the costs awarded will include costs reasonably incurred before the action started, such as costs incurred in complying with a Pre-Action Protocol.'[7]

Both of these judgments and section 51 of the 1981 Act were considered in a construction context in *McGlinn v Waltham Contractors*. There, His Honour Judge Coulson held that

> '… as a matter of principle, the costs incurred in complying with a Pre-Action Protocol may be recoverable as costs "incidental to" any subsequent proceedings. Whether or not a particular item of Pre-Action Protocol costs can properly be described as having been incurred "incidental to" the proceedings will, of course, be a matter of fact and assessment on each occasion.'[8]

That logic is, it is submitted, equally as applicable to pre-action disclosure application costs as it is to pre-action protocol costs such that, where the fact and degree of the costs incurred require, they can be considered costs 'of and incidental' to the subsequent claim in which the product of the disclosure are used (and so within the jurisdiction of the court under section 51).

It is recognised that these *dicta* concern costs arising out of purportedly compulsory processes rather than a voluntary one. Without developing arguments as to why considering pre-action disclosure voluntary might be inaccurate, it is submitted that the *dicta* are relevant in the absence of authority bearing directly on the question of the courts' jurisdiction to include pre-action disclosure costs as costs in the case.

Comment in *Hall v Wandsworth Health Authority* is equally relevant and, it is submitted, more directly supportive of an argument in favour of the courts

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6 *Re Gibson's Settlement Trusts* [1981] Ch 179, page 184E.

7 *Callery v Gray* [2001] EWCA Civ 1117; also [2001] 1 WLR 2112, [2001] 3 All ER 833.

8 *McGlinn v Waltham Contractors Ltd* [2005] EWHC 1419 (TCC), para 9; also 102 Con LR 111, [2005] 3 All ER 1126, [2005] BLR 432, [2005] TCLR 8, [2006] 1 Costs LR 27.

having the necessary jurisdiction.[9] In that case, solicitors for the would-be claimants were contemplating proceedings for damages in negligence. They wrote letters before action requesting the disclosure of hospital notes which were not forthcoming. Originating summonses were then issued before a master in chambers (under section 33(2) of the Supreme Court Act 1981 and RSC Order 24, rule 7A) for the production of documents. The defendants consented to the orders. The master made orders for no order as to costs in each case, refusing the claimants' request for leave to appeal against such orders. The claimants then appealed to a judge in chambers.

On appeal the judge, Tudor Price J, held that the defendants had acted unreasonably in withholding disclosure against one of the claimants. In relation to the general rule he is reported as having stated that it was fair and right that the party put to expense – and who might never be sued – should be reimbursed. On the *appropriateness* of an order of costs in the case, Tudor Price J stated:

> 'The lack of certainty or even a high probability that a claim would be made against the person ordered to produce made it inappropriate to order costs in cause; [but] *that* [order] *would cause no injustice in practice.*'[10] [*emphasis added*]

In addressing his reference to injustice, he went on to state[11]:

> 'The plaintiff, if he eventually succeeded in a claim, whether against the defendant in the originating summons or another defendant, might well be able to recover his costs incurred before the proceedings commenced, in taxation of the successful action.'[12]

Plainly, the learned judge saw no difficulty in costs which were already the subject of an order being repaid as a result of costs taxation in the substantive proceedings, and he drew support for that view from the well established scenario of pre-action protocol costs being within the ambit of section 51 (albeit that those costs are not often the subject of a prior order).

In the more recent case of *Bermuda International Securities v KPMG*, the parties had appeared before Timothy Walker J for an opposed pre-action disclosure application, which was granted. The judge decided that, because KPMG had acted unreasonably in opposing the application, the general rule should not be followed and that costs should be in the case. KPMG later appealed the costs order.

The Court of Appeal allowed the appeal only in part.[13] It was held to have been within Timothy Walker J's discretion to award costs of the application as costs in the case but that he was wrong, in the circumstances, to deprive KPMG of the costs of complying with the order. Accordingly Bermuda was

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9 *Hall v Wandsworth Health Authority* (1985) 82 LSG 1329.
10 *Hall*, see note 9, page 1330.
11 *Hall*, see note 9, page 1330.
12 See *Re Gibson's Settlement Trust*, note 6, page 187C.
13 *Bermuda International Securities Ltd v KPMG* [2001] EWCA Civ 269.

held to be responsible only for KPMG's costs of disclosure, and not of the application.

The fact that the Court of Appeal did not disturb the judge's order as to costs in relation to the application lends support to the proposition that an order causing the costs of pre-action disclosure to be paid by the winner of the subsequent litigation, as costs in the case, is within the courts' jurisdiction. Whilst the court could not see reason for the costs of compliance to be included as costs in the case in the circumstances (with leading counsel for Bermuda offer nothing to persuade them otherwise), that part of Timothy Walker J's order was not objected to on grounds of principle, only in light of the particular circumstances.[14]

Assuming for the time being that the courts do have jurisdiction, which it is submitted appears likely in light of the above, the only reasonable challenge of such an order would be that it offends the rationale behind the general rule – that is, that it cannot have been intended given the existence of the general rule. This is, it is submitted, not a criticism that can be legitimately made.

By the time substantive proceedings are concluded and a costs order in line with that proposed by this paper is made, first the pre-action disclosure application has long since been made, preventing the dissuasion rationale being offended. Secondly the subsequent claim has been brought, preventing the certainty rationale being offended.

If at that stage a costs order is made in favour of the successful claimant to include the costs of pre-action disclosure (such that the pre-action order requiring the then applicant to shoulder the costs is effectively reversed) there would appear to be nothing about that order which would offend the rationale of the general rule.

In summary, Lord Woolf's extension of pre-action disclosure to all civil claims was intended to encourage parties to perform a cost benefit analysis at an early stage, encouraging settlement and saving expenditure of unnecessary time and money on litigation. It was felt that the general rule as to costs (which was to become CPR 48.1) would suffice to ensure that the pre-action disclosure process was used properly.

In fact, it is submitted, the general rule discourages pre-action disclosure and in doing so works to prevent the goals Lord Woolf hoped pre-action disclosure could help to achieve. Applicants are, at present, afforded a chance of avoiding paying disclosure costs only if they hang on until standard disclosure (or the respondent acts inappropriately in resisting the application). Being encouraged to hang on until standard disclosure militates against the objectives which Lord Woolf and Lord Jackson's recommendations intended to achieve.

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14 The decision is further difficult in that it does not sit well with the danger, expressed above, that an order of this sort may be inappropriate at a pre-action stage as proceedings may never be issued. This is not something which the Court of Appeal dealt with (indeed, not something they were required to deal with given that it was not a live issue – proceedings having been issued and concluded by that stage).

Conclusion

In 2010 costs were under the microscope (undoubtedly not for the last time) and the construction industry had a difficult 12 months, exhibited by an increase in construction litigation. Lord Jackson's report, like Lord Woolf's, made many sensible recommendations that will, if properly implemented, reduce the costs of litigation and assist our industry as a result. However, in addition to creating *new* rules, it is submitted that a new approach should be taken to the *existing* rule at CPR 48.1, if their Lordships' aims are to be achieved.

It is submitted that if the courts continued to apply the general rule such that applicants must pay the costs of the application and the disclosure exercise itself (unless the circumstances at the time suggest otherwise) but were also willing and considered able to routinely include such costs in any final order as if they were costs in the case, their Lordship's objectives could be achieved by taking a new approach to an existing rule, rather than creating new rules.

If this were done, the general rule would be upheld and its rationale not offended, but potential pre-action disclosure applicants would, unlike at present, be encouraged to use the pre-action disclosure procedure as it was intended to be used.

This change would prove particularly beneficial to the construction industry – familiar as we are with document-heavy litigation – and if implemented could assist in helping to further reform our already forward thinking approach to dispute resolution.

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is to promote the study and understanding of
construction law amongst all those involved
in the construction industry'

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