The Christopher Bathurst Essay Prize (Winner)

"Do the benefits of requiring parties to litigation to disclose documents harmful to their own case outweigh the costs involved?"

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I. INTRODUCTION

> "*The scale of discovery, at least in the larger cases, is completely out of control. The principle of full, candid disclosure in the interests of justice has been devalued because discovery is pursued without sufficient regard to economy and efficiency.*"
>
> – Lord Woolf[1]

1. The requirement for parties in litigation to disclose documents harmful to their own case ("*full disclosure*") has been associated with increased costs. However, the very basis of what the Court does and ought to do is to ensure a fair and just procedure that leads to a fair and just outcome.[2] Rectitude of decision, which requires a Court to correctly apply the law to the true facts,[3] is optimized by full disclosure.

2. This essay argues that the benefits of full disclosure outweigh the costs for two principal reasons. First, the requirements of a fair hearing and a just outcome are best served by full disclosure. Second, concerns about costs are potentially overstated and can be adequately addressed without sacrificing rectitude.

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[1] Lord Woolf's "Access to Justice" Interim Report, Chapter 3, paragraph 10.

[2] *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [8].

[3] Zuckerman, Chiarloni & Gottwald, *Justice in Crisis: Comparative Dimensions of Civil Procedure* (OUP, 1999) Ch 1.

II. FULL DISCLOSURE ENSURES A FAIR HEARING AND JUST OUTCOME

3. First, full disclosure makes all relevant information available to the parties. This promotes fairer hearings because trial by ambush is avoided[4] and parties are able to fully present their case to the Court. This is particularly important in cases where one party may not have complete access to the other party's information (*e.g.* employment or personal injury claims).[5]

4. Second, the accuracy of trials increases by improving the information available to the Court.[6] This allows the Court to reach a just outcome in accordance with the true facts. Indeed, while it is rare to find a "smoking gun" which will turn a case, there have been instances where a party would have failed to prove his case but for the adverse party's full disclosure.[7]

5. Third, full disclosure encourages settlement of disputes.[8] The probability of settlement turns on the parties' estimates of their likelihood of success at trial. This in turn is largely dependent on the information available

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[4] Schwarzer, "Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective than Discovery?" (1991) 74 Judicature 178

[5] Reda, "The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions" (2012) 90 Oregon Law Review 1085 at 1107 – 1108.

[6] Cooter and Rubinfeld, "An Economic Model of Legal Discovery" (1994) The Journal of Legal Studies Vol. 23 No.1 at 446.

[7] Rogers, "Improving Procedures for Discovery and Documentary Evidence", ICCA Congress Series No 7 (Kluwer, 1996) at 133 – 134.

[8] *Supra* n4.

to them.[9] With full disclosure, a party is less likely to go to trial and would elect to settle so as to save litigation costs because it risks revealing the flaws in its own case.[10]

6. It is further submitted that full disclosure guards against frivolous litigation which wastes judicial resources: it is less likely that a potential litigant would commence a "nuisance" suit knowing its aims would be undermined by having to satisfy the requirement of full disclosure.

III. WHERE COSTS MAY UNDERMINE THE BENEFITS OF FULL DISCLOSURE

7. Three arguments are oft-cited against full disclosure.

8. First, full disclosure unduly increases a party's litigation costs because lawyers are encouraged to make overly broad requests either for fear of surprise at trial or as a deliberate strategy to force settlement, and costs of compliance with these requests is exacerbated in the digital age where documents are more voluminous. This has purportedly resulted in discovery costs comprising almost 50%-90% of total litigation costs in the US. Therefore,

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[9] Huang, "Does Discovery Promote Settlement? – An Empirical Answer" (2007) 2nd Annual Conference on Empirical Legal Studies Paper at 1.

[10] *Supra* n6 at 447.

settlement is the most fiscally prudent course regardless of a case's merits.[11] This is an unjust outcome for the party forced to settle.

9. Second, full disclosure causes inordinate delay because discovery becomes the focus of litigation rather than a mere step in the adjudication process. As a result, a judgement may come too late to be capable of redressing a party's rights because evidence may disappear or deteriorate thus affecting accuracy.[12] Justice delayed becomes justice denied.

10. Third, full disclosure may not always result in discernible benefit when measured against the costs. For instance, in one survey in cases with total litigation costs of more than US$250,000, the ratio of the average number of pages obtained in discovery to the average number of pages actually used at trial was 1,044 to 1.[13]

IV. THE CONCERNS ABOUT COSTS ARE OVERSTATED AND CAN BE SATISFACTORILY ADDRESSED

11. According to one commentator, three decades of empirical data in the US actually demonstrates that discovery costs are in fact consistent with the amount at stake and that high cost discovery is limited to exceptionally

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[11] Beisner, "Discovering A Better Way: The Need For Effective Civil Litigation Reform" (2010) Duke Law Journal 547 at 549 – 550.

[12] Zuckerman, "A Reform of Civil Procedure – Rationing Procedure Rather Than Access to Justice" (1995) 22 Journal of Law and Society 155.

[13] *Supra* n11 at 574.

complex cases.[14] This suggests that the causal link between increased litigation costs and full disclosure may be overstated. Indeed, the reason why this "cost-delay" narrative persists despite contrary evidence may be attributable to other factors such as the influence of media distortion or special interest groups.[15]

12. Further, excessive costs are really the consequence of the manner in which some lawyers abuse full disclosure to complicate and protract litigation in order to generate profit.[16]

13. In any event, the increased costs occasioned by full disclosure can be satisfactorily addressed via greater judicial management. Some methods that may be employed by a Court include:

a) Lord Jackson's "menu" approach: In complex commercial claims where full disclosure would result disproportionate costs, a Court may instead order narrower disclosure such as on an issue by issue basis or dispense with disclosure altogether.[17]

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[14] *Supra* n5 at 1111.

[15] *Supra* n5 at 1116 – 1128.

[16] Zuckerman, "Lord Woolf's Access to Justice: Plus Ca Change" (1996) 59 Modern Law Review 773.

[17] "Review of Discovery in Civil Litigation" Consultation Paper, Supreme Court of Singapore at [121] to [122].

b) E-discovery protocol in Singapore: In determining whether an application for disclosure of electronic documents is necessary, proportionate and economical, a Court will have regard to matters such as the relevance and materiality of these documents to the issues in dispute, the nature of the case and the complexity of the issues, the value of the claim and financial position of each party and the ease and expense of retrieval.[18] Indeed, parties are encouraged to agree on an electronic discovery plan to avoid wastage of time and costs. This includes a list of agreed search terms to produce a subset of documents which are deemed relevant and custodians and repositories to be searched first.

c) Cost shifting so that the party entitled to discovery bears the whole or part of the costs of compliance to prevent injustice or an abuse of process of the Court.[19]

V. CONCLUSION

14. To not insist on full disclosure is to undermine the commitment to fairly determine disputes and reach fair and just outcomes, both of which are fundamental to the administration of justice. That is why despite complaints of increased costs, leading common law jurisdictions have chosen to retain full

[18] 43E of Part IVA Practice Directions Amendment No 1 of 2012, which gives effect to the necessity requirement under Order 24 Rule 7 of the Singapore Rules of Court.

[19] *Supra* n18, 43L.

disclosure but have instituted measures to manage the costs in order to strike a balance between fairness and economy.

The Christopher Bathurst Essay Prize (First Runner-Up)

"Do the benefits of requiring parties to litigation to disclose documents harmful to their own case outweigh the costs involved?"

Submission by
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1. Disclosure of documents (hereinafter 'disclosure') is an essential aspect of the common law adversarial system. It ensures that litigants are given notice of documents relied on by other parties in the litigation, and thus allowing litigants to evaluate the strengths and weaknesses of their case, and clarify issues between them.

2. It is argued that despite the potential costs, requiring the disclosure of documents that are harmful to one's case (hereinafter 'harmful documents') is necessary to achieve the purpose of discovery – that is truth and justice; and it encourages settlement. This essay concludes by calling for a change in lawyer's attitudes towards disclosure to a more positive one.

<u>The Pursuit of Truth and Justice: Improving the Accuracy of Adjudication</u>

3. Disclosure prevents trials by ambush, and ensures a just adjudication as it informs parties of all evidence that will be presented at trial[20]. Donaldson MR in *Davies v Eli Lilly & Co* explained that litigation is to be conducted with "cards face up on the table" to ensure "real justice between opposing parties".[21]

[20] Paul Matthews & Hodge M Malek, *Disclosure* (Sweet & Maxwell, 4th Ed, 2012) at [1.02]

[21] [1987] 1 WLR 428, at 431

4. Further, disclosure allows the court to access the evidence, which then improves the accuracy of the adjudication. It is presupposed that the accuracy of adjudication depends on the quantity (and quality) of evidence available to the court – with more evidence made available, the court would be able to better understand the factual matrix of a case. Sundaresh Menon CJ in *Teo Wai Cheong v Crédit Industriel et Commercial* [*Teo Wai Cheong*] opined that:

> "Unless the court has before it all the relevant information, [real justice] cannot be achieved…. Without the relevant evidence disclosed before the hearing of a matter, a litigant cannot be said to be in a position to adequately prepare his cross-examination and so to effectively test a witness's testimony."[22]

5. Disclosure is an aspect of the fundamental principle of natural justice by ensuring litigants' right to fair hearing (*audi alteram partem*). Litigants must have the right to present their case – that is to be given a proper opportunity to consider, challenge or contradict any evidence presented. This objective cannot be achieved if not all documents are disclosed. In *Secretary of State for the Home Department v. AF*, Lord Phillips said:

> "The best way of producing a fair trial is to ensure that a party to it has the fullest information of both the allegations that are made against him and the evidence relied upon in support of those allegations.

[22] [2013] 3 SLR 573, at [42]

Where the evidence is documentary, he should have access to the documents."[23]

6. Similar proposition was accepted in Singapore. Paul Tan AR in *Dante Yap Go v Bank Austria Creditanstalt AG* [*Dante Yap*] stated as follow:

> "Discovery is one of the most powerful ploughshares – and swords – at the disposal of litigants. *When not abused*, the process is absolutely essential to a litigant's preparation for trial. Discovery allows litigants to gain access to evidence that is material to their case or the case of the opposing side that the latter may be in the possession, care or custody of. *Ensuring that parties are allowed discovery, when justified, must be a fundamental tenet of procedural justice and fairness*."[24] [Emphasis added]

Preserving Relationship Between Parties: Encouraging Amicable Settlement

7. Disclosure encourages parties to settle. The assumption is that parties will only settle if the chances of winning the litigation are slim, and that the expected legal cost exceeds the expected damages claimable. When parties have to disclose the harmful documents, parties will reconsider the strength of their case and recalculate their chances of winning the litigation. This might

[23] [2008] EWCA Civ 1148, at [64]

[24] [2007] SGHC 69, at [16]

result in parties opting to settle as opposed to going through the arduous litigation.

8. Indeed, the Assistant Registrar in *Dante Yap* observed:

> "Once a party realizes that particular issues are unsupportable by the evidence, he may drop them, amend his pleadings accordingly and narrow the scope of the trial. *He may even attempt to reach a settlement of the matter with the opposing party.*"[25] [Emphasis added]

9. Furthermore, disclosure might result in a more 'accurate' settlement. This is because when parties know of the strengths and weaknesses of each other's case, the settlement agreed upon will better reflect the merits of their cases. For example, a respondent with a weak case might agree to a higher settlement offer because the respondent realizes that the claimant has a better case.

Cost and Abuse of Disclosure

10. On the other hand, disclosure is costly. The cost involved in discovery proceeding has gone up to millions. For instance, in the Australian case of *Seven Network Limited v News Limited*[26], Justice Sackville noted that the estimated cost of discovery in that case came to $200 million, when the estimated damages claimable were only $195 million.

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[25] *Ibid*

[26] [2007] FCA 1062

11. Further, discovery is prone to abuse. Lawyers often demand the submission of excessive documents regardless of relevancy – suspecting that their opponent is hiding harmful documents; or hoping to fish valuable evidence.

12. Some (less ethical) counsels would persistently demand disclosure of (possibly) non-relevant documents hoping to tire their opponents. Some produce the documents in bad faith – submitting voluminous documents to waste the opponent's time. These practices and ill-intents eventually turn litigation to a competition of who has more money.

13. The situation is so alarming that a US Court of Appeal Judge remarked:

> "If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes."[27]

14. One may wonder if the pursuit of truth and accurate litigation may worth the millions spent. Without the requirement to disclose harmful documents, parties will have no right to order disclosure and have to make do with whatever documents they possess.

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[27] *Dahl v. City of Huntington Beach*, 84 F.3d 363, 364 (9th Cir. 1996), at [1]

15. However, the author submits that truth and accuracy in litigation is of paramount importance and should not be obstructed by cost. The author believes in this maxim: *Fiat Justitia Ruat Caelum.*

16. However, the author is mindful that high litigation costs could hinder these purposes, hence it is suggested that the court and/or legislature should do more to impose procedural and/or legal safeguard on cost. It is beyond the scope of this essay to suggest any reform. Nevertheless, it is observed that a stricter relevancy test could potentially curb the discovery cost by preventing frivolous applications.[28]

17. Thus, it is submitted that the cost of discovery does not outweigh its benefit.

Conclusion

18. Disclosure of harmful documents is desirable to improve the accuracy of trial and encourage settlement, and these benefits outweigh the costs involved.

19. Although seemingly impossible, the author would like to encourage a paradigm shift in lawyers' attitude towards discovery. Lawyers should encourage parties to disclose all documents, instead of hiding them. As put by the Chief Justice in *Teo Wai Cheong* (at [44]):

[28] The AR in *Dante Yap* opined that the "discovery applications continue to be a source of bitter distraction and needless acrimony precisely because the boundaries of discovery remain somewhat flexible" (at [16])

> "As officers of the court, solicitors owe a *special duty to the court to properly explain to their clients what these obligations are*. They also owe a duty of involvement in and supervision of the disclosure process…Nevertheless, because *this duty is owed to the court and exists for the purpose of ensuring the proper administration of justice*, it remains incumbent on solicitors, in good conscience, to act in diligent compliance." [Emphasis added]

20. The author can only hope.

The Christopher Bathurst Essay Prize (Second Runner-Up)

"Do the benefits of requiring parties to litigation to disclose documents harmful to their own case outweigh the costs involved?"

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Do the benefits of requiring parties to litigation to disclose documents harmful to their own case outweigh the costs involved?

I. Introduction

"*To disclose or not to disclose*?" This is the perennial question asked by every litigation practitioner when the process reaches 'discovery'. In discovery, parties exchange documents in their possession, custody, power which relevant to their case, whether helpful or adverse. There is, however, a lurking temptation for lawyers steep in the adversarial system to prioritize victory over truth, and the protean concept of relevance can always be tilted in favour of helpful documents. The counterbalance is found in the obligation in law for parties to disclose all relevant documents, including harmful ones.

II. Benefits

This duty is said to have numerous benefits.

First, the requirement to disclose all documents (including harmful ones) leads to a "just and efficient" disposal of litigation.[29] All relevant evidence is placed before the Judge, who adjudicates having heard all arguments on the full factual matrix. This "cards face

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[29] *Teo Wai Cheong v Credit Industriel et Commercial and anor appeal* [2013] 3 SLR 573 ("**Teo Wai Cheong v CIC**") at [41].

up on the table"[30] approach breeds confidence. Cases are disposed off fairly and completely.

The widespread acceptance of the duty is further seen in the consensual realm of arbitration. For instance, Article 9(5) of the IBA Rules for Taking of Evidence (2010) ("**IBA Rules**") allows the Tribunal to draw an inference that a piece of evidence is adverse, if a party fails to disclose the same.

The ubiquity of the principle appears to confirm its importance.

The administration of justice also calls for judicial economy. Full disclosure enables the parties to evaluate the strength of their cases before a full trial. This dose of realism assists many to settle their claims without marching to battle. There are less surprises and parties are focused on the material issues. Claims or defences may end at a preliminary stage due to the disclosure of a crucial document.

A less obvious but equally important benefit is that full disclosure facilitates a level-playing field. The unsophisticated investor will not be robbed his day in Court against a multinational bank by virtue of undisclosed evidence.

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30 *Ibid.*

III. Critique

Detractors however argue that the burdens of justice are too high.

The starting point would be the extent of the duty. For one, parties who fail their disclosure obligations may have their claim or defence struck out. In an extraordinary application where 32 affidavits were filed, a claim was struck out on the basis that the plaintiff had deliberately destroyed e-mail evidence.[31] Where transcripts of conversations between banker and customer were not disclosed, a 16 day trial was set aside and a re-trial ordered.[32] These were extreme cases but the possibility that non-disclosure would have such devastating results increases the cost for parties.

Solicitors are not spared this duty. A perfunctory regurgitation of Order 24 is insufficient.[33] Because a client cannot ordinarily be expected to appreciate the discovery obligation, solicitors owe a special duty to explain this.[34] A solicitor's is duty-bound to carefully review documents to ensure that no relevant documents have been omitted.[35]

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31 *K Solutions Pte Ltd v National University of Singapore* [2009] 4 SLR(R) 254.

32 *Teo Wai Cheong v Credit Industriel et Commercial* [2011] SGCA 13.

33 Teo Wai Cheong at [47].

34 Per Lord Wright in *Myers v Elman* [1940] AC 282 at 322.

35 *Woods v Martins Bank Ltd* [1959] 1 QB 55 at 60.

These duties increase organisation costs for clients which is spent to ensure punctilious adherence to the rule. The fear of Court sanctions and the adversary amplifying every (even inadvertent) non-disclosure imbues anxiety. The perhaps unintended consequence is that parties err on the side of completeness.

The impact of modern technology on parties' discovery obligation adds to such cost. Documents are no longer limited to those in print. Computer databases,[36] video and voice recordings,[37] photographs and phone messages are now commonplace in litigation. Of particular nuisance is electronic mail which can be produced swiftly at virtually no cost. Some statistics prove the point. According to an IBA report on civil litigation,[38] global business email volume for the first time exceeded one Exabyte in 2003.[39] A law firm estimates that a party's email discovery costs including data restoration, solicitor review) ranges from US$0.40 to US$2.00.

III. Reform?

The cost of the duty to disclose all relevant documents has not gone unnoticed.

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36 *Megastar Entertainment Pte Ltd & anor v Odex Pte Ltd* [2005] 3 SLR(R) 91.

37 *Senior v Holdsworth; ex p Independent Television News Ltd* [1976] QB 23.

38 Available online: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=28B837EC-AB93-4288-A4AC-558E34273E3F>.

39 An 'exabyte' equals to 1 million 'terabytes'. A 'terabyte' equals to 1 billion 'gigabytes'.

In a system closer to home, the United Kingdom (UK) has made subtle but significant changes to its discovery system, now termed 'disclosure'. In his *Access to Justice Report* (1996), Lord Woolf remarked that discovery (as it was then known) had become disproportionate. Typically, a large morass of documents were disclosed but few were actually material. Yet, parties and their solicitors had to expend exorbitant amounts of time and cost for document review. Lord Woolf's Report was the starting point. Further reviews of the cost of civil litigation have resulted in the recent Jackson reforms. Some wisdom can be gleaned from then.

The current Civil Procedure Rules (CPR) on disclosure delineate between 'fast-track' cases and other higher value cases The default disclosure regime would not apply to lower value / 'fast-track' cases. This ensures some level of commensurability.

For other cases, parties are treated to a 'menu' of options. They could jointly propose a discovery roadmap which would include the scope of documents and potential costs involved. The Court could make specific orders for disclosure which are issue-specific, or order that parties disclose only documents they intend to rely on, and documents which are specifically requested for. As alluded to earlier, this is the approach taken in the IBA Rules and is not uncommon in the arbitration world. This leaner, more focused, approach to arbitration may suit high value but factually unsophisticated cases.

There is, still, the fallback position of 'standard disclosure', where parties disclose all relevant documents. Yet, even this is curtailed by some measure. CPR 31.7 only

requires parties to “make a reasonable search” based on factors such as the number of documents, nature and complexity of the proceedings, and the ease and expense of retrieval of documents.

The menu of options would not be an easy reform to implement. Nonetheless the delineation between high value and low value claims is a welcomed calibration which enables access to justice. The introduction of “reasonableness” also limits the weight of expectations.

Allowing the Court to manage discovery for high-value claims no doubt shift the costs to the Courts. Case management conferences become the forum where important directions are given on the scope and extent of discovery. But in the overall scheme of things, litigants may be happy to bear such costs if it reduces the extant exorbitance of litigation.

(1,264 words)