

Leigh Day

**Litigation
and
Access to Information**

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WHY?



A group of indigenous activists attempts to gain access to Brazil's Federal Senate.
Photo: Pedro França/Agência Senado

Covering

- Litigation in High Court QBD (briefly!) & points at which the parties obtain info
- How non-parties can obtain documents that arise in the litigation
- FOI and DPA applications from Govt
- Court Visit

Not covering

- Lower courts
- Fast track, specialist lists (High Court)
- Academic access to court docs

1. THE LITIGATION PROCESS



Litigation Process (1)

- Governed by rules:
 - Civil Procedure Rules (CPR)
 - <https://www.justice.gov.uk/courts/procedure-rules/civil/rules>
- **Rule No 1** “The overriding objective”
 - Court to deal with cases justly and at proportionate cost

Investigation

Investigation into the potential claim - seek to obtain as much information as possible from public sources. Consider requests under the FOIA and DPA

Issue of Proceedings

Proceedings commenced by Claimant issuing a Claim Form

Defence and Reply

Defence is served after either 14 or 28 days (depending if an acknowledgement of service is filed). Claimant then has the opportunity to serve a Reply

Preparation of disclosure report

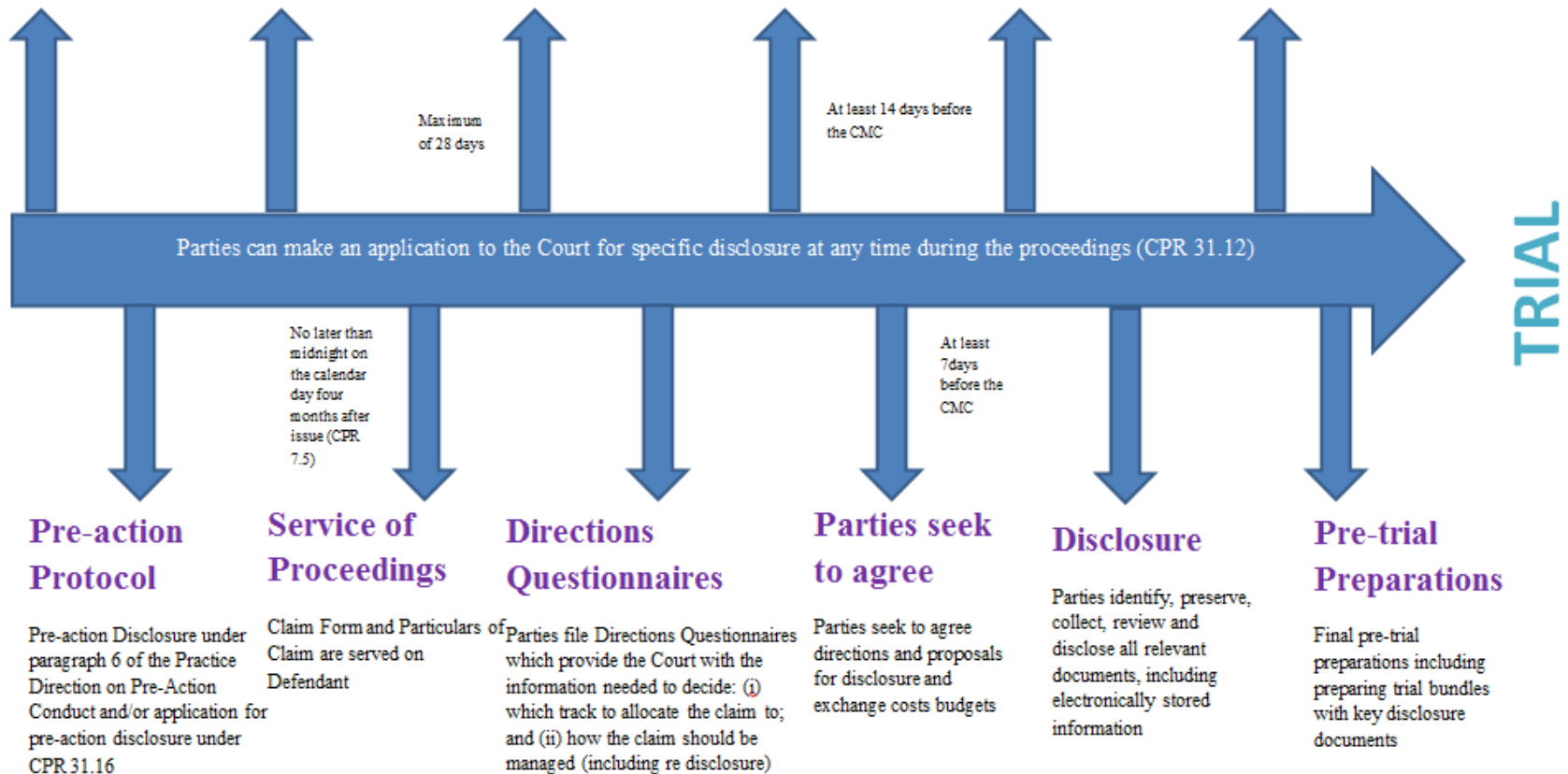
Parties submit a disclosure report and estimate their costs for providing standard disclosure. Parties may also exchange Electronic Disclosure Questionnaires

Case Management Conference

In multi-track cases, the Court will hold a CMC to: (i) review the steps the parties have taken; (ii) review the parties' compliance with any directions given by the court; (iii) decide and give directions about the steps to be taken

Witness and Expert Evidence

Parties exchange witness and expert evidence



Litigation Process (2)

- DISCLOSURE! (more later)
- “Statements of Case” - CF, POC, Defence, Reply, Counter Claim, RFI
- [NB - interim applications - eg specific disclosure, freezing order, anti-suit]
- Other important docs - witness statements (WS), bundles, skeleton arguments, submissions
- Court orders, judgments

“Disclosure”

- “A party discloses a document by stating that the document exists or has existed”
- “A party to whom a document has been disclosed has a right to inspect that document”
 - and obtain a copy



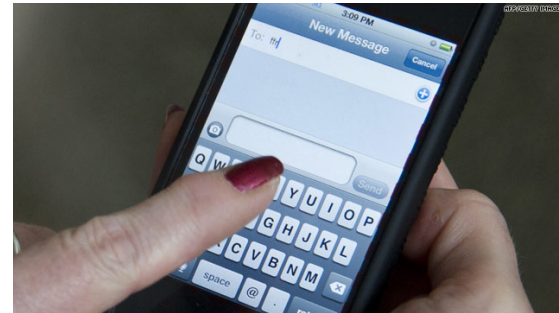
Document?

- *Document* means anything in which information of any description is recorded
 - VERY broad



Electronic disclosure

- E-mail and “other electronic communications” - text messages, photos, video, WhatsApp?, FaceBook?
- On computers and databases
- On “other electronic devices and media” - phones, cameras, audio devices, etc,
- Servers (back ups and “deleted” docs)
- Metadata



Disclosure requirements

- Specific – limited
 - Eg Anglo American – Board minutes, internal decision making policies
- Standard = normal order
 - disclosing party must make a reasonable search
 - make a list of the documents of whose existence the party is aware

Disclosure limits

- Overriding principle - proportionality
 - Limit by date, persons, place, categories.
- Privilege (must be disclosed, no right to inspect)
- Objections to disclosing certain docs (challenge by application)

Disclosure statement

- State extent of search
- Certify know duty and carried it out
- State belief that search reasonable
- Highlight limitations and give the reasons why the limitations were adopted

Penalties for false statements

- Contempt of court



Who?

- Parties
- Third parties - must be necessary
- Person/Co not yet a party
 - Court can order pre-action disclosure
 - Applicant and respondent likely to be parties to subsequent proceedings
 - Standard disclosure would cover the documents sought
 - “Desirable” - would dispose fairly of the anticipated proceedings; resolve issue w/o procs; or save costs

When?

- Points at which documents can be obtained by the parties:
 - Investigation
 - Pre-action disclosure
 - Docs referred to in the Statements of case or WS
 - Disclosure (standard)
 - Specific disclosure (any time)

Use of disclosed docs (1)

- **CPR 31.22(1)** *party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed ...*
- [NB - The rule applies to protect not only the disclosed documents themselves, but also their contents]

Use of disclosed docs (2)

- EXCEPT where:
 - (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
 - (b) the court gives permission; or
 - (c) disclosing party agrees

Use of disclosed docs (3)

- BUT

(2) *Court order - restrict/prohibit use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.*

2. ACCESS TO DOCUMENTS BY NON-PARTIES



Access to docs by non-parties

- Principle of “Open Justice”

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”

Lord Diplock 1979

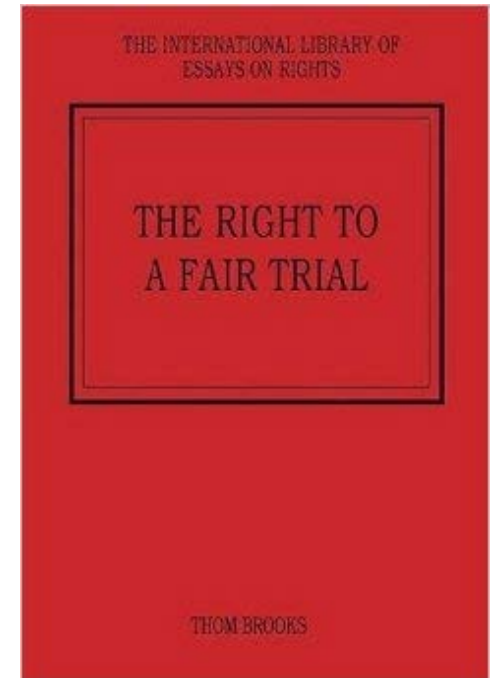
- Article 6 ECHR

“Open justice is one of the oldest principles of English law, going back to before Magna Carta. It is now set out in CPR39, and in Art 6,

Tugendhat J

Terry v Person Unknown

[2010] EWHC 119 (QB)



CPR 5.4C(1)

(Copy in your packs)

(1) No permission required:

- “statements of case”
 - (3) only if Defs have filed ackn of service or defence
 - (4) Court may order non-party not to obtain a copy of statement of case
- Public judgment or order

CPR 5.4C(2)

(2) Permission required:

Must make an application , pay fee

On notice or without notice (court can order)

- Any other document filed
 - Not everything is filed
- Communication by court with others



Documents that are not filed

- If a document has been read in open court and you can show a “legitimate interest” then you should be allowed access
 - Requests can be made to the parties or to Court
- If a document has not been read in open court then it is likely to be very difficult to obtain access

Permission

- When is permission more likely to be given to access documents on file but not yet referred to in Court?
 - documents that relate to ongoing litigation than to documents relating to historic litigation
 - open justice is primarily concerned with monitoring the decision-making process as it takes place (but end of litigation is not an absolute bar)
 - an interest in similar or related litigation
 - must identify the documents, or classes of document
 - Not entitled to wholesale review or a ‘fishing expedition’.
 - Not for documents otherwise publicly available
 - balance the non-party’s reasons for wanting the documents against the interests of the party that filed the documents



Witness statements

- Not filed:
 - ‘Witness statements do not form part of the court record or court file in the Commercial Court’ - CPR5.4C(2) did not apply (*British Arab Commercial Bank v Algosaiabi Trading Services Ltd* [2011], Flaux J)
 - BUT may be able to rely on CPR 32.13(1), which provides that: ‘A witness statement which stands as evidence in chief is open to inspection during the course of trial unless the court otherwise directs’.
 - Can ask Court to use inherent jurisdiction to obtain copies - *British Arab Commercial Bank v Algosaiabi Trading Services Ltd* [2011], Flaux J ‘... in the context of a situation where it is anticipated that the witness will give evidence... the court would have had an inherent jurisdiction to say it is appropriate that [a non-party] should have the witness statements now before the witnesses go into the witness box so they do not have to be produced on a piecemeal basis.’
- Sometimes are filed – e.g. interim applications

Types of 'other documents'

- Skeleton arguments
 - Do not form part of the 'records of the court'.
 - Court has the power, under its inherent jurisdiction, to order that skeleton arguments be provided to non-parties.
 - "...since skeletons are part of the argument and are referred to in open court and are available to the law reporters I can see no reason for withholding them." *R(Davies, James and Gaines-Cooper) v HM Revenue & Customs* [2010], Ward LJ ordered skeleton arguments to be provided to a non-party
- Trial bundles
 - *GIO personal Investment Services Ltd v Liverpool and London* [1999], Potter LJ said that members of the public were not entitled to be provided with copies of the trial bundles

Using documents which you obtain

- Once you have been granted access to a document by the Court or it is in the public domain, unless the Court has ordered otherwise, you can use it freely
- BUT, beware of defamation!
- Also, be careful not to publish anything during court proceedings with a jury - you could be found in contempt of court

Derogations from the principle of Open Justice

- Court sits in private --> judgment not public
 - E.g. to protect minors
- On application by a party, the Court may also order that the court documents should be private

Questions?



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