CHAPTER 2

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This chapter considers the point of time at which documentary disclosure becomes available. Disclosure is usually given during the course of proceedings, at a point when the issues between the parties are known. Sometimes, however, disclosure is given before substantive proceedings have been commenced, or simultaneously with proceedings being commenced, and occasionally after judgment has been given. In a few cases, disclosure may be ordered, although there are no English proceedings contemplated at all, such as for the purposes of a foreign legal action. Conversely, it is even possible to obtain disclosure from abroad for English proceedings. These categories of case are considered in order. 2.01

A. BEFORE PROCEEDINGS COMMENCED

There are a limited number of instances where disclosure is given before substantive proceedings are commenced. Such cases involve the taking of preliminary legal action, the entire object of which is to obtain the disclosure needed for the separate, later proceedings. A logically prior question, however, is the use that may be made by a prospective litigant of documents already made available through other legal proceedings or public inquiries. In these situations the production of the documents or information concerned was for the purposes of those earlier proceedings, and it is coincidental that it is of assistance in the later proceedings. Such cases involve documents from previous litigation and arbitrations, and documents from inquests and public inquiries. 2.02

Documents from previous litigation and arbitrations

Civil court proceedings (whether interlocutory or at trial) are not secret,[1] 2.03

[1] *Scott v Scott* [1913] A.C. 417; *AG v Leveller Magazine* [1979] A.C. 440; *Forbes v Smith* [1998] 1 All E.R. 973; *Al Rawi v The Security Service* [2010] EWCA Civ 482; *Rawlinson and Hunter Trustees SA v Serious Fraud Office* [2015] EWHC 266 (Comm); *Re Guardian News & Media Ltd* [2016] 1 WLR 1767 CA; *R. (on the application of C) v Secretary of State for Justice* [2016] UKSC 2, [2016] 1 WLR 444.

and the general rule is that a hearing is to be in public.[2] There is a burden on a party seeking a hearing in private to justify that.[3] In the context of disclosure typical examples of where hearings may be in private are where public interest immunity and legal professional privilege are being considered and a hearing in public may prejudice the privilege or some other right.[4] Except in rare cases,[5] publication or other use of information heard by the public attending a hearing in public is not a contempt of court.[6] Even when a matter is in private, in the absence of an order prohibiting publication, it will usually not be a contempt of court to reveal details of a hearing.[7] Official transcripts of evidence given orally, and of reasons for judgment given, can usually be obtained.[8] In appropriate cases judgments may be anonymised or redacted.[9] Where proceedings have been held in private, non-parties have no right to a transcript without permission of the court.[10] The public may normally inspect witness statements ordered to stand as evidence in chief,[11] and also written submissions and skeleton openings.[12] Even where, exceptionally, the public are lawfully excluded,[13] the order of the court may still normally be published.[14] But unauthorised invasion of lawyers' papers in court by others can amount to contempt of court.[15] Arbitration proceedings, on the other hand, are normally held in private, and the public has no right to attend or to use information given at the hearing, or to obtain transcripts or copies of the award without the consent

[2] CPR r.39.2(1).
[3] *A v BBC* [2014] UKSC 25, [2015] 1 AC 588. CPR r.39.2(3) provides a list of situations where a hearing may be in private, in whole or in part.
[4] *Dechert LLP v Eurasian Natural Resources Corporation Ltd* [2016] EWCA Civ. 375 (held an assessment of costs should be in private where these were documents which were privileged and a public hearing may prejudice defence to any charges which might arise out of an ongoing criminal investigation).
[5] Administration of Justice Act 1960 s.12 (as amended).
[6] *Hodgson v Imperial Tobacco Ltd* [1998] 2 All E.R. 673 CA.
[7] *A.F. Noonan (Architectural Practice) Ltd v Bournemouth and Boscombe AFC* [2007] EWCA Civ 848.
[8] See CPR Pt 39, Practice Direction paras 1.11 and 6.3–6.4; CPR Pt 39, Practice Direction para.1.12. In family proceedings, there has been traditionally common for judgments to be not public or redacted or anonymised, but the Family Division has in recent years been moving towards greater transparency: The Practice Guidance (Family Courts: Transparency) [2014] 1 W.L.R. 230; *Re C (Publication of Judgment)* [2015] EWCA Civ 500. In *Re C (a child) (Private Judgment: Publication)* [2016] EWCA Civ 798, *The Times*, 10 November 2016, CA.
[9] *JIH v News Group Newspapers Ltd* [2010] EWHC 2818 (QB); *R. (on the application of Willford)* [2013] EWCA Civ 674 (general principle against, especially on appeal).
[10] CPR Pt 39, Practice Direction para.6.4; *North Shore Ventures v Anstead Holdings, Inc* [2011] EWHC 910 (Ch).
[11] See Ch.21, para.21.29, below.
[12] *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd* [1999] 1 W.L.R. 984 CA.
[13] CPR r.39.2(3).
[14] Administration of Justice Act 1960 s.12; see, e.g. *A v A, B v B* [2000] 1 F.L.R. 701 (ancillary relief proceedings).
[15] *Re Griffin, The Times,* 6 November 1996.

of the parties or the permission of the court.[16] Publication or other use of such information may be a breach of contract, or of confidence, but it is not a contempt of court.

When documents are obtained by a party to English civil litigation on disclosure by another such party, they, and the information contained in them, are held subject to an obligation on the recipient not to use those documents or that information for any purpose other than that of the litigation in which they were disclosed without the permission of the court or the disclosing party and the owner of the document concerned being obtained. A similar implied obligation arises in relation to disclosure given in arbitrations. This subject (including the circumstances in which the undertaking or obligation is released) is more fully discussed in Chapter 19 below. The different question of obtaining documents from the court file in other litigation to which the person concerned is *not* a party is dealt with in Chapter 3.[17] 2.04

Criminal cases

As in civil litigation, court hearings in criminal cases are generally[18] not secret. The Criminal Procedure Rules 2015 provide for the exercise of certain kinds of jurisdiction in private,[19] and a party may apply for a hearing to be held in private.[20] Subject to limited exceptions,[21] information given publicly in open court in hearings in criminal cases can be published or otherwise used subsequently. Transcripts may be obtained.[22] The prosecuting authorities are not subject to any obligation to the court not to use material obtained in the course of a criminal investigation other than for the purpose of the criminal proceedings.[23] The disclosure of information 2.05

[16] *Dolling-Baker v Merrett* [1990] 1 W.L.R. 1205 at 1213; *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 All E.R. 136 CA. Different considerations apply to court judgments relating to arbitrations: see *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co.* [2004] EWCA Civ.314, [2005] Q.B. 207 CA.
[17] See Ch.3, paras 3.53–3.61, below.
[18] Though see the Children and Young Persons Act 1933 s.37(1) (as amended by the Youth Justice and Criminal Evidence Act 1999 s.67(1) and Sch.4, para.2(2)); Official Secrets Act 1920 s.8(4); Official Secrets Act 1989 s.11(4); Criminal Procedure Rules Pt 6.
[19] r.6.6.
[20] r.6.6; *Re Guardian Newspapers Ltd* [1999] 1 Cr.App.R. 284.
[21] See, e.g. Contempt of Court Act 1981 s.4(2); Sexual Offences (Amendment) Act 1974 s.4; Children and Young Persons Act 1933 s.49 (as amended); Criminal Justice Act 1987 s.11 (as amended).
[22] Criminal Procedure Rules 2015 r.5.5.
[23] *Preston Borough Council v McGrath, The Times*, 19 May 2000 CA. There are restrictions on the Serious Fraud Office in supplying material to third parties which has been obtained using their compulsory powers or warrant under the Criminal Justice Act 1987 s.2: see s.3 and *R. (on the application of Kent Pharmaceuticals) v Director of the Serious Fraud Office* [2004] EWCA Civ 1494, [2005] 1 W.L.R. 1302. However this is no bar to the SFO disclosing documents obtained under s.2 in civil proceedings pursuant to a disclosure order: *Tchenguiz v Director of the Serious Fraud Office* [2013] EWHC 2128 (QB).

between the parties at common law was a controversial subject, which developed very rapidly in recent times.[24] After some doubts, it was finally held that the disclosure of documents by the prosecution to the defence as unused material *did* generate an implied undertaking not to use them for any collateral purpose.[25] Doubts, however, remained in relation to used material, and to material read out in open court.[26] The subject is now the subject of comprehensive statutory provision.[27] Where material is disclosed to the accused under the provisions of the legislation, he may use it for the purposes of his defence or in connected criminal proceedings (e.g. on appeal).[28] He may also use it elsewhere to the extent that it has become public in open court,[29] or to the extent that the court gives permission.[30] Other use is prohibited,[31] and is a contempt of court.[32]

Inquests and public inquiries

2.06 Inquests are inquiries, not litigation,[33] and they have no equivalent to the disclosure process.[34] However, the inquest procedure will result in the production of various documents, including post-mortem examination reports, notes of the evidence, the inquisition recording the results of the inquest, and various certificates which the coroner may have to give. Some or all of these documents may be of assistance in subsequent legal proceedings. It is unfortunately unclear whether there is any obligation not to use such documents in subsequent proceedings without the leave of the court.[35] As to documents obtained as a result of public inquiries, the position is

[24] See *R. v Maguire* [1992] Q.B. 936; *R. v Ward* [1993] 1 W.L.R. 619; *R. v Keene* [1994] 1 W.L.R. 746; *R. v Brown* [1994] 1 W.L.R. 1599; *R. v Bromley Justices Ex p. Smith* [1995] 1 W.L.R. 944, DC; *R. v Blackledge* [1996] 1 Cr.App.R. 326; *R. v Mills* [1998] A.C. 382 HL; *Taylor v Serious Fraud Office* [1999] 2 A.C. 177; *Rajan v General Medical Council* [2000] Lloyd's Rep. Medical 153, PC; see also *Rowe and Davis v UK* (2000) 30 E.H.R.R. 1.

[25] *Taylor v Serious Fraud Office* [1999] 2 A.C. 177 HL.

[26] *Mahon v Rahn* [1998] Q.B.424 CA (overruled in *Taylor* in relation to unused material).

[27] Criminal Procedure and Investigations Act 1996 Pt I; Criminal Procedure and Investigations Act 1996 (Code of Practice) Order 2015; Criminal Procedure Rules 2015 Pt.15. See Ch.15, paras 15.56–15.58, below. See also Protocol for the Control and Management of Unused Material in the Crown Court; *R. v K* [2006] EWCA Crim 724.

[28] Criminal Procedure and Investigations Act 1996 s.17(2).

[29] Criminal Procedure and Investigations Act 1996 s.17(3).

[30] Criminal Procedure and Investigations Act 1996 s.17(4); Criminal Procedure Rules 2015 r.15.7.

[31] Criminal Procedure and Investigations Act 1996 s.17(1).

[32] Criminal Procedure and Investigations Act 1996 s.18; Criminal Procedure Rules 2015 r.15.8.

[33] *R. v South London Coroner, Ex p. Thompson, The Times* 9 July 1982; *R. v Att. Gen. for Northern Ireland Ex p. Devine* [1992] 1 W.L.R. 262 HL.

[34] See Ch.24, paras 24.18–24.31, below.

[35] See Ch.24, para.24.31, below.

perhaps clearer. Where documents are voluntarily submitted to an inquiry the submitter must be taken to waive confidence in them.[36] Even where compulsion has been used to require their submission, it seems that the better view is that there is no obligation to keep their contents confidential thereafter, and they may be used in subsequent litigation without leave.[37]

Probate cases

2.07 In probate cases, where there are any circumstances surrounding the making and execution of the will which give rise to suspicions of undue influence, want of knowledge and approval, or mental incapacity, the Law Society recommended that, on application by those attacking the will, the solicitor concerned in the making of the will should make a statement of the evidence which he could give in the matter, and should make it available to all concerned.[38] It should not be confined to narrow matters concerning execution, but should extend to all surrounding circumstances leading up to the preparation of the will.[39] If this recommendation is not followed it may have costs implications.[40]

2.08 The High Court has power to order a person believed on reasonable grounds to have "knowledge of any document which is or purports to be a testamentary document", to attend to be examined in open court, whether or not any proceedings are pending.[41] The court may not only order such person to bring the document with him (if appropriate), but may require him to answer any question in relation to it.[42] Similarly, where it appears that a person has in his possession, custody or power any document which is (or purports to be) a testamentary document, the High Court may issue a subpoena requiring him to produce the document as the court may direct, whether any proceedings are pending or not.[43] Once a grant of letters of administration has occurred an administrator may be entitled to the deceased's papers and can apply for an order against anyone holding such papers.[44]

[36] cf. *Derby & Co Ltd v Weldon* unreported 19 October 1988.

[37] See Ch.24, para.24.20, below.

[38] See *The Guide to the Professional Conduct of Solicitors* 8th edn (1999), at 450. This is omitted from the current Solicitors Code of Conduct, but continues to represent best practice.

[39] *Larke v Nugus* (1979) 123 Sol. Jo. 337, [2000] W.T.L.R. 1033 CA; cf. *Mausner v Minchler* [2006] EWHC 1283 (Ch.).

[40] *Larke v Nugus* (1979) 123 Sol. Jo. 337, [2000] W.T.L.R. 1033 CA; cf. *Mausner v Minchler* [2006] EWHC 1283 (Ch.).

[41] Senior Courts Act 1981 s.122.

[42] Senior Courts Act 1981 s.122. As to procedure, see CPR PD57A para.7.

[43] Senior Courts Act 1981 s.123.

[44] *Caudle v LD Law* [2008] 1 W.L.R. 1540 (not before grant).

Cases involving preliminary legal action

2.09 Turning now to cases which involve taking some preliminary legal action, the sole purpose of which is to obtain the disclosure required, these are:

(a) *Norwich Pharmacal* orders;
(b) pre-action disclosure under the Senior Courts Act 1981 s.33;
(c) corporate insolvency;
(d) applications to inspect the court file in other litigation.

These are dealt with in Chapter 3.

B. AT THE TIME THAT PROCEEDINGS ARE COMMENCED

2.10 In some cases disclosure orders are made simultaneously with proceedings being commenced. The main such cases are:

(a) disclosure orders ancillary to injunctions.
(b) search orders (formerly known as *Anton Piller* orders).

(a) Orders ancillary to injunctions

2.11 These are orders which are ancillary, not just to "ordinary" interim injunctions to restrain a continuing or threatened wrong,[45] but also to "tracing" injunctions,[46] where the claimant makes a proprietary claim to the property in the defendant's hands, and to freezing (formerly called *Mareva*) injunctions,[47] in which the claimant's claim is unrelated to the property, and the defendant is merely restrained from rendering himself "judgment-proof" before trial. Freezing injunctions may be granted by both the High Court and the County Court.[48]

2.12 In all these kinds of case, the court has jurisdiction at an interlocutory stage (indeed, even before proceedings are commenced)[49] both under s.37 of the Senior Courts Act 1981 and its own inherent jurisdiction to order disclosure of facts or documents which are important in ensuring the

[45] CPR r.25.1(1), (8).
[46] CPR r.25.1(1)(c), (2).
[47] CPR r.25.1(1)(f).
[48] County Courts (Remedies) Regulations 1991 reg.3 formerly restricted powers to grant freezing injunctions. This prohibition was removed by the County Court Remedies Regulations 2014, which revoked the 1991 Regulations.
[49] CPR r.25.2(1)(a), (2)(b), (3).

effectiveness of the injunction.[50] Thus, in the case of an injunction to restrain a breach of confidence, the court has power to order a defendant to disclose documents which concern the confidential information in question and which might reveal the "source" of the breach,[51] or to disclose the names and addresses of former business contacts.[52] The court does have power to order disclosure as to property and assets which may be the subject of a freezing injunction. A reasonable possibility of a freezing injunction is enough to found jurisdiction for the court in its discretion to make an order.[53] However, the court will not order disclosure of information or documents which may be relevant in a remote sense to some future application for a freezing injunction.[54] An applicant should not seek such disclosure on a speculative basis to see if he can fish for information to justify a subsequent application for a freezing injunction. Where assets are held through trusts, the court even has the power to order both a defendant discretionary beneficiary as well as the trustees to provide disclosure as to the trust for the purpose of ascertaining the extent of the defendant's control of assets held within trust structures.[55]

2.13 In tracing or "freezing" cases, the most important facts are often those concerning the defendant's assets. In the tracing case, this is because the claimant wants to know into what assets his tracing claim may now be made.[56] In the "freezing" case, the disclosure order[57] is usually made to enable the claimant to "police" his injunction by putting third parties in whose hands such assets may lie (typically banks) on notice of the court order.[58] Ordinarily a disclosure order should not be wider than the freezing order. Thus where the freezing order is confined to assets within the jurisdiction, the disclosure order should also be confined to assets within the

[50] CPR r.25.1(1)(g), (3); Senior Courts Act 1981 s.37(1); *JSC BTA Bank v Ablayavoz* [2012] EWCA Civ 1411 at [168].
[51] *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] A.C.1 at 38–40 HL.
[52] *Intelsec Systems Ltd v Grech-Cini* [2000] 1 W.L.R. 1190.
[53] *Lichter & Schwarz v Rubin* [2008] EWHC 450 (Ch), *The Times*, 18 April 2008; CPR r.25.1(1)(g).
[54] *Parker v C.S. Structured Credit Fund Ltd* [2003] EWHC 391 (Ch), [2003] 1 W.L.R. 1680.
[55] *JSC Mezhdunarodiniy Promyshlemniy Bank v Pugachev* [2014] EWHC 3547 (Ch) at [49], [2015] EWCA Civ. 139.
[56] See, e.g. *London & Counties Securities v Caplan* unreported 26 May 1978; *Mediterrania Raffineria v Mabanaft* unreported 1 December 1978 CA; *Bankers Trust Co v Shapira* [1980] 1 W.L.R. 1274 CA; *Re D.P.R. Futures Ltd* [1989] 1 W.L.R. 778 at 787–788; *CIBC Mellon Trust Co. v Stolzenberg* [2003] EWHC 13 (Ch), *The Times*, 3 March 2003. Gee, *Commercial Injunctions* 5th edn (2004).
[57] See CPR Pt 25, Practice Direction 25A—Interim Injunctions, Annex, Freezing Injunction, paras 9–10, and Search Order, paras 18–10; *Admiralty and Commercial Courts Guide* (2014), Appendix 5.
[58] See, e.g. *A v C* [1981] Q.B. 956n; *A. J. Bekhor & Co. Ltd* v *Bilton* [1981] Q.B. 923 CA; *C.B.S. (UK) v Lambert* [1983] Ch. 37 CA; *Re a Company* [1985] B.C.L.C. 333 CA; *Motorola Credit Corporation v Uzan* [2002] EWCA Civ 989, [2002] 2 All E.R. (Comm) 945, *The Times*, 10 July 2002, CA.

jurisdiction.[59] The court also has jurisdiction to require a defendant to provide disclosure as to the sources of the funding of his defence.[60] A defendant making an application to vary the order (i.e. to permit increased or additional spending) will be required to give full disclosure of his means, liabilities and expenditure necessary to maintain his standard of living or, in the case of a corporate defendant, its ordinary way of business.[61] Cross-examination can be ordered of the defendant on his statement of assets in an appropriate case.[62] But this is an exceptional measure, not to become a routine feature of freezing injunction proceedings,[63] and the court may make an order for cross-examination subject to an undertaking not to use the material without permission for the purpose of bringing contempt proceedings.[64] An order for cross-examination may also be made against a non-party pursuant to the *Norwich Pharmacal* jurisdiction, but again this is unusual.[65] The deposition arising from the examination may not be used by any person other than the examinee for any purpose other than that of the proceedings in question, except with the permission of the examinee or of the court.[66]

2.14 But a disclosure order may also be made, in exceptional cases, where the defendant opposes the imposition of the injunction on a contested hearing, and it is desired to test his written evidence.[67] However, the court is not in such cases limited to information regarding assets. It is also open to the court to order, as ancillary to a freezing injunction, the disclosure or provision of other information designed to assist the injunction. For example, the court may order the defendant to sign letters instructing a Swiss bank to disclose to the claimant information concerning any account which the defendant maintained with that bank.[68] The court may also order a claimant who, in breach of the rule 31.22 obligation or implied undertaking on disclosure,[69] has passed disclosed documents to a third party, to disclose on

[59] *Rybolovleva v Rybolovlev* unreported 18 February 2009, BVI High Court at [55].
[60] *JSC BTA Bank v Ablyazov* [2011] EWHC 2664 (Comm).
[61] *House of Spring Gardens Ltd v Waite* [1984] F.S.R. 277 at 284; *Bird v Hadkinson* [1999] B.P.I.R. 653 (duty to make full and accurate disclosure).
[62] *A.J. Bekhor & Co v Bilton* [1981] Q.B. 923 CA; *House of Spring Gardens Ltd v Waite* [1985] F.S.R. 173 CA; *Bayer v Winter (No.2)* [1986] 1 W.L.R. 540; *JSC BTA Bank v Ablyazov* [2009] EWHC 2833 (QB); CPR r.32.7 (RSC Ord.29 r.1A); *Pathways v West* [2004] NSWSC 903, (2005) 212 A.L.R. 140 at [9] (possible for cross-examination even when no affidavit or statement).
[63] *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia, The Times*, 22 October 1996 CA.
[64] *Motorola Credit Corporation v Uzan (No.2)* [2002] EWHC 2187 (Comm); order for cross-examination upheld on appeal, *Motorola Credit Corporation v Uzan (No.6)* [2003] EWCA Civ 752, [2004] 1 W.L.R. 113 CA.
[65] *Kensington International Ltd v Republic of Congo* [2006] EWHC 1848 (Comm).
[66] CPR r.34.12.
[67] *Bank of Crete S.A. v Koskotas* [1991] 2 Lloyd's Rep. 587 CA.
[68] *Bayer A.G. v Winter (No.2)* [1986] F.S.R. 357; *Bank of Crete S.A. v Koskotas* [1991] 2 Lloyd's Rep. 587 CA.
[69] See Ch.19 below.

affidavit the circumstances and details of such passing.[70] But the information sought ought not to extend beyond the policing of the injunction.[71] The court is wary of allowing wide-ranging disclosure as part of a freezing injunction. Thus a provision in a freezing order requiring a defendant to reveal whether he has obtained bribes other than those specifically alleged is objectionable.[72]

2.15 It should be noted that disclosure orders in aid of freezing injunctions are made under s.37(1) of the Senior Courts Act 1981 or the court's inherent jurisdiction, and not under CPR Pt 31, for the disclosure concerned is not likely to fall under "standard disclosure" in the action.[73] But it will probably be otherwise in tracing cases, and may be so in case of other interlocutory injunctions.[74] Whether disclosure is ordered under CPR Pt 31, or under s.37(1) of the Senior Courts Act 1981 or the inherent jurisdiction, one thing that the court may not do is to order disclosure designed to reveal breaches of earlier orders.[75] The standard form of ancillary disclosure order requires the defendant to give the information "at once",[76] i.e. upon service of the order upon him. This has been described as draconian.[77] Usually, the court will refuse an application to stay the disclosure provision in a freezing order pending the determination of an application to set aside the order.[78] This will enable the freezing order to be policed. This does not mean that a disclosure order will invariably be maintained whilst the freezing order or disclosure order is being challenged either at first instance or pending an appeal.[79] In some cases the court has varied the disclosure to disclosure being confined to the claimant's legal representatives, pending the hearing of the set aside application.[80] The court may make an unless order striking out a defence or debarring a defence for failure to comply with a disclosure provision in a freezing order.[81] It is open to the court to make an "unless" order for disclosure even though there is a pending jurisdictional or other challenge.[82] The failure to comply with the disclosure provision in a freezing

[70] *Bhimji v Chatwani (No.2)* [1992] 1 W.L.R. 1158.
[71] *Armco Inc v Donohue* unreported 25 October 1999, R.Ct. of Jersey.
[72] *International Fund for Agricultural Development v Jazayeri* unreported 8 March 2001, Comm. Ct.; *Den Norske Bank v Antonatos* [1999] Q.B. 271.
[73] *A.J. Bekhor & Co Ltd v Bilton* [1981] Q.B. 923 at 939.
[74] *A.J. Bekhor & Co Ltd v Bilton* [1981] Q.B. 923 at 939; *R.H.M. Foods v Bovril Ltd* [1982] 1 W.L.R. 661 at 664–665; *Bayer A.G. v Winter (No.2)* [1986] 1 W.L.R. 540 at 544; *X Ltd v Morgan-Grampian (Publishers) Ltd* [1990] 2 All E.R. 1 at 5–6; *Bhimji v Chatwani (No.2)* [1992] 1 W.L.R. 1158 at 1166–1169; *Exagym Pty Ltd v Professional Gymnasium Equipment Pty Ltd (No.2)* [1994] 2 Qd. R. 129.
[75] *A. J. Bekhor & Co Ltd v Bilton* [1981] Q.B. 923 CA.
[76] CPR Pt 25, Practice Direction—Interim Injunctions, Annex, Freezing Injunction, paras 9–10.
[77] *S & T Bautrading v Nordling* unreported 5 July 1996 CA.
[78] *Raja v Van Hoogstraten* [2004] EWCA Civ 968, [2004] 4 All E.R. 793 at [101]–[105].
[79] *Dalemont Ltd v Senatorov* 2012 (1) JLR 168 at [25], Jersey Royal Court.
[80] *JSC BTA Bank v Ablyazov (No.2)* [2009] EWCA Civ 1125.
[81] *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1411 at [123]–[168].
[82] *JSC BTA Bank v Ablyazov* [2010] EWHC 2352 (Comm).

injunction or search order may amount to a contempt of court.[83] It may also be a factor in favour of a receivership order in aid of a freezing injunction.[84]

2.16 The extent of the territorial scope of injunctions (especially freezing injunctions) has been a live issue in recent years, and, since ancillary discovery orders are generally tied to such orders, there has been similar debate about their scope. The basic principle is that the court has the power to grant an injunction against anyone who is amenable to its jurisdiction. This may be territorial, in the sense of persons being (even temporarily) within the territory of the jurisdiction (i.e. England and Wales). However, jurisdiction may also be extraterritorial, in the sense of persons who submit to the jurisdiction,[85] or are subject to it on some other basis.[86]

2.17 In tracing cases the court has never minded whether the assets concerned were within or without the territorial jurisdiction, so long as the defendant was personally amenable to the jurisdiction.[87] But in freezing cases the courts originally declined to impose injunctions in respect of assets outside the territorial jurisdiction, even though the defendant himself was subject to such jurisdiction.[88] Disclosure orders ancillary to such injunctions were similarly limited.[89]

2.18 But the courts then found, in personal jurisdiction, the same freedom to impose extraterritorial injunctions in freezing cases as they had long enjoyed in tracing cases.[90] It is now not uncommon, in cases of worldwide freezing injunctions, to order disclosure of assets worldwide, even in cases in which the defendant is challenging the jurisdiction of the English court.[91] Moreover the existence of worldwide asset discovery orders has persuaded the courts subsequently to order such worldwide discovery even in cases of injunctions limited to assets in England and Wales (though this is not, of course, inevitable). The main reason for this is to enable sensible decisions to be made about the need to use injuncted assets to pay existing debts,

[83] *Daltel Europe Ltd v Makki* [2005] EWHC 749 (Ch), [2006] EWCA Civ 94; *Microsoft Corp v Mbaezue* [2009] EWHC 51 (Ch); *Masri v Consolidated Contractors International Co SAL* [2011] EWHC 1024 (Comm); *JSC BTA Bank v Ablyazov* [2012] EWHC 455 (Comm), [2012] EWCA Civ 1411 CA.

[84] *JSC BTA Bank v Ablyazov* [2010] EWHC 1779 (Comm), [2010] EWCA Civ 1141 CA.

[85] e.g. under pre-existing contract, or voluntarily on an ad hoc basis.

[86] e.g. pursuant to the Civil Jurisdiction and Judgments Act 1982, or under CPR rr.6.17–6.35.

[87] *Penn v Lord Baltimore* (1750) 1 Ves. Sen. 444; *Cook Industries v Galliher* [1979] Ch. 489; *Altertext Inc v Advanced Data Ltd* [1985] 1 W.L.R. 457, and see Ch.19, para.19.04, below.

[88] *Ashtiani v Kashi* [1987] Q.B. 888 CA; *Reilly v Fryer* (1988) 138 N.L.J. 134.

[89] *Ashtiani v Kashi* [1987] Q.B. 888 CA; *Reilly v Fryer* (1988) 138 N.L.J. 134.

[90] *Babanaft International Co S.A. v Bassantne* [1990] Q.B. 202 CA; *Republic of Haiti v Duvalier* [1990] Ch. 13 CA; *Derby & Co Ltd v Weldon (No.1)* [1990] Ch. 48 CA; *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch. 65 CA; *Baltic Shipping Co v Traslink Shipping Ltd* [1995] 1 Lloyd's Rep. 673; *Bank of China v NBM* [2002] 1 W.L.R. 844 CA; *Dadourian Group Int Inc v Simms* [2006] EWCA Civ 399, [2006] 2 Lloyd's Rep. 354 CA.

[91] *Grupo Torras S.A. v Al-Sabah* unreported 16 February 1994 CA.

living and legal expenses, and so on. However, in many cases it will be neither appropriate nor necessary for a freeze order confined to assets within the jurisdiction to contain a disclosure requirement for assets worldwide, and a party subject to such an order may apply to set aside the extraterritorial aspect of the disclosure order.[92]

2.19 In recent years, applications for freezing orders in aid of foreign proceedings have become a common feature in the High Court.[93] In the context of s.25 of the Civil Jurisdiction and Judgments Act 1982, the foreign proceedings are proceedings on the substance of the matter.[94] The court is usually cautious before making any such order[95] and s.25(2) provides that the court may refuse to grant relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from s.25 in relation to the subject matter of the proceedings in question makes it inexpedient for the court to grant it. The court will look at any connection with this jurisdiction of the defendant and his assets. Thus if the defendant has neither a presence nor assets within the jurisdiction, it will refuse to make an order.[96] The presence of assets in England may in appropriate circumstances demonstrate a sufficient connection.[97] Where a defendant is neither resident nor has assets within the jurisdiction, it may still be expedient to grant an order if the defendant has some links to the jurisdiction,[98] but such an order will only be granted in exceptional circumstances.[99] Where there is an exclusive statutory procedure available for a foreign authority to obtain a freeze of assets, that will make it inexpedient to grant relief under s.25.[100] There are five particular considerations which should be borne in mind in considering whether it is inexpedient to make an order.[101]

(1) Whether the making of the order will interfere with the management of the case in the primary court (e.g. where the order is

[92] *Rybolovleva v Rybolovlev* unreported 18 February 2009, BVI High Court at [55].

[93] Civil Jurisdiction and Judgments Act 1982 s.25.

[94] *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880, [2009] 1 W.L.R. 665 CA.

[95] *Lewis v Eliades* [2002] EWHC 335 (QB), *The Times*, 28 February 2002, QBD.

[96] *Motorola Credit Corporation v Uzan (No.2)* [2003] EWCA Civ 752, [2004] 1 W.L.R. 113 CA; *Belletti v Morici* [2009] EWHC 2316 (Comm)

[97] *Mobil v Petroleos de Venezuela* [2008] EWHC 532 (Comm), [2008] 1 Lloyd's Rep. 684.

[98] *Royal Bank of Scotland v FAL Oil* [2012] EWHC 3628 (Comm), which seems to have been an exceptional case where an order was made.

[99] *ICICI Bank Plc v Diminco NV* [2014] EWHC 3124 (Comm) at [27(4)] (disclosure order confined to assets within jurisdiction).

[100] *Blue Holding v USA* [2014] EWCA Civ 1291, [2015] 1 WLR 1917 CA.

[101] *Motorola Credit Corporation v Uzan (No.2)* [2003] EWCA Civ 752, [2004] 1 W.L.R. 113 at [115]. See also *Banco National de Commercio Exterior SNC v Empresa de Telecommunicaciones de Cuba SA* [2008] 1 W.L.R. 1936 CA; *Masri v Consolidated Contractors International (No.2)* [2009] 2 W.L.R. 621; *ETI Euro Telecom International NV v Republic of Bolivia* [2009] 1 W.L.R. 665; *Belletti v Morici* [2009] EWHC 2316 (Comm).

inconsistent with an order in the primary court or overlaps with it).

(2) Whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders. This does not in itself render it inexpedient for the English Court to do so.[102]

(3) Whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person resides or where the assets affected are located. If so, then respect for the territorial jurisdiction of that state should discourage the English court from using its unusually wide powers against a foreign defendant.

(4) Whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order.

(5) Whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order it cannot enforce.[103] Where a foreign defendant has tenuous links to the jurisdiction where interim relief is sought, and there is every reason to believe it will refuse to comply and there is no real sanction to enforce compliance, then it is likely to be inexpedient to make worldwide freezing and disclosure orders against such a defendant under s.25.[104]

(b) Search orders (*Anton Piller* orders)

2.20 A "search order" (formerly known as an *Anton Piller* order[105]) is a particular form of mandatory interlocutory injunction, usually requiring the defendant (or a third party):

(a) to deliver up immediately to the plaintiff specific or categorised documents or other property; and/or

(b) to permit the plaintiff to search named premises and copy or take away all such specific or categorised documents or other property as may be found there.

[102] *Credit Suisse v Cuogi* [1998] QB 818 at 829; *Motorola v Uzan (No.2)* [2004] 1 WLR 113 at [119].

[103] *Belletti v Morici* [2009] EWHC 2316 (Comm), [2009] 2 C.L.C. 525, Flaux J set aside an order against persons abroad given absence of any connection between those persons and the jurisdiction, and the impracticability of enforcing an order against them.

[104] *Royal Bank of Scotland v FAL Oil* [2012] EWHC 3628 (Comm) at [37].

[105] From *Anton Piller K.G. v Manufacturing Processes Ltd* [1976] Ch. 55; see generally, Gee, *Commercial Injunctions* (5th edn, 2004). For the form of an order, see CPR Pt 25, Practice Direction 25A —Interim Injunctions, Annex; *Admiralty and Commercial Courts Guide* (2014) Appendix 5.

Originally such orders were made under the inherent jurisdiction, but they now have a statutory basis.[106] Then,[107] as now,[108] the order directs the defendant (or other person to whom it is directed) to permit the claimant (or other person described in the order) to enter premises and search for and copy or take away specified material. Failure to permit entry may be a contempt of court,[109] so too a failure to comply with the disclosure obligations under a search order.[110] The detailed practice for the execution of search orders is regulated by Practice Direction.[111] The wording of the Order may be limited to search and delivery up initially, leaving it to the inter partes hearing to determine whether the claimant can examine the material taken. This may be appropriate where large amounts of electronic data are concerned and images are taken of storage devices. The court may decide that disclosure in the normal way should follow by the defendant and not permit the claimant or his forensic expert to do so.[112]

2.21 Although such orders began life in the intellectual property context, in order to prevent the destruction of evidence (e.g. infringing copies) in the defendant's hands, it is well established that such orders may be used for the purpose of obtaining, in effect, advance disclosure from defendants or others in cases where there is, inter alia, evidence to show that documents tending to establish liability or other disclosable material are in the defendants' (or others') possession and a real possibility that they may be destroyed or suppressed if the defendants or others concerned are given the opportunity to do so.[113] In the *Anton Piller* case the Court of Appeal set out the three essential pre-conditions for the making of such an order as follows:

(1) An extremely strong prima facie case.

(2) The damage, potential or actual, must be very serious for the applicant.

(3) There must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a

[106] Civil Procedure Act 1997 s.7; CPR r.25.1(1)(h).

[107] See *Bhimji v Chatwani* [1991] 1 W.L.R. 989.

[108] Civil Procedure Act 1997 s.7(3).

[109] *Chanel Ltd v 3 Pears Wholesale Cash & Carry Co.* [1979] F.S.R. 393.

[110] *LTE Scientific Ltd v Thomas* [2005] EWHC 7 (QB); *Daltel Europe Ltd v Makki* [2005] EWHC 749 (Ch).

[111] CPR Pt 25, Practice Direction 25A—Interim Injunctions, paras 7–8; *Gadget Shop Ltd v Bug.com Ltd* [2001] F.S.R. 383, Ch.D. (failure to follow standard form of order); *Elvee Ltd v Taylor* [2001] EWCA Civ 1943 at [65]–[69], *The Times*, 18 December 2001, CA (applications in intellectual property cases should be in Chancery division).

[112] *CBS Butler Ltd v Brown* [2013] EWHC 3944 (QB).

[113] See, e.g. *Rank Film Distributors v Video Information Centre* [1982] A.C. 380 HL; *Yousif v Salama* [1980] 1 W.L.R. 1540; *Emanuel v Emanuel* [1982] 1 W.L.R. 669.

CHAPTER 9

Inspection of Documents

A. INTRODUCTION

Inspection of documents by another party may take place in a number of different circumstances, including cases where: (1) freezing (*Mareva*), (2) search (*Anton Piller*) or (3) *Norwich Pharmacal* orders have been made. In such cases it is the court's order that will regulate such inspection. But the more usual case is that of inspection following service of a notice under CPR r.31.5, informing a party of his opponent's wish to inspect documents. These may be: (4) documents disclosed in the List of Documents, or (5) documents mentioned in a statement of case, a witness statement, a witness summary, an affidavit or an expert's report. This chapter deals expressly with cases (4) and (5), although some of the following discussion will also be relevant even in cases (1), (2) or (3) referred to above. 9.01

B. NOTICE TO INSPECT

Under the old rules a party serving a List of Documents had also to give notice of the documents' availability for inspection.[1] This had to state a time within seven days after service at which the documents might be inspected at a specified place.[2] The production for inspection of documents disclosed on discovery usually took place in accordance with that notice, although the 9.02

[1] RSC Ord.24 r.9; CCR Ord.14 r.3.

[2] Although sometimes it was attempted to defer inspection until a particular condition was satisfied, e.g. that the other party had served his List: *Football League Ltd v Football Association Ltd* unreported 20 September 1991, CA.

court might order alternative arrangements in some cases.[3] The party serving a List was deemed to have been served by the party on whom the List was served with a notice requiring the production at the trial of such documents specified in the List or affidavit as were in his possession, custody or power.[4]

9.03 Both of these rules have now gone.[5] Under the CPR, a party has a right to inspect documents the existence of which is disclosed to him under Pt 31,[6] except where the document is no longer in the disclosing party's control,[7] where the disclosing party has a right or duty to withhold inspection,[8] or where he considers it would be disproportionate to the issues in the case to permit inspection[9] (and so states in his disclosure statement).[10] A party *discloses* a document by stating that the document exists or has existed.[11] It also includes voluntary disclosure as where it is mentioned in a witness statement.[12] A party also has a right to inspect documents mentioned in certain documents prepared by his opponent for use in court and served on him.[13] But, in order to exercise those rights, he must give written notice to the disclosing party of his wish to inspect.[14] The disclosing party then has seven days to permit inspection.[15] The place[16] and the time[17] of inspection, the redaction of the original documents,[18] and the supply of copies,[19] are all dealt with later in this chapter. It should however be borne in mind that the parties may agree in writing, or the court may direct, that inspection should take place in stages.[20]

C. DOCUMENTS MENTIONED IN STATEMENTS OF CASE ETC.

9.04 This is quite different from inspection of documents disclosed in Lists of Documents. It was said of the equivalent rule under the old RSC[21] that,

[3] See paras 9.14 and 9.17, below, and see also para.9.42 in relation to "business books".
[4] RSC Ord.27 r.4(3).
[5] Though cf. CPR r.32.19.
[6] CPR r.31.3(1).
[7] CPR r.31.3 (1)(a); as to "control", see Ch.5 paras 5.57–5.73.
[8] CPR r.31.3 (1)(b); see generally Ch.11.
[9] CPR r.31.3(1)(c), (2)(a); see Ch.15 para.15.25.
[10] CPR r.31.3 (2)(d); as to the "disclosure statement", see Ch.6 para.6.05.
[11] CPR r.31.2.
[12] *Smithkline Beecham Plc v Generics (UK) Ltd* [2003] EWCA Civ 1109, [2004] 1 W.L.R. 1479 CA.
[13] CPR r.31.14; see paras 9.04–9.12, below.
[14] CPR r.31.15(a).
[15] CPR r.31.3 (1)(c), (2)(a).
[16] See para.9.13, below.
[17] See para.9.17, below.
[18] See paras 9.43–9.45, below.
[19] See para.9.19, below.
[20] CPR r.31.13. The same is true of disclosure: see Ch.2 para.2.33.
[21] From 1965 to 1999, it was RSC Ord.24 r.10 (CCR Ord.14 r.4).

instead of being "intended to give a party discovery of all documents relating to the case which are in his adversary's possession", the rule applicable here was "intended to give the opposite party the same advantage as if the document referred to had been fully set out in the pleadings".[22] There was no need for a List of Documents to have been served, or even for pleadings to be closed.[23] The same is true today under the current rule.[24] Under this rule, a party "may inspect a document mentioned in" a statement of case, a witness statement, a witness summary, an affidavit,[25] or (with certain exceptions)[26] an expert's report.[27] But the right is only in relation to the claim concerned, and not in relation to any overlapping claim, even between the same parties.[28] As with documents disclosed in a List of Documents, however, the party with the right must give written notice to his opponent of his wish to inspect,[29] and inspection must be permitted within seven days.[30] Under the old rules the producing party had to serve a counter-notice setting time and place for inspection, together with a statement of any objection to production of any of them.[31] It was an objection that the document was irrelevant,[32] or that it was privileged.[33] A failure to give such a counter-notice, or an objection to production of any document, enabled the court to make an order for production at such time and place and in such manner as it thought fit.[34]

9.05 But there is no requirement for counter-notices under the CPR, nor for any statement of objection to inspection, Nor indeed is there express power for the court to order inspection which is wrongly refused. There *is* express power for the court to order "specific inspection",[35] but in terms this power only applies to documents referred to in r.31.3(2) (inspection refused on proportionality grounds).[36] Presumably the court may make an order for inspection in such a case under its general power to rectify errors of

[22] *Quilter v Heatly* (1883) 23 Ch.D. 42 at 50; *Rafadain Bank v Agom Universal Sugar Trading Co Ltd* [1987] 1 W.L.R. 1606 at 1610–11; *Mantaray Pty Ltd v Brookfield Breeding Co Pty Ltd* [1992] 1 Qd.R. 91 at 96.
[23] *Quilter v Heatly* (1883) 23 Ch.D. 42 CA; *Smith v Harris* (1883) 48 L.T. 869 at 870; *Mantaray Pty Ltd v Brookfield Breeding Co Pty Ltd* [1992] 1 Qd. R. 91 at 96; *Robinson v Adskead (No.1)* (1995) 12 W.A.R. 574.
[24] CPR r.31.14.
[25] CPR r.31.14(1).
[26] See CPR r.35.10(4).
[27] CPR r.31.14(2).
[28] *OJSC TNK-BP Holding v Beppler & Johnson Ltd* [2012] EWHC 2596 (Ch).
[29] CPR r.31.15(a).
[30] CPR r.31.15(b).
[31] RSC Ord.24 r.10(2); CCR Ord.14 r.4(2).
[32] *Siddeley-Deary Motor Car Co v Thompson* (1916) 140 L.T. Jo. 3374.
[33] *Roberts v Oppenheim* (1884) 26 Ch.D. 734; *Bristol Corporation v Cox* (1884) 26 Ch.D. 678; *Atikin v Ettershank* (1885) 7 A.L.T. 21. See *Blue Holdings (1) Pte Ltd v National Crime Agency* [2016] EWCA Civ 760, [32] (no free-standing "necessity" test under CPR).
[34] RSC Ord.24 r.11(1); CCR Ord.14 r.5(1).
[35] CPR r.31.12(1); as to the mode of application, see para.9.39, below.
[36] CPR r.13.12(3).

procedure,[37] on the basis of the failure to comply with r.31.15(b). Once it is shown or admitted that a document is mentioned in a statement of case, a witness statement, a witness summons, a witness summary, an affidavit or an expert's report, the onus is on the party against whom the application is made to produce it unless he can show good cause why he should not.[38] As commented in one case, if a party thinks it worthwhile to mention a document in his pleadings, witness statements or affidavits, the court should not put difficulties in the way of inspection, subject to questions of privilege.[39]

9.06 Normally a reference to a communication in writing, even in general terms, is sufficient to amount to a document or documents being mentioned within the meaning of the rule.[40] However, the court's power to order production is subject to the overriding objective in CPR r.1.1, which the court must seek to give effect to in exercising any power given to it by the Rules.[41] This may be compared with the former rule, under RSC Ord.24 r.13,[42] that production should be necessary either for disposing fairly of the cause or matter or for saving costs.[43] Where a document has been mentioned, inspection can be resisted not only on grounds of privilege, but also on the more general grounds in CPR r.31.3, such that the document is not within a party's control or that it would be disproportionate to the issues in the case to permit or order inspection.[44] The court retains a discretion to refuse inspection.[45] Thus where in a statement there was a reference to a database, inspection was successfully resisted on grounds that it would be disproportionate to do so and would be an unjustified interference with art.8 ECHR rights.[46] In another case, the court was prepared to assume that if the document is irrelevant, then CPR r.31.14 does not apply,[47] although perhaps another way of putting it would be to say that it would be disproportionate to order disclosure of irrelevant material.

9.07 In the case of experts' reports, a party may apply for an order for inspection of any document mentioned in an expert's report which has not

[37] CPR r.3.10.
[38] *Quilter v Heatly* (1883) 23 Ch.D. 42 at 51; *Hunter v Dublin, Wicklow and Wexford Railway Co* (1891) 28 Ir. R. 489 at 495.
[39] *Expandable Ltd v Rubin* [2008] EWCA Civ 50, [2008] 1 W.L.R. 1099 at [24], Rix LJ; *Aqua Global Solutions Ltd v Fiserv (Europe) Ltd* [2016] EWHC 1627 (Ch), [19], [24].
[40] *Expandable Ltd v Rubin* [2008] EWCA Civ 50, [2008] 1 W.L.R. 1099 at [25] ("he wrote to me"); see paras 9.11–9.12 below.
[41] CPR r.1.2.
[42] CCR Ord.14 r.8.
[43] *Hydro-Dynamic Products Ltd v A H Products Ltd* unreported 21 August,1986, Hoffmann J; *Oystercatcher Commodities Ltd v J M Harwood & Co Ltd* unreported 29 October 1986, Hoffmann J; *Union Insurance Ltd v Incorporated General Assurance Ltd* unreported 2 July 1991, CA; see Ch.11 para.11.01, below.
[44] *Aqua Global Solutions Ltd v Fiserv (Europe) Ltd* [2016] EWHC 1627 (Ch), [23]; *Blue Holdings (1) Pte Ltd v National Crime Agency* [2016] EWCA Civ 760, [30].
[45] *Blue Holdings (1) Pte Ltd v National Crime Agency* [2016] EWCA Civ 760, [28].
[46] *Webster v Ridgeway Foundation School Governors* [2009] EWHC 1140 (QB) at [31]–[36].
[47] *Barr v Biffa Waste Services Ltd* [2009] EWHC 1033 (TCC) at [51].

already been disclosed in the proceedings.[48] However, before issuing an application the party should request inspection of the document informally, and inspection should be provided by agreement unless the request is unreasonable.[49] Where an expert report refers to a large number of documents and it would be burdensome to copy or collate them, the court will only order inspection if it is satisfied that it is necessary for the just disposal of the proceedings and the party cannot reasonably obtain the document from another source.[50] Where a party already has documents and it would be expensive or burdensome on the requesting party to obtain copies elsewhere, then it may not be reasonable to expect him to obtain the documents by himself rather than from the party who has disclosed or served the expert report referring to them. An expert report must state the substance of all material instructions, whether oral or written, on the basis of which the report was written.[51] Such instructions are not privileged against disclosure (and inspection)[52] and hence any privilege is in effect waived once the report has been served. The court will not order disclosure of those instructions or permit any questioning in court (other than by the party who instructed the expert) in relation to those instructions unless it is satisfied that there are reasonable grounds to consider that the statement of instructions given in the report to be inaccurate or incomplete.[53] The reference in CPR r.31.10 is to the actual expert's report served in the proceedings and hence does not override privilege in any earlier draft reports that may exist.[54] Material supplied by the instructing party to the expert on the basis of which the expert is asked to advise should be considered part of the instructions.[55]

9.08 "Document" is defined for the purposes of CPR Pt 31, and this has already been discussed.[56] "Statement of case" for this purpose not only includes a claim form, particulars of claim, a defence, a Pt 20 claim, and a reply to defence, but also includes further information given in relation to them voluntarily or by court order under CPR r.18.1.[57] "Affidavit" has been held to include an affidavit verifying a List of Documents,[58] an affidavit responding to interrogatories,[59] and an affidavit sworn and served on an

[48] CPR r.31.14(2).
[49] CPR Pt 31, Practice Direction 31A para.7.1.
[50] CPR Pt 31, Practice Direction 31A para.7.2; *Admiralty and Commercial Courts Guide* (2014) para.H2.21.
[51] CPR r.35.10(3); CPR Pt 35, Practice Direction para.2.28(8).
[52] CPR r.35.10(4); CPR Pt 35, Practice Direction para.4. See Ch.22 para.22.20 (privilege).
[53] CPR r.31.10(4).
[54] *Jackson v Marley Davenport Ltd* [2004] EWCA Civ 1225, [2004] 1 W.L.R. 2926 CA.
[55] *Lucas v Barking, Havering & Redbridge Hospitals NHS Trust* [2003] EWCA Civ 1102, [2004] 1 W.L.R. 220 CA.
[56] See Ch.5, paras 5.02–5.07 and Ch.7, paras 7.07–7.12.
[57] CPR r.2.3(1); under the old rules, see *Cass v Fitzgerald* [1884] W.N. 18; *Milbank v Milbank* [1900] 1 Ch. 376 at 385.
[58] *Pardy's Mozambique Syndicate Ltd v Alexander* [1903] 1 Ch. 191.
[59] *Moore v Peachey* [1891] 2 Q.B. 707.

opposing party though not filed in court.[60] It would seem that the rule covers not only any affidavit sworn by a party to the action, but also any affidavit sworn by an unconnected third party and filed or used on behalf of a party.[61] It has also been held to include an exhibit to an affidavit,[62] as the effect of an exhibit is the same as if the contents of that exhibit were set out in the body of the affidavit.[63] Logically, this may lead, in modern litigation with large exhibits, to very wide potential production under CPR r.31.14,[64] though limited now by the "overriding objective" in CPR r.1.1, and the provisions of CPR r. 31.3.[65]

9.09 Under the old rules, it was held that, for the court to have jurisdiction under RSC Ord.24 r.11[66] to order production, there was no requirement that the document concerned should actually be in the possession, custody or power of the respondent; the question was one of discretion to be exercised on the facts of each case[67] and there was no rule that production of documents not in the possession, custody or power of the respondent should only be ordered in rare cases.[68] The question of the court's power to order inspection under the CPR has already been considered,[69] but there is nothing in the new rules to suggest that the position as regards control of the document concerned is any different. The court will not generally order production under this rule of a document privileged from production, unless privilege is waived by the reference to it in the affidavit, statement of case or witness statement.[70] In an appropriate case, the court will order production subject to sealing up irrelevant material.[71] But, if a party fails to permit inspection of a document which under the Rules he should, he may not rely on it without the court's permission.[72]

[60] *Re Fenner and Lord* [1897] 1 Q.B. 667 CA.
[61] *Dubai Bank Ltd v Galadari (No.2)*, *The Times*, 11 December 1989, per Morritt J; on appeal [1990] 1 W.L.R. 731 at 737.
[62] *Hunter v Dublin, Wicklow and Wexford Railway Co* (1891) 28 Ir.R. 489; *Re Hinchcliffe* [1895] 1 Ch. 117 CA (not a case under Ord.24 r.10) followed in *Nissho Iwai Corp v Gulf Fisheries Company* unreported 12 July 1988, Hirst J (an Ord.24 r.10 case); cf *Sloane v British Steamship Co* [1897] 1 Q.B. 185.
[63] *Re Hinchcliffe* [1895] 1 Ch. 117 at 120.
[64] See *Nissho Iwai Corp v Gulf Fisheries Company* unreported 12 July 1988, Hirst J (RSC Ord.24 r.10).
[65] *Webster v Ridgeway Foundation School Governors* [2009] EWHC 1140 (QB), [31]–[36].
[66] CCR Ord.14 r.5.
[67] *Rafadain Bank v Agom Universal Sugar Trading Co Ltd* [1978] 1 W.L.R. 1606 CA; *Quilter v Heatly* (1883) 23 Ch.D. 42 at 49; *Robinson v Adshead (No.1)* (1995) 12 W.A.R. 574.
[68] *Dubai Bank Ltd v Galadari (No.2)* [1990] 1 W.L.R. 731 at 741.
[69] See paras 9.05–9.06, above.
[70] *Roberts v Oppenheim* (1884) 26 Ch.D. 724 at 733; the question of waiver appears not to have been considered: *R. v IRC Ex p. Taylor* [1989] 1 All E.R. 906 CA; as to waiver of privilege by reference in a statement of case, in an affidavit or a witness statement, see Ch.16, paras 16.15–16.19, 16.23–16.24, below.
[71] *Quilter v Heatly* (1883) 23 Ch.D.42; see para.9.37, below.
[72] CPR r.31.21; see also *Webster v Whewall* (1880) 15 Ch.D. 120; *Roberts v Oppenheim* (1884) 26 Ch.D. 734; *Bristol Corporation v Cox* (1884) 26 Ch.D. 678 at 685.

9.10 The more difficult question under RSC Ord.24 r.10[73] was what constituted a "reference" in the pleadings or affidavit to the "document" concerned. First, it was clear that a general or compendious reference to a class of documents, as opposed to a reference to individual documents, fell within the rule. Thus in one case[74] the plaintiff referred generally to all his business invoices, letters and bill heads, and these were held within the rule. On the other hand it was clear that the mere fact that a particular transaction, referred to in an affidavit or pleading, would be likely to be *evidenced* by a document, did not in itself import a reference to that document.[75] Nor was it enough that a particular transaction, so referred to, was likely to have been effected by a document, as that would involve "reference by inference"; what was required was the making of a direct allusion to a document or documents.[76] However, where there was an insufficient allusion for the purposes of the production requirement, a more definite reference could often be obtained by seeking further and better particulars of the particular pleading or objecting to the affidavit concerned as an insufficient statement of sources of information.[77]

9.11 Under CPR r.31.14 the rule is differently phrased to that under the RSC. The rule is no longer whether "reference is made" to a document. What matters is whether it is "mentioned" in the larger document. The view may have been taken that the deliberate change in wording, coupled with the reductivist philosophy behind the Woolf reforms, was suggestive of an intention to reduce the scope of the rule. However, it seems that there is no substantive change. The Court of Appeal was content to assume that there is no effective or substantive difference in the meaning between "mentioned" in CPR r.31.14 and "reference" in RSC Ord. 24 r.10.[78] The Court adopted the well established test of direct allusion as an elucidation of CPR r.31.14's language, which speaks of "mentioned". The change in wording underlines two matters. The first is to confirm the test of "direct allusion" or "specifically mention". Secondly, the expression "mentioned" is as general

[73] CCR Ord.14 r.4.
[74] *Smith v Harris* (1883) 48 L.T. 869.
[75] *Dubai Bank Ltd v Galadari (No.2)* [1990] 1 W.L.R. 731 at 738.
[76] *Dubai Bank Ltd v Galadari (No.2)* [1990] 1 W.L.R. 731 at 739; *Eagle Star Insurance Co Ltd v Arab Bank Plc* unreported 25 February 1991, Hobhouse J; *Overseas Union Insurance Ltd v Incorporated General Insurance Ltd* unreported 2 July 1991, CA; *Continental Bank N.A. v Aeakos Compania Naviera S.A.* unreported 20 January 1993, CA (reference in affidavit to "transfer" of interest in a loan was sufficient reference to the document by which the transfer was made); *Klabin v Technocom Ltd* unreported 20 September 2002, Guernsey CA (compendious reference to documents in affidavit is sufficient).
[77] *Dubai Bank Ltd v Galadari (No.2)* [1990] 1 W.L.R. 731 at 739; *Eagle Star Insurance Co Ltd v Arab Bank Plc* unreported 25 February 1991, Hobhouse J; *Overseas Union Insurance Ltd v Incorporated General Insurance Ltd* unreported 2 July 1991, CA; *Continental Bank N.A. v Aeakos Compania Naviera S.A.* unreported 20 January 1993, CA (reference in affidavit to "transfer" of interest in a loan was sufficient reference to the document by which the transfer was made); *Klabin v Technocom Ltd* unreported 20 September 2002, Guernsey CA (compendious reference to documents in affidavit is sufficient).
[78] *Expandable Ltd v Rubin* [2008] EWCA Civ 59, [2008] 1 W.L.R. 1099 at [23].

as could be. The document in question does not have to be relied upon, or referred to in any particular way or for any purpose, in order to be mentioned.[79]

9.12 Nevertheless, it is submitted that one document is not "mentioned" in another unless the reference is specific and direct. In *Expandable v Rubin* it was held that the expression "he wrote to me" is a direct allusion to a document and thus within CPR r.31.14.[80] In one case, a defence contained quotes from the notes of an interview without mentioning the fact that the quotes had been taken from the notes. It was held that this did not fall within CPR r.31.14 on the basis that quoting from a document does not amount to mentioning it.[81] In another case, a defence only referred to the defendant's expert's provisional advice, and made no reference to any documents, so fell outside CPR r.31.14.[82] A generic reference to a class of documents in an affidavit, in the absence of any direct or specific identification of any actual document, has been held to fall outside CPR r.31.14.[83] On the other hand, the use in the witness statement evidence of the word "request" was held in context to refer to the written request for mutual legal assistance from a foreign government.[84]

D. PLACE OF INSPECTION

9.13 Discovery was, as has already been mentioned, originally a procedure of the Court of Chancery.[85] Under the old Chancery practice, documents produced for inspection by a party pursuant to an Affidavit of Documents were deposited in court and inspected there by his opponent.[86] Subsequently a practice grew up, as a matter of indulgence to the disclosing party, that, unless there was some special reason, the documents could be produced at the party's own solicitor's offices.[87] When discovery was introduced in the

[79] *Expandable Ltd v Rubin* [2008] EWCA Civ 59 at [24].
[80] *Expandable Ltd v Rubin* [2008] EWCA Civ 59 at [25]. See also *Aqua Global Solutions Ltd v Fiserv (Europe) Ltd* [2016] EWHC 1627 (Ch).
[81] *Rigg v Associated Newspapers* [2003] EWHC 710 (QB), [2003] All E.R. (D) 97 (Apr); however disclosure was ordered under CPR r.31.12.
[82] *Cherrywood Restaurants Ltd v Gamma Investments Ltd* [2004] EWHC 3227 (Ch), [2004] All E.R. (D) 260 (Dec).
[83] *Masri v Consolidated Contractors International Company Sal* [2010] EWHC 2640 (Comm) at [38].
[84] *Blue Holdings (1) Pte Ltd v National Crime Agency* [2016] EWCA Civ 760 at [20]–[26].
[85] See Ch.1 para.1.11, above.
[86] *Bonnardet v Taylor* (1861) 1 John. & H. 383; *A.G. v Whitwood Local Board* (1871) 40 L.J. Ch. 592; *Brown v Sewell* (1880) 16 Ch.D. 517; *Prestney v Mayor of Colchester* (1883) 24 Ch.D. 376 CA.
[87] See Bray, p.165, citing *Prentice v Phillips* (1843) 2 Hare. 152; *Groves v Groves* (1853) 2 W.R. 86; *Brown v Sewell* (1880) 16 Ch.D. 517 at 518; and *Prestney v Mayor of Colchester* (1883) 24 Ch.D. 376 CA, amongst other cases.

common law courts in the mid-nineteenth century, the procedure had to be different because the common law courts had no facilities for accepting such deposits and enabling inspection to take place. Accordingly, production was ordered at the offices of the solicitor of the owner of the documents.[88]

Under the RSC, the court did not normally concern itself with where the 9.14
inspection should take place. It was for the disclosing party to state where he proposed to produce the documents for inspection,[89] and for the other party to object. If the court considered on application by an aggrieved party that inspection was being offered unreasonably, in terms of time or place, then it might make an order for production at such time and place and in such manner as it thought fit.[90]

Thus in appropriate cases the court might order production in the place 9.15
where the documents were in constant business use,[91] partly in one place and partly in another,[92] or even abroad.[93] The court might even order deposit in court as under the former practice,[94] for example where there were grounds for suspicion that the documents might be tampered with.[95] At the end of the day it was a matter for the discretion of the court, with the exercise of which the Court of Appeal would not readily interfere.[96]

Under the CPR there is no longer an obligation on the disclosing party to 9.16
state where the documents may be inspected.[97] The burden is on the party wishing to inspect to give written notice of his wish to do so.[98] Then the disclosing party has seven days in which to provide inspection.[99] In practice this will normally occur at his solicitor's office, as before, but the matter is at large. If circumstances properly call for different arrangements, the disclosing party can make them, and it will be for the inspecting party to object. If the disclosing party does not permit inspection or will only permit it at an unreasonable place or time, the matter will have to be resolved by application to the court.[100]

[88] Bray, at p.166.
[89] RSC Ord.24 r.9; CCR Ord.14 r.3.
[90] RSC Ord.24 r.11(1); CCR Ord.14 r.5(1).
[91] *Mertens v Haigh* (1860) Johns. 735; *Crane v Cooper* (1838) 4 Myl. & Cr. 263; *Gerard v Penswick* (1818) 1 Wils. Ch. Ca. 222, 1 Swan. 534.
[92] *Bustros v Bustros* (1882) 30 W.R. 374 CA; *Prestney v Colchester Corp* (1883) 24 Ch.D. 376 CA.
[93] *Whyte & Co. v Ahrens & Co.* (1884) 50 L.T. 344; *Bustros v Bustros* (1882) 30 W.R. 374; *Lindsay v Gladstone* (1869) L.R. 9 Eq. 132 at 133 (defendant's documents brought from India at plaintiff's expense).
[94] *Leslie v Cave* [1886] W.N. 162.
[95] *Mertons v Haigh* (1860) Johns. 735 at 738. As to the practice in such a case, see Bray, pp.166–170.
[96] *Bustros v Bustros* (1882) 30 W.R. 374 CA; *Prestney v Colchester Corp* (1883) 24 Ch.D. 376 at 382, 383, 385.
[97] But Form 265, in part one of the list, requires a statement as to whether documents are kept elsewhere.
[98] CPR r.31.15(a).
[99] CPR r.31.15(b); see para.9.03, above.
[100] See para.9.39, below.

E. TIME OF INSPECTION

9.17 The old Chancery practice is set out by Bray,[101] who also points out that the common law practice was to provide expressly for time of inspection in the order. Under the RSC, the Notice to Inspect served by the disclosing party[102] had to state the time or times at which inspection would be available. Under the CPR, there is no requirement on the disclosing party to do anything of this kind. The burden is on the inspecting party to give written notice of his wish to inspect,[103] and then the disclosing party has seven days to permit it.[104] In practice, the parties will agree on the time for inspection.[105] As with the place of inspection, if the disclosing party offers inspection at unreasonable times, the matter will have to be resolved by application to the court.[106]

9.18 In modern times, with the quality, speed and cheapness of photocopying, an inspecting party looks at the originals either in order to decide which are important enough to have copied[107] or sometimes, with copies already obtained, in order to check particular documents for markings or writing which have not copied well. Where documents are numerous, it may not be possible to inspect all of them on one occasion, so that several attendances may be needed, and this was so even in the nineteenth century.[108] But this does not mean that a party may inspect the same document(s) as many times as he pleases. Strictly, the disclosing party is only obliged to produce each document for inspection once, although parties are expected to co-operate with each other and behave reasonably in these matters.

F. COPIES

9.19 The rule has long been that a party entitled to inspect original documents is entitled to take copies (i.e. in the sense of copying out their contents)[109] of those documents at his own expense. With the advent of photocopying, the practice grew up whereby the producing party's solicitor would provide photocopies of documents as requested, for an appropriate fee. However, although in practice it was in the solicitor's financial interest to supply the

[101] Bray, at p.171.
[102] See Ch.6 para.6.22, above.
[103] CPR r.31.15(a); see paras 9.03, 9.16, above.
[104] CPR r.31.15(b); see paras 9.03, 9.16, above.
[105] *Prentice v Phillips* (1843) 2 Hare. 152.
[106] See para.9.39, below.
[107] As to which see para.9.19, below.
[108] *Mertens v Haigh* (1860) Johns. 735 at 749, where production was limited to three weeks.
[109] See Bray, pp.174–175, and *Ormerod, Grierson & Co v St George's Ironworks Ltd* [1905] 1 Ch. 505 CA; such copies do not infringe any copyright, as being made for a judicial purpose: Copyright, Designs and Patents Act 1988 s.45.

copies, he could not be compelled to do so, and neither was the inspecting party entitled to remove the original documents so as to be able to use his own or his solicitor's photocopying equipment.

9.20 But in 1987 the old rules of court were amended to provide machinery for the inspecting party to require the disclosing party to supply copies.[110] Now, CPR r.31.15(c) serves a similar function. The inspecting party may (even without having seen the original) request a copy of a document[111] and, if he undertakes to pay reasonable copying costs, the disclosing party has seven days to supply that copy. There is no requirement that the request be in writing. The previous rule included a number of limitations on the right. The document had to be capable of being copied by photographic or other process. The request had to be made "at or before the time when inspection takes place". There are no similar provisions in the CPR. Under the previous rule, where there was a failure to supply the copy, there was express provision for application to the court.[112] That too has gone, and so application must now be made under the general provision to that effect.[113]

9.21 It is likely that these provisions apply to pre-action or non-party disclosure under ss.33–35 of the Supreme Court Act 1981.[114] It is true that such disclosure, and the right of inspection, is ordered under the Act, not under the CPR. The new Rules merely regulate the procedure,[115] and indeed the relevant rules[116] refer to "an application . . . under any Act". But CPR r.31.15, refers to "a right to inspect a document", and r.31.3 confers such a right on a party to whom a document has been "disclosed". Presumably a document is "disclosed" for this purpose even though disclosed under quite separate statutory provisions.

9.22 The reference in the old rule to "photographic or similar process", and its absence from r.31.15(c), raise the question how far the rule applies to "documents" in other than the conventional sense, i.e. tape recordings, microfiches and computer programs and databases.[117] Now that the rule omits the restrictive words "capable of being copied by photographic or similar process", and given the wide definition of document for the purposes of Pt 31,[118] all these cases must now be covered.[119] In one case, under the old rules, 50,000 documents were scanned into electronic form, from which compact discs could be made.[120] It was held that since the plaintiffs had

[110] RSC Ord.24 r.11A; CCR Ord.14 r.5A.
[111] *The American Endeavour Fund Ltd v Trueger* unreported 23 January 1998, R. Ct. of Jersey (order for "inspection of documents to be given by CD-ROM").
[112] RSC Ord.24 r.11A(3); CCR Ord.14 r.5A(3).
[113] CPR r.3.10; see para.9.39, below.
[114] County Courts Act 1984 ss.52–54.
[115] *O'Sullivan v Herdmans Ltd* [1987] 1 W.L.R. 1047 HL.
[116] CPR rr.31.16, 31.17.
[117] O'Hare and Hill, *Civil Litigation* 9th edn (2000), p.535.
[118] CPR r.31.4; see Ch.5 para.5.02, above.
[119] *The American Endeavour Fund Ltd v Trueger* unreported 23 January 1998, R. Ct. of Jersey (order for "inspection of documents to be given by CD-ROM").
[120] *Grupo Torras S.A. v Al-Sabah, The Times* 13 October 1997.

scanned the documents for their own purposes, they could not charge any part of the scanning costs to other parties, but only the costs of cutting and supplying the compact discs. The costs of the scanning would form part of the plaintiffs' reasonable costs of the action. It is doubtful, where a party discloses a tape of poor quality, that he can be required to provide a transcript.[121]

9.23 The r.31.22 obligation (formerly implied undertaking) on disclosure[122] applies just as much to copies of original documents, and to the information contained in those copies, as to the originals themselves. However, property in the copies, paid for by the inspecting party, will belong to the inspecting party, and the court will not order their return to the disclosing party, or their destruction at the end of the case, unless there is real cause to believe that the inspecting party will breach the obligation.[123]

G. TRANSLATIONS

9.24 It frequently happens in modern practice that disclosure is given of documents wholly or partly in foreign languages. The disclosing party will obviously have had to consider the relevance of the documents before disclosing them. If they are important they will need to form part of the trial bundle and almost certainly will need to be translated into English, each such document preferably in a single, agreed translation. This is both time consuming to arrange, and expensive to pay for. But as a matter of law a disclosing party is under no obligation to provide a translation of any document at or before the time of inspection (or indeed thereafter).[124] If the party disclosing the documents is successful in the action, the cost of the translations will probably form part of the reasonable costs of the action.[125] However, if a party already has in his control or obtains translations of disclosable documents, these translations will be disclosable and should be made available in the normal way.[126]

9.25 Recently the Court of Appeal has given guidance on the general question of translations, with a view to avoiding this kind of dispute:

> "In principle, whenever a party relies on a document in a foreign language, the translation should be sorted out at an early stage. Ideally the party relying on the translation should send it to the other(s) with an express request for agreement within a reasonable time. If the document is quite long the key passages relied on should be identified so that the other side can concentrate on these. If the translation is agreed, well and good. But if not, the Court at the case management stage should normally insist upon agreement or early resolution of the translation dispute, if necessary by a hearing for that purpose."[127]

[121] *Paddick v Associated Newspapers Ltd* [2003] EWHC 2991 (QB), [2003] All E.R. (D) 179 (Dec), where the point was left open.
[122] See Ch.19 paras 19.03–19.04, below.
[123] *Brue Ltd v Solly, The Times* 9 February 1988.
[124] *Bayer A.G. v Harris Pharmaceuticals Ltd* [1991] F.S.R. 170.
[125] *Grupo Torras S.A. v Al-Sabah* [1998] Masons C.L.R. 90 at 97.
[126] *Sumitomo v Credit Lyonnais Rouse* [2001] EWCA Civ 1152, [2002] 1 W.L.R. 479 CA (translations of non-privileged documents are in same position as copies). In *Han v Cho* (2008) 297 D.L.R. (416) 572 (British Columbia Supreme Court) it was suggested that unofficial translations done in-house as a result of the legal team's efforts were privileged (*Sumitomo* not cited).

In one case, concerning experts' reports, the Court held, on the (rather special) facts of the case, that the claimants' expert reports should be translated by them into the language of one of the defendants.[128]

H. ELECTRONICALLY HELD DOCUMENTS AND EQUIPMENT

9.26 Electronic disclosure has already been covered in Ch.7. However, the problems and issues are no less potentially complex when it comes to inspection of electronically held data.[129] Parties are now expected to co-operate at an early stage as to the format in which electronic copy documents are to be provided on inspection. In the case of difficulty or disagreement, the matter should be referred to the judge for directions at the earliest practical date, if possible at the first case management conference.[130] The discussions between the parties as to electronic disclosure prior to the first case management conference should cover issues relating to the format and inspection of documents. This includes the cost of the provision of electronic documents and whether it would be appropriate to use the services of a neutral electronic repository for their storage.[131]

9.27 In practice, particularly where there is a limited amount of material, inspection can be by the provision of printouts of the relevant material.[132] This may not be appropriate where there is a large volume of material or where a printout will not capture all the relevant data or be in a form difficult to read such as in the case of spreadsheets or some calculations. In such a case, inspection may be by the provision of the data in electronic form, such as by the provision of a CD-ROM or even as an attachment to

[127] *Gemstar-TV Guide International Inc v Virgin Media Ltd* [2011] EWCA Civ 302.
[128] *Bank St Petersburg PJSC v Arkhangelsky* [2015] EWHC 2497 (Ch) at [57] ff.
[129] Clive Freedman assisted with section H of this chapter for the 4th edition.
[130] CPR Pt 31, Practice Direction, 31B para.32.
[131] CPR Pt 31, Practice Direction 31B para.9(4)–(8).
[132] Where printouts are provided, in certain circumstances it may be appropriate to provide some additional information, e.g. creation date, edits and author. There may also be issues as to whether hidden database fields should also be disclosed.

an email or a posting on an internet site.[133] This may result in a considerable saving of costs for the party to whom the documents are being disclosed, as paper copies of voluminous documents can be very expensive. More and more frequently parties are scanning documents and then providing the scanned material in electronic form.

9.28 Whether it be the provision of scanned material or of material already held in electronic form, it is important that the parties co-operate as to the format in which the electronic data is to be provided. In some cases the provision of documents in electronic format may be more appropriate for specific categories of documents identified by the requesting party than for all categories of documents disclosed. In large scale litigation parties will often agree a protocol for inspection and ensure that their systems are compatible. The LiST Group produced a very helpful Data Exchange Protocol, which is updated from time to time as practices in this area change.[134]

9.29 The Practice Direction which applies to multi-track proceedings commenced on or after 1 October 2010 (unless the court otherwise orders), makes specific provision as to the format of disclosure. Save where otherwise agreed or ordered, electronic copies of disclosed documents should be provided in their native format (i.e. original form in which it was created by a computer software program), in a manner which preserves metadata relating to the date of the creation of each document.[135] A party should provide any available searchable OCR versions of electronic documents with the original, but may choose not to do so in respect of redacted documents.[136] Where electronic disclosure is being given of redacted documents, then the redacting party should inform the other party that redacted versions are being supplied and the original unredacted or unaltered version must be retained.[137]

9.30 The Practice Direction provides that electronic documents should generally be made available for inspection in a form which allows the party receiving the documents the same ability to access, search, review and display the documents as the party giving disclosure.[138] Most operating systems come with advanced search engines these days and the utility of disclosable documents in text searchable format when preparing witness

[133] Considerable cost may be incurred in putting the documents into a manageable electronic form. Parties should discuss in advance how this cost should be shared, and if necessary obtain directions from the court. In *Grupo Torras S.A. v Al-Sabah* [1998] Masons C.L.R. 90, Mance J held that the cost of providing copies to the other parties should be related to the cost of providing individual CD-ROMs (approximately £20 each), and not to the amount usually charged for each photocopied page or the cost of putting the documents into an electronic database. The costs of creating the database might however be recoverable as part of the costs recoverable following the conclusion of the case.

[134] *http://www.listgroup.org/publications.htm.*

[135] CPR Pt 31, Practice Direction 31B para.33.

[136] CPR Pt 31, Practice Direction 31B para.34.

[137] CPR Pt 31, Practice Direction 31B para.35.

[138] CPR Pt 31, Practice Direction 31B para.6(h).

statements and for trial is clear. There is a lot to be said for the approach that in the majority of cases electronic documents should be produced in native format unless there is good reason not to do so, or the parties agree otherwise.[139]

9.31 Documents held in electronic form may only be accessible using specialised equipment. This may in particular be true when the electronic format has been rendered obsolete by advances in technology. If electronic documents are best accessed using technology which is not readily available to the party entitled to disclosure, and that party reasonably requires additional inspection facilities, the party making disclosure should co-operate in making available to the other party such reasonable additional inspection facilities as may be appropriate in order to afford inspection in accordance with CPR r.31.3.[140] The court has an inherent jurisdiction to order the disclosing party to provide facilities for the "documents" to be read: these may be microfiche readers, tape and video recorders, or computers, with specialist software, as the case may be.[141] Obviously, however, there will be special circumstances in each case requiring the court to tailor the order to the specific needs of the case.

9.32 Data held in an electronic database may give rise to practical problems. Whilst the document is not the information, but the media on which the data is stored, in practice it is often inappropriate or impractical to allow an opposing party access to a database. A computer database may contain all sorts of confidential, personal, irrelevant or privileged material. Inspection of such material raises a number of issues:

(1) Should inspection be confined to the provision of printouts of the relevant material?
(2) Should the documents be disclosed in electronic form, such as by the provision of data on a CD-ROM?
(3) In what format should the data be provided?
(4) Can the material be easily read by the other party and are the systems used by the parties compatible?
(5) What facilities or equipment should the disclosing party make available?
(6) If there is to be inspection of the disclosing parties computer or database, what conditions or restrictions should be imposed?

9.33 In *Derby & Co Ltd v Weldon (No.9)*,[142] Vinelott J pointed out a number of the difficulties that might arise in the context of computer databases:

[139] *Deutsche Bank AG v Chang Tse Wen* [2010] SGHC 125 at [25], Singapore H. Ct, order for electronic documents to be produced in native format and not just printed copies.

[140] CPR Pt 31, Practice Direction 31B para.36.

[141] *Grant v Southwestern and County Properties Ltd* [1975] Ch. 185 at 198; *Athlete's Foot Australia Pty Ltd v Divergent Technologies Pty Ltd* (1997) 78 F.C.R. 283 Fed. Ct. Aus.; *Senior v Holdsworth* [1976] Q.B. 23 at 32, 36, 41 CA.

[142] [1991] 2 All E.R. 901.

(a) the need to screen out from the database irrelevant or privileged material;
(b) the retrieval of information by reprogramming the computer;
(c) the problems of access and reprogramming without interrupting other daily use of the computer;
(d) the need for safeguards:

(i) to protect old tapes or discs against damage through being read; and
(ii) to protect the computer reader against damage from old tapes or discs;

(e) the possibility of copying the database onto a disc or a tape, or directly onto another computer, giving rise to the further possibility of analysis in ways not originally contemplated.

9.34 Vinelott J added that:

"... these problems arise not at the initial stage of discovery when disclosure must be made of the extent of relevant information recorded in a computer database, but when application is made for production for inspection and copying of a document. It is clear... that the court has a discretion whether to order production and inspection and that the burden is on the party seeking inspection to satisfy the court that it is necessary for the disposing fairly of the case or cause or matter or for saving costs. At that point the court will have to consider, if necessary in the light of expert evidence, what information is or can be made available, how far it is necessary for there to be inspection or copying of the original document (the database) or whether the provision of print-outs or hard copy is sufficient, and what safeguards should be incorporated to avoid damage to the database and to minimise interference with everyday use if inspection is ordered."[143]

9.35 The court has power to order inspection of the database itself and give access to a party's computer or direct the provision of an imaged version of a database (e.g. copy of the hard drive). Both situations may pose practical difficulties as usually the database will hold something more than the relevant and disclosable material. For both data held in an electronic database and documents in electronic form generally, the masking or editing of irrelevant and privileged material can be impractical and costly. The court will usually not make an order for access to a party's computer or for the provision of a copy of a hard drive[144] and will only do so if it can be shown

[143] [1991] 2 All E.R. 901 at 907.
[144] e.g. *Nucleus Information Systems v Palmer* [2003] EWHC 2013 (Ch); *Vector Transportation Services Inc v Traffic Tech Inc*, 2008 Can LII 11050 Ont. Sup. Ct. (laptop ordered to be produced for expert to see if he could find relevant deleted emails).

to be necessary and proportionate. Where there are technical issues or where it is appropriate not to allow a party to have access to other material, the court may permit inspection and interrogation of a computer system by an independent expert, who will be subject to undertakings necessary to protect the interests of the disclosing party. It is generally where there are issues as to whether documents have been concealed or deleted or an issue as to whether material has been distorted, retained or created or received on a computer or particular database, that an expert inspection has been ordered.[145] The ordering of the production *in specie* of a computer hard drive is only done in exceptional cases.[146]

I. WHO MAY INSPECT?

9.36 In ordinary cases, it is obviously open to the inspecting party himself to inspect, but this is rare in cases where he has legal representation. The usual course is for his solicitor to inspect, although this latter may do so by means of admitted or unadmitted staff, at any rate as long as he is not a "mere office-boy".[147] In large cases, solicitors may be accompanied by barristers. There may be special cases where the court is justified in preventing the party himself from inspecting or in making other arrangements,[148] but such cases will be rare. In the nineteenth century, the courts were much exercised by the question whether a person who had the right to inspect could bring with him, or even send in his place, a non-lawyer professional expert.[149]

9.37 Prima facie a party may inspect by his solicitor or other agent, but the party's "agent" must be general, and not appointed specially for this purpose.[150] The court has power, upon application being made for the purpose, to permit inspection by a "special" agent, e.g. one qualified in accounting, scientific or other expertise where this is necessary, but the burden of satisfying the court of this lies on the inspecting party.[151] It is of course open to the disclosing party to object to the particular agent put forward, but the burden lies on him to show that the agent is not to be accepted.[152] The court may impose terms upon inspection by such expert agents, and these are dealt with later.[153]

[145] *Molton v Tectronix UK Holdings* [2003] EWHC 383 (Ch); *Vector Transportation Services Inc v Traffic Tech Inc*, 2008 Can LII 11050 Ont. Sup. Ct; *Innovative Health Group Inc Calgary Health Region* (2008) 294 D.L.R. (4th) 83, Alta CA.
[146] *Innovative Health Group Inc v Calgary Health Region* (2008) 294 D.L.R. (4th) 83 Alberta CA.
[147] *Lindsay v Gladstone* (1869) L.R. 9 Eq. 132 at 136.
[148] e.g. *Church of Scientology v DHSS* [1979] 1 W.L.R. 723, and see also Ch.15 para.15.25, below.
[149] See Bray, pp.177–180.
[150] *Draper v Manchester, Sheffield & Lincolnshire Railway Co* (1861) 3 De G.F. & J. 23 at 27; *Bonnardet v Taylor* (1861) 1 J. & H. 383.
[151] *Davies v Eli Lilly & Co* [1987] 1 W.L.R. 428 CA.
[152] *Davies v Eli Lilly & Co* [1987] 1 W.L.R. 428 CA.
[153] Ch.15, paras 15.25–15.32.

J. THE EFFECT OF INSPECTION

9.38 The effect of inspection of documents upon privilege and other rights of confidence in those documents is dealt with later.[154]

K. APPLICATIONS TO THE COURT

9.39 An application for an order for inspection is made to the master or district judge.[155] The former rules conferred express power on the court to make orders for inspection of documents.[156] The CPR only do so expressly where inspection has been refused on grounds of lack of proportionality,[157] or on an application made by a party to ask the court to decide on a claim under CPR r.31.19(3) to withhold inspection of a document or part of document.[158] In all other cases, the application is founded on the general power of the court to make orders putting right failures to comply with the rules.[159] Generally speaking, the CPR do not expressly require that such applications be supported by evidence. But in practice the court will need to be satisfied that the factual premises for the making of the order are satisfied,[160] and so it will be sensible at least to verify the application notice with a statement of truth,[161] so that its contents may be relied on as evidence.[162] As already mentioned, the court in making an inspection order must seek to give effect to the overriding objective.[163] Sanctions for failure to comply with an order for inspection are discussed later.[164]

9.40 CPR rr.31.3 and 31.14 confer a right to inspect. The effect of CPR r.31.12(3), even though on its face it appears to refer to documents referred to in CPR r.31.3(2) and of CPR r.3.1(2)(m), is to give the court power to order a party to permit another party to inspect any document which he has a right to inspect. Ordinarily, the appropriate order will be to order the party concerned to permit inspection (or provide copies as appropriate). However, there may be cases in which the appropriate order will be to require a party to give specific authority to solicitors (or experts) for another party to inspect records in the hands of a non-party. Such an order must be

[154] See Ch.16, paras 16.20–16.22, below.
[155] To the judge in the Commercial Court, Technology and Construction Court and the Patents County Court. Appeals are dealt with in Ch.6 paras 6.59–6.60.
[156] RSC Ord.24 r.11; CCR Ord.14 r.5.
[157] CPR r.31.12(1), (3).
[158] CPR r.31.19(5); *Atos Consulting Ltd v Avis Plc* [2007] EWHC 323 (TCC).
[159] CPR r.3.10.
[160] CPR Pt 23, Practice Direction para.9.1.
[161] CPR r.22.1(3).
[162] CPR Pt 23, Practice Direction para.9.7.
[163] CPR r.1.2(2).
[164] See Ch.17, below.

drafted with particular care where it provides that the party authorise a non-party to permit an opposing party to inspect medical records.[165]

L. RSC ORDER 24 RULE 12[166]: PRODUCTION TO THE COURT

9.41 This rule formerly allowed the court, at any stage of proceedings, to order any party to produce to the court any document in his possession, custody or power relating to any matter in question in the proceedings, and to deal with the document when produced in such manner as it thought fit.[167] The rule was rarely used in practice, and there is no equivalent in the CPR. A similar result may now be obtained by the use of a witness summons.[168]

M. BUSINESS BOOKS

9.42 Again formerly, where production of any "business books" for inspection was applied for, the court might, instead of ordering production of the original books, order a copy of entries in the books to be supplied, to be verified on affidavit by a person who had examined the copy with the originals.[169] Again this rule was rarely used in practice, and there is no equivalent in the CPR.

N. SEALING-UP

9.43 Sealing-up for the purposes of disclosure by List was considered earlier.[170] So far as inspection is concerned, the old Chancery practice was to order production for inspection, but to give the producing party leave to seal up such parts of books or similar documents as were sworn by him not to relate to the matters in question in the proceedings.[171] The inspecting party had no right to inspect the sealed-up parts, even if he suspected that they were relevant and the affidavit was untrue,[172] and even if the sealing-up had been

[165] *Bennett v Compass Group* [2002] EWCA Civ 612 CA.
[166] CCR Ord.14 r.7.
[167] *Lewis v Londesborough* [1893] 2 Q.B. 191; *Pardy's Mozambique Syndicate Ltd v Alexander* [1903] 1 Ch. 191; *Ron West Motors Ltd v Broadcasting Corp of New Zealand* [1989] 2 N.Z.L.R. 433.
[168] See Ch.10 paras 10.02–10.36, below.
[169] RSC Ord.24 r.14(1); CCR—no equivalent, but cf. the County Courts Act 1984 s.76, and CCR Ord.1 r.6.
[170] See Ch.6, paras 6.18–6.20, above.
[171] *Campbell v French* (1792) 1 Anst. 58; 2 Cox Eq. Cas. 286; *Sheffield Canal Co v Sheffield & Rotherham Railway Co* (1843) 1 Ph. 484; *Curd v Curd* (1842) 1 Hare. 274; *Bull v Clarke* (1864) 15 C.B. (N.S.) 851.
[172] *Sheffield Canal Co v Sheffield & Rotherham Railway Co* (1843) 1 Ph. 484; *Crow v Columbine* (1843) 2 L.T. (O.S.) 454; *Eaton v Lewis* (1853) 20 L.T. (O.S.) 243.

done carelessly.[173] The leave given was to seal up, not to remove or mutilate parts of documents, and hence documents had to be produced in their integrity.[174]

9.44 The old practice was applied generally to the High Court after 1875,[175] and although by the time the CPR were introduced, in 1999, the "common form" order for production, including liberty to seal up irrelevant material, was no longer made, there was nothing to prevent application being made for an appropriate variation in the order for production. Where covering-up would be more appropriate or less burdensome than sealing-up, then the court might permit that.[176] In practice, what often happened was that the parties agreed that irrelevant material might be covered up, or the producing party covered it up anyway and left it to the inspecting party to complain. The test was whether the part covered up was irrelevant and there was no requirement that such part constituted or related to separate subject matter. The producing party's oath of irrelevance was conclusive unless the court could be satisfied from the documents produced or from anything in the affidavit that it did not truly state what it sought.[177] Thus, in one case where the terms, but not the financial limits, of the insurance cover of one party were relevant, the policies in question could be produced with the financial limit on cover blanked out.[178]

9.45 Under the CPR, the test of "relevance" is abandoned in favour of the tests of reliance, adverse effect and support.[179] But there is nothing in the CPR to prevent the same technique being used and it is routinely adopted in practice. The producing party will cover up the material not required to be disclosed and will permit the inspecting party to inspect only the redacted text. Or (more usually) he will photocopy the sealed-up text and permit inspection only of the copy. In either case it will be for the inspecting party thereafter to complain, and demonstrate if he can from the documents produced or the circumstances of the case that the producing party's statement of irrelevance is wrong.[180] Otherwise it is conclusive.[181] It is also possible to mask passages where documents have been produced electronically, although where large numbers of documents are being disclosed, it is

[173] *Jones v Andrews* (1888) 58 L.T. 601 CA.
[174] *Ayres v Levy* (1868) 19 L.T. 8.
[175] *Re Pickering* (1833) 25 Ch.D. 247 CA; *Jones v Andrews* (1888) 58 L.T. 601 CA; *Graham v Sutton, Carden & Co* [1897] 1 Ch. 761 CA; and see also Ch.1 para.1.12, above.
[176] *Graham v Sutton, Carden & Co* [1897] 1 Ch. 761 CA.
[177] *GE Capital Corporate Finance Group v Bankers Trust Co* [1995] 1 W.L.R. 172 CA; *Paddick v Associated Newspapers* Ltd [2003] EWHC 2991 (QB), [2003] All E.R. (D) 179 (Dec); see also *Curlex Manufacturing Pty Ltd v Carlingford Australia General Insurance Ltd* [1987] 2 Qd. R. 335.
[178] *Cox v Bankside Members Agency Ltd* (1994), noted 145 N.L.J. 313 CA; see also *Pacific Investments Ltd v Christensen* 1997 J.L.R. 170 at 175–176 Jersey CA.
[179] See Ch.5 para.5.19, above.
[180] See *Shah v HSBC Private Bank (UK) Ltd* [2011] EWCA Civ 1154, [27]–[29].
[181] *Paddick v Associated Newspapers Ltd* [2003] EWHC 2991 (QB), [14]–[21]; *Banwaitt v Dewji* [2013] EWHC 883 (QB).

almost inevitable that mistakes may be made.[182] As the Practice Direction accompanying CPR Pt 31 makes clear,[183] a claim to withhold inspection of a document or part of a document, disclosed in a List of Documents does not require an application to the court. Where such a claim has been made, a party who wishes to challenge it must apply to the court. Even so, it should be made clear in the List itself what documents have been redacted or sealed up and on what grounds.[184]

9.46 In Australia there are two lines of authority. The first follows *GE Capital* in permitting a party to provide inspection on the basis of the production of redacted copies or masked documents, with the confidential and irrelevant portions blanked out.[185] The second states that a party should not be allowed to provide disclosure and inspection on this basis unilaterally, but should only do so if the parties agree, or with the sanction of the court.[186] The two strands have been sought to be reconciled by making a distinction between where there is an order for general discovery, as opposed to limited discovery. It has been held that in the former case a party is entitled to seal up irrelevant parts of a document without the consent of the other party or the permission of the court. Where the order is for limited discovery, a party in Australia requires consent or permission to do so.[187]

9.47 As indicated above, the practice originally related only to material sworn to be irrelevant. Where *privileged* material was concerned, the producing party could not assert its irrelevance.[188] However, in the 1990s, in two cases at first instance the High Court permitted a producing party to cover up privileged material contained in documents being produced.[189] These decisions were criticised as inconsistent with authorities on waiver of privilege[190] but were subsequently approved by the Court of Appeal,[191] and followed subsequently.[192] So a producing party may redact a document on grounds of privilege, whether that document deals with one subject matter

[182] *Seven Network Ltd v News Ltd (No.13)* [2006] F.C.A. 354 Fed. Ct. Aus.
[183] CPR Pt 31, Practice Direction 31A para.6.1.
[184] Ch.6, paras 6.18–6.20. *CMCS Common Market Commercial Services v Taylor* [2011] EWHC 324 (Ch), [46]; *Decura IM Investments Ltd v UBS AG, London Branch* [2014] EWHC 3476 (Comm), [53].
[185] *Optus Communications Pty Ltd v Telstra Corporation Ltd* [1995] F.C.A. 254.
[186] *Gray v Associated Book Publishers (Aust) Pty Ltd* [2002] F.C.A. 1045; *Rio Tinto Ltd v Commissioner of Taxation* [2005] F.C.A. 1335.
[187] *Egglishaw v ACC (No.2)* [2009] F.C.A. 12, (2009) 253 A.L.R. 354 Fed. Ct. Aus.
[188] Though *Carew v White* (1842) 5 Beav. 172 and *Churton v Frewen* (1865) 2 Dr. & Sm. 390.
[189] *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd* [1992] 2 Lloyd's Rep. 540; *British & Commonwealth Holdings v Quadrex Holdings Inc* unreported 4 July 1990, Gatehouse J.
[190] Style & Hollander, *Documentary Evidence*, 4th edn (1993), pp.139–140; Ch.16, paras 16.38–16.39, below.
[191] *GE Capital Corporate Finance Group v Bankers Trust Co* [1995] 1 W.L.R. 172 CA; see also *Re Galileo Group Ltd* [1999] Ch. 100.
[192] *Hellenic Mutual War Risks Association (Bermuda) Ltd v Harrison* [1997] 1 Lloyd's Rep. 160; see also *Somerville v Australian Securities Commission* (1993) 118 A.L.R. 149 at 155 Fed. Ct. Aus.

CHAPTER 20

Information requests

A. BACKGROUND

CPR Pt 18, introduced the concept of the information request. This encompasses and replaces two established methods of obtaining information from a party, namely: 20.01

(1) Interrogatories,[1] the purpose of which is to seek information about an opposing party's case, which is to be verified on affidavit.
(2) Requests for Further and Better Particulars,[2] the purpose of which is to obtain details or clarification of a party's pleadings.

Whilst interrogatories have now been replaced in England and Wales, much of the learning relating to interrogatories is still relevant. Interrogatories are still used in other common law jurisdictions. The courts in England and Wales continue to follow many of the principles which have applied to interrogatories in dealing with information requests, particularly in relation to privilege and objections to requests.[3] 20.02

The practice of obtaining interrogatories and the extent of their use varied considerably over time up until their replacement in April 1999 by information requests. Most of the reported authorities relating to interrogatories were decided in the period 1885 to 1926. The small number of reported decisions on interrogatories between 1926 and 1990 was a reflection of how 20.03

[1] Formerly governed by RSC Ord.26.
[2] Formerly governed by RSC Ord.12 r.12.
[3] Similar considerations apply in relation to the practice of Requests for Further and Better Particulars, although many of the authorities are no longer relevant.

little interrogatories were being used during that period, despite judicial encouragement to do so.[4] The use of interrogatories may well have been limited because between 1893 and 1990 leave of the court was necessary to serve interrogatories, thus increasing the cost of litigation, and the success of an application for leave could rarely be guaranteed. Indeed, interrogatories were often refused on various grounds such as prolixity, oppressiveness, fishing or as being unnecessary. The Civil Justice Review of 1988[5] recognised that interrogatories do have a useful purpose and that the necessity to apply to the court for an order may well have been a limiting factor in practice. In 1990 a new procedure was introduced, whereby a party might serve interrogatories without court order, and this placed the burden on the party served to apply to the court for an order varying or withdrawing the interrogatories.[6] The new procedure led to a discernible increase in this form of discovery in the 1990s as reflected in the level of reported decisions.

20.04 Part 18 of the CPR, and the Practice Direction supplementing it represented a major change from the former practice of serving interrogatories without leave and leaving it to the party opposing the interrogatories to apply to the court to set aside or vary the request. The CPR introduced a twofold approach whereby a party may serve a preliminary request for further information or clarification and only if that is not responded to satisfactorily or at all, then an application for an order under Pt 18 can be made in order to require the party to provide information or clarification. Part 18 does not apply to cases proceeding on the small claims track,[7] although in such proceedings the court may on its own initiative require a party to provide further information.[8]

20.05 Since the introduction of information requests in 1999 certain trends can be observed in practice which may be summarised as follows:

(1) Information requests have shown themselves to be a useful and practical source of obtaining clarification and information from an opposing party. In most cases on the multi-track they are deployed.
(2) There are extremely few reported cases dealing with information requests. This is not through any lack of use, but in practice most requests are answered or their scope reduced between the parties without any court order.
(3) Decisions at first instance on an information request are rarely appealed. These are case management decisions best left to the discretion of the first instance judge, rather than interfered with on an appeal.
(4) Generally requests are being made and answered within the spirit of the overriding objective, where costs, necessity and proportionality are paramount. The courts have been vigilant to discourage costly and oppressive requests.
(5) In practice it is often difficult to predict how the court will deal with a request for further information. Rather than risk the costs of an adverse ruling, parties tend to use an element of give and take in dealing with requests.

[4] *Duke of Sutherland v British Dominions Land Settlement Corp* [1926] Ch. 746 at 753.
[5] Cm.392 (1988).
[6] RSC Ord.26 r.1(1).
[7] CPR r.27.2(1)(f).
[8] CPR r.27.2(3).

B. OBJECTIVES OF REQUEST

20.06 The purpose of information requests is to seek information about a party's case. Information requests may be used to fulfil the following objectives:

(1) to obtain admissions;
(2) to reveal weaknesses in the other party's case;
(3) to obtain information as to material facts which the applicant needs to prove in support of his case;
(4) to ascertain details of aspects of the other party's case so as to reduce surprise at the exchange of witness statement stage or at trial;
(5) to obtain clarification of the other party's case and to limit the other party's ability to depart from his case as clarified;
(6) to narrow the issues between the parties and thus reduce the expense and length of trial, including the expense of earlier stages in litigation such as disclosure of documents and witness statements.[9]

20.07 The above objectives are reflected in para.1.2 of the Practice Direction, which provides that a request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the requesting party to prepare his own case or to understand the case he has to meet.

[9] See in context of the merits of interrogatories over disclosure of documents, *Anglo Irish Bank v Browne* [2011] IEHC 140; *Austal Ships v Incat Australia (No.3)* [2010] F.C.A. 795, (2011) 272 A.L.R. 177 at [77] (unlikely that interrogatories will be permitted as a substitute for discovery of documents).

C. THE PRELIMINARY REQUEST

Form of request

20.08 The Practice Direction provides that before making an application to the court for an order under Pt 18, the party seeking clarification or information should first serve on the party from whom it is sought a written Request for that clarification or information stating a date by which the response to the Request should be served. The date must allow the second party a reasonable time to respond.[10] The Practice Direction sensibly does not specify the period as what is reasonable depends on the circumstances, including the length of the Request and the nature of the enquiries necessary in order to respond.

20.09 A Request must comply with para.1.2 of the Practice Direction which stipulates the following requirements:

(1) The Request should be concise. This probably goes further than the practice of the court in relation to interrogatories, whereby prolix interrogatories were disallowed.
(2) The Request should be strictly confined to matters which are reasonably necessary and proportionate. The application of this principle must have regard to the nature of the particular case.[11] This requirement in essence means that the Request should relate to matters in issue, and be kept within sensible bounds and appropriate in all the circumstances.
(3) The Request must be directed enabling the requesting party to prepare his own case or to understand the case he has to meet. In essence the Request must be to fulfil one of the proper objectives identified above.

20.10 The form of the Request depends on what is appropriate in the circumstances. A Request may be made by letter if the text of the Request is brief and the reply is likely to be brief, otherwise the Request should be made in a separate document.[12] This is a sensible approach as Requests by letter are likely to be cheaper for all concerned.[13] A Request by letter should state that it contains a Request under Pt 18 and deal with no matters other than the

[10] CPR Pt 18, Practice Direction para.1.1. References in this chapter to the Practice Direction are to the Practice Direction issued in relation to CPR Pt 18 unless otherwise stated.
[11] *National Grid Transmission Plc v ABB Ltd* [2014] EWHC 1555 (Ch) at [40]; see para.20.51, below.
[12] CPR Pt 18, Practice Direction para.1.4.
[13] Prior to the introduction of the CPR a practice grew up in the Commercial Court whereby requests for information were often dealt with in correspondence rather than formal interrogatories with responses verified on affidavit.

Request.[14] Thus for trial bundles the Request and any response can conveniently be placed amongst the statements of case.

20.11 A Request (whether made by letter or in a separate document) must[15]:

(1) be headed with the name of the court and the title and number of the claim;
(2) state in its heading that it is a Request made under Pt 18, identify the first party (party making the Request) and the second party (party from whom a response is sought) and state the date on which it is made;
(3) set out in a separate numbered paragraph each request for information or clarification;
(4) where a Request relates to a document, identify that document and (if relevant) the paragraph or words to which it relates;
(5) state the date by which the first party expects a response to the Request.

20.12 A Request which is not in the form of a letter may, if convenient, be prepared in such a way that the response may be given on the same document. To do this the numbered paragraphs of the Request should appear on the left-hand half of each sheet so that the paragraphs of the response then may appear on the right. Where a Request is prepared in this form an extra copy should be served for the use of the second party.[16] If reasonably practicable a request should be served by email.[17]

20.13 The Practice Direction provides that Requests must be made as far as possible in a single comprehensive document and not piecemeal.[18] There should be no objection in principle to a party serving separate Requests for each statement of case (or other pleading). This will often be the most convenient course. The Request and response can then be placed behind the relevant statement of case for bundle purposes. It is often sensible to make a Request relatively soon after a statement of case has been served, rather than waiting for pleadings to be closed and serving a global request relating to more than one such statement. Even so it is open to a party to make all his requests in one composite document seeking information and clarification of statements of case and matters which in the past would have been the subject of interrogatories.

20.14 The Practice Direction makes no distinction between parties who are individuals and other parties such as partnerships or corporations. This follows the practice in relation to Requests for Further and Better Particulars of a pleading where the Request was directed to a party and no named

[14] CPR Pt 18, Practice Direction para.1.5.
[15] CPR Pt 18, Practice Direction para.1.6.
[16] CPR Pt 18, Practice Direction para.1.6(2).
[17] CPR Pt 18, Practice Direction para.1.7.
[18] CPR Pt 18, Practice Direction para.1.3.

individual. The practice in relation to interrogatories was that where they were to be served on two or more parties or were required to be answered by an agent or servant of a party, a note at the end of the interrogatory should have specified which of the interrogatories each party or, as the case may be, an agent or servant was required to answer, and which agent or servant.[19] However, where the party to be interrogated was a body corporate or unincorporated, which was empowered by law to sue or be sued whether in its own name or in the name of an officer of other person, the officer or member on whom the interrogatories were to be served had to be specified in a note at the end of the interrogatories.[20] Where a party is serving a Request under Pt 18, there seems to be no objection in principle to specifying in the Request which officer, servant or agent of a party should provide the information for a response. Indeed in appropriate cases there is no objection to asking questions about individuals; the responding party would no doubt look to that individual, where appropriate and practicable, to provide the information for the response.

Form of response to a Request

20.15 A response to a Request must be in writing, dated and signed by the second party or his legal representative.[21] Where the Request is made in a letter the second party may give his response in a letter or in a formal reply. Such a letter should identify itself as a response to the Request and deal with no other matters than the response.[22]

20.16 Unless the Request is in the format which permits the response to be provided on the same sheet, a response must[23]:

(1) be headed with the name of the court and the title and number of the claim;
(2) in its heading identify itself as a response to that Request;
(3) repeat the text of each separate paragraph of the Request and set out under each paragraph the response to it;
(4) refer and have attached to it a copy of any document not already in the possession of the first party which forms part of the response.

A second or supplementary response to a Request must identify itself as such in the heading.[24] The second party must when he serves his response on

[19] RSC Ord.26 r.2(1)(c).
[20] RSC Ord.26 r.2(1)(b).
[21] CPR Pt 18, Practice Direction para.2.1.
[22] CPR Pt 18, Practice Direction para.2.2.
[23] CPR Pt 18, Practice Direction para.2.3.
[24] CPR Pt 18, Practice Direction para.2.3(2).

the first party serve on every other party and file with the court a copy of the Request and of his response.[25] The parties may use Practice Form PF56 for a combined request and reply.[26]

Statement of truth

20.17 The response to a Request, whether given voluntarily or by court order under r.18.1 becomes part of a party's statement of case to the extent the response includes any further information given in relation to the statement of case.[27] A voluntary response to a Request without court order should be verified by a statement of truth, if the response includes any further information given in relation to a claim form, particulars of claim where these are not included in a claim form, defence Pt 20 claim, or reply to defence. This is because these documents fall within the definition of a statement of case, which must be verified by a statement of truth.[28] CPR r.22.1 does not expressly stipulate that a response which is neither part of a statement of case nor one which is made in compliance with an order under r.18.1 to provide further information is required to be verified by a statement of truth. However, the Practice Direction suggests that all responses should be verified by a statement of truth.[29] CPR r.22.1(1)(a) provides that a response complying with an order made under CPR r.18.1 to provide further information, must be verified by a statement of truth.

Form of objection

20.18 The nature of objections is considered separately below. The formal requirements are that, if a second party objects to complying with the Request or part of it, or is unable to do so at all or within the time stated in the Request, he must inform the first party promptly and in any event within that time. He may do so in a letter or in a separate document by way of a formal response, but in either case he must give reasons and, where relevant, give a date by which he expects to be able to comply.[30] Where a second party considers that a Request can only be complied with at disproportionate expense, and objects to comply for that reason, he should say

[25] CPR Pt 18, Practice Direction para.2.4.
[26] *Queen's Bench Guide* (2016) para.7.6.1.
[27] CPR r.2.3(1), which defines a "statement of case" as a claim form, particulars of claim where these are not included in a claim form, defence Pt 20 claim, or reply to defence and includes any further information given in relation to them voluntarily or by court under r.18.1.
[28] CPR r.22.1.
[29] CPR Pt 18, Practice Direction para.3.
[30] CPR Pt 18, Practice Direction para.4.1.

so in his reply and explain briefly why he has taken that view.[31] This is a considerable improvement on the former practice in relation to interrogatories and Requests for Further and Better Particulars of a pleading, where often the objecting party's reasons for objection were not spelt out in the response and the nature of the objection often was only clarified at a court hearing.

20.19 Unlike the former practice in relation to interrogatories, where it was for the party opposing the interrogatories to apply to the court to set aside the interrogatories,[32] in relation to a Request under Pt 18, there is no need for a second party to apply to the court if he objects to a Request or is unable to comply with it at all or within the stated time. It is then for the requesting party to apply to the court for an order under Pt 18.[33]

D. APPLICATIONS FOR ORDERS UNDER PART 18

Rule 18.1(1)

20.20 The court may at any time order a party to:

(1) clarify any matter which is in dispute in the proceedings; or
(2) give additional information in relation to any such matter, whether or not the matter is contained or referred to in a statement of case.

20.21 The power to make an order is subject to any rule of law to the contrary.[34] It is not entirely clear what is meant by this restriction, but it undoubtedly covers situations where a person is prohibited by statute from providing information. It probably also covers privilege in the sense that, where privilege is taken, the court should not override that privilege unless the case falls within a recognised exception.[35]

Court's own initiative

20.22 The court may make an order under Pt 18 of its own initiative,[36] even in cases on the small claims track.[37] The procedure provided by the rules is that where the court proposes to make an order of its own initiative it may

[31] CPR Pt 18, Practice Direction para.4.2(2).
[32] RSC Ord.26 r.3(2).
[33] CPR Pt 18, Practice Direction para.4.2(1).
[34] CPR r.18.1(2).
[35] See Ch.11, paras 11.04–11.143, above.
[36] CPR r.3.3(1).
[37] CPR r.27.2(3).

(not must) give any person likely to be affected by the order an opportunity to make representations and specify the time by and manner in which the representations must be made.[38] Where the court proposes to hold a hearing to decide whether to make the order it must give each party likely to be affected at least three days' notice of the hearing.[39] However, the court may make an order without hearing the parties or giving them an opportunity to make representations.[40] In such a case the party affected may apply to set aside or vary the order.[41] Where a defence appears to disclose no reasonable grounds for defending a claim, or to be an abuse of the process, of the court's process or otherwise likely to obstruct the just disposal of the proceedings, then the court may make an order under CPR r.18.1, requiring the defendant within a stated time to clarify his defence or to give additional information about it.[42] Before deciding the track to which to allocate proceedings or deciding whether to give directions for an allocation hearing to be fixed, the court may order a party to provide information about his case.[43]

The application

20.23 The application notice for an order under Pt 18 should set out or have attached to it the text of the order sought. It should specify the matter or matters in respect of which the clarification or information is sought.[44] The format of the order sought should cover the formal requirements for a Request.[45] If a Request for further information or clarification has not been made, the application notice should explain why not. If a Request has been made, the application notice or the evidence in support should describe the response, if any.[46] Applicants may use Practice Form PF57 for their application notice.[47] Both the first party and the second party should consider whether evidence in support of or in opposition to the application is required.[48] In view of the overriding objective of the procedural code of enabling the court to deal with cases justly, which includes saving expense and dealing with the case in ways which are proportionate,[49] in most cases it will not be necessary or appropriate to file evidence in relation to an

[38] CPR r.3.3(2).
[39] CPR r.3.3(3).
[40] CPR r.3.3(4).
[41] CPR r.3.3(5), (6).
[42] CPR r.3.4(2)(a) and (b); Practice Direction 3A—striking out a statement of case para.3.4.
[43] CPR r.26.5(3).
[44] CPR Pt 18, Practice Direction para.5.2.
[45] CPR Pt 18, Practice Direction para.1.6.
[46] CPR Pt 18, Practice Direction para.5.3.
[47] *Queen's Bench Guide* (2016) para.7.6.3.
[48] CPR Pt 18, Practice Direction para.5.4.
[49] CPR r.1.1(2)(b), (c).

application. Parties are expected to act sensibly in relation to requests, and generally only take out an application after attempting to reach agreement. The Admiralty and Commercial Courts Guide expressly provides that if a party declines to provide further information, the solicitors or counsel for the parties must communicate directly with each other before any application is made to the court.[50]

20.24 Where the second party has made no response to a Request served on him, the first party need not serve the application notice on the second party and the court may deal with the application without a hearing. This applies only if at least 14 days have passed since the Request was served and the time stated in it for a response has expired.[51] The court in such a situation will not necessarily be in the best position to ascertain whether any objections to the information or clarification sought apply. Unless the court otherwise orders, the order will be served on the second party with a copy of the application notice and any supporting evidence.[52] The second party may apply to the court within seven days of service to set aside the order.[53] In addition, or alternatively, he may state the grounds of his objection in his response to the order. It is open to the court in cases where the application is dealt with without a hearing[54] specifically to include a liberty to apply to set aside or vary the order within a specified period, even where the application notice has been served.

20.25 Unless there has been no response to a Request, then the application notice must be served on the second party and all other parties to the claim.[55] An order made under Pt 18 must be served on all parties to the claim.[56] The order will specify the time within which the response should be provided; the length of time will of course depend on the circumstances. The court may specify the consequences of non-compliance with the order. Thus in appropriate cases it may order that non-compliance will lead to the statement of case being struck out. Where the order requires particulars to be given of a particular pleaded allegation, it may specify that allegation be struck out from the statement of case if there is non-compliance. The response to an order made under Pt 18 must be verified by a statement of truth.[57]

Timing

20.26 CPR Pt 18 does not specify when an application for an order should be made. Generally the Case Management Conference, where there is one, is a

[50] (2014) para.D15.1.
[51] CPR Pt 18, Practice Direction para.5.5.
[52] CPR r.23.9(2).
[53] CPR r.23.10; the order must contain a statement of this right: r.23.9(3).
[54] CPR r.23.8.
[55] CPR Pt 18, Practice Direction para.5.6.
[56] CPR Pt 18, Practice Direction para.5.7; CPR r.18.1(3).
[57] CPR r.22.1(1)(b).

convenient time.[58] When an application should be made will of course depend on all the circumstances and the court's powers are subject to the overriding objective in CPR Pt 1.[59] Where the application is in relation to a statement of case and it is necessary for a question to be answered for the opposing party to understand the case he has to meet, the application may follow relatively soon after the statement of case has been served and a preliminary Request has been made and not answered or not answered satisfactorily. The request for further information of the Particulars of Claim should, if possible, be formulated prior to the CMC, so it can be considered on that occasion.[60] Where further information is sought of a matter not contained in a statement of case, consideration should be given as to whether it is more appropriate to wait until after disclosure of documents or exchange of witness statements.[61] There can be no hard and fast rule as to whether an application should be made before or after disclosure of documents or exchange of witness statements, as sometimes a response may narrow the issues between the parties and hence narrow the issues for which disclosure or witness statements are necessary.[62] It would only rarely be appropriate to make an application prior to the service of the defence, as until then it is not normally known what matters are in dispute.[63] Similarly, it will rarely be appropriate to make an application against a claimant prior to the service of the defence[64]; making an application prior to the defence may only delay the claimant in proceeding with his claim.[65]

[58] *Technology and Construction Court Guide*, 2nd edn (2005, revised 2014) para.5.5.2 provides that if the defendant wants to request further information of the Particulars of Claim, the request should if possible, be formulated prior to the first CMC, so it can be considered on that occasion. In practice this course is usually followed in all divisions.
[59] *Toussaint v Mattis* [2000] EWCA Civ 167.
[60] *Technology and Construction Court Guide*, 2nd edn (2005, revised 2014) para.5.5.2.
[61] *National Grid v ABB Power* [2012] EWHC 869 (Ch) at [61]–[79] (no order for answers to request prior to exchange of witness statements); *Syngenta Ltd v Chemsource Ltd* [2012] EWHC 1507 (Pat) at [63]–[77]; *Thrombosis Research Institute v Demoliou-Mason* [1996] F.S.R. 785 (interrogatories inappropriate before disclosure and exchange of witness statements); *Det Danske Hedeselskabet v KDM International Plc* [1994] 2 Lloyd's Rep. 534 at 537 (interrogatories prior to exchange of witness statements almost always premature); see also *Hall v Sevalco Ltd* [1996] P.I.Q.R. 344 CA.
[62] Where a clear litigious purpose would be served, interrogatories have been allowed prior to disclosure of documents: *UCB Bank Plc v Halifax (SW) Ltd*, *The Times*, 15 July,1996; *Corporacion Nacional del Cobre de Chile v Metallgesellschaft AG*, *The Times*, 6 January 1999 (interrogatories exceptionally allowed for purposes of summary judgment application, prior to disclosure of documents); *Hall v Sevalco* [1996] P.I.Q.R. 344 CA.
[63] *Mercier v Cotton* (1876) 1 Q.B.D. 442 CA; *Re a debtor* [1910] 1 K.B. 59 CA (bankruptcy petition); *Fenwick v Johnston* (1876) Bitt.Prac.Cas. 120; *Beal v Pilling* (1878) 38 L.T. 846 (interrogatories ordered after defence filed by co-defendant).
[64] *Re Sutton Glassworks Ltd* [1997] 1 B.C.L.C. 26 (interrogatories prior to service of respondent's evidence in directors disqualification proceedings inappropriate and premature). It may be appropriate to seek further information of the claimant's particulars of claim prior to the service of the defence, where a response is necessary to enable the defendant to plead properly to the claim.
[65] *Disney v Longbourne* (1876) 2 Ch.D. 704; . *Hawley v Reade* [1876] W.N. 64, where the answer of the claimant to interrogatories would affect whether or not any defence was to be filed at all.

In exceptional circumstances it may be appropriate to make an application under CPR Pt 18 even prior to the service of particulars of claim by a claimant, although there will be a heavy burden on any party making an application to establish that a response is necessary at that stage. In the context of interrogatories, they have been allowed before service of the claim as to the circumstances of a collision in Admiralty,[66] and in defamation proceedings as to the exact words spoken in order to enable a claimant to plead a particulars of claim, where he was able to adduce evidence that he had been defamed but was unable to set out the words used as there were no witnesses willing to provide him with such information.[67] But in another case the Court of Appeal refused an order under Pt 18 (for disclosure of a third party's identity) where the judge had not yet considered various case management issues, and the relevance of the disclosure to the pleaded cases.[68] It is not appropriate to couple an application for the summary dismissal of a claim or a strike out of a pleading, with an application for further information. In principle, a request for further information implies that further information may exist. It should, therefore, be made before there is an application for summary determination, unless that application for summary determination is already justified. Combining the two is likely to lead to wasteful satellite litigation.[69]

E. BETWEEN WHOM AVAILABLE

20.27 A Request may be served and an order under Pt 18 may be made, against any party to proceedings.[70] The rules and Practice Direction do not expressly provide that there must be some issue between the requesting party and the other party for the determination of the court; whereas with interrogatories the rules expressly provided that they had to relate to "any matter in question between the applicant and that other party in the cause".[71] The practice developed in relation to interrogatories was that, as between parties other than claimants and defendants, there had to be some right to adjust between them in the action or proceedings.[72] Thus a claimant was not obliged to respond to interrogatories from a co-claimant unless there was some issue between them and interrogatories were confined to such issues. The same principles applied to co-defendants.[73] Where there

[66] *The Isle of Cyprus* (1890) 15 P.D. 134.
[67] *Atkinson v Fosbroke* (1866) L.R. 1 Q.B. 628.
[68] *Toussaint v Mattis* [2000] EWCA Civ 167.
[69] *Watson v Ian Snipe & Co* [2002] EWCA Civ 293 CA, at [35].
[70] CPR r.18.1(1).
[71] RSC Ord.26 r.1(1); *Birchal v Birch Crisp & Co* [1913] 2 Ch. 375 CA.
[72] *Shaw v Smith* (1886) 18 Q.B.D. 193 CA, 198, 200; *Molloy v Kilby* (1880) 15 Ch.D 162 CA; *Brown v Watkins* (1885) 16 Q.B.D. 125.
[73] *Clayson v Rolls Royce* [1951] 1 K.B. 746 CA; *Marshall v Langley* [1889] W.N. 222.

were no rights to be adjusted between defendants and no issue arose between them, interrogatories were refused.[74]

Requests are available between claimants to counterclaim and defendants to counterclaim. A Pt 18 order sought by defendants to counterclaim against claimants in the original action may be sought, but in the usual case an application will be refused unless there is an issue joined between them.[75] 20.28

A Pt 18 order may be sought by a co-defendant to a counterclaim, but again the court is unlikely to make an order unless there is some right between the co-defendants to counterclaim to be adjusted in the action.[76] 20.29

A Request may be made and a Pt 18 order may be sought in Pt 20 proceedings; generally the court is only likely to make an order where an issue is raised between the party seeking the order and the respondent.[77] 20.30

The Pt 18 procedure applies in relation to "litigation friends"[78] as fully as against a person under no disability. The same principles apply in relation to Requests and Pt 18 applications in proceedings involving foreign states or sovereigns as with disclosure of documents. 20.31

An order may be made against the Crown as against any other party. The order must direct by what officer of the Crown the further information is to be provided. Care should be taken to select the officer in the best position to supply the information.[79] 20.32

F. RELEVANCE

A Request must relate to a matter which is in dispute in the proceedings.[80] Thus for a Request to be permissible and a Pt 18 order available, the 20.33

[74] *Brown v Watkins* (1885) 16 Q.B.D. 125, as explained in *Shaw v Smith* (1886) 18 Q.B.D. 193; *Manatee Towing Co and Coastal Tug & Barge Inc v Oceanbulk Maritime S.A.* [1999] 1 Lloyd's Rep. 876.
[75] *Molloy v Kilby* (1880) 15 Ch.D 162 CA (interrogatories).
[76] *Alcoy v Greenhill* [1896] 1 Ch. 19 CA.
[77] CPR Pt 20 encompasses what were called third party proceedings in the RSC. With interrogatories the practice was that they could be sought as between a defendant and the third party and as between the plaintiff and the third party where some issue on the pleadings was raised between them: *Bates v Burchell* [1884] W.N. 108; *Eden v Weardale Iron Co* (1887) 34 Ch.D. 223, 35 Ch.D. 287 CA. Interrogatories were available in interpleader proceedings: *White v Watts* (1862) 12 C.B.(N.S.) 267. Interrogatories were available as between claimants to a limitation fund: *The Nedenes* [1925] W.N. 23. They were also available in adverse proceedings in the winding of a company: *Re Barned's Banking Co Ex p. Contract Corp* (1867) L.R. 2 Ch.App. 350; *Re Contract Corp (Cooch Case)* (1872) L.R. 7 Ch.App. 207; *London and Yorkshire Bank v Cooper* (1885) 15 Q.B.D. 473 CA.
[78] See CPR Pt 21.
[79] *Re Sutton Glassworks* [1997] 1 B.C.L.C. 26 at 30 (interrogatories directed to Secretary of State inappropriate in directors' disqualification proceedings).
[80] CPR r.18.1(1).