Documents "Mentioned" in Witness Statements

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Introduction. In *Morten Hoegh and Thomas Hoegh v Taylor Wessing LLP and MSR Partners LLP* [2022] 4 WLUK 137, the court considered an application for the production of documents referred to in a witness statement pursuant to CPR Practice Direction 51U ("PD51U"). The case provides a comprehensive and useful overview of the case law on the topic to date and confirms the current position as to when a document is "mentioned" for the purposes of PD51U.

CPR PD51U. CPR PD 51U paragraph 21 concerns the production of "documents referred to in evidence" and provides:

"*21.1 A party may at any time request a copy of a document which has not already been provided by way of disclosure but is mentioned in—*

- *a statement of case;*
- *a witness statement;*
- *a witness summary;*
- *an affidavit; or*
- *an expert's report.*

21.2 Copies of documents mentioned in a statement of case, witness evidence or an expert's report and requested in writing should be provided by agreement unless the request is unreasonable or a right to withhold production is claimed.

21.3 A document is mentioned where it is referred to, cited in whole or in part or there is a direct allusion to it.

21.4 Subject to rule 35.10(4), the court may make an order requiring a document to be produced if it is satisfied such an order is reasonable and proportionate (as defined in paragraph 6.4)."

Paragraph 6.4 PD51U provides:

"*6.4 In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors—*

- *the nature and complexity of the issues in the proceedings;*
- *the importance of the case, including any non-monetary relief sought;*
- *the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;*
- *the number of documents involved;*
- *the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);*
- *the financial position of each party; and*
- *the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost*."

Background. The proceedings concerned a claim for damages against the claimants' former solicitors, Taylor Wessing, and former accountants, MSR LLP, for alleged negligent advice in relation to Morten and Thomas Hoegh's tax affairs.

The second defendant made an application for an order pursuant to CPR PD51U paragraphs 21.1 and 21.4 requiring the claimants to produce documents which were said to be mentioned in a witness statement provided by their lawyer ("Ray-Smith 3") which had been filed in support of a pleading amendment application.

The second defendant asserted that documents were "mentioned" in four paragraphs of Ray-Smith 3 due to those paragraphs referring to a "review" which PwC had been instructed to undertake. The four instances where documents were said to be "mentioned" were:

- "*PwC were instructed to undertake a review of the* [claimants'] *tax affairs*";

- "*it was initially anticipated that the bulk of the Review had already been* substantively *completed by the* [defendants]*";*

- *"In the* event, *however, since their instruction in relation to the Review in around March 2021, PwC has uncovered multiple further issues as a result of the* [defendants'] *negligence";* and

- "*the consequences of the original negligence, some of which were only revealed by PwC's* Review."

The claimants resisted the application on the basis that no documents were mentioned in these paragraphs, arguing that references to the "review" were references to a process. The claimants also resisted production on the basis that (i) any document mentioned was likely to be the subject of legal advice or litigation privilege, and further or in the alternative that (ii) any document mentioned was highly confidential, its production was not required for the fair disposal of the proceedings and the request to produce it was unreasonable and/or disproportionate.

Judgment. Deputy Master McQuail analysed the leading cases on PD51U (and its predecessors, CPR 31.14 and RSC 24, Rule 10) in detail. In particular, focus was given to the Court of Appeal's decision in *Dubai Bank Limited v Galadari* [1990] 1 WLR 731 which acknowledged the correctness of the decision in *Smith v Harris* (1883) 48 L.T. 869 in relation to the old RSC 24, rule 10 which described documents being "referenced" rather than "mentioned."

In *Dubai Bank,* Slade LJ held at [738C] that "*a compendious reference to a class of documents, as opposed to a reference to individual documents, is well capable of falling within the rule, providing that it is indeed a reference.*" Slade J went on to conclude at [739H] that "*in our judgment, a mere opinion that on the balance of probabilities, a transaction referred to in a pleading or affidavit must have been effected by a document, does not give the court jurisdiction to make an order under R.S.C., Ord. 24, r. 10, unless the pleading or affidavit makes direct allusion to the document or class of documents in question.*"

Deputy Master McQuail also considered the Court of Appeal's decision in *Rubin v Expandable Ltd* [2008] EWCA Civ 59 which considered whether the words "he wrote to me" constituted the "mentioning" of a document pursuant to the CPR. In *Rubin*, Rix LJ held at [15]-[17] that "*reference to a conveyance, guarantee, mandate or mortgage* […] *would be a reference to a document as would reference to the contents of such documents: but that the mere reference to the effect of some transaction or document, such as to say that a property was conveyed or that somebody had guaranteed a loan would not be sufficient.*"

Having considered these cases in detail, Deputy Master McQuail dismissed the application and held at [39] that the "review" of the claimants' tax affairs "[…] *was a process, which probably generated documents, but it was not itself a document or collection of documents or even a compendious reference to a class of documents and nor did it 'comprise of' documents*." She went on to state at [40] that "*the Court of Appeal cases of Dubai and Rubin are clear. A document is not 'mentioned' to engage what is now paragraph 21 of PD51U unless the reference is a direct allusion to it or to its contents. Reference by inference is not sufficient and reference to the effect of a document rather than its contents is also not sufficient. Further a mere opinion that on the balance of probabilities a transaction will have been effected by a document is not itself enough.*"

Comment. This case confirms the existing position, *i.e.* that the purpose behind the rule is a "cards on the table" approach to litigation and that "mentioned" is not a difficult test; it is "*as general as could be" (NCA v Abacha [2016] EWCA Cic 760, [23])*. Nonetheless, there is a real difference between a reference to the *effect* of a document and the *contents* of a document and the court will not accept overly technical arguments on whether a document has been "mentioned."

The case serves as a helpful reminder to practitioners to always be mindful of a party's obligation to disclose documents referred to in evidence.

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Please do not hesitate to contact us with any questions.

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