

RULES COMMITTEE CONSULTATION PAPER

PROPOSALS FOR REFORM OF THE LAW OF DISCOVERY

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Preliminary

1. There is widespread dissatisfaction expressed in New Zealand and other common law countries with the traditional discovery procedures. The Committee has been considering the topic throughout this year, and this consultation paper has been prepared. Comment is sought as to whether there should be change to the rules on discovery, and, if so, what form those changes should take. This consultation paper sets out the background, and three options.
2. Please return comment to the Clerk to the Committee, Ms Sophie Klinger, by Friday 20 November 2009, to the address above.

Introduction

3. There was originally no right to discovery at common law. Techniques to order that documents be made available were developed in the common law courts, but these were limited. The most important development was in the late eighteenth century when equity intervened. The Chancery Courts developed procedures to interrogate a defendant, and also an auxiliary jurisdiction to permit a party to file a bill of discovery in which the only relief sought was that the defendant provide certain information.
4. The English Common Law Procedure Act 1854 gave the common law courts the power to order general discovery. This development, coupled with the fusion of law and equity in 1875, led to the development of the modern law of discovery. The history is discussed in *McLean v Burns Philp Trustee Co Pty Ltd* [1985] 2 NSWLR 623 at 644, and Simpson, Bailey and Evans *Discovery and Interrogatories* (2 ed) at 12 – 14. The test that developed in the nineteenth century for deciding whether documents should be discovered was set out in the classic statement of Lord Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v The Peruvian Guano Co* (1882) 11 QBD 55 at 63 (known commonly as *Peruvian Guano*):

It seems to me that every document which relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information

which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words ‘either directly or indirectly’ because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary if it is a document which may fairly lead him to a train of enquiry which may have either of those two consequences.

5. This approach was widely accepted in the common law world, and it applies to discovery in New Zealand. The essential concept behind present notions of discovery in New Zealand is that the best way to achieve justice between the parties is to have all the relevant information placed before the Court. This was described as an approach where the parties are required to place their “cards face up on the table” (Sir John Donaldson MR, *Davies v Eli Lilly & Co.* [1987] 1 WLR 428). This approach is reflected in a statement of Barker J, emphasising the open nature of civil litigation, following the changes to the Rules in 1986 in *Green v CIR* [1991] 3 NZLR 8 at 11:

[T]he whole thrust of rule changes has been to require parties to civil litigation to put as many cards on the table as possible. The adversarial approach has been eroded considerably by many of the new High Court Rules adopted in 1986.

Problems with the present approach to discovery

6. The *Peruvian Guano* approach to discovery has its supporters. It has been argued that it is one of the strengths of the common law that it features a thorough and probing disclosure process: *Preliminary Report, Review of Civil Litigation Costs*, Jackson LJ, 388. The “cards on the table” approach will, it is said, reveal documents that may be decisive. Emails, letters and other documents prepared at the time will provide a surer way to find the truth than the recollection of witnesses long after the event. The proposition is that it is in the interests of justice for exhaustive discovery to take place to ensure that key documents that may decide the outcome of the case are known. The contrast is made with the legal systems of Western Europe based on Roman Law, where there is a duty to disclose to opponents the documents a party will rely on, but no obligation to produce documents which are adverse to a party’s case or helpful to that of the opponent.
7. *Peruvian Guano* or “train of enquiry” discovery has proven to be an expensive and burdensome process in most civil proceedings. The problems were discussed in detail by Lord Woolf in his *Access to Justice: Final Report* (July 1996). He concluded that discovery had become disproportionate, particularly in larger cases where very significant numbers of documents had to be identified and listed, even though very few would have any significance to the issues in the trial. Lord Woolf observed at [17] of Chapter 21 of the *Access to Justice Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) that the result of the *Peruvian Guano* decision:

... was to make virtually unlimited the range of potentially relevant (and therefore discoverable documents), which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense, it is among a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is.

8. The Australian Law Reform Commission in its 2000 report *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89 2000) stated at para 6.67:

In almost all studies of litigation, discovery is singled out as the procedure most open to abuse, the most costly and the most in need of court supervision and control.

9. The Canadian Bar Association *Systems of Civil Justice Taskforce Report* (1996), noted that there are different rules governing discovery across Canada, “but there is nearly universal dissatisfaction with most of them” (at 43). In consultations the Canadian Bar Association recorded that “litigation and business lawyers from across the country ranked the complexity and number of discoveries and scheduling problems in the discovery process as key factors contributing to procedural delay”, (at 43).
10. There is a clear perception in New Zealand of there being a crisis in civil litigation, articulated strongly by profession representatives at the Legal Research Foundation seminar “Civil Litigation in Crisis – What Crisis?” last year. There was a consensus that the huge amounts being spent on discovery were not good either for the profession or the public. In litigation over a modest sum, vast expenditure on discovery cannot be warranted.
11. These concerns are reflected in observations in the Law Commission Report on *General Discovery* (NZLC R78 2002) at 4, where the costs of general discovery were described as “excessive and disproportionately high”. It was accepted in that paper that there were problems in relation to discovery that required addressing (at 4).
12. In other common law jurisdictions the perception that the *Peruvian Guano* “train of enquiry” approach caused unacceptable levels of delay and expense has led to reform in the law of discovery. Indeed, the majority of Australian States, the United Kingdom and Canada have abolished the “train of enquiry” test. It is necessary to briefly review these changes.

Changes to the “*Peruvian Guano*” approach

13. Lord Woolf proposed significant reforms to the traditional *Peruvian Guano* “train of enquiry” approach. The suggested new test was that the parties’ own documents relied on in support of their contentions were to be disclosed, together with “adverse documents” of which a party was aware, and which to a material extent adversely affected that party’s own case or supported another party’s case, (Ch 12 para. 38). In

addition background documents or train of enquiry documents could be ordered to be discovered at the Court's discretion (Ch 12 para. 39). There had already been similar reforms in Queensland (see Cairns, "New Discovery Regime for Queensland" (1994) 18 U.Q.L.J. 93).

14. The Woolf report led to major changes in the rules relating to discovery in the United Kingdom in the English Civil Procedure Rules 1998. The traditional *Peruvian Guano* approach was discarded, and a new disclosure requirement was adopted, being those documents relied on by a party, and those which adversely affect the party's own case or support that of another party. This is referred to in more detail at [25].
15. Following the abolition of the "train of enquiry test" in Queensland, South Australia, New South Wales, the Northern Territory and the Federal Court have all abolished the *Peruvian Guano* "train of enquiry" test and have opted for disclosure only of documents which are "directly relevant to an allegation in issue in the pleadings".
16. A considerable body of anecdotal evidence in the United Kingdom and Australia indicates that these reforms have not significantly reduced litigation costs and delays. Despite the change in test from the wording of *Peruvian Guano*, a "kitchen sink" approach to discovery still prevails. A conservative approach in the professions in those countries has meant that as much money and time is spent on discovery as before. *Peruvian Guano* appears to rule from the grave. The crisis in civil litigation of excessive costs and delays continues.
17. In the Canadian Federal Court all relevant documents must be listed, and relevant documents are defined as being those on which a party intends to rely or documents which tend to "adversely affect the party's case or ... support another party's case".
18. In 2002 the New Zealand Law Commission published its report on general discovery (NZLC R 78 2002). It recommended that discovery should continue to be available as of right, but restricted in its scope by:
 - Limiting the obligation to matters directly in issue and withholding the entitlement to general discovery until the pleadings sufficiently define the issues: [18];
 - Making it easier in appropriate cases to obtain "a[n] ... order limiting the width of the discovery obligation or prescribing the manner in which in the particular circumstances it is to be performed [excluding] any obligation to list such documents as pleading and unmarked copies": [18].
19. The Law Commission indicated that there will be cases in which discovery of background material and "train of enquiry" information will be appropriate. It recommended that the Court be empowered to order supplementary discovery, provided that:
 - Compliance with such an order will not unreasonably delay the expeditious disposal of the proceedings: [18];

- The cost of compliance is not disproportionate to what is at stake in the proceedings: [9].
20. The New Zealand District Court Rules have recently been reviewed. The new rules establish a radically new regime for the management of claims in the District Court. The proposed new regime may be summarised as follows:
- There is no initial discovery requirement.
 - If the matter does not settle initially and the plaintiff wishes to continue, an “information capsule” must be served on the other side. That capsule must contain information on the nature of the claim and information that the plaintiff intends to rely on. The capsule must “list or describe sufficiently the essential documents supporting the plaintiff’s [or defendant’s] claim”. The defendant must lodge an information capsule in response. There is a requirement to provide will-say statements.
 - There is no provision for traditional “train of enquiry” or “adverse documents” discovery at any stage.
21. In New Zealand the *Peruvian Guano* test is still enshrined for the High Court in rule 8.18. Each party must list the documents which “relate to the matter in question in the proceeding”. “Relate to” is treated as meaning “relevant to”. The concept of relevance has been given an expansive definition: *M v L* [1999] 1 NZLR 747, 750 (CA).
22. Although there is a discretion as to the terms of discovery orders contained in the existing rule 8.18(1), there are few applications for anything less than full discovery. There are likely to be several reasons for this. There is the natural reluctance to depart from the familiar way of doing things. The delegation of discovery is to junior members of the profession who may well feel that comprehensive discovery is the safe option. There is also the pressure of the rule that non-discovered documents can be produced only with the leave of the judge and it is better to be sure of production rather than risk a technical disaster, coupled with the possibility of a subsequent action for negligence if pre-trial preparation goes wrong.

Should the High Court Rules be changed?

23. The argument that is raised against change to the existing discovery regime is that there is a greater capacity for injustice if the system of discovery in place does not produce all documents that are relevant to the outcome of the case. It is said that nothing less than the “train of enquiry” approach to discovery will ensure all relevant documents are disclosed and justice done between the parties.
24. A lesser test or different approach may not be as likely to reveal all relevant documents. However a number of points can be put forward in answer to retention of the status quo:

- The fact that discovery only takes place after the pleadings have been finalised and the case is well underway can mean that a lot of cost is incurred before the documents relied on by the other party are known and understood. A system where the documents to be relied on are listed at the outset when pleadings are filed, by the party who knows of them and intends to use them, may lead to earlier settlements. This will be a natural consequence of the strengths and weaknesses of the parties' cases being better appreciated at the outset.
- Rules of Court should not only promote a just result in the quite small proportion of cases that actually go to trial; they should also facilitate settlements out of court. There is a strong public interest in promoting settlements, saving court time and reducing the delay in hearing those cases which must be heard. More cases are likely to settle if the strengths and weaknesses of the parties' cases, as shown through the documents relied on, are revealed at a very early stage.
- The existing system is far from certain to produce all relevant documents. There is a difficulty in a system which involves parties making disclosure against their interests. Ultimate certainty that all discoverable documents are disclosed could only be achieved by getting an impartial third party who does not have an interest in the proceedings to examine every document to ensure that there is proper discovery. Even then, that third party would be dependent on all the possibly relevant documents being made available. There is no perfect system. As is stated in Hollander *Documentary Evidence* (9 ed 2006) at para 8.10:

We all know the Hollywood film where the junior employee has a crisis of conscience and blows the whistle on his employers by telling the other side about the smoking gun which his employers had decided not to disclose with the connivance of the law firm. Smoking guns do win cases, but not all that often. They occur more in works of fiction than real life.

- There is now a recognised danger in litigation that the cost of proceeding to a trial is so enormous that parties are discouraged from litigating at all. The cost of discovery then becomes an access to justice issue. The large amounts spent damage the reputation of the profession, and the public's confidence in the administration of justice.
- It is logical to tailor the discovery to the issues on a necessity and proportionality basis. In major litigation between large corporate parties, comprehensive old-style discovery may be acceptable. But most litigation is not in this category. If the case only concerns a small amount of money, comprehensive discovery may not be economic. It is desirable to give courts a discretion to balance the costs of discovery against the likely benefits that will be obtained.

- There would be a real advantage in a tailored approach to discovery that is ‘driven by the issues’. Discovery orders would be made in respect of specific types of documents that can be shown to clearly relate to the issues.
- The New Zealand High Court Rules, left unchanged, will be out of step with those of the District Court, and the majority of Commonwealth superior Court jurisdictions.

Options

Option 1: Retention of the status quo

25. New Zealand could, in common with a minority of the Australian States and Hong Kong, retain the *Peruvian Guano* approach. This would reflect the view that many consider it to be a strength of the common law that the parties are obliged to place all their cards on the table. Supporters of the existing regime maintain that unless a genuine and practical improvement can be made, the existing system should be left in place. They could well say that the failure in the United Kingdom of the attempts to modify the *Peruvian Guano* test mean that it is best left alone.

Option 2: Maintain the present approach but amend the “train of enquiry” test to “adverse documents”

26. Such a change would be along the lines of the reforms implemented already in Queensland, the United Kingdom, the Australian Federal Court, and New South Wales. The essential two planks upon which these reforms are based are:
- there is an obligation on the parties to disclose the documents that they rely on to support their contentions in the proceedings, and
 - in addition, they must disclose adverse documents, being documents of which parties are aware and which to a material extent adversely affect their own case or support another party’s case.

In England CPR 31.6 requires a party to conduct a reasonable search and to disclose:

- the documents on which he or she relies;
- the documents which:
 - adversely affect his or her own case;
 - adversely affect another party’s case; or
 - support another party’s case; and

(c) the documents which he or she is required to disclose by a relevant practice direction.

27. There is something of a consensus that this modification of the *Peruvian Guano* test, now called “standard disclosure”, has not resulted in great changes in practice. By and large, lawyers have continued to discover in the same way. As stated in the Jackson Report at p 392:

Further, standard disclosure does not include “relevant” documents – these are documents that are relevant to the issues in the proceedings but that do not obviously support or undermine either side’s case. However, in practice, it seems that parties continue to disclose this broader category of documents. Reasons for this include a desire (a) to avoid being subject to specific disclosure applications; (b) to avoid having to repeat the disclosure process if the case being met or run is amended slightly; (c) to avoid judicial criticism for not having disclosed documents sooner; (d) to avoid difficulties in assessing whether a document assists the other party’s case (in circumstances where it is unclear from the pleadings); and (e) to enable the disclosure process to be completed by more junior staff (which is consequently cheaper).

28. The dissatisfaction with this change in the United Kingdom has in part contributed to the discussion of reform that has led to the review of civil litigation presently being conducted by Lord Justice Jackson’s Committee. It has led to ongoing investigation of reform in Australia and Canada.

Option 3: Initial disclosure followed by particular discovery

29. The Federal Court of Australia Practice Note issued by Black CJ, (Practice Note 14, 3 December 1999), provides that general discovery orders will not be issued as a matter of course, even by consent, and that the Court will mould orders for discovery to suit the facts of a particular case. Any discovery will be initially on a limited basis, and will relate to specific documents. It reads:

14. Discovery

Practice Note No. 14 issued on 12 February 1999 is revoked and the following Practice Note No. 14 is substituted.

1. Practitioners should expect that, with a view to eliminating or reducing the burden of discovery, the Court:
 - a. will not order general discovery as a matter of course, even where a consent direction to that effect is submitted;
 - b. will mould any order for discovery to suit the facts of a particular case; and
 - c. will expect the following questions to be answered:
 - i. Is discovery necessary at all, and if so for what purpose?
 - ii. Can those purposes be achieved:

by means less expensive than discovery?

By discovery only in relation to particular issues?

By discovery (at least in the first instance – see (iii)) only of defined categories of documents?

iii. Particularly in cases where there are many documents, should discovery be given in stages, eg initially on a limited basis, with liberty to apply later for particular discovery or discovery on a broader basis?

iv. Should discovery be given in the list of documents by general description rather than by identification of individual documents?

2. In determining whether to order discovery, the Court will have regard to the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely cost of the discovery and its likely benefit.

3. To prevent orders for discovery requiring production of more documents than are necessary for the fair conduct of the case, orders for discovery will ordinarily be limited to the documents required to be disclosed by Order 15, rule 2(3).

30. The Federal Court does not have the broad civil jurisdiction of the New Zealand High Court, but it does hear witness actions. The concept of limiting discovery to documents that are necessary for “the fair conduct of the case” may be useful across the spectrum of civil litigation.

31. In judicial review proceedings discovery can only be obtained by a specific order of the Court under s 10(2)(i) of the Judicature Amendment Act 1972. In practice particular attention is paid to the scope of discovery, and specific discovery orders are made: *Adams v Medical Research Council of New Zealand* HC DUN CP55/86 19/2/87 19 February 1987, Tipping J; *Abdee v New Zealand Law Society* HC WN CIV-2004-485-2643 1 April 2005 Gendall AJ, and *Air NZ Limited v Auckland International Airport Ltd* (2001) 16 PRNZ 783. In *Air New Zealand Limited v Auckland International Airport Ltd* HC AK M1634-SD/00 30 April 2001 Priestley J, specific discovery was ordered in a judicial review proceeding of various documents and reports identified by description. Priestley J there observed at [37]:

The time may well have arrived in New Zealand for Masters and Judges to use the undoubted power which they have, particularly under Rules [8.20] and [8.36], to test assertions of relevance in the discovery field. The time, effort and cost of listing, copying and inspecting volumes of documents, which will never be referred to by either the parties or the Court, must in a litigation context be regarded as unproductive and often useless.

32. In some judicial review proceedings the defendant will be the main depository of the relevant documents. In the situation where a Ministerial decision is challenged, a

plaintiff is unlikely to have the relevant documents. The plaintiff will need to find a way of flushing those documents out. There is, of course, the availability of information under the Official Information Act 1982, but the availability of OIA disclosure should not be a basis for reduced discovery, unless the documents have already been obtained and are in the plaintiff's possession.

33. In practice, the specific discovery regime for judicial review appears to work well. Its success is an indication that a specific discovery regime is workable in practice.
34. Clause 23 of the First Schedule (Rules applying to arbitration generally) of New Zealand's Arbitration Act 1996 provides that:

23. Statements of claim and defence

- (1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting the claim, the points at issue and the relief or remedy sought, and the respondent shall state the defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. *The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.*

[emphasis added]

35. The IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999) provide for initial disclosure by parties of the documents they intend to rely on, followed by particular discovery of specifically designated types of documents on application.
36. In relation to further discovery, the IBA Rules provide that the parties must submit a request to produce further documents, and must demonstrate that such documents are relevant to the issues. This is known as the "request to produce" procedure.
37. It has been difficult to get information as to how well such procedures are working, but the anecdotal evidence available is favourable, and specific discovery in arbitration processes causes no obvious difficulties.
38. The failure of the existing discovery regime to limit costs and delay, and the inability of alterations to the *Peruvian Guano* discoverability test to achieve any real improvement, must be compared with the apparent success of such alternatives which require some initial disclosure, and thereafter specific discovery which must be justified. There is an obvious logic in a system which discloses initially the documents to be relied on, and thereby informs the other side of the case they must face at the outset. There is also an obvious logic in a procedure which requires the cost and delay of further discovery to be justified, rather than an automatic process. That justification has to be more than the possible use of documents in a train of enquiry. It has to show that the likely importance of the documents to the issues in

the case is proportionate to the cost of listing them and making them available for inspection.

39. There are other specific precursors to such a change that have been implemented in other Commonwealth jurisdictions. Thus the present standard disclosure in Part 31 of the United Kingdom Rules includes a duty of reasonable search, and 31.7 lists essentially the same factors as now proposed as factors determining the proportionality issue, (see proposed rule 8.24A(7)). In Ontario the new Civil Rules issued following the Osborne Report of 20 November 2007, and to come into effect on 1 January 2010, require proportionality to be considered on all motions relating to discovery. Rule 29.2.03 lists mandatory considerations on the proportionality issue which are very similar to the criteria in the proposed rule 8.24A(7). In Western Australia the court can limit the ambit of discovery at any time in accordance with "principles of positive case-flow management", but according to Chapter 13 of the *Review of the Criminal and Civil Justice System* (1999), "both powers appear to have had little impact in practice: discovery is rarely limited by court order and it still normally occurs at the close of pleadings. It is unclear whether this is because practitioners are unaware of the provisions or there is a general reluctance to use them." Care must be taken in considering such developments to avoid the assumption that processes worked out in a commercial paradigm will apply to all types of cases.
40. Members of the Committee had the opportunity to discuss its ideas with the Lord Justice Jackson Committee investigating reform of civil procedure in the United Kingdom, which visited New Zealand recently. The ideas that were discussed are reflected in the Preliminary Report that has now been issued by that Committee. The idea of initial disclosure and then particular discovery is referred to favourably, and put forward as a proposal which merits consideration. It is described in these terms, as the second option, (after the first option which is to make no change):
- 6.3 Option 2: Abolish standard disclosure and limit disclosure to documents relied upon, with the ability to seek specific disclosure. This would be akin to the IBA rules approach. It would drastically reduce the number of documents disclosed in "heavy" cases and the ensuing costs which result. The parties would remain under a general duty to place before the court all material facts known to them. However, they would not be under a duty to spend thousands (or in some cases millions) of pounds in searching out documents which may, just possibly, assist their opponents. If option 2 is adopted, careful consideration will need to be given to the extent to which specific disclosure applications will be permitted. Furthermore, if option 2 is adopted, it could either be adopted generally or, alternatively, adopted for specific categories of litigation.
41. A draft rule reflecting a new discovery regime has been prepared by the Committee. The two central concepts are:
- Initial disclosure by the party filing a pleading of the principal documents which that party will rely on; and

- Particular discovery ordered by the Court of relevant documents specified by nature and subject matter, if such discovery is necessary and proportionate.
42. In ordering discovery, the Court would carry out a balancing exercise which would consider the likely probative value of the document, (a concept now well understood in the context of evidence issues), the nature and complexity of the proceedings, the number of documents, and the costs involved in searching for and retrieving the documents. There would be a responsibility on counsel to endeavour to agree on the scope of a particular discovery order, and thus avoid the cost of a hearing on the topic.
43. Draft rules for option three are attached as appendix “A”. The rule numbers used reflect the position they would occupy in the High Court Rules. At this stage, the draft does not address other areas of possible reform, in particular the appointment of special masters to direct discovery in large cases, and the duties of counsel and the parties. No attempt is made to reconcile the proposed rules with the existing rules, or to make the adaptations that would be necessary to the existing rules if there was this change. The purpose of this draft is to present the essential elements of the proposed reform so that it can be assessed and discussed, before any more detailed drafting exercise is undertaken.

Option 4

44. *Option 4(a)*

A modification of option three (initial disclosure/ followed by particular discovery) would be for the new rules to be applicable to specific categories of litigation where there is likely to be a good case either for option two (disclosure of adverse documents) or for general discovery. In this context tort claims could be considered as a separate class, and be subjected to an option two regime. In some tort cases, the documentation might be easily categorised, e.g. in a negligent misstatement case against a bank, the diary notes on a client file at branch and regional office can be readily identified for an application for specified disclosure. Sir Rupert Jackson identifies Fraud and “cases alleging questionable practice” as being candidates for general discovery, see chapter 8, para 2.11.

Option 4(b)

Another view is that option three remain for all classes of case, leaving counsel to apply for an option two regime or general discovery based on the particular requirements of the case. Such a policy would act as a brake upon *Peruvian Guano* “ruling from the grave”, as is the UK experience, in the view of Sir Rupert Jackson, see paragraph 27 above.

45. The using of differing tests for different types of litigation was highlighted in a discussion contained in Chapter 17 of Grainger & Fealy, *Civil Procedure Rules in Action* (2nd Ed 2000), quoted in *Air New Zealand Limited v Auckland International Airport Ltd* at [47]:

Lord Woolf accepted the basic desirability of discovery, 'because of its contribution to the just resolution of disputes'. However, he was scathing about the cost and ineffectiveness of the existing system. He felt that two factors had combined to transform discovery into a hugely complicated and expensive exercise, often producing little of real evidential utility. The first factor was the sheer weight of paper in modern life – much of it the pointless progeny of a continuing love affair between lawyers and the photocopier. The second factor was the extended meaning of 'relevance', as laid down in the case of *Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55. As the old White Book note put it:

[Relevant documents] are not limited to documents which would be admissible in evidence ... nor to those which would prove or disprove any matter in question: any document which, it is reasonable to suppose, contains information which may enable the party applying for discovery either to advance his own case or to damage that of his adversary, or if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences must be disclosed.

The result was a discovery process that was 'monumentally inefficient' especially in the larger cases. And, as Lord Woolf put it, 'The more conscientiously it is carried out, the more inefficient it is'. He concluded that the benefit of discovery would only outweigh the disadvantages 'of substantially greater control over the scale of discovery is exercised than at present'. The solution was to find a satisfactory form of control and then to ensure that it was enforced.

Lord Woolf's own proposals hinged on the distinctions between four different categories of documents:

- (1) A party's own documents, on which he relied in support of his contentions;
- (2) Adverse documents, being documents of which a party was aware and which to a material extent adversely affected his own case or supported another party's case;
- (3) The relevant documents, being documents which did not fall into category (1) or (2), because they did not obviously support or undermine either side's case, but which were nevertheless part of the 'story' or background;
- (4) Train of enquiry, or *Peruvian Guano*, documents.

Lord Woolf termed disclosure of documents in categories (1) and (2) 'standard discovery' and of documents in (3) and (4) as 'extra discovery'. He proposed that on the fast track only standard discovery

should usually be allowed. On the multi-track, the breadth of discovery should vary according to the circumstances of a particular case. Only extremely rarely – say in dishonesty cases – would *Peruvian Guano* discovery be ordered. Furthermore, just as a judge might have a rolling programme for resolving issues, so Lord Woolf envisaged that he might order a rolling programme for discovery, possibly with different standards of discovery applying to different issues. What was to be avoided ‘at all costs’ was uncontrolled discovery of the sort that previously took place.

46. While this is an option, a new approach along the lines of option three could have sufficient flexibility to apply generally. In the case of a dispute between residential neighbours, for instance, "the nature and complexity of the proceeding" is likely to produce a different answer to the question of what is proportionate discovery, than where the dispute is a battle between large corporate entities over a joint venture. This sort of flexibility may make specific categories unnecessary.

Conclusion

47. No option provides a “perfect solution”. However, there is certainly a danger in seeking perfect discovery. As Jacob LJ commented in his dissenting judgment in *Nichia Corporation v Argos Limited* [2007] EWCA Civ 741 at [51] in the context of a patents matter:

But a system which sought such “perfect justice” in every case would actually defeat justice. The cost and time involved would make it impossible to decide all but the most vastly funded cases. The cost of nearly every case would be greater than what it is about. Life is too short to investigate everything in that way. So a compromise is made: one makes do with the lesser procedure even though it may result in the justice being rougher. Putting it another way, better justice is achieved by risking a little bit of injustice.

48. Comment is now sought on whether any change is necessary, and, if so, whether any of the proposals set out in this paper should be adopted. Alternative suggestions are welcome.

“A”

DRAFT RULES FOR OPTION THREE

8.15A Initial disclosure

- (1) When filing a pleading, a party must, unless subclause (2) applies, serve with it a bundle of all the documents referred to in that pleading, or any other document filed in the proceeding, together with any additional principal documents in the party’s control on which that party intends to rely at the trial or hearing.
- (2) A party need not comply with subclause (1) if:
 - (a) the circumstances make it impossible or impracticable to comply with subclause (1); and
 - (b) a certificate to that effect, setting out the reasons why compliance is impossible or impracticable, and signed by counsel for that party, is filed and served at the same time as the pleading.
- (3) A party acting under subclause (1) must serve the bundle referred to in subclause (1) within 10 working days from the filing of the pleading (or within any extended period a Judge may allow).
- (4) Despite subclause (1), a party must not include in a bundle filed by that party any document contained in a bundle that has already been filed.
- (5) A copy or version of a document that contains a modification or an obliteration or other marking must be treated as a separate document.
- (6) If a party who is obliged to comply with subclause (3) fails to do so, a judge may make an order under rule 7.48 that the pleading filed by that party be struck out, and order that party to pay costs.
- (7) This rule applies to an amended pleading which either—
 - (a) refers to documents not referred to in any earlier pleading filed by the party filing the amended pleading; or
 - (b) raises a fresh issue or fresh issues of other than a purely legal nature.
- (8) Despite rule 1.3, in this rule **pleading** means a statement of claim or a statement of defence including a statement of claim or statement of defence attached to a third party notice or subsequent party notice or a cross-notice.

8.24A Particular discovery

- (1) A party seeking disclosure of documents additional to those disclosed under rule 8.15A may apply to the court for an order for particular discovery.
- (2) The application must be made not less than 15 working days before the second case management conference for the proceeding, or such shorter period as may, for good reason, be allowed by a Judge.
- (3) The application must—
 - (a) describe the documents, or class or classes of documents, required, specifying their nature, subject matter (to the extent this is known) and dates:
 - (b) state the grounds of the application, including a statement why disclosure of the documents or each class of documents is necessary, and proportionate in the circumstances of the proceeding.
- (4) Disclosure of a document or a class of documents must not be ordered if the disclosure is not necessary or would be disproportionate in the circumstances of the proceeding.
- (5) A disclosure is **necessary** if the document or class of documents is relevant to an issue in the proceeding and the applicant does not already hold, and has no ready means of access to, the document or class of documents.
- (6) A disclosure is **disproportionate** if the cost or likely cost of providing it outweighs the likely benefit of that disclosure.
- (7) When deciding whether disclosure would be disproportionate, the court may have regard to all relevant circumstances, including—
 - (a) the likely probative value of a document or class in relation to the issues in the proceeding:
 - (b) the nature and complexity of the proceeding:
 - (c) the number of documents:
 - (d) the costs involved in searching for, or retrieving, any document or class of documents.
- (8) An order for particular discovery referring to a class of documents must describe that class in words which are as precise and specific as possible.
- (9) The parties or their counsel may file a consent memorandum for consideration at the case management conference but the court may, after hearing the parties, make an order for particular discovery in terms other than those agreed if this is necessary to comply with subclause (4).
- (10) For the purposes of subclause (5) the availability of a document or class of documents as information

under the Official Information Act 1982 is irrelevant.

8.24B Responsibilities in connection with order

- (1) At least 5 working days before filing an application under rule 8.24A, a party or counsel for that party must notify the other parties or their counsel of the scope of the particular discovery requested.
- (2) The request must—
 - (a) state the reasons for the request:
 - (b) supply the information specified in rule 8.24A(3).
- (3) Parties or their counsel must endeavour to agree on the scope of a particular discovery order.
- (4) Costs may be awarded against any party that the court is satisfied has unreasonably failed to agree on the scope of the order.