

ARTICLE:

ELECTRONIC EVIDENCE IN CONTROL OF AND ADVERSELY AFFECTING THE OPPOSING PARTY: A COMPARATIVE STUDY OF ENGLISH AND NORWEGIAN LAW

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A global phenomenon – different legal traditions

Using electronic evidence in civil proceedings is an increasing phenomenon across the world. Regardless of legal traditions, we use computers, mobile telephones, various electronic devices, all of which are now part of networks. The information we store on electronic equipment is potential evidence. A number of issues arise that affect the legal landscape: the information that the parties will have access to, legally and practically; what restrictions there might be to obtain access to the data; how different legal traditions cope with such challenges, such as whether the rules function according to the intention for the rule. This article is based on a comparative study of two different jurisdictions: England & Wales and Norway.

General

The English legal system is a common law system, and judges develop many of the primary legal principles from case to case in a system of precedent.¹ Common law is traditionally compared with Germanic and Roman legal families, known as civil law. Civil law is generally

rule-based and tends to express ideas in abstract, conceptual and symmetrical terms. When common law proceeds from case to case, civil law proceeds from general principle to general principle.²

The Norwegian legal system is part of what is often recognized as Nordic law, due to the close relation of language, history, nature, religion and common legal habits.³ In the grand comparative theories, Nordic law has normally been conceived of as a mix between powerful Germanic and weaker common law elements.⁴ Germanic and Nordic law has the same basic commitment to a particular doctrine of legal sources, with legislation as the supreme source of law. However, Nordic legal thinking is said to be more practical and tangible than in Central Europe.⁵ Zweigert and Kötz are of the opinion that 'it would be right to attribute the Nordic laws to the Civil Law, even although, by reason of their close interrelationship and their common 'stylistic' hallmarks, they must undoubtedly be admitted to form a special legal family, alongside the Romanistic and German legal families'.⁶ In the field of civil procedure, Norwegian law seems to lean towards common law. The English Civil Procedure Rules were one of the main sources of inspiration when the Norwegian civil

1 Penny Darbyshire, *Darbyshire on the English Legal System*, (9th edn, Sweet & Maxwell, 2008), p. 9.

2 Peter de Cruz, *Comparative Law in a Changing World*, (3rd edn, Taylor & Francis, 2007), p. 39.

3 Ewoud Hondius, 'Pro-active Comparative Law: The Case of Nordic Law', in Peter Wahlgren, ed,

Scandinavian Studies in Law (Stockholm Institute for Scandinavian Law, 2007), p. 145.

4 Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamäki, eds, *Nordic Law – Between Tradition and Dynamism (Intersentia, 2007)*, p. 7.

5 Jaakko Husa, Kimmo Nuotio and Heikki

Pihlajamäki, eds, *Nordic Law – Between Tradition and Dynamism (Intersentia, 2007)*, pp. 8-9.

6 Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law (3rd edn, Clarendon Press, 1998)*, p. 277.

procedure law, the Dispute Act (DA) of 2005, was enacted.⁷

Disclosure

Overview of the English rules

Introduction

In both English and Norwegian civil procedure, the parties are responsible for obtaining and presenting evidence. English civil procedure is based on the Civil Procedure Act of 1997 and the Civil Procedure Rules (CPR) of 1998. The collection of evidence is done by the rules of disclosure. CPR 31.6 requires a party to disclose:

- a) the documents on which he relies; and
- b) the documents which
 - i) adversely affect his own case;
 - ii) adversely affect another party's case; or
 - iii) support another party's case; and
- c) the documents which he is required to disclose by a relevant practice direction.

There are three matters that must be considered when disclosing documents – in our case electronic documents.⁸ First, there has to be a 'document'. Pursuant to CPR 31.4, a 'document' is 'anything in which information of any description is recorded'. This means that all kinds of electronically stored information (ESI) also are considered as documents.⁹ The CPR is regularly supplemented by practice directions (PDs), which regulates areas within the CPR. Practice Direction 31B (31BPD) regulates Disclosure of Electronic Documents and applies to all proceedings started on or after 1 October 2010. Taken together with Practice Direction 31A, they replace the previous Practice Direction 31.¹⁰ 31BPD emphasizes as its first point that 'document' in CPR 31.4 also extends to electronic documents.

The second matter that must be considered when disclosing documents is whether the document in the 'control' (CPR 31.8) of a party. 'Control' is defined to cover physical possession, the right to possession, and the right to inspect or take copies. The requirement is not limited in time: disclosure documents are those 'which are or have been' in the party's control.¹¹ With two exceptions, a party is not required to disclose documents that do not already exist.¹² In these exceptional cases, the court has power to require a party to create a document, which must then be disclosed. However, it seems that the information contained in the document must either already be in the party's possession, or at least be available to him.¹³

The third matter is the scope of the obligation, that is, those documents that should be included in the disclosure. The Civil Procedure Rules have limited the amount of documents that should be disclosed from the previous *Peruvian Guano* test to 'standard disclosure', mentioned above in rule 31.6.¹⁴ In *Nichia Corporation v Argos Limited*, Jacob LJ commented on this development:¹⁵ '[...] the disclosing party should, before making disclosure, consider each document to see whether it adversely affects his own or another party's case or supports another party's case. It is wrong just to disclose a mass of background documents which do not really take the case one way or another.' The court has, however, the power to exceed or limit the 'standard' level.¹⁶

A reasonable search

According to the provisions of CPR 31.7, the disclosing party is required to make 'a reasonable search' for documents falling within rule 31.6(b) or (c). This requirement needs some brief additional comments. There are substantial differences between paper documents and electronic documents, and this influences the disclosure process.¹⁷ First, the volume of electronic documents is usually significant compared with paper documents. This is partly due to the fact that electronic documents are more easily duplicated and that e-mail has opened new opportunities to disseminate information. Thus there is substantially more information than previously.¹⁸ Second, electronic

7 *The Report of the Committee on the Dispute Act, NOU 2001:32: Rett på sak*, p 181-185. The report is available at <http://www.regjeringen.no/nb/dep/jd/dok/nouer/2001/nou-2001-32.html?id=378579>, including the draft statute and summary in English.

8 Paul Matthews and Hodge M. Malek QC, *Disclosure* (2nd edn, Sweet & Maxwell, 2007), p. 123.

9 In Norwegian civil procedure ESI is recognized as 'real evidence' – a thing, not a document, the Dispute Act § 26-1. However, this distinction is

only effective upon the presentation of the evidence in court, which is not the topic of this article.

10 CPR 31BPD 1.4.

11 Paul Matthews and Hodge M. Malek QC, *Disclosure*, p. 142.

12 CPR 18.1 (1) b and 35.9.

13 Paul Matthews and Hodge M. Malek QC, *Disclosure*, p. 143.

14 *Compagnie Financière du Pacifique v Peruvian Guano Co.* (1882) 11 Q.B.D. 55 at 63.

15 *Nichia Corporation v Argos Limited* [2007] EWCA

Civ 741 at 46.

16 Paul Matthews and Hodge M. Malek QC, *Disclosure*, p. 128.

17 Paul Matthews and Hodge M. Malek QC, *Disclosure*, pp. 188-189.

18 Stephen Mason and Burkhard Schafer, 'The Characteristics of Electronic Evidence in Digital Format', in Stephen Mason, gen ed, *Electronic Evidence* (2nd edn, LexisNexis Butterworths, 2010), p. 31.

documents are more difficult to dispose of than paper documents, and businesses have different retention policies, making it uncertain what will be found. In addition, the lack of order in which electronic documents are stored challenges the sorting process. Third, electronic documents may be manipulated, either deliberately or accidentally. Surveying the authenticity of electronic evidence is expensive and uses resources, and an extensive survey is not always proportionate in civil litigation.

The above mentioned challenges are reflected in Practice Direction 31B.¹⁹ The direction provides for additional rules regarding the extent of what constitutes a reasonable search in rule 31.7, and sets out the factors that may be relevant in deciding the reasonableness of a search for electronic documents. The practice direction also encourages the parties at an early stage, preferably before the first case management conference, to discuss the use of technology in the management of electronic documents, including the scope of a reasonable search, the use of agreed key words, and the use of agreed software tools.²⁰ The failure of one party to follow the guidance is illustrated in *Digicel (St. Lucia) Limited v Cable & Wireless Plc*.²¹ Without any agreement, the defendant conducted what they thought was a reasonable search. The defendant's exercise cost some £2 million and some 6,700 man hours of lawyers' time.²² Morgan J concluded that the defendant had not carried out a reasonable search, and ordered new searches of sources and searches with new key words that had not been considered.²³

Proportionality

The overriding objective in the practice direction includes dealing with the case in ways that are proportionate.²⁴ This was considered in *Nichia Corporation v Argos Limited*.²⁵ Jacob LJ stated that 'Proportionality requires that the procedure to be adopted be tailored to the size of the dispute'.²⁶ The issue of proportionality was also considered in *Digicel (St. Lucia) Limited v Cable & Wireless Plc*, at 80-82. Morgan J admitted that it was necessary to consider the proportionality when adding additional key words, and it was unfortunate that the dispute about the extent of the key word searches came to court after the

defendants acted unilaterally in choosing key words and conducting a search. He considered however, that 'in disregarding the clear advice in Part 31 Practice Direction, the Defendants have exposed themselves to the risk that the Court will conclude that their search was inadequate and that the Court should order the Defendants to carry out a further search'.

Sanctions pursuant to English rules

General

Pursuant to the Civil Procedure Rules, the duty to disclose evidence adversely affecting your own case is quite clear: it is necessary to conduct a proportionate, reasonable search of documents in the control of the party, and to disclose those which supports one owns or another party's case, or those which adversely affects one owns or another party's case. The sanctions for not complying with the rules are mentioned in part 3 of the CPR. There are three main sanctions under the CPR: cost orders (CPR 3.8(2)), an order to stay proceedings (CPR 3.1(2)(f)), and striking out in part or whole, a claim or defence (CPR 3.4(2)(c)).²⁷ An order to strike out a case is recognized as the strictest sanction. Where a party has failed to comply so that a fair trial is no longer possible, the court is bound to refuse to allow the party to take further part in the proceedings and (where appropriate) to determine the proceedings against him.²⁸ The party may apply for relief from the sanction. Such an application must be supported by evidence. A failure to comply can also be met by new orders from the judge, such as to disclose certain evidence within a period of time, or to cooperate so a digital evidence specialist can analyze the material.

Order for disclosure

Even with strict sanctions, there is a possibility that a party might try to conceal evidence. The more the court has the impression of a party trying to conceal evidence, the more they are willing to order further disclosure. In *Digicel (St. Lucia) Ltd v Cable & Wireless Plc*, Morgan J stated the following:

'Further, even if a claim of conspiracy might lack particulars of the individual steps and the trial by inference from overt acts and, so far as I can tell in

19 CPR 31BPD 8.

20 CPR 31BPD 4.

21 [2008] EWHC 2522 (Ch).

22 *Digicel (St. Lucia) Limited v Cable & Wireless Plc* [2008] EWHC 2522 (Ch) at 25.

23 *Digicel (St. Lucia) Limited v Cable & Wireless Plc* [2008] EWHC 2522 (Ch) at 67, 70 and 95.

24 CPR 31BPD 8.20.

25 [2007] EWCA Cv 741.

26 *Nichia Corporation v Argos Limited* [2007] EWCA Cv 741 at 53, cf. Stephen Mason, 'England & Wales', in *Electronic Evidence*, p. 371.

27 Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (OUP, 2003), p. 364. A 'stay' is explained by Andrews as the court's power to 'blow the

whistle and tell the parties to leave the field for a period to cool off (a 'stay') and to explore the chances of settlement [...]', see Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System*, p. 139.

28 Paul Matthews and Hodge M. Malek QC, *Disclosure*, p. 442.

this case, the Claimants have pleaded overt acts of delay and obstruction and can ask the Court to infer that the similarity in the Defendants' behaviour across several jurisdictions was not a matter of coincidence, but was a matter of conspiracy. Further, I accept the Claimants' general submission that because the tendency of conspirators is to conceal rather than to reveal, proper disclosure is all the more important in a conspiracy claim.²⁹

In this instance, Morgan J, based on the allegation of conspiracy, found it necessary to order further disclosure, although he also considered proportionality at 46:

'It is no doubt true that where there is a conspiracy the conspirators are careful not to leave written records of their conspiracy behind them. However, it is also well known that people say things in e-mails which they would not dream of putting into a letter or a minute or a formal note. Further, in litigation involving allegations of conspiracy or similar allegations, it may only take one revealing statement in a document, perhaps an e-mail to show clearly what people really thought or what people really were intending to achieve [...] Against that, it must be remembered that what is really required by an order for standard disclosure is 'a reasonable search' for relevant documents. Thus, the rules do not require that no stone should be left unturned. [...] This attitude is justified by considerations of proportionality.'

In this context, Morgan J referred to *Nichia Corporation v Argos Limited*.³⁰ Considerations of proportionality were also the centre of discussion in *Goodale v The Ministry of Justice*.³¹ The claimants were convicted prisoners admitted into the prison system of England & Wales, who were all drug addicts and therefore admitted to a detoxification regime. The policy was, alleged by the claimants, that 'one size fits all'. This caused the prisoners unnecessary pain and suffering, and in one case a prisoner died. The unusual feature of this case is that the Ministry of Justice did not want to carry out any search for ESI. The Minister argued that it would be disproportionate to carry out the exercise, and produced some provisional statistics as to the quantity of documents that would be necessary to search. Senior Master Whitaker commented on this argument at 13

(emphasis in the original):

'It would have to be totally disproportionate to make **any** search of electronically stored documents in terms of PD31 2A(4) to be able to avoid doing so altogether. I do not see in this case any reason arising out of the volume of documents to be searched, for not ordering that the defendants disclose electronically stored documents in this case and I will order them so to do.'

This was not a case of conspiracy as in *Digicel*, but Senior Master Whitaker still had the impression that the defendants were trying to conceal evidence adversely affecting their own case:

'In my judgment it would be totally wrong to require the claimants to accept only the disclosure of documents that exist in paper form because it is not going to reveal, or the chances are quite strong it is not going to reveal the actual communications containing the thoughts and opinions and evidential experience of those persons working for the defendant which are going to be the most helpful to the claimant in revealing documents that damage the defendant's case.'³²

The case of *Fiddes v Channel 4 TV Corporation*³³ was an appeal against an order refusing an application for specific disclosure in a libel action. The appellant, Mr Fiddes, had applied for an order that Studio Lambert Limited carry out a search of its IT system's back-up tapes for deleted e-mail communications. Tugendhat J did not find this search necessary. He stated that in this case, it was a matter of speculation whether the search would produce anything relevant, and if it did, whether it would help the claimant's case or undermine it. The members of the Court of Appeal had the same opinion. The appellant tried to take the respondent's credibility in doubt, but even the fact that one of the respondent's laptops was stolen from the defendant's home the day before it was to be collected, and also the fact that the respondent changed her explanation for deleting her e-mail, did not affect the court's decision. The appellant was not able to convince the court that he was likely to find something of significance in the deleted e-mails, and the court, referring to PD31 2A.4(d) (now 31BPD.8.21(5)), was not convinced that the specific disclosure was necessary.

29 *Digicel (St. Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 2522 (Ch) at 15.
30 [2007] EWCA Civ 741.

31 [2010] EWHC B40 (QB).
32 *Goodale v The Ministry of Justice* [2010] EWHC B40 (QB) at 20.

33 *Fiddes v Channel 4 TV Corporation* [2010] EWCA Civ 516.

Cost sanctions

The failure of not paying attention to the Practice Directions can draw adverse comments on the party's behaviour.³⁴ In *Digicel (St. Lucia) Limited v Cable & Wireless Plc*, neither party paid attention to the advice in PD31 2A.2, stating that the parties should at an early stage in the litigation discuss issues that may arise regarding searches for electronic evidence.³⁵ The same mistake was made in *Earles v Barclays Bank Plc*.³⁶ The claimant was a property developer who claimed that he had sustained consequential loss and damage, due to unauthorised transfers by his bank. The parties neglected the advice in PD31 2A.2, and did not discuss issues regarding electronic disclosure prior to the case management conference. The electronic disclosure provided from the bank did not include the telephone records of the bank, relevant Transfer Sheets to record instructions received from customers over the telephone or relevant e-mails between the relationship manager for the bank and the claimant. Simon Brown QC J stated however, that 'even though the failure to disclose such critical information to assist the Court is surprising and to be deplored, there is no evidence that it has been done deliberately or constitutes spoliation in order to gain a tactical evidential advantage at the trial'.³⁷ The bank succeeded in case, but because of the negligence for failing to follow the Practice Direction and for not disclosing the relevant ESI, the bank was not awarded costs as is usually for a successful party (CPR 44.3). Simon Brown QC J underlined that a cost order 'must objectively be a reasonable one for the unsuccessful party to bear. The overriding objective requires the court to observe 'proportionality' and to 'ensure that the parties are on an equal footing'.³⁸ He concluded that awarding the bank 25 per cent of their costs was 'a sum that is proportionate and fair'.³⁹

Strike out

In some cases, a party has already deleted or lost ESI of significance for the case. The deletion of evidence can be a sign that the party had attempted to conceal evidence. An example of this is *Marius Rybak v Langbar International Limited*.⁴⁰ On several occasions, Rybak had failed to comply with disclosure orders. Days before his computers were ultimately handed over for inspection

by a digital evidence specialist at the order of the court, he used a program called 'Erase Free Space', which overwrote all the deleted files. Morgan J concluded that this was done intentionally. Rybak's witness statement was not very trustworthy and Morgan J concluded at 76:

'I also say that I should send a very clear message to Mr Rybak and anyone else who considers behaving as he has done. The court will not assist a litigant in destroying data and will not assist a litigant to fight a case on the limited material that that litigant chooses to make available, suppressing other material which would be material to the decision of the court.'

To compound the bad behaviour, Rybak failed to obey an 'unless' order, providing for the consequences of a breach. Morgan J found no reason for relieving Rybak from this consequence, and the claim and the defence to the counterclaim were struck out.

In *Bilta (UK) Ltd (In Liquidation) v Nazir*,⁴¹ one of the defendants, Jevitia Sa, had upgraded their computers after having given disclosure by list. The upgrade did not involve the copying of files from previous computers to new ones, and the previous hard disks had been wiped clean.⁴² When the claimant applied for further disclosure, there were hardly any ESI of relevance. Lewison J stated at 22:

'So far the wiped hard disks are concerned, although the practice direction does refer to deleted documents and metadata, as included within the category of electronic documents, I do not consider that a party who is required to give standard disclosure is automatically required to subject hard drives to expensive forensic recovery techniques. It is in all cases a question of proportionality.'

Lewison J did not strike out the case. The decisive factor was probably that the missing evidence could have given strong support to Jevitia's case. Jevitia was not trying to conceal documents supporting the claimant and Lewison J was not persuaded that the consequence of Jevitia's action was that a fair trial was no longer possible, or that there was not a substantial risk that a fair trial was no longer possible.

There are classes of documents which may be

³⁴ Stephen Mason, 'England & Wales', in *Electronic Evidence*, pp. 363-364.

³⁵ *Digicel (St. Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 2522 (Ch) at 47.

³⁶ *Earles v Barclays Bank Plc* [2009] EWHC 2500 (Mercantile).

³⁷ *Earles v Barclays Bank Plc* [2009] EWHC 2500 (Mercantile) at 41.

³⁸ *Earles v Barclays Bank Plc* [2009] EWHC 2500 (Mercantile) at 80.

³⁹ *Earles v Barclays Bank Plc* [2009] EWHC 2500 (Mercantile) at 86.

⁴⁰ [2010] EWHC 2015 (Ch).

⁴¹ [2010] EWHC 3227 (Ch).

⁴² *Bilta (UK) Ltd (In Liquidation) v Nazir* [2010] EWHC 3227 (Ch) at 14.

withheld from inspection in the disclosure process. With three exceptions, the existence of documents falling within these classes must still be disclosed by the litigant by including them in the list.⁴³ Although disclosure normally will have to be given, protective limitations may be introduced at the stage of inspection. This topic is beyond the remit of this article.

Comparison with the Norwegian rules⁴⁴

The duty to provide evidence

Pursuant to Norwegian civil procedure rules, each party has the duty and right to present their version of the facts, substantiated by evidence.⁴⁵ However, the Norwegian Dispute Act (DA) is not similar to English disclosure.⁴⁶ The parties can choose which evidence they will present to the court – there are no rules of a technical nature, such as the English rule of best evidence, the rule of hearsay, or the rule of direct and indirect evidence. However, the court may limit the presentation of evidence if the evidence is not relevant, if is not suited to strengthen the case, or noteworthy, or if the court finds it necessary to have the evidence presented in another way.⁴⁷

Unlike the English procedural rules, Norwegian law does not require a party to present evidence that adversely affects his own case, but the parties shall ensure that the factual basis of the case is correct and complete. They must provide such explanations and summaries of evidence as are required to fulfil this obligation, and they have a duty to give testimony and provide access to the evidence.⁴⁸ A party is required to attach all the documentary evidence he intends to present in court to the pleadings, so the counterparty is able to prepare for the trial. A party is also required to inform the other party about the existence of important evidence that they have reason to believe that the opposite party is not aware. This applies irrespective of whether such evidence is in favour of the party notifying the other of the existence of the evidence, or in favour of the opposite party.⁴⁹ The last section of the provision is a development, bringing the provisions contained in the previous Dispute Act from 1915, and moving Norwegian civil procedure closer to the English version.⁵⁰ The previous Dispute Act was closer to the

German and Austrian approach, where a party is only responsible for presenting evidence supporting his own case.⁵¹ Pursuant to the preparatory work to the Dispute Act, which is considered a legal source in accordance with Norwegian legal jurisprudence, the obligation to provide information is a general obligation. This should lead to the conclusion that the parties in general are required to provide information on evidence adversely affecting their own case.⁵² In reality, the obligation is interpreted in a far weaker way.

In practice, the parties tend to ignore the provision, and the sanctions for not informing the other party about evidence adversely affecting their own case are few and seldom used. The sanctions available to the judge are discussed below. The new provision provides a change of orientation away from the Germanic principle that a party is responsible for its own case, and can choose which evidence to present to substantiate their view. The lawyers' code of ethics requires lawyers, within the legal framework and to the best of their ability, to protect their clients' interests, and might also reflect the lawyers' choice of action.⁵³ The result is that Norway operates between the Germanic and the common law approach. This provision is seldom challenged, probably because of the rare use of sanctions by the judiciary.

Challenges with ESI⁵⁴

If the evidence a party wants to present is not in his hands, he has three possible options (assuming that the conditions are met). The main procedure is simply to request the person in control of the evidence to gain access to it or to provide a copy. Assuming that the party making the request knows what it is looking for and the evidence is easy to specify, this is a practical way of obtaining evidence. As previously mentioned, the counterparty is obliged to contribute, providing the evidence is relevant to the case.

The problem arises when a party is not certain of exactly what they are looking for. It is much more difficult to request the evidence, and this problem usually increases when the material is stored electronically. There could be several different versions of the file or it is not known how or where the material is

43 The exceptions are cases of penalties made recoverable by virtue of any enactment, Bank of England Act 1998, s.82 and documents covered by public interest immunity. See Paul Matthews and Hodge M. Malek QC, *Disclosure*, p. 203.

44 The author is responsible for the translations from Norwegian to English.

45 DA § 21-3.

46 For a survey in English of the main features of Disputes Act 2005, see Inge Lorange Backer, 'The

Norwegian Reform of Civil Procedure', in Peter Wahlgren, ed, *Scandinavian Studies in Law* (Stockholm Institute for Scandinavian Law, 2007), pp. 42-75.

47 DA § 21-7.

48 DA § 21-4 (1).

49 DA § 21-4 (2) and § 5-3.

50 DA (1915) § 188.

51 Dr Wolfgang Freund, Dr Erich Schweighofer and Lothar Farthofer, 'Austria', p. 56, and Dr

Alexander Duisberg and Henriette Picot, 'Germany', p. 340, in Stephen Mason, gen ed, *International Electronic Evidence* (British Institute of International and Comparative Law, 2008).

52 Ot.prp. no. 51 (2004-2005), p. 454.

53 The Norwegian Bar Regulation, ch. 12 sec. 1.2 (2).

54 For an overview of the Norwegian rules regarding electronic evidence, see Harald Hjort and Svein Willassen, 'Norway', in *International Electronic Evidence*.

stored. The more diffuse information there is, the more difficult is it to get the evidence. A second solution is to apply for the 'taking of evidence' within the litigation.⁵⁵ This is a convenient option if seeking ESI from third parties, such as banks, telephone companies or hospitals, and the counterparty is not able to provide such data. When the counterparty is in control of the evidence, there is always a risk that the evidence might be tampered with or modified. This risk is reduced to a minimum when a third party is in control of the evidence. The party can therefore apply for a taking of evidence without fearing that the application, including a notice to the counterparty, will result in tampered or modified evidence.

The challenge usually occurs when evidence is in the hands of the counterparty and the party making the request fears the evidence will be destroyed or lost, a common fear regarding ESI. Notifying the counterparty might, depending on the personality of the people involved, tempt certain people to delete the evidence, and since the courts rarely impose sanctions, a party usually judges that it is not worth the risk of making such a request. The party may then, as a third option, apply for a 'securing of evidence', which is similar to the English pre-action search. If there is a reason to fear that notifying the counterparty will prevent evidence from being secured, the securing could be undertaken without notifying the counterparty. Even though the securing of evidence is meant to be an exceptional procedure, dealing with ESI it is quite often the only reasonable solution. This is discussed further below.

Comparison of sanctions

The court's inference of the parties' actions

As a general comment, it seems much easier to withhold any ESI that adversely affects the case of a party pursuant to Norwegian law, rather than under English procedure. If the opposing party is not aware of the evidence or not familiar with the details, it is difficult for them to obtain access to the evidence. On the other hand, the Dispute Act provides for some sanctions.

The most commonly used sanction is the fact that the parties' actions are reflected in the evaluation of evidence. The Norwegian legal system is based on the free evaluation of evidence and the evaluation shall, pursuant to DA § 21-2, be based on facts that come to light during the trial. The judge will base their judgment

on the facts they find most likely. In this assessment, the judge is expected to use their reasonable discretion and general principles of experience, universal human insights about people's behaviour and alleged motives for their behaviour. When a party fails to fulfil his obligation to present relevant evidence and this is believed to be intentional, it is reasonable to conclude that he has something to hide that is likely to weaken his case. Where there is reasonable doubt, the court must be able to emphasize this. In other words, there is an onus of proof that adversely affects the party who has control of evidence and neglects to provide it.

Even though the English civil procedure rules do not operate with free evaluation of evidence, the court is open to draw adverse inferences where a party does not provide proper disclosure or has destroyed documents. The court may take it into consideration in assessing the credibility generally of the person in default, or it may draw the inference that the specific document unfavourable to the cause of the party who has destroyed it or has failed to disclose it.⁵⁶ Even if this is not recognized as a formal sanction in accordance with to the English rules, English judges have a similar ability to deal with such failures.

Cost sanctions

Another common sanction is to order the restraining party to pay the counterparty's litigation costs. This assessment is undertaken in nearly every case, pursuant to DA chapter 20. The general rule is, as with the English rules, that the unsuccessful party will be ordered to pay the costs of the successful party, for which see CPR 44.3(2)(a) and DA § 20-2. However, a party who has been successful to a significant degree without having won the case may, pursuant to § 20-3, be awarded costs from the opposite party in full or in part, if weighty reasons suggest so. An example of this is the case A v B from the Borgarting Court of Appeal.⁵⁷ The case was about the breakdown of a relationship, and the parties could not agree on the value of some shares in a company.⁵⁸ The court found that:

'It is emphasized that A both before trial and during the trial has failed to submit relevant material to the case that he has access to. The appellate court agrees with the District Court's review. Regarding the appellate court's view, several inquiries from the

⁵⁵ DA ch. 27.

⁵⁶ Paul Matthews and Hodge M. Malek QC, *Disclosure*, p. 434.

⁵⁷ LB-2008-186582.

⁵⁸ In Norway family cases are handled by the DA—there are no special procedure rules as in England & Wales.

counsel for B or assistants were directed to A, but with rather a cautious response. The court does not consider it necessary to go into the various requests and responses in detail, but assume that it was necessary for B to go to court to get the necessary insight into A's business activities in the X AS.⁵⁹

The Borgarting Court of Appeal found that these reasons were sufficiently compelling to award partial costs to B (Dispute Act § 20-3), and B was awarded costs for the proceedings in the District Court.

The English rules provides the court with the discretion as to whether the costs are payable by one party to another, the amount of those costs and when they are to be paid.⁶⁰ The CPR sets out a non-exhaustive list of orders, which the court may make, for which see CPR 44.3(6). The orders have to apply reasons of proportionality.⁶¹

By the Norwegian rules, a party may be awarded costs in full or in part, irrespective of the outcome of the case, if the costs have arisen due to the negligence of the opposite party, pursuant to DA § 20-4(c). In the case *Clivden Eiendom AS v the State by the Tax Collector in Oslo*, the Tax Collector in Oslo demanded bankruptcy proceedings to be initiated against Clivden because of a presumption of insolvency.⁶² It transpired that Clivden had submitted a tax return, but neglected to inform the Tax Collection Office. This meant that Clivden was entitled to tax deductions and was not insolvent. The company was still required to cover the opposite party's costs, because the costs had arisen due to Clivden's negligence.

In the case of *Aanesen v Bellmann Mathisen and others*, the question was whether Aanesen had failed to present important documents prior to legal action, pursuant to DA § 5-3.⁶³ The Supreme Court determined that the obligation at this stage involved only a duty to provide information about a document, not to present it. The action (or lack of action) was not considered as a failure, and Aanesen was therefore not ordered to pay the opposite party's cost in accordance with DA § 20-4(c). The result would be different if Aanesen failed to present evidence after the case was filed. In this respect, the provisions of DA § 20-4(c) are not particularly useful for situations where the information adversely affects the negligent party's case. It is more likely that the opposite party would in full or in part win the case if the negligent party fails to present relevant

evidence.

In comparing the English and the Norwegian civil procedure rules, it can be concluded that the rules regarding costs between the parties have a marked resemblance. The substantive content in the provisions are also similar, and the rules seem to be used frequently in both countries.

Penalty notices and strike out

The strictest sanction in Norway is to issue the party with a penalty notice, pursuant to DA § 16-7(2). A penalty notice is an order from the court to a party to carry out an earlier neglected action under the threat of being considered to be absent in the case if the deadline is neglected.⁶⁴ The order requires that that the action is carried out because it is essential to the counterparty or necessary for the proper treatment of the issue. The jurisdictional threshold is high, but the consequences are strict. If the defendant fails to comply with the order, the court may pronounce a judgment in which the claimant succeeds partly or wholly, for which see § 16-10. If the claimant fails to comply with its duty to present evidence, the case may be dismissed in accordance with § 16-9. A search on the Norwegian case law databases on §§ 16-7, 16-9 and 16-10 indicate that these sanctions are hardly used in situations where a party is negligent in undertaking his obligations of presenting evidence, regarding both paper documents and ESI.⁶⁵

The penalty notice rules resemble the English rules of striking out. In both situations, the party is, after a failure to comply with his obligations, issued an order clearly stating the consequences of failing to comply with the 'unless' order. The consequences are also similar. According to the Norwegian rules, § 16-10 (2), judgment by default must be based on the grounds of the claimant's allegations, provided that these have been notified to the respondent and do not appear to be clearly incorrect. The English rules do not have a similar regulation, but the court will state the consequences of not complying with the order. According to CPR 3.4(3), the court may in addition make any consequential order it considers appropriate.

The main difference is probably that even though the rules about striking out are rarely used, they *are* used in England, while such sanctions are hardly used in Norway. It is not obvious why the rules are used differently. It may be due to the different attitude of

59 LB-2008-186582, under the heading 'Samlet verdvurdering'.

60 CPR 44.3(1).

61 Peter T. Hurst, *Civil Costs* (4th edn, Sweet & Maxwell, 2007), p. 138.

62 LB-2010-62581.

63 Rt. 2009, p. 627.

64 Ot.prp.nr.51 (2004-2005), p. 425

65 <http://www.lovdato.no/>. Searches on the three provisions were conducted on 10 June 2011.

disclosing evidence. When expecting to be given all relevant evidence, the withholding of evidence is regarded as a failure of the obligation of disclosure. Conversely, when both the parties and the court are used to the fact that a party only presents evidence supporting its own case, the situation will have to be extreme before the court orders a party to present evidence adversely affecting its own case. The reason behind the difference could also be because judges interpret the rules differently. When a rule is interpreted in a specific strict way, the following cases will interpret the provision the same way, and the high threshold to meet the requirements reduces the amount of cases. Another possibility, which is less plausible, is that Norwegian litigation does not face the same problems as in England, and that the limited use of the strongest sanction is due to the fact that Norwegian parties behave more properly. Unless there is empirical proof to demonstrate that litigants in England & Wales are more prone to destroy evidence or fail to obey orders of the court than litigants in Norway, this argument is not persuasive. When comparing the two systems, the opposite is more probable: a system with less control of the presentation of evidence will, to a larger extent, tempt the parties to withhold evidence adversely affecting their own case, especially evidence such as ESI which are easily deleted (but not necessarily expunged).⁶⁶

Summary

The general disclosure rules in the two countries are, due to the different legal systems and the traditions, quite unlike. In England & Wales, failing to present evidence will certainly adversely affect the party's case. In comparison, judges in Norway seem to a much larger extent to accept that files 'unfortunately' have been deleted, or that they no longer exist for some reason. Parties to litigation in Norway, unlike their counterparts in England, are not instructed to preserve evidence.⁶⁷ Even though the parties understand that they are not to delete relevant evidence, the different approach taken to sanctions between England & Wales and Norway might reflect the attitude of the courts when relevant material has mysteriously disappeared. The problem is that the sanctions are not used often, and the interpretation of the rules has arguably been too strict. The narrow interpretation of the rules fails to send out

the message to litigants that they will be penalised for destroying evidence. Arguably, it should be possible to create a civil procedure system that is able to handle ESI as evidence without all the expenses that follows with a disclosure.

Considering the differences, it is interesting to note how many similarities there are. Norway has the same sanctions for not complying with the rules, and the same overriding objective as in England & Wales. The Dispute Act Committee was inspired by Lord Woolf's reform paper, and the consideration of proportionality was one of many elements the members brought into the Dispute Act. As a preliminary conclusion, the general disclosure rules relating to electronic evidence functions better in England & Wales than in Norway.

Preliminary legal actions

Pre-action disclosure in England & Wales

In both England and Norway the court may issue preliminary orders before legal action begins. English law provides for four types of order, but only one of them gives the applicant the possibility of disclosing evidence meant for use in subsequent litigation.⁶⁸ Under CPR 31.16(3) the court may make an order for pre-action disclosure if the following requirements are met:

The court may make an order under this rule only where-

- (a) the respondent is likely to be a party to subsequent proceedings;
- (b) the applicant is also likely to be a party to those proceedings;
- (c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and
- (d) disclosure before proceedings have started is desirable in order to—
 - (i) dispose fairly of the anticipated proceedings;
 - (ii) assist the dispute to be resolved without proceedings; or

⁶⁶ For a discussion of this problem, see Stephen Mason, *Electronic Evidence*, 2.17 – 2.18 and individual chapters covering the different jurisdictions.

⁶⁷ 31BPD 3, see also Stephen Mason, 'England &

Wales', *Electronic Evidence*, p. 385 ff.
⁶⁸ Paul Matthews and Hodge M. Malek QC, *Disclosure*, p. 57. Matthews and Malek mentions three other preliminary actions; Norwich Pharmacal orders, corporate insolvency and

applications to inspect the court files in other litigation.

(iii) save costs.

Previous to the CPR, the scope for pre-action disclosure was limited to proceedings for personal injury and death. Lord Woolf recommended that pre-action disclosure should become available in all types of case, although subject to special application.⁶⁹ The application must include a specification of what documents or classes of documents are sought. The narrower the disclosure requested and the more determinative it may be of the dispute in issue between the parties to the application, the easier it is for the court to find the request well-founded; and vice versa.⁷⁰ The court is given discretionary powers to decide whether pre-action disclosure pursuant to sub paragraph (d) is 'desirable' or not. Among the important considerations are the nature of the injury or loss complained of; the clarity and identification of the issues raised by the complaint; the nature of the documents requested; the relevance of any protocol or pre-action inquiries; and the opportunity which the complainant has to make his case without pre-action disclosure.⁷¹

Regarding ESI in the counterparty's control, pre-action disclosure could be an expedient tool to gain access to the evidence at an early stage, when this is necessary for the further proceedings of the case, to save costs or to resolve the dispute without proceedings. It is difficult, however, to find cases where access to ESI is the main problem. Usually the applicants struggle to meet the requirements for a pre-action disclosure, and the fact that the evidence adversely affects the party in control of the evidence seems to be of less importance.

In the case of *Moresfield Limited v Banners (a firm)*,⁷² the parties had agreed on pre-action disclosure. After four months of delay, before the disclosure was commenced, the defendants abandoned the agreement, claiming that the circumstances had now changed and it was too late for pre-action disclosure. They also wanted to avoid giving disclosure, arguing that the only remaining relevant material in the scope of their instructions was that emanating from the claimants. Lawrence Collins J did not accept the argument, at 63:

'I am also satisfied that the two files, which relate exclusively to the work done by KPMG [the defendant] in relation to this transaction, will, expressly or by inference from the work done, tend to show what their instructions were and whether they gave assurances

as alleged, and accordingly be within the scope of standard disclosure with the potential to adversely affect KPMG's case.'

The disclosure was limited to two working files, and was therefore clearly specified. The other requirements were also met, and Lawrence Collins J did not find the defendants reasons for their change of position convincing, and ordered pre-action disclosure.

In *Hutchinson 3G UK Limited v O2 (UK) Limited*,⁷³ Hutchinson claimed that its four principal competitors had, by way of concerted practice and by way of an abuse of their dominant position, prevented the development of an efficient and effective alternative Mobile Number Portability system, thereby restricting and distorting the competition between Hutchinson and the respondents. Hutchinson sought an order for pre-action disclosure of a vast bulk of documents and classes of documents to find evidence adversely affecting the respondents. However, the court found the request 'so lacking specificity, that it is not possible to accept that the entirety of the classes of documents are 'likely' or 'may well' fall within standard disclosure.'⁷⁴

Securing of evidence in Norway

The pre-action disclosure in Norway is called 'securing of evidence', and the provision provides for the following requirements:

§ 28-2 Vilkårene for bevissikring

Bevissikring kan begjæres når beviset kan få betydning i en tvist hvor den som setter fram begjæringen, vil kunne bli part eller partshjelper, og det enten er en nærliggende risiko for at beviset vil gå tapt eller bli vesentlig svekket, eller av andre grunner er særlig viktig å få tilgang til beviset før sak er reist.

§ 28-2 Conditions for securing evidence

Evidence may be secured if it may be of importance in a dispute of which the applicant may become a party or intervener, in so far as there is a clear risk of the evidence being lost or considerably impaired, or if there are other reasons why it is of particular importance to obtain access to such evidence prior to the litigation being initiated.

69 Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System*, p. 617, Lord Woolf, *Access to Justice: Final Report (1996)*, ch. 12, paras 47-50.

70 *Black v Sumitomo Corporation [2002] 1 WLR*

1562, [2001] EWCA Civ 1819 at 72.

71 *Black v Sumitomo Corporation [2002] 1 WLR* 1562, [2001] EWCA Civ 1819 at 88.

72 [2003] EWHC 1602 (Ch).

73 [2008] EWHC 55 (Comm).

74 *Hutchinson 3G UK Limited v O2 (UK) Limited [2008] EWHC 55 (Comm)* at 47, cf. Stephen Mason, 'England & Wales', in *Electronic Evidence*, p. 356.

Originally this provision was created to make it possible to obtain testimonial evidence if the witness was so diseased that he or she would probably not be able to attend court for an oral testimony, and for things that would inevitably be destroyed waiting for the trial, typically because they would rot or perish.⁷⁵ The provision is now frequently used to secure ESI.

The procedure is divided into two parts, the securing process and the sorting process. The securing procedure is as follows: A party applies for the securing of evidence and the court considers the application and may approve it. The court then orders the enforcement officer to do the securing. If the evidence is electronically stored, the enforcement officer is usually assisted by technical staff, and forensic images of hard disks, servers and other storage devices are frequently made. The enforcement officer preserves the information. Then comes the sorting process. If the secured material is ESI, the parties will usually have to agree on the search methods and key words to identify the relevant evidence. If the applicant has limited knowledge of the documents, files and logs he wants to obtain access to, this could be an exhausting process. This will be considered below. The technical staff sort out the relevant material and this is submitted to the applicant.

Overriding comments

In comparing the English and Norwegian rules, there are several observations to make. In Norway, it appears that a party cannot expect to obtain access to all relevant evidence through the duty to provide evidence. If the evidence a party seeks is ESI, the only viable way is to apply for the securing of evidence. The system does not appear to be based on trust and co-operation, but on mistrust and scepticism. Another striking difference between English procedure and the rules in Norway, is that the parties do not participate in the sorting process in Norway. This task is delegated to technical staff paid in advance 50/50 by both parties, and the final allocation of costs is done by a cost order in connection with the judgment. In England, the party giving disclosure pays for these costs. Since the technical staff are not hired by either of the parties in Norway, there is no co-operation between the parties and the technical staff. They work on the instructions agreed by both parties. If the parties cannot agree, which is not unusual, the court will have to decide the instructions.

In marked contrast to the English procedural rules, in Norway there is an apparent lack of regulation related to the implementation of the rules. The Practice Directions in England & Wales provides for the order that things should be done, and how the parties should behave. In Norway, the Dispute Act hardly mentions anything regarding the need to secure of evidence. DA § 28-4 proclaims: 'The provisions on access to real evidence and the taking of evidence in litigation shall apply correspondingly to the securing of evidence as far as they are appropriate'.⁷⁶ The problem is that these provisions are not appropriate, at least not for the securing of ESI. The procedure for the securing of evidence is then undertaken according to what the court finds most appropriate. This differs from case to case and from judge to judge, but the procedure mentioned above is the procedure that most judges find reasonable in the absence of similar guidelines set out in England.

To whom the provision applies

Among the more detailed differences between England and Norway, are how to specify to whom the provision applies. DA § 28-2 requires that the applicant 'may become a party or intervener', but provides no guidance to the person or the company about where the securing of the evidence will take place. In England, CPR 31.16 requires the respondent to be 'likely to be a party to subsequent proceedings'. However, pursuant to DA § 28-3 (2), the application must specify the opposing party that is expected that any ensuing action will be directed against. CPR 31.17 covers pre-action disclosure against a person not a party, so the differences are basically a question of structure.

Specification

An important topic within securing of evidence is the requirement for a specification of the evidence. A party is obliged to specify the evidence it wants access to – what kind of information and the nature of the evidence. The provisions regarding the securing of evidence have no requirements about specifying the evidence. It is therefore necessary to consider the general obligation to provide relevant evidence to the counterparty, more specifically, the provisions of DA § 26-6:

§ 26-6 Utformingingen av begjæring om bevis tilgang

(1) En begjæring om tilgang til eller spørsmål om

⁷⁵ NOU 2001:32: Rett på sak, p. 987.

⁷⁶ § 28-4 Gjennomføringen av bevis sikring. For gjennomføringen av bevis sikring gjelder reglene om tilgang til realbevis og bevisopptak i retts sak tilsvarende så langt de passer.

realbevis skal spesifiseres slik at det er klart hvilke bevisgjenstander kravet gjelder.

(2) Retten kan lempe på kravet til spesifikasjon dersom dette er uforholdsmessig vanskelig å etterkomme, og det er en nærliggende mulighet for at kravet kan gi tilgang til bevis.

§ 26-6 The contents of an application for access to evidence

(1) An application for access to or questions concerning real evidence shall be specified in such a manner that it is clear which item of evidence the application relates.

(2) The court may relax the specification requirements if these are unreasonably complicated to comply with, provided that there is a clear possibility of the application yielding access to evidence.

In *Normarc v Norwegian Special Mission*,⁷⁷ the Supreme Court stated, at 35 – 36, that it was not necessarily appropriate to set the same standards for an application to provide evidence as an application for securing evidence, based on consideration of the aims and the practical challenges: ‘Not least for electronically stored data the practical circumstances could make it hard to get far in the specification’.⁷⁸ The court should, in the exercise of its discretion, consider to what extent the specification is possible and how likely it is to find evidence that can be secured reasonably. The applicant and later claimant, Normarc, claimed that former employees had brought with them trade secrets when they left Normarc and established NSM. The court ordered the securing of evidence, and the respondent was required to provide the enforcement officer and his assistants access to the company’s premises in Oslo and at Gardermoen Airport to make forensic images of all the material on its servers, CDs, tapes and other storage resources on the workstations of four former employees, as well as all backup files from August 2003 to August 2004.⁷⁹ The extent of the securing of evidence is said to be equivalent to 285 million A4 pages and is considered as one of the largest exercises of the securing of evidence in Norway to date. The amount of

information and the challenge in sorting out the relevant evidence may resemble English disclosure, except for the significant difference that NSM is not the one doing the sorting process. This is undertaken, as mentioned in general terms above, by technical staff operating on instructions from the court.

The Norwegian system is not used to handling such a vast volume of information and has no rules or regulations on how to operate such a sorting process. The fact that the party who originally had the information in their hands does not handle the sorting process makes it even more difficult to conduct. The parties agreed on some key words, but NSM objected to revealing the result of this search, alleging that they contain company secrets. Normarc then applied to use a search method with MD5 hash checksum on the files in the secured material for the purpose of carrying out an automated comparison of metadata and MD5 hash checksums of the content on Normarc’s own servers as of January 2004. By comparing the lists of MD5 checksums, it is possible to see if the same checksum can be found – and if so, to find out what hides behind the checksum. In a judgment given in April 2011 in the same case, the Court of Appeal required NSM to give Normarc access to these checksums.⁸⁰ The judgment is final.

The jurisdictional threshold

Another important discussion is to compare the jurisdictional threshold to the exercise of the discretionary power. As mentioned above, the court can order pre-action disclosure if it is ‘desirable’ and if subsequent proceedings with the applicant and the respondent as parties are ‘likely’. In *Black v Sumitomo Corporation*,⁸¹ Rix LJ stated at 72 – 73 that ‘[...] ‘likely’ here means no more than ‘may well’. [...] Temptations to gloss the statutory language should be resisted. The jurisdictional threshold is not, I think, intended to be a high one.’ The Court of Appeal has expressed other opinions in respect of the threshold. In *Rose v Lynx Express Ltd*,⁸² the *Black v Sumitomo* case was not referred to. Peter Gibson LJ expressed the view at 4 that ‘In our view it will normally be sufficient to found an application under CPR 31.16(3) for the substantive claim pursued in the proceedings to be properly arguable and to have a real prospect of success, and it will normally

⁷⁷ Rt. 2006, p. 626.

⁷⁸ Rt. 2006, p. 626 at 35-36.

⁷⁹ TOSLO-2004-42431.

⁸⁰ LB-2010-149042.

⁸¹ [2002] 1 WLR 1562, [2001] EWCA Civ 1819.

⁸² [2004] EWCA Civ 447.

be appropriate to approach the conditions in CPR 31.16(3) on that basis.⁸³ This requires that the case must have a sufficient factual basis to support it. ‘An applicant has not made out a good or properly arguable case for breach [...] if there is no credible evidence of primary facts from one may at least be able to infer that an act of infringement is likely to have taken place’.⁸⁴ The two different tests have been discussed in later cases and a conclusion has so far been drawn in *Kneale v Barclays Bank*:⁸⁵

‘If I had to decide which test was the correct one for the “arguable case” jurisdictional threshold, I would conclude that it was the lower one suggested by *Black v Sumitomo* and by *BSW v Balltec*. [...] [A]t the pre-action stage where the whole purpose of the application is to ascertain whether to bring a claim or not, it cannot be right that the applicant has to establish a case which is sufficiently arguable to have a “real prospect of success” in the sense which that phrase has under the CPR.’

Discussion has also focussed on the requirements in sub paragraph (d) and in particular whether disclosure is ‘desirable’ in order to dispose fairly of the anticipated proceedings, to assist the resolution of the dispute without initiating proceedings, or to save costs. Tomlinson J stated the following regarding this matter:

‘That is a requirement which serves double duty in the rule in that it is both a jurisdictional requirement and, of course, a requirement, or one of the elements is perhaps a better way to put it, which the court must take into account in the overall exercise of its discretion whether to order disclosure before the proceedings have begun. It is not enough, therefore, simply to conclude that disclosure before proceedings have started is in general terms desirable simply in the sense that it will enable the parties, or one of them, to know more clearly where it will stand, but the court must go further and conclude that, in all the circumstances, it is appropriate that the court should make an order of this sort, bearing in mind that the rule is not couched in mandatory terms but is

introduced by the words ‘the court may make an order under this rule only where’.⁸⁶

As part of the assessment related to sub paragraph (d), Tomlinson J also requires the disclosure to be ‘necessary’. It is not a sufficient consideration to take a case out of the ordinary run because a pre-action disclosure would enable the applicant to ‘draft a more focused pleading, or possibly to put some flesh upon the bones’.⁸⁷

The courts in Norway also have jurisdictional thresholds in the exercise of the discretionary power. Pursuant to DA § 28-2 the evidence ‘may be of importance’ in a dispute and there has to be ‘a clear risk’ of evidence being lost or considerably impaired, or if there are other reasons why it is ‘of particular importance’ to obtain access to such evidence prior to the initiation of the action. As Tomlinson J explained regarding CPR 31.16(3)(d), § 28-2 of the DA also serves ‘double duty’ in the rule. The court must take into account both the jurisdictional requirement that it ‘may be of importance’, and in addition one of the two elements in the provision in the overall exercise of its discretion whether to order disclosure before the proceedings have begun.

In *Oslo Bilauksjon AS v A and X AS*,⁸⁸ the Court of Appeal stated that the first requirement, ‘may be of importance in a dispute’, was a statement of the general requirement of legal interest, founded in DA § 1-3 (2).⁸⁹ An explanation of the subject of legal interest is not within the scope of this article, but in short, the requirement of legal interest is usually considered regarding a writ, and since a securing of evidence precedes this legal step, it would be necessary to predict the result of this assessment. The Norwegian requirement ‘may be of importance in a dispute’ could be compared with the English requirement ‘likely’ in CPR 31.16(3)(a) and (b), for which see *Black v Sumitomo Corporation* at 72 on this point.

In respect of the second requirement, there are two alternative conditions. The two elements are aimed at two different situations. The first element describes a kind of emergency situation – ‘a clear risk’ of evidence being lost or considerably impaired – and this element

83 In *BSW Limited v Balltec Limited* [2006] EWHC 822 (Ch) at 20, Peter Gibson LJ referred to the same threshold test in *ED&F Man Liquid Products Ltd* [2003] EWCA Civ 472. The threshold test in *Rose v Lynx Express* was followed and applied in *Pineway Limited v London Mining Company Limited* [2010] EWHC 1143 (Comm) at 21-22.

84 *BSW Limited v Balltec Limited* [2006] EWHC 822 (Pat) at 20.

85 *Kneale v Barclays Bank Plc* [2010] EWHC 1900 (Comm) at 37

86 *Trouw UK Ltd v Mitsui & Co (UK) Plc* [2006] EWHC 863 (Comm), [2007] UKCLR 921 at 19.

87 *Trouw UK Ltd v Mitsui & Co (UK) Plc* [2006] EWHC 863 (Comm), [2007] UKCLR 921 at 43. The test was followed and applied in *Pineway Limited v London Mining Company Limited* [2010] EWHC 1143 (Comm) at 52.

88 LB-2010-202642.

89 ‘§ 1-3 The subject matter and character of legal action [...] (2) The party bringing the action must establish a genuine need for having the claim determined as against the respondent. Weight shall be attached to the relevance of the claim and to the connection of the parties to the claim.’

is frequently used in connection with ESI. The court is given a broad discretion in deciding whether the risk is clear enough. In *Oslo Bilauksjon v A and X AS*, the applicant alleged that the respondent breached a competition clause in the employment contract and also a breach of confidentiality. A was a former employee of the applicant, a company that held open and closed car auctions, and was now employed by X AS, a company who had started an auction business. The applicant applied for securing of evidence, including ESI regarding X's routines and systems for auction operations, customer lists and correspondence regarding customers and business partners. The application was rejected in the county court, but the Court of Appeal found that both the first requirement, 'may be of importance' in a dispute, and the second requirement first element, 'a clear risk' of evidence being lost or considerably impaired, was met and ordered the securing of evidence.

In another case, *Vema v Larsen and Hessevik*,⁹⁰ a similar subject matter was also recognized as a case with 'clear risk' of evidence being lost. One employee and one dealer both resigned from their positions, and terminated the dealer agreement with Vema and established private contact with Vema's suppliers. This was a breach of a competition clause in the employment contract and a breach of confidentiality. The court ordered the securing of evidence from the defendants' e-mail accounts and their private computers.

The second element in the Norwegian provision is a development with the DA of 2005 and relates to the situation where a party needs to assess their legal position in relation to other potential counterparties regarding potential litigation. Here it may be important to the party to gain access to the evidence controlled by the potential counterparty in order to assess their legal position, and to secure evidence in case of subsequent proceedings.⁹¹ The provision resembles the English *Norwich Pharmacal* orders, named after the case *Norwich Pharmacal Co v Commissioners of Customs & Excise*.⁹² Such an order could be given if a potential claimant intends to assert his legal rights against a wrongdoer, but needs information from the defendant to identify the wrongdoer. This information must be necessary to enable action to be initiated.⁹³ Unlike the Norwegian provision, the subject matter of a *Norwich Pharmacal* application is information rather than evidence.⁹⁴ This makes it easier to avoid allegations of 'fishing expeditions'. The preparatory work of the

Dispute Act stresses the importance of avoiding these kinds of applications, and emphasizes that 'the wording also implies that it concerns an exceptional rule with a relatively narrow scope'.⁹⁵ The commentary review of the Dispute Act states in relation to this that 'the threshold for deciding the securing of evidence will be high, and securing of evidence is an extraordinary instrument that should not be used without just cause. Evidence can therefore not be used to "look counterparts in their cards"'.⁹⁶

A well-known Norwegian case, *Altibox AS v Sandrew Metronome Norge AS and Filmkameratene AS*,⁹⁷ resembles an application for a *Norwich Pharmacal* order. Sandrew Metronome Norge AS and Filmkameratene AS applied for information about the identity of an individual behind an IP-address allocated by the Internet Service Provider (ISP). The subscriber with this IP-address had been active in file sharing and had made available copyrighted material owned by the applicants. Pursuant to the Act on Electronical Communications § 2-9, information about the identity of ISP subscribers are confidential. The Supreme Court concluded, however, that even though this material was confidential, the court had the power to order the securing of evidence pursuant to DA ch. 28. The judgment was kept secret from both the subscriber and the public until the securing of evidence had been completed.

At first glance, the Norwegian provision might give the impression that the jurisdictional threshold is higher than the English. However, it is arguable that the words 'clear risk' and 'particular importance', despite the statements in the preparatory works, are easily met regarding ESI. For instance, if the applicant is able to provide evidence to make it probable that the respondent has acted in contravention of an agreement, it is then possible for an applicant to allege that the counterparty might delete the relevant evidence. Despite the wording, it appears that the jurisdictional threshold is lower in Norway than in England & Wales.

Not giving notice to the counterparty ahead of the search

The possibility of not giving notice to the counterparty is probably one of the most important differences between the English pre-action disclosure and the Norwegian securing of evidence. This element is mainly used in cases regarding ESI.⁹⁸ The provision in Norway is as

90 08-095049TVI-AHER/1.

91 NOU 2001:32 Rett på sak, p. 987.

92 [1974] A.C. 133, [1973] 3 WLR 164, [1973] 2 All ER 943, HL.

93 Paul Matthews and Hodge M. Malek QC, *Disclosure*, p. 59.

94 Paul Matthews and Hodge M. Malek QC, *Disclosure*, p. 62.

95 NOU 2001:32 Rett på sak, p. 988.

96 Tore Schei and others, *Tvisteloven* (2007), p. 1249.

97 Tore Schei and others, *Tvisteloven* (2007), p.

1249.

98 Maria Astrup Hjort, *Regulering av e-post som bevis etter den nye tvisteloven – praktiske og rettslige utfordringer*, in *Festskrift til Jussformidlingens 35-årsjubileum* (2008), Det juridiske fakultets skriftserie nr. 114, p. 132.

follows:

§ 28-3 Begjæring om bevissikring. Rettens avgjørelse

[...] (3) Bevissikring kan iverksettes straks dersom rask gjennomføring er nødvendig for å sikre beviset. Om mulig skal motparten varsles før bevissikringen slik at motparten kan la seg representere under denne. Dersom varslings ikke lar seg gjennomføre i tide, skal retten så vidt mulig oppnevne en representant for motparten 2 og snarest underrette motparten om det som er foretatt.

§ 28-3 The application for securing evidence. The ruling of the court

[...] (3) The court may order the securing of evidence without notification of the opposite party, provided that there is reason to fear that notifying the opposite party could prevent evidence from being secured. Neither the counterparty nor the public should be notified of the case before the securing of evidence is completed, or more than six months have passed since the case was closed. The applicant should not be allowed access to the evidence until the ruling is final in circumstances where it may be of importance to the opposite party to prevent such access. § 32-8 applies correspondingly. An application from the counterparty for oral proceedings must be done within two weeks after the securing is conducted.

The possibility of not giving notice to the counterparty was introduced in 2004 to meet the Norwegian obligations under the TRIPS-agreement.⁹⁹ Even though the agreement applies only to intellectual property rights, the provision was made general on the grounds that 'the need to secure evidence without notice to the other party can actually be just as large in other cases as in infringement of intellectual property rights.'¹⁰⁰ Preparatory works stressed that 'it is just exceptionally permitted to make important judgements without the other party being heard'.¹⁰¹ It seems as if the exception has become the rule.

The Norwegian provision may resemble the rule in CPR 25.1(1)(h), previously known as *Anton Piller*

orders.¹⁰² These orders direct the defendant to permit the claimant to enter premises and search for and copy or take away specified material.¹⁰³ It is not certain how frequently this is used to give disclosure of ESI before the proceedings are started, even though it might be possible, in accordance with the provisions of CPR 25.1(1)(b). However, there must be a need to prevent a denial of justice, and an order for delivering up the materials will not be sufficient.¹⁰⁴ In addition, the applicant is not permitted, without the permission of the court, to use any information obtained as a result of the order for the purpose of any civil proceedings, other than the claim.¹⁰⁵ These orders are mainly made by the High Court – the county court's power to make search orders are very limited.¹⁰⁶ In comparison, in Norway, the corresponding provision (DA § 28-3 (4)) is basically used to secure electronic evidence, and the power to order the securing of evidence is open to courts on all levels.

The court's discretionary power

In both jurisdictions the court has a discretionary power to decide whether a pre-action disclosure is appropriate or not. It appears that the English courts handle this power with care. Pre-action disclosure is only ordered if there is some feature of the case which makes it unusual.¹⁰⁷ If the application seems speculative, the court will not give order for disclosure.¹⁰⁸ The problem in relation to the Norwegian rules is that handling cases through the ordinary run is not a satisfying option when it comes to ESI. The result is that the court tends to authorize the securing of evidence in more usual cases, lowering the jurisdictional threshold and being generous in their discretionary assessments.

This discussion of the Norwegian procedure of securing evidence might give an impression of a legal system struggling to find out how the rules should be implemented. Such an image is not necessarily incorrect. Generally, more evidence is created and stored electronically, and when securing evidence is the most reasonable procedure to obtain access to the evidence, the system encounters difficulties. Arguably, Norway might continue to have difficulties unless Practice Directions are introduced, or some other kind of guidance is provided to the parties and the courts

99 *The Agreement on Trade Related Aspects of Intellectual Property Rights, which is part of the WTO-agreement.*

100 *Ot.prp.nr.33 (2003-2004)*, p. 6.

101 *NOU 2001:32 Rett på sak*, p. 989. See also *Tore Schei and others, Twisteloven (2007)*, p. 1254.

102 Named after the case *Anton Piller K.G. v Manufacturing Processes Ltd. [1976] 1 Ch 55*.

103 *Paul Matthews and Hodge M. Malek QC*,

Disclosure, p. 34.

104 Stephen Mason, 'England & Wales', in *Electronic Evidence*, p. 357. Mason categorizes these orders as pre-trial, but they could also be ordered pre-action, cf. CPR 25.2(2)(b).

105 *Paul Matthews and Hodge M. Malek Q.C.*, *Disclosure*, p. 38.

106 *County Courts (Remedies) Regulation 1991 No. 1222 (L.8)*, reg. 3

107 *Kneale v Barclays Bank Plc [2010] EWHC 1900 (Comm)* at 45.

108 *BSW Limited v Balltec Limited [2006] EWHC 822 (Pat)* at 81-82, *Pineway Limited v London Mining Company Limited [2010] EWHC 1143 (Comm)* at 53-54, and *Kneale v Barclays Bank Plc [2010] EWHC 1900 (Comm)* at 52.

through procedural rules.

Concluding remarks

Handling electronic stored information is a challenge in all jurisdictions. The English system has coped with the challenge by providing practice directions especially for electronic disclosure. Since the English system already has the disclosure system and the parties are used to searching for all relevant materials, the disclosure of electronic documents is just another item added to the list. The system is based on trust and co-operation between the parties, and it is likely that in most cases evidence adversely affecting the party's own case will usually be brought to the attention of the other party during the disclosure exercise. Search orders, whether pre-action or pre-trial, that are based on a party's fear that the evidence will be deleted or manipulated seems to be rare. The system is more streamlined than the Norwegian system, but on the other hand it is more expensive.

In Norway it has been assumed that ESI as evidence can be handled by the general rules, and except for the securing of evidence, there is no reasonable solution on how to obtain electronic information adversely affecting and in hands of the counterparty. Securing evidence should be an exceptional rule, not the only possibility in such cases. This is not a consideration of the Norwegian system as such. The system seems to work satisfactory with other forms of evidence. The problem is that there have not been enough adjustments to ESI as evidence, and this is highlighted when the evidence is in the hands of and adversely affecting the counterparty. The

attitude 'you cannot trust your counterparty' makes handling ESI as evidence even more difficult. If the obligation to provide relevant information adversely affecting the party's own case were more strictly interpreted and sanctions were used on a larger scale, a party may not, perhaps, have to apply for the securing of evidence to make sure that it can get access to the evidence.

In legal systems with and without disclosure, there will always be a risk that not all the relevant evidence will be presented. In many ways, ESI as evidence challenges legal procedural systems because of the massive amounts of information that is stored with little or no structure. A procedural system can cause problems to the parties, where there is a possibility of drowning in less relevant evidence or failing to obtain relevant evidence. It is not realistic to 'turn every stone'. The aim should be to develop a system where the parties contribute in turning only the necessary stones without significant costs.

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