Aleš Galič
University of Ljubljana
Slovenia

Disclosure of evidence: Privilege against self-incrimination or a quest for procedural fairness and substantive justice

"Nobody can be compelled to testify against himself and to offer evidence, unfavourable to him."

Triva, Belajec, Dika, Građansko parnično procesno pravo, 1986, p. 425

"In this country litigation… is conducted 'cards face up on the table'. Some people… regard this as incomprehensible. 'Why', they ask, 'should I be expected to provide my opponent with the means of defeating me?' The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object"

Sir John Donaldson MR in Davies v. Eli Lilly & Co. [1987] 1 WLR 428.

SUMMARY:

The first question in regard to disclosure of (documentary) evidence is **WHAT** should be disclosed. In Slovenian civil procedure party access to documents, which are in possession of the opponent and which could adversely affect the opponent's case, is quite limited. Traditionally (and based on a German / Austrian heritage of civil procedure), a principle applies that no one is obliged to help his adversary win the case. However, experience and recent developments in foreign legal systems – not only those where disclosure of evidence has for a long time been an integral part of civil justice, but also those which were traditionally rather reserved in that regard (e.g. Germany) - show that this approach might need to be re-examined. The privilege against self-incrimination is a principle of criminal procedure and as in many other aspects of law of evidence (e.g. burden of proof, standard of proof, strict exclusion of evidence obtained illegally...) it is wrong to automatically "transplant" such doctrines to civil procedure. In context of disclosure of documents in civil procedure, it is legitimately applicable only insofar it relates to the party exposing herself to the risk of being prosecuted for criminal offence, but not to the risk of merely losing the civil case at hand. The alternative is that parties should as early as possible disclose all relevant documents including those, which adversely affect her case. This strives to fulfill the overriding objective of doing justice and to enable better preparation of a trial.

On the other hand (in addition to e.g. protection of without-prejudice documents related to settlement negotiations) the importance of privacy and of protection of business secrecies should not be underestimated and the legal profession privilege should be protected. The main dilemma therefore is how to strike a proper balance between competing values and underlying policies. And this not only from the viewpoint of individual interests of litigants at hand, but from the viewpoint of public purposes of litigation as well. Another dilemma relates to the question as to what extend do rights of access to information existing under substantive law (e.g. duty to provide accounts…) interrelate with procedural law.

Whereas the question "what" should be disclosed relates predominantly to evidence, which adversely affect the party's case (and this further relates to the scope of exceptions and privileges) the second question is **WHEN** should evidence, including one the party itself wishes to rely on, be disclosed and ultimately adduced. Should the parties should remain free to bring forward fresh evidence whenever they wish to during the trial, or should a certain system of preclusions should be introduced and the judge be given powers to disregard late evidence unless proper excuse is provided? Under the Yugoslav Civil Procedure Act of 1976, parties were free to submit new facts and evidence until the end of the last session of the main hearing and – except in commercial cases – even during an appeal. It was only with the first Slovenian CPA of 1999 that a certain system of procedural sanctions for late facts and evidence was introduced in the regulation of civil litigation. Parties may assert new facts and evidence at the first main hearing at the latest and at subsequent sessions of the main hearings only if they were not able to submit them at the first main hearing through no fault of their own. However the CPA 1999 remained "half-way". The described system of sanctions for submitting facts and evidence late did not allow for the proper organisation of the preparatory stage of litigation in general. It was not able to prevent the common – however, from the aspect of the efficiency of proceedings, outright fatal – practice that attorneys filed further preparatory briefs as late as during the main hearing. Such practice resulted either in frequent adjournments of hearings or in the inability to ensure their adequate quality (on account of new arguments, facts, and evidence, which neither the court nor the opposing party had a chance to adequately consider). The Slovenian CPA was substantially reformed in 2008. The system of procedural sanctions for delays in litigation was strengthened and more importance was placed on the preparatory stage of litigation. In order to enable the other party's right to be heard and to organize their case, the first party is now obliged, whenever possible, to file new preparatory briefs in sufficient time for them to be served on the other party with adequate time before the main hearing. Furthermore, judges now have the power *sua sponte* to require (and to impose binding time limits for this purpose) that parties submit further written observations, comments, or clarifications. In addition, Judges can now pose questions and require further clarifications in writing *even before the first session of the main hearing* and can also require parties to offer further evidence or to supplement their factual assertions and to give necessary clarifications. Thus, if a judge is properly active (e.g. by giving hints and feedback by means of written procedures) already before the first session of the main hearing, parties need to react in the same manner and put forward corresponding additional evidence, in line with the judge's questions, hints, and observations. Otherwise, they will be precluded from adducing such evidence at the first oral hearing.

The judge's powers to disallow late facts and evidence are not mutually exclusive with the purpose of doing justice on the merits. Extended and intensified procedural requirements for the timely submission of (facts and) means of evidence should primarily be understood as a clear message to the parties' counsels that a diligent and active preparation for their case is necessary. In addition, introduction of sanctions against non-compliance does not necessarily mean they shall often be implemented in practice. They predominantly have a "prevention" effect. Clearly, the introduction of a system of preclusions in fact imposes an additional burden of diligent preparation for the first session of the main hearing for both – the parties as well as the judge. It therefore might not come as a surprise that the system of preclusions is opposed not only by numerous attorneys but by certain judges as well. These tools require diligent preparation before the trial, thus good knowledge of the file and a serious preliminary legal analysis by both the judge as well the attorneys. However, such a preparation cannot be expected from a judge who cannot rid himself of the old habit of having "the first serious look" at the file only at the first hearing and only then truly starting to work on the case.

The Yugoslav socialist concept of civil procedure was characterized by accentuated responsibility and (expected) activity of the judge, on the one hand, and by the non-existence of sanctions against the parties' belated submission of facts, evidence, and preparatory briefs, on the other. Both were an expression of the paramount importance placed on the "principle of material truth". However the experience in Slovenia from the period such system was in force demonstrates that the high importance assigned to the substantive aspect of adjudication ("material truth"), often led to results exactly the opposite of those it strove to achieve. It was precisely the procedural system that lacked adequate sanctions against the parties' inactivity and delay that caused the goal of substantive justice to fade. The lack of effective tools that would enable the timely gathering of procedural materials resulted in frequent adjournments of hearings, in a "piece-meal" manner of the presentation of facts and evidence and in culpably delaying a case's progress. Court hearings that are degraded to a mere "meeting point" for an exchange of further preparatory briefs do not embody the ideal of the quest for substantive justice. And neither do hearings which are immediately adjourned following a party putting forward further evidentiary proposals or following a finding that certain documentary evidence, although already relied upon by one party, has not yet been adduced (disclosed) to the court and the opposing party.

Another feature of the style of litigation in the former system was the frequent use of "ambush tactics" by attorneys. As there were no time limits for the adduction of fresh evidence and no obligation regarding advance disclosure (even of documents in possession of the party who himself relied on them), parties often filed documentary evidence only at the oral hearing. They counted on the other party being taken by surprise (though, such late disclosure was often not a result of any deliberate tactics, but a mere consequence of negligent preparation for the case, or, more frequently, a tool for achieving a desired adjournment of the hearing). The idea that it is precisely in the interests of justice – not only procedural, but substantive as well – that evidence in the hands of one party should be disclosed to the other party in a timely fashion, such that both the opposing party as well as the court can properly consider it, found no response. And all this was done, supposedly, in the name of the "quest for material truth".

What should not be neglected is the positive effect of the timely production of evidence from the viewpoint of promoting settlements. From such viewpoint, it is very useful if the parties can early enough realistically assess the strengths and weaknesses of their position – also in light of the arguments invoked and evidence disclosed by the opposing party. If a party cannot know before the main hearing what arguments and evidence are "in the hands" of his opponents, he cannot realistically assess its prospects of success. In such a case, settlement negotiations during the early stages of litigation can hardly be effective.