THE DISCLOSURE PILOT SCHEME: A TESTING NEW YEAR?

A new disclosure pilot scheme in the Business and Property Courts aims to address the costs and other burdens of disclosure in civil proceedings. However, the scheme is complex, and requires disclosure to start much earlier in proceedings than it does at present.

Key issues

- The new disclosure pilot will run for two years from 1 January 2019 in the Business and Property Courts of England & Wales.
- It will require "Initial Disclosure" of documents to be given with statements of case, at the beginning of civil proceedings.
- "Extended disclosure" may be granted later, based on one of five Disclosure Models.
- The Disclosure Models range from very simple to more complex than is currently required under the CPR.
- The new scheme risks increasing costs without firm judicial control.

THE NEW DISCLOSURE PILOT SCHEME

On 1 January 2019 a new disclosure pilot scheme will start in the Business and Property Courts of England & Wales (which include the Commercial Court and the Chancery Division). It will mean the parties to litigation providing limited disclosure with their statements of case, and additional disclosure later in the proceedings only if it is ordered, in which case it will be based on one of five "Disclosure Models". The changes will mean that parties and their legal representatives need to consider disclosure earlier than they might otherwise have done. New "Disclosure Duties" have been created for parties and their legal representatives; even where comparable duties already exist, their performance will now need to be documented carefully. Although it is intended to reduce the cost of disclosure, the scheme introduces concepts which are new, and which therefore risk being the subject of argument and increased costs unless the judiciary takes a firm grip and, in particular, accepts that subsequent disclosure can and should be curtailed in most cases.

DISCLOSURE DUTIES

The new pilot sets out "Disclosure Duties" which will apply to a person who knows that it is or may become a party to proceedings that have been or may be commenced. These are:

- to take reasonable steps to preserve documents;
- once proceedings have been commenced, to disclose "known adverse documents" (see Terminology, on the next page), unless they are privileged, whatever order the court makes;
- to comply with any order for disclosure made by the court;
- to undertake any search for documents in a responsible and conscientious manner to fulfil the stated purpose of the search;
- to act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party; and
- to use reasonable efforts to avoid providing documents to another party that have no relevance to the Issues for Disclosure in the proceedings.

Legal representatives have separate duties, which include assisting the parties to meet their own Disclosure Duties.

Parties and their legal representatives must take care over the preservation of documents, including documents which might otherwise be deleted or destroyed in accordance with a document retention policy or in the ordinary course of business. These processes must be suspended, written notification sent to all relevant employees of documents that they must retain, and reasonable steps taken to ensure that third parties who hold documents on the party's behalf do not destroy them.

INITIAL DISCLOSURE

Disclosure currently takes place after statements of case have been filed and usually after a case management conference at which orders for disclosure are made based on questionnaires completed by the parties. That will change. Under the pilot, when a party serves its statement of case (i.e. particulars of claim, defence or reply) it must also serve an Initial Disclosure List of Documents and (in electronic form) copies of the documents in the List.

The documents should be:

- the key documents on which it has relied (expressly or otherwise) in support of the claims or defences advanced in its statement of case; and
- the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

A party giving Initial Disclosure is not obliged to undertake a search for documents beyond any search it has already undertaken for the purposes of the proceedings, but it must describe those searches in the Initial Disclosure List of Documents.

Parties can agree not to provide Initial Disclosure, and the court can order that it is not required. However, if one of the parties is keen to obtain documents, it is unlikely to agree to waive the Initial Disclosure requirement and likely to try and persuade the court that Initial Disclosure is essential.

A party can also state that giving Initial Disclosure would involve its providing whichever is the larger of 1,000 pages or 200 documents (in both cases, including only documents in "page form") which the other party does not already have. If so, the requirement to give Initial Disclosure ceases for all parties. This may be the subject of controversy if a party believes that its opponent is deliberately overstating the number of pages or documents that would be involved so that it does not have to provide them.

A party must also confirm in writing, when serving its particulars of claim or defence, that steps have been taken to preserve relevant documents.

ISSUES FOR DISCLOSURE

Within 28 days of the final statement of case (which will typically be the defence but may be a reply if the claimant decides to serve one) the parties should state, in writing, whether they are likely to request Extended Disclosure (though no details of what they might request are required at this stage). If one or more parties indicates that it is likely to request Extended Disclosure, the claimant must within 42 days of the final statement of case prepare and serve on the other parties a draft List of Issues for Disclosure (see Terminology, on the right) unless such a list has already been agreed.

Terminology

- A "document" may take any form. It may be held by a computer or on portable devices, such as memory sticks or mobile phones, or within databases, and includes email, text message, webmail, social media and voicemail. It extends to information stored on servers and back-up systems and electronic information that has been deleted, and to metadata.
- "Adverse" means a document that contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute or supports the contention or version of an opposing party.
- "Known adverse documents" means documents of which a party is actually aware (without undertaking any further search for documents than it has already undertaken or caused to be undertaken) both (a) are or were previously within its control and (b) are adverse.
- A company is "aware" of an adverse document if anyone involved in the relevant events or responsible for the litigation is aware of it.
- "Issues for Disclosure" means a fair and balanced summary of the key issues in dispute which the parties consider will need to be determined by the court with some reference to contemporaneous documents.
- A "Narrative Document" is a document which is relevant only to the background or context of material facts or events and not directly to the Issues for Disclosure.

This will then be negotiated by the parties and will form part of the Disclosure Review Document, which will be used by the court when considering Extended Disclosure. This DRD must also set out further information relevant to disclosure, such as where documents are held, custodians, date ranges for searches, search terms, proposed use of technology and likely costs.

EXTENDED DISCLOSURE

A party wishing to seek documents in addition to, or as an alternative to, Initial Disclosure must request Extended Disclosure after completing a DRD. Extended Disclosure will generally take place later in proceedings, as is the case with disclosure at present. Under the current rules, parties give "standard disclosure" in most cases – that is, they must disclose the documents on which they rely, the documents that help or adversely affect them, and the documents that help or adversely affect another party's case. Disclosure under the pilot will no longer be standard disclosure but "may" be ordered using one of the Disclosure Models for each Issue for Disclosure (with the possibility of the parties having different Models for the same Issue). Whatever order for Extended Disclosure is made, the parties remain under an overriding duty to disclose known adverse documents.

There will be five Disclosure Models:

- *Model A*: No further disclosure.
- *Model B*: Limited Disclosure, namely the key documents on which the parties have relied in support of their claims or defences and the key documents necessary to enable the other parties to understand the claim or defence they have to meet.
- *Model C*: Request-led search-based disclosure, which will require parties to give disclosure of particular documents or narrow classes of documents relating to a particular Issue for Disclosure, by reference to requests set out in the DRD.
- *Model D*: Search-based disclosure, without Narrative Documents unless otherwise ordered. This will require parties to disclose documents which are likely to support or adversely affect their claim or defence or that of another party following a reasonable and proportionate search in relation to the Issues for Disclosure for which this Model has been ordered. This is the nearest equivalent to the current standard disclosure.
- *Model E*: Wide search-based disclosure, which will require a party to disclose documents likely to support or adversely affect its claim or defence or that of another party or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure. Narrative documents must be disclosed unless the court orders otherwise. This model is only to be used in an "exceptional case", and it has a much wider scope than the current standard disclosure, harking back to pre-CPR disclosure requirements.

There is no presumption that a party is entitled to Extended Disclosure. It will only be ordered if the court is persuaded that it is "appropriate" to do so in order fairly to resolve an Issue for Disclosure. The scope of any disclosure order must itself be reasonable and proportionate, having regard, for example, to the importance of the case, the likelihood of documents existing that will have probative value, the number of documents involved, the ease and expense of searching for documents, the financial position of each party, and

the need to ensure that the case is dealt with expeditiously, fairly and at proportionate cost.

SOME PRACTICAL ISSUES

The pilot scheme is silent on some issues which are likely to arise as soon as it comes into force. One of these is transitional arrangements, or what happens when particulars of claim have been filed prior to 1 January 2019 (with no Initial Disclosure required) but the defence is not due until after 1 January 2019 (with Initial Disclosure required). Should the defendant give Initial Disclosure anyway? Can the defendant demand that the claimant produce documents in return, even though it was not technically required to do so when it started the proceedings?

Another issue is likely to be the method of calculation of the 1,000 pages or 200 documents for Initial Disclosure. How is a "document" to be defined when, for example, the information is contained in a social network chat which may have lasted for many weeks or months? Must the entire thing be printed out, so that it all counts towards the total number of pages (though documents should be provided in their "native format, in a manner that preserves metadata")? Or should relevant entries be excised, printed separately and added up? If a "document" can be a one-line email or a spreadsheet running to many hundreds of pages, can a party point to five 201-page spreadsheets as taking it over the 1,000-page limit when it might also have a hundred one-line emails which would not?

The pilot also assumes that parties to litigation will agree things in a reasonable and co-operative way. While that is always desirable and to be encouraged, it is also rare, particularly in hard-fought litigation.

CONCLUSION

Currently, disclosure is a one size fits all, and expensive, process which is unsuitable in many cases. The pilot scheme, which will run for two years, allows the parties and the court to adapt the disclosure to be given in a particular case to make it more bespoke to the case in hand. Where the court orders disclosure in a case in accordance with Models A to C, the cost burden of disclosure should be materially reduced. If these models become the norm, the overall cost of disclosure will be significantly reduced. But this will require judges to engage seriously with disclosure and, in particular, not to default to the equivalent of standard disclosure (Model D) and to avoid a lurking suspicion that a party seeking to limit disclosure must have something to hide. Judges did not engage in this way after the last two major reforms to the disclosure rules (Woolf, in 1999, and Jackson, in 2013); whether they will do so this time round remains an open question.

Feedback from parties and their legal representatives will be critical in reviewing the pilot. Those responsible for collecting, searching, reviewing and disclosure of documents will need to highlight how the scheme works in practice, including problems in complying with the new scheme, so that any final version is as useful and cost-effective as possible.

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