

“Wholesale Cultural Change”

The Disclosure Pilot Scheme in the Business And Property Courts

Paul Darling QC, Sarah Bousfield,
David Hopkins, Daniel Benedyk

3 October 2018

Introduction (1)

- The pilot begins 1 January 2019
- Aim is to reduce the costs, scale, and complexity of disclosure
- Applies to extant actions, as well as claims initiated after 1 January 2019
- Applies to claims in the Business and Property courts, with some exceptions

Introduction (2)

- Practice Direction 51U
- Pre-action protocols still apply
- Saving provision for certain CPR Pt 31 rules

Principles

- Importance of disclosure to the fair resolution of civil proceedings
- Cooperation between the parties
- Directed toward issues, reasonableness and proportionality

Duties

- Broadly familiar from current regime
- Two of particular note:
 - Continuing duty to disclose known adverse documents
 - Duty for legal representatives to cooperate with one another

Initial Disclosure (1)

- ***At the same time as*** serving its particulars of claim or defence, a party must also:
 - file and serve its Initial Disclosure List of Documents, and
 - serve (electronically) the key documents on which it relies and the key documents which are necessary to understand its case

Initial Disclosure (2)

- Exceptions:
 - **By agreement.** Parties must record reasons and make them available to court if requested. Court may set aside
 - **By order of the court**
 - **Initial Disclosure would exceed 1,000 pages/ 200 documents.** Requirement for Initial Disclosure then ceases for all parties

Extended Disclosure (1)

- Five Models for Disclosure, A–E
- Two categories:
 - Non-search-based disclosure: A and B
 - Search-based disclosure: C, D and E

Extended Disclosure (2)

- **Model A:** Disclosure confined to known adverse documents

Extended Disclosure (3)

- **Model B: Limited disclosure**

Extended Disclosure (4)

- **Model C:** Request-led search-based disclosure

Extended Disclosure (5)

- **Model D:** Narrow search-based disclosure, with or without Narrative Documents

Extended Disclosure (6)

- **Model E:** Wide search-based disclosure

Written statements regarding Extended Disclosure

- By 28 days after final statement of case, each party must state in writing whether or not it is likely to request Model B, C, D or E Extended Disclosure
- At this point, parties do not particularise the Model(s) or issue(s)
- No prescribed form for statement

Disclosure Review Document (1)

- Use if any party states it is likely to request Model B, C, D or E
- To be completed jointly by the parties in advance of the first CMC
- Not all sections will always be used

Disclosure Review Document (2)

- Section 1A: Issues for Disclosure and proposed Disclosure Models
- Use if any party states it is likely to request Model B, C, D or E

Brief description of the Issue for Disclosure	Ref to statement of case	Issue agreed?		Proposed Model of Extended Disclosure (A – E)		Decision (for the court)	
		Yes	No (party not agreeing)	Claimant	Defendant		
1.	Whether the credit reference provided by D1 to C in respect of A was negligently supplied	PoC para 21	x		C	A	
	<i>[Alternative proposed wording, if not agreed]</i>						
2.	...						

Disclosure Review Document (3)

- Section 1B: Model C requests for Disclosure
- Use if any party proposes Model C

	Issue for Disclosure	Request for Document or narrow category of documents which are likely to support or undermine its own case or that of another party and which fall within the scope of the request made	Response	Decision (for the court)
1.	Whether the credit reference provided by D1 to C in respect of A was negligently supplied	Any or all emails* dated from 1 January 2006 to 31 December 2017 sent from the email account of D1's CEO	The class of documents requested is disproportionately wide and, in any event, not necessary to resolve this issue	
2.	...			

* Note the DRD specifically states "Broad and wide-ranging formulations such as "any or all documents relating to..." should not be used.": Section 1B, para 3

Disclosure Review Document (4)

- Section 2: Questionnaire
- Use if any party has proposed Model C, D or E (but not B)

Order for disclosure

- At the CMC court *may* order Extended Disclosure
- No presumption
- Different Models can be ordered for different Issues for Disclosure
- May order Extended Disclosure in stages

Disclosure Guidance Hearings

- Either before or after the first CMC
- Max 30 minutes
- Parties represented by the lawyers with direct responsibility for conduct of disclosure
- “By way of discussion”. Guidance recorded in note

Discussion

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