New Year's resolutions: new disclosure pilot scheme

December 2018

From 1 January 2019 the disclosure pilot scheme will apply to the majority of new and existing proceedings in the Business and Property Courts of England and Wales. The disclosure pilot scheme will almost entirely replace the existing rules on disclosure and aims to bring about a "wholesale cultural change" to the approach taken to disclosure by parties, their lawyers and the judiciary.

Wholesale cultural change

The approach to disclosure of documents in English litigation proceedings is often seen as one of the draws for international litigants to the English courts. However, in recent years the disclosure process has increasingly come under fire for the cost, scale and complexity involved.

In response to concerns raised by court users and the legal profession, a working group chaired by Dame Elizabeth Gloster was set up to review the rules on disclosure. The working group concluded that "wholesale cultural change" of the disclosure process was required and that this could only be achieved by replacing the existing framework with entirely new rules and guidelines.

The new disclosure rules, which have been published in the form of a new practice direction (PD 51U), will launch as a two-year pilot from 1 January 2019. The pilot will apply to the majority of new and existing proceedings in the Business and Property Courts.

Keeping up-to-date with technology

The new rules seek to bring the disclosure rules up-to-date by getting rid of outdated concepts premised on hard copy paper disclosure and reflecting developments in technology. One of the objectives behind the reforms is to encourage a greater use of technology in disclosure. The new rules expressly refer to technology-assisted review ('TAR') (e.g. predictive coding) and where parties decide not to use TAR, particularly in larger cases involving more than 50,000 documents, the parties will need to explain why it is not being used. With a view to future-proofing the new scheme, the guidance also makes clear that parties should not feel constrained from proposing new forms of technology that may be developed in future.

Two-stage disclosure process

The new rules provide for a new two-stage disclosure process.

Initial Disclosure

As a general rule, each party will need to provide with their statements of case (i) the key documents on which they have relied (expressly or otherwise) and (ii) the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

Initial Disclosure will not be required in every case. It can be dispensed with by agreement or by court order, and Initial Disclosure will not be

required if it would involve a party providing the larger of more than 1,000 pages or 200 documents. This threshold is likely to be met in many larger complex commercial disputes.

The rules do not specify what happens in cases where some statements of case are filed before the end of 2018 (when there is no obligation to provide Initial Disclosure) and others are due to be filed in 2019 (when there will be a *prima facie* requirement to provide Initial Disclosure). The absence of transitional provisions in the new rules means that they will be trickier for those in the early stages of proceedings commenced before the end of 2018 to apply, but we expect that the parties and the courts will need to adopt a pragmatic approach to navigate the grey areas and ensure a smooth transition (as far as possible) between the old and the new regimes.

Extended Disclosure

A party wishing to seek disclosure in addition, or as an alternative, to Initial Disclosure will need to request Extended Disclosure from the court. Extended Disclosure will be ordered by reference to five disclosure models in relation to issues for disclosure drawn up by the parties. The disclosure models are:

- **Model A**: disclosure of known adverse documents only (no search needed).
- **Model B:** similar to Initial Disclosure without page/document limits (no search needed).
- **Model C:** request-led search-based disclosure of particular documents or narrow classes of documents.
- **Model D:** narrow search-based disclosure of documents which are likely to support or adversely affect a party's claim or defence or that of another party in relation to one or more issues for disclosure (with or without narrative background documents).
- **Model E:** wide search-based disclosure of documents falling within Model D as well as documents which may lead to a train of inquiry which may result in the identification of other documents for disclosure and narrative documents.

Moving away from standard disclosure

The new Extended Disclosure models are not unlike the disclosure orders the court can make under the current regime. For example, Model D is similar to what we currently refer to as 'standard disclosure'. However, the new rules provide that where parties propose Models D or E, they will need to explain why Model C is not sufficient. This indicates a clear steer away from the current 'default' option of standard disclosure towards the request-led approach to disclosure often used in international arbitrations (although importantly known adverse documents will still need to be disclosed even if they fall outside the parties' requests).

Adopting an arbitration-style approach to disclosure may have costs benefits as it can result in a smaller pool of documents to be searched and reviewed, and possibly, disclosed. However, disclosure requests in complex disputes can be difficult to agree and the back and forth between parties on these issues can be time consuming and expensive. In the absence of agreement by the parties, it will fall to the court to decide whether disclosure requests are reasonable and proportionate.

List of issues for disclosure

Any Extended Disclosure granted by the court will ordered by reference to a list of issues for disclosure drawn up by the parties. The issues for disclosure are the key issues in dispute that will need to be decided by the court with some reference to contemporaneous documents. Agreeing a list of issues for disclosure could prove to be a sticking point in certain cases due to the large number of complex issues at the centre of many big commercial disputes. It may also result in a frontloading of cost, although a more targeted approach to disclosure could lead to costs savings at later stages in proceedings.

Parties seeking Extended Disclosure will need to complete a Disclosure Review Document (or 'DRD') which sets out the list of issues for disclosure, the disclosure model proposed for each issue, information about where and how relevant data is held, and the parties' proposals for searching that data, including the use of technology.

Express disclosure duties

The new rules include express disclosure duties on parties and their legal representatives backed by court sanctions. Each party is under express duties including obligations to take reasonable steps to preserve documents, to comply with disclosure orders made by the court, to undertake any search for documents in a responsible and conscientious manner, to act honestly and to use reasonable efforts to avoid producing irrelevant documents to the other side (i.e. no 'document dumping').

Known adverse documents. In addition, each party is under a duty to disclose, regardless of any order for disclosure made, 'known adverse documents', unless they are privileged. A document will be 'adverse' if it contradicts or materially damages the disclosing party's version of events on an issue in dispute or supports that of the other side. To the extent that parties conduct searches for documents (whether or not required by any Extended Disclosure models ordered) any adverse documents identified as a result of those searches will also need to be disclosed.

The new rules dispense with the current concepts of 'disclosure' and 'inspection' and define 'disclose' as a party stating that a document (on an individual basis or as part of a class) has been identified and either producing a copy or stating why it will not be produced. The new rules appear to suggest that a party is not required to 'disclose' known adverse documents that are privileged. It is not clear, however, whether that means a party will not need to state that such documents have been identified rather than simply withholding them from production.

Whilst the broad principle is not a new one – parties giving standard disclosure under the existing rules are required to disclose adverse documents – the formulation of the duty in the new rules has prompted questions over its scope and the extent of knowledge required in the context of companies and other organisations.

The new rules state that:

- The duty applies to adverse documents of which a party is actually aware (without needing to conduct a further search).
- A company's knowledge extends to those persons within the company who have accountability or responsibility for the relevant events or circumstances which are

the subject of the dispute or for the conduct of the proceedings.

- Corporate parties will be expected to take reasonable steps to check the position with any person who was in such a position but has since left the company.

Despite these clarifications, the question of precisely who will fall into this group of persons in any given case will be highly fact dependent and a likely area of dispute between parties. For example, a person who had responsibility for events which are the subject of a dispute may not know which documents are 'adverse' if he or she is not involved in the conduct of the litigation and therefore is not familiar with the issues in dispute.

What does this mean in practice?

The pilot has for the most part received a positive reception from the courts, court users, and lawyers. The new rules encourage parties to engage and cooperate on disclosure at an earlier stage in proceedings, and steer parties and the courts away from the 'one size fits all' approach of standard disclosure towards a more focussed approach based on the particular requirements of each case. However, there are some uncertainties in the new rules which will require court guidance (e.g. in relation to known adverse documents) and changing the wording of the rules can only take us so far towards achieving the reform's ambitious aims. As the working group behind the pilot acknowledges, meaningful reform of the disclosure process requires a "wholesale cultural change" by parties, their legal representatives and the judiciary.

Whether the pilot achieves the aims of reducing the scale, cost and complexity of disclosure (and without sacrificing the English court's stand-out ability to get to the heart of any dispute) remains to be seen but there is no doubt parties and their advisers will need to engage sooner and more explicitly about their disclosure strategy (and the technology available to achieve it).

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