Carter-Ruck

Litigation Disclosure Changes

A cure worse than the disease?

An Analysis by Oliver Cox, Senior Associate

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A new Disclosure Pilot Scheme has come into effect in Business and Property Courts across England and Wales. Will this make litigation better or worse for people and businesses pursuing remedies in these courts?

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INTRODUCTION: A PILOT WITH POTENTIAL PITFALLS

From 1 January 2019 litigators who operate in London's Rolls Building or in court centres at Bristol, Cardiff, Birmingham, Manchester, Leeds, Newcastle or Liverpool may well be confronted with this new pilot scheme.

It has been over a year since the Disclosure Working Group first published proposals suggesting that a new disclosure regime should be piloted. Since November 2017 the proposals and the associated draft Practice Direction (now finalised and published here) have been pored over and dissected, and generally well-received - perhaps symptomatic of a belief across the profession that anything which might reduce the burdens of the current system must be a step in the right direction.

On 5 March 2018 the Law Society posted a more considered response - amongst other points, it said the proposals were overly focused on high-value litigation, reflecting a London-centric development team and process. Up to July 2018 the discussion felt like a sandbox exercise, discussing a hypothetical change: however on 31 July 2018 the Civil Procedure Rule Committee confirmed final approval of the new Disclosure Pilot Scheme. It is now 2019 and the date of implementation has arrived.

Here we review the final form of the pilot scheme. We suggest that even for practitioners focused on high-value London-centric commercial litigation there are some significant potential pitfalls. We conclude, perhaps controversially, that while some of these changes will bring some improvements, the gains will be marginal and unless judges are forced to override the wishes of the parties there may ultimately be little real change in the majority of cases.

SUMMARY OF THE PILOT SCHEME

Courts/Cases Affected

The pilot scheme will apply to cases listed in the Business and Property Courts in the Rolls Building in London or in the court centres of Bristol, Cardiff, Birmingham, Manchester, Leeds, Newcastle or Liverpool (with only a few specialist exceptions listed in the Practice Direction under paragraph 1.4). It will not apply in the County Court, "although this may be reviewed in the course of the pilot".

The Law Society made representations that the pilot should be mandatory only for complex cases of over £500,000, and should not be applied to additional types of case such as contentious Probate or Trusts of Land and Appointment of Trustees Act 1996 matters - but there is no indication in the Practice Direction that these have been taken up.

TIME PERIOD

The pilot scheme will apply to any case issued within a two year period from the pilot scheme's commencement date, 1 January 2019.

INITIAL DISCLOSURE

Unless otherwise ordered or agreed between the parties, there will be limited "Initial Disclosure" of key documents (those which are relied on by the disclosing party and/or are necessary for other parties to understand the case they have to meet), to be given with statements of case.

A search should not be required for Initial Disclosure, although one may be undertaken (and if it is, the search will have to be "briefly" described in the Initial Disclosure's List of Documents).

DISCLOSURE REVIEW DOCUMENTS

A new joint Disclosure Review Document replaces the current Electronic Documents Questionnaire - it also requires the parties' proposals for Extended Disclosure. As is explained in the document, the parties must cooperate on this document prior to the first CMC.

EXTENDED DISCLOSURE FIVE OPTIONS

Default Standard Disclosure is replaced by a "menu" of five further optional "Extended Disclosure" options for the disclosure phase. Disclosure may be further tailored to apply one form of disclosure only to a particular issue, and/or to selected parties only. There is no presumption that a party is entitled to Extended Disclosure, and a party seeking Extended Disclosure must specifically indicate one of these options to be applied to each of the key issues for disclosure:

- Model A (Disclosure confined to known adverse documents): a party must do no more than comply with its obligation to provide "known adverse documents".

- Model B (limited disclosure): disclosure of (1) documents caught by Initial Disclosure plus (2) known adverse documents.

- Model C (request-led search-based disclosure): disclosure of particular documents or classes of documents according to requests agreed between the parties/determined by the Court (plus known adverse documents).

- Model D (narrow search-based disclosure, with or without "Narrative Documents"): the parties must conduct a reasonable and proportionate search in relation to the relevant issue(s) and disclose documents likely to support or undermine its own case or that of another party (plus known adverse documents). "Narrative documents" (those relevant only to the background or context of material facts or events, not a defined disclosure issue) will be excluded unless otherwise specified.

- Model E (wide search-based disclosure) requires Model D disclosure, but parties are also obliged to disclose documents which may lead to a train of inquiry that could result in the identification of other documents for disclosure.

COST ESTIMATES FOR PREFERRED MODEL OR DELAY

Paragraph 22 of the Practice Direction states that parties should bring estimates of their preferred model for disclosure to the CMC.

However, where Form H costs budgets are required, "if it is not practical to complete the disclosure section of Form H in relation to disclosure prior to the court making an order in relation to disclosure at the [CMC], the parties may notify the court that they have agreed to postpone completion of that section of Form H until after the [CMC]. If they have agreed to postpone they must complete the disclosure section within such period as is ordered by the court after an order for disclosure has been made at the [CMC]. Where possible the court will then consider (and if appropriate, approve) that part of the cost budget without an oral hearing".

ANALYSIS

Disclosure Working Group's Diagnosis

Few would fault the Disclosure Working Group's depiction of the existing situation: it described the *"perceived excessive costs, scale and complexity of disclosure"* and noted that *"[s]earches are often far wider than is necessary, and disclosure orders are not sufficiently focused on the key issues" which "often results in the production of vast quantities of data, only a small proportion of which is in fact referred to at trial."*

Those who have sat in data rooms, or amidst the carousel bundle shelving of the Commercial Court, will be aware of the staggering volume of material the largest commercial trials now generate.

It is equally fair for the Disclosure Working Group to criticise *"inadequate engagement"* between parties prior to the first CMC, and to state that "neither the profession, nor the judiciary, has adequately utilised the wide range of alternative orders under CPR 31.5(7). In practice, standard disclosure has remained the default order for most cases."

THE PROPOSED CURE

Again, few would take issue with the Disclosure Working Group suggestion that the *"fundamental yardstick for the parties and the court, throughout, should be what is appropriate in order fairly to resolve the issues in the case".* There are (to be clear) definite positives in the proposals extrapolated from this principle:

a) First, early disclosure of "killer" documents alongside statements of case should (i) discourage speculative claims and (ii) promote early settlement or disposal of weak or flawed claims or defences.

b) Early Initial Disclosure also increases the chance of time and costs savings through no order for Extended Disclosure later in the case - every case has some key documents, but if these can be produced early then the chance of the Court being able to draw a line on disclosure at that point is increased.

The proposal that disclosure budgeting may follow the menu decision is also entirely logical (the alternatives, of either guesswork and/or up to five alternative contingencies, would seem madness). However, these changes involve, for at least a proportion of cases, a set of real risks.

EXISTING PROVISION

It is important to recall that both early disclosure of documents and the "menu" options exist as things practitioners should be doing already (see (a) the content of our existing pre-action protocols and (b) the Disclosure Working Group's comment above regarding the *"wide range of alternative orders under CPR 31.5(7)").*

The fact that these options are not being taken up means that litigants are cautious about them: mere conservatism in firms/chambers and on the bench cannot alone explain Standard Disclosure's ongoing popularity in the face of these existing alternatives.

RISKS

Risk 1: Catch 22

The pilot scheme creates a catch-22: early disclosure of "known" key documents by the parties, including adverse documents, without an obligation to do a search.

The assumption is that both parties will be aware of at least the majority of the key documents. To an extent this is usually true: the SPA, the invoice, whatever the key document is that the parties have already argued over for weeks or months before bringing in the lawyers.

However, for every case which turns on such documents, there is another which is won or lost by the obscure - the internal email or manuscript jotting which undermines or confirms a party's case. Initial Disclosure will not catch this document, though it would (in hindsight) be "key".

Risk 2: Dishonesty

This would not be a problem (in the sense that the case will not be wrongly decided for the want of the document) if the relevant document were to be picked up later though Standard Disclosure/Model D.

However, it follows from the existence of Basic Disclosure combined with an option for no Extended Disclosure and/or Models A, B and even C that there is risk of unscrupulous parties who are aware of such documents first putting them "out of their minds" for the Statements of Case phase - and then (through an order for no Extended Disclosure/Models A, B and even C) having a route through the litigation without ever having to do a full search and disclose the result.

A dishonest party might be just as dishonest in the context of a Standard Disclosure search - but it is harder to be so, and the fingerprints of tampering can often be detected. This problem was acknowledged (although not fully explored) by the Law Society in their March 2018 response to the proposals - *"At present, parties search for adverse documents at an early stage to assess prospects. Under the proposed system, it is left open for parties to stay ignorant and avoid conducting searches which might result in them locating adverse documents."*

Risk 3: Bias for Standard Disclosure

For the full implications, it is necessary to consider the position of the solicitors and Counsel. We all might like the sound of no disclosure - but we are also risk-averse creatures. The filing cabinet of an opponent is a Rumsfeldian "unknown unknown".

If the case is one where there is any chance of the other side possessing such case-altering material, but we do not know what form it might take, how can we properly dismiss the risk of crucial information never seeing the light of court? Particularly if the other side are asking for no Extended Disclosure/Model A - what surer way to light the touchpaper of a stressed client's paranoia, suggesting their opponent might have something they want to hide? How, in such circumstances, can solicitors easily advise asking for anything other than Model D - i.e. Standard Disclosure?

Those defending the proposals will answer with the word "cost" - the facts of the case will often suggest whether Model D (or C) might be appropriate, and this can be quite properly weighed against the costs of the process. That is an adequate answer for cases where disclosure is not really the focus - where the dispute is more one of law than evidence, or where the priority is to force a simply recalcitrant defendant through to an enforceable judgment. But it is not an answer where a litigant simply does not know what has happened behind, say, the closed doors of a large corporate opponent which is pushing for no Extended Disclosure/Model A.

Those defending the pilot might also say it is wrong to take a point on potential miscarriage of justice where there is already a trade-off - it's a rare case today that is subjected to *Peruvian Guano* train-of-enquiry disclosure, so the possibility of a key document lurking in a filing cabinet somewhere exists even under the existing Standard Disclosure regime. But Standard Disclosure, through the relevance test and the obligation of search, inherently offers a balance between (1) enquiry into the true facts of the case and (2) costs.

Risk 4: Costs Implications

Parties will need to bear in mind that the scheme means increased front-loading of litigation costs, driven by the earlier consideration of disclosure.

However there are further implications. As early as March 2018 the Law Society noted a concern with the then-proposed movement of costs budgeting to after the CMC: *"Disclosure costs will not be determined until after the Case Management Conference (CMC). This means that further work in relation to budgets will need to be undertaken post-CMC. This will result in additional cost and possibly a further CMC to make a final determination on Costs Budgets."*

The Practice Direction now states that *"Where possible the court will then consider (and if appropriate, approve) that part of the cost budget without an oral hearing"*: the fact remains that a possible two-stage CMC might well erase whatever savings are made on disclosure. This is particularly the case if the first CMC is also to become a battleground on disclosure when it might not have been previously: the variety of disclosure provisions will in themselves generate dispute and therefore cost.

Larger parties may have a positive incentive not only to seek lesser disclosure orders, but also to generate expensive arguments on the point prior to (and, indeed, at) the CMC about disclosure issues. The Court will have to ensure that, in the attempt to simplify disclosure, better-resourced parties are not being handed a tool for oppression.

CONCLUSION

One Step Forward, One Step Back?

Initial Disclosure at an early stage is a step forward. It is also valuable to have the option of no Extended Disclosure/Models A, B and C available for appropriate cases. However, all of these options, and Initial Disclosure, are already available. It is difficult to see how, under the pilot scheme, the alternatives to Model D will be called on in anything other than what are, in this writer's experience, relatively unusual circumstances where disclosure is not a major issue.

Standard Disclosure is onerous, and expensive - but the fact is that there is often a trust gap between the parties that have come to litigation, and it frequently manifests around disclosure. Standard Disclosure and the attendant searches are the only way to bridge that gap for the majority of such clients: it places their minds at rest and causes them to believe that (in regard to disclosure at least) justice has been done. Indeed, for some high-value cases, it may be at least part of the reason why claimants brought matters to this jurisdiction in the first place.

It places a considerable burden on solicitors in particular to ask them to (a) persuade/reassure their clients that a lesser form of disclosure is appropriate/proportionate, and also, potentially, (b) suffer the slings and arrows and possible negligence claims if the other side are later somehowfound to have held something back which would have been uncovered by standard disclosure/ Model D.

It follows that most mistrustful clients will still want Model D, solicitors will be properly reluctant to refuse them in many cases, and it will fall to the bench to either (1) effectively preserve the status quo by ordering Model D in most cases, or otherwise (2) override the wishes of the parties. The right cases can and should get some value out of the new Pilot Scheme, doubtless to the benefit of all parties - but it will not be “goodbye” to the data rooms or the bundle carousels just yet.

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