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DISCLOSURE PILOT SCHEME GUIDANCE AND CASE LAW UPDATE

The Disclosure Pilot Scheme (the “Pilot”) introduced substantial changes to the disclosure process with significant implications for parties, practitioners and the judiciary. Six months on from the launch, we consider some of the key objectives that underpin the Pilot, how it is operating in practice and review some of the recent guidance published to complement Practice Direction 51U ("PD 51U").

Background

Key objectives of the Pilot
Before considering the key changes and how the Pilot is operating in practice, we assess the main objectives that underpin it: namely, culture change; use of technology; and co-operation.

Culture change
Litigation culture is being influenced by a recognition that parties and Courts should have flexibility to devise a process geared to a case. Businesses need to be able to litigate without incurring costs which are disproportionate to the complexity and value of the claim. That is particularly important in disclosure, where the volume of data that may fall to be disclosed has vastly increased, often to unmanageable levels. The disclosure menu, introduced in 2013, was a step towards a more flexible model of disclosure, but was seldom used. That led the Working Group to conclude that the only way to achieve “wholesale cultural change” is through the “widespread promulgation of a completely new rule and guidance”.

A central part of the reform is the removal of standard disclosure in its current form. Instead, PD 51U introduces five new models of Extended Disclosure (the “Disclosure Models”), labelled A–E, with Model D, a form of search based disclosure (found at para.8.2 PD 51U) widely perceived as the direct replacement for standard disclosure. Critically, there is no automatic right to Model D, or to any of the other Disclosure Models. The Court will only make an order for Extended Disclosure where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure (para.6.3 PD 51U).

The concept of Extended Disclosure is just one part of the push towards cultural change. Another key aspect of the reforms is the new concept of Issues for Disclosure. The Working Group found that, under CPR Pt 31, searches are often far wider than necessary and disclosure orders are not sufficiently focused on the key issues. That leads to the production of vast quantities of data, only a small proportion of which is relevant to the issues. Under the Pilot, parties therefore need to agree the Issues for Disclosure prior to the first Case Management Conference (“CMC”). The list requires careful drafting. It should include only those key issues in the dispute, which the parties consider will need to be determined by the Court, by reference to contemporaneous documents, for there to be a fair resolution of proceedings. The Court may then order that Extended Disclosure be given using different Disclosure Models for different Issues for Disclosure but not if it will increase costs and complexity.

These features of the Pilot are intended to balance the benefits of the traditionally extensive disclosure system with the cost and complexity of dealing with vast numbers of documents. The challenge now is to utilise the new rules to achieve proportionality.

Use of technology
CPR Pt 31 is “conceptually” based on paper disclosure and was deemed as unfit for purpose for electronic disclosure by the Working Group (para.2(v) Proposals for a Disclosure Pilot for the Business and Property Courts in England and Wales November 2017). As a result, the Pilot promotes the use of technology in order to improve efficiency and proportionality. Many parties already use e-disclosure review and analysis technologies but the Pilot imposes specific duties on parties and separately on their legal advisors to consider them. For example, under para.9 of PD 51U, parties are required to consider the use of software or analytical tools, including technology assisted review (“TAR”) (where an analysis of a limited number of documents is extrapolated to a wider data set).
The duties to consider the use of technology are supported by the format of the newly introduced Disclosure Review Document (“DRD”) which provides parties with the framework on how to approach disclosure. The DRD assumes the use of data analytics tools and TAR for managing electronic data review and parties must justify a decision not to use TAR where the “review universe” is in excess of 50,000 documents (section 14, DRD).

Parties have been using technology in disclosure for some time but the focus of the Pilot (as enshrined in the express duties and the DRD) makes clear that there is a step change in the Court's expectation. Parties will need to consider carefully how technology can support the disclosure process and proactively engage to address disclosure. The decision-making process, outcome and justification must then be recorded in the DRD.

Cooperation
The Working Group concluded that there was inadequate engagement between the parties and their advisors before the first CMC. To counter the lack of engagement, the Pilot imposes a general duty on parties and their legal representatives to cooperate with each other so that the scope of disclosure can be agreed or determined efficiently (para.2.3 PD 51U). Cooperation is a common thread throughout PD 51U with parties expected to cooperate in seeking to agree the List of Issues for Disclosure, the Extended Disclosure Models applicable to each Issue and to present a joint, completed DRD to Court before the CMC. A failure to cooperate, including in the process of agreeing the DRD, risks sanction from the Court under para.20 of PD 51U (see further below). The duty to use reasonable efforts to avoid providing documents to another party that have no relevance to the Issues for Disclosure (under para. 3.1(6)) is further evidence of the cooperation required under the Pilot.

Pilot scheme in practice
In this early phase of the Pilot, a number of issues have emerged as grounds for discussion. These include the parties' duties of preservation, the disclosure of known adverse documents, and the preparation required before the first CMC. The following section assesses these issues.

Preservation duties
When parties know that they are, or may be, subject to proceedings, they are required to preserve documents in their control that “may” be relevant to the claim. The duty continues throughout the life of the case. Control extends to documents not merely in the parties' possession but also where there is a right to possession or to inspect/take copies. The duty extends to requiring parties to:

- suspend routine data deletion processes during the proceedings;
- prevent alteration or destruction of documents;
- send a written notification to relevant employees and former employees to give notice: (i) of the documents to be preserved; and (ii) that they should not delete or destroy those documents and should take reasonable steps to preserve the material;
- take reasonable steps so that agents or third parties who may hold documents on the party's behalf do not delete or destroy documents that may be relevant to an issue in the proceedings; and
- confirm compliance with the duties of preservation when serving a statement of case.

Legal representatives who have conduct of litigation or who are instructed where their client knows it may become a party to proceedings are also under preservation duties. These include taking reasonable steps to advise and assist their client to comply with its duties.

Although the preservation duties are extensive, the use of the term “reasonable” for certain duties, such as the obligations in respect of monitoring agents or third parties, denotes that the steps to be taken should be proportionate. When assessing the required action, it would be prudent for parties to record the decision-making process, the outcome and the justification.

Known adverse documents
A further duty applying during the course of a claim is to disclose “known adverse documents” (unless they are privileged) once proceedings are commenced. A document is “adverse” if it or any information it contains 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 events of an opposing party on an issue in dispute. There has been some discussion on when “known adverse documents” should be disclosed. Paragraphs 9.1 and 9.2 of PD 51U provide that Disclosure Certificates must be provided confirming that all known adverse documents have been disclosed either within 60 days of the first CMC (if there is no Extended Disclosure, as considered further below) or with Extended Disclosure.
Case Management Conference

A further important aspect of the Pilot is requiring the parties to tackle disclosure at an earlier stage in proceedings. The Pilot requires parties to complete additional steps before the first scheduled CMC. These steps include filing a draft List of Issues and Models for disclosure, a finalised joint DRD and Certificates of Compliance, as well as seeking to resolve any dispute over the scope of Extended Disclosure (see paras 7.6, 9.2, 10.7, 10.8, 10.9 of PD 51U, and Annexes to PD 51U). The responses should include an estimate of the likely costs of giving the disclosure proposed and the likely volume of documents involved. This will allow the Court to determine whether the proposals on disclosure are reasonable and proportionate (PD 51U para.22.1). As a result, detailed information as to the costs associated with disclosure are required to be provided at an early stage in proceedings, at the latest, 14 days before the CMC (PD 51U para.10.6). The Claimant is required to update the DRD throughout the proceedings (unless otherwise agreed or ordered) to ensure that it reflects the parties’ combined comments and discussions.

At the first CMC, the Court will assess whether any of the Disclosure Models should apply to any or all Issues for Disclosure. The models range from an order for disclosure of known adverse documents only on particular issues for disclosure, through to the widest form of disclosure, requiring the production of documents which may lead to a train of enquiry. As stated above, Model D will no longer be regarded as the default option.

With a view to encouraging more focused case management, the Pilot includes a range of orders which the Court may make at the CMC to reduce the burden and cost of disclosure. When considering the orders to make on disclosure, the well-recognised test of reasonableness and proportionality is now applied by reference to defined criteria at para.6.4 of PD 51U. The criteria encompass the following factors:

i) the nature and complexity of the issues in the proceedings;
ii) the importance of the case, including any non-monetary relief sought;
iii) the likelihood of documents existing that will have probative value in supporting or undermining a party’s claim or defence;
iv) the number of documents involved;
v) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);
vii) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

Recent developments and guidance

There are authoritative sources of valuable guidance on a number of points which have been published in the last six months. The guidance complements PD 51U and covers points such as the proper approach to transitional cases.

Insolvency and Companies Proceedings

The Chief Insolvency and Companies Court Judge published, in February 2019, a note applicable to the Insolvency and Companies List regarding the application of PD 51U to cases in those Courts (see above). This clarified that the Pilot applies to the Insolvency and Companies List, but does not apply to PD 51P which provides the procedure for Insolvency Express Trials. The Pilot applies to Pt 7 proceedings with statements of case. Forms of originating process familiar to users of the Insolvency and Companies List, such as petitions and applications are not statements of case for the purposes of the Disclosure Pilot. An exception is made for petitions for relief pursuant to sections 994-996 of the Companies Act 2006 and/or for winding up on the just and equitable ground, since these are analogous to Pt 7 proceedings with statements of case.


Transitional cases

The Practice Note, dated 1 December 2018, from Chief Master Marsh (see Civil Procedure 2019 Vol.1 at para.57AB.4) confirms that the Pilot does not have transitional provisions. The Note recognised that in the early stages of the Pilot, the Court may not have a completed DRD. However, it added that, if the Court is asked to make an order for Extended Disclosure, the parties should, as far as possible assist the court providing with the CMC bundle a list of the Issues for Disclosure and the Disclosure Models considered most suitable. Whilst a key issue at the outset, the questions relating to transitional cases will decline in importance. The Note also clarified that a request for the Court to hold a Disclosure Guidance Hearing is made by issuing an application notice.
Part 8 claims
A further note, issued by the Chief Chancery Master, on 27 March 2019 (see above), confirms that the Pilot will not apply to Pt 8 claims albeit the Court has the power to order Extended Disclosure in proceedings under Pt 8.

Chancery Court Guide
The revised Chancery Court Guide 2019 explains the application of the Pilot to cases listed in the Chancery Division (See Civil Procedure 2019, Vol.2 para.1A-0).

Minutes of the Commercial Court User Committee in December 2018
The recent minutes of the Commercial Court User Committee, dated 4 December 2018, circulated in 2019 provide useful observations of the members of the Working Group, including Mr Justice Knowles, on the application of the Pilot (see https://www.judiciary.uk/announcements/commercial-court-users-group-meeting/). It was suggested in those minutes that judges should not hesitate to make Orders limiting the costs and scope of disclosure below the current norm, where necessary. While these minutes and the observations noted in them cannot be viewed as authoritative, they should be considered carefully for the insight they provide into the Pilot scheme.

Case law update
The most significant case to date is UTB LLC v Sheffield United Ltd [2019] EWHC 914 (Ch), unrep., Sir Geoffrey Vos, Chancellor of the High Court, clarified the approach to transitional cases. It was held that the Pilot applies to all relevant proceedings subsisting in the applicable Courts irrespective of the date of commencement and even where a disclosure order was made before 1 January 2019. Sir Geoffrey Vos C clarified that although a pre-existing order will not be disturbed by the commencement of the Pilot, that does not mean the Pilot is not applicable to proceedings where a disclosure order has already been made.

Prior to this decision, in the case of Kazakhstan Kagazy Plc v Zhunus (formerly Zhunussov) [2019] EWHC 878 (Comm), unrep., Mr Justice Andrew Baker ruled that the Court could make an order for specific disclosure under CPR Pt 31 in a case subject to the Pilot. The Court held that it had the power to make the order “under one or other of the case management powers the court nonetheless has” but this decision may be limited to the facts of the case given the comments by the Chancellor in UTB LLC v Sheffield United Ltd.

Future issues
As the Pilot progresses, there will likely be further cases and guidance that consider its application in practice. In cases of uncertainty, the parties can apply for a Disclosure Guidance Hearing to seek informal guidance from the Court before or after a CMC. The hearings are an informal means of overcoming an impasse reached by the parties. The hearings should also bring greater clarity to the scope of PD51U.

An important future issue will be the steps the Court will take to ensure compliance with the obligations under PD 51U. In this respect, the Pilot Scheme includes a range of orders and sanctions for non-compliance. By way of illustration, the Court may adjourn any hearing, make an adverse order for costs or order that any further disclosure by a party be conditional on any matter the Court shall specify. These express sanctions are in addition to the Court’s case management powers under CPR Pt 1 and 3.

Professor Rachael Mulheron of Queen Mary University is monitoring the Pilot and submitted a first private interim report to the Working Group in March 2019. Further interim reports will be provided by Professor Mulheron in due course, examining matters such as DRDs, relevant case law, and the results of questionnaire surveys. In the meantime, all feedback about the Pilot is most welcome, and should be sent to: DWG@justice.gov.uk.

The expectation is that if the Pilot is deemed a success, then the existing CPR Pt 31 will be revised to reflect the terms of an amended PD 51U that reflects issues raised during the Pilot. Consideration will also be given as to whether it should apply to proceedings outside of the B&PCs.

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