

19 June 2018

A pilot scheme to introduce extensive reforms to the English court disclosure rules has been approved in principle by the Civil Procedure Rules Committee (CPRC, the body responsible for approving civil court rule changes). The scheme will run in the Business and Property Courts in London (and some regional centres) for two years, will be mandatory for most claims (there will be some exceptions) and is expected to begin on 1 January 2019.

The new rules are intended to bring about a culture shift and make the disclosure process flexible, tailored and fit for the modern, digital world of litigation while keeping the "cards on the table approach" that is key to English litigation.

A disclosure regime fit for now

In our world of electronic communication and connectivity, vast quantities of documents and data are produced daily and new forms of technology are being adopted. Concerns have been raised that the current approach to disclosure is no longer fit for purpose when dealing with the volume and variety of electronic documents caught by disclosure orders, and about the cost, scale and complexity of the disclosure process in major commercial litigation. The 2013 Jackson reforms went some way towards managing these concerns by creating a "menu" of disclosure options, but in practice little changed – an order for "standard disclosure" (disclosure of documents that adversely affect that party or another party's case or support another party's case) is still the norm.

Over the last year or so, a Disclosure Working Group ("DWG") of judges, lawyers and others has been considering, drafting and consulting on a new set of disclosure rules designed to modernise disclosure and create a wholesale cultural change. Hogan Lovells took part in a "road-test" of the new process and contributed to the consultation process.

A model menu

An approved version of the new scheme is yet to be published, but we expect it to broadly follow the draft version published by the DWG at the end of 2017.

Initial disclosure, called "Basic Disclosure", will happen at an earlier stage, with the parties'

statements of case. This will be limited to the key documents relied on by a party (without the need for a search), and those necessary for the other parties to understand the case they have to meet.

Subsequently, further "Extended Disclosure" may be ordered by the court, instead of or as well as Basic Disclosure. There will be five models of Extended Disclosure, and the parties will need to consider whether to ask the court to apply one of these to each of the main issues in the case. In a nutshell, these five models are:

- **Model A** No disclosure in relation to a particular issue
- **Model B** Limited disclosure (similar to Basic Disclosure; to apply to the extent that the necessary documents haven't already been disclosed)
- **Model C** Request based, search-led disclosure
- **Model D** Narrow search-based disclosure (similar to standard disclosure)
- **Model E** Wide search-based disclosure, requiring the production of documents which may lead to a train of enquiry (wider than standard disclosure and to be used in exceptional cases)

Regardless of what type of disclosure is ordered, the DWG has proposed an underlying duty on parties to disclose known documents in their control and adverse to their claim (unless privileged). In addition, parties would be obliged not to "document dump" and would need to comply with other express disclosure duties.

The aim is to create a more flexible and focussed approach to disclosure, with greater co-operation and engagement by the parties and more detail being given to the court upfront so that it can make informed decisions about disclosure. Disclosure similar to standard disclosure (or, in some cases, even wider disclosure) will still be possible in appropriate cases, but will need to be adequately justified. Otherwise, parties may need to become more familiar with a more request-based approach (like that used in arbitration).

To some extent the reforms will increase the work that has to be done in the early stages of a case. To ensure that obligations are met and the new approach can be followed, lawyers and their clients will need to discuss even earlier and in more detail than presently the issues in the case requiring disclosure, what documents exist and how they might be searched and reviewed (including the use of appropriate technology). In order to achieve the goals of this programme, the DWG has suggested positive duties on parties and their legal advisors (such as in relation to

document retention), backed up by express sanctions for failure to play by the rules.

What happens next?

We anticipate that final approval of the pilot scheme will be given at the next meeting of the CPRC, on 13 July 2018, with the final version of the rules published soon afterwards. The pilot is expected to begin at the start of 2019. Watch this space.

Contacts



Nicholas
Heaton

Partner



Whiston
Bristow

Partner



John Tillman

Partner



Emma
Childs

Senior
Knowledge
Lawyer



Alice Jowitt

Knowledge
Lawyer

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