

## **DISCLOSURE WORKING GROUP PRESS ANNOUNCEMENT**

31 July 2018

### **Approval for the launch of the Disclosure Pilot for the Business and Property Courts in England and Wales**

1. On 13 July 2018, the Civil Procedure Rule Committee gave its final approval to the launch of the proposal to run a two-year Disclosure Pilot scheme for cases proceeding in the Business and Property Courts in England and Wales. Subject to Ministerial consent (which will be sought later this year), the scheme will commence on 1 January 2019. In the meantime, the Disclosure Working Group (the “Working Group”) has been authorised to publish the CPRC approved version of the Practice Direction and Disclosure Review Document in draft to allow court users, the profession and judiciary time to prepare for the commencement of the Disclosure Pilot.<sup>1</sup>

### **Origins of the Disclosure Pilot**

2. In May 2016, the Chancellor of the High Court, Sir Terence Etherton, now the Master of the Rolls, established the Working Group in response to widespread concerns expressed by court users and the profession regarding the perceived excessive costs, scale and complexity of disclosure.
3. The Working Group, chaired by the then Vice-President of the Civil Division of the Court of Appeal, The Rt. Hon. Dame Elizabeth Gloster DBE PC, comprised a wide range of lawyers, experts, judges, representatives of professional associations and users of the Rolls Building jurisdictions. The Working Group was given the task of identifying the problems and proposing a practical solution on the basis that its consideration of the issue might in due course be extended more widely to other jurisdictions.
4. The Working Group concluded after its first meeting that it could not seriously be disputed that standard disclosure often produces large amounts of wholly irrelevant documents, leading to a considerable waste of time and costs. It also expressed the concern that inadequate judicial resources had led, on occasion, to judges not being able to deal effectively with disclosure issues at a case management conference, so that, in the absence of agreement between the parties, standard disclosure often became the default option.
5. It was acknowledged that while orders for standard disclosure may be appropriate (and strongly desirable) for factually complex cases, there are many other cases which can be fairly and efficiently determined on the basis of more focused and limited disclosure.
6. It was agreed that Part 31 should be re-drafted, rather than the Working Group seeking to produce a culture change in the application of Part 31 through amendments, and that this new draft should explore the possibility of introducing new graduated models of disclosure, and a new e-disclosure protocol taking into account likely developments in technology that could have an impact on disclosure in the future.
7. The Working Group met on a number of occasions over an 18-month period and delegated to a small subcommittee the task of drafting the recommended proposals. The subcommittee comprised Chief Master Matthew Marsh (Chief Master of the Chancery Division), The Hon. Mr Justice Robin Knowles CBE, (Commercial Court, London); Ed Crosse (partner at Simmons & Simmons LLP and the then President of the London Solicitors Litigation Association) and Vannina Etori (Legal Adviser and Private Secretary to the

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<sup>1</sup> These drafts may be subject to minor change prior to being included in the next CPR update in the Autumn.

Chancellor of the High Court).

8. During its review, the Working Group, through its members, consulted with a range of interested parties and received extensive feedback. Several versions of a proposed new practice direction were produced by the subcommittee between February and November 2017. These drafts benefited greatly from the extensive feedback given by users, the legal profession, judiciary and e-disclosure specialists.
9. In addition to feedback on the Practice Direction, the Disclosure Review Document (“DRD”), which will replace the existing Electronic Disclosure Questionnaire, was subjected to a ‘road-testing’ exercise over the summer of 2017. This was undertaken by a selection of law firms and users and overseen by Simmons & Simmons LLP.
10. The firms were asked to comment on and test a draft of the DRD by completing it, using details from real life cases where disclosure had been completed. The DRD was completed by junior to mid-level lawyers who had extensive (and recent) experience of handling large and small disclosure exercises. The DRD was then shortened and simplified to avoid front-loading of costs, made less prescriptive and its timetable was revised.
11. In October 2017, a revised Practice Direction and DRD were submitted one final time to the Working Group for approval, before any further public consultation could be considered. The Master of the Rolls expressed the view that consultation beyond the Working Group and the firms involved in the road-testing was desirable.
12. Final draft versions of the Practice Direction and DRD, as well as a guidance note and press announcement, were posted on the judiciary website on 2 November 2017, thereby officially launching a public consultation phase which continued until 28 February 2018.

## **The Consultation**

13. During the three month consultation, the drafting sub-committee, assisted by Lady Justice Gloster, Mr Justice Birss and HHJ David Waksman, delivered a series of presentations, at legal and other professional events in London and in the Business and Property Courts centres out of London, to ensure that judges and practitioners around England and Wales had an opportunity to voice any concerns they might have with the proposed pilot well before the consultation period closed. They were invited to feed back their comments to the sub-committee via their professional organisations or directly via email. In addition, meetings were held with professional bodies representing practitioners.
14. 26 such roadshows and meetings were held. In addition, detailed and well-considered responses were received from well over 30 contributors, many whom were institutional and on behalf of large constituencies. The sub-committee considered these responses between March and June 2018.
15. A substantially revised and improved version of the practice direction and DRD was submitted to the Civil Procedure Rule Committee on 15 June 2018. Subject to final checks by the CPRC, these proposals were given approval in principle in June and final approval at the CPRC meeting on 13 July 2018.

## **Overview of the Disclosure Pilot Scheme**

16. In summary, the key changes introduced by the Disclosure Pilot are:
  - (i) The principles upon which disclosure is based are now clearly stated in the practice direction.

- (ii) What has been termed “standard disclosure” has been removed in its current form; its replacement (Model D) should not be ordered in every case and will not be regarded as the default form of disclosure.
- (iii) The duties of the parties, and of their lawyers, in relation to disclosure are expressly set out. These include a duty to cooperate so as to promote the reliable, efficient and cost-effective conduct of disclosure. They also include a duty to disclose known adverse documents in all cases, irrespective of whether an order to do so is made.
- (iv) The duty to disclose known documents that are adverse to a party’s case has been strengthened and is now wider than the obligation under Part 31.
- (v) Unless dispensed with by agreement or order (and subject to several other exceptions), “Initial Disclosure” will be given with statements of case of key documents which are relied on by the disclosing party and are necessary for other parties to understand the case they have to meet. A search should not be required for Initial Disclosure, although one may be undertaken. Initial Disclosure is not intended to be an onerous process (generally it should comprise no more than 200 documents or 1000 pages) and there are several exceptions where it can be dispensed with entirely. For some cases, Initial Disclosure may obviate the need for any further disclosure (in whole or in part).
- (vi) After closure of statements of case, and before the case management conference, the parties should be required to meet, discuss and complete a joint Disclosure Review Document to:
  - (i) List the Issues for Disclosure in the case (those key issues in dispute which the court will need to determine with some reference to contemporaneous documents);
  - (ii) Exchange proposals for “Extended Disclosure” (including which Disclosure Models should apply for which issue(s)); and
  - (iii) Share information about how documents are stored and how they might (if required) be searched and reviewed (including with the assistance of technology).
- (vii) The DRD provides a mandatory framework for parties and their advisers to co-operate and engage prior to the first case management conference with a view to agreeing a proportionate and efficient approach to disclosure.
- (viii) At the case management conference, the court should consider which of five “Extended Disclosure” models (Models A to E) is to apply to which issue (or to all issues). 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.
- (ix) The court should be proactive in directing which is the appropriate Disclosure Model and should not accept without question the Disclosure Model proposed by the parties.
- (x) With a view to encouraging increased and more focused case management, the practice direction identifies a range of orders which the court may make to reduce the burden and cost of disclosure.
- (xi) Further the parties can apply for a Disclosure Guidance Hearing to seek informal

guidance from the court before or after a case management conference. These hearings should be used as an informal means of overcoming an impasse reached by the parties.

- (xii) When considering what orders to make on disclosure, the well-recognised test of reasonableness and proportionality is now applied by reference to defined criteria at paragraph 6.4 of the draft Practice Direction, which are relevant to disclosure. This test builds upon the overriding objective.
- (xiii) In order to inform the court's decision on Extended Disclosure, the parties are under an express Disclosure Duty to cooperate and engage before the case management conference so that the court can be informed: (a) of any joint view as to the Disclosure Model that should apply; and (b) of the estimated work and cost of using any Disclosure Model that is proposed by one or more of the parties.
- (xiv) Where cost budgeting applies, Form H Cost Budgets in relation to disclosure will still need to be completed in the usual way unless it is not practical to do so, in which case completion of the disclosure section in Form H will be postponed until after the case management conference.
- (xv) In addition, parties will be required to give estimates of the likely costs of disclosure when filing the completed DRD in order that the question of proportionality may be considered at the CMC before an order for disclosure is made.
- (xvi) Finally, the practice direction sets out the range of orders and sanctions for non-compliance with the requirements of the new scheme and in particular the new duties on the parties and their advisers.

### **Timing, scope and operation of the proposed Pilot**

- 17. With some limited exceptions, the scheme will apply to existing and new proceedings across the Business and Property Courts in the Rolls Building and in the centres of Bristol, Birmingham, Cardiff, Leeds, Liverpool, Manchester and Newcastle for a two-year period, commencing in January 2019. While the pilot will be limited to the Business and Property Courts, the expectation is that it will lead to a wider reforms in disclosure.
- 18. The operation of the Pilot will be monitored by Prof Rachael Mulheron, from Queen Mary University of London, who has volunteered to carry out this work. The expectation is that if the Pilot is deemed a success, then the existing Part 31 will be revised to reflect the terms of the Practice Direction and consideration will be given as to whether it should apply to proceedings outside of the Business and Property Courts.
- 19. The Pilot will not disturb an order for disclosure made before the commencement date unless that order is varied or set aside.
- 20. Prior to the launch, there will be a preparation period during which the sub-committee of the DWG will run a series of further presentations with users and the judiciary to help ensure that all are ready to work with the new rules in the new year.

### **Comment on the proposals**

The Rt. Hon. Sir Terence Etherton, Master of the Rolls said:

*"Disclosure is one of the key procedural stages in most evidence-based claims. It enables claims to progress to trial and facilitates settlement. The ability to obtain an order for a party*

*to disclose documents that are adverse to its claim helps to make litigation in this jurisdiction attractive.*

*It is imperative that our disclosure system is, and is seen to be, highly efficient and flexible, reflecting developments in technology. Having effective and proportionate rules for disclosure is a key attraction of English law and English dispute resolution in international markets.*

*I am very grateful to the members of the Working Group for all the considerable time and effort they have devoted to devise the Disclosure Pilot Scheme. Their work has been the product of extensive engagement with court users, the profession, judiciary and e-disclosure specialists.*

*The result is, I believe, the promulgation of an entirely new and innovative set of rules for disclosure, which, if embraced by all, should promote a significant change in culture and approach to what is a key element of civil proceedings in England and Wales.”*

The Rt. Hon. Sir Geoffrey Vos, Chancellor of the High Court said:

*“I am delighted that the disclosure pilot is now being brought into effect. It is a much-needed and far-sighted reform. There will now be a menu of options available to litigants so that disclosure can be targeted appropriately to the kind of case that is being litigated. This is an example of the Business and Property Courts responding to the legitimate concerns and expectations of their users. I much look forward to seeing the results of the pilot”.*

21. Copies of the draft Practice Direction and Disclosure Review Document were available on the Business and Property Court website.

**The Rt. Hon. Dame Elizabeth Gloster DBE, PC**

**Chair of the Disclosure Working Group**