Disclosure pilot scheme: a significant step in the right direction

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Following a consultation period ending on 28 February 2018, the Disclosure Working Group recently announced that the Civil Procedure Rule Committee has approved the pilot which will run for two years from 1 January 2019 in the Business & Property Courts.

Disclosure is a major benefit of resolving disputes in English courts, as the 'cards on the table' approach promotes settlement and helps ensure a fair outcome. However, with increasingly unmanageable volumes of electronic data, it has become a double-edged sword: disclosure is now usually the most time consuming, demanding and expensive stage in the life of a case before trial. As a result, it can be off-putting to parties contemplating litigation: the cost and workload involved can be out of kilter with the benefits of pursuing otherwise meritorious claims.

The current disclosure rules are, for the most part, unchanged since they were introduced with the Civil Procedure Rules in 1999. 'Standard disclosure' is the default option for most cases. It requires each party to disclose the documents on which it relies and which adversely affect its case or support the case of another party. This broad approach has proved to be ill-suited to litigation involving large volumes of electronic data. Practitioners end up spending a disproportionate amount of time reviewing and arranging to disclose vast amounts of documents which, whilst technically falling within the scope of standard disclosure, are of little ultimate value to the parties or the court. The burden of undertaking this task can be exploited (and usually is, given the adversarial nature of litigation). There are few practitioners who have not experienced document dumping or oppressive demands for additional disclosure.

In recent years, other jurisdictions have sought to tackle similar problems. In 2010, the Australian Law Reform Commission identified the high and often disproportionate costs of disclosure. That resulted in reforms promoting a more flexible approach to disclosure, including the principle that no disclosure is the default position.

In England and Wales, the first major attempt to tackle the problem was in 2013 when Jackson LJ introduced the so-called 'menu' of disclosure options as part of his wider costs reforms. Whilst laudable, in practice, most parties continued to choose standard disclosure. Recognising the problem, in May 2016, a 'Disclosure Working Group' was established. This comprised a cross-section of the legal community, including members of the judiciary, barristers, solicitors and IT experts.

Pilot scheme

Following a consultation period ending on 28 February 2018, the Working Group recently announced that the Civil Procedure Rule Committee has approved the pilot which will run for two years from 1 January 2019 in the Business & Property Courts. The scheme replaces the existing regime with a new Practice Direction (which can be found here). It is a radical departure: standard disclosure is out; 'Initial Disclosure' and 'Extended Disclosure' are in.

Initial Disclosure requires a party to disclose the 'key' documents on which it relies and those necessary to enable the other parties to understand the case that they have to meet. It is provided at the same time as a party serves its statement of case. However, crucially, the requirement to give Initial Disclosure is dispensed with if it would involve providing more than around 1,000 pages or 200 documents (whichever is higher).

Extended Disclosure is not automatic. Instead, a party must apply to the Court for an order for Extended Disclosure (of which there are five models to choose from, ranging from extremely limited disclosure to disclosure that is akin to standard disclosure). In theory, that means a case could proceed without any disclosure being given (where Initial Disclosure has been dispensed with and no order for Extended Disclosure is made). However, in complex commercial disputes, we expect the Courts to recognise that it is necessary to order some form of disclosure.

Orders for Extended Disclosure are to be dealt with at the first case management conference. If there are any later disputes about the scope of disclosure, then the pilot introduces 'disclosure guidance hearings' as the vehicle through which they will be addressed. These are intended to be reasonably informal: for example, skeleton arguments are not required and the legal representatives with conduct of the disclosure exercise will conduct the advocacy.

In advance of the CMC, the parties are required to engage with each other in agreeing a 'Disclosure Review Document'. This deals with disclosure on an issue by issue basis; each party is required to set out the Model of Extended Disclosure (if any) they wish to obtain for each issue (reaching agreement where possible).

Commentary

Whilst the key change introduced in the pilot – the replacement of standard disclosure with one, both or neither of Initial Disclosure and Standard Disclosure – could have been drafted into the existing rules, the Working Group has opted to start from scratch by re-writing the entire disclosure regime. This is intended to impress upon practitioners the need to adopt a new mindset towards disclosure.

The rules are accompanied by the introduction of various principles, such as the requirement for parties to co-operate and assist the Court. Whilst some of these principles already exist in some form (e.g. the Overriding Objective), they have been drafted at considerable length into the new rules. The intention is to ensure that there is no doubt as to how the new rules should be applied.

As practitioners get accustomed to the new regime, we can see various ways in which unsatisfactory outcomes might occur. For example, a party's obligation to provide Initial Disclosure can be dispensed with if it would otherwise capture more than 1,000 pages of, or 200, 'key' documents. However, it is for the party to decide what is 'key': if it wishes to delay giving early disclosure, it may adopt an extensive definition to ensure that it exceeds the necessary threshold. The only forum for other parties to take issue is at the first case management conference or a disclosure guidance hearing. Similarly, the parties are required to choose which Model of Extended Disclosure they require for each issue for disclosure (if any). However, until there is a change in mindset away from the default option of seeking standard disclosure, it is not difficult to foresee parties continuing to agree that all issues for disclosure require Model D Extended Disclosure (which is akin to standard disclosure).

In other words, bad habits die hard. Whilst it is incumbent on practitioners to ensure that they embrace the new regime, in our view, it will be important for the judiciary to intervene, and where appropriate, sanction parties that misapply the rules.

There are some aspects of the scheme where we foresee difficulties regardless of the level of cooperation between parties. For example, disclosure guidance hearings have a maximum hearing length of 30 minutes. That is unlikely to be sufficient to deal with complex matters such as privilege. In addition, parties are required to disclose documents that they know are adverse to their case. However, the rules do not specify how and when this should happen.

Nonetheless, we welcome the pilot as a significant step forwards. It contains many sensible measures to make disclosure more efficient and less costly whilst maintaining (and in some respects strengthening) the 'cards on the table' approach introduced with the Civil Procedure Rules. If practitioners and parties act as they are required to do, subject to initial teething issues and potential tinkering of the rules before the new regime takes effect across all courts on a permanent basis (as is the intention), all parties should benefit.
