DISPUTE RESOLUTION BRIEFING

Pilot of new disclosure rules: a change for the better?

A Disclosure Working Group (the working group), chaired by Lady Justice Gloster, was set up in 2016 to consider the rules governing disclosure of documents in English litigation. This was prompted by court users' continuing concerns over the excessive burden and cost of disclosure, and the perception that previous attempts at reform had not produced real improvements.

The working group's proposals, which included drafts of a new practice direction (PD) and disclosure review document (DRD), were published in November 2017 and were subject to consultation until the end of February 2018 (*see Opinion "Proposals for disclosure reform: do they fit the bill?", www.practicallaw.com/w-012-8522*).

On 31 July 2018, the working group announced the launch of a two-year pilot in the Business and Property Courts, based on what it describes as a substantially revised and improved version of the PD and DRD, which have been submitted to and approved by the Civil Procedure Rule Committee. Professor Rachael Mulheron, of Queen Mary University of London, will monitor the pilot, which will start on 1 January 2019. If deemed a success, it is expected that the existing disclosure rules in Part 31 of the Civil Procedure Rules (CPR) will be revised to reflect the terms of the PD.

The new disclosure process

The pilot PD sets out a new two-stage process for disclosure:

Initial disclosure. This stage was referred to as "basic disclosure" in the draft PD. It requires parties, when serving their particulars of claim or defence, to provide the key documents relied on in support of the claims or defences advanced and the key documents necessary for other parties to understand the claim or defence they have to meet. Documents already provided to the opponent, or known to be in its possession, are excluded.

This obligation may be dispensed with by agreement or court order. In addition, it will not apply where a party concludes and states in writing, approaching the matter in good faith, that it would involve either party providing more than about 1,000 pages or 200 documents, whichever is larger. This threshold has increased from 500 pages in the draft PD, but it still seems likely to be exceeded in most major commercial cases.

Extended disclosure. Parties can request extended disclosure in addition, or as an alternative, to initial disclosure. Extended disclosure will be based on one or more of five different disclosure models that will be selected in relation to the issues for disclosure that the parties will need to identify for this purpose. No application notice is required, but the parties will be expected to have completed the DRD setting out the list of issues for disclosure, their proposals as to which disclosure model(s) should apply, and information as to how documents are stored and how they might be searched and reviewed. The disclosure models are:

- Model A: disclosure confined to known adverse documents. This was referred to as "no order for disclosure" in the November draft. The amendment is presumably to clarify that known adverse documents must always be disclosed (*see "Known adverse documents" below*).
- Model B: limited disclosure. This is essentially initial disclosure plus the disclosure of known adverse documents. There is no obligation to carry out a search for documents but, if a search is conducted and uncovers adverse documents, they will need to be disclosed.
- Model C: request-led search-based disclosure. This is an order to disclose particular documents or narrow classes of documents by reference to requests from the opposing party, similar to the approach often adopted in international arbitration (*see box "Moving closer to arbitration?"*).
- Model D: narrow search-based disclosure, with or without narrative documents. This is an order to disclose documents that are likely to support or adversely affect any party's case in relation to one or more of the issues for disclosure. It requires parties to undertake a reasonable and proportionate search. Narrative documents, defined as those that are relevant only to the background or context and not directly to the issues for disclosure, should not be disclosed unless specified in the order.
- Model E: wide search-based disclosure. This is an order to disclose the documents that a party would have to disclose under model D, and documents that may lead to a train of inquiry that may result in the identification of other documents for disclosure under that model. This model is only to be ordered in an exceptional case. It is essentially the form of disclosure that existed under the old pre-CPR rules of court although, even under this model, the requirement is only to undertake a reasonable and proportionate search.

Issues for disclosure

The PD envisages that extended disclosure will proceed by reference to a list of issues for disclosure. The claimant is responsible for preparing the draft list and, according to the PD, should seek to ensure that it provides a fair and balanced summary of the key areas of dispute for which extended disclosure is likely to be sought. The parties must discuss and seek to agree the draft.

The issues for disclosure are expressly limited to the key issues that the parties consider need to be determined with some reference to contemporaneous documents, rather than every issue that is denied or not admitted in the parties' statements of case. However, in any major commercial case, there are likely to be large numbers of issues that fall into this category, some of which may be very complex, and there may be significant differences between the parties as to how the issues should be presented. The preparation of the list of issues for disclosure therefore represents a frontloading of cost, although it may ultimately be outweighed by other savings resulting from the greater focus that the new approach is intended to instil.

The PD expressly states that the court may order a different disclosure model to apply to different issues for disclosure in the case. New

wording added since the draft PD states that, in the interests of avoiding undue complexity, the court will rarely require different models for the same set of documents. This is puzzling. It seems to presuppose an ability to determine, in advance of a search, which sets of documents will, or may, be relevant to which issues for disclosure, and that sets of documents can be parcelled out between the issues without overlap. In many cases this will not be the reality.

How much of a change?

The new disclosure models are not wildly different from the current menu of disclosure options set out in CPR 31.5. However, the express aim of the reforms is to reduce the extent of disclosure and therefore the cost. The PD steers the parties, and the court, away from the unthinking adoption of broad disclosure models and toward a more tailored solution, not least by abandoning terminology that might suggest a standard or default option. While model D (narrow search-based disclosure) is the equivalent of standard disclosure under the current menu of disclosure options, it is neither referred to as, nor intended to be, the standard approach.

However, as many have recognised, including the working group itself, the changes to the rules are only part of the picture. If the pilot is to bring in real benefits, it can only be by way of a wholesale cultural change among court users. The PD notes the court's expectation that the parties and their representatives will co-operate to assist in determining the scope of disclosure as efficiently as possible, and that the court will be concerned to ensure that disclosure is not wider than is reasonable and proportionate in order fairly to resolve the issues for disclosure. The working group's press announcement further emphasises that the court should be proactive in directing an appropriate disclosure model, and should not accept the parties' proposals without question (*www.judiciary.uk/wp-content/uploads/2018/07/press-annoucement-disclosure-pilot-approved-by-cprc.pdf*).

Known adverse documents

The PD contains an express duty on litigating parties to disclose known adverse documents, unless they are privileged, regardless of any order for disclosure. The aim is to ensure that the moves to rein in disclosure do not threaten the English court's ability to do justice based on all relevant facts. If there is a smoking gun that at least one of the parties is aware of, it should come out.

As formulated in the draft PD, however, this provision gave rise to obvious questions for disclosure by companies and other organisations, including whose knowledge is relevant. The PD seeks to clarify that it is the knowledge of any person with accountability or responsibility for the relevant events or circumstances or the conduct of the proceedings. It is also necessary to take reasonable steps to check the position with anyone who had this accountability or responsibility but has since left the organisation. This is helpful, but there remains obvious scope for dispute.

Privilege

The draft PD stated that, where a party wishes to claim a right or duty to withhold documents, most obviously on grounds of privilege, it must describe the document (or part of a document or class of documents) and explain with reasonable precision the grounds for exercising the right or duty. It was not clear, however, whether this was meant to signal a move away the current practice of describing privileged documents in generic terms, towards a US-style privilege log with its attendant risk of satellite litigation. The PD addresses this concern, deleting the reference to "reasonable precision" and providing welcome clarification that a claim to privilege may, unless the court orders otherwise, be made in a form that treats privileged documents as a class.

Proof of the pudding

The reforms have been broadly welcomed by court users and the judiciary. If accompanied by the requisite culture change, they could make a real impact on the burden and costs of disclosure in many cases. There are, however, a number of issues that may need to be clarified through case law, including most significantly the provisions relating to known adverse documents. As ever, the proof of the pudding will be in the eating: in this case, the two-year pilot which is to be conducted before a final decision is made on the reforms.

Julian Copeman is a partner, and Maura McIntosh is a professional support consultant, at Herbert Smith Freehills LLP. *The PD and DRD are available at www.judiciary.uk/publications/announcement-that-cprc-has-approved-disclosure-pilot.*

Moving closer to arbitration?

The disclosure pilot Practice Direction (PD) contains an express statement that, where the parties propose disclosure model D or E, they should be ready to explain to the court why model C is not sufficient. This suggests an attempt to bring disclosure in English court litigation closer to the approach often associated with international arbitration, although with the distinction that known adverse documents will always have to be disclosed whether or not they fall within a specific request.

The arbitration approach certainly has its advantages. It may lead in many cases to a narrower pool of documents that have to be searched and ultimately disclosed, and it is popular with many commercial clients. However, it should not be seen as a panacea. The PD envisages that where the parties cannot agree on the requests that should form the basis for disclosure, the court will have to determine whether the request is reasonable and proportionate; just as an arbitral tribunal will frequently be called on to do in international arbitration. In practice, significant time and cost can be spent debating and determining these points before the search for documents even begins, leading to further frontloading. The question, again, will be whether that time and cost is outweighed by other savings.