OPINION

PROPOSALS FOR DISCLOSURE REFORM

Do they fit the bill?

Julian Copeman and Maura McIntosh of Herbert Smith Freehills LLP discuss recent proposals to reform the rules governing disclosure.

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For more than two decades, there has been an ongoing struggle to find a solution to the problems posed by documentary disclosure in English litigation in the light of the massive growth in the volume of documents in that period. The challenge is to ensure that parties put their cards on the table to a sufficient extent to enable the court to achieve justice based on all relevant facts, while at the same time keeping the process, and the costs, under control so that justice is not put beyond the reach of all but the most deep-pocketed.

In the most recent attempt to strike the right balance, a Disclosure Working Group (the working group) was set up, chaired by Lady Justice Gloster, in response to widespread concerns expressed by court users over the excessive costs, scale and complexity of disclosure. The working group's proposals, including a draft practice direction, a new disclosure review document and guidance, were published on 2 November 2017 and are subject to consultation until 28 February 2018. After that they will be considered by the Civil Procedure Rule Committee with a view to setting up a two-year pilot in the Business and Property Courts.

The working group has proposed a completely new rule on disclosure, but how likely is it that the new rule will result in real change?

A bit of history

Under the pre-1999 Rules of the Supreme Court, parties had to disclose all documents which were broadly relevant, or which could lead to a train of enquiry that could produce relevant information. With the advent of electronic documents, this was becoming problematic during the 1990s, even before email became prevalent. The Woolf reforms, implemented through the Civil Procedure Rules (CPR) from April 1999, sought to tackle the burden of dealing with the increased volume of documents by doing away with the previous very broad approach in favour of the then new concept of standard disclosure (*see feature article "Commercial disputes: the practical impact of the Woolf reforms", www.practicallaw.com/8-101-2625*). This required the disclosure only of documents that supported or adversely affected any party's case or on which the disclosing party relied.

Standard disclosure was meant to be a narrower test, aimed at controlling the number of documents that had to be reviewed and disclosed, and therefore reducing costs. In practice, however, the costs of disclosure continued to balloon, in part because of the ever-increasing mass of electronic documents produced and stored by businesses, and in part because it proved cheaper for parties to disclose all apparently relevant documents than to work out which were genuinely helpful or harmful.

In spite of the growth of low-cost document review services, and predictive coding technology aimed at tackling the cost and extent of the disclosure process, disclosure has remained one of the principal drivers of costs in larger actions. The Jackson reforms, introduced from April 2013, again tried to rein in the process, this time by replacing the presumption of standard disclosure with a menu of disclosure options from which the court must choose, having regard to the overriding objective and the need to limit disclosure to what is necessary to deal with the case justly (*see feature article "Jackson reforms: what commercial parties need to know", www.practicallaw.com/3-524-7405*). The intention was to instil a more focused approach, tailoring the disclosure order to the requirements of the case at hand, rather than simply defaulting to standard disclosure.

For all its good intentions, however, the menu approach did not succeed in that aim

(*see Opinion "The Jackson reforms: one year on", www.practicallaw.com/9-561-9365*). The working group has identified a number of defects in the current regime, including that neither the professions nor the judiciary have adequately used the wide range of alternative disclosure orders available. In short, it seems that the tastes of court users have not diversified to embrace the full menu; standard disclosure remains by far the most popular dish.

The proposed new disclosure process

The working group proposes a new two-stage process for disclosure:

Basic disclosure. When serving their particulars of claim or defence, parties would provide the key documents relied on and the key documents necessary for other parties to understand the case they have to meet. This obligation could be dispensed with by agreement, and it would not apply where a party concluded that it would involve providing more than 500 pages of documents. On that basis, it seems unlikely that basic disclosure would often be a feature of major commercial cases.

Extended disclosure. Parties could then request further disclosure, by reference to five disclosure models:

- No order for disclosure (model A).
- Limited disclosure, which is essentially basic disclosure plus the disclosure of known adverse documents (*see box "Known adverse documents"*). There is no obligation to carry out a search for documents (model B).
- Request-led search-based disclosure, which is an order to disclose particular documents or narrow classes of documents in response to requests from the opposing party, similar to the approach often adopted in international arbitration (model C).
- Narrow search-based disclosure, with or without narrative documents, which are defined as those that are relevant only to the background or context of material facts or events, and would be disclosed only if specifically stated in the order (model D).
- Wide search-based disclosure, which is essentially old-fashioned, pre-CPR train of enquiry disclosure, which would only be ordered in an exceptional case (model E).

Where the chosen model requires searches to be undertaken, the parties would have to discuss and seek to agree, and the court could give directions, on various matters aimed at reducing the burden and costs of the disclosure exercise, including limiting the scope of the searches (for example by reference to date ranges, custodians and keywords) and the use of technology-assisted review software and techniques.

Models vs menu

The list of disclosure models does not look dramatically different from the current menu of disclosure options. However, there are at least three significant differences.

Firstly, although model D is roughly equivalent to what is currently referred to as standard disclosure, that terminology has been firmly consigned to the dustbin. The obvious message, which was lacking in the previous attempt to move away from a default option, is that there is nothing standard about this model.

Secondly, the new rule is designed to allow an appropriate model to be chosen for each issue in the case. To that end, where any party intends to request an order for extended disclosure, the parties must seek to agree a draft list of issues for disclosure before the first case management conference, and the order would identify the appropriate model for each issue on that list. Therefore, rather than a blanket approach, the working group envisages a more tailored choice on an issue-by-issue basis. Incidentally, this also explains why model A is included in the list of disclosure models; it would otherwise be rather odd to include no order for disclosure as one of the models for extended disclosure.

Thirdly, the proposed rule contains clear signs steering the parties, and the court, toward a more restrained approach to disclosure. These include that the court would order extended disclosure only if persuaded that it is appropriate to do so in order fairly

Known adverse documents

At the same time as seeking to rein in the excesses of disclosure, the Disclosure Working Group has kept in mind the aim of enabling the court to do justice based on all relevant facts, which many see as a fundamental attraction of the English court system internationally.

To meet concerns among the Disclosure Working Group and consultees about what might be seen as a watering down of the duty to disclose adverse documents, the proposed new disclosure rule includes an express duty to disclose documents that a party knows to be, or to have been, in its control and adverse to its case on the claim, unless they are privileged. This duty would apply regardless of any order (or no order) for disclosure more generally.

The aim behind this proposal is laudable, but it gives rise to obvious difficulties where the disclosing party is a large company or other organisation. Whose knowledge is relevant for these purposes? And what sort of knowledge is required? What if a relevant individual knew of an adverse document, perhaps even wrote it, but has genuinely forgotten about it in the intervening months or years? These questions cry out for answers.

to resolve one or more of the issues for disclosure. In addition, an order for extended disclosure would have to be reasonable and proportionate having regard to the overriding objective and certain factors set out in the rule, including the nature and complexity of the issues, the importance of the case, and the number of documents.

A change of culture

Even with these changes, if the new rule is to usher in a major departure from current practice, it can only do this by changing attitudes among court users.

The working group is clearly under no illusions on this score. Its proposals refer to the working group's unanimous view that a wholesale cultural change is needed. The new rule and guidelines are to be introduced with a view to achieving that change but, as with any cultural change, rules alone cannot bring it about. As the working group puts it, there will need to be a change in professional attitudes and a shift towards more proactive case management by judges; the court should proactively direct the parties towards the appropriate model and not simply accept without question the parties' proposed model.

The judiciary's role will be key. A parallel can be drawn with the then new CPR 3.9 on relief from sanctions, which was introduced by the Jackson reforms in April 2013. The stated intention of the changes to CPR 3.9 was to force a change of culture, so that breaches of rules and court orders would not be tolerated as readily as they were previously. It was remarkably successful in achieving that aim, but only because of the strict (at times overly strict) approach the courts took to its implementation, as exemplified by the Court of Appeal decisions in *Andrew Mitchell MP v News Group Newspapers Ltd* and *Denton v TH White Ltd, Decadent Vapours Ltd v Bevan, Utilise TDS Ltd v Davies* (*[2013] EWCA Civ 1537, see News brief "Mitchell and its aftermath: getting tough on compliance", www.practicallaw.com/2-555-4150; [2014] EWCA Civ 906, see News brief "Mitchell guidance clarified: an end to the roller coaster ride?", www.practicallaw.com/1-574-9846*).

In the same way, it seems plain that any major shift in practice relating to disclosure will depend on judges sending a clear message that they are not prepared to continue to go along with the status quo.

Privilege

The proposed rule also provides that where a party wishes to claim a right or duty to withhold a document, part of a document, or a class of documents, most obviously on grounds of privilege, it must describe the document (or part or class) and explain with reasonable precision the grounds on which the right or duty is being exercised.

It seems that this is intended to signal a departure from the current practice of describing privileged documents in generic terms, but quite what it requires is at best opaque. It could mean anything from a slightly more detailed description of the basis on which a class of documents is said to meet the test for legal advice or litigation privilege, all the way up to a full US-style privilege log giving details of individual documents for which privilege is claimed. The potential for satellite litigation is evident, and is prevalent in the US where the details in the log lead to frequent challenges.

Real change ahead?

Overall, the proposed reforms take a balanced and sensible approach which could make a real difference in practice if there is appropriate buy-in from litigating parties, the profession and the judiciary. However, the risk is that, as with the reforms in 1999 and 2013, parties simply continue as before while paying lip service to the new regime.

There are, in addition, some problematic provisions, in particular regarding known adverse documents and the rather vague requirement for a precise explanation of the grounds on which privilege is claimed. Unless these provisions are clarified, there is a risk that they will give rise to costly disputes, which may undo some of the benefits of the headline reforms.

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