

COUNTDOWN TO THE DISCLOSURE PILOT SCHEME: VIEWS FROM SOME ARCHITECTS OF PREVIOUS DISCLOSURE RULES

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Vince Neicho of Integreon and Mark Surguy, dispute resolution partner at Weightmans, provide some thoughts on the mandatory Disclosure Pilot Scheme (PD51U) that will apply (with limited exceptions) in the Business and Property Courts for two years from 1 January 2019.

The closing word goes to Sir Rupert Jackson, of 4 New Square, principal architect of the last round of disclosure reforms.

by *Vince Neicho, Vice President of Legal Services at Integreon and Mark Surguy, Partner, Weightmans*

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From 1 January 2019, a mandatory (subject to limited exceptions) Disclosure Pilot Scheme (DPS) will operate, for two years, in the Business and Property Courts (B&PCs). The pilot is aimed at achieving a complete change of culture in the approach to disclosure in civil litigation. Despite several previous rule changes designed to make the disclosure process more proportionate, the clear message from clients and practitioners was that, in practice, standard disclosure had remained the default. Particularly given the exponential growth in document generation through greater use of technology, there was a consensus that something needed to be done. This is not the first attempt to seek to encourage a more proportionate approach to the disclosure process.

In this article, we have gathered views on this latest attempt, from architects of previous disclosure rule changes.

Vince Neicho is a subject matter expert on e-disclosure, e-discovery and managed document review at Integreon. Previously, he was responsible for global litigation support at Allen & Overy. He was a member of the Working Group which produced PD 31B (a model which has clearly had a strong influence on the form of the DPS), and assisted Lord Justice Jackson on the disclosure elements of his Civil Costs Review.

Mark Surguy, a partner in the Disputes and Litigation team at Weightmans, was also closely involved in the development of PD 31B. Mark has over 25 years' private practice experience of advising and representing companies, institutions and individuals in domestic and international commercial litigation, fraud and insolvency cases across multiple sectors. He has expertise in computer forensics, digital evidence, data protection and cross-border e-Discovery, and the use of leading-edge technology to assist in fact-finding.

We start by putting some questions to Vince and Mark.

We then round things off with a closing comment from *Sir Rupert Jackson*, of 4 New Square, principal architect of the last round of disclosure reforms, who introduced the menu options in CPR 31.5 (under the disclosure regime that will continue to operate in parallel with the DPS for cases not within the ambit of the pilot), and who has also drafted rules for a Fixed Costs Pilot Scheme, which will introduce a streamlined approach for disclosure (see *Blog post, CPRC Snippets: May 2017*).



WHAT WERE THE MAIN CONCERNS REGARDING THE DISCLOSURE PROCESS, AND WHY DO YOU THINK THAT A NEW SET OF RULES WAS NECESSARY?

In our view, a new set of rules should not have been necessary. If parties had read and abided by the existing PD 31B and CPR 31.5, and they and the judiciary had exercised robust case management, there would be no need for change. However, we very much hope that renewed focus on the rules, against the backdrop of a desire for change and cost reduction, just might act as a “wake-up call” to parties to desist from considering the disclosure process as a ripe opportunity for tactical gain.

The catalyst for change was pressure from the GC100 group. Smaller companies and individuals who might find themselves up against “corporate mammoths” in proceedings might have a different perspective on the approach to disclosure. However, something needed to change to stop parties “running roughshod” over the existing rules. Hopefully, the rules will be applied in a way that takes account of parties’ respective positions, particularly in cases where one party has the majority of the documents or is significantly better resourced. On this point, the DPS specifically includes “the financial position of each party” as a factor to be considered when considering whether it is reasonable and proportionate to make an order for Extended Disclosure (paragraph 6.4(6), DPS).

WHAT DO YOU THINK THE KEY POTENTIAL IMPROVEMENTS ARISING FROM THE NEW RULES ARE LIKELY TO BE?

It is probably too early to say.

The assumption is that the new scheme will reduce costs and permit proportionate justice to be achieved. Under the DPS, parties owe a specific duty to the court “to use reasonable efforts to avoid providing documents to another party that have no relevance to the Issues for Disclosure in the proceedings”. If complied with, that will be a great improvement.

IF YOU HAD TO SINGLE OUT ONE POINT IN THE NEW RULES FOR PRACTITIONERS TO NOTE, WHAT WOULD IT BE?

We would highlight two points that are “joint first” in our list:

- The need to use technology.
- The expectation that parties will meaningfully cooperate.

Neither of these is a new obligation.

HOW CAN PRACTITIONERS AND PARTIES MAKE THE MOST OF THE NEW REGIME?

By taking advantage of the re-emphasis on cooperation, and adopting a practical, realistic approach. In most cases, an overly adversarial approach to the scope of disclosure is not in the interests of clients.

We would also advocate designing a tailor-made approach that works for the case, with a view to confining the involvement of the courts to the really contentious issues (assuming that you cannot resolve them yourselves).

Many parties who become embroiled in litigation infrequently, or as a “one-off”, are not prepared for what is involved in court proceedings. Those who are regularly in the courts may not have to do too much. Arguably, they may even start searching less, so that they do not get to know about adverse documents at the outset. This would not be a good thing.

Continuing to embrace the use of effective enterprise storage repositories which are fully searchable, deleting documents that are not required to be retained, and considering bringing search technologies in-house are all sensible matters to consider.

WHAT DO PRACTITIONERS NEED TO DO TO PREPARE?

In substance, the DPS builds on the ideas underlying the Shorter and Flexible Trials pilot schemes. Both pilots have concluded and are now part of the rules. The emphasis in those schemes is on limiting disclosure and moving away from the default of “standard disclosure”.

Smaller scale disputes should be able to be disposed of more quickly and more cheaply, and practitioners should be looking to ensure litigation is conducted at proportionate cost.

Practitioners should already have been using the techniques promoted since the Jackson/civil litigation reforms were introduced. The ideas are not new, but there is now a fresh emphasis on getting to grips with the “culture change” envisaged by Sir Rupert Jackson.

WHAT DO CLIENTS NEED TO DO TO PREPARE?

Efficient and sound disclosure starts with effective information governance.

The more a party is aware, and in control, of its systems, and can readily identify potentially rich evidence pools, the easier it will be for it to comply with its disclosure obligations.

Given the emphasis in the DPS on the fact that different disclosure models might apply not only to different issues, but also for each of the parties (see paragraph 8.3, DPS), each party needs to be ready to explain what each of the potential models might be expected to produce if it were applied.

This information would be enormously helpful to the client’s advisors when considering the approach, cost and proportionality.

IN YOUR VIEW, WHAT ARE THE MOST CHALLENGING ASPECTS OF THE NEW REGIME?

Any small party litigating against a big one needs to be aware, from the outset, that it may not be able to rely on the opposing party to provide the extensive disclosure that it might expect under the present rules. Accordingly, when assessing merits, all parties need to be aware that they cannot necessarily rely on their opponents later being ordered to produce wide-ranging disclosure.

For some, the most challenging aspect will be determining the appropriate use of technology to aid the process. It is not a case of using technology “for technology’s sake”. There needs to be a realisation, by both the parties and the court, that not all technology is appropriate in every case, and human input is still very much necessary.

Current practices seem to suggest that another significant challenge will be for legal advisors to engage and co-operate in what is traditionally a (very) adversarial environment.

DO YOU BELIEVE THAT THE JUDICIAL APPROACH TO DISCLOSURE WILL CHANGE SIGNIFICANTLY AS A RESULT OF THE DISCLOSURE PILOT SCHEME?

For the pilot to succeed, it will be critical that the judicial approach changes significantly.

Approaches we see now such as “go away and sort it out” or “just hand it over anyway” need to stop.

The courts will play a crucial role in understanding what is being requested or opposed by each of the parties, and their respective arguments. In doing so, they may request assistance from those close to the data and the disclosure process.

This might mean that, at disclosure hearings, judges will need to be addressed not only by counsel and solicitors, but also by litigation support personnel and/or client IT managers.

It is encouraging to see that certain judicial training programmes now include awareness sessions on technology and its interaction with litigation.

DO YOU THINK THAT THE INTRODUCTION OF THE PILOT SCHEME WILL POSSIBLY IMPACT ON HOW PRACTITIONERS USE THE CPR 31/PD31A/PD31B REGIME: FOR EXAMPLE, ENCOURAGING MORE USE OF THE ELECTRONIC DOCUMENTS QUESTIONNAIRE AND MORE CREATIVE THINKING ABOUT THE APPROPRIATE DISCLOSURE MODELS, AS WELL AS MORE ACTIVE CASE MANAGEMENT BY JUDGES?

Where the rule does not apply and the “old” regime is being followed, the “old” scheme is sufficiently flexible to accommodate all the techniques found in the new regime.

Indeed, the new regime draws heavily on the former practice. Anyone seeking disclosure outside the strict terms of the DPS will be able to adopt any of the models for Extended Disclosure if the other parties agree. It will not be possible to insist unilaterally on any aspect of the new regime whilst working under the auspices of the old regime (such as Initial Disclosure, for example) but everything is possible by cooperation.

Where the parties are working properly together, there should be few problems with disclosure, and those problems that cannot be resolved between the parties will be able to be resolved speedily and effectively by the judge.

Cooperation was at the heart of the former practice and the new pilot also has cooperation at its core. Indeed, cooperation is the key to successful disclosure.

WHAT WOULD YOUR MESSAGE BE (I) TO PRACTITIONERS AND (II) TO PARTIES?

Disclosure needs to be seen by parties, practitioners and the court as an important and integral part of the litigation process, and not an “inconvenience” that gets in the way and needs to be disposed of quickly. It is, after all, the part that produces the most evidential value, either directly or by underpinning witness evidence. Accordingly, at the case management conference, adequate time must be allowed for disclosure considerations, and disclosure should feature prominently in the topics to be discussed.

Inter-party cooperation should not be seen as a one-off “checking a tick-box” exercise. Rather, it needs to be meaningful and ongoing. Parties need to understand the obligation of their advisors to cooperate with their adversaries and advisors should not “hold back” for fear of their clients believing they have “gone soft”.

When considering challenges to opposing parties’ disclosure, focus not on the process, but on the content and substance. For example, instead of suggesting that a party’s approach was defective (in that it would have excluded x, y and z from the pool of documents considered by the legal team), perhaps suggest “we would have expected to see documents referring to a, b and c in the production set.” That way, argument can be made not on the technical approach adopted, but rather on what might need to be done to include the documents sought or expected.

The message for practitioners is essentially the same as it was in 2013.

The key points are:

- Address disclosure right from the moment you are instructed.

- Collaborate with your opponent.
- Know what your case, and your opponent's case, require in order to be proved.
- Keep up to date with the developing capability of technology.
- Get someone senior involved and do not delegate disclosure to the junior members of the team.

DO YOU HAVE ANY OTHER GENERAL OBSERVATIONS ON THE DISCLOSURE PROCESS?

It is worth pointing out that not all treatment of data in proceedings is a "disclosure cost". A prudent party and its advisors will conduct a comprehensive trawl of data in any event, to enable a proper assessment of merits and pleadings to be drafted and to form a witness proofing set. If done properly, it may be that disclosure will flow naturally from those exercises without being a significant cost burden in its own right.

Although the new rules adopt the same principles as PD 31B and CPR 31.5 (including, for example, the use of technology, inter-party cooperation, and the menu of options) the implementation of the fresh approach affords potential parties the opportunity to reconsider their disclosure strategies, and desist from using the disclosure process as a playground for tactical manoeuvring. If this change occurs and the judiciary takes up the mantle of robust case management on disclosure matters, we can hope that considerable momentum will come to bear and we will find ourselves in a more acceptable place when it comes to disclosure costs. Watch this space!

It is debateable whether rules alone, or at all, can change culture. Without a change, however, traditional common law disclosure could be driven further towards a civil code approach, with a more judge-led, and less party-led, way of managing the evidence. If the pilot fails, CPR 31 could be easily reinstated and would not require a significant adjustment to re-embrace.

SOME FINAL THOUGHTS FROM SIR RUPERT JACKSON

The final word goes to Sir Rupert Jackson, architect of the last round of disclosure reforms (including the introduction of the menu of options in CPR 31.5(7)).

Although Sir Rupert previously suggested that "culture change", not rule change, is required, rather like Vince and Mark, he does not disagree that new rules are required in order to provide renewed impetus for that necessary culture change. Asked for his verdict on the Disclosure Pilot Scheme, he says

"I think that the new pilot rules are excellent.

Excessive disclosure is a driver of delay and high costs. Every civil justice reformer appreciates that and tries to tackle the problem. Lord Woolf did so by introducing 'standard disclosure'. I did so by introducing the 'menu option'.

Unfortunately, practitioners and judges tend to stick to their old ways. It is simplest to say 'disclose everything'. It is hard work to grapple with the issues and whittle down disclosure to a proportionate level at the outset of a case. But that is what the parties should do. The new pilot disclosure rules will, hopefully, force the parties to do just that."