

DISCLOSURE PILOT SCHEME: Update – (almost) 1 year on...

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6th November 2019



Practice Direction 51U

Para.1 – General

- Found in Practice Direction 51U
- Runs for 2 years: 1 January 2019 – 31 December 2020
- Applies to all cases whether commenced pre or post 1 January 2019 (more on this later...), but will not disturb existing order
- Pilot scheme for disclosure in Business and Property Courts → will operate in IP cases except:
 - IPEC proceedings
 - Proceedings within the Shorter and Flexible Trial schemes
- In patent cases, PD63, para.6.1 to 6.3 will continue to apply

Principles – Para.2

- §2.3: The court expects co-operation
- §2.4: Disclosure will be no “*wider than is reasonable and proportionate ... to fairly resolve those issues*”.

Factors (§6.4):

1. the nature and complexity of the issues;
2. the importance of the case;
3. the likelihood of documents existing that will have probative value;
4. the number of documents involved;
5. the ease and expense of searching /retrieving;
6. the financial position of each party; and
7. the need for speed and proportionate cost.

Duties – Para.3

Duties apply as soon as a party knows that it is or *may* become a party to proceedings that have been or *may* be commenced, and include:

- (1) Duty to preserve documents
- (2) Duty to disclose known adverse documents (more on this later...)

Para.5 – Initial Disclosure

“Initial Disclosure”

- Takes place at same time as filing a statement of case
- Requires party to provide an “Initial Disclosure List” and copies of key documents that are:
 - relied on in support of its case, and
 - necessary to understand the case.
- Does not include adverse documents (more on those later)

Initial Disclosure (cont.)

- Initial disclosure is not required if:
 - Parties agree to dispense with it (court may set aside agreement)
 - Court dispenses with it
 - It would involve more than 1000 pages or 200 documents
 - D is out of jurisdiction – required once jurisdiction is not contested
- Disclosing party must:
 - provide other party with electronic copies of documents
 - file list at court but not documents
- Disclosing party not required to:
 - Conduct any search
 - Provide documents already provided pre-action or that are known to be in other party's possession
 - Translate documents

Para.6 – Extended Disclosure

- A party can request an order for Extended Disclosure at the CMC
- Court will only order Extended Disclosure if:
 - (a) it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure; and
 - (b) it is reasonable and proportionate having regard to the overriding objective
- Onus on party seeking disclosure
- The parties must complete a Disclosure Review Document (“DRD”) before the CMC (replaces Electronic Disclosure Questionnaire)
- Costs in the case, usually

Para.7 – Timetable

When?	What?
Within 28 days of final Statement of Case (“SoC”)	Each party states whether it wants Extended Disclosure
Within 42 days of final SoC	C sends proposed “List of Issues for Disclosure” to D
Within 14 days of receipt	D respond with amendments
Thereafter (if seeking Models C-E) – at least 14 days before the CMC	Parties exchange DRD Sections 1 (List of Issues with proposed disclosure models) and 2 (detailed proposals). [Section 1B (requests for Model C) to be sent within 28 days of D’s response – other side to respond within 14 days]
5 days before CMC	File joint agreed draft setting out any areas of disagreement
Prior to CMC	Each party files certificate of compliance

“List of Issues for Disclosure” =
r.7.3: The key issues in dispute that will need to be determined with some reference to contemporaneous documents

Para.8 – Extended Disclosure Models

- MODEL A:** no further disclosure
- MODEL B:** *"limited disclosure"*: documents a party relies on. No obligation to search
- MODEL C:** *"request-led search-based disclosure"*: documents a party relies on plus requests to carry out searches for specific documents (or classes of docs) relating to specific issues
- MODEL D:** *"narrow search-based disclosure (with or without narrative documents)"*: duty to carry out reasonable and proportionate search for documents that may support or be adverse to any issue
- MODEL E:** *"wide search-based disclosure"*: extends Model D to "train of enquiry" documents (docs which may identify other docs for disclosure) and narrative documents. Exceptional!

NOTE: The court will order different models for different issues and for different parties.

NOTE 2: Always under duty to disclose known adverse documents

Known adverse documents

- There is a continuing duty to disclose known adverse documents regardless of any order made for disclosure – para.3.1(2):
 - = documents that a party is actually aware (without undertaking any further search for documents) both
 - (a) are or were previously within its control, and
 - (b) are adverse.
- When:
 - Where an Order is made for Extended Disclosure → at the time ordered for such Extended Disclosure – para.9.1
 - In other cases → disclosed within 60 days of the 1st CMC - para.9.2

Disclosure Review Document (App. 2)

- DRD is only required if a party is seeking search-based Extended Disclosure – Models C to E.
 - List main issues for disclosure (section 1A)
 - Exchange proposals as to model of Extended Disclosure (section 1A)
 - If Model C is sought, identify the particular requests made and why (section 1B)
 - Share information as to how and where documents are stored, how they may be searched and reviewed, and costs estimates (section 2)
- Parties to seek to agree the DRD before the CMC – joint agreed draft filed 5 days before CMC
- Failure to engage can result in adverse costs order, adjournment or dismissal of application for Extended Disclosure
- Each party must file a certificate of compliance before the CMC

Section 1A:
Issues for Disclosure and proposed Disclosure Models

Brief description of the Issue for Disclosure ²		Reference to statement of case	Issue agreed?		Proposed Model of Extended Disclosure (A – E)		Decision (for the court)
			Yes	No (party not agreeing)	To be completed by claimant	To be completed by defendant	
1.							
	<i>[Alternative proposed wording, if not agreed]</i>						
2.							
3.							
4.							

Section 1B: Model C requests for Disclosure

Claimant / Defendant (delete as appropriate)				
	Issue for Disclosure	Request for Document or narrow category of documents which are likely to support or undermine its own case or that of another party and which fall within the scope of the request made	Response	Decision (for the court)
1.	Issue []:			
2.		.		
3.				
4.				
5.				
6.				
7.				
8.				
9.				

Section 2 Questionnaire

Claimant / Defendant (delete as appropriate)		
	Question	Details
Phase 01	DATA MAPPING	
1.	Hard copy documents / files Confirm whether hard copy documents (for example, notebooks, lever arch files, note pads, drawings/plans and handwritten notes) that are not originally electronic files should be included in collection. Please propose an approach for the production of hard copy documents: if they will be scanned and made searchable or if they will be disclosed and made available for inspection in hard copy only.	
2.	Electronic files: data sources/locations Please set out details on all data sources to be considered at collection including: <ul style="list-style-type: none"> (1) Document repositories and/or geographical locations (2) Computer systems or electronic storage devices (3) Mobile phones, tablets and other handheld devices (4) Document management systems (5) Email servers (6) Cloud based data storage (7) Webmail accounts e.g. Gmail, Hotmail etc (8) Back-up systems 	

Choice of Model

- DRD is considered by the Court at the CMC
- No presumption that a party is entitled to Model D/E
- Choice of model depends on key principle:
 - “no wider than is reasonable and proportionate in order to fairly resolve those issues”
- The Court may make any appropriate provision in making an order for Extended Disclosure, e.g. scope of searches, methodology etc.
- Para.11 – Can apply for Disclosure Guidance Hearing

Para.12 - Compliance

- An order for Extended Disclosure is complied with by:
 - Service of a Disclosure Certificate (App.4) + Statement of Truth
 - Service of an Extended Disclosure List
 - Production of the documents (excluding withheld documents)
- Para.12.5 – cannot rely on a document in your control that you have not disclosed at the requisite time w/o permission of the court or agreement of the parties
- Can apply for further orders:
 - Para 17: in event of non-compliance with Extended Disclosure Order
 - Para 18: where seek variation / an additional order
- Para.20 – full range of sanctions for non-compliance

Case law: Transitional Provisions

- PD51U §1.3 provides:

The pilot shall not disturb an order for disclosure made before the Commencement Date or before the transfer of proceedings into a Business and Property Court, unless that order is varied or set aside...

- White Book guidance at §51.2.10 states:

“[t]he pilot does not apply to any proceedings where a disclosure order had been made before it came into force unless that order is set aside or varied”.

UTB LLC v Sheffield United Limited [2019] EWHC 914 (ChD)

- Geoffrey Vos J:
 - DPS applies to all proceedings → White Book guidance wrong
 - Interpret PD51U flexibly and pragmatically
 - Intended to effect a cultural shift → emphasis on reasonableness, proportionality and cooperation

UTB LLC v Sheffield United Limited cont.

- Inspection of privileged documents by the court:
 - Existing case law: Court has broad judicial discretion to inspect, to be exercised cautiously
 - PD51U §14.3 tightens this discretion: court may only inspect if it is *“necessary”*
 - Inspected documents here as expedited trial was imminent, he was only being asked to inspect a sample of documents and he could see no other way of properly testing SUL’s submissions

A few points of principle

- *Al Jaber v Al Ibrahim*
[2019] EWHC 1135 (Comm):
 - The DPS applies to an application for the disclosure of documents under old CPR 31.14 (disclosure of documents referred to in statements of case) made before the commencement date of the DPS, but heard in 2019.
- *White Winston Select Asset Funds LLC v Mahon*
[2019] EWHC 1381 (Ch):
 - The Court has the power to make a specific disclosure order, despite the DPS making no express provision in relation thereto

A few (more) points of principle

- *Vannin Capital PCC v Rbos Shareholders Action Group Ltd* [2019] EWHC 1617 (Ch)
 - Parties should make use of Disclosure Guidance Hearings (Para.11)
 - DPS brings in new scheme → old case law may not be relevant.
 - Para.18 provides:

18.1 The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.

18.2 The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4).

Yet a few (more) points of principle

- *Obaid v Al-Hezaimi* [2019] EWHC 1953 (Ch)
 - The duty to disclose known adverse documents applies to all cases, even where disclosure already completed before end 2018
- *Andrew Brownsword Hotels Limited v Kenex Engineering Limited* [2019] EWHC 1966 (TCC)
 - Principles in the DPS will be relevant to applications for pre-action disclosure under CPR 31.16

Yet still a few (more) points of principle

- *Ventra Investments Limited (in creditors' voluntary liquidation) v Bank of Scotland Plc* [2019] EWHC 2058 (Comm)
 - Existing order for disclosure under old regime treated as order for Extended Disclosure for purposes of disclosure applications under §17.1 / 18.1 of PD51U
 - Difference between test for further disclosure orders under para 17 and 18 PD51U at most a difference in emphasis:
 - 17: must satisfy the court that making an order is reasonable and proportionate
 - 18: must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate
 - Court should be wary of allowing new regime to operate as a “framework for injustice”.

Some example IP cases under the DPS

1. *Merck Sharp & Dohme Ltd v Wyeth* [2019] EWHC 1692 (Pat)
2. *Akebia Therapeutics Inc v Fibrogen Inc* [2019] EWHC 914 (ChD)

Conclusions

- Significant shift in emphasis away from traditional disclosure orders
- Starting position = only key documents relied upon and “known adverse documents”
- But, in most IP cases, issue-based Extended Disclosure likely (i.e. IPEC-style disclosure)
- Areas of uncertainty which may need to be explored:
 - Level of particularity for the List of Issues for Disclosure
 - When are “known adverse documents” actually “*known*”?

Thank you

H|C