THE DISCLOSURE PILOT SCHEME
VIEWS FROM THE GROUND

Johnny Shearman of Signature Litigation LLP and Graham Jackson of London Legal consider the key features and challenges of the disclosure pilot scheme from the point of view of both the solicitor and the electronic disclosure expert.

A wholesale cultural shift and a change in professional attitudes was thought necessary to address the perceived defects in the disclosure process under Part 31 of the Civil Procedure Rules (CPR) (Part 31). To achieve this change, a completely new set of rules and guidelines to govern disclosure was introduced at the beginning of 2019, known as the disclosure pilot scheme (the pilot), implemented through Practice Direction (PD) 51U (*see Briefing "Pilot of new disclosure rules: a change for the better?", www.practicallaw.com/w-016-3651*). The pilot is not, however, simply a rewrite of Part 31. It operates along different lines driven by reasonableness and proportionality.

The two-year pilot, widely regarded as being one of the most significant procedural developments in English litigation after the implementation of the Jackson reforms, is now only six months away from its scheduled conclusion. It was anticipated that an interim report commenting on the relative successes and failures of the pilot would be published following a review conducted at the end of 2019 by the pilot's official monitor, Professor Rachael Mulheron of Queen Mary University. Despite Professor Mulheron completing that work, no substantive report has been published by the judiciary to date. Understandably, the 2019 novel coronavirus disease (COVID-19) pandemic has led to certain other priorities taking precedence to ensure the continuation of the justice system during the extended period of lockdown experienced in the UK. However, it is arguable that the pilot appears to have lost momentum at a critical point in its implementation.

From the outset, the pilot was described as a living pilot and it was thought that learned improvements would be suggested and even implemented throughout its life. However, there has been little in the way of considered feedback. Limited comments have been provided in the Commercial Court Report 2018-2019 (the Commercial Court report) and through the release of the minutes of the Commercial Court Users Group meeting dated 20 November 2019 (the Commercial Court minutes) (*www.judiciary.uk/wp-content/uploads/2020/02/6.6318_Commercial-Courts-Annual-Report_WEB1.pdf; www.judiciary.uk/wp-content/uploads/2020/02/Minutes-of-Comm-Ct-Users-Group-20.11.19.pdf*). However, it remains unclear what is likely to happen when the pilot concludes at the end of 2020.

This article considers each of the key features of the pilot from the point of view of both the solicitor and the electronic disclosure expert, and outlines the challenges that the pilot faces in order for it to be said that it has changed the disclosure landscape for the better.

ORIGINS OF THE PILOT

While the pilot was implemented on 1 January 2019, its origins extend back to 2015 when the then Chancellor of the High Court, Sir Terence Etherton, met with representatives of the GC100. The focus of the GC100's complaint was the disclosure regime under Part 31. The Part 31 regime was labelled as not fit for purpose for failing to deal with the scale and complexity of modern electronic disclosure and therefore leading to perceived excessive costs.

In May 2016, the Disclosure Working Group (the working group) was established. It was chaired by the then Vice President of the Civil Division of the Court of Appeal, Dame Elizabeth Gloster and comprised a range of lawyers, experts, judges, representatives of professional associations and users of the Rolls Building jurisdictions. The working group was tasked with identifying the problems associated with the Part 31 regime and proposing a practical solution (*see box "The Part 31 regime"*). Over a period of two years, the working group set about drafting the practice direction that would govern the pilot scheme. It sought various feedback and carried out a public consultation (*see Opinion "Proposals for disclosure reform: do they fit the bill?", www.practicallaw.com/w-012-8522*). In July 2018, the Civil Procedure Rule Committee approved a final version of the practice direction, which has become PD 51U.

The pilot is mandatory for existing and new proceedings in the Business and Property Courts. There are a few limited exceptions, which include public procurement, admiralty and Intellectual Property Enterprise Court proceedings, the Shorter Trials Scheme, the Flexible Trials Scheme and the fixed costs regime (*see feature article "Streamlined litigation: piloting towards shorter and flexible trials", www.practicallaw.com/5-620-0509*). The pilot is not limited to London and applies equally to the centres in Manchester, Bristol, Cardiff, Birmingham, Leeds, Newcastle and Liverpool.

Unlike many of the Jackson reforms, no transitional measures were put in place for the pilot. Therefore, at the stroke of midnight on 1 January 2019, the pilot applied to new and existing cases alike. Undoubtedly this led to some confusion around the applicability of the pilot to existing cases where an order for disclosure had already been made.

The Part 31 regime

The Disclosure Working Group (the working group) concluded after its first meeting that it was indisputable that standard disclosure often produces large amounts of wholly irrelevant documents, leading to a considerable waste of time and costs. It was also concerned that inadequate judicial resources had led, on occasion, to judges not being able to deal effectively with disclosure issues and that, absent agreement from the parties, standard disclosure under Part 31 of the Civil Procedure Rules (Part 31) had become the default position.

The working group's views were supported by the results of a survey conducted in the New Law Journal and across the London Solicitors Litigation Association. The results were conclusive:

- 70% of responses considered that the Part 31 regime was ineffective in controlling the burden and costs of disclosure.
- There was little engagement between parties on disclosure-related issues.
- There was a perceived lack of robust case management by the courts.
- The menu of disclosure options provided for under Part 31 was rarely used.
- There was insufficient use of technology.
- The focus on paper-based disclosure was unsuitable in a digital world.

The working group's overall conclusion was that, while orders for standard disclosure may be appropriate and desirable for factually complex cases, many other cases can be fairly and efficiently determined on the basis of more focused and limited disclosure. Therefore, Part 31 should be redrafted to introduce graduated models of disclosure and a new e-disclosure protocol to take account of likely developments in technology.

DISCLOSURE DUTIES

One of the first obvious differences between the pilot and the Part 31 regime is the introduction of codified disclosure duties. The disclosure duties have been a central part of the pilot from the outset. They featured in the early drafts of PD 51U and were only ever lightly amended throughout the consultation period. In broad terms, the content of these duties has been largely uncontroversial as, in one guise or another, they already existed through case law. However, these duties are now codified for all to see, as are the sanctions for failing to discharge them.

The disclosure duties

The disclosure duties extend to both parties and their legal representatives. They must:

- Take reasonable steps to preserve documents that may be relevant to any issue in the proceedings.
- Disclose known adverse documents, other than privileged documents, regardless of any order for disclosure made.
- Comply with any disclosure order.
- Search for documents in a responsible and conscientious manner.
- Act honestly when reviewing documents.
- Use reasonable efforts to avoid disclosing documents that have no relevance to the issues for disclosure.

Preserving documents. The duty to preserve documents applies as soon as a person knows that it is, or may become, party to proceedings that have commenced or may be commenced. Accordingly, a person must take reasonable steps to:

- Preserve relevant documents.

- Suspend deletion and destruction processes.

- Give relevant employees and former employees written notice identifying documents or classes of documents to be preserved.

Known adverse documents. The pilot introduced the concept of known adverse documents to correct a procedural quirk under the Part 31 regime which meant that, unless standard disclosure was ordered, which was almost always the case, parties were not necessarily under an obligation to disclose documents known to be adverse to their position. Under the pilot, parties must disclose known adverse documents. These are documents, other than privileged documents, that:

- A party is actually aware of without undertaking any further search for documents than it has already undertaken or caused to be undertaken.

- Are within its control.

- Are adverse to its case.

This duty arises once proceedings commence and persists, meaning that a party must disclose an adverse document should they become aware of it at a later stage and even after any order for disclosure has been made.

Irrelevant documents. The duty to use reasonable efforts to avoid disclosing irrelevant documents attempts to prevent the practice, which had developed under the Part 31 regime, of document dumping; in other words, disclosing a mass of irrelevant material in the hope of concealing relevant material or simply to increase the costs of review for the opposing party. While sanctions were previously available to punish this behaviour, they were rarely used. This express duty now makes the position clear.

The duties in practice

While the content of the disclosure duties has been uncontroversial, there has been some concern among practitioners in relation to when these duties apply; in particular, the duty to preserve documents. The earliest this duty can arise is when a person knows it may become a party to proceedings that may be commenced. However, to identify that point in time requires careful judgement because, as soon as it is triggered, parties must contact employees and former employees about the preservation of potentially relevant documents, and legal representatives need written confirmation that these steps have been taken. Taking this action may cause unnecessary concern if, realistically, proceedings remain a remote possibility and may also inadvertently alert third parties to the potential dispute. It is the authors' view that there is scope to temper the requirements of contacting former employees without diluting the overall duty to preserve documents.

However, the early preservation of data is undoubtedly a good thing and, when this duty was being drafted, legal technology was clearly in mind. Arguably, the best way of complying with the duty to preserve documents is to engage an e-disclosure provider at an early stage in order for it to collect and store potentially relevant data. This limits any risk that a party may fail to adequately preserve its data, which might lead to adverse inferences being drawn at a later stage.

Finding the correct method and deployment strategy to satisfy this duty and cope with large volumes of data can prove to be the challenge. This is no surprise when considering the obligations to preserve a broad range of potential evidence while, at the same time, cost-effectively review documents and produce smaller volumes of data. To bridge this gap, the use of early case assessment (ECA) techniques can be applied (*see box "ECA technology"*).

ECA technology

Early case assessment (ECA) technology and its processes enable parties to quickly assess their electronic disclosure landscape and, by deploying the right strategy, begin to identify potentially key documents, which is also useful in relation to initial disclosure.

The adoption of technology and consultancy in this way is not yet a standard consideration due to perceived additional cost. However, the ability to confidently remove irrelevant documents through advanced searching, which is one aspect of ECA, and focus on what is more likely to be relevant before embarking on a review is one way to lower the cost of the overall disclosure process. In terms of justifying how a party has approached the disclosure exercise, using ECA to refine search strategies like keyword filtering is an effective option but this is also still rarely considered, even now under the pilot.

Confusion has also arisen over the past 18 months in relation to known adverse documents and when they should be disclosed. Despite some users suggesting that initial disclosure should include known adverse documents, the working group outlined that these need not be disclosed as part of initial disclosure unless a document falls strictly within the relevant definition.

It is unclear from the drafting of PD 51U exactly when known adverse documents should be disclosed. PD 51U states that, once proceedings have commenced, a party must disclose known adverse documents unless they are privileged. However, it also provides that adverse documents that have not already been disclosed should be disclosed at the time ordered for extended disclosure or, as necessary, 60 days after the first case management conference (CMC) (*paragraphs 9.1 and 9.2, PD51U*). The working group has now clarified that there is no obligation to disclose known adverse documents before the periods specified in paragraphs 9.1 and 9.2 of PD 51U. It would be useful if this clarification could be expressly codified in PD 51U. It is the authors' view that an appropriate amendment be made even if the pilot is extended and, in any event, before any formal adoption of PD 51U.

INITIAL DISCLOSURE

The pilot requires parties to serve with their statements of claim an initial list of documents. Initial disclosure is limited to the key documents on which the party has relied, expressly or otherwise, in support of its claims or defences and the key documents that are necessary to enable

opposing parties to understand the case they have to meet. A party giving initial disclosure must serve copies of these key documents in electronic form except where they are already in the other party's possession or have already been provided.

A party giving initial disclosure is under no obligation to search for documents beyond any search it may have already undertaken for its own purposes. In addition, initial disclosure can be dispensed with if the parties so agree, or if the court so orders, or if the volume of documents exceeds 1,000 pages or 200 documents.

The feedback provided in the Commercial Court minutes noted that initial disclosure has been regarded as helpful and useful. Its adoption has been largely uncontroversial; no significant dispute has arisen in relation to it to warrant meaningful judicial consideration. At the beginning of the pilot it seemed that parties were taking advantage of the ability to forgo initial disclosure by agreement. However, initial disclosure now appears to be readily accepted as part of the process of preparing statements of case. There are two good reasons as to why this is so.

Firstly, while initial disclosure was heralded as a significant difference from the Part 31 regime, conceptually parties are already used to giving limited disclosure in accordance with the PD on Pre-action Conduct and Protocols. This requires parties to disclose key documents that are relevant to the issues in dispute before proceedings are commenced. In addition, parties have a right to inspect documents mentioned in a statement of case under CPR 31.14. The slight difference here is that, under CPR 31.14, those documents must be requested whereas, under the pilot, there is a presumption that documents referred to, expressly or otherwise, in a statement of case will be included as part of initial disclosure.

Secondly, e-disclosure experts, whether in-house or external providers, are better supporting the organisation of documents at an early stage. Providers have improved their ECA offering in this respect. The technology has got better and the pricing is more competitive, even in the past 18 months of the pilot's operation. While still underused, this technical support at the initial disclosure stage is important as parties are, eventually, required to record the searches undertaken in relation to initial disclosure in the disclosure review document (DRD).

One of the concerns raised in relation to initial disclosure in the consultation phase of the pilot was in relation to the front-loading of costs. This was a key reason why 1,000 page or 200 document limits were introduced, which was meant to represent a light touch. However, the costs of complying with initial disclosure need not be disproportionate and ECA deployed at this early stage, if used correctly, can lead to potentially significant savings at later stages of the disclosure process.

DISCLOSURE REVIEW DOCUMENT

For cases subject to the pilot, the DRD replaces both the disclosure report and the non-mandatory electronic documents questionnaire (EDQ), which remain applicable under the Part 31 regime. The DRD must be completed if at least one party seeks an order for extended disclosure.

Aim of the DRD

The DRD is the single document that parties should use to communicate with one another and with the court regarding the disclosure process. It is intended to:

- Facilitate the exchange of information between the parties and provide a framework for discussion around the initial scoping of a disclosure exercise.
- Help parties to agree a sensible and cost-effective approach to disclosure.
- Provide the court with the information it needs to make appropriate case management decisions.

The DRD should provide judges with all the information they need to make the necessary decisions in relation to disclosure at the first CMC (*see box "The three sections of the DRD"*). It is designed to limit the amount of correspondence between the parties on the issue of disclosure. The claimant must submit the document to the court. Any disagreement between the parties should be recorded in the DRD so that a judge is neither required to look at two separate documents nor to be referred to correspondence in order for the parties' positions to be explained.

The DRD in practice

The DRD has a markedly different feel to its predecessors: the disclosure report and the EDQ. It is both more descriptive and prescriptive. It genuinely feels more like a guide to the disclosure process than a simple form that parties are required to complete to comply with the CPR. In addition, there is no doubt that in order to

The three sections of the DRD

The disclosure review document (DRD) is broken into three sections.

Section 1A and 1B. The first section provides the court with a summary of the parties' positions in relation to extended disclosure by identifying the issues for disclosure. Issues for disclosure are the key issues in dispute that the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. For each issue for disclosure, the parties must record which of the five extended disclosure models is intended to be used.

Section 2. The second section of the DRD provides the court with information about the electronic data held by each party. It includes references as to how the data are stored, how the parties intend to process and search the data, and any points that have not been agreed through discussions and that the court may therefore need to determine.

Section 3. The third section contains guidance for the parties on some basic disclosure methodology. It is intended to serve as a guide to the key principles that the parties should discuss and seek to agree on concerning their approach to the collection, review and production of documents. It also serves as a framework for maintaining a record of the disclosure process at each stage.

properly complete the DRD parties should be engaging with the disclosure process sooner than they were ever likely to have done under the Part 31 regime. This is useful and, arguably, how it should be, as this ensures that the parties are properly briefed on what is required of them to comply with their disclosure duties in a timely and orderly fashion. The alternative, which happened far too often under Part 31, is that disclosure is not properly considered until the disclosure exercise needs to happen. At that point, the parties are in a rush and the reality is that this leads to a lack of co-operation, which inevitably leads to conflict.

The DRD makes clear that the pilot puts electronic data squarely at the centre of the disclosure process. While this may seem obvious now, it was not the case under the Part 31 regime, which was drafted shortly before the rapid rise in data volumes, data types and the complexities of different applications in use. As a result, the provisions governing electronic disclosure in Part 31 felt like an afterthought. The shift from hard copy to digital is significant and the DRD goes so far as requiring parties to consider how and what technology can be deployed to aid the review of electronic data. For example, if data volumes exceed 50,000 documents, parties must justify why they do not intend to use technology assisted review (TAR), given its potential for time and costs savings (*see News brief "Predictive coding: practical pointers", www.practicallaw.com/w-014-9171*). This proactive approach has been welcomed by e-disclosure specialists as their involvement at an earlier stage can lead to more efficient, cost-effective disclosure in the long term.

Contention and controversy

Despite a number of positives in favour of the DRD, it has been a hotbed of contention between parties since it was introduced. Some might argue that this is exactly what the DRD is intended to be. The parties should air their grievances, record them in the DRD and have the court decide the outcome. However, this somewhat misses the point of what the pilot is trying to achieve, which is a wholesale cultural shift and change in professional attitudes towards the disclosure process. This requires greater co-operation between the parties but, in some cases, the DRD is providing more fodder for parties to fight over. Anecdotally, the DRD has not resulted in a reduction in the amount of correspondence between the parties; if anything, it has increased. In particular, numerous letters are being sent in relation to what needs to be recorded in the list of issues for disclosure.

This increase in correspondence may, of course, be due to the process still being relatively novel and the fact that parties are simply testing the parameters. However, the Commercial Court report records something similar, noting that there has been game-playing in some cases, with parties taking tactical positions on the completion of the DRD. This is emphasised by the comments of the current Chancellor of the High Court, Sir Geoffrey Vos, in his decision in *McParland & Partners Ltd v Whitehead* (*[2020] EWHC 298 (Ch), www.practicallaw.com/w-024-5667*). Helpfully, the Chancellor stated that no advantage should be gained from a party being difficult about agreeing the list of issues for disclosure or DRD and that judges should be astute to call out parties that fail properly to co-operate, as is required under the pilot.

The Chancellor also made clear that the issues for disclosure are very different from issues for trial. The list of issues for disclosure need not be lengthy. The starting point for the identification of the issues for disclosure should, in every case, be driven by the documents that are, or are likely to be, in each party's possession. In addition, the parties need to understand that the issues for disclosure have an important function beyond the CMC. Having framed the scope of the documents to be located and reviewed by the disclosing party, they enable the review of documents to be conducted in an orderly and principled manner.

There is a question to be asked as to whether the drafting of the DRD is at fault. However, realistically, aside from perhaps some minor tweaks, the DRD is a sensible addition to the disclosure process and is focused on the practicalities. Undoubtedly, the DRD affords opportunities to score points over an opponent but this may not be in the client's best interests and is unlikely to accord with the overriding objective. In the future, for it to be said that the DRD is a positive development, the issue of game-playing needs to be tackled by the judiciary.

E-disclosure

The clear intention behind the DRD is to encourage collaboration between all of the parties involved. The past 18 months has demonstrated that the engagement of e-disclosure experts to provide support throughout this process continues to vary significantly. Understandably, practitioners grappling with the changes for the first time may consider involvement from external parties to be overkill, causing delays and additional cost. However, practitioners should be wary of ignoring the support on offer to help explain the best use of technology or, in some cases, its limitations, especially for complex matters.

The DRD requires parties to consider analytical tools and the use of TAR for cases that have substantial sources of data and where extended disclosure is sought. This represents a significant milestone in the wider acceptance of e-disclosure technology. Previously, under the Part 31 regime, despite the decision in *Pyrrho Investments Limited v MWB Property Limited* where the High Court permitted the use of predictive coding, there was limited direction as to how parties should go about agreeing a TAR protocol (*[2016] EWHC 256 (Ch); see Briefing "E-disclosure: lift off for predictive coding technology?", www.practicallaw.com/8-628-4545*).

Now, the opportunity is laid out for both parties to take advantage of TAR workflows, taking account of time limitations, costs, functionality and the defensibility of the process; that is, the ability to defend the use of TAR if challenged by the opposing party. While the technology is not new, the mandatory requirement under the pilot to consider its use and agree a protocol is new. This does, however, require parties to be proactive in their approach to the disclosure process and positively manage the complexities that can arise.

EXTENDED DISCLOSURE

Under the pilot, there is no longer an automatic right to disclosure. Instead, parties must apply for what is referred to as extended disclosure. The court will grant extended disclosure only where it is reasonable and proportionate to do so, having regard to the overriding objective of the CPR, which is to deal with cases justly and at a proportionate cost. Before the first CMC, parties must inform each other whether they intend to request extended disclosure.

Extended disclosure models

There are five different models of extended disclosure, each are more in depth than the next. Parties can agree a single model or choose different models for different issues in the case. The five disclosure models are:

- Model A: disclosure limited to known adverse documents.
- Model B: limited disclosure, which includes key documents on which a party has relied (expressly or otherwise) in support of their case and documents that are necessary to enable the other parties to understand the case against them and, additionally, known adverse documents.
- Model C: request-led search-based disclosure, which provides for the disclosure of specific documents or narrow classes of documents relating to a particular issue for disclosure, by reference to requests set out in the DRD.
- Model D: narrow search-based disclosure, with or without narrative documents. Parties are required to disclose documents that are likely to support or adversely affect their case or that of another party in relation to one or more issues for disclosure.
- Model E: wide search-based disclosure, which requires a party to disclose documents that they would have to disclose under model D but also documents that may lead to a train of inquiry which might result in the identification of other documents for disclosure.

Model trends

The Commercial Court report gave an indication as to the types of orders that were being made in relation to the disclosure models in the first six months of the pilot. Across the Business and Property Courts, in cases where a single model order is made, 53% were for model C. Where multiple orders were made, 42% were for model C and the rest either model B or D. In the Commercial Court, 80% opted for model C. In the Technology and Construction Court, model B proved popular.

Although there was a menu of different disclosure options under the Part 31 regime, in reality, only standard disclosure was used. There was a widely held belief that model D, which is analogous to standard disclosure, would continue to be used in the vast majority of cases under the pilot. However, model C appears to be being used frequently either as a standalone option or in combination with models B and D. This is possibly because the concept of model C is not a new one: it is similar to the Redfern schedule (originally devised by Alan Redfern), which is routinely used in international arbitration.

However, while the early figures may be regarded as encouraging, no figures have been released for the period beyond the first six months of the pilot. It is therefore very difficult to know if these trends are continuing or if, as more parties use the pilot, model D has begun to emerge as the default once again.

In addition, there have been some signs that perhaps the models are not being used as intended. For example, parties might be seeking multiple model C orders and thereby overcomplicating the process. The approach to choosing between disclosure models was neatly demonstrated in *McParland*, where models B, C and D were ordered in respect of the different issues for disclosure. For example, model C was suited to an issue where a vast number of documents were likely to exist but most of which would likely be irrelevant to the actual dispute; whereas model D was more suited to the central issues of breach and loss, in regard to which there was significant mistrust between the parties.

The models chosen for each issue for disclosure should simplify the process rather than complicate it. Parties should consider what documents they are likely to hold and to what issues those documents are relevant. Properly undertaking this simple step should, in theory, mean that the appropriate model is adopted without undue time and costs being expended to reach that decision (*see box "Using technology in disclosure"*).

Narrative documents

The position in relation to narrative documents has, to some extent, been misunderstood. Narrative documents are documents that are relevant only to the background or context of material facts or

Using technology in disclosure

The shift towards a greater use of technology and the early signs of a shift away from standard disclosure in all instances is encouraging. Nevertheless, whether the disclosure models require simple document organisation, such as models A and B, or more sophisticated means to search and streamline review, such as models C, D and E, there is now an abundance of innovative technologies available to help parties interrogate and review their data (*see "Extended disclosure models" in the main text*).

In fact, one of the challenges that practitioners face is navigating the sheer choice that is now available to them and understanding which solution is appropriate for which situation. That said, many of the analytical tools that help practitioners to organise and find relevant data quickly, such as email threading, near duplication detection and concept searching, have been in use long before the pilot was introduced. This gives comfort as these methods are now widely accepted and their use is rarely up for debate.

Focusing more on search-led models where forms of active machine learning (a form of technology-assisted review) assist in prioritising data by learning from reviewer decisions, means that the technology not only delivers relevant data faster, practitioners can more appropriately resource reviews of large data volumes and, ultimately, manage costs. The risk is the expectation that technology can deliver perfect results and, if not prepared and set up in the right way, it can be a costly exercise to correct. However, as was usefully indicated in *Agents' Mutual Ltd v Gascoigne Halman Ltd and another*, the court does not anticipate perfect results; nor does it expect a leave-no-stone-unturned approach to be taken (*[2019] EWHC 3104 (Ch)*). The question that parties should ask themselves under the pilot is whether a reasonable and proportionate search has been undertaken.

events and are not directly relevant to the issues for disclosure. In essence, narrative documents provide additional detail, which strictly may not be relevant to the issues but help to tell the story of the dispute within its factual matrix.

Narrative documents should not be disclosed if either model A, B or C has been ordered by the court. Under model D, an order should specify whether a party giving model D disclosure is to search for and disclose narrative documents. If the order does not specify whether narrative documents should be disclosed, it is presumed that they should not. Only under model E, which will be ordered in exceptional cases such as those dealing with issues of fraud and dishonesty, is there a presumption that narrative documents should be searched for and disclosed. The disclosure of narrative documents had become routine under the Part 31 regime but this should not be the case under the pilot and a different mindset is needed.

DISCLOSURE GUIDANCE HEARINGS

Disclosure guidance hearings were introduced under the pilot to enable parties to seek guidance from the court concerning the scope or implementation of an order for extended disclosure. They are available to parties that have made real efforts to resolve disclosure-related disputes and where guidance from the court is likely to be material.

A disclosure guidance hearing may be fixed by issuing an application notice, before or after a CMC. Disclosure guidance hearings have a maximum length of 30 minutes, with 30 minutes of reading time. There is an expectation that evidence will not be required and that the legal representative with direct responsibility for the conduct of disclosure will be the person who participates in the discussion. Typically, the guidance given by the court will be recorded in a short note but the court may, where appropriate, make an order at a disclosure guidance hearing.

The use of disclosure guidance hearings, or lack thereof, has captured the focus of the judiciary over the past 18 months. This is because parties were simply not making use of them in the early stages of the pilot. This led to the High Court expressly encouraging the use of disclosure guidance hearings (*Vannin Capital PCC v RBOS Shareholders Action Group and others [2019] EWHC 1617*).

It is unclear how many disclosure guidance hearings have taken place. The Commercial Court minutes indicated that very few parties had used them but there is some indication that they are now starting to be used. However, one of the key criticisms made against disclosure guidance hearings is the 30-minute time limit. For cases of some complexity, dealing with matters such as privilege or even new technology, this is rarely going to provide sufficient time for the issues to be considered properly. However, the 30-minute hearing length may not be set in stone despite the wording of PD 51U suggesting otherwise; for example, in *McParland* the disclosure guidance hearing was reportedly listed for one hour. Therefore, parties may be able to request a longer hearing but it is unclear what arguments for this would be acceptable and, therefore, requests risk being rejected. If it is the case that parties can request a longer hearing, this should perhaps be reflected in the wording of PD 51U.

Another criticism levied at disclosure guidance hearings is the requirement that a legal representative with direct responsibility for the conduct of disclosure is to be the person who participates in the

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discussion with the court. Inevitably, that representative is, more often than not, a more junior member of the legal team. This places a significant burden on that individual and it is likely that, in reality, parties will want counsel or a more senior member of the team to take the lead. The Commercial Court minutes note that parties are treating disclosure guidance hearings as akin to CMCs. It is easy to say that this should not be the case, but this begs the question whether parties should be criticised or even penalised for wanting a more experienced advocate in that role.

In addition, the pilot presupposes that the representative will be a legal representative. While it is likely that the court would be open to hearing from e-disclosure specialists, this still does not happen routinely despite the obvious depth of knowledge and experience among these individuals. To encourage this, it would be useful if the pilot were amended to specifically express this as an option. In the meantime, it remains to be seen how the courts will deal with this issue over the next six months and beyond.

LOOKING FORWARD

It is evident that the implementation of the pilot has not been smooth sailing. The pilot is now well past the halfway point in its official timeline but, arguably, the first several months were lost, largely as a result of confusion caused by a lack of transitional provisions for matters previously under the Part 31 regime. Even the courts struggled initially, despite a great deal of pragmatism being exhibited in early decisions; for example, in *White Winston Select Asset Funds LLC and another v Mahon and another* and *Kazakhstan Kagazy plc and others v Zhunus and others* (*[2019] EWHC 1014 (Ch); [2019] EWHC 878 (Comm)*).

However, it was not until the judgment in *UTB LLC v Sheffield United Ltd and others* was handed down on 9 April 2019 that unequivocal guidance was given confirming that the provisions of the pilot apply to cases where a disclosure order was made under Part 31, meaning that any subsequent application dealing with disclosure would be decided in accordance with the pilot (*[2019] EWHC 914 (Ch), www.practicallaw.com/w-020-5006*). It is only after this decision that the detail of the pilot has begun to be tested. This initial delay alone could warrant a short extension to the pilot.

In addition, realistically, many practitioners have not yet had to grapple with the full extent of the pilot. Some practitioners have only had cases that involved the document preservation stage: a point acknowledged in the feedback given in the Commercial Court minutes.

A further argument in favour of an extension is the position on costs. In the past 18 months, very few cases that have operated fully under the pilot will have run the full course of the litigation process. It is therefore very difficult to consider whether the pilot has reduced the costs of disclosure: a significant criticism of the Part 31 regime. The working group did a good job of reviewing the Part 31 regime before the pilot was implemented. However, given that disclosure in England and Wales is a unique selling point of conducting litigation in this jurisdiction, that same level of critique is needed of the pilot and especially of the associated costs.

It is self-evident that the cultural shift and change in professional attitudes has not come as readily as was perhaps envisaged or hoped. This has led to the court adopting a robust approach when interpreting the pilot. Every opportunity is being taken to reiterate that co-operation between the parties is expected. The repetition of this point would not be necessary if the level of co-operation that was expected was already being demonstrated. However, it cannot be disputed that the very nature of litigation is adversarial. Therefore, despite the courts not wanting parties to use the pilot as a stick with which to beat their opponents, as this conduct is unacceptable and should be met with adverse costs orders, it appears that the court may be forgoing its own carrot and picking up the stick itself. For example, the courts are applying a significant level of scrutiny when determining applications brought under the pilot. *Agents' Mutual Ltd v Gascoigne Halman Ltd and another* demonstrates this point as the High Court went to great lengths to consider whether further disclosure was reasonable, proportionate and necessary (*[2019] EWHC 3104 (Ch)*).

Without further feedback from the judiciary and the working group it is difficult to know whether the pilot has been a success. The Commercial Court minutes suggest that, if feedback is positive, there will not be a gap between the end of the pilot and the introduction of PD 51U. It was envisaged that, towards the end of 2020, the Civil Procedure Rule Committee and the Master of the Rolls would be giving serious consideration to permanent changes to reflect the pilot. It was suggested that it would be desirable to set a permanent course after the pilot, with refinements made through the Commercial Court Guide and CPR.

While that may be a sensible approach, there is a strong argument to be made that the pilot should be extended before any permanent changes are solidified. In the meantime, all parties should be vigilant about not overcomplicating the process, respecting the express duty of co-operation, and making sure that costs are monitored.

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