



5 Stone Buildings

The Disclosure Pilot

**Jordan Holland and
Rose Fetherstonhaugh**

23 April 2021

www.5sblaw.com

The Disclosure Pilot: what?

- A new(ish) disclosure regime for the Business and Property Courts
- Does not apply in the County Court (yet)
- Currently in place until 2022

The Disclosure Pilot: why?

- A new culture for disclosure? Intended to operate “*along different lines driven by reasonableness and proportionality*” *UTB LLC v Sheffield United Ltd* [2019] EWHC 914 (Ch)... *but does it*
- Designed to apply to high and low value cases equally
- Parties should avoid an “*unduly granular and complex approach to disclosure*”: *McParland & Partners Ltd v Whitehead* [2020] EWHC 298 (Ch), Vos C (now MR) at [3]-[4] and 55

The Disclosure Pilot: extent

- Applies to all Part 7 claims.
- Does not apply directly to Part 8 claims, BUT:
 - Can be applied by analogy; court will tailor as appropriate
 - See Chief Master Marsh's Disclosure Pilot Practice Note in White Book (after PD51U) and in *Ball v Ball, Westway* [2020] EWHC 1020 (Ch) para 13

Initial Disclosure: PD51U para 5

- Obligation to provide Initial Disclosure List of Documents listing and accompanied by copies of the key documents (i) relied upon in support of claims/defences advanced in SoC and (ii) necessary to enable other parties to understand case they have to meet
- *Breitenbach v Canaccord Genuity Financial Planning Ltd* [2020] EWHC 1355 (Ch)
- *Qatar v Banque Havilland SA* [2020] EWHC 1248 (Comm)

Extended disclosure: PD51U para 6

- No automatic entitlement to Extended Disclosure. Court will only make a search based order for ED where persuaded appropriate to do so to resolve one or more of the Issues for Disclosure
- No requirement for an application notice. HOWEVER, parties will be expected to complete the (fairly onerous) Disclosure Review Document (see PD51U para 10 and Appendix 2) unless an order is only sought in respect of Models A and/or B
- ED generally involves Models for Disclosure by reference to the Issues for Disclosure

Extended disclosure: PD51U para 6

- In all cases an order for Extended disclosure must be reasonable and proportionate:
 1. Nature/complexity of issues in proceedings
 2. Importance of case (including non-monetary relief)
 3. Likelihood of documents with probative value existing (undermining/supporting a party's case)
 4. Number of documents involved
 5. Ease/expense of retrieval of any particular document
 6. Financial position of each party
 7. Need to ensure case is dealt with expeditiously, fairly, at proportionate cost

What is an Issue for Disclosure?

- An “Issue for Disclosure” means *only* those “key issues” in dispute, which 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* (see PD51U para 7.3).
- Will not generally be a legal issue
- Only a pleaded issue? *Lonestar Communications Corp LLC v Kaye* [2020] EWHC 1890 (Comm) v *Revenue and Customs Commissioners v IGE USA Investments Ltd* [2020] EWHC 1716 (Ch)

Issues for Disclosure: examples

- ? Proprietary estoppel
- ? Executor removal claim
- ? Probate dispute



Disclosure models: PD51 U para 8

- Models range from A to E
 - Model D most like standard disclosure
 - Model E train of inquiry
- Possible to have different Models for different Issues for Disclosure; very tailored
- Court will no longer just make a global standard disclosure order

What happens next?

- Disclosure certificate
 - Substantially in the form of Annex 4
 - Statement (with statement of truth) that all known adverse documents have been disclosed by the party
- List of documents (unless dispensed with)
- Production of documents
 - If a document can't be produced (because no longer exists, no longer in possession of party or any other reason) must describe the document and explain circumstances when ceased to exist, left possession or other reason
 - Electronic documents in native format
 - Hard copy documents in photocopy or scanned

Failure to comply with Extended Disclosure Order

- The court may make such orders as appropriate, including:
 - Serve further/revised Disclosure Certificate
 - Undertake further steps (including more searches) to comply
 - Provide further/improved list
 - Produce documents
 - Make a witness statement explaining any matter relating to disclosure
- Party applying for order must satisfy the court it is reasonable and proportionate (same factors as para 6)
- Court can also vary at any time (party applying for variation must satisfy the court necessary for just disposal of proceedings and reasonable and proportionate)

Disclosure Guidance Hearings

- Can seek guidance of the court by way of short discussion concerning operation of the Disclosure Pilot:
 - Parties made real efforts to address between themselves
 - Requires guidance rather than a ruling
 - Maximum 30 minutes for pre-reading and 30 minutes hearing
- Legal representative with direct responsibility for conduct of disclosure to be present for each party
- Guidance to be recorded in a short note to be approved by the court. But the court can make order where appropriate
- General rule = costs in the case

Are any aspects of Part 31 preserved?

- CPR 31.16: Pre-Action Disclosure
 - Both parties likely to be parties to subsequent proceedings
 - If proceedings started documents would be caught by standard disclosure
 - Disclosure desirable (to dispose fairly of proceedings, assist dispute being resolved without proceedings or save costs)
- CPR 31.17: Third Party Disclosure
 - Documents likely to support applicant's case/adversely affect another party's case
 - Necessary in order to fairly dispose of proceedings
- CPR 31.22: Disclosed documents only to be used in those proceedings

The Disclosure Pilot: is it working?

- Does it really cut costs?
- Does it make things easier for practitioners/clients?



Any questions?





5 Stone Buildings

www.5sblaw.com

Jordan Holland
jholland@5sblaw.com
Rose Fetherstonhaugh
rfetherstonhaugh@5sblaw.com

23 April 2021