ChBA Feedback on

Draft Recommendations of the Disclosure Working Group

The Association

The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of some 1,300 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

Chancery work is that which was traditionally dealt with by the Chancery Division of the High Court of Justice, but from 2 October 2017 will be dealt with by the Business and Property Courts, which will sit in London and in five regional centres outside London.

Our members offer specialist expertise in advocacy, mediation and advisory work including across the whole spectrum of company, financial and business law. As advocates members are instructed in all courts in England and Wales, as well as abroad.

Introduction

1. Through the ChBA's involvement with the Chancery Court Users Committee the ChBA became aware earlier this year of the work of the Disclosure Working Group on a proposed replacement of Part 31 and the associated Practice Directions with a reordered and rewritten single body of rules. It appears that what is intended is a radical overhaul to change behavior and culture and reduce the burden of disclosure. The new regime is to be piloted in the Business and Property Courts next year.

2. At the meeting of the Chancery Court Users Committee meeting on 12 June 2017, Chief Master Marsh invited anyone interested in this topic to express their views to the Disclosure Working Group.

3. The ChBA is interested in this topic and accordingly this paper has been prepared to express its initial views on the draft proposals. This paper has been prepared by a small working group comprising Eason Rajah QC, Richard Morgan QC, Jonathan Gavaghan and Heather Murphy, and the paper was approved by the ChBA's Main Committee at its July meeting.

The Jackson report

4. The current CPR 31 broadly implements the recommendations of Lord Justice Jackson's Final Report. That was a report made after extensive consultation with the judiciary and practitioners.

5. In relation to large commercial cases (now in the Commercial List of the Rolls Building) Lord Justice Jackson recorded the high level of satisfaction of court users, despite the high cost. He noted being told in consultation by both practitioners and clients "of international cases which were attracted to London precisely because of the "Rolls Royce" service offered and the extensive disclosure regime"; see chapter 27 para 1.7. Nevertheless, the main costs driver in such litigation was disclosure and in particular e disclosure and the majority view of consultees, which he agreed with, was that there should be a "menu option" with no default position and with the parties and the Court forced to turn their minds to the most appropriate process to adopt to disclosure in the particular proceedings.

6. In his report he recorded the two schools of thought – one that standard disclosure, and the disclosure of materially adverse documents, is fundamental to our civil justice system, and the other that the expense of disclosure was denying access to justice and should be restricted to core documents; see Chapter 37 paras 3.3 to 3.10. There was however, no appetite amongst consultees for departure from standard disclosure in most general litigation (Chapter 27 para 2.4). His recommendation, which is implicitly striking a balance between the competing interests of justice represented by the two schools of thought, was that the menu option (i.e. no default option for

disclosure) should be applied to (a) large commercial and similar claims and (b) any case where the costs of standard disclosure are likely to be disproportionate; see Chapter 37, para 4.1.

7. It is clear from his report that Lord Justice Jackson recognised that the potentially disproportionate cost in a disclosure exercise usually comes from e disclosure. In this respect, Lord Justice Jackson made no recommendation for procedural change because of the imminent introduction of the Practice Direction Governing Electronically Stored Information; Chapter 37 para 2.5.

8. CPR Part 31 now includes the menu option (i.e. no default option for disclosure) for all non personal injury multi track cases. We observe that this went further than the focused recommendation made by Lord Justice Jackson, and it was left for the courts to strike the appropriate balance between access to justice and reaching the just result.

The proposals

9. The ChBA has been shown the documents, namely:
   a) Powerpoint presentation entitled "Rolls Building Working Group on Disclosure – Update" by Chief Master Marsh and Ed Crosse dated 27 February 2017;
   b) Draft Potential Executive Summary of the Recommendations of the (full) Disclosure Working Group as at 12.05.17;
   c) Practice Direction for the proposed pilot as at 12/05/2017; and
   d) Draft- Disclosure Review Document.

10. We understand that the documents are work in progress and that a new draft Pt 31 is in progress, as is a new Disclosure Review Document.

11. These proposals include making "Basic Disclosure" of core documents relied upon by each party as the default order for disclosure and detailed provision as to the steps to be taken by parties to assist the Court in deciding whether Extended Disclosure should be ordered. There are 5 disclosure models.

12. A significant element of the proposals, and one which causes the ChBA concern, is the absence of any duty on the party to litigation to disclose materially adverse documents unless required to do so by reason of an Extended Disclosure order. There is in the draft Practice Direction a footnote to paragraph 4.2 which suggests that it may be envisaged that a duty of some kind might be imposed on legal advisors if they are aware of materially adverse documents, but it is not clear how such a duty could exist independently of a like duty on their client, without giving rise to professional embarrassment.

The problem

13. The Disclosure Working Group came into existence as a result of concerns expressed by members of GC100 over the cost and complexity of disclosure in business cases.

14. The Disclosure Working Group has identified that standard disclosure has remained the default for most cases and the menu of alternative orders added as CPR 31.5(7) by the Jackson reforms is not widely used. What is unclear from the Disclosure Working Group papers we have seen is why this is the case. One possibility is that in more cases than may have been anticipated, the parties or the Court have recognised that justice requires standard disclosure and it is proportionate. The fact that standard disclosure is the de facto default order does not necessarily mean that CPR Part 31 is not working as it should. We observe that consultation would be helpful in shedding light on the reasons why limited disclosure is not being ordered in more cases.

15. The ChBA firmly supports the impetus to reduce unnecessary cost and complexity of disclosure. The Jackson report identified two areas in which standard disclosure should not be the default position: (a) large commercial and similar claims and (b) any case where the costs of standard disclosure are likely to be disproportionate (in most cases we anticipate that this will be because the costs of e disclosure outweigh the likely benefits).

16. The Jackson report recognised, however, that in most general litigation, standard disclosure is appropriate. In many cases:
    a) disclosure is neither costly nor complex and in any event not disproportionate, particularly where there is limited e disclosure;

b) one or other party has the advantage in terms of knowledge and documents and disclosure is required to level the playing field; or

c) there may well be materially adverse documents in the possession of the parties which the other parties are not already aware of.

17. For example, standard disclosure will usually be the appropriate order in:

a) cases in which serious misconduct, dishonesty or fraud is alleged;

b) claims for breach of trust or breach of fiduciary duty;

c) probate claims;

d) claims by or against estates;

e) professional negligence claims (disclosure is often simply made from "the file"); and

f) cases in which there is no significant e disclosure – e.g. where the parties are private individuals.

18. In a desire to meet the genuine concerns of big business, it is important not to throw the baby out with the bathwater. If evidence has been gathered, or research done, to show that standard disclosure has become problematic in areas outside those identified by the Jackson report we would be interested to see it. We observe that consultation would be helpful in shedding light on where the problems are perceived to be. At present, it is not clear what types of cases were being referred to by members of the GC100 as problematic, nor why.

19. If, for example, the problem is really one concerning large commercial disputes, then a less interventionist way in which those problems might be addressed is a new practice direction in respect of such cases encouraging Masters and Judges to use the powers they already have to restrict disclosure. If, as we anticipate, much of the problem is caused by the burden of e disclosure where the volume of data is significant, then again, a less interventionist approach would be to address that issue specifically. It is open to the parties to such litigation to seek such orders if neither believes full disclosure is necessary. We observe that as far as we can see there is nothing in what is being proposed which cannot be done under the present CPR 31.

There must be a duty to disclose adverse documents

20. Disclosure is a fundamental part of litigation in England and Wales.

21. The key reason that disclosure is so fundamental is that the concept of English justice requires every party to litigation to show the other side the documents he has which support the other party and damage his own. It is intended to ensure that an English judge makes decisions on the real facts not some hypothesis capable of being generated by selective disclosure. In our view this principle must remain at the heart of any revised disclosure regime. It would be fundamentally wrong for a party to be able to run a case to trial in the knowledge that he has undisclosed documents which undermine his case or to take advantage of the fact that he has undisclosed documents which would help his opponent in some material way. There must in our view always remain a duty on all parties to litigation to disclose materially adverse documents. A removal of that requirement would fundamentally change the concept of English justice as we understand it. The ChBA is strongly against any such change.

22. The ChBA is therefore concerned that this concept appears to be missing from three of the five models of disclosure contemplated. Models A to C referred to in the executive summary can only be appropriate if the parties agree, or the Court is satisfied to a suitable threshold, that the relevant party does not have materially adverse documents, or that the chances of such documents existing does not justify the cost of the relevant search. In our view, there should still be a duty on such parties to disclose materially adverse documents, they should certify with a Statement of Truth their belief that none exist, and be under a duty to disclose if they discover they were mistaken.

Ramifications elsewhere

23. The knowledge that there is an extensive disclosure regime under English law, including of materially adverse documents, shapes the pre disclosure approach of parties to, amongst other things:

    a) the decision whether to bring litigation in England or elsewhere, or at all[1];

[1] This "cards on the table approach to litigation" was identified by the President of the Law Society as a strength of English litigation in his remarks at the seminar "English Law, UK Courts and UK Legal Services after Brexit – Legal UK

b) pre-action conduct;

c) pleadings;

d) interim applications for further information; and

e) mediation and settlement.

Once disclosure, including the disclosure of materially adverse documents, has been made, it shapes the issues in the case, witness statements and the trial itself.

24. A radical reform to the principles of disclosure, particularly one which contemplates that there is no duty on the client to disclose materially adverse documents, has the potential for far reaching ramifications to the rest of the litigation process which needs to be thought through. There is no mention of this in any of the documents we have seen so far.

25. For example, doing away with standard disclosure as the de facto default position and replacing it with "basic disclosure" – i.e. simply of the documents on which the parties intend to rely could prove a disincentive to the choice of England and Wales as a forum for litigation. As the Jackson report observed, there is evidence that many Claimants choose to start litigation here because they wish to get standard disclosure which would not be available to them in other countries. If these changes are intended to make litigation more attractive for international forum shoppers, we fear it will not.

26. Moreover, how will parties now approach the "cards on the table" approach required by pre-action protocols and the CPR? If there is a possibility that they might not need to disclose potentially damaging documents, why would they? One can see the prospects of tactical skirmishing of a kind intended to be swept away by the Woolf reforms returning if there is now an argument to be had on the scale and scope of disclosure.

27. One can also see lawyers advising their clients not to look for relevant documents at an early stage and not to show their lawyers anything other than basic disclosure documents. Apart from the ethical issues caused by building into the CPR an encouragement to suppress documents and Nelsonian blindness, all this runs counter to the modern approach that parties should evaluate the

post 2019". This was the seminar organised by the Lord Chief Justice on 12 July 2017 for Heads of Mission/Ambassadors from around the world.

strength and weaknesses of their cases at the earliest stage so that unnecessary litigation is avoided.

28. One can also see that a party dissatisfied with the disclosure ordered is more likely to use other tools such as Requests for Further Information or specific disclosure to elicit information and documents. A sea change to the disclosure regime may therefore lead to an increase in interim skirmishing elsewhere.

29. What is to now happen on applications for injunctive and other relief where parties are under a duty to make full and frank disclosure? Are they now to be under a duty to make full and frank "basic disclosure"?

30. This is clearly not a full list of the potential ramifications. The point being made here is, to what extent has consideration been given to the ramifications of a removal of a duty to disclose materially adverse documents?

Front loading of costs

31. It is appreciated that the documents are currently in draft and are work in progress, but at present they are clearly not a simplification of Part 31 but a series of more complex and novel rules. More fundamentally they envisage a considerable increase in the pre case management conference obligations of the parties and an increase in the front loading of costs. In the case of certain large commercial disputes this may well be justified. But in a great many cases, disclosure is currently not a difficult or disproportionate exercise and such front loading is itself an unnecessary and costly exercise. This is yet another point mitigating against a radical reform of CPR Part 31 to apply to all cases, but instead a more focused approach, as recommended by the Jackson report, encouraging the use of a different procedure in those cases which could benefit from it.

Consultation

32. The ChBA expresses its surprise that there has been no formal consultation on the proposed changes, or on the pilot scheme, with those stakeholders such as the ChBA, ComBar, TecBar,

Prop Bar, PLA, PNBA and the solicitors and clients who regularly appear in the Business and Property Courts and are affected by the changes. What is proposed is a significant change, moving even further away from the focused approach recommended in the Jackson report, and engaging as it does the fundamental aspect of a duty to disclose adverse documents. It is submitted that a full consultation in advance can only be beneficial and would be expected by stakeholders.

33. The ChBA therefore believes there should be consultation on the final draft CPR Part 31 and the terms and scope of any pilot. The proposed scope of the pilot is surprisingly large: covering the entirety of the work in the Rolls Building Courts for two years and potentially some of the Business and Property Courts outside London. The ChBA believes any pilot should be targeted at those Lists which are likely to have cases which would benefit (e.g. the Business List) but not the other Lists in the Business and Property Courts. This will mean that there is less likely to be disruption to the lists generally if CMCs overrun their time estimates or have to be adjourned because of the need to deal with new arguments about the extent of disclosure. Cost budgeting caused such problems when introduced and a more restricted pilot would help identify pressure points without causing a widespread effect on the lists. It would also limit the damage done if litigants are discouraged from issuing in the Business and Property Courts because of the changes.

34. The ChBA believes that there should be further detailed consultation after any pilot.

The Chancery Bar Association

25 July 2017