Disclosure Pilot - PD51U

Introduction

The Disclosure Working Group (DWG) is seeking suggestions from members of your association on further possible changes relating to five key areas of the Disclosure Pilot in PD51U, as outlined in this paper.

The pilot has now been in operation for two years. It has been recently subject to review and a series of changes were approved by the Civil Procedure Rules Committee that will take effect on 6 April 2021. The term of the pilot has been extended to 31 December 2021.

The working assumption of this paper is that the pilot, or something similar to it, is likely to be continued in the Business and Property Courts beyond the end of 2021. No decision to that effect has yet been made. It is, however, unlikely that Part 31 will be reinstated.

The DWG is considering whether any further changes to the pilot may be needed with a view to improving the way in which it operates.

We would like to thank the Association of Professional Support Lawyers and Jeff Lewis of Brabners for the feedback already received.

The DWG is now seeking ideas and suggestions on possible further changes.

What is working satisfactorily?

Our perception from the feedback provided to the DWG to date is that there are elements of the pilot that are working satisfactorily. These include:

1. The overall structure of the pilot which brings all the rules relating to disclosure into one place rather than a rule and two Practice Directions.
2. The benefit from the pilot specifying the principles it seeks to apply and the duties of the parties and their advisers.
3. Initial disclosure. Although it was not well received at the outset of the pilot, it is now thought to be useful.
4. Disclosure Models. The use of different disclosure models is, taken in isolation, a useful replacement for the list of alternative orders for disclosure in CPR 31.5(7). Some criticism has been made about the inclusion or exclusion of narrative documents in Model D.

Are there areas where improvements could be made to the pilot or where the pilot could work more satisfactorily?

We are seeking your input at a high level. Any detailed drafting points will be dealt with in due course.

Based on the feedback received by the DWG to date, the principal areas for further consideration appear to be:

1. The pilot is thought to be too complicated for lower value claims. It is said to increase the cost of disclosure when compared with Part 31.

2. Model C requests, if used too extensively, create an additional workload and can impede an efficient review of data.

3. It is difficult to define and agree a list of issues for disclosure and the effort involved in some cases largely duplicates the effort in agreeing a list of issues for trial at the CMC stage.

4. The matching of issues for disclosure to multiple Models can involve complex matrices and be costly.

5. The pilot does not operate effectively in multi-party cases.

Possible options for change

We will discuss briefly each of these areas and suggest options for change.

A. Lower value claims

The range of work that is carried out in the Business and Property Courts is very wide both in terms of complexity and value. The DWG is not convinced that a separate regime for lower value cases is needed. The pilot (and the DRD) is designed to be operated flexibly and it should be possible to apply the regime with a light touch in simpler cases.

There is also the difficulty about where to draw the line. Should it be cases where the value at risk is below £250,000, or £500,000, or £1 million or a higher figure? If lower value is to be assessed by reference to the likely maximum cost of disclosure what figure is to be chosen? One suggestion is £10,000, or alternatively where the likely cost of disclosure is less than, say, 5% of the value at risk in the claim.

We do not consider that lower value cases should be opted out of the pilot. The premise upon which the pilot is based is that Part 31 is not fit for purpose and its provisions that require collaboration between the parties are widely ignored.

One approach might, however, be to offer within the pilot an alternative regime such as one providing for:

1. A simpler arrangement that would require issues for disclosure to be agreed (nb *McParland*) but give only Model B and Model D (non-narrative) as options.

2. A simplified DRD in straightforward cases where the volume of data held by the parties is minimal.

3. The parties would be free to agree a different approach within the pilot.

If there is an alternative approach to disclosure within the pilot it could be available as an 'opt in' for all cases where the parties agree and the court approves.

B. Model C

Our view remains that Model C is a useful element of extended disclosure if it is used as the pilot intends. This view has been confirmed in the further feedback received (particularly from solicitors) who have indicated that, where properly used, Model C has worked well and saved a lot of time and costs in disclosure.

We believe that with the recent changes to the guidance within the DRD, Model C will be used more sparingly and in a more targeted fashion in future. However, it may also assist if the definition of

Model C is adjusted to provide that it is applies to "…particular documents or a narrow class of documents…" rather than "narrow classes of documents" to emphasise that each request must be narrow and focussed.

C. Model D

The option in Model D is either to exclude or include narrative documents. Although the distinction is well-intentioned, it can result in additional work for document reviewers; trying to define what is or is not a narrative document, is not easy. One approach might be to make the distinction less prescriptive in the pilot, but instead to simply require that parties seek to exclude narrative documents where possible.

D. Lists of issues

It is uncontroversial that disclosure takes place by reference to the issues in the case that require to be proved by reference to contemporaneous documents. Part 31 did not focus on individual issues but left it to the disclosing party to assess relevance by reference to the standard disclosure test. However, whether a document helps or harms a party's case can only be assessed when the issues in the case have been analysed.

The pilot requires those issues to be agreed in advance of the CMC. This has been much criticised. The parties, even if they accept the need to act collaboratively in relation to disclosure, are wary about agreeing anything at an early stage of the claim. In many cases a tactical approach has been adopted making agreement almost impossible.

One possibility would be to remove altogether the requirement to agree issues for disclosure. Although such an amendment would be popular amongst some practitioners, we consider it would be a retrograde step. Disclosure takes place at an early point in the case. However, it should be possible to distil from the statements of case the issues that are likely to need disclosure. Those drafting issues for disclosure should have in mind that the issues for disclosure are there to assist the parties to assess relevance. The greater the degree of detail and complexity, the less help they provide.

We propose that the pilot should be amended to place greater emphasis on the need for engagement between the parties in the initial consideration of what types of documents and sources of documents there are and also what documents the opposite party is likely to have. The process should be adopt a realistic approach to what the result of the disclosure exercise are likely to be.

The pilot might also be amended to adopt the following approach:

1. To require the parties to use or adapt a list of issues for trial, where one exists, instead of starting afresh to agree a list of issues.
2. To emphasise that the list should be:
    i. as short as possible;
    ii. (as required by 7.3 of the Practice Direction) focussed on - the "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";
    iii. either agreed or after reasonable efforts to agree the list should show the areas of disagreement.

3. To emphasise that a list of issues for disclosure does not bind the parties at trial. The issues in the claim may develop or be refined as the case proceeds.

We have considered but rejected the idea of providing for a cap on the number of issues for disclosure.

E. Matching issues for disclosure to models

We consider that this process need not be too laborious if:

1. The issues for disclosure are not over-detailed or over-complex; and
2. Model C requests are confined. (Paragraph 6.5 of the Practice Direction would need to be amended if this approach were adopted).
3. Special provisions are made for multi-party cases.

F. Multi-party cases

We accept that the requirement to agree a list of issues for disclosure and complete the DRD creates real difficulties in multi-party cases where the issues between the claimant(s) and particular defendants vary widely. We consider that the provisions of the pilot should remain the default arrangement; however, the parties should be free to agree an alternative approach with the Court's permission.

Our view is that it has always been open to the court to adapt the pilot to the needs of a particular case. We accept, however, that flexibility should be made express for all claims.

The pilot could be amended to deal with the particular difficulties that arise in multi-party cases to permit the parties (or a party) to apply to the court at an early stage (possibly on issuing the claim) for an order disapplying the provisions of the pilot. If the parties are able to agree a bespoke scheme for disclosure the court may be invited to approve it at a CMC. If agreement cannot be reached, the court can be asked to rule between competing proposals. The feedback received from solicitors is that we should amend the pilot to make it clear that the parties can seek to agree an alternative approach for multi-party cases and apply for an early hearing so that bespoke orders can be made.

The professional associations may wish to consider whether the approach to disclosure in multi-party cases might be the subject of a protocol that provides a framework to be adapted to individual cases. We do not envisage that the protocol would have any formal status. It would however provide assistance both to the court and the parties when formulating proposals for a bespoke regime.

Responding to this paper

If any members of your association have any ideas or suggestions on the possible changes or other proposed solutions in response to the key areas outlined in this paper, they should provide these to the DWG **by 1 March 2021** by email to master.marsh@ejudiciary.net

5 February 2021

Sir Julian Flaux - Chancellor of the High Court

Chair of the Disclosure Working Group