

Electronic Disclosure – “DeNISTification”

Hugh Sims QC & Stefan Ramel (Guildhall Chambers)

Emma Hardy (TLT) – October 2018

Introduction

1. This paper supports the presentation that we are giving during the Guildhall Chambers Commercial Team seminar on Wednesday 24 October 2018. We have organised this paper as follows. We have firstly summarised the current CPR rules and case law on e-disclosure, before then considering the position as it is likely to apply from 1 January 2019. We then set out some practical tips for managing an electronic disclosure exercise in a document-heavy case, having regard to the likely new regime, before turning finally to set out some brief thoughts on specific disclosure requests in the light of the likely new regime. We have all made contributions to this document.

The current law

Rules

2. Electronic disclosure came to the fore in October 2004, when the working party chaired by Cresswell J reported on the topic. The report did not recommend major (or indeed any) changes to the CPR, but instead suggested the insertion of a number of paragraphs in the Commercial Court Guide dealing with electronic disclosure. In due course, they were extended, by way of amendment to the then Practice Direction to Part 31, to other civil proceedings.
3. The Cresswell report was followed, in July 2009, by the e-disclosure working party chaired by Senior Master Whittaker which proposed a new practice direction for Part 31 of the CPR, which, in October 2010, became PD31B. The draft Practice Direction was commended by Jackson LJ in his Final Report on the Review of Civil Litigation Costs in December 2009.
4. A few years later, in April 2013, the then CPR r.31.5 was amended to introduce new provisions for multi-track cases including in relation to electronic disclosure (for example, in relation to the use of Electronic Disclosure Questionnaires and Disclosure Reports). Jackson LJ has recently professed himself as being disappointed at how (un)enthusiastically and (in)effectively litigants are using the ‘new’ rules¹.
5. The rules which currently apply to the disclosure of electronic documents are as follows²:

¹ See Jackson LJ’s lecture at the Law Society’s Commercial Litigation Conference on 10 October 2016.

² Readers should be aware of the extensive and useful coverage of electronic disclosure in Chapter 7 of Matthews & Malek QC (Eds.), *Disclosure*, 2017, 5th Edition, Chapter 9 of *Documentary Evidence*, Hollander QC (Ed.), 13th Edition, 2018 and of the

- 5.1. A document for the purposes of CPR r.31.4 includes “anything in which information is recorded”. That includes, of course, Electronic Documents (as provided by PD31B para 1) such as emails, text messages, instant messages, voicemails, word processed documents and databases. It also includes, however, deleted electronic documents, metadata which exists in documents. The Practice Direction contains its own definition of “Electronic Document”, which, simply put, means “means any document held in electronic form”.
- 5.2. The Editors of *Disclosure* identify these categories of electronic documents: “Directly accessible data”, “Embedded data”, “Metadata”, “Temporary data”, “Back up data” and “Residual data” (see para. 7.09).
- 5.3. The phases of electronic disclosure are usually considered to involve (in sequential order), instruction and team selection (the team will normally involve an experience lawyer, an in-house counsel of the client, and an IT specialist), mapping, preservation, collection, search, review, disclosure and production. The authors of *Disclosure* describe the preparation of an “e-disclosure plan” as being a prudent step to take.
- 5.4. PD31B supplements Part 31 on the question of disclosure of electronic documents. It is not possible to entirely summarise the PD, and reference should be made to the PD for the rules. Nonetheless, these points can be extracted:
 - 5.4.1. Paragraph 7 imposes a clear and well-known obligation on a party’s legal representatives to drive home the importance of not deleting electronic documents, whether as part of an existing document retention policy or otherwise;
 - 5.4.2. The PD encourages (paragraph 6(2)) the use of technology for the purposes of the electronic disclosure exercise – now commonly referred to as “technology assisted review” or TAR for short;
 - 5.4.3. Documents made available by way of disclosure should be made available in a form which will enable the recipient of the disclosure to access in the same way as the party giving disclosure (paragraph 6(4)). Consideration should also be given to supplying ‘disclosure data’ – see paragraph 31.
 - 5.4.4. The PD contains procedural rules directing the parties to hold discussions in advance of the first CMC in the litigation, and also to consider the use of

Technology and Construction Court e-Disclosure Protocol, prepared in association with TeCSA, SCL, and TECBAR. That protocol is sometimes used by other courts as a template.

Electronic Disclosure Questionnaires (or “EDQs”). The scope of the discussions should include the categories of documents within a party’s control, the scope of the reasonable search, the tools and techniques for giving disclosure (including, e.g. the manner in which privileged documents will be approached),

- 5.5. A litigant who is undertaking an electronic disclosure exercise remains subject to the duty, imposed by CPR r. 31.7 to undertake a reasonable search. PD31B, however, contains some important provisions which will ‘scope’ what is a reasonable search. Those factors include, the number of documents involved, the nature and complexity of the proceedings, and the ease and expense of retrieval of any particular document, the availability of documents or the contents of documents from other sources and the significance of any document which is likely to be located during a search. Further, factors such as a date range, the identify of custodians, and the location of a document will also need to be taken into account. Key word searches are pretty much inevitable, although they are something of a blunt tool. Care of course needs to be taken in the selection of the relevant key words or combination of key words. Alternatives to key word searches include data sampling and predictive coding.
6. Further changes in the field of disclosure are imminent and deserve a brief mention here, before further consideration below. In May 2016, Sir Terence Etherton (then Chancellor of the High Court) set up a Working Group on Disclosure (“the Working Group on Disclosure” or “Working Group”). According to the Press Release published by the Working Group in July 2018, the intention is to re-draft Part 31 rather than seek to amend it in part. Indeed, in June 2018, the Working Group published a new draft Practice Direction (“the draft PD”) and has created a new template disclosure document being a “Disclosure Review Document”, which will replace the current EDQ where applicable. Subject to ministerial consent, a disclosure pilot applying the new rules will become effective from 1 January 2019, apply to new and existing cases (save those where disclosure orders have already been made), and last for a 2-year period (“the Pilot”). The Pilot will apply in Bristol³ and other Business and Property Court centres. It is considered in further detail below, after a review of recent cases, which precede the Pilot.

Recent cases

7. Next, we turn to consider and summarise four recent cases which have considered issues relating to electronic disclosure.

Pyrrho Investments Ltd & Anr v MWB Property Ltd & Ors [2016] EWHC 256 (Ch)

³ Various documents supporting the pilot, such as the Draft Practice Direction, and the draft DRD can be viewed here: <https://www.judiciary.uk/publications/announcement-that-cprc-has-approved-disclosure-pilot/>

8. *Pyrrho* is a decision dated 16 February 2016 made by HHJ Matthews (then Master Matthews) in litigation between *Pyrrho Investments Ltd* and *MWB Business Exchange Limited* as claimants, and *MWB Properly Limited* and four named individuals (who were directors of the claimant(s)). The claims had three stands. Firstly, a claim, the value of which was said to run to the tens of millions of pounds that certain payments had been made in breach of fiduciary duties. Secondly, a claim seeking to recover an unlawful dividend in the sum of around £9 million. Finally, a third group of claims concerned allegations that the defendants had caused the second claimant to enter into transactions with companies in which the defendants were secretly interested, which resulted in £28.5 million being extracted from the claimants.
9. The issue before Master Matthews concerned electronic disclosure. The claim was issued before the 'new' CPR rule 31.5 had come into effect, but after Practice Direction 31B came into effect. To give an idea of the size of the problem confronting the second claimant, Master Matthew recorded that the vast majority of electronic documents were within the control of the second claimant (e.g. the emails accounts of the director defendants). The first extraction of data generated 17.6 million files which, as a result of a process of de-duplication was reduced to 3.1 million.
10. The parties had (it seems) agreed on the use by the second claimant of 'predictive coding'⁴ for the purpose of carrying out its e-disclosure exercise. After pointing out that neither PD31B, nor the CPR itself explicitly allowed the use of predictive coding software, Master Matthews went on⁵ to explain as follows why such software should be used in *Pyrrho*:

"33. In the present case, the factors in favour of approving the use of predictive coding technology in the disclosure process seemed to me to be these:

(1) Experience in other jurisdictions, whilst so far limited, has been that predictive coding software can be useful in appropriate cases.

(2) There is no evidence to show that the use of predictive coding software leads to less accurate disclosure being given than, say, manual review alone or keyword searches and manual review combined, and indeed there is some evidence (referred to in the US and Irish cases to which I referred above) to the contrary.

⁴ He explains in the judgment, at paras. 17 to 24, the nature and meaning of 'predictive coding'. In very brief summary, proprietary software 'scores' documents for relevance according to an agreed coding protocol (which will detail matters such as the data set, data custodians, reviewers, etc...and of course, keywords). In turn, that generates a sample set of documents, which a lawyer reviews for relevance, thus enabling the software to 'learn' to score documents. The exercise is then validated, through, for example, statistical sampling.

⁵ After also referring to *Goodale v Ministry of Justice* [2009] EWHC B41 (QB) and *Digicel (St Lucia) v Cable & Wireless Plc* [2008] EWHC 2522 (Ch).

(3) Moreover, there will be greater consistency in using the computer to apply the approach of a senior lawyer towards the initial sample (as refined) to the whole document set, than in using dozens, perhaps hundreds, of lower-grade fee-earners, each seeking independently to apply the relevant criteria in relation to individual documents.

(4) There is nothing in the CPR or Practice Directions to prohibit the use of such software.

(5) The number of electronic documents which must be considered for relevance and possible disclosure in the present case is huge, over 3 million.

(6) The cost of manually searching these documents would be enormous, amounting to several million pounds at least. In my judgment, therefore, a full manual review of each document would be "unreasonable" within paragraph 25 of Practice Direction B to Part 31, at least where a suitable automated alternative exists at lower cost.

(7) The costs of using predictive coding software would depend on various factors, including importantly whether the number of documents is reduced by keyword searches, but the estimates given in this case vary between £181,988 plus monthly hosting costs of £15,717, to £469,049 plus monthly hosting costs of £20,820. This is obviously far less expensive than the full manual alternative, though of course there may be additional costs if manual reviews still need to be carried out when the software has done its best.

(8) The 'value' of the claims made in this litigation is in the tens of millions of pounds. In my judgment the estimated costs of using the software are proportionate.

(9) The trial in the present case is not until June 2017, so there would be plenty of time to consider other disclosure methods if for any reason the predictive software route turned out to be unsatisfactory.

(10) The parties have agreed on the use of the software, and also how to use it, subject only to the approval of the Court.

There were no factors of any weight pointing in the opposite direction.

11. We mention this case for information. It is a decision of Foskett J in February 2016, albeit one in which he makes clear (paragraph 4) that, given the very short period of time he had to consider his judgment, his conclusions should not be cited in any other case.
12. The claim arose out of the operation by the claimants of copper mines in Peru, namely the Tintaya mine in Espinar, and subsequently the Antapaccay mine (a few kilometres from Tintaya). In May 2012, there were community protests against the mining activities of the defendants. The defendants retained the Peruvian National Police to assist in dealing with the protests and indeed paid that force for its service. The claimants were protesters who suffered injury at the hands of the police. One of the key legal points is whether the defendants are responsible for the actions of the police force.
13. The disclosure issues which arose therefore concerned the communications internally within the defendants by senior level staff and externally with the Peruvian Police Force and others in the run up to and during the protests. At a high level of generality, the issues engaged matters of proportionality (potential total value of the claims being \$250,000 against prospective defendant costs of £5.2 million). These more detailed issues also arose, however:
 - 13.1. One issue was so-called “unique hit” documents (i.e. an email in which only one of the key words appears). The defendants proposed that, in respect of some of the key words which had, in manual reviews, shown to throw up no or few disclosable documents, “unique hit” documents could simply be ignored. The claimants accepted that argument, save in respect of four words: “protest”, “tiro”, “arresto” and “arrest”. The judge sided with the claimants.
 - 13.2. The next point of contention concerned not emails but other electronic documents. A search of the defendants’ servers revealed many thousands of such documents (e.g. one server had 122,00 files in 14,00 folders), but without a homogenous indexing / archiving system in place. The defendants produced a “directory tree” showing how many pathways would have to be explored. Their IT evidence was that no single method could be employed to computerise the search, so that a manual search would be necessary. The claimant’s evidence was to the contrary, since they were able, within a period of weeks, to narrow the scope of any search to 24,000 files. Prior to the hearing, the defendants searched some of the folders / files, and that search yielded very few disclosable documents.

- 13.3. A further issue was whether, in relation to the first defendant's custodians, only their home folders and not their shared folders should be searched. The judge sided with the defendants, and declined to order a search of shared folders.
- 13.4. There were also arguments on extending the list of search terms (as a result of documents disclosed during the exercise) and the list of custodians (for the same reason). The parties also disagreed as to whether "secretary custodians" should be included. Foskett J took the view that they should not be.

Brown v BCA Trading Ltd and others, in the matter of Tradeouts Limited [2016] EWHC 1464 (Ch)

14. Brown is a judgment of Mr Registrar Jones on a s.994 of the Companies Act 2006 petition in which the issues are described as being extremely broad. The sole issue the subject of the judgment is whether, as the respondents sought, they should be ordered to give electronic disclosure using 'predictive coding' methodology as opposed to a key word search methodology. The legal costs were starkly different: £132,000 against £25,000.
15. The Registrar put a strong emphasis, when it came to determining whether 'predictive coding' would be appropriate, on whether the parties have sought constructively to narrow the live issues (having stated, in his experience, that whilst at the start of a claim the issues will be broad, by the time of a trial, they will have narrowed considerably). He also relied upon the TCC Protocol. Making the assumption that his efforts at directing the parties to narrow the issues were successful, he took the view that 'predictive coding' was appropriate. Following *Pyrrho*, he expressed his conclusions thus:

"[9] ... I reach the conclusion based on cost that predictive coding must be the way forward. There is nothing, as yet, to suggest that predictive coding will not be able to identify the documents which would otherwise be identified through, for example, keyword search and, more importantly, with the full cost of employees/agents having to carry out extensive investigations as to whether documents should be disclosed or not. It appears from the information received from the Respondents that predictive coding will be considerably cheaper than key word disclosure."

"12. As against all of that, I understand in particular in the context of section 994 petitions that it is commonly the case for there to be suspicion or at least cautiousness between the parties. This has been raised by the Petitioner and it is almost inevitable in these sorts of "quasi-family/partnership" disputes when one party alleges exclusion

and feels wrongly excluded by the other. Predictive coding is new and there will be concern that it may not be as effective as traditional but more expensive methods.

13. However, it has to be borne in mind that the parties must do their best to achieve reasonable and proportionate results in any event. That is in their own interests and meets the overriding objective. I am also encouraged in reaching my decision by the fact that directions will cause the parties to sit down before the predictive coding begins in order to discuss the criteria to adopt and the general process of disclosure. It seems to me that is the right approach. If there are any problems, they can be identified and, of course, the parties can come back to the court for further directions.

14. Furthermore, of course, I bear in mind in this case that those discussions will be between experienced solicitors who can be relied upon to hold the reins within the context of them owing their duties as officers of the court, as well as their duties to their clients. I have absolutely no reason to have any doubt that the solicitors on both sides will do other than undertake their task in accordance with their duties and proceed properly and appropriately.

15. This endorses my decision that it is right to make an order for predictive coding disclosure at this stage, with the emphasis, both with regard to that and the nature of the disclosure, ie, standard as opposed to issue, that the parties can come back to court insofar as necessary..”

Triumph Controls UK Ltd and another company v Primus International Holding Co and other companies
[2018] EWHC 176 (TCC)

16. *Triumph* is a decision of Coulson J in the context of a claim worth \$US 65 million by the claimants against defendants arising from the sale of the defendant’s aerospace business. The claim is based on breaches of warranty, involving allegations that the defendants had failed to disclose various aspects of the business including operational failings at one of its plants. Around 6 months before the date fixed for trial, the defendants sought wide ranging orders the effect of which would have been, at first blush, for the claimants to redo their electronic disclosure exercise. In due course, the defendants narrowed the scope of their application so that it was focused on (i) obtaining sight of a list of 860,000 folders and file paths, and (ii) an order requiring the claimants to undertake a manual review of 220,000 documents which were identified as potentially

disclosable during a key word search, but which hadn't been further searched short of a limited sampling exercise.

17. The key criticisms advanced by the defendants was that, in the claimants' electronic disclosure questionnaire, they indicated that after a keyword search of the data, they would manually review the documents generated as a result. There was no reference to 'predictive coding' in the EDQ. Out of 450,000 responsive documents, the claimants disclosed 16,500, but they didn't at any stage specify that some of the documents had not been reviewed manually.
18. What became clear in due course is that, having reviewed a total of around 230,000 documents manually, with the assistance of 'predictive coding', the claimants unilaterally decided not to manually review the remaining documents. The claimants explained that they sampled 1% of the remaining 220,000 documents, which only yielded 0.38% of disclosable documents. In due course, and before the hearing of the application, the claimants disclosed some 3,000 additional documents (at least 2,000 of which would have responded to the key word search).
19. The claimants' approach came in for criticism from the judge. Indeed, he criticised them for (a) not having done what they said they would do, (b) not informing the defendants of what they were actually doing, (c) nor stating how their 'predictive coding' exercise was undertaken, (d) not stating how their sampling exercise was undertaken. The judge was also surprised at the lack of involvement of a senior lawyer in the 'predictive coding' process. As a result of all of those matters, he ordered the claimants to take further steps (including a manual search, and strict directions for the timing of that) in relation to the remaining 220,000 documents. He expressed his conclusions as follows:

"33. First, the total number of documents disclosed (16,500 originally, and 3,000 since, or about 19,500 in total) appears very modest in circumstances where 450,000 documents have been identified as being responsive to the agreed keywords. In my experience, even in an ordinary case, the percentage of disclosable documents, compared to the total of responsive documents, would tend to be larger than the 4.3% or so which the 19,500 documents represent. That potential discrepancy is even starker in the present case, which is based on a wide-ranging series of allegations as to non-disclosure in respect of many different elements of an international business. Such allegations will almost always lead to a document-heavy trial.

34. Secondly, as I have noted above, around 2,000 of the documents disclosed by the claimants subsequently (i.e. after the first list and the

first supplemental list) were responsive to the original keywords. That strongly suggests that they should have been disclosed originally. That raises a further question-mark about the adequacy of the claimants' disclosure process.

35. Thirdly, the evidence makes plain that at least some of the total of 3,000 further documents have been disclosed because they were documents that the claimants' own witnesses and experts have referred to and/or wish to rely on. Something has potentially gone wrong with disclosure when, for example, a witness of fact can remember a particular document when preparing his or her witness statement which, on the one hand, is so important that he/she wants to refer to it in their evidence but which, on the other hand, has not even been disclosed.

36. Finally, the only sampling exercise which has been done on the 220,000 documents is that which produced the 0.38% prediction. For the reasons that I have given, that figure may well not be reliable. Indeed, I consider that all the other evidence demonstrates that the 0.38% is likely to be an underestimate."

The Pilot – the likely new regime from 1 January 2019

20. As noted above, the Pilot, assuming it gains ministerial consent, proposes a new regime for disclosure. The draft rules/PD has gained most commentary for the proposals to introduce a new menu of different disclosure models (removing the default/presumption in favour of standard disclosure – Model D) and an, at least arguable, strengthening, of the obligation requiring disclosure of adverse documents. However, the draft PD is also notable for its focus on e-disclosure, and the role that e-disclosure will provide when assessing which of the disclosure models is most appropriate. Some of the key changes in the Pilot may be summarised as follows (this summary is taken from the Working Group's, with some modifications, as appropriate to this talk and reflecting the views of the authors):

Duties & principles – adverse documents

21. The duties of the parties, and of their lawyers, in relation to disclosure are expressly set out, and include: (i) a duty to cooperate so as to promote the reliable, efficient and cost-effective conduct of disclosure; and (ii) a duty to disclose known adverse documents in all cases, irrespective of whether an order to do so is made; and (iii) a rule against "data dumping" – the process by which large amounts of irrelevant data are disclosed. It is the duty to disclose adverse documents which

has been the subject of most discussion. The duty to disclose known documents that are adverse to a party's case has been (arguably) strengthened and is now wider than the obligation under Part 31, since it applies to any document known to be adverse to a party as soon as its adverse nature is known. It is at least arguable that the duty to disclose adverse documents does not exist until a disclosure order has been made under the current rules, albeit once a disclosure order has been made there is an ongoing duty of disclosure. The ongoing duty on the Defendant arises under CPR r.31.11, and as noted in the commentary in Vol 1 of The White Book at 31.12.1.1, disclosure is a continuing process and continues after trial (see the case mentioned there of *North Shore Ventures v Anstead Holdings Ltd* [2012] EWCA Civ 11 at para. 42 per Toulson LJ, and see also *Vernon v Bosley (No 2)* [1999] QB 18 where documents disclosed after trial justified re-opening the case). It might be questioned, therefore, how much of the rule changes are a significant strengthening, but this concept, and the duty on both the client and the lawyer to ensure adverse documents are disclosed is writ large in the new regime. It will be interesting to what extent it may be said it will kill off settlement discussions prompted by what is to come in disclosure.

Initial Disclosure

22. The draft PD provides that unless dispensed with by agreement or order (and subject to several other exceptions), "Initial Disclosure" will be given with statements of case of key documents which are relied on by the disclosing party and are necessary for other parties to understand the case they have to meet. On one view this might be said to reflect little more than the current disclosure obligation under CPR 31.14, to disclose documents referred to in the statements of case, though it probably goes wider than this, and ought to avoid a party being able to side-step CPR 31.14 by not expressly referring to a document in a pleading even though it is a key document they intend to rely on.
23. That said, as noted above, there are some qualifications to the concept of Initial Disclosure: The rules provide a search should not be required for Initial Disclosure, although one may be undertaken. Moreover, Initial Disclosure is not intended to be an onerous process (the draft rules suggest it should comprise no more than 200 documents or 1000 pages) and there are exceptions where it can be dispensed with entirely (where for example it may be demonstrated it will not serve any great utility). However, the idea behind Initial Disclosure is clearly that it may avoid the need for any further disclosure at all (or in part on specific issues).

List of Issues for Disclosure and the Disclosure Review Document

24. The draft rules provide that after closure of statements of case, and before the case management conference, the parties should be required to meet, discuss and complete a joint Disclosure Review Document ("DRD") to: (i) List the Issues for Disclosure in the case (those key issues in dispute which the court will need to determine with some reference to contemporaneous documents); (ii)

Exchange proposals for “Extended Disclosure” (including which Disclosure Models should apply for which issue(s)); and (iii) share information about how documents are stored and how they might (if required) be searched and reviewed (including with the assistance of technology). The List of Issues for Disclosure is likely to become an important document which will assist in the formulation of any likely disputes on e-disclosure, though it is intended to be drafted in a balanced way (and the default rule appears to be that the claimant is to have principal responsibility for it). As noted above, the DRD will replace EDQs in cases where the Pilot applies and a search-based model of Extended Disclosure is in contemplation (i.e. Models C to E – see below).

25. The DRD provides a framework for parties and their advisers to cooperate and engage prior to the first case management conference with a view to agreeing a proportionate and efficient approach to disclosure. It may be considered that this already exists within the EDQ process, but the Pilot may be said to put into a mandatory framework what is already happening in a number of cases where the EDQ process is fully followed through. A few further points on the DRD are considered below.

The Disclosure Models

26. The headline grabbing change is the idea that at the case management conference, the court should consider which of five “Extended Disclosure” models (Models A to E) is to apply to which issue, or to all issues. The models range from an order for disclosure of known adverse documents only (Model A – though arguably no such order should be required at all if the duties to disclose such documents are promptly complied with), through to the widest form of disclosure, requiring the production of documents which may lead to a train of enquiry (Model E – though this is stated to apply in only exceptional cases). Standard disclosure is fourth on the list (Model D) and the whole Pilot is drafted with the purpose of encouraging critical enquiry as to why anything is required beyond “Model A”, and if so why it should not be limited (“Model B”) or request led and restricted to searches on specific targeted issues (“Model C”). The court is thus encouraged to be proactive in directing which is the appropriate Disclosure Model and will question the Disclosure Model proposed by the parties.

Disclosure Guidance Hearing

27. A potentially useful innovation, albeit one which may be less innovative to those use to the benefits of the Circuit Commercial Court, Bristol, is the notion of a “Disclosure Guidance Hearing” to seek informal guidance from the court before or after a case management conference. These hearings are intended to an informal means of overcoming an impasse reached by the parties, and are due to take only 30 minutes pre-reading and 30 minutes oral argument. It will be interesting to see how often this tool is used and how easily the courts will be able to accommodate such hearings outside the usual run of CMCs.

The overriding objective and proportionality and the “Disclosure Duty”

28. When considering what orders to make on disclosure, the well-recognised test of reasonableness and proportionality is now applied by reference to defined criteria at paragraph 6.4 of the draft PD, which are relevant to disclosure. This test builds upon the overriding objective, and is considered further below in the context of specific disclosure.
29. In order to inform the court’s decision on Extended Disclosure, the parties are under an express “Disclosure Duty” to cooperate and engage before the case management conference so that the court can be informed: (a) of any joint view as to the Disclosure Model that should apply; and (b) of the estimated work and cost of using any Disclosure Model that is proposed by one or more of the parties.

Cost Budgeting – sensible staging

30. Where cost budgeting applies, Form H Cost Budgets in relation to disclosure will still need to be completed in the usual way unless it is not practical to do so, in which case completion of the disclosure section in Form H may be postponed until after the case management conference. This seems a sensible proviso as it is often difficult for at least one of the parties to predict quite how much disclosure will be provided and how costly it is likely to be to have to respond to disclosure as well as provide it.
31. In addition, parties will be required to give estimates of the likely costs of disclosure when filing the completed DRD in order that the question of proportionality may be considered at the CMC before an order for disclosure is made.
32. All of this suggests more work will be required before the first CMC.

Redactions

33. A common problem in document-heavy litigation is the now common use of redactions which are not properly justified, or properly explained. Good practice requires an explanation for each redaction, setting out the basis for the redaction (whether on the ground of privilege or irrelevance and confidentiality). This has been the subject of recent consideration by Snowden J in the West Ham stadium litigation (*WH Holding td & West Ham United FC Ltd v E20 Stadium LLP* [2018] EWHC 2578 (Ch)). The draft PD codifies good practice in this respect (para 16).

Sanctions

34. Finally, the practice direction sets out the range of orders and sanctions for non-compliance with the requirements of the new scheme and in particular the new duties on the parties and their advisers. These include adverse costs orders, conditional orders as well the power to deal with failure as a contempt of court in “an appropriate case”.

The DRD in a bit more detail

35. To pick out a few key provisions of the DRD, Section 2 contains a questionnaire which will deal with issues such as Data Mapping which of course includes a section on Electronic Documents. The section is extensive and thorough, requiring for example that parties specify licensed proprietary software which may not be available to the other party (e.g. Bloomberg Chat). Naturally, the questionnaire also requires identification of data Custodians, date ranges for searches, and terms for keyword searches etc...
36. It also includes a specific section on “Computer Assisted Review” (“CAR”) or “Technology Assisted Review” (“TAR”), which are based on ‘predictive coding’. TAR is specifically encouraged by the courts in cases where the number of documents in contemplation as requiring review may exceed 50,000 (Section 3, para 6(F)).
37. Paragraph 6 on the current guidance notes to Section 2 in the DRD contains the following interesting wording:

For the avoidance of doubt, if only one party considers that disclosure of certain materials is required, the other party must nevertheless state its proposals as to how the disclosure of such materials should be effected, without prejudice to its position that no order for disclosure should be made. The provision of information about the data that might be relevant to a request for Extended Disclosure shall not be treated as a concession that Extended Disclosure is appropriate.

38. On one view this might encourage a claimant to seek to justify more Extended Models of Disclosure on the basis that it will provide the claimant with more visibility of what types of documents may require disclosure since the defendant will be under an obligation to state its proposals even if it resists the type of disclosure model sought. On the other hand this may provide the well prepared defendant to explain in detail why it is considered that a more onerous extended model of disclosure is not justified.
39. Section 3 of the DRD contains detailed guidance on the expected process after an Extended Model of Disclosure has been ordered, and includes the requirement for agreeing an appropriate methodology. It provides (at para 5) that an appropriate methodology for case involving electronic

documents should always include the following: (i) collection in a format which preserves metadata (where possible), so allowing equality of access and review to disclosed documents (subject to any redaction process or requirement – see above in relation to the discussion on redaction); (ii) record keeping of each stage of the process so the methodology can be explained; and (iii) to the fullest extent possible de-duplication of data (using “hash” values of the documents).

40. Section 3 (para 7) also contains considerable detail as to what should be included on the methodology record, including: (A) identifying documents not considered at collection and why; (B) the de-duplication method applied; (C) any “DeNISTing” applied; (D) approach to non-text searchable items; (E) approach with encrypted/password protected items; (F) search terms including number of responsive documents and search term responsive documents plus “family members”; and (G) any use of concept searching, clustering, email threading, categorisation or other form of analytics or TAR.
41. In footnote 6 to para 7, “DeNISTing” is defined as “*a method of reducing the number of documents subject to lawyer or computer review by removing file types that are highly unlikely to have evidentiary value. DeNISTing is the [National Institute of Standards and Technology](#) and the process of DeNISTing is based on a list of file types maintained by the agency*”. It is not expressly recognised in the draft PD but an interesting feature that the “NIST” is an agency of the US Department of Commerce, set up to promote US innovation and competitiveness. It will be interesting to see if the UK Minister is willing to sign off a UK PD which incorporates such a list without reference or qualification. That said, the underlying concept of not having to disclose files which are themselves of no value, and therefore irrelevant, ought not to be controversial, and it would be open to a party to challenge the inclusion of any particular file type depending on the nature of the issues which arise in any particular case.

Practical tips for disclosure in document-heavy cases

Overview

42. There are five practical points to have in mind, by way of overview:
 - Consider technical options early on and understand how the technology works (at least a little).
 - How to choose the right technology and vendor.
 - Linking the Disclosure Rules Pilot with Early Case Assessment tools.
 - Parties to work together to agree methodology and record decisions.

- Resourcing the disclosure exercise and planning the review.

43. Addressing each in turn below:

44. Consider technical options early on and understand how the technology works (at least a little):

- Technology advancements are moving reviews away from the linear approach of considering each document, to a technology assisted and analytics based approach so not all documents are reviewed.
- Filtering, email threading, keywords, deNISTING, and de-duplicating are all accepted and expected practices, with the expectation that parties confer and agree methods and keywords.
- Predictive coding needs approval from the Court. Concept searches can help at the outset, and are a useful tool during the review.
- The type of claim may depend on what type of review is appropriate.

45. How to choose the right technology and vendor:

- Is a preferred vendor and platform already in place, if not, choose a platform which is user friendly and you are comfortable with.
- There are lots of IT vendors, but price should not be the only factor. You need good support and advice to manage the review. Poor advice can impact on the quality of the review, and you may end up reviewing more documents than you need to.
- Obtain estimates up front and understand the hidden costs and where those break, for example, if the data expands when it is processed.
- Spending money on the correct technology can reduce the reviewer time spent on the review, so the technology costs may increase but the reviewer costs are less as a result.

46. Linking the Disclosure Rules Pilot with Early Case Assessment tools

- Technology is encouraged under the pilot.
- Under the pilot a list of key documents should be attached to the statement of case.
- Is some form of data review early on appropriate to surface key documents quickly?
- You can review the data in its native format before uploading to a platform to have an initial take on what is there.

47. Parties to work together to agree methodology and record decisions:

- As supported in case law and under the pilot scheme the parties should agree any technology advanced methods at the outset of any exercise.

- Keep meticulous records of what has been done at each stage and how decisions were made.
- It is important that reviewers report on findings during the exercise as they surface so a decision on an approach change can be discussed early on.
- Courts are much more likely to accept disclosure methodologies when they are agreed in advance by both parties.

48. Resourcing the disclosure exercise and planning the review:

- Adapting to a more technologically advanced system will require firms to make sure senior resource is available from the start of a disclosure exercise.
- Assign a project manager to set out deadlines, track progress, review costs, deal with resourcing gaps, and pick up liaison with the IT vendor.
- Senior lawyers who have detailed knowledge of the case need to be available from the outset in order to code documents to train the system if predictive coding is being used.
- Quality control checks should be carried out on documents as soon as they are coded, so reviewers can adjust decisions early on in the review if they need to.
- Use conceptual technology to assist with checks at the end of the review.

Specific (e-)disclosure requests

49. Requests for specific disclosure arising out of an e-disclosure exercise are not governed by any special CPR rules, rather, CPR r.31.12 applies. However specific disclosure applications are often now fought in or on the e-disclosure battleground. It will also be interesting to see the extent to which the Pilot will affect specific disclosure applications in the future, with its new emphasis on a more targeted disclosure approach.
50. Paragraph 5.4 of Practice Direction 31A contains further guidance: “In deciding whether or not to make an order for specific disclosure the court will take into account all the circumstances of the case and, in particular, the overriding objective... if the court concludes that the party from whom disclosure is sought has failed adequately to comply with the obligations imposed by an order for disclosure ... the court will usually make such order as is necessary to ensure that those obligations are properly complied with”.
51. Delay in making an application for specific disclosure is very much a relevant matter: see per David Steel J in *Harris v Society of Lloyd's; Adams v Society of Lloyd's* [2008] EWHC 1433 (Comm) (paras. 5-10): “The delay described above undermines the credibility of the Claimants' protestations that, leaving aside the issue of privilege, the documents are necessary for (or even relevant to) the strike-out application.”

52. It is also necessary for the court to satisfy itself as to the relevance of the documents sought, and that they are or have been in the relevant party's control (or, at any rate, that there is a prima facie case that those requirements are met). Relevance is tested by reference to the statements of case: *Harrods Ltd v Times Newspaper Ltd* [2006] EWCA Civ 294.
53. All this is now likely to require some reconsideration and revisiting in the light of the new regime contemplated under the Pilot. As mentioned above, para 6.4 of the PD contemplates that when assessing which form of Extended Disclosure Model, if any, is to apply, the court must consider what is reasonable and proportionate having regard to the overriding objective. Specific factors which the court must take into account include the following:
- (1) the nature and complexity of the issues in the proceedings;
 - (2) the importance of the case, including any non-monetary relief sought;
 - (3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;
 - (4) the number of documents involved;
 - (5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);
 - (6) the financial position of each party; and
 - (7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.
54. This list may fairly be said to be the usual list of factors the court will be considering on a specific disclosure application. However, if the court has already considered this list of factors when assessing the type of order to make prospectively, it will be interesting to see whether it becomes more or less willing to accommodate specific disclosure applications. A party who has in mind that a specific disclosure application may be well advised to position or flag this early in the judge's mind, and ensure any disclosure order made below the Extended Disclosure Model they are seeking comes with express recognition of (i) a staging concept for disclosure and/or (ii) which allows within the timetable for a possible specific disclosure application.
55. It seems quite likely that specific disclosure applications may become less common if staged disclosure effectively provides for lesser disclosure at stage 1 and greater disclosure at stage 2, if justified, since stage 2 will effectively be the specific disclosure application.

Hugh Sims QC & Stefan Ramel (Guildhall Chambers)
Emma Hardy (TLT)

October 2018