

# Multi-track disclosure – a reminder

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# Outline

- Jackson reforms
- Disclosure procedure
- Standard disclosure
- Other options

# Jackson reforms – a reminder

- Previously, standard disclosure was the default approach in MT cases
  - Parties disclose all documents which support or undermine their own case or their opponent's
  - This often involves significant electronic search-and-sift
- The Jackson reforms sought to reduce the cost of disclosure. With effect from April 2013:
  - There is a new process for disclosure, involving greater up-front consideration and discussion
  - There are different options for disclosure, and “no presumption in favour of standard disclosure” (*Central Trading v Fioralba Shipping* [2014] EWHC 2397 at 42 (Males J)) (but contrast PD31A 1.1)

# Disclosure procedure

- The new disclosure procedure:
  - Disclosure report
  - Discussion/agreement
  - First CMC – decision of the court

# Disclosure report

- File and serve no later than 14 days before first CMC (CPR 31.5(3))
- The report must
  - Describe relevant documents which exist or may exist
  - Describe where and how those documents are stored
  - Estimate what the cost of standard disclosure would be in the circumstances
  - State the party's preferred approach to disclosure
- Form N263 (optional; query usefulness)
- If the parties exchange the EDQ, it should be filed with the disclosure report (31.5(4))

# Discussion/agreement

- Parties are required to “seek to agree” on disclosure no later than 7 days before the first CMC (31.5(5))
- Parties are also required to discuss electronic disclosure, and should submit a summary of matters agreed/not agreed, “before the first CMC” (PD31B 8, 9, 14)
- In practice, consideration and discussion will need to be done well in advance of the deadline; this is likely (for example) to inform each party’s cost budget

# First CMC

- If the parties reach agreement on disclosure, the court can make an order for the agreed disclosure without a hearing (CPR 31.5(6))
- If the parties do not agree, the judge can select from the disclosure “options” in CPR 31.5(7):
  - No disclosure
  - Disclosure of documents relied on, plus requests for specific disclosure from the other party
  - Issue-by-issue disclosure
  - Documents in support, plus “enquiry” documents leading to documents in support
  - Standard disclosure
  - Any other order

# First CMC (2)

- At the same time, the court can give directions for how its chosen “option” is to be conducted (31.5(8))
  - including
    - Kinds of search
    - Whether to use lists
    - Format
    - Stages

# Standard disclosure – the list

- First stage: disclosure by list
  - Form N265, subject to adjustment for electronic documents (PD31A 3.1; PD31B 30)
  - List must include the following (CPR 31.6):
    - Documents on which the party relies
    - Documents which adversely affect any party's case
    - Documents which support another party's case
    - Other documents as required by a PD
  - List must indicate (31.10(4)):
    - Documents offered for inspection
    - Documents privileged from inspection
    - Documents no longer in the party's control

# Standard disclosure – the list (2)

- “Documents” are defined broadly – anything which records information (e.g. text messages, things stored on back-up servers – such as deleted emails) (31.4; PD31A 2A.1)
- A party must disclose all documents which are or have been in its control (CPR 31.8)
- To find those documents, a party has obligations of reasonable search (CPR 31.7)
  - Scope of the search depends on cost, significance, nature of the proceedings, number of documents involved
  - In practice, parties will generally seek to agree the scope of searches in advance
- The list must include a “disclosure statement”, explaining searches conducted (etc) (31.10(5), (6); PD31A 4.1–4.7, Annex A)

# Standard disclosure – inspection

- Second stage: inspection
  - Other party serves written notice of wish to inspect; inspection must be allowed within 7 days of notice (31.15)
  - Possible electronically or in hard copy (in which case a party may require payment of reasonable copying costs)
  - Exceptions:
    - Documents which are no longer in a party's control (31.3(1)(a))
    - Documents which are privileged
    - Where inspection would be disproportionate (the disclosing party must make this argument in its disclosure statement) (31.3(1)(c), (2))
  - Special arrangements are possible for disclosure of confidential information

# Standard disclosure – applications

- Third stage: applications
  - Parties can apply for specific disclosure or specific inspection (31.12) – for example:
    - in order to dispute a claim of privilege
    - in order to dispute the reasonableness of searches carried out, or request further searches

# Other options for disclosure

- No disclosure
  - E.g. where parties have already exchanged material evidence in pre-action correspondence
  - Cases where, by the time of the first CMC, parties only need to exchange witness statements – perhaps some accidents (non-PI)?
- Disclosure of documents relied on, plus requests for specific disclosure from the other party
  - Similar to standard practice in small claims cases
  - Suitable for limited disputes of fact – some construction disputes?
  - Risk of missing supporting evidence

# Other options for disclosure (2)

- Issue-by-issue disclosure
  - Where the issues are factually distinct – e.g. did you fail to deliver on time; did we terminate; did we fail to mitigate?
  - Can be combined with disclosure in stages (CPR 31.5(8)), e.g. for split trials on liability and quantum. But this carries the risk that parties will not see the full picture until late in the litigation, which could cause prejudice (*RBS v Highland Financial Partners* [2013] EWCA Civ 328 at 183, Maurice Kay LJ)
  - Can capture more than just documents in support of a party's own case – so can be more akin to standard disclosure

# Other options for disclosure (3)

- Documents which enable the disclosing party “to advance its own case or to damage that of any other party”, or which lead “to an enquiry which has either of those consequences”
  - Broad approach, in that “train of enquiry” documents are included; thought to be suitable for allegations of fraud or other serious wrongdoing
  - But does not obviously require a party to disclose documents which undermine its own case
  - Seems likely to set up subsequent applications for specific disclosure

# Other options for disclosure (4)

- Standard disclosure
- Any other order
  - *Norwich Pharmacal* orders, search orders
  - Bespoke orders; an opportunity to modify other “options” to capture documents which undermine the disclosing party’s case?

# Any questions?

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