

COMMERCIAL TEAM

AUTUMN WEBINAR SERIES 2020



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Introduction

- Keynote address by HHJ Russen QC, Designated Bristol Circuit Commercial Court Judge.
- The Disclosure Pilot: charting a course through the recent case law. (Stefan Ramel & Govinder Chambay).

The Disclosure Pilot: charting a course through the recent case law.

Stefan Ramel & Govinder Chambay

Practice Direction 51U

Disclosure Pilot for the Business and Property Courts

The Disclosure Pilot (a reminder)

- The Pilot has been operating (with limited exceptions) in the Business & Property Courts since 1 January 2019.
- Initial duration was fixed at 2 years (until 31 December 2020). With effect from 1 October 2020, the Pilot has been extended for a further year (to 31 December 2021).
- A key objective of the Pilot is to embed a proportionate culture of disclosure into the litigation process.

The Disclosure Pilot (a reminder)

- The Pilot introduced a much enhanced duty of co-operation between parties' legal representatives, as well as a new procedural timetable for disclosure matters.
- Initial disclosure, to be followed by notification of intended Extended Disclosure, completion of the List of Issues for Disclosure, Completion of the DRD, Disclosure Order at the 1st CCMC (with the possibility of a Disclosure Guidance Hearing).
- The Pilot is intended to operate “*along different lines driven by reasonableness and proportionality*” (*UTB LLC v Sheffield United Ltd* [2019] EWHC 914 (Ch); [2019] 3 All E.R. 698, at [75]) per Sir Geoffrey Vos C.

Key Definitions

- **Document – CPR PD51U 2.2, 2.5, 2.6.**
 - Any record of any description containing information;
 - Paper or electronic, held by computer or on portable devices such as memory sticks or mobile phones or within databases;
 - Include emails, text messages, webmail, social media, voicemail, audio, or visual recordings or other electronic communications;
 - Information stored on servers, back-up systems and electronic info which has been deleted;
 - Metadata and other embedded data not typically visible on a screen or a printout.

Key Definitions Cont..

- **Adverse Document – CPR PD51U 2.7**
 - Any document which is or contains info which contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute.
- **Known Adverse Documents – CPR PD51U 2.8**
 - Documents (other than privileged documents) that a party is actually aware (without undertaking any further search for documents than it has already undertaken or caused to be undertaken) both (a) are or were previously within its control and (b) are adverse.
- **Disclosure Review Document – CPR PD51U 10.1**
 - The document by which the parties must identify, discuss and seek to agree the scope of any Extended Disclosure sought under Model C, D or E.

Key Definitions Cont..

- **Narrative Document – Appendix 1 to PD51U 1.11**
 - A document which is relevant only to the background or context of material facts or events, and not directly to the issues for disclosure. An adverse document is not to be treated as a narrative document.
- **Initial Disclosure CPR PD51U 5.1**
 - An initial disclosure list of documents which each party must provide to one another at the same time as its statement of case and which is accompanied by copies of:
 - **(i)** the key documents on which it has relied (expressly or otherwise) in support of the claims or defences advanced in its statement of case (and including the documents referred to in that statement of case) and
 - **(ii)** the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

Bouygues (UK) Ltd v Sharpfibre Ltd [2020] EWHC 1309 (TCC)

When Should Narrative Disclosure be ordered?



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Bouygues (UK) Ltd v Sharpfibre Ltd [2020] EWHC 1309 (TCC)

- **FACTS IN OUTLINE**

- Bouygues (UK) Ltd brought a claim against Sharpfibre Ltd alleging that cladding and insulation products which had been installed by the latter were non-compliant with building regulations and the sub-contract.
- Sharpfibre brought a contribution claim against the Architect, MP, under the Civil Liability Contribution Act 1978.

- **ISSUES**

- Sharpfibre sought narrative documents from MP.
- MP disputed the need for it to disclose narrative documents.

Bouygues (UK) Ltd v Sharpfibre Ltd [2020] EWHC 1309 (TCC), 27 May 2020

- **Decision**

- The judge (Roger ter Haar QC sitting as a Deputy High Court Judge) refused to allow disclosure of narrative documents and accepted at [40-42] that narrative disclosure should only be directed where:

(i) there is a real (as opposed to a fanciful) prospect that in connection with a particular issue a document exists which is relevant only to the background or context of material facts or events, and not directly to the Issue, but which would none the less be sufficiently important to the parties' cases that it merit searches, analysis and the other costs of disclosure;

(ii) no real likelihood that such a document will emerge as a result of the disclosure exercise in respect of any other issue.

Bouygues (UK) Ltd v Sharpfibre Ltd [2020] EWHC 1309 (TCC), 27 May 2020

- **Decision Cont...**

- The judge accepted that this was not a fraud claim which might involve “secret meetings, obscure processes or hidden participants”. With the implication being that narrative disclosure, might, in such circumstances be appropriate. Rather, the judge accepted that this was a building dispute where the court will be called upon to carry out an “objective analysis” of whether a party carried out its functions to the standard of a competent professional. The width of disclosure sought would not assist the court in determining that issue. **[41-42]**

- **Takeaway Points**

- There is now a test which practitioners should keep in mind when advising /considering whether to request narrative documents. Courts are clearly focusing on whether the type of disclosure sought is **(i)** necessary and **(ii)** whether it might otherwise be disclosed more efficiently. These are therefore key points to emphasise when resisting/seeking narrative disclosure.
- Cases involving breach of contract/tortious duties are unlikely to warrant narrative disclosure.

**Breitenbach v Canaccord Genuity
Financial Planning Limited [2020]
EWHC 1355 (Ch)**

The Scope of Initial Disclosure



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Breitenbach v Canaccord Genuity Financial Planning Limited [2020] EWHC 1355 (Ch

- **FACTS/ISSUES**

- C sought additional documents 'relating to' the Defendant's pleaded defence which C contended fell within 'initial disclosure.' This was on the basis that the documents sought were key documents which were necessary to enable C to understand the defence it had to meet.
- Strictly speaking, the key parts of the pleaded defence did not depend upon any documents to be understood.
- Were the documents sought capable of falling within the definition of initial disclosure?

Breitenbach v Canaccord Genuity Financial Planning Limited [2020] EWHC 1355 (Ch)

- **Decision**

- No. Fancourt J drew a distinction between documents which are necessary to evaluate and weigh the prospects of a defence, and those which are necessary in order to understand the defence which a claimant has to meet. In this case, the documents sought by the claimant fell within the former category, see [11-14]. Documents that relate to a pleaded defence may, however, fall within extended disclosure.

- **Takeaway Points**

- The courts are adopting a strict and literal interpretation of 'Initial Disclosure'.
- When seeking disclosure, consider closely whether the information sought is **(i)** necessary to understand a party's case; or **(ii)** to enable you to make an assessment of the merits (or lack thereof) of a party's case. It appears that only information which falls within **(i)** will fall within initial disclosure.
- Query whether this strict interpretation will stifle the extent to which claims can be settled quickly. Understanding the merits (or lack thereof) of a party's case can be an important bargaining chip.

**Castle Water Ltd v Thames Water Utilities
Ltd [2020] EWHC 1374 (TCC)**

**What obligations is a party under in
relation to known adverse
documents?**

Castle Water Ltd v Thames Water Utilities Ltd [2020] EWHC 1374 (TCC)

- **Factual Outline**

- The Claimant purchased the Defendant's non-household water and sewerage retail business. A dispute arose leading to a claim and counterclaim in the region of £40m.

- **Issues**

- What obligation is a party under to discover whether it has any known adverse documents that must be disclosed?
- What does the continuing obligation to disclose known adverse documents mean?

Castle Water Ltd v Thames Water Utilities Ltd [2020] EWHC 1374 (TCC)

- **Decision**

- Stuart Smith J confirmed the existence of an obligation to look for adverse documents of which a party is aware. Otherwise, this would ‘emasculate’ the requirement to disclose known adverse documents, PD51U 3.1(2). [11]
- The judge acknowledged CPR PD51U 2.9 which states, *inter alia*:
“For this purpose it is also necessary to take reasonable steps to check the position with any person who has had such accountability or responsibility but who has since left the company or organisation”
- The judge acknowledged that there is a difference between searches and checks and how there needs to be assurance that adverse documents would not be ignored or buried. [10-11]

Castle Water Ltd v Thames Water Utilities Ltd [2020] EWHC 1374 (TCC)

- **Decision**

- Accordingly, the judge held that: **A party is obliged to take reasonable and proportionate steps to check whether it has or has had any known adverse documents, and if so, it must undertake reasonable and proportionate steps to locate them.** [12]
- But what amounts to ‘reasonable steps to check’?..
- CPR PD51U gives no guidance..
- Necessarily a fact and context sensitive question..

BUT..

Castle Water Ltd v Thames Water Utilities Ltd [2020] EWHC 1374 (TCC)

- **At [10]**

“However, it may be asserted with some confidence that, in a case of any complexity at all or an organisation of any size, reasonable steps to check whether a company or organisation has “known adverse documents” will require more than a generalised question that fails to identify the issues to which the question and any adverse documents may relate. Similarly, it will not be sufficient simply to ask questions of the leaders or controlling mind of an organisation, unless the issue in question is irrelevant to others.”

SO...

- Specific questions which identify the issue and how any adverse documents might relate to that....AND
- Where relevant, the questions should also be directed at individuals other than those who are the leaders or controlling minds, i.e less senior individuals.

Castle Water Ltd v Thames Water Utilities Ltd [2020] EWHC 1374 (TCC)

- **Second Issue:**

- What is meant by the reference to the obligation to disclose known adverse documents being a continuing obligation?

At [13]

- Provided that the party makes appropriate checks when proceedings have been commenced, and the case is formulated by reference to the pleadings: **that should cause the party to discharge its initial obligation to disclose known adverse documents;**
- **If nothing in the litigation context changes, a party is not required to renew its checks on a continuing basis (periodically or otherwise) BUT...**

Castle Water Ltd v Thames Water Utilities Ltd [2020] EWHC 1374 (TCC)

- If the circumstances change (e.g amendment), this could raise the need for the other party to review whether it has documents that were not previously known adverse documents, **and as such it is suggested that a further check will be required.**
[13]

Castle Water Ltd v Thames Water Utilities Ltd [2020] EWHC 1374 (TCC)

- Takeaway Points:
 - A party is required to take reasonable and proportionate steps to check whether it has or has had any known adverse documents – if so, reasonable and proportionate steps have to be taken to locate them;
 - Specific questions which identify the issue and any adverse documents to which it might relate should be asked – of both the leaders and controlling mind of an organisation and where relevant, less senior individuals;
 - Unless the litigation context changes (e.g amendments) which warrants further checks, there is no need to renew checks for known adverse documents;
 - If additional known adverse documents come to a party's attention then of course these will have to be disclosed; **[40]**
 - Model C requests should avoid broad formulations such as 'any or all documents relating to' or 'regarding'. The requests should be narrower and focused on the issue for disclosure. **[27]**

***Lonestar Communications Corporation
LLC v Kaye [2020] EWHC 1890 (Comm.)
(15/07/20)***

Initial Disclosure / Model C Requests

Lonestar Communications Corporation LLC v Kaye [2020] EWHC 1890 (Comm.)

- C, a telecoms company operating in Liberia, was subjected to DDOS attacks (10/15 - 02/17).
- C alleged that the attacks were perpetrated by Mr K (D1), Mr M (D2) and Mr P (D4). C alleged that D2 & D4 were senior employees of Cellcom (D3) and / or Orange Liberia (D5).
- The claim gave rise to issues of attribution and vicarious liability. J heard a 3-day CCMC, the focus of which was principally on disclosure issues.

***Lonestar Communications Corporation LLC v Kaye* [2020]
EWHC 1890 (Comm.)**

C's only Issue for Disclosure which was disputed by D was formulated as follows:

“5(a) Prior to service of these proceedings, to what extent were Cellcom and Orange Liberia aware of the DDOS attacks on Lonestar (through Mr Marziano and/or Mr Polani and/or otherwise)?”

Lonestar Communications Corporation LLC v Kaye [2020] EWHC 1890 (Comm.)

- J summarised the applicable law (derived from *McParland*) as being:

“if the relevant issue is not a pleaded issue, an issue which emerges from the parties’ contrary cases in the pleadings, it cannot be formulated as an Issue for Disclosure.”

- C’s case did not (expressly) allege that the knowledge of any individual (other than Mr M or Mr P) was relevant.
- Issue 5(a) therefore could not stand.

Lonestar Communications Corporation LLC v Kaye [2020] EWHC 1890 (Comm.)

- C and D agreed that specific Model C requests for disclosure were appropriate. C had 55 categories of disclosure, and D had 40 categories.
- The parties were praised for working co-operatively, and narrowing the scope of areas for dispute; some such areas remained, however.
- The Court's powers, as described in the PD, are as follows:

“... The court will determine whether the request is reasonable and proportionate and may either order the disclosing party to search for the documents requested, refuse the request, or order the disclosing party to search for a narrower class of documents than that requested.”

***Lonestar Communications Corporation LLC v Kaye* [2020] EWHC 1890 (Comm.)**

“However, as to the number of documents involved, the ease and expense of searching for and retrieving any particular document, and the financial position of each party, there was little, if any, evidence before the Court which was of meaningful assistance to guide the exercise of the Court’s judgment or discretion in these respects... During the hearing, the Court was informed that the number of relevant documents involved in the disclosure exercise might count into the tens or hundreds of thousands. Thus, in this respect, other than the number being sufficiently large, there is no concrete information for the Court to consider...”

(from para. 60).

Penta Ultimate Holdings Ltd v Storrier
[2020] EWHC 2400 (Ch) (14/09/20)

**Application for further Initial
Disclosure**

Penta Ultimate Holdings Ltd v Storrier [2020] EWHC 2400 (Ch)

- The Master was hearing D's application to set aside default judgment, and for 'specific disclosure'.
- C's claim was for losses caused by D, a former officer of C, including in relation to D's preparation of statutory accounts for C2.
- The allegations and counter-allegations were detailed and complex; C had also used third party professionals to correct the accounts.
- Master Kaye was prepared to set aside the default judgment, on disclosure...

Penta Ultimate Holdings Ltd v Storrier [2020] EWHC 2400 (Ch)

- Properly construed, D's application was not for specific disclosure; rather it was based on paras. 5.11 and 5.12 of PD51U (i.e. that C's Initial Disclosure was deficient).
- Disclosure was sought of documents held by C's third-party advisers, and the communications between C and those advisers in relation to the Accounts.
- C claimed to have carried out an extensive search covering 2014-2018, and a forensic analysis of D's laptop. Despite this, C's Initial Disclosure contained just 24 documents (incl. statutory accounts, payslips, and D's employment contract).

Penta Ultimate Holdings Ltd v Storrier [2020] EWHC 2400 (Ch)

- However, in responding to D’s applications, C’s witness evidence included 380 pages of documents (albeit, as the Master pointed out, no doubt cherry-picked to show C’s case in the best light possible).
- She commented: “It is for the party seeking to persuade the court that the initial disclosure was inadequate and further early disclosure was necessary to enable it to understand the claim and to formulate its defence to set out in clear terms the narrow focussed further initial disclosure it is seeking...”

Penta Ultimate Holdings Ltd v Storrier [2020] EWHC 2400 (Ch)

- Moreover, as the Master stated:

“Even if it were possible to identify a narrow focussed class of key documents that could be argued to be necessary to either understand the claim or formulate the defence it does not necessarily mean that it would be reasonable or proportionate to order further initial disclosure...”

- In addition, she concluded that, given the volume of documents exhibited by C for the purposes of the application, it was clear that there was likely to be substantially more documentation than would have fallen due in Initial Disclosure.
- Further disclosure was therefore refused.

***AAH Pharmaceuticals Ltd v
Jhoots HealthCare Ltd***
[2020] EWHC 2524 (Comm.) (23/09/20)

Varying an order for extended disclosure

AAH Pharmaceuticals Ltd v Jhoots HealthCare Ltd [2020]

EWHC 2524

- C is a wholesaler of pharmaceuticals. By a contract between C & D, C sold pharmaceuticals to D for onward sale in D's stores.
- C claimed for unpaid goods (£1.6 million); D counterclaimed, after a set-off, for £1.3 million on the basis of a 'price-matching' clause.
- At a CCMC before Waksman J in May 2020, he ordered Extended Disclosure as per the parties' DRD.
- He left to the parties the task of agreeing: "... keywords, date ranges, custodians and such other matters of fine detail. In the event that no such agreement can be reached, the parties are to apply to the Court on paper."

AAH Pharmaceuticals Ltd v Jhoots HealthCare Ltd [2020] EWHC 2524

- C & D agreed that C had 8 custodians, and D had 7. They agreed 47 keywords. There were millions of documents to search.
- For C, there were 900,000 documents, reduced to 240,000 (keywords). For D, there were 3.8 million, reduced to 1.5 million (keywords). In each case, the volume of documents was too extensive for a manual review.
- Correspondence between the parties as to how to resolve the impasse had become unproductive (e.g. should the same keyword list be applied in relation to each disclosure issue?).

AAH Pharmaceuticals Ltd v Jhoots HealthCare Ltd [2020] EWHC 2524

- On D's application to Court, J first of all proceeded to indicate what guidance he would have given if it had been a Disclosure Guidance Hearing.
- On the issue of whether C could continue with its proposed exercise in the absence of agreement from D, the Judge ruled against C:

“The Claimants may be on the right lines by pairing search terms and using sub-groups, but they should not have refused to provide the Defendants with further information or ended the dialogue.”

AAH Pharmaceuticals Ltd v Jhoots HealthCare Ltd [2020] EWHC 2524

- Before going on to conclude:

“The Claimants concern to keep to the timetable is admirable, but proceeding unilaterally in this case has, in the event, caused both sides to spend time and money on this application which would have been better spent in conference calls sorting out the “nitty gritty”

- The judge concluded that the Pilot does not enable either side to proceed unilaterally. He declined to make any orders on D’s application, and instead, required the parties to engage in further discussions about the process. He proactively listed a Disclosure Guidance Hearing.

***Disclosure Working Group
(22 September 2020)***

Disclosure Working Group

- Professor Mulheron submitted a Third Interim Report to the DWG on 25/02/20. The DWG met in June 2020 to consider the report.
- As a result, on 22/09/20, the DWG published draft amended versions of PD51U and the DRD which are being considered by the Civil Procedure Rules Committee this month.
- Key proposed changes include simplifying the DRD, and giving parties autonomy, in simpler cases, to modify / shorten the DRD. Changes to the PD will clarify when the obligation to disclose KAD's arises.