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INTRODUCTION OF A MANDATORY DISCLOSURE PILOT FROM 1 JANUARY 2019 IN THE BUSINESS AND PROPERTY COURTS

In addition to the introduction of a completely new procedure for disclosure, with which all parties to a dispute will have to become familiar, this new regime requires all businesses to consider existing document retention and management policies and procedures to manage risk, for the purpose of future disputes.

Disputes commenced in the Business and Property Courts (which is the new umbrella term for the Commercial Court, Circuit Commercial Court, Technology & Construction Court and Chancery Division) are all, save for the Admiralty and IPEC Courts, subject to a mandatory Disclosure Pilot from 1 January 2019. The Pilot not only changes the Civil Procedure Rules, but also reflects a complete change in policy.

On a domestic level, the introduction of the Pilot is in response to the widely held view that the current regime is both expensive and burdensome. In an international context, it is part of a wider campaign to position England as the preferred jurisdiction in a post-Brexit world.

In short, under the Pilot the obligations on both legal practitioners and parties to litigation are significantly more onerous, and the changes will require issues relating to disclosure to be considered at a much earlier stage in the process, with a consequent front loading of costs. While the "*cards on the table*" approach has always been perceived as a real benefit of the English judicial system, the procedural changes will have a direct impact on the strategy of dispute resolution going forward.

Key changes that will impact your business include:

- The requirement **to immediately suspend any document deletion or destruction policies** as soon as you consider you are, or may become a party to proceedings which have been or may be commenced;
- An obligation **to notify not only current, but previous relevant employees of the need to preserve documents**;
- A requirement **to take reasonable steps to ensure that agents or third parties who hold documents on your behalf do not delete or destroy documents**;
- A requirement to **disclose some documents** known as Initial Disclosure **at the outset of the litigation**;
- A shift away from the presumption of Standard Disclosure, with **the introduction of Disclosure Models A to E** – a menu of different search and disclosure obligations. All models include an obligation to disclose "Known Adverse Documents"; a document will be known if any person with accountability or responsibility for the event or circumstance which is the subject of the case, or for the conduct of the litigation, is aware.

The changes introduced by the Pilot are not just relevant to parties who are currently in dispute, but are so wide-ranging as to require all businesses to consider whether changes are needed to:

- **Existing document retention and management policies** at a global, local, project and individual level, to ensure that relevant documents are not inadvertently destroyed;
- **Employee terms of employment and HR policies** (for example in relation to exit interviews) so as to capture and ensure the return of any business data and documentation;
- **The terms of contracts with agents and third parties**, so as to again avoid the risk of documents within your control being destroyed.

More information on the Disclosure Pilot appears below.

WHAT IS DISCLOSURE?

The process of exchanging documents which either support or undermine a party's version of events. A document matching that description is a "relevant document".

WHY DO WE HAVE IT?

So that the Court can understand the true factual position from contemporaneous records and then apply those facts to the law, ensuring the case can be decided fairly, without one side suppressing material evidence they may have that undermines their position. It is a hallmark of English litigation and considered a benefit of the jurisdiction, avoiding ambush and encouraging the fair resolution of disputes following an analysis of all relevant facts.

SOUNDS FAIR. WHAT MAKES DISCLOSURE SO DIFFICULT?

It is time consuming and therefore (occasionally, very) expensive, sometimes without any real benefit in justice terms.

WHY IS IT TIME CONSUMING AND EXPENSIVE?

Because i) "documents" has a very wide meaning, ii) currently, under what is known as "Standard Disclosure", the obligation to search for all relevant documents is extremely wide, iii) since email became the preferred means of business communication, the number of documents has increased exponentially and iv) there is a tendency for parties to suspect that the others are hiding a 'smoking gun' and so vigorously pursue any perceived discrepancies in the others' disclosure. As a result, disclosure frequently becomes contentious.

WHAT'S CHANGING?

The Jackson Reforms in 2013 were meant to herald a move away from Standard Disclosure, with the introduction of more disclosure options because of the recognised costs burden of the historic process. However in practice "standard" disclosure has remained the default position. The Disclosure Pilot is seeking to change the culture and to reduce the scope for contested applications, by forcing parties to engage with each other on disclosure at an early stage.

HOW DOES THIS AFFECT ME?

The new Disclosure Pilot is long, prescriptive and, we have to say, potentially onerous. One of the more burdensome new duties means parties owe an immediate duty to the Court to take reasonable steps to preserve documents and halt document destruction policies as soon as they know they are or may be parties to litigation. That requires them, for example, to notify both current and former relevant employees and similarly any third parties in writing that they must preserve documents on whatever systems they may be held.

The Pilot introduces new concepts of "Initial Disclosure" and "Extended Disclosure", while always requiring parties to disclose "known adverse documents" of which they are aware. Awareness is a potentially difficult issue, as a party is deemed to be aware of a document if any person with responsibility for the relevant events or circumstances knew about it, even if they have left.

Initial disclosure builds upon pre-action disclosure by requiring a party serving a statement of case to disclose up to 200 key documents or 1,000 pages (whichever is the larger) necessary to understand the case (unless the parties agree that is not necessary).

The emphasis on co-operation requires the parties to liaise to produce a Disclosure Review Document ("DRD") and try and agree which of 5 new models of disclosure ought to be used for each issue identified in the case. The DRD includes details of where documents may be held (including for example Whatsapp chats, cloud based document systems, backups etc.), document formats, custodians, analytics that could be deployed to reduce the burden of disclosure, etc. Much of this was in the previously optional Electronic Disclosure Questionnaire, but will now be mandatory, and has to be done to a strict timetable following service of the last statement of case (normally, the Reply to Defence) and before the CMC. It seems inevitable that, absent agreement, CMC's are likely to become more complex and take on even greater tactical significance. This may be alleviated to a degree by new, supposedly informal "Disclosure Guidance Hearings" intended to provide guidance on any areas of disagreement.

There are also duties imposed on parties' lawyers which mean they will have to seek formal confirmation from clients of their compliance with various duties.

WHEN DOES THIS TAKE EFFECT?

The Pilot came into force on 1 January 2019, and importantly it affects any case in which no order for disclosure was made prior to this date – so even if you are in the run up to a Case Management Conference at the beginning of the year, you should expect to have to grapple with the new regime. This is a very significant procedural change both for lawyers and all the more so for parties to a claim, who will now have to be more actively involved in the process.

As anyone who has been involved in substantial litigation will confirm, reducing the burden of disclosure is a very worthwhile aim; it remains to be seen whether the new Pilot will achieve that in its current form or whether further amendments will be necessary during the 2 years for which it will run.

HOW CAN YOU HELP ME?

It seems likely that the Pilot will initially be disruptive and, if previous initiatives are anything to go by, there will be limited judicial sympathy for parties that have not done their homework.

We have for some time been preparing an extensive suite of guidance and precedents for clients aimed at smoothing out these new processes and explaining the traps and pitfalls. However, the Pilot is very process driven with an onus on project management, and will require close co-operation between clients and lawyers to ensure compliance. We feel there are tactical advantages to be gained in getting it right at an early stage, and any client facing immediate issues or impending claims is invited to get in touch as soon as possible. Otherwise, in the case of any more general queries, please feel free to contact any of the dispute resolution specialists named below or your usual client partner to discuss the position.

We can guide you on appropriate document retention and management policies, employee terms of employment and HR policies, and terms of contracts with agents and third parties.

KEY CONTACTS

For further information about any of the issues raised in this guide, please speak to your usual Stevens & Bolton contact, or:

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The information contained in this guide is intended to be a general introductory summary of the subject matters covered only. It does not purport to be exhaustive, or to provide legal advice, and should not be used as a substitute for such advice.

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