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A brighter future?

Georgina Squire is optimistic about the process of disclosure post-Jackson

As of 1 April 2013, standard disclosure is no longer the default provision in most multi-track cases. With disclosure often being the most expensive and time consuming part of the litigation process, this should be welcome news to litigants and solicitors alike. The recent decision in *West African Gas Pipeline Company Limited v Willbros Global Holdings Inc.* [2012] EWHC 396 (TCC) highlighted the significant issues encountered in the disclosure process, especially in high value claims involving e-disclosure. The new rules aim to tackle these problems by introducing stricter case management in the disclosure process.

No longer one size fits all

It is clear from the new rules that disclosure can no longer be said to be a "one size fits all" exercise. CPR 31.5(7) provides a menu of options for disclosure. The underlying objective of any order made by the court is the need to limit disclosure to that which is necessary to deal with the case justly. Gone are the days of disclosing every document in case it may be relevant. There are now various options available to the court, which include dispensing with disclosure altogether. It is clear from the new rules that standard disclosure is no longer the default provision. Solicitors and parties to litigation must think carefully about disclosure, to ensure no costs are wasted on it.

In multi-track cases, the parties are now required to file and exchange a report relating to disclosure at least 14 days before the first case management conference (CMC). This report requires a brief description of the documents that exist or may exist and may be relevant to the matters in issue in the dispute, as well as where and with whom these documents are located. CPR 31.5(3)(d) requires parties to estimate the broad range of cost that would be involved in giving standard disclosure. The parties must then specify the order on disclosure they will be seeking at the CMC.

Agree the overriding objective

Parties are required to meet and agree a proposal in relation to disclosure that meets the overriding objective. While the rule prescribes a period of not less than seven days before the first CMC for this to be done, it makes sense to start the discussions well in advance of this date. Whether a face-to-face meeting is required is not clear. It could be argued to be disproportionate in many cases. It is certainly envisaged that there will be dialogue and compromise; parties and their representatives will be expected to give this process more than mere lip service. Disclosure can be highly contentious. Starting early will allow time for a compromise to be reached by the parties ahead of the CMC. This new rule should encourage parties to agree disclosure from the menu of options to avoid incurring costs which may not be recoverable as part of standard costs on assessment, even if successful. If parties fail to agree, or attempt to agree a proposal, it is not clear what the costs consequences will be. However, it is expected the court will make some form of order, given the overriding objective.

> *"The underlying objective of any order made by the court is the need to limit disclosure to that which is necessary to deal with the case justly"*

The new disclosure rules are a significant departure from the previous approach of "leaving no stone unturned". We are still in the first days of the Jackson Reforms and it is unclear how they will work in practice. *West African Gas Pipeline*, as well as a general fear of the unknown, may make practitioners wary of adopting them in such a way as to slash disclosure with too much enthusiasm, given the yet unknown penalties for failure to handle the process correctly.

It may prove difficult for parties to embrace the new changes. The temptation will be to fall back on standard disclosure as the preferred approach. However, all indications are that the courts will discourage this, probably by strict costs management. Form H and costs budgeting will be a vehicle for the judge to do so at the CMC. Parties may well find the judge considering the parties' Form H costs estimates for disclosure, reviewing the disclosure report and proposals of the parties and giving instruction at the CMC as to how and in what form disclosure is to take. Will this be the much heralded advent of greater judicial intervention and case management? It is hard to see how judges will be able to restrict and categorise disclosure without seeing the documents and considering the evidence and issues in the case, something that will involve far greater time commitment by the judiciary in reading in and preparing for hearings.

Doubtless the reforms will change views as to what is reasonable in terms of pre-action disclosure. It may no longer be acceptable to go on a fishing expedition for documents as part of its pre-action response to a letter of claim. Such cost could be seen as disproportionate and unjust on the facts, complexity and value of the dispute. NLJ

Disclosure post-Jackson

- Ensure pre-action disclosure requests are reasonable and proportionate to the issues in dispute.
- Consider likely scope and cost of disclosure in advance of preparing the Form H. Are the costs proportionate?
- Enter into discussions with the other party/ies to agree the scope of disclosure as soon as possible after issuing proceedings.
- Fourteen days before the first CMC: file and serve the disclosure report.
- Seven days before the first CMC: ensure you have met and, if possible, agree the scope of disclosure.

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