

Client Alert

The Disclosure Pilot Scheme: One year on

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Effective from 1 January 2019, Practice Direction 51U introduced a two-year pilot scheme (the “**Pilot Scheme**”) that changed how disclosure operates in relation to all proceedings (subject to certain exceptions) in the English Business & Property Courts (the “**Courts**”). The Pilot Scheme aims to address longstanding concerns over the substantial cost, scale and complexity of disclosure under the previous regime (CPR Part 31), in part brought about by the wide prevalence of “standard disclosure” orders.¹ The Courts have confirmed that the purpose of the Pilot Scheme is not to simply rewrite the mechanics of disclosure under the CPR Part 31 regime; rather, it is “*to effect a cultural change*” by directing disclosure specifically to defined issues in dispute and ensuring that the scope of disclosure is not wider than is reasonable and proportionate in order to resolve the issues in dispute fairly.² To this end, the Pilot Scheme crucially requires the parties “*to cooperate so as to promote the reliable, efficient and cost-effective conduct of disclosure*”.³

The Pilot Scheme is just over halfway through its pilot period and, given it appears likely to stay in force after the pilot period lapses (and indeed it is expected that CPR Part 31 may be revised accordingly in due course), its reception and application by the Courts to date warrants meaningful consideration by practitioners and (potential) litigants.

I. Background

Some of the key concepts introduced by the Pilot Scheme include the following:

1. **Known Adverse Documents:** The Pilot Scheme introduces a new concept of “Known Adverse Documents”, which are non-privileged documents that a party is actually aware both (i) are or were previously within its control and (ii) contradict or materially damage the disclosing party’s contention or version of events on an issue in dispute, or support the contention or version of events of an opposing

¹ Under CPR r. 31.6, “standard disclosure” requires a party to disclose: the documents on which it relies, the documents which adversely affect its own case or another party’s case, or support another party’s case, and the documents which it is required to disclose by a relevant practice direction.

² *UTB LLC v Sheffield United Ltd* [2019] Bus. L.R. 1500, at [75] (per Vos C).

³ *Vannin Capital PCC v RBOS Shareholders Action Group Ltd and others* [2019] EWHC 1617 (Ch), at [4] (per Joanna Smith QC).

party on an issue in dispute. The parties have an ongoing duty to disclose Known Adverse Documents regardless of any disclosure orders made.

2. New disclosure phases: The Pilot Scheme established two distinct phases of disclosure:
 - a. *Initial Disclosure*: Upon serving their statements of case (i.e. Particulars of Claim, Defence (and Counterclaim), Reply (and Defence to Counterclaim)), parties must provide electronic copies of key documents relied upon in support of claims or defences advanced, and key documents that are necessary to enable the other party to understand the claims or defences that they have to meet. Initial Disclosure does not require additional searches to be undertaken and may fall away entirely in certain circumstances (such as where the list of documents amounts to the larger of 1000 pages or 200 documents).
 - b. *Extended Disclosure*: Within 28 days of the final statement of case being served, each party must state in writing whether it is likely to request Extended Disclosure. If so, the parties must agree a "List of Issues for Disclosure", which sets out the key issues in the dispute that require reference to contemporaneous documents to be fairly determined. The Court may order a predefined "Model" of Extended Disclosure in relation to each issue on the "List of Issues for Disclosure", with these ranging from Model A (no further disclosure beyond Known Adverse Documents) to Model E (wide, searched-based disclosure). No Models apply without Court approval, and there is no presumed entitlement to the pre-Pilot Scheme default disclosure level of "standard disclosure" (now effectively Model D), or even Extended Disclosure itself. The Court will only make an order for Extended Disclosure where it is persuaded that it is "*reasonable and proportionate*"⁴ to do so, having regard to the overriding objective and in particular the factors listed at paragraph 6.4 of the Pilot Scheme.⁵
3. Applications: There are two key applications that parties might make in relation to an Extended Disclosure order:
 - a. Where one party has failed to adequately comply with an order for Extended Disclosure, another party may make an application under paragraph 17 of the Pilot Scheme for such further order as may be appropriate to ensure the defaulting party's compliance with the Extended Disclosure order (a "**Paragraph 17 Application**"). Examples of orders the Courts might make include orders requiring the defaulting party to undertake further searches, produce documents or file a witness statement explaining any matter relating to disclosure. For a Paragraph 17 Application to be successful, the applicant must satisfy the Court that making an order is "*reasonable and proportionate*".⁶
 - b. Where a party would like the Court to vary an Extended Disclosure order (such as by making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular issue on the "List of Issues for Disclosure"), the party may make an application under paragraph 18 of the Pilot Scheme for any such order (a "**Paragraph 18 Application**"). For a Paragraph 18 Application to be successful, the applicant must satisfy the Court not only that the variation is "*reasonable and proportionate*", but also that it is "*necessary for the just disposal of the proceedings*".⁷
4. Disclosure Guidance Hearings: Disclosure Guidance Hearings are short hearings⁸ that may take place before or after a case management conference. These Hearings provide the parties with an opportunity

⁴ See paragraph 6.4 of the Pilot Scheme

⁵ These factors include, for example, the nature and complexity of the issues in the proceedings, the importance of the case, the likelihood of certain documents existing that will have probative value, and the number of documents involved.

⁶ See paragraph 17.2 of the Pilot Scheme

⁷ See paragraph 18.2 of the Pilot Scheme

⁸ No more than 30 minutes in length, with no more than 30 minutes of judicial pre-reading: see paragraph 11.2 of the Pilot Scheme.

to clarify the scope of Extended Disclosure where (i) the parties have made real efforts to resolve disputes between them, and (ii) a lack of Court guidance is likely to have a material effect on the Court's ability to hold an effective case management conference or the parties' ability to carry out the Court's case management directions effectively (as applicable). An application requesting a Disclosure Guidance Hearing does not normally require evidence, and guidance may be given by the Court in the form of a short note.

II. Approach of the Courts to applying the Pilot Scheme

All the case law to date indicates that the Courts are adhering to the principles that underpin the Pilot Scheme and strictly applying the provisions therein. Below are some of the key takeaways in relation to the approach of the Courts to applying the Pilot Scheme, illustrated by examples from the case law.

(i) The Courts will seek to apply the Pilot Scheme pragmatically to disclosure orders that were made prior to 1 January 2019

In *UTB LLC v Sheffield United Ltd*,⁹ the High Court confirmed that the Pilot Scheme applied to proceedings in the Courts irrespective of any disclosure orders made prior to 1 January 2019 pursuant to CPR Part 31 (a "**Part 31 Disclosure Order**") (albeit the commencement of the Pilot Scheme did not in itself disturb any Part 31 Disclosure Orders).¹⁰ In this case, a Part 31 Disclosure Order for "standard disclosure" was in force and, in March 2019, the defendants had brought an application seeking, among other items, specific disclosure (pursuant to CPR r. 31.12) in respect of certain categories of documents.

In such circumstances, Vos C held that:

1. where an application before the Courts relates to a Part 31 Disclosure Order, the Court has jurisdiction to grant an "*equivalent*" order to that for specific disclosure under CPR r. 31.12 (which has been disapplied by the Pilot Scheme) pursuant to its general case management powers; and
2. the Courts would strive to pragmatically apply the Pilot Scheme, such as by requiring parties to agree a "List of Issues for Disclosure" to assist the Court in dealing with the application.¹¹

(ii) The Courts will expect parties to take full advantage of mechanics within the Pilot Scheme that may streamline the disclosure process, such as Disclosure Guidance Hearings

In *Vannin Capital PCC v RBOS Shareholders Action Group Limited and others*,¹² the High Court considered, amongst other things, a Paragraph 17 Application by the claimant seeking an order that the second defendants perform certain further searches to ensure compliance with the Extended Disclosure order.

When dealing with the Paragraph 17 application, the judge highlighted the importance of Disclosure Guidance Hearings. He noted that "[w]hilst applications to vary an order for Extended Disclosure [i.e. Paragraph 18 Applications] do not appear to be contemplated as suitable for Disclosure Guidance Hearings, applications concerning the scope of Extended Disclosure expressly fall within that provision." On that basis, the deputy judge criticised the parties for not seeking a Disclosure Guidance Hearing in relation to the scope of the Extended Disclosure order and for instead filing lengthy skeleton arguments and submissions in respect of the order's scope pursuant to the Paragraph 17 Application; a Disclosure Guidance Hearing might well have caused the scope issue to fall away, thereby saving time and costs.

⁹ [2019] Bus. L.R. 1500

¹⁰ [2019] Bus. L.R. 1500, at [16–18, 23–24] (per Vos C).

¹¹ *Ibid.*, at [12–24] (per Vos C).

¹² [2019] EWHC 1617 (Ch)

Indeed, circumstances where parties had amply explored their differing positions in relation to the scope of an Extended Disclosure order were “*just the sort of situation*” in which such a Hearing should be utilised.¹³

(iii) The tests associated with Paragraph 17 Applications and Paragraph 18 Applications are high threshold tests

In *Agents’ Mutual Ltd v Gascoigne Halman Ltd t/a Gascoigne Halman and others*,¹⁴ the High Court scrutinised and rejected a claimant’s Paragraph 18 Application seeking (i) the disclosure of specific documents and/or classes of documents, and (ii) the performance by the defendants of certain new electronic searches of the “universe” of documents held by the defendants.¹⁵

First, the judge dismissed the Paragraph 18 Application to the extent it sought the disclosure of specific documents and/or specific classes of documents as being misconceived, given the requested items did not go to relevant issues on the pleadings (and so could not be considered reasonable and proportionate).¹⁶

Second, the judge rejected the claimant’s Paragraph 18 Application to the extent it sought the performance of further electronic searches. The claimant’s evidence in support of the application contended that there had been “*a number of serious deficiencies*” in the defendants’ approach to disclosure pursuant to the Extended Disclosure order,¹⁷ but the judge dismissed these as follows:

1. Too few documents produced by the defendants: The judge held that the fact that only 95 documents were produced by the defendants was not itself a defect. On the facts, this was not a case where it was so obvious that the documents sought must exist and it was entirely possible that there were actually very few documents relevant to the issues between the parties.¹⁸
2. Inadequate search parameters deployed: The judge held that the claimant’s argument that the searches were too narrow to properly ensure the capture of all relevant documents misunderstood the purpose of electronic keyword searches, which was in fact to reduce an unmanageable “universe” of documents to one susceptible to manual search. The judge confirmed that it was accordingly immaterial whether some relevant documents may have been missed; the correct question was whether a reasonable and proportionate search had been undertaken.¹⁹

(iv) The Courts will impose the more onerous test associated with Paragraph 18 Applications on any applications relating to disclosure brought close to the date of trial

In *Ventra Investments Limited v Bank of Scotland Plc*,²⁰ close to the date of trial, the claimant sought the disclosure of certain documents relating to its claims. The basis of the application was disputed; while the claimant submitted that it was a Paragraph 17 Application consequent on the defendant’s failure to comply with (what the court treated as) an Extended Disclosure Order, the defendant contended it should be treated as a Paragraph 18 Application to vary the Extended Disclosure Order.²¹

The deputy judge did not expressly decide the true basis of the disclosure application as the documents sought were found not to be in the control of the defendant. However, he held that, on either basis, the practical reality was that any order for disclosure so close to the date of trial would either require the trial date to be vacated, or would add to the “*already extensive burden*” of trial preparatory work in the limited period left prior to that date. In light of that, the deputy judge held that in no circumstances could it be

¹³ *Ibid.*, at [4] (per Joanna Smith QC).

¹⁴ [2019] EWHC 3104 (Ch).

¹⁵ *Ibid.*, at [3–4, 5, 8] (per Marcus Smith J).

¹⁶ *Ibid.*, at [6–8] (per Marcus Smith J).

¹⁷ *Ibid.*, at [12] (per Marcus Smith J).

¹⁸ *Ibid.*, at [13] (per Marcus Smith J).

¹⁹ *Ibid.*

²⁰ [2019] EWHC 2058 (Comm).

²¹ *Ibid.*, at [31, 34] (per Salter QC).

reasonable and proportionate for him to issue any disclosure order, unless such an order was necessary for the just disposal of the proceedings.²²

(v) Do not assume that the Court will always admit Known Adverse Documents as evidence

In *Bin Obaid and others v Al-Hezaimi and others*,²³ the Court considered an application relating to certain alleged Known Adverse Documents.

During the lead-up to trial, the defendants received confidential bank statements belonging to one of the claimants (Mr Bin Obaid) from an anonymous source.²⁴ The claimants had not previously disclosed the documents as they fell outside the scope of the original Part 31 Disclosure Order.²⁵ The defendants did not notify the claimants that they had received these confidential documents and a number of weeks after receipt exhibited the bank statements to a witness statement that was exchanged close to the date set for trial.²⁶

There was an argument as to whether the defendants were permitted to rely on this evidence. The claimants argued that, in the circumstances, a duty of confidence required the defendants to return the documents and not make use of them. Conversely, the defendants contended that the documents strongly supported their case, making them Known Adverse Documents that the claimants would have been required to disclose in any event pursuant to the provisions of the Pilot Scheme.²⁷

The judge decided to exclude the new evidence “*mainly on the basis of procedural fairness*”.²⁸ In considering a variety of factors that pointed to admission of the evidence being procedurally unfair (such as the unacceptable delay between the defendants’ receipt and production of the bank statements), it is notable that the judge appeared to consider the standard applied to Paragraph 18 Applications to be a relevant factor, despite the fact one had not actually been made.²⁹ The judge emphasised that the overall approach of the Pilot Scheme was to require disclosure not to be wider than is reasonable and proportionate to resolve the issues in dispute, and the key aim was to achieve a fair resolution. Avoiding ambush and allowing parties a proper opportunity to respond to allegations, the judge held, were both important factors in ensuring a fair resolution.³⁰

III. Comment

One year on from its introduction, it is clear that the Courts view the Pilot Scheme as having ushered in an entirely new approach to disclosure. In this new era, reasonableness, proportionality and co-operation between the parties are each fundamental tenets that must drive a disclosure process focused on only those documents necessary to resolve the defined issues in dispute.

As the Pilot Scheme has at least one more year to run, the future guidance of the Courts in relation to its operation will remain a topic of interest for practitioners and (potential) litigants.

²² *Ibid.*, at [35] (per Salter QC).

²³ [2019] EWHC 1953 (Ch).

²⁴ *Ibid.*, at [4] (per Falk J).

²⁵ *Ibid.*, at [34] (per Falk J).

²⁶ *Ibid.*, at [2–4] (per Falk J).

²⁷ *Ibid.*, at [23–25] (per Falk J).

²⁸ *Ibid.*, at [28] (per Falk J).

²⁹ *Ibid.*, at [28–37] (per Falk J).

³⁰ *Ibid.*, at [43–44] (per Falk J).

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