

Client Alert

The Disclosure Pilot Scheme: An Update on the Key Disclosure Concepts

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Effective since 1 January 2019, CPR Practice Direction 51U introduced a pilot scheme (the “**Pilot Scheme**”) changing the operation of disclosure in relation to all proceedings in the English Business & Property Courts (the “**Courts**”) (subject to certain exceptions).¹

In an earlier client alert, we explored how the Courts had applied certain of the new concepts introduced by the Pilot Scheme during its first year of operation.² This client alert provides a refresher on these concepts and analyses how the Courts have applied them in two significant decisions since our earlier client alert: (i) *McParland and Partners Ltd v Whitehead*;³ and (ii) *The Commissioners for Her Majesty’s Revenue and Customs v IGE USA Investments Ltd*.⁴

Pilot Scheme concepts

The Pilot Scheme established two distinct phases of disclosure:

- **Initial Disclosure:** When serving their statements of case, parties must provide electronic copies of the key documents relied on in support of their pleaded claims or defences, together with the key documents necessary to enable the other party to understand the claims or defences they have to meet. Initial Disclosure does not require a party to undertake any searches in order to identify responsive documents and may fall away entirely in certain circumstances.
- **Extended Disclosure:** The Pilot Scheme introduced five pre-defined Extended Disclosure “*models*” labelled A to E (the “**Models**”). Models C to E are more onerous as they require (to varying degrees) the parties to undertake searches in order to identify responsive documents.⁵

¹ The operation of the Pilot Scheme has now been extended to 31 December 2021.

² Milbank LLP, “*The Disclosure Pilot Scheme: One year on*”, 28 February 2020

(<https://www.milbank.com/images/content/1/2/v4/127338/Litigation-Client-Alert-The-Disclosure-Pilot-Scheme-Feb-2020-481.pdf>).

³ [2020] EWHC 298 (Ch).

⁴ [2020] EWHC 1716 (Ch).

⁵ By way of refresher: Model C involves one party making targeted requests for particular documents or narrow classes of documents in another party’s possession relating to a given Issue for Disclosure; Model D involves narrow search-based disclosure (in effect, “standard disclosure” under CPR r.31.6); and Model E involves wide

- a. Within 28 days of the final statement of case being served, each party must state in writing whether it is likely to request Models C, D and/or E. If so, ahead of a case management conference (a “**CMC**”), the parties must seek to agree a “*List of Issues for Disclosure*”.⁶
- b. Paragraph 7.3 of the Pilot Scheme defines “*Issues for Disclosure*” as “*only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings.*”
- c. The parties must also seek to agree which Model should apply to each Issue for Disclosure in the List of Issues for Disclosure. Any disagreement in relation to the Issues for Disclosure and/or the Models that should apply will be resolved by the Court at the CMC.
- d. The Court will only make an order for Extended Disclosure where it is persuaded that it is “*reasonable and proportionate*” to do so,⁷ having regard to the overriding objective and the factors listed in paragraph 6.4 of the Pilot Scheme.⁸

The Pilot Scheme provides for certain applications in relation to an order for Extended Disclosure:

- Where one party has failed adequately to 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 (for example, an order to undertake further or more extensive searches) to ensure the defaulting party’s compliance with the order for Extended Disclosure (a “**Paragraph 17 Application**”). For a Paragraph 17 Application to be successful, the Court must be satisfied that making such an order is “*reasonable and proportionate*”.⁹
- Where a party wishes the Court to vary an order for Extended Disclosure (for example, by making an additional order for the disclosure of specific documents relating to a particular Issue for Disclosure), that party may make an application under paragraph 18 of the Pilot Scheme (a “**Paragraph 18 Application**”). For a Paragraph 18 Application to be successful, the Court must be satisfied that varying the order would be “*necessary for the just disposal of the proceedings and is reasonable and proportionate*”.¹⁰
- Further, effective since 6 April 2021, the Pilot Scheme has been amended to include (among other things) a new provision pursuant to which a party may apply to Court for an order giving directions about any aspect of search-based disclosure under Models C, D and E (including directions about the scope of searches, the manner in which searches are to be carried out and the use of technology).¹¹ This provision is stated to operate without prejudice to paragraph 11 of the Pilot Scheme, by which parties may seek guidance from the Court at a brief hearing in relation to any point concerning the Pilot Scheme in a particular case (a “**Disclosure Guidance Hearing**”).

search-based disclosure (in effect, *Peruvian Guano* disclosure under CPR PD 31A 5.5(1)): see Pilot Scheme, para. 8.3.

⁶ See Pilot Scheme, para. 7.2. There is, therefore, no need for a List of Issues for Disclosure to be agreed where only Models A or B are sought.

⁷ See Pilot Scheme, para. 6.4.

⁸ 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.

⁹ See Pilot Scheme, para. 17.2.

¹⁰ See Pilot Scheme, para. 18.2.

¹¹ See Pilot Scheme, para. 12.6.

McParland and Partners Ltd v Whitehead

The first claimant alleged breach of the confidentiality and non-compete provisions in an employment contract by the defendant, and the second claimant (who was joined subsequently) alleged certain breaches of an advisor contract by the defendant. After statements of case had been served, the parties attempted to agree the List of Issues for Disclosure and the Models that should apply to each Issue for Disclosure therein. However, little progress was made and the parties sought the guidance of the Court at a Disclosure Guidance Hearing.

By the time of this hearing, the parties had agreed 16 Issues for Disclosure but only the appropriate Models for 9 of these.¹² At the hearing, the Court was “*content for disclosure to be provided by reference to the issues that the parties had agreed*” (despite certain reservations) and assisted the parties in relation to the 7 outstanding Issues for Disclosure.¹³ Significantly, in doing so, the Chancellor of the High Court took the opportunity to “*deliver a reserved judgment in order to clarify some aspects of the way in which the [Pilot Scheme] is intended to work*”, in particular concerning Issues for Disclosure, choice of Models and co-operation between the parties:

The identification of Issues for Disclosure¹⁴

- The Court held that the “*starting point*” for identifying the Issues for Disclosure in every case will be “*driven by the documentation that is or is likely to be in each party’s possession*”, and “*it is the relevance of the categories of documents in the parties’ possession to the contested issues before the court that should drive the identification*”.
- The Court noted that “*issues for disclosure are very different from issues for trial*”. While certain issues may properly appear in a list of issues *for trial*, it does not necessarily follow that these issues should also be included in a List of Issues for Disclosure. Issues for Disclosure are “*issues to which undisclosed documentation in the hands of one or more of the parties is likely to be relevant and important for the fair resolution of the claim*”, and so did not extend to every issue which was disputed in the statements of case. Issues for Disclosure, therefore, “*need not be numerous*”, detailed or complicated, will “*almost never be legal issues*”, and will *not* include factual issues that are already capable of being fairly resolved from documents available on Initial Disclosure.
- In addition, the Court commented that Issues for Disclosure serve an important function beyond framing the scope of the documents to be located and reviewed because “*they enable the review of documents to be conducted in an orderly and principled manner*”. The Chancellor emphasised that, under the Pilot Scheme, the review should be “*a far more clinical exercise*” because “*the reviewer has defined issues against which documents can be considered*”, in comparison with “*standard disclosure*” by reference to a party’s case (which “*was far too general*”).

The approach to choosing between Models¹⁵

- The Court used the 7 outstanding Issues for Disclosure to demonstrate how the process of choosing between Models should be approached:
 - a. One of the outstanding Issues for Disclosure related to a factual point regarding the commercial relationship between the two claimants. The Court held that this Issue for Disclosure “*was a classic one for Model C disclosure*” on the basis that the commercial relationship in question was “*a complex and long-winded affair*” which had generated a

¹² [2020] EWHC 298 (Ch), at [29] to [36].

¹³ *Ibid.*, at [37].

¹⁴ *Ibid.*, at [44] to [49].

¹⁵ *Ibid.*, at [50] to [52].

significant volume of documentation, most of which would have no relevance to the defendant's position or the proceedings. As a result, targeted requests for particular documents or narrow classes of documents (i.e., Model C) was most appropriate for this Issue for Disclosure, rather than "standard disclosure"-style Model D.¹⁶

- b. The other 6 outstanding Issues for Disclosure broadly related to the allegations of breach and one element of the loss claimed. The Court considered that the parties had over-complicated matters by proposing a variety of Models C and D in relation to these issues. Instead the Court suggested that, as these Issues for Disclosure made up "*the central nub of the dispute*" and there was mistrust between the parties (including in relation to whether each had provided complete Initial Disclosure), "*the simplest and most appropriate course was to agree model D*" (i.e., narrow search-based disclosure).
- c. The Court also acknowledged that "*parties can agree different models for different parties in relation to the same issue*". For example, if a claimant holds the majority of the documentation relevant to a particular Issue for Disclosure, it may be appropriate, in relation to that issue, to apply Model D for the claimant and Model B or C for the defendant.¹⁷
- d. The Court concluded: "*the [Pilot Scheme] does not require compliance to be time-consuming or costly. It just requires the parties to consider what documents they are likely to hold and to what issues those documents are relevant.*"
- The Court's guidance in *McParland* has been followed in a number of subsequent decisions. For example, in *Lombard North Central plc and another v Airbus Helicopters SAS*,¹⁸ at a CMC, the Court decided that the appropriate Model to be applied in respect of certain Issues for Disclosure was Model D as "*a recognition of these being central issues in the case*", rather than as a "*reversion to old practices*" (i.e., a reversion to "standard disclosure" under CPR r.31.6).¹⁹ In addition, when considering two competing formulations of a particular Issue for Disclosure, the Court added some nuance to the guidance in *McParland* in relation to the relationship between the Issues for Disclosure and the issues disputed in the statements of case. The Court held that, while it "*may well be right that there are cases where it is inappropriate for there to be a rigid tracking of the pleaded issue*" when formulating the Issue for Disclosure (as set out in *McParland*), the fact that the Issue for Disclosure was one that was "*at the very heart of [the] case*" meant it was appropriate to formulate it by reference to the pleaded issue.²⁰ Therefore, of the two formulations of the Issue for Disclosure, the Court preferred the formulation that more closely tracked the pleaded issue.

Co-operation between the parties²¹

- Finally, the Chancellor strongly emphasised "*the need for a high level of co-operation between the parties and their representatives in agreeing the issues for disclosure*". On that basis, parties seeking to use the Pilot Scheme tactically ("*as a stick with which to beat their opponents*") could expect to have adverse costs orders made against them: "*such conduct is entirely unacceptable*".

¹⁶ The Court in *Castle Water Ltd v Thames Water Utilities Ltd* [2020] EWHC 1374 (TCC) endorsed the approach in *McParland* and provided guidance on the formulation of Model C requests (at [7vi]): "*Model C is likely to be appropriate where vast documentation is likely to exist, most of which is irrelevant to the actual dispute: McParland at [57]. It is implicit in this that the questions asked where Model C is adopted need to be tightly focused, or the benefits of avoiding a general trawl will be diminished or lost altogether.*"

¹⁷ See Pilot Scheme, Appendix 2, paragraph 10 of the guidance to completing Section 1A of the Disclosure Review Document.

¹⁸ [2020] EWHC 3819 (Comm).

¹⁹ *Ibid.*, at [30].

²⁰ *Ibid.*, at [17].

²¹ [2020] EWHC 298 (Ch), at [53] to [54].

The Commissioners for Her Majesty's Revenue and Customs v IGE USA Investments Ltd

In October 2018, HMRC brought a c.£650 million claim against a number of companies in the GE group (“GE”) in relation to GE’s tax liability. The following year, HMRC applied for permission to amend its claim to allege fraud (the “**Amendment Application**”), which GE resisted.²²

At a CMC shortly thereafter, the Court made a direction for Extended Disclosure applying Model D unless otherwise agreed between the parties or further ordered. Following this, the parties attempted, without success, to agree a List of Issues for Disclosure.²³

Both parties filed evidence in relation to the Amendment Application. HMRC’s evidence referred to the fact that it had twice referred the GE matter to its Fraud Investigation Service (“**FIS**”) (which, on both occasions, had declined to investigate). GE wrote to HMRC asking for copies of the documents relating to the two referrals (the “**FIS Documents**”), contending that these documents would be relevant in determining whether the fraud alleged by HMRC had a “*real prospect of success*” (i.e., the test which would be applied in the Amendment Application). HMRC refused, and GE made a Paragraph 18 Application for “specific disclosure” of the FIS Documents (the “**Disclosure Application**”).²⁴

The Disclosure Application was dismissed, with a Deputy Master holding at first instance that he had no jurisdiction to make the order in the absence of a List of Issues for Disclosure and where no allegations of fraud were contained in the pleadings (but only in HMRC’s draft amended statements of case).²⁵

GE appealed this decision on the grounds that the Deputy Master had erred in:²⁶

- treating Issues for Disclosure as being confined to the issues that can be identified within the statements of case; and
- conflating the distinct concepts of Issues for Disclosure and the List of Issues for Disclosure.

The appeal was allowed by the High Court, which also granted GE’s Disclosure Application. Before considering the appeal itself, the Court provided useful guidance on “specific disclosure” under the Pilot Scheme. It noted that, while the phrase “specific disclosure” might generally be “*useful and understandable shorthand*”, the powers underlying Paragraph 17 and 18 Applications, “*although superficially similar*” to the power under CPR r.31.12 (i.e., to order “*specific disclosure or inspection*”), are different in material ways. In particular, the Court emphasised that paragraph 18 of the Pilot Scheme empowers the Court to “*vary*” a previous order for Extended Disclosure by making an additional order for disclosure of specific documents, and any such additional order must relate “*to a particular Issue for Disclosure*”.²⁷

The Court then moved on to address the two grounds of appeal:

- Issues for Disclosure are not confined to issues identified in the statements of case: After considering the definition of “Issues for Disclosure” at paragraph 7.3 of the Pilot Scheme, the Court held that the Pilot Scheme does *not* limit the scope of “Issues for Disclosure” to matters to be determined at trial and/or those issues raised in the statements of case. In particular, it is not necessary for an Issue for Disclosure to be identifiable on the face of the statements of case; rather, it is enough for that issue to be something which will need to be determined by the Court in order for there to be a fair resolution of the proceedings as a whole.²⁸ In the present case, therefore, even

²² [2020] EWHC 1716 (Ch), at [6] to [11].

²³ *Ibid.*, at [13] to [14].

²⁴ *Ibid.*, at [15] to [17].

²⁵ *Ibid.*, at [3], [18] and [67].

²⁶ *Ibid.*, at [43].

²⁷ *Ibid.*, at [30] to [31]. Whereas the Pilot Scheme expressly retained certain provisions from CPR Part 31, these did not include the rule for specific disclosure contained in CPR r.31.12.

²⁸ *Ibid.*, at [57].

though the proposed amendments alleging fraud were not yet issues identifiable on the face of the statements of case, it was enough for jurisdiction under paragraph 18 of the Pilot Scheme that they were clearly issues which would need to be determined by the Court in order for there to be a fair resolution of the proceedings.²⁹

- **Distinguishing Issues for Disclosure and the List of Issues for Disclosure:** The Court held that the key concept which informs the scope of disclosure under the Pilot Scheme is the Issues for Disclosure, whereas the List of Issues for Disclosure is “*only a tool*” to be used in the process.³⁰ In this regard, the Court emphasised that paragraph 18 of the Pilot Scheme “*is not limited or restricted by reference to the tool of the List of Issues for Disclosure*”, and so it does not matter (for the purposes of a Paragraph 18 Application) if a List of Issues for Disclosure is in place or not. Rather, what matters “*is that there is an existing order for Extended Disclosure and that the new disclosure relates to an Issue for Disclosure*.” As there was a previous order for Model D disclosure and the allegation of fraud was a key issue to be resolved in the proceedings, the Court disagreed with the Deputy Master’s finding that there could be no jurisdiction for an order under paragraph 18 of the Pilot Scheme unless and until there existed a List of Issues for Disclosure.³¹

Having established that it had jurisdiction, the Court then considered whether the “specific disclosure” of the FIS Documents was “*necessary for the just disposal of the proceedings and [was] reasonable and proportionate*” (i.e., the test pursuant to paragraph 18.2 of the Pilot Scheme). The Court determined that it was for two reasons: (i) the importance of the disclosure due to the size of the claim and the allegations of fraud, and (ii) the order for disclosure would not be oppressive for HMRC, as it had already searched for and collected the FIS Documents.³²

Comment

It is clear from the cases discussed above that “Issues for Disclosure” is a central concept for the Pilot Scheme. As set out by the Chancellor in *McParland*, commenting on the relevant definition in paragraph 7.3 of the Pilot Scheme, the Issues for Disclosure are the “*issues to which undisclosed documentation in the hands of one or more of the parties is likely to be relevant and important for the fair resolution of the claim*”. Furthermore, the Issues for Disclosure are not limited to the issues in dispute in the statements of case (or, in fact, to the contents of a List of Issues for Disclosure); and parties should not conflate Issues for Disclosure and issues for trial.

The Courts have also been keen to emphasise that the Pilot Scheme is “*built on co-operation*”³³ and designed to simplify, rather than complicate, disclosure, such that compliance should not be “*time-consuming or costly*” (see *McParland*).

²⁹ *Ibid.*, at [68]. This applied in two respects: the fair resolution of the Amendment Application and, if the amendments were allowed, of the proceedings as a whole.

³⁰ *Ibid.*, at [61].

³¹ *Ibid.*, at [60] to [66], [69].

³² *Ibid.*, at [70] to [76].

³³ [2020] EWHC 298 (Ch), at [53].

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