Article written by Helen Evans on 2nd March 2018.

"Standard disclosure will disappear": how is the impending disclosure pilot scheme likely to affect professional negligence cases?

Just as the criminal courts are getting to grips with the consequences of documents not being disclosed, the Business and Property Courts are setting about embarking on a pilot scheme to water down disclosure. This article explores the reasons for the pilot scheme, explains what cases will fall within the pilot scheme, summarises the scheme itself and looks at some of the problems that are likely to emerge in professional negligence claims.

Why is the pilot scheme taking place?

As the number of documents held in hard copy and electronic form by parties has increased, so have the costs of disclosure. The issue was identified as a problematic area in the reforms imposed on civil litigation by Lord Justice Jackson in 2013. The Jackson Reforms gave the courts a number of tools to try and cut down the costs of litigation, including ordering disclosure that was narrower in scope than standard disclosure (CPR 31.5(1)). At the first CCMC the courts were supposed to consider whether they should direct otherwise by reference to a menu of options (under CPR 31.7) ranging from an order dispensing with disclosure at one end of the extreme to standard disclosure at the other, via middle ground options such as issue based disclosure. The rule never caught on and it remained unusual to have an order for anything other than standard disclosure.

Although the existing rules have not encouraged a culture change, the Business and Property Courts are hoping shortly to commence a pilot scheme aimed more forcefully at bringing about a much more limited disclosure regime under CPR 31. Indeed, the Disclosure Working Group's ("DWG's") Briefing Paper states that "standard disclosure will disappear in its current form".

The step appears to have been prompted largely by complaints about litigation costs raised by General Counsel to the FTSE 100 Group of Companies. However, the proposed pilot scheme has not met with unqualified enthusiasm elsewhere.

When will the pilot scheme start and what falls within it?

The informal consultation for the pilot scheme closed on 28 February 2018 and although the commencement date has yet to be set, the pilot is expected to commence in October 2018 (provided the Rules Committee approves the draft rules). The draft Practice Direction states that the pilot applies "from the Commencement Date". It does not state that it only applies to claims issued after that date.

The pilot will last for 2 years and affect cases in the Business and Property Courts in various places including London, Manchester, Leeds, Bristol and Cardiff. A large number of professional negligence claims are likely to fall within the pilot.

Below I assume that the pilot scheme will be implemented in the form currently envisaged.

What will disclosure under the pilot scheme entail?

Disclosure will usually be a two stage process: "basic disclosure" at the outset followed by "extended disclosure" (if appropriate) later on.

What is basic disclosure?

A party will be required to provide "basic disclosure" of key documents along with its statement of case (unless those documents run to more than 500 pages). "Basic disclosure" comprises the documents that are relied on by the disclosing party and which are necessary for the opposing party to understand the disclosing party's case. Although no search is required at this stage, this step will inevitably increase the costs of the pleading stage. No adverse documents have to be disclosed at this stage (although there is a general duty to disclose adverse documents to which I return below). The one sided nature of "basic disclosure" therefore does not sit easily with the co-operative approach required by the pre-action protocol.

What is extended disclosure and how do you get it?

A party seeking anything other than "basic disclosure" has to fill in a "Disclosure Review Document" (or "DRD") to request it. The seeking party has to start thinking about what disclosure it wants from the pleading stage. When serving a statement of case, a party will have to indicate whether it is seeking extended disclosure. Any party seeking extended disclosure will then have to prepare a draft list of issues for disclosure within 21 days of the deadline for a Reply. Completing the DRD will be a substantial and onerous task. Again, this will cause a significant shift forward in costs.

The parties will be required to discuss and seek to agree the draft list of issues for disclosure before the CMC.

At the first CMC, provided one party has requested "extended disclosure", the court has to consider which of 5 model orders for disclosure to impose, as follows:

- Model A: no order for disclosure.
- Model B: limited disclosure (which appears to amount to documents on which a party actively relies, plus documents adverse to a party's case).
- Model C: request-led search-based disclosure. This is essentially limited disclosure plus specific requests by the opposing party, accompanied by requirement to carry out a search and disclose adverse documents.
- Model D: narrow search-based disclosure, with or without narrative documents. This is the model most similar to "standard disclosure", requiring a reasonable search for documents that support or adversely affect a party's case. A court will only be empowered to order Model D if it is reasonable and proportionate to do so in order to resolve the issues fairly. There is no presumption in favour of Model D.

- Model E: wide search-based disclosure including "train of enquiry" documents. This model is only appropriate in exceptional circumstances.

It is not easy to tell precisely what falls within what model. The difference between Model A and Model B is particularly hard to grasp, given the need to make basic disclosure and to give adverse disclosure in every case.

The proposals suggest that the disclosure models imposed will be detailed. They will identify matters such as the date ranges for searches and the custodians or sources of documents. The level of information to be included in the orders is a good indication of the amount of work that will be required in advance of the CMC.

What are the provisions for disclosure of adverse documents?

All of the models carry with them a requirement to disclose known adverse documents. There is no guidance about what is meant by "known", but this appears to entail actual (rather than constructive) knowledge.

Models C to E require searches to be carried out, and these searches may of course give rise to adverse documents of which a party was not aware.

Problems likely to emerge in professional negligence claims

Three particular problem areas spring to mind in professional negligence claims, namely: front loading of costs, imbalance between the parties, and disclosure of adverse documents.

Front loading of costs

It will be apparent from the description of the pilot scheme that it will require parties to focus much more closely on what disclosure they are seeking from the pleadings stage onwards. The way the system is designed now requires each party to think in detail about what it wants from the other side (rather than to focus on its own disclosure). A party seeking anything other than basic disclosure will have to incur the substantial costs of completing a list of disclosure issues and the DRD. Given the requirement that the disclosure model adopted be reasonable and proportionate, the seeking party is likely to have to pull together detailed information about what disclosure may cost. A party resisting extended disclosure will have to do similar work in order to argue against the model. Although there is some suggestion that costs budgeting may be delayed until after the relevant disclosure model is imposed, the court will want to know what the disclosure stage will cost before it reaches a decision about what is appropriate. Of course, having additional costs budgeting hearings after disclosure has been dealt with will also increase parties' expenditure.

Imbalance between the parties

It is a common feature of professional negligence claims that a defendant professional has a hard copy file of documents and a claimant does not. Although the quality of professionals' filing varies, they tend to hold in one place all or most of the documents that will allow the court to determine breach of duty at least. By contrast, the bulk of the documents relating to issues such as causation and loss tend to be held by claimants. They are rarely in one file. They can come from a disparate number of sources, such as emails, letters, bank statements, information about investments and so on. Claimants are likely to to depict disclosure as a substantially more onerous task for them, and argue for the slimmer disclosure models (whilst seeking the defendant's complete hard copy file).

When deciding what is reasonable and proportionate, the court has to take into account a party's financial means as well as the ease and expense of locating and retrieving documents. Again, this may work in some claimants' favour.

Knowledge of adverse documents

Unless the court imposes a disclosure model with a search requirement, a party is only under a duty to disclose "known" adverse documents. This is likely to prove troublesome in professional negligence claims. Two problems immediately spring to mind:

- Many professional negligence claims are only started years after the event giving rise to the action. Given the operation of s. 14A of the Limitation Act 1980 it is not uncommon to have claims started over 10 years after the matters complained of. How realistic is it to expect a party to know about the existence of 10 year old adverse documents if there is no search requirement?
- Many professional negligence claims are brought by corporate claimants. Whose knowledge is relevant for the purposes of adverse documents? The current directors? The former directors? Which ones? What enquiries have to be made?

Identifying who is reasonably likely to know what about the documents will therefore also form an important part of preparing for a disclosure CMC.

Summary

The disclosure pilot that is expected to start in October 2018 is likely to pose significant challenges for lawyers handling professional negligence claims (particularly on the defendant side). It will require significant changes of practice in terms of grappling with disclosure early on and being prepared to persuade the court to go beyond what would currently be regarded as very basic disclosure. If standard disclosure is shortly to be a thing of the past, it is important to get thinking about which parts of it are most necessary to professional negligence claims. It will be for the seeking party to identify and explain why documents of a particular type have to be disclosed in order for there to be a fair trial.