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Chancery Division

McParland & Partners Ltd and another *v* Whitehead

Practice Note

B

[2020] EWHC 298 (Ch)

2020 Feb 7; 14 Sir Geoffrey Vos C

Practice — Disclosure — Business and Property Courts — Guidance as to application of disclosure pilot in relation to extended disclosure — Identification of issues C *for extended disclosure — Approach to choosing between disclosure models — Requirement for co-operation between parties — CPR Pt 51, Practice Direction 51U, paras 6, 7, 8, 9*

The disclosure pilot provisions for the Business and Property Courts in Practice Direction 51U supplementing CPR Pt 51 are intended to apply across a wide range of cases. In every case the type of extended disclosure given under paragraphs 6–9 D of the Practice Direction has to be fair, proportionate and reasonable. Compliance with the disclosure pilot must not be a disproportionately costly or time-consuming exercise, and therefore parties have to think co-operatively and constructively about their dispute and the documents which need to be produced for the matter to be fairly resolved. Issues for disclosure are very different from issues for trial, and should be driven by the relevance of the categories of documents in the parties' possession to the contested issues before the court. The disclosure issues need not be numerous, E should not be unduly granular or complex, will almost never be legal issues, and will not include factual issues that are already capable of being fairly resolved from the documents available on initial disclosure. The models of extended disclosure chosen should simplify the process rather than complicate it. Parties can, but do not have to, agree different models of extended disclosure for different parties in relation to the same issue. A high level of co-operation between the parties and their representatives in agreeing the issues for disclosure and completing the disclosure review document F is required, and that means that it is entirely unacceptable to use the provisions for litigation advantage and that any party attempting to do so will face serious adverse costs consequences (post, paras 4, 44, 46–47, 52, 53, 54, 55–58).

The following cases are referred to in the judgment:

Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576; [2004] 1 WLR G 3002; [2004] 4 All ER 920, CA

Lomax v Lomax [2019] EWCA Civ 1467; [2019] 1 WLR 6527, CA

No additional cases were cited in argument.

APPLICATION

By a claim form dated 15 November 2018, the first claimant, McParland H & Partners Ltd, commenced proceedings against the defendant, Stuart Whitehead, alleging breaches of non-compete and confidentiality clauses in a service agreement after the defendant allegedly e-mailed the first claimant's client database to a personal address. By the order of District Judge Matharu dated 31 July 2019, the first claimant was given permission to join the second claimant, Fairstone Financial Management Ltd, to proceedings and amend

the claim form and particulars of claim to include breaches of a contract entered into by the second claimant and defendant. By the order of District Judge Richmond dated 31 October 2019, a disclosure guidance hearing under Practice Direction 51U supplementing CPR Pt 51 was listed, so that the court could assist in resolving disputes between the parties as to the appropriate disclosure that should be made in the matter.

The facts are stated in the judgment, post, paras 18–28.

Aidan Reay (instructed by *Weightmans LLP*) for the claimants.

Nigel Grundy (instructed by *Farnworth Shaw Solicitors, Colne*) for the defendant.

The court took time for consideration.

14 February 2020. **SIR GEOFFREY VOS C** handed down the following judgment.

Introduction

1 This was a disclosure guidance hearing ("DGH") under the CPR's Practice Direction 51U: Disclosure Pilot for the Business and Property Courts ("PD51U" or "the Disclosure Pilot"). At the DGH, the parties sought "guidance from the court by way of a discussion with the court in advance of … a case management conference, concerning the scope of extended disclosure". Paragraph 11(1) of PD51U provides that such a hearing can take place where (i) the parties have made real efforts to resolve disputes between them, and (ii) the absence of guidance from the court before a case management conference ("CMC") is likely to have a material effect on the court's ability to hold an effective CMC.

2 At the start of the hearing, I explained to counsel that I intended, unusually for a DGH, to deliver a reserved judgment in order to clarify some aspects of the way in which the Disclosure Pilot is intended to work. In particular, the case presented questions on the approach to disclosure issues which gave the court the opportunity to provide guidance for other users of the Business and Property Courts.

3 In this case, initial disclosure was provided by the parties in accordance with paragraph 5.1 of PD51U[1*]. The issues on which the parties were unable to agree concerned the way in which extended disclosure was to be given under paragraphs 6–9 of PD51U. The watchword is contained in paragraph 6.4 of PD51U, which provides that an order for extended disclosure in all cases "be reasonable and proportionate having regard to the overriding objective including" certain factors, namely: (1) the nature and complexity of the issues in the proceedings; (2) the importance of the case, including any non-monetary relief sought; (3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence; (4) the number of documents involved; (5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates); (6) the financial position of each party; and

[*] *Reporter's note*. The superior figure in the text refers to a note which can be found at the end of the judgment, on p 711.

A (7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

4 These factors demonstrate that the provisions of the Disclosure Pilot are intended to apply across a wide range of cases stretching from the highest value business cases to the lowest value ones, and from the most complex, lengthy and document intensive to the least complex cases with few relevant documents. PD51U provides a menu of options which allows B for a range of disclosure approaches designed for the particular dispute. It is critical, however, that in every case, the type of extended disclosure is fair, proportionate and reasonable. The Disclosure Pilot should not become a disproportionately costly exercise. This latter requirement means that the parties have to think co-operatively and constructively about their dispute and what documents will require to be produced for it to be fairly resolved. C In smaller value disputes particularly, but also in higher value ones, unduly granular and complex solutions should be avoided. This case demonstrates that point specifically.

5 Before dealing with the issues that were considered at the DGH, it is necessary to set out the parts of PD51U that are relevant to this case, a brief overview of the factual background, the procedural history, and the D disclosure issues that were ultimately agreed between the parties.

Further relevant provisions of PD51U

6 Paragraph 3.2 of PD51U sets out the legal representatives' duties in relation to disclosure, in addition to the parties' duties provided for in paragraph 3.1, including continuing duties of preservation and honesty, but also a duty E

> "(3) to liaise and co-operate with the legal representatives of the other parties to the proceedings (or the other parties where they do not have legal representatives) so as to promote the reliable, efficient and cost-effective conduct of disclosure, including through the use of technology."

F **7** Paragraph 7.1 and 7.2 of PD51U provide for the timing of the agreement of issues for disclosure. Paragraph 7.3 explains the meaning of the term as follows:

> "'Issues for disclosure' means for the purposes of disclosure only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous G documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case by denial or non-admission."

Paragraph 7.4 makes clear that:

> "The claimant should seek to ensure that the draft list of issues for disclosure provides a fair and balanced summary of the key areas of H dispute identified by the parties' statements of case and in respect of which it is likely that one or other of the parties will be seeking extended disclosure."

8 Paragraph 7.5–7.9 make provision for the way in which agreement is to be reached. Paragraph 7.6 provides that "In advance of the first case

management conference, the parties must discuss and seek to agree the draft list of issues for disclosure", and that "They should consider whether any draft issue for disclosure can be removed", and that the parties should indicate at this point, which model of extended disclosure is sought for each party, and "Where Model C disclosure is contemplated the parties should discuss the requests that might apply for the purpose of that disclosure".

9 Paragraph 8 of PD51U deals with the extended disclosure models. Paragraph 8.2 states clearly that "There is no presumption that a party is entitled to extended disclosure, and in particular to Model D or Model E disclosure", and that "No model will apply without the approval of the court". Paragraph 8.3 explains that although "The court may order that extended disclosure be given using different disclosure models for different issues for disclosure in the case", "In the interests of avoiding undue complexity the court will rarely require different models for the same set of documents", and that "The court may also order that extended disclosure be given by only one party, or that different models are to apply to each party's disclosure on a particular issue for disclosure".

10 Model A confines disclosure to known adverse documents. Model B limits disclosure and expressly explains that it applies "where and to the extent that they have not already done so by way of initial disclosure, and without limit as to quantity". The limitation is to

> "(a) the key documents on which [the parties] have relied (expressly or otherwise) in support of the claims or defences advanced in their statement(s) of case; and (b) the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet; and in addition to disclose known adverse documents in accordance with their (continuing) duty under paragraph 3.1(2)."

No new search is required under Model B.

11 Model C is "Request-led search-based disclosure":

> "of particular documents or narrow classes of documents relating to a particular issue for disclosure, by reference to requests set out in or to be set out in section 1B of the disclosure review document ["DRD"] or otherwise defined by the court."

12 Model D is "narrow search-based disclosure, with or without narrative documents", which are defined by paragraph 1.11 of Appendix 1 as documents which are "relevant only to the background or context of material facts or events, and not directly to the issues for disclosure", but "for the avoidance of doubt an adverse document … is not to be treated as a narrative document". Model D requires disclosure of "documents which are likely to support or adversely affect its claim or defence or that of another party in relation to one or more of the issues for disclosure", and "Each party is required to undertake a reasonable and proportionate search in relation to the issues for disclosure for which Model D disclosure has been ordered". The order for Model D disclosure "should specify whether a party giving Model D disclosure is to search for and disclose narrative documents".

13 Finally, Model E is "wide search-based disclosure" or what is more commonly known as "train of inquiry" disclosure. It is stated to be exceptional and is not relevant to this case. Where an order for Model B, C, D or E extended disclosure is made on one or more issues for disclosure,

any adverse documents to be disclosed in compliance with the duty under paragraph 3.1(2) above and not already disclosed must be disclosed at the time ordered for that extended disclosure.

14 Paragraph 9.5 of PD51U again states expressly that

> "When it is necessary to decide any question of what is reasonable and proportionate under a particular disclosure model, the court will consider all the circumstances of the case including the factors set out in paragraph 6.4 above and the overriding objective."

Paragraph 9.6 provides that where searches are to be undertaken:

> "the parties must discuss and seek to agree, and the court may give directions [on certain stated matters] with a view to reducing the burden and cost of the disclosure exercise."

15 Paragraph 10 of PD51U deals with the completion of the DRD. It emphasises the need to adjust the process depending on the complexity of the case, and the need for co-operation. Paragraph 10.3 provides that:

> "If a party fails to co-operate and constructively to engage in this process the other party or parties may apply to the court for an appropriate order at or separately from the case management conference, and the court may make any appropriate order including the dismissal of any application for extended disclosure and/or the adjournment of the case management conference with an adverse order for costs."

16 Paragraph 11 of PD51U deals with DGHs as follows:

> "11.1 The parties may seek guidance from the court by way of a discussion with the court in advance of or after a case management conference, concerning the scope of extended disclosure or the implementation of an order for extended disclosure, where—
>
> "(1) the parties have made real efforts to resolve disputes between them; and
>
> "(2) the absence of guidance from the court before a case management conference is likely to have a material effect on the court's ability to hold an effective case management conference …"
>
> "11.3 At a disclosure guidance hearing the court will generally expect a legal representative with direct responsibility for the conduct of disclosure to be the person who participates on behalf of each party in the discussion concerning the scope of extended disclosure or the implementation of an order for extended disclosure.
>
> "11.4 The guidance given at a disclosure guidance hearing will be recorded in a short note, to be approved by the court. Whilst the primary function of the disclosure guidance hearing is to provide guidance, for the avoidance of doubt the court may, where appropriate, make an order at a disclosure guidance hearing.
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> "11.5 Unless otherwise ordered, the costs of a disclosure guidance hearing are costs in the case and no order from the court to that effect is required."

17 Finally, paragraph 20.2 provides for sanctions including those for non-co-operation:

> "If a party has failed to comply with its obligations under this pilot including by … failing to co-operate with the other parties, including in the process of seeking to complete, agree and update the disclosure review document, the court may adjourn any hearing, make an adverse order for costs …"

Factual background

18 McParland & Partners Ltd, the first claimant, ("MPL") is a company that provided financial planning and advisory services. Mr Stuart Whitehead ("Mr Whitehead") is an independent financial adviser, who was employed by MPL from 20 August 2008. Whilst he worked for MPL, he delivered financial planning and advisory services to MPL's clients.

19 On 23 August 2013, the terms of Mr Whitehead's employment by MPL were allegedly recorded in a written service agreement. The service agreement contained a clause providing for confidentiality (clause 18), and a 12-month non-compete clause to take effect immediately on the termination of his contract of employment (clause 26.2).

20 On 18 June 2014 MPL allegedly entered into an enterprise firm agreement ("EFA") with Fairstone Financial Management Ltd, the second claimant ("FFML"). On the same date, FFML entered into an adviser contract with Mr Whitehead. The adviser contract included confidentiality and data return provisions (clauses 2.6 and 9.3) and a 12-month non-solicitation provision (clause 8.1(a)).

21 On 15 December 2015, Mr Whitehead incorporated Whitehall Wealth Management Ltd ("WWM").

22 On 1 February 2016, FFML sold shares in MPL to Fairstone Holdings Ltd under a downstream buyout agreement, and on 1 March 2016, Fairstone Holdings Ltd acquired the remaining shares in MPL.

23 On 16 March 2016, Mr Whitehead resigned from MPL's employment. MPL says that he was obliged under his service agreement to give six months' notice expiring on 15 September 2016. Mr Whitehead says that his employment must be taken to have terminated in July 2016, when MPL procured FFML to revoke his Financial Conduct Authority ("FCA") permissions.

24 On 8 April 2016, Mr Whitehead allegedly e-mailed MPL's client database to a personal e-mail address in the name of WWM. In mid-April, Mr Whitehead became ill and went on sick leave.

25 On 12 April 2016, PNM Financial Management Ltd's ("PNM") solicitors wrote to the claimants attaching a list of 18 clients, who had previously had funds under management with MPL, now said to be clients of PNM. By this time, Mr Whitehead allegedly had some working connection with PNM.

26 At the end of August 2016, Mr Whitehead was certified fit for work. MPL contends that he agreed with MPL that he would remain on garden leave until his notice terminated on 15 September 2016.

27 Mr Whitehead's employment with MPL and (if relevant) FFML ceased either in July 2016, if Mr Whitehead is right, or on 15 September 2016, if MPL is right. Either way, the one-year non-compete clause, if valid, ran from one of those dates.

28 According to the claimants, on 30 June 2017, MPL transferred its assets and business to FFML and MPL ceased trading on that date.

Mr Whitehead contends that he did not become aware of that fact until these proceedings were well under way.

Procedural history

29 The claim form was issued by MPL alone on 15 November 2018. It alleged breaches of the non-compete and confidentiality clauses in the service agreement, saying that MPL could not know the full extent of Mr Whitehead's wrongdoing in advance of disclosure.

30 On 11 January 2019, Mr Whitehead filed a defence asserting the unenforceability of the confidentiality and non-compete clauses in the service agreement, and denying the alleged breaches and any loss to MPL.

31 On 20 February 2019, District Judge Khan transferred the claim from the Business and Property Courts in Manchester to the Preston Combined Court Centre. On 2 March 2019, District Judge Anson allocated the case to the multi-track and listed a CMC for 23 April 2019. He ordered the parties to file a chronology, statement of issues, and case summary, all of which was duly done.

32 On 23 April 2019, counsel attended the CMC before District Judge Anson in Preston. Mr Nigel Grundy appeared for Mr Whitehead on that occasion, as he did before me. He explained to me why District Judge Anson had transferred the claim back to the Business and Property Courts in Manchester. Apparently, Mr Whitehead had just discovered that MPL had stopped trading, and that it was intending to apply (i) to join FFML as a second claimant, and (ii) to call expert evidence. Mr Grundy suggested the trial of a preliminary issue as to the validity of the contractual terms. The district judge thought the complexities made it inevitable that the case would have to be tried in the Business and Property Courts in Manchester, and included in the order an exhortation that the parties should "communicate with each other more effectively concerning the management of the claim and, in particular, any discrete applications which are to be made".

33 On 31 July 2019, District Judge Matharu gave MPL permission to join FFML as a second claimant and to amend the claim form and the particulars of claim. The amendments were, in the event, made late on 16 August 2019, and included further allegations of breaches of the adviser contract, and of losses being sustained by FFML, as well as by MPL. All parties provided initial disclosure broadly in accordance with the requirement of PD51U.

34 On 31 October 2019, District Judge Richmond made a consent order adjourning the CMC because the parties had been "unable to agree key matters of disclosure and experts and the court is unlikely to resolve these matters within the allotted time of one hour". The DGH was listed for one hour on 7 February 2020.

35 The parties have now agreed 16 issues for disclosure, which they have included in section 1A of their DRD. I set out those issues in their entirety as they are relevant to what I have to decide:

(1) The circumstances relating to [Mr Whitehead's] signing of the [service agreement] on 16 September 2013, and in particular whether there was consideration for that agreement.

(2) [FFML's] commercial relationship with [MPL] in particular the contractual relationship with clients serviced by [MPL] on its behalf and the circumstances in which [FFML] carried on the business succession to [MPL].

(3) The circumstances in which [Mr Whitehead] entered into a contract with and/or engagement by [FFML].

(4) The circumstances in which and the terms on which [Mr Whitehead] dealt with clients of [FFML] and/or on behalf of [FFML] and/or in the course of his engagement by [FFML].

(5) The circumstances relating to the incorporation [of WWML], its operations and its business activities.

(6) Confidential information to which [Mr Whitehead] had access during his employment with [MPL] and his engagement by [FFML] and applied or provided to [Mr Whitehead] for the calculation of commissions.

(7) The accessibility and/or communication of [MPL's] staff handbook and/or policies.

(8) Communications between the parties shortly before, on and following [Mr Whitehead's] submission of his notice of resignation (on 15 March 2016).

(9) The nature and content of the alleged client database; the circumstances relating to its creation; the obtaining, verification, presentation and arrangement of information contained therein; and the accessibility of that information.

(10) The circumstances relating to [Mr Whitehead's] sending of the e-mail of 8 April 2016 to his [WWML] e-mail account; and [Mr Whitehead's] use, retention, storage, transfer, onward transmission or dissemination (or similar) and/or deletion of the information/content attached thereto.

(11) The circumstances of [Mr Whitehead's] alleged closure of the [WWML] e-mail account and any information contained or stored therein.

(12) The revocation of [Mr Whitehead's] FCA permissions.

(13) The date on which [Mr Whitehead's] employment with [MPL] and his engagement with [FFML] terminated.

(14) [Mr Whitehead's] alleged use of confidential information relating to [MPL's and FFML's] business. Mr Whitehead noted the "witness statements disclosed and served from the clients referred to in the appendix to the amended particulars of claim/defence stating no use of confidential information by [Mr Whitehead]".

(15) The circumstances relating to the transfer of clients from [MPL's and FFML's] to [Mr Whitehead], [PNM] and/or [WWML], and the servicing of such clients by [Mr Whitehead] (whether on his own account or via/on behalf of any corporate entity). Mr Whitehead noted the "witness statements disclosed and served by the relevant clients about the circumstances of their transfer".

(16) Loss of profit sustained by [MPL and FFML] in consequence of [Mr Whitehead's] alleged unlawful conduct.

36 The parties also agreed the appropriate models for disclosure to be given in relation to 9 of these 16 issues. They could not, however, agree the appropriate models for issues 2, 5, 10, 11, and 14–16.

The disposition at the DGH

37 In the course of the DGH, I indicated that, despite my reservations about the issues that had been agreed, which I intended to express in this judgment, I was content for disclosure to be provided by reference to the issues that the parties had agreed. In that way, further delay to this already much delayed action would be avoided.

38 After discussion at the DGH, Model B (limited disclosure) was agreed for all issues apart from issue 2 (for which Model C—request-led search-based disclosure—was agreed), and issues 5, 10, 11, and 14–16 (for which Model D—narrow search-based disclosure—was agreed). The issues for which Model B was agreed were issues that were generally covered by the initial disclosure that had been given by the parties. None was likely to be contentious. It may be noted also that initial disclosure in this case was most helpful in identifying the necessary scope of the extended disclosure that was truly necessary.

39 In effect, this meant that the only issue for which requests had to be directed related to MPL's relationship with FFML, and the circumstances in which it carried on business in succession to MPL. The rationale for this approach was that the claimants would undoubtedly have many documents relating to the takeover of MPL by Fairstone companies, but those would be unlikely to bear upon the issue in this case, which was whether one or other of the claimants had a real claim for loss of business against Mr Whitehead as a result of his alleged breaches of contract and confidence. The specific requests that were agreed (and are included in the order agreed by the parties) allowed the claimants to redact commercially sensitive information from the contractual documentation.

40 The issues for which Model D was ultimately agreed represented the core of the dispute. They related, in broad terms, to breach and loss. After encouragement from the court, the parties agreed that there was little point in salami slicing these issues in a case of this kind. There was significant mistrust between the parties. Narrow search-based disclosure was appropriate, because it was known that (i) the defendant's case was that the customers that had left the claimants would have done so without solicitation or use of confidential information, and (ii) the claimants doubted the defendant's veracity as to the actions he took in leaving the claimants' business and joining PNM. Loss was critical for these reasons too, and disclosure of documents relating to the business lost by the claimants and the business gained by the defendant was central to achieving a mediated settlement in due course.

41 I have considered whether the Model D disclosure should include narrative documents. Although there was no argument about this, I do not think it should, and I have amended the agreed order accordingly. Narrative documents are those that are relevant only to the background or context of material facts or events, and not directly to the issues for disclosure. They are normally not required or ordered, particularly in a case where it is the actions of the parties that matter rather than their specific motives.

42 Finally, the court encouraged the parties to proceed to a privately arranged mediation as soon as disclosure had occurred, since both sides agreed that it was necessary to see from disclosure whether their suspicions were justified before a useful mediation could take place. The claimants suspected more extensive breaches by the defendant, and the defendant suspected an absence of loss of business by the claimants. In this connection, I mentioned the recent Court of Appeal decision of *Lomax v Lomax* [2019] 1 WLR 6527 to the parties. The question in *Lomax* was whether the court had the power to order parties to undertake an early neutral evaluation under CPR r 3.1(2)(m). It was held that there was no need for the parties to consent to an order for a judge-led process. I mentioned that *Lemox* inevitably raised

the question of whether the court might also require parties to engage in mediation despite the decision in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002. In the result, the parties fortunately agreed to a direction that a mediation is to take place in this case after disclosure as I have already indicated.

The operation of the Disclosure Pilot

43 There are a number of areas in which the parties in this case have misunderstood how the Disclosure Pilot is intended to work. I do not say that by way of criticism, since I believe that the solicitors have tried on each side to comply with the pilot. It will hopefully help parties in other cases if I explain the misunderstandings that have arisen here. They are in three categories as follows: (1) The identification of issues for disclosure; (2) The approach to choosing between disclosure models; and (3) Co-operation between the parties.

The identification of issues for disclosure

44 The starting point for the identification of the issues for disclosure will in every case be driven by the documentation that is or is likely to be in each party's possession. It should not be a mechanical exercise of going through the pleadings to identify issues that will arise at trial for determination. Rather 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 of the issues for disclosure.

45 I can give an example from this case. Issue 13 was agreed as being "The date on which [Mr Whitehead's] employment with [MPL] and his engagement with [FFML] terminated". The parties both accept that Mr Whitehead wrote to MPL terminating his employment on 16 March 2016. They also agree that, under clause 22.1 of the service agreement, six months' notice of termination was required (terminating on 15 September 2016). They disagree about whether the revocation of Mr Whitehead's FCA permissions by FFML in July 2016 amounted to an immediate termination of both the service agreement and the adviser contract. The issue raised by these pleadings is, therefore: when did (a) the service agreement, and (b) the adviser contract, terminate? But, had the parties thought the point through, they would have realised that that issue is one of law or construction of agreed actions, and not one to which any documents, beyond those already produced on initial disclosure (i e the contracts themselves and the pleaded letters and e-mails), will be relevant. Accordingly, whilst the issue would properly appear in the list of issues for trial, there was no reason in this case for it to appear in the list of issues for disclosure. The parties effectively acknowledged that to be the case by choosing Model A for issue 13. In fact, as I say, it was not an issue that needed to appear on the list of issues for disclosure at all. Further examples of this include all those issues for which the parties eventually agreed Model B, namely issues 1, 3–4, 6–9, and 12.

46 It can be seen, therefore, that issues for disclosure are very different from issues for trial. 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. That is why paragraph 7.3 of PD51U provides that issues for disclosure are "*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" (emphasis added). Paragraph 7.3 goes on to explain, as I just have, that issues for disclosure do "not extend to every issue which is disputed in the statements of case by denial or non-admission".

47 This explanation demonstrates that, in many cases, the issues for disclosure need not be numerous. They will almost never be legal issues, and they will not include factual issues that are already capable of being fairly resolved from the documents available on initial disclosure.

48 In this case, there are, in the simplest possible terms, really only three issues for disclosure: (1) What was the commercial relationship between MPL and FFML and how and when did FFML succeed MPL as the trading entity engaging Mr Whitehead, (2) What did Mr Whitehead do between March 2016 and (say) March 2018 that was in breach of his obligations to the claimants, and (3) What losses did one or other of the claimants suffer as a result of those breaches? That first issue equates to issue 2 agreed between the parties. The second issue equates to issues 5, 10, 11, 14, and 15 agreed between the parties. The third issue equates to issue 16 agreed between the parties. I have suggested March 2018 for the end date in the second issue because that is six months after the end of the latest possible non-competition year. It may be that the parties would have suggested a different date. Identifying it would depend on their detailed knowledge of what documents each side actually possessed. It is at least possible that documents after the end of the year of supposed non-competition would bear on what had happened during that year. I repeat for the sake of emphasis that issues for disclosure do not need to be detailed or complicated, particularly in a relatively straightforward dispute like the present one.

49 Finally, I might mention that the issues for disclosure have an important function beyond the CMC. Having framed the scope of the documents to be located and reviewed by the disclosing party, they enable the review of documents to be conducted in an orderly and principled manner. Under standard disclosure, the test was whether a document supported or adversely affected a party's "case". This was far too general. Under the Disclosure Pilot the reviewer has defined issues against which documents can be considered. The review should be a far more clinical exercise.

The approach to choosing between disclosure models

50 An example from this case also neatly demonstrates how this process should be approached. Issue 2 that I reframed as the first issue above asked: what was the commercial relationship between MPL and FFML, and how and when did FFML succeed MPL as the trading entity engaging Mr Whitehead? In this case, the Fairstone takeover of MPL was plainly a complex and long-winded affair. It no doubt generated much documentation, most of which would have no relevance to Mr Whitehead's specific position or to this dispute. Mr Whitehead's solicitors did, however, reasonably request further documentation, beyond what had already been provided by way of redacted copies of some of the agreements including the EFA between FFML and MPL. They framed questions to reflect their requests but were met by the answer that redaction was an issue raised by inspection, not disclosure. That was an unhelpful response. In the result, this issue was a classic one

for Model C disclosure. The detailed requests have now been agreed, but the principle is clear.

51 Likewise, the second reframed issue: what did Mr Whitehead do between March 2016 and (say) March 2018 that was in breach of his obligations to the claimants, provides a further good example. The parties proposed a variety of Models C and D for their breach issues 5, 10, 11, 14, and 15. That approach over-complicated the process. As I have said, there was mistrust between the parties, and neither trusted the other to have provided complete initial disclosure. The simplest and most appropriate course was to agree Model D disclosure for the breach issue(s), since that makes up the central nub of the dispute. The same goes for the third loss issue. Much time and expense would have been saved if the parties had approached their task in this way. This is, as I have said, a fairly straightforward case, and the Disclosure Pilot 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.

52 I should mention also that, whilst the parties can agree different models for different parties in relation to the same issue, that is not a requirement. The breach issue here could perhaps have attracted Model D for the defendant, but Model B or C for the claimant. In fact, however, that might have been unfair, as the claimants are perhaps as likely to have documentation showing that clients wanted to leave them, as the defendant is to have documents showing he breached his contracts.

Co-operation between the parties

53 I have, as I have said, no intention of criticising the parties in this case. None the less, I do wish to emphasise the need for a high level of co-operation between the parties and their representatives in agreeing the issues for disclosure and completing the DRD. The Disclosure Pilot is built on co-operation as its terms make clear (see paragraphs 2.3, 3.2(3), and 20.2(3) of PD51U). This is not intended to be mere exhortation.

54 It is clear that some parties to litigation in all areas of the Business and Property Courts have sought to use the Disclosure Pilot as a stick with which to beat their opponents. Such conduct is entirely unacceptable, and parties can expect to be met with immediately payable adverse costs orders if that is what has happened. No advantage can be gained by being difficult about the agreement of issues for disclosure or of a DRD, and I would expect judges at all levels to be astute to call out any parties that fail properly to co-operate as the Disclosure Pilot requires.

Conclusions

55 The Disclosure Pilot is intended to operate proportionately for all kinds of case in the Business and Property Courts from the smallest to the largest. Compliance with it need not be costly or time-consuming.

56 The important point for parties to understand is that the identification of issues for disclosure is a quite different exercise from the creation of a list of issues for determination at trial. The issues for disclosure are those which require extended disclosure of documents (i e further disclosure beyond what has been provided on initial disclosure) to enable them to be fairly and proportionately tried. The parties need to start by considering what

A categories of documents likely to be in the parties' possession are relevant to the contested issues before the court.

57 Unduly granular or complex lists of issues for disclosure should be avoided. Likewise, the models chosen should simplify the process rather than complicate it. Here Model C was appropriate for an issue where vast documentation was likely to exist, most of which was irrelevant to the actual dispute, and Model D was appropriate to the two central issues of breach and B loss, in which there was significant mistrust between the parties. No extended disclosure at all was required for other issues.

58 Co-operation between legal advisers is imperative. The Disclosure Pilot must not be used as an opportunity for litigation advantage. If that is attempted, the parties responsible will face serious adverse costs consequences.

C **59** I have approved the order agreed between the parties reflecting the discussion that took place at the disclosure guidance hearing.

Note

1. When the Disclosure Pilot came into force at the beginning of 2019.

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Order accordingly.

ANDRE ARMENIAN, Barrister

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