**Disclosure in the Business and Property Courts**

This element introduces the disclosure regime in the Business and Property Courts.

**Civil procedure rules**

The main CPR which support the content of this element are 57AD PD.

**The challenge**

One way of considering the disclosure regime in the Business and Property Courts is that it was introduced to address some of the difficulties presented by the regime in CPR 31. The process and scope of standard disclosure (CPR 31.6 and CPR 31.8) make it likely that the vast majority of documents relevant to a dispute will be revealed to the parties and available for use in litigation (subject to privilege etc). However, this is at significant cost. Over time, the number of documents involved in giving standard disclosure has grown as business practices have changed and in particular as the volume and range of electronic documents (as defined in 31B PD 5(3)) have grown exponentially. The time and expense involved in standard disclosure have accordingly grown too.

Attempts have been made to control this by:

- Requiring the parties and the court to explore in detail what a reasonable search would be in the context of electronic disclosure (31B PD); and

- Encouraging the parties and the court to explore disclosure orders other than standard disclosure (CPR 31.5(3) to (8)).

However, ensuring a process of disclosure and inspection which is just and proportionate (CPR 1.1) remains a challenge. This is the challenge which the disclosure regime in the Business and Property Courts (the “BPC disclosure regime”) aims to address, and that regime is the subject of this element.

**Scope**

The BPC disclosure regime applies to proceedings which are:

- In the High Court rather than the County Court; and

- In the Business and Property Courts (including in various district registries); and

- Which are not in a list of excluded types of proceedings (57AD PD 1.4).

Where the BPC disclosure regime applies, it applies in place of CPR 31, 31A PD and 31B PD. The BPC disclosure regime preserves certain parts of CPR 31 and associated PDs in relation to pre-action disclosure and disclosure against a person not a party (CPR 57AD Section II), but those areas are outside the scope of this element.

**Principles**

The BPC disclosure regime is underpinned by various principles (57AD PD 2) and relatively broad duties (57AD PD 3). Several repeat and/or articulate more specifically for disclosure the principles in the overriding objective, but some more specific to disclosure are set out below. It is important not to overlook the principles and duties – the BPC disclosure regime aims to introduce a change in culture in relation to disclosure and the principles and duties will be interpreted accordingly.

- Scope of disclosure no wider than reasonable / proportionate

- Parties to co-operate with each other and court re efficient disclosure

- Legal representatives must satisfy themselves that any claim to privilege is properly made and explained (57AD PD 3.2(5)).

- Parties to avoid providing documents with no relevance to issues

**Preservation of documents**

- As soon as a party thinks that it may become a party to proceedings that may be commenced it is obliged to take reasonable steps to preserve documents in its control that may be relevant to any issue (57AD PD 3.2(1)).

- It must prevent the deletion / destruction of such documents, even under a routine / ‘ordinary’ document retention / destruction policy (57AD PD 4.1).

- It must give notice to any employees / former employees / agents who may be in possession of disclosable documents not to destroy / delete them (57AD PD 4.2).

- Legal representatives must notify their client of their obligations set out above and obtain written confirmation that they have been complied with (57AD PD 4.4).

**Known adverse documents**

Regardless of whether any disclosure order is made in the court proceedings, a party to proceedings must disclose ‘**known adverse documents**’ either at the same time as giving Extended Disclosure (see later in this element) or, if Extended Disclosure is not ordered, within 60 days of the first case management conference (57AD PD 3.1(2) and 9).

A document is adverse if it:

*‘contradicts or materially damages the disclosing party’s contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute’ (57AD PD 2.7)*

An adverse document is a ‘**known** adverse document’ if a party is aware that it is or was in its control and is adverse, without carrying out a search. A company or other organisation is ‘aware’ if a person with responsibility within the organisation for the events or the circumstances which are the subject of the case, or for the conduct of the proceedings, is aware. An organization must take reasonable steps to check the position with any person who has had such accountability or responsibility but who has since left the organisation (57AD PD 2.8-2.9)

**Initial disclosure**

In the vast majority of claims, when a party serves its statement of case, it must also provide to the other parties:

- An Initial Disclosure List of Documents, listing the key documents on which it relies (whether or not they are mentioned in that statement of case) and those that are necessary to enable the other parties to understand the claim / defence they have to meet.

- Copies of those documents, in electronic form unless otherwise agreed / ordered.

This is called ‘Initial Disclosure’ (see generally 57AD PD 5).

The Initial Disclosure List must also be filed at court.

If it appears that it might require a party to disclosure more than 1000 pages of documents, or more than 200 documents, then the requirement to give disclosure ceases for all parties.

The parties can agree not to give Initial Disclosure, and the court can dispense with it.

**Extended disclosure**

So far in this element, we have referred to the obligations to give Initial Disclosure and to disclose known adverse documents (at the appropriate time). Note, however, that neither obligation is as broad as standard disclosure. In particular, neither obligation includes an obligation to carry out a search for documents.

A party may wish to seek ‘Extended Disclosure’ (see generally 57AD PD 6). The approach is to:

- Identify the Issues for Disclosure. This is not defined in the BPC disclosure regime. It appears to mean the issues from the litigation in relation to which some sort of Extended Disclosure is proposed (which need not be all the issues in the litigation).

- Choose from 5 models for Extended Disclosure for those issues. It is a key point under the BPC disclosure regime that different Models may be used for different issues.

An order for Extended Disclosure must be reasonable and proportionate.

The court will generally determine whether to order Extended Disclosure at the first case management conference.

**Disclosure Models A-E**

Remember that regardless of which, if any, model is used, a party will still need to disclose known adverse documents.

A: **Disclosure confined to known adverse documents**

B: **Limited disclosure** – documents on which a party wishes to rely or which are necessary to enable the other parties to understand the claim or defence they have to meet (so similar to Initial Disclosure, but without any limit on volume of documentation).

C: **Disclosure of particular documents or narrow classes of documents** – including a requirement to search for those documents

D: **Narrow search-based disclosure, with or without Narrative Documents-** a search for documents likely to support or adversely affect a party’s claim / defence or that of another party in relation to one or more of the Issues for Disclosure, plus a reasonable and proportionate search – so broadly the same as standard disclosure under CPR 31.6 and 31.8. The court may extend this to cover ‘Narrative Documents’ – those which set out context or background but which are not directly relevant to the issues for disclosure.

E: **Wide search-based disclosure** – all the documents falling within Model D, together with documents that might lead to a train of enquiry resulting in the identification of further documents for disclosure, and also including Narrative Documents.

**Procedure**

**- Within 28 days** of last statement of case: **each party** indicates whether it is likely to request search-based Extended Disclosure (Models C, D or E).

- If one or more parties so indicates, **within 42 days** of the last statement of case **the claimant must:**

a. prepare and serve a **draft List of Issues for Disclosure** (using Section 1A of the ‘Disclosure Review Document’ contained in Appendix 2 of 57AD PD). This is not a list of all issues in dispute. It is a list of key issues which the court will need to decide with some reference to the documents in order for the resolution of the proceedings to be fair.

**b. Propose a Model for each Issue**.

- Within 21 days of service of the Claimant’s proposals, any other party must reply indicating its agreement or its own Issues and proposals for Models.

- The parties must try to agree the List of Issues and Models before the first CMC.

- After the above, if the parties are seeking any Model C, D or E disclosure, then section 2 of the Disclosure Review Document (costs estimates of proposals, possible estimates of likely documents involved) must be prepared and exchanged not later than 14 days before the case management conference.

- A finalised single joint Disclosure Review Document should be filed by the claimant not later than 5 days before the case management conference.

- If the parties agree that Extended Disclosure is limited to Models A and B, then there is no obligation to prepare a List of Issues for Disclosure.

- The court will decide what disclosure to order at the CMC.

- An order for Extended Disclosure is complied with by serving a Disclosure Certificate (which includes a statement of truth), serving an Extended Disclosure List of Documents, and producing the documents disclosed where there is no claim to withhold production of them. Disclosable documents are produced to the other parties electronically in their native format and preserving meta data, or using scanned versions in relation to hard copy documents (57AD PD 13)

**Summary of the BPC disclosure regime**

**[**Diagram showing the following:

Statements of case served: Initial Disclosure

Within 28 days of last statement of case: Each party indicates whether intends to seek Model C, D or E Extended Disclosure

Within 42 days of last statement of case: C prepares and serves List of Issues for Disclosure and proposes models.

Within 21 days of service of List of Issues: Parties reply – agree or make own proposals, and subsequently discuss details

CMC: At CMC, court decides what order to make

60 days after CMC/ As directed by court: Known adverse documents: disclosed with Extended D. / 60 days after CMC

As directed by court: Parties comply with any Extended Disclosure ordered.

**Less complex claims**

Appendixes 5, 6 and 7 of the 57AD PD set out a slightly simplified version of the BPC disclosure regime for less complex claims. These are claims where the nature, value, complexity and the likely volume of Extended Disclosure suggest the full procedure would not be beneficial. Claims with a value of less than £1,000,000 are presumed to be such claims unless factors other than value suggest the contrary.

The main differences between the BPC disclosure regime for less complex claims and the full procedure are:

- A simplified Disclosure Review Document is used;

- Models C and E disclosure are not available – only A, B and D; and

- Parties are instructed to prepare the List of Issues for Disclosure in a way which is brief and at a high level of abstraction.

**Summary**

- The disclosure regime in the Business and Property Courts aims to achieve a cultural shift in regards to disclosure.

- Parties are required to disclose key documents on which they rely or which are needed to understand their position with their statement of case (‘Initial Disclosure’).

Parties must disclose ‘known adverse documents’ – adverse documents they are aware of without needing to carry out a search.

- Beyond this, parties must liaise before the case management conference to complete Disclosure Review Documents by which they identify a list of issues in relation to which disclosure is required, and what form of disclosure they propose for each issue.

- There is a simplified procedure for less complex claims.