DISCLOSURE IN THE BUSINESS AND PROPERTY COURTS

Lecture by Sir Julian Flaux the Chancellor of the High Court

on 18 January 2023, at 5.15pm

1. Thank you for inviting me to speak this evening about the Disclosure Practice Direction PD57AD. A particular thank you to Ed Crosse and Natalie Osafo who were members of the Disclosure Working Group and to their respective firms who have co-sponsored this event in association with the LSLA, Combar and the Chancery Bar Association.

Introduction

2. In 2016 a delegation from the GC100 Group of General Counsel asked to meet with the then Lord Chief Justice and Master of the Rolls to discuss aspects of litigation in England and Wales that were of concern to its members. Their concerns particularly focussed on the way in which disclosure took place under CPR Part 31 in light of the massive increase in the volume of data that was being produced by businesses in the ordinary course of events. With their concerns in mind a larger open meeting with users followed in the Rolls Building. The MR then set up a Working Group initially chaired by Dame Elizabeth Gloster and later chaired by me.

3. The Working Group was drawn from a wide range of interested bodies (the professional associations, the judiciary, the Government Legal Department and technology specialists). Whilst the GC100 may have been the catalyst for setting up the Working Group its brief was very broad, and took into account the full range of claims in the Business and Property Courts. Engagement with users – a traditional strength of all the courts within the Business and Property Courts umbrella - has been important throughout.

4. From an early stage the Working Group was unanimous in agreeing that CPR Part 31 was not working well in disputes handled in the Business and Property Courts. There were perceived to be two key failures in the way in which disclosure operated under Part 31. First, the process by which disclosure was given lacked structure and second, the parties' legal representatives often did not treat it as an exercise requiring collaboration.

5. The Working Group agreed that further amendments to Part 31 beyond those implemented as part of the Jackson reforms would not be sufficient to bring about the change in approach that was required. Nothing short of a fundamental change in the conduct and culture of disclosure was needed, which was never going to be easy to achieve.

6. The explosion of digital data continues. Vijay Rathour, who is a disclosure technology provider at Grant Thornton, and a member of the Working Group, recently summarised the position in a report to the Civil Procedure Rules Committee:

> *"Studies suggest that depending on data type, the volume of data generated and held by corporate clients is increasing by about 40% year on year and in recent years, especially due to the pandemic, the reliance on remote communication and home working technologies such as Microsoft Teams, Zoom and WhatsApp, has increased the variety of data as well as its volume and both of these challenges require different solutions. Data volumes are growing at a rate higher than the capacity of a human-only review team.*
>
> *Five years ago a 50 gigabyte case with around 250,000 documents would have been considered fairly large. Today, the* ***smallest*** *iPhone available has the capacity to hold 128 gigabytes of data; ten years ago this was 8 gigabytes. We are routinely processing 1 terabyte (ie 1024 gigabyte), claims, a current*

investigation encompasses 40 million reviewable documents and this is not our largest. Notably, through the use of technology assisted review approaches, this population was reduced to around 5,000 relevant documents."

7. I do not propose to set out the history of the Pilot and the lengthy consultation that preceded it, because since 1 October 2022 we now have a scheme under the Practice Direction that is part of the Rules and not just a pilot. All of us, judges, practitioners and clients need to embrace it and make it work well.

8. The Practice Direction emphasises how essential cooperation between the parties and assistance to the Court are. These are the things that avoid waste, delay and expense. They do not dilute the quality of adversarial engagement; in fact, they help to focus that engagement and make it effective. They enable case management to achieve its fullest potential, as the parties, assisted by their legal representatives, work with the Court to enable a dispute to be fairly resolved. This is about thoughtful, rigorous, sensible litigation.

The new scheme for disclosure

9. I want in this lecture to look to the future; to consider not so much the technical aspects of the drafting of the Practice Direction but rather to explain how the regime is intended to operate. The lecture is not intended to usurp or replace the development of the law relating to disclosure in decided cases as we go forward. However, I hope it will provide a reference point if there is uncertainty. The Disclosure Working Group has now been disbanded but we will continue to learn more as the Practice Direction is used in practice and there will always be an opportunity to make further adjustments.

10. I hope that we can all agree that the entire process of litigation only works well and efficiently if there is sensible cooperation between the parties. CPR rules 1.3 and 1.4 are central to the CPR and the role of the Court in applying the overriding objective. Where practitioners cooperate professionally, they comply with rather than undermine their duties to their clients.

11. The need for cooperation in giving disclosure is of a different order to other areas of cooperation. Each party is required to undertake a process that will involve disgorging documents, some of which may be unhelpful to the disclosing party's case. They are entitled to disclosure in return. Practitioners have duties to their clients and to the Court to help ensure that if there are adverse documents they are produced. In Common Law jurisdictions this is an essential part of a fair system of dispute resolution. However, it has to be subject to controls to prevent abuse and excessive cost.

12. The scheme for disclosure that is now contained in PD57AD bears little resemblance to CPR Part 31. Part 31 contains 23 rules and three associated Practice Directions. PD57AD is quite different for several reasons. First, it is self-contained. There is no need to cross-refer between a rule and a supporting Practice Direction. Second, and because it is a single self-contained Practice Direction, it is not drafted in the way that a typical rule is; it includes quite extensive guidance. This was deliberate and was an approach requested in consultation; the intention was to create a scheme that could be read as a narrative, particularly with litigants in person in mind. Third, the scheme deals with important aspects of disclosure that are not found in CPR Part 31 at all such as the duties that are placed upon the

parties and their advisers (para 3) and the unfettered obligation to disclose 'known adverse documents'. Fourth, the scheme constitutes the driver for a necessary change of culture in relation to disclosure in business and property litigation.

13. CPR Part 31 has been cast by some critics of the Practice Direction in the role of an "old friend" and seen in the warm glow of nostalgia. However, Part 31 which was devised and developed in an era when paper documents were predominant, is ill-suited to the modern digital era.

14. It is also sometimes said that the new scheme of disclosure contained in PD57AD may be "standard disclosure by another name". It was so described in a recent article in the Law Society Gazette. This fundamentally misses the point that the Practice Direction contains an entirely new scheme for disclosure. It sets out the principles that underpin disclosure and the duties placed upon the parties and advisers. There is a new obligation to provide Initial Disclosure, and Extended Disclosure is graduated by reference to Issues for Disclosure and Models and has to be justified.

15. Seeing PD57AD as a new form of standard disclosure is an illustration of the tendency to see new rules through the lens of the rules they replace. I do not suppose even the most enthusiastic among you would regard reading PD57AD from beginning to end as suitable bedtime reading, but even a cursory read will reveal that the scheme in PD57AD bears little resemblance to Part 31.

16. Adapting to such a significant rule change *is* challenging, particularly where it concerns an aspect of the litigation process which is complex, difficult, and frankly speaking, at times, not particularly enjoyable.

17. When faced with a fundamental re-writing of the rules on disclosure, to achieve a change in culture, which essentially required a re-learning of core skills, it is perhaps understandable that some may initially be less enthusiastic than others about embracing such change.

Core principles of the new scheme

18. I propose to highlight some of the key principles that are set out in the Practice Direction:

(1) In paragraph 2.1 there is a statement of principle about the important role disclosure plays in litigation in England and Wales:

"Disclosure is important in achieving the fair resolution of civil proceedings. It involves identifying and making available documents that are relevant to the issues in the proceedings."

(2) Paragraph 2.3 puts cooperation at the heart of the exercise:

"The court expects the parties (and their representatives) to cooperate with each other and to assist the court so that the scope of disclosure, if any, that is required in proceedings can be agreed or determined by the court in the most efficient way possible."

(3) Paragraph 2.4 then provides the four central messages that lie at the heart of the new scheme:

"The court will be concerned to ensure that disclosure is directed to the issues in the proceedings and that the scope of disclosure is not wider than is reasonable and proportionate (as defined in paragraph 6.4) in order fairly to resolve those issues, and specifically the Issues for Disclosure (as defined in paragraph 7.6)."

19. The four messages that can be derived from this are:

(1) The role of the Court is made clear. Disclosure is not left to the parties to operate as they wish (hoping that they can carry on applying Part 31). Unlike Part 31, the Court is required to supervise the use of Extended Disclosure.
(2) Disclosure is directed to the key issues in the proceedings and specifically to the Issues for Disclosure.
(3) The scope of disclosure must be limited by reference to reasonableness and proportionality. Guidance on what this means is contained in paragraph 6.4 of the Practice Direction.
(4) The function of disclosure is to assist with the fair resolution of the issues in the claim.

How does the new scheme work?

20. Two broad themes can be discerned from the Practice Direction. First, it provides a **structure** or framework within which disclosure takes place. Second, there is an essential theme of **engagement**; disclosure demands cooperation between the parties and their representatives.

Structure

21. Disclosure is a complex and demanding process and so a principled and structured approach is needed. The main concepts which can be found in the Practice Direction include:

(1) Disclosure is not just a stage in the life of a claim and it is not helpful to see it just as a 'phase' which follows statements of case. Wherever possible, disclosure must be thought about before litigation commences. As is apparent from many pre-action protocols.

(2) The Practice Direction deals with document preservation and in many cases requires Initial Disclosure. This goes further than the provisions in Part 31 for disclosure of documents referred to in a statement of case and in the general pre-action protocol at para 6c for disclosure of key documents. For those who want to avoid Initial Disclosure, I would ask rhetorically, why would you not want to ensure at the outset that the other party has the core documents you have relied upon and those which are essential in order to understand your case? And why would you not want the corresponding core documents from the other party?

(3) There are two disclosure regimes, the Less Complex Claims regime and the Standard regime. Thought needs to be given at the outset to which regime is likely to suit the claim best.

(4) There is no entitlement to Extended Disclosure. It must be justified and approved by the Court.

(5) In accordance with paragraph 2.4, the scope of disclosure must be set by reference to the key issues in the claim that justify disclosure being given, and will be calibrated by reference to Models.

(6) The Disclosure Review Document ("DRD") provides a framework for the parties to seek Extended Disclosure and the Court to approve, or not, what is sought.

Engagement

22. The duties placed upon the parties and their advisers are spelled out in paragraph 3 of the Practice Direction. The central theme again is co-operation. Disclosure simply cannot operate effectively without the parties

engaging with each other. That requires them to communicate in a constructive and meaningful way to fulfil their obligations. The language used in the Practice Direction gives a good idea about what is needed:

(1) Paragraph 3.2(3) *"… to liaise and cooperate with the legal representative of the other parties…"*

(2) Paragraph 7.10 *"… the parties must discuss and seek to agree …".*

(3) Section 1A DRD *"… the parties should have regard to their duties to co-operate and engage with each other in a constructive way …".*

23. Genuine and meaningful cooperation, discussion and engagement is required. In a very simple case it may suffice to exchange views in letters. In most cases however that is unlikely to be sufficient. The legal advisers must talk to each other with the objective being to provide the Court with a workable framework for Extended Disclosure. If the parties have genuine differences and have tried to resolve them, the Court can assist. That should be the default position - it is not helpful to burden a CMC with differences about disclosure that could have been resolved with a greater degree of effort. And of course, when needed you can and should enlist the Court's assistance at an early stage by seeking Disclosure Guidance.

24. The requirement to engage is not new (see for example Part 31.5(5)); what is new is that with closer Court supervision of disclosure it is no longer open to parties to ignore the obligation. It is intended that the culture should change both now and in the future.

Practical considerations

25. It bears repeating that the process of disclosure starts where possible before the claim is issued, particularly in the case of the claimant. Disclosure is much more than an isolated step in the claim. It involves at an early stage considering factors such as:

(1) What documents need to be preserved?

(2) What documents need to reviewed in order to give advice about the claim or its defence?

(3) What are the likely issues, or what are the issues that have been identified in pre-action correspondence?

(4) What Initial Disclosure will need to be provided?

(5) What are likely sources of data, are documents in hard copy or electronic and will electronic searches be required now and/or later? Are documents held on multiple electronic devices or servers? Are documents held at multiple sites potentially across different jurisdictions?

(6) Which party is likely to hold the bulk of the documents to be searched? It may be that one party holds all the data that needs to be searched and disclosed.

(7) What is the likely volume and nature of data that may need to be searched and reviewed?

(8) Should an e-disclosure provider be appointed at the outset? In most cases, unless you have such resources in-house, the answer to that question is likely to be "Yes".

(9) What type of claim is it? Are there multiple parties? Does it involve allegations of dishonesty or an assessment of the state of mind of one or more person?

(10) Is the claim suitable for the Shorter Trials Scheme?

(11) Is the claim fairly to be regarded as a "Less Complex Claim"?

26. It is sometimes said that the Less Complex claim scheme is subject to financial limits but that is not an accurate summary of the criteria set out in paragraph 3 of Appendix 5 to the Practice Direction. Value is only one indicator. There is no reason in principle why the Less Complex claim scheme may not be used in a relatively high value claim, if the nature and lack of complexity of the claim or the likely volume of documents, or any combination of those factors, make it suitable for the scheme. Both the Commercial Court and Chancery Guides encourage parties to use it.

27. These considerations long pre-date what is generally regarded as the disclosure stage of the claim. To some of you they may seem rather basic. Many commentators have observed that the disclosure scheme results in the front loading of work and costs. I would suggest that these considerations are no more than good practice. In one sense litigation is a linear process moving from stage to stage. However, in reality those stages are not distinct and do not simply unfold one following the other.

Issues for Disclosure

28. The importance of having an agreed and workable List of Issues for Disclosure cannot be overstated. However, this has been the aspect of the new scheme with which many practitioners have struggled. The process of seeking to agree Issues for Disclosure has been in some cases, but by no means in all, an unnecessary battleground. Fortunately, this is becoming less common as the Practice Direction has bedded down.

29. Before looking at precisely what the Practice Direction provides in relation to Issues for Disclosure, it is again worth looking at Part 31 by way of

comparison. The standard disclosure test was included in the CPR with the intention of curtailing what was, in the late 1990s, regarded as excessive disclosure. The idea was that providing for standard disclosure as the core test for relevance (a word that is not in fact found in Part 31) would prevent unfocused and wide-ranging disclosure on the 'better in than out' approach.

30. The problem with the test in rule 31.6 is that it operates by reference to a party's "case" without providing any mechanism for establishing and agreeing what is comprised in the case. It is left to each side to form their own view about their own and the other party's case. Furthermore, it assumes that every aspect of the case is of equal significance for the purposes of disclosure.

31. No doubt some practitioners applied an analytical approach and considered the statements of case and the issues to be derived from them. But there is no encouragement in Part 31 or its Practice Directions to do so. It is hard to imagine just how Part 31 operates effectively at a practical level, particularly in cases where gargantuan volumes of documents are involved.

32. The new scheme works in a different way. The issues that warrant disclosure are first identified and then they are considered in the context of the likely universe of documents. The exercise must always have in mind the requirement in paragraph 6.7:

> ***"6.7** It is important that the parties consider what types of documents and sources of documents there are or may be, including what documents another party is likely to have, in order that throughout a realistic approach may be taken to disclosure."*

33. The Practice Direction requires a structured approach to be taken with a view to agreeing what issues require disclosure, which party needs to provide disclosure in relation to each issue (it may often be both but not invariably) and what scope of disclosure is proportionate to that issue.

34. Judges in the Business and Property Courts have experience of CMCs in which the parties present an agreed list of issues for disclosure running to many scores of issues. Both parties have picked over the statements of case, leaving no issue unturned, and produce a massive list. Lawyers like detail and no doubt anxiety plays its part in making agreement difficult. There will be concern about permitting the other party to evade production of what is probably a mythical 'smoking gun', concern about appearing soft if a collaborative approach is taken and a lack of trust that the other side will comply with their duties. Although this is understandable, it is unhelpful. Issues for disclosure are important but they are only one, proportionate, part in the process of giving disclosure.

35. Paragraph 7.6 defines the term "Issues for Disclosure" and three elements from the definition are worth highlighting. They are (i) the key issues in dispute (ii) that will need to be determined by reference to contemporaneous documents for there to be a fair resolution of the proceedings and (iii) they do not include every issue in dispute by denial or non-admission.

36. The clearest possible steer about the number of Issues for Disclosure there should be and the manner of their drafting was given by the previous Chancellor in *McParland and Partners Ltd v Whitehead* [2020] EWHC 298 (Ch). That guidance is now set out in paragraph 7.6 of the Practice Direction:

"The List of Issues for Disclosure should be as short and concise as possible."

"Short and concise" says it all, and does not require elaboration.

37. There is also now a useful elaboration in para 7.7 about the function that Issues for Disclosure perform:

> ***"7.7*** *When drafting Issues for Disclosure the parties should have regard to the primary functions of those Issues namely*
>
> *(i) to help the parties to consider, and the court to determine, whether Extended Disclosure is required and, if so, which Model or Models should be used;*
>
> *(ii) to assist the parties in identifying documents and categories of documents that are likely to exist and require to be disclosed;*
>
> *(iii) to assist those carrying out the disclosure process to do so in a practical and proportionate way including, in the case of search-based disclosure, to help define and guide the searches;*
>
> *(iv) to assist with the process of reviewing documents produced by searches; and*
>
> *(v) to avoid the production of documents that are not relevant to the issues in the proceedings."*

38. If those relatively limited functions are borne in mind, it should be easier to settle the Issues for Disclosure. A realistic approach to Issues for Disclosure needs to be taken bearing in mind their functions and the need for the List to be as short and concise as possible. In contrast, drafting Issues for Disclosure as part of a detailed analysis of every issue in the

claim will lead to excessive and unnecessary complexity. It will make it more difficult to agree the issues and if they are overly complex, their usefulness will be much reduced. I acknowledge the practical difficulties in the context of adversarial litigation in reaching agreement, but it needs to be recognised that there are different ways of drafting that can achieve the same objective.

39. Issues for Disclosure need be no more than serviceable to perform the relatively limited function they have. In reality, it is inconceivable that Issues for Disclosure that are short and concise and drafted and agreed in good faith will be the subject of criticism by the court and, importantly, they can always be revised or supplemented: see para 7.12.

40. Compromise is needed but not if it results in taking the line of least resistance and agreeing a List that is far longer and complex than is needed. If there is a fundamental difference between the parties – 10 short issues against 30 lengthy ones – it is very likely that the Court can give guidance speedily and almost certainly without a hearing. Seek early guidance from the Court as this will save costs and enable the main CMC to focus on more important issues.

41. Finally on this topic, I suggest practitioners will produce a workable List of Issues for Disclosure if they follow two related guidelines:

    (1) First, they apply the mantra "short and concise". If the list is not short and/or the issues are not concise, start again.
    (2) Second, have in mind that the list should be a practical working document, related to the likely sets of documents that will have to be reviewed. It is a working tool, which should assist the review

team in the process of disclosure, a process that inevitably is not an exact science. You can take comfort from the overriding obligation to produce adverse documents, which is not to be found in CPR Part 31.

Models

42. Similarly, when the objective of relating Disclosure Models to Issues for Disclosure is understood, the parties should be able to produce a workable and proportionate regime for disclosure in relation to the dispute.

43. Para. 6.6 makes the objective clear:

> ***"6.6*** *The objective of relating Disclosure Models to Issues for Disclosure is to limit the searches required and the volume of documents to be disclosed. Issues for Disclosure may be grouped. Disclosure Models should not be used in a way that increases cost through undue complexity."*

44. In the early stages of the Pilot the final words of that paragraph were not often applied. Parties presented the Court with long lists of issues for disclosure using a wide range of Models, as if there was an expectation that most of the Models ought to be used in every case. This was a misunderstanding of the way in which the Pilot was intended to operate. The position is now set out in the clearest possible terms in paragraph 8.3:

> ***"8.3*** *The court may order that Extended Disclosure be given using different Disclosure Models for different Issues for Disclosure in the case. It is important that there is moderation in the number of Models used and the way in which they are applied to the Issues for Disclosure so that the disclosure process that will follow, using the*

Models and the Issues for Disclosure, will be practical. In the interests of avoiding undue complexity the court will rarely require different Models for the same set or repository of documents…"

45. When choosing Models there are two main guiding questions to be considered. First, what types and sources of documents are likely to exist: see para 6.7. There is no need to overcomplicate disclosure. Secondly, the parties will want to have in mind what type of issues they are dealing with. Examples of the type of question that may need to be asked include:

(1) How important is the issue?

(2) Is any extended disclosure needed in light of what has been disclosed on Initial Disclosure or in the pre-action phase? Accordingly, will Model B suffice for some or all of the issues?

(3) Are there issues that are issues of law or construction that are not Issues for Disclosure?

(4) Is there an issue about what somebody thought or knew or about why they acted as they are alleged to have done? If so, communications are likely to be important and Model D searches will be needed.

(5) Is there an issue concerning fraud or dishonesty or conspiracy. These types of issue are likely to warrant wide-ranging disclosure that are highly focussed. Can Model E be justified?

(6) Is there a need to produce Narrative Documents and can this be justified?

(7) Are there particular documents or narrow classes of documents that will make use of Model C helpful?

Model C

46. In the early stages of the Pilot Model C was often used as a strategic weapon in a way that was not intended. Lengthy and overly granular requests for disclosure were fired across to the other party, which were then debated ad nauseam by the parties, and in many instances, became the subject of much debate at CMCs. This was not the approach envisaged when Model C was introduced.

47. Model C was taken from the Shorter Trials Scheme (PD57AB) to allow a party in a document-light case or on an issue that could sensibly be document-light to make some limited, focused requests for disclosure relating to specific documents or narrow classes of documents. Model C is not a means of interrogating a wide body of data or to replicate searches that might be undertaken to achieve a Model D form of disclosure.

48. Paragraph 10.4 now makes it clear that "Model C requests should not be used in a tactical or oppressive way." That paragraph places emphasis on the need to be very focused and limited in the requests made. The Court does not want to see something akin to an elaborate Redfern schedule as encountered in international arbitration.

49. Model C serves an important function, but a limited one. It can be useful to identify "particular documents or narrow classes of documents" as core documents that are important and can readily be located. If the documents in question cannot readily be identified[1] then Model C should not be used. Moreover, close attention should be paid to the guidance in the Practice Direction about avoiding overcomplexity. In essence if the same dataset

[1] For example: "Bank statements with X bank between Y and Z dates; or Minutes of board meetings of X Ltd between Y and Z dates."

will have to be searched for other issues or Model C will result in extensive searches, then Model C is unlikely to be helpful. There are very helpful guidance notes forming part of the DRD entitled "Completion of Section 1B of the DRD" which can be found in Appendix 2 of PD57AD and in the White Book at 57ADPD.3, which are likely to be treated as authoritative by the Courts.

Avoid a "pick and mix" approach when seeking to match Models to Issues.

50. Having been through the Issues for Disclosure and matched Models to each Issue, it is necessary to step away from the detail and to ask whether more than one or two Models are really necessary. Will using more than one Model result in increased cost and undue complexity? If so, that should be avoided. For example, if you are faced with a party that is proposing multiple Model C and Model D orders across a range of Issues for Disclosure, then something may well have gone wrong. In many cases, it will suffice to use Model D with Model B applied to more peripheral issues.

51. The parties should have in mind when producing issues for disclosure and considering the models that may be used, what the data landscape contains or is likely to contain. Disclosure is inevitably imperfect. The searches may not be perfectly targeted, or they may not hit on every key document, or reviewers may not appreciate the significance of some documents. Rather than spending time on an approach that will likely simply result in volume, careful thought needs to be given to what searches are really necessary to get to the key documents. Searches must be limited and be focussed.

52. The way to reduce the complexity and cost of the disclosure exercise in such cases is to focus on Section 2 of the DRD, which sets out (and hopefully limits by agreement) the extent of the data landscape to be interrogated. It is very hard to achieve that outcome simply by relying on an overly complex matching of Models to Issues.

Section 2 of the DRD – restricting the data landscape

53. Completion of the different sections of the DRD is part of an integrated process. Section 1A lists Issues for Disclosure and Proposed Models and 1B, sets out Model C requests. Section 2 is the Questionnaire which replaces the Electronic Disclosure Questionnaire under Practice Direction 31B. The parties cannot properly engage in the process of agreeing the issues and the models, without knowing what the consequences will be in terms of workload and likely output, matters which can only be assessed by reference to Section 2. Unless you know what those consequences are in terms of matters such as the size of the data universe, where the documents are, the number of custodians and the date range, it is difficult to determine whether the proposed models lead to disclosure which is reasonable and proportionate.

54. Thus, Section 2 of the DRD is one of the most important aspects of the new scheme. If properly completed and discussed by the parties in advance of the CMC, it not only ensures that the extent of the data landscape to be searched is discussed, agreed (and in consequence hopefully reduced), but it also serves to flush out areas of difficulty for discussion with the Court.

55. For example, if your client has data, which is going to be very difficult or expensive to retrieve or review, then this is something that you can raise,

upfront, in Section 2. If the other side nevertheless insists that you undertake searches for data which you say will be either impracticable or disproportionately expensive to retrieve, then that can be discussed and resolved at the CMC. Conversely, if the Section 2 Questionnaire identifies that there is only very a limited data set, it may be appropriate to revisit whether the issues and models can be simplified and whether to use the Less Complex Claims procedure.

56. Under CPR Part 31, such pre-CMC discussions rarely took place. Instead, the parties would blindly agree to an order for Standard Disclosure and then have an argument later on about what that meant, often leading to expensive specific disclosure applications. It is remarkable how few "specific disclosure" applications there have been in the Business and Property Courts (or more accurately applications under paragraph 17 or 18 of PD57AD seeking better or further disclosure) since the Pilot was first introduced. I believe the reason for this is that problem areas are being dealt with upfront, through proper engagement, rather than being stored up for later.

57. Section 2 of the DRD, is also the place where parties are required to give consideration to the use of technology and, where possible, set out their proposals. The Practice Direction places technology at its heart. Indeed, one of the key duties on parties and their advisers is to promote the reliable and efficient conduct of disclosure "through the use of technology" (paragraph 3.2(3)). This too requires cooperation from an early stage.

58. My last observation on section 2 of the DRD is that it is essential that it be completed as early as possible. If that is done, issues between the parties can be flushed out and, if necessary, resolved at the CMC. Completing the

DRD shortly before the CMC is rarely going to allow enough time for proper engagement and resolution.

What does the Court expect?

59. I should say something about the importance of the CMC or CCMC. In many cases the CMC will be the first occasion when the Court has an opportunity to consider the claim. This is a key moment in the life of a claim and decisions will be taken that will affect the shape of the trial or more often the stage at which the claim can be settled. It is absolutely right that the parties make great efforts to agree as much as they can. This is of great assistance to the Court and enables judicial time to be used efficiently and productively.

60. However, the CMC is rather more than an exercise in approving what the parties have agreed. It is only very rarely in the Business and Property Courts that the CMC should be adjourned and a consent order approved unless the claim is routine and the directions are unexceptional. The parties should expect the directions they have agreed to be interrogated. It is usually very helpful for the Court to discuss the claim and the directions. Depending on the case, this does not necessarily require attendance by the proposed trial advocates. In relation to disclosure specifically, the solicitors who have had day to day conduct of the preparation for the CMC may be in a much better position to assist the Court than counsel who has been briefed shortly before the CMC.

61. So far as disclosure is concerned, the CMC should generally be the occasion when all the issues relating to disclosure are ironed out. Not only should the parties normally leave the CMC with the issues for disclosure and models resolved but also having obtained clear directions about the

scope of searches. Of course, there will be claims where that is not possible and a further hearing or directions given on paper may be needed.

62. What does the Court expect from the parties? There are four essential requirements:

(1) The parties must be able to demonstrate that there has been genuine engagement.
(2) The parties must show that they have understood the need for a proportionate approach to disclosure.
(3) There must be a clear methodology that underpins the approach to disclosure that has regard to the likely sources of documents.
(4) There should be few differences left for the court to resolve. It is unacceptable to present the Court, for example, with widely differing lists of issues for disclosure and expect the Court to settle issues presented in that way at the CMC. If the parties find intractable difficulty before the CMC they should seek early guidance from the Court: see para 11.

63. If these steps are not taken, then the parties run the risk that the CMC is adjourned with an adverse order for costs.

Sanctions

64. The Practice Direction does not contain any express or implied sanctions for failures to comply with its requirements. This is deliberate because the primary need is for collaboration not coercion. However, paragraph 20 of the Practice Direction gives the court power to impose sanctions where there has been default. In particular, there is power to adjourn a hearing and make an adverse costs order.

65. As I have said previously, if the parties have made genuine efforts to resolve disagreements about disclosure and acted in good faith the Court will not resort to sanctions. The position is different where one or both parties are in default and there has been a failure to engage in the way that is required. In those circumstances judges may well consider it is appropriate to adjourn the CMC to a later date. The Court may well in addition either make an adverse costs order, or perhaps more fittingly, if both parties are in default, no order for costs or an order disallowing the costs of preparing a hopeless DRD whilst directing parties to do the exercise again.

Conclusions

66. There is no doubt, as judges fully understand, that disclosure is a demanding and technical exercise that is more often than not handled with remarkable skill and expertise by practitioners.

67. As I have said, there have been complaints that the new system front loads work and cost. But I wonder whether that is really so? Can it sensibly be said that allowing parties to proceed through disclosure without any such engagement, thought and focus will lead to an efficient outcome when it comes to the review and production of data? Do we really want a situation where parties can dump vast quantities of documents on the other side as a litigation tactic? Or where parties have failed to discuss how such documents should be produced from a technical perspective? Or where parties are having to undertake searches across a far larger body of data than is proportionate, simply because there has been no discussion about this or parties have been like ships that pass in the night so far as disclosure is concerned?

68. All too often that was the position under Part 31 in business litigation, and that is why users, such as the GC100, made it clear that a new approach was required. As important as the detail of the Practice Direction is the culture change it seeks to bring about.

69. Disclosure is unlikely to become easier as the volume and different types of data increases. However, if practitioners work hard to avoid unnecessary complexity in providing the framework in which the process is carried out, increasing volumes of data can be managed. Technology, of course, is key to addressing the problem of big data, but for technology to work best, the parties need to discuss and agree how it should be used.

70. Disclosure is central to our system of litigation. It is one of the things that enables claims to be tried fairly. We all, judges, practitioners, and clients, need to make the new procedure work well and support the change in culture. Our legal system has a hard-won reputation for fairness and in my opinion the proper management of the burden of disclosure, which the Practice Direction seeks to achieve, can only enhance that reputation, nationally and internationally.

Sir Julian Flaux

Chancellor of the High Court

18 January 2023