Painful procedure

Jeff Lewis with a litigator's view on the impact of the disclosure pilot scheme

Those of us of a certain vintage can remember an old pre-CPR rule known as 'automatic strike-out'. The aim of this rule, when it was introduced, was entirely laudable: in order to end the entirely unacceptable situation whereby relatively simple cases took many years to reach trial, a rule was brought in so that, in effect, any case that was not listed for trial within six months of close of pleadings would be automatically struck out. The result was that the automatic strike-out rule, in curing one ill, created many others and became loathed by lawyers, judges, and clients alike.

The rule was swept away in the changes brought by the inception of the CPR in 1999. Fast forward a couple of decades, and the rule makers introduced another scheme with entirely laudable objectives: to address the problem that the proliferation of electronic documents causes to the disclosure process. The scheme is loathed by lawyers, judges and – you guessed it – clients alike. The strength of feeling was reflected in the tone of practitioners' feedback to the pilot's monitor, Professor Rachael Mulheron of Queen Mary University London, in her February 2020 report on the first year of the scheme's operation.

The Disclosure Pilot Scheme (DPS) was introduced in the Business and Property Courts (BPC) in England and Wales in January 2019. The pilot was expressly designed to mitigate some of the 'excessive costs, scale and complexity' reportedly experienced by parties under the previous rules for disclosure. Indeed, the trigger for the DPS was the dissatisfaction expressed by the GC100 about disclosure obligations under those previous rules.

The DPS was originally designed to run for two years, until January 2021. Its life has since been extended twice, such that it is now due to end at the end of this year.

AMENDMENTS TO THE SCHEME

The principal reason for the latest extension is that a whole raft of changes was introduced to the DPS in October 2021, and the latest extension is, sensibly, to allow time for the amendments to bed in and to provide an opportunity to consider further feedback received.

And here the Disclosure Working Group (DWG), which has been behind the DPS, should receive credit for its willingness to consider the feedback and for making changes to address some of the criticisms of the DPS. Here I should disclose a (kind of) interest, in that in late 2020, I was invited to meet with members of the DWG to discuss the impact of the DPS on lower-value claims; I can genuinely say that I found the DWG to be entirely receptive to constructive criticism, and to be extremely willing to take on board my comments. And so it proved: one of the most significant changes brought about by the October 2021 amendments was the creation of a separate, simplified disclosure regime for 'less complex claims'. A less complex claim is the default position for any claim with a value of less than £500,000, and the less complex claim procedure could also be appropriate if the nature, complexity and likely volume of extended disclosure renders it appropriate.

There is no doubt that the procedure for less complex claims makes the DPS more palatable for lower-value / more straightforward claims. It carries with it a number of benefits to promote proportionality, of which perhaps the most welcome is a simplified form of Disclosure Review Document (DRD).

That's all very well so far as it goes, but it fails to recognise that even this simplified regime still generates significantly more costs than disclosure under Part 31 CPR did.

Nor does the introduction of the less complex claims procedure assist with those claims (of which there are of course very many) that are not a less complex claim. True, the raft of amendments introduced in October 2021 has assisted with those claims; the introduction of a bespoke regime for multi-party cases, the changes to the models under the DPS (and in particular the introduction of more practical rules around the disclosure of narrative documents), and the amendments introduced to simplify the task of preparing lists of issues for disclosure will inevitably save some costs. But the overriding perception is that these changes 'fiddle around the edges' while the fundamental difficulties caused to litigants in the Business and Property Courts by the DPS remain.

Take, for example, the amendments in relation to the list of issues for disclosure. Although they place greater emphasis on the need for engagement between the parties, nevertheless the mechanics of actually agreeing the list can easily become a disproportionately time-consuming and expensive exercise.

Similarly, simplifying the models has not addressed the real mischief that matching issues for disclosure to models is almost always complex and laborious (and therefore costly). Moreover, this exercise bemuses the parties themselves and undermines their confidence in the litigation process; if ever an exercise created an impression that lawyers 'live in a bubble' insulated from 'the real world of business' then this one is it. Even if litigants have not lost faith in the process during the pre-CCMC work, then they are bound to do so when watching counsel and the court tediously (and often haplessly) arguing the finer points of the disclosure models at a CCMC.

The reference to 'counsel' in the above paragraph was not incidental. Whereas previously, solicitors were often content to advocate at a CCMC, the complexity of the DPS (and the DRD) means that solicitors' appearances as advocates at a CCMC have become something of a rarity, thus further adding to a party's costs bill for a CCMC. Indeed, Professor Mulheron's Third Interim Report (February 2020) noted that counsel were now involved in the vast majority of CCMCs, and that respondents had observed that counsel involvement in disclosure-related matters had increased under the DPS.

Nor do the amendments remedy one of the fundamental problems of the DPS: that the parties, their lawyers and (notably) judges are much better able to resolve disputes over matters such as search words, location of search and so forth once some disclosure has taken place. By trying to address the matter 'in advance' (ie. at a CCMC), everybody is trying to wrestle with the problem in the abstract; experience shows that everybody could take a far more informed view once the disclosure process has actually begun.

Likewise, the simplification of the DRD, while welcome, fails to address many of its criticisms. While the DRD is perhaps a necessary document in the context of the DPS and all its requirements, the overwhelming view arising from a survey of Manchester BPC practitioners was that the cost and effort involved with the preparation of the DRD is entirely disproportionate to the benefits that it provides; indeed, again in her Third Interim Report, Professor Mulheron reported that 88% of respondents considered that the preparation of the DRD had increased the costs and the time associated with the disclosure process (with the additional cost often said to be in five figures). Anybody who has completed a DRD on behalf of a client is, I would suggest, unlikely to disagree. No wonder that Professor Mulheron described the DRD as 'perhaps the most vociferously criticised aspect' of the DPS.

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Traditionally, disclosure has been in many ways 'the jewel in the crown' in the English legal system, and yet in the BPC it is increasingly taking on the role of 'the embarrassing uncle at Christmas', whom nobody wants to go near, but everybody accepts must be tolerated through gritted teeth.

Indeed, a survey of Manchester BPC practitioners effectively concluded that the DPS has turned disclosure from being a vital but relatively straightforward element of the litigation process, into a cumbersome and disproportionately expensive one. Everything from the preparation of the list of issues for disclosure, through to the completion of the DRD and the discussion with opponents (which can, even with opponents who are helpful and cooperative, become protracted) all adds to costs for no apparent tangible benefit.

THE CONTEXT

Part of the impetus for the DPS came from one or two very large cases (involving oligarchs!) in the London Courts, in which the volume of documentation disclosed was disproportionate and unwieldy. However, such cases are very much the exception. It must also be remembered that the vast majority of cases settle before (often well before) trial; thus, the benefits that more streamlined disclosure might bring to the trial process need to be balanced against the drawbacks that the DPS brings to that vast majority of cases that settle. In reality, the worst that generally happened pre-DPS was that more documents were searched for and discovered than might be necessary; thus, the DPS has been the classic 'sledgehammer to crack a nut'.

Having begun by recognising that the DPS came about for laudable reasons, it would be remiss not to acknowledge that its existence has, quite properly, focused lawyers' minds on the disclosure process. It would also be unfair not to remember that the explosion in the number of electronic documents in the last couple of decades had created a problem in terms of disclosure that needed to be addressed. So how to reconcile these factors with the criticisms that have been levelled at the DPS?

Unlikely as it perhaps is, I would suggest that the answer lies in the abolition of the DPS – but that such abolition should be tempered by strong encouragement to case management judges actively to consider the full range of disclosure options that Part 31 CPR offers. Whereas, before the DPS, courts almost always defaulted to ordering standard disclosure, the legacy of the DPS should be that parties and Courts should actively consider the full menu of options under Part 31.

The introduction of the DPS was a drastic step. It was done in good faith and with the best of intentions, but ultimately its unpopularity with lawyers and litigants (not to mention judges), and the reasons for that, cannot simply be ignored. It took eight years for 'automatic strike-out' to get a decent funeral; when the DPS ends at the end of this year, the rule-makers have the chance to bury it in just half that time.

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