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Background

At a disclosure guidance hearing (**"DGH"**) in the High Court, the Chancellor of the High Court, Sir Geoffrey Vos, provided further clarification in a reserved judgment on how the Disclosure Pilot (the "**Pilot**") is intended to work. In particular, guidance was provided to help parties identify the correct issues for disclosure and choose the appropriate disclosure models.

The judgment was provided in a case involving two Claimants, McParland & Partners Limited ("**MPL**") and Fairstone Financial Management Limited ("**FFML**"), who both had various advisory and employment contracts with the Defendant, Mr Stuart Whitehead. These contracts contained a combination of confidentiality, non-competition and non-solicitation clauses that the Claimants alleged were breached by the Defendant, and of which they could not know the full extent of wrongdoing in advance of disclosure.

The parties' Case Management Conference was adjourned as they were "unable to agree key matters of disclosure and experts and the Court [was] unlikely to resolve these matters within the allotted time of 1 hour". A DGH was listed under CPR PD 51U. Prior to the DGH, the parties agreed a list of 16 issues for disclosure, which they included in their disclosure review document. The parties also agreed on what would be the appropriate model of extended disclosure for 9 of their 16 disclosure issues. The different disclosure models are categorised from A to E and each offer disclosure of varying extents requiring more or less investigation. There is no presumption that a party is entitled to extended disclosure and none of the models apply without the approval of the Court.

The Decision

The DGH resolved the parties' disclosure issues and determined the most appropriate model for each issue, however, the resolution is not where the interest in this case lies.

Vos LJ provided commentary on the operation of the Pilot when deciding on issues and models, separated into three headings:

1 The identification of issues for disclosure

Documentation that is or is likely to be in each party's possession should be the basis of the issues, the exercise is not one of identifying the issues that will arise at trial for determination. Parties should not include issues that are founded in law or interpretation.

Vos LJ illustrates through an example from the case at hand. One of 16 agreed issues was "the date on which Mr Whitehead's employment with MPL and his engagement with FFML terminated". The date on which Mr Whitehead wrote to terminate his employment was accepted by both the parties who were also in agreement that a 6 month notice of termination was required. The only disagreement was whether an earlier revocation of Mr Whitehead's FCA permissions by FFML amounted to an immediate termination of both the contracts. This issue would not have revealed any additional relevant documents beyond those that had already produced on initial disclosure. The parties already had the contract and were in agreement on the facts so the issue to be resolved was exclusively one of law to be determined at trial.

The issues for disclosure should not contain legal or factual issues capable of being fairly resolved from the documents already available. It might result in the issues for disclosure not being very numerous, but this is encouraged. Vos LJ demonstrates how this can be done by cutting down and modifying the parties' agreed disclosure list from 16 to only 3 issues.

To provide further assistance, Vos LJ summarised how the Pilot has changed the disclosure position:

"*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.*"

2 The approach to choosing between the disclosure models

Vos LJ used two examples from the case in the form of his reframed issues to demonstrate how the parties should choose the disclosure model.

The first reframed issue was "what was the commercial relationship between MPL and FFML, and how and when did FFML succeed MPL as the trading entity engaging Mr Whitehead?" This issue related to a complex and longwinded takeover of MPL by FFML which was likely to have generated a great deal of documentation. The vast majority of the information that relating to this issue would have no relevance to Mr Whitehead's specific position or the dispute.

Vos LJ first determined that a reasonable disclosure request had been made in relation to this issue on behalf of the Defendant for redacted copies of agreements made between MPL and FFML. Model C (request-led search-based disclosure) allows the Court to "order a party to give disclosure of particular documents or narrow classes of documents relating to a particular Issue for Disclosure." Therefore, model C should be used as it was an issue where vast documentation was likely to exist, most of which was irrelevant to the actual dispute.

The second reframed issue was "what did Mr Whitehead do between March 2016 and (say) March 2018 that was in breach of his obligations to the claimants." The problem with this issue was that there was mistrust between the parties and neither party trusted the other to have provided complete initial disclosure. Model D (narrow search-based disclosure, with or without narrative documents) requires a party to "disclosure documents which are likely to support or adversely affect its claim or defence or that of another party." Model D requires each party to undertake a reasonable and proportionate search in relation to the issue. Vos LJ viewed model D as the simplest and most appropriate course for the central issues of breach and loss as there was "significant mistrust between the parties" and the issue "makes up the central nub of the dispute".

3 Cooperation between the parties

Vos LJ emphasised the need for a high level of cooperation between the parties in agreeing the issues for disclosure. The terms of the Pilot make it clear that it was "built on cooperation".

Vos LJ acknowledges that some parties to litigation have sought to use the Pilot "as a stick with which to beat their opponents" but provided a warning to those parties who "can expect to be met with immediately payable adverse costs orders." Vos LJ affirmed that no advantage can be gained by being difficult in agreeing the disclosure issues and he therefore expects judges at all levels to call out parties that fail to cooperate with the Pilot.

Commentary

Vos LJ throughout his judgment repeated the same advice with variations only in the phrasing, this phrase being: "Parties need to consider what documents they are likely to hold and to what issues those documents are relevant". It would appear that if the parties were to formulate their issues based on the relevant documents that they are likely to hold, they will experience the most efficient and cost-effective disclosure process intended by the Pilot.

The judgment provides further indication that the Pilot has truly overhauled the previous disclosure process. If parties to litigation continue to approach disclosure with the previous rules in mind, they may find themselves subject to severe cost consequences imposed by the Court. Vos LJ expressed that he had "no intention of criticising the parties in this case". Nonetheless, as the Pilot draws ever closer to the end of its infancy, parties should appreciate that the leniency currently experienced may lessen with not be so prevalent.

For further information, please contact Georgina Squire or the Partner with whom you usually deal.