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| **THE DISCLOSURE PILOT**  **in the**  **BUSINESS AND PROPERTY COURTS**  ***Relevant Questionnaire, circulated to all interested parties, October 2019***  ***by***  ***Prof. Rachael Mulheron, Official Monitor of the Disclosure Pilot***  *\*\*\**  *Please note: This document is also available for download at the following Queen Mary University of London website:*  <https://www.qmul.ac.uk/law/research/impact/discmon> |

Your responses to the following questions (or to those which have arisen in your experience of the Disclosure Pilot) would be gratefully received:

**Q1. *Your own experiences*.**

Approximately how many cases have you conducted in which you have had direct experience of the Disclosure Pilot? In which of the B&PCs, and region/s, has your experience been focused? What is the furtherest stage that your case/s have reached under the Pilot?

**Q2. *Initial Disclosure*.**

**(a)**  Were you involved in a case in which the parties agreed to dispense with Initial Disclosure? What were the reasons (per [5.8]) for that agreement?

**(b)**  Did the court order that Initial Disclosure was not required? If so, what reasons were given for that dispensation?

**(c)** Do you think that the threshold at which Initial Disclosure is not required (i.e., the larger of 1,000 pp or 200 documents) is appropriate and realistic?

**Q3. *Adverse documents*.**

The Disclosure Pilot requires the disclosure of adverse documents. Have you encountered any difficulties with:

**(a)** identifying an ‘adverse document’ which ‘materially damages’ the disclosing party’s argument or version of events (as that is defined in [2.7]); or

**(b)** the stage in the proceedings at which known adverse documents must be disclosed?

**Q4. *Preservation of documents***.

The obligations upon legal representatives with respect to the preservation of documents are outlined at [3.2] and [4].

**(a)** Have you encountered any difficulties or issues in complying with these obligations?

**(b)** In particular, have you encountered any difficulties in notifying former employees, agents, or third parties, of their obligations to preserve documents?

**Q5. *Extended disclosure*.**

**(a)** In the cases in which you have been involved, have there been any disagreements arising between the parties as to whether Extended Disclosure is required, having regard to the ‘reasonable and proportionate’ factors listed in [6.4]?

**(b)** Did any issues arise for either party regarding the completion of Section 2 of the Disclosure Review Document (DRD)? Was there disagreement as to which Extended Disclosure model to adopt *per issue*?

**(c)** What reasons were given for the judicial decision to approve one model of disclosure over another? Were different models ordered for different issues for disclosure?

**(d)** Did discussions about the different options for Extended Disclosure per issue take place in person or by phone? Was there more than one discussion as to how to complete Section 2 of the DRD?

**(e)** Did you engage counsel to argue for or against the models for Extended Disclosure at the CMC and/or to draft a detailed Skeleton of Argument on this issue for the CMC?

**(f)** Do you agree that the various Models of disclosure, A-E, have been properly defined and distinguished, for the purposes of this Pilot? If not, how would you revamp the Models described?

**Q6. *Issues for disclosure*.**

**(a)** Have you had any issues arise regarding the agreement of the list of issues for disclosure?

**(b)** Was the demarcation between the list of issues for disclosure (the sole subject of the Disclosure Review Document) and the list of issues for trial kept clear, in your view?

**(c)** Did either party seek to add new issues for disclosure at a later date than the initial CMC? Was an application made to the court, or was it dealt with by consent on the papers?

**Q7. *Disclosure Review Document*.**

**(a)** Do you have any comments on the DRD form, and about the ease or difficulty of its completion? Did either party modify the form in any way? If so, in what way? Could its presentation and format be improved, in your view?

**(b)** Did you encounter any difficulties in filing the DRD on the CE file? If so, please outline.

**(c)** If Model C was applied for, did any issues arise for either party regarding the completion of Section 1B of the DRD? Did the court order that any further information should be supplied? Please provide details if possible.

**(d)** The models for Extended Disclosure have already been discussed in Q5(f) above. Have you any other comments to make, in relation to the completion of Section 2 of the DRD?

**(e)** Did the judge seem knowledgeable as to (i) the various models of disclosure, and (ii) the types of analytical methods and software review which were proposed, agreed, or ordered?

**(f)** In Section 2, was the provision of an estimate of costs (Q15) feasible or premature to answer at the stage of the DRD completion? Did the court consider that the estimates provided were ‘reasonable and proportionate’? If not, why not?

**(g)** The DRD is central to the efficacy of the Pilot. Do you think that the joint negotiation and completion of the DRD saved costs and time in the litigation in which your client is involved?

**Q8. *Technology-assisted review.***

**(a)** Did your client, or your opponents, use analytics, or technology-assisted review (TAR), or computer-assisted review software? Was this provided by a third party?

**(b)** What was the approximate basic cost of that disclosure?

**(c)** Was Q14 of Section 2 of the DRD feasible or premature to answer at the stage of the DRD completion?

**(d)** Do you have any particular comments relating to the use of TAR under the Disclosure Pilot?

**Q9. *Narrative documents.***

**(a)** In your experience, was Model D or Model E disclosure ordered with, or excluding, narrative documents? Was that order sensible, in your view?

**(b)** Do you consider that the presumption to exclude narrative documents under Model D is sensible and workable?

**Q10. *Timings*.**

**(a)** Did any issues arise with regard to the timetable for the various steps under the Pilot? Was the timing too short, or too long, in your view? If so, did you draw this to the attention of the court, prior to, at, or after, the CMC?

**(b)** Were there any issues relating to the timing of: written confirmation as to whether Extended Disclosure would be sought; preparation of the list of issues for disclosure; any amendments to that list of issues; completion of the DRD; and filing of the certificate of compliance?

**Q11. *Disclosure Guidance Hearings*.**

**(a)** Did either party request a Disclosure Guidance Hearing? If so, why? If you were tempted to, but did not, why did you decline to request such a hearing?

**(b)** If you have participated in a Disclosure Guidance Hearing, was it listed promptly? What was the time taken for the hearing? Was it heard by telephone or in hearing? Was it helpful to the overall outcome?

**Q12. *Case management hearings*.**

**(a)** Was the CMC listed appropriately to take account of the issues surrounding disclosure which were to be resolved in the case? Did either party request additional time for the CMC?

**(b)** Was the CMC completed at the first hearing, or did it have to be adjourned? What was the total time taken for the CMC?

**(c)** Did the judge seem well-prepared for the CMC? Did the judge comment upon any additional information that would have been helpful to resolve disclosure disputes at the CMC?

**Q13. *Adverse costs orders*.**

Were any adverse costs orders made against either party in connection with disclosure? Please provide details if possible.

**Q14. *Unrepresented litigants*.**

Did you act for either the claimant or for the defendant in proceedings in which the opponent was legally unrepresented? If so, please confirm any additional tasks that had to be completed by you.

**Q15. *Overall outcomes to date*.**

It is very early in the life of the Pilot. However, in your experience, and insofar as you can make meaningful comments at this stage, has the new process of disclosure under the Pilot (especially by comparison with your experiences under CPR 31):

**(a)** saved the parties costs overall (insofar as the parties can assess that at this stage)? If it is too early to draw any analysis as to costs saved or incurred by comparison: as a result of the disclosure undertaken to date, do you consider that you were able to obtain a more focused order on disclosure from the court (e.g., an order for disclosure that departed from Model D across all issues in a case) which will, ultimately, serve to save costs as the proceedings progress?

**(b)** achieved as accurate a result (i.e., the right documents disclosed and the irrelevant ones sifted out), relevant to the issues for disclosure, as the previous system, i.e., not a perfect outcome, but a proportionate outcome, given the ‘overriding objective’ of CPR 1.1;

**(c)** reduced the burden on the court, both in interlocutory and trial time, in resolving issues of disclosure and (if applicable) in resolving issues for trial; and

**(d)** achieved the sort of ‘culture change’ which was the purpose of the Pilot, *viz*, a greater degree of co-operation, proportionality, and reasonableness, in the parties’ approach towards disclosure?

**Q16. *Amendments to PD 51U.***

In your view, are there any modifications to PD 51U’s drafting which would help to streamline or to improve the efficiency of disclosure, or to make the process of disclosure easier, particularly given that the Pilot may be ‘rolled out’ to other courts in due course?

**Q17. *Any other feedback*.**

If you have any further suggestions/comments which are not covered by the points above, please feel free to provide those further comments.

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| *Please send all responses to: Prof. Rachael Mulheron, via either of the following methods:*  *Email:* [*r.p.mulheron@qmul.ac.uk*](mailto:r.p.mulheron@qmul.ac.uk)*, or*  *Post: Dept of Law, Mile End Road, London, E1 4NS*  *The final date for responses is:* ***Friday, 15 November 2019***  *All comments will be anonymized, and will be collated and summarized in a Third Interim Report, which will be provided to the Disclosure Working Group by the end of 2019.* |

**Thank you very much for your feedback!**