

Disclosure in the Business and Property Courts

This executive summary is designed to be read in conjunction with our executive summary entitled Disclosure. This is because the fundamentals of disclosure remain the same, but the means by which they are achieved are different with the pilot scheme for the Business and Property courts (“B&PC’s”).

WHAT IS DISCLOSURE?

Disclosure is a key part of litigation and all parties in England and Wales are obliged to comply with it. Disclosure is where both parties reveal to one another relevant documents both hard copy and electronic (whether they support or are detrimental to your case) within a party’s control. The theory is that it will allow the parties to explore settlement having understood the strength or weakness of an opponent’s case based on the documents they hold and if the case proceeds to a final hearing that the court is able to determine a case with all relevant information to hand.

WHY IS THE BUSINESS AND PROPERTY COURT PROCESS DIFFERENT?

Proceedings that are commenced in the B&PCs are subject to a new disclosure regime under the Disclosure Pilot Scheme (“DPS”) which is currently operating in the B&PCs under Practice Direction (“PD”) 51U. The DPS is intended to run as a 2-year pilot from the 1 January 2019.

A key aim of the DPS is to ensure that as there is an ever-increasing number of electronic documents, that the volumes and costs do not become disproportionate to the underlying case.

The DPS differs from traditional disclosure as the process is mainly “*front loaded*”. That means that disclosure does not normally happen until further down the court process. The idea is that by “front loading” the disclosure at the beginning of proceedings, this will focus the parties’ minds and allow one another to evaluate the strengths and weaknesses of their cases. This may promote early settlement.

Important Principles Governing the DPS

The cornerstones of the DPS are co-operation and proportionality. These are fundamental to the disclosure process.

The DPS expressly identifies the following principles, which underpin the entire disclosure process:

- The court expects the parties (and their representatives) to co-operate with each other, and to assist the court, so that the scope of disclosure, if any, that is required can be agreed, or determined by the court in the most efficient way possible.
- 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 in order to fairly resolve those issues.

Express duties under the DPS

Under the provisions of the DPS, there are the following 6 express duties that are owed to the court:

1. To take reasonable steps to preserve documents in your control that may be relevant to any issue in the proceedings. This includes:
 - 1.1 documents that are (or were) in your physical possession;
 - 1.2 documents in respect of which you have (or had) a right to possession;
 - 1.3 or documents in respect of which you have a right to inspect or take copies (for example, documents held by third-party professional agents, such as other firms of solicitors or accountants).
2. To disclose "*known adverse documents*", in accordance with the timings specified in the rules. This means documents that either contradict or materially damage your contention or version of events. When we consider the requirement to disclose known adverse documents, it will be necessary to consider documents that any person who has accountability for the events or circumstances which are the subject of the case, or the conduct of these proceedings, is aware. There is no requirement to undertake any searches for this purpose. It will also be necessary to take reasonable steps to check the position with any person who previously had such accountability or responsibility but has since left.
3. To comply with any order for disclosure made by the court (which will usually be at the first case management conference, after each party has provided details of what disclosure it considers to be reasonably required).
4. To undertake any search for documents, that is ordered by the court, in a responsible and conscientious manner to fulfil the stated purpose of the search.

5. To act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party.
6. To use reasonable efforts to avoid providing documents to another party that have no relevance to the issues in the proceedings on which disclosure of documents is required.

These are continuing duties that will last until the conclusion of the proceedings (including any appeal) or until it is clear that there will be no proceedings.

EXPRESS DUTIES FOR LEGAL REPRESENTATIVES

As your legal representatives, Tenet also owe express duties to the court in conjunction with the disclosure process, namely:

1. To take reasonable steps to preserve documents within our control that might be relevant to any issue in the proceedings.
2. To take reasonable steps to advise and assist you to comply with your disclosure duties.
3. To liaise and co-operate with the legal representatives of the other parties to the proceedings (or the other parties if they do not have legal representation) so as to promote the reliable, efficient and cost-effective conduct of disclosure, including through the use of technology.
4. To act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party.
5. To undertake a review to satisfy ourselves that any claim to privilege from disclosing a document is properly made and that the reason for the claim to privilege is sufficiently explained. Confidential communications passing between a party and its legal advisers, in which the party is seeking or obtaining legal advice, will be subject to legal advice privilege. Certain confidential communications made when litigation is likely, or has begun, passing between a party and its legal advisers, a party and third parties (for example, potential witnesses) and, in certain circumstances, the legal advisers and third parties, where the main purpose of the communication is to seek or obtain evidence for use in the litigation, or to provide advice on the litigation will be subject to litigation privilege.

WHAT IS A DOCUMENT?

Under the DPS, "document" has a wide meaning. A document may take any form including, but not limited to, paper or electronic. It may be held on a computer or portable devices, such as memory sticks or mobile phones or within databases. It includes emails and other electronic communications such as text messages, webmail, social media, and voicemail, audio or visual recordings.

It extends to information that is stored on servers and back-up systems and electronic information that has been "deleted". It also extends to metadata, and other embedded data that is not typically visible on a screen or a print-out: for example, details of the time and creation, or modification, of a document, or the author, date and time of sending an email. Metadata may be created automatically by a computer system or manually by a user.

DOCUMENT PRESERVATION

The court rules specify a number of steps that must be taken so as to ensure that potentially relevant documents are preserved. It is essential that these are complied with. Failure to comply could result in adverse inferences being drawn and may also give rise to costs sanctions.

It is important to note that documents to be preserved include documents which might otherwise be deleted or destroyed in accordance with a document retention policy or in the ordinary course of business.

The court rules expressly require you to ensure that potentially relevant documents are preserved by:

1. Suspending any relevant document deletion or destruction processes for the duration of the proceedings.
2. In certain circumstances sending written notification to all relevant employees, and former employees, identifying the classes of documents required to be preserved, and notifying them that they should not delete or destroy those documents, and should take reasonable steps to preserve them.
3. Taking reasonable steps so that agents or third parties who may hold documents on your behalf do not delete or destroy documents that may be relevant to an issue in the proceedings.
4. Providing written confirmation that you have taken these steps.

THE DPS PROCESS

Unlike 'normal' disclosure the process is split into two under the DPS.

1. Initial disclosure

This involves each party providing copies of a) the key documents upon which they are going to rely in support of the claim or defence and b) the key documents that are necessary to enable the other party to understand the claim or defence that they have to meet.

The provision of these key documents takes place at the stage that a party files and serves its particulars of claim or defence. A list of the documents must be served with copies of the documents in electronic format (unless otherwise ordered or agreed).

It is important to remember to avoid providing documents that have no relevance to the issue as there is a cap of 1,000 pages or 200 documents (whichever is the larger). There is no requirement to undertake a search beyond any already undertaken.

There are certain exceptions when initial disclosure will not be necessary. We shall advise you if these apply.

2. Extended disclosure

Within 28 days of the final statement of case being filed each party should state whether they believe further disclosure is required. Extended disclosure will only be ordered where it is appropriate to fairly resolve an issue in the case. Extended disclosure will usually take the form of one of the disclosure models (detailed below).

DISCLOSURE REVIEW DOCUMENT

If the parties agree that Extended Disclosure is necessary, then a request must be made to the court in a joint Disclosure Review Document (“DRD”). Within this document the parties must set out:

- A list of “Issues for Disclosure” in the case;
- Proposals for Extended Disclosure, including which Disclosure Model is sought; and
- Information about how documents are stored and how they might be searched and reviewed.

Usually, the Claimant will take the lead in identifying the issues for disclosure. It is expected by the court that there will be a considerable degree of co-operation between the parties and that they should seek to narrow the issues between themselves and not extend to every issue arising from the statement of case.

DISCLOSURE MODELS

The DRD should identify which disclosure model is sought. This does not have to be consistent throughout the issues or parties, for instance it could be that a different model is applied to the claimant and defendant for a particular issue.

- **Model A: Disclosure confined to known adverse documents**
Disclosure is of known adverse documents only. A DRD would not be required in this instance.
- **Model B: Limited disclosure**
This model requires the parties to disclose key documents and adverse documents. There is no limit on quantity and no obligation to undertake a search beyond any already conducted when undertaking initial disclosure. Where a search does take place, the continuing duty to disclose applicable documents applies.
- **Model C: Request-led search-based disclosure**
If a party has made a request in the DRD for disclosure of particular documents or narrow classes of documents relating to a specific issue, then the court may order the same if not agreed.

- **Model D: Narrow search-based disclosure, with or without narrative documents**
Under this model each party shall undertake a reasonable and proportionate search in relation to the agreed/ordered Issues for Disclosure. A Narrative Document is one which is relevant only to the background or context of material facts or events, but not directly relevant to the Issues for Disclosure.
- **Model E: Wide search-based disclosure**
This will only be ordered in exceptional cases (often fraud related cases) and is the widest search-based disclosure. Each party must disclose documents which are likely to support or adversely affect their claim or defence in relation to one of more of the issues for Disclosure or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure. Narrative documents must also be searched for and disclosed.

All of the models encompass an ongoing duty to disclose known adverse documents.

HOW TO PROVIDE EXTENDED DISCLOSURE

Extended disclosure is complied with by serving an extended list of documents, a disclosure certificate signed by the party giving disclosure and production of the documents.

The disclosure certificate should include a statement supported by a statement of truth signed by the party (or an appropriate person at the party) that all known adverse documents have been disclosed.

SOME GENERAL "DO'S AND DON'TS"

Do's

- Do discuss with your legal team any documents that you propose to circulate internally.
- Do preserve all documents that are potentially disclosable.
- Do suspend any document destruction policies (both paper and electronic documents).
- Do liaise with your team about preserving documents.
- Do consider if any third parties hold documents that may be relevant to your dispute as you may need to instruct your lawyers to write to those third parties to seek that they preserve the relevant documents.
- Do ensure that you comply with relevant data protection requirements. It will be important to ensure that you keep in mind the relevant data protection requirements, including those that apply under the General Data Protection Regulation ((EU) 2016/679).

Don'ts

- Do not search for documents until we have had a chance to discuss the claim with you in more detail. Note that it will be necessary to keep a record of any searches that are undertaken (or caused to be undertaken) and to provide the court with brief details.
- Do not create new documents (or annotate or amend existing documents) relating to the dispute. It is very important that you do not create any new documents that might have to be disclosed that could damage your case.
- Do not circulate documents to your internal team that may be relevant to the dispute.
- Do not ask anyone externally (third parties) to send documents to you without talking to the team here.
- Do not destroy any documents (either paper or electronic)

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