Client Alert | Commercial Litigation

McParland v Whitehead: Chancellor of the High Court gives guidance on the Disclosure Pilot Scheme

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In *McParland & Partners Limited and Fairstone Financial Management Limited v Stuart William Whitehead*,[1] Sir Geoffrey Vos, Chancellor of the High Court, provided clarification of how some aspects of the Disclosure Pilot for the Business and Property Courts are intended to work, along with guidance for users of the Business and Property Courts who are required to follow it.

The Disclosure Pilot

Starting in January 2019, the Business and Property Courts in England & Wales (including the Business List of the Chancery Division and the Commercial Court) adopted a new Disclosure Pilot Scheme (the "**DPS**"),[2] with the aim of reducing the burden on parties associated with giving disclosure of documents. The working group charged with creating the DPS noted that the previous standard disclosure system (under CPR 31) "*often produces large amounts of wholly irrelevant documents, leading to a considerable waste of time and costs*".[3]

The goal of the DPS was to encourage a more flexible approach to disclosure, involving proactive direction from the Court (including "*increased and more focused case management*") and greater engagement of parties before the first Case Management Conference "*with a view to agreeing a proportionate and efficient approach to disclosure*".

On approval of the DPS, Sir Terence Etherton, Master of the Rolls, said, "It is imperative that our disclosure system is, and is seen to be, highly efficient and flexible, reflecting developments in technology. Having effective and proportionate rules for disclosure is a key attraction of English law and English dispute resolution in international markets".

Facts

The underlying dispute between the parties concerned alleged breaches by Mr Whitehead of a service agreement for his employment by McParland & Partners Limited ("**McParland**") and an enterprise firm agreement he entered into with Fairstone Financial Management Limited. In substance, the dispute related to the confidentiality, notice and non-compete provisions contained in those agreements.

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1 [2020] EWHC 298 (Ch).

2 Under Practice Direction 51U of the Civil Procedure Rules.

3 Disclosure Working Group Press Announcement, 31 July 2018, "Approval for the launch of the Disclosure Pilot for the Business and Property Courts in England and Wales", https://www.judiciary.uk/wp-content/uploads/2018/07/press-annoucement-disclosure-pilot-approved-by-cprc.pdf.

Proceedings were commenced by McParland in November 2018, with Mr Whitehead's defence filed in January 2019. Further procedural steps took place throughout 2019. On 31 October 2019, the case management conference was adjourned because the parties were unable to agree key matters of disclosure.

On 7 February 2020, the parties appeared before the Chancellor at a Disclosure Guidance Hearing, seeking guidance from the Court on these issues.

The High Court Decision

In giving his judgment, the Chancellor reminded court users that "[t]he Disclosure Pilot is intended to operate proportionately for all kinds of case in the Business and Property Courts from the smallest to the largest. Compliance with it need not be costly or time-consuming".[4] As well as dealing with the issues in this particular case, the Chancellor gave clear guidance in relation to three frequent "misunderstandings" as to the operation of the DPS.

The Identification of Issues for Disclosure

The Chancellor explained that the starting point for identifying the Issues for Disclosure should be the documentation that is (or is likely to be) in each party's possession. This is a different exercise to identifying the issues arising on the pleadings. There is generally no need for issues of law or construction to be included in parties' lists of Issues for Disclosure at all.[5] Instead, the Issues for Disclosure "will almost never be legal issues, and they will not include factual issues that are already capable of being fairly resolved from the documents available on initial disclosure".[6]

The Chancellor also noted that the Issues for Disclosure occupy an important role beyond the CMC – namely, in the ongoing process of reviewing documents, enabling that review "to be conducted in an orderly and principled manner". Under the DPS, the document reviewer "*has defined issues against which documents can be considered*". This is "*a far more clinical exercise*"[7] than the generic reference to a party's "*case*" under the previous standard disclosure regime.

The Approach to Choosing Between Disclosure Models

The Chancellor encouraged parties to consider what documents they are likely to hold, and to what issues those documents are relevant. Where specific documents can be requested, this will be "*a classic [Disclosure Issue] for model C*". He also noted that, while it is possible for each party to apply a different model to the same issue, fairness may dictate that the same model should be used by both parties.

Cooperation Between the Parties

Finally, the Chancellor emphasised, in the strongest terms, the importance of cooperation between the parties. There is a "need for a high level of cooperation between the parties and their representatives in agreeing the Issues for Disclosure and completing the [Disclosure Review Document]". Indeed, cooperation is at the heart of the new regime: "[t]he Disclosure Pilot is built on cooperation".[8]

The Chancellor also warned that "some parties to litigation in all areas of the Business and Property Courts have sought to use the Disclosure Pilot as a stick with which to beat their opponents", which is "entirely unacceptable". Parties should "expect to be met with immediately payable adverse costs orders if that is what has happened". He added that "[n]o advantage can be gained by being difficult about the agreement of Issues for Disclosure or of a [Disclosure Review Document]".[9]

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4 Echoing his comments when the DPS was launched that *"[t]here will now be a menu of options available to litigants so that disclosure can be targeted appropriately to the kind of case that is being litigated*". Disclosure Working Group Press Announcement, 31 July 2018.

5 Although parties should, of course, remain alive to the possibility of identifying documents which form part of the factual matrix to assist in the construction of a contract.

6 At paragraph 47

7 At paragraph 49

8 At paragraph 53

9 At paragraph 54

Significance of the Decision

As the DPS enters its second year, judges in the Business and Property Courts have had increasing experience of how parties are approaching it. This fresh guidance from the Chancellor will now be at the forefront of judges' minds when Disclosure Guidance Hearings are before them.

As the Chancellor noted, "the provisions of the Disclosure Pilot are intended to apply across a wide range of cases stretching from the highest value business cases to the lowest value ones, and from the most complex, lengthy and document intensive to the least complex cases with few relevant documents". In other words, the DPS has to be adaptable, and a one-size-fits-all approach will not be effective. The DPS will only work if the parties, and their legal advisers, cooperate to set the parameters of the disclosure exercise involved. The Chancellor has made this point forcefully and repeatedly – and parties should be prepared to face adverse costs orders if they do not act in the spirit of the DPS.

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