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LITIGATION COMMITTEE response to the Questionnaire circulated by Professor Rachael Mulheron, Official Monitor of the DISCLOSURE PILOT in the Business and Property Courts in October 2019

The City of London Law Society ("CLLS") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response to the Questionnaire in respect of the Disclosure Pilot in the Business and Property Courts has been prepared by the CLLS Litigation Committee.

Introductory comments

1. The Questionnaire is asking for feedback based on particular cases, as well as comments based on experiences generally. We are conscious that a number of member firms are responding separately to the Questionnaire. We do not consider it appropriate for the CLLS to duplicate these experiences of particular cases, and so we are confining our comments to what we consider to be the key themes implicit in the Questionnaire. For this reason we have not answered all the questions, but hope our responses are of some assistance.

2. As an initial observation (and as Question 15 recognises), it is very early on in the life of the Pilot. For this reason, and also because most of the cases dealt with by the constituent firms of the Committee are large-scale and take time to percolate through the system, hands-on experience of the Pilot is still fairly limited, and the disclosure stage of few cases in the Pilot have concluded. The following remarks therefore make very initial and broad-brush comment on how things appear to be working so far; further feedback will need to be sought when the Pilot is more mature.

Question 2: Initial Disclosure

3. As Initial Disclosure only applies to key documents relied on / those necessary to understand the case, many of our members' cases (medium and

large-scale) will often be within the 1,000 pages/ 200 documents threshold. Our sense is that the provision of these documents is not excessively burdensome given that Initial Disclosure does not involve a search obligation, and these documents are in any event gathered to draft the pleadings and are often provided to the other side as part of pre-action correspondence. Furthermore, it is helpful to gather key documents from the other side at an early stage. So we are supportive of this aspect of the pilot. It is also of benefit in smaller cases (in terms of scope of issues and complexity).

Question 3: Adverse documents

4. In practice, parties do not appear to be disclosing known adverse documents at the stage of Initial Disclosure, mainly because Initial Disclosure in medium and large-scale cases is normally followed by Extended Disclosure.

5. In addition, there are potential difficulties in identifying known adverse documents. The intention is that a case which can be limited to Initial Disclosure or Model B should not require the parties to carry out any further search for documents, yet the lack of clarity in the definition of "known adverse documents" and its subjective nature means that parties are likely to want to carry out such a search, despite the definition stating that this is not required. If a known adverse document exists, but those with "accountability or responsibility" have forgotten about it, they face the risk of being accused of having deliberately concealed it if it later comes out. In order to protect their position, the relevant individuals are likely to want a search carried out in order to identify such documents, even if the model chosen does not require this.

Question 4: Preservation of documents

6. The requirement to notify former employees in particular is seen as disproportionately burdensome. It is suggested that there be some limitation or exemption in the case of larger employers (especially where they are multinational corporations, or the events in question span a lengthy time period or occurred a long time ago) and/or some limitation in the application of this provision to cases where it can be shown that there is a genuine likelihood that former employees may hold materials which are no longer available from the employer. The practical difficulties would be reduced if the rules were less prescriptive so that litigants and legal advisors can consider on a case by case basis what is required "honestly" to comply with their obligation to "take reasonable steps" to preserve documents relevant to the proceedings. Alternatively, the rules should be amended so that the employer should only be required to take reasonable steps to notify relevant former employees who are likely to hold key material on behalf of the employer which is relevant to an issue in the proceedings and which is not otherwise held by the employer.

Question 5: Extended disclosure

7. Extended Disclosure, and the requirement to complete the detailed Disclosure Review Document, would seem to be targeted mainly at the larger cases (in terms of scope and complexity). It is too early to be able to assess whether costs have been saved, by reducing substantially the amount of disclosure using the

issues based approach in Model C, although this ought in some cases to be achievable.

8. At the same time, there is no doubt that the new requirements placed on advisers to prepare the List of Issues and to agree which disclosure Model applies to them has placed a greater costs burden on litigants before the CMC. This may be justified in some larger cases, but there are a number of medium sized cases where the parties' advisers consider that Model D (standard disclosure) is appropriate. However, there is no mechanism by which this can simply be agreed (as it can for Model B), without going through the process of compiling a list of issues for disclosure and a detailed Disclosure Review Document. In these cases the extra process is increasing costs and delay, without any corresponding savings to compensate. Some feedback (although this is not the view of all our members) reflects the view that being able to agree standard disclosure without preparing lists of issues (for Model C) and the very detailed Disclosure Review Document in certain cases would lead to a similar result (Model D / standard disclosure) more quickly and at appreciably lower cost.

9. In our view, the key to reducing costs is reducing the size of the data set at an early stage rather than creating a more complex review process. One proposal to achieve this is to narrow the data set earlier. This could be done by settling fundamental data set parameters such at custodians and data ranges as preliminary case management issues before the other parts of Section 2 of the DRD are completed. Further, we consider that the form of the Disclosure Review Document is not suitable for complex disclosure where the DRD will need to go back and forth between the parties many times and the volume of data is high. The ordering of the questions and the terminology around the use of technology does not follow how disclosure is approached in practice. In particular, we suggest that Section 2 of the DRD should start by addressing custodians and dates ranges.

10. With regard to co-operation, the parties and their advisers can be required (pursuant to the Pilot rules) to undertake particular steps by completing forms and writing to each other with proposals. However, it is unrealistic in our view to expect parties with opposing interests as to the volume and scope of disclosure to co-operate by reaching agreement in many cases in relation to lists of issues and Models. The greater complexity of the Extended Disclosure provisions give more scope for parties to argue about these steps, thereby increasing unnecessarily the time taken on them and therefore their cost. Some firms have experienced this situation.

Question 11: Disclosure Guidance Hearings

11. It is generally felt that the imposition of a 30 minute cap on Disclosure Guidance hearings is not realistic; in many cases, the issues will require significantly more time to resolve. We also suggest that these hearings (or early split CMCs) could be used to set key data set questions (for example, custodians and data ranges) at an early stage, so that the remaining disclosure issues can addressed in a more efficient and meaningful way without having to consider the many permutations of the hypothetical.

Question 12: Case Management hearings

12. Some evidence suggests that the need to agree Lists of Issues and draft the Disclosure Review Document has led to longer, more adversarial, CMCs.

Question 15: Overall outcomes to date

13. On the positive side, feedback has acknowledged that the Pilot has required parties to consider the mechanics of disclosure at an earlier stage than usual. The formal integration of technology as a cost-saving tool in disclosure has also been welcomed. For smaller cases, the new scheme may bring advantages by reducing the scope of disclosure. For the larger cases, it is as yet unclear whether the new system will genuinely bring any more benefit than the current one under CPR 31, and whether the present mischiefs - scope for delay, increased cost, argumentative and adversarial behaviour - will be ameliorated.

    (a) As explained above, it is too early in many cases to be able to assess whether the parties will save costs in the end, compared to the pre-Pilot regime under CPR 31. However, it is already clear that in some cases the extra layers of administration now required are adding to the cost of disclosure, without any benefit in terms of restricting the volume of documents to be disclosed.

    (b) We do not feel able to say whether in any given case there has been a more "accurate" result (and indeed we are not sure how this could ever be assessed).

    (c) In terms of the burden on the Court, we think it is too early to be able to assess the effect on trial time, but some evidence suggests that CMCs are taking longer.

    (d) In terms of promoting more reasonable behaviour and proportionate case management, we recognise that there are helpful "cultural" statements in the new provisions; whether they will have the desired effect on sufficient numbers of parties to litigation to make a real difference is open to question, and some present scepticism. Certainly, there has not in our view been a “culture change” to date.

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THE CITY OF LONDON LAW SOCIETY
LITIGATION COMMITTEE

Individuals and firms represented on this Committee are as follows:

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