NEW DISCLOSURE RULES – PILOT UPDATE

CTRL
MARINE SOLUTIONS LTD

Disclosure in court and arbitration proceedings in England and Wales is changing. Since 1 January 2019, parties to litigation in the Business and Property Courts have been conducting disclosure under the disclosure pilot rules, and LMAA Tribunals have been making similar orders in arbitration. However, the Law Gazette recently reported that further new proposals have been drawn up to address fears about increasing costs.

Previously, the old procedure for standard disclosure usually required each party to serve a list of all documents in their possession or control which were relevant to the issues in dispute which supported or undermined their or the other party's case. Each party could then request to inspect any document on the other party's list unless it was privileged from inspection. Common practice was to request a copy of all documents. A party could apply to Court or the Tribunal for specific disclosure of particular documents which they felt ought to have been made available and had not been.

Under the new rules, parties are required to identify issues in dispute and agree the scope of disclosure for each issue first. Rather than serving a list of their own documents, each party subsequently serves a list of documents which fall within the agreed scope and which they wish to inspect. The intention is to cut down on the production of documents which do not help to resolve any of the issues in dispute, thereby reducing costs and saving time. This development has been viewed as a move away from the traditional "cards on the table" model of litigation towards a limited disclosure regime more commonly seen in Civil Law jurisdictions.

It has been reported[1] that some Business and Property Courts litigators have discovered the requirement for the parties to agree the scope of disclosure in advance of serving document lists has led to a more adversarial environment which has been time consuming and therefore expensive to negotiate.

In the Business and Property Courts, this work is being carried out prior to and at the Case Management Conference stage. In arbitration, practitioners familiar with the LMAA Rules will be aware that the LMAA Questionnaire, which must be completed by each party after close of pleadings, requires the parties to set out the issues in dispute and this in turn sets the scope of disclosure. Under both the old and new disclosure rules, Courts and Tribunals have the power to determine the scope of disclosure if this cannot be agreed, and it has always been open to the parties to challenge overly narrow disclosure by making an application for specific disclosure. This has always been the case, whether these disputes occur before documents are exchanged (under the new rules) or after (under the old standard disclosure regime).

The Business and Property Courts' Disclosure Working Group's proposed changes to the disclosure pilot will be put to the Civil Procedure Rule Committee for review in October or November 2020. It remains to be seen whether and how they will be adopted in other forums such as arbitration.

[1] https://www.lawgazette.co.uk/news/disclosure-pilot-creating-adversarial-environment-litigators-fear/5105568.article