

DISCLOSURE IN THE TCC AFTER THE JACKSON REFORMS

Quick Reference Guide

- The emphasis of the reforms is to ensure that disclosure directions are dealt with by the first Case Management Conference (CMC)
 - Alternative options to standard disclosure have been provided
 - The combined effect of these changes means the stakes for the first CMC are raised much higher
- Likely to have a significant impact on early proceedings, especially where the parties cannot agree an appropriate disclosure process

Standard disclosure is no longer the default option

New Provisions	Pros & Cons
<p>Prior to the first CMC parties are required prepare a disclosure report verified by a statement of truth, and ideally agree on:</p> <ul style="list-style-type: none">➤ The location and amount of likely relevant documents;➤ The disclosure process and the appropriate thresholds for documents that must be disclosed;➤ Measures to deal with electronic documents, and early exchange of the N264 form; and➤ A cost budget for the disclosure exercise.	<ul style="list-style-type: none">✓ Aim is to ensure that disclosure is proportionate, given that it commonly one of the most costly stages in civil litigation.✓ Early consideration of disclosure encourages an efficient approach.✓ Effective agreement with the opposing party may prevent an over-inclusive approach to disclosure.✓ Should reduce specific disclosure applications later, if agreement of approach early.

New Provisions	Pros & Cons
	<ul style="list-style-type: none"> ✓ Aims to minimise costs in the long run. ✓ Transparency may encourage settlement at an earlier stage. ✓ Early consideration of how to manage documents (particularly in paper heavy disputes) reflect existing best practice, but now requires early organisation and decisions about disclosure by all. × Parties may be prejudiced if they are not fully briefed and in a position to take an informed view about and agree disclosure at such an early stage. × Inaccurate information at the outset could have a detrimental effect on costs later in proceedings. × The additional legal work required for a first CMC is likely to increase costs in the short term. × 1st CMC likely to become a battleground: parties will need to be ready to justify to the court their preferred disclosure option. × Query whether Courts may order different forms of disclosure for different parties in the same dispute if that's more proportionate?
<p>Disclosure menu: In addition to the usual standard disclosure (documents which support or adversely affect a party's case), there</p>	<ul style="list-style-type: none"> ✓ Flexible approach encourages the parties to agree a disclosure solution most appropriate for each case.

New Provisions	Pros & Cons
<p>are a broad range of alternative disclosure options specified in which the parties should consider including:</p>	<ul style="list-style-type: none"> ✓ Where appropriate there is scope to drastically reduce the number of documents disclosed. ✓ Compared to standard disclosure, there is the potential for cost savings. × Decisions made as to the extent of disclosure could have an important effect on the case. × Parties are likely to seek a disclosure solution that most benefits their client's position. × The first CMC could become akin to a "mini trial" as key decisions will be made.
<ul style="list-style-type: none"> ➤ No disclosure; 	<ul style="list-style-type: none"> ✓ Will drastically reduce costs and complexity. × Rarely appropriate in large scale litigation. × Where a dispute turns on a point of law Part 8 proceedings may be more appropriate.
<ul style="list-style-type: none"> ➤ Disclosure of documents relied upon, and specific disclosure requests from the other side 	<ul style="list-style-type: none"> ✓ Akin to disclosure in international arbitration. ✓ Can narrow disclosure to only the documents that pertain to the disputed items. × Parties need to know at least the categories of documents they require.

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	<ul style="list-style-type: none"> × May be difficult to assess if this order is appropriate at the first CMC stage. × Logically would require an order for the preparation of "Redfern" style schedules after initial disclosure. × Likely to lead to an increase in specific disclosure applications which will extend the duration of disclosure.
<ul style="list-style-type: none"> ➤ Disclosure by issue; 	<ul style="list-style-type: none"> ✓ Flexibility to tailor issues to the facts of a case. ✓ May be appropriate where a small number of key issues will determine the case. × Assumes parties will be able to agree a set of issues: yet there is no suggestion issues lists will routinely be ordered by the Courts at any stage of proceedings (as happens in the Commercial Court), let alone before disclosure. × Negotiation of key issues is often a lengthy and costly process. × Duplicated disclosure will occur when documents are relevant to more than one issue.
<ul style="list-style-type: none"> ➤ each party disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences 	<ul style="list-style-type: none"> ✓ Ensures that all relevant documents are captured. ✓ Where large sources of potentially relevant material are identified (electronic servers, email accounts, etc), these will be disclosed.

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	<ul style="list-style-type: none"> ✓ Appropriate where a case relies heavily on evidence of fact. ✓ Has in effect remained the reality of standard disclosure by many when disclosing substantial quantities of documents, rather than seeking to limit scope, as was properly required by standard disclosure. × Potential for huge volumes of documents to be disclosed. × Likely to require e-disclosure software and consultants to review and reduce the extent of disclosure information. × Review process of large sources of information will generate significant costs.
<ul style="list-style-type: none"> ➤ Standard disclosure 	<ul style="list-style-type: none"> ✓ Familiar to the parties and a settled process. × Often disproportionate in terms of cost and time when a more focused approach would be more suitable. × Courts are likely to encourage new regime.
<ul style="list-style-type: none"> ➤ Other appropriate disclosure such as a “key to the warehouse” order. 	<ul style="list-style-type: none"> ✓ Allows parties to suggest new creative approaches to disclosure. ✓ “key to the warehouse” type orders ensure transparency and limit review process to privileged documents only. ✓ Where a party has very significant amounts of hard copy

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	<p data-bbox="1227 320 2047 411">documents and yet can easily isolate and remove privileged papers, this can be used as a good tactical tool to shift onus of significant review costs to the opponent.</p> <ul style="list-style-type: none"> <li data-bbox="1182 448 2047 507">× Data handling and storage costs for “key to the warehouse” orders are likely to be high. <li data-bbox="1182 544 2047 603">× Flexibility may just create more issues for legal teams to dispute. <li data-bbox="1182 639 2047 730">× Shifts onus of deciding the scope of document review to the opposing party when often it is the party who possesses the documents who is best placed to decide this.