Practice Direction 57AD: co-operation is key

Ed Patton examines the intricacies of compliance in the Disclosure Pilot Scheme

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It has been just over a year since the Disclosure Pilot Scheme (PD 51U) was made permanent by way of PD 57AD. As was well documented at the time, the purpose of the Disclosure Pilot Scheme, and by extension PD 57AD, was to bring about "cultural change" in disclosure during civil litigation. These proposed changes had a particular focus on ensuring co-operation and proportionality with respect to time, and of course cost. In order to assist with this, new approaches were introduced, including the concept of "initial disclosure", the disclosure review document and the various models of extended disclosure.

The recent case of *Irwell Riverside Developments Ltd v Arcadis Consulting* (UK) Ltd [2023] EWHC 2864 (TCC) has helpfully provided some useful guidance with respect to how practitioners should approach its duties under this relatively new regime, as well as specific applications which can be made under it. In particular, *Irwell* is of assistance with respect to applications made following a failure to comply with an order for Extended Disclosure and applications to vary a previous order.

BACKGROUND

The main claim in *Irwell* concerned the construction of three blocks of apartments. Irwell Riverside Developments Ltd (IRDL) is a property developer that engaged Arcadis as the structural engineers to design various elements of the buildings, including the podium slabs. In 2020, Arcadis identified an issue with their design for the podium slabs and were able to rectify the same before pouring began on blocks A and B. However, pouring had already taken place for block C and therefore remedial changes were required, together with design changes for A and B.

Case management directions were agreed by consent, with Irwell ordered to give extended disclosure under Model D. However, on receipt of the disclosure, Arcadis considered it inadequate and made an application under paragraphs 17 and 18 of PD 57AD.

THE APPLICATION

At the application hearing, IRDL confirmed that it had engaged an external provider to carry out the disclosure harvesting exercise and they had identified 961,346 documents. After applying agreed date ranges, search terms, de-duplication and finally, a solicitor-led review for relevance, 2,079 documents were then disclosed. However, Arcadis considered it "self-evident" that relevant documents were missing from the documents provided.

After correspondence on this issue, IRDL provided 23,000 documents to Arcadis, which was referred to as "IRDL's pot of documents" in the judgment. IRDL's "pot" consisted of the approximate number of documents identified prior to the manual review which had been carried out by IRDL's solicitors.

Arcadis carried out a review of a sample of the pot of documents and alleged that relevant new documents were found that had not been previously disclosed by IRDL. IRDL disputed the relevance of these documents and so Arcadis made its application. In response IRDL was clear that all of the agreed date ranges and search terms were applied and that the failure to identify expected documents did not mean that there was a failure to comply with the original order.

JUDGMENT

In the judgment handed down on 15 November 2023, a distinction was made between paragraph 17 of the Practice Direction – concerning applications after a failure to comply with an existing order, and paragraph 18 – where a party sought to vary an existing disclosure order. In the latter case the burden on the applicant was higher as the applicant would have to show that varying the original order was necessary, reasonable and proportionate.

At the hearing, clarity was sought about the provision of the Practice Direction under which the application was being advanced. Arcadis argued that the application was made under both paragraphs. However, Neil Moody KC, sitting as a deputy judge of the High Court, found that in the absence of proposed new search terms or other potential variations of the existing order, the application had to be determined under paragraph 17, ie this was a question of compliance with a previous order, rather than a request to vary a previous one.

Arcadis' application had included an appendix seeking 16 categories of documents from IRDL. However, the application was

criticised for failing to link those documents with the Issues for Disclosure contained in the disclosure review document. There was no precision with respect to the documents applied for or specific allegations of non-compliance with the existing order.

In deliberating on each of the categories of documents sought by Arcadis, Neil Moody KC considered that the relevant question under paragraph 17 was whether IRDL had been non-compliant with the original order in relation to each of those categories. In doing so, he noted that Arcadis had not articulated exactly what it wanted IRDL to do (by way of new search terms/date ranges etc.), and indeed IRDL had provided its "pot" of documents in order to try and meet Arcadis' concerns.

With respect to certain categories of documents, Neil Moody KC found that an "erroneous approach to relevance when manually reviewing the documents" was adopted and so there was a failure to comply with the existing order. IRDL was ordered to carry out a further search of the "pot" adopting a different approach to relevance (and specifically seeking certain types of documents) when doing so. This approach was also ordered with respect to several of categories of documents sought by Arcadis. In some instances, if documents falling into those categories could not be found, then a witness statement should be provided explaining the reasons why that was the case.

However, with respect to other categories sought by Arcadis, the judge found no evidence of non-compliance with the original order, noting that Arcadis was free to conduct its own manual searches of the 23,000 further documents provided if it considered that to be justified. No order was made with respect to these categories of documents.

KEY LEARNINGS

Having agreed date ranges, search terms and Issues for Disclosure, Arcadis were concerned that certain documents had not been produced and considered the later provision of the "pot" to be a "data dump". Arcadis refused to carry out a full manual review of these documents as it considered that IRDL had already been ordered to do so by the original disclosure order. In response, IRDL's position was that it had complied with the original order and should not have to do anything further.

In the absence of concrete criticism of IRDL's actions and a clear and precise request as to how IRDL should rectify the situation, the application had to be determined under paragraph 17 only. This meant that the key question was one of compliance with an existing order rather than deciding what IRDL should do to rectify the situation (as Arcadis may have preferred).

Even then, there was a failure to explain the alleged failure to comply with the existing order or demonstrate how the documents sought related to the agreed Issues for Disclosure. The judge noted that the application had the characteristics of a specific disclosure application under CPR 31.12, but this had not been advanced (and would not have been the right approach in any event).

The main takeaway from the judgment is the criticism of the parties' failure to co-operate and how this might have been addressed. The judge noted that parties could have used the provision at paragraph 11.1 of the Practice Direction to "seek guidance from the court on any point concerning the operation of this Practice Direction", speculating that if the parties had done so this may well have resolved the issues much sooner, and encouraging other practitioners to do so in the future. SJ

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