Revisiting Part 8 disclosure

The courts can order additional disclosure of witness evidence - but there could be costs consequences, as Andrew Morgan explains

Andrew Morgan

Andrew Morgan is an associate solicitor at Russell-Cooke ***russell-cooke.co.uk***

A recent decision in an estate administration case clarifies the correct approach to disclosure in Part 8 claims, confirming that more flexibility is available than may at first appear.

CONTEXT

Part 8 of the Civil Procedure Rules (CPR) provides an alternative, streamlined procedure to the usual Part 7 method of conducting civil litigation. It is perhaps underappreciated that the Part 8 procedure contains its own disclosure regime which envisages much more limited information exchange than under the Part 7 procedure.

Part 7 claims commence with formal pleadings setting out the claim and defence in law. Disclosure, inspection and witness evidence follow. In contrast, Part 8 claims begin with the parties' witness evidence. The claimant "must file any written evidence on which he intends to rely when he files his claim form" (CPR 8.5(1)); and the defendant "who wishes to rely on written evidence must file it when he files his acknowledgment of service" (CPR 8.5(3)).

Given the assumption that Part 8 claims do not concern substantial disputes as to fact, it follows that information exchange should be front-loaded and the level of information exchange thereafter required by Part 8 should be much more limited. Practitioners' own experience may cast doubt on the accuracy of the assumption.

For instance, practitioners advising on the eligibility of an applicant under the Inheritance (Provision for Family and Dependants Act) 1975 – a claim that must be brought under Part 8 (CPR 57.16(1)) –may find themselves grappling with firmly disputed factual matrices. Unsurprisingly, the parties' self-serving witness evidence may not reveal the material information (adverse documents) that would allow the court to justly determine the claim.

Fortunately, CPR 8.6(1)(b) mitigates the inflexibility of that front-loading. A party may rely on additional written evidence with the permission of the court. In other words, a party can apply for sequential disclosure and then additional witness evidence.

Applications could be avoided with proactive planning before the claim has even begun

COURT PERMISSION

Practice Direction 51U of the CPR contains a pilot scheme for disclosure in the business and property courts. The scheme began on 1 January 2019 and applies to existing and new proceedings in place of the existing disclosure rules (as set out at CPR 31) for a period of two years.

There's no doubt that PD 51U applies to Part 7 claims. The same could not be said for Part 8 claim. The confusion seems to have originated from paragraph 5.1 PD 51U. This specifically excludes initial disclosure from Part 8 claims, and therefore left open the possibility that the remainder of PD 51U did apply to Part 8 claims.

Chief Master Marsh's note dated 27 March 2019 (referred to in the White Book introduction to Part 8) helpfully clarified that:

1. PD 51U does not apply directly to Part 8 claims;
2. The Part 8 procedure contains its own regime for disclosure; and
3. The court has the power to make an order for extended disclosure under PD 51U in a Part 8 claim

Chief Master Marsh recently made clear in *Ball v Ball and another* [2020] EWHC 1020 (Ch) how flexibly the court is prepared to treat applications for disclosure in Part 8 claims,

even where the applicant has not engaged as they should with the third bullet point above.

BALL v BALL

The claimant sought an account for his late father's estate. At the directions hearing a request to file further witness evidence was refused and there was no order for disclosure.

On 5 February 2020 (five months after the directions hearing and three months before the final hearing), the claimant's solicitors supplied two lever arch files of previously undisclosed documents. Most of the documents were obtained from Companies House. The defendants objected to the claimant relying on the documents as they were not exhibited to a witness statement and not provided with the court's permission. Moreover, the documents had been supplied without explanation as to why they were considered relevant.

Chief Master Marsh provided a useful summary of the Part 8 disclosure regime: "[The] parties [must] provide all their written evidence at the outset. However, it is common for the court to permit further evidence to be relied on and disclosure is also ordered on occasions, formerly under CPR 31 and now by adapting as appropriate PD 51U... CPR rule 8.5 sets a very strict framework with the evidence 'front-loaded'. It will usually be right to permit further evidence to be filed… The inflexibility of the Part 8 regime is unhelpful in cases of any complexity.

He noted that CPR 8.6(1)(b) "undoubtedly contains a sanction" (ie an attempt by a party to disclose documents that they wish to rely on without the court's permission may, strictly speaking, require a party to apply for relief from sanctions). However, he immediately clarified that "the court adopts a pragmatic approach and will generally permit further written evidence to be relied on without requiring an application for relief from sanctions".

In the event, he permitted reliance on the further evidence. Significantly, this was allowed without requiring the claimant to make a formal application for permission or for relief from sanctions. Permission was granted on the basis that:

- It was likely at least some of the documents would help explain the history of the matter.
- The prejudice to the defendants was minimal since they would already be aware of the documents filed at Companies House. If the documents were ultimately of little value, the defendants may be compensated in costs for wasted time reviewing the documents.
- In respect of *Denton*, the breach was not considered serious and the explanation that the documents may be useful was sensible. Bearing in mind the circumstances of the case and the interests of justice, it was appropriate to give permission.

PRACTICAL GUIDANCE

Although Ball shows that the burden on a party seeking to rely on further disclosure is relatively easy to discharge, the circumstances of that case are far from a guide on best practice. Besides the potential costs consequences mentioned by the Chief Master, it is foreseeable that given the potential risk to the final hearing date, permission may not have been granted where the documents weren't publicly available and where the prejudice to the defendant may have been more marked.

To stand the best prospects of success, an application for extended disclosure in a Part 8 claim should address the Issues for disclosure; the model(s) from A to E that apply to each issue for disclosure, and explain why such model(s) are reasonable and proportionate.

The applicant should detail why the court must see additional documents to fairly resolve the issues for disclosure. These are "only those key issues in dispute" (paragraph 7.3 of PD 51U) – clarified in *McParland & Partners Ltd v Whitehead* [2020] EWHC 298 (Ch).

Ideally, such an application should be dealt with at the directions hearing. If not, an application made as soon as possible (together with, subject to the circumstances, an application for relief from sanctions) should limit potential prejudice to the other parties.

Applications could be avoided with proactive planning before the claim has even begun. Clients may occasionally have the luxury of electing between Part 7 and 8 procedures, for example, TOLATA (Trusts of Land and Appointment of Trustees Act 1996) claims. Practitioners must advise which would be preferable and disclosure will undoubtedly be part of that discussion.

Although *Ball* has muddied the distinction (with the flexible application of extended disclosure in Part 8 claims), Part 7 claims retain a more regimented and overall more comprehensive programme for disclosure. To those wishing to keep their options open, experience teaches that it is never too early to obtain witness proofs. Even for those who go down the Part 7 route, clarifying the factual account immediately can be an invaluable resource from the beginning, particularly in beneficial ownership disputes.

Part 8's inflexible front-loading poses problems in theory but, in practice, *Ball* shows the court is willing to sanction additional disclosure. SJ

Practitioners must advise which of the Part 7 or 8 procedures would be preferable and disclosure will undoubtedly be part of that discussion