

High Court Orders Exceptional “Model E” Train of Inquiry Disclosure

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INTRODUCTION

In *Ras Al Khaimah Investment Authority v Azima* [2022] EWHC 1295 (Ch), the High Court ordered that “Model E” (“Train of Inquiry”) disclosure be given in the proceedings in relation to a “key” issue for disclosure pursuant to CPR Practical Direction 51U (“PD51U”). The Court ordered Model E disclosure having regard to the fact that a conspiracy was alleged and that there was a substantial lack of available documentation available from the Defendants.

BACKGROUND

The decision concerned an application for security for costs and disclosure pertaining to the retrial of the Defendant’s counterclaim against *Ras Al Khaimah Investment Authority* (“RAKIA”) as a result of new evidence coming to light. In his counterclaim, the Defendant (Mr Azima) alleged that his email accounts had been unlawfully hacked by RAKIA and four additional Defendants (whom the Defendant received permission to add to the counterclaim as a result of a previous judgment).

In relation to the disclosure application, the Judge was required to consider two matters:

- The wording and/or inclusion of certain issues for disclosure; and
- The appropriate disclosure “Model” for certain of the issues for disclosure.

This article discusses the debate around whether Model D (i.e., ordering the disclosure of documents which are likely to support or adversely affect a party’s claim or defence or that of another party) or Model E (i.e., ordering the disclosure of documents that would fall within Model D *and* documents that “*may lead to a train of inquiry which may*

then result in the identification of other documents for disclosure”) was appropriate for Issue 3(a) in the proceedings. Issue 3(a) is described as follows:

“From 1 December 2014 until 30 September 2016 what steps, which were or might reasonably be construed as being unlawful, were taken by or on behalf of RAKIA, RAK DEV, or other RAK government persons or entities (or on behalf of other Defendants) to obtain information about or belonging to Mr Azima.

What information was thereby obtained, to whom was it provided, and for what purposes was it provided?”

The Defendants asserted that Model D was to apply to Issue 3(a) and proposed the underlined words above to be inserted into the issue. Mr Azima objected to the inclusion of these words and proposed that Model E disclosure was to apply. Neither party, however, disputed that Issue 3(a) was a central issue to the proceedings.

JUDGMENT

Michael Green J declined to include the restricting additional underlined words proposed by the Defendants and ordered that Model E disclosure should be provided in relation to Issue 3(a).

Before making his decision, Green J considered the relevant background to the disclosure issues. This background included the fact stated at [70] that “*there has undoubtedly been a substantial loss of documentation [and that], [t]his puts Mr Azima at serious disadvantage in terms of having available contemporaneous documentation from which to test the evidence and the credibility of witnesses.*” Green J was unable to conclude that previous failures of disclosure showed “*a deliberate policy of document destruction or lack of candour to RAKIA’s approach to disclosure*” but that these events informed the current debate about the extent of disclosure required (see [70]).

Green J also considered that the nature of the allegations made against the Defendants by Mr Azima were relevant to whether Model E disclosure should be ordered. At [71], he stated: “*Mr Azima alleges a clandestine conspiracy to hack his confidential data. Because those involved in the alleged conspiracy would be unlikely to create documents that revealed it or contained smoking guns together with the policies of document destruction, this means that Mr Azima’s case will largely have to be built on inferences.*”

Issue 1: Should Model D or Model E Apply to Issue 3(a)?

At [64], Green J noted paragraph 8.3 of PD51U provided that Model E disclosure was only to be ordered in an “*exceptional case*”. The Judge referred to two cases on the issue. The first was *Kelly v Baker* [2021] EWHC 964 (Comm) in which Moulder J stated at [16] that the starting point is that Model E should only be ordered in exceptional cases. She went on to say that it would be insufficient to say that (i) it is a relatively high value case, (ii) it is important to the Claimants, or (iii) that it involves allegations of fraud.

The second case Green J referred to was *State of Qatar v Banque Havilland SA* [2020] EWHC 1248 (Comm). In this case, Cockerill J also confirmed the exceptional nature of Model E and said that she would expect to see Model E being ordered in fewer cases in light of the disclosure pilot. She stated at [22] that: “*the disclosure pilot is designed to try to produce something which is more limited than might have been the case in the past; and so it is plainly not enough to say that this is a serious case involving conspiracy and therefore Model E must follow. That is not the approach which the disclosure pilot indicates.*”

A further decision in the *State of Qatar* case was also referenced¹ in which certain disclosure orders made by Cockerill J were revisited by Mr David Edwards QC (sitting as a High Court Judge) on the basis that new evidence had come to light. In this further decision, Model E disclosure was sought, and granted, for certain issues. Mr Edwards QC ordered Model E disclosure on the basis that important sources of information were not available (e.g., mobile phone data had been wiped and notebooks were lost), documents had been withheld and in circumstances where a conspiracy was alleged, it was unlikely that any smoking gun would be found.

In considering these cases and the background facts described above, and having been provided with examples of categories of documents (e.g., invoices) in which further context may be important in the proceedings, Green J stated at [79] that “*where there has potentially been a cover-up of wrongdoing, there needs to be a mechanism for exploring whether there was indeed a cover-up and, if so, how it worked*”. He decided the case was exceptional as a result of the importance of Issue 3(a) in the proceedings and in light of the surrounding circumstances and ordered Model E disclosure.

Issue 2: Should the Additional Wording Be Included in Issue 3(a)

In determining that the additional wording should not be included, Green J held at [82] that the Defendants’ proposed wording limiting disclosure on the issue went too far and considered that the wording could be used as a mechanism to avoid disclosing what Mr Azima would be permitted to otherwise see on Issue 3(a).

¹ See *State of Qatar v Banque Havilland SA* [2021] EWHC 2172 (Comm).

COMMENT

The case provides a useful insight into the narrow circumstances in which Model E disclosure will be appropriate. It also serves as a reminder of the “exceptional” nature in which Model E disclosure will be applied and emphasises the clear drive under the disclosure pilot scheme to tightly restrict the granting of such an order. It is clear that where issues of conspiracy and loss of documentary evidence are involved, there is a greater possibility of Model E disclosure being ordered.

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