

YOUR DISCLOSURE OBLIGATIONS

- ▶ What is the Disclosure Pilot?
- ▶ Does the Disclosure Pilot apply to cases that commenced before the introduction of the Disclosure Pilot?
- ▶ Is the position affected by a pre-existing order for standard disclosure?

What's it about?

The Disclosure Pilot (**the Pilot**) was introduced to the Business and Property Courts only on 1 January 2019 for 2 years. Its objectives are to modernise standard disclosure under CPR Part 31 by introducing a 'menu' of disclosure options and encourage a change in culture between the parties and the Court whereby there are express duties of cooperation and engagement for both the parties and their legal representatives. The Pilot encourages the effective use of technology and ensures that the Court has information to make informed decisions about disclosure. Key changes to disclosure under Practice Direction 51U (PD51U) include an improved 'menu' of disclosure options for parties to consider, 'initial disclosure' with statements of case as well as 'extended disclosure' when a party seeks disclosure beyond initial disclosure.

The recent case of **UTB LLC v Sheffield United & Others [2019]** EWHC 914 (Ch) considered and clarified how the Pilot will apply to pre-January 2019 cases. The case related to an ownership dispute concerning Sheffield United Football Club and the application of the new practice direction arose as part of the issues heard by the Court.

Sheffield United Limited was challenging UTB LLC's claims to privilege in respect of certain documents and sought for them to be disclosed under the new Pilot. An order for standard disclosure had previously been made prior to the introduction of the Pilot. Sheffield United argued that PD51U did not apply as an existing order for disclosure had already been made prior to the Pilot coming into effect.

In considering this issue, the Chancellor of the High Court stated that paragraph 1.2 of PD51U notes that "*the Pilot applies [from 1st January 2019] ... to existing and new proceedings in the [Business and Property Courts]*". He quoted paragraph 1.3 of PD51U in his judgment which provides that "*the pilot shall not disturb an order for disclosure made before [1st January 2019]*". The Chancellor of the High Court stated that the following interpretation of PD51U in the White Book at paragraph 51.2.10 was wrong: "*the pilot does not apply to any proceedings where a disclosure order had been made before it came into force unless that order is set aside or varied*".

The Chancellor of the High Court considered that the Pilot "*was deliberately put in place without transitional provisions so that it would apply to all existing proceedings even where an initial disclosure order had been made*". The Pilot applied "*for all relevant proceedings subsisting in the Business and Property Courts, whether started before or after 1st January 2019, even in a case where a disclosure order was made before 1st January 2019 under CPR Part 31*".

Why does it matter?

The Pilot will apply to further applications for disclosure in the Business and Property Courts even where a previous disclosure order was made before the Pilot came into effect.

The Chancellor of the High Court's judgment confirms that the interpretation of the White Book was incorrect and parties should ensure that, if a disclosure order prior to 1 January 2019 is being revisited, the parties should understand their obligations before pursuing a further application for disclosure and at the very least, engage about the application of PD51U and have some discussion about the issues for disclosure.

Parties are expected to cooperate with each other. The Chancellor of the High Court warned that "*Extended disclosure is not, therefore, something that should be used as a tactic, let alone a weapon, in hard fought litigation. It is all about the just and proportionate resolution of the real issues in dispute*".

Now what?

- ▶ Where an order for standard disclosure has already been made, parties will be expected to comply with their disclosure obligations set put in PD51U when the Court is determining any further applications for disclosure.

- ▶ The Chancellor of the High Court noted in his judgment that parties who want to apply to the Court for Extended Disclosure under PD51U “*should give detailed thought to the new rules and specifically to the way in which they will affect their application*”.
- ▶ Parties and their legal representatives should cooperate with each other during disclosure to allow the court to reach an “*expeditious and proportionate*” solution.

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