

High Court Makes the Disclosure Pilot Scheme Permanent for the Business and Property Courts

14 September 2022

The Chancellor of the High Court, Sir Julian Flaux, and Master of the Rolls, Sir Geoffrey Vos, have announced the approval of a new Practice Direction for disclosure in the Business and Property Courts, making the Disclosure Pilot Scheme permanent.

The new Practice Direction 57AD (“PD 57 AD”) will apply to all existing and new proceedings (subject to limited exceptions) in the Business and Property Courts from 1 October 2022. The new practice direction largely implements the rules from the Disclosure Pilot Scheme (Practice Direction 51U) (“DPS”), which was implemented in 2019 in an attempt to manage the costs and complexity of the disclosure process.

The DPS has been criticised by many in the profession for making the disclosure process more complex than it had been under the old regime. The DPS introduced new stages to the disclosure process and was criticised for not ultimately making disclosure more manageable for large commercial disputes. However, the approval of PD 57 AD for disclosure is an endorsement from the High Court of the DPS and provides the Business and Property Courts with case management powers to actively manage disclosure issues and bring about a “cultural change” in how disclosure is approached. PD 57 AD has not, at this stage, been implemented more widely and does not replace the standard rules for disclosure and inspection of documents (found in Part 31 of the Civil Procedure Rules), which still apply in other courts.

What Is the DPS? In May 2016, the High Court established a Disclosure Working Group in response to widespread concerns expressed by court users and the profession regarding the perceived excessive costs, scale and complexity of disclosure.

The DPS was introduced in the Business and Property Courts from 1 January 2019 to bring the principles of reasonableness and proportionately to the forefront of the disclosure process. Some key features of the DPS included:

- **Emphasis on early engagement:** The DPS emphasised the importance of identifying sources of potentially relevant data with precision and early in the proceedings.

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- **Standard disclosure not the default:** The DPS introduced a new menu of disclosure options which allows a party to apply different disclosure models to different issues. Standard search-based disclosure is not the default.
 - **Co-operation is essential:** The DPS requires the parties to co-operate to identify the issues and methods for disclosure so as to reduce the costs of the disclosure process. In advance of the first CMC the parties are required to engage with each other in agreeing a “Disclosure Review Document” which deals with disclosure on an issue-by-issue basis.
 - **Guidance may be sought from the Court:** the DPS introduced new Disclosure Guidance Hearings, enabling the parties to seek guidance from the Court by way of a short hearing rather than engaging in extensive correspondence resulting in applications.
 - **Encouraging the use of technology:** The DPS encourages parties to consider the use of technology in reviewing documents, and if a party has more than 50,000 documents to review and decides not to use technology to assist in that review, they have to explain why.

These new disclosure rules are intended to be better-suited to litigation involving large volumes of electronic data. The previous rules are, for the most part, unchanged since they were introduced with the Civil Procedure Rules in 1999. The rules have not kept pace with the changes to technology and the increasingly large volumes of electronic data that is now considered the norm in complex commercial disputes.

Disclosure in the Business and Property Courts Going Forward. The DPS will now end on 1 October 2022 with the introduction of PD 57AD for the Business and Property Courts.

There are a number of minor amendments to the DPS introduced by the new rules:

- Clarifying that the new regime does not apply to Part 8 claims unless ordered otherwise;
- Clarifying when “known adverse documents” should be disclosed;
- Providing additional guidance regarding the approach that should be adopted when formulating issues for disclosure;

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- Introducing new wording providing that a party may not only address Model C disclosure requests to the other party or parties but also may suggest using Model C regarding documents it proposes searching for and disclosing;
 - Confirming that a Disclosure Certificate may be signed by the party's legal representative, provided that the legal representative has explained the significance of the Disclosure Certificate to their client and has been given written authority to sign the Disclosure Certificate on the client's behalf. The party will be deemed to have agreed to, and be bound by, the certifications given by their legal representative.
 - Increasing the claim value below which (unless the other specified factors indicate otherwise) claims should be treated as "Less Complex Claims" from £500,000 to £1 million.

We anticipate that the courts will continue to grapple with how the new scheme should be applied so that the aims of ensuring a reasonable and proportionate approach to disclosure are met. There are some areas which seem ripe for further development—for example, the rules do not contain express provisions on how multiparty claims should be accommodated but reserve the court's case management powers to depart from the timetable set out in the rules for multiparty litigation. It remains to be seen how the courts will apply PD 57 AD in managing large and complex multiparty litigation, and we expect this will be an area to watch.

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