

PRACTICE DIRECTION []

DISCLOSURE PILOT FOR THE BUSINESS AND PROPERTY COURTS

1. General

- 1.1 This Practice Direction is made under Part 51 and provides a pilot scheme for disclosure in the Business and Property Courts. Section I provides a new scheme for disclosure.
- 1.2 The pilot applies from the Commencement Date for two years to claims in the Business and Property Courts of England and Wales and the Business and Property Courts in Manchester, Birmingham, Leeds, Bristol and Cardiff.
- 1.3 The pilot shall not disturb an order for disclosure made before the Commencement Date or before the transfer of a claim into a Business and Property Court, unless that order is set aside. If a claim is transferred out of one of the Business and Property Courts into a court that is not one of the Business and Property Courts, any order for disclosure made under the pilot will stand unless and until any other order is made by the transferee court.
- 1.4 The pilot shall not apply to a claim which is –
 - (1) a competition claim as defined in Practice Direction 31C;
 - (2) within the Intellectual Property and Enterprise Court; or
 - (3) within the Shorter and Flexible Trials Schemes.
- 1.5 The pilot will continue to apply after the end of the two year period to any claim to which it applied at that point.
- 1.6 For the purposes of the pilot, where the provisions of this Practice Direction conflict with other provisions of the rules or other practice Directions, this Practice Direction shall take precedence. For the avoidance of doubt, the reference to standard disclosure in paragraph 6.1 of Practice Direction 63 shall be taken to mean disclosure in accordance with this Practice Direction.
- 1.7 Terms in Section I of this Practice Direction shall have the meaning given to them in the schedule of definitions at Appendix 1.
- 1.8 Save for those provisions of CPR Part 31 that are set out in Section II, and the related provisions of Practice Directions 31A and 31B, CPR Part 31 and Practice Directions 31A and 31B shall not apply to any claim falling within the pilot.
- 1.9 Save that references in Section II to an Electronic Documents Questionnaire should be treated as references to the Disclosure Review Document, nothing in this Practice Direction is intended to change the application or working of those provisions of CPR Part 31 that are set out in Section II and the related provisions of Practice Directions 31A and 31B, and CPR Part 31 as a whole should still be used to interpret those provisions.

SECTION I

2. Principles

- 2.1 Disclosure is important in achieving the fair resolution of civil claims.
- 2.2 The court expects the parties (and their representatives) to cooperate with each other and to assist the court so that the scope of disclosure, if any, that is required in a claim can be agreed or determined by the court in the most efficient way possible.
- 2.3 The court will be concerned to ensure that disclosure is directed to the key issues in the claim and that the scope of disclosure is not wider than is reasonable and proportionate in order fairly to resolve those key issues, and specifically the Issues for Disclosure (as defined in Appendix 1).

3. Duties in relation to Disclosure

- 3.1 A person who is a party to a claim that has been commenced or who knows they may become a party to a claim that has or may be commenced is under the following duties (“the Disclosure Duties”) to the court –
 - (1) to take reasonable steps to preserve documents in its control that may be relevant to the claim;
 - (2) to disclose, regardless of any order for disclosure made, documents it knows to be or to have been in its control and adverse to its case on the claim, unless they are privileged;
 - (3) to comply with any order for disclosure made by the court;
 - (4) to undertake any search for documents in a responsible and conscientious manner to fulfil the stated purpose of the search;
 - (5) to act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party; and
 - (6) to refrain from providing documents to another party that have no relevance to the Issues for Disclosure in the claim.
- 3.2 Legal representatives who have the conduct of litigation on behalf of a party to a claim are under the following duties to the court –
 - (1) to take reasonable steps to preserve documents within their control that may be relevant to the claim;
 - (2) to take all reasonable steps to assist and cause the party to comply with its disclosure duties;
 - (3) to liaise and cooperate with the legal representatives of the other parties to the claim (or the other parties where they do not have legal representatives) so as to promote the reliable, efficient and cost-effective conduct of disclosure, including through the use of technology;
 - (4) to act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party; and

- (5) to undertake a review to satisfy themselves that any claim by the party to privilege from disclosing a document is properly made and its basis sufficiently explained.
- 3.3 The duties at 3.1 and 3.2 above are continuing duties that last from when a claim is contemplated, or first intimated, until the conclusion of the claim (including any appeal).

4. Preservation of Documents

- 4.1 Documents to be preserved in accordance with the duties at paragraph 3.1(1) and 3.2(1) above include documents which might otherwise be deleted or destroyed in accordance with a document retention policy or in the ordinary course of business. Preservation includes, in suitable cases, making copies of sources and documents and storing them.
- 4.2 The duty under paragraph 3.1(1) and 3.2(1) includes –
- (1) an obligation to suspend relevant document deletion or destruction processes for the duration of the claim;
 - (2) an obligation to send a written notification in any form to all relevant employees in accordance with paragraph 4.3 below; and
 - (3) an obligation to take reasonable steps so that agents or third parties who may hold documents on the party's behalf do not delete or destroy documents that may be relevant to the claim.
- 4.3 A written notification under paragraph 4.2 above should –
- (1) identify the documents to be preserved; and
 - (2) notify the recipient that they should not delete or destroy those documents and should take reasonable steps to preserve them.
- 4.4 The parties' legal representatives must, within a reasonable period of being instructed in relation to a claim or a claim that is contemplated or intimated –
- (1) notify their client of the need to preserve documents and of their obligations under paragraph 3.1 above; and
 - (2) obtain written confirmation from their client or an appropriate representative of their client that their client has taken the steps required under paragraphs 4.2 and 4.3 above.
- 4.5 Each party must confirm in writing when serving their Particulars of Claim or Defence (as appropriate), that steps have been taken to preserve relevant documents in accordance with the duties under paragraph 3.1(1) and 3.2(1) above, and as required by paragraph 4.1 to 4.4 above.

5. Basic Disclosure

- 5.1 Save as provided below, and save in the case of a claim form without particulars of claim, each party must provide to all other parties at the same time as its statement of case a list of and copies of –

- (1) the key documents on which it has relied (expressly or otherwise) in support of the claims or defences advanced in its statement of case; and
- (2) the key documents that are necessary to enable the other parties to understand the case they have to meet.

5.2 This process shall be known as “Basic Disclosure”.

5.3 Basic Disclosure is not required where –

- (1) the parties have agreed to dispense with it (see 5.7 below);
- (2) the court has ordered that it is not required (see 5.9 below); or
- (3) a party concludes that giving Basic Disclosure would involve it or any other party providing more than 500 pages, at which point the requirement to give Basic Disclosure ceases for the purposes of the case.

Documents comprising media not in page form are not included in the calculation of the page limit at (3) but, where provided pursuant to a requirement to give Basic Disclosure, should be confined strictly to what is necessary to comply with paragraph 5.1 above.

5.4 A party giving Basic Disclosure –

- (1) is under no obligation to carry out a search for documents beyond any search already conducted for the purposes of obtaining advice on its case or preparing its statement of case;
- (2) is not required to provide documents by way of Basic Disclosure if such documents have –
 - (a) already been provided to the other party, whether by disclosure before proceedings start (see CPR 31.16) or through pre-action correspondence or otherwise in the period following intimation of the claim; or
 - (b) are known to be in the other party’s possession.

5.5 Unless otherwise ordered, or agreed between the parties, copies of documents shall be provided in electronic form for the purpose of Basic Disclosure. The List of Documents should be filed but the documents must not be filed.

5.6 In a claim where a statement of case is to be served on a defendant out of the jurisdiction Basic Disclosure is not required in respect of that defendant unless and until that defendant files an acknowledgement of service that does not contest the jurisdiction, or files a further acknowledgement of service under CPR 11(7)(b).

5.7 For the avoidance of doubt, Basic Disclosure does not require any document to be translated.

5.8 The parties may agree in writing, before or after the commencement of a claim, to dispense with, or defer, Basic Disclosure. Each party should record its respective reasons for any agreement, so that those reasons may be available to the Court, on request, at any case management conference. The court may set aside such agreement if it considers that Basic Disclosure is likely to provide significant benefits and the costs of providing Basic Disclosure are unlikely to be disproportionate to such benefits.

- 5.9 The court shall disregard any prior agreement to dispense with Basic Disclosure when considering whether to order Extended Disclosure.
- 5.10 If a party is requested but does not agree to dispense with Basic Disclosure, the requesting party may apply to the court with notice to the other party for directions limiting or abrogating the obligation to provide Basic Disclosure if it considers compliance with the obligation will incur disproportionate cost or be unduly complex. Such an application must be made by application notice, supported by evidence where necessary, and, save in exceptional cases, will be dealt with without a hearing or at a short telephone hearing.
- 5.11 A complaint about Basic Disclosure shall be dealt with at the first case management conference unless, exceptionally and on application, the court considers that the issue should be resolved at an earlier hearing.
- 5.12 A significant failure to comply with the obligation to provide Basic Disclosure may be taken into account by the court when considering whether to make an order for Extended Disclosure and the terms of such an order. It may also result in an adverse order for costs.

6. **Extended Disclosure**

- 6.1 A party wishing to seek disclosure of documents in addition to, or as an alternative to, Basic Disclosure must request Extended Disclosure. No application notice is required. However, the parties will be expected to have completed the Disclosure Review Document pursuant to paragraphs 7 and following below.
- 6.2 The court will determine whether to order Extended Disclosure at the first case management conference or, if directed by the court, at another hearing convened for that purpose or without a hearing.
- 6.3 The court will only make an order for Extended Disclosure where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure.
- 6.4 In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective and, in particular, the following factors –
- (1) the nature and complexity of the issues in the proceedings;
 - (2) the importance of the case, including any non-monetary relief sought;
 - (3) the likelihood of documents existing that will have probative value in supporting or undermining a party's case;
 - (4) the number of documents involved;
 - (5) the ease and expense of retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);
 - (6) the financial position of each party; and
 - (7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.
- 6.5 A request for Extended Disclosure must specify which of the Disclosure Models listed in paragraph 8 below are proposed for each Issue for Disclosure. It is for the party requesting

Extended Disclosure to show that what is sought is appropriate, reasonable and proportionate.

7. Identifying the Issues for Disclosure

- 7.1 When serving a statement of case (other than a claim form without particulars of claim), the party must at the same time state, by letter, whether or not it is likely to request Extended Disclosure to include one or more of Models B, C, D or E (see paragraph 8 below) on one or more issues. At this point it should not particularise the Model(s) or the issue(s).
- 7.2 Where one or more of the parties has indicated it is likely to request Extended Disclosure, the Claimant must within 21 days of the time limited for service of a reply, prepare and serve on the other parties a draft List of Issues for Disclosure unless the equivalent of such a list has already been agreed between the parties (for example, as part of a fuller list of issues). The List of Issues for Disclosure should be set out in the manner prescribed by Section 1A of the Disclosure Review Document and paragraph 10 below.
- 7.3 The Claimant should seek to ensure that the draft List of Issues for Disclosure provides a fair and balanced summary of the key areas of dispute identified by the parties' statements of case and in respect of which it is likely that one or other of the parties will be seeking Extended Disclosure.
- 7.4 In the event that a particular Issue for Disclosure has not been included in the List of Issues for Disclosure, or is described in a manner that is unacceptable to the Defendant, the Defendant should provide the Claimant with its proposed wording or alternative wording for inclusion in the draft List of Issues for Disclosure as soon as practicable but in any event no later than 14 days after service of the draft List of Issues for Disclosure.
- 7.5 In advance of the first case management conference, the parties must discuss and seek to agree the draft List of Issues for Disclosure. They should consider whether any draft Issue for Disclosure can be removed. For each Issue for Disclosure that is maintained, the parties should indicate at this point which Model of Extended Disclosure is sought for each party. Where Model C Disclosure is contemplated the parties should discuss the requests that might apply for the purpose of that disclosure.
- 7.6 The List of Issues for Disclosure may be revised or supplemented at any time prior to or following the case management conference, including as a result of statements of case or amended statements of case subsequently served or discussions between the parties in relation to the Disclosure Review Document.

8. Extended Disclosure Models

- 8.1 Extended Disclosure may take the form of one or more of the Disclosure Models set out below.
- 8.2 The court may order that Extended Disclosure be given using different Disclosure Models for different Issues for Disclosure in the case. The court may also order that Extended Disclosure be given by only one party, or that different Models are to apply to each party's Disclosure on a particular Issue for Disclosure.

Model A: No order for Disclosure

The court may order that no, or no further, disclosure is required in relation to some or all of the Issues for Disclosure (save for known adverse documents in accordance with the duty at paragraph 3.1(2) above).

Model B: Limited Disclosure

- (1) The court may order the parties to disclose (where and to the extent that they have not already done so by way of Basic Disclosure) –
 - (a) the key documents on which they have relied (expressly or otherwise) in support of the claims or defences advanced in their statement(s) of case; and
 - (b) the key documents that are necessary to enable the other parties to understand the case they have to meet (not including Narrative Documents unless the Court directs otherwise);

and in addition to disclose known adverse documents in accordance with their duty at paragraph 3.1(2) above.

- (2) A party giving Model B Disclosure is under no obligation to carry out a search for documents beyond any search already conducted for the purposes of obtaining advice on its case or preparing its statement(s) of case.

Model C: Request-led Search-based Disclosure

- (1) The court may order a party to give disclosure of particular documents or narrow classes of documents relating to a particular Issue for Disclosure, by reference to requests set out in or to be set out in Section 1B of the Disclosure Review Document or otherwise defined by the court.
- (2) If the parties cannot agree that disclosure should be given, or the disclosure to be given, pursuant to a request, then the requesting party must raise the request at the case management conference. The court will determine whether the request is reasonable and proportionate and may either order the disclosing party to search for the documents requested, refuse the request, or order the disclosing party to search for a narrower category of documents than that requested. Any appropriate limits to the scope of the searches to be undertaken will be determined by the court using the information provided in the Disclosure Review Document.
- (3) For the avoidance of doubt, a party giving Model C Disclosure must still comply with the duty at paragraph 3.1(2) above to disclose known adverse documents; these will include any arising from the search directed by the court.

Model D: Narrow Search-based Disclosure, with or without Narrative Documents

- (1) Under Model D, a party shall disclose documents which are likely to support or undermine its own case or that of another party in relation to one or more of the Issues for Disclosure.
- (2) Each party is required to carry out a reasonable and proportionate search in relation to the Issues for Disclosure for which Model D disclosure has been ordered. Any appropriate limits to the scope of the searches to be undertaken will be determined by the court using the information provided in the Disclosure Review Document.

- (3) The order should specify whether a party giving Model D disclosure is to search for and disclose Narrative Documents. If the order does not so specify, Narrative Documents should not be disclosed.
- (4) For the avoidance of doubt, a party giving Model D Disclosure must still comply with the duty at paragraph 3.1(2) above to disclose known adverse documents, these will include any arising from the search directed by the court.

Model E: Wide Search-based Disclosure

- (1) Under Model E, a party shall disclose documents which are likely to support or undermine its own case or that of another party in relation to one or more of the Issues for Disclosure or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure.
 - (2) Model E is only to be ordered in an exceptional case.
 - (3) Each party is required to carry out a reasonable and proportionate search in relation to the Issues for Disclosure for which Model E disclosure has been ordered. The scope of the search will be determined by the court using the information provided in the Disclosure Review Document and is likely to be broader than that ordered for Model D Disclosure.
 - (4) Narrative Documents must also be searched for and disclosed, unless the Court otherwise orders.
 - (5) For the avoidance of doubt, a party giving Model E Disclosure must still comply with the duty at paragraph 3.1(2) above to disclose known adverse documents, these will include any arising from the search directed by the court.
- 8.3 Where an order for Model B, C, D or E Extended Disclosure is made on one or more Issues for Disclosure, all adverse documents to be disclosed in compliance with the duty at paragraph 3.1(2) above must be disclosed at the time ordered for that Extended Disclosure. In any other case all adverse documents to be disclosed in compliance with that duty must be disclosed within 30 days of the first case management conference unless the court directs a different period. The provisions of this paragraph do not affect the fact that the duty at paragraph 3.1(2) above is a continuing duty as provided by paragraph 3.3 above: if adverse documents in the control of a party come to its knowledge at a later date they must (unless privileged) be disclosed without delay.
- 8.4 In an appropriate case, the court will be prepared to order that the question of which party bears the costs of Disclosure is to be given separate consideration at a later stage rather than the costs being treated automatically as costs in the case.

9. Principles governing the choice of Disclosure Models

- 9.1 There is no presumption that a party is entitled to Model D or Model E disclosure and neither Model will apply without the approval of the court.
- 9.2 When deciding whether or not it is reasonable and proportionate to order a particular Disclosure Model, the court will consider all the circumstances of the case including the factors set out in paragraph 6.4 above and the overriding objective.

9.3 Where the Disclosure Model requires searches to be undertaken, the parties must discuss and seek to agree, and the court may give directions, on the following matters with a view to reducing the burden and costs of the disclosure exercise -

(1) that the scope of the searches which the disclosing parties are required to undertake be limited to –

- (a) particular date ranges and custodians of documents;
- (b) particular categories of documents and/or file types;
- (c) specific document repositories and/or geographical locations;
- (d) specific computer systems or electronic storage devices; and
- (e) documents responsive to specific Keyword Searches, or other automated searches (by reference, if appropriate, to individual custodians, creators, repositories, file types and/or date ranges); and

(2) the use of technology assisted review software and techniques.

9.4 In making an order for Extended Disclosure, the court may include provision for all or any of the following –

- (1) requiring the use of specified software tools;
- (2) identifying the methods to be used to identify and remove duplicate documents;
- (3) requiring the use of data sampling;
- (4) specifying the format in which documents are to be disclosed;
- (5) identifying the methods that the court regards as sufficient to be used to identify privileged documents and other non-disclosable documents; and
- (6) requiring the use of a staged approach to the disclosure of electronic documents.

9.5 In considering Extended Disclosure as well as when complying with an order for Extended Disclosure the parties should have regard to the guidance set out in Section 3 of the Disclosure Review Document.

10. **Completion of the Disclosure Review Document**

10.1 The Disclosure Review Document is the document by which the parties must identify, discuss and seek to agree the scope of any Extended Disclosure sought.

10.2 The parties' obligation to complete, seek to agree and update the Disclosure Review Document is ongoing. If a party fails to co-operate and constructively to engage in this process the court may make appropriate orders at the case management conference, including the dismissal of any application for Extended Disclosure and/or the adjournment of the case management conference with an adverse order for costs.

- 10.3 Where a party has indicated in Section 1A of the Disclosure Review Document its intention to seek Model C request-led search-based disclosure, it must complete and then provide Section 1B of the Disclosure Review Document to the other party as soon as is reasonably practicable after completion of Section 1A of the Disclosure Review Document and, in any event, not less than 28 days before the date fixed for the case management conference.
- 10.4 Any party provided with Section 1B requests must, as soon as reasonably practicable and, in any event, at least 14 days before the case management conference, respond by completing the "Response" column of Section 1B, either agreeing to each request or giving concise reasons for any refusal and serving the completed form on the requesting party.
- 10.5 If a party proposes that Model C request-led search-based disclosure would be appropriate for its disclosure on one or more Issues for Disclosure, but the other party (who would need to formulate the requests) disagrees, no Section 1B form will be completed in advance of the case management conference. The court may order Model C disclosure, even where the party that would formulate the requests opposes this. If the court orders Model C disclosure, it will then set down a timetable for Section 1B to be completed and a hearing date if needed for any areas of disagreement to be determined by the court.
- 10.6 Having completed the List of Issues for Disclosure in Section 1A of the Disclosure Review Document pursuant to paragraph 7 above, the parties should prepare and exchange drafts of Section 2 of the Disclosure Review Document as soon as reasonably practicable and in any event not later than 14 days before the case management conference.
- 10.7 The parties must seek to resolve any disputes over the scope of any Extended Disclosure sought in advance of the first case management conference. Any disputes which have not been resolved will normally be decided by the court at the first case management conference.

11. **Disclosure Guidance Hearing**

- 11.1 The parties may seek guidance from the court by way of a discussion with the court in advance of or after a case management conference, concerning the scope of Extended Disclosure or the implementation of an order for Extended Disclosure, where –
 - (1) the parties have made real efforts to resolve disputes between them and they provide a certificate substantially in the form set out in Appendix 4 to that effect; and
 - (2) the absence of guidance from the court before a case management conference is likely to have a material effect on the court's ability to hold an effective case management conference, or the absence of guidance from the court after a case management conference is likely to have a material effect on the parties' ability to carry out the court's case management directions effectively.
- 11.2 A Disclosure Guidance Hearing may be fixed by issuing an application notice, before or after a case management conference. Evidence will not normally be required. The application will have a maximum hearing length of 30 minutes and a maximum of 30 minutes pre-reading.
- 11.3 At a Disclosure Guidance Hearing the court will generally expect it to be a person with direct responsibility for the conduct of disclosure to be the person who participates on behalf of each party in the discussion concerning the scope of Extended Disclosure or the implementation of an order for Extended Disclosure.

11.4 The normal order on a Disclosure Guidance Hearing will be costs in the case.

12. **Complying with an Order for Extended Disclosure**

12.1 An order for Extended Disclosure, other than an order made under Model A, is complied with by undertaking the following steps –

- (1) service of a Disclosure Certificate substantially in the form set out in Appendix 2 signed by the party giving disclosure;
- (2) service of a List of Documents; and
- (3) production of the documents which are disclosed over which no claim is made to withhold production.

12.2 The order for Extended Disclosure will not have been complied with until each step specified in paragraph 12.1 has taken place.

12.3 The court may make an order for Extended Disclosure in stages.

12.4 Disclosure of documents which no longer exist requires the disclosing party to describe each such document with reasonable precision and explain the circumstances in which, and the date when, the document ceased to exist. If it is not possible to identify the individual documents, the class of documents which has ceased to exist must be described with reasonable precision.

12.5 In the case of a company, firm, association or other organisation, or where the Disclosure Certificate is signed by a party on behalf of other parties, the certificate must;

- (1) identify the person signing the Disclosure Certificate; and
- (2) explain why he is considered to be an appropriate person to sign it.

12.6 A party may not without the permission of the Court rely on any document in its control that it has not disclosed at the time required for Extended Disclosure (or within 30 days after the first case management conference in a case where there will be no Extended Disclosure). For the avoidance of doubt the party and its legal representatives remain under the duties at paragraph 3.1 and 3.2 above.

13. **Production of documents**

13.1 A party's duty to disclose documents is limited to documents which are or have been in its control.

13.2 Save where otherwise agreed or ordered, a party shall produce –

- (1) disclosable electronic documents to the other parties by providing electronic copies in the documents' native format, in a manner which preserves metadata; and
- (2) disclosable hard copy documents by providing scanned versions or photocopied hard copies.

- 13.3 A party should provide any available searchable OCR versions of electronic documents with the original, unless they have been redacted. If OCR versions are provided, they are provided on an “as is” basis, with no assurance to the other party that the OCR versions are complete or accurate.
- 13.4 A party need not disclose more than one copy of a document unless additional copies contain or bear modifications, obliterations or other markings or features which are of themselves of a level of probative value so as to cause those additional copies to fall within a party’s Basic or Extended Disclosure obligations.
14. **Right to withhold production of documents (other than public interest immunity), and redaction**
- 14.1 A person who wishes to claim a right or duty (other than on the basis of public interest immunity) to withhold disclosure or production of a document, or part of a document, or a class of documents which would otherwise fall within his obligations of Basic Disclosure or Extended Disclosure may exercise that right or duty without making an application to the court subject to –
- (1) describing the document, part of a document or class of document; and
 - (2) explaining, in the Disclosure Certificate, with reasonable precision, the grounds upon which the right or duty is being exercised.
- 14.2 A party who wishes to challenge the exercise of a right or duty to withhold disclosure or production must apply to the court by application notice supported where necessary by a witness statement.
- 14.3 The court may inspect the document or samples of the class of documents if that is necessary to determine whether the claimed right or duty exists or the scope of that right or duty.
- 14.4 If the right or duty claimed is based upon confidentiality, whether benefiting a party to the claim or a third party, the court may order disclosure to a limited class of persons, upon such terms and subject to such conditions as it thinks fit. The court may make further orders upon the request of a party, or on its own initiative, varying the class of persons, or varying the terms and conditions previously ordered, or removing any limitation on disclosure.
- 14.5 A party may redact a part or parts of a document on the ground that the redacted data comprises data that is –
- (1) irrelevant to any issue in the claim, and confidential; or
 - (2) privileged.
- 14.6 Any redaction must be accompanied by an explanation of the basis on which it has been undertaken and confirmation, where a legal representative has conduct of the litigation for the redacting party, that the redaction has been reviewed by the legal representative with control of the disclosure process. A party wishing to challenge the redaction of data must apply to the court by application notice supported where necessary by a witness statement.

15. Failure adequately to comply with an order for Extended Disclosure

15.1 Where there is or may be a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to;

- (1) serve a further, or revised, Disclosure Certificate;
- (2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;
- (3) provide a further or improved List of Documents;
- (4) produce documents; or
- (5) make a witness statement explaining any matter relating to disclosure.

15.2 The party applying for an order under paragraph 15.1 must satisfy the court that making an order is reasonable and proportionate.

15.3 An application for any order under paragraph 15.1 should normally be supported by a witness statement.

16. Varying an order for Extended Disclosure

16.1 The court may make an order that varies an order for Extended Disclosure.

16.2 The party applying for an order under paragraph 16.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the Claim and is reasonable and proportionate.

16.3 An application for an order under paragraph 16.1 must be supported by a witness statement explaining the circumstances in which the original order for Extended Disclosure was made and why it is considered that order should be varied.

16.4 The court's powers under this paragraph 16 include, but are not limited to, making an order for disclosure in the form of Models B to E and requiring a party to make a witness statement explaining any matter relating to disclosure.

17. Restriction on use of a privileged document which has been inadvertently produced

17.1 Where a party inadvertently produces a privileged document, the party who has received the document may use it or its contents only with the permission of the court.

17.2 Where a party is told, or has reason to suspect, that a document has been produced to it inadvertently, that party shall not read the document and shall promptly notify the party who produced it to him. If that party confirms that the document was produced inadvertently, the receiving party shall, unless on application the court otherwise orders, either return it or destroy it, as directed by the producing party, without reading it.

18. **Sanction**

18.1 If a party has failed to comply with his obligations under this pilot including by –

- (1) not complying with any procedural step required to be taken;
- (2) failing to discharge his duties specified in paragraph 3; or
- (3) failing to cooperate with the other parties, including in the process of seeking to complete, agree and update the Disclosure Review Document;

the court may adjourn any hearing, make an adverse order for costs or order that any further disclosure by a party be conditional on any matter the court shall specify.

19. **Documents referred to in evidence**

19.1 A party may at any time request a copy of a document which has not already been provided by way of disclosure but is mentioned in –

- (1) a statement of case;
- (2) a witness statement;
- (3) a witness summary;
- (4) an affidavit; or
- (5) (subject to rule 35.10(4)) an expert's report.

19.2 Copies of documents mentioned in a statement of case, witness evidence or an expert's report and requested in writing should be provided by agreement unless the request is unreasonable or a right to withhold production is claimed.

19.3 A document is mentioned where it is referred to, cited in whole or in part or there is a direct allusion to it.

19.4 The court may make an order requiring a document to be produced if it is satisfied such an order is reasonable and proportionate.

20. **Cost**

20.1 The parties are required to provide an estimate of what they consider to be the likely costs of giving the disclosure proposed by them in the Disclosure Review Document in order that a court may consider whether such proposals on disclosure are reasonable and proportionate.

20.2 There is no obligation to complete Form H in relation to disclosure prior to the case management conference. In cases where the cost budgeting regime applies, the parties must complete the disclosure section of Form H within such period as is ordered by the court after an order for disclosure has been made at the case management conference by which time the parties should be able to reach an informed view as to the likely costs.

21. **False Disclosure Certificates**

- 21.1 Proceedings for contempt of court may be brought against a person if he signs, or causes to be signed by another person, a false Disclosure Certificate without an honest belief in its truth.

SECTION II

Disclosure before proceedings start

31.16

(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started.

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where—

(a) the respondent is likely to be a party to subsequent proceedings;

(b) the applicant is also likely to be a party to those proceedings;

(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to —

(i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs.

(4) An order under this rule must —

(a) specify the documents or the classes of documents which the respondent must disclose; and

(b) require him, when making disclosure, to specify any of those documents —

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection.

(5) Such an order may —

(a) require the respondent to indicate what has happened to any documents which are no longer in his control; and

(b) specify the time and place for disclosure and inspection.

(Rule 78.26 contains rules in relation to the disclosure and inspection of evidence arising out of mediation of certain cross-border disputes.)

Orders for disclosure against a person not a party

31.17

(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where—

(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and

(b) disclosure is necessary in order to dispose fairly of the claim or to save costs.

(4) An order under this rule must –

(a) specify the documents or the classes of documents which the respondent must disclose; and

(b) require the respondent, when making disclosure, to specify any of those documents –

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection.

(5) Such an order may –

(a) require the respondent to indicate what has happened to any documents which are no longer in his control; and

(b) specify the time and place for disclosure and inspection.

(Rule 78.26 contains rules in relation to the disclosure and inspection of evidence arising out of mediation of certain cross-border disputes.)

Rules not to limit other powers of the court to order disclosure

31.18

Rules 31.16 and 31.17 do not limit any other power which the court may have to order –

(a) disclosure before proceedings have started; and

(b) disclosure against a person who is not a party to proceedings.

Claim to withhold inspection or disclosure of a document (public interest immunity)

31.19

(1) A person may apply, without notice, for an order permitting him to withhold disclosure of a document on the ground that disclosure would damage the public interest.

(2) Unless the court orders otherwise, an order of the court under paragraph (1) –

(a) must not be served on any other person; and

(b) must not be open to inspection by any person.

...

(8) This Part does not affect any rule of law which permits or requires a document to be withheld from disclosure or inspection on the ground that its disclosure or inspection would damage the public interest.

Subsequent use of disclosed documents and completed Electronic Documents Questionnaires

31.22

(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –

(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;

(b) the court gives permission; or

(c) the party who disclosed the document and the person to whom the document belongs agree.

(2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.

(3) An application for such an order may be made –

(a) by a party; or

(b) by any person to whom the document belongs.

(4) For the purpose of this rule, an Electronic Documents Questionnaire which has been completed and served by another party pursuant to Practice Direction 31B is to be treated as if it is a document which has been disclosed.

Appendix 1

1. Definitions for the purpose of Section I

- 1.1 “*Commencement Date*” means [date to be added]
- 1.2 “Control” in the context of disclosure is limited to documents: (a) which are or were in a party’s physical possession; (b) in respect of which a party has or has had a right to possession; or (c) in respect of which a party has or has had a right to inspect or take copies.
- 1.3 “*Copy*” means a facsimile of a document either in the same format as the document being copied or in a similar format that is readable by the recipient;
- 1.4 “*Data Sampling*” means the process of checking data by identifying and checking representative individual documents;
- 1.5 “*Disclose*” comprises a party stating that a document that is or was in its control has been identified or forms part of an identified class of documents and either producing a copy, or stating why a copy will not be produced.
- 1.6 “*Disclosure Certificate*” means a certificate that is substantially in the form set out in Appendix 2 and signed in accordance with the Practice Direction.
- 1.7 “*Disclosure Data*” means data relating to disclosed documents, including, for example, the type of document, the date of the document, the names of the author or sender and the recipient, and the party disclosing the document;
- 1.8 “*Disclosure Guidance Hearing*” means the discussion between the parties and the court referred to in paragraph 11;
- 1.9 “*Disclosure Review Document*” means the Disclosure Review Document at Appendix 2 which is to be completed by the parties pursuant to the Practice Direction, in respect of any application for Extended Disclosure;
- 1.10 “*Document*” means anything in which information of any description is recorded. This includes but is not limited to paper records, computer disks, computer software, electronic documents, including e-mail and other electronic communications such as text messages and voicemail, word processed documents and databases, information stored on portable devices such as memory sticks and mobile phones, voicemails, and audio or visual recordings, in each case as appropriate including all metadata. In addition to information that is readily accessible from computer systems and other electronic devices and media, the definition covers information that is stored on servers and back-up systems and electronic information that has been “deleted”. It also extends to metadata, and other embedded data which is not typically visible on screen or a print out;
- 1.11 “*Electronic Image*” means an electronic representation of a paper document;
- 1.12 “*Issue(s) for Disclosure*” means for the purposes of disclosure only those key issues in dispute, which the parties consider will need to be determined by the court by reference to contemporaneous documents in order for there to be a fair resolution of the claim. It does

not extend to every issue which is disputed in the statements of case by denial or non-admission

- 1.13 “*Keyword Search*” means a software-aided search for words across the text of an electronic document;
- 1.14 “*List of Documents*” means a list of documents in chronological order, identifying each document by a description including the date, the category of document (e-mail, Word document, Excel spreadsheet, text message, voicemail etc.) and the author or sender and any recipient. Where appropriate the list must distinguish between documents which exist and those that no longer exist;
- 1.15 “*Metadata*” is data about data. In the case of an electronic document, metadata is typically embedded information about the document which is not readily accessible once the native electronic document has been converted into an electronic image or paper document. It may include (for example) the date and time of creation or modification of a word-processing file, or the author and the date and time of sending an e-mail. Metadata may be created automatically by a computer system or manually by a user;
- 1.16 “*Narrative Document*” means a document which is relevant only to the background or context of material facts or events;
- 1.17 “*Native Electronic Document*” or “*Native Format*” means an electronic document stored in the original form in which it was created by a computer software program;
- 1.18 “*Optical Character Recognition*” (*OCR*) means the computer-facilitated recognition of printed or written text characters in an electronic image in which the text-based contents cannot be searched electronically.

Appendix 2

[Disclosure Review Document to form Appendix 2]

Appendix 3

[Draft Disclosure Certificate to be added]

Appendix 4

[Certificate for a Disclosure Guidance Hearing]