

Access to Public Domain Documents Pilot

CPR Practice Direction 51ZH

Guidance Note

Introduction

1. This Pilot, which is provided for by Practice Direction 51ZH (PD 51ZH) forms part of the current consideration of access to court documents and documents deployed by parties in court proceedings.
2. It reflects concerns about public access to documents in the public domain expressed in Lady Hale's judgment in *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38,¹ in which she considered the scope of both **CPR 5.4C** and the court's inherent jurisdiction to order disclosure of documents to non-parties.
3. The Pilot is a first step towards easier access to documents in the public domain.
 - a. It does not affect existing systems for access to court documents within CPR (which will be part of a wider review), unless the court orders otherwise.
 - b. It operates only in relation to documents which enter the public domain as a matter of common law principles as explained in *Dring*.
 - c. It aims to advance the principle of open justice in the civil courts by testing a relatively simple protocol for access to the main documents which enter the public domain by being used in public court proceedings; ie. those documents which principally inform public understanding of court proceedings.

Proposed Scope and Timeline

4. The Pilot will start in the Commercial Court (including the London Circuit Commercial Court) and the Financial List (except where a party is unrepresented and has not used the CE-File electronic filing system before).

1. ¹ In particular, Lady Hale urged '*the bodies responsible for framing the court rules in each part of the UK to give consideration to the questions of principle and practice raised by this case*' (*Dring* [51]).

5. The Pilot will be in place for 2 years; however it is anticipated that there will be a review after six months. If successful the Pilot will then be extended to further courts – most likely initially other Business and Property Courts jurisdictions.
6. This Pilot introduces new provisions governing documents which enter the public domain only. Unless the court orders otherwise, it does not affect:
 - a. Existing CPR regimes relating to access to documents on the Court's own file – such as CPR rule 5.4B (Supply of documents to a party from court records) and CPR rule 5.4C (Supply of documents to a non-party from court records).
 - b. Nor does it affect other orders which the Court may make regarding access to documents (such as confidentiality and anonymity orders under CPR 39.2 (General rule – hearing to be in public)). The Court's power to make such orders is unaffected, and pre-existing orders imposing confidentiality or anonymity regimes will not be overridden by the Pilot. Existing Practice Directions and Court Guides are also unaffected.

Content: Public Domain Documents

7. The Pilot identifies certain documents as Public Domain Documents. The intent is (i) only to capture documents which do as a matter of law enter the public domain and (ii) only to bring within the process those which can be made available without imposing an undue burden on parties or the Court.
8. The Pilot changes the position from the default being to require an *application* by the person seeking the documents, to the default *being provision* of the identified documents.
9. The list (at PD 51ZH paragraph 8) captures most – but not all – documents which enter the public domain as a matter of English Law. The Pilot identifies the main documents which are likely to inform the public's understanding of court proceedings and are the categories of documents which historically have been most often sought by non-parties at common law. These are documents which are not currently the subject of any rules as to filing.
10. The Pilot does not affect CPR 5.4B (Supply of documents to a party from court records) and CPR 5.4C (Supply of documents to a non-party from court records).
11. The main categories of documents covered by the Pilot are:
 - a. Written submissions – skeleton arguments and written opening and closing submissions, as well as other submissions provided to the judge in the course of the hearing;
 - b. Witness statements/affidavits;

- c. Expert reports.
12. As witness statements/affidavits often annex a great deal of material which a judge would not be expected to read, and which would not be referred to at the hearing, exhibits to witness statements are not included.
13. Annexes and exhibits to expert reports will be included in the Pilot because frequently the main results of an expert's evidence or material required to comprehend the report is included in the appendices or annexes (for example accountants' spreadsheets, or cases analysed by legal experts).
14. The Pilot only applies to documents which enter the public domain via a hearing which takes place in public. Where a hearing is conducted in private it does not apply.
15. Two further points of detail should be noted:
- a. What are not included are the underlying documents either read by the judge in private or referred to in court which are not themselves Public Domain Documents under paragraph 8.
 - b. However this limitation should in practice be largely compensated for by:
 - i. Paragraph 8(g) which is designed to enable a judge to order that other particularly important documents qualify as Public Domain Documents and trigger the filing requirement. The circumstances in which this will happen are not defined, save to make clear that it relates to key documents only. The provision is designed to apply only where it is artificial to regard a document as not being public – for instance where it has been read out in open court (in full or nearly in full) or where it is referred to so extensively that it is impossible to understand argument without it. It is not intended that this will result in provision of all documents referred to at trial or in skeletons; only objectively key documents should be capable of being ordered to be filed.²
 - ii. At paragraph 8(h) there has been added the possibility for parties to agree Public Domain Documents. This is in response to positive and helpful feedback from the solicitors' associations, who can envisage parties in some cases being content to identify and provide a limited number of core documents up front.

² For example the contract which is the centre of an argument about construction of a single term in the context of multiple other terms within the same contract, or the letter which is essentially read out in full and repeatedly referred to.

Mechanics of the Pilot

16. The starting point for access is the Court's existing systems – specifically CE-File. This court filing system is widely used. It has (essentially) three layers: public access, party access and court access. Using this existing widely used capability offers an efficient solution to the problem of how to expedite disclosure to non-parties.
17. It is currently simple for any person to access the public side of the system, from where it is possible to see, for any given case, the case title and what documents within CPR 5.4C (Supply of documents to a non-party from court records) (ie. claim forms, orders etc.) exist. Copies of these can then be ordered for a small fee.
18. The Pilot outlines a process whereby documents which enter the public domain as a matter of common law, are deemed to become Public Domain Documents for the purposes of the Pilot. Such documents will generally have been filed by the parties on CE-File already; they will however need to be re-filed on this public facing side of CE-File once a public hearing has started as publicly accessible documents.
19. The Pilot provides that parties themselves are to file such documents by categories which will enter 'public view' on CE-File within a Filing Period. This ensures that no or minimal additional court time or resources are required, in the majority of cases. There is also no scope for inadvertent publication by the Court of private material. Instead the matter of filing as a public document is in the party's control.
20. The Pilot will create new CE-File filing categories for public documents for such filings. These are listed in paragraph 10 of PD 51ZH.

Process and the Filing Period

21. The structure is that a party must file its Public Domain Documents within a set period, known as the Filing Period, from when the document enters the public domain.
 - a. For skeleton arguments and written opening/closing submissions (the documents most often sought) the Filing Period is 2 clear days from the start of the hearing.
 - b. The default Filing Period for all other Public Domain Documents runs from the day when the document enters the public domain by being used or referred to in a court hearing and ends at 16.00 14 days thereafter, unless otherwise ordered or unless the parties consent to earlier filing.

22. The Filing Period requirement is simple enough for shorter cases. There does however need to be provision for some differences. These are principally:
- a. For longer hearings there will need to be orders (made at the start of a trial or at a case management conference or pre-trial review) for staged filing.
 - b. Consultation has suggested that it is also desirable for there to be provision for earlier filing of documents where both parties consent.
23. Publication is the default position and the party who wishes not to file, or to file in part only, will have to seek an order to that effect before the deadline for filing via a “Filing Modification Orders” (“FMOs”).
24. This process will deal with concerns about public filing – for example where there is confidential material. In such cases the party can explain its concerns to the judge hearing the trial or application, and the judge can rule accordingly – either for filing with redactions, or for no filing pending any application by an interested party, when the question of the balance between the protected interest and public access can be weighed appropriately – and any costs implications (eg. as to cost of redactions) can be grappled with.
25. The Pilot steers away from formal applications by the parties for FMOs. There will be a relatively informal process as part of the trial or hearing. Since the Pilot reflects the law on public domain documents, the cases (certainly in Phase 1 – Commercial Court, London Circuit Commercial Court and Financial List cases) where it would not be appropriate to make the documents available will be rare. Provision is therefore made for a written request for an FMO, and draft Order, with evidence only where necessary. Requests may be made before a hearing and when the judge is not yet assigned by making the request via CE-File. Once a request is made the Filing Period is suspended until that request is determined. If the hearing has already taken place so that the document is already a Public Domain Document, a party can still ask the court for an FMO, but this will have to be done by formal application under CPR Part 23 (General rules about applications for court orders) rather than written request.
26. For applications by non-parties either for FMOs or for access to documents which are not made available or fully available via the Pilot there has to be a more formal structure via CPR Part 23 (General rules about applications for court orders).
27. A similar process via a normal CPR Part 23 (General rules about applications for court orders) application is provided for applications by non-parties wishing to limit public disclosure (for example if a party’s evidence says something derogatory about them, or has the capacity to harm their interests). There are two separate strands to this:
- a. Applications made before the document enters the public domain (before the Filing Period commences);

- b. Retrospective applications; it does sometimes happen that a person only belatedly realises that they have been named or commented on in evidence before the courts.
28. There is provision under paragraph 19 for an FMO to be challenged by a non-party – for example where at the time of a hearing an FMO is made on the basis that redactions to protect confidentiality would be costly and time-consuming, and the document is unlikely to be of interest outside the parties, but an interested party wishes to see the rest of the document or challenge confidentiality. This is of course not dissimilar to the current process for third parties to seek public domain documents under the inherent jurisdiction; it does however give an explicit structure to a process which has caused much confusion over the years. The Pilot therefore has the advantage of setting out the process which many non-parties currently do not appreciate is necessary.
29. Finally, while it is not envisaged that non-compliance will be a serious issue – in the light of the fact that professional court users well understand the importance of open justice – the PD contains provision for an order to be made compelling a party to make the appropriate filing. This would be amenable to the usual sanctions by way of contempt of court if not complied with.

ENDS