

Case law update on the disclosure pilot scheme: *UTD LLC v Sheffield United Limited*

[2019] EWHC 914 (Chd)

1. The culmination of Sheffield United’s 2018/19 season was a successful one: promotion to the Premier League. As the club now prepares for its return to the top flight of English football for the first time in over a decade, a battle for control between its two owners continues to make its way through the High Court. While the outcome of this litigation will be of great importance to those interested in the football club’s future, for legal practitioners the case has generated an important judgment on the equally interesting topic of the Disclosure Pilot for the Business and Property Courts (“DPS”).
2. The DPS commenced on 1 January 2019 and will initially run for a period of two years. An informative article providing an overview of the DPS was prepared by David Walsh of Essex Court Chambers and can be found [here](#).
3. Prior to its commencement, one of the uncertainties of the DPS related to its application to existing cases in which orders for disclosure had already been made. While the number of cases in this category will diminish with time, at present and in the near future there will be a substantial number of cases that fall into this category which will have to grapple with the issues that arise.
4. The DPS does not have transitional provisions. Instead it provides as follows:
 - a. Paragraph 1.2 of PD51U (a copy of which can be found [here](#)) provided that “*The pilot applies from the Commencement Date for two years to existing and new proceedings in the Business and Property Courts*”.
 - b. Paragraph 1.3 of PD51U provided that “*the pilot shall not disturb an order for disclosure made before the Commencement Date [...] unless that order is varied or set aside.*”
 - c. The notes in the White Book at CPR Part 51.2.10 stated that “*the pilot does not apply to any proceedings where a disclosure order has been made before it came into force unless that order is set aside or varied.*”

5. A number of judges have now had cause to consider the application of the DPS to existing cases. The first two in time were as follows:
 - a. *White Winston Select Asset Funds LLC v. Mahon* [2019] EWHC 1014 (Ch), in which Mr Edwin Johnson QC, sitting as a Deputy Judge of the High Court, considered an application for specific disclosure. He could not find a directly equivalent rule in the DPS giving the court jurisdiction to make a specific disclosure order. He noted that paragraph 18 of the DPS appeared to apply where there had been a direction for Extended Disclosure, which was not the case in the matter before him. Nevertheless, he concluded that the court had power to make an “*equivalent*” order to that under CPR r. 31.12.
 - b. *Kazakhstan Kagazy Plc v Zhunus (formerly Zhunussov)* [2019] EWHC 878 (Comm) dated 4 April 2019, in which Andrew Baker J also considered an application for specific disclosure. He noted that strictly CPR pt. 31 no longer applied. He then proceeded on the unchallenged basis that “*under one or other of the case management powers the court nonetheless has, it must be right that the court can, in an appropriate case, make a proper and targeted order for specific disclosure, such as might have been given under Part 31, if justified.*”
6. The decision of Sir Geoffrey Vos, Chancellor of the High Court, in *UTB LLC v Sheffield United Limited* [2019] EWHC 914 (Ch) dated 9 April 2019, is the latest and now leading authority on the issue. The Chancellor decided that:
 - a. The note in the White Book at CPR 51.2.10 was wrong. The DPS is applicable to proceedings where a disclosure order has already been made (see §16 of the judgment).
 - b. The DPS was intended to apply and does apply, to all relevant proceedings subsisting in the Business and Property Courts, whether started before or after 1 January 2019, even in a case where a disclosure order was made before 1 January 2019 under CPR pt. 31 (see §17 of the judgment).

- c. 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 (see §23 of the judgment).
 - d. The court will interpret the new PD51U in a way that makes it work as effectively in relation to applications for disclosure in proceedings issued after 1 January 2019 as it will in relation to further applications for disclosure made in cases where disclosure was already ordered under CPR Part 31 before that date (see §24 of the judgment).
 - e. That none of Sheffield United Limited’s disclosure applications satisfied the requirements of paragraph 18.2 of PD51U to the effect that the orders sought were “*necessary for the just disposal of the proceedings and [were] reasonable and proportionate.*” (see §110 of the judgment).
7. That is useful, albeit not exhaustive, guidance that will need to be carefully scrutinised by parties to existing cases in order to determine how it applies to their particular issue. One common issue is likely to be where it leaves parties, in cases where standard disclosure has already been ordered under CPR pt. 31 and provided, who now want to seek what was previously referred to as specific disclosure. As to that:
- a. All of the authorities considered above accept that it is open to the court to make some form of such disclosure order. The precise basis for the court’s jurisdiction is, however, less clearly established in those cases.
 - b. Paragraph 18.1 of the DPS provides “*The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.*” [emphasis added]
 - c. As to paragraph 18.1, it is possible that the solution to the fact / problem that an order for Extended Disclosure will not have been made, is found in the approach of the Chancellor in recognising that “*the standard disclosure ordered in this case has been interpreted by the parties as if it were Model E wide search-based disclosure*”.

- d. On this approach the Chancellor did not seem to consider there to be any issue with his jurisdiction to order further disclosure. The issue in *UTB LLC v Sheffield United Limited* was that the parties had not given “*advanced thought to the production of ‘Issues for Disclosure’, or to the requirements of PD51U more generally*”. However, they had a list of issues that was described as “*sufficient to enable to the court to deal with the applications that have been made.*”
 - e. Drawing that together, parties may decide that the prudent position when seeking “specific disclosure” is to proceed under paragraph 18.1 of the DPS to apply for an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure. In order to sustain that application, it appears to be necessary to produce an Issues for Disclosure document as a reference point.
8. In such cases the Issues for Disclosure document would not have been prepared at the stage in the proceedings that is required in a case that commenced after 1 January 2019 (i.e. at the close of statements of case and upon either party indicating that it is likely they will request Extended Disclosure) nor within the mandated timeframe (i.e. within 42 days of the final statement of case) (see paragraphs 7.1 to 7.2 of PD51U). Despite that, the approach mooted above would accord with the Chancellor’s guidance that detailed thought must be given to the new rules and it would also seem appropriate in light of the Chancellor’s decision that the court “*will interpret the new PD51U in a way that makes it work as effectively [...] in relation to further applications for disclosure made in cases where disclosure was already ordered under CPR Part 31 before that date.*”
9. The approach mooted above is also consistent with the indication given at the Commercial Court Users Group meeting on 4 December 2018 (a record of which can be found [here](#)). In relation to the early period of the DPS, Knowles J and Chief Master Marsh encouraged parties to have an eye on the rules, in particular by providing the Court with information that would have to be provided under the DPS.

10. Taking that indication together with the guidance now given by the Chancellor, parties may decide that the sensible and prudent course to take in further disclosure applications is to prepare an Issues for Disclosure document by reference to which such disclosure decisions can be made. In cases of uncertainty, the parties also now have the option of applying for a Disclosure Guidance Hearing to seek informal guidance from the Court (see paragraph 11 of PD51U).

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