UPDATES TO THE DISCLOSURE PILOT

1 The Master of the Rolls has introduced a number of amendments to the Disclosure Pilot and Practice Direction 51U, which are effective from 1 November 2021. Here is what you need to know about the amendments.

OVERVIEW

2 There are four principal changes to the Disclosure Pilot.

2.1 *First*, in multi-party cases, the Court may make an order for a *bespoke* timetable and procedure for disclosure, in order to meet the individual needs of the case.

2.2 *Second*, an attempt has been made to simplify the process for agreeing the Lists of Issues for Disclosure.

2.3 *Third,* there is a new disclosure regime for 'Less Complex Claims' (typically claims of less than £500,000).

2.4 *Fourth*, PD51U ¶11.2 has been re-drafted to remove the emphasis on hearings as part of the Disclosure Guidance procedure, and to encourage parties to make greater use of the procedure.

A MULTI PARTY CASES

3 Cases in the Commercial Court (and the Business and Property Courts generally) frequently involve more than one claimant or defendant (or both). PD51U ¶1.12 provides that in multi-party cases, the court may order a *bespoke* timetable and procedure for disclosure to meet the individual needs of the case.

4 Under what circumstances will the Court make such a bespoke order? PD51U ¶7.11 makes clear that such orders may be appropriate "*where the risk of undue complexity in Lists of Issues for Disclosure is heightened*". Although the Court has the power to make such a bespoke order, the amendments make clear that "*the provisions of the pilot* ***remain the default*** *arrangement"* (emphasis added). Accordingly, parties seeking to obtain a bespoke order from the Court will therefore want to show how and why the List of Issues for Disclosure presents an increased risk of complexity, in order to justify a departure from the default position.

5 When should an application under PD51U ¶1.12 be made? PD51U ¶1.12 is not particularly

helpful on this point. It merely says that such an application "*should be made at an early stage*", and does not provide further guidance as to what is meant by "*early stage*".

B LISTS OF ISSUES FOR DISCLOSURE

6 The amendments also seek to make the process of agreeing Lists of Issues for Disclosure a less contentious exercise. The simplifications are set out at PD51U ¶¶7-10. The key changes are as follows.

6.1 If there is an existing a list of issues for trial, and the parties agree that it is suitable (with or without adaptation) for disclosure, then it may be used as the List of Issues for Disclosure (PD51U ¶7.2.1)

6.2 The claimant must, at the same time as serving its draft List of Issues for Disclosure, identify for each Issue for Disclosure, which Model of Extended Disclosure it proposes for each party (PD51U ¶7.2.2).

6.3 PD51U ¶8 encourages 'moderation' in the number of Models used and the way in which they are applied to the Issues for Disclosure.

6.4 There is express recognition that "*The List of Issues for Disclosure should be as short and concise as possible*" (PD51U ¶7.3). Parties should also consider what matters are common ground when producing the List, but should *only* include those key issues in dispute in the List (PD51U ¶7.3).

6.5 There is also an attempt to refine and limit the use of Model C in the Lists. PD51U ¶10.4 stipulates that where Model C is proposed for any Issues for Disclosure, these requests should be "*limited in number, focused in scope and concise*" so that the responding party may be clear as to the particular document(s) or narrow classes of document for which it is being asked to undertake searches.

6.6 ¶10.4 also states that "*Broad and wide-ranging formulations such as 'any or all documents relating to…' should not be used*", and that Model C requests should not be used in a tactical or oppressive way.

C LESS COMPLEX CLAIMS

7 The amendments have created a separate regime within the Disclosure Pilot for 'Less Complex Claims'.

8 'Less Complex Claims' is defined in ¶¶3-4 of Appendix 5 of PD51U as claims which by virtue of their nature, value, complexity and the likely volume of Extended Disclosure may

not benefit from the full procedure set out in the main body of PD51U. If the value of the claim is less than £500,000 then the claim should be treated as a Less Complex Claim, unless other factors indicate to the contrary (e.g. non-financial relief is sought).

9 What is the 'Less Complex Claims' procedure? It is set out in full at Appendix 5 to PD51U, but the principal points to note are as follows: (*i*) it is aimed at creating a simplified disclosure regime; (*ii*) Extended Disclosure will be given using only Models A, B or D; (*iii*) Models C and E are not available; (*iv*) the Issues for Disclosure must be brief and drafted at a high level of abstraction; (*v*) the number of Issues for Disclosure should rarely exceed five; and (*vi*) it uses a simplified version of the Disclosure Review Document (see Appendix 6 to PD51U).

10 It remains to be seen how widely used this procedure will be, but it represents another attempt by the Courts to provide mechanisms for parties and their representatives to ensure that the costs of the disclosure exercise do not become disproportionate.

D DISCLOSURE GUIDANCE

11 PD51U ¶11.2 has been redrafted ever so slightly, in order to remove the emphasis on hearings as part of the Disclosure Guidance procedure. The Courts will seek to provide Disclosure Guidance on the documents without an oral hearing "*where suitable*". This reflects a desire to ensure that the Disclosure Guidance process does not become an alternative forum for parties to seek litigation advantage and in which costs are disproportionately incurred.

12 The changes to PD51U ¶11.2 can be seen from the track changes below.

"~~A~~ Disclosure Guidance ~~Hearing~~ may be ~~fixed~~ obtained by issuing an application notice~~, before or after a case management conference.~~ The application notice should contain a statement identifying the point upon which guidance is sought and confirming the matters at (1) to (3) of paragraph 11.1 above. Evidence will not normally be required for ~~a~~ Disclosure Guidance ~~Hearing and an early hearing will be offered where possible.~~ If a hearing is requested, or is fixed by the Court, ~~T~~the application will ordinarily have a maximum hearing length of ~~30~~ 60 minutes and a maximum time of 30 minutes for pre-reading. However, where suitable the Court may decide to deal with the application on the documents and without an oral hearing. The Court may also direct a longer maximum hearing length or time for pre-reading, if it is required.

13 No doubt this change is designed to encourage parties to take heed of the warning issued in **Vannin Capital PCC v RBOS Shareholders Action Group Ltd** [2019] EWHC 1617 (Ch). In that case, Joanna Smith QC (sitting as Deputy High Court Judge) criticised the parties for engaging in protracted correspondence and issuing costly and time-consuming

applications, instead of availing themselves of the Disclosure Guidance process.

Freddie Popplewell
Essex Court Chambers
fpopplewell@essexcourt.net

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