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PRACTICE DIRECTION 57AD – DISCLOSURE IN THE BUSINESS AND PROPERTY DIVISION

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1. General

1.1 This Practice Direction provides for disclosure in proceedings in the Business and Property Division.

1.2 The Commencement Date is 1 October 2022. This Practice Direction applies to existing and new proceedings in the Business and Property Courts of England and Wales.

1.3 This Practice Direction shall not disturb an order for disclosure made before the Commencement Date or before the transfer of proceedings into a Business and Property Court, unless that order is varied or set aside. If proceedings are transferred out of the Business and Property Division, any order for disclosure made under this Practice Direction will stand unless and until any other order is made by the transferee court.

1.4 This Practice Direction shall not, unless otherwise ordered, apply to proceedings which are—

- (1) a Competition claim as defined in Practice Direction 31C;
- (2) a Public Procurement claim;
- (3) within the Intellectual Property and Enterprise Court;
- (4) within the Admiralty Court;
- (5) within the Shorter and Flexible Trials Schemes;
- (6) within a fixed costs regime or a capped costs regime; or
- (7) claims proceeding under Part 8.

1.5 In the Patents Court, PD63 paragraphs 6.1 to 6.3 will continue to apply under this Practice Direction with the following modification: unless the court expressly orders otherwise, no provision in this practice direction nor any disclosure order made under this Practice Direction will take effect as requiring disclosure wider than is provided for in PD 63 paragraph 6.1.

1.6 For the purposes of this Practice Direction, where its provisions conflict with other provisions of the rules or other Practice Directions, this Practice Direction shall take precedence.

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 proceedings falling within this Practice Direction.

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.

1.10 Provisions relating to Extended Disclosure in Less Complex Claims are contained in Appendix 5. Less Complex Claims are defined in paragraph 1.9 of Appendix 1 to this Practice Direction.

1.11 This Practice Direction applies in multi-party cases. However, the court may order that the timetable and procedure is to be varied so as to provide a bespoke timetable and procedure to meet the needs of the individual multi-party case. Any application to the court in this connection should be made at an early stage.

1.12 A party seeking an order for disclosure in a Part 8 claim shall serve and file a List of Issues for Disclosure in relation to which disclosure is sought and the Models that are to be adopted for each issue. The court may adapt the provisions of this Practice Direction in such manner as may be appropriate when making an order for disclosure in a Part 8 claim.

SECTION I

2. Principles, “document”, “adverse” and “known adverse documents”

2.1 Disclosure is important in achieving the fair resolution of civil proceedings. It involves identifying and making available documents that are relevant to the issues in the proceedings.

2.2 For the purpose of disclosure, the term “document” includes any record of any description containing information. The term is further defined below.

2.3 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 proceedings can be agreed or determined by the court in the most efficient way possible.

2.4 The court will be concerned to ensure that disclosure is directed to the issues in the proceedings and that the scope of disclosure is not wider than is reasonable and proportionate (as defined in paragraph 6.4) in order fairly to resolve those issues, and specifically the Issues for Disclosure (as defined in paragraph 7.6).

2.5 A “document” may take any form including but not limited to paper or electronic; it may be held by computer or on portable devices such as memory sticks or mobile phones or within databases; it includes e-mail and other electronic communications such as text messages, webmail, social media and voicemail, audio or visual recordings.

2.6 In addition to information that is readily accessible from computer systems and other electronic devices and media, the term “document” extends to 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 printout.

2.7 Disclosure extends to “adverse” documents. A document is “adverse” if it or any information it contains contradicts or materially damages the disclosing party’s contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute, whether or not that issue is one of the agreed Issues for Disclosure.

2.8 “Known adverse documents” are documents (other than privileged documents) that a party is actually aware (without undertaking any further search for documents than it has already undertaken or caused to be undertaken) both (a) are or were previously within its control and (b) are adverse.

2.9 For this purpose a company or organisation is “aware” if any person with accountability or responsibility within the company or organisation for the events or the circumstances which are the subject of the case, or for the conduct of the proceedings, is aware. For this purpose it is also necessary to take reasonable steps to check the position with any person who has had such accountability or responsibility but who has since left the company or organisation.

3. Duties in relation to disclosure

3.1 A person who knows that it is or may become a party to proceedings that have been commenced or who knows that it may become a party to proceedings that 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 any issue in the proceedings;
- (2) by no later than the time(s) set out in paragraphs 9.1 to 9.3, to disclose known adverse documents, unless they are privileged. This duty exists regardless of whether or not any order for disclosure is made;
- (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 use reasonable efforts to avoid providing documents to another party that have no relevance to the Issues for Disclosure in the proceedings.

3.2 Legal representatives who have the conduct of litigation on behalf of a party to proceedings that have been commenced, or who are instructed with a view to the conduct of

litigation where their client knows it may become a party to proceedings that have been or may be commenced, are under the following duties to the court—

- (1) to take reasonable steps to preserve documents within their control that may be relevant to any issue in the proceedings;
- (2) to take reasonable steps to advise and assist the party to comply with its Disclosure Duties;
- (3) to liaise and cooperate with the legal representatives of the other parties to the proceedings (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 the reason for the claim to privilege is sufficiently explained.

3.3 The duties under paragraphs 3.1 and 3.2 above are continuing duties that last until the conclusion of the proceedings (including any appeal) or until it is clear there will be no proceedings.

3.4 Where there is a known adverse document but it has not been located, the duty to disclose the document is met by that fact being disclosed, subject to any further order that the court may make.

4. Preservation of documents

4.1 Documents to be preserved in accordance with the duties under paragraphs 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 proceedings;
- (2) in accordance with paragraph 4.3 below, an obligation to send a written notification in any form to relevant employees and former employees of the party where there are reasonable grounds for believing that the employee or former employee may be in possession of disclosable documents which are not also in the party's possession; 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 an issue in the proceedings.

4.3 A written notification under paragraph 4.2 above should—

- (1) identify the documents or classes of 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 Legal representatives who have the conduct of litigation on behalf of a party to proceedings that have been commenced, or who are instructed with a view to the conduct of litigation where their client knows it may become a party to proceedings that have been or may be commenced, must within a reasonable period of being instructed—

- (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 (and may do so by their legal representative) 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. Initial Disclosure

5.1 Save as provided below, and save in the case of a Part 7 claim form without particulars of claim, each party must provide to all other parties at the same time as its statement of case an Initial Disclosure List of Documents that lists and is accompanied by 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 including the documents referred to in that statement of case); and
- (2) the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

5.2 This form of disclosure is known as “Initial Disclosure”.

5.3 Initial Disclosure is not required where—

- (1) the parties have agreed to dispense with it (see paragraph 5.8 below);
- (2) the court has ordered that it is not required (see paragraph 5.10 below); or
- (3) a party concludes and states in writing, approaching the matter in good faith, that giving Initial Disclosure would involve it or any other party providing (after removing duplicates, and including documents referred to at paragraph 5.4(3)(a)) more than (about) whichever is the larger of 1000 pages or 200 documents (or such higher but reasonable figure as the parties may agree), at which point the requirement to give Initial Disclosure ceases for all parties for the purposes of the case.