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New Practice Direction Widens Public Access to English Court Documents

Background

The new Practice Direction 51ZH – Access to Public Domain Documents provides for a pilot scheme intended to improve public access to documents deployed by parties in court proceedings. The scheme is one of the key initiatives of the judiciary's Transparency and Open Justice Board to advance the principle of open justice. Other expected changes include a wider review of the existing rules for access to court documents under the Civil Procedure Rules, the live-streaming of proceedings in the Administrative Court and the inclusion of hyperlinks to cases cited in judgments available on The National Archives' website.

The scheme will initially operate for a period of two years, from 1 January 2026 to 31 December 2027, in the Commercial Court, the London Circuit Commercial Court of the King's Bench Division and the Financial List (Commercial Court and Chancery Division) and will be subject to review after its first six months.¹ Filing requirements will apply to documents "filed for or used" in court hearings taking place in public from 1 January 2026 onwards. In certain cases, this will therefore include documents prepared or filed before the scheme started.

Effects of the pilot scheme

Under the regime preceding the entry into force of the scheme, most court documents are not readily available to the public. Unless they first seek the Court's permission, non-parties can only access the statement of case (without any of the documents filed with or attached to it) along with any public judgment or order. This makes following the course of a case challenging (as well as being out of step with some peer jurisdictions, including notably the United States), especially considering that statements of case only become publicly available once (i) the defendant has filed an Acknowledgement of Service or a Defence; (ii) the claim has been listed for a hearing; or (iii) judgment has been entered. Other documents, such as witness statements and expert reports, are even harder to obtain. Non-parties must otherwise apply for access to other documents pursuant to CPR 5.4C (*Supply of documents to a non-party from court records*) and the court's inherent jurisdiction to order access to court documents.

The scheme modifies this *status quo* by widening the categories of court documents publicly available by default. Unless the Court orders otherwise, any person will be able to access copies of: (i) written submissions (skeleton arguments, written opening and closing submissions and other submissions provided to the judge and relied upon in the hearing); (ii) witness statements, affidavits and expert reports relied upon as evidence in chief at trial or at a public hearing; and (iii) any other documents the parties agree to make publicly available. Exhibits and annexes to expert reports will also be publicly available, unlike those attached to witness statements or affidavits. The scheme will, however, neither affect (i) the operation of CPR 5.4B (*Supply of documents to a party from court records*), CPR 5.4C, Practice Direction 5A (*Court documents*) and Practice

¹ The scheme will not apply – for example – to insolvency proceedings or cases heard by the Competition Appeal Tribunal.

Direction 5C (*CE-File electronic filing and case management system*); nor (ii) the validity of, and the Court's ability to make, any court order (e.g. regarding access restrictions relating to the confidentiality of court documents).

The Court can also order that "documents critical to the understanding of the hearing" be made publicly available. Although the Practice Direction neither defines the meaning of "critical" nor the circumstances warranting the making of such order, its Guidance Note specifies that the Court will only exercise its discretion where it would be artificial to regard a document as not being public, such as when the document was read in open court or referred to so extensively that it is otherwise impossible to understand the underlying argument without it. The Guidance Note provides two specific examples: (i) a contract at the centre of an argument about construction of a single term in the context of multiple other terms within the same contract; and (ii) a letter which is essentially read out in full and expressly referred to at the hearing. Access to documents used or referred to in private hearings (e.g. arbitration claims under the Part 62 regime), read by the judge in private or subject to a court order will not become available as part of the scheme. Likewise, the scheme will not apply to litigants in person who have not previously used the CE-File system.

Practicalities

Parties will need to file the relevant documents on CE-File (i) within two clear days after the start of the hearing, for skeleton arguments and written submissions; or otherwise (ii) by 4pm, 14 days from the day the document entered the public domain by being used or referred to in a court hearing, unless the Court orders otherwise or parties consent to an earlier filing date. The Court's discretion will likely prove consequential in the context of longer hearings where the judge may decide to delay the availability of certain documents up until a given stage of the trial (e.g. after specific witnesses have given evidence). Failure to comply with the filing requirements may lead the Court to order a party to proceed with the relevant filings, who may also become subject to contempt proceedings in case of continued non-compliance with the scheme's obligations.

Parties seeking to restrict or prevent access to certain documents – whether for confidentiality purposes or because of costs implications (e.g. when a substantial number of redactions would be required, at the cost of the disclosing party) – will need to apply for a Filing Modification Order ("FMO"). The Court retains its discretion to restrict or prevent access to court documents and can, amongst other things, waive the filing requirement entirely, amend the filing period or order that a document be filed subject to the redaction of commercially sensitive information. As the scheme reflects existing case law, which requires clear and substantiated justifications to depart from the principle of open justice, the Court will only restrict access in rare instances, and parties should thus assume that transparency is the default position under the scheme. The Court may make FMOs of its own initiative or it may be sought by any party or non-party named or referred to in a public document or a document that would be expected to become public. The applicable procedure will vary depending on whether a party or a non-party applies for the order, though it is generally more onerous for non-parties. In both cases, the filing period will only start running after the determination of the relevant application, until which point the relevant document must not be filed. Although the precise mechanics are not set out in the Practice Direction, non-parties will be able to challenge FMOs through a Part 23 application on notice to (i) all parties; and to (ii) any person named in, and who obtained the FMO in relation to, the relevant document.

Key implications

As with schemes which the Courts have piloted in other areas, the practical implications will only become more apparent with time; however, some aspects of the scheme already appear likely to attract interest and controversy among clients and practitioners alike. We address some of these aspects below:

- **Risk of collateral use:** the London Solicitors Litigation Association expressed [concerns](#) regarding the risk of collateral use of court documents (such as witness statements) in other, including foreign, proceedings. These concerns may, however, be overplayed. As set out above, the filing period under the scheme is only triggered once documents enter the public domain, at which stage collateral use restrictions no longer apply pursuant to CPR 31.22(1)(a).
- **Case management:** an uptick in requests for FMOs and applications for confidentiality orders risks burdening the courts. Although the extent to which they will be willing to entertain FMOs requests remains to be seen, parties will need to factor in time accordingly and engage in early planning. Non-parties who may nonetheless be implicated in ongoing proceedings will also need to be more vigilant to ensure that sensitive documents and other evidence does not make its way into the public domain inadvertently.
- **Publicity:** although media outlets and business competitors will now be able to access court documents more swiftly, any reputational risk should not be overstated. The Court's adherence to the principle of open justice means that non-parties

would have likely been able to obtain these documents beforehand, if they followed the appropriate (albeit sometimes cumbersome) procedure. As the Court will continue to exercise its discretion to restrict access when interests of confidentiality so require, claimants are advised to seek FMOs / confidentiality orders in advance of the hearing and, in any event, at the earliest opportunity (i.e. simultaneously with the issue of the claim form). From a practical perspective, access to documents on CE-Filing is in any case not immediate as it currently takes several days to receive the requested document, upon payment of the requisite £11 fee.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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