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DISCLOSURE GUIDANCE NOTES

DATED: NOVEMBER 2018

DUTY OF DISCLOSURE

The disclosure obligation in each case will depend on a number of factors, including the procedural “track” to which the case is allocated (for example, fast track or multi-track) and whether electronic documents will have to be disclosed.

In most cases, the usual order will be for what is known as standard disclosure. This requires each party to disclose to the opposing party:

- The documents on which it relies;
- The documents that adversely affect its case or another party’s case;
- The documents that support another party’s case.

The court rules set out a procedure to be followed when giving standard disclosure. Under that procedure, the documents are usually disclosed by serving a list of documents on the opposing party. The underlying principle is that the court can only deal with the case justly if all of the relevant material is out in the open. It is important to be aware that the time periods specified in the rules and orders are deadlines.

Parties are compelled to disclose to each other any damaging documents, as well as helpful ones. The disclosure process, therefore, forces parties to be realistic about their chances of success in the litigation and, for that reason, many disputes settle either shortly before or shortly after disclosure.

The duty of disclosure is strict, and the courts take it very seriously. As your solicitor, I am under a duty to inform you of these obligations, and ensure that you understand them. This note contains a significant amount of important information.

DUTY TO DISCLOSE DOCUMENTS, INCLUDING ELECTRONIC DATA

Your duty is to disclose documents. “Document” has a very wide meaning under the court rules. It includes all media in which information of any description is recorded: for example, tapes, computer records and emails, as well as paper.

The definition of a document also extends to electronic material that is not easily accessible, such as electronic documents stored on servers and back-up systems, and electronic documents that have been deleted. It also includes information stored and associated with electronic documents, known as metadata.

DUTY TO DISCLOSE DOCUMENTS THAT ARE, OR HAVE BEEN, IN YOUR CONTROL

You are obliged to disclose helpful or damaging documents that are, or have been, in your control. “Control” also has a specific meaning under the court rules. It is not limited to documents that you have (or previously had) in your possession. It also includes documents that you have (or had) the legal right to possess, inspect or copy.

THE REASONABLE SEARCH

A party’s obligation is to conduct a **reasonable** search for documents that are, or have been, in its control. This means that you are not obliged to carry out an exhaustive search for documents, sparing no expense and leaving no stone unturned.

What constitutes a reasonable search will depend on the facts of each case, but there are certain factors that the court will apply when assessing the reasonableness of a search. These include:

- Number of documents.
- Nature and complexity of the proceedings.
- Ease and expense of retrieval of any particular document.
- Significance of any document likely to be located during the search.

When considering the ease and expense of retrieval of electronic documents, specific points to consider include:

- Accessibility of electronic documents (including email communications) on computer systems, servers, back-up systems and other electronic devices or media.
- Location of relevant documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents.
- Likelihood of locating relevant data.
- Cost of recovering, disclosing and providing inspection of any relevant electronic documents.
- Likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection.

Another factor to consider in the context of electronic documents is the availability of documents, or contents of documents, from other sources.

Depending on the circumstances, it may be reasonable to search for electronic documents by means of agreed keyword searches.

When determining the extent of the search for documents that is required in each case, the underlying principle is proportionality. Disclosure can be the most costly aspect of any piece of litigation. The court will be looking to manage the disclosure exercise so as to facilitate a just outcome, but with an eye to balancing the sums in issue with the cost of litigating.

THE PRACTICALITIES OF THE DISCLOSURE EXERCISE AND PREPARING A LIST OF DOCUMENTS

The first stage is to determine the extent of the search for documents that will be required. The next step is to conduct the search. Once the documents have been located, we must review the materials and decide which documents must be disclosed.

Lists of documents are normally prepared prior to exchange of any documents. The list is in a prescribed form which has been **enclosed** with this guide. The disclosed documents will be described in the list of documents in one of the three sections:

- Relevant documents that you currently have, and which the other side may view or “inspect”. These documents will be listed either individually or by category.
- Relevant documents that you currently have, but which the defendant may not inspect: for example, privileged documents (see below). By convention, these documents are described generally rather than being individually listed but recent case law suggests that the nature of the documents should be stated and the factual basis of the grounds giving rise to the claim for privilege should be set out.
- Relevant documents that you had, but which you are no longer in possession of.

The main categories of documents that are privileged are:

- Confidential communications passing between a party and its legal advisers, in which the party is seeking or obtaining legal advice. It applies to transactional advice as well as advice regarding contentious matters. These documents are subject to legal advice privilege.
- Certain confidential communications made when litigation is likely or has begun, passing between a party and its legal advisers, a party and third parties (for example, potential witnesses) and, in certain circumstances, the legal advisers and third parties, where the main purpose of the communication is to seek or obtain evidence for use in the litigation, or to provide advice on the litigation. These documents are subject to litigation privilege.
- Correspondence and other communications generated as part of a genuine attempt to settle an existing dispute. These documents are subject to “without prejudice” privilege.

Where documents are privileged, it is extremely important that you do not take any steps that might result in privilege

being lost (or “waived”). This may occur if confidentiality in the material is lost. Therefore, please take care not to circulate any existing documents to third parties.

Once the documents are categorised, the parties can then provide copies of the disclosure-able documents. As the case progresses, you may be ordered to provide supplement lists of documents detailing what other documents you have in your possession which you have not previously listed or disclosed. There is no prescribed form of list for this purpose, but parties generally use the enclosed form.

THE DISCLOSURE STATEMENT

The list of documents must contain a disclosure statement that is signed by you.

The disclosure statement must set out the extent of the search that has been made to locate documents that are required to be disclosed, and provide specific information regarding the search for electronic documents and the specific media searched.

The person signing the disclosure statement must certify that s/he understands the duty of disclosure and, to the best of his/her knowledge, has carried out the duty. S/he must expressly state that s/he believes that the extent of the search was reasonable in all the circumstances. This is a serious matter. Signing a disclosure statement without an honest belief that it is true carries the risk of proceedings for contempt of court, and the penalty of imprisonment.

SUMMARY - DOS AND DON'TS

There are a number of important points to bear. The main points are as follows:

- Do not destroy documents.
- The list of documents will need to state what has happened to any documents that have been lost or destroyed. A suggestion that potentially important documents may have been lost or destroyed after the proceedings began could be very damaging to your case as the court would likely draw adverse inferences.
- Do not create new documents (or annotate or amend existing documents).
- Some documents that are created may be protected by litigation privilege. However, you will need to monitor carefully any communications whether internal or external. This includes communications between, or involving, those who are not witnesses or potential witnesses, or who are not involved in making decisions about the way in which the litigation should be conducted.
- Do not ask any third party to send you documents. There are certain documents that you may not have in your possession, and may not have the legal right to possess, inspect or copy. Those third-party documents will not be disclosable, unless they come into your possession.

LIST OF DOCUMENTS - THE PRESCRIBED FORM

List of documents: standard disclosure

Notes

- The rules relating to standard disclosure are contained in Part 31 of the Civil Procedure Rules.
- Documents to be included under standard disclosure are contained in Rule 31.6
- A document has or will have been in your control if you have or have had possession, or a right of possession, of it **or** a right to inspect or take copies of it.

In the	
Claim No.	
Claimant (including ref)	
Defendant (including ref)	
Date	

Disclosure Statement

I, the above named

Claimant

Defendant

Party (if party making disclosure is a company, firm or other organisation identify here who the person making this disclosure statement is and why he is the appropriate person to make it)

state that I have carried out a reasonable and proportionate search to locate all the documents which I am

required to disclose under the order made by the court on (date of order)

I did not search for documents:-

pre-

dating

located elsewhere than

in categories other than

for electronic documents

I carried out a search for electronic documents contained on or created by the following:

(list what was searched and extent of search)

I did not search for the following:-

documents created

before

documents contained on or created by the

Complainant

Defendant

PCs

portable data storage media

databases

servers

back-up tapes

off-site storage

mobile phones

laptops

notebooks

handheld devices

PDA devices

documents contained on or created by the

Claimant

Defendant

mail files

document files

calendar files

web-based applications

spreadsheet files

graphic and presentation files

documents other than by reference to the following keyword(s)/concepts

(delete if your search was not confined to specific keywords or concepts)

I certify that I understand the duty of disclosure and to the best of my knowledge I have carried out that duty.

I further certify that the list of documents set out in or attached to this form, is a complete list of all documents which are or have been in my control and which I am obliged under the order to disclose.

I understand that I must inform the court and the other parties immediately if any further document required to be disclosed by Rule 31.6 comes into my control at any time before the conclusion of the case.

I have not permitted inspection of documents within the category or class of documents (as set out below)

required to be disclosed under Rule 31(6)(b) or (c) on the grounds that to do so would be disproportionate

to the issues in the case.

Signed

Date

(Claimant)(Defendant)(’s litigation friend)

List and number here, in a convenient order, the documents (or bundles of documents if of the same nature, e.g. invoices) in your control, which you do not object to being inspected. Give a short description of each document or bundle so that it can be identified, and say if it is kept elsewhere i.e. with a bank or solicitor

I have control of the documents numbered and listed here. I do not object to you inspecting them/producing copies.

List and number
here, as above,
the documents in
your control which
you object to being
inspected.
(Rule 31.19)

I have control of the documents numbered and listed here, but I object to you inspecting them:

Say what your
objections are

I object to you inspecting these documents because:

List and number here, the documents you once had in your control, but which you no longer have. For each document listed, say when it was last in your control and where it is now.

I have had the documents numbered and listed below, but they are no longer in my control.