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Unpacking Open Justice – the Commercial Court's drive to make documents filed in litigation accessible to the public

I. Introduction

Practice Direction 51ZH came into force on 1 January 2026 and represents one of the most significant practical changes to transparency in commercial litigation in recent years, fundamentally altering how court documents become accessible to the public.

It applies to both new and existing proceedings and will initially run for two years in the Commercial Court, the London Circuit Commercial Court, and the Financial List. However, there is every expectation that it will be rolled out to further courts following a successful pilot.

The practice direction is likely to have wide-ranging ramifications requiring recalibration of how documents are drafted, how case management is approached, and how clients are advised about the realities of conducting litigation. Strategic thinking about confidentiality and the public nature of litigation and what that means for their clients must, even more so now, be at the forefront of every litigator's mind. Bullet point

II. The old regime and the Supreme Court's decision in *Cape v Dring*

Under the pre-existing framework, direct access by the public to court documents was effectively limited to hard copy skeleton arguments at hearings, statements of case (excluding attachments), and judgments or orders made in public. Non-party access to other documents operated on an application-driven basis, requiring a formal application under CPR 5.4C(2) to obtain documents which had been 'read' by the Court or referred to at a public hearing.

In reality, this made it difficult for members of the public (including the press) to access witness statements, expert reports, disclosed documents, and often even skeleton arguments. There was no clear mechanism for non-parties to identify what documents existed and had been 'read' by the Court or referred to at a public hearing, let alone obtain them efficiently. The result was a system where access depended on the persistence of applicants, their willingness to pay application fees, and the discretion of individual judges.

The Supreme Court's decision in *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38 changed everything. It reiterated, for the modern era, longstanding principles of open justice. "*The principal purposes of the open justice principle are two-fold: to hold individual courts and judges to account, and to enable the public to understand how the justice system works and why decisions are taken. Now that much more of the argument and evidence is reduced to writing before a hearing, it is difficult for non-parties to follow what is going on without access to the written material, including documents [42-43]. The default position is that the public should be allowed access, not only to the parties' submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing, which are not limited to those the judge has been asked to or has said that he has read [44].*"[1]
Six years later, the Courts have finally begun to implement the Supreme Court's decision – enter Practice Direction 51ZH.

III. How PD 51ZH works

The pilot scheme inverts the existing position; rather than requiring non-parties to apply for access, it places a positive obligation on the parties to the proceedings to file certain documents (**Public Domain Documents**) produced by that party on the public-facing part of the Court's electronic filing system within specified deadlines.
Under paragraphs 7 and 8 of PD 51ZH, the following categories of documents become Public Domain Documents once used or referred to at a public hearing:

1. Skeleton arguments and written submissions (including opening and closing submissions)
2. Witness statements and affidavits relied upon as evidence in chief at trial or at a public application hearing (but not documents appended or annexed to them)
3. Expert reports, including annexes and appendices, adduced as evidence in chief or relied upon at a public hearing
4. Any other document or documents critical to the understanding of the hearing ordered by the judge at the hearing to be a Public Domain Document
5. Documents agreed by the parties to be Public Domain Documents

A document merely referred to in a Public Domain Document does not itself become public unless it independently falls within these categories or is brought within scope by a court order or agreement.

IV. Timing of filing of Public Domain Documents

The pilot imposes strict deadlines:

1. Skeleton arguments and written submissions: by 4pm, two clear days after the first day of the hearing in which they are used
2. All other Public Domain Documents: by 4pm, 14 days after the day on which they are first used or referred to at a hearing

[1] https://supremecourt.uk/uploads/uksc_2018_0184_press_summary_1131aad794.pdf

The PD does not (currently) impose sanctions on the parties for failing to comply with the filing requirements, but there is a provision for the Court to order a party to file a document which has not been filed.

V. Filing Modification Orders

PD 51ZH provides a safety valve through Filing Modification Orders (**FMOs**). FMOs can be made on the Court's own initiation or be sought by: i) a party; or ii) any non-party named or referred to in a Public Domain Document.
FMOs may:

1. Prevent non-party access to a document
2. Waive or restrict the filing requirement
3. Permit redaction before filing
4. Extend or vary the filing period

Pending the determination of an FMO request, the filing period is suspended.
FMOs are expected to be granted sparingly—only where there is genuine justification for departure from the default position. It remains to be seen how willing the Court will be to grant such orders, particularly where the applicant is a person merely named in a Public Domain Document.

VI. Practical implications: adapting to the new landscape

Interim applications/hearings

The obligation to file documents applies equally to interim hearings as it does trial. Each interim hearing represents a fresh opportunity and/or risk to each party that the documents become public. Since interim applications often relate to disclosure and, on occasion, require the Court to look at trial witness statements, the date on which these documents become public may be brought forward significantly.

Skeleton Arguments and Written Submissions

It was already standard practice for copies of skeleton arguments and submissions to be made available in hard copy to in-person attendees at hearing. However, the online availability of these documents will, in reality, mean they are much more widely accessible. Parties will need to carefully consider:

1. How to avoid unnecessary inclusion of confidential figures or strategic information that is not essential
2. Whether material truly needs to be in the skeleton, or can be addressed orally
3. Where confidential material must be included
4. Whether to seek directions at the CMC regarding confidentiality and redactions

Witness Statements and Expert Reports

Lawyers must now approach drafting on the basis that witness statements and expert reports (including annexes and appendices) will become publicly accessible shortly after being referred

to in a public hearing. This is a significant change and is likely to drive a change in how witness statements and expert reports are prepared:

1. Annexes and appendices: the requirement to file annexes and appendices to expert reports is likely to cause particular concern. Experts have traditionally included large amounts of information in annexes and appendices, including potentially sensitive financial information.
2. Confidential Information: where witness statements, expert reports, or annexes and appendices to expert reports necessarily include commercially sensitive material, parties should consider in good time whether an FMO will be required and build this into the case management timetable.
3. Reputation management: witnesses will have to be advised that their written evidence will be publicly available. This requirement may materially affect the willingness of certain witnesses to give evidence and/or the scope of the evidence they are willing to give.

Solicitor witness statements

The pilot scheme does not differentiate between solicitor and other witness statements. It must be assumed, therefore, that solicitor statements, which in practice have historically rarely become publicly available, will now be easily accessible. This requirement is likely to drive a change in how solicitor statements are prepared and the scope of the matters they address.

Case Management Considerations and Confidentiality Orders

The pilot will inevitably require adjustments to standard CMC directions. For example, parties may wish to make express provision for FMO applications, including directions which specify a deadline for parties to identify documents for which FMOs may be sought, and a mechanism for resolving such applications efficiently.

There is likely to also be renewed interest in confidentiality club arrangements, the existence of which are likely to significantly impact the willingness of the Court to grant FMOs and/or permit redactions. Where confidentiality orders already exist, lawyers should ensure that they continue to provide the required level of protection and/or require amendment.
Strategic use of the pilot

There is obvious potential for parties to use the pilot tactically. For example,

1. A party might bring an interim application with the express intention of ensuring certain documents and/or witness statements are made public prior to trial;
2. A party might argue that a particularly damaging document is a "key document" under paragraph 8(g) and seek an order from the judge forcing its opponent to file it publicly.
3. A party might seek to include prejudicial and/or damaging material in witness statements predominantly to put pressure on the opposition with the threat of impending publication.
4. A party may check whether other parties have complied with their obligations and seek orders to compel compliance.

Paragraph 9 and the risk of a chain of Public Domain Documents

The operation of paragraph 9 of PD 51ZH appears likely to require clarification in the near term:

If a Public Domain Document refers to another document, that other document does not become a Public Domain Document unless it is a document referred to in paragraph 8.

On one reading, the effect of this provision is that any witness statement, affidavit, or expert report merely referred to in (for example), a skeleton argument or solicitor statement for an interim application, will render that document a Public Domain Document. I.e. if the document is mentioned (even in passing), then it is deemed to have been "*used or referred to at a hearing in public*". If those witness statements, affidavits, or expert reports also mention further documents, then the whole chain of documents would become Public Domain Documents. If that interpretation is correct, and given the tendency to cross-refer to documents, a party could, by mentioning a single document in a skeleton, become obliged to file numerous other documents. It is likely that the Court will have to clarify soon whether this is the intended effect of Paragraph 9.

VII. Intersection between PD51ZH and collateral use restrictions

Under CPR 31.22, documents disclosed in proceedings may only be used for the purpose of those proceedings—unless they have been "read to or by the court, or referred to, at a hearing which has been held in public." Once that threshold is crossed, collateral use restrictions fall away, and the document can be used freely, including in foreign proceedings or for media publication.

PD 51ZH does not change the substantive law on when collateral use restrictions are released. However, it materially changes the visibility of that release. Under the old regime, a third party would have no easy way of knowing which disclosed documents had been referred to at a public hearing—they would need to attend the hearing, obtain transcripts, or make speculative applications. Now, with skeleton arguments and witness statements publicly filed within days of the hearing, any interested third party can review those documents and identify precisely which disclosed documents were referenced. The publicly filed materials effectively become a roadmap to documents that have lost their collateral use protection.

This creates obvious potential for strategic exploitation. A party could, for example, ensure that references to its opponent's particularly damaging disclosed documents are included in its skeleton argument or witness statements—not because those references are forensically necessary, but because their inclusion signals to regulators, competitors, or litigants in other jurisdictions that those documents are now available for use. The party making the reference bears no cost (the reference may appear innocuous in context), while the disclosing party loses any protection it may have previously enjoyed.

The Courts have power under CPR 31.22(2) to restore protection where references were "marginal" or "adventitious", but these kinds of orders may now be too late, as the damage will already have been done. It will become increasingly necessary to seek directions at the CMC stage, including FMOs, pre-emptive orders pursuant to CPR 31.22, and confidentiality orders, regarding the treatment of particularly sensitive disclosed documents, and parties will need to scrutinise skeletons and witness statements for unnecessary references that may be designed to trigger a release.

VIII. Conclusion

The practical effect of Practice Direction 51ZH, therefore, should not be underestimated. The seemingly small changes to the accessibility of documents relied on by parties to litigation will drive significant changes both in how public litigation is and in how it is conducted.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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