

# High Court Provides Guidance on English Disclosure Rules

31 March 2022

## INTRODUCTION

English disclosure rules have been addressed in two recent decisions of the High Court in *Sheeran & Ors v Chokri & Ors* [2021] EWHC 3553 (Ch) and *Provimi France S.A.S. & Ors v Stour Bay Company Limited* [2022] EWHC 218 (Comm). Taken together, these decisions have highlighted:

- That litigants (including Ed Sheeran) may be required to personally satisfy the Court that they have complied with their disclosure obligations.
- The importance of solicitors clearly explaining disclosure duties (particularly those pertaining to document preservation) to clients unfamiliar with English disclosure rules.

We discuss each of these cases below.

### ***Sheeran & Ors v Chokri & Ors* [2021]**

The claim in this action relates to a song written by Ed Sheeran and others called “Shape of You”. The claimants sought a declaration that they had not infringed any copyright of the defendants in a song called “Oh Why”; it had been suggested in correspondence between the parties that “Shape of You” had infringed the defendants’ copyright.

Following disclosure by the parties, the defendants made an application under paragraph 17 of Practice Direction 51U (“PD 51U”) alleging that the claimants’ disclosure had been inadequate and requesting the disclosure of further documents.

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PD 51U paragraph 17.1 provides that:

17.1 Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to—

- (1) serve a further, or revised, Disclosure Certificate;
- (2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;
- (3) provide a further or improved Extended Disclosure List of Documents;
- (4) produce documents; or
- (5) make a witness statement explaining any matter relating to disclosure.

Further, PD 51U paragraph 17.2 requires the party applying for an order under paragraph 17 to satisfy the court that making an order is reasonable and proportionate.

The Court considered its task was twofold: (1) to identify whether there had been a failure to comply with paragraph 17.1; and (2) to determine whether the making of some curative order under paragraph 17.1 would be both reasonable and proportionate. Further, the Court found that to make an order under PD 51U paragraph 17, there must be more than just a general suspicion of a shortcoming in relation to disclosure. Instead, *“something is needed to show that there is a likelihood (as opposed to a possibility) of further documents existing”*.

On the facts, the Court found that there were real and significant concerns with the claimants’ disclosure, and so found it reasonable and proportionate to order disclosure in relation to: (i) the claimants’ diaries; and (b) recordings and voice notes relating to “Shape of You” (including earlier versions or parts of “Shape of You”).

The Court also strongly suggested Mr. Sheeran put in a witness statement confirming certain information in relation to his social media accounts and directed that he should also identify to the defendants what the so-called “Album Delivery Day” was.

Notably, in light of the Court finding that Ed Sheeran *“did not appear to have personally engaged with the disclosure process much (if at all)”*—largely due to the fact that his manager had undertaken the disclosure exercise on his part—the Court ordered Mr. Sheeran *“to make a witness statement...stating that he has personally satisfied himself that his disclosure obligations have been met”*. The Court also noted that whilst Mr. Sheeran

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was a ‘busy person, with a recording, song-writing and performing career, he had initiated these proceedings, and so it was important that he took responsibility for his own disclosure.’

***Provimi France S.A.S. & Ors v Stour Bay Company Limited [2022]***

On 10 October 2019, Provimi France S.A.S. (the “Claimant”) commenced proceedings against Stour Bay Company Limited (the “Defendant”) alleging that the Vitamin D3 500 Feed Grade product that the Defendant had sold to it was defective. Accordingly, the Claimant claimed damages for breach of the contracts of sale.

In these proceedings, which were subject to the Disclosure Pilot Scheme (PD 51U), the Defendant complained about a “substantial lacuna” in the Claimant’s disclosure. This lacuna was the result of the Claimant group’s document retention policy, which provided for documents held in individual Microsoft Outlook files to be deleted after three years. Accordingly, Outlook documents pre-dating 2016—the entire period relevant to the claim—may not have been available.

Notably, under [PD 51U paragraph 3.1](#):

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.

Correspondence between the parties’ solicitors had suggested that the failure to put in place a litigation hold, to prevent documents from being automatically deleted, was not the result of the Claimant’s solicitors failing to give advice, but the result of the Claimant’s in-house lawyer—unfamiliar with English disclosure rules—failing to appreciate the advice given as to the types of documents that should be retained.

The Court noted that the deletion of emails, which likely included a number of relevant documents, was “highly regrettable”, and that “*it serve[d] to emphasise the importance of solicitors dealing with clients unfamiliar with English disclosure rules explaining the position fully.*”

Further, the Court also considered that “[i]t may well be that an instruction simply to retain relevant documents, without explaining or ensuring that the client understands exactly what “relevant” means, is not enough.”

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In considering whether to draw an adverse inference from the absence of documents, the Court followed the approach of the Supreme Court in *Efobi v Royal Mail Group Ltd*,<sup>1</sup> which suggested that the answer is largely a matter of ordinary rationality and common sense.

### COMMENTARY

The above two cases join an increasing list of authority on the recently extended Practice Direction 51U. In particular, *Sheeran v Chokri* concerned paragraph 17, where a party had failed to adequately comply with their disclosure obligations, whilst *Provimi France* concerned a party's document preservation duties under paragraph 3.

Importantly, *Sheeran v Chokri* highlights that litigants are not immune to the English disclosure process, and even celebrities like Ed Sheeran may be required to personally satisfy the Court that they have met their disclosure obligations. The clear message from the Court is that the same rules apply to everyone (“*nemo est supra leges*”).

Furthermore, *Provimi France* illustrates the importance of solicitors clearly explaining English disclosure rules to clients unfamiliar with their disclosure obligations. In particular, this case shows that instructing clients to simply retain relevant documents—without explaining what “relevant” means—may not be enough.

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<sup>1</sup> [2021] 1 WLR 3863 at [41] per Lord Leggatt JSC.

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Please do not hesitate to contact us with any questions.

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