

# Guidance on Redaction (of Disclosed Documents) under CPR PD 51U

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**Introduction.** In *JSC Commercial Bank Privatbank v Kolomoisky and others* [2022] EWHC 868 (Ch), the High Court considered the approach taken by the first defendant's solicitors when redacting over 6,000 WhatsApp messages. The Claimants submitted that the redactions were unjustified and sought an order that certain messages be disclosed unredacted.

The case is a helpful reminder that once a document has been identified as relevant for disclosure, confidential information can only be redacted if it is “*irrelevant to any issue in the proceedings*”. This may be a broader test than whether the information is irrelevant to the *list of issues* for disclosure. For this reason, parties may not have good grounds to redact information about a broader commercial relationship in circumstances where that relationship is relevant to the issues in the proceedings.

It will be important for a party seeking to apply redactions that a detailed and clear explanation is provided for the basis on which they have been undertaken.

**The Facts.** The application was brought in the context of allegations made by Privatbank that the first and second defendants orchestrated a scheme to misappropriate around US \$2 billion from the bank.

The disclosure orders were made on 26 June 2020 under CPR PD 51U. It was common ground that the defendants had an obligation to carry out search-based extended disclosure and that this exercise was to be done by reference to the Issues for Disclosure. It was also common ground that the defendants had the right to redact irrelevant and confidential information in accordance with para 16 of CPR 51U:

*16.1 A party may redact a part or parts of a document on the ground that the redacted data comprises data that is -*

- (1) irrelevant to any issue in the proceedings, and confidential; or*
- (2) privileged.*

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*16.2 Any redaction must be accompanied by an explanation of the basis on which it has been undertaken and confirmation, where a legal representative has conduct of litigation for the redacting party, that the redaction has been reviewed by a legal representative with control of the disclosure process. A party wishing to challenge the redaction of data must apply to the court by application notice supported where necessary by a witness statement.*

The first defendant disclosed 26 chains of WhatsApp messages from his mobile phones, each with heavy redaction. Of the c. 6,000 messages, all but 272 were disclosed in unredacted form. In a number of instances, it was not possible to identify the counterparty to the message. The Claimant asked the court to order that 17 of the messages be disclosed in full. Alternatively the Claimant sought an order for the court to inspect the documents itself or for the documents to be disclosed to a closed group of solicitors to review and agree a way forward.

**The Judgment.** Trower J considered that a distinction needed to be drawn between (i) identifying a document as relevant in accordance with the Issues for Disclosure; and (ii) determining that a document was “*irrelevant to any issue in the proceedings*” for the purposes of para 16.1(1) of CPR 51U. Once a document has been identified as disclosable, the question of whether parts of it can be excluded from inspection is to be assessed by applying a broader test of what may be relevant to any issue in the proceedings.

The judge was concerned that this was not a distinction that the first defendant’s solicitors had understood when applying the redactions. The first defendant’s solicitors had explained in correspondence that there were a small number of messages in respect of which they accepted that it was “*at least arguable that they may be relevant to the issues for disclosure*”. However, they said that they considered them unlikely to be of any particular significance to the issues in dispute in the proceedings. The judge said that these statements appeared to illustrate that the approach adopted to relevance was too narrow.

The judge was not satisfied with the explanations provided by the first defendant’s solicitors that the information was irrelevant merely because it was said to be about unrelated commercial transactions and other commercial information that was unrelated to the issues in the proceedings. The Claimants had submitted that how the first and second defendants dealt with each other in relation to their joint assets, the character and closeness of their business relationship and the way in which they operated together were relevant to the issues in proceedings. The judge accepted that communications about the business relationship between the first and second defendants may have a direct bearing on the ability of the Claimant and the court to have a proper understanding of the true nature of the business relationship between them.

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The court considered it significant that few of the documents disclosed by the first defendant came from his own personal sources: he did not use a personal email account nor a desktop computer to store or create electronic documents, and his social media presence was minimal. The WhatsApp messages which included communications about the first and second defendants' business relationship therefore were of heightened importance.

In light of these findings, Trower J found that “*there has been or may have been a failure adequately to comply with an order for extended disclosure*” and ordered a re-review of all the redactions of the WhatsApp messages, taking into account what was expressed in the judgment about the breadth of what is capable of being relevant. The judge also ordered the solicitors to prepare a schedule of messages identifying (in relation to each message) the names of the recipients, the date and time sent and a generic description of their content. Where the content of multiple messages was the same only then could they be grouped together to consider whether or not the redacted material was actually irrelevant to issues in dispute.

### Going Forward.

- This case is an important reminder that, while parties giving disclosure have the ability to redact *irrelevant* confidential information, the test for relevance should not be limited to whether the information is relevant in accordance with the *issues for disclosure*. The question of whether the information is “*irrelevant to any issue in the proceedings*” is a broader test.
- While the court identifies the need for proportionality in conducting a search for relevant documents, once a document has been identified for disclosure, different considerations apply to whether there are justifiable grounds to apply redactions.
- The court may adopt greater vigilance where documents are heavily redacted to ensure that there is a proper basis to apply redactions. Parties should therefore think carefully about applying broad redactions to “unrelated commercial transactions and other commercial information” in circumstances where evidence of the wider commercial relationship between the parties may have relevance beyond the specific transaction in dispute.
- Parties should provide a clear and specific explanation of the reasons why information has been redacted. Where a generic explanation is given to a large number of redactions, this may invite greater scrutiny from the court and can result in costly and time-consuming disputes between the parties over disclosure obligations.

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Please do not hesitate to contact us with any questions.

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