

eDisclosure  
Practice Direction 57AD

September 2022



# eDisclosure - Practice Direction 57AD

**Practice Direction 57AD (“PD57AD”), which applies to new and existing proceedings in the Business and Property Courts<sup>1</sup>, comes into force on 01 October 2022.**

**In this publication, we have considered the key disclosure requirements under PD57AD.**

## The Purpose of Disclosure

The purpose of disclosure is to ensure that parties to proceedings know of all documents<sup>2</sup> that relate to their case, thus avoiding an ambush at trial. It is of paramount importance that parties understand disclosure requirements, particularly where *electronic documents* are concerned<sup>3</sup>. The court expects parties to proceedings (and their legal representatives) to cooperate with each other and to assist the court so that the scope of disclosure, if any, that is required in proceedings can be agreed or determined by the court in the most effective way possible<sup>4</sup>. The court will be concerned to ensure that disclosure is directed to the issues in the proceedings and that the scope of disclosure is not wider than is reasonable and proportionate in order fairly to resolve those issues, and specifically the issues for disclosure<sup>5</sup>.

Parties requesting search-based Extended Disclosure (i.e. Models C, D, and/or E) must prepare a *List of Issues for Disclosure* – this is not required if the parties are agreed that Extended Disclosure is confined to Models A and B (*please refer to the table on page 5 of this publication*).

## Adverse Documents

Disclosure extends to “*adverse*” documents. A document is “*adverse*” if it or any information it contains contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute, whether or not that issue is one of the agreed *Issues for Disclosure*<sup>6</sup>. Where there is a known *adverse document* but it has not been located, the duty to disclose the document is met by that fact being disclosed, subject to any order the court may make<sup>7</sup>.

## Disclosure Duties (Parties and Legal Representatives)

PD 57AD sets out specific **disclosure duties** for **(1)** parties to proceedings<sup>8</sup>; and **(2)** legal representatives who have the conduct of litigation on behalf of a party to proceedings **(i)** that have been commenced, or **(ii)** who are instructed with a view to the conduct of litigation where their client knows it may become a party to the proceedings<sup>9</sup>.

These disclosure duties continue until the conclusion of the proceedings (including any appeal) or until it is clear there will be no proceedings.<sup>10</sup>

1 PD57AD, 1.2: The Commencement Date is 1 October 2022. This Practice Direction applies to existing and new proceedings in the Business and Property Courts of England and Wales and the Business and Property Courts in Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester and Newcastle. For the avoidance of doubt, it does not apply in the County Court. This Practice Direction is substantially in the form of (and replaces) Practice Direction 51U.

2. PD57AD, 2.2: For the purpose of disclosure, the term “document” includes any record of any description containing information; PD57AD, 2.5: A “document” may take any form including but not limited to paper or electronic; it may be held by computer or on portable devices such as memory sticks or mobile phones or within databases; it includes e-mail and other electronic communications such as text messages, webmail, social media and voicemail, audio or visual recordings; PD57AD, 2.6: In addition to information that is readily accessible from computer systems and other electronic devices and media, the term “document” extends to information that is stored on servers and back-up systems and electronic information that has been ‘deleted’. It also extends to metadata, and other embedded data which is not typically visible on screen or a printout.

3. PD57AD, 2.1: Disclosure is important in achieving the fair resolution of civil proceedings. It involves identifying and making available documents that are relevant to the issues in the proceedings.

4. PD57AD, 2.3

5. PD57AD, 2.4

6. PD57AD, 2.7

7. PD57AD, 3.4

8. PD57AD, 3.1

9. PD57AD, 3.2

10. PD57AD, 3.3

# eDisclosure - Practice Direction 57AD

## Disclosure Duties

Party/Parties' Disclosure Duties	Legal Representatives' Disclosure Duties
<p>A <b>person</b> 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 "<b>Disclosure Duties</b>") to the court:</p>	<p><b>Legal representatives</b> who have the conduct of litigation on behalf of a party to proceedings that have been commenced, or who are instructed with a view to the conduct of litigation where their client knows it may become a party to proceedings that have been or may be commenced, are under the following <b>duties</b> to the court:</p>
<p><b>(1)</b> To take reasonable steps to <b>preserve documents</b> in its control that <b>may be relevant to any issue</b> in the proceedings.</p>	<p><b>(1)</b> To take <b>reasonable steps to preserve documents</b> within their control that may be <b>relevant to any issues in the proceedings</b>.</p>
<p><b>(2)</b> No later than the time(s) set out in paragraphs 9.1 to 9.3 [of PD57AD], <u>to disclose <b>known adverse documents</b>, unless they are privileged</u>. This duty exists regardless of whether or not any order for disclosure is made.</p>	<p><b>(2)</b> To take <b>reasonable steps</b> to advise and assist the <b>party</b> (i.e., client) to <u>comply with its Disclosure Duties</u>.</p>
<p><b>(3)</b> To <b>comply with any order for disclosure</b> made by the court.</p>	<p><b>(3)</b> To <b>liaise and cooperate</b> with the <b>legal representatives</b> of the other parties to the proceedings (or the other parties where they do not have legal representatives) so as to promote the reliable, efficient and cost-effective conduct of disclosure, <u>including thorough the use of technology</u>.</p>
<p><b>(4)</b> To undertake <b>any search for documents</b> in a <b>responsible and conscientious manner</b> to fulfil the stated purpose of the search.</p>	<p><b>(4)</b> To act <b>honestly</b> in relation to the process of <b>giving disclosure</b> and reviewing documents disclosed by the other party.</p>
<p><b>(5)</b> To <b>act honestly</b> in relation to the process of giving disclosure and reviewing documents disclosed by the other party.</p>	<p><b>(5)</b> To undertake a review to satisfy themselves that <u>any claim by the party to <b>privilege</b> from disclosing a document is properly made and the reason for the claim to privilege is sufficiently explained</u>.</p>
<p><b>(6)</b> To use <b>reasonable efforts</b> to avoid <b>providing documents to another party</b> that have <b>no relevance</b> to the <i>Issues for Disclosure</i> in the proceedings.</p>	

# eDisclosure - Practice Direction 57AD



## Disclosure Models under PD57AD

- Disclosure Models should not be used in a way that increases cost through undue complexity<sup>11</sup>.
- The court may order that Extended Disclosure be given using different Disclosure Models for different *Issues for Disclosure* in a case.
- It is important that there is moderation in the number of Models used and the way in which they are applied to the *Issues for Disclosure* so that the disclosure process that will follow, using the Models and the *Issues for Disclosure*, will be practical.
- In the interests of avoiding undue complexity the court will rarely require different Models for the same set or repository of documents.
- The court may also order that Extended Disclosure be given by only one party, or that different Models are to apply to each party's Disclosure on a particular *Issue for Disclosure*.
- In some cases, it may be appropriate, practical and proportionate for different Models to be applied to different types of documents (e.g. one Model for physical documents and another Model for electronic documents)<sup>12</sup>.
- Known adverse documents must be included in disclosure under Models A – E. Adverse documents must be disclosed at the time ordered for Extended Disclosure. In a case where no order for Extended Disclosure is made, parties must still disclose known adverse documents within 60 days of the first CMC and provide a Disclosure Certificate certifying that this has been done<sup>13</sup>.
- Extended Disclosure may take the form or one of more of Disclosure Models A-E<sup>14</sup>.
- There is no presumption that a party is entitled to search-based Extended Disclosure (Extended Disclosure Models C, D, and/or E).
- No Model will apply without the approval of the court<sup>15</sup>.

11. PD57AD, 6.6: The objective of relating Disclosure Models to Issues for Disclosure is to limit the searches required and the volume of documents to be disclosed. Issues for Disclosure may be grouped. Disclosure Models should not be used in a way that increases cost through undue complexity.

12. PD57AD, 8.3

13. PD57AD, 9.2

14. PD57AFD, 8.1

15. PD57AD, 8.2

# eDisclosure - Practice Direction 57AD

## Models A - E

<b>Model A</b>	<b>Disclosure confined to known adverse documents.</b> <sup>16</sup>
<b>Model B</b>	<b>Limited Disclosure</b> <sup>17</sup> - Key documents on which the parties seek to rely.
<b>Model C</b>	<b>Disclosure of particular documents or narrow classes of documents</b> <sup>18</sup> - If the parties cannot agree that Model C disclosure should be given, the requesting party must raise it at the CMC. The request must be reasonable and proportionate.
<b>Model D</b>	<b>Narrow search-based disclosure, with or without Narrative Documents</b> <sup>19</sup> - Documents that are likely to support/adversely affect a claim/defence in relation to one or more of the <i>Issues for Disclosure</i> . Reasonable and proportionate searches are required. The court will limit scope based on the information provided in the DRD. The court may order whether <i>Narrative Documents</i> should be included/excluded, otherwise, parties take a reasonable and proportionate view to including/excluding <i>Narrative Documents</i> based on the volume and cost of any subsequent review by the receiving party.
<b>Model E</b>	<b>Wide search-based disclosure</b> <sup>20</sup> - Documents which are likely to support/adversely affect a claim/defence in relation to one of more of the <i>Issues for Disclosure</i> or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure. Reasonable and proportionate searches to be undertaken in relation to the <i>Issues for Disclosure</i> ; the scope of the search will be determined by the court using the information in the DRD. Model E is likely to be broader than Model D. Ordered in exceptional cases. Includes <i>Narrative Documents</i> .

16. PD57AD, 8.3: Model A; Disclosure confined to known adverse documents: The court may order that the only disclosure required in relation to some or all of the Issues for Disclosure is of known adverse documents in accordance with the (continuing) duty under paragraph 3.1(2) PD57AD.

17. PD57AD, 8.3: Model B: Limited Disclosure: (1) The court may order the parties to disclosure (where and to the extent that they have not already done so by way of Initial Disclosure, and without limit as to quality) – (a) the key documents on which they have relied (expressly or otherwise) in support of the claims or defences advanced in their statement(s) of case; and (b) the key documents that are necessary to enable the other parties to understand the claim or defence they have met; and in addition to disclose known adverse documents in accordance with their (continuing) duty under paragraph PD57AD; (2) A party giving Model B Disclosure is under no obligation to undertake a search for documents beyond any search already conducted for the purposes of obtaining advice on its claim or defence or preparing its statement(s) of case. Where it does undertake a search however then the (continuing) duty under paragraph 3.1(2) PD57AD [the Disclosure Duties – see table above] will apply.

18. PD57AD, 8.3: Model C: Disclosure of particular documents or narrow classes of documents: (1) The court may order a party to give disclosure of particular documents or narrow classes of documents relating to a particular Issue for Disclosure, by reference to requests set out in or to be set out in Section 1B of the Disclosure Review Document or otherwise defined by the court.; (2) If the parties cannot agree that disclosure should be given, or the disclosure to be given, pursuant to a request, then the requesting party must raise the request at the case management conference. The court will determine whether the request is reasonable and proportionate and may either order the disclosing party to search for a narrower class of documents than that requested. Any appropriate limits to the scope of the searches to be undertaken will be determined by the court using the information provided in the Disclosure Review Document. A party may address Model C requests not only to the other party or parties, but also propose that Model C be used in respect of documents which it may propose searching for and disclosing; (3) For the avoidance of doubt, a party giving Model C Disclosure must still comply with the duty (the "Disclosure Duties") under paragraph 3.1 (2) PD57AD to disclose known adverse documents; these will include any arising from the search directed by the court.

19. PD57AD, 8.3: Model D: Narrow search-based disclosure, with or without Narrative Documents: (1) Under Model D, a party shall disclose documents which are likely to support or adversely affect its claim or defence or that of another party in relation to one or more of the Issues for Disclosure.; (2) Each party is required to undertake a reasonable and proportionate search in relation to the Issues for Disclosure for which Model D disclosure has been ordered. Any appropriate limits to the scope of the searches to be undertaken will be determined by the court using the information provided in the Disclosure Review Document. (3) The court may order the parties to include or exclude Narrative Documents. In the absence of an order, the parties are encouraged to take reasonable steps to exclude Narrative Documents where it is reasonable and proportionate to do so with a view to reducing the overall volume and the cost of any subsequent review by the party receiving the disclosure; (4) For the avoidance of doubt, a party giving Model D Disclosure must still comply with the duty (the "Disclosure Duties") under paragraph 3.1(2) PD57AD to disclose known adverse documents; these will include any arising from the search directed by the court.

20. PD57AD, 8.3: Model E: Wide search-based disclosure: (1) Under Model E, a party shall disclose documents which are likely to support or adversely affect its claim or defence or that of another party in relation to one of more of the Issues for Disclosure or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure (because those other documents are likely to support or adversely affect the party's own claim or defence or that of another party in relation to one or more of the Issues for Disclosure); (2) Model E is only to be ordered in an exceptional case; (3) Each party is required to undertake a reasonable and proportionate search in relation to the Issues for Disclosure for which Model E Disclosure has been ordered. The scope of the search will be determined by the court using the information provided in the Disclosure Review Document and is likely to be broader than that ordered for Model D Disclosure. (4) Narrative Documents must also be searched for and disclosed, unless the court otherwise orders. (5) For the avoidance of doubt, a party giving Model E Disclosure must still comply with the duty (the "Disclosure Duties") under paragraph 3.1 (2) PD57AD to disclose known adverse documents; these will include any arising from the search directed by the court.

# eDisclosure - Practice Direction 57AD

**Search-based Extended Disclosure under Models C, D and/or E will be ordered where it is reasonable and proportionate having regard to the overriding objectives including the following factors<sup>21</sup>:**

1. The nature and complexity of the issues in the proceedings.
2. The importance of the case, including any non-monetary relief sought.
3. The likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence.
4. The number of documents involved.

<sup>21</sup>. PD57AD, 6.4



## List of Issues for Disclosure

The **claimant** is responsible for preparing and serving a draft List of Issues for Disclosure where search-based Extended Disclosure is sought. This must be done **within 42 days** of the **final statement of case** (unless an agreed list of issues for trial already exists and the parties agree that it is suitable (with or without adaption to be used for disclosure)). The draft *List of Issues for Disclosure* should be set out in **Section 1A of the DRD**<sup>22</sup>.

The claimant should seek to ensure that the draft *List of Issues for Disclosure* provides a fair and balanced summary of the key areas of dispute identified by the parties' statement of case and in respect of which it is likely that one or other of the parties will be seeking search-based Extended Disclosure<sup>23</sup>.

The *List of Issues for Disclosure* does not bind the parties at trial. The *List of Issues for Disclosure* need not contain/include a list of all the issues in the case and the issues in the case may develop or be refined as the case proceeds. The List of Issues for Disclosure may be revised or supplemented at any time prior to or following the CMC, including as a result of statements of case or amended statements of case subsequently served, or discussions between the parties in relation to the DRD.

In a multi-party case, where the risk of undue complexity in *Lists of Issues for Disclosure* is heightened, while the provisions of PD57AD remain the default arrangement, an application may be made under *paragraph 1.11 PD57AD* to request that the Court order for a bespoke timetable and procedure to be set in order to meet the needs of the multi-party case<sup>24</sup>.

### PD57AD, 7.6 - List of Issues for Disclosure Requirements

- The *List of Issues for Disclosure* should be as **short and concise** as possible.
- "*Issues for Disclosure*" means for the purposes of disclosure only those **key issues** in dispute, which the

parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings.

- The *List of Issues for Disclosure* does **not extend to every issue which is disputed in the statements of case** by denial or non-admission.
- For the purposes of producing a *List of Issues for Disclosure* the parties should consider what matters are **common ground** but should only include **the key issues in dispute** in the list.

### PD57AD, 7.7 - Primary functions of the Issues for Disclosure

When drafting Issues for Disclosure the parties should have regard to the **primary functions of those Issues** namely:

1. To help the parties to consider, and the court to determine, **whether Extended Disclosure is required** and, if so, which Model or Models should be used.
2. To assist the parties in **identifying documents and categories of documents** that are likely to exist and require to be disclosed.
3. To assist those carrying out the disclosure process to do so in a **practical and proportionate** way including, in case of search-based disclosure (i.e. Models C, D and/or E), to help define and guide the searches.
4. To assist with the process of **reviewing documents** produced by searches.
5. To avoid the production of documents that are **not relevant** to the issues in the proceedings.

22. PD57AD, 7.2

23. PD57AD, 7.8

24. PD57AD, 7.16



## Disclosure Review Document (DRD)

The DRD is the document by which the parties must identify, discuss and seek to agree the scope of any Extended Disclosure sought of Model C, D and/or E, and provide that information in due course to the court<sup>25</sup>.

The DRD may be modified (shortened or lengthened) as required in order that key information is exchanged and in due course provided to the court in an efficient, convenient and helpful format - this may include revising some of the questions asked in Section 2 of the DRD or adding others relevant to the particular disclosure exercise to be undertaken.

In cases where there is likely to be limited disclosure or the identification and retrieval of documents is

straightforward, not every section of the DRD will need to be completed. For such cases the parties should consider whether it would be more appropriate to use the Less Complex Claims regime<sup>26</sup>.

## On-Going Duty

The parties' obligation to complete, seek to agree and update the DRD is ongoing. If a party fails to co-operate and constructively engage in this process the other party or parties may apply to the court for an appropriate order at or separately from the CMC, and the court may make any appropriate order including the dismissal of any application for Extended Disclosure and/or the adjournment of the CMC with an adverse order for costs.

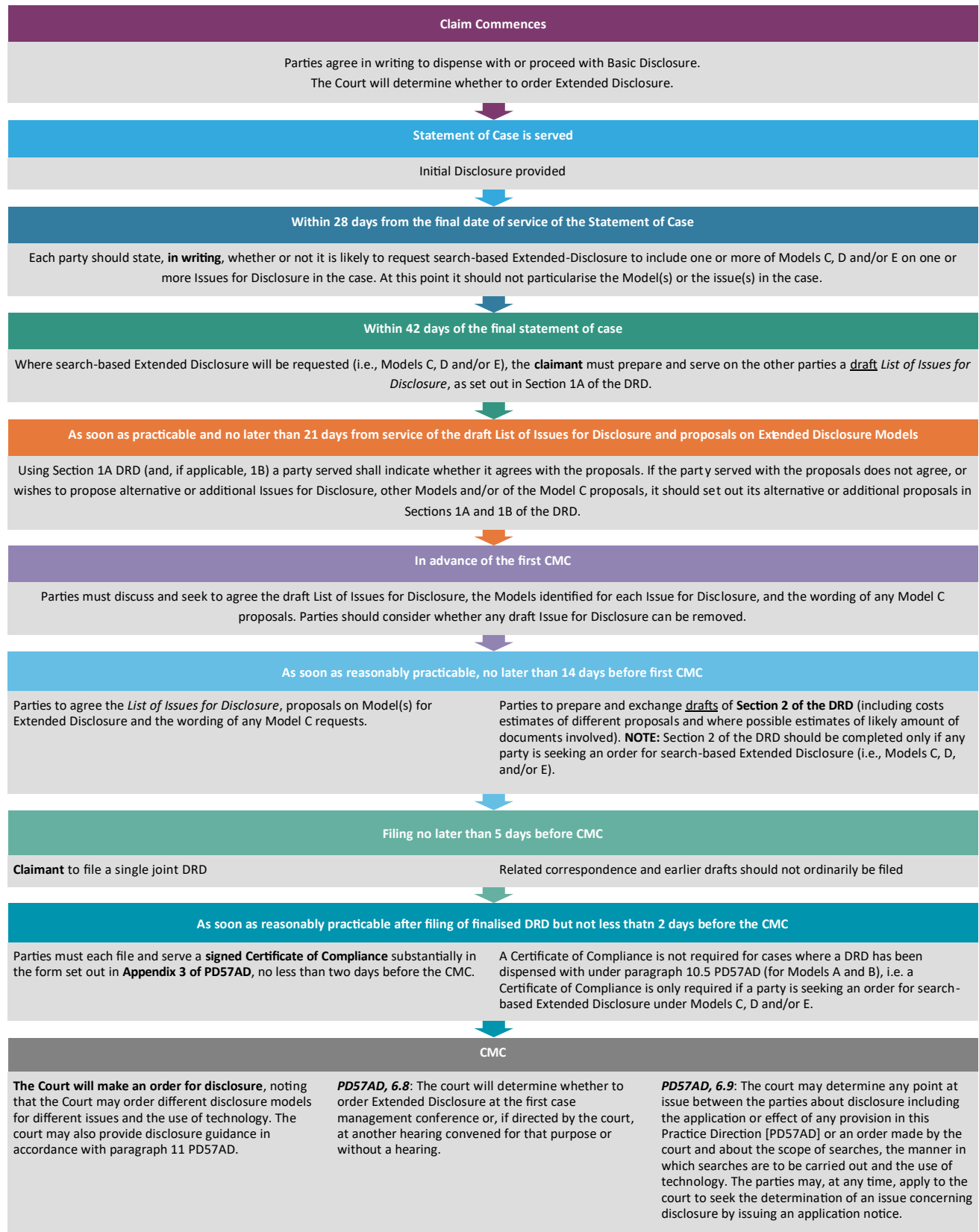
25. PD57AD, 10.1

26. PD57AD, 10.2



# eDisclosure - Practice Direction 57AD

## Extended Disclosure Timelines under PD57AD





## **Fiona Campbell**

Senior Associate, Dispute Resolution

+44 (0)330 460 6620

+44 (0)7741 905675

[fiona.campbell@fieldfisher.com](mailto:fiona.campbell@fieldfisher.com)