

# Disclosure in BVI court proceedings

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## Introduction

Commercial litigation disputes in the British Virgin Islands (**BVI**) require the parties to undergo a formal exchange of documents relevant to the issues in the case. This process is called disclosure. Usually, the deadline for disclosure is set by the court at the first case management hearing once proceedings have been issued.

Each party must disclose to the other parties those documents which are directly relevant to the issues in the claim and are within the party's control. A document is directly relevant if it supports or adversely affects the case of any of the parties to the proceedings.

The process begins by each party conducting a 'reasonable search' for documents within its control. Control does not necessarily mean that the document is within the party's possession, it includes those held by third parties which it has the right to access, such as files held by professional advisors. These documents will be reviewed by the parties' advisors to assess which meet the legal test for relevance and to check whether there is any reason why they should not be disclosed (such as privilege which is explained below).

Each party then files and serves on the other parties a list of these documents. The disclosure list must be accompanied by a sworn statement from the party verifying that they have complied with their disclosure duty.

The other party may then serve a notice to inspect the documents, requiring the other party to provide copies. In practice, inspection always takes place.

In addition to standard disclosure, the court may make a variety of orders including issue-based disclosure and specific disclosure if a party is concerned that a relevant document or class of documents has not been disclosed.

## Privileged documents

Not all disclosable documents are available for inspection. Privileged communications include documents which are directly relevant but are not disclosable due to an exception such as litigation privilege or legal professional privilege. Litigation privilege protects any documents or communications between a lawyer and their client or a third party that were created for the dominant purpose of preparing for existing or anticipated litigation. Legal advice privilege protects documents or communications between the lawyer and client where the dominant purpose is to provide legal advice. Other common exceptions include without prejudice privilege, covering communications created for the purpose of settlement of the dispute, or common interest privilege, covering documents that are disclosed to a third party with a common interest in the subject matter of the privileged document, or in litigation in connection with which the document was created.

## Failure to give disclosure

The disclosure obligation requires parties to preserve and not destroy or delete any documents from when litigation is contemplated until the proceedings are concluded. The disclosure duty is ongoing throughout the proceedings. This means that if documents not available during the initial disclosure process are found later, they must still be disclosed.

Parties may not rely on documents which have not been disclosed. There are potentially serious consequences for a failure to comply with disclosure obligations, including the party's claim or defence being struck out and potentially judgment being entered against them. The deliberate withholding or destruction of disclosable documents could even lead to a finding that a party is in contempt of court.

## Pre-action disclosure and Norwich Pharmacal orders

There is no formal procedure in the Eastern Caribbean Supreme Court Civil Procedure Rules, applicable in the BVI, for obtaining pre-action disclosure from a defendant.

To obtain documents and information before commencing proceedings requires an application to the court, often for a Norwich Pharmacal Order, whereby innocent third parties who have become 'mixed up' in the wrongdoing may be able to provide information such as the identity of the wrongdoer, the location of assets or other information required to bring the claim. This is the subject of a separate guide: [Norwich Pharmacal relief – obtaining information relating to a BVI company from its registered agent](#).

## Contacts

A full list of contacts specialising in Litigation and Dispute Resolution can be found [here](#).