CIVIL PROCEDURE NEWS

Issue 10/2017 01 December 2017

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In Brief

Cases

■ **Re W (A Child) (Care Proceedings: Non-Party Appeal)** [2016] EWCA Civ 1140; [2017] 1 W.L.R. 2415, 17 November 2016. (Sir James Munby PFD, McFarlane and Christopher Clarke LJJ)

Appeal—whether witness an appellant—whether necessary to appeal against reasoned judgment

European Convention on Human Rights, arts 6 and 8; Human Rights Act 1998, ss.3 and 6; CPR r.52.1(3)(d); FPR rr.12.3(3), r.12.3(4). In child care proceedings following a fact-finding hearing the judge made highly critical comments concerning two witnesses in the judgment. The criticisms had not been put to the witnesses during the hearing, nor had the possibility of such adverse comment been raised with them by the judge during the hearing. They first became aware of them when a draft judgment was circulated and they, along with the parties, were asked for comment. None of the parties sought to appeal from the judgment. Due to the nature of the criticism the witnesses, one a police officer, the other a social worker, sought to appeal from the decision. Two procedural questions arose: first, as witnesses could they appeal from the decision; and secondly, could they appeal when they sought to challenge findings in the judgment rather than the order made by the judge. **Held**, on the first issue, it was well-established that the definition of *"appellant"* in CPR r.52.1(3)(d) was a broad one that could encompass non-parties to proceedings; see ***George Wimpey UK Ltd v Tewkesbury Borough Council*** (2008). If necessary therefore it would be possible to rely on that principle to enable the witnesses in the present case to appeal. It was however unnecessary to do so because the witnesses had been invited to make submissions on the draft judgment and this was sufficient to render them *"additional parties"* for the purposes of Family Procedure Rules r.12.3(3) and r.12.3(4). They could thus appeal as parties to the proceedings. Alternatively, and additionally to the non-party jurisdiction confirmed in ***George Wimpey UK Ltd v Tewkesbury Borough Council*** (2008), the witnesses could also if necessary have relied upon s.3 of the Human Rights Act 1998 to secure their status as appellants. This was the case because the criticism in the judgment engaged their art.8 rights under the European Convention on Human Rights. As a Convention right was engaged it was necessary to read down any relevant regulation and court rules, including CPR r.52.1(3)(d), to provide the witnesses with a right of appeal. On the second issue, while the general rule was that appeals were from orders not from reasoned judgments, there was in the present case no need to determine whether the appellants sought to appeal from an order or whether the basis of their appeal was an impermissible challenge to the judge's reasoning. Due to the fact that in the present case neither the possibility of criticism nor the criticism itself had been put to the witnesses prior to the circulation of the draft judgment they had not been afforded a fair process, as guaranteed at common law and under art.6 of the Convention i.e., they had not been given proper notice of the criticism to be made of them or a proper opportunity to challenge the criticism. Given that, the court had arguably acted unlawfully contrary to s.6(1) of the 1998 Act and the witnesses could therefore properly appeal in order to assert and have determined the question of whether the court had in fact acted unlawfully. Given this it was thus unnecessary to determine whether the challenge was to the judgment or its reasoning. ***Compagnie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd (No. 3)*** [2002] EWCA Civ 1142; [2003] 1 W.L.R. 307, CA; ***George Wimpey UK Ltd v Tewkesbury Borough Council*** [2008] EWCA Civ 12; [2008] 1 W.L.R. 1649, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at paras 52.0.6, 52.1.3.)

■ **Grenda Investments Ltd v Barton** [2017] EWHC 2372 (Comm), 20 September 2017, unrep. (Picken J)

Summary judgment—approach to costs

CPR Pt 24, PD24 para.9.2. Applications to strike out proceedings as an abuse of process and for summary judgment by the defendant were both dismissed: see ***Grenda Investments Ltd v Barton*** [2017] EWHC 2371 (Comm). The question of costs arising from the failed strike out application were dealt with straightforwardly. The defendant, who brought the strike out application, was ordered to pay the costs of that application. The question of the costs arising from the claimant's summary judgment application was however considered to be *"more nuanced"*. Moreover, it was noted that this was an area on which there appeared to be no guidance as to the approach to take. **Held**, the judge made a split order: first, he awarded the claimant its costs from issue of the application until June 2017. This was justified, notwithstanding the application failed, due to the fact that the defendant's failure to provide an appropriate answer to a request for further information made in respect of the defence underpinned the claimant's application. The defendant's conduct thus justified the adverse costs award notwithstanding the fact it succeeded in defending the summary judgment application; secondly, following the provision of further information concerning the defence in June 2017 the situation changed, a different approach to costs was required. In the absence of guidance as to the

proper approach to take when a summary judgment application has failed, the court had *"to approach matters doing what I consider to be the fair and just thing in the exercise of my discretion."* On the facts of the present application, that meant that the costs of the application should be the defendant's costs in the case. This would be the fair and just approach, as it would enable the defendant to recover his costs if his defence, which would be examined at trial, ultimately succeeded, but if he does not neither he nor the claimant will recover costs of the application. (See ***Civil Procedure 2017*** Vol.1 at para.24.6.7.)

- **R. (Network Rail Infrastructure Ltd) v The Secretary of State for the Environment, Food & Rural Affairs** [2017] EWHC 2259 (Admin), 8 September 2017, unrep. (Holgate J)

Length of skeleton arguments—extent of bundles

CPR rr.1.1, 1.3. The claimant sought judicial review of a decision taken by an inspector on behalf of the defendant, concerning a stopping up of a public path. In the course of his judgment Holgate J made a number of critical comments concerning the manner in which the claim had been dealt with at trial. He did so in order to provide guidance for future litigants; to draw attention to unacceptable litigation practice. In the present case, and contrary to clear authority in ***R. (Newsmith Stainless Ltd) v Secretary of State for Environment, Transport and the Regions*** (2001), there were six volumes of bundles, of approximately 2,000 pages of

> *"'largely irrelevant material'. Additionally, the claimant's skeleton argument was 'long, diffuse and often confused. It also lacked proper cross-referencing to those pages in the bundle which were being relied upon by the Claimant. The skeleton gave little help to the court."*

A core bundle was provided prior to the hearing of no more than 250 pages. Only 5–6 pages outside that core bundle were referred to at the hearing. The simple point on which the claimant succeeded was only alluded to in its skeleton argument. Parties were reminded once more that the provision of such bundles and prolix, poorly drafted skeletons is contrary to the overriding objective and the duty imposed on parties to assist the court in furthering it. It causes the court, contrary to CPR r.1.1(2)(e), to expend a disproportionate amount of time and its limited resources dealing with such matters, to the detriment of *"other litigants waiting for their matters to be dealt with."* It was noted that the court has sufficient powers to deal with such matters in future i.e., refusing to accept such skeletons and bundles, to direct that core bundles only will be accepted or to direct specific limits on the length of skeleton arguments, imposing cost sanctions on parties who do not conduct themselves appropriately through making them bear the costs of *"inappropriate conduct of litigation."* ***R. (Newsmith Stainless Ltd) v Secretary of State for Environment, Transport and the Regions*** [2001] EWHC Admin 74; [2017] P.T.S.R. 1126, Admin, ref'd to.

- **Merit Holdings Ltd v Michael J Lonsdale Ltd** [2017] EWHC 2450 (TCC), 11 October 2017, unrep. (Jefford J)

Part 8 claim—guidance as to its proper use in adjudication proceedings and generally

CPR Pt.8. A claim arose from the construction of premises in London between a specialist contract and a mechanical services sub-contractor. A Pt 8 claim was commenced, in which the claimant sought a declaration concerning the correct interpretation of the contract between the two parties. In July 2016 the defendant gave notice, terminated the contract, and intimated that it would seek to recover costs from the claimant incurred due to it having to complete work that the claimant ought to have done under the contract. In September 2016, the claimant commenced an adjudication seeking recovery of a sums said to be due under to it under the contract. The adjudicator determined that the sums claimed were due. In January 2017, the claimant commenced a second adjudication in respect of further sums said to be due. In April 2017, the claimant commenced Pt 8 proceedings seeking a declaration as to the correct basis on which payment under the contract was to be calculated. **Held**, Jefford J refused to grant any declarations, and in doing so highlighted the need to ensure that Pt 8 proceedings are only used in appropriate circumstances. First, while Pt 8 proceedings can properly be used in respect of *"Adjudication Business"* per para.9 of the Technology and Construction Court Guide, it should not be assumed that such proceedings are properly to be used automatically. Not all adjudication business is suitable for the Pt 8 process. Parties should take care to follow the guidance set out in para.4.1 of the TCC Guide concerning when Pt 8 proceedings can properly be used. As that para. of the Guide puts it,

> *". . . the TCC will also hear any applications for declaratory relief arising out of the commencement of a disputed adjudication. Commonly, these will concern:*
>
> - *Disputes over the jurisdiction of an adjudicator. It can sometimes be appropriate to seek a declaration as to jurisdiction at the outset of an adjudication, rather than both parties incurring considerable costs in the adjudication itself, only for the jurisdiction point to emerge again at the enforcement hearing.*

- *Disputes over whether there is a construction contract within the meaning of the Act (and, in older contracts, whether there was a written contract between the parties).*
- *Disputes over the permissible scope of the adjudication, and, in particular, whether the matters which the claimant seeks to raise in the adjudication are the subject of a pre-existing dispute between the parties."*

More importantly than this, Jefford J emphasised that parties ought not to use the Pt 8 process where the question they seek to resolve involves the determination of a *"substantial dispute of fact"*. Part 8 is specifically designed to resolve matters that do not involve such factual disputes, and where the question which the court is to determine *"should be framed with some degree of precision and/or be capable of a precise answer"*: CPR rr.8.1(2)(a), 8.2. If parties did not adhere to the guidance, and to the limitations inherent in the application of the Pt 8 process, there was—as the present case, due to the nature of the issue for determination and an absence of factual information relevant to resolving it, and others in the TCC had demonstrated—

> *"a real risk of the Part 8 procedure being used too liberally and inappropriately with the risks both of prejudice to one or other of the parties in the presentation of their case and of the court being asked to reach ill-formulated and ill-informed decisions."*

Such improper use not only caused prejudice to the parties, but evidently—albeit this was unstated—it would cause prejudice to other court users through the improper use of court resources contrary to CPR r.1.1(2)(e). (See ***Civil Procedure 2017*** Vol.2 at para.2C-44.)

■ **Tapster v Nursing and Midwifery Council** [2017] EWHC 2544 (Admin), 13 October 2017, unrep. (Andrews J)

Re-opening High Court appeal—when further appeal pending

CPR r.52.30. A nurse was subject to proceedings for professional misconduct before the Nursing and Midwifery Council. Adverse findings were made and sanctions imposed. A statutory appeal was thereafter pursued by the nurse before the High Court. The appeal was successful as to sanction. The challenge to the finding of liability was not however ruled upon. A question arose whether the nurse could seek to re-open the statutory appeal in order for the question of liability to be considered, or whether any challenge to the decision on the statutory appeal ought properly to be determined by the Court of Appeal. **Held**, the power to re-open an appeal is one that can only be used exceptionally. It was not appropriate to exercise it in the present case. The proper route to challenge the decision on the statutory appeal was via an application for permission to appeal to the Court of Appeal. This was the case as the power to re-open was a *"remedy of last resort"*, one that could not properly be used where there was, and as an alternative to re-opening, a further appeal process available. In other words, the availability of an appeal route to the Court of Appeal was an effective alternative remedy (CPR r.52.30(1)(c)). (See ***Civil Procedure 2017*** Vol.1 at para.52.30.2.)

■ **Revill v Damiani [2017] EWHC 2630 (QB)**, 27 October 2017, unrep. (Dingemans J)

Whether requirement that compromise entered into by protected party not binding unless approved by the court is discriminatory

European Convention on Human Rights, arts 6, 14, and art.1 of Protocol 1; CPR r.21.10. The claimant suffered serious personal injury arising from a road traffic accident whilst riding a motorcycle. Consequently, he suffered a brain injury which meant that he lacked capacity to conduct litigation on his own behalf. He was thus a protected party for the purposes of CPR Pt 21. Liability was admitted. Following a joint settlement meeting, a memorandum was agreed setting out a lump sum payment, including calculations for future losses based on the 2.5% discount rate. At the time the memorandum was agreed, it was anticipated that the Lord Chancellor was, under s.1 of the Damages Act 1996, shortly to vary the discount rate. On 27 February 2017, just prior to the time when the claimant's solicitor was to issue an application to the court seeking its approval of the settlement, the discount rate was reduced from 2.5% to minus 0.75%. This meant that the amount due to the claimant under the settlement had increased substantially. The defendant thereafter withdrew his agreement to the settlement. It was common ground that until the compromise had been approved by the court it could be withdrawn. The question was whether the requirement for court approval under CPR r.21.10 breached the claimant's rights guaranteed under the European Convention on Human Rights as it unlawfully discriminated against him as a protected party. **Held**, if there was unlawful discrimination it arose under a combination of arts 6 and 14 of the Convention. As the claim for damages was a chose in action it did not fall within the ambit of art.1, protocol 1 of the Convention and did not therefore engage art. 14 of the Convention. It was common ground that CPR r.21.10 was discriminatory. It was also common ground that the discrimination served a legitimate aim viz., the four purposes identified at ***Civil Procedure 2017*** Vol.

1 para.21.10.1. The question thus was whether CPR r.21.10 was a proportionate means to secure its legitimate aim. On that point, Dingemans J held that that it was a proportionate means to secure its aim, and as such CP r.21.10 was not incompatible with the Human Rights Act 1998 and furthermore the defendant had been properly entitled to withdraw from the agreement: no declaration to the effect that the agreement was binding could properly be made. The rule was proportionate as its aims required there to be a court-approval scheme to provide adequate protection of protected parties from other parties and their own lawyers. Furthermore, (i) the approach taken by the Civil Procedure Rule Committee, which differed from that in family proceedings where such settlements were binding pending court approval (***Smallman v Smallman*** (1972)), was within its discretion; (ii) the rule is long-established thus all practitioners know and understand the basis on which they enter negotiations; (iii) providing a basis for all parties to withdraw from a compromise prior to approval secures equality of arms requiring permission to withdraw from an agreement as the approach in family proceedings requires can create legal uncertainty, unnecessary cost and concern for the parties; (iv) finally, the rule forms part of the court's case management powers, which enable the court to secure the proportionate and efficient management of protected parties' claims *"thereby securing the good administration of justice and protecting the relevant rights"*. ***Dietz v Lennig Chemicals Limited*** [1969] 1 A.C. 170, HL; ***Smallman v Smallman*** [1972] Fam. 25, CA; ***Drinkall v Whitwood*** [2003] EWCA Civ 1547; [2004] 1 W.L.R. 462, CA; ***Dunhill v Burgin (Nos. 1 and 2)*** [2014] UKSC 18; [2014] 1 W.L.R. 933, UKSC, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at paras 52.0.6, 52.1.3.)

■ **Bates v Post Office Ltd** [2017] EWHC 2844 (QB), 10 November 2017, unrep. (Fraser J)

Group Litigation Order—effective case management—cost sanctions

CPR rr.1.1(2)(d), 1.4(1), 1.4(g), 1.4(2)(l), Pt 19. Group litigation, with over 500 claimants, was brought against the Post Office Ltd. Problems arose concerning the fixing of hearings. In April 2017 case management directions were made requiring the 1st case management conference (CMC) to take place on 19 October 2017. The court was informed by clerks to the claimants' leading counsel that that date was one on which they were unavailable. As Fraser J put it (at para.9):

> *"This response was referred immediately to me, and appeared to be a clear case of the tail wagging the dog. It is notable that judicial availability, and the dates ordered both in the GLO and in Directions Order No.1, were considered such a secondary consideration to counsels' diaries"*

Fraser J required a formal application to move the date of the 19 October 2017 CMC to be made. Such application had to be supported by a witness statement. The direction was *"wholly ignored"*. The sole justification, given by letter from leading counsel, for moving the CMC hearing date was counsel's availability. Fraser J directed that the CMC would not take place at counsel's convenience, as such an approach would lead to *"delay at every step of the litigation"*. Additionally, the general conduct of the litigation by both parties was that no substantive hearing should take place, or be fixed, before autumn 2018; an approach redolent of the pre-CPR party-controlled conduct of litigation. As Fraser J described it (at para.12), this was an approach which if described *"as leisurely, dilatory and unacceptable in the modern judicial system would be a [description of] considerable understatement."* In the event at the CMC in October 2017, a substantive hearing was directed to take place for 20 days from 5 November 2018. Subsequently the defendant's leading counsel informed the court that he was unavailable during this time due to a prior professional commitment. He requested the trial date be moved to 2019. The request was not opposed. The CMC was restored to consider this issue. **Held**, the request was declined. Notwithstanding the fact that the defendant's leading counsel was already engaged in complicated and extremely high value litigation, there were two reasons justifying that decision: first, the need to ensure the effective administration of justice in the immediate case; and secondly, the adverse effect that granting the application may have on litigation generally. If hearings were fixed around the availability of counsel, case and trial timetables would inevitably move out of the control of the court. The case timetable would in effect be managed by the parties, and without reference to the need to ensure the court timetable was managed efficiently and effectively both for the immediate litigants and other court users. Not only would it create the perception of unfair treatment by allowing one litigant to effectively dictate the case management timetable, if would also give rise to a perception of unfairness if the other litigant later asked for the timetable to be varied in its favour and that application was refused. Acceding to such requests from both parties would in effect see case management revert to the pre-CPR position, thus undoing the benefits derived from effective court-based case management. Such an approach would simply lead to the incipient growth of litigation delay, and its attendant costs. The better approach, particularly in group litigation, is to ensure that hearings are *"fixed well in advance"* in order to enable counsel to plan their diaries accordingly. Such an approach was consistently with the overriding objective and the court's duty to manage claims expeditiously and fairly. Furthermore, Fraser J noted that parties were under a duty to assist the court in furthering the overriding objective; that duty was particularly acute in group litigation. Failure to act accordingly,

as was manifest in the present case through various failures to file documents in time, through refusals to disclose relevant documents, and threats of pointless satellite litigation, would if not corrected be visited by *"draconian"* costs sanctions.

- **BNM v MGN Ltd [2017] EWCA Civ 1767**, 7 November 2017, unrep. (Sir Terence Etherton MR, Longmore and Irwin LJJ)

Costs—Proportionality test

CPR r.44.4(2) (pre-April 2013), CPR rr.44.3(2), 44.3(5) (post-April 2013). Appeal from a final costs certificate, under which the appellant was ordered to pay the respondent's costs arising from proceedings for the misuse of confidential information. The claim had been funded via a conditional fee agreement and an ATE insurance policy, which fell under the definition of *"pre-commencement funding arrangement"* in CPR Pt 38 (post-2013). The question was whether, in such circumstances, the costs were to be assessed according to the pre-2013 proportionality test or the post-2013 proportionality test. It was also anticipated that should the answer be the post-2013 test, then guidance might finally be given as to how the post-2013 proportionality test should be applied. **Held**, as a pre-commencement funding arrangement, the appropriate method of assessment was to apply the pre-2013 proportionality test. As such no guidance, obiter or otherwise, was given as to the approach to take to the post-2013 proportionality test. (See ***Civil Procedure 2017*** Vol.1 at paras 52.0.6, 52.1.3.)

- **Glencore Agriculture BV v Conqueror Holdings Ltd** [2017] EWHC 2893 (Comm), 16 November 2017, unrep. (Popplewell J)

Service by email—authority to accept service by company employee—arbitration

Arbitration Act 1996, ss.17, 67, 68, 79, 80(5). Arbitration proceedings resulted in a final arbitral award being made against the claimant in September 2016. The claimant, however, was unaware of the arbitration proceedings until it received the award by post. All previous documents relating to the arbitration, including the notice of arbitration, had been sent, via email, to an individual employee of the claimant who, by September 2016, had left the company. The question for the court was whether service by email of the notice of arbitration to the employee constituted valid service (see s.17 of the Arbitration Act 1996). **Held**, service was not validly effected. The employee was a *"relatively junior employee"*. While the service provisions within the Arbitration Act 1996, s.76, where less circumscribed and prescriptive than under CPR Pt 6, and email is a valid means of effecting service without the need to obtain prior agreement to its use, this applied where email service was effected to a generic company email address, where it would be expected that the email would be forwarded to the relevant person within the organisation. The same could not be said where service by email was purported to be effected by service on an individual employee's email address. In such circumstances the test was the same as for service by post on a named individual (see para.26):

> *"Whether it constitutes good service if directed to an individual's email address must depend upon the particular role which the named individual plays or is held out as playing within the organisation."*

The answer to that question was to determine which individuals, within the organisation, had the authority to accept service such that service upon them was service upon the company: ***Meridian Global Funds Management Asia Limited v The Securities Commission*** (1995). That was to be determined by the application of agency principles i.e., did the employee have either express or implied actual authority or ostensible authority to accept service on behalf of the company. On the facts of this case, there was no basis to conclude that the employee had any such authority to accept service, and thus service by email could not amount to valid service in this case and could not amount to effective service of the notice of commencement of the arbitration. ***Tanham v Nicholson*** (1872) L.R. 5 H.L. 561, HL; ***Hely-Hutchinson v Brayhead Ltd*** [1968] 1 Q.B. 549, CA; ***Meridian Global Funds Management Asia Limited v The Securities Commission*** [1995] 2 A.C. 500, PC; ***Bernuth Lines Ltd v High Seas Shipping Ltd (The Eastern Navigator)*** [2006] 1 Lloyd's Reports 537, Comm; ***Jetivia SA v Bilta (UK) Ltd*** [2016] A.C. 1, UKSC; ***Sino Channel Asia Ltd v Dana Shipping and Trading PTE Singapore & Anr*** [2017] EWCA Civ 1703, unrep., CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at paras 52.0.6, 52.1.3.)

Practice Updates

PRACTICE DIRECTIONS

■ **CPR PRACTICE DIRECTION—92nd Update**, in force on the **21 November 2017.**

The update contains a number of amendments consequent upon amendments to the Civil Procedure Rules contained in Civil Procedure (Amendment Rules No.2) 2017 (SI 2017/889) (see ***Civil Procedure News*** No.8 of 2017). It ought properly to have come into force at the same time as that statutory instrument, and its delay has thus contributed to a lack of clarity and certainty in the law for the period in which it has been delayed. It amends PD2C, PD4 (Forms), PD5B, PD51N, PD51O, PD59, PD62, PD78 and the EU Competition Law Practice Direction to replace references to Mercantile in respect of Mercantile Court and Mercantile judges with references to the Circuit Commercial Court and Circuit Commercial Court judges.

It makes provision to replace the existing para.5.1 in PD47 (Procedure for Detailed Assessment of Costs and Default Provisions) with new paras 5.1, 5.A1 to 5.A4 and makes consequent amendments to PD47 paras 17.8–17.11 and 18.3; the amendments render use of the electronic spreadsheet format for bills of costs mandatory in the circumstances provided for where:

> *"(a) the case is a Part 7 multi-track claim, except—*
>
> *(i) for cases in which the proceedings are subject to fixed costs or scale costs;*
>
> *(ii) cases in which the receiving party is unrepresented; or*
>
> *(iii) where the court has otherwise ordered; and*
>
> *(b) the bills of costs relate to costs recoverable between the parties for work undertaken after 6 April 2018 ('the Transition Date')."*

It provides, in new para.5.A1 a model electronic bill of costs and links to an online spreadsheet format.

The Update also omits PD51L (New Bill of Costs Pilot Scheme) from the CPR. It further makes minor amendments to PD 52C, to substitute references to the Legal Aid Agency for references to the Legal Services Commission, and to PD52D to substitute a reference to the Pensions Act 2003 to the Pensions Act 2004 and to substitute a new para.27A(1)(2)(b), which makes reference to s.32(1) of the Education (Wales) Act 2014. Minor amendments are made to PD78 (European Procedures) to correct a reference to art.5 of the European Small Claims Procedure Regulation in para.17(1), and to provide a link to both the amended and previous versions of the Regulation.

Finally, and most substantively the 92nd Update introduces a new PD (Business and Property Courts), which creates the new Business and Property Courts. It further amends PD7A (How to Start Proceedings—The Claim Form) so as to make provision for commencing claims in the Business and Property Courts via a new para.2.5, which provides as follows:

> *"2.5 A claim relating to Business and Property work (which includes any of the matters specified in paragraph 1 of Schedule 1 to the Senior Courts Act 1981 and which includes any work under the jurisdiction of the Business and Property Courts, may, subject to any enactment, rule or practice direction, be dealt with in the High Court or in the County Court. The claim form should, if issued in the High Court, be marked in the top right hand corner 'Business and Property Courts' and, if issued in the County Court, be marked 'Business and Property work' (save, in the County Court, for those areas listed in paragraph 4.2 of the Business and Property Courts Practice Direction as exceptions).*
>
> *(For the equity jurisdiction of the County Court, see section 23 of the County Courts Act 1984.)"*

The new PD (Business and Property Courts) provides as follows:

- while working within the current statutory and procedural framework, the Business and Property Courts of England and Wales are constituted of the High Court's Chancery Division, the Commercial and Circuit Commercial Courts, the Admiralty Court and the TCC, all of which are based in the Rolls Building in London (see PD paras 1.1 and 1.5). Where, however, there is any inconsistency between the provisions of this PD and other PDs, the former prevail (see PD para.1.6). Reference to the existing Court Guides remains essential (see PD para.1.7);
- The Chancery Division District Registries, the TCC and Circuit Commercial Courts based in Birmingham, Bristol, Cardiff, Leeds and Manchester. The regional courts are referred to as "BPCs District Registries" within the PD and

are properly to be known as Business and Property Courts in Birmingham, Bristol etc., apart from the court in Cardiff, which is to be known as the Business and Property Courts in Wales (see PD paras 1.1–1.2);

- Work within the BPCs is to be dealt with in specific courts and lists, which are then to be divided into further, specialist, sub-lists e.g., there will be a Business List, which is divided into a Pensions sub-list and a Financial Services and Regulatory sub-list (see PD paras 1.3–1.4). Claimants will need to ensure that they commence proceedings at the appropriate BPC court location and by reference to the appropriate list and sub-list, and should do so having considered the need for any specialist judicial expertise (see PD paras 2.2–2.3);
- Provision is made for claims issued in London to be heard in a BPC District Registry and for Commercial Court judges to hears claims issued in the Circuit Commercial Court. Provision is also made for certain claims e.g., Revenue List, EU Competition claims, Intellectual Property List, issued in BPC District Registries to be managed or tried in London (see PD paras 2.4–2.5);
- Further provision is made for the application of criteria to be considered where proceedings are to be transferred between the BPC in London and BPC District Registries and also to the specific County Court centres (see PD paras 3.1–3.3 and paras 4.1–4.4);
- In BPC District Registries provision is to be made to create specific *"appeal slots"* for block permission to appeal applications and appeals which can be heard by *Group A judges "(as defined in PD52A)"*. The Practice Direction does not amend PD52A to define what a Group A judge might be. This was perhaps a drafting error in the Update. It is however rectified via the 93rd Update, see below (see PD paras 5.1–5.2).

CPR PRACTICE DIRECTION – 93rd Update, in force on the **22 November 2017.**

The update contains a number of minor amendments to update various Practice Directions to take account of changes to County Court hearing centres (PD2C) and update court addresses (PD25A, PD54A, PD81 and PD—Devolution Issues and Crown Office Applications in Wales (English)). It also

- amends PD3E— to substitute a new para.7.2 dealing with the recoverable costs for completing costs Precedent H. The new para.7.2 is as follows:

  "7.2 Save in exceptional circumstances—

  (a) the recoverable costs of initially completing Precedent H shall not exceed the higher of £1,000 or 1% of the total of the incurred costs (as agreed or allowed on assessment) and the budgeted costs (agreed or approved); and

  (b) all other recoverable costs of the budgeting and costs management process shall not exceed 2% of the total of the incurred costs (as agreed or allowed on assessment) and the budgeted (agreed or approved) costs."
- omits para.22.10 of PD8A (the requirement for a party, when filing a witness statement, to file a further copy of the witness statement, including exhibits, for the use of the court);
- amends PD8C para.3.1 to provide for a claimant to file one, rather than two copies, of a paginated and indexed bundle in statutory reviews of planning matters;
- amends PD35 to substitute new para 11.1—11.4, concerning the approach to be taken to the use of concurrent expert evidence (hot-tubbing). The new provisions provide for the following:

  "11.1 At any stage in the proceedings the court may direct that some or all of the evidence of experts from like disciplines shall be given concurrently. The procedure set out in paragraph 11.4 shall apply in respect of any part of the evidence which is to be given concurrently.

  11.2 To the extent that the expert evidence is not to be given concurrently, the court may direct the evidence to be given in any appropriate manner. This may include a direction for the experts from like disciplines to give their evidence and be cross-examined on an issue-by-issue basis, so that each party calls its expert or experts to give evidence in relation to a particular issue, followed by the other parties calling their expert or experts to give evidence in relation to that issue (and so on for each of the expert issues which are to be addressed in this manner).

  11.3 The court may set an agenda for the taking of expert evidence concurrently or on an issue-by-issue basis, or may direct that the parties agree such an agenda subject to the approval of the court. In either case, the agenda should be based upon the areas of disagreement identified in the experts' joint statements made pursuant to rule 35.12.

11.4 Where expert evidence is to be given concurrently, then (after the relevant experts have each taken the oath or affirmed) in relation to each issue on the agenda, and subject to the judge's discretion to modify the procedure—

(1) the judge will initiate the discussion by asking the experts, in turn, for their views in relation to the issues on the agenda. Once an expert has expressed a view the judge may ask questions about it. At one or more appropriate stages when questioning a particular expert, the judge may invite the other expert to comment or to ask that expert's own questions of the first expert;

(2) after the process set out in (1) has been completed for any issue (or all issues), the judge will invite the parties' representatives to ask questions of the experts. Such questioning should be directed towards: (a) testing the correctness of an expert's view; (b) seeking clarification of an expert's view; or (c) eliciting evidence on any issue (or on any aspect of an issue) which has been omitted from consideration during the process set out in (1); and

(3) after the process set out in (2) has been completed in relation to any issue (or all issues), the judge may summarise the experts' different positions on the issue and ask them to confirm or correct that summary."

- amends PD51M to extend the duration of the Financial Markets Test Case Pilot scheme until 30 September 2020 and substitute a new para.2.1 concerning the nature of a qualifying claim under the Scheme;
- amends PD510 to effect, in addition to typographical amendments, the following changes to the Electronic Working Pilot Scheme:
  - extends the scheme until 6 April 2018, it having previously been specified to come to an end on 16 November 2017;
  - updates the reference in paragraph 1.1(2) from the Insolvency Rules 1986 to the Insolvency Rules (England and Wales) 2016;
  - makes various amendments concerning the Electronic Working Scheme: for instance it makes provision to render the use of electronic working mandatory for those who are legally represented and optional for those who are not legally represented. As such it renders mandatory use of CE-File, which was intended to come into effect on 25 April 2017, and does so as from 1 October 2017; for filing and loading documents under the Electronic Working scheme or for filing during times when the scheme is off-line (down-time); for the filing of confidential documents via the Electronic Working scheme; the applicability of the power to cure procedural error that occurs whilst using the Electronic Working scheme under CPR r.3.10(b); payments, and fee remission, made whilst using the scheme; and the calculation of time periods whilst using the scheme;
- amends PD52A to provide detailed provisions concerning, amongst other things, which judges may hear applications for permission to appeal and appeals from other judges. This is intended to provide the means to ensure that judges dealing with such matters, particularly given the increase in judicial deployment within and between courts and within-court appeals, are of a senior level to those from whom the appeal lies;
- amends PD52B to substitute a new para.2.2 concerning appeal centres in the County Court and to insert a new para.2.3 providing for the transfer of appeals between appeal centres by direction and upon application. It further provides, also by substitution, a new Table B setting out the circuit appeal centres;
- amends PD64B to omit the second sentence of para.7.7(4), concerning what is to be done where no consultation with pension trust beneficiaries; and
- purports to amend PD66, albeit it contains no text setting out what the amendment might be. As the Civil Procedure Rules website has published, in addition to the 92nd and 93rd Updates, the Crown Proceedings Act 1947, list of government departments authorised for service, it may be the case that the proposed amendment to PD66 was to its Annex 2. This issue will no doubt be clarified in the future.

PRACTICE GUIDANCE

Pre-Action Protocol for Judicial Review

As from **27 November 2017** Annex A, section 2 of the Protocol is amended such that the address to which letters before claim in Immigration, Asylum or Nationality cases should be sent is: Litigation Allocation Unit, 6 New Square, Bedfont Lakes, Feltham, Middlesex, TW14 8HA.

In Detail

REVIEW OF WITNESS EVIDENCE ON APPEAL – CHEN v NG (BRITISH VIRGIN ISLANDS) [2017] UKPC 27, 17 AUGUST 2017

The trial process is, as Lord Macmillan put it, "*an imperfect instrument*" (***Thomas v Thomas*** [1947] A.C. 484, HL, at 490). As he went on to state, the court may in some cases be "*left with a doubt whether with the imperfect means at its disposal it has achieved perfect justice, especially where the evidence is widely conflicting*". While this concern was identified in the context of a matrimonial dispute, the point is one that can be applied more widely to claims where there is a significant conflict of factual evidence. Such doubts on the part of the court may go further for the parties, and give rise to appeals challenging factual findings made by a trial judge.

Rare though it may be for such appeals to succeed, as Clarke LJ discussed in ***Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)*** [2003] 1 W.L.R. 577 (CA), such challenges can and do succeed. The general approach to them is that set out by Clarke LJ in ***Assicurazioni Generali*** at paras 14-17 (as endorsed in ***Datec Electronics Holdings Ltd v United Parcels Services Ltd*** [2007] UKHL 23; [2007] W.L.R. 132 (HL) at para.46 and recently restated in ***The Mayor and Burgesses of the London Borough of Haringey v Ahmed & Ahmed*** [2017] EWCA Civ 1861 (CA)). Such challenges will only succeed where those findings were either unsupported by the evidence before the judge or that the decision subject to challenge was one that no reasonable judge court have reached i.e., the trial judge's assessment of the evidence was wrong ***(Assicurazioni Generali SpA*** at paras 12-17, 197; ***The Mayor and Burgesses of the London Borough of Haringey*** at paras 29-31).

In ***Chen v Ng (British Virgin Islands)*** [2017] UKPC 27, the Privy Council, considered the approach to such appeals where the was a challenge to the trial judge's assessment of witness evidence when it was based on matters not put to the witness during the trial.

Factual Background

The dispute in ***Chen v Ng (British Virgin Islands)*** (2017) concerned the ownership of certain shares in a company registered in the British Virgin Islands. The trial judge held that the shares were held, both legally and beneficially by, Chen. On appeal from that decision, the Eastern Caribbean Court of Appeal held that Chen in fact held the shares on trust for Ng. Chen appealed from that decision to the Privy Council, which allowed the appeal and remitted the claim for a retrial. One of the issues on the appeal concerned the trial judge's approach to the Ng's evidence. The judge rejected it on two grounds: first, that it provided an explanation of the transfer of shares by him to Chen that "would have been "self-evidently futile"; and secondly, the arrangement for transferring the shares to Chen was said to have involved a scheme which would have resulted in Ng obtaining a means to ensure the shares were re-transferred to him. These reasons for rejecting his evidence were noted by Lord Neuberger PSC and Lord Mance as not being "inherently objectionable." In reaching his decision to reject Ng's evidence the trial judge made findings concerning this credibility. He did so based on written material before the court and on his seeing Ng being examined and cross-examined for one and a half days. On the appeal before the Privy Council it was not suggested that the trial judge's basis for rejecting Ng's evidence was either unreasonable or unjustified. The basis of the appellate challenge was procedural: that the judge's basis for disbelieving Ng arose from matters that had not been put to Ng during the trial. The Privy Council agreed with the conclusion reached by the Eastern Caribbean Court of Appeal on this issue: it was wrong of the judge to base his conclusions concerning credibility on matters not put to Ng while he was giving evidence.

The Privy Council's Decision

The Privy Council, noted that the approach to appellate courts when considering a trial judge's conclusions on witness evidence was that they should only interfere with them if they could not be reasonably justified or explained: ***Thomas v Thomas*** [1947] A.C. 484, HL; ***McGraddie v McGraddie*** [2013] UKSC 58; [2013] 1 W.L.R. 2477, UKSC; ***Henderson v Foxworth Investments Ltd*** [2014] UKSC 41; [2014] 1 W.L.R. 2600, UKSC; ***Central Bank of Ecuador v Conticorp SA*** [2015] UKPC 11, PC. It did so without reference to either, but consistently with both, ***Assicurazioni Generali SpA*** or ***Datec Electronics Holdings***. The decision pre-dates the Court of Appeal (Civil Division)'s recent restatement of the test in ***The Mayor and Burgesses of the London Borough of Haringey v Ahmed & Ahmed*** (2017).

Turning to the specific question of the approach to take to findings as to credibility, the Privy Council noted the long-established general rule that witnesses should only be impeached as to their credibility having been given an opportunity to hear and respond to any challenge to the accuracy of their evidence: ***Browne v Dunn*** (1893) 6 R. 67, HL, as recently applied by the English and Welsh Court of Appeal in ***Markem Corpn v Zipher Ltd*** [2005] R.P.C. 31,

CA. As Lord Neuberger PSC and Lord Mance JSC put it, at para.53,

> *"... where it is not made clear during (or before) a trial that the evidence, or a significant aspect of the evidence, of a witness (especially if he is a party in the proceedings) is challenged as inaccurate, it is not appropriate, at least in the absence of further relevant facts, for the evidence then to be challenged in closing speeches or in the subsequent judgment."*

Challenges to evidence credibility or accuracy should therefore, generally, and in the absence of further relevant facts, be raised during cross-examination. That being said, the Privy Council also recognised, at para.52, that it is not always the case, due to the nature of the trial process that every such point may be raised during the trial, and given that,

> *"it is inevitable that there will be cases where a point which strikes the judge as a significant reason for disbelieving some evidence when he comes to give judgment, has not been put to the witness who gave it."*

When an appellate court therefore comes to assess a trial judge's rejection of witness evidence, where it is based on matters not put to the witness, it should bear that in mind. It should particularly approach the question (see paras 54-55) whether to uphold the trial judge's findings by considering

> *"[54] . . . whether the trial, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him.*
>
> *[55] At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds."*

Comment

This decision (along with the Court of Appeal's recent decision ***The Mayor and Burgesses of the London Borough of Haringey v Ahmed & Ahmed*** (2017) which restated the general approach to appeals challenging findings of fact) reiterates three fundamental points:

- First, it emphasises the importance for parties and the court to ensure that critical points, and particularly those going to credibility, are put to witnesses during the trial, and particularly during cross-examination. Notwithstanding the point that appellate courts should consider, when assessing challenges arising from points not put to witnesses during trial, the overall fairness of the trial, complacency is to be discouraged in order to promote procedural fairness; a point equally and forcefully articulated in the Court of Appeal's decision in ***Re W (A Child) (Care Proceedings: Non-Party Appeal)*** [2016] EWCA Civ 1140; [2017] 1 W.L.R. 2415 (CA) (noted above).
- Secondly, it highlights the difficulties appellants will face when mounting a challenge to a trial judge's findings of fact.
- And thirdly, it highlights a prior difficulty faced by appellants, or rather potential appellants. Given the difficulty in successfully challenging findings of fact, and particularly findings as to credibility, it will be equally and accordingly difficult to meet the "real prospect of success" test for permission to appeal. While ***Re W (A Child)***-type situations may provide a basis for meeting the second, "some other compelling reason" limb of the permission to appeal test. Such situations are however likely to be rare. As such putative appellants ought to approach the question of whether to seek permission to appeal from findings of fact with particular care and circumspection.

EDITOR: **Dr J. Sorabji**, UCL Judicial Institute; Principal Legal Adviser to the Lord Chief Justice and the Master of the Rolls
Published by Sweet & Maxwell Ltd, 5 Canada Square, Canary Wharf, London, E14 5AQ
ISSN 0958-9821

Typeset by Matthew Marley
Printed by Hobbs The Printers Ltd, Totton, Hampshire.

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