CIVIL PROCEDURE NEWS

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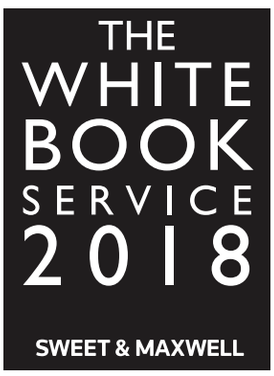

In Brief

Cases

Moylett v Geldof [2018] EWHC 893 (Ch), 14 March 2018, unrep. (Henry Carr J)

Expert report—admissibility

CPR Pt 35. Two objections were taken to an expert's report: first, that it contained opinions other than those of the expert whose report it was; and secondly, that it purposed to express an opinion on the "*ultimate question in the proceedings*". Henry Carr J noted that the proper approach was for the court not to spend time seeking to excise inadmissible comment by an expert from a report, but should rather leave it to the trial judge to read the report as a whole and, in doing so, only consider those parts of it that are admissible. As Thomas LJ put it in ***Secretary of State for Business Enterprise and Regulatory Reform v Aaron*** (2008) at para.117,

> *"It is my experience that many experts report views on matters on which it is for the court to make its decision and not for an expert to express a view. No modern or sensible management of a case requires putting the parties to the expense of excision; a judge simply ignores that which is inadmissible."*

Also see the guidance given by the Court of Appeal in ***Hoyle v Rogers*** (2014). While the opinions in the report were inadmissible, it was for the trial judge to determine whether to treat them as such, per Henry Carr J (at para.4),

> *"The ultimate message from that decision is that it is much preferable for the court, rather than picking through expert reports, seeking to excise individual sentences and engaging in an editing exercise, to allow the trial judge to consider the report in its entirety, assuming that it is genuine expert evidence, and to attach such weight as it sees fit at the trial to those passages in the report."*

On the second, ultimate issue, question, it was for the trial judge to determine the weight to be given to the expert's views on the subject. ***Secretary of State for Business Enterprise and Regulatory Reform v Aaron*** [2008] EWCA Civ 1146; [2009] Bus. L.R. 809, CA, ***Hoyle v Rogers*** [2014] EWCA Civ 257; [2015] Q.B. 265, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.2 at para.35.0.5.)

NPV v QEL [2018] EWHC 703 (QB), 28 March 2018, unrep. (Nicklin J)

Interim injunction application—service by text message

CPR PD 6A para.9.3(2), Pt 25. An interim non-disclosure and harassment injunction was granted on a without-notice basis. The order was made in proceedings where there was an allegation that the defendants were blackmailing the claimant. The proceedings were heard in private and the parties were anonymised. The court file was also sealed. The Order was made in terms that reflected the model order contained in ***Practice Guidance (Interim Non-disclosure Orders)*** [2012] 1 W.L.R. 1003. The specific point of note was that the Judge permitted service of the application to be effected by text message. This was permitted as it was the "only practical means" of service available to the claimant where personal service could not be effected and no other means of service were available. (See ***Civil Procedure 2018*** Vol.2 at para.2E-148.)

St Clair v King [2018] EWHC 682 (Ch), 28 March 2018, unrep. (Andrew Sutcliffe QC sitting as a deputy judge of the High Court)

Serious procedural irregularity in grant of summary judgment

CPR Pt 3.4, rr.24.2, 52.21(1)(b) and 52.21(3)(b). Proceedings were issued challenging the validity of a will. In January 2017, when the claimant was acting in person, an application to strike out was dealt with by the Master as an application for summary judgment. The Master held that the claim had no real prospect of success and struck it out. The claimant appealed. She did so on a number of grounds, one of which was that the Master's decision was unjust as rather than striking the claim out the application ought to have been adjourned to enable her to obtain legal advice in order to make a (further) application to amend her particulars of claim. This, it was argued, amounted to a serious procedural irregularity: CPR r.52.21(3)(b). **Held**, the appeal was allowed, and permission to amend the claim was granted. While the Master could properly have dealt with the defendant's strike out application at the hearing as a strike out application, and while there were certain circumstances where a court could properly exercise its discretion to treat such an application as including one for summary judgment, this was not an appropriate case for the Master to treat a strike out as including a summary judgment application. It was not because in cases where the court could properly exercise its discretion to do so there was no procedural unfairness to the claimant, as they were in a position

to properly deal with a summary judgment application. In the present case, there was no formal application by the defendant to have the strike out application treated as including a summary judgment application, nor did the Master expressly deal with the issue of whether it was fair to do so whilst setting aside the procedural requirements applicable to summary judgment applications at the hearing. The judge noted that at no time was it explained to the claimant that there was a distinction between strike out and summary judgment, nor was she given an opportunity to seek an adjournment. It was particularly important that, as a litigant-in-person, the claimant should have been given proper notice of the summary judgment application. Moreover, in dealing with the summary judgment application, the Master erred in conducting the application hearing in effect as a mini-trial contrary to the approach articulated in ***Three Rivers v Bank of England (No.3)*** (2003). In the circumstances, and due to the serious procedural irregularity before the Master the appeal proceeded as a re-hearing rather than a review: ***Asiansky Television v Bayer Roisin*** (2001), ***Asiansky Television v Bayer Roisin*** [2001] EWCA Civ 1792; [2002] C.P.L.R. 111, CA, ***Three Rivers DC v Bank of England (No.3)*** [2003] 2 A.C. 1, HL, ***S v Gloucestershire County Council*** [2001] Fam. 313, CA, ***Taylor v Midland Bank Trust Co Ltd*** [2002] W.T.L.R. 95, CA, ***Moroney v Anglo-European College of Chiropractice*** [2009] EWCA Civ 1560, unrep., CA, ***Serene Construction Ltd v Barclays Bank plc*** [2016] EWCA Civ 1379, unrep., CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at paras. 3.4.6 and 52.21.5.)

Gujra v Roath [2018] EWHC 854 (QB), 19 April 2018, unrep. (Martin Spencer J)

Strike out—summary judgment—dishonesty

CPR rr.3.4(2)(a), 24.2. A claim was brought for malicious prosecution and breach of duty of care arising from an alleged agreement between the parties under which the defendants were said to have consented to two cars which belonged to them being set on fire. In the present proceedings it was assumed that consent was given. The defendants defended the claim on the basis, amongst other things, that by asserting such an agreement the claimant could not have "known, realised or suspected that the purpose of doing so was the making of a fraudulent insurance claim". The Master struck out the claim and, in the alternative, granted summary judgment. He did so on the basis that the claimant must have known that the agreement was for an illegal purpose: to facilitate insurance fraud. In the present case a finding of turpitude was inevitable and the claimant ought to be barred. **Held**, Martin Spencer J dismissed an appeal from the Master's judgment. In so doing he noted that it was generally inappropriate for a court to strike out a claim where dishonesty was in issue, this was permissible where a finding of dishonesty was inevitable. Furthermore, even where dishonesty is in issue it was permissible for a court to grant summary judgment. As the judge explained it (at para.20),

> *"… where dishonesty is in issue, I would accept that it is generally not appropriate for a court or tribunal to make a finding or draw an inference in relation to it on a strike-out application, unless the evidence is so overwhelming that a finding of dishonesty is virtually inevitable, the premise is that either dishonesty must be explicitly in issue (as in Ivey) or the circumstances are such that they allow for a number of innocent explanations to refute what might otherwise be a prima facia appearance of dishonesty on the documents (as in Rouse). But where the facts which are not just admitted but are positively relied upon by the Claimant point so strongly towards an insurance fraud with which the Claimant was complicit, the court is entitled to draw an inference of dishonesty in the absence of a plausible explanation from the Claimant. Even where dishonesty or good faith is put in issue, there may still be grounds for claiming summary judgment. In this regard, I endorse the dictum of Gross J (as he then was) in Antonio Gramsci Shipping Corporation v Recoletos Ltd [2010] EWHC 1134 (Comm) where he said:*
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> > *'3. On the one hand, summary judgment is designed for plain cases – cases which are not fit for trial at all: Three Rivers DC v Bank of England (3) [2001] 2 All ER 513 per Lord Hope at [95]. That consideration weighs all the more heavily when the case involves allegations of serious fraud or dishonesty; generally, conclusions on such issues ought to be reached at trial, so that obvious caution ought to be exercised before giving summary judgment in a case of that nature: Wrexham Associated Football Club Ltd v Crucialmove Ltd [2006] EWCA Civ 237, esp. at (49–59). On the other hand, where it can be ascertained without the conduct of a mini-trial that there is no realistic prospect of a successful defence, then summary judgment will or may be appropriate and the Court should not be deterred from granting such relief simply because of the volume – or, in some cases, smokescreen – of documents. Moreover, if in all the circumstances, there is no real prospect of a Defendant successfully defending a claim, then, even though good faith, fraud or integrity are an issue, there is no longer a bar to giving summary judgment: Wrexham Associated Football Club.' (emphasis added)".*

Wrexham Associated Football Club Ltd v Crucialmove Ltd [2006] EWCA Civ 237, [2007] B.C.C. 139, CA, ***Antonio Gramsci Shipping Corporation v Recoletos Ltd*** [2010] EWHC 1134 (Comm), unrep, Comm, ***Joyce v O'Brien*** [2013] EWCA Civ 546; [2014] 1 W.L.R. 70, CA, ***Les Laboratoires Servier v Apotex Inc*** [2014] UKSC 55; [2015] A.C. 430, UKSC, ***Rouse v Aviva Insurance Ltd*** (2016) WL 00589978, unrep, (CC at Bradford), ***Patel v Mirza*** [2016] UKSC 42; [2017] A.C. 467, UKSC, ***Ivey v Genting Casinos (UK)*** [2017] UKSC 67, [2017] 3 W.L.R. 1212, UKSC, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at paras. 3.4.1 and following, and 24.2.3.)

■ **Halliburton Co v Chubb Bermuda Insurance Ltd** [2018] EWCA Civ 817, 19 April 2018, unrep. (Sir Geoffrey Vos, Chancellor of the High Court, Simon and Hamblen LJJ)

Arbitration—arbitrator—bias

Arbitration Act 1996, ss.24, 33. A dispute arose from the Deepwater Horizon oil rig disaster. The dispute was referred to arbitration under the terms of a Bermuda form insurance policy. London was the arbitral seat. The arbitral tribunal was to have three arbitrators. The parties could not agree on the identity of the third arbitrator and application was made to the High Court which resulted in Chubb's preferred choice of arbitrator being appointed. It subsequently came to light that the arbitrator had acted in previous arbitrations in which Chubb had been involved and in which overlapping issues with the present arbitration had arisen. A challenge to the arbitrator's appointment on the grounds of perceived bias was rejected by the High Court. **Held**, the Court of Appeal dismissed an appeal from that decision. In doing so it gave the following guidance on the application of the test for bias to arbitral appointments: (i) s.24 of the 1996 applies the common law test of apparent bias on arbitrators; (ii) while the fact that an arbitrator had "inside information and knowledge" through, for instance, acting in previous arbitrations that concerned the same or overlapping subject matter which might give rise to legitimate concerns that on its own that was not sufficient to justify a finding of apparent bias; (iii) under the common law a judge is required to "*disclose facts or circumstances which would or might provide the basis for a reasonable apprehension of lack of impartiality*" at the outset of proceedings. This is particularly important in borderline cases. This approach applies to arbitral tribunals as it does the judiciary. The test for apparent bias is the same for judges as it is arbitrators and the need for early disclosure of such information is as important for the latter as it is the former; (iv) in respect of what is disclosed, the Court of Appeal stated (at paras 70–71),

> *"[70] The disclosure required depends on what the arbitrator knows. The fact that disclosure is required of circumstances that might lead to a conclusion of apparent bias, emphasises that the question of what is to be disclosed is to be considered prospectively. The question of whether or not disclosure should be made, or should have been made, depends on the prevailing circumstances at that time. A decision as to disclosure based on a conclusion which might be drawn can only be made on the basis of the circumstances as they were then known to be and, in principle, a determination of whether or not such disclosure should have been made should similarly be so judged. In this regard, we disagree with the approach of the judge who considered that the issue of whether disclosure ought to have been made was to be determined retrospectively by reference to whether, having regard to all matters known at the later stage to the fair-minded and informed observer, the circumstance would lead to the conclusion that there was a real possibility of bias.*
>
> *[71] In summary, we consider the present position under English law to be that disclosure should be given of facts and circumstances known to the arbitrator which, in the language of section 24 of the Act, would or might give rise to justifiable doubts as to his impartiality. Under English law this means facts or circumstances which would or might lead the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased."*

Finally, the Court of Appeal considered the consequences of non-disclosure of such information. Where information that ought to have been disclosed had not been disclosed, the arbitrator "*will not have displayed the 'badge of impartiality' which he should have done*". This would be a factor to take into account in considering whether there was apparent bias. Furthermore, an inappropriate response to the suggestion that there ought to have been or should be disclosure could lead to or provide additional support for a finding of apparent bias. However, it went on to note that non-disclosure of something that ought to have been disclosed which does not "*give rise to justifiable doubts as to the arbitrator's impartiality, cannot, however, in and of itself justify an inference of apparent bias. Something more is required – see, for example, the comments of Lord Mance in Helow v Home Secretary at [58].*" ***Locabail (UK) Ltd v Bayfield Properties Ltd*** [2000] Q.B. 451, CA, ***Taylor v Lawrence*** [2003] Q.B. 528, CA, ***Davidson v Scottish Ministers (No.2)*** [2005] 1 S.C. 7, HL, ***Helow v Secretary of State for the Home Department*** [2008] 1 W.L.R. 2416, HL, ***Guidant LLC v Swiss Re International SE*** [2016] EWHC 1201 (Comm); [2016] 1 C.L.C. 767, Comm., ***Beumer Group UK Ltd v Vinci Construction UK Ltd*** [2016] EWHC 2283; [2018] 1 All E.R. (Comm) 80, TCC, ***Almazeedi v Penner (Cayman Islands)*** [2018] UKPC 3, unrep., PC, ref'd to. (See ***Civil Procedure 2018*** Vol.2 at para.2E-148.)

■ **Hickey v The Secretary of State for Work and Pensions** [2018] EWCA Civ 851, 20 April 2018, (Kitchin, Hickinbottom, Coulson LJ)

Appeals—amending grounds of appeal

CPR r.52.17. On an appeal to the Court of Appeal arising from proceedings before the First-tier Tribunal and then on appeal from there to the Upper Tribunal, Hickinbottom LJ reiterated the proper approach to be taken to grounds of appeal and the necessity of seeking to formally amend them where an appellant wishes to depart from the grounds on which permission to appeal was granted. This was particularly necessary as the grounds of appeal prescribe the

extent of an appeal court's jurisdiction. As Hickinbottom LJ summarised the position (at paras 73–75),

> *"[73] Whilst it is important that this court—like all other courts—is not a slave to form, the Civil Procedure Rules set out procedural requirements, and not mere aspirations. They do so for good reason. The time of both parties and the court can be wasted if issues are not identified clearly and succinctly in the grounds of appeal, supported by relevant circumstances giving rise to the appeal and the appellant's arguments or submissions as set out in a skeleton argument. Without such proper focus, it is impossible for appeal courts to deal with their prodigious workloads efficiently and effectively.*
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> *[74] So far as grounds of appeal are concerned, the requirements of the CPR are clear.*
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> *i) For an appeal, permission is generally required from either the court which made the decision to be appealed or the appeal court itself (CPR rule 52.3(1), which also sets out various exceptions to the requirement for permission). Permission can be sought from either court (CPR rule 52.3(2)).*
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> *ii) An appeal is instigated by lodging an appellant's notice with the appeal court. Where the appellant requires permission in respect of some or all of the grounds upon which he proposes to rely, he must seek permission in the appellant's notice (CPR rule 52.12(1)).*
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> *iii) In any event, with the appellant's notice, an appellant must file:*
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> > *'grounds of appeal, which must be set out on a separate sheet attached to the appellant's notice and must set out, in simple language, clearly and concisely, why the order of the lower court was wrong or unjust because of a serious procedural or other irregularity' (CPR PD 52B para 4.2(d))*
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> *See also CPR PD 52C para 5(1) to the same effect. (Parties are required to comply with each of the CPR Part 52 practice directions (CPR rule 52.2).) This requirement for particularisation of grounds of appeal reflects the fact that an appeal will be allowed where—and only where—the decision of the lower court was (a) wrong or (b) unjust because of a serious procedural or other irregularity in the proceedings of the lower court (CPR rule 52.21(3)). In practical terms, the obligation is enforced by a requirement that, except for appeals from a small claim or appeals for the Family Division of the High Court, appellant's notices must be in Form N161, section 6 of which requires grounds of appeal to be filed in accordance with those paragraphs of the practice directions. The grounds of appeal, although required to be on a separate sheet of paper, are therefore an inherent part of the appellant's notice.*
>
> *iv) Therefore, in respect of each way in which it is said that the decision below is wrong or unjust, the grounds of appeal must address, clearly and concisely, the relevant part of the decision and the way in which it is said to be wrong or unjust. The reasons why it is said the decision is wrong or unjust must not be included in the grounds, and must be confined to the skeleton argument (CPR PD 52C para 5(2)).*
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> *v) The appeal court's jurisdiction is constrained by the scope of the grounds of appeal and of the permission that has been granted (Gover v Propertycare Limited [2006] EWCA Civ 286; [2006] ICR 1073).*
>
> *vi) Therefore, where an appellant who has obtained permission to appeal wishes to rely upon a ground of appeal for which he has not previously sought permission to appeal, he must seek permission to amend his grounds of appeal under CPR rule 52.17.*
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> *vii) So far as appeals to the Court of Appeal (Civil Division) are concerned, that rule is supplemented by paragraph 30 of CPR PD 52C, which provides as follows:*
>
> > *'(1) An appeal notice may not be amended without the permission of the court.*
> >
> > *(2) An application for permission to amend made before permission to appeal has been considered will normally be determined without a hearing.*
> >
> > *(3) An application for permission to amend (after permission to appeal has been granted) and any submissions in opposition will normally be dealt with at the hearing unless that would cause unnecessary expense or delay, in which case a request should be made for the application to amend to be heard in advance.*
> >
> > *(4) Legal representatives must—*
> >
> > > *(a) inform the court at the time they make the application if the existing time estimate is affected by the proposed amendment; and*
> > >
> > > *(b) attempt to agree any revised time estimate no later than 7 days after service of the application.'*

That provision appears to be based on the premise that, once permission has been granted (and any remaining original grounds of appeal rejected), any proposed amendments are likely to be modest and can therefore sensibly be left to the appeal hearing itself. However, that supposition does not detract from the requirement that an appellant who has obtained permission to appeal and wishes to add to or otherwise amend his grounds must make a formal application to do so under CPR rule 52.17, as soon as he reasonably can. Grounds of appeal cannot be covertly amended, for example by including changes to them in the skeleton argument. Such an application—and any response by the respondent—will be considered by a master or a single judge, who will determine whether the application can properly be left to the constitution hearing the appeal or whether it should be dealt with prior to the hearing. If the latter, the application will usually be dealt with on the papers without an oral hearing, unless the judge considers that it cannot be dealt with properly and justly without a hearing.

[75] Compliance with the rules will ensure that appeal hearings are properly focused, as they must be. Although of course the merits of an application to amend grounds of appeal will necessarily be fact-specific, where an appellant proposes substantial changes to the grounds of appeal from those upon which he has obtained permission to appxeal but has made no application – or no reasonably prompt application—to amend, he should not expect an appeal court to be sympathetic. Appeal courts have a variety of sanctions at their command should a party fail to comply with important mandatory procedural rules that apply to appeals."

Gover v Propertycare Limited [2006] EWCA Civ 286; [2006] 4 All E.R. 69, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.52.17.3.)

- **Williams v The Secretary of State for Business, Energy & Industrial Strategy** [2018] EWCA Civ 852, 20 April 2018, (Lewison, Hamblen, Coulson LJJ)

Pre-Action Protocol—fixed costs—settlement before proceedings

CPR rr.36.13, 36.20, 45.24, Pre-Action Protocol for Low Value Personal Injury (Employer's Liability and Public Liability) Claims. The claimant suffered from noise-induced hearing loss. A DDJ held that the claim ought to have been brought under the Pre-Action Protocol for Low Value Personal Injury (Employer's Liability and Public Liability) Claims (EL/PL Protocol). As such the claimant was held to be entitled to fixed costs and disbursements only: CPR r.45.24. A later decision by a second judge held that that decision was wrong and directed a provisional assessment of costs: CPR r.47.1. Two issues arose on appeal to the Court of Appeal: first, whether the EL/PL fixed cost regime applied to claims that settled before proceedings started under CPR Pt 36; and secondly, even if the EL/PL fixed costs regime under CPR r.45.24 did not apply, was it permissible to take account of party conduct under CPR Pt 44 to reach the position that recoverable costs could be limited to those otherwise only recoverable if the fixed costs regime under the EL/PL Protocol applied. **Held**, the first ground of appeal failed. The EL/PL fixed costs regime under CPR r.45.24 only applied where a claim had started under the EL/PL Protocol or there were CPR Pt 7 proceedings and a judgment. It did not apply where proceedings were not commenced and there was no judgment, as was the case in the immediate matter. However, the second ground of appeal was allowed. Where it was unreasonable not to have commenced proceedings under the EL/PL Protocol, the court could, through applying CPR Pt 44, hold that recoverable costs should be limited to the fixed recoverable costs and disbursements applicable under CPR r.45.24. As Coulson LJ put it (at para.56),

"In my view, it is at this point that paragraphs 2.1, 3.1 and the warning at 7.59 of the EL/PL Protocol, become relevant. Taken together, those paragraphs comprise a clear indication that, if a claim should have been started under the Protocol but was not, and it was unreasonable that the claim was not so started, then by the operation of the Part 44 conduct provisions, the claimant should be limited to the fixed costs that would have been recoverable under the EL/PL Protocol."

In reaching this decision Coulson LJ also explained the role of the Civil Procedure Rule Committee and its relationship to the Ministry of Justice. It did so in respect of an argument in the appeal that the Rule Committee had failed to properly implement a policy decision made by the Ministry in respect of EL/PL Protocol. Coulson LJ put it as follows (at para.48),

"The CPRC is a statutory body which is obliged to consider the MOJ policy documents with which it is provided, but has no obligation to accept or implement all or any part of those policies. The CPRC is there to consider the proposals from the MOJ and to make Rules to address any part of those policies which it considers appropriate. Therefore, as a matter of law, the policy documents themselves cannot usually be relied on as an aid to the interpretation of the CPR. At the very least, the minutes and other documents generated by the CPRC would be required, in order to see what the CPRC's response was to the policy in question…"

O'Beirne v Hudson [2010] EWCA Civ 52; [2010] 1 W.L.R. 1717, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.45.24.1.)

Practice Updates

STATUTORY INSTRUMENTS

THE CIVIL PROCEDURE (AMENDMENT No. 2) RULES 2018 (SI 2018/479). In force from **7 May 2018.**

The second set of CPR amendments for 2018 effect two changes. First, they introduce a new r.2.4A to provide the lawful basis for CPR PD2E to enable the exercise of the County Court's jurisdiction by legal advisers. Secondly, they make provision within Pt 36 and Pt 45 for the application of fixed recoverable costs rules and the costs rules following acceptance of a Pt 36 Offer where currently applicable to the EL/PL Pre-Action Protocol to the new Pre-Action Protocol for Resolution of Package Travel Claims.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION—97th Update. In force from **7 May 2018.**

Following the withdrawal of PD2E concerning the exercise of the County Court's jurisdiction by legal advisers in August 2017 due to the oversight in not providing a basis in the Civil Procedure Rules to underpin it, PD51Q—The County Court legal advisers pilot scheme was reintroduced. This PD Update now omits PD51Q and reintroduces PD2E—Jurisdiction of the County Court to be exercised by a legal adviser. It does so in the light of CPR amendments affected by The Civil Procedure (Amendment No.2) Rules 2018.

CPR PRACTICE DIRECTION—96th Update. In force from various dates. It effects the following revisions:

- PD51O—the duration of the Electronic Working Pilot scheme is extended to 6 April 2020. In force from **4 April 2018**;
- PD51P—the duration of the Insolvency Express Trials Pilot Scheme is extended to 6 April 2020. In force from **30 March 2018**;
- PD51R—is variously amended. Particular amendments are: the insertion of a new para.1.12A to make provision for the use of new online processes within the Online Court Pilot Scheme which are in a state of development. Makes further amendments consequent to that; and, the substitution of a new para.2, which removes the previous requirement that use of the Pilot Scheme was by invitation only. The scheme can now be used by any claimant whose claim would otherwise use the Money Claim Online scheme and whose claim is otherwise suitable for the Pilot Scheme. In force from **26 March 2018**, subject to a transitional provision applicable to claims commenced in the Pilot Scheme prior to that date permitting the continued use of the *http://www.moneyclaim.reform.hmcts.net* website to access the Online Court website.

INSOLVENCY PRACTICE DIRECTION. In force from **25 April 2018.**

On 25 April 2018, the Chancellor of the High Court, Sir Geoffrey Vos, exercising delegated authority from the Lord Chief Justice, and with the concurrence of the Lord Chancellor, issued a new Insolvency Practice Direction. The new PD expressly replaces all previous Insolvency Practice Directions, Statements and Notes. It does not, however, affect any Civil Procedure Practice Directions or Pilot Schemes or the Practice Direction on Directors Disqualification Proceedings. It has been updated to reflect the introduction of the Business and Property Courts and by incorporating reference to their CPR Practice Direction. It has also been updated to take account of the introduction of the Insolvency Rules 2016, to make provision for the listing of insolvency proceedings before specific judicial office-holders, and to clarify routes of appeal from decisions of specified judicial officer-holders.

PRE-ACTION PROTOCOLS

PRE-ACTION PROTOCOL FOR RESOLUTION OF PACKAGE TRAVEL CLAIMS

On 27 March 2018, the Master of the Rolls approved a new Pre-Action Protocol governing the resolution of package travel claims. The Protocol is in force from **7 May 2018**. It applies to claims for damages for personal injury arising from "gastric illness contracted during a package holiday," which "*may include a claim for diminution in value or loss of enjoyment suffered by the same claimant, but excludes a claim under the Athens convention or the Montréal Convention*". A package holiday is one "*regulated by the Package Travel, Package Holidays and Package Tours Regulations 1992 ('the Package Travel Regulations') or any subordinate or amending legislation arising from EU Directive 2015/2302*". Such claims must be valued at "*not more than £25,000 on a full liability basis including*

pecuniary loss but excluding interest" to fall under the Protocol. The amendments to CPR Pts 36 and 45 made under the Civil Procedure (Amendment No.2) Rules 2018 (SI 2018/479), noted above, bring the Protocol within the scope of CPR rr.36.20, 36.21 and Pt 45, Section IIIA. The Protocol is printed at: *http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-resolution-of-package-travel-claims*. Shortly after it was issued the Protocol was amended to clarify the point that its fixed recoverable cost scheme does not apply to claims which when issued are allocated to the small claims track: see paras 4.1(5) and 4.2 as inserted on 30 April 2018.

PRE-ACTION PROTOCOL FOR DEBT CLAIMS

As of **30 April 2018** para.3.1(d) of the Protocol was amended to insert reference to the Standard Financial Statement which is available from the Money Advice Service.

PRE-ACTION PROTOCOL FOR PROFESSIONAL NEGLIGENCE

As of **30 April 2018** a new para.6.2(i) is inserted to make provision for referral of the professional negligence dispute to a scheme of adjudication. This follows a pilot scheme run by the Professional Negligence Lawyers Association, see *https://pnba.co.uk/wp-content/uploads/2016/05/Professional-Negligence-Adjudication-Pilot-Pack-Launch-date-25-May-2016.pdf*.

PRACTICE GUIDANCE

PRACTICE NOTE—ADMIRALTY: ASSESSORS' REMUNERATION

In January 2017, Tear J (the Admiralty Judge) issued a new Practice Note concerning the remuneration of Trinity Masters, nautical and other assessors in Admiralty cases (See ***Civil Procedure 2018*** Vol.2 para.2D-142). The Practice Note specified that it would be updated annually in April by reference to the Retail Price Index. The updating was carried out in April 2019, and a new Practice Note, dated 1 April 2018, was issued. It replaces the previous Practice Note of 3 January 2017 and is to be applied to all admiralty actions and appeals the hearings of which commence on or after 1 April 2018; for actions the hearings of which commenced before that date the January 2017 Practice Note continues to apply. The Practice Note is reprinted below.

Practice Note (Admiralty: Assessors' Remuneration) of 1 April 2018

1. This guidance is issued by Mr Justice Teare with the agreement of Sir Terence Etherton, Master of the Rolls, and Sir Brian Leveson, President of the Queen's Bench Division. It is issued as a Practice Note and not as a Practice Direction. It replaces Practice Note (Admiralty: Assessors' Remuneration) of 3rd January 2017.

2. In the absence of special directions given in a particular case the level of remuneration which should normally be paid to Trinity Masters and nautical and other assessors summoned to assist the Court of Appeal, the Admiralty Court on the trial of an action, or a Divisional Court of the Queen's Bench Division is as follows:

(1) Full day's attendance at hearing: £775;

(2) Half day's attendance at hearing: £387.50;

(3) Attendance at court when case is not heard: £155 per hour;

(4) Consultation with the court on a day when there is no hearing: £387.50;

(5) Attendance to hear reserved judgment (including any consultation with the court on the same day): £195;

(6) If notice of attendance is countermanded less than two days before the hearing: £387.50; and

(1) Assessors should receive reasonable sums for their travelling expenses and subsistence;

(2) Where there is a cross appeal, or where appeals are heard together, or where actions are consolidated or tried together, the proceedings should be treated as one appeal or action as the case may be;

(3) In the absence of special directions given in a particular case, the remuneration and expenses should be paid by the appellant or the party setting down the action as the case may be without prejudice to any right to recover from any other party the amount so paid on assessment.

3. The figures specified in paragraph 2 above are subject to annual adjustment. The next such adjustment will be on 1 April 2019. The adjustment will be index-linked to the Retail Price Index.

4. The guidance in this Practice Note takes effect on 1 April 2018 and is to apply to all actions and appeals the hearing of which begins on or after that date. For guidance concerning actions and appeals the hearing of which began before 1 April 2018 see the Practice Note (Admiralty: Assessors' Remuneration) of 3rd January 2017.

In Detail

TAYLOR v LAWRENCE AFTER THE REMOVAL OF THE RIGHT TO AN ORAL PERMISSION HEARING—R (GORING-ON-THAMES PARISH COUNCIL) v SOUTH OXFORDSHIRE DISTRICT COUNCIL [2018] EWCA CIV 860

The Issue

R (Goring-On-Thames Parish Council) v South Oxfordshire District Council [2018] EWCA Civ 860, 25 April 2018, unrep. (Sir Terence Etherton, Master of the Rolls, McCombe and Lindblom LJJ) considered the application of the jurisdiction established in ***Taylor v Lawrence*** [2002] EWCA Civ 90; [2003] Q.B. 528, CA, now codified in CPR r.52.30, following the changes effected to CPR Pt 52 on 3 October 2016. In doing so it considered, for the first time, whether those changes—and in particular the removal of the right to an oral permission hearing—required an expansion of the ***Taylor v Lawrence*** jurisdiction.

The Claim

A Parish Council brought judicial review proceedings against a District Council challenging a grant of planning permission. In November 2016, Cranston J made a declaration that the District Council's planning decision did not comply with duties arising under the Planning (Listed Buildings and Conservation Areas) Act 1990 and the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. Permission to appeal from that decision was refused by Cranston J and then by Rafferty LJ in the Court of Appeal.

An application to reopen the permission to appeal application under the jurisdiction in CPR r.52.30 was made by the District Council and another party in March 2017. The application was referred to an oral hearing before the Court of Appeal. The basis of the application was, it was submitted, that Rafferty LJ did not have a proper opportunity to consider the appellant's skeleton argument and the refusal of permission failed to deal with the principal ground of appeal and set out fundamental legal errors. As such the judicial process was "corrupted" in the ***Taylor v Lawrence*** sense. Additionally, the appellant had had no opportunity to appear and make oral argument before the court as that right had been lost in the changes to CPR Pt 52 in October 2016; the right to an oral hearing was "central" to the English legal system per Laws LJ in ***Sengupta v Holmes*** [2002] EWCA Civ 1104; (2002) 99(39) L.S.G. 39, CA. When the lack of an oral hearing was taken together with the submitted legal errors by Rafferty LJ, the appellant—it was argued—had suffered an "exceptional injustice", which justified reopening the permission to appeal application.

The Decision

The Court of Appeal in a judgment of the Court dismissed the application. The application was, in its view, one that fell well short of the test to re-open and was refused.

In reaching its decision the Court of Appeal endorsed the explanation of the residual jurisdiction set out in CPR r.52.30 at ***Civil Procedure 2018*** Vol.1 at para.52.30.2 i.e., that it is a truly exceptional remedy which can only be invoked when it can be demonstrated that the integrity of the earlier proceedings has been critically undermined.

The Guidance

In reaching its decision the Court of Appeal took the opportunity to restate the principals governing the exercise of the jurisdiction established in the voluminous case law on the subject. It also amplified the guidance. It did so at paras 11–14 of its judgment:

> *"[11] … The relevant jurisprudence is familiar, but the salient principles bear repeating here.*
>
> *[12] Giving the judgment of the court in In re Uddin (A Child) [2005] 1 WLR 2398, Dame Elizabeth Butler-Sloss, the President of the Family Division, observed that the hurdle to be surmounted in an application to re-open under CPR 52.17 (now CPR 52.30) was much greater than the normal test for admitting fresh evidence on appeal. She observed (in paragraph 18 of her judgment) that the Taylor v Lawrence jurisdiction 'can in our judgment only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined'. And she added this (in paragraph 22):*
>
> > *'22. … In our judgment it must at least be shown, not merely that the fresh evidence demonstrates a real possibility that an erroneous result was arrived at in the earlier proceedings (first instance or appellate), but*

that there exists a powerful probability that such a result has in fact been perpetrated. That, in our view, is a necessary but by no means a sufficient condition for a successful application under CPR r.52.17(1). It is to be remembered that apart from the requirement of no alternative remedy, "The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations": Taylor v Lawrence [2003] QB 528, para 55. Earlier we stated that the Taylor v Lawrence jurisdiction can only be properly invoked where it is demonstrated that the integrity of the earlier litigation process, whether at trial or at the first appeal, has been critically undermined. That test will generally be met where the process has been corrupted. It may be met where it is shown that a wrong result was earlier arrived at. It will not be met where it is shown only that a wrong result may have been arrived at.'

[13] In Barclays Bank plc v Guy (No.2) [2011] 1 WLR 681 Lord Neuberger M.R. said (in paragraph 36 of his judgment):

'36. … If a party fails to advance a point, or argues a point ineptly, that would not, at least without more, justify reopening a court decision. If it could be shown that the judge had completely failed to understand a clearly articulated point, it is possible that his decision might be susceptible to being reopened (particularly if the facts were as extreme in their nature as a judge failing to read the right papers for the case and never realising it)… .'

[14] In Lawal v Circle 33 Housing Trust [2014] EWCA Civ 1514, Sir Terence Etherton, then the Chancellor of the High Court, summarized the principles relevant to an application under CPR 52.30 (in paragraph 65 of his judgment):

'65. … The following principles relevant to [the] application [of CPR 52.17, as the relevant rule then was] to this appeal appear from Re Uddin (A Child) … and Guy v Barclays Bank plc … . First, the same approach applies whether the application is to re-open a refusal of permission to appeal or to re-open a final judgment reached after full argument. Second, CPR 52.17(1) sets out the essential pre-requisites for invoking the jurisdiction to re-open an appeal or a refusal of permission to appeal. More generally, it is to be interpreted and applied in accordance with the principles laid down in Taylor v Lawrence … . Accordingly, third, the jurisdiction under CPR 52.17 can only be invoked where it is demonstrated that the integrity of the earlier litigation process has been critically undermined. The paradigm case is where the litigation process has been corrupted, such as by fraud or bias or where the judge read the wrong papers. Those are not, however, the only instances for the application of CPR 52.17. The broad principle is that, for an appeal to be re-opened, the injustice that would be perpetrated if the appeal is not reopened must be so grave as to overbear the pressing claim of finality in litigation. Fourth, it also follows that the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large, or that the point in issue is very important to one or more of the parties or is of general importance is not of itself sufficient to displace the fundamental public importance of the need for finality.'

Sir Terence Etherton C went on to say (in paragraph 69):

'69. … [The] appellants' reasons for re-opening the application for permission to appeal Judge May's possession order amount, on one view, to no more than a criticism that Arden LJ's decision to refuse permission to appeal was wrong. That is not enough to invoke the Taylor v Lawrence jurisdiction.'"

Having set out the principals, the Court at para.15 went on to add a further requirement not set out in the summary given in ***Lawal v Circle 33 Housing Trust*** [2014] EWCA Civ 1514; [2015] H.L.R. 9, CA,

"[15] For completeness, there should be added to that summary of the principles in Lawal the requirement that there must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined."

Having set out the principles, the Court turned its mind to the question the removal of the right to an oral permission hearing introduced in October 2016. It rejected the submission that this required either the Court to adopt a differential approach to applications to reopen an application for permission to appeal and applications to reopen a substantive appeal. The same approach applied to both. The fact that the right to an oral hearing was no longer available was thus rejected as a basis for revising the approach taken to applications to reopen applications for permission to appeal. As the Court put it (at paras.29–33),

"[29] … CPR 52.30 jurisdiction will never be engaged simply because it might plausibly or even cogently be suggested that the decision of the court in the underlying proceedings, whether it be a decision on a substantive appeal or a decision on an application for permission to appeal, was wrong. The question of whether the decision in the underlying proceedings was wrong is only secondary to the prior question of whether the process itself has

been vitiated. But even if that prior question is answered 'Yes', the decision will only be re-opened if the court is satisfied that there is a powerful probability that it was wrong.

[30] These principles apply to all applications under CPR 52.30, and with equal force to both applications to re-open substantive appeals and applications to re-open applications for permission to appeal. The authorities cited in argument before us have all concerned the application of the Taylor v Lawrence principles in cases where there has been a substantive decision of the court in the preceding litigation, rather than a decision to refuse permission to appeal from a decision in a lower court. It would be wrong, however, to suppose that the rigour of the principles applying to Taylor v Lawrence applications is in any way relaxed where the decision under consideration is a decision, on the papers, to refuse permission to appeal to the Court of Appeal rather than a substantive decision of this court on an appeal itself.

[31] In the context of an application for permission to appeal whose consideration is said to have been critically undermined or corrupted, the first question will be whether the judge whose decision is the subject of the application to re-open has sufficiently confronted and dealt with the grounds of appeal. Secondly, if the conclusion is reached that the process has been critically undermined it will still be necessary for the court to consider whether, had that not been so, that it is highly likely, in the sense of there being a powerful probability, that the decision on the application for permission to appeal would have been different and that permission to appeal would have been granted.

[32] It should also be understood, and this case provides an opportunity to dispel any doubt there may be on the point, that the principles governing the CPR 52.30 jurisdiction have not been modified or relaxed in response to the change in the procedure for the determination of applications for permission to appeal that was brought about, with effect from 3 October 2016, in CPR 52.5."

The Court went on to give two practical warnings to practitioners. The first focused on the ***Taylor v Lawrence*** jurisdiction (at para.34),

"Legal representatives advising applicants for permission to appeal should not think, and should not encourage applicants to think, that CPR 52.30 provides a default procedure for challenging the court's decision to refuse the application for permission to appeal, whether on paper or at an oral hearing, if one is held."

The second focused on ensuring that problems did not arise in consideration of grounds of appeal. In that regard practitioners were reminded that they should ensure that when they draft grounds of appeal they do so "crisply and clearly". They should avoid repetition. They should avoid being discursive. The main issues must be identified concisely and in separate grounds of appeal. This way they best ensure that their points are addressed by the judge dealing with the application for permission (at para.36).

Comment

The ***Taylor v Lawrence*** jurisdiction is a remedy of last resort. If the argument that the changes to CPR Pt 52 introduced in October 2016, which removed the right to an oral permission hearing, had succeeded in justifying a relaxation of the strict test to invoke this jurisdiction had succeeded, there would have been a real risk that it would have become a means to side-step the aim underpinning the removal of the right to an oral permission hearing i.e., the promotion of a more proportionate approach to permission applications. It would have moved the jurisdiction away from being an exceptional one, that was capable of being relied on only where there had been a corruption of the permission or appeal process. This decision makes it clear that the jurisdiction remains as it was: exceptional.

The judgment also sounds an important warning to practitioners. The importance of clear drafting cannot be underestimated. This is particularly the case where there is no possibility of explaining or clarifying points made in writing at an oral hearing. In a paper-only process, the importance of clarity is at an even greater premium than it ought ordinarily to be. This decision stresses that the onus is on parties' representatives to ensure their points are put as clearly as possible. Should they fail to do so, and should a permission application fail as a consequence of any lack of clarity, the strong suggestion underpinning this decision is that fault will lie at the door of those who drafted the grounds of appeal and not the court. Post-2016, for applications for permission to appeal, clarity is key.

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