# CIVIL PROCEDURE NEWS

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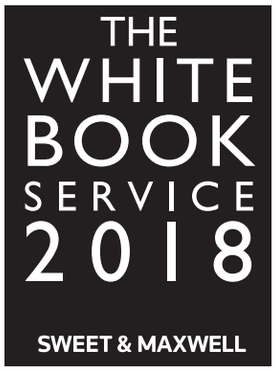

# In Brief

## Cases

- **R. (Environment Agency) v Tapecrown Limited, R. (Tapecrown Limited) v Oxford Crown Court v Environment Agency** [2018] EWCA Crim 1345 and [2018] EWHC 1450 (Admin), 17 May 2018, unrep. (Treacy LJ, Stuart-Smith J, HHJ Munro QC sitting as a judge of the Court of Appeal (Criminal Division); Treacy LJ and Stuart-Smith J)

*Court of Appeal (Criminal Division)—jurisdiction—contempt of court*

**Administration of Justice Act 1960, s.13, Criminal Appeal Act 1968, s.50, Senior Courts Act 1981, ss.29(3), 31(6), 45(1), 53(2)(b), Environmental Permitting (England and Wales) Regulations 2010, reg.44, CPR r.70.2A**. The applicant pleaded guilty in 2015 to breaches of regs.12 and 38 of the 2010 Regulations before the Crown Court sitting in Oxford, in that it had been running an unauthorised/unregulated waste site. It subsequently failed to comply with an agreement to clear waste from the site, following which it was made subject to a remediation order: reg.44 of the 2010 Regulations. That order contained a penal notice. The applicant did not comply with the remediation order. Contempt proceedings were pursued, which resulted in the applicant being fined for contempt. An order under CPR r.70.2A was also made. That order appointed a waste management company to clear the site of waste, which it then did, at the applicant's expense. The applicant challenged the waste management company's invoice, on grounds of reasonableness, for the works done. The applicant was then granted several extensions of time to file evidence in support of its challenge to the invoice. Following those extensions the applicant applied for a further extension, which was refused. The applicant appealed to the Court of Appeal (Criminal Division) (CACD). It did so in reliance upon s.13 of the 1960 Act, which was said to give the CACD jurisdiction to hear appeals from "any order or decision" of the Crown Court. This was challenged by the Environment Agency. In the alternative, the applicant sought to challenge the decision by way of judicial review. **Held**, the CACD did not have jurisdiction. While the CACD, under s.13(1) of the 1960 Act had jurisdiction to hear appeals from orders made when a Crown Court was exercising its jurisdiction to punish for contempt (see ***R. v Seramuga*** (2005)), the order being challenged was not such an order. The Crown Court exercised its jurisdiction to deal with contempt when it imposed a fine and costs on the applicant. When it later went on to make the remediation order under CPR r.70A(2) that "*did not constitute an order of the court in the exercise of its jurisdiction to punish for contempt of court*"; moreover, such orders were not dependent upon a finding of contempt. The remediation order might have arisen as a consequence of the contempt, but it did not form part of the punishment for contempt. As such the CACD's jurisdiction under s.13 of the 1960 Act did not arise. The court then went on to consider, by way of *obiter*, whether the CACD had jurisdiction under s.50 of the 1968 Act, on the basis that it provided for an appeal from sentence. The remediation order was, however, too far removed from the order made on conviction to form part of any sentence for the purposes of s.50, and as such jurisdiction did not arise in that way. Having determined the CACD had no jurisdiction, the court reconstituted itself as the Administrative Court. It went on to consider whether, as such, it had jurisdiction. **Held**, the Administrative Court had jurisdiction to consider a judicial review of the Crown Court's remediation order. While the Crown Court was a superior court of record, over which—as such—the High Court would not normally have supervisory jurisdiction, s.29(3) of the 1981 Act provided that where the Crown Court was exercising jurisdiction other than "*in matters relating to trial on indictment*" the High Court had supervisory jurisdiction. The applicable test was:

> *"whether the decision of the Crown Court was one affecting the conduct of a trial on indictment given in the course of the trial or by way of pre-trial directions. It would also include matters by way of sentence passed at the end of a trial on indictment."* (***In Re Smalley*** (1985) at 642–66).

This was a matter for case-by-case determination; helpful guidance on answering it was given in ***R. v Manchester Crown Court ex parte DPP*** (1994) through the application of the following question:

> *"Is the decision sought to be reviewed one arising in the issue between the Crown and the defendant formulated by the indictment (including the costs of such an issue)?"*

The present case was not one which arose from an issue between the Crown and applicant. It may have arisen from the sentencing decision, but it was far removed from that as it derived from an order made under the CPR following a failure to comply with a remediation order—hence it was an issue between the applicant and the party directed to remove the waste by the court for payment for services carried out pursuant to a court order. It was thus within the ambit of the supervisory jurisdiction provided for within s.29(3) of the 1981 Act. ***In Re Smalley*** [1985] A.C. 622, HL, ***R. v Manchester Crown Court ex parte DPP*** [1993] 1 W.L.R. 1524, HL, ***R. v Seramuga*** [2005] 1 W.L.R. 3366, CACD, ref'd to. (See ***Civil Procedure 2018*** Vol.2 at para.9A-98.)

■ **Jones v Birmingham City Council** [2018] EWCA Civ 1189, 23 May 2018, unrep. (Sir Brian Leveson PQBD, Underhill and Irwin LJJ)

**Anti-social Behaviour, Crime and Policing Act 2014, s.34**. Proceedings were commenced by Birmingham City Council against seventeen individuals under the 2014 Act seeking anti-social behaviour injunctions. The question arose whether proceedings under s.34 of the 2014 Act were proceedings in respect of a criminal charge and, even if they were not and hence were civil proceedings, whether the criminal standard of proof should apply. Kerr J held that the proceedings were civil proceedings and that the civil standard of proof should apply. An appeal to the Court of Appeal was dismissed. It **held** that: (i) it was established that conduct that was underpinned by criminality did not necessarily have to be dealt with by way of criminal charge, i.e. preventative or protective measures may be taken without also involving punitive or retributive measures; (ii) the standard of proof was the balance of probabilities. There were only two possible standards, the civil and criminal standard, as has been made clear by the UK Supreme Court on numerous occasions. Where a court order placed significant restrictions on an individual's liberty that did not of itself require the application of the criminal standard of proof for the purposes of art.6(1) of the European Convention on Human Rights. That was well-established: see the approach to the standard of proof in care proceedings and in respect of proceedings for the recovery of property under the Proceeds of Crime Act 2002; on the latter point see ***Gale v Serious Organised Crime Agency*** (2011). Furthermore, the 2014 Act's provisions and the choice of the civil standard was a deliberate choice by Parliament. ***Guzzardi v Italy*** (A/39) (1981) 3 E.H.R.R. 333, ECtHR, ***Matyjek v Poland*** (38184/03) (2011) 53 E.H.R.R. 10, ECtHR, ***De Tommaso v Italy*** (43395/09) (2017) 65 E.H.R.R. 19, ECtHR, ***R. (McCann) v Manchester Crown Court*** [2002] UKHL 39; [2003] 1 A.C. 787, HL, ***Secretary of State for the Home Department v Rehman*** [2001] UKHL 47; [2003] 1 A.C. 153, HL, ***B (Children) (Sexual Abuse: Standard of Proof)*** [2008] UKHL 35; [2009] 1 A.C. 11, HL, ***Gale v Serious Organised Crime Agency*** [2011] UKSC 49; [2011] 1 W.L.R. 2760, UKSC, ref'd to.

■ **Nori Holdings Ltd v Public Joint-Stock Company 'Bank Otkritie Financial Corporation'** [2018] EWHC 1343 (Comm), 6 June 2018, unrep. (Males J)

*Anti-suit injunction—Recast Brussels Regulation—arbitration*

**Council Regulation 1215/2012 (Brussels I Regulation (recast))**. An application for an anti-suit injunction was made to restrain court proceedings in Russia and in Cyprus. Those proceedings were said to be in breach of an arbitration clause. A number of issues arose, including:

> *"whether the decision of the CJEU in West Tankers Inc v Allianz SpA (Case C-185/07) [2009] AC 1138 that a court in one European member state cannot grant an injunction to restrain proceedings brought in breach of an arbitration clause in another member state remains good law"*

following the entry into force of the Recast Brussels I Regulation. It was argued that the ***West Tankers*** decision no longer remained good law in the light of the Recast Regulation, see its recital 12, and the opinion of A-G Wathelet in ***Proceedings Concerning Gazprom OAO (Case C-536/13)*** (2015). **Held**, whatever A-G Wathelet's opinion might say to the contrary, and there were many reasons for not accepting it as authoritative (see paras 86-99), there was:

> *" … nothing in the Recast Regulation to cast doubt on the continuing validity of the decision in West Tankers (Case C-185/07) [2009] AC 1138 which remains an authoritative statement of EU law": see paras 99.*

It was clear that neither the Recast Regulation nor its recitals expressly departed from the principled approached set out in ***West Tankers*** and restated in ***Gazprom*** that:

> *"[83] … an anti-suit injunction ordered by a court is incompatible with the original Brussels Regulation, while an award of arbitrators to the same effect is not, even when made the object of court proceedings for recognition and enforcement of the award".*

***West Tankers Inc v Allianz SpA (Case C-185/07)*** [2009] 1 A.C. 1138, ECJ, ***Proceedings concerning Gazprom OAO (Case C-536/13)*** [2015] 1 W.L.R. 4937, ECJ, ref'd to. (See ***Civil Procedure 2018*** Vol.2 at para.15-95.)

■ **GM v Carmarthenshire County Council** [2018] EWFC 36, 6 June 2018, unrep. (Mostyn J)

*Expert evidence—admissibility—recognised area of expertise*

**CPR r.35.4**. In proceedings under the Children Act 1989, Mostyn J considered the admissibility of expert evidence given by an independent social worker. In doing so he examined the approach to the question whether such evidence could properly be understood to be expert evidence. He noted that the applicable test to determine this question was that identified by Evans-Lombe J in ***Barings Plc v Coopers & Lybrand*** (2001) at para.45 and approved by Hildyard J in ***RBS Rights Issue Litigation*** (2015) at paras 13-14. Mostyn J helpfully restated the test in the following terms at para.14,

*"[14] … in order to be admissible in civil proceedings the expert evidence must be:*

*i) contained within a recognised body of expertise governed by recognised standards and rules of conduct relevant to the question which the Court has to decide; and*

*ii) of such a nature that that a person without instruction or experience in the area of knowledge or human experience would* ***not*** *be able to form a sound judgment on the matter without the assistance of a witness possessing special knowledge or experience in the area."* (Emphasis in original text.)

The test in family proceedings was noted to set a significantly higher threshold test. In the present case the evidence put forward by the independent social worker concerning "*attachment theory*" could not properly be said to be within a recognised body of expertise. It did not meet the requisite threshold to be admitted as expert evidence. There was no evidence before the court that the subject matter of the report was *"the subject of any specific recognised body of expertise governed by standards and rules of conduct"*, nor was confirmation given that students could study the subject either at university level or professionally. As such it failed to satisfy the first criterion of the test as restated by Mostyn J. Secondly, the theory was in itself no more than "*a statement of the obvious*". As such it failed to meet the second criterion. Even as such a statement it did not assist the court in reaching a decision. While this case concerned family proceedings, attention should be paid to its emphasis on the need for courts to consider questions of admissibility on the basis of whether suggested expert evidence truly is "expert evidence" at an early case management stage, i.e. when it is considered whether to grant permission for expert evidence to be adduced under CPR r.35.4. ***Barings Plc v Coopers & Lybrand*** [2001] P.N.L.R. 22, ChD, ***RBS Rights Issue Litigation*** [2015] EWHC 3433 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.35.4.1.)

- **Moreno de la Hija v Lee** [2018] EWHC 1374 (Ch), 6 June 2018, unrep. (David Halpern QC sitting as a deputy judge of the High Court)

*European Enforcement Order—non-compliance with Regulation's requirements—no jurisdiction to register in country where enforcement to take place*

**Regulation (EC) No.805/2004, articles 13, 14, 23, CPR r.3.1(7)**. The claimant brought proceedings in Spain for alleged copyright infringement (the Spanish proceedings). Service was effected on an address which was not the defendant's (Sir Christopher Lee, represented by his widow and executrix) home. As such, he did not become aware of them. Judgment in default was obtained. Enforcement, against the defendant and others, was authorised in the sum of 710,000 euros. The claimant applied for substituted service of the enforcement proceedings. The application, which was granted, was based on the fact that the claimant did not know the defendant's address; a point noted in the present proceedings to indicate that it was "likely" the claimant knew the defendant was unaware of the proceedings. Following substituted service, the Spanish court issued a European Enforcement Order (EEO). The EEO, while it was issued in the prescribed form, was not completed so as to confirm that the proceedings had been served properly. As such it did not comply with the requirements of arts 13 and 14 of the Regulation. Nor was there an indication that non-compliance had been cured per art.18 of the Regulation. Following rectification of the EEO, in respect of the defendant's name and the amount subject to enforcement, the EEO was registered with the High Court. A copy of the EEO was then sent to the defendant, whose case it was that this was the first notice he had of the proceedings. Subsequently a without notice application was issued, seeking a stay of the EEO (art.23 of the Regulation). Master McCloud granted the stay. Subsequently, the proceedings were transferred to the Chancery Division, where the claimant applied to set aside or revoke the stay. Master Clark held that that application had to be by way of application under CPR r.3.1(7), on the basis that if Master McCloud had erred in granting the stay it was *"sufficiently fundamental to justify revocation of her Order"*. The Master held that Master McCloud had, on the facts, no jurisdiction to stay the EEO under art.23 of the Regulation. However, the Master went on to hold that the EEO's failure to show, on its face, that the service requirements had been complied with meant it was formally invalid and not capable of registration or enforcement. As such Master McCloud was entitled to grant a stay on that ground under the court's inherent jurisdiction. The claimant appealed. **Held**, the appeal was dismissed. Where an EEO did not clearly show that there had been compliance with the Regulation's requirements it should not be registered in the country in which enforcement is sought. The EEO in this case ought not therefore to have been registered. The country in which enforcement takes place retains "residual control" over the question whether to accept an EEO. While this must not amount to a review of the underlying proceedings or certification, it can properly consider whether the EEO, on its face, shows that the minimum standards set for its completion by the Regulation have been complied with. This is to enable that court to ascertain whether the country of origin's court has satisfied itself that the minimum standards required have been complied with. A failure to complete the EEO in this respect means that the court in the country of enforcement cannot be satisfied that the court of the country of origin has satisfied itself that the EEO can properly be granted. Master Clark was right to hold that Master McCloud had no jurisdiction to grant a stay under art.23 of the regulation; for such a stay to be granted there needed to be a challenge to the proceedings in Spain which at the

time the stay was granted there was not. She was also right to hold that Master McCloud could, under the court's inherent jurisdiction, grant a stay on the basis of the EEO not being compliant with the minimum standards set out by the Regulation. Non-compliance meant the EEO was "*not a proper EEO and the court of enforcement ought not to give effect to it*". ***G v de Visser*** [2013] Q.B. 168, ECJ, ***Zulfikarpašic v Gajer*** (case C-484/15) [2017] I.L. Pr. 16, ECJ, ***Collect Inkasso v Konjarov***, 28 February 2017 (case C-289/17), unrep., ECJ, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.74.32.)

- **Sahota v Singh** [2018] EWHC 1685 (Ch), 8 June 2018, unrep. (HHJ Pelling QC sitting as a judge of the High Court)

*Appeal—failure to file respondent's notice*

**CPR rr.52.13(2)(b), 52.21**. Bankruptcy orders were made in June 2016, an appeal from which was listed for July 2018. The respondents applied, at a directions hearing prior to the appeal hearing, for permission to adduce new evidence. They did so on the basis that this evidence was a response to late evidence that the appellant had submitted to the court prior to the bankruptcy orders being made. The respondent also applied to adduce entirely fresh evidence. In essence the respondent's position was that the orders should be upheld for reasons different from or additional to those subject to the appeal: CPR r.52.13(2)(b). The respondent had not, however, filed a respondent's notice, as required by CPR r.52.13(3) and no application to file one out of time had been made. As the judge noted, if the appellant's succeeded in persuading the court that the original decisions were flawed for the reasons they set out in their appellant's notice then the appeal court, in exercising its discretion afresh, would only be able to take account of the material before the court at first instance: see CPR r.52.21. The judge noted however that the respondent's faced a problem:

> *"[21] … At the hearing of an appeal, a party may not rely on something unless it is contained in that party's appeal notice. The appeal notice for these purposes as far as the respondents are concerned, being a respondents' notice which has not been filed in circumstances where the time for filing a respondents' notice has long since passed …".*

In this case the evidence that the respondent wished to rely on in support of its position was not before the judge at first instance. It could not be admitted on an appeal as it did not satisfy the test set out in CPR r.52.21(2)(b) applied consistently with CPR r.1 and ***Ladd v Marshall*** (1954): see ***Terluk v Berezovsky (No.2)*** (2011). Given the decision that the respondent's evidence would not be capable of satisfying the relevant test, and thus could not be relied on at the appeal, the judge did not consider the question of the effect of non-compliance with the requirement to file a respondent's notice. **Held**, the application to adduce the evidence was refused. ***Ladd v Marshall*** [1954] 1 W.L.R. 1489, CA, ***Terluk v Berezovsky (No.2)*** [2011] EWCA Civ 1534, unrep., CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at paras.52.13.3, 52.21.3.)

- **Axa Insurance UK Plc v Financial Claims Solutions Ltd** [2018] EWCA Civ 1330, 15 June 2018, unrep. (Sharp LJ VPQBD, Flaux LJ, Sir Stephen Richards)

*Exemplary damages—fraudulent motor accident claims*

A sophisticated motor insurance fraud resulted in default judgments being obtained against insureds of the appellant insurance company by the respondent. Enforcement proceedings were pursued against the appellant by the respondent. Those proceedings were restrained by an injunction which enjoined the respondent from continuing with them. The appellant then pursued Pt 20 proceedings, seeking compensatory and exemplary damages against the respondent for the torts of deceit and unlawful means conspiracy. Subsequently the original claims were struck out and judgment entered in the appellant's favour in the Pt 20 proceedings. The appellants were awarded compensatory damages. Exemplary damages were not awarded. An appeal from the refusal to award exemplary damages was brought to the Court of Appeal. **Held**, the appeal was allowed and exemplary damages were awarded. Exemplary damages were the exception to the general rule that damages ought to be compensatory. As such the Court ought not to extend the circumstances where such damages were available beyond the three categories set out by Lord Devlin in ***Rookes v Barnard*** (1964). In this case the question was whether the appellant were entitled to exemplary damages under the second of those three categories i.e., the one which "*encompasses cases where the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the claimant.*" Where the court is satisfied that that is the case "*exemplary damages may be awarded to deter and punish such cynical and outrageous conduct*". This was such a case, as it was with similar fraudulent insurance claims. It was because the aim was to secure large sums of money via the fraud. Such monies would not be recoverable by way of a successful claim for compensatory damages. In assessing the applicability of the second category, a court must "*analyse the position prospectively when the tort is committed, at which time the tortfeasor may or may not ultimately achieve the profit it seeks to achieve.*" Furthermore, the availability of exemplary damages was not limited by the availability

of compensatory damages that would ensure that the victim's full loss was recovered: see ***Ramzan v Brookwide Ltd*** (2011). And see Rix LJ, in preference to Sedley LJ, in ***Borders (UK) Ltd v Commissioner of Police of the Metropolis*** (2005) to the effect that second category exemplary damages are not limited to cases where compensatory damages would leave the victim otherwise uncompensated, but were to be awarded to punish and deter wrongful conduct. As Flaux LJ put it at paras 29–31,

> *"[29] Furthermore, I do not read Sedley LJ at [26] of his judgment in the Borders case as saying that the second category is limited to such cases of 'unreachable' damages, but even if he were, the wider analysis of Rix LJ is to be preferred. It is clear from [47] of the judgment of May LJ in that case that he too did not consider that the availability of an award of exemplary damages was affected by whether the claimant could have claimed the disgorgement of the tortfeasor's profit as compensatory damages.*
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> *[30] At [43] of his judgment, Rix LJ said:*
>
> > *'Exemplary damages no doubt remain a controversial topic (see McGregor at paras 11-001/8). In my judgment, however, Kuddus indicates, if anything, that, controversial as they are, they are not to be contained in a form of straight-jacket, but can be awarded, ultimately in the interests of justice, to punish and deter outrageous conduct on the part of a defendant. As long therefore as the power to award exemplary damages remains, it is not inappropriate in a case such as this, where the claimants have been persistently and cynically targeted, that they, rather than the state, should be the beneficiaries of the court's judgment that a defendant's outrageous conduct should be marked as it has been here. They are truly victims, and, for the reasons given by Master Leslie himself, there is no question at all of the award becoming a mere windfall in their hands.'*
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> *[31] Provided that it is recognised that the criterion which Lord Devlin identified, that the wrongdoer has calculated that the profit to be made from the wrongdoing may well exceed any compensation he has to pay the claimant, must have been satisfied for exemplary damages in the second category to be available, this seems to me to be an appropriate statement of the approach to be adopted to the award of exemplary damages in this category."*

Furthermore, the question whether criminal proceedings or contempt proceedings could have been brought against the respondents was irrelevant to the question whether exemplary damages could be awarded. The present case was a paradigm case for the award of second category exemplary damages. ***Rookes v Barnard*** [1964] A.C. 1129, HL, ***Broome v Cassell*** [1972] A.C. 1027, HL, ***Kuddus v Chief Constable of Leicestershire Constabulary*** [2002] 2 A.C. 122, HL, ***Borders (UK) Ltd v Commissioner of Police of the Metropolis*** [2005] EWCA Civ 197; [2005] Po. L.R. 1, CA, ***Ramzan v Brookwide Ltd*** [2011] EWCA Civ 985; [2012] 1 All E.R. 903, CA.

- **R. (SS (Sri Lanka) v The Secretary of State for the Home Department** [2018] EWCA Civ 1391, 15 June 2018, unrep. (Lewison and Leggatt LJJ, Sir Colin Rimer)

*First-tier Tribunal—effect of delay in hearing oral evidence on decision*

A Sri Lankan national claimed asylum in 2013. The asylum claim was rejected by the Secretary of State in 2014. An appeal from that decision was heard in the First-tier Tribunal (Immigration and Asylum Chamber) (the FTT). The appeal was heard in December 2014. At the hearing oral evidence was given. The FTT's decision and statement of reasons was completed in April 2015, although the decision was not promulgated until June 2015. The appeal was dismissed. That decision was then appealed to the Upper Tribunal (Immigration and Asylum Chamber). That appeal was brought on the basis that given the delay between the hearing and the decision it was arguable that adverse findings of fact concerning the appellant's credibility were unsafe. The Appeal was dismissed: there was no basis to find that the delay had given rise to a material error of law. Permission to bring a second appeal from that decision was initially refused. It was subsequently granted at an oral hearing; the Court of Appeal having been informed that there was an "*unwritten rule*" in the Upper Tribunal that where an appellant's credibility was in issue, a delay of more than three months between the hearing and the decision rendered the decision unsafe. On the basis that this was an important point of practice or procedure that needed to be clarified, permission was granted. Directions were given requiring, if possible, the parties to produce a joint statement setting out that such a delay rendered decisions unsafe in the FTT, and for evidence in support of the statement as to the stated practice to be obtained to assist the Court of Appeal. At the hearing of the appeal, no joint statement was submitted, and the respondent submitted a statement approved by the President of the Upper Tribunal (Immigration and Asylum Chamber). The statement set out that the senior members of the Upper Tribunal were unaware of a three-month rule. Authorities submitted by the appellant said to support the existence of such a rule were noted by the Court of Appeal to demonstrate, contrary to the appellant's position, that no such rule or practice existed. **Held**, the appeal was dismissed. There is no rule concerning delay between hearing an appeal in the FTT and giving the judgment, which provides that where there is a three-month delay between the two, the decision is automatically unsafe. While such a practice had existed prior to

2000, the Court of Appeal's decision in ***Sambasivam v Secretary of State for the Home Department*** (2000) and cases following it, particularly ***Cobham v Frett*** (2001), made it clear that it no longer did so. In the light of the authorities which the appellant relied upon, it was clear that permission to bring a second appeal had been obtained on an unintentionally "*false basis*". Leggatt LJ went on however to reconsider the decision in ***Sambasivam***.

> *"[24] . . . this appeal provides an opportunity to revisit the guidance given in the Sambasivam case. That decision established that it cannot simply be inferred from the fact of excessive delay in a case where the appellant's credibility is in issue that the decision is unsafe, and that it is always necessary to consider the particular circumstances of the case. Moreover, . . . examples given by Potter LJ [in that case] of circumstances in which the IAT might properly decide not to remit the case for rehearing despite a delay of over three months illustrate the need for a causal link between the delay and the (lack of) safety of the decision, as they are all circumstances where it can be seen that, for one reason or another, the delay has not infected the decision. But at the same time … Potter LJ said:*
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> > *'In cases of delay of this kind, the matter is best approached from the starting point that, where important issues of credibility arise, a delay of over three months between hearing and determination will merit remittance for re-hearing unless, by reason of particular circumstances, it is clear that the eventual outcome of the application, whether by the same or a different route, must be the same.'*
>
> *[25] This statement can be read as endorsing a (rebuttable) presumption in favour of remittance in cases where important issues of credibility arise and where there has been a delay of over three months. It also appears to set a high bar for rebutting this presumption by requiring the IAT to be satisfied, not just that the decision was not impaired by the delay, but that, if the case were reheard, the outcome 'must be the same'.*
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> *[26] I do not read the statement in the Sambasivam case as to how the question of delay 'is best approached' as intended to articulate a binding rule of law. I think it plain that the Court of Appeal was simply seeking to give to the IAT what was considered at that time to be useful practical guidance. Circumstances have changed, however, since that guidance was given. As explained in the statement approved by the Chamber President [submitted by the respondent to the present appeal]:*
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> > *'In the days of the Immigration Appeal Tribunal (before 2004) there were observations in that Tribunal that a delay of three months might or perhaps would merit remittal. The context of those observations was a jurisdiction in which remittal for rehearing was readily directed, often with the consent of the Home Office. Much has changed since then, including the abolition of the Immigration Appeal Tribunal and its replacement by the Asylum and Immigration Tribunal, in part specifically in order to reduce the number of remittals. The AIT was in 2010 replaced by the Upper Tribunal (Immigration and Asylum Chamber), a superior court of record, with procedure rules that apply across the whole, multi-jurisdiction Upper Tribunal.'*
>
> *[27] Another significant development since the Sambasivam case is the decision of the Privy Council in Cobham v Frett [2001] 1 WLR 1775 and cases following it which have authoritatively established the correct approach where an appeal is based on excessive delay in delivering judgment.*
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> *[28] There is no justification for applying a different or special approach on appeals to the Upper Tribunal (Immigration and Asylum Chamber) from the approach which is generally applicable in cases of delay in giving a decision. Nor does the fact that the appellant's credibility was in issue justify applying a different test – though it may of course, depending on the circumstances, be an important factor in applying the test. There is no good reason to remit a case for rehearing just because it turned on assessment of the appellant's credibility if the appellate court or tribunal can be confident that the assessment has not been affected by the delay. In each case, the question that needs to be asked is whether the delay in preparation of the decision has caused the decision to be unsafe.*
>
> *[29] It can therefore be confirmed that the approach to the issue of delay adopted by the Upper Tribunal in the case of Arusha and Demushi, applying the decision of this court in RK (Algeria), which requires a nexus to be shown between the delay and the safety of the decision, is the correct approach. The only significance of the fact that delay between hearing and decision has exceeded three months is that on an appeal to the Upper Tribunal this period remains an appropriate marker of when delay is of such length that it requires the FTT judge's findings of fact to be scrutinised with particular care to ensure that the delay has not infected the determination."*

The Court of Appeal then went on to discuss the established approach to the assessment of witness demeanour. ***Sambasivam v Secretary of State for the Home Department*** [2000] Imm. A.R. 85, CA, ***Cobham v Frett*** [2001] 1 W.L.R. 1775, PC (BVI), ***Habib Bank Ltd v Liverpool Freeport (Electronics) Ltd*** [2004] EWCA Civ 1062, unrep., CA, ***Secretary of State for the Home Department v RK (Algeria)*** [2007] EWCA Civ 868, unrep., CA, ***Jervis v Skinner***

[2011] UKPC 2, unrep., PC (Bah.), ***Arusha and Demushi (deprivation of citizenship-delay)*** [2012] UKUT 80 (IAC); [2012] Imm. A.R. 645, UT (IAC), ref'd to.

- **Malone v Birmingham Community NHS Trust** [2018] EWCA Civ 1376, 19 June 2018, unrep. (Patten and Hamblen LJJ)

*Conditional Fee Agreement—whether applicable to unnamed defendant*

The claimant was a prisoner at HMP Birmingham, which was run by the Ministry of Justice. He brought proceedings alleging a negligent failure, whilst he was in prison, to diagnose cancer. The defendant was one of two NHS Trusts to provide health care services at the relevant time for the Ministry. There was difficulty in identifying the proper defendant to the claim. The claim was issued naming three defendants: the Ministry of Justice, the respondent, and the Birmingham and Solihull Mental Health Foundation Trust. The respondent acknowledged that it was the proper defendant, and the other named defendants were removed from the claim. The claim settled. An issue arose concerning the costs of the claim, which were to subject to detailed assessment. The focus of the issue concerned the application of a conditional fee agreement (CFA) that the claimant had entered into. The CFA only named the Home Office as a potential defendant to the claim. The defendant argued that the consequence of that was that the CFA was limited to a claim against the Home Office or the Ministry of Justice, i.e. it did not apply to a claim brought against it. The costs judge held that, as a matter of construction, the CFA was so limited. As such no costs where recoverable under the CFA. Furthermore, as no other form of retainer had been entered into by the claimant, no costs were recoverable through the application of the indemnity principle. An appeal from that order was subsequently brought and dismissed. A second appeal was then brought to the Court of Appeal on two grounds: first, the CFA's wording as to what work it applied to which was set out as follows:

> *"All work conducted on your behalf following your instructions provided on [sic] regarding your claim against Home Office for damages for personal injury suffered in 2010",*

did not limit the retainer's scope. It was simply intended to identify the claim to which it applied. As such it was not intended to limit its application to a claim against the Home Office; secondly, in any event reference to the Home Office included a reference to any other public authority or authorities responsible for the claimant's welfare while he was in prison. **Held**, the appeal was allowed on the first ground. The court did not therefore need to determine the second ground and did not do so. In reaching its finding the Court of Appeal noted that the CFA demonstrated "*poor quality drafting and little attention to detail*". It contained "*three manifest mistakes*", i.e.:

> *"[21] … (i) the omission of the date of the instructions and (ii) the omission of the definite article before 'Home Office' and (iii) the description of the claim as being against 'Home Office'. The Home Office had not been responsible for operating prisons for some years."*

The defendant accepted that reference to the Home Office was a misnomer, and it should be read as referring to the Ministry of Justice as the government department responsible for prisons. Given the poor drafting of the CFA, the Court applied the approach to construction set out in ***Wood v Capita Insurance Services*** (2017) per Lord Hodge at paras 11-13, which required that,

> *"[22] … the interpretation of such an agreement is likely to call for more emphasis on the factual matrix and contextual considerations and less principal emphasis on close textual analysis."*

Applying this approach, it was apparent as "*a matter of language*" that "*all work conducted*" in the CFA was meant to cover all work done following on from the claimant's instructions. It was descriptive of the instructions received and not prescriptive of the nature of future work to be done. This was clear from the contractual context, where little care had been taken in drafting the CFA. Absence of careful drafting supported the conclusion that the wording was meant to be "*descriptive rather than prescriptive*". As the Court stated,

> *"[29] . . . If the intention had been to define and limit the coverage of the CFA to claims against a particular defendant, greater care and precision would be expected and, in particular, one would not expect the named defendant to be an entity which was obviously inappropriate. Although [Counsel for the defendant] suggests that the CFA involves a 'positive choice' being made as to the defendant, this is not consistent with the obvious misnomer of that defendant."*

Furthermore, four contextual issues supported the Court's analysis: (i) the CFA was entered before proceedings were commenced, i.e. at a time when it would be unclear who the proper defendant was likely to be. As such it was unlikely that the "*named opponent*" was intended to be prescriptive, "*to limit the CFA to proceedings against that opponent*"; (ii) it was in neither the claimant's nor their solicitors' interest for the CFA to be drafted in a way that imposed "*strict definitional limits which may exclude foreseeable work*", not least when it was entered into an early

stage of the claim; (iii) when the CFA was entered into there was uncertainty as to who the correct defendant, with that question to be determined. Again this pointed away from a strict definitional approach; and, (iv) there was no reason in this case for the solicitor to limit the scope of the CFA: ***Law v Liverpool City Council*** (2005), distinguished. ***ICS Ltd v West Bromwich Building Society*** [1998] 1 W.L.R. 896, HL, ***Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*** [1997] A.C. 749, HL, ***Law v Liverpool City Council*** [2005] EWHC 90020 (Costs), unrep., SCCO, ***Chartbrook Ltd v Persimmon Homes Ltd*** [2009] UKHL 38; [2009] 1 A.C. 1101, HL, ***Wood v Capita Insurance Services*** [2017] UKSC 24; [2017] A.C. 1173, HL, ref'd to.

■ **Gempride Ltd v Bamrah** [2018] EWCA Civ 1367, 21 June 2018, unrep. (Davis and Hickinbottom LJJ)

*Bill of costs—solicitor's responsibility for work done by agent*

**CPR r.44.11**. The claimant, a solicitor, suffered a personal injury after she tripped on a doorstep in a block of flats owned by the defendant. The defendant admitted liability. Proceedings were issued, in which the claimant instructed the solicitor's firm for which she was the sole principle/practitioner. She did so whilst having a BTE insurance policy, which would have enabled her to instruct her insurer's panel solicitors. She chose not to do so, and instructed her own law firm and did so on the basis of a CFA, for which she—as the sole principle/practitioner—completed the risk assessment, checklist etc. She signed the CFA both as claimant in a personal capacity and on behalf of her solicitor's firm. The Court of Appeal noted that it was common ground before it that the CFA was void, as the claimant could not lawfully contract with herself. The hourly rate specified in the CFA was £232 per hour. This was subsequently increased by the claimant to £280 per hour. The increase was justified on the basis of what was said to be the defendant's unreasonableness. The claim settled. Costs were in issue. The claimant's law firm instructed a firm of costs draftsman to prepare a Bill of Costs. It did so, and used the £280 hourly rate which was applied to the entirety of the costs. The claimant's law firm certified the Bill of Costs. Additionally, in response to Points of Dispute, the claimant's law firm stated that alternative funding mechanisms were not available, when in fact BTE insurance was available. The Master disallowed profit costs claimed by the claimant's law firm: CPR r.44.11. This was overturned on appeal. On appeal to the Court of Appeal, appeal allowed. The claimant was only entitled to half the profit costs claimed. In reaching its decision the Court of Appeal **held**, (i) the claimant, as an authorised litigator, was responsible for the actions of her agent, the costs draftsman, who was not authorised to conduct litigation. Ordinary agency principles applied: ***Crane v Canons Leisure Centre*** (2007) applied. And see Hickinbottom LJ at para.103,

> *"[103] Although only an extension of the conventional principles of agency into the particular statutory field with which we are concerned, at a time when new business practices mean that solicitors are more frequently subcontracting work out to the unauthorised, it seems to me to be an important matter of principle that solicitors on the record – and other authorised litigators and 'legal representatives' for the purposes of the CPR – understand that they remain ultimately responsible for the acts and omissions of those to whom they delegate parts of the conduct of litigation, particularly where those to whom such work is delegated are not authorised. It is only in that way that the supervisory jurisdiction of the court can be effectively maintained. Although an order under CPR rule 44.11 cannot be made against someone who is neither a party nor a legal representative, for the purposes of that rule the conduct of someone who is not an authorised litigator may be attributable to a legal representative on agency principles as explained in the authorities to which I have referred."*

(ii) a court could properly take account of a party's unreasonable conduct in applying CPR r.44.11. It was not necessary to show dishonesty in order for there to be relevant misconduct. Certifying the Bill of Costs for a rate higher than the actual hourly rate was unreasonable conduct; (iii) the defendant ought to have been informed that alternative funding was available, and this ought to have been taken account of in assessing costs. Where BTE insurance is available but is not taken up—as here because the claimant did not want to use the insurer's panel solicitors—it remained an alternative source of funding that was relevant to the assessment of whether the claimant had reasonably incurred additional liabilities under the CFA. ***Crane v Canons Leisure Centre*** [2007] EWCA Civ 1352; [2008] 1 W.L.R. 2549, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.44.11.1.)

■ **Tuson v Murphy** [2018] EWCA Civ 1461, 22 June 2018, unrep. (Underhill, Bean and Sales LJJ)

*Pt 36 Offer—effect of claimant's dishonesty on liability for costs*

**CPR rr.36.13(6), 36.17(5)**. The claimant, a school teacher, suffered a personal injury and the consequent development of obsessive compulsive disorder (OCD), having fallen from a horse whilst having riding lessons at the defendant's riding school. Contributory negligence was agreed at 15%, liability having been admitted. The claim was initially valued at £1.5 million. The value was based on the claimant no longer being able to work. After the claim was issued the claimant secured a playgroup franchise. No mention of the franchise was contained in witness statements and expert reports subsequently served by her, or in support of her claim. Twelve months after the playgroup franchise purchase the claimant transferred it to a third party. Following its transfer the defendant's solicitors became

aware of the fact that the claimant had owned and run it during the previous year. In a subsequent witness statement the claimant explained her involvement in the playgroup and the rationale for not mentioning it previously. In essence she set out that she had not, by failing to disclose her involvement in it, misrepresented either her claim or her health. Following service of that witness statement, i.e. in full knowledge of the situation concerning the playgroup, the claimant's involvement in it, and past non-disclosure of that, the defendant's solicitors made a Pt 36 Offer. The Offer stated that if accepted within 21 days the defendant would pay the claimant's costs, otherwise the costs were to be determined by agreement or by the court. The Offer was accepted outside the 21-day period. The question of costs was not agreed. It was subsequently determined by the court, with the judge ordering the defendant to pay the claimant's costs up to 1 April 2014, which was prior to service of the claimant's first witness statement. The basis of the decision was that it would be unjust to make the normal order for costs as that would in no way sanction the claimant for setting out her case on a misleading basis, i.e. for telling no one, including her own solicitors and employment expert, about her involvement in the playgroup which placed doubt on her claims concerning her ability to work in the light of the development of OCD. The claimant appealed. **Held**, the appeal was allowed. In considering whether it would be unjust to make the normal costs order under CPR r.36.13(5), the court had to take account of, amongst other things, "*the information available to the parties at the time when the Part 36 Offer was made*": CPR r.36.17(5). In this case the defendant was aware of the claimant's non-disclosure concerning the playgroup at the time the Pt 36 Offer was made. Furthermore, the non-disclosure was not itself evidence of the claimant's disability being fabricated, nor did it amount to a gross exaggeration of her position per ***Summers v Fairclough Homes Ltd*** (2012). It was correct however to conclude, as the judge had in reaching his decision, that the claimant's conduct was "*dishonest and misleading*". The judge erred in reaching his decision on costs notwithstanding that fact because he failed to take account of the fact that: (i) the defendant's Pt 36 Offer was unconditional; (ii) was made in full knowledge of the claimant's non-disclosure; and (iii) made in full knowledge of the consequences of acceptance of that offer if it had been accepted within 21 days, i.e. the claimant would then have been entitled to her costs to that date as of right (CPR r.36.13(1)). The guidance to making a ***Calderbank*** offer, as set out by Lord Clarke JSC in ***Summers*** at para.54 was available to the defendant if it wished to protect itself in respect of costs. While an assessment of whether it was unjust to make the normal costs order was fact-sensitive, per ***SG v Hewitt*** (2012), it was not correct to conclude it was "*entirely a matter of discretion*". As Bean LJ put it at para.29,

> *"[29] I agree that costs decisions are fact-sensitive and that it may be unwise to attempt to list the categories of case in which it would be unjust to make the normal order. But it is painting with too broad a brush to say that the decision is entirely a matter of discretion, either generally or even in any case where a party has behaved dishonestly."*

In determining whether it was unjust the court had to consider all the circumstances of the case. The principles to be applied in doing so were those summarised by Briggs J in ***Smith v Trafford Housing Trust*** (2012) at para.13, as endorsed by the Court of Appeal in ***Webb v Liverpool Women's NHS Foundation Trust*** (2016) at para.38. Furthermore, the approach taken in ***Tiuta PLC (in liquidation) v Rawlinson & Hunter (a firm)*** (2016) was approved by Bean LJ at paras 32–35, particularly that in cases where facts are known to the defendant's legal advisers at the time a Pt 36 Offer is made and do not change significantly—as the case here—during the period between the Offer being made and acceptance it will be "*highly unlikely to be unjust to apply the default costs rule*". While the claimant's non-disclosure was dishonest and misleading, it was known to the defendant's solicitors at the time the Pt 36 Offer was made. It was thus not unjust to make the normal costs order. ***Summers v Fairclough Homes Ltd*** [2012] UKSC 26 [2012] 1 W.L.R. 2004, UKSC, ***Smith v Trafford Housing Trust*** [2012] EWHC 3320 (Ch), (2012) 156(46) S.J.L.B. 31, ChD, ***SG v Hewitt*** [2012] EWCA Civ 1053; [2013] 1 All E.R. 1118, CA, ***Webb v Liverpool Women's NHS Foundation Trust*** [2016] EWCA Civ 365, [2016] 1 W.L.R. 3899, CA, ***Tiuta PLC (in liquidation) v Rawlinson & Hunter (a firm)*** [2016] EWHC 3480 (QB), unrep. QBD, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.36.17.5.)

- **Lisle-Mainwaring v Associated Newspapers Ltd** [2018] EWCA Civ 1470, 27 June 2018, unrep. (Newey and Coulson LJJ)

*Judicial authority to determine matters following retirement—Permission to appeal—jurisdiction of High Court following conclusion of hearing*

**Judicial Pensions and Retirement Act 1993, s.27(1), CPR rr.23.8, 52.3(2), Senior Courts Act 1981, s.9(1), CPR PD52A para.4.1**. The claimant brought proceedings under the Protection from Harassment Act 1997 against the defendant. She applied for an order for specific disclosure, which was heard by Sir David Eady. The application was dismissed on 23 March 2018. No application for permission to appeal was made at that hearing. Subsequently the claimant's sought permission to appeal from the judge by way of written application. The defendant was not provided with a copy of the application. Sir David's judicial authority, under s.9(1) of the Senior Courts Act 1981, expired at midnight on 23 March 2018 when he reached the age of 75, due to the operation of mandatory retirement provisions

in the Judicial Pensions and Retirement Act 1993. Concerned that he would have no lawful authority to deal with the application after 23 March, Sir David dealt with the application and, as the Court of Appeal put it, "*purported to grant permission to appeal*", notwithstanding the fact that the defendant was unaware of the application. Subsequently, Sir David informed the claimant that he "*probably*" should not have granted permission. Once informed, the defendant's position was that the grant of permission was invalid, and hence if it were to be granted it was for the Court of Appeal to do so. The Court of Appeal **held** that the grant of permission was invalid and that it should not grant permission to appeal. The High Court had no jurisdiction in this circumstance to grant permission to appeal as permission was not applied for at the hearing at which the judgment was handed down but rather after judgment was handed down: ***Monroe v Hopkins (No 2)*** (2017) approved. As Coulson LJ explained at paras 15–17 and 20,

> *'[15] … A party who wishes to appeal should first seek the permission of the judge against whom the appeal is sought to be made. The application for permission to appeal should be made at the relevant handing down of the judgment. In these days when reserved judgments are so common, the parties would have seen a draft and will have no difficulty at all in being ready to make an application at the hand-down. But even if the judgment has been given orally, there should usually be no difficulty in the making of an application for permission at the hearing itself.*
>
> *[16] This has more than one advantage. First, if there is no application for permission to appeal at the hand-down, it allows the judge to know that his or her involvement with that case is at an end, and papers can be returned, destroyed or archived. Secondly, if an application is made at the hearing, it can be dealt with when the issues are fresh in everyone's minds. It makes for certainty and efficiency.*
>
> *[17] I accept that there may be occasions when a losing party is not in a position to know whether or not an application for permission to appeal will be made at the hand-down. In my experience those cases are rare, but one potential category would be a case, like this one, where the judge did not circulate a written draft beforehand, and instead gave a lengthy oral judgment at the hearing. In such circumstances, the losing party may not know whether or not they want to appeal, and they may need to take advice on the matter before making a final decision. In those circumstances, the correct course, as identified by Warby J in Monroe, is to ask the judge for an adjournment of that part of the hearing only, so that, if necessary, a later application can be made for permission to appeal. If that is done, then the judge can control the making of any subsequent application, usually by imposing a very short time limit on the losing party to reach a conclusion, and then ensuring the proper provision of submissions by both sides, either orally or in writing.*
>
> …
>
> *[20] … Another advantage of [this] practice and procedure … is that it ensures, either at the handing down of the judgment, or at the adjourned hearing (if that was what was sought and granted), that the successful party/potential respondent has the opportunity of making submissions on the application for permission to appeal. The importance of those submissions should not be understated: for example, I note that paragraph 19 of Practice Direction 52C (dealing with appeals to the Court of Appeal) sets out detailed provisions relating to the service by a respondent of a brief statement of any reasons why permission should be refused, in whole or in part. In this way, the provision by the successful party of detailed reasons why permission should not be granted is not just a matter of form; it can have an important bearing on whether or not permission to appeal is granted or not."*

Furthermore, Warby J in ***Monroe*** was right in his conclusion that support for the contrary in ***Multiplex Construction (UK) Limited v Honeywell Control Systems Limited (2007)*** was not good law and was not to be followed as it was concerned with a previous and different version of the CPR. Additionally, that CPR r.23.8 enabled courts to deal with applications without a hearing where the parties consented was of no relevance to the present question. Coulson LJ however noted a possible exception where it would be relevant: where an application for permission, which was made at the hand down, was adjourned with the parties putting in "*written submissions agreeing that there was a point of law which should be considered by the Court of Appeal.*" In such circumstances, the judge could dispense with a hearing of the permission application. It was noted that this would be "*an extremely rare event*". Coulson LJ also correctly noted that Sir David Eady's authority as a judge did not, contrary to his concerns, expire upon his 75th birthday. Provision was made in s.27(1) of the 1993 Act to enable a judge, upon reaching mandatory retirement age, to go on to give judgment or deal with ancillary matters arising from proceedings they had commenced hearing prior to reaching retirement age. Dealing with an application for permission to appeal was within the scope of this provision. While Coulson LJ dealt with this issue without reference to authority, this proposition was clearly established by the Court of Appeal in ***R. v Lord Chancellor Ex parte Stockler*** [1996] 8 Admin. L. R. 590; [1997] C.O.D. 24, Times, May 7, 1996 (Bingham MR, Evans & Ward LJJ). ***Multiplex Construction (UK) Limited v Honeywell Control Systems Ltd*** [2007] EWHC 236 (TCC); [2007] Bus LR 13, TCC, ***Monroe v Hopkins (No 2)*** [2017] EWHC 645 (QB); [2017] 1 W.L.R. 3587, QBD, ref'd to. (See ***Civil Procedure 2018*** Vol.2 at para.9A.32.)

# Practice Updates

## PRACTICE DIRECTIONS

**INSOLVENCY PRACTICE DIRECTION.** In force from **4 July 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. That Practice Direction has now been replaced in its entirety by an amended Insolvency Practice Direction, which came into force on 4 July 2018. As with its immediate predecessor it affects neither CPR PD 51P nor the Practice Direction on Directors Disqualification Proceedings. The amended Practice Direction differs from its predecessor in that it makes clearer provision concerning the relationship between the Practice Direction—Business and Property Courts. It also makes clearer provision for the distribution of insolvency work in the South East of England.

# In Detail

## PARALLEL PROCEEDINGS IN THE COUNTRY COURT AND FIRST-TIER TRIBUNAL—GUIDANCE—AVON GROUND RENTS LTD v CHILD [2018] UKUT 204 (LC)

**Background**

The development of courts with parallel, overlapping, and often inconsistent jurisdiction was recognised to be a fundamental problem in the 19th century. It leads to uncertainty in the law, procedural and jurisdictional complexity, unnecessary cost and delay, and brings the administration of justice into disrepute. The problem was dealt with at that time by consolidating the various common law and equity courts into a single, omnicompetent High Court with a single procedural code—the Rules of the Supreme Court. Since that time there has been a slow, yet steady, move away from the Victorian aim of a single court of justice with the proliferation of various Tribunals over the course of the 20th century. That proliferation was, to a certain extent, ameliorated in 2007 with the—then—long overdue consolidation of the tribunals into the First-tier and Upper Tribunals. It remains the case, however, that the courts and tribunals have, to varying degrees, overlapping and complementary jurisdictions, which the Victorians would have rightly viewed as being ripe for consolidation.

In July 2015 the Civil Justice Council established a working party to consider how the overlapping jurisdiction of the County Court and First-tier Tribunals' Property Chamber might be utilised in order to reduce the number of separate applications and hearings concerning the same subject matter notwithstanding the existence of separate jurisdictions: see *Civil Justice Council, Final Interim Report of the Working Group on Property Disputes in the Courts and Tribunals* (*https://www.judiciary.uk/wp-content/uploads/2011/03/final-interim-report-cjc-wg-property-disputes-in-the-courts-and-tribunals.pdf*). In other words, it considered the extent to which it was possible to create what might be described as a virtual single jurisdiction. Its starting point was reforms effected by the Crime and Courts Act 2013. Following those reforms:

- District judges of the County Court were First-tier Tribunal judges (Tribunals, Courts and Enforcement Act 2007, s.6. This had been the case since the 2007 Act was enacted);
- First-tier Tribunal judges were judges of the County Court (County Courts Act 1984, s.5(2)(t) and (u) as amended by Crime and Courts Act 2013, Sch.9, Pt 1, para.4);
- the Lord Chief Justice and Senior President of Tribunals could deploy, either directly or by way of arrangements, such judges to sit in the County Court and/or the First-tier Tribunal (Crime and Courts Act 2013, s.21; Tribunals, Courts and Enforcement Act 2007, Sch.4, Pt 2.); and
- deployment of judges between courts and tribunals is not as of right, but subject to arrangements made by the Senior President of Tribunals and Lord Chief Justice. In the present case, for instance, FTT judges are able to sit as judges in the County Court as they are authorised to do so under arrangements made by the Lord Chief Justice by the Flexible Deployment Group chaired by Mrs Justice Pauffley (First-tier Tribunal (Property

> Chamber), *Guidance in Unopposed Business Lease Renewal Cases with effect from 1 December 2017*, para.3 and Tribunals Spring 2017*, How to avoid dancing in a ring*, at [15] (*https://www.judiciary.uk/wp-content/uploads/2017/03/mcgrath-how-to-avoid-dancing-in-a-ring-spring-2017.pdf*)).

Following the Civil Justice Council's report a number of pilot schemes were established to test its recommendations and thus the viability of the virtual single jurisdiction. As the Upper Tribunal makes clear in ***Avon Ground Rents Ltd v Child*** [2018] UKUT 204 (LC) at paras 1–3, a pilot scheme has been in operation since the end of 2016 concerning residential property disputes (the residential property pilot). Additionally, a further pilot scheme was established, as from 1 December 2017 concerning unopposed business lease renewal claims. Its statutory basis was said to be the amendments to the County Courts Act 1984, effected by the 2013 Act, which established that First-tier Tribunal judges were judges of the County Court: see First-tier Tribunal (Property Chamber), *Guidance in Unopposed Business Lease Renewal Cases with effect from 1 December 2017*, para.2.

Care needs to be taken here: that a judge is a judge of two distinct courts or tribunals cannot of itself confer jurisdiction from a court to a tribunal or vice versa. It simply means that the individual judge can sit as a judge of the tribunal in the tribunal and as a judge of the court in the court. If this were the basis of jurisdiction for the pilot schemes it would be, at best, a thin one; one open to substantive challenge. There are however two ways in which such pilot schemes could work: first, through the exercise, where applicable, of a power to transfer County Court proceedings to the First-tier Tribunal under statutory authority, such as that contained in s.176A of the Commonhold and Leasehold Reform Act 2002 (the 2002 Act); or, secondly, by separate County Court and First-tier Tribunal proceedings being heard simultaneously in the County Court and First-tier Tribunal by a single judge sitting as both a judge of the former and of the latter. This is known as "double-hatting". In the latter case there would be two entirely separate proceedings, yielding separate but complementary judgments, with two separate substantive and procedural regimes applying. Additionally, there was a suggestion that a third alternative existed: that County Court proceedings could be transferred by party consent to the First-tier Tribunal with that consent conferring on the Tribunal the Court's jurisdiction: see, for instance the Guide to Residential Property Applications at para.4.11, "*The Tribunal will only be deciding further county court issues if all the parties consent.*" *(https://www.lease-advice.org/advice-guide/application-first-tier-tribunal-property-chamber/#)*. As will be seen such suggestions are misplaced: substantive jurisdiction cannot be conferred by consent.

**The Facts**

The respondent was the owner of a flat in Essex, held on a long leasehold. In November 2015, the appellant's managing agent issued demands for service charges and ground rent. No response was made to the demand or to further correspondence. In October 2016 the respondent issued a County Court claim for the unpaid service charges and related expenses. At the same time the appellant paid the service charges, and issued a defence to the claim that stated that she had not received the demands. A District Judge "*sent*" the proceedings to the First-tier Tribunal for determination. They had in fact been transferred pursuant to s.176A of the 2002 Act. The proceedings where thereafter managed by a judge of the First-tier Tribunal (FTT). In May 2017, the appellants were informed that the FTT Judge would like to "*use his County Court jurisdiction*" to deal with all matters relating to costs so that the matter, as to costs incurred in the County Court proceedings prior to the claim being sent to the FTT need not be dealt with by a further hearing in the County Court. The appellant's stance was that the FTT had no jurisdiction to determine matters as to County Court costs under the County Courts Act 1984. The FTT judge clarified the position. The County Court costs were not to be determined by the FTT. They were to be determined by the FTT judge sitting as a judge of the County Court in the County Court, following the completion of all matters relating to the proceedings in the FTT, i.e. once the FTT hearing of the matter concluded he would reconstitute the proceedings as a County Court hearing. As the judges hearing the simultaneous appeals in the Upper Tribunal (UT) and County Court in the case put it at para.12,

> *"[12] We consider that the reasonable and well-informed reader would have understood the FTT's letters to mean that the FTT judge proposed to sit alone as a judge of the County Court to deal with the costs of the legal proceedings, both in the County Court and the FTT, after the FTT had determined the substantive issues which remained in dispute between the parties."*

The hearing of the claim took place, initially before the FTT Judge and two FTT Tribunal members. They dealt with the substantive issues in the matter. The judge, then sitting as a judge of the County Court—not as the appeal decision at para.15 incorrectly states "*a district judge of the County Court, made an order as to costs*." The reason the FTT judge could not sit as a district judge is simply that a FTT judge is not as a matter of law a district judge of the County Court. FTT judges are, under the County Courts Act 1984 ss.5(1)(c) and 5(2)(t) or (u), "*judges of the County Court*". They are not district judges as they do not fall within the ambit of s.5(1)(b) of that Act. They are judges who, however, in virtue of CPR PD2B para.13(b), have the same jurisdiction as a district judge.

The appellant appealed from the FTT's decision. Permission was sought notwithstanding the fact that a small sum of money was involved because of the importance of clarifying the practice that had been adopted. To ensure that the appeal was properly constituted, permission was also sought and obtained from the County Court. The present appeals were heard by Tribunal judges who were also County Court judges.

**The Decision**

On the appeals, the UT and County Court held as follows:

- the statutory power to deploy judges from the FTT to sit in the County Court, and vice versa, could not affect the substantive statutory jurisdiction of the FTT or County Court. This is obvious as otherwise the power to deploy a High Court judge to the UT would clothe the UT in the High Court's jurisdiction;
- such deployment equally did not alter the FTT's and County Court's procedural rules;
- The FTT's costs jurisdiction is more limited than that available in the County Court; and
- Different procedural rules govern the appeal procedure in the FTT and County Court, not least in respect of the applicable appeal time limits.

Given these substantive and procedural differences and the fact that cross-deployment of a judge between the courts and tribunals does not alter or confer jurisdiction,

> *"[45] It is therefore essential that where a judge acts on the same occasion both as a judge of the FTT and as a judge of the County Court, that judge is very clear in his or her own mind as to which 'hat' is being worn in relation to each aspect of the decision-making process, and that he or she maintains and articulates a clear distinction at all times between the discrete functions and roles being performed."*

This was particularly important where transfer was not being effected by way of statutory authority under, for instance, s.176A of the 2002 Act, and two separate hearings one in the FTT and one in the County Court were to be listed together and heard by the same judge sitting in both jurisdictions simultaneously. This was important because as the UT had previously held, the FTT's jurisdiction is statutory; jurisdiction cannot be conferred on it by consent of the parties; and—where a formal transfer had been effected by statutory power, such transfer was limited to "*to the question transferred and all issues comprehended within that question*": see ***Avon*** at para.46 and ***Cain v London Borough of Islington*** [2015] UKUT 0117 (LC) at para.15. And see ***Avon*** at [47],

> *"[47] … that the FTT has no power (even with the consent of the parties) to extend its jurisdiction, or to arrogate to itself a jurisdiction to determine questions which the County Court had no power to transfer to the FTT for determination. In the context of a transfer under s.176A of the 2002 Act, only questions which the FTT would have had the jurisdiction to determine under any of the enactments specified in s.176A (2) may properly be transferred from the County Court to the FTT. These do not include the determination of the costs of the instant proceedings in the County Court, since such costs fall to be determined under s.51 of the 1981 Act, which is not specified in s.176A(2). In our judgment, the scope of the questions transferred from the County Court for determination by the FTT depends not just upon the terms of the County Court's order but, more fundamentally, upon whether any particular matter was within the jurisdiction of the FTT under an enactment specified in s.176A(2). Of course, even in those cases where a transfer order is not made and a judge is deployed to sit in both the FTT and the County Court (see para.3 above), the tribunal must ensure that it does not act outside its jurisdiction."*

In the present case it was clear that the FTT judge intended to deal with the County Court costs issue as the County Court, which was the idea intended by the Civil Justice Council and the pilot scheme. However, that was not what happened as, in fact, the judge sat in the FTT and determined the County Court costs issue. As such the FTT acted outwith its jurisdiction, and the appeal as to costs was allowed. It was noted that at the time of the hearing before the FTT and County Court, the County Court costs had not become costs recoverable in FTT proceedings under Sch.11, para.1(1) of the 2002 Act: see ***Avon*** at para.51. The costs could only have been assessed in virtue of s.51 of the Senior Courts Act 1981 and the CPR in the County Court.

**The Upper Tribunal's Guidance**

Given the problems that had occurred in the present proceedings and the need for clarity in operating the present pilot schemes, the following guidance was given in ***Avon*** at paras 81–84,

> *"[81] We consider that this case provides a number of important lessons for the future where cases are transferred from the County Court for hearing in the FTT. First, the scope of what is transferred to the FTT depends not just upon the terms of the Court's order but more fundamentally upon whether the matter was within the jurisdiction of the FTT, as defined more particularly in s.176A(2) of the 2002 Act. When a transfer order is drawn up care*

*needs to be taken to see that it identifies the specific matters being transferred, that those matters do fall within the FTT's jurisdiction and that they fall within the scope of the power to order the transfer.*

*[82] Second, jurisdiction cannot be conferred on the FTT (or for that matter on the County Court) by consent. Statements suggesting otherwise must in future be avoided. For example, paras. 3.2, 5.1, 5.3, 6.1 and 6.2 of the Practice Guide for the Residential Property Dispute Deployment Pilot suggest that the FTT may decide issues falling outside its own jurisdiction but within that of the County Court, and vice versa. Although a person who is a judge of both the FTT and the County Court may wear two hats, these two separate jurisdictions (and their respective procedural rules) cannot be elided, or treated effectively as a single jurisdiction, without legislative change. No doubt our comments on what was intended to be a helpful introduction to the pilot can be addressed by some suitable redrafting.*

*[83] Third, the FTT only has jurisdiction to determine the costs of proceedings pursuant either to r.13 of the FTT Rules or an application in accordance with Sch. 11, para. 5A of the 2002 Act. The FTT has no jurisdiction to determine the costs of proceedings under s.51 of the 1981 Act, which are the preserve of the Court, applying any relevant contractual costs provisions in the lease and the applicable provisions of CPR 44. The FTT must leave the issue of costs falling outside its jurisdiction to the County Court. This emphasises the need for a tenant to consider making an early application under para. 5A, both to the County Court and to the FTT. Since a para. 5A application has to be made to the Court or tribunal to which the proceedings relate, there may need to be two applications in so far as costs are, or may be, incurred in proceedings before two different courts or tribunals. We understand that the standard form of application to the FTT under section 27A of the 1985 Act already makes provision for an additional application under Sch. 11, para. 5A of the 2002 Act. Where proceedings are transferred from the County Court to the FTT for determination, the possibility of making such an application is a matter which can be considered at a case management hearing or in directions given by the procedural judge.*

*[84] Fourth, there can be no objection to an FTT judge sitting also as a judge of the County Court to determine under s. 51 of the 1981 Act the costs of proceedings transferred from the County Court, both in that Court and in the FTT.[3] But the judge must be very clear about which role he is performing, and should ensure that he does not involve his fellow FTT members in making any decision in the exercise of the County Court's jurisdiction. Sitting as a judge of the County Court, the FTT judge may also give effect to any decision of the FTT in an order of the Court under s.176A(3) of the 2002 Act. However, the rules of natural justice require the County Court judge to give a fair and proper opportunity to each of the parties to address him on any points he may consider to be relevant to his decision."*

It is hoped that this guidance will be followed in future. More significantly however, the present decision and its guidance highlights the care that needs to be taken in formulating pilot schemes that are to operate across the courts and tribunals. The benefits of a single jurisdiction are well-known, and have been for over a hundred years. In that sense, the need for a pilot scheme to demonstrate them again might seem otiose. However, given the necessity of such schemes as means to establish how and in what ways 'virtual single jurisdictions' are to work in practice, it may be advisable for the present and any future pilots to be contained within well-publicised formal pilot schemes, which set out their ambit, application, procedure including appeal procedure, and which are authorised by the relevant procedural Rule Committees. If not, it may well be that such schemes should be authorised, following appropriate scrutiny, by the Master of the Rolls and Senior President of Tribunals.

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