CIVIL PROCEDURE NEWS

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Red and White Services Ltd v Phil Anslow Ltd [2018] EWHC 1699 (Ch), 23 May 2018, unrep. (Birss J)

Cost budgeting—basis

CPR rr.3.12, CPR PD3E. A competition law dispute arose between rival bus companies in Cwmbran. An issue arose in respect of the parties' costs budgets. The defendant's budget to trial was £288,000. The claimant's and third party's budgets to trial were of £1.5 million each. The defendant argued that their costs budgets were "seriously disproportionate" given that the claim was likely to be between £80,000 to £120,000. In considering the issue Birss J noted both that in assessing a costs budget a court is concerned with clarifying parties' costs risk: the budget clarifying, to a significant extent, the potential recoverability in terms of costs. Moreover, he emphasised the important point that costs budgets do not directly restrict the cost of litigation: they can only do so indirectly, by making clear from an earlier stage of litigation recoverable costs. As he put it at para.24:

> *"[24] … Costs budgeting is not directly concerned with how much a party can actually spend to protect their reputation either. Wealthy litigants can spend what they like but whether they can recover what they spend from the other party is a different matter. The budget is concerned with recoverable costs. In other words it addresses how much a party can spend whereby the other party then has to bear the costs risk that they might have to pay a figure of that order if they lose the action."*

Willis v MRJ Rundell & Associates Ltd and Grovecourt Ltd [2013] EWHC 2923 (TCC); [2013] 6 Costs L.R. 924, TCC ***Wright v Rowland*** [2016] EWHC 2206 (Comm); [2016] 5 Costs L.O. 713, Comm., ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.3.12.6.)

Atha & Co Solicitors v Liddle [2018] EWHC 1751 (QB), 9 July 2018, unrep. (Turner J)

Abuse of process—incorrect court fee paid—whether claim brought within limitation period

CPR rr.16.2, 16.3. The claimant pursued a personal injury claim against her employers. The trial of the claim was to take place in 2010. The claim was discontinued prior to trial in light of a joint expert's report. The claimant subsequently pursued proceedings against her, by then, former solicitors. The basis of the claim was that she had not agreed to discontinue the personal injury claim. The claim form was received by the court on 29 March 2016. It was not however issued until 7 April 2016. Limitation expired on 31 March 2016. The defendant applied to strike out the claim and/or obtain summary judgment on the basis that the claim was statute-barred. That application was refused. The defendant appealed. On the appeal the defendant conceded that, subject to satisfaction of pre-conditions, a claim is brought on the date it was received by the court. The defendant argued however that the claimant had failed to specify the correct value of the claim on the claim form, contrary to CPR rr.16.2 and 16.3. It further argued that the value was deliberately misstated by the claimant at an undervalue in order to avoid paying the correct issue fee for the true value of the claim. This, it was said, was an abuse of process. **Held**, appeal dismissed. Turner J held that the claim's value was misstated on the claim form. It had been misstated for tactical reasons. While the claimant had not acted dishonestly, this was an abuse of the court's process: ***Attorney-General v Barker*** (2000) applied. It was not such as to justify striking the claim out. However, the issue here was complicated due to the limitation point. Notwithstanding the abuse of process concerning the misstatement of value, the claim was brought when it was received by the court i.e., within the limitation period. In reaching this decision, Turner J noted that, ***Barnes v St Helens Metropolitan Borough Council*** (2007) established that a claim form is brought when it is delivered to the court, not when it is issued. This was an issue of risk allocation. This decision, and ***Page v Hewetts Solicitors*** (2012), had subsequently been understood to have established a hard-edged principle that for a claim to be delivered to the court it must be accompanied by the correct fee. This had not however formed part of the ratio of those decisions; payment of the correct fee had been assumed. Turner J declined to follow prior High Court decisions that had taken the approach that a claimant had to do all in its power to ensure the correct fee accompanied the claim form for it to be understood to have been delivered to the court per ***Barnes***: ***Bhatti v Ashgar*** (2016), ***Lewis v Ward Hadaway*** (2016) not followed. ***Dixon v Radley House Partnership*** (2016), ***Glenluce Fishing Company Ltd v Watermota Ltd*** (2016) adopted a preferable approach; particularly see the obiter comments from ***Dixon***, where there was an underpayment in value of the court fee steps could be taken to ensure that that was made up at a later stage through, for instance, the use of unless orders. The claim was brought when the claim form was itself delivered to the court. Finally, Turner J noted that given that this was an issue which, due to irreconcilable High Court decisions, was ripe for authoritative guidance by the Court of Appeal. ***Attorney-General v Barker*** [2000] 1 F.L.R. 759, DivCt, ***Barnes v St***

Helens Metropolitan Borough Council [2006] EWCA Civ 1372; [2007] 1 W.L.R. 879, CA, ***Page v Hewetts Solicitors*** [2012] EWCA Civ 805; [2012] C.P. Rep. 40, CA, ***Bhatti v Ashgar*** [2016] EWHC 1049 (QB); [2016] 3 Costs L.R. 493, QBD, ***Lewis v Ward Hadaway*** [2015] EWHC 3503 (Ch); [2016] 4 W.L.R. 6, ChD, ***Dixon v Radley House Partnership*** [2016] EWHC 2511 (TCC); [2017] C.P. Rep. 4, TCC, ***Glenluce Fishing Company Ltd v Watermota Ltd*** [2016] EWHC 1807 (TCC); [2016] T.C.L.R. 9, TCC ref'd to. (See ***Civil Procedure 2018*** Vol.1 at paras 7.2.1, 16.3.2.)

- **Broughal v Walsh Brothers Builders Ltd** [2018] EWCA Civ 1610, 10 July 2018, unrep. (Patten, Hamblen, Moylan LJJ)

Permission to appeal—approach to apparent bias following refusal on papers

CPR r.52.4(2). The claimant issued proceedings in 2014 in respect of a claim for damages for personal injury. The claim was against his employers. Standard disclosure was directed. The claimant failed to provide disclosure of his medical records. Ultimately in default of compliance with the disclosure order the claim for damages was assessed at nil. The claimant applied for relief from sanctions. It was refused. Permission to appeal was refused by the judge who refused to grant relief. Further applications for permission to appeal were dismissed on the papers by a Circuit Judge. The claimant sought a reconsideration at an oral hearing under what was then CPR r.52.3(4) (now r.52.4(2)). This was considered by a different Circuit Judge, who granted permission to appeal. The substantive appeal took place before the first Circuit Judge i.e., the one who had refused permission to appeal on the papers. The appeal was dismissed. At the start of the appeal hearing, however, the claimant made an application that the Circuit Judge recuse herself on the ground of apparent bias. She refused it in the light of ***Sengupta v Holmes*** (2002). That decision established that a Court of Appeal judge who had refused permission to appeal on the papers was not precluded on grounds of apparent bias from sitting on an appeal, where permission had subsequently been granted at an oral hearing, as part of a constitution of three judges of the Court. The Court of Appeal noted in the present case that this was the first occasion when it had considered the question whether a single judge refusing permission to appeal on the papers was precluded from hearing that matter on appeal on grounds of apparent bias. Appeal dismissed. Patten LJ, with whom Hamblen and Moylan LJJ agreed, **held** as a matter of principle,

> *"[35] … The decision in Sengupta is … binding authority in my view for the proposition that the prior involvement of a judge at the permission stage involving a consideration of the papers does not disqualify that judge from hearing the substantive appeal (or, for that matter, an oral renewal of the application) unless the judge has expressed his views in such a way as to indicate to any fair-minded lay observer that he has reached a concluded view and is unlikely to be open to further argument. Many of these cases will be highly fact-sensitive and will not necessarily involve the use of extreme language or behaviour as Ezsias illustrates. But they will all be cases in which it will be readily apparent from a consideration of all the relevant facts and surrounding circumstances including the nature of the claim that the judge appears to have come to a fixed and concluded view on the merits. These cases are by their very nature likely to be rare. There is certainly nothing inherent in the process which is inimical to the possibility of a fair oral hearing by the judge who has made the paper decision. The test for granting permission imposed by CPR 52 (does the appeal have a real prospect of success?) does of course mean that the judge who refuses permission will have concluded that the grounds of appeal are not sufficient even to qualify as seriously arguable. For the purposes of granting permission, it is not necessary to consider that the appeal is likely to succeed. But, for the reasons given by Keene LJ in Sengupta, that is not enough in itself to disqualify the judge from hearing the appeal. With the benefit of oral argument, the judge will be open to being persuaded that his or her initial view was wrong. This is an everyday feature of litigation both at first instance and in the Court of Appeal."*

Locabail (UK) Ltd v Bayfield Properties Limited [2000] Q.B. 451; [2000] 2 W.L.R. 870, CA, ***Sengupta v Holmes*** [2002] EWCA Civ 1104, (2002) 99(39) L.S.G. 39, CA, ***Jiminez v London Borough of Southwark*** [2003] EWCA Civ 502; [2003] I.C.R. 1176, CA, ***Ezsias v North Glamorgan NHS Trust*** [2007] EWCA Civ 330; [2007] 4 All E.R. 940, CA, ***Helow v Secretary of State for the Home Department*** [2008] UKHL 62; [2008] 1 W.L.R. 2416, HL, ***Dwr Cymru Cyfyngedig v Albion Water*** [2008] EWCA Civ 536; [2009] 2 All E.R. 279, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.52.4.1.)

- **Cartwright v Venduct Engineering Ltd** [2018] EWCA Civ 1654, 17 July 2018, unrep. (Arden, Henderson, Coulson LJJ)

Qualified one-way cost shifting—Tomlin order

CPR rr.38.6(1), 44.13 to 44.16. Proceedings were issued against six defendants for damages arising from noise induced hearing loss. Liability was admitted by the third defendant for any liability established against the first and second defendants. Claims against those two defendants were then discontinued. The claimant then compromised claims, via a Tomlin Order, against the fourth, fifth and sixth defendants. The claimant then sought to discontinue the

claim against the third defendant, which sought costs up to the notice of discontinuance: see CPR r.38.6(1). The third defendant argued that they could be paid their costs from the sum paid to the claimant under the Tomlin Order. The claimant took the position that as it was protected by the qualified one-way costs shifting (QOCS) regime the third defendant could not secure payment of costs from sums payable by another defendant. Furthermore, it was said that as the sum was to be paid under a Tomlin Order, the basis of the damages payment was contractual and not therefore within the ambit of CPR r.44.14. The Costs judge held that the claimant was correct to argue that the payment under the Tomlin Order was contractual, and thus beyond the ambit of CPR r.44.14. That determined the issue. However, the Costs judge went on to find that, if there had been an order of the court such as to engage CPR r.44.14, then the third defendant's costs would have been recoverable from damages paid by another defendant. An appeal to the Court of Appeal was dismissed. The Court **held** as follows. First, following the approach of the Court of Appeal in ***Wagenaar v Weekend Travel Limited*** (2014), the proceedings were to be understood as a single set of proceedings against the various defendants. Where a claimant issued proceedings against multiple defendants, it was—as the Costs judge stated correctly—permissible for one defendant to enforce a costs award against the claimant out of sums payable to the claimant by another defendant: see Coulson LJ at para.33,

> *"[33] … Claimants with QOWCS protection should not think that this general principle does not apply to them, or that they can issue proceedings against any number of defendants with impunity."*

Secondly, CPR r.44.14 was not engaged where there was a Tomlin Order. Tomlin Orders were not orders for "damages and interest". As Coulson LJ, applying ***Community Care North East v Durham County Council*** (2012) and following the Court of Appeal ***Watson v Sadiq*** (2013), put it at para.45,

> *"[45] … a Tomlin order cannot be described as 'an order for damages and interest made in favour of the claimant'. It is no such thing. It is a record of a settlement reached between the parties which is designed to have binding effect. In that sense, as the parties agreed in the present case, it is no different to the settlement that arises when there is an acceptance of a Part 36 offer. Such acceptance does not require any order from the court, so a settlement in consequence of an acceptance of a Part 36 offer would also be outside the words of r.44.14(1)".*

L'Oreal S v eBay International AG [2008] EWHC B13 (Ch), unrep., ChD, ***Community Care North East v Durham County Council*** [2010] EWHC 959 (QB); [2012] 1 W.L.R. 338, QBD, ***Watson v Sadiq*** [2013] EWCA Civ 822, unrep., CA, ***Wagenaar v Weekend Travel Limited*** [2014] EWCA Civ 1105; [2015] 1 W.L.R. 1968, CA ***Plevin v Paragon Personal Finance Ltd (No 2)*** [2017] UKSC 23; [2017] 1 W.L.R. 1249, UKSC, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.44.16.1.)

■ **A (Children)** [2018] EWCA Civ 1718, 25 July 2018, unrep. (Sir Ernest Ryder SPT, King and Sales LJJ)

Burden of proof—not a mathematical exercise

A local authority appealed from an order of the High Court which dismissed its application for care orders in respect of five children. The Court of Appeal allowed the appeal. In the course of her judgment, with which the Senior President of Tribunals and Sales LJ agreed, King LJ considered the approach to be taken to the burden of proof. In reaching his decision at first instance, the judge drew on the approach to determining the balance of probabilities articulated by Mostyn J in ***A County Council v M & F*** (2011). Applying that approach, in determining whether the burden of proof had been discharged by the Local Authority, the judge aggregated the probability of two possibilities, expressed by reference to percentages, to reach the conclusion that it had not been. King LJ was clear that the approach taken by Mostyn J, and applied by the judge in the present case, was not a proper way to approach the burden of proof. As she put it, at para.51 (and see para.54),

> *"[51] … I cannot agree that the use of percentages and or 'aggregation' is the proper approach to the judicial function in respect of the simple application of the balance of probabilities."*

Having reviewed the authorities, King LJ concluded that they established that the proper approach to determining whether the burden of proof had been discharged was as follows,

> *"[58] …*
>
> *i) Judges will decide a case on the burden of proof alone only when driven to it and where no other course is open to him given the unsatisfactory state of the evidence.*
>
> *ii) Consideration of such a case necessarily involves looking at the whole picture, including what gaps there are in the evidence, whether the individual factors relied upon are in themselves properly established, what factors may point away from the suggested explanation and what other explanation might fit the circumstances.*
>
> *iii) The court arrives at its conclusion by considering whether on an overall assessment of the evidence (i.e. on a preponderance of the evidence) the case for believing that the suggested event happened is more*

compelling than the case for not reaching that belief (which is not necessarily the same as believing positively that it did not happen) and not by reference to percentage possibilities or probabilities."

See ***The Popi M*** (1985) and ***Nulty Deceased v Milton Keynes Borough Council*** (2013), particularly Toulson LJ's rejection of the latter decision which rejected a mathematical or pseudo-mathematical approach to determining the balance of probabilities. As he put it at para.35 of ***Nulty***,

"[35] The civil 'balance of probability' test means no less and no more than that the court must be satisfied on rational and objective grounds that the case for believing that the suggested means of causation occurred is stronger than the case for not so believing. In the USA the usual formulation of this standard is a 'preponderance of the evidence'. In the British Commonwealth the generally favoured term is a 'balance of probability'. They mean the same. Sometimes the 'balance of probability' standard is expressed mathematically as '50 + % probability', but this can carry with it a danger of pseudo-mathematics, as the argument in this case demonstrated. When judging whether a case for believing that an event was caused in a particular way is stronger than the case for not so believing, the process is not scientific (although it may obviously include evaluation of scientific evidence) and to express the probability of some event having happened in percentage terms is illusory."

The Popi M [1985] 1 W.L.R. 948, HL, ***Re B (Minors)*** [2008] UKHL 35; [2009] 1 A.C. 11, HL, ***A County Council v M & F*** [2011] EWHC 1804 (Fam); [2012] 2 F.L.R. 939, FD, ***Nulty Deceased v Milton Keynes Borough Council*** [2013] EWCA Civ 15; [2013] 1 W.L.R. 1183, CA, ref'd to.

- **BDW Trading Ltd v Integral Geotechnique (Wales) Ltd** [2018] EWHC 1915 (TCC) 25 July 2018, unrep. (HHJ Stephen Davies sitting as a judge of the High Court)

Expert witnesses—proper approach to preparation of joint statement

CPR rr.35.3, 35.12, PD35 para.9, Technology and Construction Court Guide para.13.6.3. A professional negligence claim was brought by the claimant housebuilder against the defendant consultant engineers firm. In the course of dismissing the claim HHJ Stephen Davies made some observations concerning the expert witnesses. In preparing a joint statement of experts one of the experts had sent the first draft to the solicitors instructed by the defendant. He did so to seek their comments. In the light of those comments the expert revised the draft joint statement. This was noted to be a "serious transgression" of the required approach to the preparation of such statements: see CPR PD 35 para.9, and TCC Guide para.13.6.3. As the judge explained, at para.18,

"[18] … To be clear, it appears to me that the TCC Guide envisages that an expert may if necessary provide a copy of the draft joint statement to the solicitors, otherwise it would not be possible for them to intervene in the exceptional circumstances identified. However, the expert should not ask the solicitors for their general comments or suggestions on the content of the draft joint statement and the solicitors should not make any comments or suggestions save to both experts in the very limited circumstances identified in the TCC Guide [which are, "where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement"]. That is consistent with the fact that any agreement between experts does not bind the parties unless they expressly agree to be so bound (see Part 35.12(5)). There may be cases, which should be exceptional, where a party or its legal representatives are concerned, having seen the statement, that the experts' views as stated in the joint statement may have been infected by some material misunderstanding of law or fact. If so, then there is no reason in my view why that should not be drawn to the attention of the experts so that they may have the opportunity to consider the point before trial. That however will be done in the open so that everyone, including the trial judge if the case proceeds to trial, can see what has happened and, if appropriate, firmly discourage any attempt by a party dissatisfied with the content of the joint statement to seek to re-open the discussion by this means."

(Although not referred to, also see ***Robin Ellis Ltd v Malwright*** [1999] B.L.R. 81, TCC). (See ***Civil Procedure 2018*** Vol.1 at para.35.12.1.)

- **Phoenix Healthcare Distribution Ltd v Woodward** [2018] EWHC 2152 (Ch), 26 July 2018, unrep. (HHJ Hodge QC sitting as a judge of the High Court)

Extent of parties' duty to assist their opponent

CPR rr.1.3, 6.15. A breach of contract and misrepresentation claim was issued on 19 June 2017, the day before the claim became time-barred. Service had therefore to be effected by 19 October 2017. The claim form was sent to the defendant's solicitors and received by them at the latest by 18 October 2017. The defendant's solicitors had not however been authorised to accept service. On 20 October 2017, the defendant's solicitors informed the claimant's solicitors they were not authorised to accept service. Applications were made to validate service retrospectively. The applications were granted by the Master. An appeal was brought from that decision. **Held**, appeal allowed. In reaching his decision the judge considered ***OOO Abbott v Econowall UK Ltd*** (2016) and ***Higgins v ERC Accountants***

& Business Advisers Ltd [2017]. He did so in respect of the proper approach to be taken to the duty to assist the court imposed on parties by CPR r.1.3. ***Higgins*** applied. In reaching his judgment, HHJ Hodge QC held, at para.170, that the CPR, and particularly CPR r.1.1 and 1.3, "*does not require a solicitor who has in no way contributed to a mistake on the part of his opponent, or his opponent's solicitors, to draw attention to that mistake.*" Even where there is time for the party's opponent to remedy the procedural mistake there is no such requirement. This was the view in ***Higgins*** and there was nothing in ***OOO Abbott*** to suggest the judge in that case took a different view: see para.173. This general principle was, as the judge in ***OOO Abbott*** noted, subject to qualification viz.,

> *"[173] … The overriding objective does require parties to take reasonable steps to ensure, so far as is reasonably possible, that there is a clear, common understanding between them as to the identity of the issues in the litigation, and also as to related matters, including procedural arrangements. But that requires there to have been a genuine misunderstanding that has arisen between the parties regarding a significant matter."*

For the duty to assist to be required of a party to draw attention to an error on their opponent's part: (i) there must be a genuine misunderstanding between the parties; (ii) it must relate to a significant matter; and (iii) the party in question must have contributed to the misunderstanding arising. In the present case, the defendant there was no such misunderstanding to which the defendant had contributed. ***OOO Abbott v Econowall UK Ltd*** [2016] EWHC 660 (IPEC); [2017] F.S.R. 1, IPEC, ***Higgins v ERC Accountants & Business Advisers Ltd*** [2017] EWHC 2190 (Ch), unrep. ChD, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.1.3.2 and Vol.2 at para.11.15.)

■ **Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Group)** [2018] EWCA Civ 1795, 31 July 2018, unrep. (Sir Brian Leveson PQBD, Hamblen and Newey LJJ)

Non-party—right to obtain documents—court records—CPR and inherent jurisdiction

CPR r.5.4C. The appellant was involved in two claims concerning damages paid to victims of mesothelioma. Those claims settled shortly before judgment in 2017. A very significant amount of documentation, both hard copy and electronic, were involved in the trial. The respondent, a non-party to the two claims, following the settlement and dismissal of all other proceedings, applied to obtain all documents that were used or disclosed at the trial of one of the claims. The application was made under CPR r.5.4C. It was heard by a Master who directed, amongst other things, that: (i) skeleton arguments, written submissions and transcripts be placed on the court file; and (ii) permission was granted for the applicant (the respondent before the Court of Appeal) to obtain from the court records: witness statements and exhibits; expert reports; transcripts; disclosed documents relied on by the parties at trial which were in hard copy bundles; written submissions; skeleton arguments; and statements of case if in the hard copy bundles relied on at trial. Permission to appeal was refused on the Master's own motion. The respondent subsequently sought and obtained an injunction on a without notice basis to the effect that any document obtained from the court file was not to be "read, copied, distributed or published" pending an inter partes hearing. The injunction was effectively maintained at the inter partes hearing, and the Master's order was stayed pending appeal. Permission to appeal was subsequently granted by a High Court judge with the appeal transferred to the Court of Appeal on the basis that it raised important points of practice and procedure. **Held**, the appeal was allowed on one of the grounds pursued. The Order was set aside in its entirety. The parties were invited to agree the documents that were to be obtained from the court file within categories identified by the Court of Appeal. Absent such agreement the court, following written submissions, would determine the issue. In reaching its decision the Court of Appeal reviewed the approach to the principle of open justice within the CPR. It identified the crucial question on the appeal as the meaning of "court records", which is undefined within the CPR. In respect of this it **held** that, court record has a narrow meaning, viz.,

> *"[40] … The 'records of the court' are essentially documents kept by the court office as a record of the proceedings, many of which will be of a formal nature. The principal documents which are likely to fall within that description are those set out in paragraph 4.2A of CPR 5APD.4, together with 'communication between the court and a party or another person', as CPR 5.4C(2) makes clear. In some cases there will documents held by the court office additional to those listed in paragraph 4.2A of CPR 5APD.4, but they will only be 'records of the court' if they are of an analogous nature.*
>
> *[41] This will include a list of documents, but not the disclosed documents themselves. It may include witness statements and exhibits filed in relation to an application notice or Part 8 proceedings (see CPR 8.5), but not usually witness statements or expert reports exchanged by the parties in relation to a trial. Such statements and reports are not generally required to be filed with the court and they will typically be provided to the court only as part of the trial bundles.*
>
> *[42] The receipt document for the trial bundles may be a record of the court, but not the trial bundles themselves. Trial bundles cannot be regarded as being part of the 'records of the court' for a number of reasons in addition to those given by CIH as summarised above and in particular:*

(1) Trial bundles are provided for the judge. They are for the judge to use, mark, annotate, re-order or edit as he or she thinks fit. In so doing, no judge would consider that they were adulterating 'records of the court'.

(2) Trial bundles may pass through the court office en route to the judge, but the court office has no interest in or role in relation to trial bundles, other than acknowledgment of their receipt.

(3) Trial bundles are routinely destroyed by the judge or (if applicable) his/her clerk after the conclusion of proceedings. This would not be appropriate if they were 'records of the court'. But nor, often, would it be appropriate to return the judge's bundles, not least because they are likely to contain comments and annotations. Whilst redaction of comments/annotations might be possible that would probably have to be carried out by the judge or his/her clerk and would in any event reveal the fact of comment/annotation. In many cases there would therefore need to be the creation of a new set of unmarked trial bundles.

(4) Trial bundles are not stored in the court office, nor are they only taken out of the office with the permission of the court, as CPR 5APD5.5 requires.

(5) The administrative burden for the court office storing trial bundles would be enormous, particularly if they had to be retained as 'records of the court' even after the conclusion of proceedings. Trial bundles routinely run to thousands of pages and multiple bundles. In heavy commercial litigation, for example, there will often be over 100 files of trial documents.

(6) The procedure for obtaining copies of documents from the 'records of the court' involves the court office taking and providing copies. Such a procedure clearly contemplates a limited copying exercise. It cannot have been intended that court officers would have to copy thousands of documents, as would be the case with many trial bundles.

(7) The application for permission for copies to be obtained requires 'the document or class of document" to be identified—CPR 5APD4.3. A trial bundle is not a 'document or class of document'.

[43] The principle of open justice does not require non-parties to have access to trial bundles. Trial bundles routinely include a large number of documents which are never referred to at trial but are included on a precautionary basis. Whilst, as discussed below, there may be cases where it is necessary to inspect some specific documents in order to understand and scrutinise the trial process, inspection of entire trial bundles is unlikely to be required for this purpose."

Simply filing a document with the court does not transform it into a court record. Furthermore:

- skeleton arguments are not court records; they are "advocate's documents" not parties' documents: ***GIO Personal Investment Services Ltd v Liverpool & London Steamship P&I Ass. Ltd*** (1999) followed, and see ***Law Debenture Trust*** (2003) at para.17. Nor can skeleton arguments be construed as "communications" between party and the court;
- transcripts of proceedings are not court records. The appropriate means to seek to obtain copies of transcripts is CPR PD39A para.6.

For the avoidance of doubt, Hamblen LJ, with whom Leveson PQBD and Newey LJ agreed, specified at para.54 that CPR r.5.4C:

"For the avoidance of doubt, I consider that it should be made clear that the 'records of the court' for the purpose of that rule do not generally include:

(1) The trial bundles.

(2) The trial witness statements.

(3) The trial expert reports.

(4) The trial skeleton arguments or opening or closing notes or submissions.

(5) The trial transcripts."

Hamblen LJ then considered the inherent jurisdiction. At para.112 he summarised the position as follows:

"[112] …

(1) There is no inherent jurisdiction to allow non-parties inspection of:

(i) trial bundles;

(ii) documents which have referred to in skeleton arguments/written submissions, witness statements, experts'

reports or in open court simply on the basis that they have been so referred to.

(2) There is inherent jurisdiction to allow non-parties inspection of:

(i) Witness statements of witnesses, including experts, whose evidence stands as evidence in chief and which would have been available for inspection during the course of the trial under CPR 32.13.

(ii) Documents in relation to which confidentiality has been lost under CPR 31.22 and which are read out in open court; which the judge is invited to read in open court; which the judge is specifically invited to read outside court, or which it is clear or stated that the judge has read.

(iii) Skeleton arguments/written submissions or similar advocate's documents read by the court provided that there is an effective public hearing in which the documents are deployed.

(iv) Any specific document or documents which it is necessary for a non-party to inspect in order to meet the principle of open justice."

In exercising its discretion, balancing the non-party's reasons for obtaining the documents and a party's private interest in preserving their confidentiality, under CPR r.5.4C to permit a non-party to obtain copies of documents from the court record, the following factors were identified at para.127 as being relevant:

"…

(1) The extent to which the open justice principle is engaged;

(2) Whether the documents are sought in the interests of open justice;

(3) Whether there is a legitimate interest in seeking copies of the documents and, if so, whether that is a public or private interest.

(4) The reasons for seeking to preserve confidentiality.

(5) The harm, if any, which may be caused by access to the documents to the legitimate interests of other parties."

Finally, the approach taken to the application by the Master was deprecated; see particularly, Leveson PQBD at paras.145–147. ***Dobson v Hastings*** [1992] Ch. 394, ChD, ***SmithKline Beecham v Connaught*** [1999] 4 All E.R. 498, CA, ***GIO Personal Investment Services Ltd v Liverpool & London Steamship P&I Ass. Ltd*** [1999] 1 W.L.R. 984, CA, ***Barings v Coopers & Lybrand*** [2000] 1 W.L.R. 2353, CA, ***Lilly Icos Ltd v Pfizer Ltd (No.2)*** [2002] EWCA Civ 2; [2002] 1 W.L.R. 2253, CA, ***Law Debenture Trust Corporation (Channel Islands) Ltd. v Lexington Insurance Company*** [2003] EWHC 2297 (Comm); (2003) 153 N.L.J. 1551, Comm., ***Chan U Seek v Alvis Vehicles Ltd (Guardian Newspapers Ltd intervening)*** [2004] EWHC 3092 (Ch); [2005] 1 W.L.R. 2965, ChD, ***British Arab Commercial Bank v Algosaibi Trading Services Ltd*** [2011] EWHC 1817 (Comm), unrep., Comm., ***R. (Guardian News & Media Ltd) v Westminster Magistrates Court*** [2012] EWCA Civ 420, [2013] Q.B. 618, CA, ***Nestec SA v Dualit Ltd*** [2013] EWHC 2737 (Pat), unrep., Pat., ***NAB v Serco*** [2014] EWHC 1225 (QB), unrep., QBD, ref'd to. (See ***Civil Procedure 2018*** Vol.2 at para.9A-98.)

Practice Updates

STATUTORY INSTRUMENTS

- **THE CIVIL PROCEDURE (AMENDMENT No. 3) RULES 2018 (SI 2018/975).** In force from **1 October 2018.**

The third set of Amendment Rules for 2018 effects the following changes. First, it clarifies for the avoidance of doubt, via a new r.1.5, that the overriding objective does not undermine the use of the Welsh language in legal proceedings conducted in Wales. Secondly, it makes specific provision, via a new r.5.6, for the use of documents in either the English or Welsh languages to be used in civil proceedings which are conducted in or have a connection with Wales. Responsibility is placed on any party seeking to or who will place documents in Welsh before the court to inform the court as soon as practicable. This is to enable the court to take such steps as are appropriate in the circumstances, such as any translation into the English language should that be necessary. Thirdly, a new Part 57A—Business and Property Courts is inserted. This specifies which courts form BPC. It further provides for their work to be divided and listed in the courts and lists (nb: not specialist lists) set out in PD57AA—Business and Property Courts. It also makes provision for the CPR and CPR PDs to apply to claims in the Business and Property Courts except as provided

for otherwise in this Part or as a PD, e.g., PD57AA or PD57AB, provides. Fourthly, it deletes CPR rr.65.2 to 65.7, consequent on statutory repeals. Fourthly, via the deletion of CPR r.65.47(5) and the insertion of a new CPR r.81.4(6) it clarifies the power of district judges to commit a person for breach of an injunction. Finally, it amends CPR r.82.2(3)(e) in the light of the decision in *Cardiff City Council v Lee (Flowers)* [2016] EWCA Civ 1034; [2017] 1 W.L.R. 1751. It provides that a writ or warrant may be issued without the court's permission where there has been non-compliance with an order suspending an order for possession through non-payment of money. The amendment varies CPR r.83.2(3)(e) so that it reads as follows:

"(3) A relevant writ or warrant must not be issued without the permission of the court where—

. . .

(e) under the judgment or order, any person is entitled to a remedy subject to the fulfilment of any condition, and it is alleged that the condition has been fulfilled ***(other than where non-compliance with the terms of suspension of enforcement of the judgment or order is the failure to pay money)****."* (Amendment in bold.)

PRACTICE DIRECTIONS

- **CPR PRACTICE DIRECTION—98th Update.** In force from **1 August 2018,** except for amendments to PD 2E, which take effects from **1 October 2018.** It effects the following revisions:
  - Amends PD 2C, PD 26, PD 45, PD 47, PD 52B to remove references to the County Court at Lambeth hearing centre consequent on its closure;
  - Amends PD 2E to update the reference in para.1.2 to "Greater Manchester" in substitution for "Manchester Civil Justice Centre & Manchester Outer" concerning the Designated Civil Judge's jurisdictional area. In the Schedule various amendments are made to, broadly speaking, extend the scope of work that legal advisers are able to carry out under the authorisation in the PD;
  - Amends a typographical error in PD 14, paragraph 7.2(f) by replacing reference to "offer" with "admission";
  - Amends PD 17E paragraph 2.1(1), consequent on PD 2E permitting the authorisation of County Court legal advisers to effect amendments to statements of case;
  - Amends PD 26 paragraph 3.1(2)(a) to make provision for orders extending stays to facilitate settlement to be made under authorisations to County Court legal advisers under PD 2E as well as by a judge;
  - Amends PD 27 paragraph 3.1(1) to clarify the fact that any person authorised under the Legal Services Act 2007 to act as a litigator or advocate, in addition to barristers, solicitors, legal executives, is not a lay representative for the purposes of CPR Pt 27;
  - Amends PD 47 to make provision for an online version of a new Precedent S, which can be found at: *http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-47-procedure-for-detailed-assessment/practice-direction-46-costs-special-cases2*;
  - Amends PD 52B to reflect the transfer to Manchester Civil Justice Centre from Liverpool of the appeal centre for appeals from the County Court at Wigan;
  - Amends PD 74A paragraphs 4.2(3), 4.3(3) and 7.2 to make provision for County Court Legal Advisers to deal with applications for certified copies.

Most significantly the PD inserts a new PD 51T—The County Court Legal Advisers Pilot Scheme—Final Charging Orders. This makes provision for a pilot scheme to run from 1 August 2018 to 1 April 2020. It enables County Court legal advisers to make final charging orders made at the County Court Money Claims Centre.

CPR PRACTICE DIRECTIONS—99th and 100th Updates. Just short of its 20th anniversary, the CPR reached its 100th PD Update. It did so in unusual circumstances. The 99th Update was revoked without having ever been formally published, although the fact that it was revoked suggests that it formally came into force and needed to be amended prior to its publication. The **100th Update** comes into force on **1 October 2018**, except for: the revocation of the 99th Update, which took effect on 4 September 2018; and, the amendment to CPR PD 51O and introduction of the new CPR PD 51U, both of which come into force on **1 January 2019**. The 100th Update effects the following, as it:

- revokes the 99th Update;
- amends PD 2B and PD 81 to clarify the extent to which a District Judge may make a committal order consequent upon the breach of an injunction;

- amends PD 51O by way of substitution to extend, as from 1 January 2019, the electronic working pilot scheme to the Queen's Bench Division;
- introduces, as from 1 January 2019, a two-year disclosure pilot scheme applicable via PD 51U, with certain exceptions, in the Business and Property Courts;
- specifies that the PD—Business and Property Courts is renumbered as PD 57AA—Business and Property Courts;
- introduces a new PD 57AB—Shorter and Flexible Trials Scheme, which formalises the two-year pilot scheme that previously ran as CPR PD 51N;
- amends by substitution the PD relating to the use of the Welsh language to reflect principles articulated in the Welsh Language Act 1993 and the Welsh Language (Wales) Measure 2011.

PRACTICE GUIDANCE

GUIDANCE—UNOPPOSED BUSINESS LEASE PILOT SCHEME. HMCTS has, since January 2018, been running a pilot scheme (albeit not one under CPR Pt 51) whereby unopposed business lease renewal claims have been transferred to be heard in the First-tier Tribunal from the County Court at Central London. (It is worth noting that comparable guidance issued by the First-tier Property Tribunal concerning such a Pilot stated that it commenced in December 2017. The discrepancy may arise from the pilot being postponed.) The pilot runs until January 2019: see further ***Civil Procedure News*** No.7 of 2018 and ***Avon Ground Rents Ltd v Child*** **[2018] UKUT 204 (LC)**. HMCTS has reissued Guidance, Standard Directions, and a pro forma Listing Questionnaire concerning the Pilot. The various documents are accessible at:

- Guidance: *http://41todw2i37w9c74zg3ndz7xp-wpengine.netdna-ssl.com/wp-content/uploads/2018/08/Guidance-unopposed-business-lease-renewals.pdf*
- Standard Directions: *http://41todw2i37w9c74zg3ndz7xp-wpengine.netdna-ssl.com/wp-content/uploads/2018/08/DR-1-Standard-directions-5-Apr-2018.pdf*
- Listing Questionnaire: *http://41todw2i37w9c74zg3ndz7xp-wpengine.netdna-ssl.com/wp-content/uploads/2018/08/Listing-Questionnaire.pdf*

In Detail

DISCLOSURE PILOT SCHEME

Background

Civil Procedure News No.2 of 2018 summarises the relevant background to the Disclosure Pilot Scheme. In short, to address identified shortcomings with the disclosure process of excess litigation cost, a Disclosure Working Group, chaired by Gloster VP considered the problem and made recommendations. The proposals were published for consultation on 2 November 2017. The proposed framework consisted of a pilot Practice Direction (**Pilot Scheme Practice Direction**) as a revised CPR Pt 31 and associated documents, which sought to achieve a more efficient and flexible process.

The Proposals

A draft practice direction published for consultation envisaged that the parties would give basic disclosure limited to those documents upon which the parties rely and which are necessary for the other party or parties to understand the case put against them. Where a party wished to seek disclosure of documents in addition to, or as an alternative to, basic disclosure, the party would be required to apply for extended disclosure following completion of a Disclosure Review Document (**DRD**) and consultation with the other parties.

The Consultation Outcome

During the three month consultation, 26 such roadshows and meetings were held to ensure that judges and practitioners had an opportunity to voice any concerns they might have with the proposed pilot well before the consultation period closed. They were invited to feed back their comments to the subcommittee via their professional organisations or directly via e-mail. In addition, meetings were held with professional bodies representing practitioners.

In light of feedback from the forums for discussion, a substantially revised and improved version of the Pilot Scheme Practice Direction and DRD was submitted to the Civil Procedure Rule Committee (**CPRC**) on 15 June 2018. The CPRC gave approval in principle to the proposed Disclosure Pilot Scheme in June 2018 and final approval at the CPRC meeting on 13 July 2018. The Pilot Scheme was published in CPR Update 100 (see above).

The main features of the Disclosure Pilot Scheme

With some limited exceptions, the Disclosure Pilot Scheme will apply to existing and new proceedings across the Business and Property Courts in the Rolls Building and in the centres of Bristol, Birmingham, Cardiff, Leeds, Liverpool, Manchester and Newcastle for a two-year period, commencing on 1 January 2019. While the pilot will be limited to the Business and Property Courts, the expectation is that it will lead to wider reforms in disclosure.

The duties of the parties, and of their lawyers, in relation to disclosure are expressly set out, chiefly in the Pilot Scheme Practice Direction. These include a duty to cooperate so as to promote the reliable, efficient and cost-effective conduct of disclosure. They also include a duty to disclose known adverse documents (unless privileged) in all cases, irrespective of whether an order to do so is made.

Unless dispensed with by agreement or order (and subject to several other exceptions), "Initial Disclosure" will be given with statements of case of "key documents" which are relied on by the disclosing party and are necessary for other parties to understand the case they have to meet. A search should not be required for Initial Disclosure, although one may be undertaken. A party wishing to seek disclosure of documents in addition to, or as an alternative to, Initial Disclosure must request "Extended Disclosure". No application notice is required. However, the parties will be expected to have completed the DRD (see further below).

After closure of statements of case, and before the first case management conference, the parties should meet, discuss and complete a joint DRD. The DRD requires the parties to (amongst other matters) collaborate to prepare a list of issues for disclosure, agree on the appropriate Model for disclosure and share information to assess the retrieval of documents.

At the first case management conference, the court will consider whether any of five "Extended Disclosure" models (Models A to E) is to apply to which issue (or to all issues). The models range from an order for disclosure of known adverse documents only on particular issues for disclosure, through to the widest form of disclosure, requiring the production of documents which may lead to a train of enquiry. The reforms remove the disclosure recognised under that termed "standard disclosure" which is replaced with Model D disclosure, which should not be ordered in every case and will no longer be regarded as the default option.

The following summary reflects the models (as contained at paragraph 8 of the Pilot Scheme Practice Direction):

i. Model A: Disclosure confined to known adverse documents, which requires disclosure in relation to some or all of the issues for disclosure (as agreed during the process of preparing the DRD) of known adverse documents

ii. Model B: Limited Disclosure, which requires disclosure of:

    a. the "key documents" on which they have relied (expressly or otherwise) in support of the claims or defences advanced in their statement(s) of case; and

    b. the "key documents" that are necessary to enable the other parties to understand the claim or defence they have to meet; and in addition to disclose known adverse documents.

iii. Model C: Request-led search-based disclosure, which requires disclosure of particular documents or narrow classes of documents relating to a particular issue for disclosure, by reference to requests set out in or to be set out in the DRD or otherwise defined by the court.

iv. Model D: Narrow search-based disclosure with or without narrative documents, which requires parties to disclose documents which are likely to support or adversely affect its claim or defence or that of another party in relation to one or more of the issues for disclosure.

v. Model E: Wide search-based disclosure (only in exceptional cases), which require disclosure of documents which are likely to support or adversely affect the parties' case or that of another party in relation to one or more of the issues for disclosure or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure.

When considering the orders to make on disclosure, the well-recognised test of reasonableness and proportionality is now applied by reference to defined criteria at paragraph 6.4 of the draft Practice Direction. The criteria encompasses the following factors—

i. the nature and complexity of the issues in the proceedings;

ii. the importance of the case, including any non-monetary relief sought;

iii. the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;

iv. the number of documents involved;

v. the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);

vi. the financial position of each party; and

vii. the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

With a view to encouraging increased and more focused case management, the Disclosure Pilot Scheme includes a range of orders which the court may make to reduce the burden and cost of disclosure. In addition, the parties can apply for a Disclosure Guidance Hearing to seek informal guidance from the court before or after a case management conference. The hearings are an informal means of overcoming an impasse reached by the parties.

Finally, the Pilot Scheme Practice Direction includes a range of orders and sanctions for noncompliance with the requirements of the new scheme and in particular the new duties on the parties and their advisers.

Preparation for the Pilot Scheme

Prior to the launch, there will be a preparation period during which there will be a series of further presentations with users and the judiciary to help ensure that all are ready to work with the reformed rules in the new year. The Disclosure Working Group is running a series of presentations for lawyers and other court users during the Autumn 2018, including at the Law Society's Commercial Litigation conference on 16 October 2018 and the Legal Week Commercial Litigation and Arbitration Forum on 6 November 2018. Further, Practical Law is hosting a Webinar on the morning of 10 October 2018 that will include discussion with members of the working group, including Dame Elizabeth Gloster, Knowles J, Master Marsh, and Ed Crosse. For details on that, please contact Laura Feldman at laura.feldman@kcl.ac.uk.

The expectation is that if the Pilot is deemed a success, then the existing CPR Pt 31 will be revised to reflect the terms of the Practice Direction and consideration will be given as to whether it should apply to proceedings outside of the Business and Property Courts.

The Pilot will not disturb an order for disclosure made before the commencement date unless that order is varied or set aside.

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