CIVIL PROCEDURE NEWS

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In Brief

Cases

- **Viner v Volkswagen Group United Kingdom Ltd** [2018] EWHC 2006 (QB), 30 July 2018, unrep. (Senior Master Fontaine)

Extension of time to serve claim form—Group Litigation

CPR rr.7.6(2), 7.6(3). In the context of the VW Emissions group litigation a claimant deliberately did not serve its claim form against the defendants, although they had a copy of the claim form. It did not do so for over two years, despite agreeing several extensions of time for service. Following the expiry of the service time limit, the claimant applied to serve out of time. **Held**, application refused. In refusing the application the Senior Master noted that the deliberate decision taken by the claimant not to serve the claim was a "serious misjudgement" on their part. That there was a group litigation order in existence and that they had not served the claim as they were waiting for issues in the GLO to be determined were not good reasons for not serving the claim. The claim ought to have been served in time, and if necessary a stay sought thereafter. ***Hoddinott v Persimmon Homes (Wessex) Ltd*** [2007] EWCA Civ 1203; [2008] 1 W.L.R. 806, CA, ***Hashtroodi v Hancock*** [2004] EWCA Civ 652; [2004] 1 W.L.R. 3206, CA, ***Collier v Williams*** [2006] EWCA Civ 20; [2006] 1 W.L.R. 1945, CA, ***Ehrari (A Child) v Curry*** [2007] EWCA Civ 120; [2007] R.T.R. 42, CA, ***Malcolm-Green v And So To Bed Ltd*** [2013] EWHC 4016 (IPEC); unrep., IPEC, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at paras 7.6.2 and 7.6.3.)

- **Kimathi v The Foreign And Commonwealth Office** [2018] EWHC 2066 (QB), 2 August 2018, unrep. (Stewart J)

Statements of case—evidence

CPR rr.32.2, 33.6. The proceedings arose from complex, long running litigation brought by a significant number of claimants concerning allegations of, for instance, personal injury. The injuries are alleged to have arisen as a consequence of the claimants' detention during events prior to Kenya's independence in the 1950s. An issue in the present, test case, was whether statements of case could be relied on as evidence at trial. **Held**, it is clear from CPR r.32.2 and r.32.6 that "the contents of a statement of case are not evidence in a trial." That they are verified by a statement of truth does not alter that position; see ***Arena Property Services Limited v Europa 2000 Limited*** (2003) at para.18. As Stewart J elaborated at para.35,

> *"[35] Clearly, if a Claimant or witness adopts in his or her oral evidence the whole or any part of a pleading (e.g. Part 18 responses) then they are evidence in the trial. Otherwise, the evidence from a Claimant is only that contained in his or her witness statement verified in oral evidence, together with such oral evidence as the Claimant/witness gave on oath/affirmation. I do not accept the Claimants' submissions. First, they say that refusing to consider as evidence at trial matters verified in a statement of case elevates a general rule into a statute. It does not. It is the clear effect of a procedural rule, made under Statutory Instrument, as to how facts are to be proved. Secondly, they say that in the above authorities, there was nothing from the parties that assisted their case and the issue was whether evidence existed, not how statements were to be classified, adding: 'Here the facts exist. D's complaint is that because they are in the wrong place, they should be categorised as something other than facts'. This is not the point. Rule 32.6 is clear that 'any fact … is to be proved … at trial by their oral evidence given in public' (my underlining). That is why witnesses specifically adopt statements in their oral evidence, thus proving them for purposes of the trial. If facts have been proved as required by Rule 32.6, then there is no need to attempt to rely on Statements of Case; if they have not been so proved, then, at trial, the Statements of Case (unless adopted in oral evidence) do not prove those facts."*

Arena Property Services Ltd v Europa 2000 Ltd [2003] EWCA Civ 1943, unrep., CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.32.2.1.)

- **LXA v Willcox** [2018] EWHC 2256 (QB), 23 August 2018, unrep. (HHJ Robinson sitting as a judge of the High Court)

Modification of procedure—litigant-in-person

CPR rr.1.1(2)(a), 3.1A. Proceedings were brought for damages arising from personal injury. Whilst the defendants were initially represented, however some months before trial representation was discontinued. Acting as a litigant-in-person (LiP), the 2nd defendant informed the court that she would not attend the trial. She asked for her witness

statement and arguments set out in a Counter-Schedule of Loss to be considered at trial. The real issue in the case was damages. The judge considered the approach that was to be taken under CPR r.3.1A(4) and (5), where a litigant was unrepresented. **Held**, (i) CPR r.3.1A(5), read with CPR r.1.1(2)(a), applies both where the LiP is present and where they are not present in court; (ii) the court should be careful to avoid descending into the forensic arena when putting questions to witnesses under CPR r.3.1A(5). They should be at pains to ensure they do not cease to be an impartial arbiter (or equally appear to be so). They should however question with a view to obtaining evidence of forensic value. In carrying out this difficult balancing exercise it was helpful to consider Hayden J's analysis in ***PS v BP*** (2018); (iii) where an LiP is not present but has indicated, as in this case, before the hearing issues that concern them it is proper for a judge to explore them with the represented party and their witnesses; (iv) in many cases such an approach would go no further than the general approach taken by judges to clarify issues. In other cases, it will go beyond clarification, as judges will need to explore matters on behalf of the LiP i.e., a more investigative or inquisitorial approach will be justified. In the latter circumstances it was particularly important to ensure the balancing exercise was carried out properly. ***PS v BP*** [2018] EWHC 1987 (Fam); unrep., FD, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.5.4C.1 and following.)

- **Hanley v J C & A Solicitors** [2018] EWHC 2592 (QB), 28 September 2018, unrep. (Soole J sitting with Master Haworth as an assessor)

Power to order solicitor to provide client or former client with copy documents

Solicitors Act 1974, ss.68, 70, CPR r.31.16. The court considered the question whether it had power either under s.68 of the Solicitors Act 1974 or its inherent jurisdiction to direct a solicitor, by way of an order of delivery up, to provide a former client or current client with copies of documents that are the solicitor's property, on payment of reasonably costs. This issue has recently given rise to a number of conflicting decisions by Queen's Bench Division Masters, see ***Green v SGI Legal LLP*** [2017] EWHC B27 (Costs) noted in ***Civil Procedure News No.1 of 2018***, ***Swain v JC & A Ltd*** [2018] EWHC B3 (Costs) noted in ***Civil Procedure News No.3 of 2018***. The present appeals before Soole J were from decisions that held that there was no jurisdiction to make orders to that effect. This was contrary to the position taken in ***Swain***. It was also contrary to the approach taken by the High Court in Northern Ireland in ***The Mortgage Business Plc v Taggart*** (2014). **Held**, the appeals were dismissed. The court has no jurisdiction either under s.68 of the 1974 Act or its inherent jurisdiction to make an order requiring a solicitor to provide copies of documents that are the solicitor's property to clients or former clients. Having reviewed previous authorities, Soole J concluded as follows at paras.61–62,

> *"[61] First, as a matter of principle, an order for delivery up or otherwise in relation to property belonging to another must have an explicit legal basis.*
>
> *[62] Secondly, the powers referred to in s.68 are derived from the inherent jurisdiction, not the statute itself. The section simply extends the reach of the jurisdiction to cases in which no business has been done in the High Court. It reflects, with immaterial amendments, the provisions of successive statutes governing solicitors. Thus the scope of the jurisdiction is to be identified from authority, rather than interpretation of the statutory language."*

Previous decisions relied upon as justifying the existence of the power to order delivery up did not provide authority for the proposition that the court had the power under its inherent jurisdiction to do so where the documents to be subject to such an order were the solicitors' property: see paras.63-71. Finally, at para.71,

> *"[71] Fourthly, the critical requirement of ownership cannot be overcome by reference to the language of s.68; the overall purpose of Part III of the Solicitors Act 1974; analogy with CPR 31.16 or with the Court's powers on a s.70 application or with the rationale of the required ingredients of a statute bill; or the requirements of PD46 para 6.4. The inherent jurisdiction does not provide a form of pre-action disclosure of documents belonging to the solicitor."*

Ex parte Horsfall 108 E.R. 820; (1827) 7 B. & C. 528, Ct of KB, ***Ex parte Holdsworth*** 132 E.R. 836; (1838) 4 Bing. N.C. 386, Ct of CP, ***Re Thomson*** (1855) 20 Beav. 545, 52 E.R. 714, Ct of Ch, ***Re Wheatcroft*** (1877) 6 Ch.D. 97, ChD, ***Leicestershire County Council v Michael Faraday and Partners Ltd*** [1941] 2 K.B. 205, CA, ***In re Crocker*** [1936] 1 Ch. 696, ChD, ***Myers v Elman*** [1940] A.C. 282, HL, ***Chantrey Martin v Martin*** [1953] 2 Q.B. 286, CA, ***Fox v Bannister King & Rigbeys*** [1988] Q.B. 925, CA, ***Ralph Hume Garry (a firm) v Gwillim*** [2002] EWCA Civ 1500; [2003] 1W.L.R. 510, CA, ***Richards Butler v Hansen*** [2002] EWHC 1883 (Ch), unrep., QBD, ***Mortgage Business plc v Taggart*** [2014] NICh 14, unrep., HC of NI, ***Assaubayev v Michael Wilson & Partners*** [2014] EWCA Civ 1491, unrep., CA, ***Swain v J C & A Ltd*** [2018] EWHC B3 (Costs), unrep, (SCCO), ref'd to. (See ***Civil Procedure 2018*** Vol.2 at para.67PD.1.)

■ **Conversant Wireless Licensing SARL v Huawei Technologies Co. Ltd** [2018] EWHC 2549 (Ch), 2 October 2018, unrep. (Henry Carr J)

Determination of costs following compromise of interim application

CPR.44.2. An application for an anti-suit injunction concerning litigation in China arising from potential FRAND licences was compromised. The sole remaining issue between the parties concerning the application was that of costs. Henry Carr J noted that two cases had previously considered the approach a court was to take when considering costs following a compromise: ***Brawley v Marczynski (No.1)*** (2003) and ***BCT Software Solutions Ltd v C Brewer & Sons Limited*** (2004). In the former, it was stated that in such a situation the court's approach should be one that looked to securing justice between the parties without incurring "*unnecessary court time and additional cost*" i.e., to apply to overriding objective. If it was obvious which party would have succeeded on the substantive issue, that party ought to be awarded costs. If it was not obvious, then it would depend on the circumstances, whether the court would look at the substantive issue to determine the question of costs, but that in the absence of a good reason no order as to costs would be the approach taken. In the latter case, it was stressed that in such a situation it remained open to the court to take the approach that if costs were not compromised then the action was not compromised and must therefore continue. The present situation could be distinguished. Previous authority concerned compromise of a trial, where witnesses may have given evidence and been cross-examined. The present case concerned compromise of an interim application, with no cross-examination. The application had, however, been fully-argued before Henry Carr J before it was compromised. As such he was in the position identified in ***Brawley v Marczynski (No.1)*** (2003), such that he was in the position to determine who would have succeeded on the application absent compromise. He was also in the position to form a view of party conduct. Furthermore, significant costs were at stake. **Held**, applying ***Brawley v Marczynski (No.1)*** (2003), costs, to be assessed, would be awarded to the claimant as it had, in substance, succeeded on the application. **Brawley v Marczynski (No 1)** [2003] 1 W.L.R. 813, CA, ***BCT Software Solutions Ltd v C Brewer & Sons Limited*** [2004] C.P. Rep. 2, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.44.2.6.)

■ **Liverpool Victoria Insurance Company Ltd v Khan & Ors** [2018] EWHC 2581 (QB), 5 October 2018, unrep. (Garnham J)

Contempt of court—expert evidence

CPR rr.32.14. Proceedings were brought by the claimant against four defendants seeking their committal for contempt of court. The proceedings arose from a personal injury claim arising from a road traffic accident brought by a taxi driver. Amongst the individuals against whom the proceedings were brought was an expert witness, whose area of expertise was medico-legal work focused on personal injury. His practice was described as operating on an "industrial scale", producing thirty-two reports per day. It was alleged that the defendant expert witness had been reckless in accepting assertions made by the lawyer acting for the claimant in personal injury proceedings as to the nature of the claimant's symptoms. **Held**, the expert was negligent in revising his report allowing such assertions to be incorporated into the report. He revised the report "not caring whether (the assertions) were true or false, and not caring whether or not the Court was misled as a result". The judgment provides an illustration of the dangers that can arise where expert witnesses fail to act consistently with their common law duties and those imposed by CPR r.35.3. ***Attorney General v Leveller Magazine Ltd*** [1979] A.C. 440, HL, ***A.G. v Newspaper Publishing PLC*** [1988] Ch. 333, CA, ***Director of the Serious Fraud Office v O'Brien*** [2014] UKSC 23; [2014] A.C. 1246, UKSC, ***Nield v Loveday*** [2011] EWHC 2324 (Admin); [2011] 4 Costs L.O. 470, Admin., ***Berry Piling Systems Ltd v Sheer Projects Ltd*** [2013] EWHC 347 (TCC); [2013] B.L.R. 232) ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.35.3.4.)

■ **Lloyd v Google LLC** [2018] EWHC 2599 (QB), 8 October 2018, unrep. (Warby J)

Representative action—court's power to act on own initiative

CPR rr.6.37(1)(b), 19.6, PD6B para.3.1(9). The claimant sought permission to serve proceedings seeking compensation for damages said to arise from breaches of the Data Protection Act 1998. The claimant was a representative claimant: CPR r.19.6. The class said to be represented was that of individuals in England and Wales who were said to have been affected by the alleged breach of the 1998 Act. While compensation was sought, the claim did not allege financial loss or distress. **Held,** permission to serve out of the jurisdiction was refused, as the claim did not satisfy the requirements of CPR PD6B para.3.1(9): it did not disclose any basis upon which damages could be awarded. Moreover, the court had jurisdiction to control a representative action once it was brought, and to do so of its own initiative. It could, therefore, prohibiting a representative claimant from continuing to act as such, and—as here—prevent the continuance of such an action where it was apparent, for example, that the represented class did not satisfy the requirement that they have the "*same interest in the litigation*": see paras 43 –44 and 82–105. (See ***Civil Procedure 2018*** Vol.1 at para.19.6.3.)

■ **Page v RGC Restaurants Ltd** [2018] EWHC 2688 (QB), 15 October 2018, unrep. (Walker J)

Incomplete costs budget—application of sanction

CPR rr.3.9, 3.10, 3.14, PD3E. Following a costs and case management conference the claimant was made subject to a sanction, which limited their costs budget to court fees. The sanction was imposed in respect of what was described by the claimant as an "interim costs budget"; a concept not provided for within the CPR. This contained details of costs incurred and expected costs to be incurred. It did not, however, contain details of expected costs related to trial. The sanction was imposed as the Master held that the "interim costs budget" failed to comply with the requirements for costs budgets set out in CPR PD3E. It was not a costs budget, and as such the sanction imposed by CPR r.3.14 applied. The claimant appealed. **Held**, appeal allowed in part. The sanction under CPR r.3.14 ought only to have been applied to the non-compliant parts of the budget i.e., in this case the part which failed to set out costs relating to the trial. This was not a case where relief from sanction under CPR r.3.9 applied; relief was not being granted to the imposition of the sanction. The sanction ought not to have been applied to the whole of the costs, and thus to court was, in reality, correcting the Master's order rather than granting relief from it. In considering the application of the ***Mitchell*** and ***Denton*** test for relief, to determine whether it was appropriate, either in whole or in part, to disapply the CPR r.3.14 sanction—the application of which would otherwise follow automatically from the failure to file a wholly compliant costs budget—Walker J noted at para.165 that while the failure to file a fully completed costs budget was not such as to amount to "gross negligence", it was "negligent". Practitioners would be wise therefore to approach costs budgets on the basis that they ensure that they are fully compliant with all applicable provisions of the CPR. ***Pittalis v Grant*** [1989] Q.B. 605, CA, ***Brent LBC v Tudor*** [2013] EWCA Civ 157; [2013] H.L.R. 20, CA, ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795, CA, ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 392, CA, ***Kimathi v Foreign and Commonwealth Office*** [2018] EWHC 605 (QB), unrep., QBD, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at paras.13.4.2 and 13.4.3.)

■ **Bates v The Post Office No.2 (strike out application)** [2018] EWHC 2698 (QB), 17 October 2018, unrep. (Fraser J)

Witness statement—strike out

CPR r.32.4. The defendant to proceedings subject to a Group Litigation Order issued an application to strike out significant parts, noted as being between one quarter and a third of the evidence, of six witness statements filed by claimants. The witness statements concerned matters to be dealt with at a trial of common issues across the various claims. Fraser J noted that the applicable test was well-established; summarised in ***Wilkinson v West Coast Capital*** (2005) at paras 4 –6 and ***Civil Procedure 2018*** Vol.1 para.32.4.21. The defendant advanced a number of arguments supporting its application, each of which was rejected by Fraser J. In particular the judge noted that a submission that without the evidence being struck out the trial would become "*unmanageable*"; "*cross-examination would be constantly interrupted by regular repetitive objections by Leading Counsel for the defendant on the same grounds, again and again*". Fraser J rejected this submission at para.53 as, amongst other things,

> *"[53] … It is not possible to rule on objections to questions in cross-examination in advance, just as it was not possible for the court to deal with striking out passages in evidence before those witness statements were served.'*

Additionally, Fraser J stated at para.56 that in determining whether to strike out the question whether the evidence was such as it might "*generate adverse publicity*" for the party seeking to have it struck out was irrelevant, it was "*not a concern of the court*". As he went on to note, "*The court is not a marketing or PR department for any litigant, and the principle of open justice is an important one.*" ***Wilkinson v West Coast Capital*** [2005] EWHC 1606 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.32.4.21.)

■ **Hewes v West Hertfordshire Hospitals NHS Trust (3)** [2018] EWHC 2715 (QB), 18 October 2018, unrep. (Foskett J)

Summary judgment—clinical negligence claim

CPR Pt 24. Summary judgment was given in a clinical negligence. It was granted on the basis that the claimant had no real prospect of establishing breach of duty. The order was granted at a stage prior to expert witness reports being exchanged, although the Master considered the defendant's expert's report and the response to it by the claimant's expert: the response not having dealt with the main issue in the claim. On this basis the Master concluded that the claimant had failed to adduce credible medical opinion evidence to demonstrate that the claim had a realistic prospect of success at trial. The claimant appealed. **Held**, the appeal was allowed. In granting the appeal Foskett J noted that there are no reported decisions where a summary judgment application in clinical negligence proceedings has succeeded. As a matter of principle, he stated, there was no reason why in an appropriate clinical negligence case summary judgment should not be granted. However, as he noted at para.45, there would be few cases where summary judgment could be granted prior to the exchange of experts'

"[45] … As a matter of principle there is no reason why clinical negligence cases are any different from any other case and an obviously weak case on liability or causation is vulnerable to such an application. That said, there will be few cases, in my view, where such an application could ordinarily be contemplated before the relevant experts' reports have been exchanged and, in most cases, until after the experts have discussed the case and produced a joint statement. Experts do from time to time change their views in the light of discussions with their counterparts and, whilst it is not to be encouraged and is ordinarily unsuccessful, there are occasions when a party will make a credible application to substitute another expert at some stage. This means that the task of considering, on a summary judgment application, evidence 'which can reasonably be expected to be available at trial and the lack of it' (see ***Royal Brompton Hospital NHS Trust v Hammond*** *[2001] EWCA Civ 550 at [19] and* ***Tesco Stores Ltd v Mastercard Incorporated*** *[2015] EWHC 1145 (Ch) at [9]–[10]) is one that needs to be undertaken with caution."*

Royal Brompton Hospital NHS Trust v Hammond [2001] EWCA Civ 550; [2001] B.L.R. 297, CA, ***Tesco Stores Ltd v Mastercard Incorporated*** [2015] EWHC 1145 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para. 24.2.3.)

Practice Updates

PRACTICE GUIDANCE

Practice Note—Applications in connection with cross-border mergers

On 4 October 2018 the Judicial Office published a Practice Note, issued by the Chief Registrar, Insolvency and Companies Court Judge Briggs (*https://www.judiciary.uk/wp-content/uploads/2018/10/practice-note-on-cross-border-mergers-october-18.pdf*). The note explains the approach the court will take to applications concerning cross-border mergers brought in respect of the Companies (Cross-Border Mergers) Regulations (SI 2007/2974), where one of the companies is a UK company. As such the Note applies to companies "*within the meaning of the Companies Acts (see section 1 of the Companies Act 2006) other than (a) a company limited by guarantee without a share capital (see section 5 of the Companies Act 2006), or (b) a company being wound up…*' (reg.3 of the 2007 Regulations). The Practice Note is reprinted below.

PRACTICE NOTE

The purpose of this note is to explain the Court's approach when hearing applications in connection with a cross-border merger pursuant to the Companies (Cross-Border Mergers) Regulations 2007 ("the Regulations"). It applies where one or more of the transferor companies is a UK company (as defined in the Regulations).

Such a merger cannot proceed without a certificate from the High Court certifying that the pre-merger steps in relation to the UK merging company have been properly completed. The final decision to approve the merger is reserved to the member state whose laws govern the transferee company.

In such a case, an applicant may (where appropriate) seek an order from the Court summoning a meeting or meetings of members and/or creditors of the UK merging company under Regulation 11; and the applicant will seek an order certifying that the pre-merger acts and formalities required of the UK merging company have been properly completed under Regulation 6(1).

The practice of the Companies Court is that such applications are heard by an ICC Judge. In an appropriate case the ICC Judge may adjourn the hearing of an application to a High Court Judge.

At the hearing of an application, the Court will consider the question of creditor and employee protection. Creditors for this purpose may include any party who is owed a debt (including prospective and contingent debts), employees, policyholders, those who have pension rights and others. The evidence should address the position of creditors of the UK merging company, the effect of the merger upon them (including issues arising from the UK's departure from the European Union, if any), and any proposals to protect their interests.

Chief Registrar, ICC Judge Briggs 4 October 2018

In Detail

PRIVILEGE AFTER DIRECTOR OF THE SERIOUS FRAUD OFFICE v EURASIAN NATURAL RESOURCES CORP LTD [2018] EWCA CIV 2006

In ***Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd*** [2018] EWCA Civ 2006, 5 September 2018, unrep., (***SFO v ENRC***) the Court of Appeal (Leveson PQBD, Vos C and McCombe LJ) considered the application of legal professional privilege (LPP) where there had previously been a criminal investigation.

The Background

Eurasian Natural Resources Corp Ltd (ENRC) is an English incorporated company. In 2010 it received what appeared to be a whistleblowing email concerning alleged corruption regarding a wholly-owned subsidiary. ENRC engaged DLA Piper UK LLP, later Dechert, to investigate, subsequent to which the Serious Fraud Office (SFO) commenced a criminal investigation. The SFO then issued notices under section 2(3) of the Criminal Justice Act 1987 requiring the production of various documents created during the course of ENRC's internal investigation. ENRC resisted production on the grounds that the documents were subject to LPP. The SFO issued CPR Pt 8 proceedings seeking a declaration that the documents were not privileged. Andrews J in the High Court, ***Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Ltd*** [2017] EWHC 1017; [2017] 1 W.L.R. 4205 (QB), held three categories of document were not subject to privilege. The categories were: notes of interviews with present and former employees taken during the internal investigation by ENRC's external lawyers (Dechert); reports generated by ENRC's forensic accountments; and, other materials generated by the forensic accountments. An appeal from the decision was allowed in part by the Court of Appeal.

Litigation privilege and criminal proceedings

The first issue, which the Court of Appeal identified as primarily a factual one, was whether Andrews J was correct to conclude that criminal proceedings were not reasonably within ENRC's contemplation. The Court of Appeal disagreed. While it may not be the case in every instance where the SFO is carrying out an investigation that criminal proceedings could reasonably be in contemplation, where it makes the prospect of prosecution clear then it will be. It had been made clear prosecution was a prospect in this case. Even where there is uncertainty as to the prospect of prosecution that did not mean that the "*writing may not be clearly written on the wall*" (see para.98).

LPP and settlement

The second issue concerned the question of the applicability of LPP to settlement. In the case of ***Bailey v Beagle Management Pty Ltd*** [2001] FCA 185 at para.11, Goldberg J in the Federal Court of Australia, held that where a document was created for the purpose of settling litigation it was not subject to litigation privilege.

That analysis was adopted by Andrews J and applied to the question whether the various categories of documents were subject to litigation privilege. The Court of Appeal held that this was the wrong approach to take. Particularly, it held that taking as the starting point for analysing whether documents were subject to litigation privilege the question whether they were created for the purpose of being shown to the other side was the wrong starting point: ***SFO v ENRC*** at para.102. Contrary to the position adopted in ***Bailey v Beagle*** such documents could, in principle, fall under litigation privilege in the same way as any other advice given during the conduct of litigation. As the Court of Appeal put it at para.102,

> *"[102] The fact that solicitors prepare a document with the ultimate intention of showing that document to the opposing party does not, in our judgment, automatically deprive the preparatory legal work that they have undertaken of litigation privilege. We can imagine many circumstances where solicitors may spend much time fine-tuning a response to a claim in order to give their client the best chance of reaching an early settlement. The discussions surrounding the drafting of such a letter would be as much covered by litigation privilege as any other work done in preparing to defend the claim. We doubt, therefore, the correctness of the legal principles that the judge stated at paragraph 61 of her judgment, and the way that she applied them at paragraphs 168-171. In both the civil and the criminal context, legal advice given so as to head off, avoid or even settle reasonably contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of resisting or defending such contemplated proceedings."*

In the present case, the question to have asked was what was the dominant purpose for the creation of the documents, not whether they were created to be shown to the SFO in order to avoid or prevent litigation. In any event on a proper factual analysis, the various documents were not actually created to be shown to the SFO. The dominant purpose for

which they were created was to resist or avoid litigation i.e., contemplated legal proceedings. As a matter of principle such a dominant purpose was such as to attract litigation privilege: see paras 103–119.

The Court of Appeal's affirmation of the application of litigation privilege, the first authority to do so explicitly, to documents created for the purposes of avoiding or settling litigation or contemplated litigation is a welcome clarification. Moreover, it is an approach that is consistent with previous statements explaining the rationale underpinning litigation privilege, see for instance, Lord Simon in ***D v National Society for the Prevention of Cruelty to Children*** [1978] A.C. 171 at 231–232, where the importance of providing a zone of safety for individuals to obtain information to promote settlement was stressed in the context of the provision of legal advice in an adversarial system. While Lord Simon did not explicitly make the point that litigation privilege covers advice given for the purposes of promoting settlement, it is at the very least implicit in his acceptance that a legal adviser needs to be in a position to be provided with full disclosure by their client in the context of litigation in a system where, as he noted it was only "*a rare case*" that would actually be fought out in court, with many cases settling.

Three Rivers (No.5) **and the definition of the client**

Finally, the Court of Appeal examined the scope of legal advice privilege. Given its decisions on the first two points, this did not properly arise for decision. However, given the arguments raised, it dealt with the point. The starting point is that legal advice privilege arises in respect of communications between a lawyer and their client. The communications must be for the provision of legal advice. Andrews J applying the approach taken by Hildyard J in ***The RBS Rights Issue Litigation*** [2016] EWHC 3161 (Ch); [2017] W.L.R. 1991 (ChD), which applied the Court of Appeal's decision in ***Three Rivers (No.5)***, held that who came within the scope of "client" in the corporate context should be construed narrowly. As Andrews J put it at para.82 of her judgment,

> *"[82] … where the client is a corporation, the communication with the lawyer must be to or from a person who is authorised to seek and receive legal advice on behalf of the corporation, and the communication must be for the purposes of, or in the course of that person giving or receiving legal advice."*

Communications between an employee and a lawyer other than those within the scope of the above were not therefore within the ambit of legal advice privilege. The Court of Appeal stated that if it had to determine the issue, it would have agreed that this was the correct interpretation of ***Three Rivers (No.5)***. As it put it para.123 of its judgment,

> *"[123] … we would have determined that Three Rivers (No. 5) decided that communications between an employee of a corporation and the corporation's lawyers could not attract legal advice privilege unless that employee was tasked with seeking and receiving such advice on behalf of the client …'*

That being said, it went on to conclude, at para.130, that while it was not open to it to depart from ***Three Rivers (No.5)***, if it could have done so, it would have done so. It was not however possible for it to do so. That would have to be a matter for the United Kingdom Supreme Court (UKSC) in an appropriate case. In making that last point the Court of Appeal made it abundantly clear that in its view any such review ought to correct an erroneous development in the law of privilege. Most importantly, it criticised the approach taken in ***Three Rivers (No.5)***, which drew upon an analysis of case law developments in the 19th century. They, it was noted, were drawn from a time when legal professional privilege was still in a state of development, and ought therefore to be treated with caution. A better approach, and this could be extrapolated more generally to procedural developments, would be for this area to be considered on a principled basis. As the Court of Appeal put it, at para.125, "… *principled analysis of the purpose of legal advice privilege should be undertaken*" and this should form the basis of a reappraisal of the law. In this respect Lord Scott's at paras.28–30 of ***Three Rivers (No.6)*** should be the guide i.e., that the fundamental principled underpinning of legal advice privilege to communications of facts to lawyers for the purpose of securing such advice was to further the rule of law. This rationale was as applicable to large corporations, as it was to small ones and to individuals. The approach in ***Three Rivers (No.5)*** failed to reflect that. Additionally, it was apparent that the development of the common law internationally demonstrated that the approach in ***Three Rivers (No.5)*** was an outlier: it had not been followed or adopted elsewhere. The English common law was out of step, and was so in an area where a common approach ought properly to be expected. In the light of the powerful criticism of its prior decision by the Court of Appeal, it is perhaps to be hoped that this issue is considered by the UKSC sooner rather than later and that the law here is subjected to a principled appraisal and clarification.

EDITOR: **Dr J. Sorabji**, UCL Judicial Institute; Principal Legal Adviser to the Lord Chief Justice and the Master of the Rolls
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