CIVIL PROCEDURE NEWS

Issue 10/2018 09 December 2018

CONTENTS

THE WHITE BOOK SERVICE 2018

SWEET & MAXWELL

In Brief

Cases

Carrick v Kingston Upon Hull City Council [2018] EWHC 2861 (Ch), 4 July 2018, unrep. (Barling J)

Civil Restraint Order—power to impose a penal notice

CPR rr.3.11, 81.1(3), PD 3C. An extended civil restraint order (CRO) was re-issued against the appellant. The substantive issue on the appeal was whether the CRO could properly be issued with a penal notice. **Held**, the appeal was dismissed. While there was an absence of authority on the point, and as the power to commit for contempt of court under r.81.1(3) applied to all civil courts, as a matter of principle there was no reason to treat CROs differently from other court orders. As such the normal consequences for breach should apply. While it would be an 'unusual case' to grant an application to commit for contempt for breach of a CRO, the fact that the jurisdiction existed means that there is power for any of the civil courts when granting a CRO to affix a penal notice to the order. On a separate point, Barling J held that except where the CRO specified the means by which an individual subject to the order was required to make applications under the order to the court, it was permissible for them to be made by formal application notice or by letter. There was nothing in Practice Direction 3C to require an individual subject to a CRO to make applications under the order to the court by way of application notice. (See ***Civil Procedure 2018*** Vol.1 at para.3.11.1.)

Ayton v RSM Bentley Jennison [2018] EWHC 2851 (QB), 27 July 2018, unrep. (May J)

Pre-action costs—right to issue proceedings to recover where damages not in issue

CPR Pt 36, Pre-action Protocol for Professional Negligence. The claimant pursued a claim for professional negligence against the defendants for £10,000. A pre-action letter was sent to the defendants under the Pre-action Protocol for Professional Negligence disputes. Oddly, that Pre-action Protocol fails to make provision for costs arising from investigating and preparing a pre-action letter. That perhaps ought to be revisited by the Civil Procedure Rule Committee. Subsequently, the defendants sent the claimant a cheque for the sum claimed plus one percent interest. No sum was included concerning costs. Thereafter the defendants' solicitors confirmed that they would not pay any costs as they were, they suggested, under no obligation to do so. The claimant issued proceedings seeking damages for negligence and/or fraud, as well as a claim for £30,000, arising from a car purchase said to have been made in reliance on the alleged negligent advice. The claimant returned the defendant's cheque. The defendants paid the sum contained in the cheque into court and pleaded the defence of tender before claim. The claimant thereafter made two Pt 36 offers. Prior to trial, the defendants ultimately admitted that the claimant was due compensation plus interest, on all of the claim bar the car purchase claim. At trial, the car purchase claim was dismissed. Costs were therefore awarded consistently with the Pt 36 offers. The defendants appealed. A central issue in the appeal was whether pre-action costs were recoverable, specifically that it was not permissible for a claimant to issue proceedings where damages are not in issue solely to seek a costs order in respect of such pre-action costs. **Held**, it was permissible to issue proceedings to recover pre-action costs where a defendant was refusing to pay such costs following settlement. As May J put it at paras 47–48,

> *"[47] The PAP makes it clear that the onus is not just on a claimant to avoid proceedings. Once the process has started, by the issuing of a letter of claim, it is for both parties to seek to resolve their disagreements. What the defendants did at the pre-action phase in this case was to offer an ex gratia payment, with no admission of liability, of the full amount of the damages claimed plus interest at 1 per cent. There was no offer to pay costs, and when the claimant enquired about costs, it was clear that the defendants were adopting a position (of refusing to pay) which they intended to maintain and to fight, as they did, all the way to the Court of Appeal.*
>
> *[48] The only option left to a claimant in circumstances where a pre-action offer is made to pay damages but there is a persistent refusal to cover legal costs is to issue proceedings…"*

Re Gibson's Settlement Trusts [1981] Ch 179, Ch D, ***McGlinn v Waltham Contractors*** [2005] EWHC 1419 (TCC); [2005] 3 All E.R. 1126, TCC, ***Birmingham City Council v Lee*** [2008] EWCA Civ 891; [2008] C.P. Rep. 43, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.C1A-014.)

Grant v Dawn Meats (UK) [2018] EWCA Civ 2212, 16 October 2018, unrep. (Hickinbottom, Coulson and Haddon-Cave LJJ)

Stay of proceedings—calculating to serve proceedings

CPR r.7.5. An employee pursued a claim for personal injury against their employer under the Pre-Action Protocol for Low Value Personal Injury (Employers Liability and Public Liability). The employer admitted liability. Due to concerns

about limitation, and with parties unable to agree quantum, a Pt 8 claim was issued. Prior to service of the claim form, and in order to enable medical evidence to be obtained, the employee applied for a stay of proceedings at the time that the claim was issued. The stay was granted and thereafter extended. The stay expired on 30 November 2016. The claim form was not issued until 6 March 2017. The question arose as to whether the imposition of the stay effected the time within which the claim form ought to have been served. The employer argued that the claim had not been served within four months of issue; that the imposition of the stay did not affect service time limits. The DDJ held that the stay of proceedings applied to all aspects of the proceedings and thus it stayed the running of the service time limits; as such the claim had been served in time. An appeal from that decision was allowed, holding that the stay did not stop time running to serve the claim form. **Held**, on appeal to the Court of Appeal, the claim had been served in time. As Coulson LJ explained the position at para.18,

> *"[18] …, a stay operates to 'halt' or 'freeze' the proceedings. In general terms, no steps in the action, by either side, are required or permitted during the period of the stay. When the stay is lifted, or the stay expires, the position as between the parties should be the same as it was at the moment that the stay was imposed. The parties (and the court) pick up where they left off at the time of the imposition of the stay."*

Furthermore, there was no basis to treat the rules on service of claim forms any differently from other rules within the CPR. In the present case, this meant that the time to serve was suspended at the time the stay was imposed and started to run again from the date the stay expired. Consequently, time to serve expired on 17 March 2017, eleven days after service was effected. (See ***Civil Procedure 2018*** Vol.1 at para.7.5.1).

- **New Media Distribution Company Sezc Ltd v Kagalovsky** [2018] EWHC 2742 (Ch), 16 October 2018, unrep. (Marcus Smith J)

Witness statement—annexing expert report impermissible

CPR r.32.4(1), Pt 35. An application to exclude parts of a witness statement was considered by Marcus Smith J. The paragraphs which were the subject of the application contained evidence from the witness regarding what he believed Ukrainian law and the law of New York to be. They also, however, expressed opinions on what the law actually was. Those opinions were, Marcus Smith J noted, the means by which the witness sought to introduce statements of two experts. The paragraphs in the witness statement were, as he put it at para.6, to "act as the 'gateway' for material . . . that is … expert opinion". **Held**, the paragraphs were to be excluded from the witness's evidence as: (i) the witness is not an expert witness, but a witness of fact. As such he could only properly give and be cross-examined on evidence of fact; (ii) factual statements, witness statements are not the proper vehicle for adducing expert evidence. Expert evidence can only be introduced through the proper application of the provisions of Pt 35. Those provisions cannot be "circumvented simply by attaching the expert statements to a statement of fact" (see para.10). It is only through the proper application of Pt 35 that the proper safeguards, required by the rules concerning expert evidence, can be applied properly e.g., the expert's duty to the court, the expert's declaration, the court's assessment whether the expert is an expert, whether they should be subject to cross-examination. (See ***Civil Procedure 2018*** Vol.1 at para.32.4.5)

- **Wheeldon Brothers Waste Ltd v Millennium Insurance Company Ltd** [2018] EWCA Civ 2403, 18 October 2018, unrep. (Coulson LJ)

Test for permission to appeal—TCC

CPR r.52.6(1). In an application for permission to appeal from a decision of the Technology and Construction Court, released from the prohibition on citing permission to appeal decisions, Coulson LJ restated the principles governing the grant of permission to appeal under r.52.6(1). He first restated the general summary of the approach to appeals on questions of fact (summarised by Lewison LJ in ***Fage UK Limited v Chobani Limited*** (2014) at para.114) which in essence provide that findings of fact will only be overturned on appeal if they were such that 'no reasonable judge' could have made such findings e.g. when there was, as Coulson LJ put it at para.10

> *"…no evidence at all to support the finding that was made, or the judge plainly misunderstood the evidence in order to arrive at the disputed finding."*

He then noted that the approach taken to appeals in respect of expert evidence must proceed with a similar degree of caution, notwithstanding the fact that such evidence will be underpinned by a written report. In this regard Coulson LJ noted May LJ's warning from ***Thomson v Christie Manson & Woods Limited*** (2005) at para.141, in which the latter he noted that assessments of expert evidence by an appellate court would be most likely to form part of a wider assessment of the evidence in a case i.e., factual evidence, and hence appellate courts had to be "very slow to intervene" in a trial court's findings. Having reviewed those authorities and a number of pre- and post-CPR authorities on the approach to applications for permission to appeal from decisions of the TCC, and other specialist courts, Coulson LJ concluded as follows at paras 17 and 18:

"[17] In those circumstances, I consider that the applicable principles can be summarised as follows:

i) The CPR provides a single test for applications for permission to appeal which covers the entirety of the High Court, including the TCC (Virgin Management).

ii) Any application for permission to appeal on matters of fact or evaluations of expert evidence must surmount the high hurdle identified in Fage, Henderson, Thomson and Grizzly Business.

iii) In addition, because a judgment in the TCC is likely to involve i) detailed findings of fact in an area of specialist expertise (Virgin Management and Skanska) and/or ii) lengthy and interlocking assessments of both factual and expert evidence (Skanska and Thomson) and/or iii) factual minutiae which is difficult or impossible sensibly to reconsider on appeal (Skanska), the Court of Appeal will be reluctant to unpick such a judgment (Thomson), with the inevitable result that obtaining permission to appeal on such matters in a TCC case may be harder than in other, non-specialist types of case (Virgin Management, Skanska and Yorkshire Water).

[18] I should add that whilst, for obvious reasons, my focus has been on the TCC, I see no reason why these principles should not apply equally to appeals from any other specialist court. I note that Teva UK Ltd v Boehringer Ingelheim Pharma GmbH & Co KG [2016] EWCA Civ 1296 broadly adopts the same principles for appeals in patent cases."

Held, applying those principles, permission to appeal from the decision from the TCC in the present case was refused. ***Virgin Management v de Morgan Group*** (1994) 68 B.L.R. 26, CA, ***Skanska Construction UK Limited v Egger (Barony) Limited*** [2002] EWCA Civ 1914, unrep., CA, ***Yorkshire Water Services Limited v Taylor Woodrow Construction Northern Limited*** [2005] EWCA Civ 894; [2005] B.L.R. 395, CA, ***Thomson v Christie Manson & Woods Limited*** [2005] EWCA Civ 555; [2005] P.N.L.R. 38, CA, ***Fage UK Limited v Chobani Limited*** [2014] EWCA Civ 5; [2014] E.T.M.R. 26, CA, ***Teva UK Ltd v Boehringer Ingelheim Pharma GmbH & Co KG*** [2016] EWCA Civ 1296; [2017] 4 All E.R. 976, CA, ***Grizzly Business Ltd v Stena Drilling Ltd*** [2017] EWCA Civ 94, unrep., CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at paras 52.3.10–52.3.11.

- **Terry v BCS Corporate Acceptances Ltd** [2018] EWCA Civ 2422, 2 November 2018, unrep. (Sir Geoffrey Vos C, Hamblen LJ and Henry Carr J)

Jurisdiction to set aside a judgment said to be obtained by fraud

CPR rr.1, 3, 3.1(7), 3.4(2), 13.3. Claimants obtained a judgment in default of defence in 2013. Damages were assessed in the sum of £1,982,652.70 and €578,701 together with costs. A worldwide freezing injunction was thereafter issued against the defendant. The defendant subsequently issued applications to strike out the claimants' claim (post-judgment), a stay of those proceedings and to set aside the default judgment. The basis of the various applications was the allegation that the claimants' claim was fraudulent. Laing J dismissed the applications. The defendant's appealed. **Held**, the appeal was dismissed. Underpinning the defendant's application was the question what was the appropriate procedure by which a party could challenge a judgment said to have been obtained by fraud. Hamblen LJ, giving the judgment of the court, noted that there were two "well-established" means to challenge a judgment on such a basis: first, to bring a further action to set aside the judgment on the basis of fraud (***Flower v Lloyd*** (1877); ***Jonesco v Beard*** (1930)); and secondly, an appeal brought on the basis, if relevant, of fresh evidence in order to secure a retrial (***Noble v Owens*** (2010)). In the present case it was suggested that there were two further alternative approaches: first, to strike out the claim as an abuse of process under r.3.4 or under the court's inherent jurisdiction relying on ***Summers v Fairclough Homes Ltd*** (2012); or, to set aside such a judgment under power given by rr.1 and 3.1(7). The Court of Appeal held, in respect of the first proposed alternative, that Laing J was correct in holding that the court had no jurisdiction to strike out a claim post-judgment. Any attempt to rely on dicta that might appear to support the assertion that the court had such a jurisdiction from ***Summers v Fairclough*** was misconceived: see paras 41–67. In respect of the second proposed alternative, there was no basis on which it could properly be said that r.3.1(7) could be relied upon. Its application, on authority, was limited in terms of its application to interim orders. Its application to final orders was even more limited; its application in such circumstances would be "very rare". Examples of its application to final orders were to possession orders where a defendant had not attended the hearing or, by analogy, under similar provisions in family proceedings where there is a duty of full and frank disclosure. Neither circumstance applied to this case. Particularly, reliance on the family proceedings analogy was not justifiable due to the differences between the court's jurisdiction in family proceedings and its jurisdiction in civil proceedings; a point emphasised by Lady Hale in ***Sharland v Sharland*** (2015). Moreover, where default judgment has been obtained the only proper means to set aside such a judgment is through the special procedure provided by r.13.3; the approach in ***Samara v MBI & Partners UK Ltd*** (2016) approved. In so far as reliance on r.1 or the court's inherent jurisdiction was concerned, the Court emphasised that the existence of the two established mechanisms to

challenge judgments on the basis of alleged fraud told against the existence of any such residual jurisdiction. ***Flower v Lloyd (No.1)*** [1877] 6 Ch D 297, CA, ***Hip Foong Hong v H Neotia & Company*** [1918] A.C. 888, PC, ***Jonesco v Beard*** [1930] A.C. 298, HL, ***Noble v Owens*** [2010] EWCA Civ 224; [2010] 1 W.L.R. 2491, CA, ***Summers v Fairclough Homes Ltd*** [2012] UKSC 26; [2012] 1 W.L.R. 2004, UKSC, ***Roult v North West Strategic Health Authority*** [2009] EWCA Civ 444; [2010] 1 W.L.R. 487, CA, ***Tibbles v SIG Plc*** [2012] EWCA Civ 518; [2012] 1 W.L.R. 2591, CA, ***Kojima v HSBC Bank Plc*** [2011] EWHC (Ch); [2011] 3 All E.R. 359, Ch D, ***Sharland v Sharland*** [2015] UKSC 60; [2016] A.C. 871, UKSC, ***Gohil v Gohil (No 2)*** [2015] UKSC 61; [2016] A.C. 849, UKSC, ***Samara v MBI & Partners UK Ltd*** [2016] EWHC 441(QB), unrep., (QBD) ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.3.4.3.6.)

- **Suez Fortune Investments Ltd v Talbot Underwriting Ltd** [2018] EWHC 2929 (Comm), 5 November 2018, unrep. (Teare J)

Witness anonymity—applicable test

CPR rr.3.1, 39.2(4). The question arose in proceedings arising from the alleged scuttling of a ship whether the court should require a witness who had been referred to in the proceedings by a pseudonym to be identified by their real name. An application to that effect was made under the court's general case management powers in r.3.1. It was noted, however, that the court's approach to the application would need to take account of the approach that is taken to applications made under r.39.2(4), which concern orders prohibiting the disclosure of witness identity. **Held**, the application was granted. In reaching that decision Teare J set out, at paras 10–16, a helpful summary of the principles applicable to applications seeking witness anonymity, viz.:

> *"[10] The applicable legal principles were not in dispute. Ordinarily, the identity of a witness in civil proceedings will be made public as a matter of course (see Scott v Scott [1913] AC 417). The CPR provides for the Court to depart from that general rule. CPR 39.2(4) says: 'The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness.' The burden in such applications lies with the party seeking non-disclosure (see, for example, R v Legal Aid Board (ex p. Kaim Todner) [1999] QB 966, at [2], and Yalland v Secretary of State for Exiting the European Union [2017] EWHC 629 (Admin), at [24]).*
>
> *[11] The parties based their submissions largely on the Court's common law jurisdiction to grant anonymity, rather than on the ECHR, but it is clear that the applicable principles are substantially the same whichever jurisdiction is being invoked (see Re Officer L and others [2007] 1 WLR 2135, and Adebolajo v Ministry of Justice [2017] EWHC 3568 (QB), at [19]—[23]). As Lord Reed said in Re BBC [2014] UKSC 25, 'the common law principle of open justice remains in vigour, even when Convention rights are also applicable'.*
>
> *[12] In considering an application for non-disclosure of a witness' identity, the Court applies a two-stage test (see, for example, Kalma v African Minerals Limited [2018] EWHC 120 (QB), at [29]). These stages are: (1) The threshold test: the grant of anonymity must be necessary, based on a legitimate fear of danger; (2) If that threshold is met, the court will balance the witness' interest in anonymity with the interests of the parties in a fair trial, together with the public interest in open justice.*
>
> *[13] As to the first stage of the test, the threshold of 'necessity' is 'formidable' (see the Kalma case, at [31] and the Yalland case, at [24]). The applicant must show some direct link between the witness' legitimate fear of danger, on the one hand, and the disclosure of the witness' identity, on the other. If the extent of the witness' fear, or the prospects of the danger eventuating, would not be 'materially increased' by the disclosure of the witness' identity, then it cannot be said that anonymity is necessary, though of course some other protective measures may be (see Re Officer L, at [24]). Accordingly, anonymity is unlikely to be necessary if the identity of the witness is already known to, or could easily be discovered by, those who threaten harm (see Cherney v Deripaska [2012] EWHC 1781 (Comm), at [51]—[52]).*
>
> *[14] It is sufficient (at least for the purposes of the common law jurisdiction) that the witness has a genuine subjective fear of danger, even if that fear is not objectively verified (see the Adebolajo case, at [30], and Libyan Investment Authority v Société Générale [2015] EWHC 550 (QB), at [32]). If such a genuine fear is proven, it is no response to show that other people in the same position as the applicant would not be similarly fearful (see the Kalma case, at [34]).*
>
> *[15] The second stage of the test arises only if the 'necessity' threshold has been met. This stage requires a balancing exercise, looking at the interests of the witness, the parties, and the public in all the circumstances of the case. As Lloyd-Jones and Lewis LJJ said in the Yalland case, at [23]: '[w]hether a departure from the principle of open justice is justified in any particular case will be highly fact-specific and will require a balancing of the competing rights and interests.'*

[16] Amongst the factors that may be considered within this balancing exercise are: (1) what the witness' evidence is and how central it is to either party's case; (2) the nature and extent of the danger to which the witness fears he or she is exposed; (3) the extent of the public interest in the case, and whether the public interest would be met by, for example the disclosure of certain descriptive qualities about the witness rather than his or her actual identity (see the Yalland case, at [38]—[39]); and (4) whether the witness is, or is associated with, a party to the proceedings, or has been called purely to assist in the resolution of the dispute. As to the last of these, Lord Woolf MR said in the Kaim Todner case, at [8]: 'A witness who has no interest in the proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity, since the courts and parties may depend on their co-operation.' The extent to which these, and other, factors are relevant will depend on the facts of each case.'"

Scott v Scott [1913] A.C. 417, HL, ***R v Legal Aid Board (ex p. Kaim Todner)*** [1999] Q.B. 966, CA, ***Re BBC*** [2014] UKSC 25; [2015] A.C. 588, UKSC, ***Re Officer L*** [2007] 1 W.L.R. 2135, HL, ***Cherney v Deripaska*** [2012] EWHC 1781 (Comm), unrep., Comm., ***Libyan Investment Authority v Société Générale*** [2015] EWHC 550 (QB), unrep., Comm., ***Adebolajo v Ministry of Justice*** [2017] EWHC 3568 (QB), unrep., QBD, ***Yalland v Secretary of State for Exiting the European Union*** [2017] EWHC 629 (Admin); [2017] A.C.D. 49, DivCt, ***Kalma v African Minerals Limited*** [2018] EWHC 120 (QB), unrep., QBD, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.39.2.14.)

■ **Philcox v Wilson** [2018] EWHC 3138 (QB), 16 November 2018, unrep. (O'Farrell J)

Extended Civil Restraint Orders

CPR rr.2.3(1), 3.11, 23.12, 52.20(5), 52.20(6), PD 3C para.3.1. Applications for permission to appeal brought by the applicant were dismissed as being totally without merit. As such, the court had to consider whether to make a civil restraint order. The respondent sought an order imposing an extended civil restraint order (ECRO) on the applicant in the light of a number of proceedings that the applicant had instituted and which it was submitted were motivated by a vendetta against the respondent. Furthermore, it was submitted that absent such an order further proceedings would be issued in the future, and that given the circumstances an ECRO was the proper, the proportionate response to the "threat posed by the Applicant to the due administration of justice". The applicant resisted the application. **Held**, an ECRO would be made. In reaching her decision, O'Farrell J noted that while a party may apply for the imposition of a civil restraint order, the court could make such an order on its own initiative and was required to do so where an application for permission to appeal had been dismissed as being total without merit (CPR rr.23.12, 52.20(6)). She further noted the rationale and approach to the grant of such orders explained in paras 63–40 of ***Nowak v The Nursing and Midwifery Council*** (2013). They were intended to protect the court's process from abuse and were only justified in so far as they were required to do so, see ***Nowak*** and ***Society of Lloyd's v Noel*** (2015). She further noted that the general approach to imposing an ECRO was that they would not be made unless at least three claims or applications had been dismissed as totally without merit, see ***CFC 26 Limited v Brown Shipley and Co Ltd*** (2017), and that while the court is under a duty to record where that was the case, it was possible for a court to find that a claim or order had been dismissed on the totally without merit basis even if that fact was not recorded, see ***R (Kumar) v Secretary of State for Constitutional Affairs*** (2006) at paras 67–68. In assessing a party's conduct: (i) the court could take account of all their litigation history. The court was not confined to consider those orders that were dismissed as being unmeritorious, nor was the court limited to looking at a limited period of litigation: ***Society of Lloyd's*** endorsed, while ***The Law Society of England and Wales v Otobo*** (2011) stated not to set out a correct statement of the law on this point. Finally, O'Farrell J stated, at para.28, that in assessing whether a party had persistently issued claims or applications that were totally without merit to meet the pre-conditions for the grant of an ECRO, then:

"[28] … practice direction 3C does not require the 'totally without merit' determination to be made in three distinct or unrelated claims or applications. It is sufficient that there are at least three separate orders made by the court based on findings that the claims or applications were unmeritorious. Therefore, a renewed application may count as an additional 'totally without merit' application for this purpose."

In the present case the pre-conditions were made out, and then having considered the question of whether to exercise the discretion to impose an ECRO, O'Farrell J held that in the circumstances it should be exercised and such an order made. ***Bhamjee v Forsdick*** [2004] 1 W.L.R. 88, CA, ***R (Kumar) v Secretary of State for Constitutional Affairs*** [2006] EWCA Civ 990; [2007] 1 W.L.R. 536, CA, ***The Law Society of England and Wales v Otobo*** [2011] EWHC 2264 (Ch), unrep., Ch D, ***Nowak v The Nursing and Midwifery Council*** [2013] EWHC 1932 (QB), unrep., QBD, ***Society of Lloyd's v Noel*** [2015] EWHC 734 (QB); [2015] 1 W.L.R. 4393, QBD, ***CFC 26 Limited v Brown Shipley and Co Ltd*** [2017] EWHC 1594 (Ch); [2017] 1 W.L.R. 4589, Ch D, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.3.11.1.)

■ **Secretary of State for the Home Department v R (on the application of Lucas)** [2018] EWCA Civ 2541, 16 November 2018, unrep. (Hamblen, Hickinbottom and Coulson LJJ)

Procedure on adjournment to an oral hearing of application of permission to appeal

CPR r.52.5. In joined appeals in respect of the lawfulness of the detention of foreign criminals, Hamblen LJ set out guidance on the approach to take where an application for permission to appeal is adjourned to be determined at an oral hearing. In the present case, Hickinbottom LJ had refused three grounds of appeal, while adjourning the fourth to be dealt with in open court. It was argued that having adjourned the one ground to be dealt with in open court, absent an express order barring the court from considering the other three grounds, the oral hearing could consider any ground on which permission to appeal was sought. Hamblen LJ noted that it was clear from Hickinbottom LJ's order that permission to appeal had been refused on three grounds, and that looked at as a whole, his order was only adjourning one ground for oral hearing. As such the three grounds had been refused on paper. Furthermore, there was no mechanism to challenge the refusal of permission to appeal on those grounds: see r.52.5. As guidance for the future, and to avoid any doubt as to the position, where permission to appeal was refused on the papers that should clearly be stated, particularly where one or some grounds were adjourned to an oral hearing. Hamblen LJ noted that the Court of Appeal's forms would be amended to ensure that such distinctions and decisions were more easily identified in future. (See ***Civil Procedure 2018*** Vol.1 at para.52.5.1.)

■ **Slade (t/a Richard Slade And Company) v Boodia** [2018] EWCA Civ 2667, 27 November 2018, unrep. (Newey, Coulson and Haddon-Cave LJJ)

Solicitors—Interim Bill of Costs

Solicitors Act 1974 ss.69, 70. An issue arose between a solicitors' firm and their former clients. The issue centred on the nature of a large number of invoices that had been delivered to the former clients, arising out of the retainer. The former clients issued proceedings seeking an assessment of those invoices under s.70 of the Solicitors Act 1974. One specific issue was whether the invoices were interim statute bills under the 1974 Act; a statute bill being one that complies with the terms of that Act, and an interim statute bill being one raised during the course of a retainer in respect of a task that had been completed. The Master held that they were not interim statute bills. An appeal from that decision was rejected. A further appeal was brought to the Court of Appeal, which **held** that the individual invoices were interim statute bills. Both the Master and the judge on appeal had held that to qualify as an interim statute bill, the bill must be "*a complete and final account of the fees sought for the period covered by it*"; that they must be "*a complete self-contained bill of costs to date*", see ***Davidsons v Jones-Fenleigh*** (1980) and ***Bari v Rosen*** (2012). As a consequence, they had held that to constitute an interim statute bill, a bill had to include any profit costs and disbursements claimed. Absent their inclusion, the bill could not be treated as complete and self-contained and thus could not be treated as a statute bill. The Court of Appeal rejected this approach. It was not justified by the wording of the 1974 Act. It would lead to practical difficulties if correct, as it would mean that a solicitor would not be able to issue an interim statute bill unless and until they had themselves received an invoice for all disbursements arising during the period for which the bill was intended to cover. The approach adopted by the Court of Appeal in ***Aaron v Okoye*** (1998), where it was accepted that counsel's fees that had not been included in one statute bill could properly be included in a second one was endorsed. At the time the first bill was invoiced, counsel's fees were being disputed. The Court of Appeal in the present case held that this approach was not consistent with approach adopted by the Master and the judge on the first appeal. On the contrary, per Newey LJ at para.36, a bill could amount to a statute bill even where it did not include "*both profit costs and disbursements for the period it covers*". A bill that simply contained profit costs or disbursements could amount to an interim statute bill; see Newey LJ at para.38. Furthermore, where previous authorities had referred to a bill needing to be "self-contained and complete", what had been meant was that it had to be apparent that that the content of that bill was final as to its subject matter, i.e., as to what it contained, and that the solicitors were not via that bill simply seeking a payment on account; see Newey LJ at para.31. ***Underwood, Son, & Piper v Lewis*** [1894] 2 Q.B. 306, CA, ***In re Hall & Barker*** (1878) 9 Ch. D 538, Ch D, ***In re Romer & Haslam*** [1893] 2 Q.B. 286, CA, ***Davidsons v Jones-Fenleigh*** [1997] Costs L.R. (Core Vol.) 70, CA, ***Chamberlain v Boodle & King*** [1982] 1 W.L.R. 1443, CA, ***Aaron v Okoye*** [1998] 2 Costs L.R. 6, CA, ***Ralph Hume Garry v Gwillim*** [2002] EWCA Civ 1500, [2003] 1 W.L.R. 510, CA, ***Abedi v Penningtons*** [2000] 2 Costs L.R. 205, CA, ***Harrod's Ltd v Harrod's (Buenos Aires) Ltd*** [2014] 6 Costs L.R. 975, Ch D, ***Bari v Rosen*** [2012] EWHC 1782 (QB); [2012] 5 Costs L.R. 851, QBD, ref'd to. (See ***Civil Procedure 2018*** Vol.2 at para.7C-114 and following.)

Practice Updates

PRACTICE DIRECTIONS & PRACTICE GUIDANCE

- **CPR PRACTICE DIRECTION—101st Update**. In force from **8 November 2018** in respect of the amendment to PD 2E and 30 November 2018 in respect of the introduction of PD51V.

The Practice Direction update makes a minor amendment to PD 2E—Jurisdiction of the County Court that may be exercised by a legal adviser. The amendment is to correct what appears to be a typographical error to column 2 of entry 12 of the Practice Direction's Schedule—Jurisdiction of the County Court that may be exercised by a legal adviser. The Practice Direction also introduces a new pilot scheme, to supplement Pt 13. The new pilot scheme, PD51V—The Video Hearings Pilot Scheme, is to run from 30 November 2018 to 30 November 2019. It provides for specified applications to set aside default judgments to be conducted by video hearing. The full text of the pilot scheme PD is set out below.

PRACTICE DIRECTION 51V – THE VIDEO HEARINGS PILOT SCHEME

This Practice Direction supplements Part 13

CONTENTS OF THIS PRACTICE DIRECTION

Scope and interpretation

1.1 This practice direction, made under rule 51.2 of the Civil Procedure Rules ("CPR"), establishes a pilot scheme to be called "the Video Hearings Pilot Scheme" ("the pilot").

1.2 The pilot will test a procedure for applications to set aside default judgments entered under Part 12 of the CPR to be heard by the court via an internet-enabled video link ("a video hearing").

1.3 All parties or their legal representatives will attend the hearing of the application, using the video-link, from suitable IT equipment and will see and hear, and will be seen and heard by, each other and the judge determining the application.

1.4 Hearings will be held in public. Members of the public may access a hearing by attending the court in person and will see and hear the judge and the parties or their legal representatives on a screen in the court room.

1.5 The pilot runs from 30th November 2018 to 30th November 2019.

1.6 The pilot applies where—

(a) the County Court has entered judgment in respect of a claim for a specified amount of money only, under Part 12 of the CPR;

(b) a party has applied to set aside judgment under CPR 13.2 or 13.3;

(c) the application will be heard at either the Birmingham or Manchester Civil Justice Centres ("the relevant court"); and

(d) on the date of receipt of the application, the parties' e-mail addresses, or the e-mail addresses of their legal representatives, are known to the relevant court.

1.7 Subject to paragraph 2.1(b), the court may notify the parties or their legal representatives by e-mail. If notification is made by e-mail, the court must also decide whether it is appropriate to send notification by post or telephone at the same time.

1.8 Where provisions in this practice direction conflict with other provisions in the CPR or other practice directions, this practice direction takes precedence. The rest of the rules and practice directions, however, will continue to apply to the application, along with any changes to the rules or other practice directions made by this practice direction or orders made by the court to enable the application to be determined.

Applications to set aside judgments under the pilot

2.1 On receipt of an application the relevant court will—

(a) allocate a date and time for the application to be heard; and

(b) notify the parties by post and e-mail—

(i) of the date and time when the application will be heard;

(ii) that the hearing will proceed as a video hearing if the conditions in paragraph 2.2 are met; and

(iii) that if the conditions in paragraph 2.2 are not met, the parties will be required to attend the hearing in the manner directed by the court.

2.2 The conditions referred to in paragraph 2.1(b)(ii) and (iii) are that—

(a) each party has consented to the application proceeding by way of a video hearing;

(b) at least 14 days before the hearing date, each party or legal representative has completed, online, a pre-video hearing suitability questionnaire, the link to which will be provided by the court;

(c) a court officer has considered the completed pre-video hearing suitability questionnaires and is satisfied that each party or legal representative is able, and has access to the IT equipment required, to participate in a video hearing;

(d) a judge has considered both the application and the completed pre-video hearing suitability questionnaires and has determined that the application may proceed by way of a video hearing; and

(e) at least 7 days before the hearing date, the court—

(i) has set-up a video hearing user account for each party or legal representative; and

(ii) has tested the IT equipment used by each party or legal representative and confirmed that it will enable them to access the relevant court's video hearing service.

2.3 If the conditions in paragraph 2.2 are met, the application will be heard by way of a video hearing and the court must notify the parties accordingly.

2.4 If any of the conditions in paragraph 2.2 are not met—

(a) the parties must attend the hearing of the application in the manner directed by the court; and

(b) not less than 5 days before the appointed date for the hearing, the court must notify the parties of the arrangements for the hearing.

SENIOR COURTS COST OFFICE GUIDE 2018

On **16 November 2018**, a revised edition of the Senior Courts Cost Office Guide was issued. It is the first revision since 2013 and is to take effect immediately. It has been fully revised to take account of the numerous changes to costs procedure and practice since the Jackson reforms were introduced. It also now contains detailed guidance, in sections 8 and 9, on the approach to take to electronic bills of costs. As with the other Court Guides it is now to be updated on a regular basis in electronic form (see *https://www.judiciary.uk/wp-content/uploads/2018/11/6.4764_JO_SCCO-Guide-2018_v4.pdf*).

In Detail

APPLICATION TO SET REGISTRATION OF A FOREIGN JUDGMENT—BERHAD v FRAZER-NASH RESEARCH LTD [2018] EWHC 2970 (QB)

In ***Berhad v Frazer-Nash Research Ltd*** [2018] EWHC 2970 (QB), 6 November 2018, unrep., Pepperall J, considered an application to set aside the registration of a foreign judgment under the two-stage process provided for by s.9(4) of the Administration of Justice Act 1920 and CPR r.74.3(2) and rr.74.6 and 74.7.

The Background

In April 2018 judgments of the High Court of Malaya in Berhad's favour were registered under s.9 of the Administration of Justice Act 1920. As a consequence those judgments were capable of enforcement in England and Wales as if they were judgments of the High Court in England and Wales. Subsequently, Fraser-Nash applied to set aside the registration order. Three grounds were advanced to support the application: first, that an appeal from the Malaysian judgments was pending in Malaysia. As such the bar on registration contained within s.9(2)(e) of the 1920 Act prohibited registration; secondly, there had been such delay on the part of Berhad in seeking to register to judgments that the application was an abuse of process or, alternatively, the delay should lead to the court refusing to exercise its discretion to register the judgments; and, thirdly, as Berhad had failed to comply with r.74.4 by failing to supply the court with relevant transcripts of judgments from Malaysia.

The decision

The application to set aside was dismissed. Pepperall J held that there was no proposed appeal in Malaysia against the substantive judgments, but rather against a declaratory judgment concerning their enforceability. As such the statutory bar on registration was not made out. Secondly, the proposed appeal required the grant of permission to appeal and did so out of time. Thirdly, there was nothing to show that there was a prospect that the proposed appeal would meet the necessary threshold for permission to be granted. And, finally, the proposed appeal's timing appeared to be timed to provide a basis to set aside registration. While there had been a ten-year delay between the judgments being entered in Malaysia and the attempt to enforce, while it was in part inexcusable and inordinate, it that did not amount to an abuse of process, nor was there any evidence of prejudice arising from the delay such as to justify the application to register being struck out. Finally, in respect of Pt 74, the application had been supported by evidence that exhibited the judgments to be enforced and certified transcripts. It was not necessary to exhibit other judgments, such as in the present proceedings, one of the Malaysian Court of Appeal that determined that the judgments could be executed by Berhad against Fraser-Nash in Malaysia. However, notwithstanding the application's dismissal, due to the fact that there was a current application to extend time to appeal the judgments in Malaysia, enforcement was stayed pending the resolution of those applications and, if permission was granted, the subsequent appeal proceedings.

In reaching his decision Pepperall J's judgment set out a number of areas of guidance for future such applications.

The appropriate approach to the application to register the judgments

Pepperall J, at para.25 of his judgment, described the approach to be taken to applications to register foreign judgments. As he put it,

> *"[25] The usual procedure in these cases is that the matter is considered and, invariably, an order is made by a master on the papers without notice to the judgment debtor. Notice of registration is served on the debtor who can then apply to set aside the registration."*

Unusually, but as Pepperall J noted given a complicated history to the litigation between the parties, the application to set aside was listed for an oral hearing at the debtor, Fraser-Nash's request. Pepperall J also expressed a view, at para.26, on the approach that might beneficially have been taken in this case, and in other similar cases where there was a complicated history to the proceedings,

> *"[26] … I expressed the tentative view in the course of submissions that, upon recognising that this was not a straightforward case that could be conveniently dealt with by a master on the papers, it might have been better to have made the application on notice. Certainly, there was no breach of the rules in electing not to do so since r.74.3(2) expressly allows applications for registration to be made without notice. Furthermore, I acknowledge that both the Act and the rules allow the judgment debtor to apply to set aside registration orders. Making the initial application on notice might therefore have led to two inter partes hearings, although in such circumstances the court hearing the set-aside application could be expected to be rather stricter in its application of Tibbles v. SIG plc [2012] EWCA Civ 518, [2012] 1 WLR 2591 in order to prevent the second hearing simply traversing the same territory."*

Tentative as the view might have been, it is one that has much to commend it as a sensible and proportionate approach to such applications given the prospect it holds out of contentious issues being dealt with at the initial registration stage rather than at a later application, thus promoting a more efficient use of court and party resources.

The application to set aside—the approach to be taken

Following the usual approach to applications to register foreign judgments, the application to set aside was the first inter partes hearing. It was the also the first time that the applicant seeking to set aside had been aware of the proceedings; the application to register being made without notice.

In these circumstances Pepperall J held that the approach to applications to set aside articulated in ***Tibbles v SIG plc*** [2012] EWCA Civ 518; [2012] 1 W.L.R. 2591, CA, did not apply. It did not apply as the application to set aside was the first on-notice, inter partes hearing. The approach in ***Tibbles*** did not apply as it was concerned with applications to set aside following an inter partes hearing. ***Tibbles*** was not concerned with, nor did it apply to, applications made under r.23.10 where there had been no prior inter partes hearing. Moreover, it was not applicable to the procedure to set aside under r.74.7, which provided a bespoke version of r.23.10, in the present context. As Pepperall J put it at para.31,

> *"[31] In my judgment, the principles enunciated in Tibbles are not engaged in applications under r.23.10, or indeed under the bespoke provision to like effect in r.74.7. The hearing before me was the first opportunity for the Respondents to present their evidence and to make their arguments …"*

Late service of evidence—the non-applicability of the test for relief from sanctions

Evidence in support of the application to set aside was not filed and served in accordance with the time limits provided for in Practice Direction 23A paras 6.11 and 6.13. As such, it was argued that relief from sanction under r.3.9 was required. And as such it was said the test set out in ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3296, CA, applied.

Pepperall J rejected the submission that relief from sanction was necessary. He did so on the basis that the provisions of PD 23A do not impose a sanction for non-compliance. Moreover, even if it had imposed a sanction the test for relief from sanctions would not apply in the present case. This was due to the fact that the late filing and service of evidence in this case arose because it was evidence in response to events that had just occurred: it was updating evidence in response to a new event.

The pending appeal point

A foreign judgment cannot be registered if an appeal is pending; s.9(2)(e) of the 1920 Act. There was, as Pepperall J noted, no authority on the question as to what was necessary for there to be an appeal pending. In the present case, an extension of time to seek permission to appeal and an application for permission to appeal were pending. He noted that there was however authority on what it meant for an appeal to be pending in other contexts. In respect of r.10.24(2) of the Insolvency Rules 2016, the term had been construed to mean that an appeal had to be on foot; it was not sufficient for there to be an extant, undetermined, application for permission to appeal. Permission to appeal needed to have been granted for there to be a pending appeal: see ***Rehman v Boardman*** [2004] EWHC 505 (Ch) at para.19 and ***Barker v Baxendale-Walker*** [2018] EWHC 1681 (Ch).

Furthermore, in order to come within the prohibition on registration on the ground that an appeal is pending, it is necessary to demonstrate that there is an entitlement to appeal. Where there is however only an entitlement to seek permission to appeal, as in the present case, there is not entitlement to appeal. Moreover, where there is a requirement to seek permission to appeal within a certain time, and no application is made, the need to seek permission to bring the application for permission out of time is an additional hurdle to be overcome before it can be said that there is an entitlement to appeal.

Summary

Pepperall J's decision helpfully clarifies the following points concerning the procedure to be adopted on applications to set aside:

- Ordinarily an application to set aside registration should be the first on-notice inter partes hearing. Where, however, there is a complex litigation history the more proportionate approach would be for the application to register to be on-notice and inter partes and any subsequent application to set aside to follow the approach in ***Tibbles***;
- Where the normal without-notice ex parte approach to registration has been followed, an application to set aside does not come within the scope of ***Tibbles***. It does not because it is a bespoke process, which provides for the first contested inter partes hearing between the parties;
- Non-compliance with the time limit to file and serve evidence provided by PD 23A does not engage r.3.9;
- For there to be a pending appeal for the purposes of s.9(2)(e) of the 1920 Act there must either be an entitlement to appeal or permission to appeal must have been granted. An entitlement to seek permission to appeal was not sufficient. Nor was it sufficient for there to be an extant application for permission to appeal out of time.

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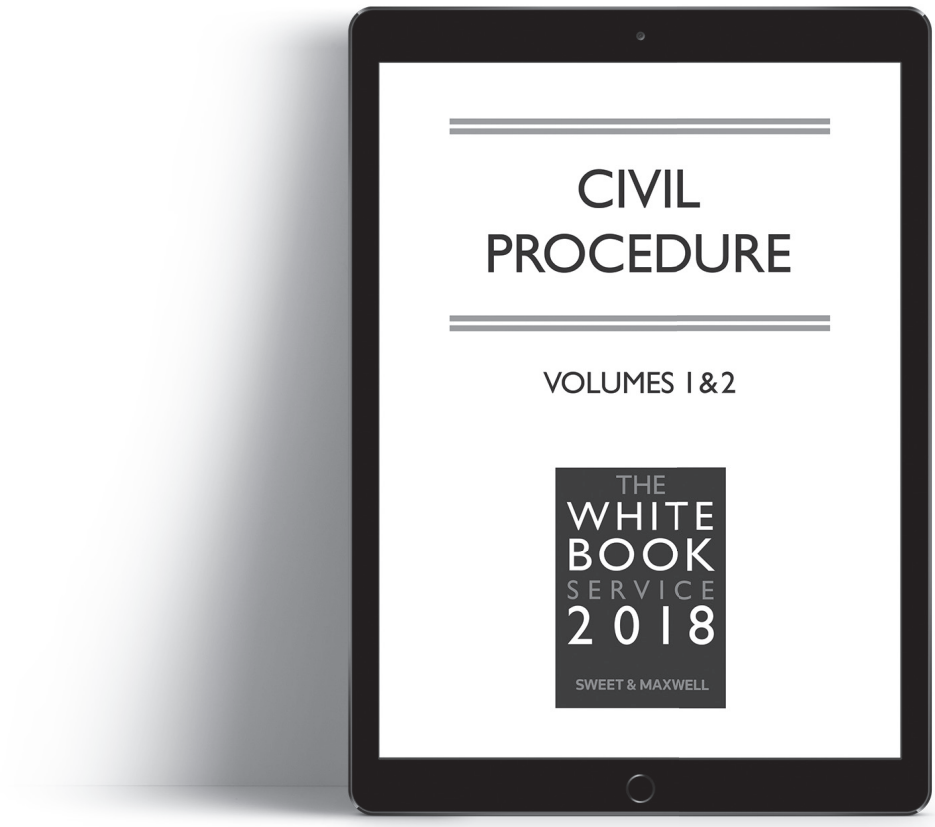

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Published by Sweet & Maxwell Ltd, 5 Canada Square, Canary Wharf, London, E14 5AQ
ISSN 0958-9821
© Thomson Reuters (Professional) UK Limited 2018
All rights reserved
Typeset by Matthew Marley
Printed by Hobbs The Printers Ltd, Totton, Hampshire.

30808173