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Cases

- **The ECU Group Plc v HSBC Bank Plc** [2018] EWHC 3045 (Comm), 9 November 2018, unrep. (Andrew Baker J)

Retrospective permission of subsequent use of disclosed documents

CPR r.31.22(1)(b). Documents were disclosed as part of pre-action disclosure (CPR r.31.16). Prospective permission was sought to use the disclosed documents to bring proceedings in England and Wales other than in the proceedings in which pre-action disclosure was made. Prospective permission was also sought to use the disclosed documents to seek legal advice in and to prepare and bring legal proceedings in the United States. In addition, retrospective permission was sought for prior use of the documents in a variety of communications relating to the prospective proceedings in the United States. **Held**, prospective permission was granted. In respect of the question of retrospective permission it was noted that the court could make such an order but that it would be rare for it to do so; see ***Miller v Scorey*** (1996). In granting retrospective permission in the present case Andrew Baker J stated that in determining whether to do so the question whether to grant prospective permission, if such an application had been made, was an important factor. It was not however a necessary nor a sufficient factor. He further noted that the court had a variety of sanctions at its disposal for any breach of the requirement to seek and obtain prospective permission: strike out was not the only possible sanction. Adverse costs awards, for instance, could be ordered. He further indicated that, in his view, the general approach in permission applications would be to sit in private for any part of the permission hearing where the content of the documents was referred to. ***Miller v Scorey*** [1996] 1 W.L.R. 1122, ChD, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.31.22.1.)

- **Mark v Universal Coatings & Services Ltd** [2018] EWHC 3206 (QB), 23 November 2018, unrep. (Martin Spencer J)

CPR r.3.9, PD16, para.1.4. A personal injury claim was struck out. Amongst other things the question arose whether the claimant's failure to serve a medical report and schedule of loss engaged the "implied sanction" doctrine; see, ***Altomart v Salford*** (2014). On the basis that the breach did give rise to an implied sanction, the issue was ought relief from sanctions be granted subject to the test in ***Mitchell*** and ***Denton***. Relief from sanction was not granted. On appeal to Martin Spencer J, it was **held** that: (i) not all rules within the CPR which provided that a party "must" do something gave rise to an implied sanction for non-compliance; and, (ii) a failure to comply with the requirements of PD16 to serve a medical report or a schedule of loss with a particulars of claim was not such as to give rise to an implied sanction. As such the question of relief from sanctions did not properly arise. He went on to explain that the reason why non-compliance with some rules carried with it an implied sanction was due to the significant consequences that arose from the breach. The significance could be discerned from the default position that followed breach. This can be seen from the paradigm case of implied sanctions, failure to serve a notice of appeal in time. The default position that applies in the absence such rule compliance is that the trial judgment stands and there can be no appeal. To give rise to an implied sanction for default, the nature of the default ought to be of analogous significance. ***Sayers v Clarke Walker*** [2002] 1 W.L.R. 3095, 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. 3296, CA, ***Altomart v Salford*** [2014] EWCA Civ 1408; [2015] 1 W.L.R. 1825, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.3.9.15.)

- **Griffin Underwriting Ltd v Varouxakis** [2018] EWHC 3259 (Comm), 28 November 2018, unrep. (Males J)

Variation of time limits—court notification

CPR rr.2.11, 3.8, PD58 para.7. A claim was brought against a defendant who was domiciled in Greece. Jurisdiction was said to arise under art.7(2) of the Brussels Regulation (Recast). The court's jurisdiction was challenged. It was argued, however, that the challenge to jurisdiction was out of time. **Held**, the jurisdictional challenge was dismissed. In reaching that decision Males J considered the effect of a variation on the time limit to challenge jurisdiction. As the present claim involved proceedings before the Commercial Court, any agreement between the parties to extend or otherwise vary procedural time limits had to be notified to the court by the claimant. A failure to notify the court rendered the agreement ineffective. As Males J explained the position at paras 44–48,

> *"[44] Upon filing his acknowledgement of service, Mr Varouxakis had 28 days to make his application to challenge the jurisdiction of the court, expiring on 26 April 2017: CPR 11(4) as varied for Commercial Court proceedings*

by CPR 58.7. In the event that he failed to do so, he would be treated as having accepted that the court has jurisdiction: CPR 11(5). The making of an application to challenge jurisdiction would mean that no Defence need be served: CPR 15.4(2).

[45] CPR 2.11 provides that the time specified by a rule for a person to do any act may be varied by the written agreement of the parties. In the Commercial Court, however, any such agreement must be notified to the court in writing, with reasons, and the court may make an order overriding the agreement: CPR 58 PD para 7. It would no doubt be unusual for the court to wish to override a sensible agreement made by the parties, but this at least enables the court to retain control of the proceedings. CPR 2.11 contains no express limit on the length of any agreed variation of time but does include a cross reference to CPR 3.8. CPR 3.8 also enables the parties to agree an extension of time for doing an act required by the rules where the rules also specify the consequences of failure to comply, but provides that unless the court orders otherwise the maximum extension which can be agreed is 28 days and, even then, that the extension must not put at risk any hearing date. Paragraph C3.3 of the Commercial Court Guide explains that the general power to agree variations to time limits contained in CPR 2.11 enables the parties to agree extensions longer than 28 days, but that even if this is agreed, the court should be invited to make a consent order.

[46] It seems to me that there is some tension between CPR 2.11 and CPR 3.8 but, in the Commercial Court at any rate, the parties must notify the court of any agreed extension, as required by the rules and the guide. In the present case the parties did not notify the court of the moratorium agreed on 25 April 2017. In those circumstances a question arises as to the effect of the moratorium. Did it take effect to extend the time for challenging the jurisdiction indefinitely despite the parties' failure to notify the court? Was it effective to extend the time but only for 28 days (e.g. if CPR 3.8 was the applicable rule)? Or did the failure to notify the court render the moratorium wholly ineffective?

[47] I would hold that the failure to notify the court meant that the moratorium was not effective to extend the time for the defendant to challenge jurisdiction. It is important that the court retains control of the proceedings and has at least the opportunity to consider whether to override any agreement reached between the parties, in accordance with CPR 58 PD para 7. It is not open to the parties to agree an indefinite extension of time without notifying the court. To hold that the moratorium was effective despite the failure to comply with the notification requirement would deprive the court of control and would mean that there was no effective sanction for non-compliance. Or as Hobhouse J used to say in the days long before the CPR, in this court it takes three to make an agreement.

[48] Accordingly Mr Varouxakis must be treated as having accepted that the court has jurisdiction in accordance with CPR 11(5). The same result would follow slightly later if the agreed moratorium was effective to extend the time but only for 28 days."

(See ***Civil Procedure 2018*** Vol.1 at para.2.11.1.)

■ ***Raja v Van Hoogstraten*** [2018] EWHC 3261 (Ch), 29 November 2018, unrep. (Morgan J)

Stay of costs—whether permanent

CPR r.40.8A. Following a trial of a preliminary issue of whether the first defendant had a beneficial interest in two properties, the claimant was ordered to pay one-third of the second to seventh defendants' costs. The claimant applied for a permanent stay on the costs order following the second to seventh defendants' non-compliance with various orders made consequent on the costs order. **Held**, Morgan J noted that there was no prior authority on the scope of CPR r.40.8A or its predecessor, RSC Ord.45 r.11. To stay the order permanently would, in reality, be to set it aside. The defendant's non-compliance would not justify setting aside the costs order aside under CPR r.3.1(7). That suggested it would not be a proper exercise of the discretion to impose a stay if it was to be permanent. Furthermore, to effectively deny the defendants the opportunity to enforce the costs order would go beyond the authorities concerning when it was permissible to deny an individual, who was in contempt of court, from accessing the court; ***JSC BTA Bank v Ablyazov*** (2012) considered. A permanent stay would have the same effect and, as such would go beyond the authorities on that issue. In the light of these points, the application was refused. ***JSC BTA Bank v Ablyazov*** [2012] EWCA Civ 1411; [2013] 1 W.L.R. 1331, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.40.8A.1.)

■ **WH Holding Ltd v E20 Stadium LLP** [2018] EWCA Civ 2652, 30 November 2018, unrep. (Sir Terence Etherton C, Lewison & Asplin LJJ)

Legal professional privilege—dominant purpose

CPR 31.3, 31.19(6)(a). The Court of Appeal considered the scope of its recent decision in ***Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd*** (2018). It considered whether that decision had altered the

long-established requirement that to attract litigation privilege a document had to be created for the sole or dominant purpose of conducting litigation. In particular it addressed the question (see para.8)

> *"[8] … whether litigation privilege extends to documents which are concerned with the settlement or avoidance of litigation where the documents neither seek advice or information for the purpose of conducting litigation nor reveal the nature of such advice or information."*

The court **held** that the decision in ***Eurasian*** had not altered the approach. On the contrary, it had confirmed that litigation included attempts to avoid or settle litigation; a point it noted, at para.14, which was at the least implied in Buckley LJ's judgment in ***Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co*** (1913) 850 at 856. Specifically, documents produced which were concerned with settling or avoiding litigation must be created for the sole or dominant purpose of obtaining information or advice about existing or contemplated litigation to come within the scope of litigation privilege. There was no basis to find documents created for commercial purposes came within the scope of litigation privilege. The court also considered whether there was a separate head of privilege that applied to, and covered, internal corporate communications. It **held** that there was no such blanket privilege applicable to such communications. In so far as the decision in ***Bristol v Cox*** (1884) supported the existence of such a privilege it was wrongly decided. ***Bristol v Cox*** (1884) overruled. The court summarised the position following ***Eurasian*** and its decision, at para.27, as follows,

> *"[27] In summary, our conclusions are as follows:*
>
> *i) Litigation privilege is engaged when litigation is in reasonable contemplation.*
>
> *ii) Once litigation privilege is engaged it covers communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with the conduct of the litigation, provided it is for the sole or dominant purpose of the conduct of the litigation.*
>
> *iii) Conducting the litigation includes deciding whether to litigate and also includes whether to settle the dispute giving rise to the litigation.*
>
> *iv) Documents in which such information or advice cannot be disentangled or which would otherwise reveal such information or advice are covered by the privilege.*
>
> *There is no separate head of privilege which covers internal communications falling outside the ambit of litigation privilege …"*

Mayor and Corporation of Bristol v Cox (1884) 26 Ch D 678, ChD, ***Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co*** [1913] 3 K.B. 850, CA, ***Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd*** [2018] EWCA Civ 2006, unrep., CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.31.3.13.)

■ **Stallion Eight Shipping Co. SA v Natwest Markets Plc** [2018] EWCA Civ 2760, 11 December 2018, unrep. (Sir Terence Etherton C, Gross and Flaux LJJ)

Shipping—wrongful arrest—security

CPR rr.61.8(4)(b), 61.5. Natwest Markets Plc (the bank) lent $15,700,000 to the appellant. The loan was secured over the M.V. Alkyon (the vessel). A dispute arose between the bank and the appellant as to whether there had been a default under the loan agreement. The bank issued a claim in rem and obtained a warrant of arrest and thereafter arrested the vessel. The appellant applied for the vessel's release unless the bank provided a cross-undertaking in damages. The Admiralty judge refused the application. The Court of Appeal dismissed an appeal from that order. **Held**, while the nature of a maritime arrest of a vessel was akin to that of a freezing injunction, which would suggest that as a cross-undertaking in damages was available in the latter case such an undertaking should also be available in the former case, there were strong reasons to maintain the long-established position that arrest was of right and that damages for wrongful arrest were only capable of recovery for wrongful arrest arising from bad faith (mala fides) or gross negligence (crassa negligentia). While it was permissible for the courts to change the law absent legislation or a rule change, where there was a longstanding practice as here, it should not do so; ***The Evangelismos*** (1858) considered. ***The Evangelismos*** (1858) 12 Moo. P.C. 352, ref'd to. (See ***Civil Procedure 2018*** Vol.2 at para. 2D-39.)

Practice Updates

Disclosure Pilot Scheme

On 1 January 2019, the disclosure pilot scheme contained in CPR PD51U commenced. Subscribers are reminded that the pilot applies to both existing and new proceedings within the Business and Property Courts in England and Wales and in its regional centres in Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester and Newcastle. It does not however apply to proceedings in the County Court. Subscribers should not that the Disclosure Working Party seeks feedback on the pilot's operation at: DWG@justice.gov.uk.

In Detail

ACCESS TO COURT DOCUMENTS—(R) BRITISH AMERICAN TOBACCO (UK) LTD v SECRETARY OF STATE FOR HEALTH [2018] EWHC 3586 (ADMIN)

In ***(R) British American Tobacco (UK) Ltd v Secretary of State for Health*** [2018] EWHC 3586 (Admin), 20 December 2018, unrep., Green LJ considered an application under CPR r.5.4C(2) for disclosure of documents from the court records. The documents had been relied on in judicial review proceedings, see ***British American Tobacco v Secretary of State for Health (Action on smoking and health, intervening)*** [2015] EWHC 1169. The present judgment is the first to consider the recent Court of Appeal authority on access to documents, ***Cape Intermediate Holdings Ltd v Dring*** [2018] EWCA (Civ) 1795, 31 July 2018, unrep (***Cape***). An appeal from ***Cape*** to the UK Supreme Court is expected to be heard in February 2019.

The Background

Judicial review claims had been brought seeking a declaration that The Standardised Packaging of Tobacco Products Regulations 2015 were unlawful. Following judgment in those proceedings, an application was made on behalf of a US-based NGO. It sought disclosure of documents from the judicial review claims on the basis that they would support greater understanding of the legal and factual issues arising in them. Thus it would facilitate debate concerning the issue, at the heart of the judicial review claims, of standardised plain cigarette packaging. The present disclosure application was wide-ranging. It sought, for instance, expert reports, letters sent by the World Health Organisation, witness statements of the Chief Medical Officer of the United Kingdom, and submissions to UK Ministers.

The claimants in the original proceedings did not oppose the application. The Secretary of State, however, did so. Green LJ summarised those submissions, at para. 24, as follows,

> *"[24] … (i) the application applies for documents from court file pursuant to CPR 5.4(C)(2); (ii) the Secretary of State objected to the documents being provided to the Applicant; (iii) CPR 5.4(c) was concerned with obtaining copies of documents "from court records" by a party who was not a party to the proceedings; (iv) the extent of the categories of documents falling within CPR 5.4(C)(2) was explained in Cape where the Court of Appeal ruled (at paragraphs [40ff]) that, for the purposes of CPR 5.4(C)(2), 'the records of the court' did not include, inter alia: trial bundles, trial witness statements, or trial expert reports; (v) it followed that the Applicant was not entitled to the documents sought since they did not fall within the ambit of CPR 5.4(C)(2); (vi) since the application was made pursuant to CPR 5.4(C)(2) the Secretary of State did not address the issue of the inherent jurisdiction and if the Court intended to consider its powers under inherent jurisdiction then the Secretary of State wished to address the Court on the question of the limitations on the Court's inherent jurisdiction set out in Cape…".*

Green LJ refused to allow the Secretary of State to make submissions on the application of the inherent jurisdiction. He did so on the basis that lengthy extensions of time to make submissions had already been granted and that any such submissions could, and hence should, have been made already.

Submissions in support of the application were also made by Action on Smoking and Health (ASH), an intervenor. In essence, its submissions in support of disclosure focused on the benefit placing the material in the public domain would provide to the public debate concerning standardised plain packaging, particularly in those countries which were considering similar legislative proposals.

The position in *Cape*

The position concerning disclosure of documents under CPR r.5.4C(2) was summarised by Hamblen LJ in ***Cape*** at para.40. It was essentially limited to documents kept as a record of proceedings, i.e., mainly formal documents set out in CPR PD5 para.4.2A, those analogous to such documents, and communications between the court and a party or to another person. As Hamblen LJ also stated, at para.54, disclosure of the following documents could not be provided for under r.5.4C(2), as they were not court records: For the purpose of that rule: trial bundles; witness statements; expert reports; skeleton arguments; opening or closing arguments; submissions; or, transcripts of proceedings.

As to the power to order disclosure of court documents under the inherent jurisdiction, which supplements CPR r.5.4C(2) it was summarised at paras 112–113 of Hamblen LJ's judgment, and noted by Green LJ in the present case at paras 20–21 (on the relationship between rules of court and the inherent jurisdiction see, for instance, M. Dockray, *The Inherent Jurisdiction to Regulate Civil Proceedings*, L.Q.R. 1997, 113(JAN), 120, fn.70 and the cases cited therein. In essence the inherent jurisdiction encompassed those documents that fell outside the scope of CPR r.5.4C(2).

Open justice in the present case

The starting point for consideration of the question whether to grant the application where, as here, all the documents subject to the application where read in open court, the judge had been invited to do so, or had been invited to read them out of court, or—simply—had read them, was the constitutional principle of open justice. The underpinning of this principle was, as Green LJ put it, "*fundamental to democracy*" (para.28). In that he echoed Lord Judge CJ's recognition in the Court of Appeal in ***R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No.2) (Guardian News and Media Ltd intervening)*** [2011] Q.B. 218, paras 38–39, that open justice was both an element of democratic accountability of the judicial process and freedom of expression, which underpin public scrutiny of the courts and the ability of the press and the public to educate themselves as to what goes on in the courts and to comment, criticise and debate judgments.

Equally, open justice ensures that judges cannot lapse into arbitrary or negligent decision-making. As Green LJ put it, again at para.28, it acts as a "*powerful discipline upon judges*". More than that, it provides a strong incentive to parties to provide honest accounts; as Bentham once put it, in *The Rationale on Judicial Evidence*, full publicity is a vital check against dishonest parties and dishonest witnesses. Thus, it promotes probity and accuracy in decision-making. And, finally, it helps ensure the judiciary cannot be subject to improper or unjustifiable criticism. These various rationale are all the more pertinent where a public authority is a party to litigation (***A v British Broadcasting Corporation (Scotland)*** [2015] UKSC 25; [2015] A.C. 1600 at para.23).

Consistently with the Supreme Court's acknowledgment in ***R (UNISON) v Lord Chancellor*** [2017] UKSC 51; [2017] 3 W.L.R. 409 of the benefit to society that the civil courts provide through proceedings and their judgments, Green LJ noted how the principle of open justice, itself central to a commitment to the rule of law, has a "*wide class of beneficiary*". Within that class, as would be expected, are NGOs, see Green LJ at para.32 and ***Kennedy v Charity Commissioners*** [2014] UKSC 20; [2015] 1 A.C. 45 at para.1. Thus, the NGO in the present case could rely on the principle of open justice in the same way as any member of the public or of the media could rely upon it.

To render open justice effective in an era where significant amounts of evidence and submissions are adduced in writing rather than orally before the court, such documents in so far as they form a part of proceedings cannot but be capable of disclosure to non-parties. Hence the presumption in favour of their disclosure, see ***R (Guardian News & Media) v City of Westminster Magistrates Court*** [2012] EWCA Civ 420; [2013] Q.B. 618 at para.77. That presumption can, however, be displaced in respect of access to documents as it can in other circumstances such as party anonymity or access to the court room during a hearing. Such restrictions being no more than strictly necessary, see Green LJ at para.38. Hence disclosure must remain a matter to be dealt with by the court exercising a supervisory jurisdiction over its own process.

The decision

Having outlined the principles, Green LJ concluded that the application should be granted, see paras 47–48. The documents were to be released to the applicant who it was noted, like any member of the public or media, had had a right to attend the hearing of the judicial review proceedings. As such there was a strong presumption in favour of disclosure and placing the documents in the public domain. (It might well have been noted that given the public nature of those proceedings the documents were, consistently with the principle of open justice already in the public domain given that the proceedings and hearing were carried out in public.) The one limitation on disclosure was that where privilege had properly been claimed in respect of any redacted documents that was to be maintained.

In reaching his decision Green LJ made the following points of wider interest:

- First, drawing a distinction between those documents that fell within the scope of CPR r.5.4C(2) and the inherent jurisdiction was an 'artificial' exercise. In respect of those documents for which disclosure was sought there was inherent jurisdiction to grant disclosure (para.39).

  It may well be considered that in future therefore applications for disclosure will generally be made under both the CPR and the inherent jurisdiction. If it is an artificial exercise to distinguish the basis on which disclosure can be made, due to the complementarity of the two jurisdictions, except where it is said that a document falls outside both jurisdictions, the need to particularise the specific basis on which disclosure is sought would equally seem an artificial and technical exercise. This might equally suggest that, in this area, there is an argument for the Civil Procedure Rule Committee to give careful consideration to codifying the inherent jurisdiction so that litigants, and particularly litigants-in-person, can more readily ascertain the nature and scope of the jurisdiction to order disclosure of such documents;

- Secondly, it was doubtful whether the reason why an individual sought disclosure of such documents was determinative of such an application. As Green LJ put it, at para.41, it was unlikely that the court would want to become an arbiter of an individual's "subjective reasons" for seeking access to such documents. This is consistent with the general principle that an individual may enter court to witness proceedings without, generally, being required to justify why they are doing so. Access to documents is one more facet of open justice, which Green LJ rightly noted, "*is an important constitutional virtue in its own right…*". Absent some good reason for limiting the right of access, the general position was that access should be granted, see para.43.

  Furthermore, as noted by Green LJ at para.44 as a reason for granting the present application, but of wider importance as an explanation of the importance of granting access to such documents, placing the documents in the public domain would, amongst other things, enhance public understanding of the judgment in the proceedings to which they related. It would thus enhance democratic debate and democratic accountability of the courts inherent in the constitutional principle of open justice; and

- Thirdly, access to documents can, however, properly be restricted in such circumstances where the principle of open justice is limited i.e., where a hearing was held in private or material deployed in the proceedings was rendered private or closed e.g., where national security, confidentiality, trade secrets, the rights of children etc were engaged: see para.42, and CPR r.39.2 generally.

Finally, Green LJ at para.46 noted the approach that had been taken in comparable litigation in the United States. He summarised the position as follows,

> *"[46] The approach that I adopt is also consistent with that adopted in the US where the Courts, in the wake of litigation there concerning the alleged suppression by the tobacco industry of relevant health information, ordered the disclosure into the public domain of vast amounts of internal tobacco industry documents. All of this (exceeding circa 50 million documents) is now searchable online facilitated by means of a practical guide produced for that purpose by the WHO…".*

Two points arise from this observation.

First, there is a good deal to be learnt from comparable approaches to open justice. The United States, as a comparable common law jurisdiction with a shared historic commitment to open justice, surpasses the English and Welsh courts in its ability to turn that commitment into a reality. That the US courts can ensure that documents of the amount Green LJ noted can be and are made available online puts the approach here to shame. A system that, committed as it is to open justice as a means of securing democratic accountability of the courts, public scrutiny and debate, as that operative in England and Wales cannot yet provide a comparable level of online access is to be deeply regretted. It is a weakness that ought properly to be remedied.

Secondly, as the current HMCTS reform programme, which is developing greater use of online processes, progresses it is to be anticipated that increasing amounts of material will be submitted, managed and dealt with by the courts online. This ought to provide the means to increase online access to the public. Equally, it might lead to a reduction from the present in access to the public. Care will need to be taken to realise the benefit of moving increasing amounts of the civil process online, and to guard against any impermissible reduction in the practical implementation of the constitutional principle of open justice.

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Published by Sweet & Maxwell Ltd, 5 Canada Square, Canary Wharf, London, E14 5AQ
ISSN 0958-9821

Typeset by Matthew Marley
Printed by Hobbs The Printers Ltd, Totton, Hampshire.

42624494