CIVIL PROCEDURE NEWS

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Cases

- **Lady Moon SPV SRL v Petricca & Co Capital Ltd** [2018] EWHC 3678 (Ch), 7 December 2018, unrep., (Anthony Elleray QC, a deputy Judge of the High Court)

Jurisdictional challenge—power to order a rolled-up hearing

CPR Pt 8 and Pt 11. Proceedings were issued under Pts 8 and 64. It sought directions concerning the administration and winding up of a real estate investment fund that was established under Italian law. The defendant challenged the court's jurisdiction, applying under Pt 11 for a declaration that the English court has no jurisdiction in respect of the Pt 8 claim. The question before the judge was whether the jurisdictional challenge could be heard in a rolled-up hearing i.e., whether it could be heard at the same time as the court was determining the claimant's claim. The judge noted that research by counsel and the court had not found any precedent where the court had held such a rolled-up hearing (see para.22). **Held**, the judge was not prepared to hold that there was no power to order a rolled-up hearing of a jurisdictional challenge and the main claim. He noted that rolled-up hearings were ordered in the Court of Appeal, where permission to appeal applications where listed with the appeal hearing, and in the Administrative Court, where permission to bring judicial review applications could be listed with the substantive application to follow should permission be granted. Both those circumstances were noted to be directed by the specific court rarely (see paras 25–26). In the light of that, the court would only rarely exercise its jurisdiction to direct a rolled-up hearing, jurisdictional challenge and a main claim. In the present case, the application for such a hearing was dismissed. (See ***Civil Procedure 2018*** Vol.1 at para.8.0.7.)

- **Mayr v CMS Cameron McKenna Nabarro Olswang LLP** [2018] EWHC 3669 (Comm, 14 December 2018, unrep. (Males J)

Expert report—joint statement—constructive approach required

CPR r.35.12 Permission to adduce expert evidence was granted in a dispute that involved a claim for "several hundred million Euros". Standard directions relating to the expert evidence were made. As such there was to be an initial exchange of reports following by a joint meeting. As Males J noted, there can be no doubt as to the conduct to be expected from experts at such a joint meeting. As he put it at para.2:

> *"[2] … Nobody involved in litigation in this court, whether as client, lawyer or expert, can be in any doubt that the court expects and requires the experts at the joint meeting to take a constructive approach, discussing the contents of their report and the issues on which they are required to express their opinions, reaching agreement where they can and setting out concisely where they cannot reach agreement and why they cannot."*

It is then for the experts, as an aspect of their overriding duty to the court, to ensure that a joint memorandum (joint statement) is then prepared and its content agreed. This responsibility falls on the expects. Lawyers and parties cannot instruct the experts on the content of the joint memorandum (joint statement), although lawyers may provide assistance to the experts in terms of helping them to focus on the issues. In this Males J, albeit he did not refer to it, can be seen to endorse the approach to joint statements explained by HHJ Stephens sitting as a judge of the High Court in ***BDW Trading Ltd v Integral Geotechnique (Wales) Ltd*** [2018] EWHC 1915 (TCC); [2018] P.N.L.R. 34 (TCC) (See ***Civil Procedure News*** No.8 of 2018). Males J, at para.4, then went on to explain that it was only after the joint memorandum (joint statement) was completed that short supplemental expert reports could be prepared in order to deal with any points on which the experts were unable to agree at the joint meeting. Such supplemental reports are not an opportunity to repeat the content of the initial expert report. Whether or not this is specified in any directions, it is implicit in any such directions order. In the present case there was a real failure to comply with this approach. As a consequence of the expert's non-compliance, Males J revoked the permission to adduce expert evidence and made an ordering barring the claimants from adducing the expert's evidence unless they were able to:

> *"[17] … come forward … with a proper and acceptable procedure which will include a proper joint meeting and will meet the criteria of relief from sanctions if they wish to pursue this evidence. If they have simply left it too late to do so in an acceptable way then that is something for which they must take the consequences."*

(See ***Civil Procedure 2018*** Vol.1 at para.35.12.1.)

■ **Phonographic Performance Ltd v Ellis (t/a Bla Bla Bar)** [2018] EWCA Civ 2812, 18 December 2018, unrep. (Lewison, King and David Richards LJJ)

Contempt of court—power to impose both a custodial sentence and a fine

CPR r.81.31. In an appeal in a dispute arising from a copyright infringement dispute, the Court of Appeal considered whether there was power to impose both a custodial sentence and a fine where there had been a contempt of court. The Court **held** that such power existed, see Lewison LJ, with whom King and David Richards LJJ agreed, at para.54:

> *"[54] However, that case [Re M (Children) [2005] EWCA Civ 615, [2005] 2 F.L.R. 1006, CA] does not say that a fine cannot be combined with a custodial sentence in an appropriate case; and cases in the criminal courts have upheld that practice. There is, in my judgment, equally no objection in principle to the combination of a fine and a custodial sentence in a case of contempt. In Ex p Fernandez (1861) 10 CBNS 3 Hill J imposed a sentence for contempt consisting of a fine of £500 and a term of imprisonment. That sentence was upheld by the Court of Queen's Bench. Re A Special Reference from the Bahama Islands [1893] AC 138 was a reference to the Privy Council. The Chief Justice of the Bahamas was offended by an anonymous scurrilous letter about him published in a local newspaper. He summoned the editor to see him and asked for the identity of the correspondent. When the editor refused the Chief Justice sentenced him to be kept in custody during his (the Chief Justice's) pleasure and to pay a fine of £40. The Privy Council was asked three questions by the Secretary of State for the Colonies, one of which was whether the sentence was lawful. On the assumption that contempts had been committed, their Lordships (sitting as a committee of 11 judges including the Lord Chancellor, the Lord Chief Justice and the Master of the Rolls) reported that the sentences were lawful. Although those were cases of criminal contempt, I can see no reason to suppose that civil contempt is different."*

(See ***Civil Procedure 2018*** Vol.1 at para.81.31.4.)

■ **Ndole Assets Ltd v Designer M&E Services UK Ltd** [2018] EWCA Civ 2865, 21 December 2018, unrep. (Davis, McCombe and Peter Jackson LJJ)

Right to conduct litigation—non-delegability by litigant-in-person

Legal Services Act 2007, ss.12, 13, 14, Sch.2 para.4, Sch.3 para.2(4)(b). A litigant-in-person attempted to effect service of a claim form and particulars of claim on the defendant. Service was carried out by an unregistered barrister on behalf of the litigant-in-person. The defendant applied for a declaration that service was invalid and that the claim be struck out. The basis of the application was that service fell within the ambit of carrying out the conduct of litigation, a reserved legal activity under the 2007 Act. Hence service by the unregistered barrister was unlawful and thereby invalid. Coulson J (as he then was) held that service was valid: service of process, as a reserved legal activity, was capable of delegation. (As noted in ***Civil Procedure News*** No.6 of 2017.) On appeal to the Court of Appeal, **held**: Coulson J's decision was upheld albeit for different reasons. It was wrong as a matter of law that a reserved legal activity, such as the conduct of litigation, could be delegated. The judge failed to take account of the Court of Appeal authority of ***Gregory v Turner*** (2003) confirming this: the decision has not been cited to the judge (as noted in ***Civil Procedure News*** No.6 of 2017). That being said, the administrative or mechanical process of effecting service carried out by a process server or the post office did not amount to the conduct of litigation, see para.67. In this case, the impermissible delegation did not render service, which the Court of Appeal confirmed at para.65 fell within the ambit of the "conduct of litigation", a nullity. It was a procedural irregularity. In the circumstances of the present case there was no good reason to invalidate service under r.3.10(1). The decision thereby confirms the continued validity of the principle in ***Gregory v Turner*** (2003) to the control of the right to conduct litigation and by necessary implication to the right to exercise a right of audience post-Legal Services Act 2007. ***Gregory v Turner*** [2003] 1 W.L.R. 1149, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.2 at para.13-12.)

■ **Mays v Drive Force (UK) Ltd** [2019] EWHC 5 (QB), 4 January 2019, unrep. (Deputy Master Hill QC)

Expert evidence—permission to adduce statistical evidence as to life expectancy

CPR r.35.4. The claimant brought a claim seeking substantial damages for personal injury. The injuries sustained were traumatic brain injury and orthopaedic injuries. Their effect on his life were noted to be catastrophic. Liability was admitted. An issue arose as to whether the parties should be granted permission to adduce expert evidence concerning life expectancy. The cost of the expert was budgeted to be approximately £15,000. In the context of the quantum of the claim (from between £1 to 2 million to more than £2 million) no objection on proportionality grounds to the expert was taken (a number of other experts in other fields had already been granted permission to give evidence). **Held**, it was clear on authority that the court can, where appropriate, consider whether there are factors other than the index event at the heart of the claim that have effected a claimant's life expectancy. In an appropriate case this evidence can be given by way of statistical expert evidence in addition to other expert evidence. It is a

matter for a trial judge to determine what, if any, weight is to be given to statistical expert evidence, and also to consider any issues as to the credibility of such evidence. Claims that permitting such evidence to be adduced would open the floodgates to the use of such evidence were of doubtful merit, at best. ***Royal Victoria Infirmary & Associated Hospitals NHS Trust v B (a child)*** [2002] EWCA Civ 348; [2002] P.I.Q.R. Q10, CA, ***Sarwar v Ali*** [2007] EWHC 274 (QB), unrep., QBD, ***Burton v Kingsbury*** [2007] EWHC 2091 (QB), unrep., QBD, ***Lewis v Royal Shrewsbury Hospital NHS Trust***, 29 January 2007, unrep., QBD, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at paras 35.1.1 and 35.4.2.)

■ **Various Claimants v Giambrone & Law (a firm)** [2019] EWHC 34 (QB), 11 January 2019, unrep, (Foskett J)

Non-party costs order—indemnity insurer

Senior Courts Act 1981 s.51. An application was brought against an insurance company seeking a non-party costs order under s.51 of the 1981 Act; see ***Travelers Insurance Company Ltd v XYZ*** (2018). The application was brought by the solicitors' firm for whom it provided professional indemnity insurance. The insurer had entered into an agreement (the HOTS agreement) with the law firm to provide funding for its defence of group claims, which were ultimately successful. Foskett J **held** that the indemnity insurer was liable to pay non-party costs, which he assessed as being half the costs awarded to the claimants. In reaching his decision the judge held that the fact that under the terms of the agreement between the law firm and the insurer, the latter in reality ceded control of the litigation to the former, did not take the insurer outside the scope of s.51 of the 1981 Act. In determining whether to make a non-party costs order against the indemnity insurer it was important to consider the wider circumstances, which in this case were that the insurer had to have been aware there were concerns about the prospects of success of defending the claims and that it had chosen to enter an agreement that ceded control of the defence. Those considerations, and in addition the fact that through the arrangement the insurer obtained the benefit of aggregating the claims brought against the law firm into a single claim, were sufficient to justify the imposition of the non-party costs order. As Foskett J put it at paras 78–80:

> *"[78] In my view, where an indemnity insurer substantially relinquishes control of the conduct of the litigation to the insured (or fails to take steps to control it when there are grounds for intervening), and does so in the expectation that it will be immune from a costs liability towards the opposing party if the opposing party is successful, that expectation is open to be falsified by the court in a section 51 application, particularly if the prospects of success for the insured are assessed as poor.*
>
> *[79] I would see that as the essential basis for making an order in this case and as a stand-alone factor that opens up the broad discretion conferred by section 51. To the extent that any broad support is required from previous authorities, then the reciprocity/asymmetry issue referred to in the Travelers Insurance case … offers some support, albeit that the facts were rather different in that case, as does TGA Chapman Ltd v Christopher [1998] 1 WLR 12.*
>
> *[80] I would add that, in my judgment, Mr Majumdar was right to say that the arrangement reflected in the HOTS was one which benefited AIG because, certainly vis-á-vis the Giambrone partners, the aggregation issue became settled at a time when there were doubts about whether AIG's interpretation of the policy provisions and the MTC was correct. As he says, the "consequence of a successful defence would have been that AIG's alleged right to aggregate would not need to be tested." This means that permitting the defence costs to be underwritten in the way for which the HOTS provided did benefit AIG. I accept, of course, that the arrangement (and thus the payment of the defence costs) was not for AIG's sole benefit, but that it obtained some material benefit from the arrangement is a cumulative factor that adds weight to the making of an order under section 51…"*

TGA Chapman Ltd v Christopher [1998] 1 W.L.R. 12, CA, ***Travelers Insurance Company Ltd v XYZ*** [2018] EWCA Civ 1099; [2018] 3 Costs L.O. 401, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.46.2.6 and Vol.2 para.9A-202.)

■ **Caine v Advertiser And Times Ltd** [2019] EWHC 39 (QB), 14 January 2019, unrep. (Dingemans J)

Challenge to jurisdiction—service of claim form

CPR Pt 11. A businessman brought a claim for libel against a local newspaper company and its director. The claim form was delivered in person on 5 October 2017. It ought to have been served by 9 September 2017. On 19 October 2017, the defendants acknowledged service. They were at the time litigants-in-person. They failed to indicate on the acknowledgment of service that they wished to contest jurisdiction. On 7 November 2017, by which time the defendants were legally represented, an application to strike out the claim under r.3.4(2) or for summary judgment under r.24.2 was made. No application under Pt 11 was made. On appeal from the Master, Dingemans J considered a number of issues. Of particular note are the issues concerning the application of Pt 11. First, Dingemans J held, at para.30, that it was clearly established by the Court of Appeal in ***Hoddinott v Persimmon Homes (Wessex) Limited***

(2007) "*that an application that the court should not exercise its jurisdiction to try a claim must be made by CPR Part 11*". An application to set aside late service could not, therefore, be made under r.3.4. Secondly, an application for an extension of time to dispute jurisdiction can be made notwithstanding no explicit reference to such a possibility in r.11(4) and (5): ***Texan Management Ltd v Pacific Electric Wire and Cable Co Ltd*** (2009) and ***Le Guevel-Mouly v AIG Europe Limited*** (2016). Such an application must be made under r.3.9. ***Burns-Anderson Independent Network plc v Wheeler*** [2005] EWHC 575 (QB); [2005] I.L. P.r. 38, (MrCt), ***Hoddinott v Persimmon Homes (Wessex) Limited*** [2007] EWCA Civ 1203; [2008] 1 W.L.R. 806, CA, ***Texan Management Ltd v Pacific Electric Wire and Cable Co Ltd*** [2009] UKPC 46, unrep., PC, ***Aktas v Adepta*** [2010] EWCA Civ 1170; [2011] Q.B. 894, CA, ***Denton v TH White Limited*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, CA, ***Le Guevel-Mouly v AIG Europe Limited*** [2016] EWHC 1794 (QB), unrep., QBD, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.11.1.1.)

- **Hughes Jarvis Ltd v Searle** [2019] EWCA Civ 1, 15 January 2019, unrep. (Patten, Leggatt and Nicola Davies LJJ)

Contempt of court—judicial warning not an order

CPR Pt 81, s.118 of the County Court Act 1984. A trail of a possession claim was heard over three days. The sole director of the claimant company gave evidence. During the course of his evidence there was a short adjournment. He was given the usual warning not to discuss his evidence during the adjournment. After the hearing resumed, he was cross-examined. Prior to the end of the day's hearing, he asked the judge if, assuming he had not completed his evidence, he was permitted to speak to his legal representative. The trial judge told him he was not permitted to discuss his evidence. At the end of the hearing, with the cross-examination not complete he was given the usual warning again. The witness, despite the judge's warnings, sent his lawyers a number of emails that night. The emails were not read or responded to. The judge determined that the witness had breached an explicit order, that his conduct amounted to wilful disobedience of that order. The judge remanded the witness in custody to the following morning and struck the claimant's claim out. On appeal, the Court of Appeal **held**, that the judge had exceeded her powers concerning contempt. The warning was not a court order. If the judge had wanted to order the witness not to send emails, or otherwise communicate with his lawyers, she could have made such an order in clear terms. Although, as Patten LJ noted, at para.28 it is difficult to see why a judge would think such an order would either be necessary or appropriate. Nor could the judge rely on the contempt powers arising under s.118 of the County Court Act 1984, as that only applied where contempt was committed in the face of the court. That was not the case here. While it was possible that a witness who discussed their evidence with a third party during an adjournment could commit a contempt of court by way of an interference with the administration of justice, if it was done so in order to enable the court to be given false evidence, that was not this case either (see para.35). In any event the County Court had no jurisdiction, absent permission from a High Court judge, to deal with that latter kind of contempt. Furthermore, Patten LJ explained the purpose of the judge's warning not to discuss evidence during an adjournment (see paras 23–24):

> *"[23] Witnesses are commonly given warnings by the trial judge not to discuss their evidence until after it has been completed. The purpose of the warning is to protect the witness from any attempt by a third party to influence their evidence and also to ensure that, so far as possible, the evidence which the witness gives is his or her own best recollection unassisted by any other person. Compliance with the warning both protects the witness and the effectiveness of the trial process.*
>
> *[24] If however a witness, as in this case, fails to comply with the judge's warning, it is necessary for the judge to make an assessment of the damage which that has caused. If the witness has attempted, for example, to obtain information about something by email but the email was not responded to then, whatever else may be the position, no damage has in fact been caused to the integrity of the trial process…"*

As Leggatt LJ went on to say at para.57:

> *"[57] When, as occasionally happens, an incident occurs during a trial which gives the trial judge cause for concern that the integrity of a witness's evidence might have been compromised, a measured approach is called for. The aim should almost always be to investigate the facts as far as necessary but otherwise to complete the trial with as little interruption as possible, leaving any question of whether there has been a contempt of court or whether any further action is warranted to be considered at the end of the proceedings after judgment has been given."*

In Re M (A Minor) (Contempt of Court: Committal of Court's own Motion) [1999] Fam. 263, CA, ***Balogh v Crown Court at St Albans*** [1975] Q.B. 73, CA, ***DPP v Channel Four Television Co Ltd*** [1993] 2 ALL E.R. 517, QBD, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.81.12.1.)

■ **McDonald v Rose** [2019] EWCA Civ 4, 15 January 2019, unrep. (Underhill VP, David Richards and Coulson LJJ)

Guidance on time to make application for permission to appeal

CPR rr.52.3(2), 52.12, PD 52B paras.3.1, 3.2 and 3.3. An application for permission to appeal to the Court of Appeal was made out of time. An application for an extension of time was made. The Court of Appeal noted that the applications raised issues of general importance, on which guidance was necessary. It was necessary as the existing authorities were not properly understood. At para.21, the court summarised the "*procedure that ought to be followed in consequence by parties wishing to seek permission to appeal from the lower court (which is good practice though not mandatory)*". The guidance is as follows:

> *"[21] …*
>
> *(1) The date of the decision for the purposes of CPR 52.12 is the date of the hearing at which the decision is given, which may be ex tempore or by the formal hand-down of a reserved judgment: see Sayers v Clarke and Owusu v Jackson. We call this the decision hearing.*
>
> *(2) A party who wishes to apply to the lower court for permission to appeal should normally do so at the decision hearing itself. In the case of a formal hand-down where counsel have been excused from attendance that can be done by applying in writing prior to the hearing. The judge will usually be able to give his or her decision at the hearing, but there may be occasions where further submissions and/or time for reflection are required, in which case the permission decision may post-date the decision hearing.*
>
> *(3) If a party is not ready to make an application at the decision hearing it is necessary to ask for the hearing to be formally adjourned in order to give them more time to do so: Jackson v Marina Homes. The judge, if he or she agrees to the adjournment, will no doubt set a timetable for written submissions and will normally decide the question on the papers without the need for a further hearing. As long as the decision hearing has been formally adjourned, any such application can be treated as having been made 'at' it for the purpose of CPR 52.3 (2) (a). We wish to say, however, that we do not believe that such adjournments should in the generality of cases be necessary. Where a reserved judgment has been pre-circulated in draft in sufficient time parties should normally be in a position to decide prior to the hand-down hearing whether they wish to seek permission to appeal, and to formulate grounds and such supporting submissions as may be necessary; and that will often be so even where there has been an ex tempore judgment. Putting off the application will increase delay and create a risk of procedural complications. But we accept that it will nevertheless sometimes be justified.*
>
> *(4) If no permission application is made at the original decision hearing, and there has been no adjournment, the lower court is no longer seized of the matter and cannot consider any retrospective application for permission to appeal: Lisle-Mainwaring.*
>
> *(5) Whenever a party seeks an adjournment of the decision hearing as per (3) above they should also seek an extension of time for filing the appellant's notice, otherwise they risk running out of time before the permission decision is made. The 21 days continue to run from the decision date, and an adjournment of the decision hearing does not automatically extend time: Hysaj. It is worth noting that an application by a party for more time to make a permission application is not the only situation where an extension of time for filing the appellant's notice may be required. It will be required in any situation where a permission decision is not made at the decision hearing. In particular, it may be that the judge wants more time to consider (see (2) above): unless it is clear that he or she will give their decision comfortably within the 21 days an extension will be required so as to ensure that time does not expire before they have done so. In such a case it is important that the judge, as well as the parties, is alert to the problem.*
>
> *(6) As to the length of any extension, Brooke LJ says in Jackson v Marina Homes (para. 8) that it should normally be until 21 days after the permission decision. However, the judge should consider whether a period of that length is really necessary in the particular case: it may be reasonable to expect the party to be able to file their notice more promptly once they know whether they have permission."*

Prudential Assurance Co Ltd v McBains Cooper (A Firm) [2000] EWCA Civ 172; [2000] 1 W.L.R. 2000, CA, ***Sayers v Clarke Walker*** [2002] EWCA Civ 645; [2002] 1 W.L.R. 3095, CA, ***Jackson v Marina Homes Ltd*** [2007] EWCA Civ 1404; [2008] C.P. Rep. 17, CA, ***Owusu v Jackson*** [2002] EWCA Civ 877; [2003] P.I.Q.R. 186, CA, ***R. (Hysaj) v Secretary of State for the Home Department*** [2014] EWCA Civ 1633; [2015] 1 W.L.R. 2472, CA, ***Monroe v Hopkins (No.2)*** [2017] EWHC 645 (QB); [2017] 1 W.L.R. 3587, QBD, ***Lisle-Mainwaring v Associated Newspapers Ltd*** [2018] EWCA Civ 1470; [2018] W.L.R. 4766, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at paras 52.3.6 and 52.12.3.)

■ **Kaefer Aislamientos SA De CV v AMS Drilling Mexico SA De CV** [2019] EWCA Civ 10, 17 January 2019, unrep. (Davis, Asplin, Green LJJ)

Test to set aside jurisdiction

CPR rr.6.33(2)(b)(v) and 6.33(2A). A dispute arose concerning sums said to be due and unpaid under a contract for various works done to refurbish an oil rig. Claim forms and particulars of claim were served out of the jurisdiction on two defendants in Singapore. Jurisdiction was said to arise under art.25 of the Brussels I Regulation (Recast) (Regulation (EU) 1215/2012); the two defendants, it was argued, were undisclosed principles of two further defendants who had contracted on their behalf on standard terms and conditions that contained an English law and jurisdiction clause. At first instance, the judge held that there was a good arguable case that one of the two defendants based in Singapore was an undisclosed principle, whereas there was no such case in respect of the other. The Court of Appeal dismissed an appeal from the order. In so doing it considered the approach to take to the United Kingdom Supreme Court's (UKSC) decisions in ***Brownlie v Four Seasons Holdings International*** (2017), ***Goldman Sachs International v Novo Banco SA*** (2018) concerning the test applicable to establish jurisdiction. In explaining the approach taken by the UKSC, the Court of Appeal (Green LJ with whom Asplin and Davis LJJ agreed) **held**, at paras 70–71, that the test to establish jurisdiction was that set out in Lord Sumption's judgment in ***Goldman Sachs***. It was as follows:

> *"… 'that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it'…"*

It went on to hold that: (i) the first limb of the Goldman Sachs' test was a relative test as per the test in ***Canada Trust Co v Stolzenberg (No.2)*** (1998). The test was one of plausibility, and was context specific and flexible. It was not necessary to establish it on the balance of probabilities, nor was it necessary to establish "much the better argument" (see paras 73–77); (ii) the second limb required the court to approach the material before it with "judicial common sense and pragmatism". It was to try to overcome evidential difficulties as far as it "reliably" could (see para.78); and (iii) the third limb to:

> *"… an extent … moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits." (see para.80).*

Additionally, Davis LJ (with whom Asplin LJ agreed) deprecated the approach taken in such applications concerning jurisdiction by claimants. He said as follows, at para.124:

> *"[124] It is also, to my mind, very regrettable that applications of this kind seem, judging by the present case and other cases cited to us, to be generating so much complexity of debate. One understands the potential importance to the parties. Even so, this is by its nature an interlocutory process, not in any way concerned with a final conclusion on the facts or merits. Hearings and judgments in such cases should so far as possible be appropriately concise accordingly. I also rather deprecate the approach of claimants (as here) peremptorily in correspondence seeking the fullest and widest possible disclosure from defendants, in effect by way of fishing exercise, as though such proceedings are already some kind of ongoing trial process: and then coolly relying on non-disclosure as of itself supporting the claim of a plausible case. In the present case, the judge rightly saw through that ploy. That is not to say that defendants in an appropriate case are not required to put in detailed evidence and supporting materials in explanation, where that is called for; and failure to do so sufficiently may in some instances cause adverse conclusions to be drawn. But there are limits: that is the nature of this jurisdiction."*

Canada Trust Co v Stolzenberg (No.2) [1998] 1 W.L.R. 547, CA, ***Brownlie v Four Seasons Holdings International*** [2017] UKSC 80; [2018] 1 W.L.R. 192, CA, ***Goldman Sachs International v Novo Banco SA*** [2018] UKSC 34; [2018] 1 W.L.R. 3683, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.6.37.15 and following.)

■ **SPI North Ltd v Swiss Post International (UK) Ltd (Rev 1)** [2019] EWCA Civ 7, 17 January 2019, unrep. (Lewison and Henderson LJJ)

No duty to make enquiries before drafting defence where pleading a non-admission

CPR r.16.5(1)(b). The Court of Appeal considered the question whether r.16.5(1)(b) requires defendants, when drafting a "non-admission" in a defence, are required to make reasonable enquiries from third parties before they can properly be in a position to state that they are "*unable to admit or deny*" an allegation pleaded by a claimant in

a particulars of claim. This is the first time the courts have considered this question. At first instance, HHJ Klein sitting as a judge of the High Court held that there was such a duty on defendants. The Court of Appeal **held** that there was no such duty to make reasonable enquiries before pleading a non-admission defence. In reaching this decision, it was noted that r.16.5(1)(b) was to be interpreted consistently with the overriding objective: rr.1.1 and 1.2. As such reliance on its predecessor under the RSC and equally analysis in the Woolf Reports, while helpful background, were of limited help in interpreting the rule. Care must also be made not to be misled by the continued use of the phrase "non-admission" as a shorthand for the pleading under r.16.5(1)(b). It was not to be taken to mean that the approach under the CPR was the same as that under the RSC. As Henderson LJ explained at para.48:

> *"[48] … I do, however, agree with [the] starting point, which is the significant difference between the language and structure of rule 16.5(1) on the one hand, and the position which obtained under the RSC on the other hand. Continuing use of the language of non-admission, convenient though it may be, must not be allowed to blur the distinction, or still less to encourage a reversion to the bad old days when a defendant could get away with a stonewalling defence full of indiscriminate non-admissions. Clearly, a defendant is now under a positive duty to admit or deny pleaded allegations where he is able to do so, and he may only put the claimant to proof of a fact where he is unable to admit or deny it. But that does not answer the question of what 'unable' means in this context."*

Henderson LJ went on to hold at paras 49–55, in respect of the question whether there was a duty to make enquiries, that there were two main reasons why there was no such duty: first, the short period of the procedural timetable for serving a defence and the strict procedural timetable which followed on from that, in which it would be difficult for a defendant to make any such reasonable enquiries. Although it was noted that there is, however, no reason why a defendant should not, if possible, make such enquiries and, if it furthered the overriding objective they should do so; and secondly, the potential for satellite litigation, as evidenced in the present case, that would arise from such an obligation concerning whether such a duty had been complied with by a defendant. Additionally, Henderson LJ noted the difficulty in verifying the defence with a statement of truth if such an obligation existed. ***Stanfield Properties v National Westminster Bank*** [1983] 1 WLR 568, ChD, ***McPhilemy v Times Newspapers Ltd*** [1999] 3 All E.R. 775, CA, ***Madonna Ciccone v Associated Newspapers Ltd*** [2009] EWHC 1108 (Ch); (2009) 32(7) I.P.D. 32048, ChD, ***Al Rawi v Security Service*** [2010] EWCA Civ 482; [2012] 1 A.C. 531, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.16.5.2.)

- **General Dynamics United Kingdom Ltd v Libya** [2019] EWHC 64 (Comm), 18 January 2019, unrep. (Males LJ)

Arbitral award—enforcement against a State—no power to dispense with service

CPR r.6.28, Pt 62, State Immunity Act 1978 s.12. The question arose whether it was permissible to dispense with service of an arbitration award under r.6.28, when enforcement is sought against a State by court proceedings in England and Wales. As Males LJ noted (giving judgment in High Court proceedings commenced prior to his appointment to the Court of Appeal), service of court proceedings is governed by s.12 of the 1978 Act. That Act requires service to be effected by the Foreign & Commonwealth Office. **Held**, it was not permissible to dispense with service of the award, even if it was issued under the procedure set out in Pt 62. Rules of court could not set aside statutory requirements, see para.45-46. (See ***Civil Procedure 2018*** Vol.1 at para.6.28.1.)

- **Maitland-Hudson v Solicitors Regulation Authority** [2019] EWHC 67 (Admin), 24 January 2019, unrep. (Green LJ and Carr J)

Assessment of medical condition of litigant—ability to take part in proceedings effectively

Solicitors Act 1974 s.49. An appeal was brought from a decision of the Solicitors Disciplinary Tribunal to strike the appellant of the solicitors' roll. The appeal was founded on the basis of alleged procedural unfairness, which was said to have arisen because the appellant acted in-person before the Tribunal and was at the time of the proceedings unable to properly defend himself. The appellant having had to admit himself into hospital. The Tribunal had refused to adjourn the proceedings. It had done so notwithstanding consultant psychiatrist experts for both the appellant and the Solicitors Regulation Authority concluding that he was unable to represent himself effectively. **Held**, the appeal was dismissed by the Administrative Court. In reaching her decision Carr J (with whom Green LJ agreed), rejected the argument that, as a general principle, a court could not substitute its own view of a party's medical health, in the context of a consideration of their ability to take part in proceedings effectively, for that of a relevant expert. It was well-established that it was perfectly legitimate for a court to account of its own assessment of a party's health. As Carr J put it at paras 83–84:

> *"[83] I am unable to accept this proposition as a matter of general principle. There is no blanket rule that a court*

(or tribunal) must ignore what it sees and hears in court. Solanki was a very extreme case on its facts. The first instance judge there essentially completely disregarded the medical evidence without giving any reasons and substituted it with his own opinion that the claimant in that case was not genuine.

[84] It is quite legitimate for a court to take account of its own assessment of a litigant's capacity to participate effectively in its overall assessment of the evidence before it, including the expert medical evidence, if it considers it appropriate to do so. No court is ever bound to accept the expert evidence before it, even if that evidence is agreed; see for example Levy v Ellis-Carr and others [2012] EWHC 63 (Ch) at [36] (endorsed in Hayat at [38]). A court or tribunal is entitled to weigh up the medical evidence against all of the other material available to it. If it intends to depart from the conclusion of an expert or experts, it needs, of course, to exercise caution. It also needs to bear in mind that litigants with, for example, mental health illness may mask their problems or not understand that it may not be in their best interests to continue. It must also give reasons for its conclusion. The Judge's failure to do so in Solanki was central to the Court of Appeal's criticism of the Judge's approach."

Levy v Ellis-Carr [2012] EWHC 63 (Ch), unrep., ChD, ***Solanki v Intercity Technology Ltd*** [2018] EWCA Civ 101, [2018] 1 Costs L.R. 103, CA, ***General Medical Council v Hayat*** [2018] EWCA Civ 2796, unrep., CA, ref'd to.

Practice Updates

STATUTORY INSTRUMENTS

THE CIVIL PROCEDURE (AMENDMENT) (EU EXIT) RULES 2019 (SI 2019/147). In force from **1 March 2019.** The first set of amendment rules for 2019 focus on Brexit. The rules are, unusually, made by the Lord Chancellor and not the Civil Procedure Rule Committee (CPRC). They are made under s.40 of the Sanctions and Anti-Money Laundering Act 2018. Any further such rules made under this Act will be made by the CPRC, see s.40(3) of the 2018 Act. The statutory instrument amends CPR Pt 79. It does so by making a series of technical amendments, which enable the closed material procedure to be applied to challenges to decisions made under the 2018 Act concerning the imposition of sanctions regimes against, for instance, terrorist groups.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION—102nd Update. In force from **14 January 2019**. It introduces a capped costs pilot scheme, which is based on the capped costs scheme operative in the Intellectual Property & Enterprise Court. It does so through a new Practice Direction 51W—The Capped Costs List Pilot Scheme, which is to run until 13 January 2021. The pilot scheme is only operative in the following courts within the Business & Property Courts: the London Circuit Commercial Court the Circuit Commercial Court at Leeds and Manchester; the Technology & Construction Court at Leeds and Manchester; and, the Chancery Division, District Registries in Leeds and Manchester. The pilot scheme, which is voluntary, is available to claims within those courts except for those: whose monetary value exceeds £250,000; in which a trial will exceed two days, exclusive of reading time and judgment; which raises issues of fraud or dishonesty; which are likely to give rise to extensive disclosure, witness or expert witness evidence; or, raise a large number of issues or involve a large number of parties.

CPR PRACTICE DIRECTION—103rd Update. In force from **14 January 2019**. The Practice Direction Update amends Practice Direction 51R—The Online Court Pilot. It changes the name of the Practice Direction and pilot scheme to Practice Direction 51R—Online Civil Money Claims Pilot. It effects a number of technical amendments to enable it to be further amended in future more easily, and introduces procedures for defendants to respond to a claim.

In Detail

BUSINESS & PROPERTY COURTS—LOCAL PRACTICE GUIDANCE

The Business and Property Courts (BPC) were formally introduced in October 2017, via CPR Update 92, and then on 1 October 2018 through the introduction of CPR Pt 57AA as a consequence of the Civil Procedure (Amendment No.3) Rules 2018 (SI 2018/975). The courts that form part of the BPC are divided into the "Business and Property Courts of England and Wales" and "B&PCs District Registries"; see CPR PD 57AA para.1.2. The former are the High Court's Chancery Division, the Commercial Court, the Technology and Construction Court, the Circuit Commercial Court, and the Admiralty Court, all of which are located in the Royal Courts of Justice, Rolls Building. The latter are the High Court's Chancery Division, the Technology and Construction Court, and the Circuit Commercial Court in the Birmingham, Bristol, Leeds, Liverpool, Manchester, Newcastle and Cardiff High Court District Registries; see CPR PD 57AA para.1.1.

Since the introduction of the BPC two of the District Registries have issued local practice guidance, in the form of Practice Notes. While, the creation of local practices was deprecated by the Woolf reforms, and such Practice Notes do not have the status of Practice Directions (see *Bovale v Secretary of State for Communities and Local Government* [2009] EWCA Civ 171; [2009] 1 W.L.R. 2774, CA, and ***Civil Procedure 2018*** Vol.2 para.12-43), given the recent creation of the BPC such guidance will be of particular benefit to practitioners. It is to be hoped that a consistent approach is, however, adopted by the various BPC District Registries and by the Business and Property Courts of England and Wales and that, in the near future, general guidance is given in either an updated Business and Property Courts Advisory Note (***Civil Procedure 2018*** Vol.2 para.2FB-6) or a relevant Court Guide.

The first of the two new practice notes concerns the Business and Property Courts in **Leeds**, it was issued unsigned on 4 January 2019 and revised on 14 January 2019. The second practice note concerns the Business and Property Courts in **Manchester** and was issued undated by Barling J (as Vice-Chancellor of the County Palatine of Lancaster). Both are reproduced below.

THE LEEDS BPC PRACTICE NOTE

NEWS FROM
THE BUSINESS AND PROPERTY COURTS IN LEEDS
and
THE COUNTY COURT AT LEEDS, BUSINESS AND PROPERTY WORK
JANUARY 2019
HIGH COURT, BUSINESS AND PROPERTY COURTS

1. DISCLOSURE PILOT: 1 January 2019

The Disclosure Pilot for the Business and Property Courts starts on 1 January 2019.

The scheme will help with the exchange of information in a case, helping all parties to agree a sensible and cost-effective approach to disclosure and identify areas of disagreement

The Pilot is given effect to by:

Practice Direction 51U – Disclosure Pilot For The Business And Property Courts.
The PD can be found by clicking here: Practice Direction

The appendices to the PD can be found here:

https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/courts-of-the- chancery-division/cpr-guides-and-forms/disclosure-pilot-for-the-business-and-property- courts/§

A relevant Practice Note (applying to some but not all BPC lists) can be found here:

https://www.judiciary.uk/publications/practice-note-business-and-property-claims-in-court/

2. CAPPED COSTS PILOT: 14 January 2019

The voluntary capped costs pilot operating in (among other places) Leeds came into force on 14 January 2019 under the 102nd update to the CPR and comprises CPR PD51W. It can be found here: http://www.justice.gov.uk/courts/procedure-rules/civil/pdf/update/cpr-102-pd- update.pdf

The pilot is a voluntary capped costs pilot operating in the Business and Property Courts in Leeds and Manchester (Chancery, Circuit Commercial and the Technology and Construction Court) and the London Circuit Commercial Court for cases valued up to £250,000. The pilot derives from Sir Rupert (formerly Lord Justice) Jackson's Costs Review in which the terms of the pilot were published as part of Sir Rupert's final report in the summer of 2017. Some amendments (notably the removal of provisions regarding appeals) have been made.

The pre-modified PD and further information regarding the related Jackson Reforms are accessible via this link: https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental- report-online-3.pdf

See chapter 9, pp 122 – 125

It is based on the capped costs regime in the Intellectual Property & Enterprise Court (IPEC). The pilot will run for two years from 14th January 2019 to 13th January 2021.

A note regarding the Pilot is to be found here: https://www.chba.org.uk/for- members/library/practice-directions-court-notices/practice-direction-capped-costs-pilot

3. ELECTRONIC or CE FILING: FEBRUARY/MARCH 2018

Electronic or CE Filing is due to be extended to the BPC Courts in Leeds (and other District Registry BPCs) in February or March 2019. The system has been in operation in the Rolls Building London for some time. is anticipated to be voluntary at first but will almost certainly become compulsory for litigants who are legally represented.

For information about CE Filing see:

https://www.gov.uk/guidance/ce-file-system-information-and-support-advice

4. ORDERS

Lodging of Orders after hearings: *In the BPCs in Leeds and unless otherwise directed:*

1. *the Applicant (or Claimant on directions cases where there is no separate application) is expected to lodge an electronic word version form of an agreed Minute of Order made at any hearing;*
2. *The electronic version should be filed by 12 noon no later than two business days after the hearing in question.*

If not lodged as required, then without further notice the Court is likely to list the matter for a hearing in order to finalise the order and receive an explanation as to why the Minute has not been lodged.

5. SKELETON ARGUMENTS AND BUNDLES

Bundles need to be provided to the advocates in sufficient time for them to prepare and lodge skeleton arguments.

The dates by which bundles and skeleton arguments are to be lodged with the Court (as provided by court order or the relevant Court Guide) are dates which must be met and are not dates to be aimed for.

As regards interim applications, bundles and skeletons should normally be lodged at the latest by 10am of the working day before the date of the hearing

It is the duty of advocates to take steps to ascertain what directions apply as regards bundles and skeleton arguments.

On too many occasions bundles and skeleton arguments are being filed late. From January 2019, the BPCs in Leeds will be less forgiving about such failures which disrupt court preparation and other cases. ***Parties can expect that late lodging will be met with the imposition of sanctions which may include costs sanctions and/or the adjournment of a hearing or trial.***

6. NEW E-MAIL ADDRESS FOR THE BPCs IN LEEDS

Please note that as of Monday 14th January 2019 the email address for the Business and Property Courts will change. For the avoidance of doubt this is for all correspondence/documents relation to BPCs (including insolvency).

The new email address is BPC.Leeds@justice.gov.uk

THE COUNTY COURT AT LEEDS
BUSINESS AND PROPERTY WORK

7. NEW E-MAIL ADDRESS FOR THE COUNTY COURT: BUSINESS AND PROPERTY WORK ONLY

Please note that as of Monday 14th January 2019 the email address for Business and Property Work in the County Court at Leeds will change. For the avoidance of doubt this is for all correspondence/documents relation to Business and Property Work (including insolvency).

The new email address is BPC.Leeds@justice.gov.uk

8. ORDERS

The provisions applying to the High Court, Business and Property Courts in Leeds outlined in paragraph 4 above apply also to the County Court at Leeds in relation to Business and Property Work.

9. SKELETON ARGUMENTS AND BUNDLES

The provisions applying to the High Court, Business and Property Courts in Leeds outlined in paragraph 5 above apply also to the County Court at Leeds in relation to Business and Property Work. Where the Business and Property work is chancery related then the provisions of the Chancery Guide should be applied, as if the case where a High

Court case save insofar as there is express order inconsistent with the Guide. Where the Business and Property work is TCC related then the provisions of the TCC guide should be applied as if the case where a High Court case save insofar as there is express order inconsistent with the Guide.

4 January 2018 (revised 14 January 2019)

THE MANCHESTER BPC PRACTICE NOTE

PRACTICE NOTE

1. *From 28 January 2019, the Business and Property Courts in Manchester will commence using the new CE-File electronic court file and some data stored on the old IT system will be transferred to CE-File.*
2. *Court users will not be able to file documents electronically direct to the court file until the middle of 2019. This note is intended to govern the position in the intervening period.*
3. *From 28 January 2019 the court file, whether it is in electronic or paper form, will contain only those documents that the*

court is required to hold pursuant to the CPR, whether they are documents created by the court or lodged by the parties.

4. *All claims issued on and after 28 January 2019 ("New Claims") will be allocated a new style number. Claims issued prior to 28 January 2019 ("Old Claims") will be given a new style claim number in place of the existing number on the first occasion a document is filed on or after 28 January 2019.*
5. *The old claim number will not be recognised by CE-File. It will only be necessary to provide the court with the old number where a payment out is to be made of funds paid into court prior to 28 January 2019.*

New Claims

6. New claims will be *managed as far as possible from the electronic file. All documents lodged with the court (other than those referred to in paragraphs 9 and 10 below) will be scanned to the electronic file and case management will be carried out using that file unless the volume of documents makes that impractical. If paper versions of documents are required a direction will be given to lodge further paper copies, usually in the form of a bundle.*
7. *The court will not maintain a paper file for New Claims. Paper documents lodged with the court, after having been scanned to the file, will be retained for a period of 6 months. They will be available only in the event that scanning errors need to be corrected. They will be destroyed at the end of the period.*
8. *The only exception will be original documents that are required to be lodged with the court pursuant to an order or a provision of the CPR (such as original wills). Original documents will be retained, as now, in a separate secure storage area. Original documents must be clearly marked as such with a front sheet marked in a font of not less than 14 point:*

"CLAIM NO. XXXXXX
ORIGINAL DOCUMENT – NOT TO BE DESTROYED"

9. *Exhibits to witness statements in Part 7 and Part 8 claims must not be filed with the witness statement. The filing party should provide an electronic version of the exhibit in pdf format at the same time as filing the witness statement.*

Old Claims

10. *Documents filed or created on or after 28 January 2019 will be retained only on CE-File. They will not be added to the paper file. As with New Claims, documents will be retained only for 6 months.*

Hearing Bundles - Old and New Claims from 28 January 2019

11. *From 28 January 2019 a hearing bundle will be required for every hearing, however short.* ***A strict "No bundle, no hearing" policy will be adopted****. If no bundle has been lodged, it is very likely the hearing will be adjourned to the next available date.*
12. *Responsibility for lodging the hearing bundle will normally fall on the applicant. This general rule will apply whether or not the applicant is a Litigant in Person unless the applicant is a Litigant in Person and a represented party has been directed by a judge or agreed in writing to assume responsibility for the production of the hearing bundle. The parties must co-operate with each other and all parties have responsibility for ensuring that the court receives a bundle lodged two clear days before the hearing, save where this is impossible due to the urgent nature of the hearing. Late service of documents is not a reason to delay lodging the bundle. If necessary, documents may be added to the bundle.*
13. *Exhibits should only include the essential documents. Correspondence should be exhibited only where there is a real need for the court to consider it and there is a real likelihood of it being referred to at a hearing. The provisions of paragraphs 9 and 10 will apply to Old and New claims from 28 January 2019*

Form 149C (Notice of Provisional Allocation)

14. *Form 149C (Notice of Provisional Allocation) requires the parties to lodge a range of documents. It will be the responsibility of the claimant to lodge a bundle containing the statements of case, the directions questionnaires and all associated documents within 5 working days of the deadline specified in Form 149C.*

Witness Statements

15. *Witness statements for trial and expert's reports should never be filed, unless the court has expressly directed this.*

General

16. *Correspondence with the court, and documents to be lodged, must not be sent by more than one medium.*
17. *Where a court fee must be paid, the document should only be sent in paper form.*

The Hon. Mr Justice Barling
Vice-Chancellor of the County Palatine of Lancaster

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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