CIVIL PROCEDURE NEWS

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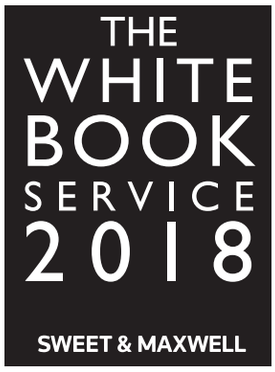

In Brief

Cases

Excel-Eucan Ltd v Source Vagabond System Ltd [2018] EWHC 3864 (Ch), 10 October 2018, unrep. (HHJ Pearce sitting as a judge of the High Court)

Shorter and flexible trial scheme—suitability for scheme

CPR rr.3.1(7), 3.1.2(m), PD 57AB (previously PD 51N). Proceedings were issued arising from the alleged breach of a licence to manufacture an ammunition bag. The licence to manufacture was granted by the patent holder. At the first case management conference an objection was raised to the dispute being dealt with on the shorter trial scheme. It was argued that the complexity of the issues were such, taken with the nature of disclosure and the potential trial length, that the proceedings were unsuitable for the scheme. **Held**, the application to remove the proceedings from the shorter trial scheme was rejected. In determining the question it was appropriate for the court to consider: the extent of disclosure; the nature of any expert evidence; the likely trial length, and particularly if the trial could be expected to be no more than four days in length (see PD 57AB para.2.3). Where the statements of case suggested the claim was such as to involve a degree of complexity that might, on the face of it, suggest it was outside the scope of the shorter trial scheme, which supposed "simplicity and brevity" in relevant statements of case. The key issue was to focus on what the judge referred to as "*reality of what the shorter trial scheme is about*": the fact that the case can be heard within a trial estimate of four days, with disclosure that is not extensive and without the need for extensive witness or expert evidence. Where, as here, it was anticipated that, notwithstanding complexity in statements of case, those proceedings can properly be dealt with on the scheme they should remain within it. It was noted, however, that developments in the course of case management may be such as to justify revisiting a decision to transfer to or keep a claim on the shorter trial scheme. (See ***Civil Procedure 2018*** Vol.1 at para.57ABD.1.)

Bowman v Thomson [2019] EWHC 269 (QB), 21 January 2019, unrep. (Dingemans J)

Expert witness—no power to impose condition after permission granted

CPR r.35.4. In clinical negligence proceedings, a claimant had been granted permission to rely on an expert urologist. The claimant had previously instructed a different expert urologist, but had decided not to rely on their report. An application for specific disclosure of the original urology expert's report was made by the defendant and refused by HHJ Roberts. The defendant appealed from the refusal. **Held**, the appeal was dismissed. In dismissing the appeal Dingemans J noted the jurisprudence on the disclosure of expert reports, viz., ***Lane v Willis*** (1972), ***Beck v Ministry of Defence*** (2003), ***Vasiliou v Hajigeorgiou*** (2005), ***Edwards-Tubb v JD Wetherspoon Plc*** (2011). Dingemans J then went on to hold that the court had no jurisdiction to place a condition on the grant of permission to rely on the second urologist's report following permission being granted. Furthermore, although it had not been argued before HHJ Roberts and was thus doubtful if the issue could be raised in the appeal from his order, there was no basis in the present case to exercise the discretion to vary the order for permission. ***Lane v Willis*** [1972] 1 W.L.R. 326, CA, ***Beck v Ministry of Defence*** [2003] EWCA Civ 1043, [2005] 1 W.L.R. 2206, CA, ***Vasiliou v Hajigeorgiou*** [2005] EWCA Civ 235; [2005] 1 W.L.R. 2195, CA, ***Edwards-Tubb v JD Wetherspoon*** Plc [2011] EWCA Civ 136; [2011] 1 W.L.R. 1373, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.35.4.4.)

The Personal Representatives of Hutson v Tata Steel UK Ltd [2019] EWHC 143 (QB), 1 February 2019, unrep. (Turner J)

Group Litigation Order—cut-off dates

CPR r.19.11, PD 19 para.13. Multiple claims were brought seeking compensation for harm alleged to have been caused by employees in the steel industry from inhalation of noxious material. The various claims were consolidated via a Group Litigation Order. As is usual the GLO provided for strict time limits for claimants to join the group register. A number of claims had not been registered before the cut-off date. Two applications were made seeking an extension of time to join the register. **Held**, the applications were granted. In reaching that decision Turner J noted that a hard and fast approach to cut-off dates was inappropriate. The proper approach was set out in ***Pearce v Secretary of State for Energy and Climate Change*** (2015), which while it noted that cut-off dates were essential for "good case management" and certainty for parties, too mechanistic an approach was not to be adopted. Extensions of time were not and should not be the norm, but they could be granted. In considering whether to grant an extension where there had been a failure to comply with the formal requirements for entry on the group register in time, it was necessary to consider the prejudice that an extension would cause to a defendant. Where there was

such prejudice it would be harder for an applicant to persuade the court to grant the extension. Where a claim that had been issued on behalf of deceased party was a nullity, and hence incapable of rectification (see ***Kimathi v Foreign and Commonwealth Office*** (2016)), it was permissible for a second claim to be brought by personal representatives of the estate, subject to arguments about the second claim being an abuse of process. Where such a second claim is brought, there is a discretion to extend the cut-off period to permit that claim to be entered on the group register. The proper approach to take to such an application was agreed to be that taken to relief from sanctions i.e., the test set out in in ***Denton v TH White Ltd*** (2014). While Turner J did not rule on this, it is suggested that the approach is consistent with the general trend concerning the application of this test to applications for relief from the adverse consequences of non-compliance with procedural time limits: see also ***Kimathi v Foreign and Commonwealth Office*** [2017] EWHC 939 (QB), unrep. (QBD), where the same approach was taken, albeit this was not referred to by Turner J. ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, CA, ***Pearce v Secretary of State for Energy and Climate Change*** [2015] EWHC 3775 (QB), unrep. (QBD), ***Kimathi v Foreign and Commonwealth Office*** [2016] EWHC 3005 (QB); [2017] 1 W.L.R. 1081, (QBD), ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.19BPD.21.1.)

- **Middlesbrough Football & Athletic Co (1986) Ltd v Earth Energy Investments LLP (In Liquidation)** [2019] EWHC 226 (Ch), 8 February 2019, unrep. (Sir Geoffrey Vos, CHC)

Extending Civil Restraint Order—Discharge

CPR r.3.11, PD 3C para.3.2. The Court of Appeal considered various issues concerning extended civil restraint orders (ECRO). In doing so it clarified the following: (i) a Circuit judge who is authorised to sit as a judge of the High Court under s.9(1) of the Senior Courts Act 1981, is a "High Court Judge" for the purposes of r.2.3 and PD 3C; (ii) there is no general power to set aside an ECRO except by way of an appeal; (iii) an application to vary or amend an ECRO under PD 3C para.3.2(2) can be made in those circumstances applicable to an application under r.3.1(7), "*namely where there has been either a material change of circumstances since the order was made, or where the facts on which the original decision was made were mis-stated*." The question whether such a variation could be granted in other "*out of the ordinary circumstances*" remained an open question, see ***Tibbles v SIG plc*** (2012) per Rix LJ at para.39. ***Tibbles v SIG plc*** [2012] EWCA Civ 518, unrep, CA, (See ***Civil Procedure 2018*** Vol.1 at para.3.11.1.)

- **Cameron v Liverpool Victoria Insurance Co Ltd** [2019] UKSC 6, 20 February 2019, unrep. (Lord Reed DPSC, Lord Sumption, Lord Carnwath, Lord Hodge and Lady Black)

Unnamed defendants—circumstances when can bring proceedings

Road Traffic Act 1988, ss.15, 1 CPR rr.6.15, 19.1. Proceedings were issued in respect of a road traffic accident. The vehicle which collided with the claimant's car failed to stop after the accident, but was traced via its registration number. The vehicle's owner failed to inform the claimant who was driving his car at the time of the accident. It also became apparent that the vehicle was not properly insured. The claim for damages was brought against the vehicle's owner. That claim was dismissed via summary judgment on the basis that the claimant could not prove that the vehicle's owner was the driver at the time of the accident. A cross-application by the claimant to amend the claim in order to substitute an unnamed defendant, identified by description only, for the vehicle's owner was refused. An appeal from that refusal was dismissed. The Court of Appeal subsequently held that the principle established in ***Bloomsbury Publishing Group v News Group Newspapers*** (2003) was not limited to claims for injunctive relief: it was of general applicability. On appeal, the UKSC rejected the approach taken by the Court of Appeal. It **held**, at paras 16–26, that as a general rule, and except where the circumstances would enable a claim to be properly served or dispensed with, for proceedings to be brought against an individual they must be capable of being identifiable as a particular person. Where an unknown driver of a car was described by reference to something they had done in the past, they had not be rendered identifiable. It was not possible to serve a defendant in such circumstances. This was because it was "*a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard*" (para.17). To the extent that the Court of Appeal had previously held in ***Abbey National plc v Frost*** (1999) that for alternative service of a claim form to be effected it was not necessary for it to be capable of bringing proceedings to a defendant's attention, that was wrong in law. On the contrary, "*subject to any statutory provision to the contrary, it is an essential requirement for any form of alternative service that the mode of service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant*." (para.21.) ***Abbey National plc v Frost*** [1999] 1 W.L.R. 1080, CA, ***Bloomsbury Publishing Group v News Group Newspapers*** [2003] EWHC 1206 (Ch); [2003] 1 W.L.R. 1633, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at paras 16.5.1 and 19.1.3.)

- **Otuo v The Watch Tower Bible And Tract Society of Britain (Relief from Sanctions 2)** [2019] EWHC 346 (QB), 21 February 2019, unrep. (Warby J)

Permission to serve witness summary

CPR r.32.9. A claimant, litigant-in-person, failed to serve witness statements. He applied for relief from sanctions in respect of that failure. He also applied for permission to serve witnesses summaries instead of the witness statements. The application for relief from sanctions was to be considered according to the criteria set out in ***Denton v TH White Ltd*** (2014). Relief from sanctions was, in this case, granted. In addition to satisfying the ***Denton*** test it was also necessary to demonstrate that he ought, in principle, to be permitted to rely on the witness summaries. In order to determine that question it is necessary to consider the following:

> *"[20] … (1) the threshold question of whether Mr Otuo has shown an inability to obtain a witness statement; subject to that (2) the extent to which the witness is likely to be able to give relevant evidence; (3) the compatibility with the overriding objective of permitting Mr Otuo to lead evidence from the witness in question on the topics he has specified; and (4) the adequacy of the content of the summary."*

Warby J went on to provide further guidance as follows:

> *"[22] Outside the bounds of fiction, it is rare that a party will choose to call a witness 'blind', without first obtaining a statement or proof of evidence, or some clear indication that the witness would give evidence favourable to the case of the party calling the witness. That is because it is rare that a party will be well-advised to do this at all, given the strong and fundamental rule that a party is not normally entitled to cross-examine or seek to discredit his own witness: The Filiatra Legacy [1991] 2 Lloyds Rep 337, 361 (CA). A party who puts in a witness statement is normally bound by its content. A party calling a witness, who can only ask a non-leading question, is bound by the answer. A vivid example of the practical impact of these rules in the defamation context is provided by McPhilemy v Times Newspapers Ltd (No 2) [2000] EMLR 575 (CA). In my judgment, these points are to be borne in mind when exercising the discretion at play on this application, particularly given Mr Otuo's status as a litigant in person. It may be a proper exercise of discretion to refuse permission to pursue a course which is liable to take up time on matters which may be peripheral at best and/or to do his case more harm than good.*
>
> *[23] … What I mean by adequacy is two things [in respect of the second and fourth criteria]. First, whether the summary satisfies the requirements of CPR 32.9(2)(a), by containing the evidence which the claimant knows and which would otherwise be contained in a witness statement. Secondly whether it is fair in all the circumstances to confront the defendants with a summary of the kind in question. This is a discretionary process, because the Court is always required to exercise its powers in accordance with the overriding objective, and is entitled to exclude relevant evidence from its consideration."*

Denton v TH White Ltd [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.32.9.1.)

- **Michael Wilson & Partners Ltd v Emmott** [2019] EWCA Civ 219, 26 February 2019, unrep. (Gross, Peter Jackson, Rose LJJ)

Post-judgment freezing injunction – 'Angel Bell' exception

CPR rr.1(1), 25.1(1)(f). In the context of long-running litigation the Court of Appeal considered the ***Angel Bell*** exception, which provides for payments made in the ordinary course of business to be exempted from the scope of a freezing injunction: see ***Iraqi Ministry of Defence v Arcepey Shipping (The Angel Bell)*** (1981). A post-judgment freezing injunction had been obtained in long-running proceedings. When granted in 2014 it contained the ***Angel Bell*** exception. By order dated 13 July 2017, the ***Angel Bell*** exception was, however, removed from the freezing injunction by Sir Jeremy Cooke. The removal was challenged on appeal to the Court of Appeal. **Held**, the appeal was dismissed. In giving the lead judgment, with which Peter Jackson and Rose LJJ agreed, Gross LJ, while referring to freezing injunctions by their pre-CPR name of *Mareva injunctions*, provided a clear analysis of the case law development and application of post-judgment freezing injunctions. Having done so he summarised the proper approach to such freezing injunctions, and particularly the application and disapplication of the ***Angel Bell*** exception as follows (paras.53-57)

> *'[53] It is time to draw the threads together. First, post-judgment Mareva injunctions are granted to facilitate execution, by guarding against a risk of dissipation over the period between judgment and the process of execution taking effect, where the judgment would remain unsatisfied if injunctive relief was refused: **Masri**, at [34]. With respect to the dicta in **Camdex** [at 636-640], post-judgment Mareva injunctions can no longer be described as rare: **Nomihold**, at [32]. Whether pre-or post-judgment, a Mareva injunction is not intended to confer a preference in insolvency (**Camdex**, at p.638) and does not form a part of execution itself.*

[54] Secondly, by reason of its nature and as a matter of realism, a post-judgment Mareva will increase the pressure on a defendant to honour the judgment debt. The mere increase in such pressure does not make it illegitimate or "in terrorem". The facts in ***Camdex*** *were extreme, concerning as they did the Central Bank of a friendly foreign State and the freezing of an asset of no value in the process of execution.*

[55] Thirdly, in the light of Tomlinson LJ's further reflections in ***Nomihold****, it cannot be said that, without more, the (Angel Bell) exception would be inappropriate in a post-judgment Mareva. In this regard, the observations of Colman J in* ***Soinco*** *and Tomlinson J in* ***Masri****, went too far.*

[56] Fourthly, it can be said, however, on the basis of ***Nomihold*** *(at [33]), that "it will sometimes and perhaps usually be inappropriate" to include the exception in a post-judgment Mareva injunction. Given the policy of the law strongly in favour of the enforcement of judgments, as already remarked, it would indeed be curious were the position otherwise - leaving the judgment debtor free to carry on business and ignore the outstanding judgment. The context is that a risk of dissipation must already have been demonstrated, as otherwise no Mareva injunction (with or without the exception) would have been granted at all. Accordingly, over the period between judgment and execution taking effect, a Mareva, without the exception, serves to hold the ring: . .*

[57] Fifthly, I would prefer not to characterise refusal of the exception in a post-judgment Mareva as either a "starting point" or a presumption. For that matter, I would be equally reluctant to pigeon-hole refusal of the exception as a remedy of last resort; there is no warrant for so confining such a decision, save that the more draconian the relief, the greater the need for its justification. Instead and while it strikes me as an obvious matter to consider when granting a post-judgment Mareva, the appropriateness or otherwise of the exception in such a Mareva should be treated as a question turning on all the facts in the individual case. In addressing this question, Tomlinson LJ's test in ***Nomihold****, at [33] ("it will sometimes and perhaps usually be inappropriate" to include the exception in a post-judgment Mareva), furnishes helpful and appropriately nuanced general guidance. Thus analysed, the decision by a Judge to permit or refuse its inclusion is a discretionary decision reached on a fact specific basis, with which this Court will be slow to interfere. Furthermore, while a Judge, when considering refusal of the exception, would no doubt have regard to the ambit of the Mareva sought, the assets thus frozen and the impact on the judgment debtor's business, I am not at all attracted to the distinction which Mr Doctor attempted to draw between bank balances and other assets; nor do I think that the test for refusal favoured by Tomlinson LJ in* ***Nomihold****, at [33], was in any way confined to balances in bank accounts. In some circumstances, removal of the exception in respect of bank balances could readily prove as destructive of a defendant's business as removal of the exception across the board.'*

In applying this approach to the present case, Gross LJ went on to state that as the decision to remove the ***Angel Bell*** exception was a matter of judicial discretion, the Court of Appeal could not intervene unless it could be shown Sir Jeremy Cooke had arrived at his decision as a result of an error of law or principle. That had not been demonstrated in the present case. On the contrary this was, on the facts, a 'paradigm case' for removing the exception as: (i) there was a risk of dissipation of assets; (ii) this was a case where the party subject to the freezing injunction had adopted a 'won't pay' rather than 'can't pay' attitude; (iii) 'every effort had been made to resist enforcement and make it more difficult'; (iv) questions of where enforcement was to be attempted were irrelevant; (v) removal of the exception is not a matter of last resort; (vi) while the Court should not take lightly the possibility that removal of the exception might result in the closure of the business that would otherwise be funded under the ***Angel Bell*** exception, in this case the answer to that threat lay in the hands of the appellant; (vii) while it could not be known if removing the exception would aid execution of he judgment, its removal was not an *in terrorem* threat. In a separate judgment, with which Rose LJ agreed, Peter Jackson LJ made a number of observations about the manner in which the litigation had been conducted. In doing so he stressed that it was incumbent on future judges dealing with this litigation – and by implication other judges dealing with comparable litigation – to properly bear in mind the need to ensure that no one set of proceedings is permitted to utilise more than its proper share of the court's resources. As he put it (at para.70),

'Having listened to the history of the litigation between these two solicitors, I protest at the shameful waste of time and money caused by their private dispute, which has now continued for 13 years and left their reputations in tatters. We were told that Mr Emmott's global costs amount to £2.5 million, and Mr Wilson's several times that. Courts in four countries have been (and in at least two cases are being, with no end in sight) plagued with their proceedings and counter-proceedings. It appears that Mr Wilson will stop at nothing to prevent Mr Emmott from receiving the award to which, for all his deceit, he is entitled. Against that background, the robust and principled approach taken by Sir Jeremy Cooke was entirely appropriate. Any court in this jurisdiction that has to consider this dispute in future would do well to remember that the overriding objective in civil proceedings includes a duty on the court to save expense, deal with the case expeditiously and fairly, and allot to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; further, that the

parties have a duty to help the court to achieve this. This pathological litigation has already consumed far too great a share of the court's resources and if it continues judges will doubtless be astute to allow the parties only an appropriate allotment of court time.'

Iraqi Ministry of Defence v Arcepey Shipping (The Angel Bell) [1981] Q.B. 65, Comm, ***Nippon Yusen Kaisha v Karageorgis*** [1975] 1 W.L.R. 1093, CA, ***Mareva Compania Naviera SA v International Bulk Carriers Ltd*** [1975] 2 Lloyd's Rep. 509, CA, ***Camdex International Ltd v Bank of Zambia (No. 2)*** [1997] 1 W.L.R. 632, CA, ***Soinco SACI v Nookuznetsk Aluminium Plant*** [1998] Q.B. 406, Comm, ***Masri v Consolidated Contractors*** [2008] EWHC 2492 (Comm), unrep, Comm, ***Mobile Telesystems Finance SA v Nomihold Securities Inc*** [2011] EWCA Civ 1040, [2012] 1 All E.R. (Comm) 223, Comm, ref'd to. (See ***Civil Procedure 2018*** Vol.2 at para.15.5.5)

■ **Sartipy (aka Hamila Sartipy) v Tigris Industries Inc** [2019] EWCA Civ 225, 1 March 2019, unrep. (Bean and Males LJJ)

Extended Civil Restraint Order—persistently making applications without merit

CPR PD 3C para.3.1. The appellant challenged the making of an extended civil restraint order against her. On the appeal the central question before the Court of Appeal was whether the judge had jurisdiction to make the order in circumstances where, it was said, the appellant was not party to proceedings and applications brought by her son. The Court of Appeal considered whether a "*as distinct from her son, [was] not a party who … 'persistently issued claims or made applications which are totally without merit'.*" **Held**, the appeal was dismissed. In reaching its decision the Court of Appeal first affirmed Newey J's explanation of the meaning to be given to "persistently" in PD 3C para.3.1: it was correct to say that to persistently issue or make claims or applications that are totally without merit requires at least three such claims or applications to have been made (para.28). Having affirmed that, Males LJ with whom Bean LJ agreed, provided by way of clarification the following guidance (paras.29-37):

"[29] First, 'claim' refers to the proceedings begun by the issue of a claim form. In the course of those proceedings one or more applications may be issued. If the claim itself is totally without merit and if individual applications are also totally without merit, there is no reason why both the claim and individual applications should not be counted for the purpose of considering whether to make an ECRO.

[30] Second, although at least three claims or applications are the minimum required for the making of an ECRO, the question remains whether the party concerned is acting 'persistently'. That will require an evaluation of the party's overall conduct. It may be easier to conclude that a party is persistently issuing claims or applications which are totally without merit if it seeks repeatedly to re-litigate issues which have been decided than if there are three or more unrelated applications many years apart. The latter situation would not necessarily constitute persistence.

[31] Third, only claims or applications where the party in question is the claimant (or counterclaimant) or applicant can be counted (although this includes a totally without merit application by the defendant in the proceedings). A defendant or respondent may behave badly, for example by telling lies in his or her evidence, producing fraudulent documents or putting forward defences in bad faith. However, that does not constitute issuing claims or making applications for the purpose of considering whether to make an ECRO. Nevertheless such conduct is not irrelevant as it is likely to cast light on the party's overall conduct and to demonstrate, provided that the necessary persistence can be demonstrated by reference to other claims or applications, that an ECRO or even a general civil restraint order, is necessary.

[32] Fourth, as Newey J also held in CFC 26 Ltd, the term 'a party [who] has … issued' such claims or applications refers not only to the named party but also to someone who is not a named party but is nevertheless the 'real' party who has issued a claim or made an application. Again, I respectfully agree. Although 'the real party' is not a concept expressly found in the Civil Procedure Rules, it is a concept which has been deployed from time to time, for example in the context of funding proceedings (cf. Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] UKPC 39, [2004] 1 WLR 2807 at [25]), while security for costs may be ordered against a claimant who 'is acting as a nominal claimant' (CPR 25.13(1)(f)). It is unnecessary to explore in this appeal the limits of the "real party" concept, but it must extend to a person who is controlling the conduct of the proceedings and who has a significant interest in their outcome.

…

[35] Fifth, where the named claimant allows the use of his or her name to issue claims or make applications which are totally without merit, an ECRO may be made against the named party notwithstanding that he or she is personally innocent of any misconduct or even ignorant of the claims or applications which the 'real' party has been making. By permitting his or her name to be used, the named claimant or applicant takes responsibility for

the conduct of the individual who exercises control over the conduct of the proceedings.

[36] Sixth, however, in that situation the named claimant is not responsible for claims and applications made by the "real" party in his or her own name in other proceedings.

…

[37] Seventh, when considering whether to make a restraint order, the court is entitled to take into account any previous claims or applications which it concludes were totally without merit, and is not limited to claims or applications so certified at the time, albeit that in such cases the court will need to ensure that it knows sufficient about the previous claim or application in question: R (Kumar) v Secretary of State for Constitutional Affairs (Practice Note) [2006] EWCA Civ 990, [2007] 1 WLR 536 at [67] and [68].".

Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] UKPC 39; [2004] 1 W.L.R. 2807, PC, ***R (Kumar) v Secretary of State for Constitutional Affairs (Practice Note)*** [2006] EWCA Civ 990; [2007] 1 W.L.R. 536, CA, ***CFC 26 Ltd v Brown Shipley & 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.)

Practice Updates

STATUTORY INSTRUMENTS

THE CIVIL PROCEDURE (AMENDMENT) RULES 2019 (SI 2019/342). In force from **6 April 2019.**

The first set of amendment rules for 2019 introduce the following changes to the CPR. First, they correct an inadvertent error in a previous set of amendment rules by reintroducing reference to r.5.4A in the contents to Pt 5. Secondly, r.21.12(1A) is amended to clarify the application of costs and expenses recoverability to situations where a litigation friend acts for a child and not where they act for a protected person. Thirdly, r.21.12(8) is amended in respect of the rules concerning disbursements and fixed costs where a litigation friend applies for a payment out of damages. Fourthly, Pt 39 is amended following a review, which ultimately originated in recommendations by the 2010 Neuberger Super-Injunctions Report, to ensure it more properly reflects the constitutional principle of open justice. Fifthly, Pt 61 is amended to make a number of technical changes to update the wording of the Pt and render it consistent with primary legislation (the Senior Courts Act 1981). It further introduces provision to rectify a gap in the rules concerning giving security in admiralty claims identified in *The Atlantik Confidence* [2014] 1 Lloyd's Rep 1 586, CA.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION—104nd Update. In force from **6 April 2019**, apart from the amendments: to PD 2C, PD 51N and the PD relating to the Use of the Welsh Language in Cases in the Civil Courts in or Having a Connection with Wales, each of which came into force on **18 February 2019**; to PD 51X, which come into force on **1 April 2019**; and, PD 3E, which come into force on **25 April 2019**. The amendments are as follows:

- PD 2C—Starting Proceedings in the County Court. Technical amendments to delete references to Chichester County Court and Chippenham and Trowbridge County Court hearing centres following their closures;
- PD 3E—Costs Management. Substitutes a new Annex C Precedent R Budget Discussion Report;
- PD3G—Requests for the Appointment of an Advocate to the Court. Incorporates as a PD a Memorandum of Understanding entered into by the Lord Chief Justice and Attorney-General, dated 19 December 2001 (see ***Civil Procedure 2018*** Vol.1 at para.39.8.1), concerning the process for appointing an advocate to the court (amicus curiae);
- PD 21—Children and Protected Parties. Amends para.11.2 to insert a new para.11.2(4A), which requires a litigation friend to file a copy of the bill of costs or informal breakdown of costs with the witness statement required by para.11.2(1) where a claim is made for payment out in relation to costs or expenses;
- PD 32—Evidence. Transfers to PD 32 provisions previously contained in PD 39A, which is omitted;
- PD 39A—Miscellaneous provisions relating to Hearings. Omits the PD;
- PD 39B—Court Sittings. The PD is renamed as PD 2F—Court Sittings. A number of technical amendments are also made to the PD;

- PD 51N—Shorter and Flexible Trials Pilot Scheme. The Pilot Scheme was replaced by PD 57AB, with effect from 1 October 2018. Inadvertently PD 51N was not explicitly omitted at that time, albeit it was impliedly revoked with the introduction of PD 57AB. It is now formally omitted;
- PD 51X—New Statement of Costs for Summary Assessment Pilot. Inserts a new statement of costs for the summary assessment pilot;
- PD 61—Admiralty Claims. Makes amendments to introduce a mechanism for providing security by guarantee as an alternative to a payment into court to resolve a gap in the rules noted in *The Atlantik Confidence* [2014] 1 Lloyd's Rep 1 586, CA. Makes a number of further amendments to update and correct the terminology in the PD;
- PD relating to the Use of the Welsh Language in Cases in the Civil Courts in or Having a Connection with Wales. Updates the reference to "allocation questionnaire" in para.3.2 to "directions questionnaire".

CPR PRACTICE DIRECTION—105th Update. In force from **25 February 2019**. This Practice Direction Update amends PD 51O – Electronic Working Pilot Scheme to extend it to the Business & Property Courts District Registries in Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester, Newcastle. It will apply to proceedings starting in those District Registries on or after 25 February 2019. It may apply to proceedings started prior to that date, but only by order of the court. From 30 April 2019, the Practice Direction amendment provides that where a party is legally represented they will be required to commence and/or continue proceedings or applications using CE-File.

PRACTICE GUIDANCE

BUSINESS AND PROPERTY COURTS—GUIDANCE—UPDATE

Following the publication of the updated PD 51O—Electronic Working on 25 February 2019, and the formal extension of electronic working to the B&PCs District Registries, proceedings can be issued in the B&PCs District Registries electronically and documents can be filed by parties electronically in B&PCs District Registries cases that are on the electronic working system.

Practice Direction 51O applies to all B&PCs District Registries. Consequently, regional and local practice and guidance notes released prior to 25 February 2019 in anticipation of the planned roll-out of electronic working to the B&PCs District Registries (such as the two noted in ***Civil Procedure News*** No.2 of 2019) should therefore be viewed as having been superseded by the Practice Direction.

PRACTICE NOTE—ELECTRONIC WORKING PILOT SCHEME—QUEEN'S BENCH DIVISION

On 11 February 2019, Senior Master Fontaine issued guidance concerning the implementation of electronic working following the extension of PD 51O to the Queen's Bench Division, apart from the Administrative Court, with effect from 1 January 2019. It is of particular importance as it provides guidance on the application of CE-File to claims and appeals in the QBD issued before 17 November 2018, and to its application to claims and appeals issued on or after that date. The Practice Note is reprinted below:

Practice note by Senior Master Fontaine: The Electronic Working Pilot Scheme

QUEEN'S BENCH DIVISION

1. Following the amendments to PD51O (The Electronic Working Pilot Scheme) which came into effect on 1 January 2019, the Electronic Working Pilot Scheme ("the EWPS"), has commenced in the Queen's Bench Division of the Royal Courts of Justice (save for the Administrative Court), using the new CE-File electronic court file.
2. Court users are able to file documents electronically direct to the court file. Court Users can sign up to use electronic filing by logging on to https://efile.cefile-app.com. This note is intended to explain what the practical effects of the EWPS. Further practical guidance for users of CE-file can be found at https://www.gov.uk/guidance/ce-file-system-information-and-support-advice
3. All Claims and Appeals issued on and after 17 November 2018 are now managed through CE File and all documents filed are held on CE-File. Some Claims (not Appeals) issued before 17 November 2018 have also been migrated to CE-File and parties can also file documents in and case manage such cases electronically. Parties can also request that a claim (not Appeals) be migrated to CE-File.
4. All historic claims held on CE-File will be allocated a new style claim number. 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 17 November 2018.

5. Claims and Appeals will be managed as far as possible from CE-File. All documents filed with the court 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. The court will not maintain a paper file for claims filed and managed on CE-File.
6. The only exception will be original documents that are required to be filed with the court pursuant to an order or a provision of the CPR. 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"

7. Draft Orders must be filed as Word documents. All other documents filed must be in pdf format.
8. Any documents filed with or attached with a statement of case must be filed as a separate pdf document in the document field marked "associated filing".
9. Exhibits, Annexes and Appendices must each also be filed as an associated filing to the main document.
10. Where a document or statement of case is subject to a confidentiality or anonymity order the party filing the same must request confidentiality in the appropriate field in the Filing Information screen and must state the reason for such request in the Documents Comments filed (e.g. Order dated 00/00/2019). If an anonymity order is in place, the party filing any document affected by such order must also file a redacted copy of the document. The redacted copy should be added as an associated filing. Only the associated filing will then be visible to public search.
11. A hard copy hearing bundle is required for every hearing. If no bundle has been lodged, the hearing may be adjourned to the next available date.
12. Responsibility for lodging the hard copy hearing bundle will normally fall on the applicant, or the claimant for a CMC or CCMC. This general rule will apply whether or not the applicant is a Litigant in Person, unless a represented party has been directed by a judge or agreed in writing to assume responsibility for the production of the hard copy 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 hard copy bundle. If necessary, documents may be added to the bundle.
13. Hearing Bundles must be removed or collected by the parties within 7 days of the hearing unless the judge directs otherwise. If not removed they will be disposed of by the court as confidential waste.
14. Correspondence with the court and documents to be filed must not be sent by more than one medium.

Senior Master Fontaine
Queen's Bench Division

11 February 2019

In Detail

DRAFT CIVIL PROCEDURE RULES 1998 (AMENDMENT) (EU EXIT) REGULATIONS 2019

At the time of writing the UK is expected to leave the European Union on 29 March 2019 ("exit day"). While it remains unclear whether the date of departure may be postponed and, whether postponed or not, the UK leaves the EU with a withdrawal agreement, the government has published a number of draft statutory instruments and Parliament has made a number of statutory instruments that are to have an impact on the Civil Procedure Rules when, and if, they come into force. These various statutory instruments, made or to be made under s.8 of the EU (Withdrawal) Act 2018, are as follows:

- The Designs and International Trade Marks (Amendment etc.) (EU Exit) Regulations 2019;
- Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019;
- Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019;
- Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019;
- Service of Lawyers and Lawyer's Practice (Revocation etc.) (EU Exit) Regulations 2019;
- Competition (Amendment etc.) (EU Exit) Regulations 2019;
- Plant Breeders' Rights (Amendment etc.) Regulations (EU Exit) 2018;
- Patents (Amendment) (EU Exit) Regulations 2018;
- Trade Marks (Amendment etc.) (EU Exit) Regulations 2018;
- European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1311);
- European Public Limited-Liability Company (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1298);
- Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provision) (EU Exit) Regulations 2018 (SI 2018/1257);
- The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018 (SI 2018/1124).

In order to effect amendments to the CPR consequent upon these various statutory instruments as well as the UK's anticipated accession in its own right, as of 1 April 2019, to the Hague Convention on Choice of Court Agreements 2005 the government has published the draft Civil Procedure Rules 1998 (Amendment) (Eu Exit) Regulations 2019 ("the 2019 Regulations"). Further amendments are to be expected to the Practice Directions that supplement those Parts, as well as to the Practice Direction—Competition Law, and the Practice Direction—Application for warrant under the Competition Act 1988.

The basis of the amendments will be the fact that a number of EU Regulations and Directives will cease to have effect in UK law or will be retained only in modified form. These various EU Instruments are: Regulation (EU) No.1215/2012 (the Judgments Regulation); Regulation (EC) No.44/2001 (Brussels I); Regulation (EU) 606/2013 (the Protection Measures Regulation); Regulation (EC) No.805/2004 (the EEO Regulation); Regulation (EC) No.1896/2006 (EOP Regulation); Regulation (EC) No.861/2007 (ESCP Regulation); The Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark (the 2007 Lugano Convention and its predecessor); The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968 (the 1968 Brussels Convention); Council Regulation (EC) No.1393/2007 (the Service Regulation); Council Regulation (EC) No.1206/2001 (the Taking of Evidence Regulation); Directive 2008/52/EC (the Mediation Directive); Council Directive (EC) No.2004/48 (Enforcement of Intellectual Property Rights Directive); Regulation (EC) No.1610/96 (SPC Regulation for plant protection products); Council Regulation (EC) No.207/2009 (Community trade mark); Council Regulation (EC) No.6/2002 (Community designs); Council Regulation (EC) No.2100/94 (Community plant variety rights); the EU Mediation Directive (2008/52/EC); and, arts 101 and 102 of the Treaty on the Functioning of the European Union (competition rules).

Assuming that the various Regulations come into force on exit day, then the 2019 Regulations will effect a number of amendments to the CPR. By way of overview those amendments are as follows:

- CPR Pt 5: minor amendment to omit r.5.4C(1b) and its cross-reference to mediation settlement agreements. This is to be subject to saving and transitional provisions, which will maintain the omitted rule in respect of

mediations that commenced prior to exit day;

- CPR Pt 6: significant amendments are expected to take account of the revocation of the Service Regulation (1393/2007) and the Taking of Evidence Regulation (1206/2001), the Judgments Regulation (EU 1215/2012) and the non-application of the Brussels and Lugano Conventions. Further amendments take account of the revocation of the European Communities (Lawyer's Practice) Regulations 2000. Substantial revisions are thus made to Sections II, III and IV of Pt 6, subject to saving and transitional provisions;
- CPR Pt 8: minor amendments to omit cross-references to Pt 78;
- CPR Pt 12: amendments to rr.12.3, 12.10 and 12.11 in order to omit references to Brussels and Lugano Convention states and EU Member states, and to the Lugano Convention and the Judgments Regulation. This is to be subject to saving and transitional provisions, which will maintain r.12.10(b)(i) and (ii) and r.12.11(4)(a) where a claim was served out of the jurisdiction prior to exit day;
- CPR Pt 13: a minor amendment to r.13.3 to omit reference to art.19(4) of the Service Regulation (1393/2007);
- CPR Pt 25: amended to delete reference to Brussels Contracting States, States bound by the Lugano Convention and Regulation States from r.25.13(2)(a)(ii). This is to be subject to saving and transitional provisions, which will maintain the omitted sub-paragraph where a claim was issued prior to exit day;
- CPR Pt 30: amendments to r.30.8 to replace references to arts 101 and 102 of the Treaty on the Functioning of the European Union with references to chapters 1 and 2 of the Competition Act 1998. This is to be subject to saving and transitional provisions, which will maintain the rule, in specified circumstances, as it was prior to exit day where an EU competition law infringement arose prior to exit day;
- CPR Pt 31: minor amendments to omit cross-references in r.31.3(1)(d), r.31.12, r.31.16 and r.31.17 to Pt 78. This is to be subject to saving and transitional provisions, which will maintain r.31.3(1)(d) as it was prior to exit day where Cross-Border Mediation (EU Directive) Regulations 2011 applied to a mediation before exit day;
- CPR Pt 32: minor amendments to omit a cross-reference to Pt 78 from r.32.7;
- CPR Pt 34: amendments consequent upon the EU Service Regulation (1393/2007) and Taking of Evidence Regulation (1206/2001) ceasing to apply to the UK on exit day. Most significantly, this will entail the omission of Section III of this Part. Saving and transitional provisions maintain rr.34.22 to 34.24 in limited circumstances e.g., where a court made an order for the issue or submission of a request prior to 29 March 2019 (exit day) but further action required by the rule was not effected by exit day, then the "*court may treat the order as one for the issue of a letter of request under rule 34.13 and proceed accordingly*" and see the saving provision in reg.13 of the Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provision) (EU Exit) Regulations 2018;
- CPR Pt 63: a number of amendments to omit from exit day rr.63.1(2)(j)(iv), (v), (vii), r.63.2(1)(b)(i), r.63.14(2)(a)(ii) and r.63.14(2)(b)(ii). These amendments are subject to saving and transitional provisions applicable where however, a claim relating to either Community registered design, Community plant variety rights, or Community trade marks commenced prior to exit day. In such circumstances, r.63.1 continues to apply as it did prior to exit day;
- CPR Pt 68: this Part is revoked in its entirety. A saving and transitional provision, however, provides that where proceedings that began prior to exit day had been stayed under r.68.5, they continue to be stayed unless and until the court directs otherwise;
- CPR Pt 74: significant amendments are expected to take account of the revocation of the Judgments Regulation (EU 1215/2012) and the non-application of the Brussels and Lugano Conventions. Further amendments, subject to saving and transitional provisions, are to take account of the effect of the European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1311), and the Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019. Where the Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019 amendments are made to preserve Section VI of this Pt to maintain recognition of incoming protection measures.
- CPR Pt 78: this Part is revoked in its entirety. Saving and transitional provisions, however, provide that the EOP Regulation and the ESCP Regulation (with modifications) and the Cross-Border Mediation (EU Directive) Regulations 2011 continue to apply as if not revoked where: an application for an EOP was made before exit day and its enforcement is being sought in the UK; the claim form under the ESCP is lodged before exit day and enforcement of an ESCP judgment is being sought in the UK; the 2011 Regulations applied before exit day in so far as is relevant to evidence relating to a mediation.

As further detail on the exact nature of the amendments to come into force and the date on which they do so becomes clear, whether that date is 29 March 2019 or otherwise, guidance will be provided in ***Civil Procedure 2019***, its supplements, and further issues of ***Civil Procedure News***.

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