CIVIL PROCEDURE NEWS

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In Brief

Cases

■ **Galazi v Christoforou** [2019] EWHC 670 (Ch), 26 March 2019, unrep. (Chief Master Marsh)

Amendment – discontinuance

CPR Pt 38. The question arose in proceedings between family members arising from a dispute concerning property investments as to the costs of discontinuance. The specific issue identified by the court was whether the claimants had, by way of quite significant amendment to the claim, discontinued the whole or a part of the claim. As the Chief Master noted, at para.41, the distinction was important as the presumption under CPR r.38.6(1) was that a party that discontinues is liable for the other party's costs. **Held**, on the facts of the present case, the claimant had discontinued: see para.50. There was no good reason to displace the presumption: ***Brookes v HSBC Bank Plc*** (2011) at para.6 and ***Nelson's Yard Management Co v Eziefula*** (2013) at para.30 applied. Costs were ordered and also then assessed on an indemnity basis. In reaching his decision the Chief Master considered the meaning to be given to "claim" and "proceedings" in CPR r.38 and particularly the previous obiter analysis of the terms by Leggatt J in ***Kazakhstan Kagazy Plc v Zhunus*** (2016). Leggatt J at para.24 considered that the term "claim" when used in CPR r.38.2 had to "*refer either to the entire action or, at its narrowest, to all causes of action asserted by a particular claimant against a particular defendant.*" It could not "*mean a cause of action because of the repeated references (including in r.38.2) to "all or part of a claim".*" The Chief Master considered this analysis to misconstrue the rule and use of "claim" within it. As he put it at paras 44-45 and 51:

> *"[44] It seems to me, and with respect to Leggatt J, that [that] approach construes rule 38 in a way which is not in accordance with its terms. It is entirely clear that abandoning one remedy where there are other remedies will not amount to a discontinuance. However, as it seems to me, the abandonment of an entire cause of action may amount to a partial discontinuance. Pursuant to rule 38.2(1) a claimant may discontinue part of a claim. That rule obviously may apply where there is a single defendant. If there can be a partial discontinuance against a single defendant, and that partial discontinuance cannot be the abandonment of one remedy, 'claim' must mean one or more causes of action. The position is clearer still under rule 38.2(3) which permits a claimant, where there is more than one defendant, to discontinue part of a claim against "all or any of the defendants". In other words, a claimant may discontinue a cause of action against one defendant, but not against another.*
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> *[45] . . . there is no obvious reasons for the switch from using 'claim' to using 'proceedings' in later parts of the rule. Read literally, rule 38.5(2), which provides that "the proceedings" are brought to an end on service of the notice of discontinuance, would support the notion that it is only possible to discontinue the entire claim/proceedings. However, the provision has to be understood in light of the earlier part of the rule which contemplates a partial discontinuance of a claim against one of several defendants.*
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> . . .
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> *[51] . . . With great respect to Leggatt J, it seems to me that the analysis in Kazakhstan Kagazy Plc v Zhunus does not consider rule 38 as a whole and does not give sufficient weight to rules 38.2(1) and (3). Part 38 is explicit in saying that a claimant may discontinue part of a claim against one defendant. The later use of the word "proceedings" in rule 38.5(2) must be treated as a synonym for claim. The rule does not otherwise make sense. A claim is more than particular relief but may be less than the entire claim against a party."*

Brookes v HSBC Bank Plc [2011] EWCA Civ 354; [2012] 3 Costs L.O, CA, ***Nelson's Yard Management Co v Eziefula*** [2013] EWCA Civ 235; [2013] C.P. Rep. 29, CA, ***Kazakhstan Kagazy Plc v Zhunus*** [2016] EWHC 2363 (Comm); [2017] 1 W.L.R. 467, Comm., ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.38.2.2.)

■ **McKendrick v Financial Conduct Authority** [2019] EWCA Civ 524, 28 March 2019, unrep. (Hamblen and Holroyde LJJ)

Contempt of Court – sentencing – maximum sentence

CPR rr.52.21, 81.29(1). The appellant had been found to have breached two worldwide freezing junctions arising from proceedings brought by the Financial Conduct Authority concerning losses to investors in a number of investment schemes. Following a finding that he was thus in contempt of court, he was sentenced to a term of imprisonment for six months. The appellant appealed from the order. He did so on the basis that it was submitted to be too long. **Held**, the Court of Appeal dismissed the appeal. In reaching its decision, noted that the Court of Appeal would be reluctant

to interfere with a judge's decision on sentencing for contempt of court. Hamblen LJ summarised the approach, at paras 37-38, as follows:

> *"[37] In deciding what sentence to impose for a contempt of court, the judge has to weigh and assess a number of factors. This court is reluctant to interfere with decisions of that nature, and will generally only do so if the judge:*
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> *i) Made an error of principle;*
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> *ii) Took into account immaterial factors or failed to take into account material factors; or*
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> *iii) Reached a decision which was plainly wrong in that it was outside the range of decisions reasonably open to the judge.*
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> *See Mersey Care NHS Trust v Ackroyd [2007] EWCA Civ 101 at [35]-[36], Aldi Stores Ltd [2008] 1 WLR 748 at [16], Stuart v Goldberg Linde [2008] 1 WLR 823 at [76] and [81] and the very recent decision of this court in Liverpool Victoria Insurance Limited v Zafar [2019] EWCA 392 (Civ) at [44].*
>
> *[38] It follows from that approach that there will be few cases in which a contemnor will be able successfully to challenge a sentence as being excessive. If however this court is satisfied that the sentence was "wrong" on one of the above grounds, it will reverse the decision below and either remit the case to the judge for further consideration of sanction or substitute its own decision."*

The Court of Appeal went on to hold that the approach to sentencing for contempt arising from a false statement of truth, set out in ***Liverpool Victoria Insurance Company Ltd v Zafar*** (2019) at para.58, should apply where a court is considering sentencing for contempt that involves one or more breaches of a court order, see para.39, as such:

> *"[39] In LVI v Zafar at [58] this court considered the correct approach to sentencing for a contempt of court involving a false statement verified by a statement of truth. We consider that a similar approach should be adopted when - as in this case - a court is sentencing for contempt of court of the kind which involves one or more breaches of an order of the court. The court should first consider (as a criminal court would do) the culpability of the contemnor and the harm caused, intended or likely to be caused by the breach of the order. In this regard, aggravating or mitigating factors which are likely to arise for consideration will often include some of those identified by Popplewell J in Asia Islamic Trade Finance Fund (see [32] above). Having determined the seriousness of the case, the court must consider whether a fine would be a sufficient penalty. If it would, committal to prison cannot be justified, even if the contemnor's means are so limited that the amount of the fine must be modest."*

Moreover, due to the maximum sentence for contempt being imprisonment for two years, such a sentence cannot be reserved for the most severe cases of contempt. In sentencing it may, depending on the circumstances, require an element intended to encourage future, albeit belated, compliance with a court order, see para.40-41:

> *"[40] Breach of a court order is always serious, because it undermines the administration of justice. We therefore agree with the observations of Jackson LJ in Solodchenko (see [31] above) as to the inherent seriousness of a breach of a court order, and as to the likelihood that nothing other than a prison sentence will suffice to punish such a serious contempt of court. The length of that sentence will, of course, depend on all the circumstances of the case, but again we agree with the observations of Jackson LJ as to the length of sentence which may often be appropriate. Mr Underwood was correct to submit that the decision as to the length of sentence appropriate in a particular case must take into account that the maximum sentence is committal to prison for two years. However, because the maximum term is comparatively short, we do not think that the maximum can be reserved for the very worst sort of contempt which can be imagined. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum.*
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> *[41] As the judge recognised, it may sometimes be necessary for the sentence for this form of contempt of court to include an element intended to encourage belated compliance with the court's order. Where that is the case, that element of the sentence is in principle one which may be remitted if the contemnor subsequently purges his contempt by complying with the order.. . ."*

Mersey Care NHS Trust v Ackroyd (No.2) [2007] EWCA Civ 101; [2008] E.M.L.R. 1, CA, ***Aldi Stores Ltd v WSP Group Plc*** [2007] EWCA Civ 1260; [2008] 1 W.L.R. 748, CA, ***Stuart v Goldberg Linde*** [2008] EWCA Civ 2; [2008] 1 W.L.R. 823, CA, ***JSC BTA Bank v Solodchenko*** [2011] EWCA Civ 1241; [2012] 1 W.L.R. 350, CA, ***Asia Islamic Trade Finance Fund v Drum Risk Management*** [2015] EWHC 3748 (Comm), unrep., Comm., ***Liverpool Victoria Insurance Company Ltd v Zafar*** [2019] EWCA Civ 392, unrep., CA, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at paras 52.21.1, 81.29.1.)

■ **Boyd v Ineos Upstream Ltd** [2019] EWCA Civ 515, 3 April 2019, unrep. (Longmore, David Richards and Leggatt LJJ)

Injunctions – persons unknown – guidance

CPR r.19.1. Interim injunctions were granted against two named defendants and against persons unknown who were believed to be individuals likely to protest at "fracking" sites. The persons unknown were defined by five sets of descriptions. The injunctions were subject to appeal on a number of grounds, including whether the judge was correct to grant injunctions against persons unknown, particularly whether it was permissible to sue persons unknown who were not in existence until they committed a prohibited tort. **Held**, the appeals were allowed in part. In respect of the issue concerning whether the judge was correct in granting the injunctions against persons unknown, the Court of Appeal noted under the CPR there was no requirement to name a defendant on a claim form or a court order, see para.19 and following. Having reviewed the authorities, Longmore LJ, with whom David Richards and Leggatt LJJ agreed, held (at para.30) that there was "*no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort.*" As Longmore LJ put it at paras 29-30:

> *"[29] . . . In my judgment it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. That was done in both the Bloomsbury and the Hampshire Waste cases and no one has hitherto suggested that they were wrongly decided. Ms Harrison shrank from submitting that Bloomsbury was wrongly decided since it so obviously met the justice of the case but she did submit that Hampshire Waste was wrongly decided. She submitted that there was a distinction between injunctions against persons who existed but could not be identified and injunctions against persons who did not exist and would only come into existence when they breached the injunction. But the supposedly absolute prohibition on suing unidentifiable persons is already being departed from. Lord Sumption's two categories [in Cameron] apply to persons who do exist, some of whom are identifiable and some of whom are not. But he was not considering persons who do not exist at all and will only come into existence in the future. I do not consider that he was intending to say anything adverse about suing such persons. On the contrary, he referred (para 11) to one context of the invocation of the jurisdiction to sue unknown persons as being trespassers and other torts committed by protesters and demonstrators and observed that in some of those cases proceedings were allowed in support of an application for a quia timet injunction*
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> > *"where the defendant could be identified only as those persons who might in future commit the relevant acts."*
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> *But he did not refer in terms to these cases again and they do not appear to fit into either of the categories he used for the purpose of deciding the Cameron case. He appeared rather to approve them provided that proper notice of the court order can be given and that the fundamental principle of justice on which he relied for the purpose of negating the ability to sue a "hit and run" driver (namely that a person cannot be made subject to the court's jurisdiction without having such notice as will enable him to be heard) was not infringed. That is because he said this (para 15):-*
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> > *"… Where an interim injunction is granted and can be specifically enforced against some property or by notice to third parties who would necessarily be involved in any contempt, the process of enforcing it will sometimes be enough to bring the proceedings to the defendant's attention. In Bloomsbury Publishing Group, for example, the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction. The Court of Appeal has held that where proceedings were brought against unnamed persons and interim relief was granted to restrain specified acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts: South Cambridgeshire District Council v Gammell [2006] 1 WLR 658, para 32. In the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis."*
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> *[30] This amounts at least to an express approval of Bloomsbury and no express disapproval of Hampshire Waste. I would, therefore, hold that there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort."*

However, at para.31, Longmore LJ stated that a court should be "*inherently cautious*" when approaching the question whether to grant an injunction against persons unknown. This was because it was difficult to assess the extent of it. He went on to reject the submission that such an injunction should only be granted when it was necessary to do so, and that it would only be necessary to do so when no named individual could be identified. That was rejected as

"*hopelessly unrealistic*" a position to take (at para.32). He went on to give the following tentative guidance, that a court could consider when assessing the question whether to grant an injunction against persons unknown either at common law or in the context of the European Convention on Human Rights, see para.34:

"[34] I would tentatively frame those requirements in the following way:-

1) *there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief;*
2) *it is impossible to name the persons who are likely to commit the tort unless restrained;*
3) *it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order;*
4) *the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct;*
5) *the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and*
6) *the injunction should have clear geographical and temporal limits."*

Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 W.L.R. 1633, ChD, ***Hampshire Waste Services Ltd v Intended Trespassers Upon Chineham Incinerator Site*** [2004] Env. L.R. 196, ChD, ***South Buckinghamshire DC v Porter*** [2003] 2 A.C. 558, HL, ***South Cambridgeshire District Council v Persons Unknown*** [2004] EWCA Civ 1280; [2004] 4 P.L.R. 88, CA, ***South Cambridgeshire DC v Gammell*** [2005] EWCA Civ 1429; [2006] 1 W.L.R. 658, CA, ***Secretary of State for the Environment Food and Rural Affairs v Meier*** [2009] UKSC 11; [2009] 1 W.L.R. 2780, UKSC, ***Cameron v Liverpool Victoria Insurance Co Ltd*** [2019] UKSC 6; [2019] 1 W.L.R. 1471, UKSC, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.19.1.3.)

■ **Sellers v Podstreshnyy** [2019] EWCA Civ 613, 10 April 2019, unrep. (Henderson, Nicola Davies, and Rose LJJ)

Contempt of Court – need to identify appropriate length of sentence prior to reduction

CPR Pt 81. Interim freezing injunctions were obtained against the appellant. It subsequently became apparent that the injunctions had not been complied with in various ways. Committal proceedings were then issued. Of seven grounds for committal, the appellant admitted three at the committal hearing. The appellant's oral evidence at the hearing thus only related to sentencing. The judge sentenced the appellant to nine months imprisonment for two of the admitted grounds and six months for the third. The sentences were to run concurrently and took account of mitigating factors. Having determined the sentence, the judge then considered whether it should be suspended. The judge refused to suspend the sentence, holding that notwithstanding mitigation it was not justified not least given the Court of Appeal's guidance, in ***JSC BTA Bank v Solodchenko*** (2011) at para.51, to the effect that where breaches of freezing orders are concerned an immediate custodial sentence is ordinarily required. An appeal from the decision was allowed in part, to the extent that the two nine-month sentences were reduced to six-month sentences. While the Court of Appeal reached its decision on the appeal before ***Liverpool Victoria Insurance Company Ltd v Zafar*** (2019) (see ***Civil Procedure News*** **Issue 4 of 2019**) was handed down, the Court of Appeal considered that decision on the basis that if it indicated that its decision was too severe, it would invite further submissions. While the ***Zafar*** decision did not cause the Court of Appeal to reconsider its decision, its consideration of it in circumstances where expert evidence was not involved, as was the case in ***Zafar***, indicates its wider applicability to sentencing for contempt. In this decision, the Court of Appeal noted that ***Zafar*** at para.68 indicated that when sentencing for contempt, a judge should first determine the appropriate length of a term of imprisonment. Having done so the judge should then go on to determine whether there should be a reduction in sentence, in that case for an admission. In the present case the judge had not set out the length of sentence, and then the length of any reduction albeit she had made clear that credit had been given for an admission i.e., she had reduced the length of the sentence. The Court of Appeal, at para.31, accepted that it was not an error of law on the judge's part not to first set out the sentence and then consider and set out any applicable reduction. It did, however, stress that it was "best practice" for a judge considering sentencing in the light of the ***Zafar*** guidance to first determine the appropriate length of a term of imprisonment and then consider any reduction, setting out clearly in their judgment both elements. ***JSC BTA Bank v Solodchenko*** [2011] EWCA Civ 1241; [2012] 1 W.L.R. 350, CA, ***Liverpool Victoria Insurance Company Ltd v Zafar*** [2019] EWCA Civ 392, unrep., CA, ref'd to. (See ***Civil Procedure 2019*** Vol.2 at para.3C-36.)

■ **Napp Pharmaceutical Holdings Ltd v Dr Reddy's Laboratories (UK) Ltd** [2019] EWHC 1009 (Pat), 15 April 2019, (Henry Carr J)

Cross-undertaking – no jurisdiction to fortify following discharge of injunction

The second defendant applied for the claimant's undertaking in damages to be fortified. It did so after the relevant interim injunction had been discharged by the Court of Appeal. **Held**, there was no jurisdiction to grant the application, and assuming to the contrary that there was jurisdiction, the discretion to grant the application would not be exercised. In considering whether there was jurisdiction to grant an application seeking to fortify a cross-undertaking when an injunction has been discharged, Henry Carr J, having considered ***Thai-Lao Lignite (Thailand) Co Ltd v Lao People's Democratic Republic*** (2013) at paras 43-45 concluded, at para.10, that:

> *"[10] . . . The starting point is that the court has no power to order a party to give a cross-undertaking in damages. A cross-undertaking in damages is the price that a claimant is willing to pay in return for the grant of an injunction. Once the injunction has been discharged, there is no price that is worth paying because the claimant is not asking for the injunction to continue. In my view, it follows that an application for fortification of a cross-undertaking needs to be made whilst the injunction in respect of which it is given is continuing. This is not inequitable, since the court will not order security for damages, and fortification of the cross-undertaking does not amount to such an order. As Popplewell J said in Thai-Lao Lignite (supra), "[r]equiring fortification is an adjunct to the undertaking offered by a claimant, and is only 'required' in the sense of being the price which the claimant will have to pay if he wants his order to operate in futuro." It follows that there is no jurisdiction to grant this application."*

Thai-Lao Lignite (Thailand) Co Ltd v Lao People's Democratic Republic [2013] EWHC 2466 (Comm); [2013] 2 All E.R. (Comm) 883, Comm., ref'd to. (See ***Civil Procedure 2019*** Vol.2 at para.15-32.)

■ **Davey v Money** [2019] EWHC 997 (Ch),17 April 2019, unrep. (Snowden J)

Third party funding – application of Arkin cap

Senior Courts Act 1981, s.51. The defendants successfully defended claims brought against them by the claimant. The claimant was ordered to pay the defendants' costs on an indemnity basis. The defendants applied for orders under s.51 of the Senior Courts Act 1981 for a non-party costs order against the claimant's commercial litigation funder (the third party funder). The third party funder accepted that such an order should be made and should be made on an indemnity basis. It was, however, in issue whether its liability under the costs order should be limited by the *Arkin cap* i.e., according to the principles set out by the Court of Appeal in ***Arkin v Borchard Lines Ltd (Nos 2 and 3)*** (2005). Those principles, it was argued, established that the third party funder's liability was limited to "*the overall maximum of the funding that it provided to [the claimant]*"; see ***Arkin v Borchard Lines Ltd (Nos 2 and 3)*** (2005) paras 40-43. The judge noted that the *Arkin cap* had been criticised by the Jackson Costs Review, where its replacement via rule change or legislation was recommended. No such change had, however, been implemented and it had continued to be applied, see for instance, ***Excalibur Ventures LLC v Texas Keystone Inc (No.2)*** (2017) at para.28, although see Foskett J's decision in ***Bailey v GlaxoSmithKline UK Limited*** [2018] at para.59, in which he noted continued criticism of its applicability. **Held**, in the present case the *Arkin cap* should not apply. Snowden J reached that decision on the following basis: (i) while the Court of Appeal in *Arkin* adopted Lord Brown's approach to funding agreements and the discretion in respect of costs contained in section 51 of the 1981 Act in ***Dymocks Franchise System (NSW) Pty v Todd*** (2004), it had not intended its decision to "*prescribe a rule to be followed in every subsequent case involving commercial funders"*. What the Court of Appeal was doing was setting out an approach that "*might commend itself to other judges exercising their discretion [under s.51 of the 1981 Act] in similar cases in the future*" (see para.82). This was apparent from the tentative language of paras 40 and 42 of the judgment in *Arkin* and from the Court of Appeal's acknowledgment, at para.43 of its judgment, that its decision was only concerned with the situation in which "*the funder had contributed a limited part of the litigant's expense. . .*"; (ii) in no subsequent decision has *Arkin* been held to be a general principle automatically to be applied to commercial third party funding arrangements. In this respect, the submission that the Court of Appeal in ***Excalibur Ventures LLC v Texas Keystone Inc (No.2)*** (2017) took the view that the *Arkin cap* was of general application was rejected (see para.86); (iii) support for the view that the *Arkin cap* was of general application was, furthermore, not provided by the Jackson Costs Review. In light of the foregoing, Snowden J concluded, at para.89, that:

> *"[89] . . . what has become known as the Arkin cap is, in my judgment, best understood as an approach which the Court of Appeal in Arkin intended should be considered for application in cases involving a commercial funder as a means of achieving a just result in all the circumstances of the particular case. But I do not think that it is a rule to be applied automatically in all cases involving commercial funders, whatever the facts, and however unjust the result of doing so might be."*

Snowden J then, at paras 91-110 factors to consider in determining whether or not to apply the *Arkin cap*. ***Dymocks***

Franchise System (NSW) Pty v Todd [2004] 1 W.L.R. 2807, PC, ***Arkin v Borchard Lines Ltd (Nos 2 and 3)*** [2005] 1 W.L.R. 3055, CA, ***Excalibur Ventures LLC v Texas Keystone Inc (No.2)*** [2017] 1 W.L.R. 2221, CA, ***Bailey v GlaxoSmithKline UK Ltd*** [2018] 4 W.L.R. 7, QBD, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.46.2.4 and Vol.2 at para.1C-35.)

Practice Updates

PRACTICE GUIDANCE

Practice Guidance – Publication of Privacy and Anonymity Orders

On 16 April 2019, Sir Terence Etherton MR issued Practice Guidance concerning the operation of CPR r.39.2(5). That rule came into force on 6 April 2019 and provides that:

> *"Unless and to the extent that the court otherwise directs, where the court acts under paragraph (3) or (4), a copy of the court's order shall be published on the website of the Judiciary of England and Wales (which may be found at www.judiciary.uk). Any person who is not a party to the proceedings may apply to attend the hearing and make submissions, or apply to set aside or vary the order."*

As such it requires any court order made under CPR r.39.2 that provides for a hearing to be held in private (CPR r.39.2(3)) or that grants witness or party anonymity (CPR r.39.2(4)) to be published. The rule does not, however, provide any guidance on how the court or parties are to secure compliance with this requirement. The Practice Guidance explains the process to be adopted. It is reprinted below for ease of reference.

Practice Guidance: Publication of Privacy and Anonymity Orders

1. *This Guidance sets out recommended practice to courts and parties concerning the provision of copies of court orders for publication. It is issued as guidance and not as a Practice Direction by the Master of the Rolls as Head of Civil Justice.*
2. *Civil Procedure Rules (CPR) r.39.2(5) provides that, except where the court otherwise directs, a copy of a court order made under CPR r.39.2(3) or r.39.2(4) shall be published on the website of the Judiciary of England and Wales.*
3. *Any party seeking a private hearing or anonymity pursuant to CPR r.39.2(3) or (4) should ensure that they prepare and submit to the court a draft order which does not contain any information that would undermine the purpose of the order.*
4. *Copies of orders for publication should be sent by a court officer via email to the Judicial Office at: judicialwebupdates@judiciary.uk. Wherever possible, they should be sent in **pdf** format. For ease of identification, emails should be headed '**Order for Publication under CPR r.39.2(5)**'. Following receipt, they will be uploaded to www.judiciary.uk.*
5. *Where necessary, to protect the integrity of the order, the court may consider varying, under CPR r.39.2(5), the requirement to provide a copy of the court order for publication to provide for a redacted copy to be published or to set aside the requirement to publish a copy.*

Sir Terence Etherton, Master of the Rolls

16 April 2019

Practice Note – Disclosure Pilot – Insolvency & Companies List

In February 2019, Chief Insolvency and Companies Court Judge Briggs issued guidance on the application of the disclosure pilot scheme under PD51U in the Insolvency and Companies List and its non-application to proceedings under PD51P – the Insolvency Express Trials pilot scheme *https://www.judiciary.uk/wp-content/uploads/2019/03/Chief-ICCJ-Practice-Note-for-Users-Disclosure-Pilot-and-the-ICC.pdf*. The guidance is reprinted below for ease of reference.

Message from the Chief Insolvency and Companies Court Judge

This note relates to Practice Direction 51U - Disclosure Pilot for the Business and Property Courts ('the Disclosure Pilot').

The provisions of the Disclosure Pilot apply to the Insolvency and Companies List. The Disclosure Pilot does not apply to Practice Direction 51P that provides the procedure for Insolvency Express Trials.

The Disclosure Pilot applies to Part 7 proceedings with statements of case. Part 7 claims without particulars of claim and Part 8 claims are expressly excluded from certain of its requirements. Forms of originating process familiar to users of the Insolvency and Companies List, such as petitions and applications, are not 'statements of case' for the purpose of the Disclosure Pilot. An exception is made for petitions issued for relief pursuant to sections 994-996 of the Companies Act 2006 and/or for winding up on the just and equitable ground, since these are analogous to Part 7 proceedings with statements of case.

The Court may, as part of its case management powers, consider it appropriate to order disclosure in proceedings commenced by Part 8 claim, petition or application, either of its own motion or on the application of a party. As the Disclosure Pilot replaces Part 31 of the CPR, such disclosure will be in accordance with the Disclosure Pilot's provisions.

February 2019

■ Practice Note – Disclosure Pilot and Part 8 Claims

On 27 March 2019, Chief Master Marsh issued a Practice Note providing guidance on the application of the disclosure pilot scheme under PD51U to Part 8 claims *https://www.judiciary.uk/wp-content/uploads/2019/03/Practice-Note-27_03_19.pdf*. The guidance is reprinted below for ease of reference.

DISCLOSURE PILOT AND PART 8 CLAIMS
PRACTICE DIRECTION 51U – DISCLOSURE PILOT (the 'Practice Direction')

1. This note applies to claims in the following lists in the Business and Property Courts of England and Wales:

- *Business List (ChD) (and its sub-lists)*
- *Insolvency and Companies List*
- *Intellectual Property List*
- *Property Trusts and Probate List*
- *Revenue List*

2. Practitioners have expressed uncertainty about whether the disclosure pilot applies to Part 8 claims. This note is intended to provide guidance. It is not, however, authoritative about the meaning of the Practice Direction.

3. The pilot does not directly apply to Part 8 claims because Part 8 contains its own regime for the disclosure of documents that are relied on by the parties.

4. The only statement of case in a Part 8 claim is the claim form. Paragraph 5.1 of the Practice Direction says there is no obligation to give Initial Disclosure with the Part 8 claim form. This is to ensure that the provisions relating to Initial Disclosure do not overlap with, and duplicate, the provisions in Part 8.

5. The court has power to make an order for extended disclosure under the pilot in a case proceeding under Part 8. It will adopt such elements of the Practice Direction as are appropriate to the case and the scope of disclosure that is sought. The party requesting disclosure will need to identify the issues for disclosure and the Model or Models that apply. It is not expected that the full procedure for extended disclosure, including completion of all elements of the Disclosure Review Document, will normally be required.

Chief Master Marsh

27 March 2019

In Detail

DISCLOSURE PILOT SCHEME GUIDANCE AND CASE LAW UPDATE

The Disclosure Pilot Scheme (**the "Pilot"**) introduced substantial changes to the disclosure process with significant implications for parties, practitioners and the judiciary. Six months on from the launch, we consider some of the key objectives that underpin the Pilot, how it is operating in practice and review some of the recent guidance published to complement Practice Direction 51U ("**PD 51U**").

Background

Earlier editions of the ***Civil Procedure News*** summarise the background to the Disclosure Pilot Scheme (see ***Civil Procedure News* Issue 2 of 2018 and Issue 8 of 2018**). In short, the Disclosure Working Group (the "Working Group") was established in 2016 to propose practical solutions to the excessive costs, scale and complexity of disclosure. The Working Group published proposals for public consultation in November 2017. Practice Direction 51U, published in July 2018, introduced the Pilot as a mandatory scheme for the Business and Property Courts ("**B&PCs**" (save for limited exceptions as indicated in PD 51U para.1.4). The Pilot commenced on 1 January 2019 for qualifying cases.

Key objectives of the Pilot

Before considering the key changes and how the Pilot is operating in practice, we assess the main objectives that underpin it: namely, culture change; use of technology; and co-operation.

Culture change

Litigation culture is being influenced by a recognition that parties and Courts should have flexibility to devise a process geared to a case. Businesses need to be able to litigate without incurring costs which are disproportionate to the complexity and value of the claim. That is particularly important in disclosure, where the volume of data that may fall to be disclosed has vastly increased, often to unmanageable levels. The disclosure menu, introduced in 2013, was a step towards a more flexible model of disclosure, but was seldom used. That led the Working Group to conclude that the only way to achieve "wholesale cultural change" is through the "*widespread promulgation of a completely new rule and guidance*".

A central part of the reform is the removal of standard disclosure in its current form. Instead, PD 51U introduces five new models of Extended Disclosure (the "**Disclosure Models"**), labelled A–E, with Model D, a form of search based disclosure (found at para.8.2 PD 51U) widely perceived as the direct replacement for standard disclosure. Critically, there is no automatic right to Model D, or to any of the other Disclosure Models. The Court will only make an order for Extended Disclosure where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure (para.6.3 PD 51U).

The concept of Extended Disclosure is just one part of the push towards cultural change. Another key aspect of the reforms is the new concept of Issues for Disclosure. The Working Group found that, under CPR Pt 31, searches are often far wider than necessary and disclosure orders are not sufficiently focused on the key issues. That leads to the production of vast quantities of data, only a small proportion of which is relevant to the issues. Under the Pilot, parties therefore need to agree the Issues for Disclosure prior to the first Case Management Conference ("**CMC**"). The list requires careful drafting. It should include only those key issues in the dispute, which the parties consider will need to be determined by the Court, by reference to contemporaneous documents, for there to be a fair resolution of proceedings. The Court may then order that Extended Disclosure be given using different Disclosure Models for different Issues for Disclosure but not if it will increase costs and complexity.

These features of the Pilot are intended to balance the benefits of the traditionally extensive disclosure system with the cost and complexity of dealing with vast numbers of documents. The challenge now is to utilise the new rules to achieve proportionality.

Use of technology

CPR Pt 31 is "conceptually" based on paper disclosure and was deemed as unfit for purpose for electronic disclosure by the Working Group (para.2(v) Proposals for a Disclosure Pilot for the Business and Property Courts in England and Wales November 2017). As a result, the Pilot promotes the use of technology in order to improve efficiency and proportionality. Many parties already use e-disclosure review and analysis technologies but the Pilot imposes specific duties on parties and separately on their legal advisors to consider them. For example, under para.9 of PD 51U, parties are required to consider the use of software or analytical tools, including technology assisted review ("**TAR**") (where an analysis of a limited number of documents is extrapolated to a wider data set).

The duties to consider the use of technology are supported by the format of the newly introduced Disclosure Review Document ("**DRD**") which provides parties with the framework on how to approach disclosure. The DRD assumes the use of data analytics tools and TAR for managing electronic data review and parties must justify a decision not to use TAR where the *"review universe"* is in excess of 50,000 documents (section 14, DRD).

Parties have been using technology in disclosure for some time but the focus of the Pilot (as enshrined in the express duties and the DRD) makes clear that there is a step change in the Court's expectation. Parties will need to consider carefully how technology can support the disclosure process and proactively engage to address disclosure. The decision-making process, outcome and justification must then be recorded in the DRD.

Cooperation

The Working Group concluded that there was inadequate engagement between the parties and their advisors before the first CMC. To counter the lack of engagement, the Pilot imposes a general duty on parties and their legal representatives to cooperate with each other so that the scope of disclosure can be agreed or determined efficiently (para.2.3 PD 51U). Cooperation is a common thread throughout PD 51U with parties expected to cooperate in seeking to agree the List of Issues for Disclosure, the Extended Disclosure Models applicable to each Issue and to present a joint, completed DRD to Court before the CMC. A failure to cooperate, including in the process of agreeing the DRD, risks sanction from the Court under para.20 of PD 51U (see further below). The duty to use reasonable efforts to avoid providing documents to another party that have no relevance to the Issues for Disclosure (under para. 3.1(6)) is further evidence of the cooperation required under the Pilot.

Pilot scheme in practice

In this early phase of the Pilot, a number of issues have emerged as grounds for discussion. These include the parties' duties of preservation, the disclosure of known adverse documents, and the preparation required before the first CMC. The following section assesses these issues.

Preservation duties

When parties know that they are, or may be, subject to proceedings, they are required to preserve documents in their control that *"may"* be relevant to the claim. The duty continues throughout the life of the case. Control extends to documents not merely in the parties' possession but also where there is a right to possession or to inspect/take copies. The duty extends to requiring parties to:

- suspend routine data deletion processes during the proceedings;
- prevent alteration or destruction of documents;
- send a written notification to relevant employees and former employees to give notice: (i) of the documents to be preserved; and (ii) that they should not delete or destroy those documents and should take reasonable steps to preserve the material;
- take reasonable steps so that agents or third parties who may hold documents on the party's behalf do not delete or destroy documents that may be relevant to an issue in the proceedings; and
- confirm compliance with the duties of preservation when serving a statement of case.

Legal representatives who have conduct of litigation or who are instructed where their client knows it may become a party to proceedings are also under preservation duties. These include taking reasonable steps to advise and assist their client to comply with its duties.

Although the preservation duties are extensive, the use of the term "reasonable" for certain duties, such as the obligations in respect of monitoring agents or third parties, denotes that the steps to be taken should be proportionate. When assessing the required action, it would be prudent for parties to record the decision-making process, the outcome and the justification.

Known adverse documents

A further duty applying during the course of a claim is to disclose "known adverse documents" (unless they are privileged) once proceedings are commenced. A document is "adverse" if it or any information it contains contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute. There has been some discussion on when "known adverse documents" should be disclosed. Paragraphs 9.1 and 9.2 of PD 51U provide that Disclosure Certificates must be provided confirming that all known adverse documents have been disclosed either within 60 days of the first CMC (if there is no Extended Disclosure, as considered further below) or with Extended Disclosure.

Case Management Conference

A further important aspect of the Pilot is requiring the parties to tackle disclosure at an earlier stage in proceedings. The Pilot requires parties to complete additional steps before the first scheduled CMC. These steps include filing a draft List of Issues and Models for disclosure, a finalised joint DRD and Certificates of Compliance, as well as seeking to resolve any dispute over the scope of Extended Disclosure (see paras 7.6, 9.2, 10.7, 10.8, 10.9 of PD 51U, and Annexes to PD 51U). The responses should include an estimate of the likely costs of giving the disclosure proposed and the likely volume of documents involved. This will allow the Court to determine whether the proposals on disclosure are reasonable and proportionate (PD 51U para.22.1). As a result, detailed information as to the costs associated with disclosure are required to be provided at an early stage in proceedings, at the latest, 14 days before the CMC (PD 51U para.10.6). The Claimant is required to update the DRD throughout the proceedings (unless otherwise agreed or ordered) to ensure that it reflects the parties' combined comments and discussions.

At the first CMC, the Court will assess whether any of the Disclosure Models should apply to any or all Issues for Disclosure. The models range from an order for disclosure of known adverse documents only on particular issues for disclosure, through to the widest form of disclosure, requiring the production of documents which may lead to a train of enquiry. As stated above, Model D will no longer be regarded as the default option.

With a view to encouraging more focused case management, the Pilot includes a range of orders which the Court may make at the CMC to reduce the burden and cost of disclosure. When considering the orders to make on disclosure, the well-recognised test of reasonableness and proportionality is now applied by reference to defined criteria at para.6.4 of PD 51U. The criteria encompass the following factors:

i) the nature and complexity of the issues in the proceedings;
ii) the importance of the case, including any non-monetary relief sought;
iii) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;
iv) the number of documents involved;
v) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);
vi) the financial position of each party; and
vii) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

Recent developments and guidance

There are authoritative sources of valuable guidance on a number of points which have been published in the last six months. The guidance complements PD 51U and covers points such as the proper approach to transitional cases.

Insolvency and Companies Proceedings

The Chief Insolvency and Companies Court Judge published, in February 2019, a note applicable to the Insolvency and Companies List regarding the application of PD 51U to cases in those Courts (see above). This clarified that the Pilot applies to the Insolvency and Companies List, but does not apply to PD 51P which provides the procedure for Insolvency Express Trials. The Pilot applies to Pt 7 proceedings with statements of case. Forms of originating process familiar to users of the Insolvency and Companies List, such as petitions and applications are not statements of case for the purposes of the Disclosure Pilot. An exception is made for petitions for relief pursuant to sections 994-996 of the Companies Act 2006 and/or for winding up on the just and equitable ground, since these are analogous to Pt 7 proceedings with statements of case.

Chief Insolvency and Companies Court Judge Briggs also published revised standard directions for unfair prejudice petitions under s.994 of the Companies Act 2006, tailored to address the Pilot (see *https://www.judiciary.uk/wp-content/uploads/2019/03/Unfair-prejudice-petition-directions-costs-man-updated-21.02.19.docx*).

Transitional cases

The Practice Note, dated 1 December 2018, from Chief Master Marsh (see ***Civil Procedure 2019*** Vol.1 at para.57AB.4) confirms that the Pilot does not have transitional provisions. The Note recognised that in the early stages of the Pilot, the Court may not have a completed DRD. However, it added that, if the Court is asked to make an order for Extended Disclosure, the parties should, as far as possible assist the court providing with the CMC bundle a list of the Issues for Disclosure and the Disclosure Models considered most suitable. Whilst a key issue at the outset, the questions relating to transitional cases will decline in importance. The Note also clarified that a request for the Court to hold a Disclosure Guidance Hearing is made by issuing an application notice.

Part 8 claims
A further note, issued by the Chief Chancery Master, on 27 March 2019 (see above), confirms that the Pilot will not apply to Pt 8 claims albeit the Court has the power to order Extended Disclosure in proceedings under Pt 8.

Chancery Court Guide
The revised Chancery Court Guide 2019 explains the application of the Pilot to cases listed in the Chancery Division (See ***Civil Procedure 2019***, Vol.2 para.1A-0).

Minutes of the Commercial Court User Committee in December 2018
The recent minutes of the Commercial Court User Committee, dated 4 December 2018, circulated in 2019 provide useful observations of the members of the Working Group, including Mr Justice Knowles, on the application of the Pilot (see *https://www.judiciary.uk/announcements/commercial-court-users-group-meeting/*). It was suggested in those minutes that judges should not hesitate to make Orders limiting the costs and scope of disclosure below the current norm, where necessary. While these minutes and the observations noted in them cannot be viewed as authoritative, they should be considered carefully for the insight they provide into the Pilot scheme.

Case law update
The most significant case to date is ***UTB LLC v Sheffield United Ltd*** [2019] EWHC 914 (Ch), unrep., Sir Geoffrey Vos, Chancellor of the High Court, clarified the approach to transitional cases. It was held that the Pilot applies to all relevant proceedings subsisting in the applicable Courts irrespective of the date of commencement and even where a disclosure order was made before 1 January 2019. Sir Geoffrey Vos C clarified that although a pre-existing order will not be disturbed by the commencement of the Pilot, that does not mean the Pilot is not applicable to proceedings where a disclosure order has already been made.

Prior to this decision, in the case of ***Kazakhstan Kagazy Plc v Zhunus (formerly Zhunussov)*** [2019] EWHC 878 (Comm), unrep., Mr Justice Andrew Baker ruled that the Court could make an order for specific disclosure under CPR Pt 31 in a case subject to the Pilot. The Court held that it had the power to the make the order "*under one or other of the case management powers the court nonetheless has*" but this decision may be limited to the facts of the case given the comments by the Chancellor in ***UTB LLC v Sheffield United Ltd***.

Future issues
As the Pilot progresses, there will likely be further cases and guidance that consider its application in practice. In cases of uncertainty, the parties can apply for a Disclosure Guidance Hearing to seek informal guidance from the Court before or after a CMC. The hearings are an informal means of overcoming an impasse reached by the parties. The hearings should also bring greater clarity to the scope of PD51U.

An important future issue will be the steps the Court will take to ensure compliance with the obligations under PD 51U. In this respect, the Pilot Scheme includes a range of orders and sanctions for non-compliance. By way of illustration, the Court may adjourn any hearing, make an adverse order for costs or order that any further disclosure by a party be conditional on any matter the Court shall specify. These express sanctions are in addition to the Court's case management powers under CPR Pt 1 and 3.

Professor Rachael Mulheron of Queen Mary University is monitoring the Pilot and submitted a first private interim report to the Working Group in March 2019. Further interim reports will be provided by Professor Mulheron in due course, examining matters such as DRDs, relevant case law, and the results of questionnaire surveys. In the meantime, all feedback about the Pilot is most welcome, and should be sent to: DWG@justice.gov.uk.

The expectation is that if the Pilot is deemed a success, then the existing CPR Pt 31 will be revised to reflect the terms of an amended PD 51U that reflects issues raised during the Pilot. Consideration will also be given as to whether it should apply to proceedings outside of the B&PCs.

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