CIVIL PROCEDURE NEWS

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Disclosure—unofficial translations

In 2016 the European Commission determined that five European truck manufacturing groups had formed a cartel that infringed art.101 of the Treaty on the Functioning of the European Union. Subsequently a number of damages actions were commenced in the High Court and then transferred to the Competition Appeal Tribunal (CAT). A number of issues arose in those proceedings, one of which concerned the question of the disclosure of unofficial translations of certain documents that formed part of the European Commission's files. It was common ground that if those documents, which had already been disclosed, were to be referred to at any trial, then translations would be prepared and submitted. Pending such an eventuality, the lawyers acting for a number of the defendants had prepared their own, unofficial, translations of the documents, or parts thereof. The claimants in three of the actions applied for disclosure of those unofficial translations. **Held**, the application was thus refused. In reaching its decision the CAT accepted, albeit it did not need to decide the point, that there was no privilege in the translations: see ***Sumitomo Corp v Credit Lyonnais Rouse Ltd*** (2001). It did not need to decide the point as disclosure of such documents was disproportionate and was thus not to be ordered. The CAT noted that under the formerly applicable Civil Procedure Rules, RSC Ord.24 r.13(1), an applicant had to show that disclosure was necessary to enable the proceedings to be disposed of fairly. The test of necessity was explained by Sir Thomas Bingham MR in ***Taylor v Anderton*** (1995) at 434 as follows:

> *"Those words direct attention to the question whether inspection is necessary for the fair determination of the matter, whether by trial or otherwise. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment, is the test."*

That test was as relevant and applicable now as it was under the RSC i.e., it was as relevant to procedure in the CAT and, by clear inference, the CPR. As the CAT put it (see para.23):

> *"Although the Master of the Rolls was there addressing the rule for inspection under the former procedural rules, we consider that his observations apply with equal force in the context of modern procedure, in which the question of necessity is a relevant factor in the assessment of proportionality and application of the overriding objective. If anything, the courts' approach to disclosure and inspection of documents has become much stricter than it was under the previous RSC. Further, as the Court of Appeal observed in Sumitomo at [79], an order for production of documents is a matter of the court's discretion."*

In assessing proportionality, it was important to take account of the need to save costs. In the present case any costs savings that might flow from disclosure would be outweighed by a number of other factors, amongst other things: the need for the party disclosing the translations to ensure that every document translated was one which had already been disclosed and that any necessary redactions were made of translated documents; the complexity that could arise from having multiple translations of the same documents; and the fact that, as disclosure is a continuing obligation, it might inhibit parties from obtaining translations of documents in the future course of the litigation. ***Lyell v Kennedy (No.3)*** (1884) 27 Ch.D. 1, CA, ***Ventouris v Mountain*** [1991] 1 W.L.R. 607; [1991] 3 All E.R. 472, CA, ***Taylor v Anderton*** [1995] 1 W.L.R. 447; [1995] 2 All E.R. 420, CA, ***Sumitomo Corp v Credit Lyonnais Rouse Ltd*** [2001] EWCA Civ 1152; [2002] 1 W.L.R. 479, CA. (See ***Civil Procedure 2019*** Vol.1 at paras 31.3 and 31.15.)

■ **Hanson v Carlino** [2019] EWHC 1366 (Ch), 1 May 2019, unrep. (Birss J)

Power to issue bench warrant—contempt of court

CPR Pt 81. Proceedings were brought for alleged misappropriation of money and other assets by a director of a number of joint venture special purpose vehicles. A proprietary order was made in the proceedings against the defendants. The orders were not complied with fully. An unless order was made against the defendant. It required compliance with the proprietary order, in the absence of which the defendant was required to attend court to be cross-examined. The claimants issued an application seeking a bench warrant to secure the defendant's attendance at the hearing. While it was rightly noted by the claimants that seeking a bench warrant was an *"extreme step"*, as Birss J put it at para.21, *"an extreme*

remedy", it was clear the court had power under its inherent jurisdiction to issue one. In issuing the bench warrant Birss J approved the summary of the principles underpinning the jurisdiction set out by counsel for the claimant, at paras 10–11:

> *"[10] [Counsel] submitted that one can summarise conclusions to be drawn from the authorities as follows: the court has an inherent power supplemental to its other powers to secure compliance with its orders, which includes a power to issue a bench warrant and the arrest of an individual to whom the order has been addressed and where there appears to be non-compliance. The power exists to ensure compliance with the court's orders and to control its procedures. It is not necessary for there to have been a finding of contempt by the person to be arrested or an existing breach of the order in question, provided the power is properly exercised to secure compliance with the court's orders. The purpose of the bench warrant is exhausted once the respondent is brought before the court, but the court has the power of detention, either (a) to secure the respondent's attendance at the next hearing where proceedings are ongoing and his or her voluntary attendance is unlikely, or (b) where the respondent has not provided all the information the court requires and which he or she can provide. And finally, the issue of a bench warrant will result in a temporary deprivation of the respondent's liberty, and accordingly the court's discretion will only be exercised where necessary.*
>
> *[11] I am satisfied that this summary of the principles from the cases is correct. The important and fundamental point from the summary is that the court's power to issue bench warrant is not limited to circumstances where there has been a finding of contempt but can a proper case be used to ensure compliance with court orders. This is said to be a case of that kind in that it is submitted that it is necessary and right that I should issue a bench warrant, recognising that it is an extreme remedy. But in principle, what is applied for is a bench warrant in order to secure compliance with the court orders, there not having been a finding of contempt by [the defendant]."*

Re B (Child Abduction: Wardship: Power to Detain) [1994] 2 F.L.R. 479, CA, ***Law Society v McPhail***, *Times*, 15 April 2011, ChD, ***Zakharov v White*** [2003] EWHC 2463 (Ch); *Times*, 13 November 2003, ChD, ***Lexi Holdings v Luqman*** [2009] EWHC 496 (Ch), unrep., ChD, ***Westwood v Knight*** [2012] EWPCC 14, unrep., PtCC, ***DS Rendite Funds v Mehrotra*** [2018] EWHC 1610 (Comm), unrep., Comm. ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.81.0.1.)

■ ***Wolseley UK Ltd v Fiat Chrysler Automobiles NV*** [2019] CAT 12, 8 May 2019, unrep. (Roth J (President), Hildyard J, Hodge Malek QC)

Whether an additional defendant's claim was a counterclaim or additional claim

CPR rr.20.2, 20.4, 20.7. In 2016 the European Commission determined that five European truck manufacturing groups had formed a cartel that infringed art.101 of the Treaty on the Functioning of the European Union. Subsequently a number of damages actions were commenced in the High Court and then transferred to the CAT. A number of issues arose in those proceedings. In one of the proceedings, the ***Wolseley*** action, two defendants brought Pt 20 claims against an additional defendant seeking an indemnity or contribution, as in the event that they were held liable to the claimants, the additional defendant would be jointly and severally liable to the claimants. By order of the High Court, the CPR continued to apply to the procedure concerning statements of case in the proceedings (see para.9). The additional defendant, in an additional claim as against the claimants contained in its defence to the Pt 20 claims, sought declarations that it was not liable to the claimants: i.e., it sought negative declarations. The claimants applied to strike out the additional defendant's additional claim. **Held**, the claimants' application was granted. The additional claim was struck out since, having regard to s.1(4) of the Civil Liability (Contribution) Act 1978 and ***WH Newson Holdings Ltd v IMI Plc*** (2016), the declarations would serve no legitimate or useful purpose (see paras 40–52). The CAT then went on, obiter, to consider the question whether the additional claim was a counterclaim under CPR r.20.4, as the additional defendant argued, or an additional claim under CPR r.20.7. The CAT concluded that it was not a counterclaim but an additional claim. It was thus governed by CPR r.20.7 and had therefore been issued improperly (paras 53–65).This was because: (i) the contributions claims sought by the two defendants against the additional defendant were additional claims, per CPR r.20.2(1)(b). As such, the additional defendant's additional claim was "*manifestly an additional claim within rule 20.2(1)(c)*" (see para.58). It therefore could not be a counterclaim under CPR r.20.2(1)(a); (ii) CPR r.20.2(2)(b) did not lead to a different conclusion as references to "*claimants*" and "*defendants*" in the CPR must be read in the context of a particular of claim: i.e., a party is a defendant in a claim brought against it, but is the claimant in any claim brought by it; (iii) the argument that because it was inefficient and inconvenient to require the additional defendant to issue a separate claim, CPR r.20.1 required its claim to be an additional claim and not a counterclaim was rejected. The purposive provision in CPR r.20.1 could not override the explicit language of CPR rr.20.2, 20.4 and 20.7. Whatever may have been said by HMCTS staff to the contrary was of no relevance to interpreting the rules; (iv) CPR r.20.5 was irrelevant. It only concerned the situation where a counterclaim was brought against someone other than a claimant; (v) the definition of counterclaim in the Glossary to the CPR was of no significant assistance; and (vi) the meaning of "*original ... counterclaim*" in s.35(3) of the Limitation Act 1980 discussed in ***Law Society v Shah (No 2)*** (2008) was not relevant to this issue. ***WH Newson Holdings Ltd v IMI Plc*** [2016] EWCA Civ 773; [2017] Ch. 27, CA, ***Law Society v Shah (No 2)*** [2008] EWHC 2515 (Ch); [2009] 1 W.L.R. 2254, ChD. ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.20.7.)

■ **R. (Siddiqui) v Lord Chancellor** [2019] EWCA Civ 1040, 10 May 2019, urep. (Sir Timothy Lloyd)

CPR Pt 52—whether CPR r.52.5 is contrary to the right to fair trial

CPR r.52.5. Judicial review proceedings were brought challenging the validity of CPR r.52.5, as amended by the Civil Procedure (Amendment No. 5) Rules 2016 (SI 2016/768). The amendment to the rules removed the general entitlement for an appellant to have a papers-only refusal of permission to appeal renewed at an oral hearing. Under the amended rule, unless a judge directs that the permission application be considered at an oral hearing, the application will and will only be determined on the papers. Judicial review of the amendment was pursued on the grounds that the restriction on the right to an oral renewal breached both the right to fair trial under art.6 of the European Convention on Human Rights (ECHR) and the common law right of access to justice. Permission to bring judicial review proceedings was dismissed on the papers and then at an oral hearing. Following that latter refusal permission to appeal from the refusal was sought from the Court of Appeal. That application was considered at an oral hearing. **Held**, permission to appeal from the refusal to grant permission to bring judicial review proceedings was refused. There was

> *"no arguable basis for saying that limiting the availability of an oral hearing in the way done by Rule 52.5 [infringed] the common law right of access to justice"* (see para.17).

Furthermore, art.6 ECHR did not require there to be a right to an oral hearing at every stage of civil proceedings. The present approach is one that is a *"clearly legitimate and proportionate"* approach for the Civil Procedure Rule Committee to have taken as a means to reduce increasing delays in access to and the disposition of appeals (see para.19). ***Hansen v Norway*** (No. 15319/09, 2 October 2014) [2014] ECHR 1018, ECtHR, ***Sengupta v Holmes*** [2002] EWCA Civ 1104; *Times*, 19 August 2002, CA, ***R. (Dudson) v SSHD*** [2005] UKHL 52; [2006] 1 A.C. 245, HL, ***R. (Detention Action) v First-tier Tribunal*** [2015] EWCA Civ 840; [2015] 1 W.L.R. 5341, CA, ***Wasif v SSHD*** [2016] EWCA Civ 82; [2016] 1 W.L.R. 2793, CA, ***R. (Unison) v Lord Chancellor*** [2017] UKSC 51; [2017] 3 W.L.R. 409, UKSC, ***AP v Lord Advocate*** [2019] CSOH 23; 2019 S.L.T. 337, CS(OH), ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.52.5.1.)

■ **HM Solicitor General v Holmes** [2019] EWHC 1483 (Admin), 10 June 2019, unrep. (Coulson LJ and Martin Spencer J)

Divisional Court—jurisdiction to deal with contempt in the face of the Crown Court

CPR r.81.12. Proceedings were brought by the Solicitor General seeking the committal of the respondent. The basis for the committal application was alleged to be the respondent's contempt in the face of the Crown Court sitting at Bradford. Four procedural issues arose: first, whether the Divisional Court had jurisdiction to deal with the application; secondly, if it did, was permission required; thirdly, if permission was required what was the applicable test; and finally, if permission was required, should it be granted. **Held**, the Divisional Court had jurisdiction, permission was required, and it was granted. It was clear from a review of the authorities and the RSC, that the Divisional Court had always had a supervisory jurisdiction in respect of contempts committed in criminal proceedings at first instance. It had such a jurisdiction concurrently with judges of the Crown Court. This concurrent jurisdiction had most recently been restated by the Court of Appeal in ***R. v M*** (2009). The existence of this jurisdiction was clear from the express reference to it in RSC Ord.52 r.1(2) (and its predecessor in the 1938 RSC), which was the predecessor to the present CPR r.81.12. For some reason this express reference to the Divisional Court's jurisdiction was not set out in the CPR, although the Crown Court's jurisdiction was expressly set out in CPR r.81.16. The Divisional Court held, at para.28, that it could not have been the intention of the Civil Procedure Rule Committee, when it revised CPR Pt 81, to remove a substantive power and jurisdiction of the Court. A drafting error cannot remove such jurisdiction. Moreover, CPR Pt 81 read as a whole makes it clear that the jurisdiction is maintained i.e., when CPR rr.81.4–81.12 and 81.16 are read together. Particularly, CPR r.81.12 deals with the concurrent jurisdiction. It was also clear that there was nothing in the Criminal Procedure Rules, or other authority, to demonstrate that the Divisional Court's concurrent jurisdiction had been lost. As such the Divisional Court retained its jurisdiction, to which CPR rr.81.12–81.14 applied (see para.37). Consequently, under CPR r.81.13 permission was required for the contempt application to proceed before the Divisional Court. The test for permission was twofold, see para.41, and see paras 42–46 for the court's reasons on this point:

> *"[41] . . . we consider that the applicable test for permission is twofold:*
>
> *(a) Has the applicant demonstrated at least a prima facie case of contempt?*
>
> *(b) If so, is it in the public interest that an application to commit should be made?"*

On the facts of the present case the test for granting permission was made out. ***Balogh v St Albans Crown Court*** [1975] Q.B. 73; [1974] 3 W.L.R. 314, CA, ***DPP v Channel Four Television Co Ltd*** [1993] 2 All E.R. 517; [1993] Crim. L.R. 277, QBD, ***R. v M*** [2008] EWCA Crim 1901; [2009] 1 W.L.R. 1179, CA(CD), ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.81.12.1.)

■ **Kuznetsov v Amazon Services Europe SARL** [2019] EWCA Civ 964, 11 June 2019, unrep. (Sir Brian Leveson PQBD, Lewison and Floyd LJJ)

Small claim—jurisdiction to set aside judgment

CPR rr.27.9(1), 27.11, County Courts Act 1984 s.70. A small claim was issued against Amazon.co.uk. The respondent, Amazon Services Europe SARL was, purportedly, joined to the proceedings. The claim against Amazon.co.uk was dismissed. Judgment was entered against Amazon Services Europe SARL. An application to set aside judgment was brought by Amazon Services Europe SARL. It was refused. On appeal to the Court of Appeal, **held**: (i) on the facts of this case Amazon Services Europe SARL was not a party to the proceedings; (ii) as a non-party the threshold conditions for setting aside a judgment under CPR r.27.11(1)(a) and (b) were met: as a non-party they could not have been present or represented at the hearing nor could they have given notice under CPR r.27.9(1). They could thus apply to set aside the judgment against them; (iii) where an application to set aside is not made within the time limit specified in CPR r.27.11(2), the court retains a discretion to extend that time limit when that provision is read with CPR r.3.1(2)(a); and (iv) as a non-party they had no reason to attend the small claims hearing. As such they had good reason for their non-attendance, for not being represented at it, and not giving notice under CPR r.27.9(1). An argument that s.70 of the County Courts Act 1984 only permitted judgments to be set aside where such was provided for by statute was rejected. The statutory language was clear: such a power could be provided for by rules of court. (See ***Civil Procedure 2019*** Vol.1 at para.27.11.1.)

■ **Woodward v Phoenix Healthcare Distribution Ltd** [2019] EWCA Civ 985, 12 June 2019, unrep. (Bean, Asplin and Nicola Davies LJJ)

Duty to assist the court—no obligation to assist opponent

CPR r.1.3. A question arose as to the nature of the obligation set out in CPR r.1.3. The claimants purported to serve a claim form and particulars of claim. They did so by sending them by letter and email to the defendant's solicitors. They did so before the time for service expired. There had, however, been no prior confirmation that the defendant's solicitors were authorised to accept service. As such service was defective. The limitation period for the claim expired the following day. The claimants applied to validate service retrospectively. That application was granted by the Master on the basis that there was good reason to do so, as the defendants had been required under CPR r.1.3 to point out to their opponents their mistaken belief that they had effected good service. An appeal from that decision was allowed. The Court of Appeal dismissed a further appeal. **Held**, it was clear from ***Barton v Wright Hassall LLP*** (2018) that there was no positive duty under CPR r.1.3 to warn an opponent of their procedural mistakes. Reliance on dicta from ***Denton v TH White*** (2014) deprecating procedural and technical game-playing was of no assistance in establishing a positive duty under CPR r.1.3: that dicta was intended to put a stop to technical game-playing concerning applications for relief from sanction which were bound to succeed and was not relevant to the present situation. ***Asiansky Television Plc v Bayer-Rosin (A Firm)*** [2001] EWCA Civ 1792; [2002] C.P.L.R. 111, CA, ***Abela v Baadarani*** [2013] UKSC 44; [2013] 1 W.L.R. 2043, UKSC, ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, CA, ***OOO Abbott v Econowall UK Ltd*** [2016] EWHC 660 (IPEC); [2017] F.S.R. 1, IPEC, ***Higgins v ERC Accountants and Business*** [2017] EWHC 2190 (Ch), unrep., ChD, ***Barton v Wright Hassall LLP*** [2018] UKSC 12; [2018] 1 W.L.R. 1119, UKSC, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.1.4.4 and Vol.2 at para.11-15.)

■ **Re One Blackfriars Ltd (In Liquidation)** [2019] EWHC 1516 (Ch), 18 June 2019, unrep. (John Kimbell QC sitting as a Deputy Judge of the High Court)

Insolvency proceedings—amendment

CPR r.17.4, Limitation Act 1980 s.35. An application was brought by the joint liquidators of a company. The application concerned proposed amendments to particulars of claim. While some of the proposed amendments were agreed to by the respondents, the company's former administrators, some were opposed. Those opposed sought to set out a case that the former administrators had been negligent in failing to seek a rescue of the company under Sch.B1 para.3(1)(a) of the Insolvency Act 1986. The amendments were opposed, amongst other things, on the basis that they sought to bring a new claim, which did not satisfy the requirements of s.35(5) of the Limitation Act 1980 or CPR r.17.4. It was accepted that if the amendments did set out a new claim, it was statute-barred and thus did not meet those requirements. The application did not seek to obtain permission to amend by way of introducing a non-statute-barred version of the claim set out by the amendments under the approach set out in ***Mastercard Inc v Deutsche Bahn AG*** (2017). It was noted to be common ground that the correct approach to considering whether to grant permission for the amendments to be made was to be taken from ***Bellinger v Mercer Ltd*** (2014) and ***Diamandis v Wills*** (2015). As summarised by the Deputy Judge four questions had to be considered (see para.26):

> *"... Q1. Is it reasonably arguable that the opposed amendments are outside the applicable limitation period? If the answer is yes, go to Q2. If the answer is no, then the amendment falls to be considered under CPR 17.1(2)(b) (**Stage 1**).*

*... Q2. Do the proposed amendments seek to add or substitute a new cause of action? If the answer is yes, go to Q3; if the answer is no, then the amendment falls to be considered under CPR 17.1(2)(b) (**Stage 2**).*

*... Q3. Does the new cause of action arise out of the same or substantially the same facts as are already in issue in the existing claim? If not, the Court has no discretion to permit the amendment (**Stage 3**).*

*... Q4. If the answer to Q3 is yes the Court has a discretion to allow the amendment. (**Stage 4**)."*

Important guidance on considering these questions was to be derived from ***Mastercard Inc v Deutsche Bahn AG*** (2017), which the Deputy Judge held to be of general application and not a decision that ought to be confined to competition law claims (see para.31), ***Samba Financial Group v Byers*** (2019) and ***Diamandis v Wills*** (2015) paras 48 and 49, which had to be read in the light of the ***Mastercard*** and ***Samba*** guidance. As the Deputy Judge put it:

"[30] The four points which I derive from Mastercard are as follows:

30.1 Whether a new claim arises out of the same or substantially the same facts as an existing claim is not a matter of discretion or case management but is a substantive question of law which depends on analysis and evaluation to obtain the correct answer [35] & [36].

30.2 Care needs to be taken with Goode v Martin [2001] EWCA Civ 1559. An important feature of that case is that in order to make out her newly formulated claim, the claimant did not need to plead any additional facts beyond those already in the defence [42].

30.3 Differences in the nature and scope of counterfactual matters between an existing claim and a new claim can amount to a substantial difference for the purpose of Stage 2 as defined above [46].

30.4 An applicant may not generally rely on new facts pleaded in a Reply as being facts already in issue for the purpose of Stage 2 as defined above [64].

...

[32] As to the Samba case, I take the following four points from it:

32.1 It is of critical importance to carry out a careful comparative evaluation of the scope and nature of the facts in issue in the existing claim and the facts alleged in the new claim [49].

32.2 If on evaluation, the new claim is of an entirely different character from the existing claim, the threshold for permission will not be met. Broadly similar allegations, implicitly made or understood will not do [50].

32.3 In the vast majority of cases, what is 'in issue' in an existing claim will usually be determined by examination of the pleadings alone. It will be the primary, and probably the only, source of material for deciding the question [52].

32.4 A fact which the other party may or may not need to plead or respond to is not a fact already 'in issue' in the original claim. It is important to recall what was said about the policy underlying Section 35 of the Limitation Act by Hobhouse LJ in Lloyds Bank v Rogers [1997] TLR 154:

> *'The policy of the section was that if factual issues were in any event going to be litigated between the parties, the parties should be able to rely on any cause of action which substantially arises from those facts.' (emphasis added by Floyd LJ) [57]."*

The application was refused. The conditions to satisfy the test in respect of s.35 of the 1980 Act and CPR r.17.4 were not made out. Furthermore, in considering Stage 2 of the test, it was submitted that a different approach should be taken to claims under the Insolvency Act 1986. It was submitted that a specific and *"more generous amendment rule"* applied to such proceedings, which meant that as such proceedings were brought under Sch.B1 para.75 of the 1986 Act, by application notice, the enquiry at Stage 2 could look to the application notice and its supporting evidence for the purposes of s.35 of the 1980 Act. As such, it was submitted, the Stage 2 enquiry was not limited to comparing the proposed amending pleading with the unamended pleading. **Held on this point**, the Deputy Judge rejected the submission that a specific, more generous, approach should be taken to amendment in respect of such insolvency proceedings. The appropriate and applicable approach was that set out by Jackson LJ in ***Chandra v Brooke North (A Firm)*** (2013) at para.92, in respect of the approach to take to CPR Pt 7 proceedings and which, it was held, was equally applicable to the present CPR Pt 8 proceedings under the 1986 Act (see paras 35–39). ***Lloyds Bank v Rogers (No.1)*** *Times*, 24 March 1997, CA, ***Goode v Martin*** [2001] EWCA Civ 1899; [2002] 1 W.L.R. 1828, CA, ***Chandra v Brooke North (A Firm)*** [2013] EWCA Civ 1559; [2014] T.C.L.R. 1, CA, ***Bellinger v Mercer Ltd*** [2014] EWCA Civ 996; [2014] 1 W.L.R. 3597, CA, ***Diamandis v Wills*** [2015] EWHC 312 (Ch), unrep., ChD, ***Mastercard Inc v Deutsche Bahn AG*** [2017] EWCA Civ 272; [2017] C.P. Rep. 26, CA, ***Samba Financial Group v Byers*** [2019] EWCA Civ 416; [2019] 4 W.L.R. 54, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.17.4.1.)

■ **JLE (A Child) v Warrington and Halton Hospitals NHS Foundation Trust** [2019] EWHC 1582 (QB), 24 June 2019, unrep. (Stewart J)

CPR r.36.17(4). An appeal from a detailed assessment where the claimant had beaten her own CPR Pt 36 Offer. At the assessment the Master held that it would be unjust to award the claimant a sum under CPR r.36.17(4)(d). The Pt 36 Offer was for £425,000 inclusive of interest. The claimant beat the offer by slightly under £7,000. The Master in refusing to make an award under CPR 36.17(4)(d) noted that if such an award was made the claimant would be entitled to an extra 10% which would have entitled her to receive an additional sum of over £40,000. The specific issue before the Master was whether the court had power to award some but not all of the consequences set out in CPR r.36.17(4). The Master held that the court could decide whether to make an award under CPR r.36.17(4)(d) independently of its decision to make awards under CPR r.36.17(4)(a)–(c). An appeal from that determination was heard by Stewart J. **Held**, having reviewed the authorities, at paras 23 and 31,

"[23]...(i) Albeit that there is nothing in the wording of Rule 36.17 to suggest that the test should be applied separately for each of subparagraphs (a)-(d), there is nothing in the wording to suggest that it should not be applied separately for each of those subparagraphs.

ii) In deciding whether it would be unjust to make the order in sub paragraph (4), subparagraph (5) requires the Court to 'take into account all the circumstances of the case including' the matters specifically referred to in (a)-(e).

iii) Unless a rule, on its true construction, makes it clear that the exception of injustice is to be applied in every case across the board, then the Court does have jurisdiction to consider it unjust to award some, but not necessarily all the orders in subparagraph (4).

iv) That said, it would perhaps be an unusual case where the circumstances of the case, including those particularised in sub paragraph (5), yield a different result for only some of the orders envisaged in sub paragraph (4)."

Secondly, it was held that the Master erred in taking account of the amount by which the claimant beat her own offer in determining whether it was unjust to impose the consequence set out in CPR r.36.17(4). At para.44 Stewart J held that taking account of the amount by which an offer was beaten relative to the size of the bill was impermissible. It was *"not open to judges to take into account in the exercise of the discretion the amount by which a Part 36 Offer was beaten"*. To permit otherwise would be contrary to the Civil Procedure Rule Committee's reversal of the Court of Appeal decision in ***Carver v BAA Plc*** (2008). Further, the Master erred in concluding that the reduction in the bill on assessment rendered it unjust to make an award under CPR r.36.17(4)(d) when it did not render it unjust to make an award under the other provisions of that rule. This was not to say that such a circumstance might not possibly amount to a valid reason for refusing to make such an award: see ***Cashman v Mid Essex Hospital Services NHS Trust*** (2015). Furthermore, the award under CPR r.36.17(4)(d) should not be construed as compensatory. It was a punitive award, and as such should not be construed as a "bonus" or windfall for the successful party through comparing it with the manner in which the Pt 36 Offer was beaten i.e., that the additional award was large in contrast to the amount by which the offer was beaten was not a factor to be taken account of in assessing whether it was unjust to make the additional award. The Judge then went on, in obiter, to consider whether an award under CPR r.36.17(4)(d) had to be *"all or nothing"* or whether, as in ***White v Wincott Galliford Ltd*** (2019), there was power to make a partial award. The Judge stated that, taking account of the policy underpinning the power, the need to discourage satellite litigation, and the wording of the rule, it was an *"all or nothing"* power: there was no discretion to award less than 10% as an additional amount. Unless it is unjust to make the award it must be awarded in full. ***Carver v BAA Plc*** [2008] EWCA Civ 412; [2009] 1 W.L.R. 113, CA, ***Gibbon v Manchester City Council*** [2010] EWCA Civ 726; [2010] 1 W.L.R. 2081, CA, ***Fox v Foundation Piling Ltd*** [2011] EWCA Civ 790; [2011] C.P. Rep. 41, CA, ***Smith v Trafford Housing Trust*** [2012] EWHC 3320 (Ch); (2012) 156(46) S.J.L.B. 31, ChD, ***Thinc Group Ltd v Kingdom*** [2013] EWCA Civ 1306; [2014] C.P. Rep. 8, CA, ***Davison v Leitch*** [2013] EWHC 3092 (QB), unrep., QBD, ***Bataillon v Shone*** [2015] EWHC 3177 (QB), unrep., McCt, ***Cashman v Mid Essex Hospital Services NHS Trust*** [2015] EWHC 1312 (QB); [2015] 3 Costs L.O. 411, QBD, ***Ayton v RSM Bentley Jennison*** [2018] EWHC 2851 (QB); [2018] 5 Costs L.R. 915, QBD, ***White v Wincott Galliford Ltd*** [2019] EWHC B6 (Costs); [2019] 5 WLUK 451, SCCO, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.36.17.4.)

■ **General Dynamics United Kingdom Ltd v Libya** [2019] EWCA Civ 1110, 3 July 2019, unrep. (Sir Terence Etherton MR, Longmore and Flaux LJ)

Arbitration—State Immunity Act 1978—service

CPR rr.6.44, 62.18(8)(b), State Immunity Act 1978 s.12. An arbitral award was made by the ICC Tribunal in Geneva. The appellant sought to enforce the award. The appellant obtained an order dispensing with the requirement to serve the award on the respondent. The respondent challenged the order dispensing with service. It did so on the basis that,

it was submitted, mandatory to serve such an order under s.12 of the State Immunity Act 1978 i.e., there was no power to dispense with service. The Court of Appeal **held** that as an order that permitted enforcement of an award was not a document that initiated proceedings, s.12 of the 1978 Act did not apply. Hence it was not a mandatory requirement to serve an order that permitted enforcement (see paras 48–52). As the Court concluded (see paras 60–61):

> *"[60] It follows, in our judgment, that it was not mandatory in this case that either the arbitration claim form or the order permitting the enforcement of the award as a judgment had to be served through the FCO. The order permitting the enforcement of the award did, of course, have to be served pursuant to CPR 62.18(8)(b) and CPR 6.44 (which deals with service of documents on a foreign state) but the court has jurisdiction in an appropriate case to dispense with service in accordance with CPR 6.16 and/or 6.28. If that course is taken it will, of course, always be appropriate to notify the state that the order has been made and, therefore, to make arrangements (as Teare J did) to notify the state in such a way as will come to the attention of the organs of state which will be responsible for honouring the award.*
>
> *[61] We stress, however, that such notification does not amount to alternative service and must not be used as a proxy for such service which (counsel agreed) cannot be used where the respondent is a state. CPR 6.16 and 6.28 draw a distinction between dispensing with service of a claim form which may only be ordered 'in exceptional circumstances' and dispensing with service in other circumstances as to which there is a general discretion. Strictly speaking, therefore, it could be said that a judge has a general discretion to dispense with service of the order permitting enforcement of the award. We nevertheless consider that, when the order permitting enforcement of the award is to be the first time that the foreign state receives notice of a claimant's attempt to enforce an award, it is only right and proper that the court should apply the test of exceptional circumstances. It is in this way that the valid policy considerations mentioned in para 58 can (and must) be taken into account, while the court is enabled to take into account the countervailing policy of enforcing awards in an appropriate case. The judge was thus quite correct to apply the test of exceptional circumstances to the question of dispensing with service in this case. That is the test which he applied when he dealt with the matter in case he was wrong on the first issue."*

A second issue, whether it was permissible to dispense with service of a document that instituted proceedings against a state, did not arise. However, the Court stated in obiter that had it been correct to conclude that an order permitting enforcement was a document instituting proceedings then service could not be dispensed with as s.12 of the 1978 Act would have applied: ***Certain Underwriters at Lloyd's London v Syrian Arab Republic*** (2018) at para.25 disapproved. ***Certain Underwriters at Lloyd's London v Syrian Arab Republic*** [2018] EWHC 385 (Comm), unrep., Comm., ref'd to. (See ***Civil Procedure 2019*** Vol.1 at paras 6.28.1 and 6.44.1, and Vol.2 at para.2E-40.1.)

■ **ED&F Man Capital Markets Ltd v Come Harvest Holdings Ltd** [2019] EWHC 1661 (Comm), 4 July 2019, unrep. (Daniel Toledano QC sitting as a Deputy Judge of the High Court)

Jurisdiction—gloss on Vedanta Resources Plc v Lungowe

CPR Pt 11. The tenth defendant issued an application to challenge the court's jurisdiction under CPR Pt 11 and to set aside an order granting permission to serve proceedings in Singapore. In dealing with the application, the Deputy Judge considered the application of the UKSC decision in ***Vedanta Resources Plc v Lungowe*** (2019). Specifically, the issue considered was the approach to be taken to the *"multiplicity of proceedings"* factor in assessing the proper forum in which to bring a claim. **Held**, in the present case the parties did not have a straightforward choice between two jurisdictions, which was the case in ***Vedanta***. In the present case due to the operation of contractual exclusive jurisdiction clauses certain claims had to be brought in England. England was thus the only jurisdiction in which, in principle, all the claims could properly have been brought. It was unreasonable to expect a party to litigate in another jurisdiction (in this case Singapore) in breach of the exclusive jurisdiction clause, or equally to give up the rights flowing from those clauses. Given this, amongst other things, there was a strong reason to place considerable weight on the need to avoid a multiplicity of proceedings in determining the proper forum for the claim (see paras 42–54). In the event, the Deputy Judge held that England was the proper forum. ***Vedanta Resources Plc v Lungowe*** [2019] UKSC 20; [2019] 2 W.L.R. 1051, UKSC, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.11.1.5.)

■ **West v Stockport NHS Foundation Trust** [2019] EWCA Civ 1220, 17 July 2019, unrep. (Sir Terence Etherton MR, Irwin and Coulson LJJ)

ATE insurance—reasonableness and proportionality

CPR rr.44.3(5), 44.4(1), Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No. 2) Regulations 2013 (SI 2013/739). The Court of Appeal considered the correct approach to the assessment of the reasonableness and proportionality of after-the-event (ATE) insurance premiums. It did so in the context of appeals from decisions in two clinical negligence claims that limited the recoverability of such premiums. In allowing appeals from those decisions, the Court of Appeal gave the following guidance:

- the approach to assessment set out in ***Lownds v Home Office*** (2002) was, following the Jackson cost reforms, no longer good law (para.50); and
- the approach to necessity in ***Rogers v Merthyr Tydfil CBC*** (2006) was to be disregarded, however its observations on

> *"the inability of judges, without the assistance of expert evidence, sensibly to address the reasonableness of the premium (except in very broad brush terms), and the risk to the whole market if they do, remain entirely relevant and appropriate"* (paras 51–52).

Reasonableness

- the principles to apply considering whether an ATE insurance premium is reasonable, and which can be derived from ***Rogers v Merthyr Tydfil CBC*** (2006), ***Kris Motor Spares Ltd v Fox Williams LLP*** (2010) and ***Peterborough and Stamford Hospitals NHS Trust v McMenemy*** (2017) are:

> *"(i) Disputes about the reasonableness and recoverability of the ATE insurance premium are not to be decided on the usual case-by-case basis. Questions of reasonableness are settled at a macro level by reference to the general run of cases and the macro-economics of the ATE insurance market, and not by reference to the facts in any specific case [McMenemy].*
>
> *(ii) Issues of reasonableness go beyond the dictates of a particular case and include the unavoidable characteristics of the ATE insurance market [Rogers].*
>
> *(iii) District judges and cost judges do not have the expertise to judge the reasonableness of a premium except in very broad-brush terms, and the viability of the ATE market will be imperilled if they regard themselves (without the assistance of expert evidence) as better qualified than the underwriter to rate the financial risk the insurer faces [Rogers].*
>
> *(iv) It is for the paying party to raise a substantive issue as to the reasonableness of the premium which will generally only be capable of being resolved by way of expert evidence [Kris]."*

  These principles must be applied in every case (paras 56–57);

- Foskett J's suggestion in ***Surrey (A Child) v Barnet and Chase Farm Hospitals NHS Trust*** (2016) that ***Rogers v Merthyr Tydfil CBC*** (2006) was out of date, and that costs judges can engage in a robust analysis of ATE insurance premiums was disapproved (para.59);
- ATE insurance premiums because they help secure access to justice are not to be automatically treated as reasonable (para.62);
- where an ATE policy is a bespoke policy it can be challenged on wide grounds i.e., on the basis that risk assessment on which it was based was wrong (para.64);
- where the policy was a block-rated policy the grounds of challenge are more restricted. Such challenges would usually have to relate to the market and would require expert evidence. Furthermore, because of the nature of any agreement between insurers and solicitors, there may be no alternative available ATE policy to act as a comparator. Where there was such an alternative policy, expert evidence would have to consider whether it was directly comparable (paras 65–66); and
- a simple comparison between the value of the claim and the amount of the ATE premium is not a reliable measure of the reasonableness of the premium (para.67).

Proportionality

- proportionality is to be considered by reference to the matters set out in CPR r.44.3(5), and if relevant, the wider circumstances set out in CPR r.44.4(1) (paras 73–78);
- a block-rated ATE premium that has been assessed as reasonable cannot be assessed as disproportionate (paras 79–80);
- in assessing whether reasonable costs are proportionate fixed and unavoidable costs, such as court fees, must not be taken into account. Assessment should focus on those elements of costs that are incurred as a consequence of the exercise of judgment by solicitors or counsel (paras 81, 82 and 85); and
- the correct approach to conducting a proportionality assessment was (see paras 87–93):

> *"[87] We are anxious not to restrict judges or force them, when assessing a bill of costs, to follow inflexible or overly-complex rules. One of the matters, however, which is apparent from the many cases cited to us, and from the submissions of counsel on the hearing of these appeals, is that there is an absence of consistency in the way*

in which costs bills are assessed. Taking the various points made above and drawing them together, we give the following guidance on an appropriate approach.

[88] First, the judge should go through the bill line-by-line, assessing the reasonableness of each item of cost. If the judge considers it possible, appropriate and convenient when undertaking that exercise, he or she may also address the proportionality of any particular item at the same time. That is because, although reasonableness and proportionality are conceptually distinct, there can be an overlap between them, not least because reasonableness may be a necessary condition of proportionality: see Rogers at paragraph 104. This will be a matter for the judge. It will apply, for example, when the judge considers an item to be clearly disproportionate, irrespective of the final figures.

[89] At the conclusion of the line-by-line exercise, there will be a total figure which the judge considers to be reasonable (and which may, as indicated, also take into account at least some aspects of proportionality). That total figure will have involved an assessment of every item of cost, including court fees, the ATE premium and the like.

[90] The proportionality of that total figure must be assessed by reference to both r.44.3(5) and r.44.4(1). If that total figure is found to be proportionate, then no further assessment is required. If the judge regards the overall figure as disproportionate, then a further assessment is required. That should not be line-by-line, but should instead consider various categories of cost, such as disclosure or expert's reports, or specific periods where particular costs were incurred, or particular parts of the profit costs.

[91] At that stage, however, any reductions for proportionality should exclude those elements of costs which are properly regarded as unavoidable, such as court fees, the reasonable element of the ATE premium in clinical negligence cases, and the like. Specifically, therefore, if the ATE premium is assessed as reasonable, it will not fall to be reduced by any further assessment of proportionality.

[92] The judge will undertake the proportionality assessment by looking at the different categories of costs (excluding the unavoidable items noted above) and considering, in respect of each such category, whether the costs incurred were disproportionate. If yes, then the judge will make such reduction as is appropriate. In that way, reductions for proportionality will be clear and transparent for both sides.

[93] Once any further reductions have been made, the resulting figure will be the final amount of the costs assessment. There would be no further stage of standing back and, if necessary, undertaking a yet further review by reference to proportionality. That would introduce the risk of double-counting."

Lownds v Home Office [2002] EWCA Civ 365; [2002] 1 W.L.R. 2450, CA, ***Rogers v Merthyr Tydfil CBC*** [2006] EWCA Civ 1134; [2007] 1 W.L.R. 808, CA, ***Kris Motor Spares Ltd v Fox Williams LLP*** [2010] EWHC 1008 (QB); [2010] 4 Costs L.R. 620, ***Peterborough and Stamford Hospitals NHS Trust v McMenemy*** [2017] EWCA Civ 1941; [2018] 1 W.L.R. 2685, CA, ***Pollard v University Hospitals of North Midlands NHS Trust*** [2017] 1 Costs L.R. 45, QBD, ***Surrey (A Child) v Barnet and Chase Farm Hospitals NHS Trust*** [2016] EWHC 1598 (QB); [2018] 1 W.L.R. 499, QBD, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.44.3.3.)

Practice Updates

STATUTORY INSTRUMENTS

The Damages (Personal Injury) Order 2019 (SI 2019/1126) in force from **5 August 2019**. The Lord Chancellor revised the discount rate pursuant to s.A1 of the Damages Act 1996. The new rate, effective from 5 August 2019 and which replaces the previous rate set in 2017 of –0.75%, will be –0.25%.

The Civil Procedure (Amendment No. 2) Rules 2019 (SI 2019/1034) in force from **31 July 2019**. The second set of CPR amendments of 2019 amend CPR Pt 57. First, they insert a new CPR r.57.24, which requires the Court to send a copy of a declaration of presumed death to the Public Guardian, when such a declaration is made under the Presumption of Death Act 2013. Secondly, they insert a new Section VII (CPR rr.57.25–57.33), which concerns proceedings under the Guardianship (Missing Persons) Act 2017.

The Civil Procedure (Amendment No. 3) Rules 2019 (SI 2019/1118) in force from **1 October 2019**. The third set of CPR amendments effect two changes. The first amendment relates to CPR r.45.42(2)(a) and amends the definition of *"Aarhus Convention claim"*, such that it now includes a statutory review within art.9(3) of the Aarhus Convention. Secondly, it substitutes a new CPR Pt 53, which now covers Media and Communications Claims. It also establishes the Media and Communications List as a specialist High Court List.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION—108th Update. In force from **31 July 2019**. This Practice Direction Update introduces a new PD 57C—Proceedings under the Guardianship (Missing Persons) Act 2017, which supplements the provisions of the new CPR Pt 57C, Section VI.

CPR PRACTICE DIRECTION—109th Update. This Practice Direction Update makes the following amendments:

- **Practice Direction 7D—Claims for the Recovery of Taxes and Duties**. Inserts a new para.1.2 applying the PD to claims by the Welsh Revenue Authority for devolved tax recovery. Also inserts a new wording in the parentheses after para.3.1, referring to ss.164 and 168(1) of the Tax Collection and Management (Wales) Act 2016. In force from **1 July 2019**;
- **Practice Direction 27—Small Claims Track**. Omits para.4.1. In force from **1 July 2019**;
- **Practice Direction 51O—The Electronic Working Pilot Scheme**. Substitutes a new para.2.2A, which makes it mandatory for a legally represented party to use the electronic working scheme from 1 July 2019 in the Central Office of the Queen's Bench Division. In force from **1 July 2019**;
- **Practice Direction 2B—Allocation of Cases to Levels of Judiciary**. Amends the prohibition in para.8.1 on allocating applications for orders and interim applications to a District Judge in the County Court. In force from **1 October 2019**;
- **Practice Direction 3E—Costs Management**. Amends para.7.4 to clarify the date from which the court may not approve costs incurred before any costs management hearing. It makes clear that incurred costs are those incurred *"up to and including the date of the costs management hearing"*. In force from **1 October 2019**;
- **Practice Direction 7A—How to Start Proceedings—The Claim Form**. Inserts a new para.29A making provision for Media and Communications Claims to be commenced in either the High Court or County Court. In force from **1 October 2019**. Subject to a transitional provision that provides that it does not apply to claims issued before 1 October 2019;
- **Practice Direction 40F—Non-Disclosure Orders Information Scheme**. Substitutes a new PD 40F, making provision for information to be collected in respect of non-disclosure orders. In force from **1 October 2019**;
- **Practice Direction 49A—Applications under the Companies Acts and related legislation**. Amends para.16 to provide for applications under s.968 of the Companies Act 2006 to be made by either a CPR Pt 7 or CPR Pt 8 Claim. In force from **1 October 2019**;
- **Practice Direction 53A—Transferring Proceedings to and from the Media and Communications List**. Inserts a new PD 53A, dealing with transfers to and from the Media and Communications List (see above). In force from **1 October 2019**. Subject to a transitional provision that provides that it does not apply to claims issued before 1 October 2019;
- **Practice Direction 53B—Media and Communications Claims**. Substitutes the new PD 53B for the, now omitted, PD 53. Makes provision for contents of statements of case for claims within the ambit of the Media and Communications List (see above). In force from **1 October 2019**. Subject to a transitional provision that provides that it does not apply to claims issued before 1 October 2019; and
- **Practice Direction 57AA—Business and Property Courts**. Substitutes reference to EU Competition Law Practice Direction with reference to Practice Direction—Competition Law in paras 1.5 and 2.5(2). In force from **EU exit day** i.e., the day on which the Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 (SI 2019/521) comes into force.

PRE-ACTION PROTOCOLS

The Pre-Action Protocol for Judicial Review is amended from 17 September 2019. The Master of the Rolls has approved a minor amendment to the template Letter of Claim in Annex A Section 2 of the Protocol. The amendment updates the bulleted paragraph concerning the address for service of the Treasury Solicitor and inserts a new bulleted paragraph giving the address for service for Her Majesty's Revenue and Customs.

The Pre-Action Protocol for Defamation Claims is substituted by a new **Pre-Action Protocol for Media and Communications Claims** as from 1 October 2019. The Master of the Rolls has approved a new Protocol, which will apply to claims within the ambit of CPR Pt 53. It provides guidance on information to be included in letters of claim for: defamation, slander and malicious falsehood claims; privacy and breach of confidence claims; data protection claims,

including representative claims under art.80 of the General Data Protection Regulation; harassment, where the course of conduct includes publication, claims. It also provides guidance on the expectation that parties will have considered ADR, including the use of ENE.

In Detail

COURT OF APPEAL UPDATE—TEST FOR PERMISSION TO APPEAL AND TO TEST TO RAISE NEW POINTS ON APPEAL

The Court of Appeal has recently considered the proper approach to questions concerning the test to raise new points on appeal and its approach to the evaluation of a trial judge's factual findings. In ***Singh v Dass*** [2019] EWCA Civ 360, 7 March 2019, unrep. (McCombe, Moylan, Haddon-Cave LJJ) and ***Notting Hill Finance Ltd v Sheikh*** [2019] EWCA Civ 1337, 25 July 2019, unrep. (Longmore and Peter Jackson LJJ, Snowden J) it considered the first of those questions. In ***Prescott v Potamianos*** [2019] EWCA Civ 932 (also known as ***Re Sprintroom***), 6 June 2019, unrep., it considered the latter.

Test to raise new points on appeal

An appeal court has a general discretion to permit parties to raise points not raised at trial, albeit it is a discretion that *"ought to be most jealously scrutinised"* (per Lord Herschell in ***The Tasmania*** (1890) App. Cas. 223 at 225). In the context of an application to amend a notice of appeal to raise a new point, one not raised previously at trial, the Court of Appeal in ***Jones v MBNA International Bank*** [2000] EWCA Civ 514 at para.52, per May LJ, had stated that only in *"exceptional cases"* would the court permit such a point to be raised for the first time via such an amendment. That judgment and statement concerned applications to amend appellants' notices to raise new points, ones not raised either at trial or in the appellant's notice (***Civil Procedure 2019*** Vol.1 at para.52.17.3). That judgment is however inconsistent with the approach taken by the Court of Appeal in ***Pittalis v Grant*** [1989] Q.B. 605 and ***Glatt v Sinclair*** [2013] EWCA Civ 241. The test as summarised in ***Civil Procedure 2019*** Vol.2 at para.9A-56.1 is as follows:

> *"The stance which the Court of Appeal should take towards a point not raised at trial in the High Court or in the County Court and raised for the first time on appeal in the court, either in the original notice of appeal or on an application to amend the notice, has been explained in a number of authorities. The principles were set out in Pittalis v Grant [1989] Q.B. 605, CA, where the Court of Appeal held that the same principles apply to appeals from the County Court as from the High Court. (For other pre-CPR authorities, see Supreme Court Practice 1999 Vol.1 paras 59/10/10 and 59/19/5.) In the Pittalis case, the Court of Appeal stated (referring to earlier authority), that, if a point was not taken before the tribunal which heard the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. Further, if the point is a pure point of law, the appellate court retains a discretion to exclude it."*

Singh v Dass (2019) and ***Notting Hill Finance Ltd v Sheikh*** (2019) have clarified the approach. The two judgments make clear that: there is no exceptionality test, per May LJ in ***Jones v MBNA International Bank*** (2000); the principles set out in ***Pittalis v Grant*** (1989), and ***Crane (t/a Indigital Satellite Services) v Sky In-Home Ltd*** [2008] EWCA Civ 978, unrep., set out the principles to be applied when a party wishes to raise a new point on an appeal; and, those principles apply to full appeals as they do to interlocutory appeals (see ***Rana v Ealing LBC*** [2018] EWCA Civ 2074, see Snowden J in ***Notting Hill Finance Ltd v Sheikh*** (2019) at para.24).

The proper approach, as summarised by Haddon-Cave LJ, with whom Moylan and McCombe LJJ agreed, summarised the test, at ***Singh v Dass*** (2019) paras 15–18, and endorsed by Snowden J, with whom Longmore and Peter Jackson LJJ agreed, at ***Notting Hill Finance Ltd v Sheikh*** (2019) paras 23–26, is as follows:

> *"[15] The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.*
>
> *[16] First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.*
>
> *[17] Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (Mullarkey v Broad [2009] EWCA Civ 2 at [30] and [49]).*
>
> *[18] Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party*

has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (R (on the application of Humphreys) v Parking and Traffic Appeals Service [2017] EWCA Civ 24; [2017] R.T.R. 22 at [29])."

As Snowden J put it in ***Notting Hill Finance Ltd v Sheikh*** (2019), having noted at para.23 the following statement by Nourse LJ in ***Pittalis v Grant*** (1989) at 611 as being authoritative,

"The stance which an appellate court should take towards a point not raised at the trial is in general well settled: see Macdougall v. Knight (1889) 14 App. Cas. 194 and The Tasmania (1890) 15 App. Cas. 223. It is perhaps best stated in Ex parte Firth, In re Cowburn (1882) 19 Ch.D. 419, 429, per Sir George Jessel M.R.:

'the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence.'

Even if the point is a pure point of law, the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it."

and then having restated approvingly, at para.25, Haddon-Cave LJ's summary of the applicable principles, there was no test of exceptionality. See Snowden J at para.26:

"[26] These authorities show that there is no general rule that a case needs to be 'exceptional' before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken".

Snowden J then went on to explain, in the light of the applicable principles, the relevance of May LJ's reference to exceptionality concerning applications to raise new points on appeal in ***Jones***, see paras 27–28,

"[27] At one end of the spectrum are cases such as Jones in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ said in Jones (at [38]), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as May LJ also observed (at [52]), there might nonetheless be exceptional cases in which the appeal court could properly exercise its discretion to do so.

[28] At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court: see e.g. Preedy v Dunne [2016] EWCA Civ 805 at [43]-[46]. In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime."

Approach to evaluation of trial judge's findings

In ***Prescott v Potamianos*** (2019) (also known as ***Re Sprintroom***), 6 June 2019, unrep. (McCombe, Leggatt and Rose LJJ), the Court of Appeal returned to another issue that has been the subject of some principled guidance, which has not been perhaps as fully appreciated as it ought to have been. It this case it took the opportunity to review recent authorities and reiterate the correct approach to be taken by an appellate court when assessing a trial judge's evaluation on findings of fact.

Its guidance, which gives a clear summary of the relevant authorities, is set out at paras 72–78. To assist readers it is set out in full.

"[72] The question of the room for appellate challenge of such an 'evaluative' decision is an area of our procedural law which has attracted much attention from appellate courts in recent years, possibly fuelled by the ever-increasing complexity and detail of some litigation. In such litigation it is very difficult for appellate courts to put themselves in the same position as trial judges in making those decisions, based (as they are) on voluminous documentary and/or

oral evidence, which can only be summarised even in an extensive judgment at first instance. In our judgment this is just such a case.

[73] The matter was extensively considered by the Supreme Court in Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911. The Court of Appeal sought to draw some threads together, from that case and others, in IBM United Kingdom Holdings Ltd. v Dalgleish [2018] ICR 1681, at 1764-5, which was a case concerning alleged breaches of duty by an employer in relation to staff pension funds. Again, the appeal was against a judge's evaluation of whether (by then) undisputed facts gave rise to relevant breaches of duty.

[74] In paragraphs 417-420 of the judgment of the court, delivered on 3 August 2017 by Sir Timothy Lloyd, the following was said:

> *'417. The submission for the RBs was that an appellate court should only interfere with a trial judge's primary findings of fact, or with his conclusions based upon an evaluation of facts, if it is satisfied that the judge was plainly wrong, exceeding the generous ambit within which a reasonable disagreement over the evaluation of facts is possible. This was said to be justified by the well-known case of Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2003] 1 WLR 577, paras 9–10, 12, 16–17. The RBs also relied upon the decision of the Supreme Court in Henderson v Foxworth Investments Ltd [2014] 1 WLR 2600 in which it was held that, in the absence of some identifiable error, such as a material error of law or the making of a critical factual finding which had no basis in the evidence, an appellate court would not interfere with the factual findings of the trial judge unless it were satisfied that his decision was "plainly wrong" in the sense that it could not be reasonably explained or justified and so was one which no reasonable judge could have reached. We invited the parties' attention, in addition to these cases, to In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911.*
>
> *418. Reflecting upon the helpful submissions made to us on these authorities, this is not a case in which challenges are made to the judge's findings of primary fact at all. It seems to us that, even if they were put at their highest from the point of view of the RBs, the relevant issues would be largely akin to the question considered by the Supreme Court in In re B as to whether the trial judge's evaluation of whether the "threshold" requirements of the Children Act 1989 in that case had been met on the findings of primary fact made at the trial. Lord Wilson JSC characterised the issue as an "evaluative" determination (at para 44) and said: "Like all other members of the court, I consider that appellate review of a determination whether the threshold is crossed should be conducted by reference simply to whether it was wrong." (See also Lord Neuberger PSC at para 61, Lord Kerr JSC at para 110, Lord Clarke JSC at 138, and Baroness Hale JSC at paras 202–203.)*
>
> *419. In In re B, some members of the court said that it is not possible to lay down any single clear rule as to the proper approach to be taken by an appellate court where the appeal is against an evaluation: see e g per Lord Neuberger PSC at para 60 and Lord Kerr JSC at para 110. However, in a case such as the present, as it seems to us, a question such as whether the judge's view that there had been breaches of the Imperial duty is to be upheld, should be determined by asking simply whether he was or was not "wrong" rather than whether he was or was not "plainly wrong".*
>
> *420. In our judgment, Henderson, much relied on for the RBs, is not inconsistent with that conclusion, because, when read with care, it can be seen that the appeal involved a challenge to the findings of primary fact made by Lord Glennie, the Lord Ordinary, as trial judge. The issue on appeal was indeed, therefore, whether his decision was "plainly wrong". The significant issue in the case was what was the true consideration for the transaction that was being challenged as having been at an undervalue. That was not a matter of evaluation; it was a matter of finding the primary facts, to be decided on the evidence that the Lord Ordinary, as trial judge, had heard and which the Extra Division of the Court of Session, from whom the appeal was successfully brought, had not.'*

(In this quotation, the reference to the 'Imperial duty' is to the duty explained in Imperial Group Pension Trust Ltd. v Imperial Tobacco Ltd. [1991] 1 WLR 589. The 'RBs' were a class of beneficiaries affected by the employer's intended variations to the pension schemes.)

[75] A somewhat similar conclusion was drawn by the Supreme Court about a year later (30 July 2018) in R (on the application of AR) v Chief Constable of Greater Manchester Police & anor. [2018] UKSC 47 on the question of the appropriate test to be applied in assessing a challenge to a first instance judge's own assessment (sc. evaluation) of the 'proportionality' of an administrative decision on the undisputed facts of that case. In this court, we had followed the court's previous decision in R (A) v Chief Constable of Kent [2013] EWCA Civ 1706, holding that the court would reconsider the issue of 'proportionality' if it found that the first instance judge had made a 'significant error of principle'. However, the Supreme Court held (in a judgment delivered by Lord Carnwath (with whom the other members of the court agreed)), while dismissing the appeal overall, that that was 'too narrow an approach'. At paragraphs 64 and 65, Lord Carnwath said this:

'64. In conclusion, the references cited above show clearly in my view that to limit intervention to a "significant error of principle" is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle - whether of law, policy or practice - which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be "wrong" under CPR 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said (R (C) v Secretary of State for Work and Pensions [2016] EWCA Civ 47; [2016] PTSR 1344, para 34):

> *"... the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong."*

65. It follows that in the present case it was sufficient for the Court of Appeal to consider whether there was any such error or flaw in the judge's treatment of proportionality. If there was not, there was no obligation (contrary to Mr Southey's submission) for the Court of Appeal to make its own assessment.'

[76] So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion'.

[77] All this said, when assessing an evaluative decision of the facts found by a trial judge, there can be no doubt that one must also bear in mind the well-known passage in the speech of Lord Hoffmann in Biogen Inc. v Medeva plc [1997] RPC 1, 45 where he said:

> *'...The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la vérité est dans une nuance), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat Benmax as authorising or requiring an appellate court to undertake a de novo evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation.'*

[78] Again, the position is so well summarised by Lewison LJ in his well-known judgment in Fage UK Ltd. & anor. v Chobani UK Ltd. & anor. [2014] EWCA Civ 5, at paragraph 114, as follows:

> *'114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC1; Piglowska v Piglowski [1999] 1 WLR 1360; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23 [2007] 1 WLR 1325; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include*
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> *i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
>
> *ii) The trial is not a dress rehearsal. It is the first and last night of the show.*
>
> *iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.*
>
> *iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
>
> *v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
>
> *vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.'"*

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