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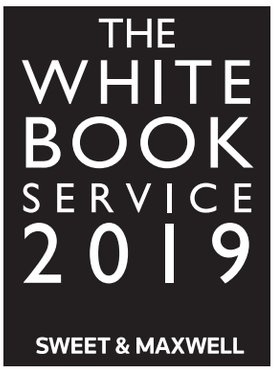

In Brief

Cases

- **Sternberg Reed Solicitors v Andrew Paul Harrison** [2019] EWHC 2065 (Ch), 2 July 2019, unrep. (HHJ Hodge QC sitting as a judge of the High Court)

Without prejudice communications—when admissible in respect of costs

An arbitration award was made in a dispute between a firm of solicitors and a former partner in the firm. The arbitrator initially awarded the claimant costs. Subsequently, he substituted a fresh determination on the question of costs, which held that the parties should bear their own costs. In reaching the second costs decision, the arbitrator held that he could take account of correspondence from the claimant, which the claimant asserted was "*without prejudice*". The claimant challenged the costs award. **Held**, the appeal was allowed in part. In reaching his decision HHJ Hodge QC noted that it was well-established that where a communication is expressly stated to be "*without prejudice*" it is inadmissible generally and in respect of determining costs (see para.30). That was clearly established by Court of Appeal authority in ***Reed Executive Plc v Reed Business Information Ltd*** (2004). The arbitrator was held to have erred in taking the opposite view. HHJ Hodge QC also noted that it was equally well-established that communications which were genuinely aimed at settling a dispute were also inadmissible at trial, and that this was the case both where they were expressly said to be "*without prejudice*" and where the correspondence was silent on that point: see ***Chocoladefabriken Lindt & Sprungli AG v Nestlé Co Ltd*** (1978) and ***Rush & Tompkins Ltd v Greater London Council*** (1989). It was also well-established that where correspondence was expressly headed "*without prejudice save as to costs*", it was admissible in proceedings to determine issues of costs: ***Cutts v Head*** (1984). In this case the correspondence was not expressly headed "*without prejudice save as to costs*". This raised a novel point of law: could it properly be implied that the "*without prejudice*" correspondence was "*without prejudice save as to costs*" or was it necessary to expressly state the costs caveat? HHJ Hodge QC held that the costs caveat could not be implied. If correspondence was to be "*without prejudice save as to costs*", that had to be expressly stated. In the present case that was not done, and such correspondence was thus admissible in respect of issues of costs. In reaching his decision, he did however accept that it remained open to the parties to retrospectively alter the basis on which earlier correspondence had been made as per ***Willers v Joyce*** (2019). As HHJ Hodge QC summarised the position at paras 44–46 and 49:

> *"[44] [It was] submitted that it was absolutely plain from Robert Walker LJ's exposition of the law, and, in particular, the way in which he addressed exception (7) at page 2445 letters C to F of his judgment, that the general 'without prejudice' rule is that 'without prejudice' correspondence is not admissible on questions of costs. That was the starting-point, and it was only diluted if the parties agreed to dilute it.*
>
> *[45] In my judgment, however, that is only the case if there is an express agreement that communications will be 'without prejudice'. In my judgment, when communications take place expressly on a 'without prejudice' basis, then the authorities are clear that they may not be referred to, even after the determination of the substantive dispute, for the purpose of deciding issues of costs unless the communications had been expressly marked 'without prejudice save as to costs', or the right to refer to the communications on issues of costs is otherwise expressly being reserved. In my judgment, that is clear from Robert Walker LJ's exposition of the 'without prejudice' rule in the Unilever case; and it is also clear from the decision of the Court of Appeal in the Reid Executive case.*
>
> *[46] Where, however, communications take place to resolve a live dispute and they are not expressly labelled 'without prejudice', then they will be treated as impliedly 'without prejudice' on the substantive dispute, and they may not be referred to until after the determination of that dispute, but they may thereafter be referred to on questions of costs. Since the law has come to recognise the concept of communications on a 'without prejudice save as to costs' basis, I see no reason why the law should impute to parties who do not expressly mark their communications 'without prejudice' an intention that the communications should be treated as impliedly 'without prejudice' for all purposes. It is clear on the authorities, including the case of Cutts v Head, that there is no underlying public policy justification that favours any wider exclusionary rule preventing communications not expressly marked 'without prejudice' from being referred to on issues of costs. I see no reason why, where the parties have not chosen to label a communication as expressly 'without prejudice', the law should imply an agreement that that communication should be treated as 'without prejudice' rather than as 'without prejudice save as to costs'.*
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> ...
>
> *[49] Where correspondence is treated as being 'without prejudice', not because it is labelled as such, but simply because it is an attempt to compromise actual or impending litigation, there can be no public policy justification for*

preventing it being referred to on issues of costs as distinct from the issues in the substantive litigation; and I see no basis for implying any agreement that no reference should be made to such correspondence on issues of costs once issues in the substantive litigation have been determined."

Chocoladefabriken Lindt & Sprungli AG v Nestlé Co Ltd [1978] R.P.C. 287, ChD, ***Rush & Tompkins Ltd v Greater London Council*** [1989] A.C. 1280, HL, ***Cutts v Head*** [1984] Ch. 290, CA, ***Unilever Plc v Procter & Gamble Co*** [2000] 1 W.L.R. 2436, CA, ***Reed Executive Plc v Reed Business Information Ltd*** [2004] EWCA Civ 887; [2004] 1 W.L.R. 3026, CA, ***Bradford & Bingley Plc v Rashid*** [2006] UKHL 37; [2006] 1 W.L.R. 2066, HL, ***Oceanbulk Shipping & Trading SA v TMT Asia Ltd*** [2010] UKSC 44; [2011] 1 A.C. 662, UKSC, ***Willers v Joyce*** [2019] EWHC 937 (Ch); [2019] Costs L.R. 781, ref'd to. (See ***Civil Procedure 2019*** Vol.2 at para.14-18.3.)

■ **Sabbagh v Khoury** [2019] EWCA Civ 1219; [2019] 2 Lloyd's Rep. 178, 12 July 2019 (David Richards and Haddon-Cave LJJ, Sir Timothy Lloyd)

Jurisdiction to grant an anti-arbitration injunction where foreign arbitration vexatious or oppressive

Senior Courts Act 1981 s.37. A dispute arose between siblings concerning their late father's assets. The dispute centred on the family business, which was a significant engineering and construction business, based in Lebanon. Only one of the parties, the first defendant, to the present proceedings is resident in England. Consequent upon the English proceedings being commenced, arbitration proceedings were commenced by the defendants in Lebanon. The claimant applied for, and was granted, an anti-arbitration injunction in the English proceedings. An appeal from that decision was heard and dismissed by the Court of Appeal. In doing so the Court **held** that the court had jurisdiction to grant such an anti-arbitration injunction to restrain an arbitration taking place in a foreign seat where that arbitration was vexatious and oppressive. The jurisdiction to do so was founded on s.37 of the Senior Courts Act 1981. As David Richards LJ put it at paras 65–66:

"[65] The power of the court to grant an injunction is conferred by section 37 of the Senior Courts Act 1981. Since the decision of the House of Lords in South Carolina Insurance Co v Assurantie Maatschappji 'De Zeven Provincien' NV [1987] AC 24, it has been recognised that, while the power is not unlimited, it can be exercised not only in protection of a legal or equitable right but also to prohibit conduct that would be vexatious and oppressive, including in appropriate cases to restrain the pursuit of foreign court proceedings. In Société Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871 (PC), it was established that an injunction may be granted to restrain proceedings in a foreign court in circumstances where, by reason of parallel proceedings in the English courts, the pursuit of the foreign proceedings would be oppressive and vexatious. A similar power as regards foreign arbitrations must exist, unless by statute (and the 1996 Act is the only candidate) section 37 has been implicitly modified to exclude an anti-arbitration injunction.

[66] In my judgment, it is not possible to extract such a modification from the 1996 Act. Reliance on the general principle in section 1(c) that 'in matters governed by this Part [Part 1] the court should not intervene except as provided by this Part' suffers from two problems. First, the matters governed by Part 1 are arbitrations with a seat in the UK (except Scotland): section 2(1). Section 2(2) and (3) extend the application of a small number of specific provisions to foreign arbitrations but, save in those respects, foreign arbitrations are not matters governed by Part 1. Second, and in any event, the word 'should', not 'shall', was deliberately chosen for section 1(c) for the purpose and effect stated by Lord Mance in AES at [33] which I have earlier quoted."

The authorities, however, are clear that the court must exercise the jurisdiction to grant such an injunction with "*great caution and restraint* ..." (see para.90). In that regard David Richards LJ noted that Hamblen J when considering whether to grant such an injunction in ***Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato Kft*** (2011) required there to be "*exceptional circumstances*" to justify making such an order. David Richards LJ went on to hold that in order to grant such an injunction it was not necessary for England to be the "*natural forum*" for the dispute (see paras 109–113). ***Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*** [1981] 2 Lloyd's Rep. 446, Comm., ***South Carolina Insurance Co v Assurantie Maatschappij De Zeven Provincien NV*** [1987] A.C. 24, HL, ***Sheffield United Football Club Ltd v West Ham United Football Club Plc*** [2008] EWHC 2855 (Comm); [2009] 1 Lloyd's Rep. 167, Comm., ***Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato Kft*** [2011] EWHC 345 (Comm); [2011] 2 All E.R. (Comm) 128, Comm., ***Excalibur Ventures LLC v Texas Keystone Inc*** [2011] EWHC 1624 (Comm); [2011] 1 All E.R. (Comm) 933, Comm., ***Injazat Technology Capital Ltd v Najafi*** [2012] EWHC 4171 (Comm), unrep., Comm., ***Whitworths Ltd v Synergy Food Ingredients & Processing BV*** [2014] EWHC 4239 (Comm), unrep., Comm., ref'd to. (See ***Civil Procedure 2019*** Vol.2 at para.9A-130.)

■ **Cape Intermediate Holdings Ltd v Dring** [2019] UKSC 38; [2019] 3 W.L.R. 429, 29 July 2019 (Lady Hale PSC, Lord Briggs, Lady Arden, Lords Kitchin and Sales)

Open justice—access to documents

CPR rr.5.4C(2), 39.2, 39.9, Practice Direction (Sen Cts: Audio Recordings of Proceedings: Access) [2014] 1 W.L.R. 632. Mesothelioma claims settled before judgment in 2017. A non-party thereafter applied for access to all the documents used or disclosed at trial in those claims. The application was allowed by the Master, who directed that the following documents be supplied from the court file to the applicant: witness statements and exhibits; expert reports; transcripts; disclosed documents relied on by the parties at trial which were in hard copy bundles; written submissions; skeleton arguments; statements of case if not in the hard copy bundles relied on at trial. An appeal from that order was allowed by the Court of Appeal; Hamblen LJ giving detailed guidance on the jurisdiction to permit access to such documents (see ***Civil Procedure News*** No.8 of 2018). An appeal from that decision to the United Kingdom Supreme Court was, in a judgment of the court, dismissed. In giving its decision the UKSC noted that the question of access to written materials disclosed by parties in civil proceedings engaged the principle of open justice. In considering the question of access, the court considered what was meant by reference to court records. It noted that there was no statutory definition of the term, and that historic practice as to the nature of court records changed over time. With this in mind, it held at paras 23–24, that:

> *"[23] The 'records of the court' must therefore refer to those documents and records which the court itself keeps for its own purposes. It cannot refer to every single document generated in connection with a case and filed, lodged or kept for the time being at court. It cannot depend upon how much of the material lodged at court happens still to be there when the request is made.*
>
> *[24] However, current practice in relation to what is kept in the records of the court cannot determine the scope of the court's power to order access to case materials in particular cases. The purposes for which court records are kept are completely different from the purposes for which non-parties may properly be given access to court documents. The principle of open justice is completely distinct from the practical requirements of running a justice system. What is required for each may change over time, but the reasons why records are kept and the reasons why access may be granted are completely different from one another."*

In determining the question of what documents a non-party may be granted access to, the court was not limited to consider only those documents that were kept on the court file or formed part of the court records. The question of access to documents was not to be determined exclusively by reference to the CPR. The court retained an inherent jurisdiction to grant access to documents, see para.41:

> *"[41] The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. It follows that, unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court or tribunal in question. The extent of any access permitted by the court's rules is not determinative (save to the extent that they may contain a valid prohibition). It is not correct to talk in terms of limits to the court's jurisdiction when what is in fact in question is how that jurisdiction should be exercised in the particular case."*

As a consequence, the default position concerning access to documents was that non-parties be allowed access "*not only to the parties' written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing*". It applied to them irrespective of whether the judge had read them or not, or whether the judge had been asked to read them or not (see para.44). This did not, however, mean that non-parties had a right of access to such documents. Non-parties seeking access must provide an explanation of why they seek the documents and how providing access will further the principle of open justice. In that respect, the media will be "*better placed than others to demonstrate a good reason for seeking access*". Others may well show that they have a "*legitimate reason*" for seeking access (see para.45). In determining whether to provide access the court must carry out a "*fact-specific balancing exercise*", which will balance:

> *"[45] ... On the one hand ... 'the purpose of the open justice principle and the potential value of the information in question in advancing that purpose' [and]*
>
> *[46] On the other hand will be 'any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others'."*

Examples where there may be good reasons for denying access are: national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality. In determining whether to grant access the court will also need to consider practicalities and proportionality. As such it will be "*highly desirable*" for such applications to be made during trial,

where documents are readily available, parties are before the court and the trial judge is in control of the process (see para.47). Following trial documents may not have been retained by the court, and hence may not be capable of being provided upon application. Even if retained it may not be proportionate to grant access. A non-party seeking access will be expected to pay the reasonable costs attended upon a grant of access.

> *"[47] ... In short, non-parties should not seek access unless they can show a good reason why this will advance the open justice principle, that there are no countervailing principles of the sort outlined earlier, which may be stronger after the proceedings have come to an end, and that granting the request will not be impracticable or disproportionate."*

In respect of trial bundles, the UKSC was clear that where they had been marked-up by the court, the parties or others they were not to be disclosed, absent consent of the person who held the bundle (see para.48). A clean copy of the trial bundle, if available, may however be the most appropriate means to provide non-party access to material. That would be for the court to decide on any such application. Finally the UKSC suggested that the Civil Procedure Rule Committee review the CPR in the light of its judgment. ***Scott v Scott*** [1913] A.C. 417, HL, ***Home Office v Harman*** [1983] 1 A.C. 280, HL, ***SmithKline Beecham Biologicals SA v Connaught Laboratories Inc (Disclosure of Documents)*** [1999] 4 All E.R. 498, CA, ***GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd*** [1999] 1 W.L.R. 984, CA, ***Barings Plc (In Liquidation) v Coopers & Lybrand (No.1)*** [2000] 1 W.L.R. 2353, CA, ***Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co (Application for Disclosure)*** [2003] EWHC 2297 (Comm); (2003) 153 N.L.J. 1551, Comm., ***R. v Howell*** [2003] EWCA Crim 486, unrep., CACD, ***R. (Guardian News and Media Ltd) v City of Westminster Magistrates' Court*** [2012] EWCA Civ 420; [2013] Q.B. 618, CA, ***A v BBC*** [2014] UKSC 25; [2015] A.C. 588, UKSC, ***Kennedy v Information Commissioner*** [2014] UKSC 20; [2015] A.C. 455, UKSC, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.5.4C.2.)

■ **Akcil v Koza Ltd** [2019] UKSC 40; [2019] 1 W.L.R. 4830, 29 July 2019 (Lord Reed DPSC, Lord Hodge, Lady Black, Lords Briggs and Sales)

Brussels Regulation (Recast)—exclusive jurisdiction—corporations

Brussels I Recast Regulation (Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) art.24(2). A dispute arose concerning a group of companies, that were part of the Koza Ipek Group based in Turkey, which was previously controlled by Mr Ipek, the second respondent in the present proceedings, and his family. Within the group, Koza Altin (KA) is a Turkish Plc and the sixth respondent in the present proceedings. Koza Ltd, which is a wholly owned subsidiary of KA, is a limited company registered in England. The group was subject to a criminal investigation in Turkey, one consequence of which was that the first to fifth appellants were appointed as trustees of the companies in the group, including Koza Ltd. In July 2016, the trustees had KA serve a notice under s.303 of the Companies Act 2006 on Koza Ltd's directors. The notice required a general meeting to be called in order to remove the directors and appoint three of the trustees in their place. As no such meeting was called, the trustees issued a notice under s.305 of the Companies Act 2006, the effect of which was to call such a general meeting. Consequently KA and Mr Ipek sought an injunction in order to stop that meeting taking place. They did so on two grounds: first, "*the English company law claim*" ground, challenged the validity of the notices given under ss.303 and 305 of the Companies Act 2006; and secondly, the "*authority claim*", which challenged the trustees' authority on the basis that they were only interim appointees acting contrary to, amongst other things, Turkish law, and as such the English courts should not recognise that they had the authority to issue them. The High Court and Court of Appeal concluded that all the claims came within art.24(2) of the Recast Regulation. The United Kingdom Supreme Court in a judgment of the court, allowed an appeal from the Court of Appeal. In doing so it **held**: (i) it was clear that art.24(2) of the Recast Regulation was to be given a narrow interpretation, that enabled a consistent approach across jurisdictions. As such its application could not properly depend on the court carrying out an evaluative judgment that could lead to different courts reaching different results on its application (see paras 28–39): see ***Hassett v South Eastern Health Board*** (2008) and ***Berliner Verkehrsbetriebe (BVG) v JP Morgan Chase Bank NA*** (2011). The "*English company law claim*" and the "*authority claim*" were separate claims. Where there are such claims, with one falling within art.24(2), it is not permissible to make an overall evaluative judgment that taken together the two claims both fall within art.24(2). The two claims were distinct, and the former could be resolved on its own terms in England without the need to take account of or resolve the latter claim. For both to have come within art.24(2) they would need to have been particularly closely linked (see para.42). That was not the case. The English courts thus did not have jurisdiction over KA and the trustees in respect of the authority claim; (ii) while the English courts had jurisdiction over Koza Ltd in respect of the "*authority claim*", they had no such jurisdiction concerning the trustees. As Lord Sales put it at para.45:

> *"Since on its proper interpretation article 24(2) of the Recast Regulation does not cover the authority claim, the English courts have no jurisdiction in relation to the trustees under that provision with respect to that claim. The proceedings against the trustees are principally concerned with the authority claim. It cannot be said that the fact that the English courts have jurisdiction under article 24(2) in relation to the English company law claim, as it concerns Koza Ltd, means*

that such jurisdiction extends to cover the trustees, who are not necessary parties to that claim and are more removed from it than they are in relation to the authority claim. Once it is appreciated that the application of article 24(2) to the authority claim and its application to the English company law claim are to be considered separately, a strict interpretation of article 24(2) as explained by the Court of Justice leads to the conclusion that it does not cover the trustees in relation to the latter claim. Further, the rationale underlying article 24(2) of avoiding conflicting decisions in relation to the relevant subject matter of each respective claim and the rationale that each respective claim should be tried in the courts best placed to do so both support that view."

Hassett v South Eastern Health Board (C-372/07) EU:C:2008:534; [2008] E.C.R. I-7403, CJEU, ***Berliner Verkehrsbetriebe (BVG) v JP Morgan Chase Bank NA*** (C-144/10) EU:C:2011:300; [2011] 1 W.L.R. 2087, CJEU, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.6JR.1 and following.)

■ **Cowan v Foreman** [2019] EWCA Civ 1336, 30 July 2019, unrep. (King, Asplin and Baker LJJ)

Non-application of the overriding objective to substantive law

Inheritance (Provision for Family and Dependants) Act 1975 s.4, CPR r.1.1. The judge at first instance granted permission for a claim to be brought out of time under s.4 of the Inheritance (Provision for Family and Dependants) Act 1975. In doing so the judge relied upon CPR r.1.1(2)(d),(e) and (f) and ***Denton v TH White Ltd*** (2014) to interpret and apply s.4 of the 1975 Act. On appeal to the Court of Appeal, it was **held** that it was inapt to apply, or rely upon the CPR, to interpret the meaning and application of the substantive provisions of the 1975 Act. The CPR, and particularly the overriding objective, is concerned with the proper prosecution of proceedings and not the question whether proceedings may be brought in the first instance, which was the purpose of s.4 of the 1975 Act (see paras 43–52). As Asplin LJ put it at paras 43–46:

"[43] ... Before turning to the proper approach to the exercise of the section 4 power, it is important, therefore, to mention the analogy which he sought to draw with the overriding objective and in particular, CPR 1.1(2)(d), (e) and (f), what he described as the 'ever-developing sanctions jurisprudence exemplified by Denton & Ors v TH White Ltd & Ors' and his reference to 'stale claims'.

[44] First, it seems to me that the concept of a 'stale claim' is of little relevance in the 1975 Act context. It is borrowed from and is more apposite to the consideration of matters under the Limitation Act 1980. Section 4 contains no long stop provision. Furthermore, the assessment, for the purposes of the substantive claim, is made at the date of the hearing and, therefore, concerns about the loss of evidence and witnesses over time are of much less importance than they might be. As Briggs J (as he then was) pointed out in Nesheim v Kosa, section 4 exists for the purpose of avoiding unnecessary delay in the administration of estates which would be caused by the tardy bringing of proceedings and to avoid the complications which might arise if distributions from the estate are made before the proceedings are brought. This dovetails with section 20 of the 1975 Act. It provides express protection for the executors/personal representatives of an estate from any liability which might otherwise arise as a result of having made a distribution from the estate more than six months after the grant of probate/letters of administration, on the ground that they ought to have taken into account that the Court might permit a claim to be made after the end of that period. Section 4 is not designed, therefore, to protect the court from stale claims as the Judge explains. On the contrary, if the circumstances warrant it, the power in section 4 can be exercised in order to further the overriding objective of bringing such claims before the court where it is just to do so, and, in such circumstances, the personal representatives have the protection afforded by section 20. The power must be considered in the context in which it arises.

[45] Secondly, it follows that I do not agree with the Judge that what he describes as 'a robust application of the extension power' is necessary. There is nothing in section 4 or in the principles distilled in Berger v Berger which requires such an approach to be adopted. Furthermore, it seems to me that the paragraphs of the overriding objective to which the Judge referred are not relevant to the exercise of section 4. They were CPR 1.1(2)(d), (e) and (f) which are concerned with dealing with the case expeditiously, allotting the case an appropriate share of the court's resources and enforcing compliance with rules, respectively. They are all concerned with managing a claim proportionately and fairly once it has been commenced, whereas section 4 is concerned with whether, given all the circumstances of the case and the delay, it is appropriate to allow a claim to be issued more than six months after a grant of probate/letters of administration.

[46] Thirdly, it seems to me that the Judge's references to the 'ever-developing sanctions jurisprudence exemplified in Denton ... ' and the fact that 'the time limit is contained within the statute rather than in a procedural rule' are for the most part inapposite. There is no disciplinary element to section 4. Unlike the provisions of the CPR, the six-month time limit in section 4 is not to be enforced for its own sake. The time limit is expressly made subject to permission of the court to bring an application after the six months has elapsed. It is designed to bring a measure of certainty for personal representatives and beneficiaries alike. When determining whether a claim should be brought outside the six-

month period, nevertheless, the court must consider all of the relevant circumstances of the case in question and the factors which were highlighted in Berger v Berger. The rationale of CPR 3.9(1) with which the 'Denton jurisprudence' is concerned, on the other hand, just like the overriding objective in CPR 1.1, is that court rules should be obeyed so that once commenced, litigation should proceed expeditiously and at proportionate cost and that court resources should not be wasted. As Chief Master Marsh neatly described it recently in Bhusate v Patel [2019] EWHC 470 (Ch) at [64], to have regard to the overriding objective or the approach to relief against sanctions in the Denton case when exercising the discretion under section 4 'involves conflating issues that, if they are related, are at best distant cousins'."

Nesheim v Kosa [2006] EWHC 2710 (Ch), unrep., ChD, ***Berger v Berger*** [2013] EWCA Civ 1305, unrep., CA, ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, CA, ***Bhusate v Patel*** [2019] EWHC 470 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2019*** Vol.2 para.11-6.)

■ **PME v The Scout Association** [2019] 7 WLUK 574, 30 July 2019, unrep., Senior Courts Costs Office (Master Leonard)

Costs assessment—authority of authorised costs officer

CPR rr.47.3, 47.21–24, CPR PD 47 paras 14.2, 20.1–20.6. The Senior Courts Costs Office's Principal Costs Officer i.e., an "*authorised costs officer*" (see para.8) assessed the costs to be paid by a defendant at a provisional costs assessment. The claimant challenged that provisional assessment on appeal under CPR rr.47.21–47.24. It was argued, amongst other things, that the costs officer had no jurisdiction under CPR r.47.3 to carry out a provisional assessment of costs. **Held**, the provisions concerning the jurisdiction of costs officers fell to be interpreted consistently with the overriding objective, applying the purposive approach to interpretation articulated by Lord Bingham in ***R. (Quintavalle) v Secretary of State for Health*** (2003) (see paras 7 and 26). It was not correct to argue that the authorised costs officer had no jurisdiction to carry out a provisional costs assessment because, as was submitted, reference to such an officer having jurisdiction had been omitted from CPR PD 47 para.14.2. That CPR r.47.3 was omitted from CPR PD 47 para.14.2 was of no significance. Practice Directions do not "*displace or overrule*" the CPR. Practice Direction 47 para.14 only has the force of a rule of court in so far as that is provided by CPR r.47.15. Rule 47.15 does not alter or vary CPR r.47.3. As such there was no need for PD 47 para.14 to make any reference to CPR r.47.3. Furthermore, should a party want to object to an authorised costs officer carrying out an assessment they ought to apply for such an order prior to the assessment being assigned to such an officer. Additionally, the Master **held** on a second issue that where a party wished to challenge a provisional assessment they had to do so initially by seeking a review at an oral hearing. They could not appeal to a costs judge from the assessment to a costs judge prior to doing so (paras 54–56). ***R. (Quintavalle) v Secretary of State for Health*** [2003] UKHL 13; [2003] 2 A.C. 687, HL, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.47.3.1.)

■ **Lomax v Lomax** [2019] EWCA Civ 1467, 6 August 2019, unrep. (McCombe, Moylan and Rose LJJ)

Early Neutral Evaluation—court's power to compel parties to carry out

CPR r.3.1(2)(m). In proceedings under the Inheritance (Provision for Family & Dependents) Act 1975 the question arose whether the court had the power to order parties to take part in Early Neutral Evaluation without their consent. Parker J held that there was no such power under CPR r.3.1(2)(m). An appeal from that decision was allowed by the Court of Appeal, which **held** that the court's case management power to conduct an ENE hearing did not depend upon party-consent: the court can require parties to take part in a judge-led ENE. The existence, and in an appropriate case exercise, of that power was consistent with the overriding objective, and specifically the requirement to save expense and to ensure that each case is allotted no more than an appropriate share of the court's resources. In reaching its decision the Court distinguished the present situation from that in ***Halsey v Milton Keynes*** (2004). It did so as ENE forms a part of the court process, whereas the issue in ***Halsey*** was whether parties could be compelled to take part in mediation that was outside the court process. It should be noted that this rationale is suggestive of two things: first, that ENE conducted outside the court process by a third party rests on party-consent i.e., it cannot be compelled for the same reason mediation could not be compelled in ***Halsey***; and, secondly, that mediation that takes place within the court process does not rest on party-consent for the same reason the ENE within the court process does not rest on party-consent. As Moylan LJ, with whom McCombe and Rose LJJ agreed, noted at para.26 ENE that forms part of the court process does not restrict parties from progressing their dispute to judgment, and as such does not obstruct their right of access to the court. That rationale appears to provide a basis for a future Court of Appeal decision to narrow the application of ***Halsey*** so that it only applies to mediation outside the court process and not judge-led mediation as part of the court process; a position that was previously supported extra-judicially by Lord Clarke MR in his criticism of the ***Halsey*** decision (*The Future of Civil Mediation* (2008) Arbitration (74.4) 419). Moylon LJ in the present case expressly refused to consider the status of ***Halsey***, noting it remained good law. ***Halsey v Milton Keynes General NHS Trust*** [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002, CA, ***Wright v Michael Wright (Supplies) Ltd*** [2013] EWCA Civ 234; [2013] C.P. Rep. 32, CA, ***Bradley v Heslin*** [2014] EWHC 3267 (Ch), unrep., ChD, ***Seals v Williams*** [2015] EWHC 1829 (Ch); [2015] 4 Costs L.O. 423, ChD, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.3.1.13.)

■ **Addlesee v Dentons Europe LLP** [2019] EWCA Civ 1600, 2 October 2019, unrep. (Lewison, Floyd & Hamblen LJJ)

Legal advice privilege—application following companies striking-off

CPR. A Cypriot company, Anabus Holdings Ltd, marked an investment scheme. The company was dissolved. Prior to its dissolution, documents were created by its lawyers which, it was assumed for the purposes of the present proceedings, were subject to legal advice privilege. Rights in respect of the documents passed to the Crown as bona vacantia, albeit the Crown has disclaimed any interest in them. The Crown has not, however, asserted or waived any privilege that might exist in respect of them. Investors in the company's investment scheme have brought proceedings against the company's law firm for damages. The basis of the claim is that the underlying scheme was fraudulent. The investors seek disclosure of the documents. The question before the court, which was identified as a novel question, was whether legal advice privilege continued to subsist notwithstanding the fact that the company had been dissolved. When the application came before the Master, it was held that legal advice privilege continued to subsist. In reaching that decision the Master distinguished the present position from that in ***Garvin Trustees v Pensions Regulator*** (2015). In that case the Upper Tribunal had held that legal advice privilege did not subsist in a situation where a company had been dissolved and there was no possibility of restoring it to the company register. On appeal the Court of Appeal considered whether the decision in ***Garvin*** was correct. More broadly the court addressed the following issue of principle:

> *"[3] ... 'whether, legal professional or legal advice privilege having attached to a communication by reason of the circumstances in which the communication was made, the communication remains privileged unless and until privilege is waived; or whether the privilege is lost if there is no person entitled to assert it at the time when a request for disclosure is made.'"*

In essence it was argued for the investors that legal advice privilege is a right that exists solely for the benefit of a specific client and their successors-in-title. Where there was no identifiable person entitled to assert the right, it ceases to exist. In the present case, as a foreign registered company the right did not pass to the Crown, or alternatively if it did the Crown had disclaimed it. As such no person existed who could assert the right. Further there was no prospect of the company being restored to the register, and even if there were the prospect of a future restoration did not alter the fact that the court had to assess at the present time if the right had been lost due to the absence of anyone capable of asserting it. The Court of Appeal approached the question cautiously, by focusing on the policy considerations underpinning the existence of legal advice privilege: ***R. v Derby Magistrates' Court Ex p. B*** (1996); ***Three Rivers DC v Bank of England*** (2004) considered. The essential policy underpinning of the privilege was to enable individuals to be able to consult lawyers confident that what is said would never be revealed absent consent. Consent to waive the privilege was key. To determine whether the privilege is lost in the present circumstances, it is necessary to consider that policy. It is one that makes clear that the privilege arises at the time when the communication is made depending on the nature and circumstances in which it is made. If they are such as to create the privilege, then they are privileged unless and until there is a waiver or it comes within the iniquity exception i.e., the advice was sought for illegal or improper purposes, such as the commission of crime. As Lewison LJ put it the authorities were clear that:

> *"[26] ... privilege attaches to a communication because of the nature of the communication and the circumstances under which it is made; and that the privilege thus established remains absolute unless it is waived."*

Furthermore,

> *"[28] ... the boundaries of legal advice privilege, within which it is absolute unless and until waived, are that the communication in question must be a communication between lawyer and client, made in connection with giving or receiving legal advice, otherwise than for an iniquitous purpose."*

In considering the question, Lewison LJ also noted how it was well-established that legal advice privilege was not a private right of the parties, but a fundamental public interest, as it was established to be, as Lord Taylor had noted in ***Derby Magistrates***, a "*fundamental condition on which the administration of justice as a whole rests*". It was further established that privilege survives the death of a living person: ***Bullivant v Attorney General of Victoria*** (1901). It survives because of the public interest, the public policy it promotes. Extrapolating from this, the question ought not to focus on whether there is someone who can assert the privilege. The privilege attaches to the communication from the time the communication is made. The question is whether there is someone who can waive the privilege. As such the answer to the present issue was that legal advice privilege subsisted following the dissolution of the company. Dissolution meant there was no-one able to waive the privilege, and not that the privilege ceased to exist because there was no-one capable of asserting it. As such ***Garvin*** was wrongly decided and hence overruled. **Held**, the Masters' decision was upheld (albeit for different reasons). ***Bullivant v Attorney General of Victoria*** [1901] A.C. 196, HL, ***R. v Derby Magistrates' Court Ex p. B*** [1996] A.C. 487, HL, ***Three Rivers DC v Bank of England*** [2004] UKHL 48; [2005] 1 A.C. 610, HL, ***Garvin Trustees Ltd v Pensions Regulator*** [2015] Pens. L.R. 1, UT, ***Shlosberg v Avonwick Holdings Ltd*** [2016] EWCA Civ 1138; [2017] Ch. 210, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.1 para.31.3.28.)

Practice Updates

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION—110th Update. In force from **7 October 2019**. This Practice Direction Update amends PD 47 (Procedure for Detailed Assessment of Costs and Default Provisions) and PD 51O (Electronic Working Pilot Scheme).

The amendment to PD 47 amends para.5.1A to introduce reference it being subject to a newly inserted para.5.1B which applies whenever an electronic bill of costs is filed with the Senior Courts Costs Office via the electronic working pilot scheme under PD 51O. It further provides that where that is the case both a full electronic spreadsheet of the bill and a pdf version must be uploaded, and that no other means of filing the electronic bill is permissible. The amendment to PD 51O extends the application of that PD (the electronic working pilot scheme) to the Senior Courts Costs Office. As a consequence from 7 October 2019 electronic working may be used by legally represented parties and those who are not legally represented. As from 20 January 2020 use of the electronic working scheme will be mandatory for parties that are legally represented.

CPR PRACTICE DIRECTION—111th Update. This Practice Direction Update amends PD 51R (Online Civil Money Claims Pilot) and PD 51S (The County Court Online Pilot). Both sets of amendments took effect as of 11.00 on **9 September 2019**.

The amendments to PD 51R extend its application until 30 November 2021. Further amendments reflect, amongst other things, the introduction of new features into the pilot scheme, which include:

- the introduction of a directions questionnaire to be completed by a defendant who intends to defend or partially defend a claim;
- the introduction of an opt-out mediation process, which will enable automatic referral to the Small Claims Mediation Service unless parties actively opt out of referral;
- a provision that will enable an authorised legal adviser to make specified case management decisions in claims that are below the value of £300, subject to the possibility of decisions being reviewed by a judge. Legal advisers may make no decision that finally determines a claim. This aspect of PD 51O only applies in pilot courts in Birmingham, Edmonton, Manchester and Clerkenwell and Shoreditch; and
- provision for the calculation of repayment plans by defendants by the court.

The amendment to PD 51S (The County Court Online Pilot) simply extends the pilot scheme until 30 November 2021.

CROWN PROCEEDINGS ACT 1947 LIST UPDATE

Practice Direction 66 (Crown Proceedings) annexes the official list of Government Departments authorised to accept service. The official list was updated and reissued on 11 September 2019. A copy is available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832184/Scan_Hugo_Bussell_20190912-131857_0729_001.pdf*.

PRACTICE GUIDANCE

PRACTICE NOTE—ADMIRALTY: ASSESSORS' REMUNERATION

In January 2017, Teare J (the Admiralty Judge) issued a new Practice Note concerning the remuneration of Trinity Masters, nautical and other assessors in Admiralty cases. It has been updated on an annual basis. The latest update was issued on 23 August 2019. The new Practice Note applies to all admiralty actions and appeals the hearings of which commence on or after 1 September 2019; for actions the hearings of which commenced before that date the previous April 2018 Practice Note continues to apply (see ***Civil Procedure 2019*** Vol.2 para.2D-142). The Practice Note is reprinted below:

Practice Note (Admiralty: Assessors' Remuneration) of 1 September 2019

1. This guidance is issued by Mr Justice Teare with the agreement of Sir Terence Etherton, Master of the Rolls, and Dame Victoria Sharp, President of the Queen's Bench Division. It is issued as a Practice Note and not as a

Practice Direction. It replaces Practice Note (Admiralty: Assessors' Remuneration) of 1 April 2018.

2. In the absence of special directions given in a particular case the level of remuneration which should normally be paid to Trinity Masters and nautical and other assessors summoned to assist the Court of Appeal, the Admiralty Court on the trial of an action, or a Divisional Court of the Queen's Bench Division is as follows:

   (1) Full day's attendance at hearing: £790;

   (2) Half day's attendance at hearing: £395;

   (3) Attendance at court when case is not heard: £158 per hour;

   (4) Consultation with the court on a day when there is no hearing: £395;

   (5) Attendance to hear reserved judgment (including any consultation with the court on the same day): £199;

   (6) If notice of attendance is countermanded less than two days before the hearing: £395; and

      (1) Assessors should receive reasonable sums for their travelling expenses and subsistence;

      (2) Where there is a cross appeal, or where appeals are heard together, or where actions are consolidated or tried together, the proceedings should be treated as one appeal or action as the case may be;

      (3) In the absence of special directions given in a particular case, the remuneration and expenses should be paid by the appellant or the party setting down the action as the case may be without prejudice to any right to recover from any other party the amount so paid on assessment.

3. The figures specified in paragraph 2 above are subject to annual adjustment.

4. The guidance in this Practice Note takes effect on 1 September 2019 and is to apply to all actions and appeals the hearing of which begin on or after that date. For guidance concerning actions and appeals the hearing of which began before 1 September 2019 see the Practice Note (Admiralty: Assessors' Remuneration) of 1 April 2018.

In Detail

GUIDELINE HOURLY RATES—OHPEN OPERATIONS UK LTD v INVESCO FUND MANAGERS LTD [2019] EWHC 2504 (TCC)

Guideline Hourly Rates for the summary assessment of costs were initially issued in 2002 by the, then, Supreme Court Costs Office. They were a by-product of the Woolf reforms. From 2006 until 2010 they were issued by the Master of the Rolls, latterly upon the advice of the Advisory Committee on Civil Costs. In 2011, its advice was rejected. The Guidelines were not updated. Following the Advisory Council's abolition in 2012 and the Jackson Cost reforms responsibility for making recommendations was transferred to the Civil Justice Council (the CJC). It took on responsibility as Jackson LJ's recommendation that a Costs Council be created to consider the Guidelines, amongst other things, was rejected. The CJC established a standing Costs Committee to carry out a "*comprehensive evidence-based review*" of the Guidelines. It reported in May 2014 (see CJC Costs Committee, *Report to the Master of the Rolls, Recommendations on Guideline Hourly Rates for 2014* (May 2014), *https://www.judiciary.uk/wp-content/uploads/2014/07/ghr-final-report.pdf* [Accessed 7 October 2019]). While the CJC made recommendations to uprate the Guidelines, it did so with reservations. Based on those reservations, Lord Dyson MR also declined to revise the Guidelines (Lord Dyson MR, *Guideline Hourly Rates: Master of the Rolls' Decision Paper* (July 2014), *https://www.judiciary.uk/wp-content/uploads/2014/07/ghr-mor-decision-july2104.pdf* [Accessed 7 October 2019]). He concluded as follows:

> *"The present situation is deeply unsatisfactory. GHRs are needed to guide summary and detailed assessments of costs. There needs to be public confidence that there is a reliable basis for them. I propose, therefore, to have urgent discussions with The Law Society and the Government to see what steps can be taken to obtain evidence on which GHRs can reasonably and safely be based."*

No further announcements have been made. The CJC's Costs Committee has not reported further, and the Guidelines remain as they were in 2010.

In ***Ohpen Operations UK Ltd v Invesco Fund Managers Ltd*** [2019] EWHC 2504 (TCC), Mrs Justice O'Farrell considered a summary assessment of a claim that had proceeded in the Technology and Construction Court. She noted the

principles applicable were not in dispute. It was clear that CPR r.44.2(1), (2), (4) and (5) applied. The parties had agreed that the claimant pay the defendant's costs, and that they be assessed on the standard basis, under CPR r.44.3(1) and (2) and r.44.4. Proportionality was not an issue. The parties' costs were broadly comparable: the defendant's statement of costs amounted to £52,152.48, the claimant's amounted to £45,417.78. O'Farrell J adopted the approach identified by Leggatt J in ***Kazakhstan Kagazy Plc v Zhunus*** [2015] EWHC 404 (Comm) at [13] i.e., that:

> *"The touchstone [of reasonable and proportionate costs] is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances."*

The claimant made two fundamental points concerning the defendant's costs. One concerned the amount of time spent on work done on documents. The other concerned the hourly rates of the defendant's solicitors. As O'Farrell J put it,

> *"[13] The claimant submits that the defendant's costs are unreasonably high and/or were unreasonably incurred in two respects:*
>
> *i) the hourly rates of the defendants' solicitors are unreasonably high, particularly when compared against the Senior Courts Costs Office ("SCCO") guideline rates; ..."*

A problem arose in respect of that submission: the nature of the Guideline Hourly Rates. They were simply of no assistance. As the Judge put it,

> *"[14] ... the hourly rates of the defendant's solicitors are much higher than the SCCO guideline rates. It is unsatisfactory that the guidelines are based on rates fixed in 2010 and reviewed in 2014, as they are not helpful in determining reasonable rates in 2019. The guideline rates are significantly lower than the current hourly rates in many London City solicitors, as used by both parties in this case. Further, updated guidelines would be very welcome."*

Mrs Justice O'Farrell raises an important point concerning summary assessments: if the position concerning the Guidelines was deeply unsatisfactory in 2014, when they had not been uprated for four years, it cannot but be far more problematic today. It is to be hoped that her judgment helps to start a proper reconsideration of the Guidelines.

If the Guidelines are reappraised, either by the CJC's Costs Committee or another body, one question that it may want to consider is if the approach taken by the Advisory Council originally, and then by the Costs Committee, was too strict in its evidential approach. This is not to suggest that any revision to the Guidelines ought not to be based on evidence of actual rates. It patently ought to be if they are to provide a basis to assess what reasonable rates ought to be. It is to suggest however that in determining the evidence-base for any new rates, the aim of the Guidelines, as Lord Dyson MR put it, when he rejected the Costs Committee's recommendations, was to provide " ... *broad approximations of actual rates in the market*". A question has to be raised whether the approach to assessing uprating of the Guidelines from the time that the Advisory Council was given responsibility for their uprating was one that focused to too great an extent on ascertaining and tracking actual rates to a high degree of accuracy, such that the need to provide "*broad approximations*" was lost. That the Costs Committee, at para.3.2 of its 2014 Report, made the point that the "*evidence-based*" approach it was required to take meant that it had to take "*a more structured and rigorous examination*" than had even been suggested was needed in the Jackson Costs Review, might well be taken to suggest that it took—it had to take—too rigorous an approach, one that pursued the perfect at the expense of the good.

It is hoped any review that ought now to take place ensures that it bears more firmly in mind the need to produce broad approximations of actual rates, rather than anything more accurate than that. Consideration might equally be given to revert to an approach closer to that which was originally taken to devising the Guidelines. Originally, pre-Woolf, the Guidelines were set locally. They were arrived at following discussions between the judiciary and local solicitors and then set by the judiciary in the area. A similar approach could be taken now, with the rates being set for Circuits and for London. The Guidelines could be based on recommendations by regional costs judges based on, for instance, their experience of costs budgets, with input from local law societies and CILEx. Broad approximations not certainty could thus be obtained. Such evidence could then be collated and considered by the Costs Committee before then being submitted to the Master of the Rolls. Such an approach could well ensure that sufficient data was gathered, thus overcoming a problem that hamstrung the Costs Committee in 2014. Whatever approach is taken, an approach needs to be taken. As Jackson LJ put it, "*it must now be accepted that the level of the [Guideline Hourly Rates] is a critical element in the civil justice system*" (cited in the Costs Committee's 2014 Report at 1.1). It is beyond time, as O'Farrell J highlighted in ***Ohpen Operations UK Ltd v Invesco Fund Managers Ltd*** (2019), for that critical element to be put back on a proper footing.

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