CIVIL PROCEDURE NEWS

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■ **White Winston Select Asset Funds LLC v Mahon** [2019] EWHC 1381 (Ch), 4 June 2019, unrep. (HHJ Simon Barker QC sitting as a High Court judge)

Bundles—preparation

CPR r.39.5, PD 32 para.27. A dispute arose from the administration of a tailoring business. Subsequent to a trial on liability, the judge commented on the nature and preparation of the trial bundle. He did so in a case in which he noted that the statements of case were all properly succinct, and there was no expert evidence. There was, however, witness evidence and disclosure by way of an order for specific disclosure. The claim value was estimated to have been £50 to £100,000. In so far as the trial bundle was concerned the judge noted that:

> *"[41] The upshot was a trial bundle comprising 35 lever arch files. The chronological bundle, comprising 28 files, contains more than 8,000 pages. If I understand it correctly, the structure appears to be that 19 files, labelled F1-F19, contain documents from Cs' disclosure and Ds' disclosure before the PTR. These total some 6,000 pages. Of these pages, very many are in colour, not a few pages are wholly redacted and are entirely black or blank, and others have redactions rendering them unintelligible or useless as evidence. There are also a number of photographs, including photographs of tailors having nothing to do with these proceedings, which are of no assistance to the issues in this case. There is a very substantial volume of information about ECL's finances, and also records of the names of customers and the work and value of orders in particular years. The remaining chronological files, labelled F20-F28 are, or appear to be, drawn from D1's disclosure following the disclosure order made at the PTR. These files contain more than 2,000 pages and consist almost entirely of email communications between D1 and customers.*
>
> *[42] The other files in the trial bundle comprise files containing some 200 pages of statements of case, disclosure lists, orders and witness evidence; a further file contains full transcripts of all interim and procedural hearings running to another 200 pages; and, a yet further file contains some 200 pages of inter partes correspondence."*

The production of such substantial bundles would, perhaps, have been justified if the material they contained was necessary for the proper resolution of the trial. As the judge noted, however, of the 8,600 pages in total within the various files, only between 400 and 450 were referred to at trial. While he did not go on to suggest that the trial bundle ought to have been limited to those 450 pages, which were mainly witness statements and statements of case, it ought to have been apparent a more focused approach was needed. The judge went on to note that the claimants had taken steps to reduce the size of the trial bundle. The approach taken had been to go through the bundle and remove or weed out duplicated documents. The problem with that was that as a technique to reduce the size of the trial bundle it "*was not infallible*" and "*doubtless . . . was costly*" (see para.44). The judge suggested that the proper approach to have been taken was not to attempt to strip back the bundle to remove duplication. On the contrary, the approach that ought to have been taken was to build up the bundle from nothing. In that way not only would duplication not arise in the first place, but equally and implicitly in the approach endorsed by the judge, the bundle could be prepared prospectively with a view to ensuring that a properly proportionate approach was taken to its preparation. The approach taken would, it was noted, be a relevant consideration when the costs of the action were to be assessed. (See ***Civil Procedure 2019*** Vol.1 at para.32PD.27.)

■ **Adesotu v Lewisham LBC** [2019] EWCA Civ 1405, 2 August 2019, unrep. (Lewison, McCombe and Bean LJJ)

Jurisdiction of County Court to hear allegations of discrimination—Housing appeal

Housing Act 1996 ss.193, 204, Equality Act 2010 ss.15, 19, 149. An appeal from a decision by a local housing authority that an individual was intentionally homeless was appealed on a point of law under s.204(3) of the 1996 Act. The basis of the appeal was, amongst other things, that the housing authority in reaching its decision had breached ss.15, 19 and 149 of the Equality Act 2010. The housing authority argued that the County Court had no jurisdiction to consider the grounds of appeal based on breaches of ss.15 and 19 of the 2010 Act i.e., the court had no jurisdiction to consider acts of alleged unlawful discrimination in respect of a statutory appeal under s.204 of the 1996 Act. The judge accepted that the court had no such jurisdiction, but granted permission to appeal and transferred the appeal to the Court of Appeal under CPR r.52.23. The Court of Appeal dismissed the appeal: a statutory review by the County Court was not a claim for judicial review, within the terms of s.113(3) of the Equality Act 2010 and Parliament had not specified that such an appeal under s.204 of the 1996 Act came within its ambit: ***Hamnett v Essex CC*** (2017). As such a discrimination

claim would need to be brought as a separate civil claim (see paras 16–19); an appeal under s.204 of the 1996 Act can only consider points of law arising from the decision under review: ***Bubb v Wandsworth LBC*** (2011) followed. ***R. (Muslu) v Haringey LBC*** [2000] 12 WLUK 141, 6 December 2000, unrep., Admin., ***Begum (Nipa) v Tower Hamlets LBC*** [2000] 1 W.L.R. 306, CA, ***Begum (Runa) v Tower Hamlets LBC*** [2003] UKHL 5; [2003] 2 A.C. 430, HL, ***Nzamy v Brent LBC*** [2011] EWCA Civ 283; [2011] H.L.R. 20, CA, ***Bubb v Wandsworth LBC*** [2011] EWCA Civ 1285; [2012] P.T.S.R. 1011, CA, ***R. (N) v Lewisham LBC*** [2014] UKSC 62; [2015] A.C. 1259, UKSC, ***Hotak v Southwark LBC*** [2015] UKSC 30; [2016] A.C. 811, UKSC, ***Hamnett v Essex CC*** [2017] EWCA Civ 6; [2017] 1 W.L.R. 1155, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.2 at para.3A-443.)

■ **Canada Goose UK Retail Ltd v Persons Unknown** [2019] EWHC 2459 (QB), 20 September 2019, unrep. (Nicklin J)

Action against persons unknown—service—identifiability of defendants

The claimants issued proceedings in respect of protests carried out at its store in London. An interim injunction was made on a without-notice basis to persons unknown. The interim injunction was continued following a hearing. Subsequently the claim lay dormant with the interim injunction in place, until the claimants issued an application for summary judgment. The judge refused to grant summary judgment. **Held**, applying ***Cameron v Liverpool Victoria Insurance Co Ltd*** (2019) and ***Boyd v Ineos Upstream Ltd*** (2019), the claim form in the proceedings had not been validly served on any defendant. Nor had there been any order for alternative service. While the second i.e., the named defendant, had received effective notice of the claim form, formal service had not been effected on them. Only service of a claim form, or an order setting dispensing with service could make someone a defendant to proceedings i.e., find the court's jurisdiction over them (see paras 59–61 and 139, and ***Cameron*** paras 9–26. Paragraph 59 of the present judgment summarises the principles to be derived from ***Cameron***). Furthermore, the proceedings had failed to identify the defendants without any proper degree of precision. Use of the term "*protestor*" was too wide, as it could apply indiscriminately to protestors who had allegedly broken the law and those who were innocent of any arguable wrongdoing (see paras 146 and following). The claimant could, and was required to, identify those individuals who could be properly identified by name or description (see para.162). ***Cameron v Liverpool Victoria Insurance Co Ltd*** [2019] UKSC 6; [2019] 1 W.L.R. 1471, UKSC, ***Boyd v Ineos Upstream Ltd*** [2019] EWCA Civ 515; [2019] 4 W.L.R. 100, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at paras 16.5.1 and 19.1.3.)

■ **Lakatamia v Su** [2019] EWCA Civ 1626, 24 September 2019, unrep. (Lewison and Asplin LJJ)

Litigants-in-person—committal for contempt—extension of time to appeal

CPR rr.52.3, 52.12(2). The applicant was committed to prison for contempt of court. Appeals against such orders do not, generally, require permission to appeal. It is, however, necessary to file an appellant's notice within the time limits set by CPR r.52.12(2). The applicant, a litigant-in-person, filed his appellant's notice four months out of time. In considering the application, the court noted that in ***R. (Hysaj) v Secretary of State for the Home Department*** (2014) it was established that the test for relief from sanctions set out in ***Denton v TH White*** (2014) applied to applications for extensions of time. ***R. (Hysaj)*** had also established that in applying the three-stage ***Denton*** test absence of a legal representative did not amount to a good reason for delay, and that litigants-in-person irrespective of whether they were assisted by a McKenzie Friend or not, were to comply with the rules to the same extent as represented parties. In the present appeal, the Court of Appeal confirmed that the approach in ***R. (Hysaj)*** applied in circumstances where a litigant-in-person had been committed to prison for contempt of court and sought an extension of time to file an appellant's notice. ***Denton v TH White*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, CA, ***R. (Hysaj) v Secretary of State for the Home Department*** [2014] EWCA Civ 1633; [2015] 1 W.L.R. 2472, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.52.12.3.)

■ **Re O (Committal: Legal Representation)** [2019] EWCA Civ 1721, 17 October 2019, unrep. (Moylan and Peter Jackson LJJ)

Litigant-in-person—committal—representation—appeals

FPR PD 37A para.12.5, CPR PD 81, CPR rr.52.3(1)(i), 52.12(2)(b). The appellant was committed to prison for contempt of court on 2 October 2019. The appellant had previously been subject to a suspended committal order; the suspension was lifted on the October date. The Court of Appeal noted that the relevant provisions in FPR PD 37A and CPR PD 81 were comparable in respect of the requirement that the court take account of the need to provide a respondent to a committal order application to be afforded an opportunity, if a litigant-in-person, to obtain legal advice, and criminal legal aid. It further noted that it was established law that where a respondent to a committal application was not afforded legal representation at the committal hearing and a court had failed to consider that issue, committal orders could be set aside; see ***Brown v Haringey LBC*** (2015). In the present case the appellant was not represented at the relevant hearings, albeit she had instructed solicitors, and the court did not take appropriate steps to secure representation for her (see para.28). **Held**, the committal order had to be set aside. The committal proceedings were criminal in nature. The court ought to have

taken steps to secure representation for the appellant i.e., by making a representation order and adjourning the committal application to enable any refusal of legal aid to be challenged (see para.31). In the absence of representation at the committal hearing, even in circumstances as in the present case where a judge concludes that evidence from a respondent to a committal applications solicitors as to why counsel is not able to attend the hearing is incredible, a short adjournment should at the least be granted. Such an adjournment is necessary to enable investigation of the situation given the serious nature of the potential adverse consequences for the respondent to a committal application. This is not to say that there may be circumstances where the application must continue in the absence of legal representation. In interpreting CPR r.52.3(1)(i), the court noted that it established that permission to appeal from a committal order was not required. That included not only an order for committal, but an order setting aside a suspension of a prior committal order where, at the least, such an order deprived an individual of their liberty. The court also noted that the time limit for appealing set out in CPR r.52.12(2)(b) applied to committal orders. ***King's Lynn and West Norfolk BC v Bunning*** [2013] EWHC 3390 (QB); [2015] 1 W.L.R. 531, QBD, ***Brown v Haringey LBC*** [2015] EWCA Civ 483; [2017] 1 W.L.R. 542, CA, ***H v T (Committal Appeal: Notices on Orders)*** [2018] EWHC 1310 (Fam); [2018] 4 W.L.R. 122, FD, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.52.12.3.)

■ **Brown v Commissioner of Police of the Metropolis** [2019] EWCA Civ 1724, 18 October 2019, unrep. (McCombe, David Richards and Coulson LJJ)

Qualified one-way cost shifting—application to mixed claim

CPR rr.44.14(1)(a), (b), 44.16(2), CPR PD 44 para.12.6. The claimant brought proceedings seeking damages for, amongst other things, the misuse of private information. Damages for both personal injury and non-personal injury were pursued i.e., the claim was a "*mixed claim*". Claims for personal injury failed. The claimant also failed to beat the defendants' CPR Part 36 Offer. The issue before the Court of Appeal was whether the claimant:

> *"[1] ... can automatically avoid the enforcement of those orders by relying on the QOCS regime [set out in CPR rr.44.13-44.16], on the ground that one of her failed claims was a claim for damages for personal injury."*

Held, the QOCS regime does not automatically apply to mixed claims. On its obvious ("*sensible and straightforward*") interpretation, the exception to the QOCS regime set out in CPR r.44.16(2)(b) applied to mixed claims. As such it was clear that the "*QOCS regime only applies to claims for damages for personal injuries*", and there was no justification to apply such protection to other claims for damage (para.32). As Coulson LJ went on to state:

> *"[32] ... It would be equally wrong to allow claimants with a mixed claim to use the fact that their claims includes a claim for damages for personal injury to gain automatic costs protection in respect of their claims for non-personal injury damages.*
>
> *[33] In my view, the exception at r.44.16(2)(b) was designed to deal with the situation where a claim for damages for personal injury was only one of the claims being made in the proceedings. In those circumstances, the automatic nature of the QOCS protection falls away. But of course, that is not the end of the matter: it then becomes a question of the judge's discretion ..."*

Submissions that the exception in CPR r.44.16(2)(b) should be read as equating "*proceedings*" in CPR r.44.13(1) to "*claim*" in CPR r.44.16(2)(b) or that "*claim*" should be read as "*cause of action*" were rejected (see paras 34–51). In respect of the application of the QOCS regime to mixed claims, Coulson LJ gave the following guidance, which was said not to be comprehensive:

> *"[54] The starting point is that QOCS protection only applies to claims for damages in respect of personal injuries. What is encompassed by such claims? It seems to me that such claims will include, not only the damages due as a result of pain and suffering, but also things like the cost of medical treatment and, in a more serious case, the costs of adapting accommodation and everything that goes with long term medical care. In addition, ... I consider that a claim for damages for personal injury will also encompass all other claims consequential upon that personal injury. They will include, for example, a claim for lost earnings as a result of the injury and the consequential time off work.*
>
> *[55] In other words, a claim for damages in respect of personal injury is not limited to damages for pain and suffering. For these reasons, as Whipple J noted [in The Commissioner of Police of the Metropolis v Brown [2018] EWHC 2046 (Admin)] at [60] of her judgment, claimants in a large swathe of 'ordinary' personal injury claims will have the protection and certainty of QOCS.*
>
> *[56] I acknowledge that, in personal injury proceedings, another common claim will be for damage to property. For example, in RTA litigation, there will usually be a claim for the cost of repairs to the original vehicle, and the cost of alternative vehicle hire until those repairs are effected. Such claims are not consequential or dependent upon the incurring of a physical injury: they are equally available to a claimant who survived the accident without a scratch as they are to a claimant who broke both legs in the accident. They are claims consequent upon damage to property,*

namely the vehicle that suffered the accident, and therefore fall within the mixed claim exception at r.44.16(2)(b).

[57] But in such proceedings, the fact that there is a claim for damages in respect of personal injury, and a claim for damage to property, does not mean that the QOCS regime suddenly becomes irrelevant. On the contrary, I consider that, when dealing with costs at the conclusion of such a case, the fact that QOCS protection would have been available for the personal injury claim will be the starting point, and possibly the finishing point too, of any exercise of the judge's discretion on costs. If (unlike the present case) the proceedings can fairly be described in the round as a personal injury case then, unless there are exceptional features of the non-personal injury claims (such as gross exaggeration of the alternative car hire claim, or something similar), I would expect the judge deciding costs to endeavour to achieve a 'cost neutral' result through the exercise of discretion. In this way, whilst it will obviously be a matter for the judge on the facts of the individual case, I consider it likely that, in most mixed claims of the type that I have described, QOCS protection will – in one way or another – continue to apply. It therefore follows that, ... to the extent that paragraph 12.6 of Practice Direction 44 suggests a different approach, I consider it to be wrong. It needs to be amended as soon as possible.

[58] It is however important that flexibility is preserved. It would be wrong in principle to conclude that all mixed claims require discretion to be exercised in favour of the claimant, because that would lead to abuse, and the regular 'tacking on' of a claim for personal injury damages (regardless of the strength or weakness of the claim itself) in all sorts of other kinds of litigation, just to hide behind the QOCS protection (as Foskett J warned in Siddiqui).

[59] Accordingly, I reject the suggestion that, if QOCS protection is not extended to cover every kind of mixed claim, then it will have a potentially adverse effect on personal injuries litigation generally. On the contrary, the absence of any cases hitherto in which this point has arisen in an ordinary personal injury claim only confirms my belief that costs in such cases have generally been properly addressed.

[60] The analysis set out above is sufficient to dispose of this appeal. However, the court heard a number of wider submissions about access to justice. Since a number of those submissions were based on what I consider to be false premises, it is appropriate to say something about that aspect of this appeal."

In reaching this decision Coulson LJ with whom McCombe and David Richards LJJ agreed, doubted the utility and accuracy of the explanation in CPR PD 44 para.12.6 of the exceptions to the QOCS regime that are contained in CPR r.44.16(1) (see para.17); reliance on that paragraph, which ought now to be revised, should be doubted. ***Jeffreys v Commissioner of Police of the Metropolis*** [2017] EWHC 1505 (QB); [2018] 1W.L.R. 3633, QBD, ***Siddiqui v University of Oxford*** [2018] EWHC 536 (QB); [2018] 4 W.L.R. 62, QBD, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.44.16.1.)

■ **R. (Liberty) v Prime Minister** [2019] EWCA Civ 1761, 22 October 2019, unrep. (Lord Burnett CJ, Sir Terence Etherton MR, Dame Victoria Sharp PQBD)

Public law—parallel litigation of the same issue in multiple UK jurisdictions

Proceedings were commenced for judicial review against the Prime Minister. The basis of the proceedings was, it was argued, that he may not comply with the obligations imposed by the European Union (Withdrawal) (No. 2) Act 2019 i.e., the requirement to seek an extension of the date on which the UK was scheduled to withdraw from the EU. Analogous proceedings had previously been issued in Scotland; see ***Vince v Prime Minister*** (2019). Following commencement of proceedings, Supperstone J refused an application for an urgent oral hearing. He did so due to there already being extant proceedings covering the same issues in Scotland. The applicants appealed from the case management decision refusing the oral hearing. They sought an order allowing the appeal and for the Court of Appeal to reconstitute itself as a Queen's Bench Division Divisional Court, which would then determine the substantive application for judicial review. **Held**, the court dismissed the application for permission to appeal. In dismissing the application the court directed its judgment could be cited: see ***Practice Direction (CA: Citation of Authorities)*** (2001). In doing so it noted the UKSC's approval of the approach to case management appeals set out by Lawrence Collins LJ in ***Walbrook Trustees (Jersey) Ltd v Fattal*** (2008) at [33] in ***BPP Holdings Ltd v Revenue and Customs Commissioners*** (2017) at [33] i.e., that appellate courts:

"[33] ... should not interfere with a case management decision by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

Applying that test there was no basis to allow an appeal from Supperstone J's decision. More significantly, the Court of Appeal considered the significance of the fact that the present proceedings and those in Scotland raised the same issues. Supperstone J refused to grant the applicant's request for an urgent oral hearing due to the Scottish courts being seized of the matter, that they had decided it, and that they had made arrangements for further hearings of the matter

before them if necessary. The Court of Appeal noted that all three of the UK's legal jurisdictions provided the means to challenge public law decisions, and that such decisions could all, ultimately, be appealed to the UK Supreme Court (see para.27). The court noted that, as far as it was aware, this was the first time that proceedings that were practically identical in substance had been commenced in all three UK jurisdictions (comparable proceedings in Northern Ireland were stayed by consent) (see para.26). In such circumstances, the court held that not only was Supperstone J's case management decision not one that could properly be said to be outside the scope of his discretion, but that it would not have been appropriate for him to make any other decision (see para.25). The reason for that was that it was wrong in principle to issue parallel proceedings in the UK's legal jurisdictions. As Lord Burnett CJ, Sir Terence Etherton MR and Dame Victoria Sharp PQBD put it at paras 28–31:

> *"[28] It would be wrong for the same matters to be litigated in parallel in England and Wales and at the same time in one of the other jurisdictions. The parties in the Northern Irish proceedings were right to agree to stay them.*
>
> *[29] It is inefficient to deploy court and judicial time to dealing with the same issues. More tellingly, it would give rise to the risk of conflicting decisions and, in the field of public law, to the potential grant of multiple discretionary orders which are not in identical terms. There is an analogy with the law relating to the grant of anti-suit injunctions designed to prevent conflicting judgments in different jurisdictions arising from the same issue.*
>
> *[30] Moreover, it is also not consistent with the principle of judicial comity for our courts to launch on an expedited and inevitably abbreviated review of precisely the same matters that were before the Scottish courts to investigate whether the Scottish courts were wrong in their decisions as to the substance of the claims prior to 19 October 2019 and to hold matters over until Monday 21 October. If it is suggested that the Scottish courts are wrong, the remedy is an application for leave to appeal to the Supreme Court. No such application was made after the Inner House delivered its opinion on 9 October.*
>
> *[31] As to comity, in the words of Lord Donaldson in British Airways Board v Laker Airways [1984] QB 142 (at 185-6): 'Judicial comity is shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards.' The Scottish courts are now the appropriate forum for all matters which arise in these proceedings to be litigated and respect must be paid to their decisions. If the Petitioners fail, they may seek the final ruling of the Supreme Court as the Prime Minister can if they succeed."*

Practice Direction (CA: Citation of Authorities) [2001] 1 W.L.R. 1001, ***Walbrook Trustees (Jersey) Ltd v Fattal*** [2008] EWCA Civ 427, unrep., CA, ***BPP Holdings Ltd v Revenue and Customs Commissioners*** [2017] UKSC 55; [2017] 1 W.L.R. 2945, UKSC, ***Vince v Prime Minister*** [2019] CSOH 77; 2019 S.L.T. 1201, CSOH, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.54.1.1.)

■ **Global Assets Advisory Services Ltd v Grandlane Developments Ltd** [2019] EWCA Civ 1764, 23 October 2019, unrep. (Patten and Asplin LJJ, Sir Rupert Jackson)

Part 36—interim payment on account of costs

Senior Courts Act 1981 s.51, CPR rr.36.13(1), 36.13(3), 44.2(8), 44.9. Proceedings seeking injunctive relief, an inquiry into damages or an account of profits, arising from the alleged use of confidential information were issued in March 2018. An interim injunction was granted on a without-notice basis. The proceedings settled against one of the respondents in August 2018. The claimants thereafter made the remaining respondents a CPR Part 36 offer. The terms of the offer were that the remaining respondents accept the terms of a final injunction. The offer was accepted within the "*relevant period*" per CPR rr.36.3(g) and 36.13. A draft consent order was prepared, which contained the terms of the injunction, a penal notice, and an order for an interim payment on account of costs. The respondents objected to the penal notice and order for an interim payment being included in the draft consent order. The appellants subsequently applied for an order in the terms set out in the draft consent order. That application was heard in March 2019, at which time the only issue still live was whether there was jurisdiction to make an order for an interim payment on account of costs, and if so for what amount. The judge, amongst other things, dismissed the application for an interim payment on account of costs. He did so following the decision in ***Finnegan v Spiers*** (2018), in which it was held that there was no jurisdiction to make such an order when a CPR Part 36 Offer had been accepted within the relevant period. **Held**, the appeal was allowed. The court had the jurisdiction to make an interim payment on account of costs. In reaching that decision Asplin LJ, with whom Patten LJ and Sir Rupert Jackson agreed, **held**: (i) s.51 of the Senior Courts Act 1981, which establishes the statutory discretion concerning costs, is expressly made subject to rules of court. Thus to determine the present issue it is necessary to consider the relationship between CPR Pts 36 and 44; (ii) in the present case, a costs order in favour of the appellants was deemed to have been made when the Part 36 Offer was accepted under CPR r.36.13(1); (iii) there was no difference in approach to be taken to deemed orders for costs or orders that the court had physically made; (iv) nor was there a distinction between the present deemed cost order and such an order made upon discontinuance under CPR r.38.6(1), the consequence of which was that the present case could not properly be distinguished from that, which concerned costs on discontinuance, in ***Barnsley***

v Noble (2012), in which case Proudman J held that there was jurisdiction to make an order for an interim payment on account of costs where a claim was discontinued. ***Barnsley*** was decided correctly; (v) the rationale for making an interim payment on account of costs was the same whether an order was made or was deemed to have been made; (vi) there was nothing in the fact that CPR Pt 36 was a self-contained code, which would preclude reference to CPR Pt 44. CPR Pt 36 was not entirely self-contained, as its integration with CPR Pt 44 demonstrates, see CPR r.36.13; and (vii) there was no tension between CPR r.36.13(1) and CPR r.44.2(8), as Asplin LJ put it at para.34:

> *"[34] In this case, once one has concluded that it is possible to look outside CPR Part 36 itself, it seems to me that there is no conflict or tension between CPR r 36.13(1) and CPR r 44.2(8) at all. It is not necessary to determine which provision must prevail. The former entitles a party to its costs of the proceedings on a particular basis and is complemented or supplemented by the latter which creates the jurisdiction to order a payment on account of those costs. CPR r 44.2(8) does not undermine or conflict with CPR r 36.13(1) at all."*

Barnsley v Noble [2012] EWHC 3822 (Ch); [2013] 2 Costs L.O. 150, ChD, ***Finnegan v Spiers*** [2018] EWHC 3064 (Ch); [2018] 6 Costs L.O. 729, ChD, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.36.13.1.)

■ **Kearney v Chief Constable of Hampshire** [2019] EWCA Civ 1841, 31 October 2019, unrep. (Underhill and Simler LJJ)

Court of Appeal (Civil Division)—jurisdiction

Senior Courts Act 1981 s.18(1), European Convention on Human Rights art.6(1), CPR r.54.12(7). The appellant was convicted of murder in 2008. CCTV evidence formed part of the circumstantial evidence adduced at trial. Permission to appeal from the conviction was refused on the papers, and an oral application for renewal was withdrawn before it was heard. An application was subsequently made to the Criminal Cases Review Commission. In support of that application the appellant requested the original CCTV footage. The respondent refused to disclose it. The CCRC reviewed the evidence adduced at trial, concluding that there were no grounds to refer the conviction to the Court of Appeal. The appellant subsequently sought to bring judicial review proceedings against the respondent in respect of its continuing refusal to provide the original CCTV footage. Permission to apply for judicial review was refused on the papers and was certified as being totally without merit. As such there was no right to an oral renewal. The appellant appealed from that decision to the Court of Appeal (Civil Division). A question arose whether the Civil Division had jurisdiction to consider the application for permission to appeal, and thus to hear the appeal. **Held**, the Court of Appeal (Civil Division) had no jurisdiction to consider the application or hear the appeal as it was from a judgment of the High Court in a criminal cause or matter (s.18(1) of the Senior Courts Act 1981), and hence the only route of appeal from the refusal of permission to bring judicial review proceedings lay to the UK Supreme Court (see paras 60 and 61). It was clear that however the decision on the application to refuse permission to appeal was characterised i.e., as a decision, an order, or a judgment, it was made in criminal proceedings. Section 18(1) of the 1981 Act and its statutory predecessors and s.1(1) of the Administration of Justice Act 1960, were to be read together such that those various terms (decision, order, judgment) were used in the legislation

> *"to an extent interchangeably in order to achieve the result that any judicial determination of any question raised in or with regard to criminal proceedings is covered ..."*

(See para.36, and ***Barras v Aberdeen Steam Trawling & Fishing Co Ltd*** (1933) at 411.) Furthermore, the absence of a right to an oral hearing in respect of the paper-refusal to grant permission to bring judicial review proceedings did not infringe art.6 of the European Convention on Human Rights. It was established that art.6 does not require there to be an oral hearing of every application in criminal proceedings, and that in the present case taking account of the proceedings as a whole, including the ability to apply to the CCRC, there was no breach of art.6 (see paras 64–66). ***Barras v Aberdeen Steam Trawling & Fishing Co Ltd*** [1933] UKHL 3; [1933] A.C. 402, HL, ***United States v Montgomery (No.1)*** [2001] UKHL 3; [2001] 1 W.L.R. 196, HL, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.54.12.1 and Vol.2 at para.9A-64.1.)

■ **Higgins & Co Lawyers Ltd v Evans** [2019] EWHC 2809 (QB), 24 October 2019, unrep. (Saini J)

Conditional fee agreement—recoverability of charges from client's estate

Law Society Model Form Conditional Fee Agreement. A question arose whether the estate of a deceased litigant who had been party to a conditional fee agreement (CFA) was liable for basic charges in respect of work done by their solicitors prior to their death. The CFA in question incorporated the terms set out in the Law Society's Model Form CFA, which has been in its present form since 2014. The relevant clause provided as follows:

> *"(c) Death*
>
> *This agreement automatically ends if you die before your claim for damages is concluded. We will be entitled to recover our basic charges up to the date of your death from your estate.*

If your personal representatives wish to continue your claim for damages, we may offer them a new conditional fee agreement as long as they agree to pay the success fee on our basic charges from the beginning of the agreement with you."

The Master held that the clause was unenforceable, applying ***Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*** (1989). On appeal from that decision Saini J **held**, that the clause was enforceable. In particular he held that: (i) it was clear on its construction that the clause entitled the solicitors to recover their basic charges upon the death of their client (para.58). As the judge put it, "*There is a single and obvious construction (of the clause): the words mean what they say*." (para.67); (ii) the clause was neither unusual nor onerous. It was a standard clause taken from a Model CFA, that was widely used for personal injury claims, and, as was the case here, in mesothelioma claims. It is in fact the usual clause dealing with the consequences of death. It was not therefore unusual. It may have, on one view, operated harshly, but that did not render it either onerous or draconian. On the contrary, it set out a sensible and fair allocation of risk. That a clause, as this one, only imposed a liability on a contracting party for the cost of services of value under a partially completed contract, did not render it onerous or unusual either; (iii) it was clear on the authorities, which are summarised in ***Do-Buy 925 Ltd v National Westminster Bank Plc*** (2010) at paras 91–92 per Andrew Popplewell QC sitting as a deputy High Court judge, that having signed the contract the client was to be taken to have been given sufficient notice of the clause (paras 80–84); and (iv) the clause was not unenforceable under s.62 of the Consumer Rights Act 2015. It was not an unfair term and did not create a significant imbalance between the parties (see paras 100–102). ***Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*** [1989] Q.B. 433, CA, ***Do-Buy 925 Ltd v National Westminster Bank Plc*** [2010] EWHC 2862 (QB), unrep., QBD, ***Arnold v Britton*** [2015] UKSC 36; [2015] A.C. 1619, UKSC, ref'd to.

Practice Updates

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION—112th Update. In force from **28 November 2019**. This Practice Direction Update makes a minor clarificatory amendment to PD 51R—Online Civil Money Claims Pilot. It clarifies that the amendment that was effected to para.2.1(1) of the PD by CPR Update 111 applies to all claims, and is not limited in its application to only such claims as are submitted on or after 11.00 on 9 September 2019.

PRACTICE GUIDANCE

Practice Note—Electronic Working in the Senior Courts Costs Office

On 1 October 2019, the Senior Costs Judge issued a Practice Note concerning the application of electronic working to the Senior Courts Costs Office via amendments to CPR PD 51O (The Electronic Working Pilot Scheme) that came into effect on 7 October 2019.

The Practice Note provides a helpful summary of the approach to be taken following the introduction of the Practice Direction amendments. The Practice Note is reprinted below.

ELECTRONIC WORKING IN THE SENIOR COURTS COSTS OFFICE PRACTICE NOTE BY THE SENIOR COSTS JUDGE

1. Following the amendments to PD51O of the Civil Procedure Rules 1998 (The Electronic Working Pilot Scheme), which came into effect on 7 October 2019, the Senior Courts Costs Office (the Costs Office) is now using the CE-File electronic court file.
2. Court users are able to file documents electronically direct to the court file by logging on to https://efile.cefile-app.com.
3. Further practical guidance for users of CE-File can be found at: https://www.gov.uk/guidance/ce-file-system-information-and-support-advice.
4. This practice note applies to detailed assessments in the Costs Office (including provisional assessments), Part 8 claims commenced in the Costs Office, the assessment of legal aid bills in the Costs Office, the assessment of the bills of deputies appointed by the Court of Protection and Criminal costs appeals. After 20 January 2020 all such proceedings will be managed by the Costs Office through CE-File and all documents filed after that date will be stored by the Costs Office only on CE-File.

5. CPR PD51O will apply, as appropriate, to the assessment of the bills of deputies appointed by the Court of Protection and to Criminal costs appeals. The practice direction may be found at: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51o-the-electronic-working-pilot-scheme#3.1.

Mandatory use of CE-File

6. Parties who are legally represented must upload documents to the court file using CE-File (and not by any other means) in the following cases:
    a. Detailed assessment proceedings in which a request for a hearing is filed on or after 20 January 2020.
    b. Applications filed on or after 20 January 2020 (whenever the proceedings were commenced).
    c. Part 8 claims commenced in the Costs Office on or after 20 January 2020.
    d. Assessment of legal aid bills filed on or after 20 January 2020.
    e. Assessment of the bills of deputies appointed by the Court of Protection filed on or after 20 January 2020.
    f. Criminal costs appeals filed on or after 20 January 2020.
7. Lawyers representing themselves in criminal costs appeals and professional deputies appointed by the Court of Protection are considered to be legally represented for the purposes of paragraph 6.
8. Any documents sent to the Costs Office other than through CE-File by parties who are legally represented in the proceedings listed in paragraph 6 will not be filed or, in the case of applications and Part 8 claims, issued. Documents sent by post or DX will be returned.

Voluntary use of CE-File

9. Any party may upload documents to the court file using CE-File in the following cases:
    a. Detailed assessment proceedings in which a request for a hearing is filed on or after 7 October 2019 but before 20 January 2020.
    b. Applications filed on or after 7 October 2019 but before 20 January 2020 (whenever the proceedings were commenced).
    c. Part 8 claims commenced in the Costs Office on or after 7 October 2019 but before 20 January 2020.
    d. Assessment of legal aid bills filed on or after 7 October 2019 but before 20 January 2020.
    e. Assessment of the bills of deputies appointed by the Court of Protection filed on or after 7 October 2019 but before 20 January 2020.
    f. Criminal costs appeals filed on or after 7 October 2019 but before 20 January 2020.

Litigants in person

10. A party who is not legally represented may upload documents to the court file in any of the cases listed in sub-paragraphs 9 (a) to (f) on and after 20 January 2020.
11. Where a party who is not legally represented files a paper document it will be scanned to the electronic file by the court staff.

Cases commenced before 20 January 2020

12. Some cases commenced before 8 July 2019 have been migrated to CE-File and parties can file documents in and manage such cases electronically. All historic cases held on CE-File will be allocated a new style case number. The old case number will not be recognised by CE-File.
13. All cases commenced between 8 July 2019 and 20 January 2020 will be entered onto CE File and documents filed in those cases will be scanned on to the electronic file by the court staff if not uploaded by the parties.

Format

14. Draft Orders must be filed as Word documents. Electronic bills must be filed in both Excel spreadsheet and pdf format. All other documents filed must be in pdf format.
15. Exhibits, Annexes and Appendices must each be filed as an associated filing to the main document.
16. Correspondence with the court and documents to be filed must not be sent by more than one medium.

Transferred cases

17. If a case is transferred to the Costs Office by another court, when the file from that court is received in the Costs Office the relevant documents will be scanned on to the Costs Office electronic file.

Anonymity orders

18. Where a document is subject to a confidentiality or anonymity order the party filing the same must request confidentiality in the appropriate field in the Filing Information screen and must state the reason for such request in the Documents Comments field (e.g. Order dated 01/10/2020). If an anonymity order is in place, the party filing any document affected by such order must also file a redacted copy of the document. The redacted copy should be added as an associated filing.

Applications

19. A hard copy hearing bundle is required for every hearing of an application. If no bundle has been lodged, the hearing may be adjourned to the next available date.

20. Responsibility for lodging the hard copy hearing bundle will normally fall on the applicant. This general rule will apply whether or not the applicant is a Litigant in Person, unless a represented party has been directed by a judge or has agreed in writing to assume responsibility for the production of the hard copy hearing bundle. The parties must co-operate with each other and all parties have responsibility for ensuring that the court receives a bundle lodged two clear days before the hearing, save where this is impossible due to the urgent nature of the hearing. Late service of documents is not a reason to delay lodging the hard copy bundle. If necessary, documents may be added to the bundle.

Skeleton arguments, chronologies and the like

21. Skeleton arguments, chronologies and similar documents prepared by advocates for hearings may be filed using CE-File or by email. Unless the court has ordered otherwise they should be filed two clear days before the hearing. Where the document relates to an application, a paper copy should be included in the hard copy hearing bundle. On and after 20 January 2020 statements of costs for summary assessment (form N260) must be filed using CE-File.

Andrew Gordon-Saker
Senior Costs Judge
October 2019

In Detail

STATUS OF THE JUDICIARY—GILHAM v MINISTRY OF JUSTICE [2019] UKSC 44

The courts form one of the three branches of the State. The judges of the High Court and Court of Appeal form part of the court (see ss.2(1) and 4(1) Senior Courts Act 1981). In so far as the County Court is concerned, as well as other courts and tribunals, the court exists separately from those judges who are judges of the court (s.5 of the County Courts Act 1984). (See ***Civil Procedure 2019*** Vol.2 para.9A-37.)

The manner in which members of the judiciary hold office, whether as an office constitutive of a court or as judges of courts and tribunals in which they can sit, had not prior to ***Gilham v Ministry of Justice*** [2019] UKSC 44 been considered definitively either by the House of Lords or the United Kingdom Supreme Court (UKSC). While, as the UKSC acknowledged in ***Gilham*** at [12], it was not in dispute that judges held a statutory office, the manner in which they do so had not been finally determined previously (see ***McMillan v Guest*** [1942] A.C. 561 at 564). This was the case notwithstanding decisions such as those noted in the Court of Appeal's judgment (***Gilham v Ministry of Justice*** [2017] EWCA Civ 2220; [2018] 3 All E.R. 521 at [41]–[47]), which supported the view that judges did not hold their office under a contract: see, ***Terrell v Secretary of State for the Colonies*** [1953] 2 Q.B. 482; ***Knight v Attorney General*** [1979] I.C.R. 194; ***Shaikh v Independent Tribunal Service*** [2004] 3 WLUK 435.

In ***Gilham*** the UKSC considered the specific question of the employment status of district judges. As Lady Hale PSC, with whom Lord Kerr, Lord Carnwath and Lady Arden JJSC, and Sir Declan Morgan agreed, noted the decision "*could apply to the holder of any judicial office*". The appeal arose from proceedings brought by a district judge, who had been appointed in February 2006. From 2011, the district judge raised a number of concerns relating to her and other district judges' workload and working conditions. They culminated in a formal grievance. A question arose whether

her complaints came within the scope of "*protected disclosures*" under s.43C of the Employment Rights Act 1996, and hence whether treatment she allegedly was subject to subsequent to making the complaints was detrimental treatment contrary to s.47B(1) of the 1996 Act. Further claims were also pursued in respect of alleged disability discrimination. The specific question the court considered was whether the district judge was a "*worker*" for the purposes of s.230(3)(b) of the 1996 Act for the purposes of the "*whistleblowing provisions*" of the Act. Before the UKSC the district judge also raised the argument, in the alternative, that she was in "*Crown Employment*": see s.191 of the 1996 Act.

The first question the UKSC considered was whether the district judge was a worker i.e., whether the judge provided work or services further to a contract. Lady Hale first noted that it was well-established that officer-holders do not necessarily hold office further to a contract; per ***Percy v Church of Scotland Board of National Mission*** [2005] UKHL 73; [2006] 2 A.C. 28 at [54] (see para.12). It is equally well-established that an office-holder may hold office further to a contract. The essential question was what the intention of the parties was i.e., was it the intention of the office-holder and the person for whom they worked or provided services to enter into a legally binding contract (see para.15)? Examining appointment to judicial office it was apparent that there was no such intention, as, for instance: the appointment process was set out in statute; appointment was determined by the application of statutory criteria; the letter of appointment was not written in contractual terms but rather contained expectations; deployment decisions were subject to negotiation between the judge and leadership judges and ultimately the Lord Chief Justice; and, pay and pensions are subject to a statutory process. Moreover, it was noted to be telling that it was not clear who the district judge's employer could properly be said to be as: appointments were made by the Lord Chancellor and are now made by the Queen; and, statute divides responsibility for the judiciary between the Lord Chancellor and the Lord Chief Justice. As Lady Hale put it at para.19:

> *"[19] ... [the] fragmentation of responsibility has both statutory and constitutional foundations and highlights how different is the position of a judge from that of a worker employed under a contract with a particular employer."*

A further factor, and one of central importance, that pointed away from a judge being a worker subject to a contract, was the constitutional point that:

> *"[20] ... Fundamental to the constitution of the United Kingdom is the separation of powers: the judiciary is a branch of government separate from and independent of both Parliament and the executive. While by itself this would not preclude the formation of a contract between a Minister of the Crown and a member of the judiciary, it is a factor which tells against the contention that either of them intended to enter into a contractual relationship."*

Taken together, the factual matrix and the constitutional context pointed away from the existence of a contractual relationship between a judge and the executive, and also between a judge and the Lord Chief Justice.

The second question then was whether a judge was in "*Crown Employment*". This is defined in s.191(3) of the 1996 Act as "*employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision*". Given the finding on the first issue, it was clear that judges were not employed under or for the purposes of the Ministry of Justice (see para.24). As a consequence:

> *"[24] ... [Judges] are not civil servants or the equivalent of civil servants. They do not work for the ministry."*

Furthermore,

> *"[24] ... Judges do not work 'under and for the purposes of' those [statutory] functions of the Lord Chief Justice [i.e., those arising under s.7 of the Constitutional Reform Act 2005] but for the administration of justice in the courts of England and Wales in accordance with their oaths of office."*

As a consequence, a judge was not in Crown Employment. Having determined the two questions in the negative, the UKSC went on to hold that the consequence of this meant that judges were excluded from the whistle-blowing protections set out in the 1996 Act. That exclusion was in breach of judges' art.14, read with art.10, rights under the European Convention on Human Rights. Considering the interpretative approach articulated in ***Ghaidan v Godin-Mendoza*** [2004] UKHL 30; [2004] 2 A.C. 557, the 1996 Act was to be read "*so as to extend its whistle blowing protection to the holders of judicial office*". The substantive claim was accordingly remitted to the Employment Tribunal.

The decision is a welcome clarification of the law concerning the status and nature of judicial office. Its clarification that judges are not civil servants, nor are they workers under a contract of employment with either the Lord Chancellor or Lord Chief Justice might previously have thought to have been obviously the case. Questions such as the present one concerning whistle-blowing protection are increasingly, however, calling assumptions into doubt. Taken together with Lord Reed's judgment in ***R. (Unison) v Lord Chancellor*** [2017] UKSC 51; [2017] 3 W.L.R. 409 at [66]–[85], which explained the constitutional role of the courts and the public good provided by public adjudication of rights, the present decision further underscores the constitutional status of the courts and judiciary. By clarifying the applicability of the whistle-blowing protection provided by the 1996 Act to judges, it should provide an additional basis to develop the arrangements concerning the governance of the courts and judiciary that have been in place since the Constitutional Reform Act 2005.

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