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Third Party Funding—damages-based agreements

Courts and Legal Services Act 1990 s.58AA. Two applications were made to the Competition Appeals Tribunal (CAT) to bring collective proceedings under s.47B of the Competition Act 1998. The underlying actions were for damages said to have arisen from a breach of art.101 of the Treaty on the Functioning of the European Union. The applications were stayed pending the UK Supreme Court's decision in ***Merricks v Mastercard Inc***. The CAT, however, considered as a preliminary issue whether the applicants' litigation funding arrangements meant that it was not appropriate to authorise either applicant to act as the class representative for the purpose of collective proceedings. In that regard, it considered two questions: first, whether the funding arrangements constituted damages-based agreements and were thus unenforceable and unlawful; and secondly, whether the funding arrangements were adequate. In respect of the first issue it was argued that the provision of third-party litigation funding amounted to the provision of "*claims management services*" for the purposes of s.58AA(7) of the 1990 Act, s.4(2) of the Compensation Act 2006 and, since 2018, s.419A of the Financial Services and Markets Act 2000; and that as a consequence, the agreement with the third-party funder amounted to a damages-based agreement. It was accepted that if this was correct, the funding arrangements did not satisfy the requirements of s.58AA of the 1990 Act and would thus be unenforceable and unlawful. Moreover, as the proposed collective proceedings were to operate on an opt-out basis such an agreement would be unlawful due to the statutory prohibition set out in s.47C(8) of the 1998 Act (see paras 10–15). It was submitted that if the argument based on s.58AA(7) of the 1990 Act was correct, its effect would be to render practically all third-party funding agreements unlawful (see para.17). **Held, on the third-party funding issue**, the third-party funding agreement was not a damages-based agreement. Litigation funding is concerned with funding litigation not managing it (para.41). More significantly, on its proper construction s.58AA of the 1990 Act could not be taken to encompass third-party funding arrangements. As the CAT put it at para.42 (and see paras 43–45 for further supporting reasons):

> *"[42] We consider that this result is supported by the proper construction of s.58AA itself. When viewed in its context, we think it is clear that s.58AA was never intended to apply to LFAs. On the contrary, in 2009 when s.58AA was introduced, there was already a distinct provision expressly designed to cover LFAs, i.e. s.58B CLSA: see para 23(2) above. It is of course true that this provision had not then been brought into force (nor has it since). [It was] submitted that it was therefore irrelevant to the question of construction. We do not agree. S.58B CLSA [which provides a separate statutory basis for regulating third-party funding arrangements and which has never been brought into force] was introduced into the statute book by the AJA [Access to Justice Act 1990], and the wording of s.108 AJA, in a form common to statutory commencement provisions, indicates the clear intention of Parliament that s.58B CLSA is to be brought into force if and when the Lord Chancellor considers it appropriate to introduce legislative regulation of LFAs: see R v Sec of State for the Home Department, Ex p Fire Brigades Union [1995] 2 AC 513 at 551, 570-571, 575. And when Parliament introduced statutory control of DBAs, by a provision to be inserted into the CLSA immediately after ss.58-58A concerning conditional fee agreements ("CFAs"), that new section was numbered s.58AA and not s.58B. That recognised the fact that there was already a s.58B on the statute book; that there was no intention to repeal it; and that it may in due course be brought into force. As at 2009, when s.58AA was enacted, s.58B was a provision which had been on the statute book for 10 years. Accordingly, as Mr Kirby put it, the arguments that s.58AA should be construed as applying to LFAs 'do not bear any relation to the background to the introduction of that section' and would amount to bringing in regulation of LFAs by the back-door."* (Editorial insertions in square brackets.)

Turning to the second issue, the CAT noted that both applications were supported by after-the-event (ATE) insurance policies in respect of potential costs liability on the part of the applicants. It was submitted that the CAT ought to approach the question of the adequacy of the ATE insurance by reference to the approach taken to an application for security for costs. In particular, concerns were raised regarding the risk of avoidance of the policy by the insurers: see ***Premier Motorauctions Ltd (In Liquidation) v PricewaterhouseCoopers LLP*** (2017) (see para.79 and following). **Held, on the ATE issue**, in respect of one of the proposed representative parties, it was a well-established, responsible, UK trade association. The risk that it might have been acting recklessly or fraudulently in securing its ATE policy was "*minimal*". Hence the risk that the insurers could be in a position to avoid the policy was equally minimal. As to the risk that the applicant might become insolvent, in that event the respondents could claim under the policy pursuant to the Third Parties (Rights against Insurers) Act 2010. Furthermore, although the liability of the participating insurers under the

policy was only several and not joint and several, this was the normal insurance practice and the likelihood of insolvency on the part of any of the insurers was "*very low*" (see paras 83–85). In respect of the other proposed representative party, it was not the insured in respect of the ATE policy concerning its potential cost risk. The insured was its third-party funder (see para.86). Such an arrangement was not itself objectionable, even if in a third-party funded claim it would be more usual for the funded party to be the insured rather than the funder. There was no realistic prospect that should the representative party become liable for costs it would not enforce its contractual right to receive funding for those costs from its funder and thus trigger the funder's (insured) obligation to pay such costs, nor was there any prospect that the funder would not claim on the policy (see para.89). Although the terms of the policy in their original form did not provide sufficient protection against the risk of avoidance and, as the insured was a Guernsey company, the respondents did not have protection against its potential insolvency under the 2010 Act, the applicant undertook to have the terms of the policy amended to restrict the right to avoid a situation of fraud and to give the respondents a direct right under the policy pursuant to the Contracts (Rights of Third Parties) Act 1999 (paras 94–96). On that basis, both forms of ATE policy were held to be adequate. ***Premier Motorauctions Ltd (In Liquidation) v PricewaterhouseCoopers LLP*** [2017] EWCA Civ 1872; [2018] 1 W.L.R. 2955, CA, ***Merricks v Mastercard Inc*** [2019] EWCA Civ 674; [2019] 5 C.M.L.R. 4, CA.

- **All England Lawn Tennis Club (Championships) Ltd v McKay (No. 2)** [2019] EWHC 3065 (QB), 5 November 2019, unrep. (Chamberlain J)

Contempt of court—criminal legal aid application procedure

Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) s.16(1), Criminal Legal Aid (General) Regulations 2013 (SI 2013/9) reg.9, Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 (SI 2013/61) regs 4–8. An issue arose as to whether the High Court or the Legal Aid Agency was the body responsible for granting criminal legal aid in respect of proceedings for criminal contempt. It had previously been held in ***King's Lynn and West Norfolk BC v Bunning*** (2015) that an application for legal aid in such circumstances was to be made to the High Court. **Held**, ***King's Lynn and West Norfolk BC v Bunning*** (2015) was wrongly decided on this point. It was permissible for the High Court to depart from it, although it had been assumed to be correct by the Court of Appeal. No decision subsequent to it had considered the question whether its finding on the present point was correct (see paras 25–26). Contrary to the headnote in ***Brown v Haringey LBC*** (2015), the Court of Appeal had not approved this aspect of the decision in ***Bunning***. The immediate question was who was the "*relevant authority*" to determine whether an individual qualified for criminal legal aid under s.16(1) of LASPO. It was accepted that the availability of criminal legal aid was a matter of right; its grant still, however, had to be determined by a relevant authority (paras 12–14). It was clear that taken together ss.18 and 19 of LASPO gave the power to determine such applications to the Director of the Legal Aid Agency where the court had no power to do so. It was also clear that s.19 of LASPO provided the court with the power to determine such applications only where regulations provided such a power (see para.9). The relevant regulations were the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013, specifically its regs 7 and 8. As Chamberlain J put it at para.11, they set out that:

> *"[11] ... Regulation 8 empowers the Court of Appeal to make a determination in 'any criminal proceedings' before it or before the Supreme Court on appeal from it. Regulation 7, by contrast, on its face empowers the High Court to make a determination only in certain criminal proceedings before it or on appeal to the Supreme Court from it: case stated appeals from the magistrates' court or Crown Court (reg. 7(1)), other proceedings described in s. 14(a)-(g) of LASPO (reg. 14(2)(a)) and one particular type of proceedings prescribed in regulations made under s. 14(h) of LASPO – those described in reg. 9(r) of the General Regulations (reg. 14(2)(b))."*

It was noted that since 2015 the Legal Aid Agency has had an established process through which applications for the determination of criminal legal aid in High Court proceedings could be made (para.15). It was clear that the decision in ***Bunning*** on this point was based on a false assumption, that if committal proceedings were criminal the application had to be to the High Court (see paras 16 and 27). In Chamberlain J's judgment at para.27: ss.16(6) and 18–20 of LASPO made clear that the relevant authority to determine an application for criminal legal aid could be determined by the Director of the Legal Aid Agency and not the High Court. Regulations 6–8 of the Determinations Regulations governed which of the two was the relevant authority for specific types of proceedings. As he put it at para.27:

> *"[27]... regs 6, 7 and 8, and those regulations alone, ... confer power on courts (the Crown Court, High Court and Court of Appeal respectively) to make a representation order. As respects the High Court, there is power to make such an order in the types of proceedings mentioned in reg. 7 and no others. Contempt proceedings, other than for contempt in the face of the court, are not covered by that regulation. It follows that the 'relevant authority' to determine applications for legal aid in respect of such proceedings is, under s. 18(1), the Director, and not the court."*

King's Lynn and West Norfolk BC v Bunning [2013] EWHC 3390 (QB); [2015] 1 W.L.R. 531, QB, ***Brown v Haringey LBC*** [2015] EWCA Civ 483; [2017] 1 W.L.R. 542, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.81.1.5.)

■ **Sabbagh v Khoury** [2019] EWHC 3004 (Comm), 14 November 2019, unrep. (HHJ Pelling QC sitting as a judge of the High Court)

Admissions—Guidance

CPR Pt 14. A dispute arose concerning, amongst other things, a share sale agreement. An issue arose concerning whether a concession made in writing by the claimant amounted to an admission for the purposes of CPR Pt 14 and, in the alternative if it was held to be an admission, permission to withdraw the concession under that Part was sought. CPR r.14.1(1) provides that a party may "*admit the truth of the whole or any part of another party's case*". It was argued that the scope of this provision was limited to:

> *"[38] ... 'a distinct element or ingredient' of a party's case and (b) must be of such an element as is set out in a pleading. I am not able to accept either of those submissions."*

Held, both submissions were rejected. As HHJ Pelling QC put it at paras 40–43:

> *"[40] ... The rule is concerned with a very practical and straightforward issue and is expressed in clear and everyday language. The phrase '... the whole or any part of another party's case...' does not require detailed contextual or textual analysis. The words mean what they say. There is nothing within the rule, or any of the other provisions of Part 14, that suggests it is necessary to substitute for the words '... any part ...' of another party's case, the words 'a distinct element or ingredient' of another party's case. I am unconvinced that this formulation is in reality any narrower than the words used in the rule but if they have the effect of limiting the scope of the rule to admissions of breaches of duty, causation or a head of loss then there is no justification for adopting them. Such a re-formulation would undermine the purpose of the rule ..."*

The rule's purpose was noted to be to save costs and delay (see para.38). HHJ Pelling QC went on to hold:

> *"[41] Although Master Davison [in **Mack v Clarke** (2017)] said that '... A defendant may, for example, admit the time, date and place of an accident. But these would not be admissions in the sense intended by Rule 14.1(1) ...' I do not agree. In the context of a claim for damages arising out of a road traffic accident for example, the claimant would have to prove each of those elements unless they were admitted. There is no justification within the text or purpose of the rule for excluding such admissions from its scope. I do not accept either that Part 14 is '... primarily directed towards admissions which would entitle a claimant to enter judgment against the defendant'. It encompasses admissions entitling the party in whose favour the admission is made to seek judgment on the admissions made – that after all is the purpose of CPR r.14.3 – but that point does not enable what is and is not within the scope of the rule to be identified other than limiting its scope to admissions that enable an application for judgment to be made. However, there is nothing within Part 14 that expressly limits the scope of the rule in this way and there is nothing in the purpose, wider context or the language used that suggests any such intention. With respect therefore, I am not able to agree with Master Davison's conclusions as to the scope of CPR r.14.1(1)."* (Editorial insertion in square brackets.)

Furthermore, the submission that admissions could only be made in respect of matters that were contained in pleadings was rejected. There was nothing in the rule to limit its scope to a party's statement of case. The reference in CPR r.14.1(1) to "*another party's case*" was not to be read as a synonym for "*statement of case*" (see para.42, and ***Obaid v Al-Hezaimi*** (2019)). ***Mack v Clarke*** [2017] EWHC 113 (QB), 27 January 2019, unrep., QB, ***Obaid v Al-Hezaimi*** [2019] EWHC 1953 (Ch), 14 June 2019, unrep., ChD, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.14.1.1 and following.)

■ **Ho v Adelekun** [2019] EWCA Civ 1988, 19 November 2019, unrep. (Sir Geoffrey Vos C, Newey and Males LJJ)

Fixed costs—applicability following acceptance of Part 36 Offer—multi-track costs

CPR Pt 45 Section IIIA, Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. The respondent brought proceedings against the appellant arising from an alleged road traffic accident. They proceeded initially under the RTA Protocol. Liability was not admitted. Consequently, the claim exited the Protocol and proceedings were issued. The claim was allocated to the fast track. The respondent, however, applied for its re-allocation to the multi-track. Prior to that application being heard the appellant made a CPR Pt 36 Offer. The appellant's solicitors, the day after the Pt 36 Offer was made, contacted the respondent's solicitors asking for confirmation whether they had received their client's instructions on the Pt 36 Offer. The respondent's solicitors also stated that they could consent to the claim's re-allocation to the multi-track. The respondent subsequently accepted the Pt 36 Offer, with the costs to be subject to detailed assessment if not agreed. The parties did not agree costs. The appellant took the position that the respondent was only entitled to fixed costs. The respondent argued that she was not so limited. At first instance it was held that the fixed costs regime under CPR Pt 45 Section IIIA applied. On appeal this decision was reversed. A second appeal to the Court of Appeal was allowed, with it holding that the fixed costs regime applied. The Court of Appeal identified two issues: first, had the appellant's solicitors offered to pay "*conventional*" costs rather than fixed costs; and secondly,

if the answer to the first question was no, ought the claim to be re-allocated to the multi-track such that the fixed costs regime would be disapplied retrospectively? Newey LJ gave the lead judgment. Males LJ gave a concurring judgment allowing the appeal for the reasons Newey LJ gave while emphasising two specific points. The Chancellor agreed with both judgments. On the first issue Males LJ noted that it turned on the correct interpretation of the Pt 36 Offer letter. It was submitted that as that letter referred to CPR r.36.13 and to costs to be subject to detailed assessment if not agreed, it offered settlement on terms of conventional not fixed costs. On its correct interpretation the wording of the Offer letter did not contain an offer to pay conventional rather than fixed costs. Reference to CPR r.36.13 was held to be of no "*great significance*". As he put it at para.29:

> *"[29] ... I do not think the fact that the 19 April letter refers to CPR 36.13 instead of CPR 36.20 is of any great significance. [Counsel for the appellant] pointed out that the standard form, N242A, similarly contains a reference to CPR 36.13, and none to CPR 36.20, but, as [counsel for the respondent] observed, an offeror is under no obligation to use N242A and the appellant did not merely adopt N242A without modification in the present case, notably because she added on, 'such costs to be subject to detailed assessment if not agreed'. What matters more, it seems to me, is that CPR 36.13 itself highlights the fact that CPR 36.20 applies to a claim formerly under the RTA Protocol and, in effect, sends the reader on to that latter rule. Thus, CPR 36.13 provides for paragraph (1) to operate subject to CPR 36.20, a note to paragraph (1) records that CPR 36.20 'makes provision for the costs consequences of accepting a Part 36 offer in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol', paragraph (3) provides for costs to be assessed on the standard basis 'Except where the recoverable costs are fixed by these Rules" and a note to paragraph (3) states that Part 45 "provides for fixed costs in certain classes of case'. [Counsel for the appellant] submitted that, had paragraph 3 of the offer letter stopped after the words 'Part 36 Rule 13 of the Civil Procedure Rules', there could have been no real question of the appellant having offered anything but fixed costs. I agree. [Counsel for the respondent] himself accepted that a simple reference to CPR 36.13 probably would not have sufficed to take the case out of the fixed costs regime."* (Editorial insertions in square brackets.)

Furthermore, it was clear that the appellant intended to make a Pt 36 Offer. Given that it was a self-contained code, it was apparent that the fixed cost regime under Pt 45 would apply. It is apparent that should a party to a claim that commenced under the RTA Protocol, and which exited it, does not want Pt 45 fixed costs to apply then such an offer cannot be a Pt 36 Offer (paras 17 and 30; and ***Mitchell v James*** (2002); ***James v James*** (2018)). Furthermore, reference to "*detailed assessment*" in the Pt 36 Offer was not to "*be taken to imply an intention to displace the fixed costs regime where there are other indications that that was not intended*" (para.31). It was equally improbable that the respondent would have appreciated that the appellant was making an offer that included conventional and not fixed costs, given that conventional costs would have put the respondent in a worse position, and would thus have accepted such an offer (para.32). Additionally, Males LJ at para.33 explained how CPR r.45.29B ought to be interpreted:

> *"[33]... [Counsel for the respondent] also relied on the fact that CPR 45.29B provides for the fixed costs regime to apply 'for as long as the case is not allocated to the multi-track' and suggested that, in consequence, the regime would automatically cease to apply from the start on re-allocation. This, however, is very far from obvious. The more natural interpretation of CPR 45.29B might be thought to be that, where a case is transferred from the fast track to the multi-track, the fixed costs regime ceases to apply prospectively, not in relation to past costs, incurred when the case was in the fast track. Nor, as I see it, does Qader v Esure Services Ltd, where the insertion into CPR 45.29B of the words 'and for so long as the claim is not allocated to the multi-track' was suggested (see paragraph 56), lend any support to [Counsel for the respondent's] contention. The Qader case did not concern a situation in which a claim was transferred to the multi-track from the fast track."* (Editorial insertions in square brackets.)

Males LJ also rejected an argument based on ***Solomon v Cromwell Group Plc*** (2011) (see para.35). In the premises, it could not properly be said that the parties had contracted out of the fixed costs regime. By way of future guidance, Males LJ emphasised at para.37:

> *"[37] For the future, a defendant wishing to make a Part 36 offer on the basis that the fixed costs regime will apply would, of course, be well-advised to refer in the offer to CPR 36.20, and not CPR 36.13, and to omit any reference to the costs being 'assessed'."*

On the second issue, it was argued that the claim should have and ought to be re-allocated to the multi-track, with a retrospective disapplication of the fixed costs regime (CPR rr.26.10 and 46.13). It was argued that notwithstanding the stay imposed on the claim following acceptance of the Pt 36 Offer, the court could deal with costs under CPR r.36.14(5). The question of re-allocation to then disapply fixed costs was, it was submitted, a costs issue relating to the proceedings within the scope of that rule. The Court of Appeal held that the question of re-allocation was not a question of costs, and was not therefore within the ambit of CPR r.36.14(5). Furthermore, there was nothing in the agreement the parties reached concerning re-allocation or the disapplication of fixed costs. Given that latter point, the judge at first instance was clearly correct to take the view that even if he had power to re-allocate the claim and disapply

the fixed costs regime, he ought not do so. To do so would have been inconsistent with the terms of the agreement the parties reached. Males LJ gave a concurring judgment, in which he stressed two points. First, that if parties wished to settle on terms of fixed costs it was easy to say so in the agreement reached (see para.43). Parties should therefore be well-advised to do so in future. Should they wish to do so, he then went on to say by way of obiter at para.44:

> *"[44] ... parties who wish to settle on terms that fixed costs will be payable would be well advised to avoid reference to assessment 'on the standard basis' in any offer letter or consent order which may be drawn up following acceptance of an offer."*

Solomon v Cromwell Group Plc [2011] EWCA Civ 1584; [2012] 1 W.L.R. 1048, CA, ***Mitchell v James (Costs)*** [2002] EWCA Civ 997; [2004] 1 W.L.R. 158, CA, ***James v James (Costs)*** [2018] EWHC 242 (Ch); [2018] 1 Costs L.R. 175, ChD, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.45.29A.1.)

Practice Updates

NOTICE UNDER COMPETITION APPEAL TRIBUNAL RULES 2015

On 11 November 2019, the Registrar of the Competition Appeal Tribunal issued a Notice under r.6 of the Competition Appeal Tribunal Rules 2015 (SI 2015/1648). The Notice provided that, as from 18 November 2019, the Tribunal's address for service is: The Registrar of the Competition Appeal Tribunal, Salisbury Square House, 8 Salisbury Square, London, EC4Y 8AP. Its address for electronic communications to the Tribunal is, however, unchanged and remains: registry@catribunal.org.uk.

In Detail

CONTEMPT OF COURT AND PRE-ACTION PROTOCOLS—JET 2 HOLIDAYS LTD v HUGHES [2019] EWCA CIV 1858

In *Jet 2 Holidays Ltd v Hughes* [2019] EWCA Civ 1858, 8 November 2019, unrep., the Court of Appeal (Sir Terence Etherton MR, Hamblen and Flaux LJJ) considered whether contempt of court proceedings could be brought in respect of a false witness statement made before proceedings had commenced. It was noted that this was an issue that Warby J had considered, but not decided, in ***Liverpool Victoria Insurance Co Ltd v Yavuz*** [2017] EWHC 3088 (QB) at paras 148–153.

The Background

The respondents booked a package holiday in December 2016. In April 2017 they gave notice to the appellants via a letter of claim of a claim for damages. The basis of the claim was an allegation that they had contracted food poisoning either as a consequence of eating contaminated food or due to insanitary conditions at the holiday resort. The basis of the proposed claim was the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) and the Consumer Rights Act 2015. The respondents' lawyers subsequently sent the appellants witness statements from the two respondents. This was said to be in compliance with the Pre-Action Protocol for Personal Injury Claims. Both statements were signed with a statement of truth. The witness statements outlined how the respondents and their children were ill from the second day of the holiday, acutely ill from the third day and did not recover fully until after they returned home. The appellants however found a variety of information on social media that contradicted that account (see para.8). They rejected the claims. The respondents did not issue proceedings. Subsequently, the appellants commenced proceedings seeking permission to commence proceedings for committal for contempt of court under CPR Pt 81.

The Decision at First Instance

Both the appellants and respondents submitted witness statements in respect of the application for permission to bring committal proceedings. In their witness statements the respondents set out that their prior witness statements were true, that they had complained during the holiday about the lack of hygiene in the hotel, and that they had been ill. The social media material, it was said, was a "*front*" and did not provide a "*true reflection of their mood at all times of the holiday*". In August 2018, by consent, permission was granted to appellants to commence committal proceedings. The matter was then listed for a case management conference. At that hearing the judge raised, for the first time, the question whether the court had jurisdiction to deal with contempt proceedings in a situation where the alleged contempt, as here in respect of the alleged false statements of truth in the pre-action witness statements, occurred "*otherwise than in connection with extant proceedings*" and where no such proceedings had been commenced. That matter was to be dealt

with as a preliminary issue. Prior to hearing it the appellants applied to amend their original application to add further grounds of contempt arising from the contents of the witness statements that had been served by the respondents in the contempt proceedings. The judge held that there was no jurisdiction to find contempt in respect of the pre-action witness statements. He also refused permission to amend the application to add further grounds. The judge held that the court had no jurisdiction as contempt proceedings concerning the making of false statements of truth, per CPR Pt 22, only arose in respect of statements "*made and presented to the court within the meaning of CPR 32.14*" (see paras 17–18).

The Court of Appeal's decision

The Court of Appeal allowed the appeal from the judge's decision. It held that:

> *"[3] ... a witness statement verified by a statement of truth made by a prospective claimant before the commencement of proceedings in purported compliance with a pre-action protocol (a 'PAP') can give rise to contempt and be the subject of an application for committal for contempt even though, following challenge by the prospective defendant to the truth of the statement, proceedings for substantive relief were in the event never issued."*

In reaching its decision, it first noted its agreement with the conclusion at first instance that the jurisdiction to bring committal proceedings did not arise under CPR r.32.14, given the requirement in CPR PD 32 para.17.1, which requires witness statements to be headed with the title of the proceedings (see para.26). The court was not however limited to the CPR to found its contempt jurisdiction. It was well-established, and recognised by CPR r.81.2(3), that the court had an inherent power to commit for contempt: see ***Malgar Ltd v RE Leach (Engineering) Ltd*** [1999] EWHC 843 (Ch); [2000] F.S.R. 393 at [395] and ***Griffin v Griffin*** [2000] EWCA Civ 119; [2000] 2 F.L.R. 44 at [21] (see paras 27–29). The test in respect of the common law jurisdiction was:

> *"[29] ... whether the conduct in question involved an interference with the due administration of justice either in a particular case or more generally as a continuing process: Attorney General v Leveller Magazine Ltd [1979] AC 440 at 449F, 459B, 468A, and 479D."*

The common law jurisdiction could be invoked in respect of conduct that occurred before proceedings had commenced (see para.31). In the present case, the respondents had used the witness statements to indicate the evidence they would give in proceedings. That they verified them with a statement of truth "*gave solemnity to that indication*" (see para.35). Given the central role that Pre-Action Protocols played in civil litigation, such a statement could engage the contempt jurisdiction. As the court put it:

> *"[36] A dishonest witness statement served in purported compliance with a PAP is capable of interfering with the due administration of justice for the purposes of engaging the jurisdiction to commit for contempt because PAPs are now an integral and highly important part of litigation architecture."*

In reaching this decision, the court set out a detailed explanation of the background, role and importance of Pre-Action Protocols (paras 37–43). It noted their origins in Lord Woolf's original proposals for reform in the Final Access to Justice Report, and how he had stressed their importance to the post-1999 civil justice system. Notwithstanding the fact that, as Lord Woolf noted guidance on pre-action conduct was "*outside the scope of the formal rules of procedure*" (Woolf Final Report, chapter 9, para.2), the Court of Appeal: (i) noted that from the outset of the CPR the Pre-Action Protocols were stated to be "*key to the success of the civil justice reforms*" per Lord Irvine LC (see para.37); (ii) all the Pre-Action Protocols were integrated into the efficient and effective working of the civil justice system through their promotion of pre-action settlement, and where that did not occur the promotion of increased efficiency and proportionality in case management, not least through the Practice Direction on Pre-Action Conduct and the court's power to take account of pre-action conduct in considering costs: see CPR rr.3.1(4)–(6) and 44.2(5)(a) (see paras 40–44); and (iii) that a number of specific Pre-Action Protocols are "*closely integrated with the CPR*" e.g.:

> *"[39] ... the PAP for Low Value Personal Injury Claims in Road Traffic Accidents and the PAP for Low Value Personal Injury (Employers' Liability and Public Liability) Claims are the subject of specific provisions in Section 11 of CPR Pt 36 (dealing with offers to settle) and Section III of CPR Pt 45 (concerning fixed costs) and Practice Direction 8B. The Resolution of Package Holiday Claims PAP is the subject of specific provision in Part IIIA of CPR Pt 45 (concerning fixed costs)."*

Given this close integration of the Pre-Action Protocols with the CPR and its PDs, it ought to be apparent that misuse of those Protocols, such as their use as a tactical device contrary to para.4 of the Practice Direction on Pre-Action Conduct, may give rise to an interference with the proper administration of justice. The use of a dishonest witness statement in an attempt to induce a proposed defendant to admit liability may be, as the court concluded at para.40, conduct that runs "*directly counter*" to the requirement in para.4, and thus was plainly an interference with the administration of justice. That being said the Court of Appeal's decision, given the nature of the scope of what could amount to an interference with the proper administration of justice, appears to open up the potential for contempt proceedings to be brought more broadly in respect of pre-action conduct. It is likely that the exact scope of this decision will be, and will need to be, developed further in future decisions.

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Published by Sweet & Maxwell Ltd, 5 Canada Square, Canary Wharf, London, E14 5AQ
ISSN 0958-9821
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Typeset by Matthew Marley
Printed by Hobbs The Printers Ltd, Totton, Hampshire.

42624613