CIVIL PROCEDURE NEWS

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Cases

■ **Vorotyntseva v Money-4 Ltd (t/a Nebeus.com)** [2018] EWHC 2596 (Ch), 28 September 2018, unrep. (Birss J)

Freezing injunction—crypto-currency

CPR r.25.1(1)(f). The applicant sought a freezing injunction on an ex parte basis against the respondent. The applicant had, it was submitted, provided the respondent with approximately £1.5 million in two forms of crypto-currency (Bitcoin and Ethereum). The sum was provided in order to enable the respondent to test its crypto-currency trading platform. The applicant believed that the sums provided had been dissipated. **Held**, the freezing injunction was granted. There was no suggestion that the crypto-currencies were not property nor that they were not amenable to the court's jurisdiction, or could not be subject to injunctive relief (see para.13). (See ***Civil Procedure 2019*** Vol.1 at para.25.1.25.7.)

■ **Gulf International Bank BSC v Aldwood** [2019] EWHC 1666 (QB), 1 July 2019, unrep. (John Kimbell QC sitting as a deputy judge of the High Court)

Expert evidence—foreign law

CPR r.35.4. Proceedings were commenced in January 2019 for sums said to be due under a personal guarantee. Service of the proceedings, with a worldwide freezing injunction, were served on the defendant in London. The defendant applied to set aside the claim form and discharge the injunction. He did so on the basis that the English courts had no jurisdiction. In the alternative, he applied for a stay of proceedings on the basis that Saudi Arabia was the proper forum. Both parties adduced expert evidence on Saudi Arabian law. An issue arose as to whether the parties ought to have applied for permission to adduce the expert evidence. **Held**, where questions of the court's jurisdiction were in issue and a party intended to rely upon expert evidence of foreign law, they were required to seek permission to do so under CPR r.35.4. There was a need to ensure that expert evidence of foreign law in such cases was subject to more effective case management than had previously been the case (see ***BB Energy (Gulf) DMCC v Al Amoudi*** (2018) at paras 49–50). As the deputy High Court judge put it at para.9,

> *"[9] ... Better case management is clearly needed for challenges to jurisdiction which involve foreign law expert evidence. Permission ought to be sought under CPR 35.4 to reply on foreign law evidence in all cases. It would also assist if there were a list of issues approved by the court for the foreign experts to address at the very latest before the applicant's initial report (usually served with the application to challenge jurisdiction) is responded to ..."*

BB Energy (Gulf) DMCC v Al Amoudi [2018] EWHC 2595 (Comm), unrep., ***Deutsche Bank AG v Comune di Savona*** [2018] EWCA Civ 1740; [2018] 4 W.L.R. 151, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.35.4.2.)

■ **Kogan v Martin** [2019] EWCA Civ 1645; [2020] E.M.L.R. 4, 9 October 2019 (Floyd, Henderson and Peter Jackson LJJ)

Assessment of witness evidence

CPR r.32.2. In a dispute over the authorship of a screenplay of a film, an issue arose concerning the approach to be taken to the assessment of witness evidence. The judge at first instance was noted by the Court of Appeal to have approached observations by Leggatt J in ***Gestmin SGPS SA v Credit Suisse (UK) Ltd*** (2013) and ***Blue v Ashley*** (2017) as

> *"an admonition that the best approach for a judge is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations and instead base factual findings on inferences drawn from documentary evidence and known or probable facts"* (see para.70).

The Court of Appeal deprecated that approach to ***Gestmin*** and ***Blue v Ashley***. As Floyd LJ explained it, giving the judgment of the court, the proper approach to the assessment of witness evidence required the court to consider the nature of the evidence and to consider witness evidence alongside contemporaneous documentary evidence. It was not to approach it on the basis that ***Gestmin*** own a general rule, see paras 88–89:

> *"[88] ... We start by recalling that the judge read Leggatt J's statements in Gestmin v Credit Suisse and Blue v Ashley as an 'admonition' against placing any reliance at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons. First, as has very recently been noted by HHJ Gore QC in CBX v North West Anglia NHS Trust [2019] 7 WLUK 57, Gestmin is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the*

fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay The Judge as Juror: The Judicial Determination of Factual Issues (from The Business of Judging, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence.

[89] Secondly, the judge in the present case did not remark that the observations in Gestmin were expressly addressed to commercial cases. For a paradigm example of such a case, in which a careful examination of the abundant documentation ought to have been at the heart of an inquiry into commercial fraud, see Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors [2019] EWCA Civ 1413 and the apposite remarks of Males LJ at paras. 48-49. Here, by contrast, the two parties were private individuals living together for much of the relevant time. That fact made it inherently improbable that details of all their interactions over the creation of the screenplay would be fully recorded in documents. Ms Kogan's case was that they were bouncing ideas off each other at speed, whereas Mr Martin regarded their interactions as his use of Ms Kogan as a sounding board. Which of these was, objectively, a correct description of their interaction was not likely to be resolved by documents alone, but was a fundamental issue which required to be resolved."

Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm), unrep., ***Blue v Ashley*** [2017] EWHC 1928 (Comm), unrep., ***CXB v North West Anglia NHS Foundation Trust*** [2019] EWHC 2053 (QB), unrep., ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.32.2.1.)

■ **Morley (t/a Morley Estates) v Royal Bank of Scotland Plc** [2019] EWHC 2865 (Ch), 22 October 2019, unrep. (Kerr J)

Witness summaries—requirements

CPR r.32.9. A dispute arose between a businessman and his former bank. The claimant applied to rely on witness summaries at trial of two witnesses. The witnesses were both former employees of the defendant. **Held**, the claimant would be permitted to rely on the two witness summaries. In reaching his conclusion on the application, Kerr J considered the approach taken to the requirements set out in CPR r.39.2(1)–(4) by Phillips J in ***Scarlett v Grace*** (2014) at para.10 and following, and by Warby J in ***Otuo v Watch Tower Bible and Tract Society of Britain*** (2019) at paras 20–23. In particular Kerr J considered the requirement that an applicant demonstrate that they were unable to obtain a witness statement per CPR r.32.9(1)(b). Kerr J, in bore in mind Warby J's guidance and also noted his agreement with the approach taken by Phillips J in ***Scarlett v Grace***, where he said that "*the requirement to show inability should be applied with a degree of rigour*". While that would normally require an applicant demonstrating that they had asked the witness whether they were prepared to provide a witness statement, that was not a pre-requisite (see para.107). Rigour had to be matched with a "*degree of reality*" (see para.108). It was not necessary to show that a witness had been asked to provide a statement and had refused. On the contrary, inability to obtain a statement could, as Kerr J put it at para.109:

"[109] ... arise for other reasons, such as illness, ignorance of the witness's whereabouts, absence from the jurisdiction, confidentiality obligations, and so forth."

As he went on to say, the test to apply was:

"[110] On the plain wording of the rule, CPR 32.9(1)(a) [sic, (a) ought to read (b)], and applying ordinary principles of causation, a person is, in my judgment, 'unable to obtain' a statement if the court is satisfied on the balance of probabilities that had a request been made to the witnesses to provide a statement the request would have been turned down." (Editorial insertion in square brackets.)

Scarlett v Grace [2014] EWHC 2307 (QB), unrep., QBD, ***Otuo v Watch Tower Bible and Tract Society of Britain*** [2019] EWHC 346 (QB), unrep., QBD, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.32.9.1.)

■ **BGC Brokers LP v Tradition (UK) Ltd** [2019] EWCA Civ 1937, 18 November 2019, unrep. (Lewison, David Richards and Arnold LJJ)

Without prejudice privilege—settlement agreement—inspection

The claimant brought proceedings arising from the supply of confidential information from former employers to one of its competitors. Following commencement of the proceedings, two of the defendants, the claimant's former employees, attended interviews with its lawyers. The interviews were carried out on a without prejudice and confidential basis. Thereafter a settlement agreement was entered into by the claimant and the third defendant. In the settlement agreement the defendant warranted that he had given full and frank disclosure of the provision of confidential information to other

parties, including in respect of an email that was said to have been sent on a without prejudice basis (the without prejudice email). A copy of the settlement agreement was provided for inspection by the claimant to the first, second and fifth defendants (the Tradition defendants). The copy provided was redacted in so far as it did not contain a copy of the without prejudice email. The Tradition defendants sought an order for inspection of an unredacted copy of the settlement agreement. In issue was the question of the without prejudice email, which it was argued was incorporated into the settlement agreement by reference to it within cl.2.2(e) of the agreement. The claimant argued that the email was subject to either without prejudice privilege or litigation privilege and, accordingly, inspection should not be ordered. The Court of Appeal **held** that the without prejudice email was not subject to either without prejudice privilege or litigation privilege as: (i) the principles concerning the application of without prejudice privilege were well-established: ***Cutts v Head*** (1984), ***Muller v Linsley & Mortimer*** (1996), ***Rush & Tompkins Ltd v Greater London Council*** (1989), and ***Walker v Wilsher*** (1889) (paras 10–14). Applying those principles it was clear that the settlement agreement, as its purpose was to conclude and not to negotiate a settlement, was not covered by the privilege. Furthermore, as the email was incorporated into the settlement agreement it too was no longer subject to the privilege. This was the case as otherwise the claimant could not, for instance, sue for breach of warranty in respect of the email's contents (para.18). As such it formed the "*the legal foundation of a potential claim for breach of warranty*" (see para.35); (ii) the requirements for claiming litigation privilege had been summarised helpfully in ***Starbev GP Ltd v Interbrew Central European Holding BV*** (2013) at [11]. They included the requirement that the communication was made for the dominant purpose of obtaining legal advice or obtaining evidence for anticipated or contemplated legal proceedings. In this case the email was incorporated into the settlement agreement for the dominant purpose of policing the agreement, and not therefore for obtaining evidence (or legal advice). ***Walker v Wilsher*** (1889) 23 Q.B.D. 335, CA, unrep., ***Cutts v Head*** [1984] Ch. 290; [1984] 2 W.L.R. 349, CA, ***Muller v Linsley & Mortimer*** [1996] P.N.L.R. 74; (1995) 92(3) L.S.G. 38, CA, ***Rush & Tompkins Ltd v Greater London Council*** [1989] A.C. 1280; [1988] 3 W.L.R. 939, HL, ***Starbev GP Ltd v Interbrew Central European Holding BV*** [2013] EWHC 4038 (Comm), unrep., ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.31.3.40.)

- **Agents' Mutual Ltd v Gascoigne Halman Ltd (t/a Gascoigne Halman)** [2019] EWHC 3104 (Ch), 22 November 2019, unrep. (Marcus Smith J)

Disclosure pilot scheme—different tests to apply where failure to comply with extended disclosure order and where application to vary extended disclosure sought

CPR PD 51U paras 17 and 18. In an application for specific disclosure in proceedings in respect of which it was accepted the disclosure pilot scheme applied, Marcus Smith J drew a distinction between the approach to be taken to applications made under PD 51U para.17, where there had been non-compliance with an order for extended disclosure, and an application to vary an order for extended disclosure under PD 51U para.18. The approach can be contrasted with that taken in ***Ventra Investments Ltd v Bank of Scotland*** (2019) which concluded in the circumstances of that case there was no practical difference between the two provisions given the proximity to trial: under both paras 17 and 18 the requirements of para.18 re necessity, would need to be made out. As Richard Salter QC sitting as a deputy judge of the High Court put it at para.35 of Ventra:

> *"[35] In my judgment, if there is any difference between the approaches required under these two provisions, it is at most a difference in emphasis which can have no practical effect in the particular circumstances of this case. An applicant under paragraph 17.1 of PD51U must 'satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4)': see paragraph 17.2. An applicant under paragraph 18.1 of PD51U must 'satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4)': see paragraph 18.2. In the present case, the practical reality is that any order for disclosure that I may make must necessarily take into account in one way or another the presently fixed date for trial. The effect of any order will either be to require that date to be vacated, or to add to the parties' already extensive burden of preparatory work in the limited period left before that date. Against that background, there are in my judgment no circumstances in which it would be reasonable and proportionate for me now to make an order for disclosure – even to rectify a failure adequately to comply with the earlier order for disclosure - unless that order was one that was necessary for the just disposal of the proceedings."*

Given the particular circumstances of ***Ventra*** concerning the proximity to trial and the consequences of making an order under either paras 17 or 18 of PD 51U, the absence of a practical distinction between the paragraphs' tests was arguably correct. However, the position considered by Marcus Smith J, where the proceedings were at an earlier, case management stage, is one that can properly be seen as articulating a generally applicable interpretation of the two provisions rather than, as in ***Ventra***, one that was influenced by proximity to trial. Setting out an interpretation of general application, Marcus Smith J stated at para.11:

> *"[11] The difference between these two provisions is easy to see:*

i) CPR 51 PD U §17 deals with the case where an Extended Disclosure order has not, or may not have been, adequately complied with. Because of the question of non-compliance, the test that must be met for the granting of an order under CPR 51 PD U §17 is that the order be 'appropriate', which requires the applicant to satisfy the court that making an order is 'reasonable and proportionate'.

ii) By contrast, CPR 51 PD U §18 deals with the case where – even though there has been compliance with an order for Extended Disclosure – the order previously made is sought to be varied. In such a case, the applicant must show not merely that making the order is 'reasonable and proportionate', but also that varying the original order 'is necessary for the just disposal of the proceedings'. Unsurprisingly, it is harder to obtain an order under CPR 51 PD U §18 than under CPR 51 PD U §17."

Ventra Investments Ltd v Bank of Scotland [2019] EWHC 2058 (Comm), unrep. ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.51UPD.18.1.)

■ **SL Claimants v Tesco Plc (CMC)** [2019] EWHC 3315 (Ch), 3 December 2019, unrep. (Hildyard J)

Privilege—disclosure under limited waiver—referred to in criminal proceedings

CPR r.31.22. Two sets of proceedings were brought against the defendant seeking to recover losses arising from investment decisions concerning the defendant's shares. The claims were brought under s.90A of the Financial Services and Markets Act 2000. A number of issues were raised at, what was, the fourth case management conference in the proceedings. One of those issues concerned a claim of privilege, which arose in an application for specific disclosure. The issue concerned a note of an interview between the defendant's senior in-house lawyer and Freshfields (the Majid note). The Majid note was subject to legal professional privilege. It was alleged that that privilege was lost as it was referred to in open court during criminal proceedings. This arose as the note was initially provided by the defendant to the Serious Fraud Office (SFO) further to a limited waiver of privilege. It was then referred to during criminal proceedings in submissions concerning an application to compel production of a further, and separate, note. It was submitted that the Majid note was thus no longer confidential nor privileged as it had been summarised, partly read out and discussed in the criminal proceedings. The defendant submitted it was still confidential and subject to privilege notwithstanding the fact it had been referred to in open court. The defendant submitted that a distinction had to be drawn between information contained in a document and the document. Loss of confidentiality in the information may be lost by public reference to it, however that did not necessarily entail loss in confidentiality in the document itself. In the present case, it was submitted, reference to three of nine pages of the Majid note should not be taken to result in a loss of confidentiality in the document. Only the information referred to in open court or, at best, the three pages of the document that contained that information could, it was thus argued, be said to no longer be confidential. **Held**, the application for specific disclosure of the Majid note was refused as: (i) it was not argued that there had been a waiver of privilege. The only issue was loss of confidentiality; (ii) it was a matter of degree whether public references by the court or by counsel amounted to a loss of confidentiality in a document. In the present case the references in open court to information in the document were not sufficient to result in a loss of confidentiality in the document; (iii) considering the application of the open justice principle per ***Cape v Dring*** (2019), there was nothing to require the document's disclosure to enable the public to understand the approach of the court to the procedural decision before the court hearing the criminal proceedings. In the premises confidentiality in the document had not been lost (see paras 32–42). ***SmithKline Beecham Biologicals SA v Connaught Laboratories Inc (Disclosure of Documents)*** [1999] 4 All E.R. 498; [1999] C.P.L.R. 505, CA, ***Gotha City v Sotheby's (No.1)*** [1998] 1 W.L.R. 114; (1997) 94(30) L.S.G. 28, CA, ***Lilly ICOS Ltd v Pfizer Ltd (No.2)*** [2002] EWCA Civ 2; [2002] 1 W.L.R. 2253, CA, ***Mohammed v Ministry of Defence*** [2013] EWHC 4478 (QB), unrep., ***Rawlinson and Hunter Trustees SA v Akers*** [2014] EWCA Civ 136; [2014] 4 All E.R. 627, CA, ***Cape Intermediate Holdings Ltd v Dring*** [2019] UKSC 38; [2019] 3 W.L.R. 429, UKSC, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.31.22.1.)

■ **Perkier Foods Ltd v Halo Foods Ltd** [2019] EWHC 3462 (QB), 16 December 2019, unrep. (Chamberlain J)

Contempt of court—burden of proof—impossibility to perform

CPR r.81.4. A mandatory injunction was granted in a commercial dispute concerning the manufacture of food snack products. The defendant failed to comply with a term of the injunction. The question arose whether they were in contempt of court for failing to comply. It was submitted that the failure to comply arose because it was impossible for the defendant to comply with the term of the injunction. Chamberlain J noted that the authorities to which he had been referred did not establish where the burden of proof lay where impossibility was in issue. He had been referred to the following authorities: ***Sectorguard Plc v Dienne Plc*** (2009); ***Masri v Consolidated Contractors International Co SAL*** (2011); ***McCann v Bennett*** (2013); ***Taylor v Van Dutch Marine Holding Ltd*** (2016); ***JSC BTA Bank v Ablyazov*** (2012); ***Westminster City Council v Addbins Ltd*** (2012); ***Reynolds v Long*** (2018). **Held**, the approach in civil proceedings is the same as that which applies in criminal law: the evidential burden lies upon the respondent, which once discharged shifts the burden to the applicant, with the standard of proof being the criminal standard (see paras 13–15).

R. v Bennett (William Anthony) (1979) 68 Cr. App. R. 168; [1979] Crim. L.R. 454, CA, ***Dean v Dean*** [1987] 1 F.L.R. 517; [1987] 1 F.C.R. 96, CA, ***Masri v Consolidated Contractors International Co SAL*** [2011] EWHC 1024 (Comm), unrep., ***McCann v Bennett*** [2013] EWHC 283 (QB), unrep., ***Taylor v Van Dutch Marine Holding Ltd*** [2016] EWHC 2201 (Ch), unrep., ***JSC BTA Bank v Ablyazov*** [2012] EWCA Civ 1411; [2013] 1 W.L.R. 1331, CA, ***Sectorguard Plc v Dienne Plc*** [2009] EWHC 2693 (Ch), unrep., ***Westminster City Council v Addbins Ltd*** [2012] EWHC 3716 (QB); [2013] J.P.L. 654, QBD, ***Reynolds v Long*** [2018] EWHC 3535 (Ch), unrep., ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.81.4.2.)

■ **King v City of London Corp** [2019] EWCA Civ 2266, 18 December 2019, unrep. (Newey, Coulson and Arnold LJJ)

Part 36 Offer—not valid when made exclusive of interest

CPR r.36.5(4). A claim was settled by consent, with costs to be assessed if not agreed. The costs were not agreed and thus progressed to detailed assessment. An offer to settle was made, which was said to be a CPR Pt 36 Offer. It was, however, said to be exclusive of interest. The central question was whether the offer was a valid Pt 36 Offer it having been said to be exclusive of costs. Both the Deputy Master and then HHJ Dight CBE held that such an offer could not be a valid Pt 36 Offer. By contrast, in ***Horne v Prescot (No.1)*** (2019) Nicol J had held that such an offer, at least in the context of detailed assessment proceedings, was a valid Pt 36 Offer. The question before the Court of Appeal was thus "whether an offer exclusive of interest can be made under CPR Part 36 either generally or at least in the context of proceedings for detailed assessment of costs...". **Held**, in dismissing the appeal: (i) an offer that fails to comply with the essential requirements of CPR Pt 36 is not a valid Pt 36 Offer. There was ample authority to that effect e.g., ***Mitchell v James (Costs)*** (2002). Part 36 is intended to be self-contained and relatively inflexible: ***Gibbon v Manchester City Council*** (2010). It was clear that the requirement set out in CPR r.36.5(4) concerning interest was intended to be a mandatory provision. Where a party wishes to make an offer that does not meet its requirements, they are free to do so; such an offer is, however, one outside Pt 36. To adopt an interpretation of Pt 36 which held the requirement to provide for interest to be permissive rather than mandatory would undermine the aim of rendering the Part simple and certain; (ii) in so far as Pt 36 Offers made in detailed assessment proceedings was concerned, the position was no different: an offer made exclusive of interest in such proceedings cannot be a valid Pt 36 Offer. This was the case for, at least, five reasons per Newey LJ with whom Coulson and Arnold LJJ agreed, see para.50:

> *"[50] ... i) CPR 47.20(4) provides for CPR Part 36 to apply to the cost of detailed assessment proceedings subject to certain modifications. None of the specified modifications bears on the present dispute;*
>
> *ii) CPR 36.5(4), which as I have said I consider to be mandatory, states that an offer to accept a sum of money is to be treated as inclusive of 'all interest'. I can see no reason why those words should not extend to interest payable under section 17 of the Judgments Act 1838 or section 74 of the County Courts Act 1984. They are surely apt to apply to every species of interest, whether, say, awarded under section 35A of the Senior Courts Act 1981 or section 69 of the County Courts Act 1984, due as of right contractually, or arising under section 17 of the Judgments Act 1838 or section 74 of the County Courts Act 1984;*
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> *iii) That point is confirmed by CPR 36.17(6). The reference to 'interest' there must encompass interest under section 17 of the Judgments Act 1838 and section 74 of the County Courts Act 1984. The same word could be expected to bear the same meaning elsewhere in Part 36;*
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> *iv) Hertel v Saunders [which Nicol J in Horne v Prescot (No.1) Ltd (2019) relied on] strikes me as something of a red herring. CPR 36.5(4) states in unequivocal terms that an offer to accept a sum of money 'will be treated as inclusive of all interest'. On any view, the interest which Mr King sought to exclude from his offer of 12 December 2017 was interest on the money that he was offering to accept. Whether or not, therefore, the interest is to be seen as 'a claim', 'part of a claim' or 'issue', the offer had to include it if it was to satisfy CPR 36.5(4);*
>
> *v) In any case, Hertel v Saunders involved a very different situation. Absent an amendment to the particulars of claim, the claimants simply could not assert entitlement to the new relief. In contrast, there is no doubt that Mr King was in a position to claim interest and to do so without raising the point in the notice of commencement. It is, in the circumstances, unrealistic to suppose that his claim did not encompass interest; and*
>
> *vi) Nicol J does not seem to me, with respect, to have provided a satisfactory explanation of how CPR 36.5(4) could be reconciled with his approach. Certainly, there is no mention of CPR 36.5(4) in paragraph 66 of his judgment."* (Editorial insertion in square brackets.)

As such it was clear that for any offer to settle to be a valid Pt 36 Offer it must not be exclusive of interest. Arnold LJ did, however at para.86, suggest that this was an issue that the Civil Procedure Rule Committee should consider, as there were arguments in favour of permitting CPR Pt 36 Offers to be made exclusive of interest. If the Rule Committee concluded otherwise, he suggested that CPR r.36.5 be amended to make explicit that such offers cannot be made

exclusive of interest. ***Mitchell v James (Costs)*** [2002] EWCA Civ 997; [2004] 1 W.L.R. 158, CA, ***Gibbon v Manchester City Council*** [2010] EWCA Civ 726; [2010] 1 W.L.R. 2081, CA, ***C v D*** [2011] EWCA Civ 646; [2012] 1 W.L.R. 1962, CA, ***Shaw v Merthyr Tydfil County Borough*** [2014] EWCA Civ 1678; [2015] P.I.Q.R. P8, CA, ***James v James*** [2018] EWHC 242 (Ch); [2018] 1 Costs L.R. 175, CA, ***Hertel v Saunders*** [2018] EWCA Civ 1831; [2018] 1 W.L.R. 5852, CA, ***Horne v Prescot (No.1) Ltd*** [2019] EWHC 1322 (QB); [2019] 1 W.L.R. 4808, QBD, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.36.5.1.)

In Detail

REPORT OF THE WITNESS STATEMENT WORKING GROUP (2019)

There have been widespread concerns over the use of witness statements, and their ability to provide best evidence, for some considerable time. In 2017 such concerns were discussed by the judges of the Commercial Court. The outcome of that discussion was the production of a discussion paper that was circulated in March 2018 to the Commercial Court Users' Group and then the creation of a Working Group that was to consist of Commercial Court judges, practitioners and members of the business sector. Subsequently, the Working Group was expanded to consider the utility of witness statements in the Business & Property Courts. Its work was informed by surveys and focus group meetings. On 6 December 2019 it issued its Report: *Factual Witness Evidence in Trials before the Business and Property Courts – Report of the Witness Evidence Working Group* (Report) (*https://www.judiciary.uk/wp-content/uploads/2019/12/Witness-statement-working-group-Final-Report-.pdf* [Accessed 6 January 2020]).

Problems with Witness Statements

While current practice concerning the use of witness statements was noted as having a number of advantages i.e., it was consistent with a cards on the table approach to litigation, it can help parties assess the merits of their claims at an early stage and thus it helps to promote settlement while also assisting effective case management by enabling parties to identify issues that require expert evidence, and it can help to promote an effective trial process, it was hampered by a number of significant disadvantages. Those were:

(i) Experience in criminal trials and civil proceedings before the introduction of witness statements showed that it was often the case that best evidence is often secured through oral examination-in-chief. The use of witness statements, which too often go through a number of revisions and iterations, leads to the position where the evidence they contain is more of an "aspirational", polished version of the evidence a witness may be able to give i.e., it does not properly reflect the evidence they can and will be able to give at trial, which is often more accurate than that set out in the witness statement (Report para.13).

(ii) The preparation of witness statements tends to "corrupt" witness memory through requiring the witness to revisit and retell their account numerous times (Report para.13).

(iii) Use of witness statements to stand as examination-in-chief places witnesses on the immediate defensive as the first oral evidence they give is under cross-examination. This results in witnesses being subject to binary questioning, which means their evidence is skewed by the nature of the question and they are not able to provide evidence in a way that they find adequate or which leaves them with an understanding that they have properly put their position forward (Report para.15). This also results in over-production of witness statements by lawyers so as to anticipate all potential lines of cross-examination, thus unnecessarily increasing costs and delay in the pre-trial and trial process.

(iv) As most judges and practitioners are no longer familiar with carrying out oral examination-in-chief, they no longer have working knowledge of the proper scope of such evidence. As a consequence, they are not in a proper position to limit the scope of witness statements accordingly (Report para.16). Consequently, witness statements often include material that is either or marginal or no relevance, that is "spin" or (albeit not noted by the Report) legal submissions. As the Report put it:

> *" ... the current practice involves regular and lengthy recitation of background which is either wholly irrelevant or of such marginal relevance that it would not justify being adduced at trial in the interests of proportionate and cost efficient trial management".*

(v) Any cost and time savings that underpinned the introduction of witness statements originally were now illusory due to the manner in which cross-examination takes place i.e., the greater length of preparation and actual cross-examination, which focuses on challenging the witness statement rather than exploring and testing those critical aspects of a witness's evidence (Report para.18).

(vi) Furthermore, due to the manner in which such statements are prepared, the pre-trial phase of case management has become more lengthy and expensive. This results in front-loading of costs and can, it was noted, reduce the prospect of settlement (Report para.19).

Recommendations

In order to remedy these various defects the Working Group made a number of recommendations, all of which were endorsed by the Business & Property Courts Board and will be taken forward by the Working Group. It ought to be anticipated that once the Working Group has finalised its work, the Civil Procedure Rule Committee will need to consider what changes need to be made to CPR Pt 32.

The recommendations were as follows:

*"73. An authoritative **statement of the best practice** regarding the preparation of witness statements should be formulated, based on the principles identified in this report.*

*74. Witness statements should contain a more developed **statement of truth** whereby the witness confirms that they have had explained to them and understand the objective of a witness statement and the appropriate practices in relation to its drafting.*

*75. The solicitor in charge of drafting the witness statement should be required to sign **a solicitor's certificate of compliance** with the Rules and the relevant Court Guide.*

*76. The individual Courts within the BPCs should give further consideration to the introduction of a requirement for parties to produce a **pre-trial statement of facts** setting out their factual case. This would be in addition to witness statements and exchanged at the same time, with a view to confining the witness statements themselves to evidence which can properly be given by that witness at trial.*

*77. **Examination-in-chief** on specific issues/topics should be available as an option, to be considered at the CMC and ordered in appropriate cases. The issues/topics that are addressed by way of examination-in-chief should be covered in a witness statement or (at least) in a witness summary.*

*78. **An extension of the page limit** for a witness statement should rarely be granted unless the judge has had the opportunity to scrutinise its contents. The general practice should be to consider such applications retrospectively at the PTR.*

*79. The Court should more readily apply **costs sanctions** and express **judicial criticism** of non-compliance with the Rules, Practice Direction and Guides, both at the PTR and following the trial.*

*80. There should be a **harmonisation of the Guides** of the Commercial Court, Chancery Division and TCC insofar as they address the general principles as to the content and drafting of witness statements."*

While the recommendations are both sensible and should be welcomed, they point to a significant shift in litigation practice and culture. Should they be introduced concerted effort and a consistent practice by both the legal profession and the judiciary will be required to embed the new approach. Promulgation of best practice guidance, the development of new procedures, and the use of costs sanctions as a means to deter the maintenance of past or poor practice on their own have proved time and again to be insufficient means to promote effective reform. Experience of the numerous failures since 1999 to reform the disclosure process are testament to that fact. What will, undoubtedly, also be needed, as is being practised via the current disclosure pilot scheme under CPR PD 51U, will be an emphasis on the promotion of a new procedural culture. As with the need and commitment to promote a new culture of disclosure, there will need to be a similar commitment to promote a new culture of witness evidence. If the recommendations are to yield the intended benefits of reducing the cost and time of witness evidence, while improving its quality, such a commitment will need to be made clear as it was in respect of disclosure by the Chancellor in ***UTB LLC v Sheffield United Ltd*** [2019] EWHC 914 (Ch) (as noted in ***Civil Procedure 2019*** Vol.1 at para.51UPD.O). It is to be hoped that practical reform will be matched with such a commitment.

EDITOR: **Dr J. Sorabji**, Barrister
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