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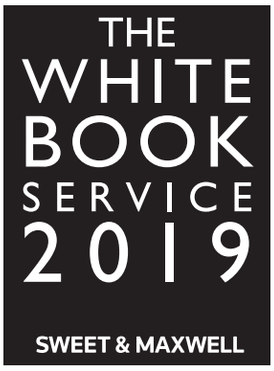
CONTENTS



In Brief

Cases

■ **PME v Scout Association** [2019] EWHC 3421 (QB); [2019] Costs L.R. 2003, 12 December 2019 (Stewart J)

Costs assessment – authority of authorised costs officer

CPR rr.47.3, 47.21–47.24, CPR PD 47 paras 14.2, 20.1–20.6. The appellants appealed from a decision of a Master concerning the scope of an appeal from a decision of an authorised costs officer (ACO) in the Senior Courts Costs Office (see ***Civil Procedure News*** No.8 of 2019). The single issue on appeal was whether:

> *"[3] The Master was wrong to conclude that, pursuant to CPR 47.24, the scope of the appeal before him was limited to a limited form of re-hearing of the single decision taken by the ACO in respect of hourly rates at the oral hearing on 15th August 2018 and/or that the Appellant was not entitled to a 'full' re-hearing of the detailed assessment as a whole."*

Held, the appeal was dismissed. The Master had reached the correct decision. In reaching that decision Stewart J noted that: an ACO's jurisdiction was governed by CPR r.47.3 and PD 47 para.3; that CPR r.47.15 and PD 47 para.14, deal with provisional assessments whether they are carried out by an ACO or a judge; and, CPR rr.47.2–47.24 and PD 47 para.20 deal with appeals from ACO decisions. In reaching his decision he rejected the submission that an appellant was entitled to a full re-hearing of the detailed assessment as a whole as follows (see para.15):

> *"[15] The Appellant submits that because of the provision in CPR 47.24 whereby the court will 're-hear the proceedings which gave rise to the decision appealed against, the re-hearing is not simply a re-hearing of the specific matter but of the entire 'proceedings'. The Appellant submits that those proceedings are the detailed assessment proceedings as a whole. It is correct that the appeal is by way of re-hearing, as provided for in CPR 47.24 and PD 47 paragraph 20.4. However, are the 'proceedings which gave rise to the decision appealed against' the detailed assessment proceedings as a whole, or the hearing before the ACO? I rule that it is the latter. This is for the following reasons:*
>
> > *(i) A provisional assessment is not a 'hearing'. A 'hearing' is fixed when specific items are challenged. Therefore, a 're-hearing' is a further hearing of a 'hearing' that has taken place. This is the oral hearing and not the provisional assessment on paper. There was a dispute about this. The Appellant's case was that the provisional assessment on paper was a 'hearing'. It was said that the Senior Court Costs Office Guide, at paragraph 13.1, when dealing with provisional assessments says: 'the bill will be referred for provisional assessment (a hearing on paper only).....'. Further, PD47 paragraph 14.3 refers to 'when the receiving party files a request for a detailed assessment hearing' and paragraph 14.3(c) requires an additional copy of any paper bill and a statement of the costs to be filed 'on the assumption that there will not be an oral hearing following the provisional assessment', thereby, it is said, distinguishing between a hearing and an oral hearing. In my judgment the paper exercise is not a 'hearing'. If it were, it would be subject to the provisions in Rule 39.2 and the general rule that hearings are to be in public, subject only to the matters in Rule 39.2(3). In fact, not only are paper provisional assessments not dealt with in public, PD47 paragraph 14.4(1) prohibits the parties from attending. The distinction between what is, and what is not, a 'hearing' can also be seen to be drawn in the separate rules concerning detailed assessment of LSC funded clients' costs and costs which are payable out of a fund other than the Community Legal Service Fund – see CPR Rules 47.18(5) and 47.19(4). The wording of PD47 paragraph 14.3, though it could perhaps be better worded, does not undermine my conclusion. I suspect that following this judgment the drafting in the SCCO Guide may need some slight revision.*
> >
> > *(ii) PD 47 paragraph 20.5 requires, if possible, a 'suitable record of the judgment appealed against', and, where reasons for the decision have been officially recorded by the court, an approved transcript. If there is no official record then the officer's comments written on the bill or advocate's notes of the reasons will be acceptable. These paragraphs envisage focus upon the decision made by (or as PD47 paragraph 20.5 says 'the judgment appealed against' of) the ACO.*
>
> *[16] Therefore, the correct construction of the 'decision' of an ACO in the detailed assessment proceedings (CPR 47.21), read in conjunction with 47.24, which is that the court 're-hear the proceedings which gave rise to the decision appealed against', provide that the only decision which can be appealed and re-heard is the oral decision by the ACO. This is notwithstanding the fact that PD47 paragraph 14.4(2) refers to the results of the paper provisional assessment as 'decisions' and that CPR 47.21 enables a party to appeal 'against a decision' in the detailed assessment proceedings. If the wording needs to be explained, I would suggest that the words in the Practice Direction are infelicitously chosen. The provisional assessment on paper does not give rise to a 'decision' which can be the subject of an appeal. It would perhaps be better described as provisional assessment of items on the bill which either become binding on the parties*

if no oral hearing is requested or which, if an oral hearing is requested, gives rise to decisions capable of being appealed.

...

[18] ... The proceedings which are to be re-heard are those before the ACO when the ACO came to the oral decision."

As the judge concluded on a proper analysis the detailed assessment process and the means to challenge decisions made in it can properly be summarised as follows (para.23):

"[23] In other words:

i) At the stage of provisional assessment the parties can accept the provisional assessment or challenge it – with risk as to costs.

ii) If they challenge it they have to set out the items which are challenged. These are then determined at the oral hearing.

iii) Parties may challenge all the decisions in the provisional assessment. There is no limit.

iv) However, if they do not then they are entitled to (a) an oral determination of the issues they have identified and (b) an appeal by way of re-hearing of the decision in relation to those issues."

(See ***Civil Procedure 2019*** Vol.1 at para.47.3.1.)

■ **AA v Persons Unknown, Re Bitcoin** [2019] EWHC 3556 (Comm), 13 December 2019, unrep. (Bryan J)

Bitcoin – property – proprietary injunction

CPR r.25.1. The applicant was an insurance company. Its systems were subject to computer hacking. To recover data taken as a consequence of that they paid a ransom in Bitcoin. Subsequently it sought to trace the Bitcoin. It sought a hearing in private and anonymisation in respect of a substantive application for a proprietary injunction, and/or a freezing injunction and/or a Norwich Pharmacal order. Anonymity and a private hearing was granted (paras 16–37). In considering the question of whether to grant the proprietary injunction, Bryan J considered whether Bitcoin, as a form of cryptocurrency, was property. He noted that this question had previously been considered, albeit not in detail, in ***Vorotyntseva v Money-4 Ltd (t/a Nebeus.com)*** (2018) by Birss J, in which he granted a freezing injunction over Bitcoin and Ethereum (see ***Civil Procedure News*** No.1 of 2020) and in an unreported decision of Moulder J in ***Liam David Robertson v Persons Unknown*** (2019), in which she granted an asset preservation order of cryptocurrencies. Bryan J also noted that the status of cryptocurrencies had been considered by the Lawtech Taskforce of the UK Jurisdictional Taskforce, which in November 2019, published a legal statement on crypto assets and smart contracts (see *https://technation.io/about-us/lawtech-panel/* [Accessed 3 February 2020]). Bryan J adopted the analysis set out in the legal statement, which led to the conclusion that cryptocurrencies while not a chose in action, on a narrow definition of that term, were nevertheless a form of property (see paras 56–61). In particular, he held that the legal statement's analysis provided an accurate statement of English law on this issue. Given that, he held that Bitcoin, as a form of property, could be subject to an interim and final proprietary injunction (see para.61). ***Vorotyntseva v Money-4 Ltd (t/a Nebeus.com)*** [2018] EWHC 2596 (Ch), unrep. ChD, ***Liam David Robertson v Persons Unknown***, 15 July 2019, unrep., ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.25.1.9.)

■ **DSM SFG Group Holdings Ltd v Kelly** [2019] EWCA Civ 2256, 19 December 2019, unrep. (Davis and Simon LJJ)

Legal advice privilege – confidentiality – use of covert recording

CPR Pt 31. Four family members sold their interests in a number of businesses in 2017. The respondent was one of those family members. He received approximately £23 million as proceeds of the sale. He subsequently became concerned that there was something wrong with the sale. Consequently, he entered the appellant's premises and placed a recording device in their in-house solicitor's office. The device recorded approximately 40 hours of conversation between the in-house solicitor and the respondent's external solicitors. Inevitably a significant amount of those conversations was subject to privilege. When the appellant discovered the device, it issued proceedings seeking injunctive relief against the respondent. The central issue that arose before the Court of Appeal was the extent to which a litigant could rely on confidential information to support a claim, where it had been obtained covertly by recordings that take place on another's premises, before they had established that they had a right to use the information. The Court of Appeal endorsed the approach taken by Brereton J in the Supreme Court of New South Wales in ***British American Tobacco Australia Ltd v Peter Gordon*** (2007). It held that the proper approach in such a situation was *"the issue of the confidentiality of documents should be resolved before they were deployed, and not at the same time or afterwards"* (para.47). As Simon LJ put it at para.47, Brereton J's approach to the issue was "*clear and principled*". That approach was set out at para.44:

"[44] In succeeding paragraphs of the judgment, Brereton J stressed the importance of the necessarily 'separate and anterior' nature of an application for injunctive relief in respect of a breach of confidence when it was proposed to seek to use the relevant information in other proceedings, see [50] and [54]-[55]. In relation to the application to transfer the proceedings from New South Wales to Victoria, he said this at [50]:

50. In this context, 'fragmentation' is unavoidable and essential: the breach of confidence proceeding is a separate proceeding, anterior to the proceeding in which it is hoped or apprehended that the confidential information may be used. This is because, unless an injunction is obtained before the information is tendered in evidence in the second proceeding, the fact that it has been obtained in breach of confidence or privilege does not render it inadmissible, and once in evidence its confidence is for all practical purposes destroyed [Calcraft v Guest [1898] 1 QB 759]. Thus in Lord Ashburton v Pape, the proceeding for an injunction to restrain publication in breach of privilege and confidence was a separate proceeding, which if it were to have utility had to be determined before the proceeding in which it was threatened to use the privileged information ...

54. Other cases that illustrate the necessarily separate and anterior nature of the application for injunctive relief in respect of a breach of confidence when it is proposed to seek to use the relevant information in other proceedings include Sullivan v Sclanders, and AG Australia Holdings Limited v Burton. Accordingly, the two proceedings – the proceeding to restrain the use of information obtained in breach of confidence, and the proceeding in which tender of that information is apprehended – are necessarily separate and to that extent 'fragmented' ... Moreover, because the issues in the two proceedings are different, there is no risk of inconsistent findings. Nor is there duplication: if the plaintiff succeeds in the breach of confidence proceeding, the defendant in those proceedings is prohibited from using the information in the other proceedings; whereas if the plaintiff in the breach of confidence proceedings fails, the defendant is at liberty to tender the information, if otherwise admissible, in the other proceedings ...

British American Tobacco Australia Ltd v Peter Gordon [2007] NSWSC 230, unrep., SC of NSW, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.31.3.6.)

■ **Wickes Building Supplies Ltd v Blair (No 2) (Costs)** [2020] EWCA Civ 17, 21 January 2020, unrep. (Hamblen, Holroyde and Baker LJJ)

Qualified One-way Costs Shifting – Application to appeals

Senior Courts Act 1981 s.51, CPR rr.44.13–44.17, 52.19. A question concerning costs arose following the determination of an appeal before the Court of Appeal. The appeal concerned the correct interpretation of part of the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims: see ***Wickes Building Supplies Ltd v Blair*** (2019). The costs issue concerned the question whether the fixed costs regime set out in CPR rr.45.17–45.19 applied to the appeal costs, or whether the applicable costs rule was that set out in CPR r.52.19. If the latter applied, a further question arose: whether the QOCS regime in CPR Pt 44 applied to the appeal costs. **Held**, (i) the costs of the appeal were governed by CPR r.52.19. That rule gave the court a discretion as to costs, and particularly to limit costs recoverable. That general discretion displaced the fixed costs regime; (ii) on the specific facts of this case, it was not appropriate for the Court of Appeal to exercise its discretion to limit recoverable costs; (iii) enforcement of costs was, however, subject to the QOCS regime. In that respect the court agreed with Edis J in ***Parker v Butler*** (2016) that *"proceedings"* in CPR r.44.13 include first instance and appellate proceedings. As Baker LJ put it at para.29:

*"[29]... In [**Hawksford Trustees Jersey Ltd v Stella Global UK Ltd** (2012) and **Wagenaar v Weekend Travel Ltd** (2014)], this court held that the word 'proceedings' had to be interpreted to reflect the legislative purpose. The purpose of the QOCS regime is to facilitate access to justice for those of limited means. As Edis J observed at paragraph 3 of his judgment in Parker v Butler, if a claimant's access to justice is dependent on the availability of the QOCS regime, that access will be significantly reduced if he is exposed to a risk as to the costs of any unsuccessful appeal which he may bring or any successful appeal a defendant may bring against him. It follows that, as Edis J noted at paragraph 17 of his judgment, to construe the word 'proceedings' as excluding an appeal would do nothing to serve the purpose of the QOCS regime. I therefore conclude that any appeal which concerns the outcome of the claim for damages for personal injuries, or the procedure by which such a claim is to be determined, is part of the 'proceedings' under CPR r.44.13. This interpretation applies even where, as here, (a) the court is dealing with a second appeal, (b) the appeal is brought by the defendant to the original claim, and (c) the court has declined to exercise its discretionary powers to limit recoverable costs under CPR 52.19."*

Hawksford Trustees Jersey Ltd v Stella Global UK Ltd [2012] EWCA Civ 987; [2012] 1 W.L.R. 3581, CA, ***Wagenaar v Weekend Travel Ltd*** [2014] EWCA Civ 1105; [2015] 1 W.L.R. 1968, CA, ***Parker v Butler*** [2016] EWHC 1251 (QB); [2016] 3 Costs L.R. 435, QBD, ***Wickes Building Supplies Ltd v Blair*** [2019] EWCA Civ 1934; [2019] 4 W.L.R. 148, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at paras 44.13.1 and 52.19.1.)

■ **Raiffeisen Bank International AG v Asia Coal Energy Ventures Ltd** [2020] EWCA Civ 11, 21 January 2020, unrep. (Lewison, Baker, Males LJJ)

Legal advice privilege – confidentiality

CPR Pt 31. A bank entered into a share sale and purchase agreement with the first defendant. Finance for the agreement was provided by a company whose solicitors confirmed to the bank that they had been provided with sufficient funds, and that they had been given irrevocable instructions to either place the funds in escrow or, should that not happen within a specified period of time to make alternative arrangements to ensure the funds could be used for the share sale and purchase. The first defendant did not complete the transaction. Proceedings were commenced by the bank against both the first defendant and the solicitors. The latter claim concerned the scope of the solicitors' instructions from the finance company concerning the funds. The bank sought disclosure of the instructions. It did so on the grounds that the instructions were not confidential and subject to privilege. The judge refused to order their disclosure. The Court of Appeal dismissed an appeal from that judgment. In doing so it outlined the general principles applicable to legal advice privilege (paras 35–41). In respect of the issue on the appeal, which was whether the instructions were confidential given that the solicitors had confirmed to the bank the nature of their instructions, the Court of Appeal **held**: (i) statements from solicitors to a third party concerning their instructions do *"not automatically and without more give rise to a loss of confidentiality in the documents which contain or evidence those instructions"* (para.63); (ii) the Court of Appeal's previous decision in ***Conlon v Conlons Ltd*** (1952) was not authority for the contrary proposition that legal advice privilege did not extend to communications that contained information which a client had instructed their solicitor to repeat (para.63); (iii) as an authority ***Conlon*** was confined to the situation where a client puts in issue what instructions were given to the solicitor (para.65); in this case the bank was seeking disclosure of information that went beyond what it knew already i.e., that the solicitor had instructions to provide the confirmation. The bank sought disclosure of information going beyond such confirmation. There was no reason why it could properly be said that confidentiality had been lost in respect of anything in the instructions beyond that which the solicitors had been authorised to confirm. ***Conlon v Conlons Ltd*** [1952] 2 All E.R. 462, CA, ***Nationwide Anglia Building Society v Various Solicitors (No.1)*** [1999] P.N.L.R. 52, ChD, ***Rawlinson & Hunter Trustees SA v Akers*** [2014] EWCA Civ 136; [2014] 4 All E.R. 627, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.31.3.6.)

■ **Cuadrilla Bowland Ltd v Persons Unknown** [2020] EWCA Civ 9, 23 January 2020, unrep. (Underhill, David Richards and Leggatt LJJ)

Injunctions against persons unknown – Ineos guidelines

CPR r.19.1. Interim injunctions were granted against persons unknown and four named individuals. They enjoined them from, amongst other things, trespassing on the claimant's land. The injunctions were breached. Contempt proceedings were initiated against three individuals, who were *"persons unknown"* for the purposes of the injunction. Subsequently they were committed to prison for contempt of court. The individuals appealed from the committal orders. On appeal the Court of Appeal considered the guidelines that Longmore LJ in ***Ineos Upstream Ltd v Persons Unknown*** (2019) tentatively outlined as requirements necessary for injunctions to be granted against persons unknown. The Court of Appeal specifically considered the fourth of the guidelines, which Longmore LJ in ***Ineos*** stated was that "*the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct*" (para.34). In the present appeal, Leggatt LJ, with whom Underhill VP and David Richards LJ agreed, noted that authorities on the issue had been brought to the court's attention, which had not been before it in ***Ineos***. In the light of those authorities (***Hubbard v Pitt*** (1976), ***Burris v Azadani*** (1995)) it was necessary to modify that guideline. As Leggatt LJ put it at para.50:

> *"[50] ... I would enter a caveat in relation to the fourth of these requirements. While it is undoubtedly desirable that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct, this cannot be regarded as an absolute rule. The decisions of the Court of Appeal in Hubbard v Pitt [1976] QB 142 and Burris v Azadani [1995] 1 WLR 1372 demonstrate that, although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford effective protection to the rights of the claimant in the particular case. In both those cases the injunction was granted against a named person or persons ..."*

Leggatt LJ went on to consider the requirement that the terms of an injunction must be set out so as to be clear and certain, which while longstanding, formed the fifth of Longmore LJ's guidelines from ***Ineos***. Leggatt LJ explained that there were three different ways in which such terms could lack certainty and clarity, and that whether they did was an issue not just to be taken account of when a court considered whether to grant an injunction, but also when a court was considering an application to enforce compliance or punish for contempt. As he put it at paras 57–60:

> *"[57] There are at least three different ways in which the terms of an injunction may be unclear. One is that a term*

may be ambiguous, in that the words used have more than one meaning. Another is that a term may be vague in so far as there are borderline cases to which it is inherently uncertain whether the term applies. Except where quantitative measurements can be used, some degree of imprecision is inevitable. But the wording of an injunction is unacceptably vague to the extent that there is no way of telling with confidence what will count as falling within its scope and what will not. Evaluative language is often open to this objection. For example, a prohibition against 'unreasonably' obstructing the highway is vague because there is room for differences of opinion about what is an unreasonable obstruction and no determinate or incontestable standard by which to decide whether particular conduct constitutes a breach. Language which does not involve a value judgment may also be unduly vague. An example would be an injunction which prohibited particular conduct within a 'short' distance of a location ... Without a more precise definition, there is no way of ascertaining what distance does or does not count as 'short'.

[58] A third way in which the terms of an injunction may lack clarity is that the language used may be too convoluted, technical or otherwise opaque to be readily understandable by the person(s) to whom the injunction is addressed. Where legal knowledge is needed to understand the effect of a term, its clarity will depend on whether the addressee of the injunction can be expected to obtain legal advice. Such an expectation may be reasonable where an injunction is granted in the course of litigation in which each party is legally represented. By contrast, in a case of the present kind where an injunction is granted against 'persons unknown', it is unreasonable to impose on members of the public the cost of consulting a lawyer in order to find out what the injunction does and does not prohibit them from doing.

[59] All these kinds of clarity (or lack of it) are relevant at the stage of deciding whether to grant an injunction and, if so, in what terms. They are also relevant where an application is made to enforce compliance or punish breach of an injunction by seeking an order for committal. In principle, people should not be at risk of being penalised for breach of a court order if they act in a way which the order does not clearly prohibit. Hence a person should not be held to be in contempt of court if it is unclear whether their conduct is covered by the terms of the order. That is so whether the term in question is unclear because it is ambiguous, vague or inaccessible.

[60] It is important to note that whether a term of an order is unclear in any of these ways is dependent on context. Words which are clear enough in one factual situation may be unclear in another ..."

Hubbard v Pitt [1976] Q.B. 142, CA, ***Burris v Azadani*** [1995] 1 W.L.R. 1372, CA, ***Attorney General v Punch Ltd*** [2002] UKHL 50; [2003] 1 A.C. 1046, HL, ***Ineos Upstream Ltd v Persons Unknown*** [2019] EWCA Civ 515; [2019] 4 W.L.R. 100, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.19.1.3, Vol.2 paras 3D-49 and 15-8.)

■ **Alibrahim v Asturion Fondation** [2020] EWCA Civ 32, 24 January 2020, unrep. (Sir Ernest Ryder SPT, Leggatt and Arnold LJJ)

Warehousing claims – strike out for abuse of process

CPR r.3.4(2)(b). Proceedings for the recovery of property to the value of approximately £28 million were commenced. On the basis that the claim was said to have been unilaterally placed on hold for a substantial period of time by the claimant i.e., "*warehoused*", it was struck out by the deputy Master as an abuse of process. An appeal from that order was allowed. That decision was subject to a second appeal on the basis that it raised an important point of principle concerning abuse of process. **Held**, the appeal was dismissed. In reaching its decision the Court of Appeal reviewed the approach to be taken to delay and striking off as an abuse of process. The court first noted that delay in prosecuting a claim does not in and of itself amount to an abuse of process (***Icebird Ltd v Winegardner*** (2009)). In ***Grovit v Doctor*** (1997) and ***Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*** (1998), Lord Woolf MR had given guidance on the approach the court should take where a claimant had commenced proceedings with no intention of pursuing the claim either at all or not until some future point in time. Such claims should not be commenced. If a claim is commenced and the claimant later decides not to pursue it for a substantial period of time, they should consider discontinuing the claim or seek a stay of proceedings. Where the claimant does not seek to discontinue or does not seek to stay the proceedings, their conduct may amount to an abuse of process. It was not the case, however, that Lord Woolf MR suggested that in all such cases such conduct would amount to an abuse of process. Nor was it the case that where the court held that such conduct was an abuse of process striking it out was the appropriate or automatic consequence; the court sanction to be applied should be proportionate. As Arnold LJ, with whom Ryder SPT and Leggatt LJ agreed, put it, having also considered two further authorities, para.61:

"[61] In my judgment the decisions in Grovit, Arbuthnot, Realkredit and Braunstein show that a unilateral decision by a claimant not to pursue its claim for a substantial period of time, while maintaining an intention to pursue it at a later juncture, may well constitute an abuse of process, but does not necessarily do so. It depends on the reason why the claimant decided to put the proceedings on hold, and on the strength of that reason, objectively considered, having regard to the length of the period in question. A claimant who wishes to obtain a stay of proceedings for a period of time should seek the defendant's consent or, failing that, apply to the court; but it is not the law that a failure to obtain

the consent of the other party or the approval of the court to putting the claim on hold automatically renders the claimant's conduct abusive no matter how good its reason may be or the length of the delay."

Neither ***Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS*** (2017) nor ***Solland International Ltd v Clifford Harris & Co*** (2015) properly interpreted supporting the proposition that warehousing always amounted to an abuse of process. Arnold LJ at para.64 then set out the approach to be taken by a court in assessing the question whether warehousing a claim amounted to an abuse of process. As he put it the proper approach was to adopt a two-stage test:

"[64] Finally on the law, I should address a more minor dispute between the parties. Counsel for Ms Alibrahim suggested that an application to strike out on the ground of abuse of process by 'warehousing' fell to be analysed in three stages. The first stage was to consider whether the claimant's conduct was an abuse of process. The second stage, if an abuse of process was found, was to consider whether the abuse was sufficiently serious to entitle the court to strike out the claim. The third stage, if the abuse was sufficiently serious, was for the court to exercise its discretion as to whether in all the circumstances striking out was the appropriate remedy. In the course of argument, however, he accepted that an alternative view was that there were only two stages to the analysis: first, the court should determine whether the claimant's conduct was an abuse of process; and if so, secondly, the court should exercise its discretion as to whether to strike out the claim. Counsel for Asturion supported a two-stage analysis. In my judgment the better reading of the authorities is that the analysis falls into two stages, and not three. Furthermore, this is supported by the structure of CPR rule 3.4(2)(b), which provides that the court 'may' strike out a statement of case if it 'is an abuse of the court's process' (it is perhaps worth noting that the authorities have added the gloss 'in all the circumstances of the case', particularly the claimant's conduct)."

Finally, the court held that in the present case striking out the claim was a disproportionate sanction to apply. Lesser sanctions could have been considered and applied. ***Grovit v Doctor*** [1997] 1 W.L.R. 640, CA, ***Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*** [1998] 1 W.L.R. 1426, CA, ***Realkredit Danmark A/S v York Montague Ltd*** [1999] C.P.L.R. 272; *The Times*, 1 February 1999, CA, ***Braunstein v Mostafazan***, 12 April 2000, unrep., CA, ***Solland International Ltd v Clifford Harris & Co*** [2015] EWHC 3295 (Ch), unrep, ChD, S***ociété Générale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS*** [2017] EWHC 667 (Comm), unrep., ***Icebird Ltd v Winegardner*** [2009] UKPC 24; [2009] 23 E.G. 93 (C.S.), PC, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.3.4.3.6.)

■ **R. (Jet2.Com Ltd) v Civil Aviation Authority** [2020] EWCA Civ 35, 28 January 2020, unrep. (Patten, Hickinbottom and Peter Jackson LJJ)

Legal advice privilege – dominant purpose requirement

CPR Pt 31. The respondent issued judicial review proceedings against the appellant in respect of one of its press releases. The particular press release, it was submitted, had, amongst other things, been ultra vires the appellant's statutory powers and issued for an improper purpose. The respondent sought disclosure of a number of documents, which it was argued were subject to legal advice privilege. Two issues were raised before the Court of Appeal: whether a communication had to have been created or sent for the dominant purpose of seeking or giving legal advice to fall within the scope of legal advice privilege; and if so, what was the proper approach to determining whether emails that had been sent between multiple parties, where one of the senders or recipients was a lawyer, were subject to privilege. **Held**, having considered the authorities and found no good reason not to accept that the dominant purpose test should apply to legal advice privilege, Hickinbottom LJ, with whom Patten and Peter Jackson LJJ agreed, held that there were good reasons to confirm that such a test applied to legal advice privilege. As he put it at para.95:

"[95] Further, in my view there are good grounds for including such a criterion.

i) Although they do have some different characteristics, litigation privilege and LAP are limbs of the same privilege, legal professional privilege. It is uncontroversial that the dominant purpose test, grown out of Grant v Downs, applies to litigation privilege. For the reasons I have given, I am unpersuaded that Eurasian is correct to consider the limbs as fundamentally different with regard to purpose. In my view, there is no compelling rationale for differentiating between limbs of the privilege in this context. The 'dominant purpose' test in litigation privilege fixed by Waugh derives from Australian jurisprudence, which has since Grant v Downs treated the purpose test (whatever it might be) as applying to both limbs of the privilege.

ii) Whilst I accept that the position is not uniform, generally the common law in other jurisdictions has incorporated a dominant purpose test in both limbs of legal professional privilege, e.g., in addition to Australia above (considered above: see paragraphs 74-75), Singapore (Skandinaviska Enskilda Banken AB v Asia Pacific Breweries [2007] 2 SLR 367) and Hong Kong (Citic Pacific Limited v Secretary of Justice [2016] 1 HKC 157 at [51]-[62]). This not only suggests that such a test is able to work in practice; but this is a legal area in which there is advantage in the common law adopting similar principles."

Having held that the dominant purpose test applied to legal advice privilege, there was no need for the court to go on to consider the second question. In obiter, however, Hickinbottom LJ provided detailed guidance at para.100 on the approach to take to determine whether the privilege applied to emails sent between multiple parties. Finally, in obiter, the court considered the scope of *"client"* for the purposes of legal advice privilege (see paras 47–59). It concurred with the approach taken by a different constitution of the Court of Appeal in ***Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd*** (2018), that the approach taken by the court in ***Three Rivers DC v Bank of England (No.5)*** (2003) was wrong in principle and in terms of practical application. It too concluded that if it were open to it to do so it would not have followed the decision in ***Three Rivers (No.5)***. Given this there must be a strong likelihood that this issue will need to be resolved by the UKSC before too long. ***Greenough v Gaskell*** 39 E.R. 618; (1833) 1 My. & K. 98, Ct of Ch, ***Anderson v Bank of British Columbia*** (1876) 2 Ch. D. 644, CA, ***Wheeler v Le Marchant*** (1881) 17 Ch. D. 675, CA, ***Grant v Downs*** (1976) C.L.R. 670, High Ct. Aus., ***Hellenic Mutual War Risks Association (Bermuda) Ltd v Harrison (The Sagheera)*** [1997] 1 Lloyd's Rep. 160, Comm., ***R. v Derby Magistrates' Court Ex p. B*** [1996] A.C. 487, HL, ***R. (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax*** [2002] UKHL 21; [2003] 1 A.C. 563, HL, ***Three Rivers DC v Bank of England*** [2002] EWHC 2730 (Comm); [2003] C.P. Rep. 34, Comm., ***United States v Philip Morris Inc (No.1)*** [2003] EWHC 3028 (Comm), unrep., ***Three Rivers DC v Bank of England (No.5)*** [2003] EWCA Civ 474; [2003] Q.B. 1556, CA, ***Three Rivers DC v Bank of England (No.6)*** [2004] UKHL 48; [2005] 1 A.C. 610, HL, ***Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd*** [2018] EWCA Civ 2006; [2019] 1 W.L.R. 791, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.31.3.6.)

- **Manchester Shipping Ltd v Balfour Shipping Ltd** [2020] EWHC 164 (Comm), 4 February 2020, unrep. (Lionel Persey QC sitting as a deputy Judge of the High Court)

Sanction for failing to file a cost budget – approach to saving provision

CPR r.3.14. The defendant failed to file their cost budget in time. It notified the claimant that if necessary, it would apply for relief from sanctions at the next costs and case management hearing (CCMC). The claimant submitted that where a party failed to file their costs budget in time, the non-compliant party had to make a timely application for relief from sanction under CPR r.3.9. It relied on ***BMCE Bank International Plc v Phoenix Commodities Pvt Ltd*** (2018) in support of that submission. The defendant had not, in this case, done so. It had not done so as it had intended to make an application for relief under the saving provision in CPR r.3.14 at the CCMC. **Held**, ***BMCE Bank International Plc v Phoenix Commodities Pvt Ltd*** was not authority for the proposition that in all cases of non-compliance with the requirement to file a costs budget, a separate application under CPR r.3.9 had to be made. There would be cases where making such an application and doing so promptly was the advisable course of action, but it was not required in every case for a non-compliant party to seek to rely upon the saving provision. Whether to exercise the discretion to apply the saving provision was, however, subject to the test for relief from sanctions set out in ***Denton*** (2014). On the facts of this case relief from sanction would be granted, and the saving provision applied. ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, CA, ***BMCE Bank International Plc v Phoenix Commodities Pvt Ltd*** [2018] EWHC 3380 (Comm), unrep., ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.3.14.2.)

Practice Updates

PRE-ACTION PROTOCOLS

On 20 December 2019, the Master of the Rolls as Head of Civil Justice approved the issue of three new Pre-Action Protocols, which replace the Pre-Action Protocol for Housing Disrepair Cases and the Pre-Action Protocol for Possession Claims by Social. Landlords. The replacement protocols are:

- a new Pre-Action Protocol for Housing Condition Cases (England);
- a new Pre-Action Protocol for Housing Disrepair Cases (Wales); and
- a new Pre-Action Protocol for Possession Claims by Social Landlords.

The new protocols came into force on 13 January 2020. The new Housing Disrepair Cases protocols reflect the increasing divergence, in specific areas, of the law of England and the law of Wales. While the protocols remain substantively the same, the English protocol encompasses specific provisions concerning fitness for human habitation in the Landlord & Tenant Act 1985 s.9A, which only applies in England. The Welsh protocol, which is essentially the same as the protocol which it replaces, not only differs from the English protocol in respect of the absence of reference to s.9A of the 1985 Act, but it has also been updated to make specific reference to organisations relevant to ADR that are based in Wales. The new Pre-Action Protocol for Possession Claims by Social Landlords now includes reference to accelerated possession

claims. It also makes provision for social landlords to comply with any guidance issued by either the Ministry for Housing, Communities and Local Government or, in Wales, Welsh Ministers in addition to complying with the protocol (see para.1.5 of the protocol). The new protocol generally, however, applies to England and Wales.

PRACTICE GUIDANCE

INSOLVENCY – APPOINTMENT OF ADMINISTRATORS – GUIDANCE

A number of concerns have been raised recently over the interaction of the Insolvency Rules and the Insolvency Proceedings Practice Direction with CPR PD 51O (Electronic Working Pilot Scheme) (see ***Re HMV Ecommerce Ltd*** [2019] EWHC 903 (Ch), ***Re Skeggs Beef Ltd*** [2019] EWHC 2607 (Ch) and ***Re SJ Henderson & Co Ltd*** [2019] EWHC 2742 (Ch)). Most recently in ***Causer v All Star Leisure (Group) Ltd*** [2019] EWHC 3231 (Ch), HHJ David Cooke noted particular concerns over the apparent exclusion of the process for appointing administrators from the operation of CE-File's otherwise 24-hour availability. On 29 January 2020, Sir Geoffrey Vos C issued a Guidance Note clarifying the approach to be taken for the appointment of administrators outside court hours. The Guidance is reprinted below.

Guidance Note on Appointing an Administrator

Practitioners have expressed concern regarding the effect of the appointment of an administrator purportedly made by filing a notice of appointment via the court's electronic filing system, outside the court's usual counter-opening hours.

It is anticipated that these issues will be addressed by amendment to the Insolvency (England and Wales) Rules 2016. Until then, court clerks will be directed to process filings in the manner set out in this note. Note that the amendments relate to Notices of Appointment only and not Notices of Intention to Appoint.

Appointment of administrators by a company or its directors under paragraph 22 of Schedule B1 to the Insolvency Act 1986

Notices of appointment of an administrator by a company or its directors under paragraph 22 which are CE-filed when the court is closed will be referred by the court clerks at the first possible opportunity to a specified High Court Judge. The Judge will determine the validity and, if appropriate, the time at which the appointment takes effect. The Judge's determination will be made on paper or following a short hearing, for which he may request written or oral submissions.

Appointment of administrators by a qualifying floating charge holder under paragraph 14 of Schedule B1 to the Insolvency Act 1986

Rule 3.20 of the Insolvency (England and Wales) Rules 2016 provides that when the court is closed the holder of a qualifying floating charge may file a notice of appointment of an administrator pursuant to paragraph 14 of Schedule B1 with the court by fax to a designated telephone number or by email to a designated email address. If such a notice is not filed in accordance with Rule 3.20, but instead is CE-filed when the court is closed, it will be referred at the first possible opportunity to a specified High Court Judge who will determine the validity and, if appropriate, the time at which the appointment takes effect. The Judge's determination will be made on paper or following a short hearing, for which he may request written or oral submissions.

January 2020
Sir Geoffrey Vos C

COUNTY COURT MONEY CLAIMS – FINAL CHARGING ORDERS – GUIDANCE

In November 2019 guidance was issued concerning the operation of Practice Direction 51T (The County Court Legal Advisers Pilot Scheme – Final Charging Orders). The guidance has been kindly provided to Civil Procedure News by the County Court Money Claims Centre (CCMC) and is reprinted below.

CCMCC Pilot – Legal Advisers approval of unopposed final charging orders

Background

On 1 October 2018 a pilot commenced at the CCMCC to enable legal advisers to approve unopposed final charging orders pursuant to the centralised procedure implemented in April 2016. To assist with the pilot and to ensure that the legal advisers are fully supported in their consolidation of the procedure may we request the following requirements are fulfilled prior to filing a charging order application at the CCMCC.

- *Legal Advisers will only approve final charging orders when they are fully satisfied that the applicant has made sufficient checks and provided appropriate documentation to confirm the identity of the defendant.*
- *Section 8 of the N379 charging order application form must be completed where there is a difference in the identity of the defendant on the charging order application and the land registry documents. Applications will be returned if this is not adhered to.*

- *If the Legal Adviser is not satisfied that the defendant's identity has been sufficiently proven they may issue a request for information letter to the applicant. This will occur at final charging order referral stage. This may occur even if Section 8 of the N379 application form has been completed*
- *Customers are advised to seek and file a credit report or other documents confirming the identity of the debtor with the initial charging order application to ensure the process proceeds without the above delays.*

Direction update: May 2019

- *Customers are advised to utilise Section 8 (further information) on the form N379 charging order application to advise what steps have been taken to confirm the identity of the judgment debtor. For example, a credit report has been sought to confirm the identity. Customers who follow this process and ensure the statement of truth on the form N379 is signed will not have to provide copies of documents sought to confirm the identity of the judgment debtor. Customers often indicate in Section 8 that they believe the judgment debtor and the person named on the Land Registry documentation (filed in support of the charging order application) are "one and the same person" and offer no further information as to steps taken to confirm this. This will not fulfil the requirement of satisfying the legal adviser that identity has been proven and will result in a direction from the legal adviser for a letter requesting further information to be dispatched to the customer.*

November 2019

In Detail

GUIDANCE ON JOINDER OF PARTIES – MOLAVI v HIBBERT [2020] EWHC 121 (Ch)

Background

In ***Molavi v Hibbert*** [2020] EWHC 121 (Ch) , John Kimbell QC, sitting as a deputy judge of the High Court, considered an application by the claimant to join two new parties to her claim for breach of confidence and copyright infringement. The application was made under CPR r.19.2. The application was resisted by the respondents and the existing defendants on the basis that it failed to satisfy the requirements of CPR r.19.2(a) and (b) i.e., it was neither desirable to add them as new parties in order to enable the court to resolve all the matters in dispute in the proceedings nor was there an issue involving the new parties and an existing party that was connected to the matters in dispute in the proceedings, such as to make it desirable to add the new party to the proceedings. Additionally, the respondents resisted the application on the basis that the claims to be advanced against them were not reasonably arguable nor was there any other good reason to order joinder. The applications were dismissed and the claim was directed to proceed under the Short and Flexible Trials Scheme (CPR PD 57AB).

In reaching his decision the deputy High Court judge gave the following guidance on both the notice requirements for joinder applications and the approach to be taken to such applications.

Guidance on joinder applications – notice to defendants

Neither of the defendants were served with notice of the joinder application. They had been informed, by letter, by the claimant's legal representatives that notice, and supporting evidence, was not required as the application was not against them. The deputy High Court judge held this to be mistaken: notice of the application and supporting evidence had to be supplied to the defendants. As he explained at para.42:

> *"[42] ... Whilst it is true, that the CPR 19.2(2) does not expressly require all applications to join or substitute a party to be served on the existing parties, it seems to me to be a matter of common sense that the existing parties to these proceedings ought to be served with copies of the application notice and evidence."*

Moreover, where joinder of one of more parties may potentially lead to cost, delay or the length of proceedings increasing, existing parties ought to be given notice and evidence in support of such an application (see para.43). In reaching that decision, the deputy High Court judge relied upon the pre-CPR approach taken to such applications in the Chancery Division as noted in *The Supreme Court Practice 1999* Vol.1 at 15/6.17, with ***Tildesley v Harper*** (1876) 3 Ch. D. 277 and ***Re Colbeck*** (1888) 36 W.R. 259 as supporting the proposition that where an application for joinder was likely to be contested notice was to be given to all parties to the proceedings.

Additionally, the deputy High Court judge also held that the claimant also came under a duty to provide the defendants with relevant information when they requested it. This duty arose under CPR r.1.3, which requires parties to assist the

court in furthering the overriding objective. The importance of providing notice and evidence to the defendants was readily apparent in the present case. While the defendants did not attend the hearing, their written submissions were noted to have provided greater detail on the case management implications of the proposed joinder than was provided by either the claimant or respondents to the application (see para.46).

Finally, in respect of notice, the deputy High Court judge gave the following guidance on the approach to take when there was a substantial dispute concerning joinder. As he put it at para.45:

> *"[45] If there is substantial dispute about whether joinder is appropriate, in particular where it appears that joinder may cause delay or increase costs in the proceedings, then a case management conference ought generally to be convened for the court to consider the case management implications of the proposed joinder in the round. While exceptionally some purely formal applications involving the substitution of say 'X PLC' for 'X Ltd' may not require such an approach and may well be capable of being dealt with by consent and without a hearing, a disputed application to add substantial new causes of action against new Defendants to an existing action seems to me to be a situation where the existing parties ought to be given notice of the application and for the application generally to heard at a case management conference."*

Guidance on joinder applications – generally

The deputy High Court judge first noted that there is no general discretion to permit joinder (see Sir Terence Etherton C in ***Welsh Ministers v Price (Rev 1)*** (also known as ***Re Pablo Star***) [2017] EWCA Civ 1768; [2018] 1 W.L.R. 738, CA, at [47]). The court's discretion to permit joinder only arises if either of the conditions in CPR r.19.2(2)(a) or (b) are satisfied; the two conditions being independent of each other (see para.49). Even where either one or other of the conditions is satisfied joinder remains a matter of discretion; the court may permit joinder, it is not required to do so. In order to satisfy the first condition, it was necessary to demonstrate that the proposed new party could assist the court to resolve the matters in dispute. Dispute was here to be given a wide interpretation i.e., it was to be read as "*in issue*". It was also necessary to show that joinder was desirable as a means to assist the court resolving the matters in dispute (see para.56, citing ***Welsh Ministers v Price (Rev 1) (Re Pablo Star)***). The approach to satisfying the second condition (CPR r.19.2(2)(b)) involved three separate considerations, which were summarised as follows:

> *"[64] For an applicant to succeed with an application under CPR 19.2(1)(b), three conditions must be met: (1) an issue must be identified between the proposed new party and an existing party (2) the issue must be connected to the matters already in dispute in the proceedings (3) it is desirable to add the new party so that the court can the issue identified in condition (1).*
>
> *[65] As to Condition (1) it is clear that it is not necessary for the issue between the new party and the existing party to be a cause of action: see XYX v Transform Medical Group [2014] EWHC 4056 at [22], in which a number of authorities are cited to the this effect.*
>
> *[66] Condition (2) is the critical condition. The issue between the existing and the proposed new party must be connected to the matters already in issue in the proceedings. The nature of the required connection is not prescribed. In some cases, the connection will be in the form of an overlap of factual evidence between the existing proceedings and issue with the proposed new party – see, for example, Dunlop Haywords (DHL) Ltd. v Erinaceous Insurance Services Limited [2009] EWCA Civ 354 at [88].*
>
> *[67] In other cases, the connection is that the new party is concerned in with the outcome in some way such that it is desirable to have all parties connected to the dispute before the court in one set of proceedings so that they are bound by the outcome. This was the case for the excess insurers proposed to be added as defendants in Dunlop Haywords (DHL) Ltd. v Erinaceous Insurance Services Limited [2009] EWCA Civ 354 at [89].*
>
> *[68] In some cases, it is an existing Defendant who raises an issue which makes it desirable that another party be joined: see e.g. Sheikhar Dooma Shetty v Al Rushaid Petroleum Investment Company [2011] EWHC 1460 (Ch) at [15]."*

Finally, the deputy High Court judge stated that as the power to join a party is a case management decision it must further the overriding objective as that is applied to the specific case (see para.50 citing ***Welsh Ministers v Price (Rev 1) (Re Pablo Star)***). One consequence of this was that an applicant is required to identify at the outset of their application which of the two conditions of CPR r.19.2(2) they rely upon. The application notice and evidence should make that clear, and so should the applicant's skeleton argument. Furthermore, the application and any skeleton argument should also consider and deal with the case management implications of the proposed joinder. Such information and argument was both necessary to enable the court to properly consider whether the CPR r.19(2)(2) conditions had been made out, but also, where it had been made out, to consider whether it should exercise its discretion to grant the application (see paras 51–53).

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