CIVIL PROCEDURE NEWS

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In Brief

Cases

■ **Thimmaya v Lancashire NHS Foundation Trust** (Claim No: B57YP861), County Court sitting at Manchester, 30 January 2020, unrep. (HHJ Claire Evans)

Expert witness – wasted costs order

CPR r.35.3. Clinical negligence proceedings were brought against the defendant. Following the trial of the action, the defendant issued an application seeking a third-party costs order, i.e., a wasted costs order, against the claimant's expert, who was a consultant spinal surgeon. The application arose as a consequence of the manner in which the expert gave evidence during the trial. As the judge noted, the expert:

> *"[2] ... was wholly unable to articulate the test to be applied in determining breach of duty in a clinical negligence case. He was given a number of opportunities to explain it; he was asked the question in different ways; that did not assist him. In the end, he stated that he did not know the test to be applied. The Claimant then had no real choice but to discontinue her claim, he being the only expert upon whom she relied."*

The defendant's application was also based on the submission that the expert was not "*generally competent*" as an expert as: (i) it related to surgery he had only carried out twice; (ii) he was not competent as an expert due to his lack of awareness of the relevant legal test for breach of duty; and (iii) he was not fit to give expert evidence in any event as, at the relevant time, he was, as was later accepted, suffering mental health problems. As a consequence, it was submitted, he ought to have realised, further to CPR Pt 35 and the relevant GMC Good Medical Practice Guidance, he was not competent to act. In the premises, the defendant sought all their costs of defending the claim. It was noted that in a subsequent case, the expert was also unable to state the relevant legal test for determining breach of duty (***ZZZ v Yeovil District Hospital NHS Foundation Trust*** (2019) at para.88). **Held**, irrespective of whether the expert knew the relevant legal test, it was improper of him to have continued to act as an expert witness while he was suffering from mental health and cognitive problems "*such that he was unable to concentrate and unable to engage properly with cross-examination*". He did not cease to act, nor did he inform his client or her legal representatives of his medical condition. These were significant failings that amounted "*to improper, unreasonable, or negligent conduct*". This was sufficient to give rise to the wasted costs jurisdiction. It was, however, noted that his ability as an expert did not itself give rise to that jurisdiction. The judge further held that by continuing to act as an expert while suffering from health problems, he had caused the defendant to have incurred all its costs from the point when he ought to have ceased acting as an expert. The consequences of his actions resulted in the loss to the claimant of having her claim heard on its merits. It had wasted court time. And it had wasted the defendant's resources. As a consequence, it was appropriate to require the expert to pay the defendant's costs from the date on which he ought to have ceased to act of £88,801.68, and of the wasted costs application. ***ZZZ v Yeovil District Hospital NHS Foundation Trust*** [2019] EWHC 1642 (QB), unrep., QBD, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.35.3.7.)

■ **Re Symm & Co Ltd** [2020] EWHC 317 (Ch), 5 February 2020, unrep. (Zacaroli J)

Appointment of administrators – CE-File – out-of-hours

IR r.3.25, CPR PD 51O, Practice Direction: Insolvency Proceedings [2018] B.C.C. 241. In January 2020 Sir Geoffrey Vos C issued guidance in order to provide clarity concerning the appointment of administrators outside court hours where notice is filed via CE-File (see ***Civil Procedure News*** No.2 of 2020). Zacaroli J noted that an amendment to the Insolvency Rules 2016 to clarify the position formally will shortly be made. Additionally he gave the following further clarification of the position and approach to be taken:

> *"[37] I consider that the preferable interpretation of paragraph 8.1 of the Insolvency Practice Direction, in agreement with ICCJ Burton in SJ Henderson & Company and the reasoning of Marcus Smith J Skeggs Beef, is that paragraph 2.1 of the Pilot Scheme does not apply to any notice of appointment of an administrator outside court opening hours. It is accordingly not permissible for the company or its directors to effect an appointment of an administrator out of court hours.*
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> *[38] This conclusion is supported by the following:*
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> > *i) The 2016 Rules (and the 1986 Rules before them) provide for the appointment of administrators out of court hours in one case only, that is where the appointment is made by a QFC Holder (a qualifying floating charge holder).*

ii) That reflects a deliberate policy that the ability to appoint an administrator out of court hours is limited to an appointment by a QFC Holder. At the time the 1986 Rules were enacted, it was not practically possible for a notice of appointment to be filed outside court hours, unless special provision for an alternative method was made, because the act of filing necessarily required the court office to be open. It was therefore unnecessary specifically to prohibit appointments out of hours by the company or its directors. The absence of specific prohibition, however, should not be interpreted as the rules permitting an appointment out of hours by directors or the company. The absence of any of the safeguards surrounding appointments out of hours by QFC Holders, in the case of appointments by the company or its directors, is a compelling indication that the drafter did not intend it to be possible for the company or its directors to make such an appointment out of hours.

iii) The difference in treatment is readily explained by the fact that the provisions enabling a QFC Holder to appoint an administrator replaced, in substance, the previous entitlement of the holder of such a charge to appoint an administrative receiver. There had never been any restriction on the time at which an administrative receiver could be appointed. No equivalent entitlement had ever previously existed for the company or its directors.

iv) I do not think that the drafter of the Insolvency Rules, when enacting Rule 1.46, which introduced the possibility of electronic delivery of documents to the court under a future pilot scheme, intended that it would extend the ability to appoint administrators out of hours to the company or its directors. Rule 1.46 is concerned with the mechanics of delivery (generally) of documents to the court. It would be surprising if a provision concerned with such mechanics was intended to alter a long-standing policy concerning the time at which an appointment of administrators could be appointed out of court. The absence of equivalent safeguards to those referred to above surrounding the appointment out of court by a QFC Holder is again a compelling indication that it was not intended to create an ability for the company or its directors to appoint an administrator otherwise than during the court day when none had existed before.

[39] That leaves the question as to the consequences which flow from a purported filing of a notice of appointment by directors outside court hours. In agreement with Marcus Smith J (at [22-24] of his judgment in Skeggs Beef), I consider that the defect in this case is properly categorised as an irregularity that has caused no substantial injustice and is capable of being cured pursuant to Rule 12.64.

[40] The appropriate cure, however, is not simply to declare that the appointment was effective at the time the notice of appointment was purportedly filed by CE-file. That was the appropriate course in Skeggs Beef because it was an appointment by a QFC Holder and the 2016 Rules permit such appointments to be effected out of hours. In the case of CE-filing by the directors, to adopt the same course would cut across the prohibition in the Insolvency Rules (as I have interpreted them above) on appointing an administrator out of court and out of hours otherwise than by a QFC Holder.

[41] Accordingly, I consider the better approach is to cure the defect by treating the notice as filed at the time the court opened for business on the next working day, in this case 10:00 am on 5 February 2020. This solution treats the CE-filing after hours as analogous to a hard-copy notice which was left on the (closed) counter of the court at, say, 8:00 am, but was physically accepted over the counter only when the court office opened for business at 10:00am. Such a filing would be effective, but only from the time the court office opened."

Re HMV Ecommerce Ltd [2019] EWHC 903 (Ch); [2019] B.C.C. 887, ChD, ***Re Skeggs Beef Ltd*** [2019] EWHC 2607 (Ch); [2020] B.C.C. 43, ChD, ***Re SJ Henderson and Co Ltd*** [2019] EWHC 2742 (Ch); [2020] B.C.C. 52, ChD, ***Re Keyworker Homes (North West) Ltd*** [2019] EWHC 3499 (Ch), unrep., ChD, ***Causer v All Star Leisure (Group) Ltd*** [2019] EWHC 3231 (Ch); [2020] B.C.C. 100, ChD, ***Re Carter Moore Solicitors Ltd*** [2020] EWHC 186 (Ch), unrep., ChD, ref'd to.

■ **McParland & Partners Ltd v Whitehead** [2020] EWHC 298 (Ch), 14 February 2020, unrep. (Sir Geoffrey Vos C)

Disclosure pilot scheme – party co-operation – issue identification – disclosure models

CPR PD 51U paras 6.1, 8.3. Following a disclosure guidance hearing, Sir Geoffrey Vos C provided guidance on the proper approach to a number of aspects of the Disclosure pilot scheme established under Practice Direction 51U. First, he explained, at paras 3–4 and 55, that the pilot scheme was intended to be applicable to all forms of proceeding in the Business and Property Courts. This was the case irrespective of the value of the claim. Parties were to ensure, both in low and high value and in complex, document-heavy and less complex document-light claims, that they did not adopt an unduly complex and granular approach to the disclosure process. In order to ensure that disclosure was reasonable and proportionate, the court and parties should ensure that no single disclosure model is treated as if it is a default form of order. Unlike the approach that was taken to standard disclosure under CPR Pt 31, neither ordering Extended Disclosure nor ordering Model D disclosure (PD 51 para.8.3) should be viewed as a default order. On the contrary, care

had to be taken to ensure that the several factors set out in PD 51U para.6.4 were given weight on any assessment of an application for extended disclosure. Such an assessment of those factors underscored the fact that the pilot scheme applied to all types of proceeding. Secondly, parties were to co-operate with each other in carrying out the disclosure process. This was an imperative of the pilot scheme. Abuse or misuse of the scheme for procedural or tactical advantage was deprecated. Parties engaging in such conduct should expect to be subject to serious adverse cost sanctions (see paras 4, 53–54 and 58). Thirdly, guidance on issue identification was given (see paras 44–49). The starting point for issue identification is the documentation in, or likely to be in, the possession of each of the parties. In carrying out the exercise parties were not to adopt a mechanical approach based on an analysis of the pleadings as issues for disclosure may well be different from issues for trial; see further PD 51U para.7.3. Categories of document should be identified by reference to issues in dispute. Issues for disclosure were unlikely to be numerous. They were unlikely to touch upon legal issues, or factual issues that could be resolved by reference to initial disclosure. Finally, in considering which was the appropriate disclosure model, Vos C stressed that Model C would be most appropriate where disclosure could not be agreed following a reasonable request for further documentation. Model D would be most appropriate where the parties did not trust each other to have properly carried out initial disclosure. Different disclosure models could apply to different parties. And, different disclosure models could apply to different parties on the same issue (see paras 50–52). (See ***Civil Procedure 2019*** Vol.1 at para.51UPD.6.)

■ **Sports Direct International Plc v Financial Reporting Council** [2020] EWCA Civ 177, 18 February 2020, unrep. (Sir Terence Etherton MR, Lewison and Rose LJJ)

Legal professional privilege – exceptions

The respondent carried out an investigation of the appellant's former auditors and an individual at that firm. The respondent is the regulatory body responsible for regulating statutory auditors and their work. Acting further to its statutory powers it requested documents from the appellant. The appellant withheld 40 documents on the basis that they were subject to legal professional privilege. The respondent argued that while the documents would ordinarily be subject to privilege, they fell, however, within a narrow exception to it. **Held**, legal professional privilege was a fundamental human right, which was subject to only two categories of exception: first, the iniquity exception (***R. v Cox (Richard Cobden)*** (1884)); and secondly, where statute has expressly modified or abrogated it. See ***R. v Derby Magistrates' Court Ex p. B*** (1996). Lord Hoffmann had not, in ***R. (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax*** (2002), held that a third exception existed, based on the decision in ***Parry-Jones v Law Society*** (1969). The suggested third exception was said to arise:

> *"[20] ... where a regulator such as the Law Society or the FRC has a statutory power to request documents then either:*
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> *i) there is no infringement of LPP when those documents are handed over in response to a request made under that power ('the no infringement exception'); or*
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> *ii) any infringement of LPP is technical only and can be regarded as authorised by the relevant statutory provisions on the basis of a less stringent test than that applied by the House of Lords in Morgan Grenfell or by the Privy Council in B v Auckland ('the technical infringement exception')."*

Rose LJ, with whom the Master of the Rolls and Lewison LJ agreed, rejected the suggestion that such an exception existed. As she put it:

> *"[24] ... There is no justification for regarding what Lord Hoffmann said in para. 32 of Morgan Grenfell as authority either for the existence of a no infringement exception to the protection conferred by LPP or for the application of some lower threshold for implying a statutory override on the grounds that any infringement of Sports Direct's LPP would be technical. The task of the court is to apply the test laid down in Morgan Grenfell and B v Auckland, by looking at paragraph 1 of Schedule 2 to see whether Parliament must have intended to override the privilege. Paragraph 1(8) and 1(9) of Schedule 2 preclude any such implication.*
>
> *...*
>
> *[40] I do not see any support in the cases following Morgan Grenfell for the proposition that para. 32 of Lord Hoffmann's speech created a no infringement exception to the absolute protection provided by privilege. Lord Hoffmann did not express his conclusion as creating any such exception and the supposed existence of such an exception has not been picked up or relied upon in the subsequent case law, in particular in B v Auckland where it would have been most relevant..."*

Also see para.46. ***R. v Cox (Richard Cobden)*** (1884) 14 Q.B.D. 153, CtCCR, ***Parry-Jones v Law Society*** [1969] 1 Ch. 1, CA, ***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, ***B v Auckland District Law Society*** [2003] UKPC 38; [2003] 2 A.C. 736, PC (NZ), ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.31.3.5.)

■ **Morrow v Shrewsbury Rugby Union Football Club Ltd** [2020] EWHC 379 (QB), 21 February 2020, unrep. (Farbey J)

Vulnerable witnesses – measures

CPR r.3.1(2)(m). The claimant was struck by a rugby post, which caused personal injury. Liability was not in dispute. The claimant applied for the appointment of an intermediary to assist him to understand the proceedings and help him to give his best evidence. He did so on the basis of the anxiety and stress he was suffering as a consequence of the accident. Farbey J noted that in criminal or family proceedings, provision was made for special measures to be taken to assist vulnerable witnesses, e.g., s.16 of the Youth Justice and Criminal Evidence Act 1999, and the Family Procedure Rules Pt 3A and PD 3A. Similar provision is not, however, made in the Civil Procedure Rules (see paras 21–26). It was not in dispute, however, that the court had sufficient powers under its general case management powers (CPR r.3.1(2)(m)):

> *"... to consider such adjustments and to make appropriate directions in order to ensure that the claimant was able to give his best evidence"* (see para.30).

In criminal proceedings:

> *"[23] It is now well-established that the court should consider 'ground rules' before a vulnerable witness is to give evidence in order to determine what directions are necessary in relation to the nature and extent of that evidence, the questions to be asked by the advocates and any other necessary modifications of the court's procedures. One of the special measures available for the assistance of vulnerable witnesses is a requirement that the witness be examined through an intermediary (section 29 of the 1999 Act). The intermediary's role is to assist the witness to understand questions and communicate answers. It is not a general witness support role which is provided by others within the criminal justice system. An intermediary is independent of the parties and owes his or her duty to the court."*

Farbey J held a "*ground rules hearing*" in which she considered what measures were needed to assist the claimant to understand questions put to him by the advocates and to communicate his answers effectively. At that hearing she heard from the claimant's intermediary and considered two reports prepared by her. Farbey J expressed some considerable reservations concerning the intermediary's role, which suggests that any consideration by the Civil Procedure Rule Committee on the question of any possible codification of rules concerning intermediaries analogous to those in criminal and family proceedings ought to be carried out with a degree of circumspection. In particular, Farbey J noted (paras 34–49):

- It was unclear how an intermediary with no apparently relevant medical qualifications could ensure that any anxiety the claimant experienced could be managed so as to ensure that his ability to communicate or understand the evidence was not hampered.
- It was unclear why, if a witness paused before answering, the inference to draw was that they were suffering anxiety and needed the assistance of an intermediary to help them communicate.
- It was unclear why the intermediary would be better placed than the court to determine when the claimant needed to take a break from giving evidence.
- It was not for the intermediary to act, or conceive of her role, as that of an umpire who would intervene and limit counsel's questioning. It is for the court to determine when and if counsel is failing to adhere to any ground rules and for it to determine what remedial action to take.
- It was not for an intermediary to step in and inform or require counsel to rephrase their questions.
- It was also not for the intermediary to communicate with the claimant while he was giving evidence. Such a course of action, if taken, would lead to "*a more than negligible chance that she might unintentionally influence what the claimant was saying*" (para.40).
- It was not appropriate for an intermediary to remain in court when the claimant was not giving evidence in order to help the claimant understand the proceedings. Such a course of action by someone who owes a duty to assist the court would result in the intermediary being with the claimant in an "*untransparent manner*" in "*a way and to a degree that the court would be unable to scrutinise or know about*" (para.41).

Notwithstanding these doubts, the defendant did not seek to discharge the intermediary. Farbey J went on to make the following directions:

> *"[42]...*
>
> > *i. The intermediary would sit with the claimant to facilitate his communication while giving his evidence and guide him through the trial bundles. This rule reflected that the intermediary's role was not to provide general witness support but to aid communication and comprehension.*

ii. The intermediary should not interrupt the claimant while he was giving evidence and should not speak to the claimant without the court's permission. If the intermediary felt that the claimant did not understand a question or that he needed a break, she should let the court know without interrupting the evidence. This rule was designed to ensure that the intermediary did not unintentionally influence the claimant's evidence to the court.

iii. The court would be mindful to allow additional breaks as and when required by the claimant. This rule was designed to ensure that the court retained control of the course of the evidence while allowing the claimant to have a break if stressed.

iv. The intermediary should be discharged once the claimant had completed his evidence. This rule was to ensure that the intermediary had no formal role after her duty to the court had been performed. If the claimant needed any assistance after that, it was the professional duty of his solicitors to provide it or to secure that it was provided.

v. The court dispensed with the need for advocates to be robed. This rule was designed to decrease the formality of the trial, with a view to putting the claimant at ease.

vi. The claimant was permitted to bring blank paper into the witness box when giving evidence. I was told that this rule would aid the claimant's concentration.

vii. Counsel for the claimant was permitted to carry out a brief examination of the claimant – beyond the adoption of his witness statement - in order to settle the claimant's nerves."

At the conclusion of the hearing Farbey J recorded the fact that the intermediary's actual contribution to the proceedings was negligible. No issues of comprehension or understanding were raised during the hearing. She concluded as follows, which again points to serious consideration being given to any future rules concerning intermediaries:

"[49] I have strong reservations about whether any of the ground rules were necessary. The intermediary served no useful role. Nothing that the intermediary did could not have been done by counsel and solicitors performing their well-defined roles founded on training, experience and professional ethics; or by the court in the exercise of its wide discretion to control proceedings and having the benefit of extensive expert evidence."

(See ***Civil Procedure 2019*** Vol.1 at para.3.1.13.)

■ **Chapelgate Credit Opportunity Master Fund Ltd v Money** [2020] EWCA Civ 246, 25 February 2020, unrep. (Patten, Moylan, Newey LJJ)

Third party funding – Arkin cap

Senior Courts Act 1981 s.51, CPR r.46.2. The appellant is a commercial funder. It financed proceedings arising from a liquidation. Snowdon J, at first instance, awarded costs against the appellant. In so doing, he refused to cap the costs consistently with the approach set out by the Court of Appeal in ***Arkin v Borchard Lines Ltd (Costs Order)*** (2005). The appellant appealed from that decision. **Held**, the appeal was dismissed. The approach set out in ***Arkin*** to the question of imposing costs on third-party funders was not a binding rule. As Lord Justice Newey, with whom Patten and Moylan LJJ agreed, put it:

"[38] ... I do not consider that the Arkin approach represents a binding rule. Judges, as it seems to me, retain a discretion and, depending on the facts, may consider it appropriate to take into account matters other than the extent of the funder's funding and not to limit the funder's liability to the amount of that funding. In the case of a funder who funded only a distinct part of a claimant's costs, a judge might well decide that it should pay no larger sum towards the defendant's costs. A judge could also, however, consider the funder's potential return significant. The more a funder had stood to gain, the closer he might be thought to be to the 'real party' ordinarily ordered to pay the successful party's costs in accordance with the guidance given in paragraph 25(3) of the Dymocks judgment (for which, see paragraph 22 above). In the case of a funder who had funded the lion's share of a claimant's costs in return for the lion's share of the potential fruits of litigation against multiple parties, it would not be surprising if the judge ordered the funder to bear at least the lion's share of the winners' costs, regardless of whether the funder's outlay on the claimant's costs had been a lesser figure."

This was not to suggest, however, that the approach in ***Arkin*** was no longer of any relevance. Newey LJ accepted at para.37 that there would be circumstances, such as those in ***Arkin*** itself, or those in ***Burnden Holdings (UK) Ltd v Fielding*** (2019) where it would continue to be of relevance. ***Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Costs)*** [2004] UKPC 39; [2004] 1 W.L.R. 2807, PC (NZ), ***Arkin v Borchard Lines Ltd (Costs Order)*** [2005] EWCA Civ 655; [2005] 1 W.L.R. 3055, CA, ***Excalibur Ventures LLC v Texas Keystone Inc*** [2016] EWCA Civ 1144; [2017] 1 W.L.R. 2221, CA, ***Burnden Holdings (UK) Ltd v Fielding*** [2019] EWHC 2995 (Ch); [2019] Costs L.R. 2061, ChD, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.46.2.4.)

■ **Cowley v LW Carlisle & Co Ltd** [2020] EWCA Civ 227, 25 February 2020, unrep. (McCombe, Holroyde and Peter Jackson LJJ)

Dissolved company – validity of application to strike out

CPR r3.4. A claim for damages arising from alleged noise-induced hearing loss was issued against four defendants. The third defendant (LW Carlisle & Company Ltd) had however previously been struck off the register of companies and dissolved. Solicitors for insurers of the former company, purporting to act on behalf of the dissolved company, applied to have the claim against the company struck out under CPR r.3.4. The district judge struck out the claim. An appeal from that decision was dismissed. The circuit judge held that, notwithstanding an argument that the district judge had no jurisdiction to strike out the claim on the application of a non-existent company, the district judge had not erred in striking the claim out on his own initiative as: (i) the company did not exist; and (ii) no attempt had been made to restore it to the register of companies. The Court of Appeal dismissed a second appeal from the district judge's judgment. While it was the case that, the Court of Appeal's decision in ***Peaktone Ltd v Joddrell*** (2012) may well support the view that a retrospective order that could restore the company to the register might validate steps taken in proceedings, the issue in the present case centred on the fact that the company had been dissolved and there had been no restoration to the register. It was necessary in such a situation to assess whether the district judge and circuit judge in such a situation were right to strike out the claim. In the circumstances, it was **held** that the district judge was entitled to strike out the claim on his own initiative. As the court put it:

> *"[33] ... the District Judge had this action before him, involving a number of defendants. He was entitled to consider how best to progress it in the exercise of his case management powers. In our judgment, therefore, he was entitled to consider whether the overriding objective was properly served by the continued presence in the action of the name of a non-existent company. He was entitled to consider whether he should exercise the power to strike out the claim purportedly brought against [the dissolved company] and he did not err in principle in making the strike out order that he did for the short reasons that he gave ..."*

Peaktone Ltd v Joddrell [2012] EWCA Civ 1035; [2013] 1 W.L.R. 784, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.3.4.3.)

■ **Butler v Bankside Commercial Ltd** [2020] EWCA Civ 203, 27 February 2020, unrep. (Lewison, David Richards and Rose LJJ)

Conditional fee agreement – reasons for allowing appeal

CPR Pt 44. A question arose concerning the wording of a conditional fee agreement (CFA) entered into in 2008. The CFA was on the Law Society's standard form. The specific issue concerned the interpretation of a term that entitled the solicitor to receive payment of the basic charges and disbursements on termination of the retainer. It further provided that they could recover their success fee if the client were to go on to succeed in their claim. The question centred on the circumstances when the retainer could be properly terminated. As Lewison LJ noted, the relevant trigger in the present case was a clause which stated that the solicitor could terminate the retainer in the event that their client rejected their opinion "*about making a settlement with [their] opponent*" (see para.1). The solicitors terminated the retainer after they provided their client with advice on how to respond to a settlement offer. The client did not respond to their advice, which included advice on making a counter-offer. The retainer was subsequently terminated. The, now, former client instructed different solicitors and eventually secured an arbitration award in respect of the claim. The solicitors subsequently issued a Bill of Costs, which was assessed at approximately £209,518. The issue was, however, whether liability to pay arose. The solicitors obtained summary judgment for the assessed amount. That decision was upheld on appeal by Turner J (***Butler v Bankside Commercial Ltd*** (2019)). On the appeal to Turner J it was argued that there were two possible interpretations to the wording: a narrow one, that limited it to providing an opinion that directly led to a settlement, i.e., to accept an offer of settlement; and, what was said by the solicitors to be the "*clear and natural meaning of the phrase*", which was that it encompassed advice about settlement, which would include advising the client to make an offer to settle. In a short judgment Turner J rejected the narrow interpretation. As he put it the making of a settlement is a process. Such a process is one that could naturally encompass taking the initiative to propose settlement. It was not restricted to waiting to hear from an opponent as to what they might be willing to offer by way of settlement. On appeal from that judgment to the Court of Appeal, the same arguments were advanced concerning the two rival interpretations. The Court of Appeal dismissed the appeal. Turner J had been correct to accept that the "*clear and natural meaning of the phrase*" was the proper meaning of the term in the CFA (see paras 13–20). In rejecting the appeal Lewison LJ simply adopted Turner J's reasoning, i.e., he did not set out reasons of his own or paraphrase Turner J's reasoning. As he explained, at para.19, such an approach was perfectly permissible:

> *"[19] In Re Portsmouth City Football Club Ltd, Neumans LLP (a firm) v Andronikou [2013] EWCA Civ 916, [2013] Bus LR 1152, Mummery LJ said at [38]:*

'If the judgment in the court below is correct, this court can legitimately adopt and affirm it without any obligation to say the same things over again in different words. The losing party will be told exactly why the appeal was dismissed: there was nothing wrong with the decision appealed or the reasons for it.'"

Re Portsmouth City Football Club Ltd (In Liquidation) [2013] EWCA Civ 916; [2014] 1 All E.R. 12, CA, ***Butler v Bankside Commercial Ltd*** [2019] EWHC 510 (QB); [2019] 1 Costs L.R. 169, QBD, ref'd to.

Practice Updates

PRACTICE GUIDANCE

QUEEN'S BENCH DIVISION – ENE GUIDANCE

In ***Telecom Centre (UK) Ltd v Thomas Sanderson Ltd*** [2020] EWHC 368 (QB), 20 February 2020, unrep., Master McCloud provided guidance on the use of early neutral evaluation (ENE) in the Queen's Bench Division. She did so in the absence of guidance on the issue in the Queen's Bench Division Guide. She noted that the approach taken to an ENE process carried out by a judge should be tailored to the circumstances of each particular case; the CPR does not prescribe a standard approach to ENE. Hence there is flexibility, for instance, to consider an all-paper process, or one which mixes written submissions with an oral hearing. She further noted that the process would likely be beneficial in cases where a view on the merits of points of law or construction were important. Additionally, cases where a view of the merits of whether a breach, if proved, would likely be held to be a repudiatory breach were said to be suitable for ENE.

In considering the procedure to be adopted, parties should also consider whether it should encompass all or only some of the key issues in dispute, whether consideration of issues might lead to settlement of other issues, and the potential impact on any trial, i.e., reduction in trial time and costs might result from the ENE if issues settled. In respect of the process, the Master also noted that the judge carrying out the ENE ought not to try the case or deal with any further contentious applications subsequent to the ENE, although if the parties give consent (and this ought to be fully informed consent) they may do so. Furthermore, and unlike the guidance given in the Chancery Division Guide, in the Queen's Bench Division there was no presumption that the opinion given by the judge carrying out the ENE should be given informally. The judge ought to determine the degree of formality required depending on the nature and complexity of the issues. Finally, it was noted that the opinion given in a judicial ENE would ordinarily be "*without prejudice*", except where the parties waive privilege, and non-binding. Parties could, however, agree to be bound by the opinion, or agree to be bound in specific circumstances, or in respect of specific issues. Flexibility is the key. To ensure that the papers used in the ENE could not be considered consequently, they would be returned to the parties at the end of the ENE process, i.e., they will not form part of the court file and will also not therefore be capable of public access.

The Master also provided a template form of ENE order for use in the Queen's Bench Division. The template order is set out below.

DRAFT ORDER for ENE – QB Masters

1. *The parties shall exchange [skeleton arguments/written submissions] [no longer than .... Pages] by no later than 4pm on ....*
2. *The parties shall [serve upon/indicate to] each other the written evidence upon which they wish to rely for the purposes of ENE by 4pm on [...]*
3. *The parties shall agree a core bundle of documents for the Master which shall be lodged by 4pm on [...]*
4. *[The ENE appointment shall take place [in private] at ..... on .... before Master ..... with a time estimate of ....]*
5. *The non-binding opinion of the judge hearing the ENE will be provided in such form as the judge decides and may be given orally, or in writing, and with such degree of formality or informality as s/he decides. The opinion may be given issue by issue or as a whole. The opinion shall be without prejudice to the claim and the opinion shall remain confidential to the parties.*
6. *After the ENE is concluded the papers relating to it shall be removed by the parties and shall be confidential unless the parties agree otherwise. No non-party shall be entitled to obtain a transcript of the hearing.*
7. *The judge shall (unless agreed by the parties) thereafter have no further involvement with the case.*

In Detail

CAPPED COSTS PILOT SCHEME – FAIZ v BURNLEY BC [2020] EWHC 407 (Ch)

Background

In ***Faiz v Burnley BC*** [2020] EWHC 407 (Ch), 25 February 2020, HHJ Halliwell, sitting as a judge of the High Court, dealt with the trial of a claim that sought declaratory relief concerning a lease of business premises (a café) at Towneley Hall in Lancashire. The claim was, it was believed, the first one allocated to the Capped Costs List Pilot Scheme under CPR PD 51W to proceed to trial.

The defendant Council were the freehold owners of Towneley Hall. The claimants acquired an assignment of a business lease over the café in 2003. In 2010 they were granted a fresh lease of the café, which was due to expire on 25 February 2020. The lease contained prohibitions on assignment and sub-letting, in the event of which the lease was to be forfeit. The Council argued that the claimants had forfeit the lease on the basis that they had sub-let the tenancy to the third claimant in the proceedings (SASSF Limited).

The issues before the judge were whether the lease was forfeit and, if so, whether the Council had waived their right to forfeit by the time they sought to exercise the right. The judge **held** that the Council had not waived their right to forfeit. It was entitled to a declaration that the lease and sub-lease were determined in 2019.

The Capped Costs Pilot Scheme

The Capped Costs Pilot Scheme was introduced in January 2019 via CPR Update 102. From 14 January 2019 until 13 January 2021 it makes provision for a Capped Costs List in certain Business and Property Courts, i.e., the London Circuit Commercial Court; the Circuit Commercial Court at Leeds and Manchester; the Technology and Construction Court at Leeds and Manchester; and, the Chancery Division, District Registries at Leeds and Manchester. Claims subject to the pilot scheme when it concludes will remain subject to it (PD 51W para.1.2). The scheme operates on a voluntary basis (PD 51W para.1.1). The scheme is intended to improve access to the Business and Property Courts. In particular, it seeks to achieve this through:

> *"(1) streamlining the procedures of the Pilot courts;*
>
> *(2) lowering the costs of litigation;*
>
> *(3) increasing the certainty of costs exposure; and*
>
> *(4) speeding up the resolution of claims."* (PD 51W para.1.1.)

The pilot scheme is available to all claims other than: those whose monetary value exceeds £250,000; those which will require a trial of more than two days, exclusive of reading time and judgment; or those that include allegations of fraud or dishonesty, are likely to require extensive disclosure and/or reliance upon witness or expert evidence, or involve numerous issues and parties (PD 51W para.1.6).

The maximum costs for each stage of proceedings subject to the pilot scheme are capped as follows (PD 51W para.3.5 and the Capped Costs Table):

Capped Costs Table

Work done in respect of—	Maximum amount of costs
Pre-action	£10,000.00
Particulars of claim	£7,000.00
Defence and counterclaim	£7,000.00
Reply and defence to counterclaim	£6,000.00
Case management conference	£6,000.00
Disclosure	£6,000.00
Witness statements	£8,000.00

Work done in respect of—	Maximum amount of costs
Experts' reports	£10,000.00
Trial and judgment	£20,000.00
Settlement/negotiations/mediation	£10,000.00
Making or responding to an application	£3,000.00
Work done post-issue which is not otherwise covered by any of the stages above	£5,000.00

Costs budgeting does not apply to cases allocated to the pilot scheme (PD 51W para.3.1).

The pilot scheme provides a simplified procedure for the management of claims. Unusually, it mandates the provision of a letter before claim, except where there is good reason such as extreme urgency for a proposed claimant not to do so. It must provide sufficient details to enable the proposed defendant to understand the proposed claim and investigate it. It must also specify the claimant's intention to issue the claim in the Capped Costs List (PD 51W para.2.4).

Defendants may themselves propose that the claim is issued in the List in a response to a letter before claim, where the claimant does not do so. A proposed defendant should respond to the letter before claim within 14 days of receipt, unless the parties agree otherwise. Should the claim wish to proceed on the List, they must issue the claim form in that List (PD 51W para.2.8).

Particulars of claim must be served with the claim form (PD 51W para.2.10). Bundles of core documents relevant to pleaded issues must also be annexed to the particulars of claim (PD 51W para.2.9). Statements of case are required to be concise. Particulars of claim and defences with counterclaims are limited to 20 pages in length. Other statements of case are limited to 15 pages in length. In exceptional circumstances, the court may however grant permission for a statement of case to be longer than the prescribed limits.

Prior to a case management conference, parties may agree to transfer an existing proceeding to the Capped Costs List (PD 51W para.2.20). They may also agree to transfer a claim from the Capped Costs List out of the scheme to the ordinary list. In either situation, the claimant must inform the court promptly of the agreement, with directions to follow. As the pilot scheme is voluntary, the court has no power to transfer claims to the Capped Costs List absent party consent (PD 51W para.2.22(3)).

The pilot scheme further modifies case management, disclosure, witness evidence, expert evidence, and trials. Case management must be carried out to further the aims of the pilot scheme (PD 51W paras 2.23–2.26). The general rule as to disclosure, is no disclosure. Parties can only rely upon those documents annexed to statements of case (PD 51W paras 2.27–2.30). Should a party seek additional disclosure, they must make a written request for disclosure to the other party. They must do so prior to serving and filing their bundle for the case management conference in the proceedings (PD 51W para.2.29). Absent that, the court may only order disclosure in exceptional circumstances.

Parties are generally limited to two witnesses at trial. Witness statements stand as evidence-in-chief. They must be no more than 15 pages in length and must be confined to issues identified in 'lists of issues' approved at a case management conference in the proceedings (PD 51W paras 2.31–2.32). As a general rule, expert evidence will not be permitted (PD 51W para.2.33). Modifications are also made to the Part 23 application procedure (PD 51W paras 2.35–2.39). Trials will be heard by the judge who heard the case management conference in the proceedings, except where that is not practicable. Cross-examination will be controlled by the court and be time limited.

The duration of the trial will equally be limited to that set out in the trial timetable. Unless the court directs otherwise, each party will only be permitted to put the principal parts of its case to a witness. Judgment should be handed down within six weeks of trial (PD 51W paras 2.40–2.43).

Approach in *Faiz v Burnley BC*

The claim was not issued on the Capped Costs List. During the course of proceedings, an interim injunction was granted to the claimants. On the return date, the judge raised the availability of the Capped Costs List with the parties, who agreed to the claims transfer to it. The parties further agreed to rely on those documents set out in their bundles of core documents. No further directions concerning disclosure were given. No expert evidence was permitted. While the claimant was limited to calling two witnesses, as provided for in the pilot scheme, the defendant was permitted to call three witnesses. This was justified in the circumstances as two of the witnesses were to give evidence on the same

factual issue, albeit covering two different periods of time. Reliance on the three witnesses could also be accommodated within the two-day trial period. The parties adopted a co-operative approach to ensuring that the claim was ready for trial on the agreed trial date. Detailed findings of fact were made at trial, with an equally detailed judgment being handed down five days thereafter.

Comment

The intention underpinning the pilot scheme, and similar schemes such as the Shorter and Flexible Trial Scheme (CPR PD 57AB) and the Insolvency Express Trials Pilot Scheme (PD 51P), is to provide a mechanism through which claims can be prosecuted and defended with a greater degree of efficiency and economy than might otherwise be the case. This is particularly the case on this pilot scheme through its ability to provide parties with a greater degree of certainty as to the potential cost of the litigation than is available either under cost budgeting or otherwise.

Faiz v Burnley BC may be the first case to proceed to trial under the pilot scheme, but it would be surprising if it was not followed by many more. By providing a speedy and economical process, it ought to be attractive to claimants and defendants who wish to ensure that their claim is prosecuted at a level of costs proportionate to the value of their dispute. Moreover, it ought properly provide a sound basis for parties who might otherwise be unable to litigate or defend proceedings due to uncertainty concerning costs. The increased certainty concerning costs, over and above that which might otherwise be provided via costs budgeting, might equally provide a basis for increased availability of legal expenses insurance. In itself, that might further promote access to the courts.

While familiarity with the various schemes that provide for shorter and more focused case management and speedier trials through greater restriction on pleadings, issues and evidence, remains at a lower level in England and Wales than in some other jurisdictions, it is likely that this pilot scheme, taken in tandem with the other similar schemes, will become increasingly used over time. Unfamiliarity may, at the present time, limit consideration of the utility of the scheme by parties and their legal advisers. This decision, and others that will no doubt follow, ought to put to rest that unfamiliarity, not least where – as here – the court actively raises the potential use of the scheme with parties at an early stage in proceedings that have not commenced on the Capped Costs List.

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