CIVIL PROCEDURE NEWS

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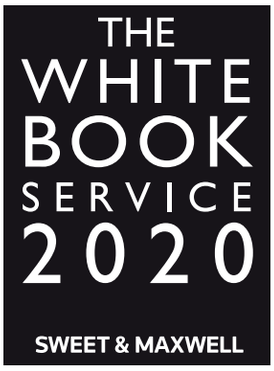

In Brief

Cases

Addlesee v Dentons Europe LLP [2020] EWHC 238 (Ch), 3 March 2020, unrep. (Master Clark)

Legal professional privilege – iniquity exception

CPR r.31.3. In proceedings arising from a gold dust investment scheme, the issue arose as to whether certain documents fell within the scope of the iniquity exception to legal professional privilege. In deciding the application, at paras 28–35 Master Clark provided a useful summary of the relevant applicable principles:

> *"[28] There was a substantial measure of agreement as to the applicable legal principles. These can be summarised as follows.*
>
> *[29] Legal professional privilege does not attach to communications between lawyer and client if the lawyer is instructed for the purpose of furthering crime, fraud or iniquity ('the fraud exception'): Derby & Co Ltd v Weldon (No 7) [1990] 1 WLR 1156 at 1166-1172; Barclays Bank Plc v Eustice [1995] 1 WLR at 1248D-1250D; Kuwait Airways Corpn v Iraqi Airways Co (No 6) [2006] EWCA Civ 286 [2005] 1 WLR 2734 at [14]; JSC BTA Bank v Ablyazov [2014] EWHC 2788 (Comm) [2014] 2 CLC 263 at [68].*
>
> *[30] Instructions given for such a purpose fall outside the ordinary scope of a lawyer/client relationship, and are an abuse of that relationship: JSC BTA Bank v Ablyazov at [76]-[93].*
>
> *[31] The fraud exception may apply equally to communications after the wrongdoing itself, where the lawyer is still instructed for the purpose of furthering the wrongdoing, for example, by concealing the wrongdoing or its proceeds: Thanki on The Law of Privilege (3rd ed) at 4.56; R v Central Criminal Court ex p Francis [1989] AC 346 at 394A-B; Derby & Co Ltd v Weldon (No 7) at 1174D-H.*
>
> *[32] The fraud exception applies whether or not the solicitor is aware of the wrongful purpose: Kuwait Airways Corpn v Iraqi Airways Co (No 6) at [14].*
>
> *[33] The fraud exception applies where the client is unaware of the wrongful purpose, if the client is being used as an unwitting tool or mechanism by a third party to further that third party's fraud. In relation to this, the question ultimately is one of fact and degree as to whether the nexus between wrongdoer and client took the lawyer/client relationship outside the ordinary scope of professional employment so that the relationship was not a confidential one: R v Central Criminal Court ex p Francis at 395H-397C; Owners / demise charterers of the dredger Kamal XXVI and barge Kamal XXIV v Owners of ship Ariela [2010] EWHC 2531 (Comm) [2011] 1 All ER (Comm) 477 at [32]; Accident Exchange v McLean [2018] EWHC 23 (Comm) at [38]-[42], [47]-[48].*
>
> *[34] In order for the court to order that disclosure and evidence should be given of otherwise privileged material on the basis of the fraud exception, it is not necessary for the alleged wrongdoing to be established by way of final determinations made on the balance of probabilities. What is required is sufficient prima facie evidence of the wrongdoing: Derby & Co Ltd v Weldon at 1172H-1173H; Barclays Bank Plc v Eustice at 1252E-G; Kuwait Airways Corpn v Iraqi Airways Co (No 6) at [42].*
>
> *[35] Where the allegation of wrongdoing is not in issue in the claim, a lower quality of prima facie evidence may be sufficient: Kuwait Airways Corpn v Iraqi Airways Co (No 6) at [42]."*

Master Clark went on to hold at para.39 that, while the allegation that the scheme operated in this case was fraudulent was not denied, because the defendant had not admitted the allegation, the claimants were required to prove it. As such the standard of proof which applied was the higher standard and not the lower prima facie standard. This was because fraud was in issue. The Master went on to: (i) hold that the applicable standard was that of a strong prima facie case; and (ii) reject a submission that the applicability of the iniquity exception was a matter that ought to be determined by the trial judge (see paras 40–48). (See ***Civil Procedure 2020*** Vol.1 at para.31.3.19.)

Brake v Lowes (Ruling on strike out of Liquidation Application) [2020] EWHC 538 (Ch), 3 March 2020, unrep. (HHJ Matthews sitting as a judge of the High Court)

Disclosure Pilot scheme – variation of order for extended disclosure

CPR PD 51U para.18.2. Model B disclosure had been ordered under the PD 51U disclosure pilot scheme. An application to vary that order was made under para.18.2 of the pilot scheme. HHJ Matthews dismissed the application. In doing so, he noted the guidance provided by Vos C in both ***UTB LLC v Sheffield United Ltd*** (2019) and ***McParland & Partners***

Ltd v Whitehead (2020) at [54]. That guidance emphasised the fact that the pilot scheme was intended to create a culture change in the approach taken to disclosure in order to lower its cost to parties. It further deprecated the use of the disclosure pilot as a tactical device by parties and emphasised that the court would visit serious cost sanctions on parties that attempted to use it in such a way. As HHJ Matthews noted, at para.8, the court was required to be vigilant in ensuring that the disclosure pilot scheme was not used in the tactical manner identified by Vos C. In dismissing the application, the judge concluded that the requirement in para.18.3 of PD 51U, which required an application to vary under para.18 to be supported by a witness statement that explained the circumstances in which the original order for extended disclosure was made, was a threshold condition for making an order to vary. This was not to adopt a technical approach. It was to ensure the court was able to properly consider the substantive issue whether the original order should be maintained or could properly be varied. That could only be done if the court was put in the position of knowing why the original order was made. As HHJ Matthews put it:

> *"[13]... in my judgment, the threshold condition for making an order under paragraph 18 is not met. It is said this is an unduly technical approach to take. Yet, the whole point of paragraph 18.3, as I understand it, is to ensure that the court, before making a variation order and thus changing the rules, as it were, for disclosure and therefore incurring further expense for the parties, should be put into a position in which it knew why the court had done what it did in the first place. That is not something which I have the advantage of knowing today. I do not regard this as a technical defect. I regard this as something rather more substantive. It may be that if paragraph 18.3 had been satisfied, I would have been satisfied under paragraph 18.2 that the variation, certainly not as originally requested, but as restricted, might have been necessary for the just disposal of the proceedings. But that question simply does not arise because, in my judgment, I cannot vary the order in the circumstances. I therefore dismiss the application."*

UTB LLC v Sheffield United Ltd [2019] EWHC 914 (Ch); [2019] 3 All E.R. 698, ChD, ***McParland & Partners Ltd v Whitehead*** [2020] EWHC 298 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.51UPD.18.1.)

- **PCP Capital Partners LLP v Barclays Bank Plc** [2020] EWHC 646 (Comm), 12 March 2020, unrep. (Waksman J)

Witness statements – inappropriate content

CPR r.32.8, PD 32 paras 17–21. At a pre-trial review, Waksman J considered whether there were any issues of concern regarding the content of witness statements. He noted that it was appropriate for this to be done prior to the trial, so that the exercise did not pose problems for effective trial management (see para.1). He noted that both parties had referred in their submissions to the recent report of the Working Group on Witness Statements (see ***Civil Procedure News*** No.1 of 2020). He rejected submissions to the effect that that report commended a binary approach to witness statements, i.e. that unless they were:

> *"riddled with inappropriate content [the court] should leave it alone, or on the other hand, if there is inappropriate content, then [the court] should simply prevent it [the witness statement] coming in and instruct the party to start all over again".*

As he put it, there was a middle ground, i.e. the court should adopt an approach that is proportionate to the case at hand. A proportionate approach is one that does not require parties to spend a disproportionate amount of time excising inappropriate material where it is, for instance, set out in a small number of sentences in a witness statement. Where, however, a number of parts of the witness statement set out inappropriate content, such as comment or the recitation of material contained in documents, that should properly be excised (see paras 2 and 8). In considering whether there is material that may need to be excised from a witness statement (or more importantly ought not to be there in the first place) Waksman J stressed that:

> *"[3] There [were] definitely elements of [the] witness statement which should not be there, in particular because, in truth, they are no more than arguments or simply bringing into the witness statement contents of the documents and nothing more than that, documents to which [the witness] was not a party."*

A party should not be afforded any increased latitude in that regard because they are alleging fraud. As he went on to explain:

> *"[4]... There may be compelling reasons why the allegation of fraud cannot be made out because of what is said in certain documents, but that does not mean that a particular witness who has no knowledge of those documents and no involvement therein, has to become the mouthpiece for making those anti-fraud submissions, as it were."*

Furthermore, witnesses ought not to put comment in their witness statements. As Waksman J noted:

> *"[10]... the purpose of the witness statement is in this context is to say, so far as the witness can say what happened, what the witness says he or she did, what he or she knew or thought or believed or intended, or, the meaning or*

content of documents to which they were a party where they can comment properly about them and where the meaning or content of that document has been called into question. Beyond that, they should not go."

(See ***Civil Procedure 202***0 Vol.1 at paras 32.8 and 32PD.17–32PD.21.)

■ **Mervyn v BW Controls Ltd** [2020] EWCA Civ 393, 16 March 2020, unrep. (Bean, Singh and Asplin LJJ)

Case management – clarifying pleadings with litigants-in-person

The Court of Appeal heard an appeal arose in Employment Tribunal proceedings. The appeal raised the question of the extent to which the Tribunal could provide assistance to a litigant-in-person (LiP) to help them formulate issues for trial, and the extent to which it could depart from an agreed list of issues where they appeared to be deficient when compared with the case as it was pleaded originally. The Court of Appeal's decision, while not under the CPR, provides helpful guidance to the approach to be taken in civil proceedings where one or more parties are LiPs and it deals with lists of issues at trial (see ***Scicluna v Zippy Stitch Ltd*** (2018) at [14], cited at para.35), and particularly to the exercise of the case management power under CPR r.3.1A and specifically CPR r.3.1A(1) and 3.1A(4). In separate judgments both Bean and Asplin LJJ indicated that, in the context of employment tribunal proceedings, where one or more of the parties was a LiP, the tribunal at the start of the substantive hearing should ascertain if a list of issues that had been drawn up at a previous case management hearing reflected the "*significant issues in dispute*" between the parties (see paras 43 and 51). As Asplin LJ noted, while proper identification of issues ought to be carried out at a case management conference, where the circumstances justified it, the list of issues could be amended at the substantive hearing. In carrying out this exercise, however:

"[51]... Obviously, the tribunal must take care not to step into the factual and evidential arena and not to be perceived as favouring one party over another. However, in order to do justice to all parties, it is equally important, where at least one of those parties is unrepresented, to clarify the issues which arise on the pleadings and to seek to confirm whether any and, if so, which claims have been conceded."

It is suggested that a similar approach can and should properly be taken at trial in civil proceedings where one or more parties is a LiP. ***Scicluna v Zippy Stitch Ltd*** [2018] EWCA Civ 1320, unrep., CA ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.3.1A.1.)

■ **Andreewitch v Moutreuil** [2020] EWCA Civ 382, 17 March 2020, unrep. (Peter Jackson and Popplewell LJJ)

Contempt of court – right to silence – litigants-in-person

CPR Pt 81. The appellant was a litigant-in-person (LiP) during committal proceedings. He appealed from a finding that he had knowingly breached court orders. The basis of his appeal was that the judge, at the start of the committal proceeding failed to inform him of his right to silence. On the contrary, he was asked to give evidence and was cross-examined on it. The Court of Appeal allowed the appeal. The failure to inform the appellant of his right to silence was not a technical breach of the rules governing committal applications. As Peter Jackson LJ put it at para.17, "*The right to silence is a core element in criminal proceedings and proceedings of a criminal character*". He went on to explain, at para.22, that to ensure that parties were informed of their right to silence in committal applications in future, courts should be referred to, and should refer to, the checklist set out by Theis J at paras 78–79 of ***Re L (A Child)*** (2016):

"[22] I would conclude by recording that counsel for both parties acknowledged, as do I, the careful way in which the judge approached the application before her. Her judgment contains a methodical checking of the procedural requirements that were satisfied. It is unfortunate that she was not also reminded of the need to inform PA of his right not to give oral evidence. This court was referred to the checklist contained in paragraph 78 of the judgment of Theis J in Re L (see below) and I have no doubt that if the judge had had the same benefit, this appeal would not have arisen.

'78. Before any court embarks on hearing a committal application, whether for a contempt in the face of the court or for breach of an order, it should ensure that the following matters are at the forefront of its mind:

(1) There is complete clarity at the start of the proceedings as to precisely what the foundation of the alleged contempt is: contempt in the face of the court, or breach of an order.

(2) Prior to the hearing the alleged contempt should be set out clearly in a document or application that complies with FPR rule 37 and which the person accused of contempt has been served with.

(3) If the alleged contempt is founded on breach of a previous court order, the person accused had been served with that order, and that it contained a penal notice in the required form and place in the order.

(4) Whether the person accused of contempt has been given the opportunity to secure legal representation, as they are entitled to.

(5) Whether the judge hearing the committal application should do so, or whether it should be heard by another judge.

(6) Whether the person accused of contempt has been advised of the right to remain silent.

(7) If the person accused of contempt chooses to give evidence, whether they have been warned about self-incrimination.

(8) The need to ensure that in order to find the breach proved the evidence must meet the criminal standard of proof, of being sure that the breach is established.

(9) Any committal order made needs to set out what the findings are that establish the contempt of court, which are the foundation of the court's decision regarding any committal order.

[79] Counsel and solicitors are reminded of their duty to assist the court. This is particularly important when considering procedural matters where a person's liberty is at stake.'"

He further noted that the Civil Procedure Rule Committee is currently consulting on a revised Pt 81. The revised rules ought to provide further assistance in ensuring that committal proceedings are carried out consistently with the applicable principles, not least because the draft rules contain express reference to the right to silence (see paras 11 and 22). ***Re L (A Child)*** [2016] EWCA Civ 173; [2016] Fam. Law 668, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.3.1A.1.)

Practice Updates

PRACTICE GUIDANCE

PRACTICE NOTE – WITNESS EVIDENCE – LENGTHY TRIAL STATEMENTS – COMMERCIAL COURT

On 11 March 2020, Teare J as judge in charge of the Commercial Court issued guidance on the proper approach to preparing witness statements for use in Commercial Court proceedings. The Guidance arises out of the Report of the Witness Evidence Working Group on Factual Witness Evidence in Trials before the Business and Property Courts (see ***Civil Procedure News*** No.1 of 2020). The Guidance applies recommendation 78 from the Report to the practice of the Commercial Court. The Guidance is as follows.

WITNESS EVIDENCE – LENGTHY TRIAL STATEMENTS

Notice from the Judge in Charge to Users of the Commercial Court

1. *For witness statements of factual witnesses for trial under CPR 32 and CPR PD32, the Commercial Court Guide provides at paragraph H1.1(h) that: "Unless the Court directs otherwise, witness statements should be no more than 30 pages in length."*

2. *The Witness Evidence Working Group's Report can be found at: www.judiciary.uk/publications/report-of-the-witness-evidence-working-group/*

3. *The Report recommends at [78] that in general extensions of the 30-page limit for trial witness statements would not be considered unless the judge had the opportunity to scrutinise the contents of the lengthy statement; the general practice should be to consider such applications retrospectively at the PTR. The Report explains at [66] that any witness statement longer than the prescribed page limit should be served when witness statements are due at the serving party's risk, that permission for the excess length should be considered at the PTR, if there is one, or on the papers if there is no PTR, but still after service so the judge can see the statement as served to make an informed decision.*

4. *That recommendation concerns only the practice of the judges of the Commercial Court in dealing with requests under paragraph H1.1(h) for excess length. Implementation does not require amendment of the CPR, any Practice Direction, or the Guide.*

5. *Commercial Court litigants and their advisors should therefore take note that the approach recommended by the Working Group, as summarised above, is now the approach that will be adopted by the judges of the Commercial Court. Therefore:*

   5.1 Requests for permission to exceed the 30-page limit under paragraph H1.1(h) of the Guide should, in general, be made: (i) at the PTR, where there is one; (ii) on paper, but after the statement has been served (and therefore by reference to the statement as served), where there is to be no PTR.

5.2 Parties and their advisors must take care to ensure that all trial witness statements served conform to CPR PD 32 and paragraph H1.1(a)-(g) of the Guide. Where a witness statement longer than 30 pages is judged not to conform, the judge considering the request for permission may, depending on the circumstances, and amongst other things: (i) refuse permission to rely on that statement at trial; (ii) require the statement to be re-drafted (shortened) for trial, at the serving party's cost; (iii) exclude parts of the statement from the evidence permitted to be adduced at trial; (iv) direct that the witness in question may not be called at trial.

The Honourable Mr Justice Teare
Judge in Charge of the Commercial and Admiralty Courts
10 March 2020

PRACTICE NOTE – ELECTRONIC BUNDLES FOR PERMISSION TO APPEAL – UNITED KINGDOM SUPREME COURT AND JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

On 16 March 2020, Lord Reed PSC issued a Practice Note establishing a new procedure for the filing of e-bundles for applications for permission to appeal to the United Kingdom Supreme Court and to the Judicial Committee of the Privy Council. The new procedure will be in force from 1 May 2020. It will operate as a parallel procedure to, rather than as a replacement for, the present paper-based procedure. The Practice Note is as follows.

Electronic bundles for Applications for Permission to Appeal

16 March 2020

The Justices wish to introduce a scheme for dealing with applications for permission to appeal electronically.

The plan is to introduce this as a parallel facility, rather than in substitution for paper, from 1st May.

Lord Reed, as President of the Supreme Court and Chairman of the Judicial Committee, issues this Practice Note to take effect from 1st May 2020. It applies to additional documents filed in support of applications for permission to appeal, and to notices of objection, respondent's submissions and objections to such applications, which are filed on or after that date.

1. Rule 7 of the Supreme Court Rules and Rule 7 of the Judicial Committee (Appellate Jurisdiction) Rules require that documents filed in hard copy must also be provided by electronic means but this requirement has not been rigidly enforced for permission applications etc. Electronic bundles are, of course, required for appeal hearings.

2. As the members of the Court and of the Board wish to extend their use of electronic material, from 1st May, all material filed in support of, or in opposition to, permission applications must also be provided in electronic form.

This means that, in addition to the hard copies which are filed,

- *additional documents filed by an appellant in support of a permission application (with the application itself) must be emailed to the Registry as a single indexed and bookmarked pdf;*
- *notices of objection or submissions or objections filed by a respondent in response to a permission application must be emailed to the registries.*

All documents, notices etc which are over 10 Mb must be provided on a memory stick as a single indexed pdf. The requirements of PD 14 and of PD 9 for electronic hearing bundles do not need to be complied with but there must be bookmarks for each separate document within the single pdf. The registry staff will then create a folder containing all these documents for each application. Material filed by interveners who support a permission application is usually sent by email and will be added to the folder.

3. Practitioners and litigants in person (party litigants) who are unable to comply with this practice should contact the Registry.

4. It is hoped that in time it will be possible significantly to reduce the number of hard copies of documents which are currently required.

Lord Reed of Allermuir

In Detail

CORONAVIRUS LEGISLATION AND GUIDANCE

A wide range of guidance has been issued concerning the operation of the courts during the Coronavirus pandemic. Practitioners should ensure that they refer to the following websites on a regular basis, as they are likely to be updated daily:

- *https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/*
- *https://www.gov.uk/guidance/hmcts-daily-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak#hmcts-operational-summary-27-march-2020*
- *https://www.gov.uk/guidance/coronavirus-covid-19-courts-and-tribunals-planning-and-preparation*
- *https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak*

COURTS ACT 2003 SS.85A TO 85D

The Coronavirus Act 2020 cl.34 and Sch.5, inserted new ss.85A to 85D into the Courts Act 2003. The provisions are in force from 25 March 2020 for a period of at least two years (see ss.88–90 of the Coronavirus Act 2020). The provisions permit, for the period where they are in force, the recording and broadcasting of proceedings, either via video or audio. The provisions are identical to those that were to have been introduced in 2017 to facilitate public participation in civil proceedings as part of the HMCTS reform programme (see cl.34 and Sch.5 of the Prison and Courts Bill 2017). The provisions enable the court to direct that, where a hearing is being held wholly remotely, e.g. where all of the participants are taking part via video or other technology, it can direct that the hearing be broadcast live and/or recorded. The court could also direct that the recording be accessed by the public after the hearing has concluded, i.e. by being broadcast in a court building. The provisions also provide for criminal sanctions for the making or transmission of unauthorised recordings. The first hearing to be livestreamed over the internet under the legislation was ***National Bank of Kazakhstan v The Bank of New York Mellon*** (Claim No FL-2018-000007) in the Financial List (QBD) on 27 March 2020.

PRACTICE DIRECTION 51Y – VIDEO OR AUDIO HEARINGS PILOT DURING THE CORONAVIRUS PANDEMIC – PILOT SCHEME

Practice Direction 51Y was introduced as a pilot scheme via CPR Update 116. It is in force from 25 March 2020 until the date at which the Coronavirus Act 2020 ceases to have effect. It introduces a pilot scheme, which supplements the video and audio recording provisions introduced via ss.85A to 85D of the Courts Act 2003. It makes specific provision concerning wholly remote hearings, i.e. those that take place where none of the participants are present in a court building at the time the hearing takes place. It provides for such hearings to be held in private, where that is necessary for the proper administration of justice, i.e. the generally applicable test under CPR r.39.2(3)(g). It further makes clear that where a member of the media is able to access such a hearing, due to the court making available access to the video technology used to facilitate the hearing, it will be a public hearing. Where an order to hold the hearing in private is made under this pilot scheme, CPR r.39.2(5) does not apply, as it only applies to such orders made under CPR r.39.2(3) or (4). As such notice of the order need not be given to the Judicial Office, it is to be expected that measures will be put in place to provide advance notice of those hearings that are scheduled to take place wholly remotely. Where a hearing is held wholly remotely and in private, the pilot scheme requires the court to consider whether it should be recorded. Where technology is available it may be video recorded. If video recording is not possible, if the court has directed it to be recorded, it must be audio recorded. Members of the public may seek the court's permission to listen to or view such a hearing after the hearing has concluded (see PD 51ZA, below).

PRACTICE DIRECTION 51Z – STAY OF POSSESSION PROCEEDINGS AND EXTENSION OF TIME LIMITS – CORONAVIRUS – PILOT SCHEME

Practice Direction 51Z was introduced as a pilot scheme via CPR Update 117. It is in force from 27 March 2020 until 30 October 2020. It imposes a stay on all possession proceedings brought under CPR Pt 55, and all possession enforcement proceedings, for 90 days from 27 March 2020. As such no possession matters or enforcement of possession may proceed further until 25 June 2020. As the Practice Direction is in force until 30 October 2020, the possibility remains that the length of the stay could be varied, i.e. extended, by a further Practice Direction. It imposes the stay to ensure that the administration of justice, which includes the enforcement of proceedings, is carried out so as not to endanger public health.

PRACTICE DIRECTION 51ZA – STAY OF POSSESSION PROCEEDINGS AND EXTENSION OF TIME LIMITS – CORONAVIRUS – PILOT SCHEME

Practice Direction 51ZA was introduced as a pilot scheme via CPR Update 118. It is in force from 1 April 2020 until 30 October 2020. It varies CPR r.3.8(4) so that parties can agree extensions of time for up to 56 days, rather than 28 days,

subject to the extension not putting at risk a hearing date. It further provides that where the parties seek an extension of beyond 56 days, whether by agreement or otherwise, they must apply to the court. Such application is to be decided on the papers, with a right to reconsideration at a hearing. It also specifies that when the court is considering any application for an extension of time, for an adjournment, or relief from sanctions it will take into account the Coronavirus pandemic's impact, as far as that is compatible with the administration of justice. Finally, it clarifies the requirement to seek permission to listen to or view a recording of a hearing provided for in Practice Direction 51Y. It makes clear that a formal application does not need to be made, but that anyone seeking to listen to or view such a recording needs to make a request to the court.

TEMPORARY INSOLVENCY PRACTICE DIRECTION

On 6 April 2020, the Chancellor of the High Court, with the concurrence of the Lord Chancellor, issued a temporary Insolvency Practice Direction. The Practice Direction is in force from that date until 1 October 2020, unless revoked or varied earlier. It applies to all insolvency proceedings in the Business and Property Courts, subject to any variations directed by a relevant supervising judge outside London. It seeks to enable such business to continue, in so far as possible, without parties having to attend court in person. It also provides guidance on the type of Insolvency and Companies Court list hearings the court will try to conduct during the current pandemic period.

LORD CHIEF JUSTICE'S GUIDANCE TO JUDGES OF THE CIVIL AND FAMILY COURTS – CORONAVIRUS (COVID-19)

On 19 March 2020, Lord Burnett of Maldon CJ issued general guidance to the judiciary concerning the operation of the civil and family courts during the coronavirus pandemic. The guidance is reprinted below. It should be read in the light of s.85A of the Courts Act 2003. It should also be read in the light of the CPR Pt 51 pilot schemes that were issued subsequently (see above).

Coronavirus (COVID-19): Message from the Lord Chief Justice to judges in the Civil and Family Courts

Events have been moving so fast that detailed guidance on how to sustain the administration of justice in these two important jurisdictions would be overtaken by developments very quickly.

We have an obligation to continue with the work of the courts as a vital public service, just as others in the public sector and in the private sector are doing. But as I have said before, it will not be business as usual.

Yesterday's announcement that schools will be closing three weeks early coupled with the need for those over 70 and with health problems to stay at home will have an immediate impact on the ability and willingness of people to attend courts and tribunals.

We are making arrangements to include those working in the courts within the scope of key workers who will be able to continue to send their children to schools. Further information about that will come later.

The rules in both the civil and family courts are flexible enough to enable telephone and video hearings of almost everything. Any legal impediments will be dealt with. HMCTS are working urgently on expanding the availability of technology but in the meantime we have phones, some video facilities and Skype. User information on Skype in on the intranet and otherwise widely available. On the Judicial Intranet (under the Practical Matters tab, select Coronavirus (Covid-19) and scroll down)

https://www.youtube.com/watch?v=2WUe59-aWI8&feature=youtu.be

https://www.youtube.com/watch?v=9MpqcXAdx0k&feature=youtu.be

https://www.youtube.com/watch?v=qQpQEDYskrc&feature=youtu.be

https://www.youtube.com/watch?v=H8xbgad2q_Q&feature=youtu.be

The default position now in all jurisdictions must be that hearings should be conducted with one, more than one or all participants attending remotely. That will not always be possible. Sensible precautions should be taken when people attend a hearing. They are now well-known. We all take them when out of the home. There will be bumps along the road as we all get used to new ways of working forced on us the biggest public health emergency the world has faced for a century.

Many more procedural matters may be resolved on paper within the rules.

You will all have been following the detail of the government's advice and the science on which it is based. It is clear that this pandemic will not be a phenomenon that continues only for a few weeks. At the best it will suppress the normal functioning of society for many months. For that reason we all need to recognise that we will be using technology to

conduct business which even a month ago would have been unthinkable. Final hearings and hearings with contested evidence very shortly will inevitably be conducted using technology. Otherwise, there will be no hearings and access to justice will become a mirage. Even now we have to be thinking about the inevitable backlogs and delays that are building in the system and will build to an intolerable level if too much court business is simply adjourned.

I would urge all before agreeing to adjourn any hearing to use available time to explore with the parties the possibility for compromise.

Some outline guidance follows:

Designated Civil Judges and Designated Family Judges should work with operational staff and listing staff to establish priorities and to consider how hearings can continue to take place as safely as possible.

Social distancing

Local practices will need to take account of variations in court facilities and the range of work that the court handles. The leadership judges with local HMCTS managers are best placed to consider local arrangements and will be supported by the Presiding Judges and Senior Judiciary in finding solutions that allow for civil court business to continue in a safe environment including making necessary adjustments to avoid large numbers of members of the public congregating in a small waiting areas. Telephone and video hearings will help. So too might avoiding or reducing block listing; identifying empty courts or other areas that can be used for waiting; if necessary, requiring people to wait outside until called. Whatever solutions are identified, people must not be required to wait in close proximity to one another.

Litigants in person

Unrepresented parties may have difficulty with telephone hearings. Sensitivity will be required. It is very unlikely that a telephone hearing would work if a litigant in person is:

- *homeless;*
- *chaotic because of alcohol or drug use;*
- *has learning disabilities;*
- *has significant mental health issues;*
- *or has other needs or disabilities which would militate against telephone hearings.*

We expect the full co-operation of the legal profession to facilitate telephone hearings as hitherto. Indeed, the professions willingness to be imaginative in the use of remote technology is clear from discussions I have had with the President of the Law Society and Chair of the Bar Council.

Trials and hearings involving live evidence

The Rules allow evidence to be received by telephone, video-link etc.

It may be difficult to maintain trials and final hearings in the short term, not least because of the inability of people to participate at all. As events develop individual decisions on priorities and practicalities will have to be made. The message is to do what can be done safely

Civil and Family court business must be sensitive to other priorities for people's time. Many people are in critical jobs (e.g. NHS, Police) and will need to be elsewhere.

Prioritising work

Designated Civil Judges and Designated Family Judges will need to work with operational and listing staff to identify local priorities, taking account of the availability of resources and the practical arrangements that can be implemented safely. All judges are to be encouraged to think creatively about solutions to maximise social distancing while allowing as much court business as possible to continue in a safe environment. Judges should be deployed as efficiently as possible at all times.

Listing officers will undoubtedly face significant challenges. To assist them as much as possible, some pragmatic decisions will have to be taken, for example as to classes of non-urgent work that simply cannot be accommodated where the default position will be to remove such work from the list.

Civil Aspects

Possession Proceedings

It is likely that the emergency legislation will affect this area of work. But it is obvious that particular sensitivity is needed irrespective of that. Applications to suspend warrants of possession should be prioritized.

Block listing of possession claims is inappropriate at this time because it would be difficult to maintain appropriate social distancing.

Judges dealing with any possession claim during the crisis must have in mind the public health guidance and should not make an order that risks impacting on public health.

Injunctions and committal hearings

Applications for injunctions and committal are likely to be urgent and such work will need to be prioritised.

Applications for breach of an injunction or undertakings are unlikely suitable for telephone hearing. Such applications are likely to be urgent and to require priority. Arrangements will be required for the safe hearing of such applications.

Civil Appeals

Most applications for permission to appeal, including oral reconsiderations, are likely to be suitable for telephone hearing, subject to practical arrangements and the observations above as to litigants in person.

Final appeals may be suitable for hearing by telephone.

Family Matters

The President of the Family Division is providing a more detailed document to assist judges sitting in the Family Court.

GUIDANCE ON THE CONDUCT OF REMOTE HEARINGS

On 20 March 2020, guidance was issued by the Heads of Division and the Senior Presiding Judge on the approach to be taken to holding hearings remotely. It was subsequently re-issued by the Heads of Division, Senior Presiding Judge and deputy Head of Civil Justice in amended form on 26 March 2020. It covers a variety of such situations (see paras 8 and 22), from a hearing being carried out partially remotely, i.e. where some of the participants are in a court room or where all the participants take part remotely but the hearing is broadcast in a court room, to hearings that are carried out entirely remotely with the hearing accessible to the public and/or media via remote technology or broadcast on the internet, or held entirely remotely and in private (see s.85A of the Courts Act 2003 and PD 51Y, noted above). The guidance is reprinted below.

CIVIL JUSTICE IN ENGLAND and WALES PROTOCOL REGARDING REMOTE HEARINGS

26 March 2020

Introduction to this Protocol

1. *The current pandemic necessitates the use of remote hearings wherever possible. This Protocol applies to hearings of all kinds, including trials, applications and those in which litigants in person are involved in the County Court, High Court and Court of Appeal (Civil Division), including the Business and Property Courts. It should be applied flexibly.*

2. *This Protocol seeks to provide basic guidance as to the conduct of remote hearings. Whilst most court buildings currently remain open, the objective is to undertake as many hearings as possible remotely so as to minimise the risk of transmission of Covid-19.*

3. *The method by which all hearings, including remote hearings, are conducted is always a matter for the judge(s), operating in accordance with applicable law, Rules and Practice Directions. Nothing in this Protocol derogates from the judge's duty to determine all issues that arise in the case judicially and in accordance with normal principles. Hearings conducted in accordance with this Protocol should, however, be treated for all other purposes as a hearing in accordance with the CPR.*

4. *It is inevitable that undertaking numerous hearings remotely will cause teething troubles. All parties are urged to be sympathetic to the technological and other difficulties experienced by others.*

5. *CPR Part 39.9 provides that "[a]t any hearing, whether in the High Court or the County Court, the proceedings will be tape recorded or digitally recorded unless the judge directs otherwise" and that "[n]o party or member of the public may use unofficial recording equipment in any court or judge's room without the permission of the court".*

6. *CPR Part 39.2(3)(g) provides that hearings can (actually must) be held in private if the court is satisfied that it is, for any reason, "necessary, to secure the proper administration of justice". In such a case, however, a copy of the court's order to that effect must, under CPR Part 39.2(5), be published on www.judiciary.uk, "[u]nless and to the extent that the court otherwise directs", and non-parties may apply to attend the hearing and make submissions, or apply to set aside or vary the order.*

6A. *A new Practice Direction 51Y entitled "Video or Audio Hearings During Coronavirus Pandemic" came into force on 25 March 2020. It provides that: "where the court directs that proceedings are to be conducted wholly as video or audio proceedings and it is not practicable for the hearing to be broadcast in a court building, the court may direct that the hearing must take place in private where it is necessary to do so to secure the proper administration of justice". Remote hearings accessed by a media representative are public proceedings. But if an order is made under PD51Y, there is no requirement for the order to be published as under CPR Part 39.2(5).*

7. *There are, therefore, the following legal issues to be addressed before any remote hearing can begin: (i) whether the hearing is to be in public or in private; if in private, on what grounds, and (ii) how is the hearing to be recorded, or can an order properly be made to dispense with recording?*

8. *As to the first, remote hearings should, so far as possible, still be public hearings. This can be achieved in a number of ways: (a) one person (whether judge, clerk or official) relaying the audio and (if available) video of the hearing to an open court room; (b) allowing a media representative to log in to the remote hearing; and/or (c) live streaming of the hearing over the internet, where broadcasting hearings is authorised in legislation (such as the new s85A recently inserted into the Courts Act 2003). The principles of open justice remain paramount.*

9. *As to the second, the recording of hearings and compliance with CPR Part 32.9 can also be achieved in a number of ways: (a) recording the audio relayed in an open court room by the use of the court's normal recording system, (b) recording the hearing on the remote communication programme being used (e.g. BT MeetMe, Skype for Business, or Zoom), or (c) by the court using a mobile telephone to record the hearing. It is not, however, permitted for the parties to record the hearing without the judge's permission.*

What should happen when a hearing is fixed?

10. *In the present circumstances, the court and the parties and their representatives will need to be more proactive in relation to all forthcoming hearings.*

11. *It is good practice for the listing office, judges, clerks and court officials to consider as far ahead as possible how future hearings should best be undertaken.*

12. *It will normally be possible for all short, interlocutory, or non-witness, applications to be heard remotely. Some witness cases will also be suitable for remote hearings.*

13. *Available methods for remote hearings include (non-exhaustively) BT conference call, Skype for Business, court video link, BT MeetMe, Zoom and ordinary telephone call. But any communication method available to the participants can be considered if appropriate.*

14. *Before ordering a hearing by court video link, the judge must check with the listing office that suitable facilities are available.*

15. *The listing office will seek to ensure that the judge(s) and the parties are informed, as long in advance as possible, of the identity of the judge(s) hearing the case.*

16. *Judges, clerks, and/or officials will, in each case, wherever possible, propose to the parties one of three solutions:-*

    (i) a stated appropriate remote communication method (BT conference call, Skype for Business, court video link, BT MeetMe, Zoom, ordinary telephone call or another method) for the hearing;

    (ii) that the case will proceed in court with appropriate precautions to prevent the transmission of Covid-19; or

    *(iii) that the case will need to be adjourned, because a remote hearing is not possible **and** the length of the hearing combined with the number of parties or overseas parties, representatives and/or witnesses make it undesirable to go ahead with a hearing in court at the current time.*

17. *If the parties disagree with the court's proposal, they may make submissions in writing by email or CE-file (if available), copied to the other parties, as to what other proposal would be more appropriate. On receipt of submissions from all parties, the judge(s) will make a binding determination as to the way in which the hearing will take place, and give all other necessary directions.*

18. *It will also be open to the court to fix a short remote case management conference in advance of the fixed hearing*

to allow for directions to be made in relation to the conduct of the hearing, the technology to be used, and/or any other relevant matters.

19. *The fact that a hearing is to be a remote hearing and, where possible, the technological method to be employed, will normally be shown in the cause list.*

The remote hearing itself

20. *The clerk or court official, and the parties, will all need to log in or call in to the dedicated facility in good time for the stated start time of the remote hearing. In a Skype, Zoom or BT call, the judge(s) will then be invited in by the clerk or court official.*

21. *The hearing will be recorded by the judge's clerk, a court official or by the judge, if technically possible, unless a recording has been dispensed with under CPR Part 39.9(1). The parties and their legal representatives are not permitted to record the hearing. With the court's permission, arrangements can be made with privately paid-for transcribers.*

22. *The hearing can be made open to the public, if technically possible, either by the judge(s) or the clerk logging in to the hearing in a public court room and making the hearing audible in that court room, or by other methods (see [8] above). But in the exceptional circumstances presented by the current pandemic, the impossibility of public access should not normally prevent a remote hearing taking place (see [6]-[7] above). If any party submits that it should do so in the circumstances of the specific case, they should make submissions to that effect to the judge.*

23. *The clerk, court official or the judge(s) must complete the order that is made at the end of the remote hearing. The wording of the order should be discussed and agreed with the parties.*

Preparations for the remote hearing

24. *The parties should, if necessary, prepare an electronic bundle of documents and an electronic bundle of authorities for each remote hearing. Each electronic bundle should be indexed and paginated and should be provided to the judge's clerk, court official or to the judge (if no official is available), and to all other representatives and parties well in advance of the hearing.*

25. *Electronic bundles should contain only documents and authorities that are essential to the remote hearing. Large electronic files can be slow to transmit and unwieldy to use.*

26. *Electronic bundles can be prepared in .pdf or another format. They must be filed on CE- file (if available) or sent to the court by link to an online data room (preferred) or email.*

The Master of the Rolls

The President of the Queen's Bench Division

The Chancellor of the High Court

The Senior Presiding Judge

The Deputy Head of Civil Justice

URGENT BUSINESS IN THE HIGH COURT – CONTINGENCY GUIDANCE

On 26 March 2020, the President of the Queen's Bench Division, Chancellor of the High Court and President of the Family Division issued guidance concerning prioritisation of urgent work during the Coronavirus pandemic. Urgent work is that which would ordinarily be dealt with via an out-of-hours application.

High Court Business Contingency Plan for maintaining Urgent Court Hearings

26 March 2020

Introduction to this Contingency Plan

1. *The Royal Courts of Justice and the Rolls Building are putting in place plans to enable them to continue to conduct court hearings during the current pandemic.*

2. *This plan identifies (i) the "urgent business" and the "business as usual" that will be dealt with by the High Court during the pandemic, and (ii) the processes that have been put in place to enable that to happen.*

3. *In outline, any business that would be sufficiently urgent to warrant an out of hours application in normal times will be considered urgent business for the purpose of this plan. Business that is not urgent business* ***("business as usual") will also continue to be dealt with during this period, as far as possible and in accordance with the contingency plans put in place by the different Divisions and Courts.*** *Urgent business will, however, be given priority.*

4. *Further details on the way in which the work of different jurisdictions is being conducted, by remote hearings wherever possible, can be found at www.judiciary.uk .*

What is urgent business?

5. *Urgent business is business that would warrant an out of hours application in any of the courts covered by this plan. The courts covered by this plan are the Queen's Bench Division, the Administrative Court, the Court of Protection, the Business and Property Courts of England and Wales, and the Family Division.*

6. *It is not appropriate to define urgent business any more closely. If the relevant duty judge [see [9] below] does not consider the application to be urgent business, it will not be dealt with.*

What processes are in place for applications during normal court hours?

7. *The process to be followed is similar to that followed in normal times to make an out of hours application in the court concerned.*

8. *In general terms, applicants should email the relevant email address below. They will then be referred to the duty listing officer who will work with the duty judges in the relevant Division or Court, depending on the nature of the business, to decide what arrangements will be made for a hearing, including a remote hearing, to take place. That email address should also be copied in for all communications to the court.*

9. *The Divisions or Courts will deal according to their own separate procedures with business as usual.*

10. *At any one time during the normal working week, at least one judge from each of the Queen's Bench Division, the Administrative Court, the Commercial Court, the Technology and Construction Court, the Court of Protection, the Family Division and the Chancery Division will be available to deal remotely with the business of that jurisdiction, including urgent business. A single duty judge from each of the Queen's Bench Division, the Family Division and the Chancery Division will be available outside normal working hours for the same purpose, in the usual way. The out of hours provision remains unchanged.*

Contact emails:

QBD, including Media & Communications: qbjudgeslistingoffice@justice.gov.uk
Family Division: rcj.familyhighcourt@justice.gov.uk
Chancery Division: ChanceryJudgesListing@Justice.gov.uk
Commercial Court Listing: comct.listing@justice.gov.uk
Technology and Construction Court Listing: tcc.listing@justice.gov.uk
Insolvency & Companies Judges Clerks: rolls.icl.hearings1@justice.gov.uk
Chancery Masters Appointments: chancery.mastersappointments@Justice.gov.uk
Administrative Court: administrativecourtoffice.immediates@hmcts.x.gsi.gov.uk

The President of the Queen's Bench Division
The Chancellor of the High Court
The President of the Family Division

UNITED KINGDOM SUPREME COURT – REGISTRY UPDATE

On 23 March 2020, the Registry of the United Kingdom Supreme Court announced that, until further notice, both the Supreme Court and the Judicial Committee of the Privy Council would be working remotely. Please check here for further updates: *https://www.supremecourt.uk/news/update-about-visiting-the-uk-supreme-court.html*. The Guidance is as follows.

Registry update

23 March 2020

The Registries of the Supreme Court and of the JCPC are now operating remotely and the building is closed until further notice. If you have any questions which are not answered by the points below please email the registry on registry@supremecourt.uk or registry@jcpc.uk and a member of staff will contact you.

Hearings

Hearings are being conducted via video conferencing facilities and parties will have been contacted with the necessary information. Hearings will be live streamed as usual although there may be a slight delay before the video on demand recording is available.

Papers for hearings

Papers for hearings must be supplied electronically. The electronic bundle should be emailed to the relevant registry as a downloadable link as soon as it is available.

Papers for filing

All documents, forms and notices etc should be sent to the registry electronically until further notice. Parties should email their documents to the relevant registry and the document will be treated as having been filed on the next business day. If the document carries a fee, please contact the registry for our bank details.

Orders

Orders will be issued electronically as usual but will not be sealed.

Time limits

Time limits will be applied flexibly and parties should bear in mind the provision of the overriding objective of the Rules that unnecessary disputes over procedural matters are discouraged.

Applications for an extension of time

There is no need to make a formal application for an extension of time for any period of less than 3 weeks, unless the application relates to a hearing which is listed in the 6 weeks from the date of the application. Please just email the relevant registry with details making sure to copy all parties into the email.

Urgent applications

Parties should contact the Registrar louise.dimambro@supremecourt.uk if an application is genuinely urgent. The relevant registry should be copied into the email.

HMCTS FEES GUIDANCE

On 1 April 2020, HMCTS provided information on how to deal with issue fees while the Royal Courts of Justice Fees Office was closed. The guidance was as follows.

The Royal Courts of Justice Fees Office will close to the public until further notice (1 April 2020)

Court users are advised to contact the relevant courts for assistance using the email addresses below.

- *Queen's Bench Masters – QBenquiries@justice.gov.uk*
- *Queen's Bench General – qbjudgeslistingoffice@justice.gov.uk*
- *Administrative Court – administrativecourtoffice.generaloffice@hmcts.x.gsi.gov.uk*
- *County Court at Central London – Bankruptcy and Companies Team - RCJBankCLCCDJHearing@justice.gov.uk*
- *Family Division – rcj.familyhighcourt@justice.gov.uk*
- *Senior Courts Costs Office using - scco@justice.gov.uk*
- *Civil Court of Appeal – civilappeals.registry@justice.gov.uk*

HMCTS COURT OF APPEAL URGENT BUSINESS GUIDANCE

On 1 April 2020, HMCTS issued guidance for Court of Appeal users concerning urgent applications, i.e. those that need to be dealt with within seven days. The Guidance was as follows.

Royal Courts of Justice Court of Appeal urgent business priorities (1 April 2020)

We are only dealing with urgent application in the Civil Appeals Office. Urgent work means applications where it is essential in the interests of justice that there be a substantive decision within the next 7 days.

***Urgent** applications should only be sent by email between 9am and 4.15pm to: civilappeals.urgentwork@justice.gov.uk*

Within 7 days of the public fees office reopening you'll need to pay the application fee or complete the relevant "help with fees" application

We'll acknowledge your application and aim to process it as quickly as possible.

***Non urgent** applications should be emailed to: civilappeals.registry@justice.gov.uk*

Within 7 days of the public fees office reopening you'll need to pay the application fee or complete the relevant "help with fees" application

Your application will be dealt with as we increase our capacity to manage new non- urgent work. All appellant's notices will be accepted on the basis that they may be rejected at a later date.

The public counter at E307 remains closed and we have temporary suspended the "drop box" service.

Bundles should not be provided electronically unless specifically requested by the Court.

All other documents should be filed electronically and all other queries should continue to be emailed to the following addresses:

Civilappeals.cmsa@justice.gov.uk

Civilappeals.cmsb@justice.gov.uk

Civilappeals.cmsc@justice.gov.uk

Civilappeals.listing@justice.gov.uk

Civilappeals.associates@justice.gov.uk

As we increase work capacity we'll look to provide a limited telephone service for users. The court will issue orders electronically for the time being.

UPDATE NOTE

Practitioners should note that further, and updated, guidance is likely to be issued on a regular basis. HMCTS, for instance, provides daily updates to its guidance.

Updated and further guidance can be found here:

- *https://www.gov.uk/guidance/hmcts-daily-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak*
- *https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/*

Additionally, guidance on the approach to applications in the Administrative Court, which at the time of writing was not yet on the HMCTS website, can be found on the Immigration Law Practitioners' Association Website:

- *http://www.ilpa.org.uk/resources.php/36079/administrative-court-office-notices-march-2020*

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