CIVIL PROCEDURE NEWS

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- **Dory Acquisitions Designated Activity Co v Frangos (Rev 1)** [2020] EWHC 240 (Comm), 31 January 2020, unrep. (Bryan J)

Power to cure procedural defect – service of unsealed claim form

CPR r.3.10. A dispute arose under a loan agreement. The claimants sought to claim US $154,135,746.40, plus interest and expenses. The claim was issued via CE-File. The claimants purported to serve the claim form on the defendants under cover of a letter and by email. The claim form was not sealed, nor did it contain the claim number. An issue arose as to whether in the absence of a seal and a claim number there had been valid service. Moreover, an issue arose as to whether the court could cure the defect in service, assuming that there was such a defect, it could be cured under CPR r.3.10. **Held**, service of an unsealed claim form that did not contain the claim number was a procedural defect, such as to render service invalid (see para.71). However, that procedural defect could be cured under CPR r.3.10 applying the guidance set out in ***Phillips v Nussberger*** (2008). In giving judgment Bryan J set out a clear summary of that guidance as it had been applied and accepted in subsequent case law. He did so as follows:

> *"[76] The guidance of the House of Lords in Phillips v Nussberger and subsequent cases can be summarised as follows:*
>
> *(1) The guidance in Phillips v Nussberger is authoritative obiter dicta.*
>
> *(2) CPR rule 3.10 is a beneficial provision to be given a very wide effect. It can be used beneficially where a defect has no prejudicial effect to the other party and to prevent the triumph of style over substance. (See Bank of Baroda at [17].) CPR rule 3.10 can apply even where the defect constitutes a failure to serve sufficient claim forms on defendants or a failure to deliver the correct claim form to the correct defendants or even where a defendant received no claim form at all, only an acknowledgement of service form in the context of service of claim forms on multiple defendants (see the Goldean Mariner [1990] 2 Lloyd's Reports 215 discussed in Phillips v Nussberger, Integral Petroleum and the Bank of Baroda). This interpretation of CPR rule 3.10 applies to originating processes as much as it does to other procedural steps (see Bank of Baroda at [19]).*
>
> *(3) In view of this broad guidance, the most important question in determining whether CPR rule 3.10 applies is whether there has been an error of procedure which might otherwise invalidate a procedural step. This would be more difficult where there has been, for example, a complete failure of service (Bank of Baroda at [17]).*
>
> *(4) Another important factor to consider is whether the defendant has suffered any prejudice as a result of the procedural error. The court has in the past used its powers under CPR rule 3.10 to remedy service of an unsealed claim form without a claim number where the service of that claim did not deprive the defendant of any knowledge of the fact that the proceedings had been or were about to be started or the nature of the claim against it (see Heron Bros Limited v Central Bedfordshire Council [2015] EWHC 604 (TCC), at [16] and below).*
>
> *(5) Whether the defect was the fault of the applicant is considered, but it is a subsidiary factor."*

Phillips v Nussberger [2008] UKHL 1; [2008] 1 W.L.R. 180, HL, ***Integral Petroleum SA v SCU-Finanz AG*** [2014] EWHC 702 (Comm), unrep., ***Heron Bros Ltd v Central Bedfordshire Council*** [2015] EWHC 604 (TCC); [2015] P.T.S.R. 1146, ***Bank of Baroda v Nawany Marine Shipping FZE*** [2016] EWHC 3089 (Comm); [2017] 2 All E.R. (Comm) 763, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.31.10.1.)

- **Canada Goose UK Retail Ltd v Persons Unknown** [2020] EWCA Civ 303, 5 March 2020, unrep. (Sir Terence Etherton MR, David Richards and Coulson LJJ)

Action against persons unknown – identifiability of defendants

The claimants issued proceedings in respect of protests carried out at its store in London. An interim injunction was made on a without notice basis to persons unknown. The interim injunction was continued following a hearing. Subsequently the claim lay dormant with the interim injunction in place, until the claimants issued an application for summary judgment. The judge refused to grant summary judgment and discharged the interim relief. An appeal from that decision was made to the Court of Appeal. The appeal was dismissed. The Court of Appeal once more considered the guidelines Longmore LJ developed in ***Ineos Upstream Ltd v Persons Unknown*** (2019) as requirements necessary for injunctions to be granted against persons unknown. In respect of the fourth of those guidelines, it agreed with the approach taken by Leggatt LJ in ***Cuadrilla Bowland Ltd v Persons Unknown*** (2020) and held that a more nuanced approach to the fourth guideline needed to be taken. It held, at para.78, that the fourth guideline, which was that the terms of an injunction against persons unknown must correspond to the threatened tort and not be so wide that they

prohibit lawful conduct, should be qualified, such that the court "*may prohibit lawful conduct where there is no other proportionate means of protecting the claimant's rights*". The Court at para.81 also accepted Leggatt LJ's approach to the fifth guideline developed in ***Ineos***, i.e. that it was permissible to in principle to refer to a defendant's intention in an injunction. However, the Court went on to say that:

> *"[81] ... It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so ... this can often be done by reference to the effect of an action of the defendant rather than the intention with which it was done ..."*

The Court went on to summarise the proper approach to take to applications for interim relief against persons unknown as follows,

> *"[82] ... it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against 'persons unknown' in protester cases like the present one:*
>
> *(1) The 'persons unknown' defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The 'persons unknown' defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the 'persons unknown'.*
>
> *(2) The 'persons unknown' must be defined in the originating process by reference to their conduct which is alleged to be unlawful.*
>
> *(3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify quia timet relief.*
>
> *(4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as 'persons unknown', must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.*
>
> *(5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.*
>
> *(6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.*
>
> *(7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction. We shall elaborate this point when addressing Canada Goose's application for a final injunction on its summary judgment application."*

Hubbard v Pitt [1976] Q.B. 142, CA, ***Burris v Azadani*** [1995] 1 W.L.R. 1372, CA, ***Attorney General v Punch Ltd*** [2002] UKHL 50; [2003] 1 A.C. 1046, HL, ***Ineos Upstream Ltd v Persons Unknown*** [2019] EWCA Civ 515; [2019] 4 W.L.R. 100, CA, ***Cameron v Liverpool Victoria Insurance Co Ltd*** [2019] UKSC 6; [2019] 1 W.L.R. 147, ***Cuadrilla Bowland Ltd v Persons Unknown*** [2020] EWCA Civ 9; [2020] 4 W.L.R. 29, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 para.19.1.3, Vol.2 paras 3D-49 and 15-8.)

■ **SP v Hewson** [2020] EWHC 499 (QB), 5 March 2020, unrep. (Farbey J)

Tomlin order – revival of claim – power to vary order on appeal

CPR r.52.20(2). Proceedings in respect of alleged harassment were settled by way of a Tomlin Order. Subsequently a second claim was issued, which made further allegations of harassment. An application to strike out the second claim was made by the appellant. Allegations in the second claim, which were held to be either matters raised in the first, settled, claim or elaborations of those allegations were struck out. Allegations in the second claim, which were held to be new, were allowed to proceed. They were allowed to proceed as the judge dealing with the strike out application, of

his own motion, lifted the stay imposed on the first claim, in effect gave permission to move the new allegations from the second to the first claim, and struck out the remainder of the second claim. On appeal, Farbey J **held**: (i) the judge erred in reviving the first claim. The effect of the Tomlin Order was that the first claim could only be revived for the purpose of giving effect to its terms. By reviving the claim, the effect of the judge's order was to allow all the allegations in the first claim to go forward to trial. The appeal was allowed in order to rectify that error; (ii) the judge was correct to strike out those aspects of the second claim that repeated or elaborated allegations made in the first claim. In respect of the new allegations raised in the second claim, it was argued that as there was no cross-appeal, the court was constrained on appeal to the terms of the judge's orders, i.e. as the new allegations formed part of a claim that had been struck out, as was the case here, the only option left to the appellant was to raise them in a further, third, claim. Farbey J noted that no authority was cited for such a limitation on the appeal court's powers. On the contrary, she **held**:

> *"[34] ... no authority for the proposition that this court, having decided that the judge fell into error in relation to part of his order, has no power to vary other parts without a respondent seeking and obtaining permission to appeal [was cited] (CPR 52.3 and 52.13). The assertion that I cannot vary a part of the judge's order without a cross-appeal does not take account of the provisions of CPR 52.20(2) which empower an appeal court to vary the order of the court below. In my judgment, that power is wide enough to encompass those matters which are consequential to a successful appeal and which are necessary in order for the court to do justice in the appeal which is before it. ..."*

(See ***Civil Procedure 2020*** Vol.1 at paras 40.6.2 and 52.20.1.)

- **Comberg v Vivopower International Services Ltd** [2020] EWHC 575 (QB), 10 March 2020, unrep. (Freedman J)

Inadvertent disclosure – obvious mistake test

CPR r.31.20. During the trial of an action for wrongful dismissal and sums claimed under oral agreements, an application was made concerning a privileged document. The document had been given to the claimant's solicitors by the defendants for inclusion in the trial bundle. The defendants submitted that the disclosure was inadvertent. They sought the document's return or destruction. The claimants contested that point. The claimants also made an application for collateral waiver in order to secure disclosure of other documents of an otherwise privileged nature. **Held**, in the circumstances of the case, the disclosure was inadvertent (see para.22). The question then became whether permission should be granted under CPR r.31.20 for the claimants to use the inadvertently disclosed privileged document. Permission was refused. The law governing the application under that rule was noted to have been set out by Clarke LJ in ***Al-Fayed v Commissioner of Police of the Metropolis*** (2002) at para.16. In this case the key principle articulated by Clarke LJ was whether the disclosure was an obvious mistake, such that an injunction would be granted to enjoin use of it. As Clarke LJ put it a mistake is likely to be an obvious one where:

> *"[16] ... (vii) ... (a) the solicitor appreciates that a mistake has been made before making some use of the documents; or (b) it would be obvious to a reasonable solicitor in his position that a mistake has been made; and, in either case, there are no other circumstances which would make it unjust or inequitable to grant relief. ..."*

In this case there was no evidence as to what the solicitor appreciated before making some use of the document. As such it was not possible for the court to determine the application on the basis of (vii)(a). The question thus focused on (vii)(b), and whether it would be obvious to a reasonable solicitor that a mistake had been made. In respect of a submission that the test set out in (vii) was not comprehensive, given that in other parts of his summary of the authorities Clarke LJ referred to the court needing to take account of all the circumstances, and noting that as the power to grant an injunction was an equitable jurisdiction there were *"no rigid rules"* (see para.16(vi) and (x) in Clarke LJ's judgment), Freedman J declined to determine whether they did provide a basis for granting an injunction in circumstances where there was no obvious mistake. Given Clarke LJ's summary of the principles, and his references to these points, the submission would appear to be one that has a good degree of force. Freedman J went on to consider the application on the basis of obvious mistake. He held that in the circumstances of this case it would be obvious to a reasonable solicitor, who was in the same position as the recipient of the document, that provision of an unredacted document was a mistake, an obvious mistake. As the document had not been deployed in the proceedings, and simply inserting it into a bundle did not mean it had been deployed, as the court had not seen the document, and as the point had been taken immediately such that privilege could be maintained by both sides, in the event that an injunction had been sought it would not have been unjust to grant an injunction enjoining use of the document (see paras 41 and 42). In reaching this decision the judge noted the particular features of the present case that lead to his conclusion were: (i) inserting the documents into the trial bundle did not form part of a disclosure exercise for the formality of a list of documents or the preparation of a major chronological bundle. ***Rawlinson and Hunter v Directors of the Serious Fraud Office (No.2)*** (2015) distinguished; (ii) they were produced as part of a simple exercise of placing documents into a bundle as part of documents that had been referred to in a witness statement that did not trespass on legal professional privilege; (iii) legal professional privilege had been asserted by all the parties throughout the proceedings. As such it would be surprising for a party to have deviated from that approach; (iv) there was no prior indication of a

departure from the established approach to privilege to justify a reasonable belief that it had been waived; (v) all other documents disclosed were redacted to maintain privilege. If privilege was waived in respect of the document in question, there would have been an expectation that it would be waived in respect of other documents; and (vi) no statement had been given by a solicitor to indicate why they had a belief that the disclosure was intentional or that privilege was being waived (see paras 35–40)). ***Al-Fayed v Commissioner of Police of the Metropolis*** [2002] EWCA (Civ) 780; (2002) 99(30) L.S.G. 39, CA, ***Rawlinson and Hunter v Directors of the Serious Fraud Office (No.2)*** [2014] EWCA Civ 1129; [2015] 1 W.L.R. 797, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.31.20.1.)

■ **R. (Elan-Cane) v Secretary of State for the Home Department** [2020] EWCA Civ 363, 10 March 2020, unrep. (King, Irwin, Henderson LJJ)

Capped costs – judicial review

Criminal Justice and Courts Act 2015 ss.88–90, CPR rr.46.16– 46.19, PD 46 paras 10.1 and 10.2. An appeal from the dismissal of the appellant's application for judicial review was dismissed. A cross-appeal in respect of costs was also dismissed. The cross-appeal raised issues concerning the operation of the capped costs regime in judicial review proceedings. In the present case the parties had agreed to a costs capping order. They had done so in lieu of an order under ss.88–90 of the Criminal Justice and Courts Act 2015. The parties had agreed to cap their recoverable costs at £3,000. The judge ordered a 33% reduction to the capped sum. It was argued that the judge erred in doing so, and ought to have applied the reduction to the entirety of the respondent's costs. It was argued that any reduction in costs under CPR Pt 44 must be applied to the totality of costs claimed and not the capped amount: see CPR rr.44.2(2)(a), (b) and 44.2(6). **Held**, the public policy that underpinned the costs capping regime under the 2015 Act was to promote access to justice in judicial review proceedings that satisfied the *"public interest proceedings"* test in s.88 of that Act. As King LJ put it:

> *"[148] ... If that test is satisfied, both sides will know from an early stage what their maximum exposure to costs will be, but they will also know that the costs which they actually incur in pursuing or defending the litigation are likely, to a greater or lesser extent, to prove irrecoverable. That is the price which has to be paid, in the wider public interest, so that justice can be obtained in important cases of this character."*

However, that was not the end of the matter. As King LJ went on to set out:

> *"[149] It does not follow, however, that the court must approach the making of its order for costs at the conclusion of such proceedings as though the cap did not exist, until it is applied at the end of the process to whatever resulting figure is yielded by application of the normal principles set out in Rule 44.2. A mechanical approach of that nature would not in my judgment sit well with the underlying public policy which is engaged, ... In my view, ... the relevant considerations of public policy should inform the whole of the exercise of judicial discretion on costs at the conclusion of such cases, and there is no reason of law or principle why the judge should not, in an appropriate case, apply a percentage reduction to the amount of the capped costs rather than the uncapped costs.*
>
> *[150] Naturally, a judge should think carefully before adopting such a course, bearing in mind that the party in question will usually have incurred substantial irrecoverable costs in excess of the cap. But the question arises in a context where both sides have known, from an early stage, that their costs will be capped, and it could be an invitation to lax practice or unreasonable litigation conduct if the successful party were free to proceed in the knowledge that, in practice, it could always count on receiving the full amount of the capped costs even if there were factors which would justify a substantial reduction of its uncapped costs."*

The Court of Appeal's decision in ***Campaign to Protect Rural England - Kent Branch v Secretary of State for Communities and Local Government*** (2019), which concerned the Aarhus Convention costs cap in environmental claims was held to be too far removed from the present situation to be of relevance to the question on the appeal (see para.151). ***Campaign to Protect Rural England - Kent Branch v Secretary of State for Communities and Local Government*** [2019] EWCA Civ 1230; [2020] 1 W.L.R. 352, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.44.16.1.)

■ **Various Claimants v MGN Ltd** [2020] EWHC 553 (Ch), 10 March 2020, unrep. (Mann J)

Strike out – proportionality

CPR rr.3.1(2)(k), 3.4(2)(b). An application was made in respect of long-running proceedings arising from *"phone hacking"*. In the course of the litigation a number of claimants had been given permission to deploy *"generic pleadings"*, i.e. ones that set out matters common to each of their cases. Such a pleading was to be additional to the claimants' individual pleadings; as such, permission to amend the individual pleadings to incorporate the *"generic pleadings"* was required. The defendant objected to the generic pleadings that were produced. In addition, the defendant sought to strike out parts of the individual claims. The application to strike out was based on the ground that parts of the claims the claimants wished to advance were disproportionate. **Held**, the court had power under CPR rr.3.1(2)(k) and 3.4(2)(b) to exclude an issue and to strike out part of a pleading, respectively, on the ground that it was disproportionate. It was noted

that ***Jameel v Dow Jones & Co Inc*** (2005) was authority for the proposition that a claim can be struck out if its value to the claimant was very limited, such that the use of resources to bring the claim was unjustifiable. That demonstrated that while it *"was a strong thing"* to strike out a claim or issue on the grounds of proportionality, the court was

> *"entitled to make a proportionality judgment in relation to its likely effect on the case in the light of the resources and effort which would have to be put into running or meeting (and deciding) it"*

(see para.31). ***Jameel v Dow Jones & Co Inc*** [2005] EWCA Civ 75; [2005] Q.B. 946, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.3.1.11.)

■ **Punjab National Bank (International) Ltd v Techtrek India Ltd** [2020] EWHC 539 (Ch), 13 March 2020, unrep. (Chief Master Marsh)

Witness statement – identification of source of statement

CPR r.32.8, PD 32 para.18.2. The claimant brought proceedings against the defendant under a personal guarantee in respect of a loan facility. The claimant applied for summary judgment. The application was dismissed. One of the issues raised during the application concerned the content of a witness statement. The Chief Master noted that CPR r.32.8 requires witness statements to comply with PD 32. He further noted that para.18.2 requires a witness statement that indicates statements are *"matters of information and belief"* rather than the witness's own knowledge must indicate their source. He noted that para.18.2 does not however specify whether

> *"the 'source' of the evidence in the case of a corporate entity must be identified by referring to a person or persons, or whether, as (in this case), it suffices to identify 'officers of the claimant'"*

(see para.17). The Chief Master on this point **held** as follows:

> *"[20] In my judgment, where the maker of a statement is relying on evidence provided by a witness who is an officer of, or employed by, an incorporated body, the requirements of paragraph 18 of Practice Direction 32 to provide the source of evidence is not complied with merely by saying that the source is the entity or officers of the entity. If the source of evidence is a person, as opposed the source being documents, the person or persons must be identified and named. A corporate entity cannot experience events and can only operate through the medium of real persons. It follows that the source of evidence must be a named person or persons. A failure to identify the source in a manner that complies with paragraph 18.2 will mean the court has to consider whether to place any weight on the evidence, especially where it touches on a central issue.*
>
> *[21] CPR rule 32.6(2) provides an exception to this general principle and permits a party to rely on matters set out in a statement of case or the application if it is verified by a statement of truth. Under CPR rule 22.1(6) the statement of truth in a statement of case may be signed by a legal representative on behalf of the party. It is nevertheless the party's statement of truth. But there is nothing in CPR rule 22(1) that requires the legal representative when signing a statement of truth on behalf of an incorporated party to identify the source of instructions from which authority to sign came."*

(See ***Civil Procedure 2020*** Vol.1 at paras 32.8.1 and 32PD.18.)

■ **Infederation Ltd v Google LLC** [2020] EWHC 657 (Ch), 18 March 2020, unrep. (Roth J)

Use of confidentiality rings – competition proceedings

CPR r.31.22. Three confidentiality rings had been established in significant competition law proceedings. An application was made by the founding members of the claimant for an independent expert to be admitted to two of the rings. The application was contested. In giving judgment Roth J considered the utility of confidentiality rings in competition law disputes between parties that are commercial rivals. He endorsed the approach identified by Lord Dyson JSC in ***Al Rawi v Security Service*** (2011) as applicable to intellectual property claims where, as Lord Dyson put it at para.64,

> *"the whole object of the proceedings is to protect a commercial interest, full disclosure may not be possible if it would render the proceedings futile. This problem occurs in intellectual property proceedings. It is commonplace to deal with the issue of disclosure by establishing 'confidentiality rings' of persons who may see certain confidential material which is withheld from one or more of the parties to the litigation at least in its initial stages. Such claims by their very nature raise special problems which require exceptional solutions. I am not aware of a case in which a court has approved a trial of such a case proceeding in circumstances where one party was denied access to evidence which was being relied on at the trial by the other party."*

Roth J held, at para.29, that the special problems raised by such proceedings applied similarly to *"competition law proceedings where rival commercial interests are involved"*. He then went on to review the case law on the subject, see paras 27–42, concluding that the authorities demonstrated as follows:

"[42] Generally, the parties concur in these arrangements, although they still require the approval of the court, having regard to the principle of open justice. Since the hearing of Google's pending application is not the trial and Foundem's application concerns the admission to the ring of an outside expert not individuals from the parties, it is unnecessary for present purposes to decide whether the observations of David Richards J require some qualification. In my view, the important points to emerge from the authorities are that: (i) such arrangements are exceptional; (ii) they must be limited to the narrowest extent possible; and (iii) they require careful scrutiny by the court to ensure that there is no resulting unfairness. Any dispute over admission of an individual to the ring must be determined on the particular circumstances of the case."

In ***McKillen v Misland (Cyprus) Investments Ltd*** (2012) David Richards J, while noting that confidentiality rings were not uncommon in intellectual property cases prior to trial, stated at para.50 – in the light of ***Al Rawi*** – that in his view

"at common law the court has no jurisdiction to deny a party access to evidence at trial. But if the jurisdiction does exist, it [was in his judgment] so exceptional as to be of largely theoretical interest only."

Roth J stated at para.53, he would grant the application. However, before doing so he gave the respondents time to consider whether they wished to pursue alternative courses of action that would obviate the need for the order to be made. In a postscript to the judgment, while not commenting on the conduct of the parties in the present case, he went on to deprecate what he noted was an increasing general tendency to seek to make confidentiality claims. As he put it:

"[57] ... I find that there is an increasing tendency for excessive confidentiality claims to be asserted over documents and information in competition law proceedings, only for those claims to be curtailed or renounced in response to protests from the other side or intervention by the court. It is my understanding that the same is the case in intellectual property proceedings. This is wasteful of time and costs, and it is not the way modern litigation should be conducted.

[58] There are of course legitimate trade secrets and currently confidential information that merit protection. But the parties and their advisors should appreciate that redactions from documents on confidentiality grounds prior to inspection and any restriction on inspection to a confidentiality ring are exceptions to the normal regime for disclosure and inspection of relevant documents. In CMCS Common Market Commercial Services AVV v Taylor [2011] EWHC 324 (Ch), Briggs J (as he then was) stated, at [40]:

'In my judgment there is no difference in principle between the ambit of the solicitor's duty, on the one hand, in the conduct and supervision of disclosure and, on the other hand, in the conduct and supervision of any redaction of disclosable documents before they are offered for inspection. Listing documents for the purposes of disclosure and making them available for inspection are both parts of the process more generally called disclosure, and the court is heavily reliant upon the solicitor's duty to carry out or at least personally to supervise both tasks ....'

[59] The decision as to whether confidentiality should be claimed for a document ultimately rests with the client, subject of course to the potential for determination by the court. But just as solicitors will not unquestioningly accept their client's view as to which documents are relevant for disclosure, I consider that they should not necessarily be satisfied by their client's view that open inspection of a document should be restricted on confidentiality grounds. Solicitors should advise their client as to the proper limits of confidentiality, given the protection for all disclosed documents under CPR rule 31.22, and the guidance as to the likely extent of justifiable confidentiality given by the EU Courts: e.g. see the judgment of the Grand Chamber of the Court of Justice in Case C-162/15P Evonik Degussa v Commission, EU:C:2017:205, at paras 64-66 (rebuttable presumption that documents at least five years old have lost their secret or confidential nature). If solicitors have reasonable grounds for supposing that their client has made excessive confidentiality claims, they should investigate the matter carefully and discuss it with their client. The obligations of solicitors in that regard are well summarised in Matthews and Malek, Disclosure (5th edn, 2017), chapter 18."

Al Rawi v Security Service [2011] UKSC 34; [2012] 1 A.C. 531, ***CMCS Common Market Commercial Services AVV v Taylor*** [2011] EWHC 324 (Ch); [2011] P.N.L.R. 17, ***McKillen v Misland (Cyprus) Investments Ltd*** [2012] EWHC 1158 (Ch), unrep, ChD, ***Evonik Degussa GmbH v European Commission*** (C-162/15 P) EU:C:2017:205; [2017] 4 C.M.L.R. 28, ECJ, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.31.22.1.)

- **Bank St Petersburg PJSC v Arkhangelsky** [2020] EWCA Civ 408; [2020] 4 W.L.R. 55 (Sir Geoffrey Vos C, Patten and Males LJJ)

Judgment – to be given in a reasonable time

CPR Pt 40. An appeal was brought from judgment in proceedings raising claims under personal guarantees and a personal loan, and counterclaims for damages arising from an alleged conspiracy to raid and seize assets. The appeal raised, amongst other things, a question of law concerning the standard of proof where issues of dishonesty arise. The court declined to lay down any more specific guidelines than were already established in the authorities, e.g. ***Re H***

(1996) and ***Re B*** (2008), and also see ***JSC BM Bank v Kekhman*** (2018) (see paras 44–47). As Vos C put it at para.47, it was not appropriate for the Court of Appeal to do so. The appeal also raised the issue of delay between the conclusion of the trial and the delivery of the judgment. It specifically raised the question whether a 22-month delay rendered the judgment unsafe. **Held**, the appeal was allowed on the basis, amongst other things, that the wrong standard of proof was applied (see para.106). In respect of the delay Vos C noted that there was an

> *"unwritten rule applicable to both the Business and Property Courts and the Court of Appeal ... that judgments should be delivered within 3 months of the hearing."*

(See para.78.) It was not the case though that delay in itself was sufficient to require a retrial. The authorities showed that delay in itself did not render a judgment unsafe such as to require a retrial. It is, however, a factor to be taken into account when an appellate court considers the trial judge's findings and the way in which they treated the evidence. The approach taken by the Court of Appeal in ***Bond v Dunster Properties Ltd*** (2011) was distinguished: see paras 81–82. In that case Arden LJ stated at para.7 that, where a judgment was seriously delayed, if an appellate court concluded that the

> *"judge's recollection of the evidence was at fault on any material point, then (unless the error could not be due to the delay) it would order a retrial if it could not be satisfied that the judge came to the right conclusion."*

In the present case, the judge had mitigated the delay through assiduous reading of the transcripts and had not left out of his careful consideration any material parts of the evidence. In this case the delay's effect was suggested by Vos C to have been that the judge was

> *"less able to deal with findings he made in the round, perhaps because the findings on one part of the case were made at such a remove in time from other findings."*

(See para.82.) Notwithstanding that, it was not appropriate to allow the appeal on the ground of delay alone. ***Rolled Steel Products (Holdings) Ltd v British Steel Corp*** [1986] Ch. 246; [1985] 2 W.L.R. 908, CA, ***Re H (Minors) (Sexual Abuse: Standard of Proof)*** [1996] A.C. 563; [1996] 2 W.L.R. 8, HL, ***Gardiner Fire Ltd v Jones*** (1998) 95(44) L.S.G. 35, CA, ***Goose v Wilson Sandford (No.1)*** [1998] T.L.R. 85, CA, ***Bishopsgate Investment Management Ltd (In Liquidation) v Maxwell (No.1)*** [1994] 1 All E.R. 261, CA, ***Bond v Dunster Properties Ltd*** [2011] EWCA Civ 455; (2011) 108(19) L.S.G. 21, CA, ***Cobham v Frett*** [2001] 1 W.L.R. 1775, PC (BVI), ***Re B (Children)*** [2008] UKHL 35; [2009] 1 A.C. 11, HL, ***JSC BM Bank v Kekhma***n [2018] EWHC 791 (Comm), unrep., ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.40.2.14.)

R. (Nolson) v Stevenage BC [2020] EWCA Civ 379, 19 March 2020, unrep. (Hickinbottom LJ)

Guidance on renewed oral applications

CPR rr.3.3(5), 23.8(c), 54.12(3). On an application to reopen an application for permission to appeal, the Court of Appeal considered the proper approach to take to applications and, as in this case, applications for interim relief, where they are decided on the papers. The particular question was whether the correct approach was to apply for permission to appeal from the refusal, or whether the correct approach was to renew the application orally (see para.12). **Held**, the application to reopen was refused. Hickinbottom LJ explained that the proper approach to take was set out in the Court of Appeal's decision in ***Collier v Williams*** (2006). It established that the proper approach was to apply to renew the application orally, and only then – if necessary – seek to appeal from the refusal at an oral renewal. As such the High Court, contrary to the deputy High Court judge's decision in the present case, had the jurisdiction to review a refusal of interim relief where that refusal was taken on the papers (also see ***R. (MD (Afghanistan)) v Secretary of State for the Home Department*** (2012) at para.21). Hickinbottom LJ noted that while there was nothing new in the jurisprudence, there was evidence to suggest that the issue was one that was causing problems more widely. As such he summarised the proper approach to assist in future applications, including applications for interim relief as follows:

> *"[18]...i) In any application to the court, even where the relevant court form does not ask the specific question, the applicant should generally indicate whether he wishes to be heard orally or whether he is content for the application to be dealt with on the papers alone. Whilst in itself that will not prevent a later application under CPR rule 3.3(5) (even by the applicant himself), it will give the other parties an opportunity to consent to the application being dealt with on the papers alone, which would prevent such a further application.*
>
> *ii) Where the court refuses an application on the papers, unless both parties have consented to it being dealt with on the papers alone, the order should be endorsed with a statement of the right to make (within 7 days or such other time as the court considers appropriate) an application to have the order set aside, varied or stayed under CPR rule 3.3(5). If the parties have consented to a paper determination, then the order will be final and should be endorsed with a statement of the right to appeal to this court within 21 days.*
>
> *iii) Any application for an adverse decision made on the papers to be 'reconsidered' at an oral hearing should clearly state that it is made under CPR rule 3.3(5) (or, if made under another specific provision of the rules, that it is so made."*

Collier v Williams [2006] EWCA Civ 20; [2006] 1 W.L.R. 1945, CA, ***R. (MD (Afghanistan)) v Secretary of State for the Home Department*** [2012] EWCA Civ 194; [2012] 1 W.L.R. 2422, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.3.3.1.)

■ **DSN v Blackpool Football Club Ltd** [2020] EWHC 670 (QB), 20 March 2020, unrep. (Griffith J)

Part 36 Offer – effect of refusal to engage in ADR – indemnity costs

CPR r.36.17(4)(b). Judgment was given for the claimant after trial. The claimant sought an order for indemnity costs having secured damages greater than an effective Part 36 Offer. The defendant objected to an award of indemnity costs under CPR r.36.17(4)(b). The court made an award on that footing. Additionally, the claimant sought indemnity costs on what was described by the judge as *"a broader basis"* and for a longer period than under r.36.17(4)(b). That was that the defendant should be required to pay all the claimant's costs on an indemnity basis due to their conduct, and specifically due to their failure to engage in attempts to settle the claim (see para.16). The defendant had, in addition to not responding to three Part 36 Offers, refused to engage in settlement negotiations in the light of their view of the strength of their defence to it. It did so when the parties were required, by court order, to consider settling the dispute by alternative dispute resolution, including mediation (see paras 23–24 and 27). **Held**, the reasons given for not engaging in mediation were *"inadequate"*. As the judge put it:

> *"[28] ... The reasons given for refusing to engage in mediation were inadequate. They were, simply, and repeatedly, that the Defendant 'continues to believe that it has a strong defence'. No defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution. Experience has shown that disputes may often be resolved in a way satisfactory to all parties, including parties who find themselves able to resolve claims against them which they consider not to be well founded. Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and they do not necessarily require any admission of liability, or even a payment of money. Even if they do involve payment of money, the amount may compare favourably (if the settlement is timely) with the irrecoverable costs, in money terms alone, of an action that has been successfully fought. The costs of an action will not always be limited to financial costs, however. A trial is likely to require a significant expenditure of time, including management time, and may take a heavy toll on witnesses even for successful parties which a settlement could spare them. As to admission of liability, a settlement can include admissions or statements which fall short of accepting legal liability, which may still be of value to the party bringing a claim ..."*

Even if the defendant were correct in its view that it had a strong defence, then its responses to the claimant's attempts to engage it in settlement attempts, and its compliance with the order to consider settlement methods, would still have been unacceptable. The appropriate standard of engagement was that set out by Vos C in ***OMV Petrom SA v Glencore International AG*** (2017) at para.39, i.e. parties are obliged to make reasonable efforts to settle, to respond properly to Part 36 Offers, and *"conduct litigation collaboratively and to engage constructively in a settlement process"*. In the circumstances, an award of indemnity costs was justified, albeit not for the whole of the claimant's costs. ***OMV Petrom SA v Glencore International AG*** [2017] EWCA Civ 195; [2017] 1 W.L.R. 3465, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.1.4.11 and Vol.2 para.14-17.)

■ **Zenith Logistics Services (UK) Ltd v Coury** [2020] EWHC 774 (QB), 3 April 2020, unrep. (Warby J)

Tomlin Order – open justice

CPR r.40.6. Warby J heard two cases together, one an appeal, the other an application to make a consent order in the form of a Tomlin Order. Both matters raised related issues concerning the relationship of the confidentiality schedule to a Tomlin Order, and particularly its relationship with the principle of open justice. In giving judgment Warby J deprecated the practice, at least in so far as the Queen's Bench Division was concerned, of the court examining the contents of the confidential schedule to a Tomlin Order. He did so rightly on the basis that the court had no power to alter the terms of the parties' agreement or to vary them. Scrutiny by the court was also contrary to the terms of CPR r.40.6. He did note however that such a practice did appear to be adopted in the Commercial Court. He further noted, without going further, that the position may be different where one or more of the parties was a litigant-in-person (see paras 57 and 67). He went on to hold that Tomlin Orders were consistent with the principle of open justice. The fact that a schedule to such an order is confidential is not a derogation from that principle. It is not because the principle of open justice does not require parties to make the terms of their agreements public, i.e. such schedules do not engage the principle. He went on to hold that the fact that a court order refers to such an agreement by referring to a confidential schedule does not create a right to inspect the agreement. The principle of open justice will only be engaged when, and if, the court is called upon to enforce the terms of the confidential schedule (see paras 57–69). Moreover, there was nothing in the decision in ***Bostani v Pieper*** (2019) to suggest that the schedule to a Tomlin Order represented an order of the court (see para.61). ***Bostani v Pieper*** [2019] EWHC 547 (Comm); [2019] 4 W.L.R. 44, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.40.6.2.)

Jankowski v Poland [2020] EWHC 826 (Admin), 8 April 2020, unrep. (Fordham J)

Extradition proceedings – open justice

CPR r.39.2, PD 51Y. Extradition appeal proceedings were heard in the Divisional Court. The Criminal Procedure Rules rather than the Civil Procedure Rules apply to such proceedings. The hearing was held partially remotely, i.e. the judge was present in court, while the parties took part via the use of remote technology, which in this case was conducted via telephone. Fordham J properly explained that such a hearing, which the public could have attended either in person at the court or via dial-in, was consistent with the principle of open justice. Such an approach is clearly applicable to civil proceedings under the CPR. As Fordham J explained,

> *"[2] I conducted an oral hearing of the appeal using special arrangements, by agreement of the parties, necessitated by the coronavirus pandemic. I sat, robed, in court 2 at the Royal Courts of Justice. The hearing and its timing were listed in the published cause list. The court building was open. The cause list recorded that the hearing was to be by telephone conference, giving an email contact for any person who wished to dial-in. BT Conferencing was used. The two Counsel addressed the court, just as they would have done had they been physically present in court. Everything said by them, and by me, could be heard clearly in open court and recorded on the court recording system which I had been told was running throughout. On the application of any person, the recording so made will be able to be accessed in a court building, with the consent of the court. The two Counsel, the appellant's solicitor ... , the appellant himself and a simultaneous interpreter ... were all able to join the hearing by telephone. Interpretation took place through a separate phone link. These arrangements were agreed between the parties, at my invitation, in the light of the Protocol regarding Remote Hearings published on 20 March 2020. The parties were content, as was I, that telephone - as opposed to Skype - was a suitable and appropriate mode.*
>
> *[3] I do not consider that there has been any derogation from the open justice principle, nor from the need to conduct an oral hearing in open court, nor from the rights of the parties. If and insofar as there has been any derogation, I am satisfied that it was necessary, justified and proportionate in securing the proper administration of justice. I was conscious that the appeal to me was pursuant to section 26 of the Extradition Act 2003 and governed by the Criminal Procedure Rules (CrPR). The hearing satisfied the standards described in CrPR CPD I paragraph 3N.17 (open justice and records of proceedings). The appellant did not attend by 'live link' (CrPR50.17(3)), as that term is defined (CrPR2.2). The receiving of representations by telephone (CrPR3.5(2)(d)) is not to be undertaken where inconsistent with the rules (CrPR3.5(1)). I am satisfied, were it necessary, that the appellant waived his right to attend by another means than by telephone (CrPR50.17(3)(a)). I am also satisfied, were this necessary, that I exercised my power (recognised in CrPR50.17(1)(a)(iii)) to order that the hearing be in 'private', but in such a way as guaranteed the rights and interests of all concerned, including the press, the public and the public interest. I am confident, even absent the comfort of an equivalent to CPR PD51Y of the Civil Procedure Rules that the hearing, as conducted, was lawful and within my powers, as being necessitated by the interests of justice. I commend the parties and their representatives for the prompt, cooperative and practical way in which the hearing was approached. I am satisfied that the mode of hearing, although unusual, caused no prejudice to any person or their interests, nor detriment to justice or the public interest. Had any submission been made, by any person, that the mode of hearing was inconsistent with any right, interest, principle or rule, I would have considered it and ruled on it on its merits."*

(See ***Civil Procedure 2020*** Vol.1 at paras 39.2.1 and 51.2.14.)

Practice Updates

STATUTORY INSTRUMENTS

THE CIVIL PROCEDURE (AMENDMENT) RULES 2020 (SI 2020/82). In force from **6 April 2020**, except for amendments to CPR Pts 45 and 73, which are in force from **30 March 2020**. The most significant amendment made is to CPR r.12.3, which makes clear that filing an acknowledgment of service or defence will bar entry of judgment in default as long as it is filed before judgment is entered. It thus confirms that the first of three constructions of that rule considered in ***Cunico Resources NV v Daskalakis*** [2018] EWHC 3382 (Comm) is correct (see ***Civil Procedure 2020*** Vol.1 at para.12.3.1). It amends CPR r.45.8 to include reference to CPR r.73.10(6A)(a), in respect of the making of final charging orders, consequent upon amendments to CPR Pt 73 (noted below). It makes two amendments to CPR Pt 52. The first makes clear that under CPR r.52.22(1) the court may deal with both substantive and costs issues as part of a *"rolled-up"* hearing, and may do so notwithstanding the fact that the general rule is that CPR Part 36 Offers should not be referred to until all other issues, apart from costs, have been determined. The second amends CPR r.52.24 to enable fellows of the Chartered Institute of Legal Executives to be authorised to exercise certain functions

of the Court of Appeal. A similar amendment is made to CPR r.54.1 in respect of the Administrative Court. CPR r.53.2 is amended to provide for the President of the Queen's Bench Division to nominate the judge who is to be in charge of the Media and Communications List. CPR r.55.11 is amended, and a new r.55.22 is substituted, to remove demoted tenancies and oral tenancies from the procedure for accelerated possession. CPR Pt 73 is amended to incorporate the provisions of what was the pilot scheme under PD 51T – County Court Legal Advisers – Final Charging Orders.

THE TAKING CONTROL OF GOODS AND CERTIFICATION OF ENFORCEMENT AGENTS (AMENDMENT) (CORONAVIRUS) REGULATIONS 2020 (SI 2020/451). In force from **25 April 2020**. The Regulations amend the Taking Control of Goods Regulations 2013 (SI 2013/1894), subject to their having no effect on enforcement action taken prior to their entry into force (see ***Civil Procedure 2020*** Vol.2 at para.9A-1234). The Regulations amend regs 9, 10, 23 and 52 of the 2013 Regulations. They do the following:

- extend time limits for taking control of goods by 12 months where on 26 March 2020 there was less than one month remaining of a time limit for taking control of goods and also extends such time limits where such a circumstance arose or will arise at a time when restrictions on movement remain in place;
- prohibit enforcement agents from taking control of goods on a highway or in premises that include a dwelling-house where a person living there would be prevented from leaving such premises without reasonable excuse;
- prevent enforcement agents from entering or re-entering premises that include a dwelling-house at a time when a person living there would be prevented from leaving the premises without a reasonable excuse; and
- where notice of enforcement is given after the Amendment Regulations came into force and during the time when protection from forfeiture of business tenancies is in place under s.82 of the Coronavirus Act 2020, the minimum amount of net unpaid rent that may be outstanding before commercial rent arrears recovery may take place is set at an amount equivalent to 90 days' rent.

The Amendment Regulations also amend reg.7 of the Certification of Enforcement Agents Regulations 2014 (SI 2014/421). That amendment extends the validity of certificates granted under the 2014 Regulations for six months beyond their original expiry date if, on 26 March 2020, there was less than three months remaining before they expired. The amendment further provides for such certificates to be similarly extended if there is less than three months remaining before they expire at a time when restrictions on movement remain in place.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 113th Update. This Practice Direction Update affected a number of amendments which were variously in force on 31 March and 6 April 2020. The amendments in force from **31 March 2020** were to:

- PD 2E and PD 51R, to enable fellows of the Chartered Institute of Legal Executives to be authorised to act as legal advisers;
- PD 51O, to extend the pilot scheme's operation to 6 April 2021; and
- PD 51T, to omit it, subject to a transitional provision, as it is now incorporated into CPR Pt 73.

The amendments in force from **6 April 2020** were to:

- PD 2B, to delete para.16, which concerned appeals, from provision concerning allocation of the judiciary;
- PD 7E, to amend the email address for filing certificates of service in para.6.2 to *ccbc@justice.gov.uk;*
- PD 16, to insert new paras 6.3 and 6.4, which make provision for specific matters to be pleaded in respect of the cost of credit hire for replacement vehicles following road traffic accidents;
- PD 22, to insert amendments to statements of truth through the insertion of wording to make clear that proceedings for contempt of court may be brought where the statement of truth is not given honestly. Further important amendments were made to require a statement of truth to be given in the maker's own language;
- PD 32, to make important amendments that require witness statements to be drafted in a witness's own language, to require a translation to be provided, to provide for information to be given as to how the translation was made, and to provide for the translator to certify that the translation is accurate. Additional amendments were made to insert into the statement of truth a clear warning that proceedings for contempt of court may be brought where the statement is not given honestly;
- PD 44, to amend para.12.6 in the light of ***Brown v Commissioner of Police of the Metropolis*** [2019] EWCA Civ 1724; [2020] 1 W.L.R. 1257, so that it makes clear that it applies in cases where either *"... rule 44.16(1) or rule 44.16(2)(a) applies"*;

- PD 52A, to amend the routes of appeal to reintroduce the general principle that destinations of appeals are determined by the rank of judge from whom a decision is appealed. Also removes the previous restriction on which judges may give directions, and deal with applications;
- PD 52D, to update references to the Bar Standards Board's Qualification Rules; and
- Proceedings Under Enactments Relating to Equality PD, amends para.2 to renumber it as para.2.1. Inserts a new para.2.2 making provision for an address for service and for e-correspondence for the Commission for Equality and Human Rights. Also inserts a new para.2.3, which makes provision concerning sanctions for non-compliance with the requirement to give notice under paras 2.1 and 2.2.

CPR PRACTICE DIRECTION – 114th Update. In force from **24 February 2020**, in respect of amendments to the Online Civil Money Claims Pilot Scheme under Practice Direction 51R, for claims submitted to the court on or after 11.00 on 24 February 2020, except in respect of amendments to para.13.1(1) and (2) of that PD. In force from **6 April 2020** in respect of amendments to para.13.1(1) and (2) and in respect of a new para.13.1(5), for claims submitted to the court on or after 11.00 on 6 April 2020. The update variously amends the pilot scheme. In particular, it:

- enables judges to consider online Directions Questionnaires and to give directions in respect of claims above £300;
- amends para.13.1(1) and (2) to include a warning concerning contempt of court in respect of the verification of statements of truth; and
- requires statements of truth to be dated via the new para.13.1(5);
- makes online admissions generally available throughout the pilot scheme;
- increases the number of pilot courts via a substituted para.20.1(1)(c).

CPR PRACTICE DIRECTION – 115th Update. In force from **2 March 2020**. This Practice Direction Update reintroduced, until 30 November 2020, the Video Hearings Pilot Scheme under Practice Direction 51V. The previous pilot scheme lapsed on 30 November 2019. As a pilot scheme it has, somewhat, been overtaken by events caused by the Coronavirus pandemic, which has seen the use of various forms of remote hearing widely adopted.

CPR PRACTICE DIRECTION 116th–118th Updates. See ***Civil Procedure News*** No.4 of 2020, Coronavirus Legislation and Guidance.

CPR PRACTICE DIRECTION – 119th Update. In force from **11.00 on 14 April 2020**. This Practice Direction Update, which was expedited in support of efforts related to the Coronavirus pandemic, affects business as usual revisions to the Online Civil Money Claims Pilot Scheme set out in Practice Direction 51R. It affects the following changes to the Pilot Scheme:

- it extends the scope of the pilot scheme to deal with Directions Questionnaires and for directions to be made online;
- it enables HMCTS authorised legal advisers to consider Directions Questionnaires online, and to make directions. It removes geographical limits on legal advisers' powers; and
- it extends the OCMC's powers to give directions, by enabling it to make directions about the future management of claims.
- The amendments remain in force until PD 51R is, itself, reviewed on 30 November 2021.

On 6 May 2020, the Ministry of Justice issued an alert that the weblink set out in para.1.5 of PD 51R is no longer operative. The correct weblink is: *https://www.moneyclaim-legal.platform.hmcts.net/*. The paragraph in the Practice Direction will, no doubt, be amended in the next CPR PD Update.

CORONAVIRUS-RELATED PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 120th Update. In force from **18 April 2020**. This Practice Direction Update amends and clarifies the pilot scheme Practice Direction on Possession Claims introduced by Practice Direction 51Z. It is in force until 30 October 2020. It inserts a new para.2A into PD 51Z and amends para.3 of that PD. The new para.2A exempts from the general stay on possession proceedings, including enforcement, imposed by para.2 of PD 51Z the following:

- a claim against trespassers to which r.55.6 applies, i.e. against trespassers who are persons unknown;
- applications for interim possession orders under Section III of Pt 55, including the making of such an order, the hearing required by r.55.25(4), and any application made under r.55.28(1); and
- applications for case management directions where they are agreed by all the parties.

The amendment does not have any transitional provisions, and would therefore seem to be of retrospective effect. The amendment to para.3 is clarificatory. It makes clear that the stay imposed by PD 51Z does not prohibit claims being issued. While it is difficult to see how a PD which imposed a stay on proceedings could properly be thought to encompass a prohibition on the issue of claims, the clarification is beneficial. Claims issued under Pt 55 are thus subject to the stay, unless they fall within one of the exceptions to it, from the time at which they are issued.

CORONAVIRUS GUIDANCE UPDATE

The Coronavirus pandemic continues to affect the operation of the civil courts. Practitioners are reminded to consult the Judiciary of England and Wales and HMCTS websites for daily updates at:

- *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*
- *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*

NON-CONTENTIOUS PROBATE – GUIDANCE ON USE OF STATEMENTS OF TRUTH IN PLACE OF AFFIDAVITS

On 17 April 2020, Sir Andrew McFarlane PFD issued guidance on the use of statements of truth in place of affidavits in non-contentious probate matters (see ***Civil Procedure 2020*** Vol.2 at Section 6C). The guidance is in effect until 30 July 2020. It is as follows.

> ***President of the Family Division: Guidance as to the replacement of affidavits with statements of truth in non-contentious probate processes***
>
> 1. *This guidance is issued to assist the courts and practitioners in relation to the use of statements of truth as a replacement for affidavits in non-contentious probate processes in current circumstances where at present many solicitors cannot access their offices or papers.*
> 2. *To enable non-contentious probate business to continue during the current social conditions imposed for the coronavirus pandemic, I am authorising the District Probate Registrars to allow statements of truth to be used as an alternative to affidavits for the following applications and processes in the Non-Contentious Probate Rules 1987 – 12 (1), 16, 19, 25 (2), 26, 32 (2), 44 (12), 46 (2) & (4), 47 (4) & (6), 48 (2)a, 50 (2), 51, 52, 53, 54 (3), 55 (2) until 30 July 2020.*
> 3. *Consideration will be given to making this rule change permanent by Statutory Instrument at a future date.*
> 4. *The changes sought will allow the Registrars to dispose of these matters in a more expeditious way for the parties and for HMCTS during the current restrictions which have resulted in Solicitors' offices being widely closed and all Probate Registries closed to members of the public; therefore, persons who need to depose to evidence in form of an affidavit do not have access to a commissioner for oaths. It will enable citizens and practitioners to continue to operate whilst measures are in place in respect of social distancing.*
>
> ***The Rt. Hon. Sir Andrew McFarlane***
> ***President of the Family Division and Head of Family Justice***

PRINCIPLES OF REMOTE ADVOCACY

The Inns of Court College of Advocacy has issued guidance to advocates on how to conduct remote hearings effectively. The guidance details eight principles of effective remote advocacy:

1. Liaise with the court or tribunal in advance of the hearing.
2. Ensure you understand the technology to be used in the hearing.
3. Ensure all the parties can be seen and be heard.
4. Ensure you know how to handle documents effectively in respect of the technology used.
5. Make the best use of written argument.
6. Be prepared, be brief and to the point.
7. Ensure that you avoid over-speaking.
8. Maintain confidentiality.

The full guidance can be obtained here: *https://www.icca.ac.uk/wp-content/uploads/2020/04/Principles-for-Remote-Advocacy-1.pdf*.

In Detail

RE BLACKFRIARS LTD [2020] EWHC 845 (Ch) – REMOTE HEARINGS

(1) Background

In ***Re Blackfriars Ltd*** [2020] EWHC 845 (Ch), 6 April 2020, unrep., John Kimbell QC, sitting as a deputy judge of the High Court, considered an application to adjourn a trial. An adjournment was said to be necessary in the light of government restrictions on movement due to the Coronavirus pandemic and concerns relating to public safety. The application arose in long-running proceedings brought by joint liquidators of One Blackfriars Ltd against its former administrators. The claim sought damages in excess of £250 million arising from alleged mishandling of the administration. The application to adjourn was made at a pre-trial review. The trial was scheduled to begin in the week of 8 June 2020 and was to last for five weeks. The trial date had been set in November 2018. It was to involve four witnesses of fact and 13 expert witnesses. The application was refused. The judgment was the first to consider guidance issued to civil courts on remote hearings.

The Arguments

The claimant's application to adjourn was primarily based on the submission that holding the trial would be inconsistent with measures the Government had taken to restrict public movement; that if it took place it would pose an unacceptable risk to the health and safety of the participants. It further submitted that holding a five-week trial via the use of untested technology posed too great a challenge. Hence there was a real risk, or potential risk, of procedural unfairness if a remote trial was held. The defendant resisted the application on the grounds that a remote trial could properly take place without endangering health and safety, and that the technology available could properly be, and had previously been, used effectively. Such a hearing would be both consistent with government measures to restrict movement, as well as guidance from the judiciary, and could be conducted fairly.

(2) The Decision

The Legislation

Social interaction and travel were noted to have been significantly curtailed by the Government, and particularly through wide powers contained in the Coronavirus Act 2020. While the Act's powers were generally such as to enable the Government to control, i.e. restrict public activity, its provisions concerning the courts differed. Rather than being restrictive in scope, they provided the means through which the courts could continue to operate through the use of remote technology. Sections 53–56 and Sch.25 to the Act achieved this through inserting into the Courts Act 2003 provisions to enable the courts to conduct proceedings wholly via audio or video technology. Additionally, reg.6(2) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350) provided that it was permissible for individuals to travel to court to fulfil a legal obligation or in order to participate in legal proceedings. Taken together both the Act and the Regulations demonstrated that Parliament intended the administration of justice to continue during the Coronavirus pandemic.

Judicial Guidance

How the courts were to continue to administer justice in a manner such that it would not endanger public health had been the subject of Practice Directions and judicial guidance. The starting point was guidance issued by the Lord Chief Justice, on 19 March 2020, to judges in the civil and family courts. That stressed that hearings were to be conducted remotely through the use of technology. That was the default; it was a position that was supported by the 2020 Act. It went on to stress that the courts were to *"do what can be done safely"* in order to maintain the operation of the justice system. This included holding trials and hearings. This guidance had been supplemented on 20 and 26 March 2020 by a Protocol regarding Remote Hearings, which provided detailed guidance on the holding of such hearings. In particular it set out three options where a trial had already been fixed: to conduct it via remote technology; to conduct it in a physical court where that could be done safely; or, to adjourn it. It was apparent therefore that adjournment was one option, not the only option. This guidance, and the Act's provisions concerning remote hearings, was supplemented by Practice Direction 51Y. It provided guidance on the holding of wholly remote hearings, particularly on issues concerning open justice. As the deputy High Court judge put it:

> *"[19] In light of the guidance which I have set out above, as well as the primary and the secondary legislation that has been passed in relation to the COVID-19 crisis, I have no hesitation whatsoever in rejecting [the] submission that to proceed with a remote trial in this case would be inconsistent with the guidance issued by the Prime Minister on the evening of 23 March 2020. There is in my judgment a clear and consistent message which emerges from the material I have referred to. The message is that as many hearings as possible should continue and they should do so remotely as long as that can be done safely."*

Moreover, it was, as had been stated by Teare J in ***National Bank of Kazakhstan v Bank of New York Mellon*** 19 March 2020, unrep., *"incumbent on ... parties to seek to arrange a remote hearing if possible"*. And, as the deputy High Court judge went on to explain:

> *"[23] ... section 71(1) of the Senior Courts Act 1981 provides that:*
>
> > *'Sittings of the High Court may be held, and any other business of the High Court may be conducted, at any place in England or Wales.'*
>
> *[24] This provision means that there is no difficulty with a High Court Judge hearing a trial remotely from his or her home and for counsel and witnesses to be in diverse locations in England and Wales. If a remote trial is ordered pursuant to Remote Hearings Protocol, then it seems to me that the Coronavirus Regulations permit, for example, a witness to travel to a solicitors' office or to any place equipped with a high-quality video link to give evidence, or for counsel to do the same thing to make submissions. The Coronavirus Regulations would also, in my judgment, permit an employee of a remote trial service provider to travel to any location (including a witness' home) to assist with the set-up and oversight of the operation of a remote trial technology. I have no doubt that everyone involved in such an operation would have the common sense to ensure that the social distancing rules are followed."*

In the premises it was clear that both the legislation, regulations, Practice Direction and guidance all pointed in the same direction, and that was that remote video technology should, as far as that is possible, be used to facilitate hearings taking place, a point recently confirmed, after ***Re Blackfriars*** was handed down, by Vos C in the Court of Appeal in ***Teesside Gas Transportation Ltd v Cats North Sea Ltd*** [2020] EWCA Civ 503 at [93]–[96].

Safety

It was reasonable for the question of health and safety in respect of a remote trial to be raised. It was an important issue, not least because a number of the expected participants were likely to fall into the category of vulnerable people, while others that might participate had caring responsibilities. These were relevant issues for the court to take account of in considering the exercise of its case management powers. They, however, did not justify an adjournment in this case as: (i) the trial was scheduled for 8 June and the Government was to review the current restrictions on movement before then. The level of restriction may thus change before the trial; (ii) there was little evidence of the specific problems participants might face, nor was there evidence of any possible mitigation that might be available concerning such difficulties; (iii) parties would be expected to co-operate and propose ways in which issues could be tried without the participation of particular expert witnesses if they were unable to take participate. This was inherent in adopting a flexible approach to the case management of remote hearings; and (iv) various steps could be taken to prepare for trial, which could ensure it could take place safely, i.e. the preparation of expert memoranda, exchange of supplementary expert reports, production of an agreed bundle. Given these issues an adjournment was not justified on the basis of safety.

The Technology

It was submitted that the technology to hold a fully remote trial with participants in different locations was not properly tested. There had, however, been at least two such full trials since 16 March 2020. While it was accepted that previous examples had been of trials on a smaller scale than the one scheduled to take place in the present one, they were not so great as to necessitate an adjournment. With co-operation and planning between the parties any such technological challenges ought to be capable of being overcome.

Procedural Unfairness

Any challenges arising from a fully remote trial where, as in this case, the two parties were well-resourced and represented, would apply equally to them. There was thus no issue arising in respect of equality of arms. Moreover, delay was in no-one's interest. Given the nature of the evidence, which was document-heavy with no allegations of dishonesty or fraud, this was not a case where all witnesses, parties and judge had to be in single physical space, i.e. a physical court room.

Conclusion

In the light of all the points made, the adjournment was refused. The arrangements for trial would, however, be reviewed at a pre-trial review on 21 April 2020. The present judgment, as with that in ***Jankowski v Poland*** [2020] EWHC 826 (Admin), see above, demonstrates the flexible approach that the courts are taking to dealing with hearings through the use of remote technology. It particularly emphasises how proceedings can take place through the appropriate use of technology to ensure participant safety, while also ensuring that the administration of justice continues at a time when traditional physical hearings in a court room may not properly be able to take place. In approaching case management, at the present time, party co-operation will become ever more important in order to help the court devise approaches that ensure the civil courts can continue to operate fairly and efficiently.

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