CIVIL PROCEDURE NEWS

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THE WHITE BOOK SERVICE 2020

SWEET & MAXWELL

In Brief

Cases

Zavarco Plc v Nasir [2020] EWHC 629 (Ch), 20 March 2020, unrep. (Birss J)

Merger – declaratory judgments

CPR r.40.20. In a dispute concerning the recovery of a significant sum of money the question arose whether the doctrine of merger applied to declaratory judgments. Birss J noted that there was no previous authority on this issue. The doctrine of merger, as Lord Sumption stated in ***Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*** (2013),

> *"[17] ... treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as 'of a higher nature' and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13 M & W 494, 504 (Parke B)..."*

The doctrine is a substantive rule of law. It is not, as Birss J noted at para.14, a procedural discretion. As such its effect was automatic where a legal right had merged with a judgment. Subsequently, a claim could no longer be brought in respect of the original cause of action: see Arden LJ in ***Clark v In Focus Asset Management & Tax Solutions Ltd*** (2014) at para.5. Historically, three justifications have been put forward to explain the doctrine:

> *"[15] ... The first is a public interest in the termination of disputes between litigants, the second is a private interest in an individual litigant not to be sued twice for the same thing, and the third is the idea that the cause of action must cease to exist once judgment had been given on it."*

In the light of Lord Sumption's judgment in ***Virgin Atlantic Airways*** it was apparent that the third justification properly explained the modern approach to the doctrine. The other two rationale were not consistent with its effect being automatic (see para.16). **Held**, the doctrine of merger can apply, in principle, to a declaratory judgment where the declaratory relief is the sole remedy granted (see paras 23–24). Care, however, needed to be taken to draw a distinction between such a declaration and one which simply stated what the claimant's right was prior to judgment. In the latter case, the doctrine would not apply to the declaration. In order to differentiate between the two types of declaration it was necessary to determine whether the pre-existing right had been extinguished by the declaratory judgment (see para.26). In those cases where the doctrine of merger did not apply to the declaration, a court could nevertheless exercise its discretion to refuse to permit a second set of proceedings concerning the cause of action to be pursued. Where it had to do so it would do so, however, not on the basis of merger but on the basis of the need to promote finality of litigation and/or on the basis that such proceedings were abusive (see para.26). ***Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*** [2013] UKSC 46; [2014] A.C. 160, ***Clark v In Focus Asset Management & Tax Solutions Ltd*** [2014] EWCA Civ 118; [2014] 1 W.L.R. 2502, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.40.20.)

Response Clothing Ltd v Edinburgh Woollen Mill Ltd [2020] EWHC 721 (IPEC), 23 March 2020, unrep. (Hacon J)

IPEC – cost capping – VAT

CPR r.45.31(1)(a). The question arose whether the costs cap imposed in respect of proceedings in the Intellectual Property and Enterprise Court to which CPR r.45.31(1)(a) applied was inclusive of VAT. **Held**, capped costs were inclusive of VAT save where CPR r.45.32 or exceptional circumstances applied, such as those identified at paras 5–12 in ***Henderson v All Around the World Recordings Ltd (Costs)*** (2013). ***Henderson v All Around the World Recordings Ltd (Costs)*** [2013] EWPCC 19; [2013] F.S.R. 42, PCC, ***Phonographic Performance Ltd v Hamilton Entertainment Ltd*** [2013] EWHC 3467 (IPEC), unrep., ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.45.31.1.)

Ho v Adelekun [2020] EWCA Civ 517, 9 April 2020, unrep. (Sir Geoffrey Vos C, Newey and Males LJJ)

Qualified one-way costs shifting – set-off

CPR r.44.14. The Court of Appeal considered a number of matters concerning costs. In particular it considered the question of set-off where the qualified one-way costs shifting regime applied under CPR r.44.14. Were it not for the Court of Appeal's previous decision on the issue in ***Howe v Motor Insurers' Bureau*** (2017), it would have been minded to hold that costs could not be set off against each other where the qualified one-way costs shifting regime applied (see para.18). The decision in ***Howe*** was, however, binding on the court. It could not, properly, be said to be *per incuriam* (see paras 20–25). **Held**, ***Howe*** applied. Given this decision it ought to be anticipated that either in this case or a future case this issue will need to be resolved by the Supreme Court, if it is not considered prior to that by the Civil Procedure

Rule Committee. ***Howe v Motor Insurers' Bureau*** [2017] EWCA Civ 932; [2018] 1 W.L.R. 923, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.44.13.1.)

Muncipio de Mariana v BHP Group Plc [2020] EWHC 928 (TCC), 20 April 2020, unrep. (HHJ Eyre QC)

Adjournment – principles applicable during pandemic – extensions of time

CPR r.3.1(2)(b), PD 51ZA. An application to stay proceedings on jurisdictional grounds was made. Evidence was to be served by 1 May 2020, with the application to be heard on 8 June 2020. An application to extend time to serve evidence until 19 June 2020 was made. If granted the application would necessitate the hearing being vacated. In considering the application, which was heard remotely and in private pursuant to PD 51Y, HHJ Eyre summarised the principles applicable during the current Coronavirus pandemic to applications to adjourn and to applications to extend time. **Held**, the application to vacate and to extend time was granted. In respect of adjournment, he noted that a different approach needed to be taken to the established position under ***Quah v Goldman Sachs International*** (2015). That guidance was applicable to *"normal times"* rather than the current circumstances (see para.18). More appropriate guidance for the adjournment applications during the pandemic could be derived from ***National Bank of Kazakhstan v Bank of New York Mellon*** (2020), ***Re One Blackfriars Ltd*** (2020) and ***Re Smith Technologies*** (2020). (See paras 18–23.) HHJ Eyre QC went on to state that:

> *"[24] In the light of those authorities and the material referred to therein I have concluded that the following principles govern the question of whether a particular hearing should be adjourned if the case cannot be heard face to face or whether instead there should be a remote hearing.*
>
> *i) Regard must be had to the importance of the continued administration of justice. Justice delayed is justice denied even when the delay results from a response to the currently prevailing circumstances.*
>
> *ii) There is to be a recognition of the extent to which disputes can in fact be resolved fairly by way of remote hearings.*
>
> *iii) The courts must be prepared to hold remote hearings in circumstances where such a move would have been inconceivable only a matter of weeks ago.*
>
> *iv) There is to be rigorous examination of the possibility of a remote hearing and of the ways in which such a hearing could be achieved consistent with justice before the court should accept that a just determination cannot be achieved in such a hearing.*
>
> *v) Inevitably the question of whether there can be a fair resolution is possible by way of a remote hearing will be case-specific. A multiplicity of factors will come into play and the issue of whether and if so to what extent live evidence and cross-examination will be necessary is likely to be important in many cases. There will be cases where the court cannot be satisfied that a fair resolution can be achieved by way of a remote hearing."*

In so far as the application for an extension of time was concerned, HHJ Eyre QC, considered and doubted the approach taken in ***Heineken Supply Chain BV v Anheuser-Busch Inbev SA*** (2020). He stressed the importance of para.4 of PD 51ZA and concluded that:

> *"[32] In my judgment the approach to applications for the extension of time in the context of the Covid-19 pandemic is to be determined by having regard to the overriding objective; paragraph 4 of PD51ZA; and the protocols and guidance which have been referred to above. In addition regard is to be had to the approach to the adjournment of trials set out above. In the light of that the Defendants' application is to be assessed against the following principles.*
>
> *i) The objective if it is achievable must be to be keep to existing deadlines and where that is not realistically possible to permit the minimum extension of time which is realistically practicable. The prompt administration of justice and compliance with court orders remain of great importance even in circumstances of a pandemic.*
>
> *ii) The court can expect legal professionals to make appropriate use of modern technology. Just as the courts are accepting that hearings can properly be heard remotely in circumstances where this would have been dismissed out of hand only a few weeks ago so the court can expect legal professionals to use methods of remote working and of remote contact with witnesses and others.*
>
> *iii) While recognising the real difficulties caused by the pandemic and by the restrictions imposed to meet it the court can expect legal professionals to seek to rise to that challenge. Lawyers can be expected to go further than they might otherwise be expected to go in normal circumstances and particularly is this so where there is a deadline to be met (and even more so when failing to meet the deadline will jeopardise a trial date). So the court can expect and require from lawyers a degree of readiness to put up with inconveniences; to use imaginative and innovative methods of working; and to acquire the new skills needed for the effective use of remote technology.*

As I have already noted metaphors may not be particularly helpful but the court can expect those involved to roll up their sleeves or to go the extra mile to address the problems encountered in the current circumstances. It is not enough for those involved simply to throw up their hands and to say that because there are difficulties deadlines cannot be kept.

iv) The approach which is required of lawyers can also be expected from those expert witnesses who are themselves professionals. However, rather different considerations are likely to apply where the persons who will need to take particular measures are private individuals falling outside those categories.

v) The court should be willing to accept evidence and other material which is rather less polished and focused than would otherwise be required if that is necessary to achieve the timely production of the material.

vi) However, the court must also take account of the realities of the position and while requiring lawyers and other professionals to press forward care must be taken to avoid requiring compliance with deadlines which are not achievable even with proper effort.

vii) It is in the light of that preceding factor that the court must be conscious that it is likely to take longer and require more work to achieve a particular result (such as the production of evidence) by remote working than would be possible by more traditional methods. In the context of the present case the Defendants said that meetings conducted remotely took twice as long and achieved less than those conducted face to face. The Claimants challenged the precise calculation but accepted that such meetings would be likely to take longer and that is readily understandable particularly in a case such as the present involving large quantities of documents and requiring at least to some extent the use of interpreters.

viii) In the same way the court must have regard to the consequences of the restrictions on movement and the steps by way of working from home which have been taken to address the pandemic. In current circumstances the remote dealings are not between teams located in two or more sets of well-equipped offices with fast internet connexions and with teams of IT support staff at hand. Instead they are being conducted from a number of different locations with varying amounts of space; varying qualities of internet connexion; and with such IT support as is available being provided remotely. In addition those working from home will be working from homes where in many cases they will be caring for sick family members or for children or in circumstances where they are providing support to vulnerable relatives at another location.

ix) Those factors are to be considered against the general position that an extension of time which requires the loss of a trial date has much more significance and will be granted much less readily than an extension of time which does not have that effect. That remains the position in the current circumstances and before acceding to an application for an extension of time which would cause the loss of a trial date the court must be confident that there is no alternative which is compatible with dealing fairly with the case."

Quah v Goldman Sachs International [2015] EWHC 759 (Comm), unrep., ***National Bank of Kazakhstan v Bank of New York Mellon***, 19 March 2020, unrep., Comm., ***Re One Blackfriars Ltd*** [2020] EWHC 845 (Ch), unrep., ***Re Smith Technologies***, 26 March 2020, unrep., ICC, ***Heineken Supply Chain BV v Anheuser-Busch Inbev SA*** [2020] EWHC 892 (Pat), unrep., ref'd to. (See ***Civil Procedure 2020*** Vol.1 at paras 3.1.3 and 3.8.0.)

Frejek v Frejek [2020] EWHC 1181 (Ch), 7 May 2020, unrep. (Roth J)

Contempt of court – remote hearing – proceeding in party's absence

CPR Pt 81. A committal application was heard via a remote hearing using Skype. The parties had been notified in advance of the hearing and the means by which to access Skype. The respondent had not, however, responded to various emails sent to him concerning the hearing. Roth J considered the approach to take in order to determine whether to proceed in the respondent's absence. He noted that the checklist set out by Cobb J in ***Sanchez v Oboz*** (2015) at para.5, which identified the issues to be considered, had been applied in the Chancery Division previously. Cobb J's checklist was as follows,

"[5] ... i) Whether the respondents have been served with the relevant documents, including the notice of this hearing;

ii) Whether the respondents have had sufficient notice to enable them to prepare for the hearing;

iii) Whether any reason has been advanced for their non-appearance;

iv) Whether by reference to the nature and circumstances of the respondents' behaviour, they have waived their right to be present (i.e. is it reasonable to conclude that the respondents knew of, or were indifferent to, the consequences of the case proceeding in their absence);

v) Whether an adjournment for would be likely to secure the attendance of the respondents, or at least facilitate their representation;

vi) The extent of the disadvantage to the respondents in not being able to present their account of events;

vii) Whether undue prejudice would be caused to the applicant by any delay;

viii) Whether undue prejudice would be caused to the forensic process if the application was to proceed in the absence of the respondents;

ix) The terms of the 'overriding objective' (rule 1.1 FPR 2010) including the obligation on the court to deal with the case 'justly', including doing so 'expeditiously and fairly' (r.1.1(2)), and taking 'any ... step or make any... order for the purposes of ... furthering the overriding objective' (r.4.1(3)(o))."

Applying that checklist, Roth J concluded that it was appropriate to proceed to determine the committal application in the respondent's absence. The respondent was held to be in contempt. Roth J did not, however, go on to impose a sanction for contempt at the remote hearing. He noted that the court had jurisdiction to do so in the respondent's absence. However, it would be *"an extreme step"* for the court to go on to consider sanctions in the respondent's absence. As such the appropriate step would be to issue a bench warrant to secure his attendance in person, physically, before the court (see para.35). (Also see the decision of Mann J also applying ***Sanchez*** in the unconnected case of ***Yuzu Hair and Beauty Ltd v Selvathiraviam*** [2020] EWHC 1209 (Ch), where the same approach to an application to adjourn a committal hearing, this time on medical grounds, was made and refused and the hearing went ahead remotely in the respondent's absence. Again the decision on sanctions was to be heard at a later date physically in a court building.) ***Sanchez v Oboz*** [2015] EWHC 235 (Fam), unrep., ref'd to. (See ***Civil Procedure 2020*** Vol.1 at paras 81.4.10 and 81.28.6.)

- **Re TPS Investments (UK) Ltd** [2020] EWHC 1135 (Ch), 11 May 2020, unrep. (HHJ Hodge sitting as a judge of the High Court)

E-bundles – guidance

Coronavirus (COVID-19): Message from the Lord Chief Justice to Judges in the Civil and Family Courts. In an application made under the Insolvency Act 1986, HHJ Hodge sitting as a judge of the High Court gave the following guidance on the approach to be taken to prepare e-bundles for use in the Business and Property Courts in Manchester. The guidance ought properly to be considered more generally in respect of civil proceedings where e-bundles are used. The guidance is as follows:

"[2] On 19 March 2020 the Lord Chief Justice delivered a message (Civil & Family Courts – Covid-19) in which he said that:

'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 ... The rules in both the civil and family courts are flexible enough to enable telephone and video hearings of almost everything ... The default position now in all jurisdictions must be that hearings should be conducted with one, more than one or all participants attending remotely ...'

Since then, all those who contribute to the administration of justice - the legal professions (barristers, solicitors, legal executives, para-legals and support staff), the court staff and the judges - have been working immensely hard, and with great initiative and creativity, to ensure that, even if it is not "business as usual", the Business and Property Courts nevertheless remain able to continue to transact the business of dispensing justice. To that end, the Business and Property Court Judges in Manchester have issued guidance on hearings before the s.9 Specialist Circuit Judges and District Judges during the Covid-19 Pandemic. At paragraph 7 it is clearly stated that;

'Unless otherwise proposed or directed, electronic bundles should contain only the documents which are essential for the hearing ...' [Emphasis supplied]

The word 'essential' was chosen advisedly, in preference to alternative formulations, such as 'that which is reasonably required', which appears, for example, in CPR 35.1 (the duty to restrict expert evidence). One (accurate) dictionary definition of 'essential' is 'indispensable or important in the highest degree'; and that is the notion which the guidance was, and is, seeking to convey. The intention underlying the use of the word 'essential', and the rationale for the restriction, was to relieve the burden cast, not only upon the judges of assimilating material in often user-unfriendly electronic bundles, but also upon the legal professionals, and any support staff, responsible for compiling the electronic bundles, by reducing the volume and scope of the documentation to be included within them.

[3] How is the instruction to restrict the electronic bundle to 'only the documents which are essential for the hearing' to be followed? It seems to me that this is probably best achieved by engaging the advocate who will present the application in court at an early stage of the process of preparing for the hearing. Only they can know how they will wish to present the application to the judge, and what material will be required to this end. When I first started in practice at the Chancery litigation Bar in 1980, it was still (just about) common practice for trial counsel to be instructed to prepare an Advice on Evidence before the preparations for trial had begun. Under the current practice,

trial counsel are frequently involved in advising on witness statements for trial. In the relatively new world (for some) of electronic bundles and remote hearings, if counsel is to be briefed to present the application, then they should be retained in sufficient time to enable them to advise as to the contents of the electronic bundle. Under the current guidance (now helpfully set out in the Covid-19 Notice at the top of the revised standard-form Manchester Chancery email acknowledgment):

'...

*2. **Electronic bundles** should be emailed to the designated email address for hearings given by the Judge no later than 3 business days before the hearing.*

*3. **Skeleton Arguments** and copies of authorities should be emailed to the designated email address no later than 2 business days before the hearing.*

...'

The reason for these time limits is that the skeleton argument will need to refer to the relevant pages of the electronic bundle; but that should not dictate the time at which the advocate is first retained for the hearing, or prevent him from having any input into the contents of the electronic bundle. Paragraph 3 of the Manchester Judges' guidance already strongly encourages the parties

'... to discuss and agree the best means for holding a remote hearing (including the provision of electronic bundles, skeletons and authorities and for recording the hearing) and, so far as possible, to do so before any application or request for a hearing and well in advance of any scheduled hearing.'

This is all part of the parties' duty (under CPR 1.3) to 'help the court to further the overriding objective'."

(See ***Civil Procedure 2020*** Vol.1 at paras A.2.1, A.3.2 and 57A.0.4.)

- **Arkin v Marshall** [2020] EWCA Civ 620, 11 May 2020, unrep. (Sir Geoffrey Vos C, Underhill and Simler LJJ)

PD 51Z – stay of possession – whether ultra vires

CPR r.51.2, PD 51Z – Stay of Possession Proceedings – Coronavirus. Two appeals from orders made in possession proceedings were heard by the Court of Appeal. The appeals concerned PD 51Z, which was made on 26 March 2020 and imposed a 90-day stay on possession proceedings as from the following day. The Practice Direction was made under CPR r.51.2, and as such was a pilot scheme practice direction, which accordingly was able to vary provisions of the CPR. Two issues arose. First, whether the Practice Direction was ultra vires. Secondly, whether the stay it imposed could be varied by a court exercising its case management powers in an individual case. It was noted that the vires challenge ought properly to have been brought by way of judicial review. The Court of Appeal accepted, however, that it was established that in certain cases it was permissible to deal with matters that properly raise public law issues in private law cases, and that while it would ordinarily have been better for the initial proceedings to be stayed for a public law challenge to be made, there was no unfairness in the matter being dealt with in the present appeal. **Held**, the Practice Direction was not ultra vires. It was evident from its wording that it was intended to assess any possible future modifications to the CPR that may be necessary during the present, and future, pandemics. It was further held that the stay imposed did not breach art.6 of the European Convention on Human Rights or the right of access to justice. The delay, which the stay imposed on possession proceedings, was short and amply justified in the exceptional circumstances of the Coronavirus pandemic. In so far as the second issue was concerned, the Practice Direction did not *"formally"* exclude the court's general case management powers. As such, in principle, the stay could be lifted in individual cases. However, the proper exercise of that power would necessarily have to be informed by the nature of the stay and the circumstances that underpinned it. Consequently, while it was not possible to say that there were no circumstances that would justify the exercise of the power to lift the stay, the Court of Appeal had *"great difficulty"* in imagining a valid justification for doing so other than, perhaps, where in an individual case maintaining the stay would undermine the purpose for which it was imposed. No normal case management considerations could justify lifting the stay. (see paras 42–44). ***Bovale v Secretary of State for Communities and Local Government*** [2009] EWCA Civ 171; [2009] 1 W.L.R. 2274, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at paras 51.2.15 and 55.0.0.)

- **MEF v St George's Healthcare NHS Trust** [2020] EWHC 1300 (QB), 22 May 2020, unrep. (Morris J, Master Haworth sitting as an Assessor)

Calderbank letter – detailed assessment

A Calderbank letter was sent by defendants shortly before a detailed costs assessment. It was not stated to be subject to an express time limit. The claimant purported to accept the offer after the substantive detailed assessment hearing had

commenced. The question arose whether such an offer contained in a Calderbank letter could be accepted following the commencement of the substantive hearing or whether it lapsed upon its commencement. **Held**, the correct approach to Calderbank letters was to consider the common law principles of offer and acceptance. CPR Pt 36 did not apply (para.31). The question was whether in the absence of express provision as to time, the offer had lapsed: see *Chitty on Contracts* (33rd edn) para.2-102 (paras 28, 29 and 31). Determining whether the offer had lapsed required consideration of, whether as a matter of fact, reasonable time for acceptance had expired at the commencement of the hearing or continued during the hearing. In determining that it continued during the hearing, Morris J held as follows:

> *"[34] First, the August 2019 Offer is an offer to settle proceedings; more particularly to settle detailed assessment proceedings. In a detailed assessment hearing, each party will almost certainly know, as the hearing progresses, how well or badly the hearing is going. They will be able to re-calculate the bill from time to time as the costs judge makes 'mini-decisions' on individual issues. In this way they might ascertain that the receiving party will recover more or less than an offer. Whilst the advent of use of electronic bills to re-calculate on an ongoing basis makes this easier, my understanding is that even without such electronic assistance, it is, and has always been, common for parties to re-calculate as the hearing goes along and decisions are made. In my judgment, this feature of detailed assessment makes the position distinct from that pertaining in other types of proceeding, where a party might well perceive that the hearing is not going well, but is less likely to know whether or not the ultimate outcome will be better or worse than an offer which has been made.*
>
> *[35] Secondly, the Part 36 procedure is available to be used in such proceedings; it was available to the Defendant, which chose instead to use the different 'Calderbank' offer approach. Part 36 is a statutory code with its own specific provisions. In particular, by express provision, a Part 36 offer can only be accepted once a hearing has commenced with the court's permission. However Part 36 does not provide that the offer lapses at the door of the court nor impose an absolute bar on acceptance post-commencement. It is not possible to rely on this position under Part 36 to support the (stricter) contention that a Calderbank offer lapses at the door of the court. There can be no direct 'read across' from Part 36 procedure to the contractual position of a Calderbank offer.*
>
> *[36] Thirdly, the course and content of the Defendant's prior offers since April 2018 is highly relevant context. First, none of the earlier offers had an absolute time limit. Rather the initial April 2018 Offer was subject to a time condition with costs consequences. In my judgment, in view of the terms of the April 2018 Offer, it is a reasonable inference that the subsequent offers (September, October and January) were subject to the condition that if they were not accepted within a reasonable time, the Claimant would be responsible for the Defendant's costs. Thus, an ability to accept the offer(s) late but subject to that costs condition is inconsistent with an absolute time limit upon acceptance. Secondly, the Defendant was aware throughout that it could withdraw the offer made, but consciously decided not to do so; see paragraph 13 above. In fact, Mr Stott was working on the assumption (and was indicating to the Claimant) that the 27 September 2018 Offer remained open throughout, and all the way until August 2019 – even if, as a matter of contract law, his reminders amounted to reinstatement of offers which had been rejected. Thirdly, the fact that the £440,000 offer remained 'open' and at the same level, despite the continuing weakening of the Claimant's claim following service of the Replies to the Points of Dispute indicates the Defendant was not necessarily concerned with the precise amount of the likely outcome."*

Furthermore, it remained open to the defendant to have issued a time limited offer. Equally, they could have withdrawn the offer at the start of the substantive, detailed assessment, hearing (see para.43). (See ***Civil Procedure 2020*** Vol.1 at para.36.2.1.)

- **Hackney LBC v Okoro** [2020] EWCA Civ 681, 27 May 2020, unrep. (Sir Geoffrey Vos C, Underhill and Simler LJJ)

PD 51Z – stay of possession – application to appeals

PD 51Z – Stay of Possession Proceedings – Coronavirus. Subsequent to the Court of Appeal's decision in ***Arkin v Marshall*** (2020), noted above, the same constitution of the Court of Appeal considered the question whether the stay on possession proceedings imposed by PD 51Z as a temporary measure during the Coronavirus pandemic applied to appeal proceedings. **Held**, it was clear from the terms of the Practice Direction that it was intended to apply to possession proceedings brought under CPR Pt 55. While appeal proceedings were governed by CPR Pt 52, appeals from possession proceedings continued to be proceedings brought under CPR Pt 55. PD 51Z thus applied to first and second appeals. It did not, however, apply to appeals to the Supreme Court, as the making of Practice Directions applicable to that Court is outside the jurisdiction of the practice direction-making power provided, in this case, by CPR r.51.2. See paras 25–28. ***Arkin v Marshall*** [2020] EWCA Civ 620, unrep., CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at paras 51.2.15 and 55.0.0.)

Magee v Willmott [2020] EWHC 1378 (QB), 29 May 2020, unrep. (Yip J)

Relief from sanctions – article 6 compliance – Appeal venue

CPR r.3.9, PD 52B. Relief from sanctions was granted to a claimant to enable them to rely on expert evidence that had been obtained after the date for exchange and where, as a consequence, the trial date had been lost. Yip J allowed an appeal from that decision and refused the grant of relief. She then went on to consider other issues. In refusing relief, Yip J held that the approach to such applications under CPR r.3.9 was compliant with art.6 of the European Convention on Human Rights. As she put it:

> *"[48] ... The court's refusal to grant relief will not offend Article 6 provided that doing so is proportionate. Securing compliance with court orders is a legitimate aim. Conducting the required balancing exercise pursuant to CPR 3.9 will generally ensure that the decision on whether to grant relief from sanctions is Convention compliant. Otherwise, litigants could act with impunity, avoiding compliance with court orders and claiming relief on the basis of their right to a fair trial, see Momson v Azeez [2009] EWCA Civ 202. The Recorder was wrong to elevate the Respondent's Article 6 right to the decisive factor in the way that he did. A proper application of CPR 3.9, weighing all the circumstances so as to deal with the application justly satisfies Article 6."*

Yip J also properly identified the effect that vacating the trial date had upon the proper allocation of court resources to other litigants, in considering whether relief should be granted (see paras 46 and 50). Separately Yip J gave guidance on the proper approach to determining the venue for an appeal, which should be followed in future:

> *"[3] The appeal was issued in Manchester for the convenience of Counsel. The court accepted jurisdiction and permission was granted by Turner J. I note that CPR PD52B sets out the appeal centre in which an appeal from the County Court must be brought. This appeal should have been brought in Oxford. As it happens, the appeal proceeded remotely given the current circumstances and it perhaps made little practical difference. However, the rules allocate work to appeal centres in a way that provides a sensible distribution of the workload and assists the administration of appeals. For the future, it should be noted that is not open to parties to elect to issue in a different appeal centre. Doing so, runs the risk that the appeal will not be accepted."*

Momson v Azeez [2009] EWCA Civ 202, unrep., CA, ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at paras 3.9.1 and 52BPD.2.)

Practice Updates

STATUTORY INSTRUMENTS

THE CIVIL PROCEDURE (AMENDMENT NO. 2) (CORONAVIRUS) RULES 2020 (SI 2020/582). In force from **25 June 2020**. This amendment introduces, on a temporary basis, a new CPR r.55.29. The new rule replaces, and continues, the stay on possession proceedings and enforcement, which was imposed by Practice Direction 51Z and which expires on 25 June 2020.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 121st Update. This Practice Direction Update amended PD 51Z by substituting a new para.3 in order to clarify that while the stay is in force courts are not to give notice to parties of any hearings, that procedural time limits do not run. The Update is in force from **10 June 2020**.

CORONAVIRUS GUIDANCE UPDATE

GENERAL GUIDANCE

The Coronavirus pandemic continues to affect the operation of the civil courts. From 1 June 2020 steps have been taken to open court buildings. It is therefore all the more important for practitioners to continue to consult the Judiciary of England and Wales and HMCTS websites for daily and weekly 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/hmcts-weekly-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* [all accessed 2 June 2020]

HEALTH AND SAFETY GUIDANCE

HMCTS has published guidance concerning health and safety within the courts and tribunals: *https://www.gov.uk/guidance/coronavirus-covid-19-courts-and-tribunals-planning-and-preparation#assessing-and-managing-coronavirus-risk* [Accessed 2 June 2020]. The guidance is endorsed by both Public Health England and Public Health Wales.

CIVIL CIRCUIT GUIDANCE

The Judiciary of England and Wales has published a range of guidance concerning approaches being taken on the Circuits to civil claims. Guidance variously includes information on: listing priorities, filing e-bundles, how remote hearings are to be conducted, and injunctions and committals. The guidance is available here: *https://www.judiciary.uk/civil-circuit-guidance/* [Accessed 2 June 2020].

BUNDLE GUIDANCE

On 20 May 2020, the President of the Family Division, Senior Presiding Judge and Judge in Charge of Live Services issued guidance on PDF bundles. The guidance is of general application. The guidance is available here: *https://www.judiciary.uk/wp-content/uploads/2020/05/GENERAL-GUIDANCE-ON-PDF-BUNDLES-f1-1.pdf* [Accessed 2 June 2020]. Also see the guidance provided in ***Re TPS Investments (UK) Ltd*** [2020] EWHC 1135, noted above.

ROYAL COURTS OF JUSTICE FEES OFFICE GUIDANCE

From 1 June 2020 the Royal Courts of Justice Fees Office will be open to the public. It will be open from 10.00 until 14.00 on Mondays, Wednesdays and Fridays. Access is by appointment only. Appointments can be made either by calling the Office on 0207 947 6527 during those hours or by emailing *feesofficecounterbooking@justice.gov.uk*. Further information on how to access the Office is set out in the Fees Office—Notice to all court users, which can be obtained here: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890355/RCJ_Fees_Office_-_Ops_Update_8_June_2020_.pdf* [Accessed 2 June 2020].

In Detail

SERAFIN v MALKIEWICZ [2020] UKSC 23 – FAIR HEARING

Background

In ***Serafin v Malkiewicz*** [2020] UKSC 23, the Supreme Court unanimously dismissed an appeal from the Court of Appeal's decision to allow an appeal from the trial judge's decision to dismiss the claimant's claim for libel. The claim concerned the content of an article published in October 2015 in *Nowy Czas*, which at the time was published in hard copy and online. The newspaper's focus was described by Lord Wilson as addressing *"issues of interest to the Polish community in the UK, particularly in London"*. The claim alleged that the article had 13 defamatory meanings. The trial judge found that all but five of the alleged defamatory meanings were either substantially true or caused the claimant no serious harm. For the other five, he held that a defence under s.4 of the Defamation Act 2013 was made out. He thus dismissed the claim. The claimant appealed. The Court of Appeal upheld the appeal. It held that the trial judge's conduct towards the claimant during the trial was unfair. It also set aside the finding that one of the alleged defamatory meanings was substantially true and also that the s.4 defence was not made out. It went on, however, to give judgment for the claimant and directed that the question of quantum be remitted to the High Court for determination by a judge of the Media and Communications List other than the trial judge.

The Issues before the Supreme Court

There were two procedural issues before the Supreme Court: first, the question of whether the hearing was unfair; and, secondly, given a finding that a hearing had been unfair what approach should an appeal court take. A further issue was also before the court, concerning the correct interpretation of s.4 of the 2013 Act. The Supreme Court gave guidance on the correct approach to take to that at paras 53–78, in doing so it indicated that the approach taken by the Court of

Appeal was not to be followed (see para.78). On the first issue, the Supreme Court agreed that the trial was unfair. On the second issue, it held that the Court of Appeal ought to have remitted the matter for a retrial.

Unfair Trial

The focus of the appeal was whether the trial judge's conduct had rendered the trial unfair. While the concept of a trial being unfair was related to bias, it was distinct from it (see paras 37–39). ***Jones v National Coal Board*** [1957] 2 Q.B. 55, CA, remained the leading authority on inquiries into whether a trial was unfair. In that case, the focus – from both parties – was that the trial judge's interventions during the trial had effectively stopped them from being able to put their cases properly. In ***Jones***, Denning LJ emphasised that judicial interventions should be as *"infrequent as possible"* when a *"witness is under cross-examination"*. Notwithstanding the fact that modern practice was one that understood the judicial role to be *"more proactive and interventionist"* than at the time ***Jones*** was decided (see ***Southwark LBC v Kofi-Adu*** [2006] EWCA Civ 281; [2006] H.L.R. 33), it remained the case that judicial interventions during oral evidence

> *"[41]... continued to generate a risk of their descent into the arena, which should be assessed not by whether it gave rise to an appearance of bias in the eyes of the fair-minded observer but by whether it rendered the trial unfair."*

In considering whether the trial was unfair reference to the quality of the judgment was not relevant. In that respect the Supreme Court at para.44 cited Black LJ's comment in ***Re G (A Child)*** [2015] EWCA Civ 834, where she stated that a

> *"careful and cogently written judgment cannot redeem a hearing in which the judge had intervened to the extent ... of prejudicing the exploration of the evidence."*

The issue was the nature of the hearing, not the nature and quality of the judgment. In assessing whether the trial was unfair, if there is a full transcript of the relevant parts of the hearing that should be the starting point. It was doubtful in such a circumstance whether the trial judge should be invited to comment. It was also not the present practice of the appellate courts to invite a judge to comment (see para.45). The absence of such comment, however, placed an obligation on the appellate court *"to analyse the evidence punctiliously"*. Where there was no transcript, it might be appropriate to ask the trial judge to comment in writing or to provide their own note of the hearing: see ***Sarabjeet Singh v Secretary of State for the Home Department*** [2016] EWCA Civ 492; [2016] 4 W.L.R. 183, CA, at para.53.

Litigants-in-Person

The claimant was a litigant-in-person. The Supreme Court noted that no authority was cited to it of a trial involving a litigant-in-person that had been held to be unfair. It noted guidance provided by the Judicial College in the Equal Treatment Benchbook. In addition to noting the difficulties that litigants-in-person are likely to face when appearing in court, the Benchbook stressed how judges may need to assist them in ways they would not assist a trained advocate. In particular, at para.46, the Benchbook provided that such assistance may include:

> *"Not interrupting, engaging in dialogue, indicating a preliminary view or cutting short an argument in the same way that might be done with a qualified lawyer."*

On this issue it concluded that

> *"[46] ... Training and experience will generally have equipped the professional advocate to withstand a degree of judicial pressure and, undaunted, to continue within reason to put the case. The judge must not forget that the litigant in person is likely to have no such equipment and that, if the trial is to be fair, he must temper his conduct accordingly."*

The correct approach to take when a trial is held to have been unfair

Assuming an appeal court holds that a trial was unfair, what order should it then make? The answer was straightforward: the court had to order a complete retrial (see para.49). Having held that the trial was unfair, an *"appellate court cannot seize even on parts of it and erect legal conclusions"*. It may be though, that the parties themselves might properly decide to limit the issues for the retrial; that was a matter for them, however.

Conclusion

The judgment provides a salutary reminder that the right to fair trial can be undermined by either bias or unfair conduct on the part of a judge. It provides a clear restatement of the importance of the approach articulated by Denning LJ in ***Jones***, while providing guidance on the approach to be taken to assessing whether a trial was unfair. The Court, however, left open the question of the extent to which a judge ought to be asked to provide comment in writing where their conduct was alleged to have rendered a trial unfair. Further guidance on this might be taken from the Court of Appeal's approach to judges giving written evidence in cases where questions of bias are raised, see ***Locabail (UK) Ltd v Bayfield Properties Ltd*** [2000] Q.B. 451 at [19]. This issue may well call for further consideration in future cases.

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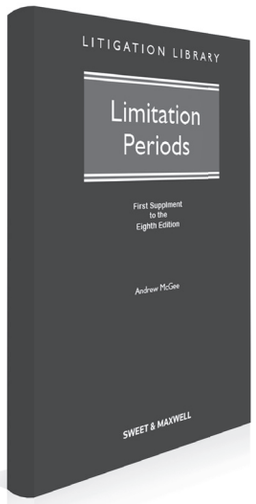

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