CIVIL PROCEDURE NEWS

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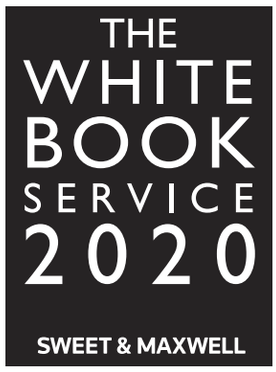
CONTENTS



In Brief

Cases

- **Breitenbach v Canaccord Genuity Financial Planning Ltd** [2020] EWHC 1355 (Ch), 18 May 2020, unrep. (Fancourt J and Master Kaye)

Disclosure pilot scheme – key documents

CPR PD 51U para.5. The claimant sought disclosure of documents, which the defendant was aware of without needing to make a search for them. It did so as part of Initial Disclosure under para.5 of the Disclosure pilot scheme. **Held**, the application was refused. Initial Disclosure requires key documents, as defined in para.5.1, to be disclosed. It was not suggested that the documents sought fell within the scope of para.5.1(1), i.e. they were not relied on expressly or otherwise for the defence. It was argued, however, that the documents were necessary to enable the defence to be understood, i.e. they were within the scope of para.5.1(2). The documents sought were, however, only necessary to enable the claimant to evaluate and weigh the defence's prospects of success (see para.11). That went beyond enabling the defence to be understood. On the contrary, the defence could be understood by reference to the pleaded case, the key parts of which did not depend on documents albeit proving them would do so. The documents sought, given that they went to evaluation and weight, might however fall within the scope of Extended Disclosure. (See ***Civil Procedure 2020*** Vol.1 at para.51UPD.5.)

- **Official Receiver v Skeene** [2020] EWHC 1252 (Ch), 20 May 2020, unrep. (Deputy Insolvency and Companies Court Judge Kyriakides)

Affidavit – implied undertaking on collateral use

CPR rr.31.22, 32.12, 32.15. The defendants were the directors of a company that went into compulsory liquidation. Subsequently, disqualification proceedings were commenced against them. The first defendant provided an affidavit on his and the second defendant's behalf within those proceedings. The proceedings did not, however, continue to trial as the defendants accepted their conduct was unfit and gave disqualification undertakings. The defendants were then subject to investigation by the Serious Fraud Office (SFO). The SFO sought documents from the Official Receiver arising from the disqualification proceedings. The Official Receiver provided a range of such documents. It did not, however, provide a copy of the affidavit. It did not do so on the basis that it could only be supplied with the permission of the court. Two issues were before the court: first, was the court's permission needed for the Official Receiver to release the affidavit; and secondly, if so, should permission be granted. **Held**, permission was required. In reaching that decision, the deputy ICC judge considered the basis on which permission was required. He noted that unlike CPR r.31.12, which applied to witness statements, CPR r.31.15, which applies to affidavits, does not include express reference for the court to grant permission for some other use of the document. Given that, the question arose whether there was any other restriction on collateral use of affidavits. The deputy ICC judge concluded that the common law, pre-CPR, position continued to apply to affidavits. That position implied an undertaking that the affidavit secured under compulsion would only be used for the purpose of the proceedings. Any collateral or subsequent use required, therefore, the court's permission. In the present case, the affidavit was not secured under compulsion, and as such the implied undertaking did not apply. ***Prudential Assurance Co Ltd v Fountain Page Ltd*** [1991] 1 W.L.R. 756, QBD, ***Derby & Co Ltd v Weldon (No.2)***, *The Times*, 20 October 1988, ChD, ***Lubrizol Corp v Esso Petroleum Co Ltd (No.2)*** [1993] F.S.R. 53, Pts Ct, ***SmithKline Beecham Plc v Generics (UK) Ltd*** [2003] EWCA Civ 1109; [2004] 1 W.L.R. 1479, CA, ***Caldero Trading Ltd v Beppler & Jacobson Ltd*** [2012] EWHC 1609 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.32.15.1.)

- **Bouygues (UK) Ltd v Sharpfibre Ltd** [2020] EWHC 1309 (TCC), 27 May 2020, unrep. (Roger Ter Haar QC sitting as a deputy judge of the High Court)

Disclosure pilot scheme – narrative documents

CPR PD 51U para.8. A dispute arose concerning alleged defective cladding. An issue arose whether narrative documents should be disclosed further to para.8 of the Disclosure pilot scheme. **Held**, disclosure of narrative documents was not necessary, and thus refused. In reaching that decision the deputy judge agreed with submissions that narrative disclosure should only be directed where there was

> *"[40] ...*
>
> > *(1) a real (as opposed to a fanciful) prospect that in connection with a particular issue a document exists which is relevant only to the background or context of material facts or events, and not directly to the Issue, but which would none the less be sufficiently important to the parties' cases that it merit searches, analysis and the other costs of disclosure*

and

> *(2) no real likelihood that such a document will emerge as a result of the disclosure exercise in respect of any other Issue."*

The deputy judge also agreed that there was strength in the submission that narrative disclosure would be more appropriate for fraud claims, which involved *"secret meetings, obscure processes or hidden participants"* rather than building disputes where the court will be called upon to carry out an

> *"objective analysis of whether [a defendant or, as in this case, a third party] in carrying out its functions did so to the standards of a competent professional"* (see paras 40–41).

(See ***Civil Procedure 2020*** Vol.1 at para.51UPD.8.1.)

- **Castle Water Ltd v Thames Water Utilities Ltd** [2020] EWHC 1374 (TCC), 29 May 2020, unrep. (Stuart-Smith J)

Disclosure pilot scheme – known adverse documents

CPR PD 51U paras 2.7–2.9 and 3.1(2). A £40 million dispute arose from the purchase of the defendant's non-household water and sewerage retail business. CPR PD 51U, the Disclosure pilot scheme, applied. While the List of Issues for Disclosure was generally agreed, a dispute arose concerning some issues. The basis of the dispute focused on the nature of the obligations that arise under PD 51U. Stuart-Smith J noted that the principles governing the application of the pilot scheme had been set out in: ***UTB LLC v Sheffield United Ltd*** (2019) at paras 75–79; ***McParland and Partners Ltd v Whitehead*** (2020) at paras 3–4, 44–54 and 58; and ***Brearley v Higgs & Sons*** (2020). He summarised those principles at para.7 of his judgment. One issue on which authoritative guidance had not been given, however, was the meaning of *"adverse"* and *"known adverse"* documents: see PD 51U paras 2.7–2.9 and 3.1(2); the latter paragraph providing that there is a continuing obligation to disclose such documents unless they are privileged. The specific question for determination was *"what the obligation of a party may be to discover whether it has any 'known adverse' documents that must be disclosed"*. Stuart-Smith J gave the following guidance: (i) it was clear that a party was under a duty to take reasonable steps to check whether it had any known adverse documents; (ii) while the pilot scheme gave no guidance on what amounted to reasonable steps,

> *"it may be asserted with some confidence that, in a case of any complexity at all or an organisation of any size, reasonable steps to check whether a company or organisation has 'known adverse documents' will require more than a generalised question that fails to identify the issues to which the question and any adverse documents may relate. Similarly, it will not be sufficient simply to ask questions of the leaders or controlling mind of an organisation, unless the issue in question is irrelevant to others":* see para.10.

Stuart-Smith J then went on to explain,

> *"[11] There is a clear distinction between carrying out checks and carrying out searches. A known adverse document is one of which a party is aware without undertaking any further search for documents: see paragraph 2.8. However, the requirement to disclose known adverse documents would be emasculated if there was no obligation at all to look for adverse documents of which the party is aware. Paragraph 3.4 states that 'where there is a known adverse document but it has not been located, the duty to disclose the document is met by that fact being disclosed, subject to any further order that the court may make.' To take an example cited by counsel during argument, it would be absurd if a party were able to say 'I know I have an adverse document, but I don't know whether it is in the left-hand drawer or the right. I have therefore not located it.'*
>
> *[12] Adopting the Practice Direction's touchstone of what is 'reasonable and proportionate' I would hold that a party must undertake reasonable and proportionate checks to see if it has or has had known adverse documents and that, if it has or has had known adverse documents, it must undertake reasonable and proportionate steps to locate them. Any other conclusion seems to me to be a rogue's charter, which is not the intended purpose or function of the Practice Direction. If, however, the provisions about known adverse documents are operated in the manner I have suggested, the other party and the court should have some assurance that the most significant adverse documents are likely to be disclosed as a matter of routine without an order for Extended Disclosure.*
>
> *[13] Finally, the question arises: what is meant by the reference to the obligation to disclose known adverse documents being a 'continuing' obligation? A clue is to be found in the references to the obligation to disclose known adverse documents arising from the search directed by the Court under Models C, D and E. Provided that the party makes appropriate checks when proceedings have been commenced against it and the case is formulated by reference to the pleadings, that should cause the party to discharge its initial obligation to disclose known adverse documents. The Practice Direction does not say or imply that, if nothing in the litigation context changes, a party is then obliged to*

revisit the question and renew its checks on a continuing basis (whether periodically or otherwise); and to interpret the 'continuing' duty as implying such an obligation would be unduly onerous. However, circumstances might change (for example a party's case might shift materially) which could raise the need for the other party to review whether it has documents that were not previously known adverse documents but now are; and the Practice Direction makes clear that if a party becomes aware of adverse documents after its initial checks and disclosure, it is under an obligation to disclose them, including where that awareness arises in the course of searches directed by the Court. This approach, which reflects the traditional approach to the continuing obligation of a party to give disclosure of relevant documents of which it is or becomes aware, is both reasonable and proportionate."

UTB LLC v Sheffield United Ltd [2019] EWHC 914 (Ch); [2019] 3 All E.R. 698, ChD, ***McParland and Partners Ltd v Whitehead*** [2020] EWHC 298 (Ch); [2020] Bus. L.R. 699, ChD, ***Brearley v Higgs & Sons*** [2020] EWHC 376 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.51UPD.2.1.)

■ **PCP Capital Partners LLP v Barclays Bank Plc** [2020] EWHC 1393 (Comm), 1 June 2020, unrep. (Waksman J)

Legal professional privilege – waiver

CPR r.31.3. An application for further disclosure was made by the claimants in litigation that arose out of the financial crisis of 2008. The substantive issue on the application concerned whether there had been a waiver of legal professional privilege. The waiver was said to arise due to there being a reference to legal advice that was given to the defendants in a number of its witness statements. **Held**, there had been a waiver of privilege. In reaching his decision the judge noted that, in so far as waiver was concerned, it was

"[48] ... not easy to find a succinct and clear definition of when it arises, going beyond general statements to the effect, for example, that the party alleged to have waived them has deployed them in some way as part of its case. But on any view in my judgment, first, the reference to the legal advice must be sufficient (a point I return to below) and second, the party waiving must be relying on that reference in some way to support or advance his case on an issue that the court has to decide.

[49] I give two examples of what is clearly not waiver. First, a purely narrative reference to the giving of legal advice does not constitute waiver. This is because, on any view, there is no reliance upon it in relation to an issue in the case. Nor does a mere reference to the fact of legal advice along these lines, 'My solicitor gave me detailed advice. The following day I entered into the contract'. That is not waiver, however tempting it may be to say that what is really being said is 'I entered into the contract as a result of that legal advice'. The corresponding point is that if that latter expression is used, then there will be waiver."

He then went on to note

"[50] ... the vexed question which still confounds the law of privilege, namely the idea that, quite apart from reliance, waiver cannot arise if the reference is to the 'effect' of the legal advice as opposed to its 'contents'."

That distinction was identified as having first arisen in ***Marubeni Corp v Alafouzos*** (1986). Having reviewed that decision, and considered the application of the contents/effect distinction in later cases, Waksman J concluded that the correct approach to applying the distinction was this:

"[60] ... the application of the content/effect distinction, as a means of determining whether there has been a waiver or not, cannot be applied mechanistically. Its application has to be viewed and made through the prism of (a) whether there is any reliance on the privileged material adverted to; (b) what the purpose of that reliance is; and (c) the particular context of the case in question. This is an acutely fact-sensitive exercise. To be clear, this means that in a particular case, the fact that only the conclusion of the legal advice referred to is stated as opposed to the detail of the contents may not prevent there being a waiver."

Marubeni Corp v Alafouzos [1986] 11 WLUK 46, CA, ***Dunlop Slazenger International Ltd v Joe Bloggs Sports Ltd*** [2003] EWCA Civ 901, unrep., CA, ***Brennan v Sunderland City Council*** [2009] I.C.R. 479, EAT, ***Digicel v Cable & Wireless Plc*** [2009] EWHC 1437 (Ch), unrep., ChD, ***Mid-East Sales Ltd v Engineering & Trading Co PVT Ltd*** [2014] EWHC 892 (Comm), unrep., ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.31.3.24.)

■ **Carillion Plc (In Liquidation) v KPMG LLP** [2020] EWHC 1416 (Comm), 3 June 2020, unrep. (Jacobs J)

Pre-action Protocols – Commercial Court

CPR r.31.16, the Pre-Action Protocol for Professional Negligence. The claimant applied for pre-action disclosure under CPR r.31.16. The application was said to have generated a considerable amount of pre-action correspondence, witness evidence and costs (see para.6). This was said to have resulted from an alleged failure on the part of the defendant to

comply with the Professional Negligence Pre-action Protocol. Ultimately the judge concluded that there was no breach of either the spirit of the letter or the Protocol, although he noted, at para.100, that compliance with the Protocol was a relevant consideration on an application for pre-action disclosure under CPR r.31.16: see ***Black v Sumitomo*** (2001). The judge also reiterated in his judgment that applications for pre-action disclosure in the Commercial Court were rare and was generally discouraged in that court (see para.109 on the latter point). As he put it at para.15,

> *"[15] Applications for pre-action disclosure in the Commercial Court are relatively rare, and the authorities to which I was referred contain no recent examples of successful applications. The 2018 edition of the White Book (paragraph C1A-010) said that pre-action disclosure orders are 'far from a foregone conclusion especially in the Chancery and Commercial courts.' In Hutchinson 3G UK Ltd. v O2 (UK) Ltd. [2008] EWHC 55 (Comm), Steel J. said (at [55]) that in order to obtain pre-action disclosure, the circumstances must be outside the 'usual run'; and that the absence of any convincing grounds for distinguishing the case from the normal run would be telling grounds for not exercising the court's discretion in favour of pre-action disclosure. In Assetco plc v Grant Thornton UK LLP [2013] EWHC 1215, Blair J. said (at [17]) that it was important to bear in mind that, certainly in the commercial context, a pre-action disclosure order is, if not exceptional, unusual. That case shows that pre-action disclosure of audit working papers is not viewed as the norm for audit negligence in the Commercial Court, notwithstanding that such documents will in due course likely be core documents for disclosure once the proceedings have started and pleadings have been exchanged."*

The judge also noted, at para.66, the helpful summary of the principles applicable to applications for pre-action disclosure under CPR r.31.16 in ***Assetco*** at para.17:

> *"[66] The relevant legal principles are conveniently summarised by Blair J. in paragraph 17 of Assetco. CPR 31.16 provides that the court may make an order for pre-action disclosure only if certain conditions are satisfied:*
>
> *i) The respondent and applicant must both be likely to be parties to subsequent proceedings. It is not however necessary to show in addition that the initiation of such proceedings is itself likely: Black v Sumitomo Corp [2002] 1 WLR 1562 at [71 – 72], Rix LJ, which is the leading case on the rule.*
>
> *ii) The documents sought must fall within the scope of the standard disclosure which the respondent would have to give in the anticipated proceedings. It follows that at the time of the application, the issues must be sufficiently clear to enable this requirement to be properly addressed.*
>
> *iii) Disclosure before proceedings have started must be desirable (i) to dispose fairly of the anticipated proceedings, (ii) to assist the dispute to be resolved without proceedings, or (iii) to save costs: CPR 31.16 (3) (d).*
>
> *iv) In considering whether to make an order, among the important considerations are the nature of the loss complained of, the clarity and identification of the issues raised by the complaint, the nature of the documents requested, the relevance of any protocol or pre-action inquiries, and the opportunity which the complainant has to make his case without pre-action disclosure (Black v Sumitomo Corp at [88]).*
>
> *v) The anticipated claim must have a real prospect of success.*
>
> *vi) In the commercial context, a pre-action disclosure order, even if not exceptional, is unusual."*

Black v Sumitomo Corp [2001] EWCA Civ 1819; [2002] 1 W.L.R. 1562, CA, ***Hutchinson 3G UK Ltd v O2 (UK) Ltd*** [2008] EWHC 55 (Comm); [2008] U.K.C.L.R. 83, ***Assetco Plc v Grant Thornton UK LLP*** [2013] EWHC 1215 (Comm), unrep., ref'd to. (See ***Civil Procedure 2020*** Vol.1 at paras 31.16.4, C1A-005 and C7A-001.)

- **Re C (Children) (COVID-19: Representation)** [2020] EWCA Civ 734, 10 June 2020, unrep. (Jackson, King and Asplin LJJ)

Equality of arms – one party's representation via video-link

CPR r.1.1(2)(a). Care proceedings were brought concerning four children. A fact-finding hearing was held in circumstances where one of the parents could not be physically present in court. The mother applied to adjourn the hearing until a time in the autumn when her leading counsel could attend the hearing in person. Expert evidence had already been heard remotely. The only evidence to be heard was that to be given by a number of family members. The judge considered the guidance given by the Court of Appeal on the conduct of remote hearings and so-called hybrid hearings (where some of the participants are in court and some take part remotely) in ***Re A (Children) (Remote Hearing: Care and Placement Orders)*** (2020) at paras 3 and 8–9. The application was refused. An appeal to the Court of Appeal was dismissed. **Held**, the hearing could take place as a hybrid hearing. Such a hearing would not amount to an infringement of the right to fair trial, as it would not give rise to inequality of arms as: (i) leading counsel could take part effectively in the hearing remotely; and (ii) that one party was represented remotely and the other by counsel in court did not give rise to an inequality of arms (see paras 22–25) in ***Re A (Children) (Remote Hearing: Care and Placement Orders)*** [2020] EWCA Civ 583; [2020] 2 F.C.R. 245, CA, ref'd to. (***See Civil Procedure 2020*** Vol.2 at para.11-11.)

Stanley v Tower Hamlets LBC [2020] EWHC 1622 (QB), 26 June 2020, unrep. (Julian Knowles J)

Relief from sanctions – consideration of COVID pandemic impact

CPR r.3.9, PD 51ZA. The claimant issued proceedings, which alleged, amongst other things, various data protection breaches and misuse of personal information. Proceedings were served by post on 25 March 2020. The deemed date of service was thus 27 March 2020. The defendants did not file an acknowledgment of service by the due date, following which the claimant applied for, and was granted, judgment in default. The defendant applied to set aside the default judgment. An application was also made for relief from sanctions. **Held**, the application to set aside was allowed as was the application for relief from sanctions. The judge noted, at para.26, that the approach to be taken to such applications was that summarised by Christopher Clarke LJ in ***Regione Piemonte v Dexia Crediop SpA*** (2014) at paras 38–41, as approved by ***Gentry v Miller (Practice Note)*** (2016) at paras 23–24. In essence the court was thus required to, first, determine if *"one or both limbs in CPR 13.3(1) are satisfied"*, and if so, to then exercise its discretion *"about whether to set aside default judgment in accordance with the Mitchell/Denton principles"* (see para.27). In considering the application of the ***Mitchell/Denton*** principles, the judge noted that he was bound to take account of the requirement set out in para.4 of PD 51ZA. That paragraph requires the court to take account of, in so far as it is compatible with the proper administration of justice, the impact of the COVID-19 pandemic. In this case, the claimant served the claim form two days after the defendant closed its offices due to the national lockdown. But for its offices being shut, the defendant would have responded in time. It was also relevant that the claimant, in the circumstances, ought to have checked if service by post was *"possible and feasible"* at the time. Notwithstanding the need to secure compliance with rules, and to ensure that litigation is carried out proportionately, it would have been *"unconscionable"* to enable the claimant to benefit from the, then and continuing, health emergency. ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795, CA, ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, CA, ***Regione Piemonte v Dexia Crediop SpA*** [2014] EWCA Civ 1298, unrep., CA, ***Gentry v Miller (Practice Note)*** [2016] EWCA Civ 141; [2016] 1 W.L.R. 2696, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.3.8.0.)

Skatteforvaltningen (Danish Customs and Tax Administration) v Shah [2020] EWHC 1658 (Comm), 24 June 2020, unrep. (Foxton J)

Stakeholder claims – competing claims

CPR r.86.1. In complex litigation brought by the Danish Tax authorities, the court provided guidance on the meaning of *"competing claims ... against [a] person in respect of [a] debt or money or for ... goods or chattels by two or more persons"* in the context of stakeholder claims under CPR r.86.1(b). The judge held as follows:

> *"[26] ... CPR 86.1 refers to the stakeholder being under a liability 'in respect of a debt or in respect of any money, goods or chattels'. It requires that 'competing claims are made or expected to be made against that person in respect of that debt or money or for those goods or chattels by two or more persons'. The words 'in respect of' are generally regarded as wide in their effect (e.g. the words 'in respect of a contract' in Practice Direction 6B para. 3.1(6) and the observations in Albon v Naza Motor Trading [2007] 1 WLR 2489 and Cherney v Deripaska [2009] 2 CLC 408, [67])), albeit the width of application they merit in any particular context will depend on the purpose and other terms of the provision in question. In this regard, it is noteworthy that the predecessor of CPR 86.1, RSC Order 17 rule 1, provided:*
>
> > *'Where a person is under a liability in respect of a debt or in respect of any money, goods or chattels, and he is, or expects to be, sued for or in respect of that money or those goods or chattels by two or more persons making adverse claims thereto'*
>
> *(emphasis added).*
>
> *[27] The disjunctive phrase 'for or in respect of that money' suggests that the latter phrase was intended to have a wider meaning than simply a claim to recover the debt as creditor, and that it was not necessary for the two rival claims to be of the same nature. In my view, this is also true of CPR 86.1. For CPR 86.1 to apply, it is necessary that the claims of the two parties are inconsistent, in the sense that compliance with one claims exposes the stakeholder to the risk of liability to the other, and for that inconsistency to have arisen because of what is in substance a dispute between the rival claimants, rather than because the stakeholder has assumed or come under inconsistent legal liabilities. If, therefore, one claimant asserts an absolute entitlement to a debt as creditor, and another assets a proprietary or security interest either in the debt itself, or in any payment made in relation to it, which could be relied upon against the stakeholder, that meets the requirement of competing claims under CPR 86.1."*

The judge went on to hold that Teare J in ***ST Shipping and Transport Pte Ltd v Space Shipping Ltd*** (2018) did not hold:

> *"[34], that there can be no competing claims for CPR 86.1 purposes when two parties assert an entitlement to a debt or asset, but the claim of one of them is a complex one which will need to be established at trial before the court will*

make orders giving effect to it. In Global Currency Exchange Network Limited v Osage I Limited [2019] 1 WLR 5868, Andrew Henshaw QC (sitting as a deputy High Court Judge) accepted that potential claims by investors to a fund, were they to establish and exercise an entitlement to rescind contracts under which they had paid monies for fraud, could constitute competing claims for CPR 86.1 purposes. In that case, the claims were subject to the contingency of the investors exercising their right to rescind (a matter which was entirely within their own control), but the judge held that this did not affect the position. He stated at [52]:

> *'If investors do have a right to rescind, then they have prospective proprietary rights to the Funds contingent upon the exercise of the right to rescind. That is in my view sufficient—subject to the question I consider in section (E) below about whether there is a factual basis for expecting claims to be made—to satisfy the requirement of CPR Pt 86 or expected competing claims. A claim that can be brought provided that the claimant takes a prior legal step, here rescission, is still in my view a competing claim which may (depending on the facts) be expected to be made for CPR r 86.1(1)(b) purposes'."*

ST Shipping and Transport Pte Ltd v Space Shipping Ltd [2018] EWHC 156 (Comm), unrep., ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.86.1.2.)

- **TFS Stores Ltd v Designer Retail Outlet Centres (Mansfield) General Partner Ltd** [2020] EWCA Civ 833, 2 July 2020, unrep. (Sir Geoffrey Vos C, Asplin and Arnold LJJ)

PD 51Z – stay of possession – application to counterclaims

CPR r.55.29, PD 51Z – Stay of Possession Proceedings – Coronavirus. Permission to appeal in two sets of proceedings for declarations concerning the question whether tenancies were excluded from the protection of the Landlord and Tenant Act 1954 was granted in November 2019. Both sets of proceedings concerned the same landlord, albeit different tenants. In the first set of proceedings the tenant had sought a declaration that the tenancy had not been excluded from the 1954 Act's protection and an injunction that would enjoin the landlord from taking possession. The landlord counterclaimed for possession. In the second set of proceedings, the landlord sought a declaration that the tenancy was excluded from the 1954 Act's protection. By the time judgment was given, the terms of the tenancies had expired, and the judge granted the landlord possession. Following the decision in ***Hackney LBC v Okoro*** (2020) the tenant submitted that the appeal had been automatically stayed further to PD 51Z. Lewison LJ, on the papers, refused the stay application. He did so on the basis that the proceedings were not brought under CPR Pt 55 but rather under CPR Pt 7, hence PD 51Z did not apply to them. Three issues were before the court: (i) did the automatic stay under PD 51Z operate to stay the appeals in the proceedings; (ii) if the stay only operated on one of the appeals or on part of the appeals, should there be an immediate hearing; and (iii) in any event, should the stay be lifted in whole or in part? **Held** (Vos C and Asplin LJ): (i) the tenant's applications for declarations and injunctions in the first proceedings were not proceedings under CPR Pt 55; (ii) the counterclaim for possession was a proceeding under CPR Pt 55 and hence at the least the appeal from the order for possession in the first proceeding was subject to a stay. As soon as the counterclaim for possession was issued the entire proceedings became proceedings for possession under CPR Pt 55 due to the mandatory nature of CPR r.55.1 (see para.27). This was the case even where the possession order was made by consent (see para.30); and (iii) the landlord's application for a declaration in the second proceeding was not a proceeding under CPR Pt 55 (see paras 18–20). Given this, the second issue did not arise as both appeals were subject to the automatic stay, which it was noted was continued by CPR r.55.29. In obiter, however, Vos C deprecated any approach that allowed claims or appeals to go forward where a possession claim was part and parcel of the proceedings (see para.33). He further stated that any such stay ought not to be lifted; it was not for the court to second guess the policy underpinning the blanket stay imposed by PD 51Z and CPR r.55.29: the approach indicated in ***Arkin v Marshall*** (2020) at para.42 was reiterated (see para.35). Furthermore, the approach taken in ***Copeland v Bank of Scotland Plc*** (2020) where the stay was lifted in order to give a reserved judgment and make consequential orders was deprecated. As Vos C put it:

> *"[36] ... A stay means what it says. If the proceedings are stayed, nothing can happen in court at all (see Arkin at [51]). The exceptions to the stay are spelt out in paragraph 2A of PD 51Z, and none of them applies to the delivery of a reserved judgment. I repeat for the avoidance of doubt that I have great difficulty in envisaging any circumstances in which it would be appropriate to lift the automatic stay (see Arkin at [42]). Possession proceedings can and will resume once the stay is lifted."*

Arkin v Marshall [2020] EWCA Civ 620, unrep., CA, ***Hackney LBC v Okoro*** [2020] EWCA Civ 681; [2020] 4 W.L.R. 85, CA, ***Copeland v Bank of Scotland Plc*** [2020] EWHC 1441 (QB), unrep., ref'd to. (See ***Civil Procedure 2020*** Vol.1 at paras 51.2.15 and 55.0.0.)

Practice Updates

STATUTORY INSTRUMENTS

THE TAKING CONTROL OF GOODS AND CERTIFICATION OF ENFORCEMENT AGENTS (AMENDMENT) (NO. 2) (CORONAVIRUS) REGULATIONS 2020 (SI 2020/614). In force from **24 June 2020**. The Regulations amend the Taking Control of Goods Regulations 2013 (SI 2013/1894), albeit they do not affect any enforcement procedure taken prior to 24 June 2020 (see ***Civil Procedure 2020*** Vol.2 at para.9A-1234). The amendments are a response to the continuing COVID-19 pandemic. The amendments amend the definition of the *"emergency period"* in the 2013 Regulations, so that it refers to the period from 26 March 2020 until 23 August 2020. It further amends the definition of *"month"* within reg.9 of the Regulations, by way of reference to the Interpretation Act 1978. It makes further amendments concerning the minimum amount of unpaid rent that must be outstanding before commercial rent recovery can take place under the 2013 Regulations and extensions of certificates issued under reg.7(3) of the Certification of Enforcement Agents Regulations 2014 (SI 2014/421).

PRACTICE GUIDANCE

PRACTICE STATEMENT (COMPANIES: SCHEMES OF ARRANGEMENT UNDER PART 26 AND PART 26A OF THE COMPANIES ACT 2006)

On 26 June 2020, Sir Geoffrey Vos C issued a new Practice Statement, rather than a Practice Direction, concerning schemes of arrangement. It replaces ***Practice Statement (Companies: Schemes of Arrangement)*** [2002] 1 W.L.R. 1345. It provides guidance on the approach to be taken to applications under Pts 26 and 26A of the Companies Act 2006. Its particular focus is the practice which ought to be followed to enable the court to determine issues of jurisdiction, creditor/member class composition, and the convening of meetings at an early stage. The Practice Statement is reproduced below.

Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006)

1. *This practice statement replaces the Practice Statement (Companies: Schemes of Arrangement) [2002] 1 WLR 1345. It is directed to the practice to be followed on applications pursuant to Part 26 or Part 26A of the Companies Act 2006 (the "2006 Act") seeking the sanction of the court to a scheme of arrangement between a company and its creditors and/or members (a "Part 26 scheme" and a "Part 26A scheme" respectively). The purpose is to enable issues concerning the jurisdiction of the court to sanction the scheme, the composition of classes of creditors and/or members and the convening of meetings to be identified and if appropriate resolved early in the proceedings. To achieve these objects the following practice should be observed.*

2. *It is the responsibility of the applicant, in relation to both a Part 26 scheme and a Part 26A scheme, to determine whether more than one meeting of creditors and/or members is required by a scheme and if so to ensure that those meetings are properly constituted.*

3. *In relation to Part 26 schemes, applications under section 896 of the 2006 Act (to convene a meeting or meetings of creditors or members) may be listed before either an Insolvency and Companies Court Judge or a High Court Judge, but applications in respect of a scheme which gives rise to any of the issues identified in paragraph 6 below should be listed before a High Court Judge. Applications under section 899 of the 2006 Act (to sanction a Part 26 scheme) will be listed before a High Court Judge.*

4. *All applications under section 901C of the 2006 Act (to convene a meeting or meetings of creditors and/or members) and all applications under section 901F of the 2006 Act (to sanction a Part 26A scheme) will be listed before a High Court Judge.*

5. *Where a High Court Judge hears an application under section 896 or section 901C of the 2006 Act the same judge should, if possible, hear the application to sanction the scheme.*

6. *It is the responsibility of the applicant, by evidence in support of the application or otherwise, to draw to the attention of the court at the hearing for an order that meetings of creditors and/or members be held ("the convening hearing"):*

    a. *any issues which may arise as to the constitution of meetings of members or creditors or which otherwise affect the conduct of those meetings;*

b. *any issues as to the existence of the court's jurisdiction to sanction the scheme;*

c. *(in relation to a Part 26A scheme) any issues relevant to the conditions to be satisfied pursuant to section 901A of the 2006 Act and, if an application under section 901C(4) of the 2006 Act is to be made, any issues relevant to that application; and*

d. *any other issue not going to the merits or fairness of the scheme, but which might lead the court to refuse to sanction the scheme.*

7. *Where an application is made to convene a meeting or meetings in respect of a scheme which gives rise to any of the issues identified in paragraph 6 above, unless there are good reasons for not doing so, the applicant should, prior to the convening hearing, take all steps reasonably open to it to notify any person affected by the scheme of the following matters:*

   a. *that the scheme is being promoted,*

   b. *the purpose which the scheme is designed to achieve and its effect,*

   c. *the meetings of creditors and/or members which the applicant considers will be required and their composition,*

   d. *the other matters that are to be addressed at the convening hearing, including the issues identified in paragraph 6 above,*

   e. *the date and place fixed for the convening hearing,*

   f. *that such persons are entitled to attend the convening and sanction hearings, and*

   g. *how such persons may make further enquiries about the scheme.*

It is the responsibility of the applicant to ensure that such notification is given in a concise form and is communicated to all persons affected by the scheme in the manner which is most appropriate to the circumstances of the case.

8. *Save for the circumstance in which there are good reasons for not giving the notification identified in paragraph 7 above, it should be given to persons affected by the scheme in sufficient time to enable them to consider what is proposed, to take appropriate advice and, if so advised, to attend the convening hearing. What is adequate notice will depend on all the circumstances. The evidence at the convening hearing should explain the steps which have been taken to give the notification and what, if any, response the applicant has had to the notification.*

9. *Where an issue identified in paragraph 6 above has been drawn to the attention of the court it will consider whether to determine that issue forthwith, or whether to give directions for the resolution of that issue.*

10. *While members and/or creditors will still be able to appear and raise objections based on an issue identified in paragraph 6 above at the sanction hearing, the court will expect them to show good reason why they did not raise the issue at an earlier stage.*

11. *In considering whether or not to make an order convening meetings of members and/or creditors (a "meetings order") the court will consider whether more than one meeting of members and/or creditors is required, and if so what is the appropriate composition of those meetings.*

12. *A meetings order may include an order giving anyone affected a limited time in which to apply to vary or discharge that order with the meetings of members and/or creditors to take place in default of any such application within the time prescribed.*

13. *The evidence for the convening hearing should describe how it is proposed that members and/or creditors are to be given notice of any meetings convened to consider the scheme. Where interests in the applicant's debt are held indirectly, for example through intermediaries, if it is proposed that the votes to be cast at the meetings should by some method reflect the views of persons holding such indirect interests, the evidence should set out the applicant's proposals in that respect and any facts justifying those proposals.*

14. *Explanatory statements should be in a form and style appropriate to the circumstances of the case, including the nature of the member and/or creditor constituency, and should be as concise as the circumstances admit. In addition to complying with the provisions of section 897 or section 901D (as the case may be) of the 2006 Act, the commercial impact of the scheme must be explained and members and/or creditors must be provided with such information as is reasonably necessary to enable them to make an informed decision as to whether or not the scheme is in their interests, and on how to vote on the scheme. Where a document is incorporated into the explanatory statement by reference, readers should be directed to the material part(s) of the document.*

15. *The court will consider the adequacy of the explanatory statement at the convening hearing. The court may refuse to make a meetings order if it considers that the explanatory statement is not in an appropriate form. However, the court will not approve the explanatory statement at the convening hearing, and it will remain open to any person affected by the scheme to raise issues as to its adequacy at the sanction hearing.*

CORONAVIRUS GUIDANCE UPDATE

The Coronavirus pandemic continues to affect the operation of the civil courts. While more courts are opening and hearings are being listed in open court, it remains 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;* and
- *https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak* [all accessed 6 July 2020]

In Detail

POSSESSION PROCEEDINGS – COMMENTARY UPDATE TO CIVIL PROCEDURE 2020 VOL.1, PARA.55.0.0

The Coronavirus pandemic has resulted in amendments to the CPR and its Practice Directions being introduced at short notice. Those amendments have, in turn, already started to produce a body of case law. This is particularly true of CPR Pt 55. It has been affected by CPR PD 51Z, which from 27 March 2020 introduced a stay on possession proceedings, and proceedings to enforce orders for possession. That PD was, in turn, amended by CPR PD Update 120 as from 18 March 2020. Most recently, the stay it imposed was replaced by a new CPR r.55.29. The ***White Book Service*** has endeavoured to ensure its commentary concerning these various amendments has been kept up to date. It was most recently updated in the Second Supplement to ***Civil Procedure 2020***. Since that Supplement was published, however, it has become necessary to make substantive changes to the commentary. In the current, unusual, circumstances, in order to assist subscribers, the decision was taken to publish a new, replacement, commentary to CPR Pt 55 in this edition of ***Civil Procedure News***. The text below is intended to replace the commentary in para.55.0.0 of ***Civil Procedure 2020*** Vol.1. The text below is also being added to the online version of ***Civil Procedure 2020*** Vol.1. Any further updating will, as necessary, be set out in the Third Supplement to ***Civil Procedure 2020***.

Updated commentary text for Civil Procedure Vol.1, Pt 55

Delete paragraph 55.0.0 and replace with:

COVID-19 Stay

55.0.0 By Practice Direction 51Z, as amended, from 27 March 2020, all proceedings for possession brought under CPR Pt 55 and all proceedings seeking to enforce orders for possession by warrants or writs of possession were stayed for a period of 90 days (subsequently extended—see below). However, the stay did not apply to:

(a) injunctions. For an example of an injunction requiring a patient to vacate a bed, see *University College London Hospitals Foundation Trust v MB* [2020] EWHC 882 (QB), Chamberlain J. See too *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11; [2009] 1 W.L.R. 2780, noted at para.55.4.5;

(b) claims against trespassers to which r.55.6 applies;

(c) 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), or any application made under r.55.28(1); or

(d) applications for case management directions which are agreed by all the parties.

The fact that a claim would be stayed did not preclude the issue of such a claim.

The full text of the Practice Direction is printed at para.51ZPD.1. It was amended on 10 June 2020 (CPR Update 121) to clarify that while the stay was in force procedural time limits were suspended and that the court was not to send any notices concerning individual proceedings. The stay expired on 25 June 2020, although the Practice Direction does not cease to have effect until 30 October 2020 (see para.51.2.15).

As from 25 June 2020, the Practice Direction has however been superseded by a new CPR r.55.29 which was introduced by the Civil Procedure (Amendment No. 2) (Coronavirus) Rules 2020 (SI 2020/582) (see para.55.29.1). As from 25 June 2020, that provision replaces and continues the former stay, in a slightly modified form, until 23 August 2020. See para.55.29.1.

In *Arkin v Marshall* [2020] EWCA Civ 620, the Court of Appeal rejected contentions that PD 51Z was ultra vires and that ss.81–82 and Sch.29 to the Coronavirus Act 2020 were inconsistent with it. The court also rejected a submission that PD 51Z was incompatible with either ECHR art.6 or the fundamental principle of access to justice. "[T]he short delay to possession litigation enshrined in PD 51Z is amply justified by the exceptional circumstances of the coronavirus pandemic." [33]

The stay under CPR PD 51Z only applied to "proceedings for possession brought under CPR Part 55" and "proceedings seeking to enforce an order for possession" within the meaning of para.2 of PD 51Z, but a landlord's counterclaim for possession "clearly" amounted to "proceedings for possession brought under CPR Part 55". If, in proceedings seeking a declaration, the landlord counterclaimed for possession, the entire action became "proceedings for possession brought under CPR Part 55" and so was caught by the stay when it was imposed in March 2020 (*TFS Stores Ltd v Designer Retail Outlet Centres (Mansfield) General Partner Ltd* [2020] EWCA Civ 833 where the Court of Appeal refused to lift the stay).

The automatic stay imposed by PD 51Z applied to appeals from possession orders which were extant when the stay began, as much as to first instance possession claims themselves. The words "all proceedings for possession brought under CPR Part 55" in para.2 of PD 51Z included such appeals. Proceedings brought under CPR Pt 55 were still "brought under CPR Part 55", even when they were under appeal (*Hackney LBC v Okoro* [2020] EWCA Civ 681; [2020] 4 W.L.R. 85 and *TFS Stores Ltd v Designer Retail Outlet Centres (Mansfield) General Partner Ltd* above).

COVID-19 Lifting the stay

55.0.0.1 In *Arkin v Marshall* (para.55.0.0, above) the Court of Appeal stated that although PD 51Z cannot be read as formally excluding the operation of CPR r.3.1 and so, as a matter of strict jurisdiction, judges retain power to lift the stay which it imposes, the purpose of the stay

> "would be fatally undermined if parties affected by the stay were entitled to rely on their particular circumstances – however special they might be said to be – as the basis on which the stay should be lifted in their particular case."

While the Court of Appeal at [42]

> "would not go so far as to say that there could be no circumstances in which it would be proper for a judge to order that the stay imposed by PD 51Z should be lifted in a particular case, [it had] great difficulty in envisaging such a case ...The approach of a blanket stay ... makes clear that possession claims are not to be dealt with on a normal case by case basis during the stay. We would strongly deprecate parties troubling the court with applications that are based only on [case management] reasons and which are in truth bound to fail." [44]

The court concluded,

> "although as a matter of strict jurisdiction a judge retains a theoretical power to lift any stay, it would almost always be wrong in principle to use it. [It did not] however, rule out that there might be the most exceptional circumstances in which such a stay could be lifted, in particular if it operated to defeat the expressed purposes of PD 51Z itself." [46].

For a case where the stay of possession proceedings imposed by CPR PD 51Z was lifted for the very narrow purpose of handing down a reserved judgment on an appeal against a refusal to set aside a possession order, which had been heard before PD 51Z came into effect, see *Copeland v Bank of Scotland Plc* [2020] EWHC 1441 (QB), although Sir Geoffrey Vos, Chancellor of the High Court, strongly disapproved of that decision in *TFS Stores v Designer Retail Outlet Centres (Mansfield) General Partner Ltd* (para.55.0.0 above).

COVID-19 Substantive law

55.0.0.2 The Coronavirus Act 2020 s.81 and Sch.29 (Residential tenancies in England and Wales: protection from eviction) make provision about notice periods in relation to possession proceedings. The Schedule amends, temporarily, various sections in the Rent Act 1977, the Housing Act 1985, the Housing Act 1988 and the Housing Act 1996 and associated regulations contained in statutory instruments. The amendments will cease to have effect on 30 September 2020. The full text of the Coronavirus Act 2020 can be found at *http://www.legislation.gov.uk/ukpga/2020/7/contents* [Accessed 3 July 2020].

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