CIVIL PROCEDURE NEWS

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In Brief

Cases

R. (Kuznetsov) v Camden LBC [2019] EWHC 3910 (Admin), 21 November 2019, unrep. (Mostyn J)

Test to set aside or vary an order made by court on its own initiative and without a hearing

CPR rr.3.3(4), 3.3(5). A costs order was made by the court of its own initiative and without a hearing in judicial review proceedings. Mostyn J noted that the test to set aside or vary a procedural order under CPR r.3.1(7) was clearly established (***Tibbles v SIG Plc*** (2012), as summarised by Lord Dyson MR in ***Mitchell v News Group Newspapers Ltd*** (2013) at para.44). There was, however, no authority on the approach under CPR r.3.3(5) to set aside or vary an order made under CPR r.3.3(4). **Held**, the test under r.3.1(7) could not be applied by analogy to r.3.3(5). If that were done it would render CPR r.3.3(4) redundant. The applicable test under r.3.3(5), which must be lower than that under r.3.1(7), was

> *"[24] ... that the court should give due weight to the decision of the judge who dealt with the matter without a hearing and should be able to identify a good reason for disagreeing with his or her decision. That is the standard I shall apply in judging this application."*

(Although also see ***Al-Zahra (Pvt) Hospital v DDM*** (2019), which held that applications to vary or set aside orders made without notice should be heard by way of rehearing not review.) ***Tibbles v SIG Plc*** [2012] EWCA Civ 518; [2012] 1 W.L.R. 2591, ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795, ***Al-Zahra (Pvt) Hospital v DDM*** [2019] EWCA Civ 1103, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.3.3.2.)

Stephenson Harwood LLP v Medien Patentverwaltung AG [2020] EWHC 1889 (Ch), 14 July 2020, unrep. (Andrew Lenon QC sitting as a deputy High Court judge)

Stakeholder application – jurisdiction challenge

CPR Pts 11, 86. The claim raised a novel issue: what was the correct procedure to challenge jurisdiction where a stakeholder claim was made under CPR Pt 86? The claim arose in circumstances arising from patent infringement proceedings. In those proceedings the defendant was assisted by a US Attorney. The proceedings were settled for $6.5 million, which sum was paid to the claimant. A dispute arose between the defendant and the US Attorney over fees for his services. Subsequently, the claimant set aside a sum of $570,000 from the settlement monies given the dispute over the fees due. Both the defendant and the US Attorney sought payment of the sum from the claimant, and threatened proceedings if the money was not paid. The claimant commenced a stakeholder application, with both the defendant and the US attorney as respondents. The defendant filed an acknowledgment of service. It did not, however, indicate that it intended to dispute jurisdiction. A deputy Master subsequently held that having not used the CPR Pt 11 procedure to dispute jurisdiction, the defendant was to be taken to have accepted the court's jurisdiction. An appeal from that decision was dismissed. **Held**, the stakeholder application was made under CPR Pt 8. As such there was no basis for suggesting that CPR Pt 11 did not apply to it; that Pt of the CPR applies where any challenge to the court's jurisdiction is made (see paras 33–45). As the deputy High Court judge put it:

> *"[42] Where, as the present case, the stakeholder application is made under CPR Part 8, the procedural mechanism for challenging the Court's jurisdiction is CPR Part 11. The wording of Part 11 is apt to apply to the stakeholder application, being the claim which the Court is being asked to try or determine. According to the editors of the White Book, CPR Part 11 'is available in all cases where the court's jurisdiction is challenged or its exercise opposed.' There is, in my view, no valid reason for excluding a stakeholder application from the scope of CPR Part 11. I do not accept MPV's argument that, since CPR Part 11 would not apply to a stakeholder application made in the course of an existing claim, CPR Part 11 should not apply to a stakeholder application made by way of a new Part 8 claim. The two procedures are different."*

Glencore International AG v Shell International Trading & Shipping Co Ltd [1999] 2 All E.R. (Comm) 922; [1999] 2 Lloyd's Rep. 692, Comm. Ct, ***Cool Carriers AB v HSBC Bank USA*** [2001] 2 All E.R. (Comm) 177; [2001] 2 Lloyd's Rep. 22, Comm. Ct, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.31.3.39.)

Navigator Equities Ltd v Deripaska [2020] EWHC 1798 (Comm), 17 July 2020, unrep. (Andrew Baker J)

Remote hearing – witness evidence – appropriate arrangements

CPR r.3.1(2)(d). A contempt hearing took place in a long-running property dispute. The hearing took place remotely, i.e. no participant was physically in a court room, and in open court over four days. The judge gave the following guidance on the steps to be taken prior to witness evidence being given remotely,

"[9] ... If a witness is to give evidence remotely, where he or she will be and who (if anyone) will be with them, and why, should be discussed between the parties in advance. That is always so, in my view, but especially it is so if the arrangement may be such that there could be interaction with the witness during their evidence that will not be visible to the court. Any arrangement other than that the witness will be on their own during their evidence should be approved by the court, in advance if possible, and parties should not assume that an arrangement will be approved just because (if it is) it is agreed between them. Sensible arrangements discussed and agreed in advance are likely to meet with approval if the court does not identify any difficulty of possible substance that the parties may have overlooked. But it must be for the court, not the parties, to control how it receives the evidence of witnesses called before it. I acknowledge that the parties were not asked by the court in advance to specify the witness arrangements here. They should have been, and that they were not is my responsibility, but equally parties should not wait to be asked."

(See ***Civil Procedure 2020*** Vol.1 at para.3.1.6.)

■ **Re C (A Child)** [2020] EWCA Civ 987, 24 July 2020, unrep. (Bean, King and Nicola Davies LJJ)

Recusal – adverse comment following hybrid hearing

CPR r.1.1(2)(a). A hybrid hearing, with some participants physically in court while others took part in proceedings remotely, took place in care proceedings. The appellant initially gave evidence in court. She subsequently told the court she had felt unwell. The judge directed that she could give the remainder of her evidence remotely. The judge rose to enable relevant arrangements to be made. Her laptop was taken to her chambers by the court associate. Despite the laptop being closed the live remote link being used for the hybrid hearing remained open. The judge was then overheard by participants who were still connected to the live link expressing pejorative comments to her clerk about the appellant. Subsequently, the judge was made aware of this, the parties all re-joined the hearing, and the judge explained that she would understand if an application were to be made for her to recuse herself and for her to arrange for a new judge to deal with the proceedings. The appellant made such an application, which was refused. The Court of Appeal upheld an appeal from that refusal. While it was clear that there was no suggestion that the judge had demonstrated bias at any time, the judge was right in her initial view that anticipated the recusal application and a need to find a new judge to hear the matter. **Held**, applying the objective test, a fair minded reasonable observer could not but conclude there was a real possibility of bias, in the circumstances of the case where: (i) the issue in the proceedings was one that could not be more serious, i.e. where the appellant was accused of either causing the death of her child or of failing to protect him from the person who caused his death; and (ii) the judge had made highly critical remarks concerning the appellant's honesty. That the remarks were made in private and not intended to be made public did not alter that assessment, in circumstances where they were broadcast to the participants during the course of the appellant's evidence. ***Porter v Magill*** [2001] UKHL 67; [2002] 2 A.C. 357, ***Ansar v Lloyds TSB Bank Plc*** [2006] EWCA Civ 1462; [2006] I.C.R. 1565, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.1.1.2.)

■ **Akinola v Oyadare** [2020] EWHC 2038 (Ch), 30 July 2020, unrep. (Deputy Master Henderson)

Whether "drop hands offer" was valid Part 36 Offer

CPR rr.36.5, 36.14. Following judgment on preliminary issues in respect of a claim for a beneficial interest in a number of properties, deputy Master Henderson considered, in an Addendum Judgment, whether a "*drop hands offer*" was a valid CPR Part 36 Offer. A "*drop hands offer*" was noted at para.41 of the Addendum Judgment to be one where a "*claim or claims should be discontinued with each side bearing its own costs*". **Held**, a drop hands offer was not a valid Part 36 Offer. The nature of the offer made was that the claimant was "*invited to withdraw the claim*" on such a basis. It was noted that there was no mechanism to withdraw a claim. Claims could be discontinued. Alternatively, they could be dismissed or stayed. Discontinuance on the basis that both sides bear their own costs was inconsistent with Pt 36 (see para.41). Furthermore, CPR r.36.14(1) specifies that when a Part 36 Offer is accepted, the claim is stayed. CPR r.36.14(2) then provides that where such an offer is accepted and it relates to the whole claim (as it did in this case), the claim is stayed on the terms of the offer. The offer was, however, to withdraw the claim. It was not possible to construe such an offer as including the imposition of a stay (see paras 42–43). As the deputy Master went on to conclude,

"[43] ... If there is a stay the proceedings would continue to exist. If there was a 'withdrawal', whatever that might reasonably be thought to mean, the proceedings would cease to exist. This line of analysis is reinforced by the consideration that the usual meaning of 'drop hands' is that each side should pay its own costs. If that was what was intended by the offer, then there would be no problem with the proceedings ceasing to exist, but if the CPR 36.13 costs consequences were to follow from the acceptance of the offer, the proceedings would need to continue to exist so that there were proceedings in which [the claimant's] costs could be assessed."

(See ***Civil Procedure 2020*** Vol.1 at para.36.14.1.)

■ **HC Trading Malta Ltd v Savannah Cement Ltd** [2020] EWHC 2144 (Comm), 4 August 2020, unrep. (Henshaw J)

Dispute resolution agreement – no entitlement to pursue claim

CPR r.1.4(2)(e). The claimant applied for summary judgment on shipping and demurrage claims. The application succeeded on the shipping claim. In so far as the demurrage claim was concerned it was refused. The parties had previously entered into a settlement agreement in respect of the demurrage dispute. That agreement contained a clause requiring the parties to attempt to resolve that dispute. Should settlement attempts fail it then required them to refer the matter for expert determination. **Held**, while the agreement to refer the matter for expert determination did not oust the court's jurisdiction, it was established that the court had a discretion to stay proceedings where they are issued in breach of an agreement to adjudicate. As Henshaw J put it:

> *"[62] The Claimant submits that the expert determination procedure does not oust the jurisdiction of the court. I am inclined to agree. However, the court should normally stay a claim which the parties have agreed should be resolved by expert determination: cf Barclays Bank plc v Nylon Capital LLP [2011] EWCA Civ 826 (per Thomas LJ):*
>
> > *'The issue on this appeal is whether the court should stay proceedings brought for a declaration as to the interpretation of an agreement on the grounds that the issue falls within the expert determination clause of the agreement. ...' (§ 1)*
>
> *On the facts, the Court of Appeal held the dispute to fall outside the clause, but clearly assumed that a stay would have been appropriate had it fallen within the clause. See also DGT Steel & Cladding Ltd v Cubitt Building & Interiors Ltd [2007] EWHC 1584 (TCC) [2008] Bus. L.R. 132 (TCC) § 5-12 and cases cited: the court has an inherent jurisdiction to stay court proceedings issued in breach of an agreement to adjudicate; the jurisdiction is discretionary but there is a presumption in favour of the parties' agreement to adjudicate, putting the persuasive burden on the party resisting the stay to show good reasons for its stance)."*

A stay was granted. Furthermore, in such circumstances, the court had no jurisdiction to grant an order for an interim payment. In the alternative, should it have such a power, where there was a dispute resolution agreement for expert determination rather than or prior to litigation, as here, it should not exercise its discretion to order such a payment (see para.63). ***DGT Steel & Cladding Ltd v Cubitt Building & Interiors Ltd*** [2007] EWHC 1584 (TCC); [2008] Bus. L.R. 132, ***Barclays Bank Plc v Nylon Capital LLP*** [2011] EWCA Civ 826; [2012] 1 All E.R. (Comm) 912, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.1.4.11.)

■ **Shagang Shipping Co Ltd v HNA Group Co Ltd** [2020] UKSC 34; [2020] 1 W.L.R. 3549, 5 August 2020, (Lord Hodge DP, Lords Briggs, Hamblen, Leggatt, and Burrows)

Evidence alleged to be obtained by torture – admissibility

CPR Pt 32. Proceedings were brought under a guarantee of a contract in respect of the charter of a ship. The contract was between two Hong Kong companies, one of which was a subsidiary of a Chinese company. The guarantee was entered into between the appellant and the Chinese company, i.e. the respondent, and was to guarantee its subsidiary's performance. It was governed by English law and provided the English courts with jurisdiction. The contract was eventually terminated by the appellant on the basis of the subsidiary's repudiatory breach. That matter was the subject of arbitration proceedings. The appellant also pursued the respondent in proceedings in the Commercial Court under the guarantee. In its defence the respondent alleged the contract was procured by bribery committed by or on behalf of the appellant. In support of that point it relied on confession evidence. The confessions were obtained from the individuals who it was said had made the bribes. The appellant in response alleged that the confessions were obtained by torture and were, thus, inadmissible. The trial judge held that no bribes had been given. Having done so he did not need to rule on the question whether the confessions were the product of torture, although he could not rule that they were out. The Court of Appeal allowed an appeal from that judgment. The Supreme Court allowed an appeal from the Court of Appeal's judgment and restored the trial judge's judgment. **Held**, the trial judge considered the question of whether there was a bribe before considering whether to exclude the evidence said to have been obtained by torture. While it was logical, as the Court of Appeal had held, for the opposite approach to be taken, i.e. to determine admissibility and if admissible determine the weight to be given to the confession evidence and then to move on to consider if there had been bribery, such an approach was not mandatory. It was a matter for the trial judge to determine the appropriate approach to take. As Lords Hamblen and Leggett put it:

> *"[58] How and in what order questions concerning the admissibility and weight of evidence are dealt with is very much a matter for the trial judge. There is no 'one size fits all' approach. The judge will consider how best to deal with such matters in the light of the issues, the evidence and the arguments in the case as a whole. There will usually, if not invariably, be more than one legitimate approach which can be taken.*

[59] In many cases, for example, issues of admissibility can be dealt with efficiently by admitting the evidence de bene esse. This means taking the evidence into account on the assumption, without deciding, that the evidence is admissible. Unless the evidence turns out to be critical to the decision to be reached, the issue of admissibility may never need to be determined. This is often a convenient approach to adopt, as resolving issues of admissibility can be complex and time consuming. ... "

This was the approach taken by the trial judge, who did not then need to determine whether the evidence was obtained by torture as he concluded that there was no bribery notwithstanding the confession evidence. This was permissible. He did not need to make a finding concerning torture as it was not necessary for his decision. As the Supreme Court noted, it is common for judges not to decide matters where they are not necessary for their decisions (see para.62). Furthermore, the trial judge could also not be criticised on the basis that he did not properly address the weight to be given to the confession evidence. It was the only evidence of bribery. By finding that there was no bribery in the light of the other evidence before him, the trial judge had necessarily found that it was of "*little or no weight*" (see paras 66–84). On a further issue, the Court of Appeal had held that the judge erred in law in not considering the details of the confessions, and particularly that he erred by not considering each confession separately. While it would have been "*much more satisfactory*" for him to have approached the confessions in such a way, the Supreme Court considered that it was clear that he had considered each of them and the issues they raised and that his conclusions related to all the confessions. There was thus no error of law (see paras 85–87). On a final point, the Supreme Court also rejected the Court of Appeal's approach to the question of how the trial judge treated the allegation of torture (see paras 94–108). As Lords Hamblen and Leggatt explained:

"[104] In the modern law of evidence relevance is the paramount consideration. The general test of whether evidence is admissible is whether it is relevant (or of more than minimal relevance) to the determination of any fact in issue in the proceedings. In the days when facts in civil as well as criminal cases were found by juries and there was fear that more weight would be given to certain kinds of evidence than they deserved, rules were developed to exclude reliance on evidence notwithstanding its relevance. The rule against hearsay is a classic example. The tendency of the law has been and continues to be towards the abolition of such rules. Thus, the rule excluding hearsay evidence has been abolished in civil proceedings. The modern approach is that judges (and, increasingly, juries) can be trusted to evaluate evidence in a rational manner, and that the ability of tribunals to find the true facts will be hindered and not helped if they are prevented from taking relevant evidence into account by exclusionary rules.

[105] There are now very few categories of relevant evidence which are inadmissible in civil proceedings, but one such category is evidence obtained by torture. Article 15 of the United Nations Convention Against Torture 1984 imposes an international obligation on state parties to 'ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made'. In A v Secretary of State for the Home Department (No 2) [2005] UKHL 71; [2006] 2 AC 221 a seven member appellate committee of the House of Lords unanimously held that it is also a rule of the common law that evidence obtained by torture is inadmissible in judicial proceedings. A minority (of three members of the committee) would have held that it was sufficient to render evidence inadmissible that there was a real risk that it was obtained by torture. However, it was decided by the majority that the test for this purpose is proof on a balance of probabilities.

[106] It is accordingly settled law, and common ground in this case, that if it is proved on a balance of probabilities that a confession (or other statement) on which a party wishes to rely in legal proceedings was made as a result of torture, evidence of the statement is not admissible and must be excluded from consideration altogether when deciding the facts in issue.

[107] The total exclusion of evidence shown to have been obtained by torture is not justified on grounds of relevance alone. As the judgments in In re A (No 2) make clear, the exclusion is founded also on reasons of public policy and morality. In the words of Lord Hope at para 112:

> *'The use of such evidence is excluded not on grounds of its unreliability - if that was the only objection to it, it would go to its weight, not to its admissibility - but on grounds of its barbarism, its illegality and its inhumanity. The law will not lend its support to the use of torture for any purpose whatever.'*

[108] It does not follow, and there is no rule, that if it is not proved on a balance of probabilities that a statement was made as a result of torture, evidence that torture was used is not admissible and must be ignored when deciding the facts in issue. There is no legal or logical reason for treating such evidence as inadmissible and good reason to treat it as admissible given its obvious relevance.

[109] We go further. A rule that required a court, in assessing the reliability of a confession, to disregard entirely evidence which discloses a serious possibility that the confession was made as a result of torture would not only be

irrational; it would also be inconsistent with the moral principles which underpin the exclusionary rule. As [Counsel for] Liberty as an intervenor on this appeal [observed], even when there are reasonable grounds for suspecting that torture has been practised, its use is often inherently difficult to prove because it tends to happen in secret, where there are no safeguards such as the recording of interviews or the presence of a legal representative, and often involves techniques which leave no lasting marks. A rule which excluded evidence that a confession has been obtained by torture unless this has been proved on a balance of probabilities would be calculated positively to encourage the practice of torture to obtain evidence for use in legal proceedings, provided that it is done in a way which is deniable. It would also put evidence that may have been obtained by torture in a uniquely advantageous position, since - as counsel for HNA rightly accepted - no such rule applies to a possibility that a confession was obtained by ill-treatment less severe than torture or by other forms of oppression or inducement. Granting a special dispensation for evidence that may have been obtained by torture would turn the law in this area upside down."

A v Secretary of State for the Home Department [2005] UKHL 71; [2006] 2 A.C. 221, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.32.1.)

■ **Gubarev v Orbis Business Intelligence Ltd** [2020] EWHC 2167 (QB); [2020] 4 W.L.R. 122, 6 August 2020, (Dame Victoria Sharp PQBD, Warby J)

Remote hearing – unlawful live-streaming

Coronavirus Act 2020 Sch.25. A libel trial took place remotely. It took place physically in court. Provision was made by court order for the hearing to be relayed to a second physical court room to enable the proceedings to be viewed live by the press and public. It became apparent that the Zoom link, via which the hearing was live-streamed to the second court room, was shared by solicitors for the claimant to individuals outside the court building. The trial judge found that this amounted to misconduct in the form of a breach of s.41 of the Criminal Justice Act 1925, s.9 of the Contempt of Court Act 1981 and disobedience to the terms of a prior court order. The particular breaches arose from the live streaming of audio and video of the trial to the various individuals outside the court building. The issue was referred to the Divisional Court under the ***Hamid*** jurisdiction (***R. (Hamid) v Secretary of State for the Home Department*** (2012) at para.11), i.e. to consider whether to refer the solicitors to the Solicitors Regulation Authority (SRA) in the light of the misconduct. **Held**, it was unnecessary for the court to refer this matter to the SRA: the solicitors had already referred themselves to the SRA. The Court stressed, however, that it was "*a matter of fundamental importance that the formalities of court hearings must be observed and orders made by the court obeyed*". This had not happened in this case. Trials and proceedings generally, are not live-streamed unless such a hearing is lawful and the court has ordered live-streaming. As this was not a wholly remote hearing for the purposes of the Coronavirus Act 2020, it could not have been lawfully live-streamed. Furthermore, during the Coronavirus pandemic

"[50] ... there have been temporary changes to the way in which parties and their representatives and others, including the media and the general public, have been permitted to obtain access to proceedings. Nonetheless, whether a court hearing is a remote hearing or a hybrid hearing, that is one that is partially face to face and partially remote, or a conventional face to face hearing, it must be conducted in a way that is as close as possible to the pre-pandemic norm."

Dame Victoria went on to stress the following:

"[51] In normal circumstances a judge can see and hear everything that is going on in court. The judge can see who is present, and whether a witness who is giving live evidence has been present in court observing and listening to the evidence of other witnesses. The judge can see whether someone is attempting to influence, coach or intimidate a witness whilst they are giving evidence. The judge can immediately see, as Warby J did in the course of this hearing, that a person sitting in court who is not a journalist appears to be tweeting on their mobile phone without first obtaining permission. That a judge can see and hear everything that happens in court enables the judge to maintain order, discipline and control over what is done in court, and thus to maintain the dignity and the integrity of the proceedings as a whole. This control extends to the recording of images and sounds of what goes on in court and what is then used outside court.

[52] Once live streaming or any other form of live transmission takes place, however, the Court's ability to maintain control is substantially diminished, in particular where information is disseminated outside the jurisdiction, as happened in this case. The opportunity for misuse (via social media for example) is correspondingly enhanced, with the risk that public trust and confidence in the judiciary and in the justice system will be undermined. In these circumstances, it is critical that those who have the conduct of proceedings should understand the legal framework within which those proceedings are conducted, and that the Court is able to trust legal representatives to take the necessary steps to ensure that the orders made by the Courts are obeyed."

R. (Hamid) v Secretary of State for the Home Department [2012] EWHC 3070 (Admin), unrep., Div. Ct, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at paras 3.1.3 and 32.1.)

Practice Updates

PRACTICE GUIDANCE

Guidance on Resumption of Possession Proceedings

On 17 September 2020, the Master of the Rolls issued guidance on the approach courts are to take to possession proceedings from 21 September 2020, that being the date on which the suspension on such proceedings that commenced on 26 March 2020 came to an end. Two sets of guidance were issued.

The first, ***Possession Proceeding Listing Priorities in the County Court***, outlined listing priorities for possession proceedings. While noting that listing was a judicial function, it set out the following guidance in terms of the types of case that should be afforded priority:

> *"(a) Cases with allegations of anti-social behaviour, including Ground 7A of Schedule 2 to the Housing Act 1988 and Section 84A of the Housing Act 1985.*
>
> *(b) Cases with extreme alleged rent arrears accrued, that is, arrears equal to at least (i) 12 months' rent, or (ii) 9 months' rent where that amounts to more than 25% of a private landlord's total annual income from any source.*
>
> *(c) Cases involving alleged squatters, illegal occupiers or persons unknown.*
>
> *(d) Cases involving an allegation of domestic violence where possession of the property is alleged to be important for particular reasons which are set out in the claim form (and with domestic violence agencies alerted).*
>
> *(e) Cases with allegations of fraud or deception.*
>
> *(f) Cases with allegations of unlawful subletting.*
>
> *(g) Cases with allegations of abandonment of the property, non-occupation or death of defendant.*
>
> *(h) Cases concerning what was allocated by an authority as 'temporary accommodation' and is specifically needed by the authority for reallocation as 'temporary accommodation'."*

It further noted that subject to these priorities, priority would generally be given to proceedings issued before the March 2020 stay commenced. Other circumstances may also need to be taken account of in determining listing priority. A full copy of the guidance can be obtained here: *https://www.judiciary.uk/wp-content/uploads/2020/09/20200917-Guidance-note-MR-to-Civil-Judges-Possession-priorities-Housing-1.pdf* [Accessed 1 October 2020].

The second guidance, ***Overall arrangements for possession proceedings in England and Wales "the overall arrangements"***, was devised by the Master of the Rolls' Working Group on Possession Proceedings, which was chaired by Robin Knowles J. It sets out detailed guidance on how the courts will approach the listing and hearing of possession proceedings. It also stresses the importance of making efforts to compromise both proceedings that were subject to the stay and new ones before re-commencing or commencing them respectively. It also summarises, at paras 25–28, the additional information claimants need to provide the court when they reactive stayed claims or commence new ones. A full copy of the guidance can be obtained here: *https://www.judiciary.uk/wp-content/uploads/2020/09/Possession-Proceedings-Overall-Arrangements-Version-1.0-17.09.20.pdf* [Accessed 1 October 2020].

CORONAVIRUS GUIDANCE UPDATE

GENERAL GUIDANCE

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*
- *https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak* [all accessed 1 October 2020].

In Detail

CHANGES TO THE COSTS MANAGEMENT PROVISIONS IN FORCE FROM 1 OCTOBER 2020

The commentary on the Ministry of Justice Civil Procedure Rules website summarising the costs budgeting content of the Civil Procedure (Amendment No.3) Rules 2020 (SI 2020/747) explains them in these terms:

> *"Cost Budgeting and Variations: rationalises the current structure of the rules on variations to cost budgets. The changes have reduced the existing structure which involved three sources of rules (CPR Rules, a PD and a lengthy Guidance Note) into two documents, a set of rules and a PD which is intended only to include practice guidance."*

For those of us who have written about the costs management procedural provisions over the last seven and a half years, it is refreshing to see that so many of the curiosities and anomalies that have filled our pages, have been addressed. The reduction from three to two of the sources from which the regime is derived, the certainty of the procedure for variation of budget and the transfer of key provisions from PD 3E to Pt 3 Section II are all to be applauded. The fact that there remain a few of the oddities and some changes of wording, that may, or may not, indicate a change of emphasis, will be to the delight of those seeking scope to argue and provoke the despair of those for whom the perfect word must always be sought. It is these that prevent this article merely being a recital of the amendments. In summary, the changes involve somethings old, new, borrowed and blue. For ease there is a destination table at the end of the article to identify where familiar provisions can now be found, highlighting those that have undergone any alteration/amendment of substance.

For those concerned that there is wholesale change to a regime, which has, in the last few years, finally shown signs of bedding in, rest relatively easy. Much of the content of the revised Pt 3 Section II and its PD ("PD 3E") is an amalgam of what was previously to be found in the rules, PD 3E and the Guidance Notes on Precedent H ("the Guidance").

The last of these three no longer exists. PD 3E para.6 expressly incorporates a table identifying where, within the budget, various items of work should be included. The table is almost identical to that in the Guidance. What has gone (and its departure is long overdue) is the reference to the preparation of updated budgets, reviewing opponent's budget and trying to agree budgets, in the PTR phase. This was a throwback to the costs management pilots that pre-dated the 2013 reforms. The majority of the Guidance itself has found its way into the amended PD 3E. A few provisions merit discrete comment.

It is unfortunate that para.4(b) of the new PD maintains what must surely be an error of drafting. One of the two occasions when a party is required to fill in p.1 of Precedent H only, is where that party's budgeted costs do not exceed £25,000. However, the budgeted costs cannot be determined until after the court has costs managed. Although what was the specific definition of "*budgeted costs*" has not survived the demise of the Guidance, it is clear from references in CPR Pt 3 Section II that these are costs after the court has costs managed (e.g. CPR rr.3.15(5) and 3.15A(1)). Indeed, this terminology pre-dates the 2019 insertion of the definition anyway. Accordingly, it appears nonsensical. In reality, this requirement has always been taken to refer to the total of all costs (both incurred and estimated). If this approach is incorrect, then the use of "*estimated*" rather than "*budgeted*" costs in the PD para.4(b) would surely better avoid confusion. The good news is that this one articulation of value ("*costs do not* ***exceed*** *£25,000*") at last removes the curious competing provisions in the Guidance and the previous PD that left those whose total costs were exactly £25,000 unsure of when to file and exchange Precedent H.

A personal disappointment is that the move of what was para.8 of the Guidance to para.10 of the PD included the retention of the word "*interlocutory*". Interim applications became, well, **interim** applications, in 1999! For some reason, the continued reference to "*third party disclosure*" rather than "*non-party disclosure*" in the disclosure phase of the table in PD 3E, elicits a shallower sigh.

The other amendments to the Guidance in the process of its incorporation into CPR PD 3E and Pt 3 Section II that are of any substance are:

- The reference to the new provisions in respect of variation of budget in PD 3E paras 3(b) and 9. Variation is considered below, as it is by far the most significant change.
- The addition, to what was Guidance para.7 on contingent costs and has now become PD 3E para.9, of the directive **not** to include "*costs which are disputed*" as a contingency, but in the appropriate phase of the budget. An example is given of the need for a particular expert. Again, the wording might have been clearer. It is the underlying case management direction sought (which generates the costs), which is disputed, rather than, necessarily, the costs, for a party may object to a particular direction, but agree the costs associated with it, if the court makes such an order.

However, there is a more practical concern with this amendment. The court remains charged with budgeting a phase by a total sum that is within the bracket of what is reasonable and proportionate, rather than by an exercise of time multiplied by rate (for that is the territory of an assessment and micro-management). If the costs attributable to a disputed direction are subsumed within a phase, rather than clearly identifiable within a discrete contingency, how is each party and the court to know how much of the overall sum for a phase relates to this direction? Take the example given of an expert. What if the budget is prepared on the basis of a direction sought for two experts, but the use of only one is agreed and, subsequently, permitted by the court? How does the court know what the estimated costs are for one expert only? It is easy, in this situation, to identify the actual disbursement sum, but the costs are an unspecified amount of the overall costs of the phase. Whilst PD 3E para.9 concludes this provision with the words "*and if necessary marked as disputed*", what does this mean? Ideally it will be taken to mean that, save where the disputed direction generates the entirety of the costs for a phase, the assumptions box for the relevant phase **must** identify both the dispute and how much of the estimated disbursements and costs respectively relate to this dispute.

- There is a minor change of wording to what was para.9 of the Guidance and is now found at PD 3E para.8. For the aficionado of the detail of costs management, it always seemed strange that the Guidance required the costs of budgeting to be inserted in the two boxes available on p.1 of Precedent H, as soon as the final budget figure had been approved by the court. This was because those figures are, in part, based on incurred costs, which, save where a costs management order has been made by agreement under CPR r.3.15(2)(c), have been neither agreed nor assessed. The figures are, therefore, far from certain immediately after costs budgeting. PD 3E para.8 recognises this. The figures to be inserted in the two boxes after the court has approved the costs budget, are now described as the "*maximum figures*", acknowledging that ultimate recovery may be a lesser sum. It remains a curiosity that this provision only applies to "*approved*" costs budgets. Why should the figures not be inserted when all or parts of the costs budget are agreed?
- The change of emphasis in PD 3E para.10(a). Whilst additional documents accompanying Precedent H were "*not encouraged*" previously, they are now positively discouraged and "*should only be prepared in exceptional circumstances*". It is worth stressing the retention in para.10(a) of the directive that "*brief details only are required in the box beneath each phase*". There appears to have been an increasing move to attaching breakdowns of costs and disbursements beyond those required in Precedent H. Less is more – often literally in this context.
- The removal of the short-lived definitions of "*incurred*" and "*budgeted*" costs. Instead, an addition at r.3.17(3)(a) provides that, save in respect of variations to budgets, the court "*may not approve costs before the date of any costs management hearing*". Assuming that the intention was not to undo any costs management that has already taken place in a claim, apart from where variation is sought, this provision must, presumably, be read as though it concluded with the words "*or vary those already subject to a costs management order*".

Some of the content of the revised PD 3E has been mentioned already, and is by the incorporation of much of what was the Guidance. However, most of PD 3E remains familiar, even if the numbering has altered, necessitating some serious late night revision! Those provisions that have "*gone missing*" are mainly to be found within Pt 3 Section II, giving them more force, although, in transition the majority of what was PD 3E para.7.3 has been deleted. However, as much of that was to the same effect as the combination of r.3.15(2)(a)–(c) and PD 3E para.7.10 (as was and now PD 3E para.12), this makes no practical difference in the approach to be adopted to costs management. The only other major addition is found at PD 3E para.3(b). It is the introduction of Precedent T, to be used in the event of a variation of a budget under CPR r.3.15A. The time has clearly come to talk of the amendments to Pt 3 Section II.

Variation of budget has been a topic of some debate since the inception of the costs management regime. That it was so was, in part, due to the language of what was PD 3E para.7.6. This inserted the otherwise unused and, in this context, undefined description, "*future costs*", into the discussion. The debate raised perfectly legitimate arguments both for, and against, variation including some form of retrospection. In support of such a jurisdiction, was the valid concern that in the time it took to secure an order permitting variation from the court, costs would, inevitably, have been incurred and their recovery would, ultimately, be subject to the uncertainty of CPR r.3.18 and "*good reason*"? To delay any work until such an order had been obtained, would artificially delay the claim and might derail the court-imposed directions timetable. Against such a jurisdiction, was the equally valid concern that costs management is designed, in part, to enable parties to make informed decisions before costs are spent. Allowing retrospection removes the certainty of knowledge of potential costs exposure, at any given moment, once a costs management order has been made. Other costs might be being incurred of which parties have no knowledge, but for which, by a retrospective order, they may become liable. Albeit in another context, the Court of Appeal in ***Harrison v University Hospitals Coventry & Warwickshire NHS Trust*** [2017] EWCA Civ 792 at para.36 confirmed the importance of parties knowing "*where they stand*". However, when the previous provision was subjected to scrutiny in ***Sharp v Blank*** [2017] EWHC 3390 (Ch), the court concluded that "*future*

costs" meant those costs after the last approved or agreed budget and, as such, if there was a significant development after that date, the court could costs manage both the incurred and the estimated costs of that development.

Amendments to the CPR in October 2019, defining "*incurred*" and "*estimated*" costs and changing what was CPR r.7.4 only served to clarify the competing views and not to resolve them. However, the amendments to Pt 3 Section II provide the answer. There is a new r.3.15A. This provides that:

- Revision is still mandatory if there is a significant development in the litigation that warrants it and may result in budgets being increased or decreased.
- A revised budget must be submitted to the court promptly.
- The revision must be shown on the new Precedent T (which readily identifies under which phases revision is being sought and by how much).
- A party must certify that, if the variation sought is an increase, the additional costs did not appear in the previous approved/agreed budget or any earlier permitted variation to it.
- Precedent T, the last approved/agreed budget and an explanation of any disagreement between the parties on the sought variation, must be submitted to the court promptly.
- The court may approve, vary or disallow the proposed variation, or may list for a further costs management conference (in other words permitting the court to deal with variation as a paperwork exercise, but presumably with the usual right to challenge any decision by an application to vary or set aside within seven days of receipt of the order).
- As part of this process the court may vary costs related to the variation that have been incurred prior to the date of the order for variation, but after the costs management order.

The CPRC has opted for the approach taken in ***Sharp***. It is important to note that this is not an open door to variation. A party so seeking must still make out its case on there being a significant development that warrants revision, and that party must act promptly. Whether the approach of the court to "*promptly*" will be as strict as it has been post March 2013 in respect of the same requirement when applying to set aside judgment under CPR r.13.3(2) is unlikely, as an application to vary is not directly linked to the relief from a sanction. However, it seems realistic to expect the court to be restrictive in its definition of promptly. As variation removes an element of costs certainty and informed decision making, the court is likely to demand expedition of application.

In addition to variation, the rule changes made by the Civil Procedure (Amendment No.3) Rules 2020 (SI 2020/747) bring into the rules provisions that were previously within PD 3E, albeit with the occasional alteration of words used, but not, it seems, meaning. These changes are set out in the destination table.

In his ***Confronting Costs Management*** lecture in May 2015 Sir Rupert Jackson boldly (given the clamour of the opposition to costs management at the time) predicted that

> *"within ten years costs management will be accepted as an entirely normal discipline and people will wonder what all the fuss was about".*

The October 2020 amendments to the regime make it significantly less bold to predict that the 10-year period was actually unduly pessimistic.

Destination table

Previous Provision	New provision	Any substantial alteration/amendment
The Guidance		
para.1	PD 3E para.4(b)	Clarifies p.1 of Precedent H only is required where costs do not **exceed** £25,000 (as well as where statement of value is less than £50,000)
para.2	PD 3E para.3(a)	
para.3	PD 3E para.5	
para.4	PD 3E para.6	
para.5	PD 3E para.7	
para.6	PD 3E para.9	Part deleted and with the additional guidance to insert "*disputed costs in a phase*", rather than as contingent costs
para.7	PD 3E para.13	
para.8	PD 3E para.10	Amended in respect of additional documents
para.9	PD 3E para.8	With change to insertion of maximum figures
para.10	N/A	Deleted
CPR PD 3E		
PD 3E para.1	N/A	Deleted
PD 3E para.2(a)	In part in CPR r.3.13(3)(a)	
PD 3E para.2(b)	PD 3E para.1	
PD 3E para.3	N/A	Deleted
PD 3E para.4	CPR r.3.13(3)(b)	
PD 3E para.5	PD 3E para.2	
PD 3E para.6(a)	In part in PD 3E para.4(a) and in part in CPR r.3.13(4) and (5)	
PD 3E para.6(b)	N/A	Deleted
PD 3E para.6(c)	PD 3E para.4(b)	See comment above under para.1 of the guidance
PD 3E para.6A	PD 3E para.11	
PD 3E para.7.1	N/A	Deleted
PD 3E para.7.2	CPR r.3.15(5)	
PD 3E para.7.3	In part PD 3E para.12	In part deleted
PD 3E para.7.4	In part in CPR r.3.17	
PD 3E para.7.5	CPR r.3.15(6)	
PD 3E para.7.6	CPR 3.15A	The revised procedural provisions for variation of costs budget
PD 3E para.7.7	CPR r.3.15(7)	
PD 3E para.7.8	CPR r.3.13(6)	
PD 3E para.7.9	CPR r.3.17(4)	
PD 3E para.7.10	CPR r.3.15(8)	

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