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Freezing injunction – costs determination

CPR r.25.1(1)(f). An application for a freezing injunction was made in proceedings concerning alleged oil and/or industrial residue contamination in Columbia. An issue arose as to the correct approach to be taken to the costs of the application. Martin Spencer J noted (at paras 46–47) that this was an area of costs on which there was little prior authority, and what authority there was focused on the approach to costs in interim injunction applications (***Picnic at Ascot v Kalus Derigs*** (2001); ***Taylor v Burton*** (2014)). The question was, should the same approach apply to both types of interim remedy, and as such ought the costs of the freezing injunction application be costs reserved or ought they to be subject to a costs award at the conclusion of the application? **Held**, the approach to costs of interim injunction applications was not applicable to costs of freezing injunction applications. Costs should be determined at the conclusion of such applications; they should not be reserved. As Martin Spencer J explained

> *"[46] ... It is in that context then that the matter comes before me on the question of costs. The first point to make is that as the parties have agreed, and it is conceded, that costs are in the discretion of the court. A point of principle which arises between the parties is whether this is an application which is akin to normal interim injunctions where the court makes assumptions on the facts and also makes reference to the balance of convenience, both of which may at the final hearing be considered quite differently when the full evidence and trial has been heard, so that it is appropriate to reserve the costs so that the position when the interim injunction was made can be viewed retrospectively in the light of the matters which have emerged at trial and in respect of which the court has made its adjudication; or whether applications for freezing orders are a discreet form of order upon grounds which are not susceptible to significant re-evaluation at trial so that an order for costs can and should be made in relation to the freezing injunction rather than await the outcome of the trial.*
>
> ...
>
> *[52] It seems to me ... that the decision in Picnic at Ascot is not wholly apposite (for) claims for freezing orders where the balance of convenience is not an issue, and where in relation to the merits of the case the court has regard to the question of whether there is a good arguable case on behalf of the claimants or not. That is sufficient for the court to determine whether a freezing order should be made, and even if at the subsequent trial it turns out that the claims fail on the basis of the evidence due to that trial, it does not at all follow that this means that the court was wrong to find that there was a good arguable case. On the contrary, those two findings are wholly consistent with each other, or maybe wholly consistent with each other. Nor is there any reference to the balance of convenience. The question is whether it is just and convenient to make an order.*
>
> *[53] Therefore, I agree . . . that the regime for the making of Freezing orders is different to the general position where interim injunctions are sought based upon balance of convenience and holding the ring pending the trial. There are, obviously, overlapping features, holding the ring being one of them. The purpose of a freezing injunction is to avoid a successful claimant being unable to enjoy the fruits of his success because there are no assets left against which the judgment can be enforced, but that is a different kind of holding of the ring to that which is involved in the usual interim injunction and balance of convenience type case.*
>
> *[54] In the circumstances, I do not consider that it is appropriate to make an order reserving the costs as I do not consider that a judge at trial is going to be in any better position than I am to adjudicate upon the costs of these applications ..."*

Picnic at Ascot v Kalus Derigs [2001] F.S.R. 2, ChD, ***Taylor v Burton*** [2014] EWCA Civ 21; [2014] 3 Costs L.O. 337, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.25.1.25.1.)

Jalla v Shell International Trading and Shipping Co Ltd [2020] EWHC 2211 (TCC), 14 August 2020, unrep. (Stuart-Smith J)

Representative proceedings – identification of class members

CPR r.19.6. Proceedings were issued in 2017 in respect of an oil spill that occurred off the Nigerian coast in 2011. They were issued by two lead or representative claimants on their own behalf and on behalf of "*others*", which was said to include "*457 communities*". A question arose whether the named claimants had the "*same interest*" for the purposes of

a representative action under CPR r.19.6 as the "*others*", i.e. the represented class members. A further question arose as to whether the represented class could be ascertained sufficiently for the purposes of that rule. The judge summarised the established approach to determining the question of "*same interest*" (paras 29–60). On this issue the judge held that the same interest test was not made out (see para.77), and therefore the claim could not proceed as a representative action. In respect of the second issue, the judge would have held that the class was ascertained sufficiently if the first question was answered in the affirmative (see para.78). In determining that question the judge set out the following, tentative guidance on the approach to be taken to the manner in which the class is to be identified, which was set out by Mummery LJ in ***Emerald Supplies Ltd v British Airways Plc*** (2010) at its paras 62–65, i.e. that it must be possible at all stages of representative proceedings for it to be said if a particular person was within the represented class and hence had the same interest as the lead or representative claimants, and which had recently been applied by the Court of Appeal in ***Lloyd v Google LLC*** (2019):

> *"[68] Despite the express adoption of the Emerald test [in Lloyd v Google], it is not clear precisely how it is to be adopted or what principles are to be applied to determine whether or not a person is in the represented class of persons before judgment. Evidently, it is not necessary for them to be listed in court documents, for that was not done in the Duke of Bedford case or in Lloyd v Google. Nor can it be determinative that reference to third party sources (such as disclosure from an opposing party or documents from the land registry) will evidence whether or not a person is within the class, although that may be a convenient check and additional evidence, as in Lloyd v Google and, to a certain extent, Millharbour. Furthermore, the authorities contemplate that a representative action may be appropriate even if some represented persons fall by the wayside after judgment. However, if clarity of definition of the class and self-certification are sufficient, as suggested by Lloyd v Google, it could be said that the classes in Emerald were comprehensibly defined and capable of self-certification even if the action was going to fail in whole or in part when it came to judgment. With considerable hesitation, I would suggest that the touchstones should be (a) clarity of definition of the class; (b) lack of internal conflict within the class, which will be a subset of (a); (c) ability to evidence inclusion within the class, whether by self-certification or otherwise; and (d) whether it appears that the class, as defined, share the same interest in the outcome of the representative proceedings that are considered to be in accordance with the overriding objective. My suggestion at (d) may be said not to be a feature of identification, but it may help to explain the different outcomes in Emerald and Lloyd v Google respectively. It also harks back to the observation of Professor Zuckerman, ... , that CPR Part 19 provides for different ways of handling multi-party actions: the mere fact of multiple parties and common issues does not necessarily or even probably indicate that a representative action is appropriate."*

Duke of Bedford v Ellis [1901] A.C. 1, HL, ***Irish Shipping Ltd v Commercial Union Assurance Co Plc*** [1991] 2 Q.B. 206; [1990] 2 W.L.R. 117, CA, ***John v Rees*** [1970] Ch. 345; [1969] 2 W.L.R. 1294, ***National Bank of Greece SA v Outhwaite*** [2001] C.P. Rep. 69; [2001] C.L.C. 591, Comm., ***Independiente Ltd v Music Trading On-Line (HK) Ltd*** [2003] EWHC 470 (Ch), unrep., ***Millharbour Management Ltd v Weston Homes Ltd*** [2011] EWHC 661 (TCC); [2011] 3 All E.R. 1027, ***Emerald Supplies Ltd v British Airways Plc*** [2010] EWCA Civ 1284; [2011] 2 W.L.R. 203, ***Williams v Devon CC*** [2016] EWCA Civ 419, unrep., ***Lloyd v Google LLC*** [2019] EWCA Civ 1599; [2020] Q.B. 747, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.19.6.3.)

■ **Griffiths v TUI UK Ltd** [2020] EWHC 2268 (QB), 20 August 2020, unrep. (Martin Spencer J)

Uncontroverted expert evidence – when it can be rejected

CPR Pt 35. The claimant claimed damages for breach of contract in respect of gastric illness that was alleged to have been caused by contaminated food or liquid whilst staying at a hotel in Turkey. The claim was dismissed. Expert evidence was adduced on behalf of the claimant from a consultant microbiologist. The defendant did not submit their own expert report. The claimant's expert's report was very short. It was "*minimalist*". It was also uncontroverted, i.e. it was the only evidence on causation. The expert was not called to give oral evidence, nor were they cross-examined. Nor did the defendant call any evidence to challenge the expert's evidence, nor did they seek to undermine its factual basis through cross-examination of the claimant, his wife, or the expert. The question was, in such circumstances, was the court bound to accept the expert's conclusions or could it reject them if it was dissatisfied with the expert's reasoning? **Held**, while there was no direct authority on this point, a court is always entitled to reject an expert report, even where it was uncontroverted, if it was "*literally, a bare ipse dixit*", i.e. an assertion with proof. An example of such a *bare ipse dixit* was a statement such as:

> *"In my opinion, on the balance of probabilities Peter Griffiths acquired his gastric illnesses following the consumption of contaminated food or fluid from the hotel."* (See para.33.)

However, where an expert report is uncontroverted the court cannot subject it to

> *"[33] ... the same kind of analysis and critique as if it was evaluating a controverted or contested report, where it had*

to decide the weight of the report in order to decide whether it was to be preferred to other, controverting evidence such as an expert on the other side or competing factual evidence. Once a report is truly uncontroverted, that role of the court falls away. All the court needs to do is decide whether the report fulfils certain minimum standards which any expert report must satisfy if it is to be accepted at all."

The minimum standards applicable are those set out in CPR PD 35 para.3, which sets out the form and content of the expert's report. An expert's report must substantially satisfy the criteria in that paragraph of the Practice Direction for it to pass the threshold for acceptance as evidence (see paras 34–35). Furthermore, Martin Spencer J went on to state:

"[36] It is, in my judgment, of significance that the Practice Direction goes not just to the form, but also the content, of an expert's report. Despite this, it is no part of the Practice Direction that an expert, in providing a summary of the conclusions reached, must set out the reasons for those conclusions and it would be harsh indeed for a court to find that, despite the terms of the Practice Direction, a report failed to meet the minimum standards required for the report to be accepted in evidence because it did not set out the reasoning leading to the conclusions. In my judgment, the law does not so require. Of course, a failure to set out the reasoning might diminish the weight to be attached to the report but, as I have stated, at this stage the weight to be attached to the report is not a consideration: that only arises once the report is controverted. It may be that, had the Defendant served controverting evidence, [the claimant's expert] would have expanded upon his reasoning, for example in a meeting of experts, and such reasoning would have found its way into a joint statement. As it turned out, that step never became necessary because the evidence ... stood alone. Nor did the Defendant seek to challenge the reasoning that might have lain behind [the claimant's expert's] conclusions by calling for him to be cross-examined, as it had every right to do. In those circumstances, the court must assume that there is some reasoning which lies behind the conclusion which has been reached and summarised, and that this reasoning is not challenged."

Coopers Payen Ltd v Southampton Container Terminal Ltd [2003] EWCA Civ 1223; [2004] 1 Lloyds Rep. 331, ***Kennedy v Cordia (Services) LLP*** [2016] UKSC 6; [2016] 1 W.L.R. 597, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.35.0.3.)

Glover v Barker [2020] EWCA Civ 1112, 21 August 2020, unrep. (Patten, Moylan, Newey LJJ)

Litigant friend – liability for other party costs

Senior Courts Act 1981 s.51, CPR Pt 21. The Court of Appeal considered the question whether a litigation friend could be held liable for the costs of proceedings. Having reviewed a range of authorities on the power to order costs under s.51 of the Senior Courts Act 1981 and the pre-CPR approach to such orders, it held that in the present case costs orders should not be made against the defendant's litigation friend. In the light of the review of the law and authorities, it summarised the approach to costs orders against litigation friends as follows,

"[64] ... i) ... where a litigation friend has not previously given an undertaking to pay the costs at issue, the power to make an order for costs against a litigation friend derives exclusively from section 51 of the 1981 Act;

ii) When deciding whether an order should be made against a litigation friend under section 51, the 'ultimate question' is 'whether in all the circumstances it is just to make the order';

iii) It will typically be just to order a claimant's litigation friend to pay costs if such an order would have been made against the claimant himself had he not been a child or protected party, but it remains the case that the Court is exercising a discretion and entitled have regard to the particular circumstances;

iv) There is no presumption that a defendant's litigation friend should bear costs which the defendant would have been ordered to pay if not a child or protected party. That the litigation friend controlled the defence of a claim which succeeded will not of itself generally make it just to make an adverse costs order against the litigation friend. Factors that might, depending on the specific facts, be thought to justify such an order include bad faith, improper or unreasonable behaviour and prospect of personal benefit. If a director causes his company to litigate 'solely or substantially for his own benefit' (to quote Lord Brown in Dymocks), that may point towards a costs order against him. The fact that a litigation friend stands to gain a substantial personal benefit must also, I think, be capable of weighing in favour of a costs order against him."

Slaughter v Talbot 94 E.R. 839; (1739) Barnes 128, CtKB, ***Bamford v Bamford*** 67 E.R. 887; (1845) 5 Hare 203, ChD, ***Morgan v Morgan*** (1865) 11 Jur. N.S. 233, ChD, ***Beavan v Beavan*** (1862) 31 L.J.N.S. 166, HCtADM, ***Dyke v Stephens*** (1885) 30 Ch.D. 189, ChD, ***Vivian v Kennelly*** (1890) 63 L.T. 778, P, ***Hooper v Mackenzie***, The Times, 23 January 1901, P, ***Eady v Elsdon*** [1901] 2 K.B. 460, KBD, ***Slingsby v Attorney-General*** (1916) 32 T.L.R. 364, CA, ***Re PC (An Infant)*** [1961] Ch. 312; [1961] 2 W.L.R. 710, ***Re G (Minors)*** [1982] 1 W.L.R. 438; [1982] 2 All E.R. 32, CA, ***Aiden Shipping Co Ltd v Interbulk Ltd (The Vimeira) (No.2)*** [1986] A.C. 965; [1986] 2 W.L.R. 1051, HL, ***Northampton HA v Official Solicitor*** [1994] 1 F.L.R. 162; [1994] 2 F.C.R. 206 CA, ***Metalloy Supplies Ltd v MA (UK) Ltd*** [1996] EWCA Civ 671; [1997] 1 W.L.R. 1613, ***Hamilton v Al-Fayed*** (Costs) [2002] EWCA Civ 665; [2003] Q.B. 1175, ***Dymocks Franchise***

Systems (NSW) Pty Ltd v Todd (Costs) [2004] UKPC 39; [2004] 1 W.L.R. 2807, ***Travelers Insurance Co Ltd v XYZ*** [2019] UKSC 48; [2019] 1 W.L.R. 6075 , ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.21.5.1.)

■ **TBD (Owen Holland) Ltd v Simons** [2020] EWCA Civ 1182, 8 September 2020, unrep. (David Richards, Newey and Arnold LJJ)

Search orders – imaging – guidance

CPR r.25.1(1)(h). The Court of Appeal considered a number of issues in proceedings concerning an employment dispute. One particular issue was the correct interpretation of a search order to computer imaging, i.e. the taking of copies

> *"of the contents of storage media incorporated in or associated with computers [mobile phones and cloud storage], without affecting the data stored there"* (see para.177).

The Court of Appeal noted that a standard form imaging order had not been developed. It expressed the view that the Civil Procedure Rule Committee ought to develop one urgently (see para.181). Pending the introduction of a standard form order, the Court of Appeal gave the following guidance on appropriate safeguards to apply to such orders. First, the court, subject to one caveat, endorsed the approach set out by Mann J in ***CBS Butler Ltd v Brown*** (2013) at paras 23, 30 and 48. The caveat was that where keyword searches are to be used to search for relevant documents, then:

> *"[192] ... The keywords to be used in keyword searching must be agreed between the parties or determined by the court. It is unacceptable for claimants to be able unilaterally to decide what keywords to employ, since experience shows that, as in this case, parties all too often propose keywords that are far too all-embracing. Considerable care is required when selecting keywords, and often it will be necessary for an intelligent combination of keywords to be employed. Furthermore, even careful keyword selection may not necessarily be an answer to the problem posed by privileged documents."*

In addition,

> *"[193] ... the basic safeguard required in imaging orders is that, save in exceptional cases, the images should be kept in the safekeeping of the forensic computer expert, and not searched or inspected by anyone, until the return date. If there is to be any departure from this, it will require a very high degree of justification, and must be specifically and explicitly approved by the court. On the return date, consideration must be given to the timing and methodology of disclosure and inspection of documents captured in the images. The presumption should be that it will be for the defendant to give disclosure of such documents in the normal way, but this presumption may be departed from where there is sufficient justification. Even if the presumption is departed from, there should be no unilateral searching of the images by or on behalf of the claimant: the methodology of the search must be either agreed between the parties or approved by the court."*

The Court of Appeal also set out a detailed account of the history and development of search orders, concluding with a helpful summary of their purposes (see paras 127–175). ***CBS Butler Ltd v Brown*** [2013] EWHC 3944 (QB); [2013] Info. T.L.R. 263, ***A v B*** [2019] EWHC 2089 (Ch); [2019] 1 W.L.R. 5832, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.25.1.27.)

■ **PJSC Tatneft v Bogolyubov** [2020] EWHC 2437 (Comm), 11 September 2020, unrep. (Moulder J)

Legal advice privilege – application – foreign lawyers

CPR r.31.3. A question arose as to the applicability of legal advice privilege to foreign lawyers. In particular, whether it applied to in-house foreign lawyers. In this case the lawyers were working for the claimant's legal department in Russia. Having reviewed the authorities, Moulder J held:

> *"[57] Accordingly in my view legal advice privilege extends to communications with foreign lawyers whether or not they are "in-house" and thus employees of a particular company or organisation and the court will not enquire into how or why the foreign lawyer is regulated or what standards apply to the foreign lawyer under the local law. The only requirement in order for legal advice privilege to attach is that they should be acting in the capacity or function of a lawyer or as expressed by Lord Neuberger in Prudential at [19], it should relate to:*
>
> > *'communications passing between a client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice' [emphasis added]*
>
> *There is no additional requirement in my view that foreign lawyers should be 'appropriately qualified' or recognised or regulated as 'professional lawyers'."*

Lawrence v Campbell 62 E.R. 186; (1859) 4 Drew. 485, CtCh, ***Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No.2)*** [1972] 2 Q.B. 102; [1972] 2 W.L.R. 835, CA, ***Three Rivers DC v Bank of England (No.6)*** [2004] UKHL 48; [2005] 1 A.C. 610, ***Dadourian Group International Inc v Simms*** [2008] EWHC 1784 (Ch), unrep. ChD, ***R. (Prudential Plc) v Special Commissioner of Income Tax*** [2013] UKSC 1; [2013] 2 A.C. 185, ***R. (Jet2.com Ltd) v Civil Aviation Authority*** [2020] EWCA Civ 35; [2020] 2 W.L.R. 1215, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.31.3.7.)

■ **Municipio de Mariana v BHP Group Plc** [2020] EWHC 2471 (TCC), 18 September 2020, unrep. (Turner J)

Case management – complex trial – time to make permission to appeal application

CPR r.52.3(2)(a). Damages claims arose from the collapse of a dam in Brazil. The claims were resisted on both substantive and procedural grounds, including forum non conveniens and case management grounds. During a lengthy hearing in which detailed and expansive submissions were before the court, an issue was raised concerning the defendant's solvency. The judge, exercising his case management powers, concluded that it was not open to the claimants to raise the issue. Following the hearing's conclusion, the judge commenced writing his substantive judgment. The claimants sought permission to appeal from the case management decision concerning the defendant's solvency. They had not indicated to the judge that they were to do so. The judge noted that this was apparently done so that he would continue to write his substantive judgment in ignorance of the application (see para.38). The judge was first notified of the application three weeks after he commenced writing his judgment, and five days after the application was made. Ultimately, the judge was asked to reconsider his conclusion on the solvency point, which he declined to do. He further concluded that he should not hand down his substantive judgment prior to the Court of Appeal considering the permission to appeal application. In reaching his decision the judge set out what he considered would have been an appropriate course of action for the claimants to have taken. First, he noted that it was permissible for parties to seek permission to appeal from the Court of Appeal without having first raised the question of permission from the lower court. That they should seek such permission from the lower court had, however, a number of well-recognised advantages that were summarised at ***Civil Procedure 2020*** Vol.1 para.52.3.6 and were set out in ***Re T (A Child)*** (2002) at its para.13 (see paras 41–43). In particular the statement of proper practice in ***Re T (A Child)*** concerning permission to appeal applications in family proceedings was noted to be equally applicable to civil proceedings. That statement, at para.13 of ***Re T (A Child)*** set out that

> *"[13] ... as a matter of practice, when a judgment is handed down by a judge of the Family Division in this building, the aggrieved party should consider in advance of the hand down fixture whether or not an application for permission is to be made and if the decision is to apply, then the application should be made at the hand down. The judge thereby has an opportunity to give on the requisite form his or her reasons for rejecting the application, the statement of which may be of some value to this court if the permission application is subsequently renewed."*

The utility of such statements being before the Court of Appeal on the permission application was all the higher in particularly complex cases, such as the present. In respect of the further question whether the judge should hand down his substantive judgment prior to the permission to appeal application, and any potential appeal, being determined by the Court of Appeal, he held that his hand down should await the outcome of the appeal proceedings. In reaching that decision he noted that handing down his substantive judgment prior to the appeal process concluding could give rise to problems:

> *"[90] ... '**Appeal first: Judgment second***
>
> *If permission to appeal were to be given and the Court of Appeal were thereafter to reach the view that my decision was wrong then one option would be for the matter to be remitted back to me for specific consideration of the evidence relating to the financial status of Samarco so that my assessment of the same could be incorporated into, and given due consideration in, my judgment but only assuming that it had not already been handed down. In the absence of any suggestion of bias or systemic mishandling of the hearing, and in the light of the extravagant additional costs and delays which would be involved, I would not expect that the case would be remitted thereafter to another judge.*
>
> *If, on the other hand, the Court of Appeal were to refuse permission or find against the claimants on the appeal then there is no reason why I should not then promptly distribute my judgment in draft in the expectation of a hand down shortly thereafter.*
>
> *However, handing down the judgment before the appeal process has exhausted could give rise to problems.*
>
> ***Judgment first: Appeal second***
>
> *I cannot, in advance, hypothetically adjudicate in my judgment on whether (and, if so, in what respects) I would have reached different conclusions had I taken into account evidence said to undermine the financial position of Samarco. Having ruled that I would not entertain argument on the point during the course of the hearing, it would be wrong for me to speculate as to the impact such arguments would otherwise have had.*

If, therefore, the Court of Appeal were to allow the appeal, this Court would then face the invidious prospect of grafting onto an already perfected judgment an ex post facto reshuffling of the factual findings upon which the flawed original had been based. Bearing in mind the complexity of the issues with which I would have to deal, I would not find this to be an attractive proposition.'"

The proper approach was to await the Court of Appeal's decision and only then should the substantive judgment be handed down. ***Re T (A Child)*** [2002] EWCA Civ 1736; [2003] 1 F.L.R. 531, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.52.3.6.)

■ **Wolf Rock (Cornwall) Ltd v Langhelle** [2020] EWHC 2500 (Ch), 23 September 2020, unrep. (HHJ Matthews sitting as a judge of the High Court)

Relief from sanction – application to breaches on policy grounds

CPR r.3.9. Company winding-up proceedings were issued. Directions were given as to service of witness statements and evidence. No sanction for non-compliance was set out either within the applicable rules (Insolvency Rules 2016 r.7.16) or the court order. Nor was there a basis to imply a sanction. This was not a case where the "*implied sanction doctrine*" applied. HH Judge Matthews noted, however, that the authorities establish three distinct situations: (i) where a rule or court order provides for an express sanction; (ii) where a sanction can be properly implied; and (iii) where the court will treat a rule or court order as being analogous to one where a sanction would be applied even if a sanction cannot be implied. As he summarised the position established by the authorities,

"[13] ... although there are cases where the rule or order does not expressly state a sanction and the court by a process of interpretation nevertheless construes the rule or order as impliedly containing one, there are also cases where there is no intention to create a sanction but the law for policy reasons treats the case as one analogous to an application for relief from sanctions, and applies the Denton/Mitchell principles."

Djurberg v Richmond LBC (2019) and ***Mark v Universal Coatings and Services Ltd*** (2019) considered. While it may be rare, as Chief Master Marsh put it in ***Djurberg***, for a court to imply a sanction in circumstances where an express sanction could have been set out, that was not the case where a sanction arose not because there was an intention to create a sanction but because for policy reasons the case was treated as being analogous to one that required an application for relief from sanctions (see paras 26–28). Where a court has set a timetable for filing and serving evidence in preparation for a hearing and that timetable has not been met relief from sanctions is required. This is not because there was an intention to sanction, i.e. the implied sanction doctrine applied. This was because setting such a timetable in advance of a hearing required the court to treat, for policy reasons, breaches of it as being analogous to those situations where a sanction was imposed expressly. As such the same test as that set out in CPR r.3.9 applied (see para.35). The ***Mitchell*** and ***Denton*** test thus applied. ***Sayers v Clarke Walker*** [2002] EWCA Civ 645; [2002] 1 W.L.R. 3095, ***Robert v Momentum Services Ltd*** [2003] EWCA Civ 299; [2003] 1 W.L.R. 1577, ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795, ***Baho v Meerza*** [2014] EWCA Civ 669; [2014] 4 Costs L.R. 620, ***Altomart Ltd v Salford Estates (No.2) Ltd*** [2014] EWCA Civ 1408; [2015] 1 W.L.R. 1825, ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3296, ***Djurberg v Richmond LBC*** [2019] EWHC 3342 (Ch); [2020] 2 All E.R. (Comm) 727, ***Mark v Universal Coatings and Services Ltd*** [2018] EWHC 3206 (QB); [2019] 1 W.L.R. 2376, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.3.9.15.)

■ **Oliver v Shaikh** [2020] EWHC 2658 (QB), 8 October 2020, unrep. (Nicklin J)

Contempt of court – new Pt 81 – sanctions

CPR rr.81.9, 81.10. The defendant was found to be in contempt of court in respect of 20 breaches of an injunction. The proceedings were adjourned in respect of the penalty to be imposed. The judge noted that the penalty phase of the proceedings was governed by the new CPR Pt 81, which came into force on 1 October 2020. He also noted that the approach to punishment for contempt, now contained in CPR r.81.9, was substantially unchanged from the prior rules (see para.14). He further noted that the new rules did not affect the prior authorities on the approach the court was to take to considering an appropriate penalty. It remained the case that the sanction was a matter for the court to determine: see ***Attorney General v Hislop*** (1991). The party bringing the application for contempt remains in a similar position to that of the prosecution in criminal proceedings, i.e. they are not to pursue the imposition of a particular sanction. Rather, they are to ensure that they confine their submissions to the "*circumstances and the consequences of the breach*" and to making the court aware of the relevant authorities (see para.16). Furthermore, the judge summarised, and applied, the principles applicable to the imposition of sanctions set out in ***Crystal Mews Ltd v Metterick*** (2006) as follows:

"[17] ...

i) The object of sanction imposed by the court is two-fold: (1) to punish the historic breach of the court's order by the contemnor; and, (2) to secure future compliance with the order. In my judgment, if those objects in any way conflict in terms of sanction, then the primary objective is to secure compliance.

ii) The sanctions available to the Court range from making no order, imposing an unlimited fine or the imposition of a sentence of imprisonment of up to two years. The Court has the power to suspend any warrant for committal.

iii) As with any sentence of imprisonment, that sanction should only be imposed where the Court is satisfied that the contemnor's conduct is so serious that no other penalty is appropriate. It is a measure of last resort. A suspended prison sentence, equally, is still a prison sentence. It is not to be regarded as a lesser form of punishment. A sentence of imprisonment must not be imposed because the circumstances of the contemnor mean that he will be unable to pay a fine. A sentence of imprisonment may well be appropriate where there has been a serious and deliberate flouting of the Court's order.

iv) The Court's task when determining the appropriate sanction to assess is to assess culpability and harm. The Court will consider all the circumstances, but typical considerations when assessing the seriousness of the contemnor's breach are:

a) the harm caused to the person in respect of whose interests the injunction order was designed to protect by the breach;

b) whether the contemnor has acted under pressure from another;

c) whether the breach of the order was deliberate or unintentional; and

d) the degree of culpability of the contemnor.

v) Mitigation may come from:

a) an admission of breach - for example, admitting the breach immediately and not requiring the other party to go to the expense and trouble of proving a breach;

b) an admission or appreciation of the seriousness of the breach;

c) any cooperation by the contemnor to mitigate the consequences of the breach; and

d) genuine expression of remorse or a sincere apology to the court for his behaviour."

In terms of mitigating factors, the judge also stated that they,

"[18] . . . may also have a bearing on the Court's view as to the likely risk of repetition of breach and therefore the assessment of the degree to which the sanction needs to serve the objective of securing future compliance. If a contemnor, even belatedly, demonstrates a genuine insight into the seriousness of his prior conduct and its unlawfulness, then the Court may well be able to conclude that the contemnor has 'learned his lesson' and the risk of future breach is thereby diminished."

Finally, the judge noted at paras 19–21 of his judgment the guidance given by the Court of Appeal in ***McKendrick v Financial Conduct Authority*** (2019) at its paras 40–41 that: (i) the maximum sentence of two years imprisonment cannot be reserved for the very worst forms of contempt. But rather

"there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum.";

and (ii) in some cases it may be necessary to include in a sentence an element intended to encourage belated compliance. Where that is done, that element of the sentence can, in principle, be remitted if the contempt is purged subsequently. If that is the case, and a sentence embodies punishment for past breaches and an element intended to encourage belated compliance, the court may on an application under CPR r.81.10 reduce the sentence accordingly. ***Attorney General v Hislop*** [1991] 1 Q.B. 514; [1991] 2 W.L.R. 219, CA, ***Crystal Mews Ltd v Metterick*** [2006] EWHC 3087 (Ch), unrep., ChD, ***McKendrick v Financial Conduct Authority*** [2019] EWCA Civ 524; [2019] 4 W.L.R. 65, ref'd to. (***See Civil Procedure 2020*** Vol.1 at para.81.9.1.)

Practice Updates

STATUTORY INSTRUMENTS

CIVIL PROCEDURE (AMENDMENT NO.6) RULES 2020 (SI 2020/1228). In force from **27 November 2020**. The statutory instrument amends CPR r.81.3 to: make clear that a district judge may, where rules or a practice direction provide, determine a contempt application; and, to provide for a wider range of judges from the Queen's Bench Division to determine contempt applications. It also inserts a new CPR r.81.13(4A) to specify that the court's permission is always required to issue a writ of restitution in aid of a writ of possession.

TAKING CONTROL OF GOODS (AMENDMENT) (CORONAVIRUS) REGULATIONS 2020 (SI 2020/1002). In force from **29 September 2020**. The Regulations amend the Taking Control of Goods Regulations 2013 (SI 2013/1894), subject to their having no effect on enforcement action taken prior to their entry into force (See ***Civil Procedure 2020*** Vol.2 at para.9A-1234). The Regulations amend reg.52 of the 2013 Regulations to make provision for the minimum net unpaid rent in respect of commercial rent areas (Tribunals, Courts and Enforcement Act 2007 s.77(3)). They affect the amendment by substituting a new reg.52(2) and inserting a new reg.52(2A). In essence, the amendments provide that the minimum amount of unpaid rent required for the period from 29 September 2020 to 24 December 2020 (inclusive) is 276 days' rent, while for the period from 25 December 2020, it is 366 days' rent. The amendments also omit reference to the 2020 Regulations from the 2013 Regulation's definitions.

PRACTICE GUIDANCE

PROTOCOL FOR INSOLVENCY AND COMPANY WORK AT CENTRAL LONDON

On **1 September 2020** HH Judge Dight CBE and HH Judge Johns QC issued updated guidance on the approach the County Court at Central London will take in respect of insolvency and company work. It replaced a previous Protocol issued on 24 March 2020. The Protocol provides information on listing remote hearings, on filing documents with the court, on applications to be considered on the papers and those that may be listed for hearing in a court room. The Protocol is reproduced below.

PROTOCOL FOR INSOLVENCY AND COMPANY WORK AT CENTRAL LONDON

1. *The protocol will apply from 7 September 2020 to insolvency and company work in the County Court at Central London. It deals with the bulk lists and some other work heard by Business & Property District Judges and replaces the protocol dated 24 March 2020.*
2. *Bankruptcy petitions will be listed for remote hearing. The current platforms are Skype for Business and BT MeetMe. For petitions by HMRC, there will be 15-minute time slots in each of which 2 petitions will be heard. For other petitions, there will be 30-minute time slots and only one petition will be heard in each. The certificate of continuing debt and of compliance with Rule 10.23 of the Insolvency Rules 2016 should be sent to RCJBankCLCCDJHearings@justice.gov.uk.*
3. *Other creditors intending to appear on the hearing of a petition must give notice in accordance with r.7.14 of the Insolvency Rules 2016 and should make a request by email to RCJBankCLCCDJHearings@justice.gov.uk to be joined to the remote hearing.*
4. *Claims for extension of time to register company charges will continue to be listed for the purpose of the Judge considering the claim on paper. There will be no attendance. The Court will order a hearing only where, on considering the claim on paper, it considers it necessary to do so. The requirement to produce the original charge is waived in this period and evidence of solvency will be accepted by email to RCJCompGenCLCC@justice.gov.uk.*
5. *Claims for the restoration of companies to the register will be listed for the purpose of the Judge considering the claim on paper. There will be no attendance. The Court will order a hearing only where, on considering the claim on paper, it considers it necessary to do so.*
6. *Public examinations will be listed for a face to face hearing in a courtroom with Covid-19 precautions.*
7. *Insolvency applications will be considered in the first instance on paper and standard directions given where possible.*
8. *The most common company applications, being for rectification of the companies register and to extend the term of an administration, will be listed for remote hearing. The current platform is BT MeetMe.*

9. *HMRC will supply to other parties the link for Skype hearings of HMRC petitions. For other remote hearings, parties will be requested in advance of the hearing to supply to the Court their email or telephone number for the purposes of being linked to the remote hearing.*
10. *Before all remote hearings except for those in the bulk petition lists, the Court will also request the filing of a bookmarked, paginated, searchable electronic pdf bundle. For the remote hearing to be effective, it is imperative that this request is complied with.*

HHJ DIGHT CBE HHJ JOHNS QC 1 September 2020

CONSULTATIONS AND WORKING PARTIES

CIVIL JUSTICE COUNCIL – PRE-ACTION PROTOCOL REVIEW

On **27 October 2020** the Civil Justice Council launched a formal review of the operation of the Pre-Action Protocols. Further to that review it is running an online survey until 18 December 2020. Information about the review is available at: *https://www.judiciary.uk/announcements/civil-justice-council-launches-review-of-pre-action-protocols/* [Accessed 3 November 2020]. The survey link is available at: *https://www.surveymonkey.co.uk/r/CJCPAPSURVEY* [Accessed 3 November 2020]. The Review's draft terms of reference are as follows:

CJC Pre-action Protocol Review Provisional Terms of Reference

1. *What amendments to the PAPs, or associated guidance to LIPs, would be desirable to draw litigants' attention to the effects of Jet2 Holidays Limited v Hughes & Hughes [2019] EWCA Civ 1858?*
2. *Are there any PAPs that are not fulfilling the purposes of PAPs as originally envisioned by Lord Woolf and/or the purposes currently set out in CPR PD 18 (sic)? What function should PAPs perform in the 2020s?*
3. *Are there major inconsistencies between PAPs and are these justified by the differences in the litigation to which they relate?*
4. *Are the "soft sanctions" for non-compliance with voluntary pre-action protocols – case management directions and costs orders – being regularly and consistently applied?*
5. *Should all PAPs be mandatory? Should any PAPs be mandatory? What should the sanctions for non-compliance be?*
6. *Are any PAPS overly technical or burdensome to litigants and can they be streamlined?*
7. *Are any PAPs lacking key steps that ought to be required of parties, or prohibit initiatives that should be allowed?*
8. *Are PAPs a mechanism for de facto compulsory ADR prior to commencement of litigation? Should they be?*
9. *What are the ratios of cases settled at the PAP stage compared to post issue mediation?*
10. *Should there be any changes to PAPs as a result of the HMCTS reform programme and the digitisation of the civil justice system generally? To what extent are PAPs already online? Should there be further digitalisation of PAP steps and guidance?*

Reference to CPR PD 18 in para.2 may be meant to refer to the Practice Direction on Pre-Action Conduct. Subscribers are encouraged to respond to the consultation.

DISCLOSURE PILOT SCHEME UPDATE

On **22 September 2020**, the Disclosure Working Group, having considered the third interim review of the Disclosure Pilot Scheme, issued a revised version of PD 51U and a simplified Disclosure Review Document. The revised documents have been submitted to the Civil Procedure Rule Committee for consideration. They are available at: *https://www.judiciary.uk/announcements/update-on-the-operation-of-the-disclosure-pilot-scheme-disclosure-pilot/* [Accessed 3 November 2020].

THE WITNESS EVIDENCE WORKING GROUP

On **22 October 2020**, the Witness Evidence Group's report and recommendations were endorsed by the Business and Property Courts Board. As a consequence the Group's recommendations, and particularly its draft Practice Direction 57AC and Statement of Best Practice for witness statements, will now be considered by the Civil Procedure Rule Committee in December 2020. The Working Group invites comments on the draft Practice Direction and Best Practice Statement. Contact details are available at: *https://www.judiciary.uk/announcements/the-witness-evidence-working-group/* [Accessed 3 November 2020].

CORONAVIRUS GUIDANCE UPDATE

GENERAL GUIDANCE

The Coronavirus pandemic continues to affect the operation of the civil courts. Given the Government's announcement of a new national lockdown as from 4 November 2020, 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 3 November 2020].

UNITED KINGDOM SUPREME COURT GUIDANCE

In **September 2020**, Lord Reed issued updated guidance for the Michaelmas Term for the UK Supreme Court. The guidance, which explains that the Supreme Court's Practice Directions are to be read in the light of it, covers information on access to the Registry, filing hearing papers, the court's approach to procedural time limits set out in the Supreme Court Rules, applications, hearings, judgments and costs. It is available at: *https://www.supremecourt.uk/docs/covid-practice-note.pdf* [Accessed 3 November 2020]. Further updates ought to be available at: *https://www.supremecourt.uk/news/arrangements-during-the-coronavirus-pandemic.html* [Accessed 3 November 2020].

QUEEN'S BENCH DIVISION GENERAL, MEDIA AND COMMUNICATIONS GUIDANCE

On **4 November 2020**, court user guidance was issued for the Queen's Bench Division. The guidance covers: urgent interim applications; the listing of hearings; the manner in which hearings are to take place; fee payment; and guidance on preparing electronic bundles for hearings. It replaces guidance previously issued on 29 September 2020.

ROYAL COURTS OF JUSTICE FEES GUIDANCE

On **28 September 2020**, updated Fees Guidance applicable to the Royal Courts of Justice (RCJ) was issued by HMCTS. The new guidance makes provision for court fees to be issued at the RCJ by credit or debit card over the phone or via email. On **4 November 2020** further guidance was issued setting out that the RCJ counter service was suspended as from 9 November 2020. It further elaborated means by which court fees can be paid via credit or debit card over the phone or via email, by CE-File, by Account, or by cheque.

ACADEMY OF EXPERTS – REMOTE HEARING GUIDANCE

On **2 September 2020**, the Judicial Committee of the Academy of Experts issued guidance for expert witnesses on the giving of evidence remotely. It provides practical guidance on preparation of reports for remote hearings, the use of documents at such hearings. It also sets out a number of practical and technical issues for consideration before taking part in a remote hearing, as well as guidance on how to take part in a remote hearing. The guidance is available at: *https://academyofexperts.org/wpcms/wp-content/uploads/2020/09/Guidelines-on-Remote-Evidence.pdf* [Accessed 3 November 2020].

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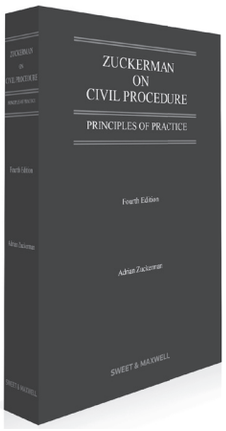
- The Disclosure Pilot in the Business and Property Courts.
- Revisions to the CPR, including Parts 36, 39 and 52.

Notable cases include: *Denton v TH White Ltd, Tchenguiz v Director of the Serious Fraud Office, Coventry v Lawrence, R (Haralambous) v St Albans Crown Court, Barton v Wright Hassall LLP and Cameron v Liverpool Victoria Insurance Co Ltd.*

The foreword to the 4th Edition is written by the Rt. Hon. Lord Briggs of Westbourne, Justice of the Supreme Court.



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EDITOR: **Dr J. Sorabji,** Barrister, 9 St John Street
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