CIVIL PROCEDURE NEWS

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Lancaster v Peacock [2020] EWHC 1231 (Ch), 28 Apr 2020, unrep. (Fancourt J, Master Kaye)

Multi-party action – approach to sampling claims

In two separate multi-party claims, the first with some 123 claimants, the second with 33 claimants, an issue arose concerning which claimants ought to be chosen as sample claimants. Fancourt J sitting with Master Kaye gave the following guidance, which is equally applicable to sampling or the selection of test cases where Group Litigation Orders have been made:

> *"[2] The purpose of taking sample claimants is twofold. First, to ensure that issues that are common to all the claimants' claims can be decided in such a way as to bind them all; and, second, to decide other factual and legal issues where the decision will not necessarily bind other claimants but is likely to give a very clear indication of the way that their cases too will be decided if tried, with the expected consequence that the parties will then be able to settle the remaining claims.*
>
> *[3] It is not, of course, necessary to have very many sample claimants in order to decide common issues. The purpose of a broader selection of sample claimants, beyond what is needed to try the common issues, is to generate sufficiently broad guidance for the likely disposal of all the other claims, whose particular facts will vary, while at the same time not overcomplicating or encumbering or significantly adding to the cost of the trial."*

(See ***Civil Procedure 2020*** Vol.1 at para.19.5.1.)

Owners of the Gravity Highway v Owners of the Maritime Maisie [2020] EWHC 1697 (Comm), 8 July 2020, unrep. (Butcher J)

Further information – non-compliance – test

CPR Pt 18. Proceedings arose in respect of a collision between two ships in the Korea Straits. An issue arose as to whether requests for further information had been complied with properly. Butcher J considered the proper approach under the CPR to assessing whether there has been compliance. Having considered the leading pre-CPR authority, ***QPS Consultants Ltd v Kruger Tissue (Manufacturing) Ltd*** (1999), and a number of post-CPR authorities, he summarised the approach as follows, at para.33:

> *"[33] ... (1) In assessing whether there has been compliance with an unless order for the provision of further information the Court will consider whether the information is plainly incomplete or insufficient given the terms of the order as to the information to be provided, including the terms of any request which it has been ordered should be answered. The further information will be plainly incomplete or insufficient if it could not reasonably be thought to be complete and sufficient.*
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> *(2) In examining completeness and sufficiency, the Court is not concerned with the truth of the answers or with their logical coherence unless any lack of coherence goes to the completeness or sufficiency of the response.*
>
> *(3) If there is non-compliance with an unless order for further information, then the sanction will take effect unless there is relief from it. In considering relief from sanction, amongst the other matters which will be taken into account, are the matters which were, in the pre-CPR context of QPS Consultants, regarded as going to the exercise of the discretion as to whether a sanction should be imposed. These will include whether the further information taken as a whole falls significantly short of what is required, and that this will depend in part 'on the number and proportion of the inadequate replies, in part upon the quality of those replies (including whether their inadequacies were due to deliberate obstructiveness, incompetence or whatever), and in part upon their importance to the overall litigation'."*

QPS Consultants Ltd v Kruger Tissue (Manufacturing) Ltd [1999] C.P.L.R. 710; [1999] B.L.R. 366, CA, ***Marcan Shipping (London) Ltd v Kefalas*** [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864, CA, ***Re Bankside Hotels Ltd*** [2014] EWHC 4440 (Ch), unrep., ***Griffith v Gourgey*** [2015] EWHC 1080 (Ch), unrep., ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.18.1.14.)

■ **National Tourism Council of Qatar v Mehdiyev** [2020] EWHC 2638 (Ch), 28 September 2020, unrep. (Deputy Master Hansen)

Non-compliance with mandatory order – order requiring act to be done by third party

CPR r.70.2A(2), inherent jurisdiction. An application to set aside a judgment in default was granted subject to conditions of security for costs and payment of past costs. The defendant was also ordered to provide proof of his identity, to allow the claimant to enforce and/or to facilitate enforcement in Azerbaijan (of which the defendant was a national). The defendant did not comply with the conditions imposed further to the decision of 28 September 2020 (***National Tourism Council of Qatar v Mehdiyev*** (2020)) or provide any identity documents as ordered. The claimant subsequently applied, by application dated 21 October 2020, under CPR r.70.2A and the court's inherent jurisdiction for an order that the defendant's former solicitor was ordered to provide the relevant identity documents from their files. On the papers and without a hearing the order was granted. (See ***Civil Procedure 2020*** Vol.1 at para.70.2A.1.)

■ **Diriye v Bojaj** [2020] EWCA Civ 1400, 4 November 2020, unrep. (Coulson, Nicola Davies, Rose LJJ)

Deemed service – signed for first class post

CPR r.6.26. A mini-cab driver issued a claim for damages arising from a road traffic accident. An issue arose concerning service of a reply to a defence, which the claimant was required to file and serve by a specified date further to an unless order. An issue arose whether the reply was deemed to be served in time. The reply was posted using Royal Mail's 'Signed For 1st Class' service, which specifies that "*items will only be delivered to an addressee or their representative once a signature or similar proof of delivery has been gained.*" The service also states that it "*aims*" to deliver post under it on the "*next working day after it has been posted*". On a second appeal to the Court of Appeal, the court was asked to determine whether this form of service

> *"is covered by the description 'First class post (or other service which provides for delivery on the next business day)' which forms part of the deemed service provisions of CPR 6.26."*

Held, service by this method was first class service (see paras 33–46). It was one method by which Royal Mail provided first class service. Alternatively, even if it were not first class service it was "*another service providing delivery on the next business day*", as provided for by CPR r.6.26. It was also wrong in principle to attempt to differentiate between the two forms of first class service provided by Royal Mail on the basis of when service was actually effected. Any such approach would be inconsistent with both the concept of "*deemed service*" and the decisions in ***Godwin v Swindon BC*** (2001), ***Anderton v Clwyd CC (No.2)*** (2002). Additionally, to hold otherwise was: contrary to the wording of CPR r.6.26, which does not refer to or recognise the concept of documents having to be "*signed for*"; to hold that a solicitor should be in a worse position for using this method of first class service than the normal one where delivery did not need to be signed for would be irrational; to hold that the deemed service provisions did not apply to this method of first class service would enable an unscrupulous intended recipient to evade service by refusing to sign for a document. ***Godwin v Swindon BC*** [2001] EWCA Civ 1478; [2002] 1 W.L.R. 997, ***Anderton v Clwyd CC (No.2)*** [2002] EWCA Civ 933; [2002] 1 W.L.R. 3174, ***Kennedy v National Trust for Scotland*** [2019] EWCA Civ 648; [2020] Q.B. 663, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at paras 6.14.1, 6.14.2, 6.20.2, 6.26.1.)

■ **Sheeran v Chokri** [2020] EWHC 2806 (Ch), 28 October 2020, unrep. (Master Kaye)

Challenge to request for further information

CPR PD 18 para.4. A dispute arose concerning an alleged copyright infringement. The issue concerned compliance by the claimants with a CPR Pt 18 request, to which they had not responded. Nor had they objected to it. The defendants obtained an order, dated 27 April 2020, requiring the claimants to comply with the request. The claimants' response to the request was in the form that the defendants were "*not entitled*" to a substantive response. The defendants applied for an unless order concerning compliance with the request. At the hearing of the application the claimants argued that the request was not a proper CPR Pt 18 request as it was not concise or strictly confined to matters that were reasonably necessary and proportionate to enable the defendants to understand the case they had to meet. This objection had not been raised previously. As the Master noted the objection had not been raised within the time limit specified in CPR PD 18 para.4, i.e. within the time stated in the request for a response to it to be given. **Held**, the claimants were in breach of the 27 April 2020 order. A "*not entitled*" response to a request was not a "*complete and sufficient response*" to a Pt 18 request. Where a party wished to contest an entitlement to further information, they must do so initially in the time frame set out within the Pt 18 request. Were they to fail to do so the requesting party is entitled "*to operate the mechanism in PD18.4 and 5 and seek to obtain an order without notice and on paper*" (see para.47): ***Fearis v Davies*** (1989) remained good law (see para.62). ***Fearis v Davies*** [1989] 1 F.S.R. 555, CA, ***QPS Consultants Ltd v Kruger Tissue (Manufacturing) Ltd*** [1999] C.P.L.R. 710; [1999] B.L.R. 366, CA, ***Re Bankside Hotels Ltd*** [2014] EWHC 4440 (Ch), unrep., ***Griffith v Gourgey*** [2015] EWHC 1080 (Ch), unrep., ***Owners of the Gravity Highway and the Owners of the Maritime Maisie*** [2020] EWHC 1697 (Comm), ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.18.1.14.)

- **LM Associates Ltd v Gibbeson** [2020] EWCA Civ 1460, 6 November 2020, unrep. (Henderson, Flaux, and Asplin LJJ)

Refusal of permission to appeal – no right to oral reconsideration – totally without merit – Court of Appeal jurisdiction

CPR r.52.4(3). The Court of Appeal, at paras 46–50, held that it had no jurisdiction to consider an appeal from a High Court decision where the High Court refused an application for permission to appeal from the County Court, had certified the application as totally without merit and refused an oral reconsideration of the order under CPR r.52.4(3). It further explained that the order that refused the oral reconsideration was deemed to form part of the High Court's order refusing permission to appeal: it did not form an independent order: ***Clerk v Perks*** (2001) distinguished. ***Clerk v Perks*** [2001] EWCA Civ 1228; [2001] 2 Lloyd's Rep. 431, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.52.2.4.)

- **XXX v Camden LBC** [2020] EWCA Civ 1468; [2020] 4 W.L.R. 165, 11 November 2020 (McCombe, Moylan, and Dingemans LJJ)

Approach to anonymity

CPR 39.2. In judicial review proceedings an issue arose as to the correct approach to take concerning party anonymisation and redaction of personal information from judgments. The Court of Appeal considered the two-stage approach derived from ***Kalma v African Minerals Ltd*** (2018), ***Suez Fortune Investments v Talbot Underwriting Ltd*** (2018). That approach provided that a court assessing such an application first had to consider a threshold test to determine whether the grant of anonymity was necessary; and secondly, if that threshold was passed, it had then to go on to assess a balancing test, which balanced the interests of the parties and the public interest in open justice. **Held**, the approach derived from ***Kalma*** and ***Suez Fortune Investments*** was deprecated. As Dingemans LJ explained (at para.24):

> *"[24] ... In my judgment it is not helpful to require judges, when confronted with applications for anonymity under CPR 39.2(4) (which often have to be determined at short notice) to ask first whether a threshold of 'necessity' has been passed before going on to carry out a balancing exercise of competing interests to determine whether an order for anonymity is 'necessary' under CPR 39.2(4). This is because such a two stage test has the potential to create confusion by using 'necessity' and 'necessary' in different ways at different parts of the test. I agree that a Court may undertake an assessment of whether the application stands any prospect of success before carrying out a balancing exercise, but I do not consider that it is necessary to do so, nor do I consider that any failure to explain in the judgment that any such exercise has been carried out is a ground for setting aside the determination of the judge at first instance. In my judgment, when confronted with an application for anonymity pursuant to CPR 39.2(4), the Court should have regard to the relevant principles set out in the authorities referred to in paragraphs 17 to 21 above, and carry out the balancing exercise of the relevant interests under CPR 39.2 to determine whether 'non-disclosure is necessary to secure the proper administration of justice and in order to protect the interests of that party or witness'."*

The principles referred to in paras 17–21 of Dingemans LJ's judgment were as follows:

> *"[17] CPR 39.2 reflects the fundamental rule of the common law that proceedings must he heard in public, subject to certain specified classes of exceptions, see Scott v Scott [1913] AC 417. In Scott v Scott, which concerned the publication of a transcript containing details about whether a marriage had been consummated, it was stated that:*
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> > *'The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect'.*
>
> *The passage of time has not undermined the importance of open justice: 'The principle of open justice is one of the most precious in our law', see R(C) v Justice Secretary [2016] UKSC 2; [2016] 1 WLR 44.*
>
> *[18] In addition to the exceptions set out in CPR 39.2(3) there are also automatic statutory reporting restrictions, which cover, for example, victims of sexual offences, family law proceedings and the identities of children in certain situations. As Lord Steyn recorded in In Re S (A Child) [2004] UKHL 47; [2005] 1 AC 593 at paragraph 20 'the Court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice'. In R v Legal Aid Board, ex parte Kaim Todner [1999] QB 966 at 977 Lord Woolf MR explained why courts needed to be careful to prevent extensions of anonymity by analogy saying:*
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> > *'the need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary*

because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted ... with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely ...'.

[19] CPR 39.4 recognises that orders for anonymity of parties and witnesses may be made. The common law has long recognised a duty of fairness towards parties and persons called to give evidence, see In Re Officer L [2007] UKHL 36; [2007] 1 WLR 2135, and balanced that against the public interest in open justice in specific cases. Under the common law test subjective fears, even if not based on facts, can be taken into account and balanced against the principle of open justice. This is particularly so if the fears have adverse impacts on health, see In Re Officer L at paragraph 22 and Adebolado v Ministry of Justice [2017] EWHC 3568 (QB) at paragraph 30.

[20] With the advent of the Human Rights Act 1998 the Courts have also been able to give effect to the rights of parties and witnesses who may be at 'real and immediate risk of death' or a real risk of inhuman or degrading treatment if their identity is disclosed, engaging articles 2 and 3 of the ECHR. A person's private life may also be affected by court proceedings, engaging article 8 of the ECHR. The common law rights of the public and press to know about court proceedings are also protected by article 10 of the ECHR, see Yalland v Secretary of State for Exiting the European Union [2017] EWHC 629 (Admin) at paragraph 20. The importance of the press interest in the names of parties was explained by Lord Rodger in Re Guardian News and Media Ltd [2010] UKSC 1; [2010] 2 AC 697 at 723. At paragraph 22 of In re S (a child) the House of Lords affirmed that the inherent jurisdiction of the High Court to restrain publicity was the vehicle by which the Court could balance competing rights under articles 8 and 10 of the ECHR.

[21] Lord Steyn addressed the way in which competing human rights should be balanced in In re S (A child) at paragraph 17. He stated that when considering such a balancing exercise four principles could be identified.

'First, neither article has as such precedence over the other. Second, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test'.

It is also necessary to have particular regard to: the importance of freedom of expression protected by article 10 of the ECHR; the extent to which material has, or is about, to become public; the public interest in publishing the material; and any privacy code; pursuant to section 12 of the Human Rights Act 1998. Many of these principles were rehearsed by Haddon-Cave LJ in paragraphs 20 to 29 of Moss v Information Commissioner [2020] EWCA Civ 580, a case in which issues not dissimilar to those in this case arose."

Scott v Scott [1913] A.C. 417, HL, ***R. v Legal Aid Board Ex p. Kaim Todner*** [1999] Q.B. 966; [1998] 3 W.L.R. 925, CA, ***Re S (A Child) (Identification: Restrictions on Publication)*** [2004] UKHL 47; [2005] 1 A.C. 593, ***Re Officer L*** [2007] UKHL 36; [2007] 1 W.L.R. 2135, ***Re Guardian News and Media Ltd*** [2010] UKSC 1; [2010] 2 A.C. 697, ***R. (C) v Justice Secretary*** [2016] UKSC 2; [2016] 1 W.L.R. 444, ***Adebolajo v Ministry of Justice*** [2017] EWHC 3568 (QB), unrep., ***R. (Yalland) v Secretary of State for Exiting the European Union*** [2017] EWHC 629 (Admin); [2017] A.C.D. 49, ***Kalma v African Minerals Ltd*** [2018] EWHC 120 (QB), unrep., ***Suez Fortune Investments v Talbot Underwriting Ltd*** [2018] EWHC 2929 (Comm), unrep., ***R. (Gullu) v Hillingdon LBC*** [2019] EWCA Civ 692; [2019] P.T.S.R. 1738, ***Moss v Information Commissioner*** [2020] EWCA Civ 580, unrep., ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.39.2.14.)

- **Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs Commissioners** [2020] UKSC 47; [2020] 3 W.L.R. 1369, 20 November 2020 (Lord Reed PSC, Lord Hodge DPSC, Lords Carnwath, Lloyd-Jones, Briggs, Sales, Hamblen)

Limitation period – mistake of law – when discoverable

Limitation Act 1980 s.32(1)(c). Restitutionary claims were brought concerning tax payments on dividends received from non-UK resident subsidiaries by UK-resident companies. The claims were subject to a Group Litigation Order. Test claims under the GLO considered the question when the limitation period for restitutionary claims based on a mistake of law began to run. The normal limitation period for such claims is six years from the date on which the money subject to the claim was paid: Limitation Act 1980 s.32. Exceptionally, the limitation period may run from the date at which the mistake of law was "*discovered*": Limitation Act 1980 s.32(1)(c). The UKSC considered two questions concerning this issue: first, whether s.32(1)(c) applied to mistakes of law; and, secondly, what was the test for discoverability under that section of the 1980 Act. **Held**, by a majority, s.32(1)(c) did apply to mistakes of law: ***Kleinwort Benson v Lincoln City Council*** (1999) applied, notwithstanding the fact that its reasoning was not convincing (see paras 148–161, 220–221 and 242–243). On the second, the majority held that the House of Lords decision in ***Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners*** (2006) was wrongly decided and should therefore be overruled. The

correct approach to the question of discoverability, which was a fact-sensitive issue and more nuanced than the more mechanical approach of ***Deutsche Morgan Grenfell*** (see para.212), was whether the claimant could, with reasonable diligence, discover their mistake in the sense of recognising that a worthwhile claim arises (see paras 193 and 209). As Lord Reed and Lord Hodge, with whom Lords Lloyd-Jones and Hamblen agreed, put it at paras 209–213:

> *"[209] It remains to consider whether the test of discoverability suggested at para 193 above, taken together with the standard of 'reasonable diligence' discussed at para 203, provides an approach to the application of section 32(1) to mistakes of law which is likely to be reasonably practical and certain in its operation. To recap:*
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> > *(1) As was explained, the suggested test of discoverability is that a mistake of law is discoverable when the claimant knows, or could with reasonable diligence know, that he made such a mistake 'with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice and collecting evidence'; or, as Lord Brown put it in Deutsche Morgan Grenfell, he discovers or could with reasonable diligence discover his mistake in the sense of recognising that a worthwhile claim arises. We do not believe that there is any difference of substance between these formulations, each of which is helpful and casts light on the other.*
> >
> > *(2) The standard of reasonable diligence is how a person carrying on a business of the relevant kind would act, on the assumption that he desired to know whether or not he had made a mistake, if he had adequate but not unlimited staff and resources and was motivated by a reasonable but not excessive sense of urgency. The question is not whether the claimant should have discovered the mistake sooner, but whether he could with reasonable diligence have done so. The burden of proof is on the claimant. He must establish on the balance of probabilities that he could not have discovered the mistake without exceptional measures which he could not reasonably have been expected to take.*
>
> *[210] In practice, the application of that approach will depend on the circumstances of the case. For example, in cases where the claimant has made a payment on the basis of a mistaken understanding of the law which has resulted from ignorance, the mistake will normally have been discoverable immediately, by seeking legal advice. Section 32(1) only has effect where a mistake could not have been discovered at the time of the payment with the exercise of reasonable diligence. On the other hand, where the payment was made in reliance on a precedent that was subsequently overruled, or an understanding of the law that was later altered by a judicial decision, the question will be whether the claim was brought within the prescribed period beginning on the date when it was discoverable by the exercise of reasonable diligence that the basis of the payment was legally questionable, so as to give rise to a worthwhile claim to restitution. Depending on the circumstances, it may be difficult to identify a specific date, but doubtful cases can be resolved by bearing in mind that the burden of proof lies on the claimant to prove that his claim was brought within the prescribed limitation period.*
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> *[211] Clearly, where a payment was made in accordance with the law as it was then understood to be, the point in time at which the claimant could, with reasonable diligence, have discovered that the basis of the payment was legally questionable, so as to give rise to a worthwhile claim to restitution, will have to be established by evidence. The focus of that evidence is likely to be upon developments in legal understanding within the relevant category of claimants and their advisers, as explained in para 178 above. Thus, in the circumstances of the present case, Lord Walker referred in FII (SC) 1 [2012] 2 AC 33 (para 48 above) to there being a reasonable prospect that the limitation period could be deferred until the time when 'a well advised multi-national group based in the UK would have had good grounds for supposing that it had a valid claim to recover ACT levied contrary to EU law'. This point is considered in greater detail in para 255 below. Evidence in relation to matters of this kind may well include expert evidence concerning the state of understanding of the law within the relevant categories of professional advisers during the relevant period.*
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> *[212] It is true that this approach involves a more nuanced inquiry than a mechanical test based on the date on which an authoritative appellate judgment determined the point in issue. But it would be unduly pessimistic to conclude at this stage that it will prove to be unworkable in practice, or too uncertain in its operation to be acceptable."*

See further para.213. ***Kleinwort Benson v Lincoln City Council*** [1999] 2 A.C. 349; [1998] 3 W.L.R. 1095, HL, ***Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners*** [2006] UKHL 49; [2007] 1 A.C. 558, HL, ref'd to. (See ***Civil Procedure 2020*** Vol.2 at para.8-85.1.)

- **Varma v Atkinson** [2020] EWCA Civ 1602, 27 November 2020, unrep. (Lewison, Rose and Stuart-Smith LJJ)

Finding of contempt – mental element

CPR Pt 81. The Court of Appeal considered the relevance of whether an alleged contemnor realised that by failing to carry out certain acts they had breached a relevant court order in determining whether they were in contempt of court. **Held**, it was not necessary for an individual to know that their conduct amounted to a breach of a court order. All that

is necessary is that as a matter of law and fact the individual was in breach of the order. Thus all that is necessary for contempt proceedings to arise is for an individual to know the terms of a court order enjoining them from carrying out specific acts and for them then to act inconsistently with the terms of that order. Motive or intention to breach the order is irrelevant. On this issue the decision in ***Irtelli v Squatriti*** (1993), which was amongst other things inconsistent with prior authority, was wrong in law. As Rose LJ explained it:

> *"[52] . . . Arlidge, Eady & Smith on Contempt (5th ed) at para. 12-93 cites the judgment of Warrington J in Stancomb v Trowbridge UDC [1910] 2 Ch 190, 194. He expressed the principle as follows:*
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> > *'If a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction and is liable for process of contempt if he or it in fact does the act and it is no answer to say that the act was not contumacious in the sense that in doing it there was no direct intention to disobey the order.'*
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> *[53] Arlidge then lists a long line of authority confirming that principle; motive is immaterial to the question of liability. In para. 12-101, the learned authors refer to the case of Irtelli v Squatriti [1993] QB 83 as hinting at 'a degree of apparent coalescence between the requirements for mens rea in civil and criminal contempt'. In that case the defendants were injuncted from selling, disposing or otherwise dealing with a property of which they owned the freehold. They later executed a charge over the property in favour of another. At the first instance hearing they did not attend and were found liable for contempt. On appeal, the Court of Appeal discharged the order on the basis that 'it was impossible to conclude that the appellants had intentionally breached the injunction'. There are various unsatisfactory features about the judgments in Irtelli. The first, as Lewison LJ pointed out during argument, is that the record in the law report of counsel's submissions on behalf of the appellants indicates that he did not assert that they were not liable for contempt, but submitted rather that the breach of the order was 'merely technical'. Secondly, the court was not referred to the contrary authorities such as Stancomb or Knight v Clifton [1971] Ch 700. The court was, on the other hand, referred to Supply of Ready Mixed Concrete [1992] QB 213, a decision of the Court of Appeal which was later overturned on this point by the House of Lords: Director General of Fair Trading v Pioneer Concrete (UK) Ltd [1995] 1 AC 456 ('Pioneer').*
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> *[54] In my judgment Irtelli v Squatriti cannot stand in the light of the many earlier and later cases which establish that once knowledge of the order is proved, and once it is proved that the contemnor knew that he was doing or omitting to do certain things, then it is not necessary for the contemnor to know that his actions put him in breach of the order; it is enough that as a matter of fact and law, they do so put him in breach. In Pioneer, Lord Nolan (with whom Lord Mustill, Lord Slynn of Hadley and Lord Jauncy of Tullichettle agreed) quoted from the opinion of Lord Wilberforce in Heatons Transport (St Helens) Ltd. v Transport and General Workers' Union [1973] AC 15 to explain the policy behind the principle: (479G of Pioneer)*
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> > *'The view of Warrington J [in Stancomb] has thus acquired high authority. It is also the reasonable view, because the party in whose favour an order has been made is entitled to have it enforced, and also the effective administration of justice normally requires some penalty for disobedience to an order of a court if the disobedience is more than casual or accidental and unintentional.'"*

Stancomb v Trowbridge Urban DC [1910] 2 Ch. 190, ChD, ***Knight v Clifton*** [1971] Ch. 700; [1971] 2 W.L.R. 564, CA, ***Director General of Fair Trading v Pioneer Concrete (UK) Ltd*** [1995] 1 A.C. 456; [1994] 3 W.L.R. 1249, HL, ***Heatons Transport (St Helens) Ltd v Transport and General Workers' Union*** [1973] A.C. 15; [1973] 3 W.L.R. 431, HL, ***Irtelli v Squatriti*** [1993] Q.B. 83; [1992] 3 W.L.R. 218, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.2 at para.3C-17.)

- **Gray v Global Energy Horizons Corp** [2020] EWCA Civ 1668, 9 December 2020, unrep. (David Richards, Henderson and Rose LJJ)

Approach to permission to appeal on issues of fact

CPR r.52.3. In an appeal in litigation concerning allegations of breaches of fiduciary duty, Henderson LJ set out in obiter guidance, at paras 490–493, the approach to be taken to courts considering applications for permission to appeal on issues of fact of a trial judge. After noting that courts needed to be cautious in approaching such applications, he explained that in determining whether to grant permission to appeal on such issues a court should be guided by the principles applicable to an appellate court determining an appeal on such a basis. A putative appellant must also ensure that they "*anchor their case to those principles and explain which of them is engaged, and why, as regards each challenge* ...". The principles referred to are those summarised in ***Henderson v Foxworth Investments Ltd*** (2014) at para.67. ***Henderson v Foxworth Investments Ltd*** [2014] UKSC 41; [2014] 1 W.L.R. 2600, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.52.21.5.)

- **Libyan Investment Authority v King** [2020] EWCA Civ 1690, 14 December 2020, unrep. (Floyd, Arnold and Nugee LJJ)

Limitation period – amendment to plead new cause of action

CPR r.17.4(2). In October 2018 the claimant's pleaded case was struck out. However, the judge did not strike out the claim form in order to afford the claimants an opportunity to restate their claim. The claimants subsequently applied to amend their particulars of claim by way of setting out new claims. The new claims were, however, set out following the expiry of the limitation period. Thus the claimants sought to rely on CPR r.17.4. The Court of Appeal **held**, CPR r.17.4(2) could only be relied upon to permit an amendment to plead a new cause of action in those circumstances specified in the Limitation Act 1980 s.35(5)(a): see ***Goode v Martin*** (2001). As such it was necessary to determine the facts that were in issue at the time the application to amend was made. In a case where no facts were in issue because, as here, the particulars had all been struck out, no facts in issue could be considered for the purposes of CPR r.17.4(2). The approach that could have been taken when the pleaded case was struck out was that the claimant could have applied for permission at that time to amend their claim to add new claims. Assuming permission was granted the claimant could have sought permission to serve amended particulars of claim. The basis for a comparison under CPR r.17.4(2) could have been carried out by comparing the amended claim form with those in the previous claim form. ***Goode v Martin*** [2001] EWCA Civ 1899; [2002] 1 W.L.R. 1828, CA, ***Travis Perkins Trading Co Ltd v Caerphilly CBC*** [2014] EWHC 1498 (TCC); [2014] B.L.R. 465, ***Carr v Formation Group Plc*** [2018] EWHC 3575 (Ch), unrep., ***Samba Financial Group v Byers*** [2019] EWCA Civ 416; [2019] 4 W.L.R. 54, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at paras 17.4.1 and following.)

- **Re W (Children: Reopening/recusal)** [2020] EWCA Civ 1685, 15 December 2020, unrep. (King, Peter Jackson, Phillips LJJ)

Recusal for bias – notice to parties

CPR r.1.1(2)(a). In private law family proceedings, a district judge recused themselves on the basis of apparent bias. On appeal to the Court of Appeal, the court considered the approach to be taken by a judge in such circumstances. Peter Jackson LJ, with whom King and Phillips LJJ agreed, explained at para.39 that when a judge decides to recuse themselves, they are required to provide the parties with formal notice of their reasoning. In that way the parties can make an informed decision as to how they wish to proceed. (See ***Civil Procedure 2020*** Vol.1 at para.1.1.2.)

Practice Updates

STATUTORY INSTRUMENTS

European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525). In force from **31 December 2020**. Provides for appellate courts in the UK (Court of Appeal in England and Wales; Court of Session (Inner House), Court of Appeal of Northern Ireland), to depart from retained EU case law on the same basis as the UK Supreme Court can depart from its own previous decisions further to the ***Practice Statement (Judicial Precedent)*** [1966] 1 W.L.R. 123.

Public Health (Protection from Eviction) (Wales) (Coronavirus) Regulations 2020 (SI 2020/1490 (W.319)). In force from **11 December 2020** until **11 January 2021**. Provides a prohibition on attending a dwelling-house in Wales order to execute a writ or warrant of possession, a writ or warrant of restitution, or to deliver a notice of eviction. It also sets out various exceptions to the prohibition.

The Public Health (Protection from Eviction) (England) (Coronavirus) Regulations 2021 (SI 2021/15). In force from **11 January 2021** until **21 February 2021**. Maintains the prohibition on attending a dwelling-house in England order to execute a writ or warrant of possession, a writ or warrant of restitution, or to deliver a notice of eviction. It also sets out various exceptions to the prohibition.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 126th Update. This Practice Direction Update affected a number of amendments to CPR PD Update 107. The amendments are in force from **20 December 2020.** They amend a number of provisions of Update 107, which entered into force on 31 December 2020 and relate to the completion of the UK's withdrawal from the EU. Amendments are made to the transitional provision amendments in CPR Update 107 to Practice Direction 52D and to the Practice Direction – Applications for warrants under the Competition Act 1998. The amendments ensure Update 107's amendments are consistent with the provisions of the UK-EU withdrawal agreement. Further amendments

are made to the Practice Direction – Applications for warrants under the Competition Act 1998, including the omission of amendments contained in Update 107 to make provision for State Aid. Amendments are also made to provisions in Update 107 to substitute the current address for the Competition and Markets Authority in its update to Practice Direction 52D and to the PD – Competition Law (Claims relating to the application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998). Finally, it substituted reference to "*exit day*" with reference to "*IP completion day*" in Update 107's amendments to PD 31C – Disclosure and Inspection in relation to Competition Claims.

PRACTICE GUIDANCE

CHANCERY GUIDE. An updated version of the Chancery Division Guide was issued in **November 2020.** Its amendments include: the provision of new contact details in Ch.2; new guidance on remote hearings in Ch.14; and, a new chapter concerning the Insolvency and Companies Court, including information on the Temporary Practice Direction that supports the Insolvency Practice Direction.

LAW OFFICERS' ADVISORY NOTE

MEDIA ADVISORY NOTICE – EMBARGOED JUDGMENTS. On **15 October 2020** the Solicitor-General issued an advisory notice concerning the dissemination of draft judgments. The notice, while specifically aimed at the media, is of general importance as a reminder of the importance of maintaining confidentiality in such documents and the potential adverse consequences that may arise for breach of the restriction on dissemination. The notice is reprinted below.

Media advisory notice – embargoed judgments

The Solicitor General Rt. Hon Michael Ellis QC MP draws attention to the legal requirement not to publish, disseminate or retain material, including online, that has been obtained from embargoed court judgments.

Judgments subject to embargo are draft judgments handed down to parties in court proceedings in advance of those judgments being made public. The release of draft judgments to the parties plays an important role in ensuring that any inaccuracies or inappropriate material can be rectified before the judgment is made public. Embargoed judgments play an important role in the administration of justice.

The Solicitor General wishes to draw attention to Practice Direction 40E of the Civil Procedure Rules and the case of Baignet v Random House Group [2006] EWHC 1131 (Ch) which confirms that publication of an embargoed judgment, or the substance contained therein, may be viewed as a contempt of court.

Further, the Solicitor General emphasises that retention, use and/or further dissemination of an embargoed judgment, or its contents, even if no premature publication occurs, is capable of constituting contempt of court.

The Attorney General's Office will be monitoring purported breaches of embargoed judgments.

Editors, publishers and social media users should take legal advice to ensure they are in a position to fully comply with the obligations they are subject to under the Civil Procedure Rules PD 40E.

CORONAVIRUS GUIDANCE UPDATE

GENERAL GUIDANCE

The Coronavirus pandemic continues to affect the operation of the civil courts. Given the continuance of restrictions across the country, 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 6 January 2021].

In Detail

CIVIL PROCEDURE RULES – EU WITHDRAWAL AMENDMENTS

On 31 December 2020 the Implementation Period of the UK's withdrawal from the EU concluded. At that time a number of amendments were effected to the CPR.

The Amending Legislation

The amendments were generally brought into force by the Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 (SI 2019/521) (as amended by the Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020 (SI 2020/1493)) as from 31 December 2020. Various amendments were also effected to the Civil Procedure Practice Directions by CPR PD Update 107, as amended by CPR Update 126. Other relevant legislative amendments to the Civil Procedure Rules were also made further to:

- the Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provisions) (EU Exit) Regulations 2018 (SI 2018/1257) in respect of Pts 6, 34, 74 and 78;
- the European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1311) in respect of Pts 6, 34, 74 and 78;
- the Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019 (SI 2019/493) in respect of Pts 74;
- the Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93) in respect of Pts 30 and PD 52D;
- the Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019 (SI 2019/469) in respect of Pts 5, 8, 31, 32, and 78;
- the Private International Law (Implementation of Agreements) Act 2020 and the UK's accession in its own right to the Hague Choice of Court Convention 2005, which concerns service out of the jurisdiction under CPR r.6.33;
- the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, which provides the basis for the Court of Appeal to depart from retained EU case law on the same basis as the United Kingdom Supreme Court can depart from its previous decisions (Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234);

Overview of the Amendments

The amendments provide as follows:

- CPR Pt 5: minor amendment to omit r.5.4C(1b) and its cross-reference to mediation settlement agreements. This is subject to saving and transitional provisions, which will maintain the omitted rule in respect of mediations that commenced prior to 31 December 2020;
- CPR Pt 6, PD 6A and PD 6B: significant amendments are made in order to take account of the revocation of the EU Service Regulation (1393/2007) and the Taking of Evidence Regulation (1206/2001), the Judgments Regulation (1215/2012) and the non-application of the Brussels and Lugano Conventions. These changes have effected substantial revisions to Sections II, III and IV of Pt 6. Specific saving and transitional provisions apply to proceedings commenced prior to 31 December 2020. Annex 2 of PD 6A is omitted. Annex (Service Regulation) is omitted from PD 6B;
- CPR Pt 8: minor amendments to omit cross-references to CPR Pt 78;
- CPR Pt 12 and PD 12: amendments to rr.12.3, 12.10 and 12.11 to omit reference to Brussels and Lugano Convention States, EU Member States, and to the Lugano Convention and the Judgments Regulation. Specific saving and transitional provisions apply, for instance, which will maintain r.12.10(b)(i) and (ii) and r.12.11(4)(a) where a claim was served out of the jurisdiction prior to 31 December 2020. Analogous amendments to PD 12;
- CPR Pt 13: a minor amendment to r.13.3 to omit reference to art.19(4) of the Service Regulation (1393/2007);
- CPR Pt 25: amended to delete reference to Brussels Contracting States, States bound by the Lugano Convention and Regulation States from r.25.13(2)(a)(ii). Saving and transitional provisions apply, which will maintain the omitted sub-paragraph where a claim was issued prior to 31 December 2020;

- CPR Pt 30: amendments to r.30.8 to replace references to arts 101 and 102 of the Treaty on the Functioning of the European Union with references to Chs 1 and 2 of the Competition Act 1998. Saving and transitional provisions apply, which will maintain the rule, in specified circumstances, as it was prior to 31 December 2020 where an EU competition law infringement arose prior to 31 December 2020;
- CPR Pt 31 and PD 31C: minor amendments to omit cross-references in rr.31.3(1)(d), 31.12, 31.16 and 31.17 to CPR Pt 78. Saving and transitional provisions apply, which will maintain r.31.3(1)(d) as it was prior to 31 December 2020 where the Cross-Border Mediation (EU Directive) Regulations 2011 (SI 2011/1133) applied to a mediation before that date. Amendments to PD 31C insert reference to transitional provisions, omit para.1.1(c) and substitute a new para.1.6;
- CPR Pt 32: minor amendments to omit a cross-reference to Pt 78 from r.32.7;
- CPR Pt 34 and PD 34A: amendments consequent upon the EU Service Regulation (1393/2007) and Taking of Evidence Regulation (1206/2001) ceasing to apply to the UK on 31 December 2020. The most important of these is the omission of Section III of this Part. Saving and transitional provisions apply to maintain rr.34.22–34.24 where a court made an order for the issue or submission of a request prior to 31 December 2020 but further action required by the rule was not effected by that date. Analogous amendments to PD 34A;
- Practice Direction 49A – Applications under the Companies Acts and Related Legislation; amendments to omit references to EU Regulations and particularly the Cross-Border Mergers Regulations;
- Practice Direction 51U – Disclosure Pilot for the Business and Property Courts; amendments to omit reference in paras 31.16 and 31.17 to cross-border mediations;
- Practice Direction 52D – Statutory Appeals and Appeals subject to Special Provisions; amendments to omit various references to arts 101 and 102 of the Treaty on the Functioning of the European Union and the European Public Limited-Liability Company Regulations 2004 (SI 2004/2326);
- CPR Pt 63 and PD 63A: various amendments to omit r.63.1(2)(j)(iv), (v), (vii), r.63.2(1)(b)(i), r.63.14(2)(a)(ii) and r.63.14(2)(b)(ii). Specific saving and transitional provisions are applicable where however, a claim relating to either Community registered design, Community plant variety rights, or Community trademarks commenced prior to 31 December 2020. Various amendments to PD 63A, particularly to delete reference to community design rights;
- CPR Pt 68 and PD 68 are revoked in their entirety. Saving and transitional provision, however, provide that stays imposed under r.68.5 prior to 31 December 2020 continue to unless and until the court directs otherwise;
- CPR Pt 74: significant amendments are made following the revocation of the EU Judgments Regulation (1215/2012) and the non-application of the Brussels and Lugano Conventions. Further amendments, subject to saving and transitional provisions, take account of the effect of the European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1311), and the Mutual Recognition of Protection Measures in Civil Matters (Amendment) (EU Exit) Regulations 2019. Various consequential amendments are made to PD 74A. PD 74B is revoked.
- CPR Pt 78 and PD 78 are revoked in their entirety. Saving and transitional provisions, however, maintain Pt 78's application for certain proceedings commenced prior to 31 December 2020.
- Practice Direction – Competition law – claims relating to the application of arts 81 and 82 of the EC treaty and Chs I and II of Pt I of the Competition Act 1998; various amendments consequent on the non-application of arts 101 and 102 of the Treaty on the Functioning of the European Union;
- Practice Direction – Application for a Warrant under the Competition Act 1998; minor amendments concerning the Competition and Markets Authority.

Full details of those amendments will be set out in the ***Fourth Supplement to Civil Procedure 2020***. Further amendments are likely to be made in the first set of 2021 amendments to the Civil Procedure Rules, which are expected to be issued so as to come into force in April 2021.

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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.*

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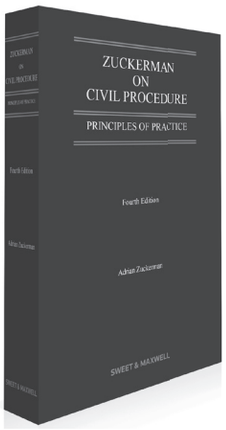

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