CIVIL PROCEDURE NEWS

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Cases

Deutsche Bank AG v Sebastian Holdings Inc [2020] EWHC 3536 (Comm), 21 December 2020, unrep. (Cockerill J)

Contempt of court – effect of new Pt 81

CPR Pt 81. The claimant had applied to commit the second defendant to prison for contempt at the time the old (pre-October 2020) Pt 81 was in force. The present hearing concerned, amongst other things, the second defendants' application to amend that application. The new CPR Pt 81 thus applied. It was accepted by all parties that the new Pt 81 had not altered the

> *"scope and extent of the Court's substantive powers in relation to committal ... and that the overarching principles applicable to civil contempts remain the same ..."* (para.7).

Moreover Cockerill J noted that the following authorities remain valid under the new Pt 81:

> *"[53] ... i) The defendant to a committal application is, it is well-established, entitled to remain silent and is not a compellable witness. This is set out in Re L (A Child) [2016] EWCA Civ 173, [2017] 1 FLR 1135 at [31]-[32] where the court referred to: 'the absolute right of a person accused of contempt to remain silent, which carries with it the absolute right not to go into the witness box';*
>
> *ii) The correlate of that right is that the Court is required to manage committal proceedings so as to safeguard that right and a failure to do so will justify the setting aside of an order for committal, even where the failure might not have changed the outcome: see Hammerton v Hammerton [2007] 2 FLR 1133 at [14]-[19];*
>
> *iii) That means that if a respondent serves evidence in advance of the committal hearing that evidence is not taken as having been deployed. The respondent may, right until the last moment, choose not to deploy it. And until it has been so deployed, it is inadmissible: Templeton Insurance v Motorcare Warranties [2012] EWHC 795 (Comm) at [(second) 24] (Eder J);*
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> *iv) The evidence may, however, be used by the applicant for the purpose of 'gathering preparatory evidence in reply' (Re B (A Minor) [1996] 1 WLR 627 at 635-636B, 638B-G, per Wall J). Pending the deployment of the respondent's evidence both his affidavit and any evidence in reply remain 'in limbo'."*

Chiltern DC v Keane [1985] 1 W.L.R. 619, CA, ***Harmsworth v Harmsworth*** [1987] 1 W.L.R. 1676, CA, ***Attorney General of Tuvalu v Philatelic Distribution Corp Ltd*** [1990] 1 W.L.R. 926, CA, ***Re B (A Minor) (Contempt of Court: Affidavit Evidence)*** [1996] 1 W.L.R. 627, FD, ***Hammerton v Hammerton*** [2007] EWCA Civ 248; [2007] 2 F.L.R. 1133, CA, ***Templeton Insurance Ltd v Motorcare Warranties Ltd*** [2012] EWHC 795 (Comm), unrep., ***Westminster City Council v Addbins Ltd*** [2012] EWHC 3716 (QB); [2013] J.P.L. 654, QBD, ***Invideous Ltd v Thorogood*** [2014] EWCA Civ 1511, unrep., ***Re L (A Child)*** [2016] EWCA Civ 173; [2017] 1 F.L.R. 1135, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.81.1.)

SMO (A Child) v TikTok Inc [2020] EWHC 3589 (QB), 30 December 2020, unrep. (Warby J)

Claimant anonymity – no right to issue proceedings anonymously

CPR r.39.2(4). Proceedings were brought for alleged breaches of data protection law by the claimant through the Children's Commissioner via a representative action under CPR r.19.6. The Commissioner applied for anonymity for the child claimant. In the course of giving judgment, Warby J dealt with an application to issue the proceedings under a pseudonym. He noted that:

> *"[11] The only information provided about the claimant was their age. Permission to issue proceedings anonymously is one thing. A right to bring a claim on behalf of a person whose identity is known but kept secret from the Court has never yet been recognised."*

This is clearly right in principle. It is one thing to anonymise parties, it is another entirely to facilitate the situation where a defendant would not be in a position to know with certainty who was bringing proceedings against them, not least so that they can properly prepare their defence. It is equally wrong in principle to accede to the suggestion that the court should exercise its jurisdiction where it too is kept in ignorance of who is bringing proceedings. Warby J granted the claimant anonymity. (See ***Civil Procedure 2020*** Vol.1 at para.39.2.14.)

■ **Revenue and Customs Commissioners v IGE USA Investments Ltd** [2020] EWHC 1716 (Ch); [2021] B.T.C. 4, 31 December 2020, unrep. (James Pickering QC sitting as a deputy judge of the High Court)

Disclosure pilot scheme – extent of jurisdiction to order specific disclosure

PD 51U paras 7.3, 17, 18. On an application for disclosure under the disclosure pilot scheme the question arose whether the court had the power to order specific disclosure when there is no agreed or approved List of Issues for Disclosure. **Held**, the court could order specific disclosure in such circumstances. While the pilot scheme did not include an express power analogous to CPR r.31.12, it contained provisions that were, indirectly, equivalent to it: paras 17 and 18, albeit those powers are materially different from CPR r.31.12 (see paras 26–31). Furthermore, in considering whether issues for disclosure were limited to those issues that can be identified in statements of case (see pilot scheme para.7.3), the deputy judge held that they are not:

> *"[48] First, this is not what paragraph 7.3 (or indeed any paragraph) of the Pilot says. Paragraph 7.3 – which is of course the paragraph which defines the concept – defines 'Issues for Disclosure' as (with underlining added) as 'only those key issues in dispute which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings .'*
>
> *[49] Litigation is a war within which there can be a number of battles. The trial will generally be the final conflict and that of course will be defined by the statements of case. Along the way, however, there will often be various skirmishes which give rise to issues which fall outside the parameters of the statements of case. Issues relating to jurisdiction, service and security for costs are examples but there are plenty of others.*
>
> *[50] Returning to the above wording of paragraph 7.3, as can be seen, reference is made to 'those key issues in dispute' and to a fair resolution of 'the proceedings'. Nowhere does the above wording limit the scope of Issues for Disclosure to those matters to be determined at trial and/or those issues raised in the statements of case."*

Furthermore, the approach articulated by Hirst J in ***Rome v Punjab National Bank (No.1)*** (1989) supported this approach. In that case Hirst J concluded that:

> *"[56] ... it did not matter that the issue (in that case, jurisdiction) was not a pleaded issue within the statements of case. What was important that the issue was one which arose within the action in a wider sense (which jurisdiction clearly did)."*

As a consequence, the decision in ***Lonestar Communications Corp LLC v Kaye*** (2020) at para.32, which limited issues for disclosure to issues raised in statements of case, was doubted. Given the importance of this issue, it is likely that the difference in approaches will need to be resolved by the Court of Appeal. ***Rome v Punjab National Bank (No.1)*** [1989] 2 All E.R. 136, Comm., ***Lonestar Communications Corp LLC v Kaye*** [2020] EWHC 1890 (Comm) unrep, Comm, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.51UPD.7.1.)

■ **SLF Associates Inc v HSBC (UK) Bank Plc** [2021] EWHC 5 (Ch), 6 January 2021, unrep. (Master Kaye)

Screenshot of remote hearing – unlawful

The Courts Act 2003 s.85C. During a remote hearing a screenshot was taken of the hearing and circulated. The taking, and hence also circulation, of the screenshot was unlawful (Courts Act 2003 s.85C, as inserted by the Coronavirus Act 2020). It is assumed therefore that the hearing was a wholly remote hearing, otherwise the screenshot would have been unlawful under the Criminal Justice Act 1925 s.41. The judge ordered that:

> *"[11] ... Any person in possession of any unauthorised recording or image of the 27 July hearing should immediately delete it and ask anyone to whom they have sent it to do the same."*

(See ***Civil Procedure 2020*** Vol.1 at para.39.2.0.1.)

■ **Anan Kasei Co Ltd v Neo Chemicals & Oxides (Europe) Ltd** [2020] EWHC 3701 (Pat), 18 December 2020, unrep. (Fancourt J)

Disclosure pilot scheme – early disclosure of adverse documents

CPR PD 51U paras 3.1(2) and 9.1. An issue concerning disclosure arose in patent infringement proceedings to which the disclosure pilot scheme applied. In particular, early disclosure of adverse documents was sought. Fancourt J noted that:

> *"[3] There is some ambiguity under the existing terms of Practice Direction 51U as to when adverse documents must be disclosed. Paragraph 3.1(2) implies there is an obligation from the outset of proceedings to disclose adverse documents, but paragraph 9.1 indicates that the time for disclosure is with any extended disclosure that is ordered. Proposed amendments to Practice Direction 51U will clarify that there is no obligation to disclose adverse documents as part of initial disclosure and that, therefore, it is paragraph 9.1 that indicates the proper time for disclosure of adverse documents."*

He resolved the ambiguity as follows:

> *"[14] I accept ... that Practice Direction 51U is properly to be interpreted as only imposing itself an obligation on a party to disclose adverse documents with extended disclosure if and to the extent that they have not previously been disclosed, but nevertheless, the court has jurisdiction on an application of this kind, if satisfied that a document is an adverse document, to make an order for earlier disclosure if it is in the interests of justice and in furtherance of the overriding objective to do so.*
>
> *[14] The real questions, therefore, are whether this document is properly to be viewed as an adverse document and whether the overriding objective would be furthered by ordering early disclosure of it".*

(See ***Civil Procedure 2020*** Vol.1 at para.51UPD.3.)

- **Allsop v Banner Jones Ltd (t/a Banner Jones Solicitors)** [2021] EWCA Civ 7, 8 January 2021, unrep. (Lewison and Arnold LJJ, Marcus Smith J)

Abuse of process – collateral attack

CPR rr.3.4(2) and 24.2. Proceedings were brought for professional negligence and/or breach of contract against solicitors and counsel in respect of work carried out for the claimant in matrimonial proceedings. The defendants applied to have the claim struck out under CPR r.3.4(2) and/or r.24.2. The district judge struck the claim out under CPR r.3.4(2) in respect of both its limbs, i.e. as an abuse of process and/or disclosing no reasonable cause of action. It was an abuse of process as it amounted to a collateral attack on a financial remedies order made in the matrimonial proceedings. The strike out was subject to an appeal to the Court of Appeal. **Held**, the appeal was allowed in part. In giving its judgment the Court of Appeal provided guidance on the approach to be taken when both limbs of CPR rr.3.4(2) and 24.2 are in issue. In such cases courts should first consider applications that are made under CPR rr.3.4(2)(a) and 24.2. As Marcus Smith J stated in his judgment (with which Lewison and Arnold LJJ agreed):

> *"[47(iii)] . . . it is generally preferable to consider whether a claim or allegation should be struck out for failing to disclose a reasonably arguable case, before the question of abuse of process is considered. On this basis, if a claim is not properly arguable, then the question of abuse does not arise. On the other hand, the question of whether a claim or allegation is abusive is one that is best considered when once it has been decided that the claim or allegation is reasonably arguable ... the true question before the court on an application to strike out for abuse of process is whether the bringing of a potentially successful claim would be manifestly unfair or bring the administration of justice into disrepute. Striking out a claim or allegation on the ground of abuse of process has nothing to do with its arguability."*

Lord Hoffmann's dicta in ***Arthur JS Hall & Co v Simons*** (2002) at 705 and 707 relied on. In so far as abuse of process was concerned the test was that set out in ***Phosphate Sewage Company Ltd v Molleson*** (1879) regarding whether to permit relitigation on the basis that there was new evidence. In respect of that Marcus Smith J held:

> *"[44(v)] ... at least where the anterior proceedings are civil, Phosphate Sewage is of no application, and not to be used as a test for the purpose of determining whether the subsequent proceedings are abusive or otherwise. Arnold J was correct to doubt the applicability of the Phosphate Sewage test in Ridgewood Properties Group Ltd v. Kilpatrick Stockton LLP, [2014] EWHC 2502 (Ch) at [43] for exactly these reasons. The fact is that subsequent civil litigation that calls into consideration an anterior civil decision may or may not be abusive depending on facts that may have nothing to do with relitigation in its strict sense or the adduction of 'new' evidence within the Phosphate Sewage test."*

Marcus Smith J also explained what relitigation was to be taken to mean in this context:

> *"[44(v)(c)] ... it is necessary to be very clear what is meant by 'relitigation'. In my judgment, relitigation means arguing the same issue, that has already been determined in earlier proceedings, all over again in later proceedings. In civil proceedings, generally speaking, for an issue to be the same, it will arise as between the same parties (or their privies) That is why, in such cases, the doctrine of res judicata estoppel comes into play. The role of the doctrine of abuse of process is, correspondingly, much more limited. The abuse doctrine will only arise where one of the parties to the earlier litigation sues a stranger to that litigation. In such a case, the claim will typically be permissible and not abusive, and that will generally be because the case is not one of relitigation at all. Rather, the stranger to the earlier litigation will be the subject of the later claim because that person has done or failed to do something which (had that person behaved as he or she should) affected the terms or nature of the anterior decision. Why or how that earlier decision was affected will depend on the individual circumstances. It may be that the later claimant's former legal advisers failed properly to prepare the case ... or failed, in an appeal, to deploy or consider a potentially winning point ... In all of these cases, what is being focussed on is "the impugned conduct of the lawyer [which is] independent of the...conclusions of the court" in the anterior decision ..."*

Phosphate Sewage Co Ltd v Molleson (1879) 4 App. Cas. 801, HL, ***Arthur JS Hall & Co v Simons*** [2002] 1 A.C. 615, HL,

Ridgewood Properties Group Ltd v Kilpatrick Stockton LLP [2014] EWHC 2502 (Ch); [2014] P.N.L.R. 31, ChD, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at paras 3.4.9 and 3.4.12.)

■ **Motorola Solutions Inc v Hytera Communications Corp Ltd** [2021] EWCA Civ 11, 11 January 2021, unrep. (Lewison, Males, Rose LJJ)

Without prejudice – unambiguous impropriety exception

CPR Pts 31 and 32. Freezing injunctions were granted against the appellants in respect of $345 million. Reliance on evidence that the first appellant had been said to have set out during settlement meetings that were without prejudice was critical to the grant of the injunctions. The statements were to the effect that the appellant would take steps to make themselves judgment-proof by moving. The judge held the statements to be admissible. He did so on the basis that they fell within the unambiguous impropriety exception to without-prejudice privilege. In doing so he held that he was bound to do so given the Court of Appeal's decision in ***Dora v Simper*** (1999). An appeal to the Court of Appeal was allowed. In giving judgment the court held that ***Dora v Simper*** (1999) was not to be followed: it neither established that statements such as those made by the appellants would, as a matter of law, always come within the unambiguous impropriety exception, nor did it establish that the court, when considering the admissibility of such evidence, was to take the applicant's account as sufficient. As Males LJ put it:

> *"[39] I have no difficulty in accepting that a threat to transfer assets to a third party otherwise than in the ordinary and proper course of business in order to render a judgment unenforceable may, at least in some circumstances, amount to unambiguous impropriety for the purpose of the exception to the without prejudice rule. That is, after all, the kind of conduct which the court will restrain by a freezing order. But I cannot regard Dora v Simper as establishing that this will always be so as a proposition of law. Whether it is must depend on the facts of the particular case. Nor can I regard Dora v Simper as binding authority that, when considering whether evidence of such a threat is admissible, it is sufficient to take the claimant's evidence at face value. Although that was indeed the approach of the court, (1) it was inconsistent, as I have sought to show, with previous authority, in particular Fazil-Alizadeh v Nikbin , (2) the reasoning was described in Berry Trade Ltd v Moussavi , rightly in my respectful view, as being 'of doubtful cogency', and (3) there is, as we will see, no trace of this approach in the subsequent cases."*

Moreover, having reviewed the authorities, he concluded:

> *"[57] ... that the courts have consistently emphasised the importance of allowing parties to speak freely in the course of settlement negotiations, have jealously guarded any incursion into or erosion of the without prejudice rule, and have carefully scrutinised evidence which is asserted to justify an exception to the rule. Although the unambiguous impropriety exception has been recognised, cases in which it has been applied have been truly exceptional, and (leaving aside Dora v Simper) there has been no scope for dispute about what was said, either because the statement was recorded (the admission of a dishonest claim in Hawick Jersey Ltd v Caplan) or because it was in writing (the email threats in Ferster v Ferster). I would not wish to exclude the possibility that the evidence about what was said at an unrecorded meeting may be so clear that the court is able to reach a firm conclusion about it (nor would I wish to encourage the clandestine recording of settlement meetings), but such cases are likely to be rare. Dora v Simper itself is clearly an outlier which has been criticised in later cases and, until the decision of the judge in this case, has never been followed. In my judgment its approach of asking whether one party's disputed evidence, if true, demonstrates an unambiguous impropriety is contrary to the weight of authority, wrong in principle and should not be followed."*

Dora v Simper, 15 March 1999, unrep., CA, ***Hawick Jersey International Ltd v Caplan***, *The Times*, 11 March 1988, QBD, ***Fazil-Alizadeh v Nikbin***, 25 February 1993, unrep., CA, ***Berry Trade Ltd v Moussavi (No.3)*** [2003] EWCA Civ 715; (2003) 100 (29) L.S.G. 36, CA, ***Ferster v Ferster*** [2016] EWCA Civ 717; [2016] C.P. Rep. 42, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.31.3.39.)

■ **Zuberi v Lexlaw Ltd** [2021] EWCA Civ 16, 15 January 2021, unrep. (Lewison, Newey, Coulson LJJ)

Damages-based agreements – enforceability

The Damages-Based Agreements Regulations 2013 (SI 2013/609) reg.4(1). A solicitor and their client entered into a retainer. The retainer included a damages-based agreement, which entitled the solicitor to a share of any damages recovered in the event that the client's claim succeeded. The claim settled. The retainer included a clause that provided that if it was terminated by the client prematurely, the client was liable to pay their solicitor their normal fees' and disbursements. A question arose whether that clause, which had not been exercised in the present case, invalidated the retainer on the basis that it contravened reg.4(1) of the Damages-Based Agreements Regulations 2013 and thus meant the solicitors could not recover a percentage of the settlement fee. **Held**, the clause did not invalidate the contract of retainer. In reaching that decision Lewison and Coulson LJJ explained the meaning of damages-based agreement; Newey LJ dissented on this point. Lewison LJ stated that:

"[33] There are two possible views of what the DBA consists of. One view is that if a contract of retainer contains any provision which entitles the lawyer to a share of recoveries, then the whole contract of retainer is a DBA. In other words, a DBA is a contract which includes a provision for sharing recoveries. But another view is that if a contract of retainer contains a provision which entitles a lawyer to a share of recoveries; but also contains other provisions which provide for payment on a different basis, or other terms which do not deal with payment at all, only those provisions in the contract of retainer which deal with payment out of recoveries amount to the DBA.

[34] In my judgment, there are good reasons for preferring the latter view. First, the object of the legislation was to permit the remuneration of lawyers by means of a share of recoveries. Second, the only part of the common law that needed to be changed to achieve that purpose was the rule against champerty. As I have said, at common law the contract of retainer, shorn of clause 9.1, would have been enforceable. There was no particular reason for Parliament to modify the other statutory and regulatory controls over lawyers' fees. Third, there is a presumption that Parliament does not intend to change the common law, except expressly or by necessary implication. There is no express provision which displaces the common law (except the rule against champerty). Fourth, the legislation cannot be said to be undermined by the co-existence of the common law. Fifth, the legislative scheme is far from comprehensive."

Coulson LJ agreed with Lewison LJ that the second of the two, the narrow interpretation, was to be preferred (see para.77). As a consequence of this decision it would now appear to be apparent that so-called hybrid damages-based agreements, i.e. ones that contain both a damages-based element and a normal fee-charging element, can be entered into validly, subject to any appeal subject to any appeal to the UK Supreme Court from this judgment succeeding. (See ***Civil Procedure 2020*** Vol.2 at para.7A2-7.)

- **Rowe v Ingenious Media Holdings Plc** [2021] EWCA Civ 29, 15 January 2021, unrep. (Floyd, Henderson, Popplewell LJJ)

Security for costs – cross-undertaking – third-party funder

CPR r.25.14. Proceedings were issued by more than 500 claimants who sought to recover losses incurred due to tax saving schemes that were unsuccessful. An issue arose as to when a defendant could be required to give a third-party funder a cross-undertaking in damages as a pre-condition for awarding security for costs. **Held**, while the giving of an undertaking to court was a voluntary undertaking, the court could require the provision of a cross-undertaking as a condition for the grant of security for costs (see CPR rr.3.1 and 25.14). Where security for costs was sought, it would only be appropriate in exceptional circumstances to require a cross-undertaking as a condition of the grant of security (see para.53). Where security was sought where claimants have commercial, third-party, litigation funding the requirement of a cross-undertaking as a condition of the grant of security should only be made in "*rare and exceptional cases*" (see para.73). ***Excalibur Ventures LLC v Texas Keystone Inc (No.2)*** [2016] EWCA Civ 1144; [2017] 1 W.L.R. 2221, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.25.14.1.)

- **Phones 4U Ltd (In Administration) v EE Ltd** [2021] EWCA Civ 116, 2 February 2021, unrep. (Sir Geoffrey Vos MR, Asplin & Green LJJ)

Disclosure – employees' email or SMS messages on mobile device

CPR r.31.8. The Court of Appeal considered an appeal from a decision of Roth J on the disclosure of employees and ex-employees' emails or SMS messages that were on a mobile device. **Held**, the court dismissed the appeal. In doing so it stated as follows:

"[24] We accept that the court has no jurisdiction under CPR Part 31 to order a defendant to disclose or allow inspection of documents that are not within its control. Save that the House of Lords was concerned with documents in the 'possession, custody or power' of the defendant under RSC Order 24, that was what Lonrho v. Shell decided. That, however, in our judgment, is the limit of the jurisdictional point.

[25] Disclosure is an essentially pragmatic process aimed at ensuring that, so far as possible 9 , the relevant documents are placed before the court at trial to enable it to make just and fair decisions on the issues between the parties. CPR Part 31 is expressly written in broad terms so as to allow the court maximum latitude to achieve this objective. It is not a straitjacket intended to create an obstacle course for parties seeking reasonable disclosure of relevant documents within the control of the other party. Some of the defendants' submissions seemed to us to have an air of that unreality. It was submitted, in effect, that, ultimately, after many (no doubt costly) applications, hearings and orders, it would indeed be possible for Phones 4U to get hold of the documents that they now know are held by the Custodians [the individuals who had mobile devices] to one of the defendants' order. It was only possible, they submitted, by making applications under CPR Part 31.12 , or for third party disclosure under CPR Part 31.17 , or ultimately, if those were not complied with, for orders based on alleged contempt. We do not agree.

[26] In our judgment, the scheme of standard disclosure in CPR Part 31 is simple and effective. A party ordered to

make standard disclosure must make a reasonable search for adverse documents. In this case, the judge has made it as clear as can be that he considered it at least reasonably possible that the work-related documents on the Custodians' personal devices 10 . would be relevant to the issues. Accordingly, he must have thought that a reasonable search should be made for them so that they could, if relevant, be disclosed. The documents included within the process are, as we have said, those within the control of the defendant within CPR Part 31.8 .

[27] CPR Part 31.5 explains how the process of disclosure is to be undertaken. It allows the court to give directions at any point 'as to how disclosure is to be given'. The judge's order was, jurisdictionally, precisely within the terms of CPR Part 31.5(8) providing for 'how' disclosure was to be given in this case. It explained what searches were to be undertaken. It said 'where' the searches were to be made, namely in the documents controlled by the defendants but in the hands of custodians. It said 'what' was to be searched for, and 'in respect of which time periods'. It said 'by whom' those searches were to be made, namely the defendants and their IT consultants. It defined the extent of 'any search for electronically stored documents', but the general provision is in any event not limited by the examples given.

[28] It will be noted that there are no limitations in CPR Part 31.5 (or elsewhere) on who can be asked to participate in the search process. It is obvious that third parties can only be compelled to do anything by an order under CPR Part 31.17 or another procedure to which they are made a party. But that does not, in our judgment, mean that the court cannot, as a matter of principle, require the parties to the proceedings to make requests of third parties by way of making a search for relevant documents. We will deal with the proportionality of making such requests below.

. . .

[30] For the reasons we have given, and subject to the question of proportionality and the GDPR, we do not think there was any jurisdictional impediment to the order that the judge made. He was entitled, as a part of directing how standard disclosure was to be given, to direct the defendants to request their own Custodians voluntarily to produce to IT consultants both their personal devices and all the emails stored on them."

The court went on to conclude that the disclosure order made was proportionate, and it dismissed the GDPR argument in so far as it was pursued. The court did, however, reject Roth J's suggestion (rider) in his judgment that the defendants need not inform the custodians that they could refuse the request. Such a point was outside the terms of the order, which was self-explanatory. ***BES Commercial Electricity Ltd v Cheshire West and Chester BC*** [2020] EWHC 701 (QB), unrep., QBD, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.31.8.2.)

Practice Updates

STATUTORY INSTRUMENTS

The Civil Procedure (Amendment) Rules 2021 (SI 2021/117). In force from **6 April 2021**. The Amendment Rules make the following changes to the CPR:

- amends CPR r.1.1(2) to make provision for vulnerable witnesses and parties, and introduces a new CPR r.1.6 which authorises the making of a new PD 1A, concerning vulnerable witnesses and parties;
- amends CPR r.3.17(3) so that costs incurred up to and including the date of any costs management hearing cannot be approved by the court;
- amends CPR r.6.33 so that permission to serve out of the jurisdiction is not required where a choice of court agreement is the basis for jurisdiction;
- amends CPR r.32.12 to insert a new r.32.12(3) to clarify that the restrictions on collateral use apply to affidavits;
- amends CPR r.36.5 to insert a new r.36.5(5) concerning the accrual of interest after the period for accepting a Part 36 Offer has expired;
- inserts a cross-reference to CPR r.83.19(4)(b) in CPR r.40.14A;
- amends CPR r.44.3(5) to make provision for costs incurred due to party or witness vulnerability to be taken account of in assessing costs proportionality;
- amends CPR Pt 51 to omit r.51.2, which made provision for transitional arrangements following the introduction of the CPR in 1999. It further inserts a new CPR r.51.3, which makes provision for Practice Directions to be issued to vary or modify the CPR in situations of public emergencies, including the COVID-19 pandemic;

- corrects an error in the heading to the table of contents in CPR Pt 55;
- amends CPR r.61.9 so that it was consistent with CPR r.12.3;
- amends various provisions consequent on the introduction of the new CPR Pt 81 on 1 October 2020;
- amends CPR Pt 70, concerning registration and enforcement of foreign judgments;
- makes clarificatory amendments to CPR Pt 71;
- makes a minor amendment to CPR r.74.48;
- amends CPR r.83.19(4)(b) to clarify the scope of the power to suspend a certificate of judgment; and
- amends CPR Pt 89 to clarify its relationship with CPR Pt 81.

Transitional provisions also provide that amendments made to CPR rr.15, 17(1) and (3), 18, 19(1) –(6) & (8), 20 and 21 do not apply to applications made before 6 April 2021 in respect of contempt of court and writs of sequestration. It further revokes the transitional provision contained in the Civil Procedure (Amendment No.3) Rules 2020 (SI 2020/747) concerning CPR r.83.2A, subject to the transitional provision referred to in the previous sentence.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 127th Update. This Practice Direction Update affected amendments to PD Update 107 to insert a transitional provision in respect of matters preserved by art.67, paras (1)(a), (2)(a) and (d) and (3)(d), (e) and (f) of the UK-EU Withdrawal Agreement and to amend the title to the transitional provision concerning competition matters. These amendments are in force from **29 January 2021**. It further made amendments to CPR PD 55C to extend the duration of the PD to 30 July 2021, and to extend the last date for filing a Reactivation Notice to restate possession claims that were subject to the stay before 3 August 2020 or to restate a claim in respect of which case management directions were made prior to 20 September 2020 to 30 April 2021. These amendments are in force from **29 January 2021**. The Practice Direction Update also made the following amendments, which come into force on **6 April 2021**:

- to insert a new PD 1A, which provides guidance to the court to ensure effective participation in proceedings for vulnerable parties or witnesses;
- to amend various paragraph references in PD 2E and 2F;
- to correct terminology references in PD 3E;
- to amend PD 6B to make provision for service out of the jurisdiction further to amendments effected by the Civil Procedure (Amendment) Rules 2021;
- to amend PD 27 consequent on amendments to CPR Pt 27;
- to amend PD 45 para.2A.1(a) to increase the sum for loss of earnings claims from £90 to £200 for claims where the damages are valued at no more than £10,000;
- to substitute a new para.19 of PD 47E to specify that offers to settle should specify if they are intended to be inclusive of the cost of preparing the bill and VAT. It further provides that an offer, other than one made under Pt 36, is to specify if it is intended to be inclusive of interest. Absent such specification, the offer is to be treated as being inclusive of these issues;
- to revoke PD 51A, on the basis that the need for transitional provisions consequent upon the CPR entering into force on 26 April 1999 are no longer necessary;
- to extent the duration of PD 51O and of PD 51X until 2022;
- to substitute an amended PD 51U, which is amended in the light of user feedback on the operation of the disclosure pilot;
- to insert a new PD 57AC to make provision for witness statements in the Business and Property Courts to reflect the case at trial;
- to insert a new PD 70B, concerning the debt respite scheme under the Financial Guidance and Claims Act 2018;
- to amend PD 71 further to amends concerning contempt of court effected by CPR Pt 81; and
- to revoke Practice Direction – (CA: Admiralty Appeals: Assessors) [1965] 1 W.L.R. 853 (1965) consequent on the amendment to PD 52C effected by CPR Update 102 to make provision there for assessors in Admiralty appeals.

PRACTICE GUIDANCE

THE QUEEN'S BENCH GUIDE. An updated version of the Queen's Bench Guide was issued on **26 January 2021**. Its amendments include new guidance on: the use of CE-File; the Media and Communications List; the effect of Brexit on cross-border service and evidence-taking, and enforcement in England and Wales of foreign judgments; contempt of court; and remote hearings.

THE SENIOR COURTS COSTS OFFICE GUIDE. On **25 January 2021**, a revised version of the Senior Courts Costs Office Guide was issued. It is the first update since 2018. Updates will now be made on a regular basis, as already occurs in respect of the other Court Guides. It particularly contains new guidance on the use of CE-File; on fast track costs; on lodging documents for hearings electronically; and group listing.

CORONAVIRUS GUIDANCE UPDATE

GENERAL GUIDANCE

The COVID-19 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 5 February 2021].

In Detail

CIVIL JUSTICE COUNCIL CONSULTATION – GUIDELINE HOURLY RATES

The Guideline Hourly Rates (GHRs) for the summary assessment of costs, initially issued in 2002, were a consequence of the Woolf Reforms. They were re-issued in updated form regularly from 2006 until 2010 by the Master of the Rolls. In 2011, however, Lord Neuberger MR declined to accept the advice on their uprating, provided to him by the Advisory Committee on Civil Costs. Following the Jackson Cost Reforms, responsibility for making recommendations concerning the GHRs fell to the Civil Justice Council. It established a Costs Committee under the chairmanship of Foskett J to make recommendations. It reported in 2014, four years after the last GHR uprating. Lord Dyson MR rejected the vast majority of the Committee's recommendations. He did so on the basis that the evidence base for uprating wasn't sufficiently reliable. Apart from discussions between Lord Dyson MR, the Law Society, and the Ministry of Justice in 2015 to ascertain if a way forward to secure more reliable evidence was possible that concluded without a way forward being identified, no further action was taken on the GHRs.

In ***Ohpen Operations UK Ltd v Invesco Fund Managers Ltd (Costs)*** [2019] EWHC 2504 (TCC); [2019] Costs L.R. 1533, Mrs Justice O'Farrell commented critically on the unsatisfactory nature of the GHRs. As she put it:

> *"[14] ... the hourly rates of the defendant's solicitors are much higher than the SCCO guideline rates. It is unsatisfactory that the guidelines are based on rates fixed in 2010 and reviewed in 2014, as they are not helpful in determining reasonable rates in 2019. The guideline rates are significantly lower than the current hourly rates in many London City solicitors, as used by both parties in this case. Further, updated guidelines would be very welcome."*

It was hoped that O'Farrell J's observation would result in renewed consideration of the GHRs (***Civil Procedure News*** No.8 of 2019). In February 2020, Sir Terence Etherton MR acting in the light of O'Farrell J's comments, instructed a CJC Working Party, chaired by Stewart J, to:

> *". . . conduct an evidence-based review of the basis and amount of the guideline hourly rates (GHR) and to make recommendations accordingly to the Deputy Head of Civil Justice and to the Civil Justice Council during Trinity term 2021."* (cited in Guideline Hourly Rates Working Group Report for Consultation (2021) at 7).

On 8 January 2021, the CJC Working Group issued a consultation on proposals to update the GHRs. The consultation can be responded to here: *https://forms.office.com/Pages/ResponsePage.aspx?id=KEeHxuZx_kGp4S6MNndq2D9fyoof86xDjqmUjF03eRNUOTJXTDNPUElZUFJVM0NIR0NEOFY3WFRaQS4u* [Accessed 5 February 2021].

The Working Group's Methodology

The Working Group adopted a "*radically different*" approach to that adopted by the Costs Committee. It did so recognising that it would not be possible, as the Costs Committee and Lord Dyson MR had previously recognised, to engage in a detailed and comprehensive evidence gathering exercise. On the contrary, it adopted an approach that attempted, "*to guide the GHR ship through the narrow strait between the Scylla of comprehensive but unachievable evidence and the Charybdis of arbitrariness*." Given that, as it also noted, the intention behind the GHR was to provide simplified and "*broad approximations of actual rates in the market*", an overly rigorous evidence-based was as unwarranted as it was simply not possible. It also adopted an approach, based on the Working Party's experience as well as judicial training, that as proportionality was not taken account of in costs assessments until after a preliminary assessment figure had been arrived at, the GHRs were not to take account of proportionality. It would be for Costs Judges to ensure that they only allowed proportionate costs after having determined an initial assessment of costs based on the GHRs.

The Working Party thus sought to canvass the views of experienced Costs Judges as to what level of costs were allowed on provisional and detailed assessments. Further evidence was gathered from the legal profession, albeit the Working Group accepted that there would, as respondents pointed out, be deficiencies in the evidence so provided. That being said it did receive a good degree of historical evidence from the profession. Submissions were also received from specialist associations, such as the Forum of Complex Injury Solicitors and the Association of Personal Injury Lawyers. Finally, it drew on the experience of Working Party members.

It is apparent that this approach differs significantly from that which the Costs Committee was required to take, and which Lord Dyson MR recognised required more financial resources than were available to the Civil Justice Council in 2014 and 2015. Rather than simply making a virtue of necessity, the approach taken by the Working Party appears to be right in principle in that it properly reflects the intention underpinning the GHRs that Lord Dyson MR recognised in 2014 and which are noted above, i.e. to produce broad approximations of market rates and no more than that. That had been

the approach taken pre-Woolf when the GHRs were set regionally following local consultation between the judiciary and local law societies. It was an approach that worked and was seemingly lost with the pursuit of accuracy fostered by the Advisory Committee on Civil Costs. It is to be hoped that the more pragmatic methodology now adopted by the Working Party will be retained in future.

Main Recommendations

Based on the evidence gathered, the Working Party recommended, and seeks consultees' views on, the following uprated GHRs.

	Grade A	Grade B	Grade C	Grade D
London 1	£512 (25.2%)	£348 (17.6%)	£270 (19.5%)	£186 (34.8%)
London 2	£373 (17.8%)	£289 (19.5%)	£244 (25%)	£139 (10.4%)
London 3	£282 (13.7%)	£232 (15.8%)	£185 (11.9%)	£129 (7%)
National 1	£261 (20.2%)	£218 (13.5%)	£178 (10.7%)	£126 (6.8%)
National 2	£255 (26.78%)	£218 (23.2%)	£177 (21.3%)	£126 (13.5%)

London 1 would apply to "*heavy commercial and corporate work*" carried out by law firms based in the City of London or central London. London 2 applies to other work carried out by firms in the City of London or by firms based in London 2 as defined in the current GHRs. London 3 remains as it does under the current GHRs, as broadly do National 1 and 2, albeit the current National Band 3 is merged into National 2. The Working Party did, however, note that future reviews should consider whether to merge National Bands 1 and 2 and also to revisit the London Bands' geographical boundaries. The consultation does, however, seek views on whether the National Bands ought to be merged at the present time. Given their convergence, the creation of a single National Band at the present time would appear to be a reasonable step to take. Future reviews, as they will have to consider the impact of changing working practices in the light of the possible introduction of the long-awaited fixed recoverable fee rates and COVID-19-related practice changes, may then be best placed to consider whether to maintain a single national band or whether to adopt a more differential approach. At the present time though, a single band appears to be more than justified given the proposed rates for the two bands.

The Consultation Questions

The consultation raises the following questions on which the Working Party seeks views:

> *"(i) The methodology used by the working group.*
>
> *(ii) The recommended changes to areas London 1 and London 2.*
>
> *(iii) The recommended GHRs set out in paragraph 4.18 of this report.*
>
> *(iv) Specifically, whether the rate of £186 for London 1 Grade D is too high; if so, at what rate it should be set and why?*
>
> *(v) The recommended changes to the geographical areas in section 5 of this report and the recommendation to have two national bands.*
>
> *(vi) Should the working group recommend that the Civil Procedure Rule Committee be requested to consider amending the summary assessment form N260 and the information provided on the detailed assessment bill - the amendment would be to require the signatory to specify the location of the fee earners carrying out the work.*
>
> *(vii) The recommended revisions to the text of the Guide [to the Summary Assessment of Costs] in Appendix J [to the Consultation Paper]."*

It is to be hoped that the consultation will receive a considerable number of responses, which will enable the Working Party to refine and then finalise its recommendations. More importantly, however, given the ongoing importance and utility of the GHRs, it is to be hoped that the Working Party's methodology and proposals are endorsed and that they will, ultimately, be accepted by Sir Geoffrey Vos MR.

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