CIVIL PROCEDURE NEWS

Issue 3/2021 11 March 2021

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In Brief

Cases

Weaver v British Airways Plc [2021] EWHC 217 (QB), 2 February 2021, unrep. (Saini J)

Group litigation – cut-off dates – advertising costs

CPR r.19.13. At a case management conference in ongoing multi-party litigation arising from a cyber-attack on British Airways, two issues were considered: first, whether or not the cut-off date to join the group litigation should be extended; and secondly, whether the claimants' solicitor's costs of advertising the litigation were recoverable. **Held**, the cut-off date was extended, while the advertising costs were not recoverable. On the cut-off date issue, Saini J concluded that the thrust of the case law pointed to decisions on whether to set a cut-off date and/or whether to vary one that had been set was:

> *"[16] ... essentially a pragmatic case management decision which must focus on the specific advantages and disadvantages of imposing a cut-off date or maintaining a cut-off date.*
>
> *[17] That case management decision has to be made guided by the overriding objective in CPR 1.1."*

It was for the party seeking to vary the cut-off date to justify such a variation. In that they need to show that there had been "*some development or feature which justifies an extension of the cut-off date*" (see [19]). The fact that there had been a prior agreement or order concerning the cut-off date was not a substantial obstacle to varying the date, as long as the variation would further the overriding objective and would promote the achievement of a fair outcome to the parties to the litigation (see [20]). In so far as the advertising costs were concerned, Saini J noted (at [44]) that they were the result of "*very substantial media publicity of [the] proceedings*". In the light of ***Motto v Trafigura Ltd*** (2011), especially Lord Neuberger MR at [110], the costs incurred were not recoverable. As Saini J explained at [48]–[49]:

> *"[48] In my judgment, it is clear as a matter of binding authority that these are not recoverable costs. I quote from the Motto case:*
>
> > *'The expenses of getting business, whether advertising to the public as potential clients, making a presentation to a potential client, or discussing a possible instruction with a potential client, should not normally be treated as attributable to, and payable by, the ultimate client or clients. Rather, such expenses should generally be treated as part of a solicitor's general overheads or expenses, which can be taken into account when assessing appropriate levels of charging, such as hourly rates.'*
>
> *[49] BA are right to contend that what was being said here by Lord Neuberger MR was essentially a reflection of the well-known indemnity principle. In my judgment, the reasoning of Lord Neuberger MR applies directly to the facts before me. The costs which have been incurred and which are to be incurred by the claimant solicitors are, in my view, essentially general overheads, albeit that they are incurred in the context of a GLO. They are not the costs that are being incurred pursuant to the GLO, paragraph 41, to which I have already made reference, but are, rather, more accurately described as the costs incurred by the claimant solicitors of 'getting the business in'. They are not for the account of BA, should BA be unsuccessful in the litigation. See also Friston on Costs (3rd Edition), para.65-100 which seems to me to reflect the correct position in law."*

Ross v Owners of the Bowbelle (Review of Taxation under Ord.62 r.35) [1997] 2 Lloyd's Rep. 196 (Note), QBD, ***Re Gibson's Settlement Trusts*** [1981] Ch. 179; [1981] 2 W.L.R. 1, ChD, ***Motto v Trafigura Ltd*** [2011] EWCA Civ 1150; [2012] 1 W.L.R. 657, CA, ***Holloway v Transform Medical Group (CS) Ltd*** [2014] EWHC 1641 (QB), unrep., ***Greenwood v Goodwin (RBS Rights Issue Litigation)*** [2014] EWHC 227 (Ch), unrep., ***Pearce v Secretary of State for Energy and Climate Change*** [2015] EWHC 3775 (QB), unrep., ***Arif v Berkeley Burke Sipp Administration Ltd*** [2017] EWHC 3108 (Comm), unrep., ref'd to. (See ***Civil Procedure 2020*** Vol.1 at paras 19.3.3 and 19.3.5.)

Santi v Santi [2021] 2 WLUK 48, 3 February 2021, unrep. (Nicklin J)

Interim injunction – costs

CPR r.25.1(1)(a). An application for an interim injunction, amongst other things, was obtained to enjoin the disclosure of information alleged to have been obtained improperly in the course of divorce proceedings. Subsequently an application was made for the costs of the application to be awarded instead of being costs reserved until the substantive proceedings were determined between the parties. **Held**, normal practice was for the costs of successful interim injunction applications to be reserved pending determination of the substantive issue in dispute. The court had, however, a discretion. See ***Wingfield Digby v Melford Capital Partners (Holdings) LLP*** (2020). There were no issues left to be decided on the points raised on the application, i.e.: the court could see where the merits lay. In such a situation the

court could award costs on those issues. ***Wingfield Digby v Melford Capital Partners (Holdings) LLP*** [2020] EWCA Civ 1647; [2020] Costs L.R. 1759, CA, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.25.1.9.)

- **Executive Authority for Air Cargo and Special Flights v Prime Education Ltd** [2021] EWHC 206 (QB), 5 February 2021, unrep. (Saini J)

Summary judgment – discretion to make declaration on specific issues

CPR Pt 24. In an appeal from a summary judgment decision, Saini J considered what appears to be a novel issue of principle concerning the grant of declarations on a summary judgment application. The issue of principle was:

> *"[112] ... When a judge determining a summary judgment application makes certain findings of fact or law on the evidence presented at that time (such as deciding a party does not have a realistic prospect of succeeding on a sub-issue), but she ultimately concludes not to grant the application itself, is she obliged to make a declaration as to those findings on the sub-issues? The effect of such declarations is intended to be to bind the parties and remove the sub-issues from the proceedings."*

Saini J rejected the suggestion that in such circumstances a declaration had to be made. As he explained:

> *"[113] In my judgment, a Judge is under no such obligation. Whether she decides to make such a declaration on the sub-issue or simply leaves the issue for the trial judge will be a fact-specific case management decision to be undertaken following assessment in accordance with the Overriding Objective, and as an exercise of discretion.*
>
> *[114] The fact that a declaration has not been sought in the application is an important but not determinative factor, as well as the fact that the applicant could have, but did not, seek determination of a preliminary issue on the matter in respect of which it now asks for a declaration. Also relevant is the fact that the sub-issue may be a matter on which the Judge considers there might potentially be more detailed factual and legal argument which was not possible in the CPR Part 24 hearing.*
>
> *[115] I would add that where there is to be a trial in any event, and the sub-issue which the Judge has determined on an interim basis is closely related to other factual or legal issues which the trial judge will examine in more detail, it seems to me that it would be generally unwise for the interim hearing Judge to make any binding declarations. What may seem correct on the evidence and argument on an interim application, may turn out to be wrong following the mature reflection available at trial."*

(See ***Civil Procedure 2020*** Vol.1 at para.24.2.2.)

- **Martlet Homes Ltd v Mulalley and Co Ltd** [2021] EWHC 296 (TCC), 16 February 2021, unrep. (Pepperall J)

Reply – pleading a new claim

CPR PD 16 para.9.2. The defendant sought to strike out part of the claimant's reply to the defence. It did so on the basis that the relevant part of the reply pleaded a new claim. In allowing the application, and striking out that part of the reply, Pepperall J explained why it was not permissible to plead new claims in a reply made under CPR r.16.7. As he put it:

> *"[18] Pleading a Reply is ... optional: rr.15.8 and 16.7, ... Indeed, a claimant who does not file a Reply is not taken to admit the matters raised in the Defence: r.16.7. While the rules give little guidance to what can be pleaded in a Reply, paragraph 9.2 of Practice Direction 16 provides:*
>
> > *'A subsequent statement of case must not contradict or be inconsistent with an earlier one; for example, a reply to a defence must not bring in a new claim. Where new matters have come to light the appropriate course may be to seek the court's permission to amend the statement of case.'*
>
> *[19] No party may serve a statement of case after a Reply without the permission of the court: r.15.9. While a Reply is reasonably commonplace, the editors of the 2020 edition of Civil Procedure (the White Book) rightly observe, at paragraph 15.9.1, that permission to serve subsequent statements of case will only be appropriate in the most exceptional circumstances and that the court is more likely to permit amendments to earlier statements of case.*
>
> *[20] In my judgment, the terms of r.16.4(1)(a), the optional nature of the Reply, the rule restricting subsequent statements of case and the terms of the Practice Direction all point to the clear conclusion that any ground of claim must be pleaded in the Particulars of Claim. New claims must be added by amending the Particulars of Claim and cannot simply be pleaded by way of Reply. I reject [the] submission that such view would deprive the Reply of all purpose. A Reply can be particularly useful in order to refute a ground of defence. For example, a Reply can properly plead:*
>
> > *20.1 a later date of knowledge pursuant to ss.14 or 14A of the Limitation Act 1980 , or that the court should disapply the primary limitation period pursuant to ss.32A or 33 of the Act , in answer to a plea in the Defence that the claim is statute barred;*

20.2 that an exemption or limitation clause was not incorporated into the parties' contract or that it was of no effect in excluding or limiting liability because the clause did not satisfy the condition of reasonableness within the meaning of the Unfair Contract Terms Act 1977 ; or

20.3 that the defendant is estopped by some earlier judgment or representation from relying upon a particular defence.

In each example, the claimant would be pleading new facts in order to refute a defence, but it would not be pleading a new claim. Equally, while there is no obligation to respond upon the facts, a Reply can usefully admit a fact alleged in the Defence (thereby avoiding the cost and trouble of needing to prove the fact and allowing the court and parties to focus on the real issues) while explaining why such admitted fact does not provide a defence to the claim. Or a Reply can deny an allegation of fact and usefully explain why such allegation must be wrong.

[21] Not only is the proposition that one can advance a new claim in a Reply contrary to the clear terms of the Practice Direction, but it is also inherently undesirable and contrary to the overriding objective of dealing with cases justly and at proportionate cost. If such practice were to be condoned, claimants would not need to be precise in their formulation of the Particulars of Claim since they could always have a second bite of the cherry when pleading the Reply. Defendants would have to seek permission from the court in order to answer by way of Rejoinder any new claims pleaded in the Reply, which might in turn call for a Surrejoinder from the claimant. Further, a claimant seeking to bring a new claim after the expiry of the limitation period could sidestep r.17.4 altogether (although possibly not s.35 of the Limitation Act 1980) by avoiding the need to make any amendment.

[22] I reject [the] submission that the prohibition in the Practice Direction upon pleading new claims in the Reply must be construed as a reference to new claims that would not, by r.17.4, be allowed to be pleaded by way of a post-limitation amendment. One has only to compare the terms of the Practice Direction with r.17.4(2) (which I discuss in more detail below) to see that the former is a broad ban on pleading new claims by way of a Reply while the latter provides a narrow power to allow some new claims to be pleaded by way of a post-limitation amendment."

Reference to the equivalent rule under the Rules of the Supreme Court was also held to be unhelpful (see [23]). (See ***Civil Procedure 2020*** Vol.1 at para.16.7.1 and following.)

- **Bilta (UK) Ltd v Tradition Financial Services Ltd** [2021] EWCA Civ 221, 22 February 2021, unrep. (David Richards, Peter Jackson and Nugee LJJ)

Adjournment – approach to be taken when witness or party cannot attend due to illness

CPR r.3.1(2)(b). An application was made to adjourn a trial based on the fact that a witness was unable to attend the trial date. Having reviewed a wealth of previous authorities, and the most recent Court of Appeal authority – that of ***Solanki v Intercity Telecom Ltd*** (2018) – Nugee LJ summarised the applicable principles (see [30]) as follows:

"[30] ... the guiding principle in an application to adjourn of this type is whether if the trial goes ahead it will be fair in all the circumstances; that the assessment of what is fair is a fact-sensitive one, and not one to be judged by the mechanistic application of any particular checklist; that although the inability of a party himself to attend trial through illness will almost always be a highly material consideration, it is artificial to seek to draw a sharp distinction between that case and the unavailability of a witness; and that the significance to be attached to the inability of an important witness to attend through illness will vary from case to case, but that it will usually be material, and may be decisive. And if the refusal of an adjournment would make the resulting trial unfair, an adjournment should ordinarily be granted, regardless of inconvenience to the other party or other court users, unless this were outweighed by injustice to the other party that could not be compensated for."

Also see [49]. Moreover, pre-CPR authorities that set out prescriptive rules that provided that where an important witness was unavailable for trial would almost have required an adjournment to be granted, were no longer good law. As Nugee LJ concluded rightly, litigation is, in many ways, no longer conducted in the same way as under the Rules of the Supreme Court (see [53]). It was, however, important to note that in assessing the importance of a witness's oral evidence in considering the fairness of a trial, when considering whether to grant an adjournment, that assessment should not be "*approached in a mechanistic or box-ticking manner*" (see [54], and see [55] on the overriding objective). ***Dick v Piller*** [1943] K.B. 497; [1943] 1 All E.R. 627, CA, ***Green v Edward Northern General Transport Co, Wood & Co, Third Party*** (1970) 115 S.J. 59, CA, ***Lombard Finance v Brookplan Trading*** [1990] 2 WLUK 322, CA, ***Teinaz v Wandsworth LBC*** [2002] EWCA Civ 1040; [2002] I.C.R. 1471, ***Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd*** [2007] EWHC 2613 (Ch); [2008] 1 W.L.R. 2380, ***Berezovsky v Russian Television and Radio Broadcasting Co*** [2010] EWCA Civ 1345, unrep., ***Dhillon v Asiedu*** [2012] EWCA Civ 1020; [2012] C.P. Rep. 44, ***Levy v Ellis-Carr*** [2012] EWHC 63 (Ch); [2012] B.P.I.R. 347, ***Solanki v Intercity Telecom Ltd*** [2018] EWCA Civ 101; [2018] 1 Costs L.R. 103. (See ***Civil Procedure 2020*** Vol.1 at paras 3.1.3 and 39.3.7.2.)

■ **CFL Finance Ltd v Laser Trust** [2021] EWCA Civ 228, 23 February 2021, unrep. (David Richards, Newey, Popplewell LJJ)

Tomlin Order – Consumer Credit Act 1974

Consumer Credit Act 1974, CPR Pt 40. Proceedings were brought to enforce a guarantee made under a loan agreement. On an appeal to the Court of Appeal an issue arose concerning a Tomlin Order that was made in order to dispose of the proceedings. The specific issue was whether the contractually binding settlement, which was contained in the confidential schedule to the Tomlin Order, could be a regulated agreement for the purposes of the Consumer Credit Act 1974. **Held** at [26]–[30], it was well-established that the schedule to a Tomlin Order was not a court order, but was rather a contract: see ***Watson v Sadiq*** (2013) at [49]–[50] and ***Vanden Recycling Ltd v Kras Recycling BV*** (2017). As such:

> *"[26] ... On the face of it, therefore, there is nothing to prevent the Settlement Agreement being a 'regulated agreement' if it involved the provision of 'credit'."*

The focus was thus on whether the agreement contained in the Tomlin Order involved the provision of credit in order to determine whether it fell under the terms of the 1974 Act. ***McMillan Williams (A Firm) v Range*** [2004] EWCA Civ 294; [2004] 1 W.L.R. 1858, ***Watson v Sadiq*** [2013] EWCA Civ 822, unrep., CA, ***Vanden Recycling Ltd v Kras Recycling BV*** [2017] EWCA Civ 354; [2017] C.P. Rep. 33, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.40.6.2.)

■ **Butters v Hayes** [2021] EWCA Civ 252, 25 February 2021, unrep. (Lewison, Peter Jackson, Newey LJJ)

Amendment – limitation – non-payment of court fee

Limitation Act 1980 s.35, Courts Act 2003 s.92, CPR rr.3.7, 3.7A1, 3.7A and 3.7AA, and Pt 17. The claimant brought proceedings for harassment in 2011. Permission was granted to amend the statement of case, further to which additional acts of harassment were added to the claim. When the claim was issued the claimant paid an issue fee of £900, albeit the fee was £800. As a consequence of the amendment, through which the claimant claimed damages of more than £1 million, the defendant submitted that a further issue fee of £770 ought to have been paid. Following a significant degree of satellite litigation, a trial on liability took place in 2019. Additionally, the defendant issued an application to strike out the amended statement of case. The basis of that application was non-payment of the court fee, and that it was now time-barred. The application was rejected. At trial the claimant succeeded on a number of grounds. The defendant was granted permission to appeal on a single ground concerning the issue whether the amended claim was time-barred. As Peter Jackson LJ put it, this meant that the Court of Appeal had to deal with the question of whether:

> *"[1] ... the non-payment of a court fee mean that time continues to run for limitation purposes in respect of a new claim within existing proceedings?"*

Held, where a new claim is made by way of amendment within a relevant limitation period, and that claim is not otherwise abusive, it will not become time-barred at a later stage because an applicable court fee had not been paid. As Peter Jackson LJ explained, having reviewed the legislative background ([2]–[9]):

> *"[10] Where a claim or counterclaim is amended, and the fee paid before amendment is less than that which would have been payable if the document, as amended, had been so drawn in the first instance, the party amending the document must pay the difference: Schedule 1 to the Fees Order. However, the CPR do not provide that a new claim will not be considered to have been 'made' if an appropriate increment is not paid; nor, ... do they provide that an original action will not have been 'brought' if the original court fee is not paid. The CPR might have said that, but they do not."*

Peter Jackson LJ went on to consider the case law. In doing so he noted that the present case was one where the non-payment was not abusive. As such the case law was not on point. However, he summarised the position from the authorities: ***Barnes v St Helens MBC*** (2006), ***Page v Hewetts Solicitors*** (2012), ***Page v Hewetts Solicitors*** (2013) ***(Page (No.2)), Bhatti v Asghar*** (2016), ***Glenluce Fishing Co Ltd v Watermota Ltd*** (2016), ***Dixon v Radley House Partnership*** (2016), ***Liddle v Atha & Co Solicitors*** (2018). He did not, however, deal with conflict in them:

> *"[23] ... From it, I reach the following conclusions:*
>
> *(1) The cases, with the possible exception of Glenluce, are concerned with the bringing of actions under Part I of the Act. They do not directly concern a new claim made by amendment within existing proceedings.*
>
> *(2) Accordingly, none of the decisions suggests that the non-payment of a fee prevents a new claim from being 'made' for the purposes of s. 35 of the Act.*
>
> *(3) As a matter of construction of Part I of the Act, an action will be brought within the limitation period if it is issued by the court within that period. The statement in Bhatti that an action will be statute-barred if issued in time but without the appropriate fee is not correct.*

> *(4) The decisions of this court in Barnes and Page establish that an action will be brought within the limitation period if it is delivered in due time to the court office, accompanied by a request to issue and the appropriate fee. They do not decide that an action will be brought in time if and only if it is accompanied by the appropriate fee.*
>
> *[24] There is a division of opinion at first instance as whether an action delivered but not issued in due time is brought at the date of delivery if the correct fee has not been proffered. There are perhaps three approaches. In Page No. 2 and Dixon it was held that an action would not be brought by reason of the non-payment alone. In Lewis, it was held that the action had not been brought because the non-payment was abusive. In Liddle it was held that the action had been brought because the non-payment had not been materially abusive, in the sense that it did not impact on the timing of the issuing of the claim. Each approach involves a trade-off between the advantages of certainty and an appreciation of the justice of the individual case. Tempting though it is to seek to resolve the question, it is unnecessary for us to do so for the purposes of the present appeal.* ***That said, my provisional view is that there is force in the concerns expressed in a number of the cases about the disallowing of a claim on limitation grounds merely because of an inadvertent miscalculation of a court fee****. I also agree with the observations of Stuart-Smith J in Dixon about the range of other responses that are available to the court to control any abuse of its processes:*
>
> > *'56. ... If identified before issue, the court may simply refuse to issue the proceedings until the proper fee is paid. If proceedings are issued, the court could direct the payment of the missing fee either at the time of issue or later. Non-compliance with that order could result in the proceedings being stayed or in a succession of peremptory orders of increasing severity that could, at least in theory, lead to a claim being struck out for non-compliance. The existence and potency of these procedural responses demonstrates that the nuclear option (i.e. holding that all proceedings that are issued without the correct fee being paid are ineffective to stop time running) is unnecessary as well as being unwarranted.'*
>
> *However, even if good faith miscalculations were not ineffective to stop time running, there is a further difficult question about where the line should be drawn in relation to calculated underpayments, as can be seen from the different approaches taken in Lewis and Liddle. As the present case is not one in which such abuse was found, resolving that question is beyond the scope of this appeal and the matter must be left for decision in a case in which the issue directly arises."* (Bold emphasis added.)

Barnes v St Helens MBC [2006] EWCA Civ 1372; [2007] 1 W.L.R. 879, CA, ***Page v Hewetts Solicitors*** [2012] EWCA Civ 805; [2012] C.P. Rep. 40, ***Page v Hewetts Solicitors*** [2013] EWHC 2845 (Ch); [2014] W.T.L.R. 479, ***Bhatti v Asghar*** [2016] EWHC 1049 (QB); [2016] 3 Costs L.R. 493, ***Glenluce Fishing Co Ltd v Watermota Ltd*** [2016] EWHC 1807 (TCC); [2016] T.C.L.R. 9, ***Dixon v Radley House Partnership (A Firm)*** [2016] EWHC 2511 (TCC); [2017] C.P. Rep. 4, ***Atha & Co Solicitors v Liddle*** [2018] EWHC 1751 (QB); [2018] 1 W.L.R. 4953, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at paras 3.7A.2, 7.2.1.)

Re Port Finance Investment Ltd [2021] EWHC 454 (Ch), 1 March 2021, unrep. (Snowden J)

Provision of witness statements from court file – scheme of arrangement

CPR r.5.4C. A non-party issued an application seeking provision of copies of four witness statements that had been filed by a company in the course of proceedings concerning a scheme of arrangement under the Companies Act 2006 Pt 26. The non-party was, as it put it, "*a business intelligence and media organisation that focuses on financial restructurings.*" The application was resisted. The witness statements had been referred to and, as Snowden J put it, paraphrased in a judgment he had given following a hearing that took place in open court in the scheme of arrangement proceedings. **Held**, the application was granted. Snowden J (at [13]–[28]) reached his decision by way of an application of the "*fact-specific balancing exercise*" articulated by Lady Hale in ***Cape Intermediate Holdings Ltd v Dring*** (2019) at [45]–[46]. In reaching that decision, Snowden J (at [29]) held the present case fell squarely within the default position of granting access identified by Toulson LJ in ***R. (Guardian News and Media) v City of Westminster Magistrates' Court*** [2012] at [85]. In reaching that decision Snowden J concluded that an application for a scheme of arrangement was one that was "*pre-eminently a process that should be open to close scrutiny*" ([13]). Little weight was to be given to the fact that the non-party was a subscription company, i.e. that its services were only available to, for instance, businesses and lawyers who subscribed to its services. Nor was it relevant that they charged a fee for access to their services ([14]–[17]). Access to the documents, none of which were said to contain confidential information, was also important in order to promote understanding of the nature of the hearing ([19]–[27]). ***R. (Guardian News and Media) v City of Westminster Magistrates' Court*** [2012] EWCA Civ 420; [2013] Q.B. 618, ***Cape Intermediate Holdings Ltd v Dring*** [2019] UKSC 38; [2020] A.C. 629, ref'd to. (See ***Civil Procedure 2020*** Vol.1 at para.5.4C.10.)

Practice Updates

STATUTORY INSTRUMENTS

Draft Whiplash Injury Regulations 2021. Draft regulations which make provision for the future tariff for damages for whiplash injuries, i.e.:

> *"... damages for pain, suffering and loss of amenity that a court may award for road traffic accident ('RTA') related whiplash injuries of up to two-years duration and any minor psychological injuries suffered on the same occasion",*

have been laid before Parliament. It is expected that they will come into force on 31 May 2021. The draft Regulations are to be made further to the Civil Liability Act 2018. Subject to provision for an uplift to be applied to the tariff in exceptional circumstances (reg.3), the incoming tariff, as per reg.2, is as follows:

"2(1) Subject to regulation 3—

(a) the total amount of damages for pain, suffering and loss of amenity payable in relation to one or more whiplash injuries, taken together ('the tariff amount' for the purposes of section 5(7)(a) of the Act), is the figure specified in the second column of the following table; and

(b) the total amount of damages for pain, suffering and loss of amenity payable in relation to both one or more whiplash injuries and one or more minor psychological injuries suffered on the same occasion as the whiplash injury or injuries, taken together ('the tariff amount' for the purposes of section 5(7)(b) of the Act), is the figure specified in the third column of the following table—

Duration of injury	*Amount – Regulation 2(1)(a)*	*Amount – Regulation 2(1)(b)*
Not more than 3 months	*£240*	*£260*
More than 3 months, but not more than 6 months	*£495*	*£520*
More than 6 months, but not more than 9 months	*£840*	*£895*
More than 9 months, but not more than 12 months	*£1,320*	*£1,390*
More than 12 months, but not more than 15 months	*£2,040*	*£2,125*
More than 15 months, but not more than 18 months	*£3,005*	*£3,100*
More than 18 months, but not more than 24 months	*£4,215*	*£4,345*

(2) In this regulation, 'duration of injury' means—

(a) the duration, or likely duration, of the whiplash injury a person has suffered; or

(b) where a person suffers more than one whiplash injury on the same occasion, the whiplash injury of the longest duration, or likely longest duration, suffered on that occasion,

if the person were to take, or had taken, reasonable steps to mitigate the effect of that injury or those injuries."

Regulation 4 makes provision for the nature of medical evidence that must be provided prior to settlement of whiplash claims further to s.6 of the Civil Liabilities Act 2018.

The Civil Procedure (Amendment No.2) Rules 2021 (SI 2021/196). In force from **31 May 2021**. The Amendment Rules effect a number of changes to the CPR, which relate to the increase in the small claims limit for personal injury claims that result from road traffic accidents. The most significant amendment is that effected to CPR r.26.6, which increases the small claims limit for personal injury claims arising from road traffic accidents to £5,000 for damages for pain, suffering and loss of amenity, while the overall claim limit remains at £10,000. The small claims limit for other claims, and particularly other personal injury claims, remains unchanged. The amendments also make provision for a number of exceptions from the increased claim limit. Amendments also make provision for the introduction of a new PD 27B, noted below, in an amended CPR r.27.2 and the introduction of the Pre-Action Protocol for Personal Injury Claims Below the Small Claims Limit in Road Traffic Accidents, also noted below, in CPR Pts 14, 26, 35 and Pt 45 Section IIIA. A further amendment is made to CPR r.16.6, which requires claim forms to specify the amount of damages for pain, suffering and loss of amenity expected to be recovered in road traffic accident personal injury claims, where the injuries arose on or after 31 May 2021.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 128th Update. This CPR Update came into force at **11.00 on 25 February 2021**. It made a number of amendments to CPR PD 51R – The Online Civil Money Claims Pilot Scheme. The amendments are mainly technical, e.g. the removal of inconsistencies concerning spelling of certain terms, or clarificatory, e.g. clarifying that where a claim is sent out of the pilot scheme by a legal adviser it is sent to the "*preferred court*" as defined in PD 51R para.1.1 or that where a claimant or defendant wishes to amend a claim form or response once they have been submitted, a CPR Pt 23 application must be made.

CPR PRACTICE DIRECTION – 129th Update. This CPR Update comes into force on **31 May 2021**. It makes a number of amendments, which flow from changes to the small claims track financial limits, the introduction of the Pre-Action Protocol for Personal Injury Claims Below the Small Claims Limit in Road Traffic Accidents and matters relating to whiplash injuries. Specifically, the Update:

- amends PD 7A by inserting a new para.3.8A, which makes provision for information, subject to exceptions, to be included in a claim form where the claim is for personal injury arising from a road traffic accident where the claim is within the increased small claims track limit;
- amends PD 16 by inserting a new para.4.3B. This makes provision for medical evidence in whiplash injury claims to be included in particulars of claim;
- renumbers PD 27 as PD 27A;
- introduces a new Practice Direction 27B – Claims Under the Pre-Action Protocol for Personal Injury Claims Below the Small Claims Limit in Road Traffic Accidents – Court Procedure. This makes provision for those claims that are not resolved via the Pre-Action Protocol for Personal Injury Claims Below the Small Claims Limit in Road Traffic Accidents; and
- amends PD 35 by way of amendment to para.2.6 to apply its provisions concerning medical evidence to include whiplash injury claims.

PRE-ACTION PROTOCOL UPDATES

On 26 February 2021, Sir Geoffrey Vos MR issued a Pre-Action Protocol Update. The Update, which forms part of the reforms also introduced by the Civil Procedure (Amendment No.2) Rules 2021 (SI 2021/196) and CPR Update 129, effected the following changes as from **31 May 2021**:

- the introduction of a new Pre-Action Protocol for Personal Injury Claims Below the Small Claims Limit in Road Traffic Accidents (the RTA Small Claims Protocol);
- amendments to the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (the RTA Protocol);
- amendments to the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims (the EL/PL Protocol); and
- amendments to the Pre-Action Protocol for Personal Injury Claims.

The main thrust of the amendments to the existing Protocols are consequential upon the amendments to the CPR arising under the Whiplash Regulations 2001 and the increase in the small claims track limit in CPR Pt 26. The new RTA Small Claims Protocol complements the RTA Protocol and is to be implemented via an online procedure (see *https://www.officialinjuryclaim.org.uk* [Accessed 5 March 2021]). It is to apply to claims for personal injury arising from road traffic accidents where: a) the personal injury claim is no more than £5,000; and b) the overall claim is no more than £10,000.

PRACTICE GUIDANCE

PRACTICE NOTE: CPR PD 57AC IN ADMIRALTY CLAIMS

On 18 February 2021, Andrew Baker J, the Admiralty Judge, issued a Practice Note that explains the practice to be applied in admiralty claims in respect of the new Practice Direction 57AC, which applies to witness statements in the Business and Property Courts from 6 April 2021. The Practice Note is reprinted below.

PRACTICE NOTE: CPR PD 57AC IN ADMIRALTY CLAIMS

1. New CPR Practice Direction 57AC applies to trial witness statements in Part 7 and Part 8 Claims in the Business and Property Courts signed on or after 6 April 2021. Admiralty claims commenced by Form ADM1, Form ADM1A, Form ADM15 or Form ADM20 fall outside the scope of PD 57AC. The question whether PD 57AC should apply has been considered by the Admiralty Court Users Committee. The Committee's recommendation is that it should. A proposal will be made to the Civil Procedure Rules Committee that, if adopted, will apply the requirements of PD 57AC to trial witness statements in such Admiralty claims signed on or after 1 October 2021.

2. A reservation was expressed about applying PD 57AC to certain witness evidence often seen in this Court, namely first hand accounts collected at the time of or immediately after a maritime casualty or incident, taken from ship's crew, engineering staff and/or officers where there may have been language or other difficulties, stressful conditions and/or significant time pressure. Such contemporaneous evidence, if collected sensibly, will tend to be valuable and by nature apt for dispensation to be given under paragraph 4.2 or 4.4 of PD 57AC (if required) to allow it later to be used for trial. The expressed concern is therefore catered for within PD 57AC, so that PD 57AC does not require to be amended or disapplied for Admiralty claims.

3. Any application under paragraph 4.2 or 4.4 of PD 57AC will be judged on its individual merits, but Admiralty Court litigants and their advisers may proceed on the basis that the Court is familiar with the realities of collecting evidence concerning a maritime casualty or incident. Where the application is founded upon such realities, it should be supported by evidence showing how full adherence to all the requirements of PD 57AC would have been impractical and that steps were taken to try to ensure, so far as practicable, that the evidence obtained was no more than the witness's own honest account, set out as they would give it. If an application supported by such evidence is made prior to the date on which trial witness statements are to be served, the Court will generally seek to determine the application without requiring the statement, or its detailed contents, to be disclosed.

Mr Justice Andrew Baker

18 Feb 2021

ROYAL COURTS OF JUSTICE – CAUSE LIST UPDATE

On 19 February 2021, publication of the cause lists for the Royal Courts of Justice and the Rolls Building migrated to the gov.uk website. They can now be found here: *https://www.gov.uk/government/collections/royal-courts-of-justice-and-rolls-building-daily-court-lists?utm_medium=email&utm_source=* [Accessed 5 March 2021].

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 March 2021].

ROYAL COURTS OF JUSTICE – FEES OFFICE UPDATE

On 1 March 2021, the telephone number for the Royal Courts of Justice Fees Office changed to 0203 936 8957: see Royal Courts of Justice, Fees Office, Information for Court Users, dated 1 March 2021 (*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/964372/RCJ_Notice_Fees_Office_1_March_2021.pdf?utm_medium=email&utm_source=* [Accessed 5 March 2021]).

In Detail

ACCESS TO REMOTE HEARINGS

In ***R. (Good Law Project Ltd) v Secretary of State for Health and Social Care*** [2021] EWHC 346 (Admin), the Administrative Court returned, in a postscript to its judgment on the substantive issue in the proceedings, to the question whether and how a court hearing could be broadcast. This is an issue that has been considered by the courts on a number of occasions now since the enactment of the Coronavirus Act 2020, which inserted – on a temporary basis – ss.85A and 85B into the Courts Act 2003.

Prior to the enactment of s.85B the position concerning broadcasting was relatively straightforward. As Chamberlain J noted in ***R. (Good Law Project Ltd)*** at [162] it was prohibited:

> *"[162] Section 41 of the Criminal Justice Act 1925 imposes a general prohibition on the taking of photographs in court and on the publication of such photographs. This prohibition extends to video recordings: R v Loveridge [2001] EWCA Crim 973, [2001] 2 Cr App R 29 ..."*

As he went on to note, rightly, provision had been made, prior to the introduction of s.85B of the 2003 Act, for limited statutory exceptions to the prohibition. The basis for such exceptions is set out in s.32 of the Crime and Courts Act 2013, which enables the Lord Chancellor, by Order, and with the agreement of the Lord Chief Justice to permit the recording and broadcasting of specified proceedings. Such an order, the Court of Appeal (Recording and Broadcasting) Order 2013 (SI 2013/2786), is in place, for instance, in respect of proceedings in the Court of Appeal and is the basis on which they are recorded and broadcast on the judiciary's YouTube channel. Absent exceptions provided for under s.32 of the 2013 Act, the court's inherent jurisdiction, again as Chamberlain J noted, which would otherwise permit and control recording and broadcasting proceedings, was constrained by the 1925 Act. In this respect though, it ought to be noted that the 1925 Act prohibition did not apply to the broadcasting of proceedings by the court itself where the broadcast was carried out within the court precincts, i.e. from one court room to another: ***R. (Spurrier) v Secretary of State for Transport*** [2019] EWHC 528 (Admin); [2019] E.M.L.R. 16 at [30].

The position was modified by the Coronavirus Act 2020. By inserting ss.85A and 85B into the Courts Act 2003 it made further provision governing the broadcasting of proceedings. The background to those provisions is instructive. They originated not in the Government's response to the COVID-19 pandemic, but in the Prison and Courts Bill 2017 Sch.6. In that Bill, the provisions were intended to provide for, and control, the recording and broadcasting of online hearings. The purpose of the provisions was made clear in the explanatory memorandum to the 2017 Bill. It explained, at para.81, that:

> *"There are no existing legislative provisions regarding the live-streaming of court or tribunal proceedings for the purpose of public participation for wholly video or wholly audio hearings. In relation to proceedings held in physical court, section 41 of the Criminal Justice Act 1925 prohibits photography (expanded by case-law to cover films) and section 9 of the Contempt of Court Act 1981 prohibits unauthorised sound recordings. Section 32 of the Crime and Courts Act 2013 gives the Lord Chancellor the power to make exceptions to these provisions."*

The basis of the provisions was therefore to make provision to control the recording and broadcasting of wholly remote hearings, i.e. those hearings where none of the participants, including the judge, are in a physical court room. Absent the provisions, any broadcast of a wholly remote hearing would thus have fallen outside the scope of the 1925 Act's prohibition on broadcasting. Chamberlain J went further than this, in that at [163] he concluded that the provisions, and particularly s.85A of the 2003 Act, provided the basis for the court to direct that the proceedings could be recorded. It might be questioned whether that is the case. Absent ss.85A and 85B of the 2003 Act, it is difficult to see why the court's inherent jurisdiction, or CPR rr.1.4(2)(k) and 3.1(2)(d), could not be relied upon to direct that wholly remote proceedings be broadcast, or recorded. Sections 85A and 85B, at least as originally intended, appear to do no more than provide a clear statutory basis for the control of recording and broadcasting such proceedings, and particularly to provide for protection for such matters analogous to that set out in the 1925 Act.

What is clear, however, is that ss.85A and 85B of the 2003 Act are limited in terms of their application. In the first instance, they only apply to wholly remote hearings. That is clear from the wording of the provisions, e.g. s.85A(1): "*If the court directs that proceedings are to be conducted wholly as video proceedings*". Equally, it is clear from ***Gubarev v Orbis Business Intelligence Ltd*** [2020] EWHC 2167 (QB); [2020] 4 W.L.R. 122, where partially remote proceedings, i.e. some participants were in a physical court room and others were attending remotely via video-link to give evidence, fell within the 1925 Act prohibition. They did so, clearly, because as a partially remote hearing, any broadcast or recording would necessarily be a broadcast of a physical court room, hence Warby J's order in ***Gubarev***, noted at [18]–[20] in that

case, emphasising that there must be no transmission of the proceedings outside a second court room (which would have fallen within the exception noted in ***R. (Spurrier)*** at [30]) that had been provided for some participants to use during the hearing.

The position therefore appears to be clear:

- the recording and broadcast of hearings that take place entirely in a physical court building is prohibited unless: (a) it is permitted under an order made under s.32 of the Crime and Courts Act 2013; or (b) it is permitted by the court to enable a court hearing to be broadcast from one court room to another court room further to ***R. (Spurrier)***;
- the recording and broadcast of partially remote hearings, i.e. those where some participants are in a court building and others are attending remotely is prohibited unless it falls under either of the exceptions applicable to hearings that take place entirely in a physical court building; and
- the recording and broadcast of wholly remote hearings is only permissible if authorised under s.85A of the Courts Act 2003.

In ***R. (Good Law Project Ltd)***, Chamberlain J further considered the application of s.85B, albeit referred to as s.86B in the judgment. In rejecting a submission that there was power:

> *"... to permit proceedings in the Administrative Court to be recorded for the purposes of broadcast, even when the proceedings are conducted wholly as video proceedings"*

(see [167]), he explained at [165], that s.85B(6)(b)'s function was:

> *"... to make clear that no offence would be committed by a person who records or transmits footage pursuant to an authorisation by the court. That is not surprising."*

That is clearly correct. It does, however, leave a question unanswered. The sub-section states as follows:

> *"For the purposes of this section a recording or transmission is 'unauthorised' unless it is—*
>
> *(a) authorised by a direction under section 85A,*
>
> *(b) otherwise authorised (generally or specifically) by the court in which the proceedings concerned are being conducted, or*
>
> *(c) authorised (generally or specifically) by the Lord Chancellor."*

Section 85B(6)(b)(a)'s application is evident in that it refers explicitly to s.85A. Section 85B(6)(b)(c)'s application is also evident, it makes clear that the Lord Chancellor has authorised recording and broadcasting via an order under s.32 of the Crime and Courts Act 2013 does not fall within the prohibition set out in section 85B. Given the penal consequences of s.85(B) that it makes clear that orders under the 2013 Act are outwith its scope, that is understandable. It is not, however, clear what authorisation s.85B(6)(b)(b) is intended to cover. The claimants in ***R. (Good Law Project Ltd)***, argued that the provision made "*no sense unless the court had power to authorise recording or transmission other than under s.85A*." Chamberlain J rejected that argument, at [165], for the reason noted above. There is, however, something in the claimant's point here. It is clear what circumstances are covered by s.85B(6)(b)(a) and (c). On the face of it they refer to the only bases on which the civil proceedings can be broadcast or recorded. It is difficult to see to what further circumstance s.85B(6)(b) might apply. The answer to that question may, however, lie outside ss.85A and 85B in the same way that the application of s.85B(6)(c) falls outside those provisions. In the case of s.85B(6)(b)(b), it might properly apply to, for instance, audio recordings of hearings authorised under CPR r.39.9 or, more broadly, to recordings of hearings in, for instance, the Court of Protection, as noted at para.65 of the Remote Access to the Court of Protection Guidance (March 2021). In other words, taken together the three sub-sections in r.85B(6)(b) make clear that all possible means by which recording can properly be authorised, both those within s.85A and outwith it, are outside the prohibition, and criminal liability attached to that prohibition, set out in s.85B. As such those sub-sections, and particularly r.85B(6)(b)(b) do not "*define or expand the scope of the court's powers to authorise broadcast and recording*", as Chamberlain J held at [166], they simply refer to the existing means to authorise such broadcast and recording, albeit those powers are not, as he went on to say "*set out in s.86A*." They are both set out within and outwith it. No doubt the position will be revisited when the current temporary provisions inserted by the Coronavirus Act 2020 are replaced by cll.166–169 of the Prison, Crime, Sentencing and Courts Bill 2021 when it comes into force.

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EDITOR: **Dr J. Sorabji,** Barrister, 9 St John Street
Published by Sweet & Maxwell Ltd, 5 Canada Square, Canary Wharf, London, E14 5AQ
ISSN 0958-9821
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All rights reserved
Typeset by Matthew Marley
Printed by Hobbs The Printers Ltd, Totton, Hampshire.

42829924