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- **Paccar Inc v Road Haulage Association Ltd** [2021] EWCA Civ 299, 5 March 2021, unrep. (Henderson, Singh and Carr LJJ)

Third-party funding – damages-based agreement – claims management services

The Courts and Legal Services Act 1990 s.58AA, the Compensation Act 2006 Pt 2 s.4(2) and (3), and the Damages-Based Agreements Regulations 2013 (SI 2013/609). An issue, amongst others, arose in collective proceedings before the Competition Appeal Tribunal whether funding arrangements provided by a third-party litigation funder were damages-based agreements (DBAs) for the purposes of s.58AA of the Courts and Legal Services Act 1990 due to their being claims management services. The specific issue was:

> *"[2] ... whether funding agreements entered into with claimants by third parties who play no part in the conduct of the litigation, but whose remuneration is fixed as a share of the damages recovered by the client, are 'damages-based agreements' within the meaning of the relevant legislation which regulates such agreements. If they are, the likely consequence would be that most, if not all, litigation funding agreements currently in existence would be unenforceable, as would the specific agreements which the Tribunal was asked to approve in the present case."*

The Court of Appeal heard an appeal from the CAT sitting both as the Court of Appeal and as a Divisional Court. **Held**, the third-party funding provided did not amount to claims management services, and as such did not come within the DBA regulations. Parliament had introduced a comprehensive statutory scheme for regulating third-party litigation funding in s.58B of the Courts and Legal Services Act 1990. While that scheme had not been brought into force, it could not have been intended that the regulation of claims management services, as provided for in the Compensation Act 2006 and via that the introduction of such services into the definition of DBAs in s.58AA of the 1990 Act, would apply to third-party litigation funding (see [87]–[97]). (See ***Civil Procedure 2021*** Vol.2 at paras 9B-141+ and 9B-142+.)

- **Eurasian Natural Resources Corp Ltd v Qajygeldin** [2021] EWHC 462 (Ch), 8 March 2021, unrep. (Master Clark)

No power to direct party to evidence steps taken to fulfil disclosure obligations

CPR PD 51U paras 10.3 and 17.1. Master Clark considered an application that raised two issues of principle concerning disclosure: first, if the court has power to direct the disclosure of documents evidencing whether a disclosing party has complied with their disclosure obligation; and secondly, if so, what principles govern the exercise of that power. The issues were considered in respect of both the disclosure pilot scheme under CPR PD 51U and the court's inherent jurisdiction. Master Clark **held** that there was no basis under either para.10.3 or para.17.3 of the disclosure pilot scheme to order such disclosure. As the Master explained:

> *"[54] The claimant's application notice relies upon PD 51U paras 10.3 and 17.1 as providing jurisdiction for the order sought.*
>
> *Para 10.3*
>
> *[55] Para 10 is headed 'Completion of the Disclosure Review Document'. Para 10.3 provides so far as relevant:*
>
> > *'The parties' obligation to complete, seek to agree and update the Disclosure Review Document is ongoing. If a party fails to co-operate and constructively to engage in this process the other party or parties may apply to the court for an appropriate order ..., and the court may make any appropriate order....'*
>
> *[56] The relevant part of the DRD in this case is section 12 (set out at para 18 above). This requires the disclosing party to provide information. It does not in my judgment require them to provide documents evidencing why documents are irretrievable. In my judgment, since a party's obligation to complete the DRD does not extend to providing documents to prove the steps it has taken (or a fortiori , any responses it has received to such steps), the 'appropriate order' which the court has power to make does not extend to the provision of such documents.*
>
> *Para 17.1*
>
> *[57] Para 17.1 provides:*
>
> > *'17.1 Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to—*

(1) serve a further, or revised, Disclosure Certificate;

(2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;

(3) provide a further or improved Extended Disclosure List of Documents;

(4) produce documents; or

(5) make a witness statement explaining any matter relating to disclosure.

17.2 The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4).'

[58] The defendant's counsel submitted that para 17.1 was not engaged because the date by which the parties are to give Extended Disclosure has not yet arrived. The claimant's counsel submitted that there was no reason in principle why paragraph 17.1 should not apply where an order for Extended Disclosure had been made, and where it has become apparent that a party's compliance with his ongoing duties (including his duties to cooperate and preserve evidence) is or may be deficient.

[59] Complying with an order for Extended Disclosure requires (in summary) 3 things to be done:

- *service of a Disclosure Certificate;*
- *service of a List;*
- *production of documents.*

Until the time when these things are to be done ... and the court is then able to assess what has been done, a party cannot, in my judgment, be said to have failed to comply with an order for Extended Disclosure. Para 17.1 is not therefore engaged.

[60] It follows from the above that the jurisdictional basis relied upon by the claimant does not in my judgment support its application."

Additionally, no authority was cited to the court in favour of the proposition that disclosure of such evidence could be required under the court's inherent jurisdiction (see [81]). However, the court did have jurisdiction to order disclosure in respect of matters not arising from the statements of case, as would be the case here. This was a jurisdiction that was only exercised *"very sparingly"*: see ***Harris v Society of Lloyd's*** (2008). There were very strong policy issues against ordering disclosure as sought in this case. Party and court resources ought to be:

"directed and focussed upon the matters which the court will need to decide in order for there to be a fair resolution of the claim at trial." (See [82]–[86].)

The application was refused. ***Harris v Society of Lloyd's*** [2008] EWHC 1433 (Comm); [2009] Lloyd's Rep. I.R. 119, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at paras 51UPD.10 and 51UPD.17.1)

Canada Square Operations Ltd v Potter [2021] EWCA Civ 339, 11 March 2021, unrep. (Sir Julian Flaux CHC, Rose and Males LJJ)

Limitation – deliberate concealment

The Limitation Act 1980 s.32(1)(b). The respondent took out a regulated fixed-sum loan with the appellant in 2006. She also took out payment protection insurance (PPI) in respect of the loan. The appellant acted as the insurance intermediary arranging the PPI policy. As the Court of Appeal noted, the appellant was not informed that only about 4.7% of the premium sum she was lent for the PPI was paid to the insurer. Approximately 95% of the premium sum lent to her, and interest paid on it, was paid to the appellant as commission. In ***Plevin v Paragon Personal Finance Ltd*** (2014), on similar facts, the Supreme Court held that where there was non-disclosure of very high commission charged to a borrower, the relationship between borrower and creditor was *"unfair"* for the purposes of s.140A of the Consumer Credit Act 1974. The respondent was provided with compensation by the appellant in 2018 following a complaint that the PPI policy was mis-sold. Subsequently, the respondent commenced proceedings, based on s.140A of the 1974 Act, to recover the balance of the premium and interest paid. She did so as the compensation paid did not cover her losses. The issue before the Court of Appeal was whether the respondent's claim was time-barred: see s.9(1) of the Limitation Act 1980. The issue arose in circumstances where the appellant, in its defence to the claim, admitted the non-disclosure of the fact it would receive commission. **Held**, (i) the creation of an unfair relationship, further to s.140A of the 1974 Act, gave rise to a breach of duty under s.32 of the 1980 Act: see ***Giles v Rhind (No.2)*** (2008); (ii) the appellant's failure to disclose the commission, in circumstances where it was under an obligation to act fairly

as per s.140A of the 1974 Act, amounted to concealment for the purposes of s.32(1)(b) of the 1980 Act. As Rose LJ explained at [75]–[77]:

> *"[75] ... Section 32(1)(b) does not refer to a duty to disclose, it refers only to concealment. Inherent in the concept of 'concealing' something is the existence of some obligation to disclose it. To construe section 32(1)(b) as being satisfied only if there is a pre-existing legal duty to disclose seems to me to add an unwarranted and unhelpful gloss on the clear words of the statute. For the purposes of the Act that obligation need only be one arising from a combination of utility and morality ...*
>
> *[76] I can see no reason why Parliament should require the court to undertake a detailed analysis of implied contractual terms between the parties or the precise scope of the tortious duties of care owned by the defendant when considering whether section 32(1)(b) is satisfied. Rix LJ's judgment [in AIC Ltd v ITS Testing Services (UK) Ltd (The Kriti Palm) (2006)] shows the dangers of such an approach ... The focus should instead be on the conduct which is alleged to amount to the concealment and on an analysis of whether the defendant was, at that point, under a sufficient obligation to disclose for the failure to disclose to amount to concealment as at that date.*
>
> *[77] I therefore consider that the majority judgments in The Kriti Palm establish that the 'duty to disclose' ... does not have to be a free-standing contractual, tortious or fiduciary duty.";* and

(iii) to determine whether concealment was deliberate for the purposes of s.32(2) of the 1980 Act, the correct test was that set out by Lord Bingham in ***R. v G*** (2003), i.e. a test of recklessness that has both subjective and objective elements (see Rose LJ at [137]). As Rose LJ summarised the test:

> *"[87] . . . the correct test was that a person acts recklessly with respect to a circumstance when he is aware of a risk that it exists or will exist and it is, in the circumstances known to him, unreasonable to take the risk. A person acts recklessly with respect to a result when he is aware of the risk that it will occur and it is, in the circumstances known to him, unreasonable to take that risk . . ."*

The appeal was dismissed. The limitation period did not begin to run until November 2018. ***R. v G*** [2003] UKHL 50; [2004] 1 A.C. 1034, ***AIC Ltd v ITS Testing Services (UK) Ltd (The Kriti Palm)*** [2006] EWCA Civ 1601; [2007] 1 All E.R. (Comm) 667, ***Giles v Rhind (No.2)*** [2008] EWCA Civ 118; [2009] Ch. 191, CA, ***Plevin v Paragon Personal Finance Ltd*** [2014] UKSC 61; [2014] 1 W.L.R. 4222, ref'd to. (See ***Civil Procedure 2021*** Vol.2 at para.8-85.1.)

■ **Beriwala v Woodstone Properties (Birmingham) Ltd** [2021] EWHC 609 (Ch), 16 March 2021, unrep. (Robin Vos sitting as a deputy judge of the High Court)

Settlement after circulation of draft judgment – discretion not to hand down judgment

CPR Pt 40. A commercial dispute settled following a five-day trial. Prior to settlement by way of Tomlin Order, which was predicated upon the judgment not being handed down, a draft judgment was circulated to the parties. The question arose whether the judge should proceed to hand down his judgment notwithstanding the settlement. **Held**, it was established that where a claim was settled after circulation of a draft judgment the court retained a discretion not to hand down its judgment: see ***Prudential Assurance Co Ltd v McBains Cooper*** (2000). The deputy judge exercised that discretion in favour of not handing down the judgment and approving the Tomlin Order. In reaching his decision the deputy judge considered the approach to be taken when considering whether or not to hand down a judgment in such circumstances. First, it was clear that the circulation of a draft judgment was not intended to be an aid to facilitating settlement: see ***R. (S) v General Teaching Council for England*** (2013) at [26] and [27]. Secondly, it was clear that a number of factors needed to be considered. As the deputy judge put it:

> *"[18] It is clear from these authorities that, in deciding whether to hand down judgment, it is necessary to weigh up both the private interests of the parties and any public interest in handing down the judgment (see F&C Alternative Investments at [9] and Barclays at [74-77]). Whilst the points relied on in particular cases may be a helpful guide, it is necessary to take into account all of the relevant circumstances.*
>
> *[19] In my view, the test is no different whether the settlement is reached before or after the draft of the judgment is provided to the parties. However, the fact that a draft judgment has been provided to the parties is clearly a relevant factor to take into account."*

The fact that the draft judgment had been finalised and circulated prior to settlement did not create a presumption in favour of handing down: ***Prudential Assurance Co Ltd v McBains Cooper*** (2000) explained on this point (see [19]–[21]). It was, however, an important public interest factor to take into account in assessing whether to hand down the judgment. Other factors to take into account that had been identified in the authorities, and which pointed towards handing down the judgment were, as noted by Lord Neuberger MR in ***Barclays Bank Plc v Nylon Capital LLP*** (2011) at [74]–[75]: that the judgment deals with a point that there is a public interest in being considered in a judgment,

e.g. because it raises a point of law of potential general interest; where an appellate court departs from the court below's decision; where the case involves wrongdoing or an activity that ought to be brought to public attention; or where the case has garnered proper (legitimate) public interest. This last point was noted to be a *"powerful reason"* for handing down the judgment. Lord Neuberger MR also noted that a relevant factor, in most cases, was how far the judge had proceeded in drafting their judgment. Further relevant factors were also outlined by Sales J in ***F&C Alternative Investments (Holdings) Ltd v Barthelemy*** (2011) at [7], those being that: considerable weight ought to be given to the parties' wishes; the public interest in conserving court time and resources by bringing the proceedings to an end; whether the dispute concerned the conduct of a range of regulated individuals or entities; whether witness honesty and credibility had been attacked during the trial and would be vindicated in the judgment; and whether there were legal questions that the judgment would develop or provide guidance on. ***Prudential Assurance Co Ltd v McBains Cooper*** [2000] 1 W.L.R. 2000, CA, ***Barclays Bank Plc v Nylon Capital LLP*** [2011] EWCA Civ 826; [2012] 1 All E.R. (Comm) 912, ***F&C Alternative Investments (Holdings) Ltd v Barthelem***y [2011] EWHC 1851 (Ch); [2012] Bus. L.R. 884, ***R. (S) v General Teaching Council for England*** [2013] EWHC 2779 (Admin), unrep., ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.40.2.6.)

- **Cuciurean v Secretary of State for Transport** [2021] EWCA Civ 357, 16 March 2021, unrep. (Lewison, Edis and Warby LJJ)

Contempt of court – knowledge – service

CPR rr.81.5 and 81.8(2)(b) (pre-October 2020 Pt 81). An injunction was obtained to enjoin individuals protesting against the HS2 rail project from trespassing on land. The injunction was granted against persons unknown. Contempt proceedings were brought against the appellant for breach of the injunction. The appellant was subsequently held to have breached the injunction 12 times. He was committed to prison for six months, suspended for 12 months, for each breach. The appellant argued on appeal, amongst other things, that he had not had *"sufficient notice"* of the injunction. Service had been effected further to CPR r.81.8(2)(b) of the pre-October 2020 CPR Pt 81 by an alternative method (now see CPR r.81.5(1) and CPR r.6.15). The essence of the appellant's argument was that the applicant seeking an order for committal had to prove beyond reasonable doubt *"something more"* than service, that being knowledge, i.e. actual notice, of the order. **Held**, the appeal was dismissed. In doing so, Warby LJ, with whom Lewison and Edis LJJ agreed, made clear that the submission that an applicant seeking an order for committal had to prove both service and knowledge was contrary to authority. Knowledge went to sanction, not to liability for contempt. As Warby LJ put it:

> *"[56] ... The effect of the authorities was summarised by Lord Oliver in Attorney General v Times Newspapers Ltd [1992] 1 AC 181, 217-218 :*
>
> > *'One particular form of contempt by a party to proceedings is that constituted by an intentional act which is in breach of the order of a competent court. Where this occurs as a result of the act of a party who is bound by the order ... it constitutes a civil contempt by him which is punishable by the court at the instance of the party for whose benefit the order was made and which can be waived by him. The intention with which the act was done will, of course, be of the highest relevance in the determination of the penalty (if any) to be imposed by the court, but the liability here is a strict one in the sense that all that requires to be proved is service of the order and the subsequent doing by the party bound of that which is prohibited.'"*

The authorities made clear that in the context of contempt proceedings:

> *"[58] ... that (1) in this context 'notice' is equivalent to 'service' and vice versa ; (2) the Court's civil contempt jurisdiction is engaged if the claimant proves to the criminal standard that the order in question was served, and that the defendant performed at least one deliberate act that, as a matter of fact, was non- compliant with the order; (3) there is no further requirement of mens rea , though the respondent's state of knowledge may be important in deciding what if any action to take in respect of the contempt."*

Nor was it appropriate to introduce into the rules on service a nebulous gloss, as submitted by the appellant, that unless the applicant can show that it would not be *"unjust in the circumstances"* of alternative service, service could be set aside. Furthermore, Warby LJ explained that, while it may appear problematic to deal with a contempt application where it had not been shown that the defendant had actual knowledge of the order giving rise to the application, that was a matter that could properly be dealt with in terms of the sanction imposed (see [62]). See ***Cuadrilla Bowland Ltd v Persons Unknown*** (2020), where in such a situation no penalty could be imposed. ***Attorney General v Times Newspapers Ltd*** [1992] 1 A.C. 191, HL, ***Cameron v Liverpool Victoria Insurance Co Ltd*** [2019] UKSC 6; [2019] 1 W.L.R. 1471, ***Boyd v Ineos Upstream Ltd*** [2019] EWCA Civ 515; [2019] 4 W.L.R. 100, ***Perkier Foods Ltd v Halo Foods Ltd*** [2019] EWHC 3462 (QB), unrep., ***Cuadrilla Bowland Ltd v Persons Unknown*** [2020] EWCA Civ 9; [2020] 4 W.L.R. 29, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.81.5.3.)

- **Re One Blackfriars Ltd (In Liquidation)** [2021] EWHC 684 (Ch), 23 March 2021, unrep. (John Kimbell QC sitting as a deputy judge of the High Court)

Consideration of efficacy of remote hearing

The Courts Act 2003 s.85A(1)(a). Following a wholly remote trial of proceedings, the deputy High Court judge set out an assessment of the remote trial process. He first noted that he was well able to assess witness evidence remotely. As he put it:

> *"[20] I did not feel in any way disadvantaged in my ability to assess the reliability or credibility of the oral witness evidence. If anything, the opposite was the case. The engineer host provided by Sparq [the company providing the remote hearing technology] not only ensured that the internet connection was sufficiently good and stable to enable remote cross-examination (well before the witness appeared) but also helped to ensure that the witness was generally positioned at a reasonable distance from the camera and in optimal light conditions. The result was in most cases as if I were sitting about 1.5 metres directly opposite both the witness and the cross-examining advocate with the trial bundle open in front of me. This permitted me to follow the ebb and flow of a cross-examination very well. If anything, I was in a better position to observe the witness's reaction to the questions and documents being put to them than if the trial had taken place in a traditional court room. In a typical Rolls Building court room, I would have been positioned behind a bench looking for the most part at the side of the witness's head from a distance of three or four metres while her or she either looked down into a paper trial bundle or at cross-examining counsel."* (Editorial addition in square brackets.)

Furthermore, the remote hearing was not considered to materially affect the deputy judge's ability to assess witness demeanour (see [22]–[23]). Secondly, the deputy judge considered the effect of a wholly remote hearing on the principle of open justice (see [24]–[25]). Having noted that such a hearing is, by default, a private hearing, the onus is on the court to ensure that public access to the court is facilitated effectively. That was done in the present case by an order under s.85A(1)(a) of the Courts Act 2003, which provided for live streaming of the hearing to a dedicated web page that was accessible by the public. The web page's address was published on the daily case list. As a consequence, 60 members of the public watched the proceedings. As the deputy judge noted, that was a larger number than would have been able to attend a physical court hearing. Furthermore, due to the availability of written materials, such as expert witness reports on screen, it was possible for those viewing the trial to follow cross-examination more effectively than otherwise would have been the case (see [18]).

As he concluded:

> *"[25] ... the remote hearing proved to be more than a second-best work around in the face of the Covid 19 pandemic. The fully remote mode of trial certainly created real challenges for the parties and their representatives, not least because of the short period to make adjustments in the preparations for trial. However, my overall assessment is that not only were those challenges overcome by appropriate and mutually agreed adjustments on the part of counsel, the parties and court but that the trial was conducted more efficiently and far more conveniently as a fully remote trial. It was also more accessible to the public than it would have been had it taken place in a traditional court room in the Rolls Building."*

(See ***Civil Procedure 2021*** Vol.1 at paras 1.4.13 and 39.2.1.)

Practice Updates

STATUTORY INSTRUMENTS

The Taking Control of Goods (Amendment) (Coronavirus) Regulations 2021 (SI 2021/300). In force from **25 March 2021**. The Regulations amend reg.52 of the Taking Control of Goods Regulations 2013 (SI 2013/1894), concerning the recovery of commercial rent arrears (see s.77(3) of the Tribunals, Courts and Enforcement Act 2007). The amendment provides that the minimum amount of outstanding unpaid commercial rent is 457 days' rent where enforcement takes place on, or before, 23 June 2021. Otherwise it is 554 days' unpaid rent thereafter.

The Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2021 (SI 2021/284). In force from **31 March 2021**. The Regulations, which apply only to England, amend Sch.29 to the Coronavirus Act 2020 to extend the period in which landlords must provide three months' notice of eviction in respect of various residential tenancies from 31 March 2021 to 31 May 2021.

The Coronavirus Act 2020 (Residential Tenancies: Extension of Period of Protection from Eviction) (Wales) Regulations 2021 (SI 2021/377) (W.118). In force from **31 March 2021**. The Regulations, which apply only to Wales, amend para.1(1)(b)(ii) of Sch.29 to the Coronavirus Act 2020. They do so by substituting 30 June 2021 for 31 March 2021 as the *"relevant period"* in that paragraph. It thus amends the period for giving notice that possession is sought of dwellings.

The Public Health (Coronavirus) (Protection from Eviction) (England) (No.2) (Amendment) Regulations 2021 (SI 2021/362). In force from **30 March 2021**. The Regulations, which apply only to England, extend the duration of the Public Health (Coronavirus) (Protection from Eviction) (England) (No.2) Regulations 2021, which prevent attendance at dwellings to execute writs or warrants of possession or to deliver eviction notices (other than in specified circumstances), from 31 March to 31 May 2021.

The Public Health (Protection from Eviction) (No.2) (Wales) (Coronavirus) Regulations 2021 (SI 2021/325) (W.84). In force from **1 April 2021**. The Regulations, which apply only to Wales, maintain the prohibition on attending dwellings to execute writs or warrants of possession or to deliver eviction notices (other than in specified circumstances), which was previously implemented via the Public Health (Protection from Eviction) (Wales) (Coronavirus) Regulations 2021 (SI 2021/12) (W.5). They maintain the prohibition until 30 June 2021. The Regulations must be reviewed on 23 April 2021, and thereafter at least once every 21 days.

The Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) Regulations 2021 (SI 2021/283). In force from **31 March 2021**. The Regulations, which apply only to England, revoke the Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No.3) Regulations 2020 (SI 2020/1472). They further amend s.82(12) of the Coronavirus Act 2020. The amendment provides that the *"relevant period"* for the purpose of s.82(12)(b) is 30 June 2021. As such non-payment of rent under a business tenancy cannot be enforced by way of re-entry or forfeiture during the *"relevant period"*, which ends, unless further amended, on 30 June 2021.

The Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) Regulations 2021 (SI 2021/253) (W.66). In force from **31 March 2021**. The Regulations, which apply only to Wales, revoke the Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) (No.3) Regulations 2020 (SI 2020/1456) (W.314). They further amend s.82(12) of the Coronavirus Act 2020. The amendment provides that the *"relevant period"* for the purpose of s.82(12)(b) is 30 June 2021. As such non-payment of rent under a business tenancy cannot be enforced by way of re-entry or forfeiture during the *"relevant period"*, which ends, unless further amended, on 30 June 2021.

PRACTICE DIRECTIONS

PRACTICE DIRECTION 66 (CROWN PROCEEDINGS) UPDATE. On 18 March 2021 the Government updated the list of government departments authorised for service under the Crown Proceedings Act 1947. Practice Direction 66 Annex 1 has been updated accordingly. The list can also be obtained here: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970831/List-of-Authorised-Government-Departments-under-s.17-Crown-Proceedings-Act-1947.pdf* [Accessed 6 April 2021].

TEMPORARY INSOLVENCY PRACTICE DIRECTION SUPPORTING THE INSOLVENCY PRACTICE DIRECTION. On 31 March 2021, Sir Julian Flaux C, with the concurrence of Lord Wolfson, issued a new temporary and supplementary Insolvency Practice Direction. It is in force from **1 April 2021** until **30 June 2021**. It replaces the previous Temporary Insolvency Practice Direction, which expired on 31 March 2021. The new temporary Practice Direction maintains in place the temporary provisions introduced by its predecessor, which was in force from 1 October 2020. It is available here: *https://www.judiciary.uk/wp-content/uploads/2021/03/IPD-making-document-25_03_21-Copy.pdf* [Accessed 6 April 2021].

PRE-ACTION PROTOCOLS

Pre-Action Protocol for Judicial Review. This Pre-Action Protocol is to be updated further to the amendment to the list of government departments authorised for service (see Practice Direction Update, above). Annex A s.2 of the PAP will be amended to show the updated address for service for Her Majesty's Revenue and Customs, which is General Counsel and Solicitor to Her Majesty's Revenue and Customs, HM Revenue and Customs, 14 Westfield Avenue, Stratford, London, E20 1HZ. As of 2 April 2021, the address had not been updated on the Civil Procedure Rule's website.

In Detail

VARIOUS CLAIMANTS v G4S PLC [2021] EWHC 524 (CH) – GROUP LITIGATION – ADDITION OF PARTIES

In ***Various Claimants v G4S Plc*** [2021] EWHC 524 (Ch), 10 March 2021, Mann J considered a number of issues concerning the adding of claimants to a multi-party claim. The claim, which was arguably issued on the last day of the limitation period, arose out of alleged breaches by the defendant of s.90A of the Financial Services and Markets Act 2000. The claims were for losses alleged to have been incurred as a consequence of allegedly fraudulent announcements by the defendant as to "*the strength and honesty of its business practices*" (see [3]). Prior to the claim form being served, on 30 April 2020, it was amended six times to add and also remove claimants. All the amendments were, arguably, made after the expiry of the limitation period. The defendant applied to strike out those claims that had been added following the expiry of the limitation period. The application succeeded.

The issues

It is well-established that when a claim form is amended, the amendment relates back to the date on which it was issued. As such, it is possible, on the application of an existing claimant, to amend a claim form to add a claimant to it after the date on which the claim would otherwise be statute-barred. The court's power to permit such amendments is governed by s.25 of the Limitation Act 1980 and CPR rr.17.1 and 19.5 (see [15]–[32], and [35]–[36]).

(i) Can an amendment be made to join separate claims?

The first issue Mann J considered was whether it was permissible under CPR r.17.1 for the addition of new claimants who had separate claims from those pleaded in the claim form. CPR r.17.1 provides that *"A party may amend his statement of case at any time before it has been served on any other party."* Two specific points were considered: first, whether the reference to *"a party"* was limited to existing claimants whose claim was already pleaded or if it applied more broadly to including potential claimants; and, secondly, if the reference to *"statement of case"* referred to the existing party's statement of case or could encompass another party's statement of case. Mann J noted that on the first issue, it was rightly conceded that *"party"* could only refer to *"an existing party"* and not to *"a would-be but not-yet party"* (see [35]). On the second issue, he held:

> *"[36] [CPR r.17.1] then allows that party to amend 'his statement of case'. In my view the natural meaning of those words is such that it refers to the statement of case embodying the claim that that claimant is making or seeks to make. It distorts the words to take it any wider than that. An amendment to plead another claimant's entirely separate case is not so much an amendment of the existing claimant's claim form by that claimant (though it would, I accept, change the document itself); it is bringing in a new person who is bringing in a separate and distinct claim. It does not seem to me to be a natural construction to treat that as an amendment by the existing party of 'his statement of case' when one considers what a statement of case is."*

As a consequence, it was not permissible under CPR r.17.1 to add additional claimants who had separate claims from those of an existing claimant. The next question was then what was the proper approach to take to challenging an amendment that sought to add such additional claimants. Should such a challenge be made under CPR r.3.4 or r.17.2? The answer to that was that r.17.2 did not apply. The proper route to challenge was r.3.4. As Mann J explained:

> *"[44] In my view a challenge based on an averment that something has happened which is not actually an amendment within 17.1 can be made under CPR 3.4 and does not have to be, and indeed cannot be, made under 17.2. 17.2 applies where 'a party has amended his statement of case where permission was not required'. In a case such as the present where a claimant has done something that it is not allowed to do under 17.1, it should not be treated as having amended its statement of case for these purposes. Accordingly CPR 17.2 does not apply. A challenge can be made under CPR 3.4 , as it has been in this case. I do not consider that the challenge has to be made under 17.2 (which has to be made within 14 days of service) because the wording of that section pre-supposes an amendment which can otherwise be properly made under 17.1. On my conclusions about 17.1 that pre-supposition is not fulfilled.*
>
> *[45] ... submissions [were made] to the effect that such a conclusion left a claimant exposed to an application challenging the amendment long after the amendment had happened, and that certainty required that 17.2 should apply to prevent that happening. The defendant would have 14 days to challenge what has happened and there would be certainty as to the position if a challenge was not made within that time. I do not consider that that submission succeeds. Obviously the court would need to address the situation if, after proceeding on the footing that a joinder was apparently valid, a defendant, perhaps months later turned round and challenged it. Rules about waiver and estoppel, or analogous rules coupled with discretion, are amply sufficient to cope with that situation."*

Given that, the amendment to add additional claimants was disallowed. That disposed of the issue before the court. However, Mann J went on, in obiter, to consider the other issues raised. Those were as follows.

(ii) Is the joinder of an additional claimant without permission under CPR r.17.1 outside the limitation period a nullity?
The defendant submitted that the addition of a claimant without permission under CPR r.17.1 was a nullity where it was done after the expiry of a limitation period. As such it was not necessary (on the assumption that the finding as to CPR r.3.4 was wrong) to rely upon CPR r.17.2 as the basis to set aside the joinder of additional claimants. It was argued, based on ***Chandra v Brooke North (A Firm)*** [2013] EWCA Civ 1559; [2014] T.C.L.R. 1, that r.17.1 cannot be relied upon to effect joinder of an additional claimant in such circumstances. On the contrary, such joinder can only be effected via s.35(5) of the Limitation Act 1980 and CPR r.19.5, where their joinder is necessary to enable the already pleaded action to be determined. That was not the position here.

Mann J rejected the submission. It could not properly be said that joinder in such circumstances could amount to a nullity. This was because the question whether joinder was valid depended on whether there was a valid limitation defence. Whether there was or not was uncertain. As he put it:

> *"[56] ... The concept of nullity is an absolute one. It can only be sensibly applied in clearly specified circumstances on the basis of clearly applicable criteria. The more indeterminate concept of an arguable limitation bar is not one that can sensibly applied to a concept of nullity as proposed in the present context. It can (and indeed is - see Chandra) applied to disallow an amendment or refuse an application for permission to amend, but that is different. A regime under which an amendment (if prima facie allowed) is permitted with scope to disallow it on a subsequent application is more sensible. If an amendment falls outside the scope of post-limitation amendments permitted by section 35 and the rules, then the discretion in CPR 17.2 could only be exercised one way ... I do not consider that nullity based on the concept of an arguable limitation defence makes sense. It also does not sit with the well-established concept that limitation is a procedural matter and a point which does not have to be taken by a defendant - that would not be possible if joinder was strictly a 'nullity'. A procedural regime which allows for a subsequent challenge if limitation is shown to be arguable (or indeed conclusively established) makes more sense."*

In reaching that decision Mann J noted Saini J had taken a comparable approach in ***Qatar Airways Group QCSC v Middle East News FZ LLC*** [2020] EWHC 2975 (QB).

(iii) If the additional parties could be joined under CPR r.17.1 is the proper route to challenge joinder an application under CPR r.17.2?
Assuming joinder was effected via CPR r.17.1, it was submitted by the claimant that the only proper route to challenge it was for the defendant to have made an application under CPR r.17.2 within 14 days of service of the claim form. No such application had been made. The defendant took the point that a r.17.2 challenge was not the only permissible route to challenge the joinder, but if it was, its application, which was stated to be under CPR r.3.4 to challenge joinder, could stand as such an application.

Mann J held that if the joinder was effected via CPR r.17.1 there was only one permissible route to challenge it (see [64]–[68]). That was under CPR r.17.2. As a consequence, a challenge had to be made within 14 days of service of the claim form. That was not done here. The CPR r.3.4 application challenging joinder was made outside that time limit. That it was made under r.3.4 and not r.17.2 could, in the circumstances and given the substantive content of the application, be treated as an application under r.17.2. That it was said to be brought under r.3.4 could be treated as a procedural error under CPR r.3.10 (see [69]). As the application was, however, brought out of time, relief from sanction was required. The application for relief was granted (see [70]–[87]).

(iv) Joinder requires party consent
The defendant raised a further challenge to joinder. CPR r.19.4(4) provides that:

> *"Nobody may be added or substituted as a claimant unless—*
>
> *a) he has given his consent in writing; and*
>
> *b) that consent has been filed with the court."*

It was argued that consent had to be that of the new claimants themselves. They could not, therefore, rely upon a statement of truth on an amended claim form signed by their solicitor. In this case it was submitted the new claimants had signed no document. It was further submitted that an amended claim form was not a sufficient document for the purposes of r.19.4(4) (see the Court of Appeal decisions in ***Kay v Dowzall*** [1993] 3 WLUK 446 and ***Fricker v Van Grutten*** [1896] 2 Ch. 649).

First, Mann J held that r.19.4(4) plainly applied to joinder of additional parties effected prior to service of the claim form (see [95]). Secondly, he rejected a submission that the Court of Appeal's decision in ***Kay v Dowzall*** (1993)

could be distinguished on the basis that it was *"unreported and obscure"*. The doctrine of precedent did not permit decisions to be distinguished on such bases (see [106]). Thirdly, the previous Court of Appeal authorities were rooted in principle, that there needed to be certainty that the party actually consented to their joinder. In the premises, the consent had to be that of the party. Consent could not be impliedly expressed by a solicitor (see [110]–[113]). Finally, it was impermissible to use a claim form as the means by which consent was given in writing. A separate document was needed. As Mann J explained:

> *"[114] However, there is a further reason why, on any footing, the claim form should not stand as a consent even if a solicitor could sign one for the client. In my view the wording of CPR 19.4(4) requires a separate document from the sort of pleading that a new claimant would inevitably have to sign anyway when he/she is added (someone would have to sign an amended claim form for them). In my view, what the rule, and the reasoning behind it as expressed in the Court of Appeal cases, requires is a separate document which is filed for the purpose of expressing the consent. The filing has to take place before the addition as a party. That can logically only be done in a separate document before the addition which takes effect via an amendment. The amending document itself (here, the claim form) cannot achieve that function. It may be that a prior document which achieves the purpose of expressing consent, but is filed for a different primary purpose (such as the witness ...) could accidentally (or incidentally) have the same effect, but I do not need to decide that. What seems to me to be clear enough is that a separate consent document has to (a) exist and (b) be filed, and the claim form introducing the new claimants does not qualify."*

As no such separate document signed by the parties was filed, their joinder would also fail on the basis of non-compliance with r.19.4(4) (see [16]).

(v) Joinder of unidentified claimants

A further issue arose as to whether a large number of claimants, including many of the additional claimants, were described accurately on the amended claim form. The defendant sought to have their claims struck out on the basis that they were not properly identified. The claimants applied to amend the names. The proposed amendments included, for instance, correcting or substituting corporate titles. The substantive issue was whether it was permissible for amendments to be made by the claimants outside the limitation period. The relevant provisions governing the application were CPR rr.17.4 and 19.5. The approach to the two provisions summarised in ***Civil Procedure 2000***, and which had been endorsed as correct in ***Jalla v Royal Dutch Shell Plc*** [2020] EWHC 459 (TCC); [2020] B.L.R. 267 at [112], was that:

> *"[125] ... 'Rule 17.4(3) applies where the intended party was named in the claim form but there was a genuine mistake as to the name of the party and no one was misled; the mistake is a mere mistake as to a name such as causes no reasonable doubt as to the identity of the party in question.*
>
> *By contrast, a mistake to which r.19.5(3)(a) applies is a more fundamental mistake which can only be cured if a new party is substituted (Gregson v Channel Four Television Corp [2000] C.P. Rep. 60, at paras 18 and 29 per May LJ and Peter Gibson LJ).'"*

As such the issues arising were:

> *"[127] ...*
>
> *a) The nature of the mistake.*
> *b) Whether there is reasonable doubt as to the identity of the party in question*
> *c) The extent to which that is relevant to a claim under 19.5(3)*
> *d) The extent to which the operation of 19.5(3)(b) can be applied to the instances to which the claimants seek to apply it.*
> *e) The date on which the test has to be applied - whether it is the date of issue or some other date."*

Having reviewed the authorities (***The Sardinia Sulcis*** [1991] 1 Lloyd's Rep. 201, ***Adelson v Associated Newspapers Ltd*** [2007] EWCA Civ 701; [2008] 1 W.L.R. 585, ***Insight Group Ltd v Kingston Smith (A Firm)*** [2012] EWHC 3644 (QB); [2014] 1 W.L.R. 1448, and ***Best Friends Group v Barclays Bank Plc*** [2018] EWCA Civ 601) Mann J summarised the approach to these issues as follows:

> *"[140] From these authorities I derive the following conclusions for the purposes of the points I have to decide:*
>
> *i) Under both 17.4 and 19.5, the mistake must be as to name and not identity.*
> *ii) 19.5 refers in terms to a substitution. However, in reality 17.4(3) has also been interpreted so as to allow what is, in fact (and law) a substitution.*
> *iii) That is because the concept of a mistake as to name is interpreted generously.*

iv) *Generosity is achieved by looking to the description of the legal requirements for qualification as the claimant or defendant (as the case may be) - Insight at paragraph 52 - usually as described in the claim form (and perhaps Particulars of Claim if served with it).*

v) *If a description is to be relied on as saving a misdescribed party it must be sufficiently specific to allow identification in the circumstances – 'more or less specific to the particular case', in the words of Sardinia Sulcis. A successful amendment will very often be a case where there is an intention to sue in a certain capacity (landlord, tenant, shipowner).*

vi) *The true identity must be apparent to the litigation counterparty, at least under 17.4(3) (Adelson para 43). It is not clear to me why this would be a requirement under CPR 19.5(3)(a) when it seems to omit the reasonable doubt criterion.*

vii) *Under CPR 17.4(3) it is a requirement that the mistake would not have caused reasonable doubt as to the identity of the party intending to sue. That is not a requirement under CPR 19.5, but the point may be relevant to the court's discretion, and may be a significant factor. [The claimant's counsel] accepted that it was capable of being relevant to discretion. I confess that it is not wholly clear to me how it is likely to play into discretion, but I suppose it is relevant to consider it as a test for whether the counterparty in reality knew in substance who the proper claimant/defendant was supposed to be. If they did then there might be more of a case for allowing the amendment, though I confess I do not find this wholly logical."*

In ***Adelson*** it was established that the person whose mistake was relevant was the person responsible for issuing the claim, either personally or through their agent (see [143]). A narrow view should not be taken to determining this issue, as it was more important to identify the nature of the mistake. In general, the mistake will lie in the hands of the claimant's solicitor, however their mistake may have arisen (see [144]). In respect of determining when the mistake as to name occurred, in respect of CPR r.17.4, it was necessary to determine whether the mistake was genuine and not one that could cause reasonable doubt at the same time, that being the time when proceedings were issued (see [156]–[159]).

Finally, Mann J considered the approach to exercising the discretion to permit amendments under CPR rr.17.1 and 19.5, should the claimants satisfy the mistake test in either case (see [272]–[276]). The leading authority on discretion was ***Horne-Roberts v SmithKline Beecham Plc*** [2001] EWCA Civ 2006; [2002] 1 W.L.R. 1662. Relevant factors to take account of in considering whether to exercise the discretion were summarised as follows:

"[281] On the authorities, therefore, the following material points can be extracted:

a) *The quality of the mistake can be relevant. An accidental slip that is easily made may be more remediable than other more serious forms of mistake.*

b) *The speed with which corrective action is taken is relevant. A speedy application will be looked on more favourably than a tardy one.*

c) *Prejudice to each party is relevant.*

d) *The fact that a claim will be extended to a claimant who would otherwise be time-barred is not, by itself, sufficient prejudice to justify a refusal of the exercise of discretion. That is logical - the ability to pursue a claim which could otherwise not be pursued is built into the legislation and the rules.*

e) *The state of knowledge of the claim on the part of the defendant is relevant. If the defendant knows of a number of similar claims already, and the amending claimant just adds one, then the prejudice to the defendant is not that great (Horne-Roberts). By contrast, if a whole batch of "new" claimants seek to come in, then that may well be different.*

f) *It is of assistance to a claimant that the defendant knows of the claim and of the mistake in advance of the proceedings. By contrast, it is relevant the other way if the defendant does not have that knowledge.*

g) *The jurisdiction is not intended to be punitive of the maker of the mistake. The court understands that honest mistakes can be made (see also Insight at para 106 and TRW).*

h) *It is said that a defendant who is notified of the claim after the expiry of the limitation period is in a better position than one who knows about it before the limitation period has expired. This is justifiable on the basis that in cases like Horne-Roberts and TRW the amended-against defendant is only being put in the same position as he thought he was in before the limitation period expired. The position is otherwise if the defendant knew nothing of the claimants or the claims made until after the period had expired."*

Given the facts of the case, and the approach the claimants had taken to completing the claim form, it was not appropriate to permit amendments to be made apart from in one case where the amendment related to a *"straight historic change of name of a corporate entity which has not been properly recorded ... and where there is no scope for reasonable doubt ..."* (see [292]). Where group litigation is concerned it is clearly apparent following Mann J's approach that claimants will need to ensure that they proceed carefully in identifying, naming and properly joining the various claimants to be included in particular claims. It ought to be equally apparent that issuing such claims ought not, if at all possible, be carried out at a point in time where there is an arguable limitation defence.

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