# CIVIL PROCEDURE NEWS

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# In Brief

## Cases

**Hunt v Annolight Ltd** [2020] EWHC 3744 (QB), 18 December 2020, unrep. (Saini J)

*Power to require legal representative to attend a hearing for cross-examination*

**CPR r.32.7**. The defendant applied for a wasted costs order against the claimant's solicitors. A witness statement was provided for the application by the supervising solicitor from the claimant's solicitors. An issue arose whether he could be compelled to attend the hearing of the application to be cross-examined. On appeal, Saini J **held** at [31]–[40]: the power to order a person's attendance at a hearing to be cross-examined on evidence they had given in writing under CPR r.32.7 applied to a legal representative who had chosen to submit written evidence. In this case the solicitor had submitted a witness statement. Solicitors had been ordered to attend for cross-examination under this rule in the past: additionally, and separately from the power under CPR r.32.7, there was "*no rule or principle which deprived the Court of the ability to require a legal representative to attend for cross-examination*": ***Godfrey Morgan Solicitors Ltd v Cobalt Systems Ltd*** (2011) followed. Nor was there anything in the rules concerning wasted costs (CPR r.46.8), which cut down either the court's general power to order attendance for cross-examination or the power in CPR r.32.7. The wasted costs regime was not a complete code, which would exclude such powers. ***Godfrey Morgan Solicitors Ltd v Cobalt Systems Ltd*** [2011] 6 Costs L.R. 1006, EAT, ***Boreh v Djibouti*** [2015] EWHC 769 (Comm); [2015] 2 All E.R. (Comm) 669, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.32.7.1.)

**Football Association Premier League v Lord Chancellor** [2021] EWHC 755 (QB), 30 March 2021 (Dingemans LJ, Nicol and O'Farrell JJ)

*Divisional Court – jurisdiction*

**Senior Courts Act 1981 s.66, CPR r.3.1(2)(bb), r.3.1(3A) and r.52.20**. Private prosecutions were brought successfully by the appellants. They then sought to recover litigation costs and expenses out of central funds from the respondent. An issue arose whether pre-commencement work costs were recoverable: see s.17(1) of the Prosecution of Offences Act 1985. A further issue arose whether the proceedings, on appeal from a Costs Judge, could be heard by a Divisional Court. Regulation 11(7) of the Costs in Criminal Cases (General) Regulations 1986 (SI 1986/1335) provided that such an appeal

> *"shall be brought in the Queen's Bench Division, follow the procedure set out in Part 52 of the Civil Procedure Rules 1998 and shall be heard and determined by a single judge whose decision shall be final".*

**Held**, the costs were recoverable. On the jurisdictional issue, the Divisional Court had jurisdiction to hear the appeal. As Dingemans LJ explained it could do so notwithstanding the reference in reg.11(7) of the 1986 Regulations to an appeal being heard and determined by a single judge due to the regulation also referring to CPR Pt 52. It could do so as CPR r.52.20 provided that an appeal court could exercise its powers further to the exercise of case management powers set out in CPR r.3.1. CPR r.3.1(2)(bb) and r.3.1(3A) provide, as a case management power, the power to direct that proceedings be heard before a Divisional Court. As he put it:

> *"[20] In my view, the parties are correct that the Divisional Court has jurisdiction to hear this appeal for the following reasons:*
>
> *i) While it is the case that regulation 11(7) says that the appeal to the High Court should be heard by 'a single judge' it also makes specific reference to the Civil Procedure Rules Part 52 and Part 52 itself cross refers to Part 3 of the CPR.*
>
> *ii) There are many occasions when a court may need to have recourse to the case management powers in CPR Part 3 . To take just one example, if there had been delay in lodging the notice of appeal for some good reason and an application for an extension was not made until after the deadline had passed, the appellant ought to be able to seek relief from sanctions under CPR r.3.9 . It is inconceivable that Parliament should have intended there to be no such case management power.*
>
> *iii) ... when this matter first came before me, exercising my case management powers and at the request of the parties, I adjourned the case to be heard by a Divisional Court.*
>
> *iv) Because of rule 3.1(3A), a single judge would now be prohibited from hearing the appeal: only a divisional court can hear the appeal. Of course I may have erroneously decided that the appeal should be adjourned to a divisional court, but if I so erred, it would be for the Court of Appeal to correct me and no such appeal was advanced. Unless and until my order was set aside on appeal, it remained valid and effective (see for instance*

*Strachan v Gleaner Co. Ltd. [2005] UKPC 33, [2005] 1 WLR 3204 citing, at [29], In Re Padstow Total Loss and Collision Assurance Association (1880) 20 Ch.D. 137 at 142 and 145).”*

***Re Padstow Total Loss & Collision Assurance Association*** (1882) 20 Ch. D. 137, ***Strachan v Gleaner Co Ltd*** [2005] UKPC 33; [2005] 1 W.L.R. 3204, ref’d to. (See ***Civil Procedure 2021*** Vol.1 at para.81.5.3.)

- **Isbilen v Turk** [2021] EWHC 854 (Ch), 9 April 2021, unrep. (Ms Pat. Treacy sitting as a deputy judge of the High Court)

*Contempt – court’s power to commence proceedings on its own initiative*

**CPR r.81.6**. Proceedings were brought by the claimant for breach of fiduciary duty and deceit in respect of fund transfers. A worldwide freezing order, which included a disclosure order, was granted against the defendant on an ex parte basis on March 2021. By consent the order was continued. An issue arose concerning compliance with the disclosure order. An application for cross-examination under s.37 of the Senior Courts Act 1981 was made by the claimant on the basis that the defendant’s compliance with the disclosure order had been late and incomplete. While the claimant did not also make an application for committal for contempt based on the alleged non-compliance on the basis that she considered it premature to do so, it was submitted that in the circumstances the court ought to consider of its own initiative whether to commence contempt proceedings under CPR r.81.6. It was further submitted that listing a directions hearing for committal proceedings under CPR r.81.6(3) would be an aid to compliance and a “*gateway*” to further contempt proceedings. **Held**, the defendant had taken steps to comply with the ex parte order and agreed to be cross-examined. In all the circumstances, e.g. the early stage of the proceedings, the time the defendant had had to comply with the ex parte order, the fact the claimant considered it premature to pursue contempt proceedings, it would not further the overriding objective for the court to commence such proceedings on its own initiative and list a directions hearing under r.81.6(3). In reaching this decision, the deputy judge considered the proper approach to the court’s power to commence committal proceedings on its own initiative. First, she noted that the requirement under CPR r.81.6 for the court to consider whether to commence contempt proceedings on its own initiative was a novel feature of the post-October 2020 Pt 81. That being noted, the new rules were not intended to change the court’s substantive contempt powers: see [26]–[29]. Furthermore, previous authorities remained relevant. In determining who was best placed to commence contempt proceedings, ***Bedfordshire Constabulary v RU*** (2013) at [32]–[33] set out a “*hierarchy of recognised applicants*”. It made clear that the party who obtained the order in respect of which there was non-compliance was best-placed to commence proceedings followed by the Attorney-General, after which it was the court. This was suggestive of the court only commencing proceedings when the relevant party or Attorney-General had not done so. This guidance suggested that the court should only commence proceedings in “*exceptional circumstances, where the contempt was clear, where there is urgency and where it is imperative to act immediately*”: see [33]. Furthermore, given the emphasis placed on proportionality and the overriding objective in respect to the pursuit of contempt applications (see ***PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov*** (2014)), it was clear that:

*“[35] ... the commencement of contempt proceedings are likely to require significant consideration under CPR 81.6 only where they are in relation to ‘serious rather than technical’ breaches; when they are ‘directed at the obtaining of compliance with the order in question’; ‘when they have a real prospect of success’; and when they involve ‘something of sufficient gravity to justify the imposition of a serious penalty’.”*

Reliance on r.31.6 was not intended to be a “*more proportionate*” or “*less intrusive*” means to secure compliance with court orders. It remained a means to commence contempt proceedings, and rested on a decision to do so that was to be used only where the court considered a contempt to have been committed: see [35]–[38]. It was not a provision to be used liberally by the court. It might also be suggested that it could only do so where it had jurisdiction, as a matter of substantive law, to initiate proceedings of its own motion, a point not raised in the proceedings but which would seem to follow from the fact that the new Pt 81 does not alter the substantive law of contempt. Additionally, the deputy judge considered to what extent and when the court was required to consider when to proceed against a defendant in contempt proceedings under r.81.6(1) and also what role the parties had under r.81.6. She concluded that:

*“[40] CPR 81.6(1) requires the Court to consider whether to proceed in contempt proceedings only where it ‘considers that a contempt of court (including a contempt in the face of the court) may have been committed’. The provision gives no guidance as to how great a likelihood is required. However, clearly the Court must take the view that a contempt may have occurred. Mr Quirk QC drew my attention to Buckinghamshire CC v Anglo Irish Plant Hire Ltd [2011] EWHC 3686 (QB). The judgment of HHJ Seymour QC provides a helpful reminder that:*

*‘ ... , as a matter of principle, it must be an element in proving a contempt, where the contempt is alleged to consist in failing to comply with a mandatory order of the Court, that the alleged contemnor had the ability to comply and merely chose not to, or to use the words that appear in the notes to the White Book: “There had been a deliberate and wilful refusal to comply.”’ [12]*

*[41] Technical breaches of court orders are therefore unlikely to require the Court to spend a great deal of time in considering whether to proceed in contempt under CPR 81.6. Such breaches, if properly analysed in their context, may be unlikely to give rise to contempt at all. If the circumstances suggest that 'a deliberate and wilful refusal to comply' might have occurred, and where an application by a party might be plausible, then the Court would be expected to consider the position more thoroughly. Even in those circumstances, however, the Court would have regard to all the considerations set out above in paragraphs 31-35 before deciding to take further steps.*

*[42] In my view, it follows that the Court should not expect submissions on CPR 81.6 in the majority of cases. If regular and lengthy submissions relating to CPR 81.6 were expected in all cases where there was an arguable (or even an obvious) breach of a court order, or if the possibility of steps pursuant to CPR 81.6 were to become a frequent, rather than an unusual, part of litigation relating to disclosure orders, this could have the most unwelcome effect of leading to precisely the outcome cautioned against in paragraph 22 of Sectorguard as an increasing amount of the Court's time and the resources of litigants might be devoted to issues relating to CPR 81.6.*

*[43] The wording of CPR 81.6(1) itself suggests that this provision is primarily a matter for the Court ('... the court on its own initiative shall consider...'), although of course the parties may wish to remind the Court of the provision where appropriate.*

*[44] Once the Court has taken the view that the circumstances are such that it should consider taking steps under CPR 81.6(3) then it may under CPR 81.6(2) require any party to give it '... such assistance ... as is proportionate and reasonable ...'. This might include representations as to the appropriateness of taking further steps in the circumstances of the particular case or, ... , assistance in preparing a summons, if that is the Court's decision."*

***Sectorguard Plc v Dienne Plc*** [2009] EWHC 2693 (Ch), unrep., ***Bedfordshire Constabulary v RU*** [2013] EWHC 2350 (Fam); [2014] Fam. 69, ***PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov*** [2014] EWHC 4370 (Comm), unrep., ref'd to. (See ***Civil Procedure 2021*** Vol.1 at paras 81.3.2 and 81.5.3.)

## Persimmon Homes Ltd v Osborne Clark LLP [2021] EWHC 831 (Ch), 12 April 2021, unrep. (Master Kaye)

*Costs budget – guidance on applications to vary*

**CPR r.3.15A**. Professional negligence proceedings were brought by the claimants against defendant solicitors. The claimants applied to vary their costs budget. The Master considered the appropriate approach to such applications under CPR r.3.15A. While the application was dismissed, the Master explained the process to be applied under the rule. First, she explained the nature of the two-stage test it set out:

*"[20] The applicant must therefore first satisfy the court that there has been a significant development in the litigation since the last approved or agreed budget which warrants a revision (upwards or downwards) to the last approved or agreed budget; and second that the particulars of the variation have been submitted promptly both to the other parties and the court in accordance with CPR 3.15A (2) to (4) .*

*[21] It is only if the applicant can satisfy the court that it has met these mandatory requirements - the threshold test - that the court goes on to consider the exercise of its discretion in relation to the variation itself and the incurred costs caught by the application to vary in CPR 3.15A (5) and (6) . An application to vary therefore involves a two-stage process."*

While it was necessary to demonstrate that there had been a significant development in the litigation to satisfy the first part of the test (the threshold test), not all significant developments would justify revising a budget. Whether a significant development warranted a variation was context-dependent: see [97]–[99]. Parties thus needed to keep their cost budgets under review; that was the means by which they could determine if there had been a significant development and thus form the basis upon which they could seek to maximise recoverable costs: see [115]. The Master went on to provide the following guidance concerning the question whether a development could properly be construed as significant:

*"[116] Although it depends on the circumstances of each case, some significant developments will be more obvious and easier to identify than others. Clearly, where the proposed variation is to add in a new phase such as expert evidence, where no expert evidence had previously been permitted, and connected to that to vary the trial phase to include, for example, expert costs of attending trial and the additional costs of an extended trial length, the court may require very little supporting information or evidence to be satisfied that the proposed variations to the costs budget relate to the significant development and do not interfere with the original cost budgeting exercise.*

*[117] However, where the significant development is said to be a change to an existing phase, and in particular a mixed phase, such as disclosure it is necessary for the court to look more closely at whether what is contended for is a significant development at all since the last approved costs budget. Do the matters raised by the applicant, in fact, change the overall scope and likely cost of that phase? Were they, or should they have been, expressly or impliedly taken into account when the last costs budget was approved?"*

Should there be a significant development that warranted variation of the budget, parties must seek to agree the variation promptly and must communicate the need for variation to the court and other parties promptly. These were further mandatory requirements of the threshold test. Again, what was prompt was context-dependent: see [100] and [120]. As the Master went on to note in respect of the requirements to communicate the need for a variation and to seek agreement on variations promptly:

> *"[121] In most cases the two aspects of the mandatory requirement for prompt submission in CPR 3.15A (2) and (4) will be closely aligned. However, there cannot be any hard and fast rule. It will depend on the facts of each case; the chronology and the nature of the variations being sought. Consistent with the overriding objective, if the parties are co-operating in narrowing the areas of disagreement in relation to the proposed variations, what constitutes 'submitted promptly' may differ from what might be considered prompt submission if no such cooperation or engagement were to take place."*

Assuming the threshold test was satisfied, the court would then need to consider its discretion under the second limb of the test. In doing so and thus considering whether to approve, vary or disallow the proposed budget variations, the court would:

> *"[101] ... engage in a more detailed consideration of the quantum of the variations sought and to be allowed.*
>
> *[102] In carrying out that exercise, the court must have regard to the overriding objective and all the circumstances including the need to deal with cases justly and at proportionate cost. This includes considering the prejudice to both the applicant if the budget is not varied and respondent if the budget is varied. The question of promptness and the nature of the significant development may come back into consideration more broadly as part of all the circumstances if the court comes to consider the overall exercise of discretion."*

(See ***Civil Procedure 2021*** Vol.1 at para.3.15A.1.)

- **IGE USA Investments Ltd (formerly IGE USA Investments) v Revenue and Customs Commissioners** [2021] EWCA Civ 534, 14 April 2021, unrep. (Henderson, Asplin and Birss LJJ)

*Limitation period – equitable rescission of a contract for fraudulent misrepresentation*

**Limitation Act 1980 ss.2 and 36(1)**. The Court of Appeal considered what the applicable limitation period is for claims for equitable rescission of a contract for fraudulent misrepresentation. Specifically, it considered whether the limitation period applicable for claims for the tort of deceit under s.2 of the Limitation Act 1980 applied to such claims or by analogy further to s.36(1) of that Act. **Held**, the relevant time limit was six years. This was because the limitation period applicable to actions for the tort of deceit brought at common law under s.3 of the Limitation Act 1623 in virtue of s.36(1) of the 1980 Act, applicable to equitable claims to rescind on the basis of fraudulent misrepresentation: ***Molloy v Mutual Reserve Life Insurance Co*** (1906). See [52]–[59]. The Court further held that it was bound by its previous decision in ***Molloy***, and that there was no basis on which to depart from it: see [85]–[98]. ***Molloy v Mutual Reserve Life Insurance Co*** (1906) 94 L.T. 756, CA, ref'd to. (See ***Civil Procedure 2021*** Vol.2 at paras 8-5 and 8-117.)

- **Bugsby Property LLC v LGIM Commercial Lending Ltd** [2021] EWHC 1054 (Comm), 27 April 2021, unrep. (Henshaw J)

*Non-party disclosure – confidentiality rings*

**CPR rr.31.17, 31.22(1)**. The court considered applications for non-party disclosure orders under CPR r.31.17. In doing so it considered the summary of the requirements applicable to the jurisdiction under that rule set out by Vos J in ***Constantin Medien AG v Ecclestone*** (2013). As Henshaw J put it:

> *"[17] The requirements flowing from CPR 31.17 were conveniently summarised by Vos J in Constantin Medien AG v Ecclestone [2013] EWHC 2674 (Ch) as comprising:*
>
> *i) the threshold test of whether it has been shown that each of the documents in the category or the class of documents sought may well help the claimant's case or damage the defendant's case;*
>
> *ii) whether disclosure of the documents is necessary to dispose fairly of the claim or to save costs;*
>
> *iii) whether the definition of the documents is sufficiently clear and specific, so that no judgments about the issues in the case are required by the respondents; and*
>
> *iv) whether, as a matter of overall discretion, disclosure of that class of documents should be ordered."*

Vos J was also noted as having previously provided guidance on the second of the four requirements, which Henshaw J went on to explain at [20] of his judgment. As he put it:

*"[20] As to the second requirement, that 'disclosure is necessary in order to dispose fairly of the claim or to save costs' (CPR 31.17(3)(b) ), Vos J said in Andrew v News Group Newspapers Ltd [2011] EWHC 734 (Ch) :*

> *'This requirement seems to me to be largely, but not wholly, to follow relevance. I need to have regard here to the availability to the claimant of similar documentation or information from other sources.' (§ 71)*

*However, I agree with the Respondents that Vos J should not be taken to have intended to state, as a general proposition, that the necessity test has little or no independent role once documents are regarded as relevant. For example, the documents already in the possession of the parties to an action may be sufficiently complete in relation to an issue for there to be no necessity to trouble a third party to provide documents on the same issue. Indeed, Vos J's second sentence quoted above alludes to that as an example of a case where the necessity test may not be passed."*

Henshaw J also provided a helpful summary of the approach to be taken to confidentiality rings or clubs to protect disclosed information prior to trial. As he put it:

*"[77] The starting point is the general protection provided by CPR 31.22(1):*

> *'A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where—*
>
> *(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;*
>
> *(b) the court gives permission; or*
>
> *(c) the party who disclosed the document and the person to whom the document belongs agree.'*

*[78] It is not possible to legislate in advance that parts of the trial will be in private ... : that will be a matter for the court to determine under CPR 39.2, weighting up confidentiality concerns and open justice. However, it is necessary to provide appropriate protection in the meantime.*

*[79] One possibility is a confidentiality ring or 'club'. The burden is on the party applying for such an arrangement to establish a real risk, deliberate or inadvertent, of a party using its right of inspection for a collateral purpose (Church of Scientology of California v Department of Health [1979] 1WLR 723, 743G). Where a risk is demonstrated the restriction must go no further than is necessary to protect the right in question. The Supreme Court has recognised that a party's commercial interest can be such a right (Al Rawi § 64), and in IPCOM v HTC [2013] EWHC 52 (Pat) Floyd J stated: 'the court should not facilitate the granting of a competitive advantage to [the Claimant] and accordingly inflict a competitive disadvantage on [the Defendant and the third parties] unless justice requires it to take such a course' (§ 31). In Libyan Investment Authority v Société Générale [2015] EWHC 550 Hamblen J noted that 'Confidentiality clubs are most typically employed in antitrust or intellectual property litigation in order to protect commercial confidences', and set out factors to be considered:*

> *'(1) The court's assessment of the degree and severity of the identified risk and the threat posed by the inclusion or exclusion of particular individuals within the confidentiality club — see, for example, InterDigital Technology Corporation v Nokia [2008] EWHC 969 at [18] and [19].*
>
> *(2) The inherent desirability of including at least one duly appointed representative of each party within a confidentiality club — see, for example, Warner-Lambert v Glaxo Laboratories [1975] RPC 354 at 359 to 361 .*
>
> *(3) The importance of the confidential information to the issues in the case — see Roussel UCLAF v ICI at [54] and IPCom GmbH v HTC Europe [2013] EWHC 52 (Pat) at [20] .*
>
> *(4) The nature of the confidential information and whether it needs to be considered by people with access to technical or expert knowledge — see IPCom GmbH v HTC Europe at [18].*
>
> *(5) Practical considerations, such as the degree of disruption that will be caused if only part of a legal team is entitled to review, discuss and act upon the confidential information — see Roussel UCLAF v ICI at [54] and InterDigital Technology Corporation v Nokia at [7].' (§ 34)."*

***Warner-Lambert Co v Glaxo Laboratories Ltd*** [1975] R.P.C. 354, CA, ***Church of Scientology of California v Department of Health and Social Security*** [1979] 1 W.L.R. 723, CA, ***InterDigital Technology Corp v Nokia Corp*** [2008] EWHC 969 (Pat), unrep., ***Andrew v News Group Newspapers Ltd*** [2011] EWHC 734 (Ch); (2011) 108(14) L.S.G. 22, ***Al-Rawi v Security Service*** [2011] UKSC 34; [2012] 1 A.C. 531, ***Constantin Medien AG v Ecclestone*** [2013] EWHC 2674 (Ch), unrep., ***IPCom GmbH & Co KG v HTC Europe Co Ltd*** [2013] EWHC 52 (Pat), unrep., ***Libyan Investment Authority v Société Générale SA*** [2015] EWHC 550 (QB), unrep., ref'd to. (See ***Civil Procedure 2021*** Vol.1 at paras 31.17.1 and 31.3.36.)

■ **Sastry v General Medical Council** [2021] EWCA Civ 623, 30 April 2021, unrep. (Macur, Nicola Davies, Lewis LJJ)

*Appeal from decision of Medical Practitioners Tribunal*

**Medical Act 1983 ss.40 and 40A, CPR r.52.21, PD 52D para.19.1**. The Court of Appeal considered two second appeals from decisions of the Medical Practitioners Tribunal (MPT). In doing so it considered the approach to be taken by an appellate court when dealing with such appeals under s.40 of the Medical Act 1980. Having reviewed the authorities Nicola Davies LJ, giving the judgment of the court, summarised the approach to be taken by the High Court on appeals under that section of the 1983 Act. Guidance was also given in respect of s.40A. First, the court noted the distinction between the two bases on which an appeal from the MPT could be brought. Section 40 provided a medical practitioner with an unqualified right to appeal. No permission to appeal requirement applied to it. By way of contrast, s.40A provided the General Medical Council a limited basis on which to appeal. It could appeal on the basis that the MPT's decision was not sufficient to protect the public. Appeals under s.40 were by way of rehearing. Appeals under s.40A were, however, by way of review, see CPR r.52.21(1) and PD 52D para.19.1: see [97]–[101]. Secondly, the approach to be taken on a s.40 appeal, and a s.40A appeal, was summarised as follows:

> *"[102] Derived from Ghosh are the following points as to the nature and extent of the section 40 appeal and the approach of the appellate court:*
>
> *i) an unqualified statutory right of appeal by medical practitioners pursuant to section 40 of the 1983 Act;*
>
> *ii) the jurisdiction of the court is appellate, not supervisory;*
>
> *iii) the appeal is by way of a rehearing in which the court is fully entitled to substitute its own decision for that of the Tribunal;*
>
> *iv) the appellate court will not defer to the judgment of the Tribunal more than is warranted by the circumstances;*
>
> *v) the appellate court must decide whether the sanction imposed was appropriate and necessary in the public interest or was excessive and disproportionate;*
>
> *vi) in the latter event, the appellate court should substitute some other penalty or remit the case to the Tribunal for reconsideration.*
>
> *[103] The courts have accepted that some degree of deference will be accorded to the judgment of the Tribunal but, as was observed by Lord Millett at [34] in Ghosh, 'the Board will not defer to the Committee's judgment more than is warranted by the circumstances'. In Preiss, at [27], Lord Cooke stated that the appropriate degree of deference will depend on the circumstances of the case. Laws LJ in Raschid and Fatnani, in accepting that the learning of the Privy Council constituted the essential approach to be applied by the High Court on a section 40 appeal, stated that on such an appeal material errors of fact and law will be corrected and the court will exercise judgment but it is a secondary judgment as to the application of the principles to the facts of the case ([20]). In Cheatle Cranston J accepted that the degree of deference to be accorded to the Tribunal would depend on the circumstances, one factor being the composition of the Tribunal. He accepted the appellant's submission that he could not be 'completely blind' to a composition which comprised three lay members and two medical members.*
>
> *[104] In Khan at [36] Lord Wilson, having accepted that an appellate court must approach a challenge to the sanction imposed by a professional disciplinary committee with diffidence, approved the approach and test identified by Lord Millett at [34] of Ghosh.*
>
> *[105] It follows from the above that the Judicial Committee of the Privy Council in Ghosh, approved by the Supreme Court in Khan, had identified the test on section 40 appeals as being whether the sanction was 'wrong' and the approach at the hearing, which was appellate and not supervisory, as being whether the sanction imposed was appropriate and necessary in the public interest or was excessive and disproportionate.*
>
> *[106] In Jagjivan the court considered the correct approach to appeals under section 40A. At [39] Sharp LJ accepted that the 'well-settled principles' developed in relation to section 40 appeals 'as appropriately modified, can be applied to section 40A appeals.' At [40], Sharp LJ acknowledged that the appellate court will approach Tribunals' determinations as to misconduct or impairment and what is necessary to maintain public confidence and proper standards in the profession and sanctions with diffidence. However, at [40(vi)], citing [36] of Khan and the observations of Lord Millett at [34] of Ghosh, she identified matters such as dishonesty or sexual misconduct as being matters where the court is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal.*

*[107] The court in Bawa-Garba (a section 40A appeal) at [60] identified the task of the High Court on an appeal pursuant to section 40 or section 40A as being whether the decision of the MPT is 'wrong'. At [67] the court identified the approach of the appellate court as being supervisory in nature, in particular in respect of an evaluative decision, whether it fell 'outside the bounds of what the adjudicative body could properly and reasonably decide' ...*

*[108] We endorse the approach of the court in Bawa-Garba, as appropriate to the review jurisdiction applicable in section 40A appeals. We regard the approach of the court in section 40 appeals, as identified in Ghosh and approved in Khan, as appropriate in section 40 appeals which are by way of a rehearing.*

*[109] We agree with the observations of Cranston J in Cheatle that, given the gravity of the issues, it is not sufficient for intervention to turn on the more confined grounds of public law review such as irrationality. The distinction between a rehearing and a review may vary depending upon the nature and facts of the particular case but the distinction remains and it is there for a good reason. To limit a section 40 appeal to what is no more than a review would, in our judgment, undermine the breadth of the right conferred upon a medical practitioner by section 40 and impose inappropriate limits on the approach hitherto identified by the Judicial Committee of the Privy Council in Ghosh and approved by the Supreme Court in Khan.*

*[110] Accordingly, we agree with the view ... that the judge, in the section 40 appeal of Dr Sastry, was required to exercise her own judgment as to whether the sanction imposed was excessive and disproportionate. It follows from the above that we do not agree with her observation at [66] that when it comes 'to an evaluation of clinical behaviour and the treatment of patients ... a court is totally ill-equipped to arrive at a view of what public protection and reputation of the profession requires. It would be wrong to substitute its own untutored view for that of a panel drawn from the profession in question.' As has been previously recognised, a court is able to arrive at a view of what public protection and the reputation of the profession requires. To describe the view of the court as being 'untutored' pays no or little regard to the ability of an appellate court to evaluate issues of public protection and the reputation of the medical profession and to its role, demonstrated in previous cases, in deciding whether the sanction imposed was necessary and appropriate in the public interest or was excessive or disproportionate.*

*[111] Further, reliance upon the MPT as drawn 'from the profession in question' may not be appropriate. Only one member of the MPT is a member of the medical profession and in this case his area of expertise was not that of the appellant.*

*[112] Appropriate deference is to be paid to the determinations of the MPT in section 40 appeals but the court must not abrogate its own duty in deciding whether the sanction imposed was wrong; that is, was it appropriate and necessary in the public interest. In this case the judge failed to conduct any analysis of whether the sanction imposed was appropriate and necessary in the public interest or whether the sanction was excessive and disproportionate, and therefore impermissibly deferred to the MPT."*

Finally, Nicola Davies LJ concluded, at [113], that where matters of dishonesty or sexual misconduct were concerned, an appeal court were:

*"well placed to assess what is needed to protect the public or maintain the reputation of the profession and is less dependent upon the expertise of the Tribunal",* see ***General Medical Council v Jagjivan*** (2017) at [40(vi)].

***Preiss v General Dental Council*** [2001] UKPC 36; [2001] 1 W.L.R. 1926, ***Meadow v General Medical Council*** [2006] EWCA Civ 1390; [2007] Q.B. 462, ***Fatnani v General Medical Council*** [2007] EWCA Civ 46; [2007] 1 W.L.R. 1460, ***Cheatle v General Medical Council*** [2009] EWHC 645 (Admin); [2009] L.S. Law Medical 299, ***Khan v General Pharmaceutical Council*** [2016] UKSC 64; [2017] 1 W.L.R. 169, ***General Medical Council v Jagjivan*** [2017] EWHC 1247 (Admin); [2017] 1 W.L.R. 4438, ***Bawa-Garba v General Medical Council*** [2018] EWCA Civ 1879; [2019] 1 W.L.R. 1929, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.52.21.1.)

# Practice Updates

## STATUTORY INSTRUMENTS

**The Civil Procedure (Amendment No.3) Rules 2021** (SI 2021/553). In force from **31 May 2021**. The Regulations make a small number of amendments to the CPR consequential upon the coming into force of Practice Direction 27B – Claims under the Pre-Action Protocol for Personal Injury Claims below the Small Claims Limit in Road Traffic Accidents. The amendments correct, by way of substitution, cross-references in CPR Pt 27 to PD 27 to references to PD 27A. They further amend r.6 of the Civil Procedure (Amendment No.2) Rules 2021 (SI 2021/196) to correct drafting and grammatical errors.

## PRACTICE DIRECTIONS

**CPR PRACTICE DIRECTION – 131st Update**. This Update contains two sets of Practice Direction amendments. First, it amends the 129th CPR Practice Direction Update by substituting a new Appendix B to Practice Direction 27B – Claims under the Pre-Action Protocol for Personal Injury Claims below the Small Claims Limit in Road Traffic Accidents. This Appendix contains the Standard Directions for liability disputes in such matters. This amendment came into force on **5 May 2021**. Secondly, it substitutes new Practice Directions, to replace the current PD 54A to 54E, to supplement CPR Pt 54. This amendment comes into force on **31 May 2021**. Particular attention is drawn to the changes set out in PD 54A concerning pleading and skeleton arguments, which were made in the light of the Court of Appeal's criticism of their length in Judicial Review matters in ***R. (Dolan) v Secretary of State for Health and Social Care*** [2020] EWCA Civ 1605; [2021] 1 All E.R. 780 at [116]–[121].

# In Detail

## DISCLOSURE PILOT SCHEME

The disclosure pilot scheme (CPR PD 51U) has now been operational since January 2019. In April 2021 a revised version of the scheme was substituted for the original. The pilot scheme has already generated considerable guidance on its operation. Recently published judgments have provided guidance on a number of specific issues concerning the identification of disclosure issues and compliance with disclosure orders.

### (i) Extended Disclosure Model D – the central nub of the dispute

In ***Lombard North Central Plc v Airbus Helicopters SAS*** [2020] EWHC 3819 (Comm), Bryan J considered the application of Model D Extended Disclosure. The application was made in a dispute that ultimately arose from the manufacture and sale of an Airbus Super Puma type helicopter. The issue was whether Model C or Model D disclosure ought to be ordered.

The defendants at [20]–[21] submitted that Model C disclosure was the appropriate model. In doing so they relied upon the explanation of the change effected by the disclosure pilot scheme given in ***Lonestar Communications Corp LLC v Kaye*** [2020] EWHC 1890 (Comm), i.e. that the pilot scheme was not simply an equivalent replacement for CPR Pt 31, with Model C as the "*implicitly preferred*" Extended Disclosure model, and Models D or E only valid options where Model C was "*not appropriate or sufficient*". The claimants at [22] did not, "*at an initial high level*" demur from those propositions. However, they submitted that, following the Chancellor's judgment in ***McParland & Partners Ltd v Whitehead*** [2020] EWHC 298 (Ch); [2002] Bus L.R. 699 at [51], Model D disclosure was the appropriate model where an issue was one that amounted to "*the central nub of the dispute*". It was not necessary for there to be an element of distrust between the parties concerning the carrying out of the disclosure process before Model D could be ordered. Bryan J accepted at [30] that Model D disclosure could be ordered in this case, and that to do so would not simply be to revert to the CPR Pt 31 approach to disclosure: the issue in question was central to the dispute. Such an order was consistent with the approach taken by the Chancellor in ***McParland*** (2020).

### (ii) Disclosure Issues, Replies to a defence and cost proportionality

In ***Performing Right Society Ltd v Qatar Airways Group QCSC*** [2021] EWHC 869 (Ch), Deputy Master Francis considered a claim brought by the Performing Right Society Ltd for an alleged global copyright breach by the defendant.

The basis of the alleged breach was that the defendant was providing, via its in-flight entertainment on commercial flights, unlicensed access to music for which the claimants were the assignee of the worldwide performing rights. The claimants sought an injunction and damages. A trial was to be held on preliminary issues. Extended disclosure was sought in respect of those issues. As such the parties were required to identify the "*issues for disclosure*" (PD 51U para.7.3; ***McParland & Partners Ltd v Whitehead*** (2020) at [46]–[47], [55]–[56]).

The first issue considered concerned the apparently limited degree to which there were any factual disputes in respect of the preliminary issues. Deputy Master Francis, at [33], rejected a suggestion that the failure on the part of the claimants to serve a reply to the defence was indicative of the nature of any factual dispute in respect of the issues. On the contrary, the fact that the parties had agreed directions to serve witness statements and statements in reply, was indicative of the fact they anticipated that there would be significant factual disputes to be dealt with at the preliminary issues trial. As such these matters were within the scope of the Issues for disclosure.

The Deputy Master at [34] then went on to consider the proportionality of making an Extended Disclosure order. He noted that the estimated costs of such an order were "*substantial*", up to around £250,000. That was not, however, determinative of the question of proportionality. The following also had to be taken into account: the nature of the dispute, i.e. that what was alleged was a significant copyright infringement that could, if upheld, lead to the recovery of substantial damages; that the dispute was between two significantly sized commercial parties; that the issues in dispute were complex; and, that the matter in dispute was of "*very great significance*" to both parties. Given these other factors, the size of the estimated costs was not such as to preclude an Extended Disclosure order being made.

### (iii) Disclosure Pilot Scheme – Control and Compliance

In ***Berkeley Square Holdings Ltd v Lancer Property Assets Management Ltd*** [2021] EWHC 849 (Ch), Robin Vos, sitting as a deputy judge of the High Court, considered the approach to compliance, and non-compliance, with a disclosure order under the disclosure pilot scheme. The claim concerned alleged dishonest payments said to have been made by the first defendant to companies that were alleged to have been owned by representatives of the claimants. A Model D Extended Disclosure Order was made. The claimants, whose lawyer oversaw the disclosure exercise, filed a certificate confirming their compliance with the order. Within that certificate they specified that documents, subject to the Disclosure Order, were not within their control.

For a document to come within the scope of disclosure for the purposes of CPR Pt 31, it must be within the definition provided in CPR r.31.8(2). The deputy judge noted that the same definition was set out in CPR PD 51U Appendix 1 para.1.1. As such the same approach to "*control*" over documents was to be taken under the disclosure pilot scheme as was taken to it in CPR Pt 31. The logical consequence of this was that:

> *"[27] ... The authorities dealing with the question of control in that context are therefore relevant to the question in this case ..."*

In that regard, it was, at [28], noted that in ***Lonrho v Shell Petroleum Co Ltd (No.1)*** [1980] 1 W.L.R. 627, the House of Lords, had established that a "*parent company does not automatically have control of the documents held by a subsidiary*". There were, however, no authorities "*in which a subsidiary has been held to have control of documents in the custody of a shareholder or parent*" (see [40]). However, as the deputy judge held, there was:

> *"[40] ... no reason in principle why such an arrangement cannot exist whatever the relationship between the parties. Whether or not there is such an arrangement is a matter of fact."*

On which point, also see ***Schlumberger Holdings Ltd v Electromagnetic Geoservices AS*** [2008] EWHC 56 (Pat); (2008) 31(7) I.P.D. 31047 at [21].

In so far as compliance with the disclosure order was concerned, the defendants submitted that the sworn statement submitted on their behalf, which set out that they did not have documents within their control, was determinative of the issue. While that was the case, it did not, however, preclude the court from ordering the equivalent of specific disclosure under CPR PD 51U para.17 following the approach taken in CPR r.31.12. As the deputy judge explained:

> *"[21] It is therefore clear from Al-Fayed v. Lonrho [(The Times, 24 June 1993)] that a sworn statement does not prevent the court from making a further order for specific disclosure in circumstances where it is satisfied that the initial disclosure is inadequate.*
>
> *[22] Mr Marshall also referred in his skeleton argument to the decision of Waksman J in Lakatamia Shipping Co Limited v. Nobu SU [2021] EWHC 203 (Comm). In that case, one of the defendants had provided sworn statements that she did not have any relevant custodians. Waksman J commented [at 53] as follows:*
>
> > *'I take the point which Mr Phillips QC accepts which is that you must not on an interlocutory hearing make a concluded finding about whether someone has possession or control of a document, particularly if that same issue is going to arise in the substantive trial because otherwise you are pre-judging it. It is not quite the same here but once a party has said on the underlying facts that they do not have control in the required sense, it is very difficult to see what more the court can do about it.'*
>
> *[23] This was not however a reserved judgment and it is not apparent what authorities were drawn to the judges' attention. In addition, the facts were very different given that the defendant maintained throughout that she had no custodians and so had provided only very limited disclosure whereas, in the present case, the claimants have provided significant disclosure of documents held by those persons whose documents they now say are not under their control. I do not therefore read Lakatamia as authority for the general proposition that I cannot make an order to remedy any perceived inadequacy in the first round of disclosure based simply on what is said in a sworn statement.*
>
> ...

*[26] ... , if there were ... a sworn statement [concerning a lack of control over documents], this would not prevent the court from making an order under paragraph 17 of PD51U if it considers that the disclosure which has already been provided is inadequate. In this context, I note that, although paragraph 18 of PD51U deals with varying an order for extended disclosure and for making an additional order for disclosure of specific documents, the provisions of CPR Rule 31.12 dealing with specific disclosure are intended to apply to situations where the initial disclosure is believed to be inadequate (see paragraph 5.1 of practice direction 31A). An order under paragraph 17 of PD 51U therefore falls within the same category as an order for specific disclosure which was expressly stated in Al-Fayed v. Lonrho to be an exception to the general rule that a sworn statement in relation to disclosure is conclusive."*

Finally, an issue arose concerning the role that a party's solicitor should play in supervising the disclosure process. It was submitted that the claimants' solicitor had not exercised an appropriate level of supervision over the disclosure process: see [80]. In that regard the deputy judge explained that the approach to take was not one that required a lawyer to manage all aspects of the process. As he summarised the position:

*"[80] Mr Beltrami criticises the claimants' solicitors for not exercising greater oversight of this process. He drew attention to the comments of Ward LJ in Hedrich v Standard Bank London Limited [2008] EWCA Civ 905 who referred [at 14] with approval to various extracts from chapter 14 of the third edition of Matthews and Malek on disclosure including the following:-*

*'14.07 The solicitor has an overall responsibility of careful investigation and supervision in the disclosure process and he cannot simply leave this task to his client... the client should not be allowed to decide relevance - or even potential relevance – for himself... it is then for the solicitor to decide which documents are relevant and disclosable'*

*[81] Mr Marshall points out that the extracts in question refer only to the solicitor's duty in relation to his client and says nothing about any responsibility in respect of third parties. He goes on to point out that the extracts include (at paragraph 14.09) the following:-*

*'he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate judge and if he has decided on reasonable grounds to believe his client, criticism cannot be directed at him.'*

*[82] Whilst I would accept that it is incumbent on a party's solicitor to exercise supervision over a disclosure process and, in particular, to explain the requirements of the process to his client, this does not necessarily mean that the solicitor must have direct contact with every individual or organisation who is being asked to search for potentially relevant documents. It will depend on the circumstances and solicitors must use their judgment."*

## Conclusion

The number of authorities explaining the application of the disclosure pilot scheme's provisions is increasing. That was inevitable. Rules always stand in need of explication. All codes of procedure, and of substantive law, require interpretation and application. What is becoming clear with the authorities concerning the disclosure pilot scheme is, however, another point. It is one it shares with the CPR as a whole. It may set out a new approach to the disclosure process, as the CPR set out a new procedural code that was to differ in approach and interpretation from the Rules of the Supreme Court and County Court Rules. However, many of its provisions carry with them the same meaning and interpretation as its predecessor. In the case of the disclosure pilot scheme then, care needs to be taken to consider whether, and if so, which of its provisions simply restate the approach taken under CPR Pt 31. In the cases noted here, it is apparent that the concept of "*control*" over documents is the same between the two sets of provisions, as was the approach to be taken to lawyer supervision of the disclosure process. While the pilot scheme is, rightly, intended to effect a new culture of disclosure (one that is more targeted and proportionate in its approach) care remains to be applied to determine when its provisions mirror those in Pt 31 such that its case law can properly be applied to the pilot scheme. In all likelihood this will mean, as is evident from questions such as the meaning of control or lawyer supervision, that technical matters – matters that do not go to the approach to the different disclosure models under the pilot scheme – ought to carry the same general approach as that in CPR Pt 31 and its jurisprudence. More substantive matters concerning the nature of the disclosure process ordered under the scheme, which go to the culture, proportionality and cost of disclosure, ought however to proceed differently, as was made clear by the Chancellor in ***McParland***.

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