CIVIL PROCEDURE NEWS

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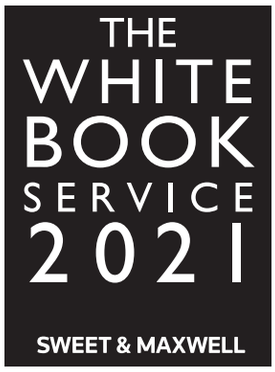

In Brief

Cases

- **Benyatov v Credit Suisse Securities (Europe) Ltd** [2021] EWHC 1318 (QB), 15 April 2021, unrep. (Freedman J)

Witness summaries – overriding objective

CPR r.32.9. The claimant applied for retrospective permission to serve witness summaries on the defendant. **Held**, the application was granted. In considering the application the judge applied the guidance set out in ***Otuo v Watch Tower Bible and Tract Society of Britain*** (2019) and ***Morley (t/a Morley Estates) v Royal Bank of Scotland Plc*** (2019) (see [18]–[21]). In considering whether to grant permission, the defendant questioned the late timing of the claimant's approach to the witnesses. The judge noted that, even assuming the claimant was late in approaching the witnesses, this was permissible as it was balanced by the defendant amending its pleadings at a late stage. Fairness and justice supported the claimant being permitted to mitigate its position in such circumstances (see [65]). Moreover, granting permission at a late stage was consistent with the overriding objective given the difficulties claimants, who – as in this case – bring proceedings against a large organisation, have in seeking the assistance of the defendant's former employees (see [69]). ***Scarlett v Grace*** [2014] EWHC 2307 (QB), unrep., ***Otuo v Watch Tower Bible and Tract Society of Britain*** [2019] EWHC 346 (QB), unrep., ***Morley (t/a Morley Estates) v Royal Bank of Scotland Plc*** [2019] EWHC 2865 (Ch), unrep., ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.32.9.1.)

- **Re Cwmni Rheoli Pentref Marina Conwy Cyfynedig (Conwy Marina Village Management Company)** [2021] EWHC 1275 (Ch), 15 April 2021, unrep. (Morgan J)

Part 8 claim – no basis to proceed with claim where no defendant

CPR Pt 8. The claimant, the management company of the Conwy Marina Village, issued Part 8 proceedings. It did so originally by naming itself as both the claimant and defendant to the claim. There was no suggestion, as would be permissible, that it was suing and being sued in different capacities. It was, as the judge noted, "*a case of the claimant suing itself*" (see [10]). In the claim, the claimant sought guidance from the court on the proper interpretation and construction of a user covenant in respect of properties in the marina. As the judge noted this was an unusual claim in that:

> *"[11] ... It is not generally the role of the court to give guidance to a legal person, whether an individual or a company. That person must go and obtain guidance from legal advisers. What the court does instead is it decides disputes between parties but this claim form does not identify an opposing party with whom the claimant is in dispute which the claimant asks the court to resolve."*

Case management orders had been made and which ordered the amendment of the claim form so that the management company was removed as the defendant. Further orders had granted the claimant permission to join a new defendant. No such defendant had, however, been identified. In the absence of a defendant, the judge held that it was not possible to continue with the claim. In the absence of a defendant, as he put it, who would be bound by any order made by the court? (See [20].) In other words, the claim and any judgment would be merely hypothetical. The specific issue that the judge had to rule on was whether the claim was properly constituted for the purposes of the CPR. It was not. As he explained:

> *"[27] I consider that this claim is not a properly constituted claim. The general business of the court is to determine disputes between parties and so one needs to have a party on either side. ... the court does not generally give advice or approve conduct. There is something of an exception to that in the case of the court's jurisdiction over trusts. For example, in Lewin on Trusts 20th Ed., Chapter 39, there is a discussion of when it is appropriate for a court to give guidance to trustees or approve the conduct of trustees. That jurisdiction informs some of the contents of the Chancery Guide but it is of no relevance to the present dispute.*
>
> *[28] Mr. Williams submits that the case comes within CPR 8.2A. That rule is headed: Issue of Claim Form without Naming Defendants. The rule provides for a Practice Direction to set out the circumstances in which a claim form may be issued under Part 8 without naming a defendant. The rule states that the Practice Direction may set out those cases in which an application for permission must be made by application notice before the claim form is issued. It also deals with the question of when and how the court should give permission for a claim form to be issued without naming a defendant.*
>
> *[29] That rule was referred to by the Supreme Court in Cameron v Liverpool Victoria Insurance Co. Ltd. [2019] 1 WLR*

1471, in particular per Lord Sumption at paragraph 19. Lord Sumption indicated his understanding that there had been no Practice Direction made under rule 8.2A. It is quite right that there has been no general Practice Direction made under that rule. However, Practice Direction 64A and Practice Direction 64B do amount to Practice Directions made under rule 8.2A. I refer, in particular, to Practice Direction 64A, paragraph 1A.2 and paragraph 5, and to Practice Direction 64B, paragraph 4.2.

[30] As I have indicated by reference to Chapter 39 of Lewin, there are cases within those two Practice Directions where the court does permit a claim form under Part 8 to be issued without naming defendants but those Practice Directions are not relevant to the present case. The position remains, therefore, that rule 8.2A has not been brought into effect in circumstances which would extend to the present case. It simply does not apply to the present case.

...

[35] It seems to me that the Civil Procedure Rules indicate a number of things: First, they indicate an expectation in the ordinary way that there will be a defendant to a dispute which will come forward to the court for decision. Secondly, the rules [see rr.19.6, 19.7 and 19.8A] deal with special cases where it is appropriate not to have a party as a defendant but in such a case if someone is going to be bound by a decision of the court in the case to which that person is not a party, that person has to be told that if he stands back from the proceedings and does not join in he runs the risk the proceedings will bind him and decide his rights.

[36] Having reviewed the Civil Procedure Rules, it seems to me clear that these proceedings are not properly constituted. If I determine anything in these proceedings as to the meaning of the covenant, no one would be bound and the proceedings would be of no utility. Mr. Williams suggested that I could decide the meaning of the covenant and that would bind the claimant. I am afraid I do not understand how such a decision would be of any help to anyone. If it only bound the claimant, it would not bind a member of the claimant. A member of the claimant could say to the claimant, 'You the management company must enforce this covenant,' and even if the judge said the covenant is not enforceable or does not mean what the member thinks, the member can say he/she is not bound by that decision.

[37] I decline to make a determination which would allegedly bind the claimant. I do not recognise that as a possible outcome." (Editorial insertion in square brackets.)

(See ***Civil Procedure 2021*** Vol.1 at para.16.2.)

■ **Boxwood Leisure Ltd v Gleeson Construction Services Ltd** [2021] EWHC 947 (TCC), 19 April 2021, unrep. (O'Farrell J)

Late service of claim form – authorities concerning relief

CPR rr.3.1(2)(m), 3.9, 3.10, 7.6. On an application for relief from the consequences of late service of a claim form, O'Farrell J, having reviewed the relevant authorities, helpfully summarised them as follows:

> *"[46] ... i) If a claimant applies for an extension of time for service of the claim form and such application is made after the period for service specified in CPR 7.5(1), or after any alternative period for service ordered under CPR 7.6, the court's power to grant such extension is circumscribed by the conditions set out in CPR 7.6(3): Barton v Wright Hassall at [8] & [21]; Vinos v Marks & Spencer at [20] & [27].*
>
> *ii) The court has a wide, general power under CPR 3.10 to correct an error of procedure so that such error does not invalidate any step taken in the proceedings: Phillips v Nussberger at [30]-[32]; Steele v Mooney [19]-[20].*
>
> *iii) In the cases cited where the power under CPR 3.10 was exercised, there was a relevant, defective step that could be corrected: Steele v Mooney (defective wording of application for an extension of time); Phillips v Nussberger, Bank of Baroda, Dory (ineffective steps taken to serve the claim form on the defendants); Integral (defective service of particulars of claim). Doubts have been expressed as to whether CPR 3.10 could or would be used where no relevant procedural step was taken: Integral at [29]; Bank of Baroda at [17]; Dory at [76].*
>
> *iv) The court also has a wide, general power under CPR 3.9 to grant relief from any sanction imposed for a failure to comply with any rule, practice direction or court order: Denton v White [2014] 1 WLR 3926 at [23] – [36].*
>
> *v) A claimant is not entitled to rely on the wide, general powers under CPR 3.10 or CPR 3.9 to circumvent the specific conditions set out in CPR 7.6(3) for extending the period for service of a claim form: Vinos v Marks & Spencer plc at [20] & [27]; Kaur v CTP at [19]; Elmes v Hygrade at [13]; Godwin v Swindon BC at [50]; Steele v Mooney at [19] & [28]; Piepenbrock at [81] & [82]; Ideal v Visa at [92]."*

Vinos v Marks & Spencer Plc [2000] EWCA Civ B526; [2001] 3 All E.R. 784, ***Godwin v Swindon BC*** [2001] EWCA Civ 1478; [2002] 1 W.L.R. 997, ***Kaur v CTP Coil Ltd*** [2001] C.P. Rep. 34, CA, ***Elmes v Hygrade Food Products Plc*** [2001] EWCA Civ 121; [2001] C.P. Rep. 71, ***Steele v Mooney*** [2005] EWCA Civ 96; [2005] 1 W.L.R. 2819, ***Phillips v Symes (A Bankrupt)*** [2008] UKHL 1; [2008] 1 W.L.R. 180, ***Bank of Baroda, GCC Operations v Nawany Marine Shipping FZE*** [2016] EWHC 3089 (Comm); [2017] 2 All E.R. (Comm) 763, ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, ***Barton v Wright Hassall LLP*** [2018] UKSC 12; [2018] 1 W.L.R. 1119, ***Dory Acquisitions Designated Activity Co v Frangos*** [2020] EWHC 240 (Comm), unrep., ***Piepenbrock v Associated Newspapers Ltd (DMG Media) of Daily Mail General Trust Plc*** [2020] EWHC 1708 (QB), unrep., ***Ideal Shopping Direct Ltd v Visa Europe Ltd*** [2020] EWHC 3399 (Ch), unrep., ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.7.6.3.)

■ **Buwule v MT Finance Ltd** [2021] EWHC 1185 (QB), 6 May 2021, unrep. (Fordham J)

Assistance to be provided to litigant-in-person – costs

CPR r.1.1. The applicant, B, applied for and obtained an interim injunction against the respondent. The interim injunction was subsequently discharged. In the order discharging it, the judge made provision for the proceedings to continue as a CPR Pt 7 claim if the applicant issued them by a set date. If no Pt 7 claim was issued, then the interim injunction proceedings stood dismissed. No claim was issued. The applicant subsequently issued an application to vary the order by way of an extension of time to issue a claim. It was accepted, rightly, before the court that notwithstanding the order, the applicant could have issued a Pt 7 claim in the normal way and that the order did not, if no claim was issued within its time limit, bar a claim from being issued (see [5] and [6]). It was apparent at the hearing before Fordham J that the applicant, a litigant-in-person, had not appreciated the position and that notwithstanding the order he could issue a Pt 7 claim. Once the position was made clear to the applicant, the application for an extension of time was not pursued on the basis that had the true position been understood, no such application would have been made. Costs were sought by the respondent. **Held**, no order as to costs was made. The respondent had only pointed out in a skeleton argument filed 15 minutes before the hearing that the applicant could have pursued a claim either via the route set out in the order or by simply issuing a Pt 7 claim in the normal way. In such circumstances, it would not be just or fair to make an adverse costs order against the appellant, who had not appreciated the true position. The respondent ought to have pointed out to the appellant that two routes were available, and that could have been done at a much earlier stage. Pointing out that fact would not amount to providing legal advice to the applicant (see [13]–[15]). (See ***Civil Procedure 2021*** Vol.1 at para.1.1.1.)

■ **Serbian Orthodox Church – Serbian Patriarchy v Kesar & Co** [2021] EWHC 1205 (QB), 13 May 2021, unrep. (Foxton J)

Service via an email forwarding

CPR r.6.20(1)(d), PD 6A. An appeal was brought from an order setting aside a default costs certificate. It had been set aside on the basis that service of the notice of commencement had not been made validly as it had not been sent to the email address agreed for service. The notice of commencement, rather than being sent to the agreed email address, had been sent to another email address used by the respondent, which then forwarded the email (and notice) to the agreed email address. **Held**, the appeal was allowed. Foxton J first dealt with the question:

> *"[12] ... whether documents which are addressed to an email address which had not been the subject of a service agreement, but which are automatically and instantaneously forwarded to another email address which has, meet the requirements of Practice Direction 6A."*

There was no appellate authority on the issue. Pre-CPR authorities did not assist in answering the question due to the differences in approach to service and deemed service in the RSC and the CPR ([24]–[33]). The one post-CPR authority, ***R. (Davies) v Kingston upon Thames County Court*** (2014), which concerned redirected postal service and which concluded, tentatively, that such service was good service was of limited assistance. For emails, instantaneous forwarding to another email address was not good service. As Foxton J explained, he reached that conclusion for the following reasons:

> *"[36] ...i) First, on the natural construction of Practice Direction 6A, it is the 'sending' of the email to the agreed address which constitutes valid service. That the word 'sent' is concerned with the address used by the party effecting service is reinforced by the use of the same word in the provisions on deemed service and the certificate of service (which are necessarily premised on events within the claimant's knowledge – something which steps taken to forward correspondence on from a postal or email address will not ordinarily be).*
>
> *ii) Second, that conclusion is more consistent with the provisions on deemed service in the CPR, with their focus on the steps taken to post a letter or send an email, which have been held, for reasons of certainty, to preclude proof of non-receipt for the purposes of establishing that service had not been validly effected. I*

note that in Austin Rover, Sir John Megaw had viewed the ability under the RSC of a defendant who had not received the document to establish that service had not been effected as supporting his conclusion that it should be possible to establish as a matter of fact that a misaddressed communication had reached the right destination. There is something in the converse proposition under the CPR.

iii) Third, I am troubled by how the provisions on obtaining default judgment would operate if there could be valid service (by reason of the on-forwarding of the communication) but, on the objective facts known to the party serving, valid service had not been effected and a truthful certificate of service could not be filed."

Furthermore, it was not permissible to rely upon CPR r.3.10 to validate defective service ([38]–[52]). It was, however, appropriate to validate service retrospectively under CPR r.6.27 ([53]–[58]). ***Austin Rover Group Ltd v Crouch Butler Savage Associates*** [1986] 1 W.L.R. 1102, CA, ***R. (Davies) v Kingston upon Thames County Court*** [2014] EWHC 4589 (Admin), unrep., ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.6.20.3.)

■ **Ingeus UK Ltd v Wardle** [2021] EWHC 1268 (QB), 14 May 2021, unrep, (Pepperall J)

Jurisdiction to make a fresh general civil restraint order

CPR r.3.11, PD 3C para.4.1. In December 2016, a limited civil restraint order was issued against the respondent. In May 2017, a further general civil restraint order (GCRO) was made against the respondent. This was then extended in May 2019 for a further two years. The applicant applied to extend the GCRO for a further two years. **Held**, it was evident from the respondent's behaviour following the making and extension of the GCRO that but for it he would have continued to issue claims and applications that would have been wholly without merit ([50] and [53]). Given the nature of that conduct it was apparent that the making of an extended civil restraint order would not be sufficient ([53]). Pepperall J noted however that there was some doubt whether the Circuit Judge who was authorised to act as a judge of the High Court under s.9(1) of the Senior Courts Act 1981, and who extended the duration of the GCRO in May 2019, had the jurisdiction to do so under PD 3C para.4.1(2) ([45]–[48]). It was, however, unnecessary to resolve that issue in the present case (albeit it is a matter that the Civil Procedure Rule Committee may wish to clarify and do so in the affirmative given the terms of s.9(5) of the Senior Courts Act 1981). It was not necessary to determine this issue, as it was clear that the court had jurisdiction on an application to extend a GCRO to issue a fresh one. As Pepperall J put it:

"[48] ... I am satisfied that the court on an extension application can instead determine that it is more appropriate to make a fresh order. Indeed, there are advantages in having a single clear order stating in terms what must not be done and for how long, and in refreshing the judges to whom any application for permission to issue a claim or application must be made. Further, I am satisfied that the court's jurisdiction to make a fresh general civil restraint order extends to circumstances where it concludes that the only reason that the respondent has not made further claims or applications that are totally without merit is because he believed that he was prevented from doing so by an earlier general civil restraint order. In any event, Mr Tabari submits that it would be open to me to extend the original general civil restraint order after its expiry: Ghassemian v. Chatsworth Court Freehold Co. Ltd [2019] EWHC 3646 (Ch), per Birss J as he then was. That said, a gap of two years would be somewhat extraordinary and no doubt well beyond anything contemplated by Birss J. Accordingly, rather than determining the point about jurisdiction, I approach this application on the basis that it is for a fresh order."

Ghassemian v Chatsworth Court Freehold Co Ltd [2019] EWHC 3646 (Ch), unrep., ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.3.11.7.)

■ **Re Gertner** [2021] EWHC 1404 (Ch), 21 May 2021, unrep. (Marcus Smith J)

Third party funding – rebuttable of presumption of control – Arkin cap

Senior Courts Act 1981 s.51, CPR r.46.2. An application was made for a third-party costs order against a litigation funder. The funding arrangement went well beyond the mere funding of the litigation, i.e. the funder was not a "*pure funder*". The funder had, in fact, "*a considerable degree of control over the litigation*" (see [10]). Its control, via the funding arrangement, was in fact "*massive*", such that while not amounting to total control it was very close to it. Evidence as to the manner in which that control was exercised was not, to any great degree, before the court. It was, however, a matter for a funder to rebut the "*natural inference*" that the level of theoretical control which it had was exercised in practice. As Marcus Smith J put it:

"[12] ... it seems to me that if the natural inference of the terms of the funding agreement ... – namely extreme control ... – is to be gainsaid, then a very high degree of frankness is to be observed by [the funder and/or funded party]. That has not happened. It seems to me that I must treat the funding agreement as saying what it says and, reading the funding agreement in that light, it seems to me that the test for imposing a third party costs order has absolutely been met in this case."

Given the level of control, it was appropriate to both make a third-party costs order and to do so without applying the ***Arkin*** cap. The nature of the interest that the funder had in the litigation justified that approach. ***Arkin v Borchard Lines Ltd*** [2005] EWCA Civ 655; [2005] 1 W.L.R. 3055, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at paras 25.14.3 and 46.2.4.)

- **Re M (Children) (Applications by Email)** [2021] EWCA Civ 806, 28 May 2021, unrep. (Jackson, Simler and Phillips LJJ)

FPR r.18.4, CPR r.23.3. The Court of Appeal provided guidance on the making of applications without filing an application notice, and particularly where they were made by email. While the appeal concerned the application of FPR r.18.4, the guidance is applicable by analogy to CPR r.23.3. The guidance is as follows:

> *"[43] This framework allows the court to accept and consider applications made without a formal application notice and to make orders without a hearing. It is desirable, at a time when the courts are under considerable pressure of work and where remote case management hearings have become common, for these powers to be used flexibly in the interests of justice and, in the Family Court, in the interests of children. To this end, the court must distinguish applications that can appropriately be made without an application notice from applications that should, because of the importance of the issue or for some other reason, be made by formal notice. The fact that it has given a general permission for applications to be made by email obviously does not prevent it from requiring an application notice to be filed in a specific instance.*
>
> *[44] Similarly, the court must discriminate between those applications that require a hearing and those that do not. The default position is that there should be a hearing, as the court can only make an order without a hearing if it does not consider that a hearing would be appropriate. It should be on solid ground if it makes an order without a hearing when, as the rule contemplates, the parties agree that a hearing is not required, or where the order is agreed. It may also decide to dispense with a hearing in other circumstances, for example where the issue is not of particular importance, or where the proper order is obvious, or where the documents contain all the information and arguments and a hearing is unlikely to add much. There will be other reasons why an application can be fairly dealt with without hearing – it is all a matter of judgement.*
>
> *[45] The essential point is that, whatever form an application takes and whether or not there is a hearing, the same standards of procedural fairness apply. The fact that an application is made by email or decided without a hearing does not mean that it should receive less careful scrutiny. On the contrary, a judge considering an application on the papers must be alert to ensure that the rules and orders of the court have been followed and that the process is as procedurally fair as if the parties were present in person."*

The judgment particularly highlights the problems that can arise where an order is made without a formal application via a "*rapid exchange*" of emails between the parties and the judge. (See ***Civil Procedure 2021*** Vol.1 at para.23.3.2.)

Erratum

In the case note to ***Persimmon Homes Ltd v Osborne Clark LLP*** [2021] EWHC 831 (Ch) published in **Civil Procedure News No.5 of 2021**, Master Kaye was accidently referred to as "he". The editors apologise for this typographical error.

Practice Updates

STATUTORY INSTRUMENTS

The Whiplash Injury Regulations 2021 (SI 2021/642). The Whiplash Injury Regulations 2021 came into force on **31 May 2021**. The statutory instrument is in the same terms as the draft noted in **Civil Procedure News No.4 of 2021**.

The Civil Proceedings and Gender Recognition Application Fees (Amendment) Order 2021 (SI 2021/462). In force from **4 May 2021**. The Order amends the Civil Proceedings Fees Order 2008 (SI 2008/1053) (see ***Civil Procedure 2021*** Vol.2 Section 10). It inserts a new para.1.10 of Sch.1 to the 2008 Order to provide for a fee of £5 to be paid in order to issue an appeal under reg.38(9) of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (SI 2020/1311).

The Civil Procedure Fees (Amendment) Order 2021 (SI 2021/588). In force from **18 May 2021**. The 2021 Order amends the Civil Proceedings Fees Order 2008 (SI 2008/1053). It:

- omits art.1(2)(a), which made reference to the County Court Business Centre;
- omits para.1.2 of Sch.1, which deletes provision for reduced fees for starting proceedings in the County Court Business Centre (CCBC) or via Money Claims Online (MCOL). Article 5.2 of the 2008 Order is amended to reflect this omission;

- omits reference to the CCBC or via MCOL from para.1.1 of Sch.1, rendering the same fees payable for starting proceedings irrespective of the means by which they were started. In other words the discounted fees for starting proceedings when using the CCBC or MCOL are omitted;
- amends para.1.4(c) of Sch.1, in order to omit discounted fees for starting proceedings via Possession Claims Online (PCOL); and
- omits para.8.1(a) and (b) of Sch.1, and replaces them with a single fee of £83 to issue an application for or in relation to enforcement via a warrant of control against goods other than to enforce payment of a fine.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 132nd Update. This Update introduced a new pilot scheme under CPR Pt 51: PD 51ZB – the Damages Claims Pilot, which is **in force** from **28 May 2021**. The pilot scheme is intended to run (in the first instance) until 30 April 2024. It is only available for use by lawyers (legal professionals) who are registered with MyHMCTS and have been granted access to the pilot scheme. It is, thus, invitation only. It applies to damages claims, subject to a number of conditions being met, e.g. the claim would not ordinarily be made under CPR Pt 8. It enables a qualifying claim to be issued via an online process, for particulars of claim and initial information for case management to be uploaded.

PRACTICE GUIDANCE

Practice Note – Pt 32. On **11 May 2021**, Sir Julian Flaux, Chancellor of the High Court issued a Practice Note concerning the use of videolink or other remote means to taking witness evidence from a foreign jurisdiction. Presumably the Practice Note is strictly limited to practice in the Chancery Division and the other Business and Property Courts, as it was not issued by either the Master of the Rolls, as Head of Civil Justice, or the deputy Head of Civil Justice. That being noted, the Practice Note sets out guidance that ought properly to be followed generally. The Practice Note is reprinted below.

PRACTICE NOTE

1. In a number of cases in the recent past, the issue has come up in relation to witnesses giving evidence by videolink or other remote means from a foreign jurisdiction, that permission may be required from the local court or other authority in the foreign jurisdiction for the witness to give such evidence remotely to a Court in England and Wales. It is for the party calling the witness to ensure that such permission, if required, is obtained in good time for the trial or hearing at which the witness is to give evidence and to inform the Court that such permission has been obtained. This is already made clear in Annex 3 to Practice Direction 32 dealing with video conferencing. Paragraph 4 deals specifically with the need to obtain permission from the relevant foreign court or authority.

2. In order to avoid unnecessary delays or disruption to trials or hearings, it is directed that, in any case where there is a pre-trial review ("PTR") a party calling a factual or expert witness remotely should have obtained any necessary permission by the date of the PTR and should inform the Court accordingly at the PTR.

3. In cases where there is no PTR, a party calling a factual or expert witness remotely should have obtained any necessary permission by the time of filing the pre-trial check list and should record in the pre-trial check list that the permission has been obtained.

Sir Julian Flaux
Chancellor of the High Court
11 May 2021

Administrative Court Listing Policy – Guidance. On 27 May 2021, the Judicial Office issued, on behalf of Mr Justice Swift, the judge in charge of the Administrative Court, new guidance (dated 31 May 2021) for court listing officers in the Administrative Court. It replaces listing policy guidance previously issued in June 2018. The policy document can be obtained from: *https://www.judiciary.uk/wp-content/uploads/2021/05/ACO-Listing-Policy.pdf* [Accessed 7 June 2021]. It applies to all Administrative Court hearings and appeals other than extradition appeals.

Administrative Court Bundle Guidance. On 27 May 2021, the Judicial Office issued, on behalf of Mr Justice Swift, the judge in charge of the Administrative Court, new guidance (dated 31 May 2021) on the preparation of electronic bundles for the use in proceedings in the Administrative Court. The guidance can be obtained from here: *https://www.judiciary.uk/wp-content/uploads/2021/05/ACO-Bundle-Guidance-26-May-2021-2.pdf* [Accessed 7 June 2021]. It is reprinted below.

Administrative Court

ELECTRONIC BUNDLES

(Practice Direction 54A, §§ 4.5 and 15; Practice Direction 54B, §1.3)

Electronic bundles must be prepared as follows and be suitable for use with all of Adobe Acrobat Reader and PDF Expert and PDF Xchange Editor.

1. *A bundle must be a single PDF.*
2. *If the bundle is filed in support of an urgent application (i.e., an application made using Form N463) it must not exceed 20mb, and (unless the court requests otherwise) should be filed by email*
3. *If the papers in support of any claim or appeal or non-urgent application exceed 20mb, the party should file:*
   a. *a core bundle (no larger than 20mb) including, as a minimum, the Claim Form and Grounds or Notice of Appeal and Grounds, or Application Notice and Grounds; documents regarded as essential to the claim, appeal, or application (for example the decision challenged, the letter before claim and the response, etc.); any witness statements (or primary witness statement) relied on in support of the claim, appeal or application; and a draft of the order the court is asked to make; and*
   b. *a further bundle containing the remaining documents.*

   Such bundles should be filed using the Document Upload Centre: see the separate HMCTS "Professional Users Guide" for detailed information about the Document Upload Centre.
4. *All bundles must be paginated in ascending order from start to finish. The first page of the PDF will be numbered "1", and so on. (Any original page numbers of documents within the bundle are to be ignored.) Index pages must be numbered as part of the single PDF document, they are not to be skipped; they are part of the single PDF and must be numbered. If a hard copy of the bundle is produced, the pagination on the hard copy must correspond exactly to the pagination of the PDF.*
5. *Wherever possible pagination should be computer-generated; if this is not possible, pagination must be in typed form.*
6. *The index page must be hyperlinked to the pages or documents it refers to.*
7. *Each document within the bundle must be identified in the sidebar list of contents/bookmarks, by date and description (e.g., "email 11.9.21 from [x] to [y]"). The sidebar list must also show the bundle page number of the document.*
8. *All bundles must be text based, not a scan of a hard copy bundle. If documents within a bundle have been scanned, optical character recognition should be undertaken on the bundle before it is lodged. (This is the process which turns the document from a mere picture of a document to one in which the text can be read as text so that the document becomes word-searchable, and words can be highlighted in the process of marking them up.) The text within the bundle must therefore be selectable as text, to facilitate highlighting and copying.*
9. *Any document in landscape format must be rotated so that it can be read from left to right.*
10. *The default display view size of all pages must always be 100%.*
11. *The resolution on the electronic bundle must be reduced to about 200 to 300 dpi to prevent delays whilst scrolling from one page to another.*
12. *If a bundle is to be added to after the document has been filed, it should not be assumed the judge will accept a new replacement bundle because he/she may already have started to mark up the original. Inquiries should be made of the judge as to what the judge would like to do about it. Absent a particular direction, any pages to be added to the bundle as originally filed should be provided separately, in a separate document, with pages appropriately sub- numbered.*

For guidance showing how to prepare an electronic bundle, see (as an example) this video prepared by St Philips Chambers, which explains how to create a bundle using Adobe Acrobat Pro https://st-philips.com/creating-and-using-electronic-hearing-bundles/

Any application filed by a legal representative that does not comply with the above rules on electronic bundles may not be considered by a Judge. If the application is filed by a litigant in person the electronic bundle must if

at all possible, comply with the above rules. If it is not possible for a litigant in person to comply with the rules on electronic bundles, the application must include a brief explanation of the reasons why.

31 May 2021

LONDON CIRCUIT COMMERCIAL COURT GUIDANCE

On 1 June 2021, Guidance was issued by HH Judge Pelling QC concerning Pre-Trial Reviews and Trial Directions in the London Circuit Commercial Court. The Guidance provides that, in general, there is an expectation that at the first CCMC a pre-trial review will not be directed to take place, but on the contrary standard directions for trial will be given. The Guidance sets out those standard directions. The Guidance is reprinted below.

LONDON CIRCUIT COMMERCIAL COURT

PRE TRIAL REVIEWS AND TRIAL DIRECTIONS

1. *The following applies to Part 7 claims where the estimated length of the trial is 5 days or less ("Relevant Cases") and will be followed at first CCMCs for Relevant Cases with effect from 7 June 2021.*
2. *Experience has shown that Pre-Trial Reviews in Relevant Cases generate disproportionate cost and are of little if any practical utility other than for the purpose of giving directions for the conduct of the trial. Such directions can be given as conveniently at the first CCMC.*
3. *Whilst it is not possible to be prescriptive, the expectation will be that at the first CCMC for Relevant Cases, the Judge will NOT direct that a Pre-Trial Review take place and WILL give the following directions for the trial:*
    1. *Where a party wishes to adduce evidence by video link or other remote means from a location outside England & Wales, that party must obtain any permission required from the local court or other authority in the jurisdiction concerned by no later than the date fixed for the filing of the pre-trial check list and must record therein either that no such permission is required or that any permission required has been obtained.*
    2. *Electronic ("soft copy") trial and authorities bundles are to be prepared in accordance with the relevant Practice Directions Protocols and Guides and filed and served in PDF format.*
    3. *The Claimant is to serve a trial bundle on the Defendant prepared in accordance with Paragraph 2 above no later than 4pm 28 days before trial.*
    4. *The parties are to use best endeavours to agree and file by no later than 4 pm 21 days before trial:*
        (i) a soft copy trial timetable.
        (ii) a soft copy chronology cross-referenced to the trial bundle; and
        (iii) a soft copy cast list.
    5. *The Claimant is to file and serve by no later than 4pm 14 days before trial:*
        (i) a soft copy written opening and pre-reading list, both cross-referenced to the trial bundle.
        (ii) a soft copy chronology, cross-referenced to the trial bundle (if not agreed pursuant to paragraph 4).
        (iii) a soft copy proposed trial time table and a cast list (if not agreed pursuant to paragraph 4).
    6. *The Defendant is to file and serve by no later than 4pm 7 days before trial:*
        (i) a soft copy written opening and pre-reading list, both cross-referenced to the trial bundle.
        (ii) a soft copy electronically amended version of the Claimant's chronology referred to in paragraph 5(ii) above, cross-referenced to the trial bundle, unless the Claimant's chronology is agreed;
        (iii) soft copy electronically amended versions of the Claimant's proposed trial time table and cast list referred to in paragraph 5(i) and (iii) unless the Claimant's proposed trial time table and cast list are agreed.
    7. *By no later than 4 pm 5 days before the date fixed for the start of the trial, the Claimant shall file with the Court Listing Office or Judge's clerk a soft copy trial bundle and agreed soft copy authorities bundle, each prepared in accordance with paragraph 2 above and (if requested to do so by either the Court Listing Office or the Judge's clerk) a hard copy trial bundle and authorities bundle for use by the Trial Judge. If either party considers that any document in the trial bundle may be impractical to use in soft copy by*

reason of its page size being other than A4,it being oriented otherwise than in portrait format or its print format being less than 10 point then a hard copy should be filed at the same time as the soft copy trial and authorities bundles.

4. *The timings identified in the draft directions can of course be varied as required at the first CCMC.*
5. *The expectation is that the Judge will use soft copy trial and authorities bundles in all trials taking place on and after 8 June 2021.*

His Honour Judge Pelling QC
Judge in Charge, London Circuit Commercial Court

PRE-ACTION PROTOCOL UPDATE

Pre-Action Protocol for Personal Injury Claims below the Small Claims Limit in Road Traffic Accidents. On 11 May 2021, Sir Geoffrey Vos MR issued an update to the Pre-Action Protocol for Personal Injury Claims below the Small Claims Limit in Road Traffic Accidents. The update amends the Pre-Action Protocol as from **12 May 2021**. The Pre-Action Protocol did not, itself, come into force until 31 May 2021. The amendments are mainly clarificatory and stylistic. Substantive amendments are, however, made to include provision for the making of statements of truth in Lists of Losses (new para.8.3(7)), for detail on tariffs (amendments to paras 8.11 and 8.14), interim payments (amendments to paras 9.3 and 9.6), and commencing proceedings (amendments to para.12.3).

In Detail

JURISDICTION TO HOLD A JOINT TRIAL – *AL SADEQ v DECHERT LLP* [2021] EWHC 1149 (QB)

In ***Al Sadeq v Dechert LLP*** [2021] EWHC 1149 (QB), Murray J considered whether to exercise the court's discretion to issue a joint trial of two claims. In doing so his judgment highlights a number of matters that are relevant to the exercise of the discretion, albeit it should always be borne in mind that such decisions are always fact-sensitive.

Factual background

Two claims were issued: the Al Sadeq claim; and the Quzmar Claim. The claimants were individuals serving sentences for imprisonment following criminal convictions in one of the United Arab Emirates. Both claimants maintain their innocence of wrongdoing (see [8]–[9]). They both issued claims against two defendants in common. The Al Sadeq claim was also issued against further defendants. Both claims involved allegations against the defendants in respect of the manner in which, it is alleged, the defendants conducted an investigation into alleged fraud and misappropriation of public assets in the Emirate of Ras Al Khaimah (at [11]–[18]). The allegations were denied "*in the strongest possible terms*" (at [20]). The defendants applied for the two claims to be heard at a joint trial.

The basis of the discretion

Murray J summarised the legal principles applicable to an application seeking an order that two claims be tried jointly as follows:

"[35] Under CPR r 3.1(2)(h) the court has the power to 'try two or more claims on the same occasion'. The following statements apply to the exercise of the court's discretion in this regard:

i) the court must further the overriding objective by actively managing cases, including under CPR r 1.4(l) by 'giving directions to ensure that the trial of a case proceeds quickly and efficiently';

ii) the court should bear in mind that 'a litigant is entitled not to be delayed in the determination of his dispute without good cause': J Bollinger SA v Goldwell Ltd [1971] FSR 405 (Megarry J) at 408;

iii) the exercise is fact-sensitive; and

iv) the court is required to identify various factors weighing for and against the exercise of its discretion, having regard to fairness to each of the parties and the efficient management of the court's business."

As Murray J noted, while there is nothing controversial about the four statements, they do not provide very much by way of practical guidance. In considering whether to exercise the discretion, which Murray J ultimately did in favour of a joint trial, the judge highlighted a number of factors relevant to the fourth of the statements of principle.

Factors identified as weighing for and against the exercise of the discretion

The first factor that was considered was the extent to which an order that there be a joint trial would delay the claims being heard and the prejudice this would cause to the claimants. Murray J accepted that this was "*an important factor that must be given serious weight*" in considering whether to exercise the discretion. It was an important factor but was not, however, one of "*overriding*" importance (at [81]). It was also noted that if a joint trial was ordered it would result in an eight-month delay to the claims being heard. This was accepted to be a significant delay. An eight-month delay would not, however, affect the fairness of any trial. It would not, for instance adversely affect witness evidence (at [90]). Given that the claims related to events that took place generally in 2014–2015, an eight-month delay, which would mean a joint trial would be heard in early 2023 whereas the Al Sadeq trial would otherwise be heard in 2022, was not significant. As such, prejudice caused by delay did not ultimately weigh heavily in favour of rejecting the application to hold a joint trial.

The second factor considered was the extent to which there was an overlap between the claims. Murray J held that given the common factual background to the claims, that they both concerned events occurring over the same time period, that they involved the same individuals and each of the two claimants was to a significant extent relying upon the other claimant's allegations in their own claims, and the evidence they would draw upon, there was extensive overlap between the claims. That did not mean, however, that the two claims would stand or fall together. They remained separate claims, notwithstanding their similarities. This pointed towards the claims being tried together.

The third factor was the extent to which there was a risk of confusion on the part of the trial judge if the two claims were heard together. As a factor going to the discretion, Murray J's judgment suggests that care needs to be taken with it, such that it is not over-stated. As he explained:

> *"[94] ... A trial judge during a joint trial is, of course, not necessarily immune from confusion, but will be alert to, and guard against, the possibility that conclusions on one claim could unfairly influence his or her thinking on the other claim. Of course, some conclusions reached on one claim will properly influence the judge's thinking on the other claim and can fairly be taken into account. That is part and parcel of the business of judging and one of the advantages of a joint trial of claims, such as these, which are closely related by virtue of arising from a common background against the same or overlapping defendants."*

The fourth factor concerned the risk that if the claims were heard separately, whether or not the same judge heard them, they would produce inconsistent judgments given the fact that they concerned common issues. This was due to the possibility that there would be differences in the evidence given or presented at trial if the two claims were heard separately. The risk that separate trials would result in different outcomes was a distinct risk. This risk could not be mitigated effectively through case management.

The fifth factor concerned the overriding objective, albeit it was not explicitly referred to in the judgment. It specifically focused on the cost savings and more effective allocation of court resources if a joint trial was heard where there were, as here, significant overlaps between claims. Given such overlaps concerning the issues to be tried, expert evidence and documentary evidence, it was "*highly likely*" that cost savings to the parties would amount to a significant sum if a joint trial was ordered. Equally, there would likely be clear savings to the court time and resource allocation if a joint trial was ordered. In considering these issues, the fact that the claimants preferred there to be separate trials was an issue to be given little weight.

Taken together, Murray J concluded that these factors when considered together supported an order that the claims be heard at a joint trial. Such an order furthered the overriding objective. It would do so because:

> *"[99] ... it will allow ... two closely related claims to be resolved together more quickly and efficiently at a lower cost and with a more proportionate allocation of court's resources than if ... two trials were to be heard sequentially."*

Conclusion

While Murray J's analysis of the issues in this case were, inevitably and properly, fact-sensitive, his identification of five key factors to consider ought to provide helpful guidance for future analyses of applications to order a joint trial to be heard. That his judgment emphasises the important of taking account of both the impact of such an order on the parties' finances and on the allocation of court resources properly emphasises the need to take account, on such applications, of the need to both ensure that litigation is conducted at proportionate cost to the parties, but also to ensure that the court takes proper account of the need to ensure its resources are allocated by reference to the needs of litigants in cases other than those before the court on the application. The factors considered thus point towards a proper consideration, amongst the other specific factors identified, of CPR r.1.2(2)(b), (c), (d) and (e).

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