# CIVIL PROCEDURE NEWS

Issue 8/2021 11 August 2021

## CONTENTS



# In Brief

## Cases

**Beattie Passive Norse Ltd v Canham Consulting Ltd** [2021] EWHC 1116 (TCC), 30 April 2021, unrep. (Fraser J)

*Professional Negligence Adjudication Scheme*

In giving judgment in a professional negligence claim brought against consulting engineers, Fraser J reminded practitioners of the benefits of the professional negligence adjudication scheme, whilst regretting that the parties had not in the immediate case utilised it. As he noted at [152]:

> *"[152] ... there is an adjudication scheme for claims in professional negligence, operated by the Professional Negligence Bar Association. It was re-launched in 2017, and if it had been used in this case, would have led to an experienced Queen's Counsel in the field considering the claims and (given it is not a statutory adjudication) issuing a non-binding decision. It is supported by the insurance industry, amongst others. It is a great pity that the parties did not adopt that method of resolving their dispute in this case. It would have been far quicker, and much more economical, than conducting a High Court trial which lasted over three TCC weeks, with all the costs to the parties that such a trial entails. In essence, this case really concerned issues of factual causation. Although they were not all called, there was a total of six different experts instructed in this case, with a claim against Canham for £3.7 million. The negligence was admitted in certain limited respects (or at least was agreed by the experts in the structural engineering joint statement). There were unusual facts, but in the event BPN have succeeded to the tune of only £2,000. Even though there were contested issues of fact, adjudications can in suitable cases proceed with oral evidence and cross-examination of witnesses. Using the scheme to which I have referred, to resolve a dispute such as this one, would have been a far better way for the parties to have proceeded."*

(See ***Civil Procedure 2021*** Vol.1 at para.C7A-002.)

**Wilmington Trust SP Services (Dublin) Ltd v Spicejet Ltd** [2021] EWHC 1117 (Comm), 30 April 2021, unrep. (Miss Julia Dias QC sitting as a deputy judge of the High Court)

*Stay of execution to enable ADR to take place*

**CPR r.3.1(2)(f)**. The claimants applied for summary judgment on amounts said to be outstanding under three separate aircraft leasing agreements. The deputy judge gave judgment on part of the claims. She declined to withhold her judgment in order to place pressure on the claimants to enter into mediation on all the claims. She rightly noted that to do so was impermissible. While noting the benefits of mediation and also noting that the court could not order parties to enter into a mediation (on which see *In Detail*, below), she rightly concluded that taking such a step would go beyond robustly encouraging parties to mediate. As the deputy judge put it:

> *"[72] ... I do not need to be persuaded of the benefits of mediation and while I cannot force the parties to mediate, it does seem to me that this would be a sensible step which I should encourage – robustly if necessary: see PGF II SA v OMFS Co. 1 Ltd, [2013] EWCA Civ 1288; [2014] 1 WLR 1386 at [22]. However, withholding a judgment to which I have found that the Second and Third Claimants are otherwise entitled seems to me to cross the line from robust encouragement to undue pressure and I decline to do so."*

That being said, having given judgment, the deputy judge went on to hold that it was permissible to stay execution of the judgment given in order to enable the parties to engage in mediation on all aspects of their dispute, i.e. including the matters on which judgment had been given. Imposing the stay for this purpose would enable the mediation to resolve, if successful, all issues between the parties. As she explained:

> *"[74] ... However, I have also expressed strong encouragement that some form of ADR should take place in the hope that this might result in a permanent solution to the ultimate benefit of all parties. It is plainly sensible that any such solution should encompass the entirety of the disputes between the parties, both current and future. In those circumstances, I consider that the course most conducive to the furtherance of the overriding objective and the interests of justice is to give judgment for the First Claimant's undisputed claims but to stay execution. In that way, the entire dispute can be brought within the ambit of any ADR procedures that the parties may choose to adopt."*

***PGF II SA v OMFS Co 1 Ltd*** [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386, ref'd to. (See ***Civil Procedure 2021*** Vol.2, Section 15.)

■ **Re An Application for Judicial Review** [2021] EWHC 1895 (Admin), 26 May 2021, unrep. (Lewis LJ and Swift J)

*Judicial Review – urgent application procedure*

**CPR Pt 54**. The Divisional Court considered whether it was appropriate to refer leading counsel to the Bar Standards Board under the Hamid jurisdiction (at [6]). The basis of its consideration was whether there had been an abuse of process through misuse of the judicial review urgent applications procedure. **Held**, while there had been a misuse of the urgent applications procedure in this case, leading counsel had acted in good faith. As such no steps needed to be taken under the Hamid jurisdiction. In reaching the decision, Lewis LJ noted that the importance of using the urgent applications procedure properly had recently been restated by the President of the Queen's Bench Division, giving the judgment of the court, in ***DVP v Secretary of State for the Home Department*** (2021) at [6]–[20]. Lewis LJ went on to emphasise that use of the urgent applications procedure for case management purposes, i.e. to obtain case management directions, was impermissible. Furthermore, the procedure must only be used where there is a situation "*of exceptional urgency that must be dealt with quickly*" (see [19]–[27]). He went on to stress that practitioners had "*to give very careful consideration to the appropriateness of using the urgent applications procedure*" (see [30]). ***DVP v Secretary of State for the Home Department*** [2021] EWHC 606 (Admin); [2021] 4 W.L.R. 75, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.54.4.1.)

■ **Re Lueshing** [2021] EWHC 1928 (Ch), 16 June 2021, unrep. (Morgan J)

*Contempt of court – no power to discharge a committal order and replace with suspended order*

**CPR rr.81.9 and 81.10**. The defendant to a committal application was committed to prison for 10 months. After serving two months of the sentence, the defendant applied to discharge the committal order under CPR r.81.10. Specifically, the defendant sought an order discharging the committal with immediate effect or varying it so as to suspend the sentence of imprisonment. Alternatively, the defendant sought to vary the length of the sentence of imprisonment. **Held**, the length of the sentence was varied to six months. In reaching his decision Morgan J considered whether he had jurisdiction to substitute a suspended committal order for the original committal order. He concluded that there was no power to do so: ***Harris v Harris (Contempt of Court: Application to Purge)*** (2002) followed. As he explained:

> *"[9] The rule I am applying is rule 81.10 and subrule (3) refers to the court making such order under the law as it thinks fit. The question of suspending a committal order is actually dealt with in rule 81.9 and subrule (2) says that an order of committal has immediate effect unless and to the extent that the court decides to suspend execution of the order or warrant. The notes in the White Book to rule 81.9 explain the source of the court's power to suspend a committal order but they also refer to the case of Harris v Harris (Contempt of Court: Application to Purge) [2002] Fam 253, a decision of the Court of Appeal. The White Book states that that case decides that when ordering the discharge from prison of a committed contemnor, the court has no power to suspend the unserved part of the sentence. I have considered the decision in Harris v Harris and Mr Deeljur has also considered its implications in the course of today's hearing. There is no doubt that under the Rules at the time that Harris v Harris was decided the Court of Appeal held that the court did not have jurisdiction to discharge a committal order and substitute a suspended committal order. One of the authorities to which Mr Deeljur referred me, namely CJ v Flintshire Borough Council [2010] EWCA Civ 393, referred to that part of the decision in Harris v Harris and proceeded on the basis that it was, in 2010, a correct statement of the law. That appears from paras.34 and 35 of the judgment of Sedley LJ in CJ v Flintshire Borough Council.*
>
> *[10] Mr Deeljur does not contend that the decision in Harris v Harris has been superseded by the new provisions in CPR Part 81. Certainly, the White Book does not consider that Harris v Harris has been superseded and, given that Harris v Harris considers the jurisdiction of the court when sentencing on committal and rule 81.10(3) says that the court may make such order under the law as it thinks fit, I can see no reason to hold that Harris v Harris has been superseded. Therefore, applying Harris v Harris in this case, I am not able to make an order in accordance with one of the alternatives put forward in the draft order. I will comment, however, that if I had had power to order the release of Mr Lueshing from prison either forthwith or at a future date and then to provide for a suspended sentence for the remainder of the original ten months, I would have been very attracted by that possibility. I think that a suspended order coming into force in that way would have real advantages in that it would underpin some of the things that Mr Lueshing says that he will do to comply with the previous order of the court that has been made but, as I say, I am not in a position to take that course.*
>
> *[11] It seems to me that the courses which are open to me are as follows. First of all, I can make no order by way of discharge so that the original committal order will run its course. Alternatively, I can discharge the committal order to the extent that Mr Lueshing may be released from prison at a future date. The next option would be to discharge the committal order to enable Mr Lueshing to be released from prison immediately. That is as soon as the court's order is communicated to the prison authorities and they are able to act upon it. If I do make an order whereby Mr Lueshing is*

*released from prison earlier than five months from the committal order and the beginning of his term of imprisonment, then I can consider reimposing, with a new timetable, the order that was made by Judge Jones on 27 May 2020 which was the order that Mr Lueshing broke thereby committing his contempt of court ..."*

***Harris v Harris (Contempt of Court: Application to Purge)*** [2001] EWCA Civ 1645; [2002] Fam. 253, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.81.10.2.)

- **Travelers Insurance Co Ltd v Armstrong** [2021] EWCA Civ 978, 1 July 2021, unrep. (Coulson, Asplin and King LJJ)

*Conflict of interest – joint retainer privilege*

**CPR Pt 31.** In group litigation, the Court of Appeal reconsidered and reaffirmed the approach to be taken to joint retainer privilege. Having reviewed the authorities, Coulson LJ summarised the applicable principles as follows:

*"[37] In my view, the authorities outlined above can be summarised in this way:*

*(a) In respect of privileged documents, a successor in title stands in the shoes of his or her predecessor: see Schneider v Leigh and Crescent Farm. Thus, if the predecessor in title is entitled to the disclosure of privileged documents, so too is the successor in title.*

*(b) The right of a successor in title to disclosure of such documents, and to assert privilege in such documents as against third parties, is not a matter of the terms of a particular assignment or deed. It is a right that passes as a matter of law: see Surface Technology and Winterthur.*

*(c) Of course, the scope of the rights of a successor in title will always depend on precisely what it is that has been passed on or assigned to him: see as far back as Minet, and the analysis in Surface Technology. Thus if a solicitor was jointly retained to deal with an IP claim and a fatal accidents claim, and the successor in title is an assignee of claims consequential upon the IP claim only, the successor in title is not entitled to see the privileged documents relating to the fatal accidents claim.*

*(d) Legal professional privilege is a fundamental right, as restated in clear terms by Sir Terence Etherton MR in Shlosberg. In a case of JRP, it is therefore a fundamental right of each party who has jointly retained the solicitors in question. There is no authority to suggest that one party's right to claim JRP might override the rights of the other party who jointly retained the solicitors, whilst Konigsberg states in unequivocal terms that one such party cannot assert privilege against the other.*

*(e) This can make for complexity, particularly in respect of what can be disclosed to third parties: see the discussion in Twin Benefits. But the general position is as set out there by Arnold J. Whilst neither party can claim privilege as against the other in respect of any documents created pursuant to the joint retainer, as against any third party (other than a successor in title, who stands in the shoes of the original party), both parties can maintain a claim for privilege in respect of any such documents.*

*(f) As the privilege is joint it can only be waived jointly and not unilaterally: see Winterthur and 19.01 of Documentary Evidence."*

***Minet v Morgan*** (1872–73) L.R. 8 Ch. App. 361, CtACh, ***Schneider v Leigh*** [1955] 2 Q.B. 195, CA, ***Crescent Farm (Sidcup) Sports v Sterling Offices*** [1972] Ch. 553; [1972] 2 W.L.R. 91, ChD, ***Re Konigsberg (A Bankrupt)*** [1989] 1 W.L.R. 1257, ChD, ***Surface Technology Plc v Young*** [2002] F.S.R. 25, ChD, ***Winterthur Swiss Insurance Co v AG (Manchester) Ltd (In Liquidation)*** [2006] EWHC 839 (Comm), unrep., ***Shlosberg v Avonwick Holdings Ltd*** [2016] EWCA Civ 1138; [2017] Ch. 210, ***Twin Benefits Ltd v Barker*** [2017] EWHC 177 (Ch); [2017] 4 W.L.R. 42, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.31.3.5.)

- **Victorygame Ltd v Ahuja Investments Ltd** [2021] EWCA Civ 993, 5 July 2021, unrep. (Baker and Andrews LJJ, Sir Stephen Irwin)

*Litigation privilege – dominant purpose – third party misled about purpose*

**CPR Pt 31**. The Court of Appeal considered an appeal from the judgment of Robin Vos (sitting as a deputy judge of the High Court) noted as ***Ahuja Investments Ltd v Victorygame Ltd*** [2021] EWHC 1543 (Ch) in ***Civil Procedure News*** No.7 of 2021. The appeal concerned the question whether litigation privilege applied to documents that had been brought into existence as a result of a degree of deception. **Held**, appeal dismissed. The deputy judge was entitled to find that the documents were subject to litigation privilege notwithstanding the basis on which they had been produced. As Andrews LJ put it having reviewed the authorities:

> *"[69] ... I can see no good reason why there should be a principle that a party that is otherwise entitled to claim litigation privilege over correspondence with a third party should lose it simply because in order to obtain the information it needed, it was forced by the third party's behaviour to bring pressure on them by threatening litigation against them (even if it did not then intend to carry out the threat) – especially when it was probably entitled to that information in the first place."*

Furthermore, Andrews LJ accepted:

> *"[59] ... without deciding the point, that an estoppel might be found to arise in the context where, in order to get the prospective defendant to the contemplated litigation to divulge information to their opponent that they would not otherwise have been obliged to disclose, a deliberate lie is told by the opponent about why the information is required. The defendant is unlikely to want to divulge that information so as to give the claimant a tactical advantage in the litigation, even if they might be compelled to reveal it at a later stage. Therefore if they are induced to provide information which they would not otherwise have provided or been obliged to provide, on the basis of 'grossly misleading' representations (as in the case of LFEPA, where the alternative factual hypothesis addressed by Judge Toulmin was that the supposed 'technical audit' was a fictitious cover for the information-gathering exercise) there might be a good foundation for an estoppel argument."*

It was more difficult to apply an estoppel analysis to the situation where information was provided by a third party (as in the present case), who would thus be less likely to be adversely affected by how the information supplied was to be used (see [60]). ***Plummers Ltd v Debenhams Plc*** [1986] B.C.L.C. 447, ChD, ***London Fire and Emergency Planning Authority (LFEPA) v Halcrow Gilbert & Co Ltd*** [2004] EWHC 2340 (TCC); [2005] B.L.R. 18, ***Three Rivers DC v Bank of England*** [2004] UKHL 48; [2005] 1 A.C. 610, ***Property Alliance Group Ltd v Royal Bank of Scotland Plc (No.3)*** [2015] EWHC 3341 (Ch); [2016] 4 W.L.R. 3, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.31.3.8.)

■ **Farrar (Deceased) v Miller** [2021] EWHC 1950 (Ch), 16 July 2021, unrep. (Marcus Smith J)

*Assignment of claim – champerty*

**Courts and Legal Services Act 1990 ss.2, 58(2), 58AA**. The claimant commenced proceedings against the defendant in 2014. Following the claimant's death in 2019, the law firm that was representing him in the proceedings applied to be substituted as the claimant. It did so on the basis that the claimant had assigned his claim to them. The law firm had been acting under a damages-based agreement (DBA), which had been amended so as to be a conditional fee agreement (CFA). Upon the assignment that agreement had terminated. The assignment was not itself either a DBA or CFA (see [24]). Moreover, the assignment's purpose was to terminate the DBA. The defendant submitted that the assignment was champertous and thus void. **Held**, the assignment was void. First, it was clear that the law drew a distinction between potentially champertous arrangements between parties and lawyers and those between parties and non-lawyers. The former are only permissible further to the terms of the 1990 Act, i.e. if they are valid CFAs or DBAs. The latter are permissible in broader circumstances where, looking at the agreement in the round, the court must:

> *"[34(1)] ... decide whether it would undermine the purity of justice, or would corrupt public justice, a question to be decided on a case by case basis."*

The assignment in this case was outwith the terms of the 1990 Act. It was thus void (see [35]): ***Sibthorpe v Southwark LBC*** (2011) followed. The defendants put forward an alternative basis on which the assignment could be said to be valid: that it was in essence a means to continue the pre-existing DBA. Marcus Smith J rejected this submission also. The first question to ask in respect of it was whether treating the assignment in this way could be understood to facilitate access to justice. On the facts, it could not properly be said to do so. Given that the "*bulk*" of the litigation costs fell under the terms of the DBA, the benefit to the claimant of the assignment was "*marginal*". Hence it could not be said to facilitate access to justice (see [45]). Secondly, the assignment undermined the purity of justice in a number of ways, e.g. control of the litigation was passed permanently to the law firm, the law firm was a "*stranger to the proceedings*", i.e. had no legitimate interest in pursuing the claim itself, and there was no other proper basis on which to justify the assignment. The law firm's sole interest in the assignment was to facilitate its own fee recovery, in respect of which it would put it in a better situation than it would otherwise have been in (see [54]). The fact that the assignment replaced a DBA did not, in any event, alter the position concerning champerty: ***Sibthorpe v Southwark LBC*** (2011) again followed (see [57]). ***Sibthorpe v Southwark LBC*** [2011] EWCA Civ 25; [2011] 1 W.L.R. 2111, ref'd to. (See ***Civil Procedure 2021*** Vol.2 at paras 7A1-7 and 7A1-8.1.)

■ **Various Claimants v Independent Parliamentary Standards Authority** [2021] EWHC 2020 (QB), 19 July 2021, unrep. (Nicklin J)

*Anonymity – press notification*

**CPR r.39.2**. Two hundred and sixteen claimants, employees or former employees of Members of Parliament, proposed to bring proceedings against the defendant for misuse of private information, breach of confidence and breach of the Data Protection Act 1998. The basis of the proposed claim was the alleged upload of their personal information to the defendant's website. The proposed claimants applied for their details to be anonymised. **Held**, the application for anonymisation was refused. There was no basis to justify a derogation from the principle of open justice. In respect of an argument that anonymisation was justified as the substantive claim was for loss of control of personal data, that was held not to be a valid basis to derogate from open justice:

> "*[49] Mr Barnes QC's argument that, as the Claimants are claiming damages for the upset of loss of autonomy/control of the relevant information, they should be anonymised to spare them further upset or distress caused by bringing the proceedings, is a novel one, but it must be rejected. The implications of such an argument would be potentially far reaching. As most data protection claims include similar claims for damages based on loss of autonomy/control, the argument for anonymity would appear to be available in most if not all of these claims.*
>
> *[50] In my judgment the proper analysis is as follows. As I have noted, the Court will adopt measures, where justified, properly to protect confidential/private information of the Claimants in the proceedings. To the extent that the Claimants contend that their identification as claimants in the civil claim they intend to bring may cause them additional distress, then they are in no different (or better) position than any other claimant who wishes to pursue a civil claim. If these Claimants succeed in the claims they intend to bring, and are awarded damages for the distress over loss of autonomy/control, then the Court will have granted the Claimants an appropriate remedy for the civil wrong that they have established. That remedy will not be harmed by the Claimants being identified in any reports of the proceedings. As I noted in Khan -v- Khan, in the context of a claim for anonymity in a harassment claim [90]:*
>
> > *'In most harassment claims, the disclosure of private information in open court is simply an incidence of the litigation and that is no different from any other civil case. But, unlike privacy claims, in most harassment claims there is normally no risk that the administration of justice will be frustrated by the proceedings being heard in open court. If a claimant succeeds in a harassment claim and obtains damages and/or an injunction, these fruits are not damaged in any way by publicity of the proceedings.'*
>
> *With necessary and appropriate safeguards to protect particular confidential/private information, the same will be true in any claim brought by the Claimants.*
>
> *[51] If the pursuit of a civil claim causes distress or upset to a claimant, the law does not usually provide an additional remedy for that. An exception to that rule is claims for defamation, in which, in some circumstances, the additional upset caused by the litigation can be taken into account in the assessment of damages. A claimant in a personal injury claim is not entitled to any additional damages as a result of being caused upset and suffering as a result having to relive a possibly traumatic injury in the course of litigation or by being publicly identified in the proceedings. Some litigants may face upsetting public hostility and criticism for the claims they bring or the defences they raise. As Lord Sumption noted, this collateral impact 'is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public'."*

Nicklin J went on to discuss the operation of the Press Association's Injunction Applications Alert Service. In this case the service had declined to notify the media of the application for anonymisation on the basis that they could not do so without knowing the names of the application. It did so despite the court's order that they be notified as a matter of fairness further to ***Re BBC*** (2015). It had done so on the basis of Newton J's decision in ***A Healthcare NHS Trust v P*** (2015). Nicklin J explained that that decision concerned the application of a Practice Direction applicable to family proceedings and Court of Protection proceedings, not civil proceedings. It was important that the Alert Service continued to be available for use in civil proceedings, especially those involving advance notice of injunctive relief applications and situations such as the present (see [13]–[32]). It was hoped that the Alert Service's refusal to notify the media in this case was based on a misunderstanding. ***A Healthcare NHS Trust v P*** [2015] EWCOP 15; [2015] C.O.P.L.R. 147, CoP, ***Re BBC*** [2014] UKSC 25; [2015] A.C. 588, ***Khan (formerly JMO) v Khan (formerly KTA)*** [2018] EWHC 241 (QB), ref'd to. (See ***Civil Procedure 2021*** Vol.1 at paras 39.2.1 and 53PG.1.)

# Practice Updates

## STATUTORY INSTRUMENTS

**The Civil Procedure (Amendment No.4) Rules 2021** (SI 2021/855). In force from **1 October 2021**, except for the amendment to CPR Pt 83, which came into force on **7 August 2021**. The Amendment Rules effect the following changes to the CPR:

- CPR r.2.3(1) is amended to clarify that the prohibition on tape recording in courts includes recording by devices other than tape recorders;
- CPR rr.21.10(2) and 21.12(1)(A) are amended to: (i) clarify the process for seeking approval of voluntary and interim payments to children and protected parties. Such applications should be made by CPR Pt 8; and (ii) provide for costs to be paid to a child's litigation friend, where, under CPR r.46.4(3), a detailed costs assessment has been dispensed with further to CPR PD 46;
- CPR r.24.3 is amended to substitute a new subpara.2, to enable claims in rem in admiralty proceedings to be subject to the summary judgment procedure;
- CPR r.25.11 is amended to clarify the approach to be taken where a counterclaim is struck out for non-payment of fees where an interim injunction had previously been granted in the counterclaim;
- CPR r.27.2(1)(h) is amended to apply CPR r.39.9 to small claims proceedings, i.e. to apply the prohibition on recording and transcription of proceedings to small claims;
- CPR r.40.2(3) and CPR rr.52.3(2)(a), 52.12(2)(a) and 52.13(4)(a) are amended to clarify when an application for permission to appeal may be made where a hearing at which judgment is given is adjourned;
- CPR r.61.10(2) is amended to clarify the approach to be taken in Admiralty claims in rem to time periods applicable to orders for sale;
- CPR r.70.2(1) is amended to update references to its Practice Direction, i.e. to replace references to PD 70 with references to PD 70A;
- CPR r.83.8A is amended to substitute a new subpara.2, which provides additional time (seven days) to serve notice of eviction to an occupier where notice was not effected at the first eviction date; and
- finally, the CPR Glossary is amended, following ***RSM Bentley Jennison (A Firm) v Ayton*** [2015] EWCA Civ 1120; [2016] 1 W.L.R. 1281 to substitute the definition of *"Defence of tender before claim"* with the following definition: *"A defence that, before the claimant started proceedings, the defendant unconditionally offered to the claimant the amount due."*

## PRACTICE DIRECTIONS

**CPR PRACTICE DIRECTION – 133rd Update**. This CPR Update is in force from **1 October 2021**, except in respect of the amendment to PD 51O and the amendment to PD 55C, both of which came into force on **18 July 2021**. It made the following amendments:

- Form N79A (Suspended Committal Order) is reinstated to PD 4, it having been deleted in error previously;
- PD 5B is amended so that parties are no longer to be required to provide a debit or credit card number when applications are filed by email;
- PD 25B is amended to correct cross-references to CPR Pt 36;
- PD 51O is amended to extend the electronic working scheme to District Registries of the Queen's Bench Division situated in Birmingham, Bristol, Leeds, Liverpool, Manchester, Newcastle and Cardiff, and the Court of Appeal (Civil Division);
- PD 51U is amended to extend the pilot scheme's duration to 31 December 2022. It also substitutes para.9.2, which states as follows:

  *"In a case where no order for Extended Disclosure is made in respect of a party on any Issue for Disclosure, that party must still disclose all known adverse documents within 60 days of the first case management conference and provide a Disclosure Certificate certifying that this has been done."*

- PD 52B is amended to omit para.3.1;
- PD 52D is amended to update references to the Welsh Language (Wales) Measure 2011;
- PD 55C is amended to extend its application to 30 November 2021;

- PD 56 is amended in the light of ***GR Property Management Ltd v Safdar*** [2020] EWCA Civ 1441; [2021] 1 W.L.R. 908 at [13]–[21] to reflect the legislative scheme for leasehold enfranchisement;
- PD 61 is amended consequent to the amendments to CPR Pt 61 (see above). It is further amended to apply PD 57AC, concerning witness evidence at trial, to Admiralty claims;
- PD 70 is amended consequent to the amendments to CPR Pt 60 (see above); and
- PD 74A is amended to omit its s.II.

**CPR PRACTICE DIRECTION – 134th Update**. This CPR Update came into force on **20 July 2021**. It applies to all claims submitted to the court on or after 11.00 on that day. It amends CPR PD 51R – the Online Civil Money Claims Pilot Scheme to ensure that a defendant who moves to or from the online scheme is not able to secure two extensions of time for submitting their response to the claim, i.e. to obtain an extension under the online scheme and one under the ordinary, paper-based scheme. It clarifies that partial completion of a paper-based response entails that judgment in default cannot be entered. Finally, it amends PD 51R to provide for the transfer of proceedings to the County Court Business Centre where the nature of a defendant's response is not provided for within the pilot scheme.

## PRACTICE GUIDANCE

**PRACTICE NOTE – ADMIRALTY: ASSESSORS' REMUNERATION.** On 30 July 2021, Andrew Baker J (the Admiralty Judge) issued a new Practice Note concerning the remuneration of Trinity Masters, nautical and other assessors in Admiralty cases. It replaces the previous Practice Note, which has been in effect since 1 September 2019. The new Practice Note applies to all Admiralty actions and appeals, the hearings of which commence on or after 1 September 2021. (See ***Civil Procedure 2021*** Vol.2 para.2D-142). The Practice Note is reprinted below.

### *PRACTICE NOTE (ADMIRALTY: ASSESSORS' REMUNERATION)*

*1. This guidance sets outs the remuneration terms which should normally apply to Trinity Masters and nautical and other assessors summoned to assist the Court of Appeal, the Admiralty Court on the trial of an action, or a Divisional Court of the Queen's Bench Division, in the absence of special directions given in a particular case. It is issued as a Practice Note by Mr Justice Andrew Baker, with the agreement of Sir Geoffrey Vos, Master of the Rolls, and Dame Victoria Sharp, President of the Queen's Bench Division.*

*2. By way of fees:*

- *Reading time spent on or from the (first) day allocated to the judge for reading time (or earlier if approved by the judge on request), but not exceeding the reading time allocated to the judge: £158 per hour up to £790 per day;*
- *Full day's attendance at hearing: £790;*
- *Half day's attendance at hearing: £395;*
- *Attendance at court when case is not heard: £158 per hour;*
- *Consultation with the court on a day when there is no hearing: £395;*
- *Attendance to hear reserved judgment (including any consultation with the court on the same day): £199;*
- *If attendance is cancelled less than two days before the hearing: £395.*

*3. By way of expenses:*

- *Reimbursement of reasonable travel expenses;*
- *If resident too far from Court for it to be reasonable to commute for and during the hearing, reimbursement of reasonable sums for overnight accommodation and a reasonable allowance for overnight subsistence.*

*4. Where there is a cross appeal, or where appeals are heard together, or where actions are consolidated or tried together, the proceedings should be treated as one appeal or action.*

*5. Fees and expenses should be paid by the appellant or the claimant without prejudice to any right to recover from any other party the amount so paid on assessment.*

*6. The guidance in this Practice Note takes effect on 1 September 2021 and applies to all actions and appeals the hearing of which begin on or after that date. For guidance concerning actions and appeals the hearing of which began before 1 September 2021 see the preceding Practice Note of 1 September 2019.*

*7. This guidance is subject to periodic adjustment, but will not be adjusted more often than every two years.*

***Andrew Baker***
***Mr Justice Andrew Baker***
***30 July 2021***

**CIVIL JUSTICE COUNCIL – GUIDELINE HOURLY RATES – FINAL REPORT**. On 30 July 2021, the Civil Justice Council issued its Final Report (dated April 2021) on Guideline Hourly Rates. The Report is available here: *https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-final-report-on-guideline-hourly-rates.pdf* [Accessed 4 August 2021]. The Report made a number of recommendations, the most significant of which is that the Guideline Hourly Rates be increased in line with the proposals for reform set out in its, previous, Interim Report, which appears both right and sensible. The recommendations are now to be considered by Sir Geoffrey Vos MR. Whatever decision is made, that the Guideline Hourly Rates continue to be of relevance ought properly to be considered in any review of the Jackson Costs reforms, which ought itself to take place in 2022 – nearly 10 years after their introduction. Both their continued relevance and their uprating might well point towards a wider concern that the Costs reforms have failed to achieve their goal.

## CORONAVIRUS UPDATE

### COURT FUNDS OFFICE UPDATE

On 16 July 2021, updated guidance was issued by HMCTS concerning paying money into the Court Funds Office. The guidance is available here: *https://www.gov.uk/guidance/coronavirus-covid-19-impact-on-the-court-funds-office* [Accessed 27 July 2021]. For ease of reference, it is reprinted below.

> ***Paying money into the Court Funds Office, submitting forms and making payment requests***
>
> *With the removal of the remaining restrictions on leaving home and attending the workplace in England with effect from 19 July 2021 the Court Funds Office (CFO) Coronavirus contingency workarounds will be lifted. As CFO appreciates that there may be a gradual return to the workplace for many people, these workarounds will apply until 9 August 2021. This means that If you;*
>
> - *want to pay money into the Court Funds Office (CFO)*
> - *are a Court of Protection Deputy submitting a 'Form P'*
> - *are a child reaching 18 years of age and wishing to claim your funds*
>
> *You should do so in the normal way by post with effect from 9 August 2021, if not before. Electronic deposits and payment requests may still be made in exceptional circumstances, such as a deposit from abroad, in a foreign currency or where a deposit must be made urgently to comply with a deadline in a court order.*
>
> *If you do not have exceptional circumstances and choose to submit an application by email however, your application will be refused if dated on or after 9 August 2021.*
>
> *If you think you need to submit an application by email, please contact the Court Funds Office (CFO) on 0300 0200 199 or email enquiries@cfo.gov.uk.*

# In Detail

## CIVIL JUSTICE COUNCIL – COMPULSORY ADR (June 2021)

### Background

In June 2021, a working party appointed by the Civil Justice Council issued a report (the ADR Report) that considered the vexed question of whether courts could compel parties to engage in alternative dispute resolution (ADR), and specifically mediation. That the question was asked was unsurprising. The Court of Appeal in ***Lomax v Lomax*** [2019] EWCA Civ 1467; [2019] 1 W.L.R. 6527 (***Lomax***) had confirmed that the court had power to compel parties to engage in Early Neutral Evaluation. Sir Geoffrey Vos C (as he then was) in ***McParland and Partners Ltd v Whitehead*** [2020] EWHC 298 (Ch); [2020] Bus. L.R. 699, 7, had raised the question whether the *obiter* conclusion in ***Halsey v Milton Keynes General NHS Trust*** [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002 (***Halsey***) that the court could not compel mediation could properly stand in the light of ***Lomax***.

Given ***Lomax*** and ***McParland*** it was only a matter of time before a High Court judge, the Court of Appeal, the Civil Procedure Rule Committee or the Civil Justice Council would revisit the question of compulsion. The Civil Justice Council were, however, the first to grasp the nettle.

## The Civil Justice Council Review – the Questions Asked

The working party asked two questions:

> "*Can the parties to a civil dispute be compelled to participate in an ADR process? (The 'legality' question) ...*
>
> *If the answer is yes, how, in what circumstances, in what kind of case and at what stage should such a requirement be imposed? (The 'desirability' question) ...*" (The ADR Report at 2.)

***Halsey*** had, as is well-known, answered both questions in the negative. That it did has been subject to considered criticism since the decision was handed down. It has equally, and unusually, been questioned by two of the three judges who were party to the judgment. Sir Alan Ward questioned it in *obiter* in ***Wright v Michael Wright (Supplies) Ltd*** [2013] EWCA Civ 234; [2013] C.P. Rep. 32 at [3]. Lord Dyson MR, who gave the judgment of the court, accepted whilst speaking extra-judicially that the answer to the legality question was put in too absolute terms (in some cases compulsion would not be unlawful), while he maintained his belief that ***Halsey*** had got the answer to the desirability question right (Lord Dyson MR, *Halsey 10 Years On—The Decision Revisited* in *Justice: Continuity and Change* (Hart, 2018.)) Sir John Laws, the third member of the Court of Appeal in ***Halsey***, did not pass comment on the decision.

## The Civil Justice Council's Review – the Legality Question

The working party concluded that a court could lawfully compel parties to engage in ADR. ***Halsey*** was wrong on this point, as had been argued extra-judicially by both Lord Philips CJ and Lord Clarke MR almost immediately after it had been handed down.

In reaching its conclusion, the working party queried ***Halsey's*** reliance on the European Court of Human Rights' judgment in ***Deweer v Belgium*** (1980) 2 E.H.R.R. 439 as support for its conclusion that compulsory mediation was "*likely*" to be contrary to the art.6 Convention right to fair trial. That decision, it noted, did not focus on the question whether compulsory ADR was in general likely to be contrary to art.6. It was a decision very strongly confined to its facts.

The working party also considered more recent decisions of the European Court of Justice, which raised the question whether compulsory pre-action mediation schemes were contrary to the right to fair trial guaranteed by art.6 (***Rosalba Alassini*** [2010] 3 C.M.L.R. 178; ***Menini v Banco Popolare Società Cooperativ*** [2018] C.M.L.R 15, 11). In those decisions, they had been held not to be contrary to the fair trial right as they served a legitimate purpose, and the mandatory nature of the scheme was a proportionate means to achieve its purpose.

In the light of these decisions, it was apparent to the working party that ***Halsey's*** approach to the legality question was unsustainable; a conclusion foreshadowed (as the working party noted) by Lord Clarke MR in 2008 when, in his critique of the decision, he noted the number of states that were signatories to the European Convention on Human Rights that had introduced mandatory ADR schemes with no art.6 issues being raised (Lord Clarke MR, *The Future of Civil Mediation* (2008) 74 Arbitration 419). As the working party concluded:

> " *... any form of ADR which is not disproportionately onerous and does not foreclose the parties' effective access to the court will be compatible with the parties' Article 6 rights. If there is no obligation on the parties to settle and they remain free to choose between settlement and continuing the litigation then there is not, in the words of Moylan LJ in Lomax, 'an unacceptable constraint' on the right of access to the court. We think that the logic of the Lomax decision is capable of applying to other forms of ADR as well as ENE.*
>
> *The logical corollary of ... [this] is that an order for participation in an ADR process that was disproportionately expensive or took an excessively long time, or was otherwise burdensome would obstruct access to the court and breach Article 6.*" (The ADR Report at 29.)

## The Civil Justice Council's Review – the Desirability Question

Having concluded that the answer to the legality question was that compulsion was permissible in principle, the working party turned to the second question: desirability.

The working party first considered general questions concerning whether compulsory ADR was desirable. They concluded that the risk that it may not work, that parties were unlikely to engage with the process effectively, and the claim that promoting the use of compulsory ADR could undermine the value of adjudication were overblown. Such claims were based more on principled objections to compulsion. There was little evidence concerning the effect it has in practice.

In so far as positive arguments existed in favour of its desirability, the working party noted that ADR, and in parts certain types of compulsory ADR, were already accepted features of dispute resolution. Moreover, a properly structured civil justice system ought to make available a wide range of dispute resolution methods. Compulsory ADR was not inconsistent with such an approach. And, given the strain the civil justice system is under at the present time, given its case load and ability to cope with it, "*concerns about diverting too many parties into settlement*" appeared to be

misplaced. Compulsory ADR was thus desirable as a means to assist the courts in dealing with their case load, a rationale that was rejected by Lord Woolf in the Access to Justice Reports as a possible justification for his promotion of settlement generally. It seems that compulsory ADR is desirable then for the same reason ADR, generally, was promoted in the 1970s and 1980s: to protect the operation of the civil justice system in an environment where increased resources to enable it to deliver adjudication are unlikely to be made available.

## Guidance on when to mandate ADR

Having concluded that compulsory ADR was both lawful and desirable, the working party then outlined a number of factors that were relevant to determining whether in a specific case parties should be ordered to take part in ADR. Those were:

- is the specific form of ADR to be ordered too burdensome or disproportionate in terms of cost or time to the parties?
- does the dispute fall within the scope of a specialist jurisdiction, which is better suited to compulsory ADR? Examples of such types of case were identified as: family disputes, disputes subject to ACAS, and possibly neighbour or boundary disputes, and contentious probate. The working party's rationale was that such cases were ones where parties were likely to be emotionally charged and the assistance of a neutral third party would be beneficial. That could be said of any dispute. Better reasons for identifying areas for compulsory ADR might properly be: that the parties are likely to have an ongoing relationship after the dispute has been resolved and the resolution is likely to manage the nature of the ongoing relationship – a factor which goes beyond the types of disputes identified by the working party; the dispute involves the interests of multiple parties; or, that a judgment may not be able to provide the optimum form of resolution for the parties, i.e. judgment as a zero-sum game is less than ideal given the nature of the dispute;
- where mediation is concerned, is the mediator an individual who the parties can have confidence in, for instance, because they are accredited or have undergone professional training?
- is legal advice available to the parties, in those cases where it is necessary? Although it went on to note that the availability of legal advice does not hamper the utility or success of small claims mediation; and
- that vulnerable parties must be protected where compulsory ADR is being considered.

The working party also noted that consideration needed to be given as to when ADR could be directed. They did not definitively answer the question whether compulsory pre-action ADR should be possible, as that might be subject to recommendations from the Civil Justice Council's ongoing review of the Pre-Action Protocols. They did suggest, however, that in all but complex cases early ENE was beneficial. As ENE was initially developed in England and Wales in the Commercial Court (***Practice Statement (Commercial Cases: Alternative Dispute Resolution) (No.2)*** [1996] 1 W.L.R. 1024), the restriction where complex cases are concerned is doubtful.

Finally, the working party noted that clear rules needed to be devised setting out the approach to be taken to parties that took part in compulsory ADR in a perfunctory manner. Not only would guidance be needed on what would amount to perfunctory compliance with a compulsory order in respect of different forms of ADR, but clarity would be needed as to application of sanctions for non-compliance, such as strike-out or adverse costs awards.

## Next steps

In all likelihood the Rule Committee will now look at how to develop the CPR, and particularly the ever-expanding online procedure, in the light of the working party's recommendations. In particular it is likely to need to flesh out the factors that a court ought to take into account when considering whether to direct parties to engage in compulsory ADR, what steps need to be taken to protect vulnerable witnesses, and whether it is appropriate (ideally based on evidence from other jurisdictions of their experience, both positive and negative, of court-accreditation) to establish a court-accredited list of approved mediators.

Prior to the Rule Committee reaching its conclusion on potential rule changes, there would nevertheless appear to be no good reason why a "*bold judge*" could not rely upon the working party's conclusions and depart from ***Halsey***, as Sir Alan Ward suggested in ***Wright v Michael Wright (Supplies) Ltd*** [2013] EWCA Civ 234; [2013] C.P. Rep. 32 at [3]. As he put it:

> *"Perhaps ... it is time to review the rule in Halsey v Milton Keynes General NMS Trust [2004] EWCA Civ 576, [2004] 1 WLR 3002 ... Perhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at Halsey in the light of the past 10 years of developments in this field."*

Given the working party's report, such a review by the Rule Committee seems now to be too long overdue. It may well also be thought likely that in an appropriate case the first mandatory mediation order will be made, or at the very least an appellate court will consider the matter of compulsion afresh (the ADR Report at 28). Were they to do so, ***Shirayama Shokusan Co Ltd v Danovo Ltd (No.2)*** [2004] 1 W.L.R. 2985 at [17]–[20] may well repay review given its consideration of the art.6 Convention right, the overriding objective and whether to direct parties to engage in mediation.

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Published by Sweet & Maxwell Ltd, 5 Canada Square, Canary Wharf, London, E14 5AQ
ISSN 0958-9821

Typeset by Matthew Marley
Printed by Hobbs The Printers Ltd, Totton, Hampshire.

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