CIVIL PROCEDURE NEWS

Issue 10/2021 11 November 2021

CONTENTS

In Brief

Cases

- **Poule Securities Ltd v Howe** [2021] EWCA Civ 1373, 21 September 2021, unrep. (Lewison, Birss LJJ and Sir Christopher Lloyd)

Unless orders – time for compliance – clarity in drafting

CPR r.2.9, PD 40B paras 8.1, 8.2. An unless order was made in proceedings that arose from a disputed property purchase. The claimant was ordered to disclose the conveyancing file of the solicitors who acted on the property purchase. In the event the solicitors refused to provide the claimant with a copy of that file, they were to file and serve a copy of their letter requesting the file and a copy of the solicitor's response. They were to do either of these acts within 28 days of the order. The claimant did not comply with the order. Subsequently, an unless order was granted. It required compliance with the initial order within seven days of the unless order. Absent compliance, the claimant's claim and defence to the counterclaim were to be struck out automatically. The unless order, as is normal in the County Court, contained two dates: the date on which the order was made (28 November 2018) and the date on which it was sealed (29 November 2018). The order was deemed to have been served on 3 December 2018. On that day the claimants applied to have the unless order set aside. That application was listed for hearing on 10 December 2018. At the hearing of the set aside application: (i) the original order had not been complied with nor had the unless order; and (ii) no application for an extension of time to comply with the unless order had been made. The set aside application was refused, and the claim was thus struck out. An appeal from that order was dismissed. **Held**, a second appeal was also dismissed. In dismissing that appeal, the Court of Appeal provided guidance on the making of unless orders. The issue was what was the time for compliance with the unless order. Was the seven-day period for compliance seven days from the date of service of the order, i.e. seven days from 3 December 2018? If so, on 10 December 2018, the claimant would not have been in breach of the order. The alternative view was that the time ran from the date the order was made, i.e. from 28 November 2018, or from the date on which it was sealed, i.e. 29 November 2018. If the alternative view was correct, then the claimant was in breach of the unless order on 3 December 2018. Relevant provisions in the CPR concerned with time orders are CPR r.2.9 and PD 40B paras 8.1 and 8.2. The former requires that:

> "*[22] ... An order imposing a time limit ought to be expressed as a calendar date with the time for compliance as well as the date, and the only exception the rule permits is if that is not practicable.*"

This requirement is broadly repeated in PD 40B para.8.1 (see [24]). Paragraph 8.2 of the PD applies to unless orders. It provides two example sets of wording to be used in formulating time to comply with the order. The first requires a specific date and time for compliance to be set out in the order. That is to be used generally. Exceptionally, the second example can be used. It requires compliance to be done by reference to the date of service of the order. As Birss LJ explained:

> "*[26] The alternatives in PD40B make obvious sense. Given that the consequence of failure to comply with an unless order can be the failure of the underlying claim (or defence) it makes obvious sense that the options ought to be either to specify a period for compliance which runs after the date the order has been served or else to express the required date unambiguously as a calendar date, and it also makes obvious sense that a calendar date (and time) is to be preferred. Nevertheless the court will always have the power to make an order which does not fall within either example.*"

It remained the case, however, that a court could always draft an unless order in terms that did not follow the approach set out in either example provided in PD 40B. Where, as in this case, a judge does not follow the approach set out in the PD that does not justify attempting to read the order made as if it were intended to comply with the PD, and therefore adopt the approach that time for compliance was intended to run from the date of service, as argued in this case. It was, however, necessary to ensure that unless orders were drafted clearly: see ***Kinsley v Commissioner of Police of the Metropolis*** (2010). It would thus seem to be advisable, wherever possible, to follow the approach set out in PD 40B albeit that doing so is not mandatory. Where there are departures from that approach there is a need to ensure that the terms of the unless order, and particularly time for compliance, are set out clearly and unambiguously. The court also went on to endorse the approach taken by the EAT in ***Segor v Goodrich Actuation Systems Ltd*** (2012) concerning concessions made in litigation. In that case Langstaff J, at [11]–[12], held that concessions made in litigation by or on behalf of parties cannot be accepted as such unless they are "*clear, unequivocal and unambiguous*", with care being needed when considering concessions made by litigants-in-person or lay representatives. ***Segor v Goodrich Actuation Systems Ltd*** [2012] UKEAT0145/11/DM, unrep., EAT, ***Kinsley v Commissioner of Police of the Metropolis*** [2010] EWCA Civ 953; (2010) 107(25) L.S.G. 17, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.2.9.1.)

■ **Barking, Havering and Redbridge University Hospitals NHS Trust v AKC** [2021] EWHC 2607 (QB), 29 September 2021, unrep. (Steyn J, Costs Judge and Master Brown sitting as an Assessor)

Bill of costs – requirements

CPR PD 47, para.5.21. Steyn J, sitting with Costs Judge and Master Brown as an Assessor, heard an appeal from the dismissal of an application to strike out the respondent's bill of costs. The application had been brought on the basis that the bill of costs failed to comply with the CPR. It further sought an order requiring service of a compliant bill of costs. **Held**, appeal allowed. In reaching that decision Steyn J emphasised that it was necessary for the solicitor who signed the bill of costs to be identifiable. In this case it was not clear from the signature who had signed the bill or, therefore, that the person signing was a solicitor as the rules required. Ensuring that a solicitor's signature certified the bill was, as had been held by the Court of Appeal in ***Bailey v IBC Vehicles Ltd*** (1998), not an "*empty formality*". The solicitor's signature must enable them to be "*readily identifiable*" (see [34]–[41]). Steyn J went on to set out detailed guidance on the proper approach to compliance with the requirements for completing paper bills of costs and electronic bills of costs (see [92]–[114]). ***Bailey v IBC Vehicles Ltd*** [1998] 3 All E.R. 570, CA, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.47PD.5.)

■ **Citysprint UK Ltd v Barts Health NHS Trust** [2021] EWHC 2618 (TCC), 1 October 2021, unrep. (Fraser J)

Service of unsealed claim form – CE-File

CPR r.3.10. A claim was issued in respect of the Public Contract Regulations 2015 (SI 2015/102). The claimant's solicitors filed the claim form via CE-File. Upon payment of the £10,000 issue fee, CE-File acknowledged receipt and sealed the claim form. It did this on 27 July 2021, which was the last day on which proceedings could be issued. The claimant's solicitor, shortly after receiving confirmation from CE-File that the claim had been submitted successfully, sent via email an unsealed copy of the claim form to the defendant's solicitors (see [4]). On 29 July 2021, court staff informed the claimant's solicitor that an additional £528 was due in respect of the issue fee. They asked for details of the solicitor's PBA Account, i.e.:

> *"a type of central account used by solicitors, which permits the court to debit it for fees if the solicitors give that authority, and it is widely used"* (see [5]).

As the solicitors did not have such an account, they paid the sum by cheque. After the £528 was received, the court uploaded a sealed claim form to CE-File. It showed its "*approved date*" as being 29 July 2021. The claim form, however, retained its electronic seal showing it having been sealed on 27 July 2021. The sealed claim form was served on 5 August 2021, which was – as the claimant's solicitors calculated – within seven days of 29 July 2021. They did so via email, albeit email had not been accepted by the defendant's solicitors as an agreed method of service (see [6]). A number of issues arose as to the validity of service. **Held**, the date on which the claim form was issued was 27 July 2021. The partial underpayment of the issue fee did not alter that fact.

> *"[20] Firstly, there is no sensible way, in my judgment, for the date of issue of the claim form to be construed as anything other than the date provided on the electronic seal on the document itself. That is the first point that needs to be resolved on these applications. That date of issue is 27 July 2021. It is applied by the E-Filing System once a member of the court staff has checked and approved submission of the documents. It is that process that generates the e-filing response from the court that stated 'The following electronic filing(s) were successfully submitted.' The seal is applied electronically and dated when that happens. This date is on the face of the claim form.*
>
> *[21] Mr West did attempt to persuade me that as a result of the partial non-payment of £528, the date of the claim form should be taken as 29 July 2021, and not the date on the seal. This was to assist the Defendant in terms of its case on limitation. I reject that attempt ... "*

It was rejected because the claim form was accepted by CE-File. It had not been refused acceptance. Read together, CPR r.7.12 and PD 51O took account of the fact that claim forms would be accepted subject to minor errors of procedure. The £528 underpayment was clearly a minor error of procedure (see [22]–[28]). Furthermore, it was a recipe for procedural chaos (and no doubt meretricious satellite litigation) if the date of issue was taken to be anything other than the date stamped on the face of the document, including by way of electronic seal. That being said, there could be exceptional circumstances when another date is accepted to be the date of issue or for the court to later direct that a claim accepted by CE-File has failed acceptance by CE-File (see [29]). As a consequence of this the claim form was served out of time. Time for service ran from 27 July 2021 and thus ran out on 3 August 2021. Service of the unsealed claim form did not amount to good service under the 2015 Regulations: ***Heron Bros Ltd v Central Bedfordshire Council*** (2015) not followed. A claim form had to be served consistently with service under the CPR for there to be effective service under the 2015 Regulations (see [32]–[35]). Service by email did not comply with the requirements for electronic service under PD 51O. There had been no agreement to accept service via that method. There must be compliance with the rules on service methods (see [39]–[41]). The question then became whether the claimant could be granted relief

having failed to serve the sealed claim form in time. Relief was granted under CPR r.3.10. The unsealed claim form was sent after proceedings had commenced (see [37]). As such it was a step in the proceedings to which that rule applied: ***R. (Good Law Project) v Secretary of State for Health and Social Care*** (2021) (the ***Pharmaceuticals Direct*** case) distinguished and not applied. Service of the unsealed claim form rather than service of the sealed claim form was a procedural error, i.e. the claimant's error was in effecting service via sending an unsealed claim form when they ought to have served the electronically sealed claim form.

> *"[53] ... I consider that to be an attractive argument, which I accept, for these reasons. The timing makes it clear that the sealed claim form was already in existence when the unsealed copy was sent. The sealed claim form was simply not available to FGS to download at 1727 on 27 July 2021, even though it had been issued. That is because of the outstanding payment required of £528. The proceedings had, however, clearly been commenced by then, because the claim form had been issued and the seal had been applied. This therefore means there were not 'non-existent proceedings', the term used by O'Farrell J in the Pharmaceuticals Direct case. My decision on this point is also consistent with that of Bryan J in Dory Acquisitions Designated Activity Company v Ionnis Frangos [2020] EWHC 240 (Comm). In that case also, although a sealed claim form had been issued, an unsealed claim form was served afterwards and CPR Part 3.10 was used to correct that. CPR Part 3.10 cannot be used to correct deficiencies in proceedings which have not already started. But if they are in existence, a state or condition which commences when the seal is applied to the claim form, then the rule is potentially available. That is the case here."*

The claimant could not be criticised for not serving the sealed claim form as that was not available to them, as a consequence of the £528 underpayment. That a sealed claim form was not available until they had made payment by cheque, which they did promptly, was not something for which they could be criticised: solicitors are not required to have a PBA account, which would have enabled payment to be made sooner than it was in this case. While grant of relief under CPR r.3.10 would mean that the defendant lost a potential limitation defence, that was not sufficient to justify the court refusing to grant relief: the error here stemmed, at least partially, from a problem with CE-File showing two different dates. (This is perhaps something the Civil Procedure Rule Committee should rectify.) Relief was granted (see [42]–[60]). Finally, Fraser J noted as follows:

> *"[66] Finally, I would emphasise the unusual facts of this particular case. The court has been presented with a number of cases recently in which proceedings have been sent electronically to another party without the Practice Direction for doing so having been fully complied with. The Pharmaceuticals Direct case is another recent example. Defendants and their advisers who are alive to the precise technicalities are therefore able to take these points. One way to avoid this occurring with what is becoming repetitive regularity is for litigation solicitors to acquaint, or re-acquaint, themselves with the full requirements of Practice Direction 6A before they serve documents electronically."*

Heron Bros Ltd v Central Bedfordshire Council [2015] EWHC 604 (TCC); [2015] P.T.S.R. 1146, ***Dory Acquisitions Designated Activity Co v Frangos*** [2020] EWHC 240 (Comm), unrep., ***R. (Good Law Project) v Secretary of State for Health and Social Care*** [2021] EWHC 1782 (TCC); [2021] B.L.R. 599, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.3.10.6.)

- **Ho v Adelekun** [2021] UKSC 43; [2021] 1 W.L.R. 5132 (Lord Briggs, Lady Arden, Lords Kitchin and Burrows, Lady Rose)

Qualified one-way cost shifting – offsetting costs liabilities

CPR r.44.14(1). The Supreme Court considered the following issue in respect of qualified one-way costs shifting (QOCS):

> *"[6] ... whether QOCS constrains in any way the defendant's liberty to seek, or the court's discretionary power to permit, a set-off between opposing costs orders, that is orders in favour of the claimant and the defendant respectively."*

The Court of Appeal in ***Howe v Motor Insurers' Bureau*** (Costs) (2020) and in the present case took differing views on the answer to the question. The Supreme Court expressed concern as to whether it was the appropriate venue to determine the question. It emphasised that the more appropriate means to rectify such issues was via the Civil Procedure Rule Committee ensuring that the rules were amended to clarify the position where such differences of interpretation arose. As Lord Briggs and Lady Rose put it in their joint judgment, with which the other Justices agreed:

> *"[9] We should say at the outset that we doubt the appropriateness of a procedural question of this kind being referred to this court for determination. The very fact that two eminently constituted Courts of Appeal have differed profoundly over the interpretation of a provision of the CPR suggests that there must be an ambiguity which practitioners need to have sorted out. The CPRC exists for the purpose of keeping the CPR under constant review. It is better constituted and equipped than is this court to put right such ambiguities, all the more so where, as here, the outcome is suggested by both parties and by the Association of Personal Injury Lawyers ('APIL'), intervening, to have potentially profound policy consequences for the maintenance of a reasonably fair and level playing field in PI litigation, something which*

this court is much less well equipped than is the CPRC to assess. Nonetheless, permission having been given, this court must decide the question of construction, leaving it to the CPRC to consider whether our interpretation best reflects the purposes of QOCS and the Overriding Objective, and to amend the relevant rule if, in their view, it does not."

The Court of Appeal, in the present case, was right to doubt its decision in ***Howe v Motor Insurers' Bureau (Costs)*** (2020) (see [47]). In answer to the substantive question before it, the Supreme Court held as follows:

"[37] ... QOCS is intended to be a complete code about what a defendant in a PI case can do with costs orders obtained against the claimant, ie about the use which the defendant can make of them. The defendant can recover the costs ordered, by any means available, including set-off against an opposing costs order, but only up to the monetary amount of the claimant's orders for damages and interest ...

[38] We consider that rule 44.14(1) works in the following way. First, it requires two comparators to be constructed. First, the aggregate amount in money terms of all costs orders in favour of the defendant. Secondly, the aggregate amount in money terms of all orders for damages and interest in favour of the claimant. We will call them A and B. If A is less than or equal to B, the defendant can enforce his costs orders without limit. If A is more than B, then the defendant can only enforce his costs orders up to the monetary limit of B. The effect of this cap, as we have called it, is to require the defendant to keep a running account in money terms of all costs recoveries which it makes against the claimant, and to cease enforcement when limit B is reached.

[39] The question remains: does the defendant have to bring into account the benefit in money terms of the set-off of a costs order in his favour; in other words does the limit B only apply to the net amount of costs owed by the claimant, having set off any costs the defendant is ordered to pay to the claimant? Plainly the defendant must bring into account the monetary benefit of setting off costs against the claimant's damages, despite the fact that this may not generate actual cash but only save the defendant from having to put his hand in his pocket to pay the damages and interest to that extent. That is what 'money terms' means. For example, assume that the claimant is ordered an award of £20,000 in damages and interest, but that the defendant has costs orders for an aggregate amount of £30,000. If the defendant has not yet paid the damages, it can set off its damages liability against the claimant's costs liability, but only up to £20,000. It must bring that £20,000 into account under rule 44.14(1) and cannot enforce the balance of its costs entitlement of £10,000, by any means of enforcement. If the defendant has already paid the damages before its costs are assessed, then it can enforce its costs orders by any other available means (set-off being in practice unavailable), but only up to £20,000. It cannot therefore be said that use of a set-off is not a means of enforcement, where costs are set off against damages.

[40] If set-off of costs against damages is therefore a form of enforcement in this context, so as to make sense of rule 44.14, then why should set-off of costs against costs not equally be a means of enforcement? Both achieve a recovery measurable in money terms for the defendant on account of its costs entitlement, and by the same self-help means of appropriating an asset of the claimant (his damages entitlement) to the part satisfaction of the defendant's entitlement against the claimant for costs. Strictly it might be said that set-off of costs against damages pursuant to rule 44.14 requires less assistance from the court than set-off of costs against costs, because the latter requires the court's direction under rule 44.12. But that just makes it more like a form of enforcement.

[41] Real assistance on the contextual meaning of enforcement is gained by reflecting on the language and structure of rule 44.14(1). The requirement is to calculate A by reference to the aggregate amount in money terms of all the defendant's costs orders made against the claimant, not the net amount arrived at by netting off opposing costs orders and striking a net balance. Costs orders in favour of the claimant are not even mentioned in the formula, and the aggregate expressly referred to is a gross not a net amount.

[42] Some slight further assistance may be available from rule 44.14(3), which prohibits the 'unenforced' part of a costs order from being registered as an unsatisfied or outstanding judgment. That would act to the detriment of the claimant's credit rating, such that the threat of it would otherwise be an incentive towards payment, and therefore a prohibited form of enforcement. This suggests a wide contextual meaning of enforcement. The concept of the judgment for costs being partly unsatisfied because of the impact of the cap in sub-rule (1) would be very odd if set-off were not a kind of enforcement for this purpose.

[43] ... we do not consider that the well- established jurisdiction to direct set-off of costs against costs under rule 44.12 is displaced by the QOCS scheme, provided that there is an order for damages or interest and that the headroom provided by that order has not been exhausted by other means of enforcement. But for the reasons already given we do not accept the submission that it is only the net costs entitlement that has to be brought into account under rule 44.12(1)."

Howe v Motor Insurers' Bureau (Costs) [2020] Costs L.R. 297, CA, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.44.14.2.)

Phones 4U Ltd v EE Ltd [2021] EWHC 2816 (Ch), 18 October 2021, unrep. (Roth J)

Permission to amendment by further particulars – applicable test

CPR r.17.3. An application for permission to amend the particulars of claim in proceedings alleging anti-competitive collusion. The action was brought by the administrators of the claimant. Allegations were "*sparsely expressed*" in the particulars as originally drafted. Following significant disclosure by the defendants the claimant applied to amend their particulars. The amendment was to provide support for allegations made in the original pleading. The issue before the court was what was the appropriate test to apply to the question whether to grant permission to amend. **Held**, permission to amend was granted. In deciding the issue, Roth J rejected the submission that, following ***Kawasaki Kisen Kaisha Ltd v James Kemball Ltd*** (2021), the appropriate test was that which applied to summary judgment. In the present case, which differed from ***Kawasaki Kisen Kaisha Ltd***, the claimant did not seek to introduce a new claim. Nor was there an application for summary judgment or for strike out. The approach on this point taken in ***JFC Plastics v Motan Colortronic Ltd*** (2019) and ***Scott v Singh*** (2020) followed:

> *"[7] Mr. MacLean, for the claimant, submits that this is the wrong approach as a matter of principle. The amendments do not seek to introduce a new claim. If they did so, then, as I understand it, he accepts that as a matter of law the real prospect of success test would apply. By contrast, here, the amendments are only giving further particulars of an existing claim. He stresses that there is no application by DT for summary judgment or to strike out the claim against it. Thus, he submits, the proper approach is that recently set out by His Honour Judge Eyre QC, sitting as a judge of the High Court, in Scott v Singh [2020] EWHC 1714 (Comm) at para 19. Referring to the submission of counsel for the claimant in support of an application to amend the particulars of claim, the learned judge said:*
>
> > *'Mr. Bergin says that this requirement [i.e. the summary judgment test] only applies when the amendment in question is raising a new claim or defence. He contended that it did not apply if the amendment was in reality further particularisation or amplification of an existing claim. Mr. Pipe [counsel for the defendant] did not concede this but in my judgement Mr. Bergin is right. The requirement that the claim or defence proposed by way of amendment has a real prospect of success arises from the need to avoid the futility of allowing a claim or defence to be made by way amendment which is liable to be struck out or to be defeated by a summary judgment application. The same consideration does not apply if the line of claim or defence is in the original pleading and will remain in issue even if the amendment is not allowed.'*
>
> *See also the judgment of His Honour Judge Pelling QC, sitting as a Judge of the High Court, in JFC Plastics v Motan Colortronic [2019] EWHC 3959 (Comm) at paras 14 and 34.*
>
> *[8] In my judgment, Mr. MacLean is correct in his submission and I respectfully agree with Judge Eyre and Judge Pelling. An application to amend by giving further particulars should not be turned by a side wind into a strike out or reverse summary judgment application. I consider that the Kawasaki Kisen Kaisha case, properly understood, provides no support for Mr. O'Donoghue's submission ..."*

Also see [9]–[11]. It remained the case that if a proposed amendment was "*vague, incoherent or incomprehensible, embarrassing or of course vexatious*" permission to amend ought not to be granted (see [12]). Roth J went on to explain the approach to be taken in the present situation:

> *"[13] I shall therefore look at the proposed amendments to which Mr. O'Donoghue took particular objection to see if they can be said to have a real prospect of supporting the underlying claim against DT. In doing so, I take account of the well known explanations of what is involved in the test for summary judgment as set out or endorsed in various Court of Appeal judgments. In that regard, I refer to the principles set out in the Kawasaki Kisen Kaisha judgment at para 18, the Elite Property judgment at paras 41–42, and the oft quoted principles articulated by Lewison J, as he then was, in Easyair Limited v Opal Telecom Limited [2009] EWHC 339 (Ch) at [15] which was subsequently approved by the Court of Appeal. Those, it seems to me, that are of particular relevance here are the principles that (1) it is not enough that a claim is merely arguable: it must carry some degree of conviction; (2) a claimant must plead sufficient facts in support of their case to entitle the court to draw the necessary inferences; (3) the court must take account not only of the evidence actually placed before it on the summary judgment application but also the evidence that can reasonably be expected to be available at trial; and (4), in reaching its conclusions, the court must not conduct a mini trial.*
>
> *[14] I also bear in mind that because there is no summary judgment or strike out application on the part of DT before the court, the claimant understandably has not put in detailed evidence of the kind that I expect it may have wished to file if faced with such an application.*
>
> *[15] Furthermore, it is important to have regard to the nature of the claim here. As I explained at the outset, this is a competition case where the allegation is of anti-competitive collusion, which is unlawful."*

And see [26]. ***JFC Plastics v Motan Colortronic Ltd*** [2019] EWHC 3959 (Comm), unrep., ***Scott v Singh*** [2020] EWHC 1714 (Comm), unrep., ***Kawasaki Kisen Kaisha Ltd v James Kemball Ltd*** [2021] EWCA Civ 33; [2021] 3 All E.R. 978, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.1.3.6.)

- **R. (Gardner) v Secretary of State for Health and Social Care** [2021] EWHC 2946 (Admin), 5 November 2021, unrep. (Bean LJ and Garnham J)

Expert evidence – judicial review proceedings

CPR r.35.1. Judicial review proceedings were pursued in respect of an alleged failure by the respondent to protect care home residents in England during the COVID-19 pandemic in March and June 2020. An issue of principle arose concerning the admissibility of expert evidence. The court noted that opinion evidence from suitably qualified experts was:

> *"admissible in ordinary civil claims with the permission of the court if it is reasonably required to resolve the proceedings, provided that the requirements of CPR 35 and its accompanying practice direction have been followed"* (see [3]).

The position in respect of judicial review proceedings was, however, different. In that respect, the court cited with approval the summary of the law applicable to such situations given by Leggatt LJ and Carr J in ***R. (Law Society) v Lord Chancellor*** (2018).

> *"[3] ... A recent and authoritative review of the law, with which we agree, is contained in the judgment of the Divisional Court (Leggatt LJ and Carr J) in R (Law Society) v Lord Chancellor [2019] 1 WLR 1649; [2018] EWHC 2094 (Admin). The Court said:*
>
> > *'36. The use of expert evidence in judicial review proceedings, as in all civil proceedings, in the High Court is governed by CPR Part 35. CPR 35.1 restricts expert evidence to "that which is reasonably required to resolve the proceedings." It follows from the very nature of a claim for judicial review that expert evidence is seldom reasonably required in order to resolve it. That is because it is not the function of the court in deciding the claim to assess the merits of the decision of which judicial review is sought. The basic constitutional theory on which the jurisdiction rests confines the court to determining whether the decision was a lawful exercise of the relevant public function. To answer that question, it is seldom necessary or appropriate to consider any evidence which goes beyond the material which was before the decision-maker and evidence of the process by which the decision was taken – let alone any expert evidence.*
> >
> > *37. The classic statement of the extent to which evidence other than evidence of the decision under challenge is admissible in judicial review proceedings is that of Dunn LJ in R v Secretary of State for the Environment, ex parte Powis [1981] 1 WLR 584, 595. The categories identified in that case can be summarised as follows:*
> >
> > *a) Evidence showing what material was before or available to the decision-maker;*
> >
> > *b) Evidence relevant to the determination of a question of fact on which the jurisdiction of the decision-maker depended;*
> >
> > *c) Evidence relevant in determining whether a proper procedure was followed; and*
> >
> > *d) Evidence relied on to prove an allegation of bias or other misconduct on the part of the decision-maker.*
> >
> > *38. Although these categories are a useful and well-established list, it would be wrong to treat them as if they were embodied in statute or as necessarily exhaustive. That is particularly so as public law has developed in ways which were not in contemplation when the Powis case was decided. In R (Lynch) v General Dental Council [2003] EWHC 2987 (Admin); [2004] 1 All ER 1159, Collins J was prepared to allow some extension of the possibility of admitting expert evidence beyond the Powis categories in a case where a decision is challenged on the ground of irrationality. The judge accepted that, where an understanding of technical matters is needed to enable the court to understand the reasons relied on in making the decision in the context of a challenge to its rationality, expert evidence may be required to explain such technical matters.'"*

That CPR Pt 35 was an exclusive code, as held by the Court of Appeal in ***Rogers v Hoyle*** (2015), did not help found an argument that expert evidence could be adduced in judicial review proceedings outside of the basis set out above. Nor did the approach taken in TCC or personal injury claims where an expert witness who is giving admissible evidence of fact is permitted to "*add expressions of opinion*": see, ***Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd*** (2008). In such cases a judge may have regard to such opinion evidence and, where it is contentious, it may be subject to cross-examination. However, as the court put it:

> *"[9] ... judicial review claims are not treated in the same way, for the reasons given by Leggatt LJ and Carr J in the Law Society case. Moreover, except in rare cases such as R (Al-Sweady) v Secretary of State for Defence [2009] EWHC 2387 (Admin), cross-examination of witnesses is not permitted in judicial review claims ..."*

Where experts had, in this case, interwoven evidence of fact and opinion evidence in witness statements, the court endorsed the approach taken by Fraser J in similar circumstances in ***R. (Good Law Project Ltd) v Minister for the Cabinet Office*** (2021). In that case, Fraser J concluded that it would be disproportionate to go through the evidence and identify and excise the evidence of opinion. As he put it, the better approach is for Counsel to:

> *"submit to the court passages where the submission is that little weight ought to be given to specific parts of the evidence of that nature ..."*

As the court concluded:

> *"[17] We consider that our treatment of the parts of the statements already admitted which take the form of argument – not all of them on the Claimants' side – should not be excessively purist. Where a witness makes a comment which could have formed part of the written or oral argument of the party adducing his or her evidence, the Court will adopt the same approach as Fraser J did in the Good Law Project case. But where [the experts' evidence] goes beyond comment and expresses the opinion that actions of the Defendants were unreasonable or negligent, such evidence of opinion is inadmissible."*

Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2008] EWHC 2220 (TCC), unrep., ***R. (Al-Sweady) v Secretary of State for Defence*** [2009] EWHC 2387 (Admin); [2010] H.R.L.R. 2, ***Rogers v Hoyle*** [2014] EWCA Civ 257; [2015] Q.B. 265, ***R. (Law Society) v Lord Chancellor*** [2018] EWHC 2094 (Admin); [2019] 1 W.L.R. 1649, ***R. (Good Law Project Ltd) v Minister for the Cabinet Office*** [2021] EWHC 2091 (TCC), unrep., ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.35.1.2.)

Practice Updates

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 136th Update. This CPR Update is in force from **1 November 2021**. It amends CPR PD 51U – Disclosure Pilot Scheme. It, primarily, introduces a new Appendix 5 to the PD, which inserts a tailored, simplified approach to disclosure for "*less complex claims*". It further provides a simplified approach to Disclosure Review Documents and disclosure lists. Amendments are also made to clarify the approach to be taken to the application of the pilot scheme to multi-party claims.

CPR PRACTICE DIRECTION – 135th Update. This CPR Update is in force from **11.00** on **1 November 2021**. It applies to all claims submitted to the court on or after that time. The Update amends CPR PD 51R – the Online Civil Money Claims Pilot. The amendments clarify when default judgment cannot be obtained. It further amends the rules governing defendants' admissions, repayment plans and settlement agreements.

TEMPORARY INSOLVENCY PRACTICE DIRECTION SUPPORTING THE INSOLVENCY PRACTICE DIRECTION. On 29 September 2021, Sir Julian Flaux C, with the concurrence of Lord Wolfson, issued a further temporary and supplementary Insolvency Practice Direction. It is in force upon the lapse of the previous Temporary Insolvency Practice Direction, i.e. from **1 October 2021**. It remains in force until further notice. It retains features of the previous Practice Direction that were not intended to be temporary measures applicable during the COVID-19 pandemic. It thus makes provision for out-of-hours appointments for administrators, making statutory demands remotely, and the time for obtaining a moratorium under s.A3 of the Insolvency Act 1986. It is available here: *https://www.judiciary.uk/wp-content/uploads/2021/10/Temporary-Insolvency-Practice-Direction.pdf* [Accessed 2 November 2021].

PRACTICE GUIDANCE

ARRANGEMENTS FOR POSSESSION PROCEEDINGS. On 3 November 2021, Sir Geoffrey Vos MR issued an announcement concerning the approach to be taken to possession hearings. The announcement set out that the temporary approach, introduced by Sir Terence Etherton MR on 17 September 2020 via the *Overall Arrangements for Possession Hearings* ceased as from 1 November 2021. As from that latter date, possession proceedings were to be governed solely by the CPR and its Practice Directions and any relevant listing policies as determined by Designated Civil Judges. The announcement is reprinted below.

> ***Statement from the Master of the Rolls: the end of the 'overall arrangements for possession proceedings'***
>
> *On 17 September 2020 the "Overall Arrangements for Possession Proceedings" were published by my Predecessor in response to the end of the unprecedented stay of proceedings in possession cases following the COVID-19 pandemic. These "Overall Arrangements" came to an end on 1 November 2021.*

The procedures to be followed for the future are those set out in Rules and Practice Directions. The informal guidance published in the "Overall Arrangements" document should no longer be viewed as governing or guiding court procedures, which are properly contained in Rules and Practice Directions or listing policies which are a matter for Designated Civil Judges to decide in the light of local conditions.

From May 2020 until July this year, Mr Justice Knowles led a cross-sector working group to consider, and address as far as practicable, matters affecting litigants and the courts during the pandemic.

The group brought together judges, court staff, government officials, legal representatives, the advice sector, and those representing landlords and tenants, mortgage lenders and borrowers. Together, supported by my office, they worked immensely hard to ensure that the courts have been prepared for the resumption of possession proceedings, and that court users were so far as possible not adversely effected by the resumption of proceedings. I am grateful for the work that they were able to do. The group produced a report to me in July 2021, which can be obtained by those interested from my office.

The group has not, of course, been concerned with the statutory framework and policy underlying the recovery of possession of residential properties from tenants. That is a matter for the Government and Parliament.

In addition to coordinating work on the exceptional procedures and practices that were necessary as a result of the pandemic, it has successfully promoted a culture of collaboration and restraint so that formal possession proceedings are increasingly becoming a last resort. The groups record of collaboration and engagement between the many agencies concerned with the housing sector has been exceptional in extraordinary times.

The Master of the Rolls, Sir Geoffrey Vos

In Detail

JALLA v SHELL INTERNATIONAL TRADING AND SHIPPING CO LTD – GUIDANCE ON REPRESENTATIVE ACTIONS

In ***Jalla v Shell International Trading and Shipping Co Ltd*** [2021] EWCA Civ 1389, the Court of Appeal provided guidance on the application of CPR r.19.6. The issue on appeal was whether the two appellants could properly bring a representative action under that rule on behalf of themselves and the Bonga Community, which was constituted of 28,000 individuals and 457 communities. The basis of the claim concerned an oil spill, which occurred in December 2011, that affected the coast and inland areas of Nigeria. The affected area was said to cover an area approximately comparable to the size of Belgium. At first instance, the application to proceed as a representative action was refused. An appeal from that decision was dismissed by the Court of Appeal. In giving judgment Coulson LJ, with whom Lewison and Green LJJ agreed, considered the nature and scope of the representative action under CPR r.19.6.

CPR r.19.6's purpose

Coulson LJ identified the purpose underpinning the representative action in classical terms. Its primary purpose, as he put it at [52] was *"to save time and costs ... [and] procedural complexity"*. It did this by ensuring that the representative parties' claims are properly tried and, as a consequence, bind the represented parties. The benefit of such an approach was obvious. If properly constituted, a representative action would ensure that if the representatives' claims succeeded so did those of the represented parties. If they failed so did the represented parties' claims. Rather than the courts having to manage and adjudicate the same dispute multiple times, they would have to do so once. The promotion of procedural proportionality, as well as efficiency and economy in proceedings, is patent as is the benefit to individual parties, as those represented will not be troubled by the costs of the representative action.

Equally, albeit Coulson LJ did not refer to it, such an approach ensures that confidence in the justice system is not undermined. Were multiple claims concerning the same cause of action to be pursued to judgment before different judges it is more than possible that they would be decided differently. Inconsistent decisions on the same law and facts could not but bring the courts into disrepute and undermine confidence in the judiciary. Representative actions, if pursued in appropriate circumstances, thus not only promote the effective administration of justice in the senses Coulson LJ identified, but do so more broadly.

In considering the representative action's purposes, Coulson LJ further noted that given them it was apparent why they would, generally, be an appropriate means of dealing with cases such as the present. As he put it at [55]:

> *"[55] It is therefore easy to see why, in a certain kind of pollution case, a representative action is an appropriate course. Say, for example, a group of residents are troubled by the emissions from the chimney of a chemical plant. If those*

residents sought an injunction against the company, it is overwhelmingly likely that they would have the same interest in the claim and therefore could be represented by one of their number. That very example of a claim in tort meeting the requirements of 'the same interest in a claim' is expressly set out at page 139 g of the report of Radcliffe and others v Coltsfoot Investments Ltd [1987] LRC (Comm) 127. Conversely, it is much more difficult to see the requirement being met in a situation where the residents have claims for different personal injuries arising from the pollution caused by the chimney. In such a case, there will usually be a group litigation order ('GLO') instead. Two examples of pollution cases in the TCC which were tried by way of a GLO are the Corby litigation [2009] EWHC 1944 (TCC) and Barr v Biffa Waste [2011] EWHC 1003 (TCC). Both were the subject of a GLO and were not representative actions under r.19.6."

Where proceedings would neither reduce procedural complexity nor enable the proceedings to be managed economically or efficiently, it would be difficult, at best, for a court to conclude that they ought to be permitted to proceed as a representative action (see [57]). In the present case, none of those purposes would have been achieved if the proceedings had gone ahead as such a form of action.

Summary of approach to be taken to representative actions

Coulson LJ considered a number of authorities concerning the approach to be taken to representative actions. In doing so he deprecated, at [48], reliance on the approach taken to the authorities by the High Court of Australia in ***Carnie v Esanda Finance Corp Ltd*** [1995] HCA 9 (noted in ***Civil Procedure 2021*** at para.19.6.3). Reliance ought properly to be given to the approach taken in English authorities, not least as Coulson LJ pointed out, the Court of Appeal in ***Emerald Supplies Ltd v British Airways Plc*** [2010] EWCA Civ 1284; [2011] Ch. 345. Having made that point, Coulson LJ went on as follows:

"[51] ... I would summarise those requirements and limitations as follows:

a) A representative action is a particular form of multi-party proceeding with very specific features. One such feature concerns the congruity of interest between representative and represented. Another is the need for certainty at the outset about the membership of the represented class.

b) The starting point (or threshold) for any representative action is that the representing parties must have 'the same interest in a claim' as the parties that they represent.

c) 'The same interest' is a statutory requirement which cannot be abrogated or modified (see [74] of [Lloyd v Google LLC [2019] EWCA Civ 1599; [2020] 2 W.L.R. 484]). It was described by Gloster LJ in Re X and others [2015] EWCA Civ 599, [2016] 1 WLR 227 as 'a non-bendable rule'.

d) The reason why the represented parties need to have the same interest in a claim as the representative claimant is because the represented parties are bound by the result of the representative action. That is what Mummery LJ in Emerald Supplies called 'the binding effect of the proceedings'.

e) The court will adopt a common sense approach to this issue. It must be the same interest 'for all practical purposes' (the expression used by Staughton LJ in [Irish Shipping Ltd v Commercial Union Assurance Co Plc [1991] 2 Q.B. 206] at 227G); or it must be 'in effect the same cause of action or liability' (the expression used by Akenhead J in [Millharbour Management Ltd v Weston Homes Ltd [2011] EWHC 661 (TCC)] at [22(3)]. This avoids the sort of rigidity deprecated by Megarry J in [John v Rees [1970] Ch. 345].

f) In this way, it is easy to see why all the stallholders in [Duke of Bedford v Ellis [1901] A.C. 1], and all the shareholders in Prudential Assurance, had the same interest in the injunction and the declarations sought. Similarly, in Lloyd v Google, the Chancellor said of the relationship between the representative and the represented parties that 'the wrong is the same, the loss claimed is the same. The represented parties do, therefore, in the relevant sense have the same interests.'

g) It may not affect the making of an order for a representative action if the represented parties also have their own separate claims for damages. In the copyright collection cases (such as Independiente), where the emphasis was on the injunction for breach of copyright, the damages were of secondary importance: they simply paid the costs of the policing operation. Individual claims for damages, which were regarded as 'subsidiary' in Duke of Bedford v Ellis, can be the subject of an inquiry or an account, or they can lead to subsequent individual claims (outside the representative action), which was the approach adopted in Prudential Assurance.

h) Thus, the existence of individual claims for damages is not necessarily a bar to their being dealt with in some way via a representative action. It will always depend on the factual circumstances.

i) The analysis of 'the same interest' is undertaken by the court at the time of the application under r.19.6. The court has to consider what the issues are likely to be by reference to all the information then available (see

Akenhead J at [22] of Millharbour). To the extent that Lord Macnaghten in Duke of Bedford v Ellis was suggesting that the exercise should be carried out solely by reference to the claimants' pleadings, that is emphatically no longer the practice, as demonstrated most recently by Emerald Supplies, Millharbour and Lloyd v Google.

j) These later authorities also show that it is necessary to consider the likely defences as part of the analysis. So in Irish Shipping, although potential defences were identified, at 227F Staughton LJ said that they were 'unlikely to arise'. The suggestion is that, if they had arisen, the case would have been decided differently. In Emerald Supplies, on the other hand, Mummery LJ said at [64] that 'if there is liability to some customers and not to others they have different interests, and not the same interests, in the actions.' In Lloyd v Google, the court expressly took into account the fact that it was 'impossible to imagine that Google could raise any defence to one represented claimant that did not apply to all others.'

k) Likewise, depending on the circumstances, limitation defences may be a factor to be taken into account when assessing whether or not to make an order under r.19.6: see [22(7)] of the judgment in Millharbour.

l) As to the equally fundamental requirement that membership of the represented class must be capable of being ascertained at the outset of the proceedings, I can do no better than repeat Mummery LJ's words in Emerald Supplies (see paragraph 46 above): 'It cannot be right in principle that the case on liability has to be tried and decided before it can be known who is bound by the judgment'."

Coulson LJ also noted that representative actions were a rarity in England and Wales. While one obvious explanation for that fact is the narrow approach taken to *"same interest"*, which is no longer followed in a number of jurisdictions across the world that have provisions equivalent to CPR r.19.6, Coulson LJ identified two specific reasons behind that fact. The first was that in many cases where there are multiple parties:

"with some or even many facts common to their individual claims, but where there are also not insignificant differences, the parties and/or the courts will usually choose one of two other options."

(See [49].) Those options were to make a GLO or for all the claimants to be added as parties to the action and a representative sample of lead claimants is then taken (see [49]–[50]). Were the *"same interest"* requirement to be widened, it is quite possible that the utility of representative actions may make it a more effective alternative to those two options.

Limitation

One of the reasons why the Court of Appeal concluded that the present claim was not a genuine representative action centred on limitation. It was accepted, in argument, that the proceedings would have to be case managed and tried as if they were individual claims. This was due to the fact that limitation, amongst other things, would need to be determined on an individual basis.

Where limitation was concerned, Coulson LJ rejected the submission that if the representative parties were held to be statute-barred in respect of their claims, a representative action could continue simply by substituting members of the represented class for them. Coulson LJ rejected this approach on two bases.

"[61] First, it would involve a form of 'rolling' representative action, where (at least potentially) no represented party was bound by the court's determination of anyone else's claim. It would require the respondents to defeat the claim of the two appellants, and then wait for the next two representatives to be chosen and to go on and endeavour to defeat those claims too. And so on. I venture to suggest that no representative action has ever been conducted in such a way. The reason? Because the existence of the manifestly different interests of the represented parties mean that it is not a representative action in the first place.

...

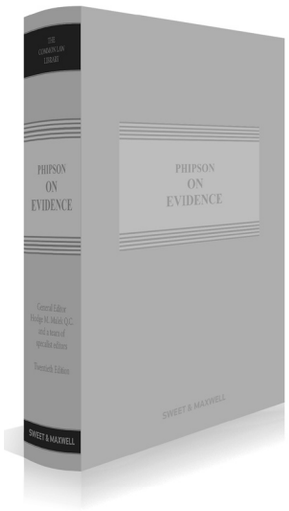
[63] Secondly, [the 'rolling substitution'] solution presupposed that the two new representatives ... had claims which were not statute-barred, and which would also succeed on causation and the justification of the claimed remedial scheme. But whether or not the claims of the new representatives actually met those requirements could only be determined by the court. So it would mean that the court would inevitably be determining, on a case-by-case basis (whether using sampling or not), whether or not each individual claim was statute-barred and/or had demonstrated the necessary or any damage to land and/or that the damage complained of was caused by the December 2011 oil spill."

This approach is plainly correct. If parties had the *"same interest"* in the proceedings, that would necessarily seem to suggest that the same limitation argument would apply to each of the representative and represented parties. There is one caveat to this. It is perfectly possible that the proposed representative parties were not properly representative of the class of represented parties. The former may be subject to a limitation argument that might not apply to the latter. In such a case that would found an argument that the proposed representatives were not proper parties to act as representatives and ought to be substituted for properly representative parties drawn from the represented class.

Phipson on Evidence

20th Edition

General Editor: Hodge M. Malek QC



Hardback
ISBN: 9780414099470
December 2021
£365

This title is also available on Westlaw UK and as an eBook on Thomson Reuters ProView

Part of the Common Law Library series, *Phipson on Evidence* is the leading work on civil and criminal evidence. It examines in detail all aspects of the principles and procedures making up the law of evidence. Coverage includes the admission of evidence, the standard of proof, the attendance of witnesses, good and bad character, legal professional privilege, hearsay, expert evidence, confessions, judicial discretion and many other evidential issues.

The new edition considers a number of important legal developments, including:

- A new chapter on the evidence in arbitration
- A new chapter on the assessment of evidence
- Discussion and commentary on the recent cases relating to LPP including the Court of Appeal judgment in *R. (on the application of Jet2.com Ltd) v Civil Aviation Authority* [2020] EWCA Civ 35, *PCP Capital Partners LLP v Barclays Bank Plc* [2020] EWHC 1393, and *Qatar v Banque Havilland SA* [2021] EWHC 2172 (Comm)
- The chapter on expert evidence has been extensively re-written and updated to take account of recent developments in this area

PLACE YOUR ORDER TODAY... **sweetandmaxwell.co.uk** **+44 (0)345 600 9355**

SWEET & MAXWELL

THOMSON REUTERS®

EDITOR: **Dr J. Sorabji,** Barrister, 9 St John Street
Published by Sweet & Maxwell Ltd, 5 Canada Square, Canary Wharf, London, E14 5AQ
ISSN 0958-9821

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

42829931