CIVIL PROCEDURE NEWS

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In Brief

Cases

Care Surgical Ltd v Bennetts [2021] EWHC 3031 (Ch), 5 October 2021, unrep. (Bacon J)

Contempt of court – "existing proceedings"

CPR r.81.3(5)(a). Directions were sought in committal proceedings. The contempt application concerned an alleged interference with the due administration of justice. The alleged interference was said to be due to the making of a false statement or one that was not believed to be true at trial and due to a failure to disclose certain matters before giving evidence at trial. An application was made to strike out the contempt application. The basis of that application was that permission to bring the application was needed and no such permission had been granted. The claimant submitted that permission was not required as the application came within the exception in CPR r.81.3(5)(a), which provides that permission is not required because it is made in *"existing"* proceedings. Proceedings were said to be existing as an enquiry into damages had been ordered, even though it was unlikely to proceed. The defendant submitted that the underlying proceedings only existed in a limited, technical way. It further submitted that the contempt application was in reality one brought under CPR r.81.3(5)(b) as it was based on what was said to be a knowingly false statement in a witness statement. **Held**, permission to appeal was not necessary in this matter. If it had been, permission would have been granted. The strike out application was refused. In reaching this decision the judge provided the following guidance on the correct interpretation of *"existing"* in r.81.3(5)(a):

> *"[7] ... the CPR does not define the word 'existing'. It is, however, on its natural meaning a broad term which does not appear to be confined to pending proceedings. The exception for existing proceedings would therefore appear to have the purpose of distinguishing between an alleged contempt that relates to proceedings that have come into existence, and contempt that relates to intended proceedings (or indeed does not relate to any proceedings in particular). If that is correct, the question of whether the proceedings are still pending or have been finally determined is irrelevant. But even if that is not correct, the reference to existing proceedings must at least be wide enough to encompass the present situation in which there is an extant provision in the underlying proceedings for a damages enquiry, whether or not that enquiry has been actively pursued by the claimant."*

(See ***Civil Procedure 2021*** Vol.1 at para.81.3.4.)

Promontoria (Oak) Ltd v Emanuel [2021] EWCA Civ 1682, 18 November 2021, unrep. (Henderson, Phillips, Nugee LJJ)

Document redaction – equality of arms – fair trial

CPR r.1.1(2)(a). In joined appeals before the Court of Appeal a question arose about the basis on which documents that were relied upon in proceedings by one party could properly be redacted. In answering the question, the court noted and summarised the guidance it had previously set out in ***Hancock v Promontoria (Chestnut) Ltd*** (2020):

> *"[44] ... we consider that Hancock provides sufficiently clear guidance for future cases. Without attempting to re-write that guidance, it can in our view be summarised as follows:*
>
> *(1) Where the Court is called upon to resolve a question of construction of a contractual document, the document must in all normal circumstances be placed before the Court as a whole: [74]. The starting point must always be that the entire document should be made available to the Court: [89].*
>
> *(2) But it may be obvious that some parts, such as the details of third party transactions, can be omitted or blanked out. In such a case a clear explanation must be given of the nature and extent of the omissions and the reasons for making them: [74]. In general, irrelevance alone is not enough to justify redaction; there must be some additional feature such as privacy or confidentiality: [74].*
>
> *(3) Mere confidentiality can seldom, if ever, justify redaction, but provisions can be redacted if it is obvious that on any reasonable view the provisions in question would be completely irrelevant to the question of construction, and the reasons for taking that view are clearly and fully articulated by the solicitor for the party seeking that redaction: [75].*
>
> *(4) But redactions on the ground of relevance should either be forbidden or if permitted at all convincingly justified and kept to an absolute minimum: [89]. Except in the clearest of cases, the question of relevance to the process of construction is one that the Court should be left to decide for itself: [89].*

(5) *In a sentence, in all normal cases, the entire document should be placed before the Court and if, exceptionally, any redactions are made, they should be fully explained and justified by the party making the redaction, with sufficient particularity for the Court to be able to rule on the need for redaction if it is challenged: [89].*"

The court went on to give further practical guidance as follows:

"*[45] We add a few comments on points that emerged in the course of oral argument. First, the Hancock guidelines are directed at a case where the Court is required to construe a document. But quite what is required in any particular case must be heavily dependent on the context: as Henderson LJ observed in argument, context is all-important. If for example there is a classic difficulty of construction that needs to be resolved – a provision that on its face is open to more than one competing interpretation – then we suspect that it would be difficult to justify withholding other parts of the same instrument as experience shows that arguments on construction are often wide ranging, and not infrequently draw on comparisons with other parts of the same instrument, even if dealing with a different aspect of the parties' agreement. That is the context of Lord Hodge's statement in Wood v Capita at [10] that in ascertaining the objective meaning of the parties' language, the Court must consider the contract as a whole.*

[46] But the present cases are not like that. The Court is not being asked to resolve the meaning of an ambiguous provision, or choose between competing interpretations. Instead the question is a very limited one: does the document before the Court effect an assignment of the relevant debt or not? That undoubtedly requires the Court to consider the meaning and effect of the provisions relied on, but that does not usually present great difficulty, and it is far more likely that a clear and convincing justification can be made out that other parts of the same document are entirely irrelevant to that question. We accept, for example, ... that in a typical invoice factoring agreement, provisions dealing with the obligations of the original creditor and the factor to account to each other are unlikely to have any relevance to the question whether the document effects an assignment of the relevant debts. We therefore accept the submissions ... that there is no absolute rule that the whole document should always be disclosed in unredacted form if asked for, as indeed Hancock itself makes clear. The ultimate question is always whether it is possible for the Court to reach a safe conclusion on the effect of the document: if it cannot, it would be unfair to the other party for the Court to proceed on the basis that the document had a particular effect, but if it can, there is no reason why it should not do so, and it would be unfair on the party relying on the document to refuse to do so.

[47] Second, it is in general unsatisfactory for questions as to the extent of redactions to be first raised at trial. The general position under the CPR is that cases should be managed in such a way that by the time the parties get to trial they should know what the evidence is on which they will each be relying, and procedural matters should have all been resolved. This is of course a counsel of perfection which cannot always be attained in practice, but in cases like the present where it is clear from an early stage that the claimant claims as assignee, the claimant's title is put in issue, and the claimant intends to rely on a redacted document to prove the assignment, the defendant should in our view raise the issue well before trial if he seeks to object to that being done, either at a case management conference or by way of interlocutory application. It will usually be obvious from disclosure that the claimant does not intend to provide an unredacted copy of the document; and that is the opportunity for the defendant to object to the claimant seeking to rely on a redacted document to prove its title."

Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2017] A.C. 1173, ***Hancock v Promontoria (Chestnut) Ltd*** [2020] EWCA Civ 907; [2020] 4 W.L.R. 100, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.1.1.)

■ **Loveridge v Loveridge** [2021] EWCA Civ 1697, 19 November 2021, unrep. (Bean & Nugee LJJ, Falk J)

Committal application – costs on withdrawal

CPR r.81.3. An application for committal for contempt was withdrawn. The judge awarded costs having found that some of the allegations pleaded were very likely or likely to have been proved if the application had proceeded. An appeal from that decision was allowed by the Court of Appeal. In reaching that decision, the Court of Appeal noted that the judge had a wide discretion as to costs and that for the Court of Appeal to interfere with it, it had to conclude that the decision was wrong, e.g. the judge had erred in principle, taken account of an immaterial factor, failed to take account of a material factor or reached a decision that was wholly wrong: ***Atlasjet Havacilik Anonim Sirketi v Kupeli (aka Kupeli v Kibris)*** (2018) at [5]. The same principles apply to appeals from costs decisions: ***Symes v Phillips (Costs)*** (2005). The Court of Appeal noted (at [158]) however that, as Pill LJ stated in ***Symes***, other factors may be present when considering appeals where costs decisions in contempt proceedings are concerned. As Pill LJ put in ***Symes***:

"*[6] In Knight v Clifton [1971] Ch 700, Sachs LJ, at p718, stated:*

'By way of a footnote it should be specifically stated that neither as regards the court's jurisdiction over costs under section 50 (1) of the [Supreme Court of Judicature (Consolidation)] Act of 1925 nor as regards the nature of the discretion to be exercised under it, is there any difference in principle between proceedings for civil contempt and

other inter partes proceedings. In practice, however, upon committal proceedings the court can on the one hand naturally look at the general course to date of the relevant cause of action when assessing what order as to costs should be made and have regard to the extent of any right or title already established, but on the other hand must keep in mind that the liberty of the subject is involved and give that factor special weight.'

[7] I respectfully agree with Sachs LJ that, while there is no difference in principle, factors may be present in contempt proceedings which are not normally present in civil proceedings. Amongst them, in a case such as the present, is the fact that the contemnor, by his admitted contempts of court, has brought the entire proceedings upon himself and is in a weaker position to claim costs as between the parties than most litigants. Another is the need not to deter claimants, who may, as in this case, be in the best position to assist the appellate court as to what happened at the trial, from doing so.

[8] The conduct and outcome of the appeal are of course important considerations ..."

Furthermore, as contempt proceedings are quasi-criminal, that the defendant is entitled to the presumption of innocence is a relevant factor when considering the costs of a withdrawn application (at [161]). It was also the case when determining such costs that the merits can be considered when either: (i) breaches were admitted; or (ii) there was no real scope for them to be denied (at [162]–[163]). That the claimant was said to be acting as a "*quasi-prosecutor*" was not easy to reconcile with Pill LJ's statement from ***Symes*** and thus not a relevant factor to take into account (at [168]). ***Symes v Phillips (Costs)*** [2005] EWCA Civ 663; [2006] 4 Costs L.R. 553, ***Atlasjet Havacilik Anonim Sirketi v Kupeli (aka Kupeli v Kibris)*** [2018] EWCA Civ 1264; [2019] 1 W.L.R. 1235, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.81.3.17.)

- **HM Attorney General v Crosland** [2021] UKSC 58, 20 December 2021, unrep. (Lord Briggs, Lady Arden, Lord Kitchin, Lord Burrows, Lady Rose)

Supreme Court – jurisdiction to entertain appeal from itself – contempt of court

Administration of Justice Act 1960 s.13, Supreme Court Rules r.9. An unregistered barrister who had been held to be in contempt of court by the UK Supreme Court sought to challenge that order. The question arose whether the Supreme Court had jurisdiction to entertain an appeal from itself in such circumstances. **Held** by a majority (Lord Briggs, Lord Kitchin, Lord Burrows, Lady Rose): (i) the Supreme Court had no inherent jurisdiction to hear an appeal from itself in respect of an order made under its contempt of court jurisdiction. No basis had been found to conclude that it had inherited such an appellate jurisdiction from the House of Lords. Such a jurisdiction did not come within that which existed under ***Ex p. Pinochet*** to cure procedural error (at [37]); but (ii) s.13 of the 1960 Act did not expressly or impliedly exclude the possibility of an appeal in such circumstances (at [38]–[44]); and (iii) it was not a conceptual impossibility for the Supreme Court to hear an appeal from itself. The court's original contempt jurisdiction is always exercised by a panel of three justices. As this was an exercise of original and not appellate jurisdiction, there was no reason to suggest that it is impermissible for one organ of the Supreme Court, i.e. another, larger panel of justices, to hear an appeal from that initial panel of three justices. As Lord Briggs explained:

"[46] The starting point is that (as prescribed by rule 9 of the Supreme Court Rules) the original contempt jurisdiction of the Supreme Court is in every case exercised by a panel of the justices. In the present case it was exercised by a panel of three. In the context of the exercise of an original rather than appellate jurisdiction, we do not consider it to be a conceptual impossibility that there can be an appeal from one organ of the Supreme Court to another. It is no objection to the constitution of an appellate panel that it includes one or more judges of equivalent seniority to the judge from whose decision the appeal is made. This regularly occurs in both the Criminal and Civil Divisions of the Court of Appeal and may, in accordance with the Constitutional Reform Act 2005, occur in the Supreme Court: see section 38(1), (4) and (8)(a) of that Act. Further, it is a very common feature of appeals in the UK generally that the appellate court consists of a larger panel than the court appealed from. It not infrequently happens that a party to an appeal to the Supreme Court wishes the court to depart from an earlier decision of the Supreme Court or of the House of Lords. In such a case the practice is for the appeal to be heard by an enlarged panel of seven or more justices, precisely to clothe it with that greater authority: see Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd (Northern Ireland) [2020] UKSC 36; [2020] 3 WLR 521, para 49. In this case, it has proved practically possible for there to be an enhanced non-conflicted panel of Justices to hear this appeal and there is no reason to suppose that this should not be possible on the rare occasions in the future when this court deals with an alleged contempt.

[47] This is not of course a general invitation to open up for general use the concept of an appeal from one panel of the Supreme Court (or any court) to another. Rather it is an examination of the alleged conceptual impossibility in the context of primary legislation that, for the reasons given above, confers an express right of appeal from an original decision of a panel of justices of the Supreme Court, in the narrowly circumscribed but important sphere of the jurisdiction to punish, including by imprisonment, for contempt of court.

[48] Where primary legislation confers a particular right it is not always (or even often) the case that it prescribes a complete code for the effective exercise of that right. That is commonly left to subordinate legislation. Where, as here the right in question is part of the rights embodied in the concept of access to justice, the procedure for its exercise is usually left to rules of court. In the present case the Rules of the Supreme Court do not prescribe how an appeal under section 13(1) from a panel of justices exercising the Supreme Court's jurisdiction to punish for contempt should be heard. But rule 9(7) provides that:

> *'If any procedural question arises which is not dealt with by these Rules, the Court or the Registrar may adopt any procedure that is consistent with the overriding objective, the Act and these Rules.'"*

As such the court had the jurisdiction to hear the appeal. The appeal was dismissed. ***R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.2)*** [2000] 1 A.C. 119, HL, ***Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd (Northern Ireland)*** [2020] UKSC 36; [2020] 3 W.L.R. 521, ref'd to. (See ***Civil Procedure 2021*** Vol.2 at para.4A-9.1.)

Practice Updates

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 138th Update. This Practice Direction Update effected a number of amendments to Practice Direction 51R. The amendments came into force from **11.00 on 8 December 2021**. The amendments separate out the online civil money claims pilot scheme from MCOL. This is likely to foreshadow the pilot scheme's ultimate consolidation as a free-standing Part of the CPR. It also amended the Help with Fees process.

CPR PRACTICE DIRECTION – 137th Update. This Practice Direction Update effected a number of amendments to Practice Directions 51O, 51U and 55C. The amendments came into force on **12 November 2021**. The amendments to PD 51O changed the date on which mandatory use of E-Filing commences in the Court of Appeal to 10 January 2022. It also postponed the date on which E-Filing by legally represented parties comes into force to 14 February 2022. The amendment to PD 51U omits wording in para.6.5 that ought to have been omitted via amendments made in CPR Update 136. The amendment to PD 55C extends the duration of the PD so that it continues in force for claims issued prior to 1 December 2022. It also extends, until 30 June 2022, the requirement for claimants to provide a notice of their knowledge of the pandemic's effect on defendants and as to compliance with the relevant Pre-Action Protocol.

PRACTICE GUIDANCE

PRACTICE GUIDANCE (REMOTE HAND-DOWN OF JUDGMENTS) IN THE COURT OF APPEAL (CIVIL DIVISION). On 16 December 2021, Sir Geoffrey Vos MR handed down guidance on the approach the Court of Appeal will take to handing down judgments when sitting in the Royal Courts of Justice. It is explicitly stated to be without prejudice to CPR PD 40E, albeit that is the case in any event as Guidance cannot amend or qualify Practice Directions. A copy of the Practice Guidance is reprinted here:

Practice Guidance (remote hand-down of judgments)

Since the start of the COVID-19 pandemic, reserved judgments of the Civil Division of the Court of Appeal have in most cases been handed down remotely in accordance with a "Covid Protocol". The procedure worked well, and I have decided that it should be retained in most cases notwithstanding that the Court has resumed routine sitting at the Royal Courts of Justice. The practice from now on will be as follows:

1. Unless otherwise directed, reserved judgments of the Court of Appeal (Civil Division) will be handed down remotely, in accordance with the procedure at paragraphs 2–4 below.

2. Notice of hand-down of reserved judgments will be given in the published daily cause list, as follows:

Until April 2022

"Remote hand-down: This judgment will be handed down remotely by circulation to the parties or their representatives by email and release to BAILII and the National Archives. A copy of the judgment in final form as handed down should be available on BAILII shortly thereafter but can otherwise be obtained on request by email to the Judicial Office (press.enquiries@judiciary.uk)."

From April 2022

"Remote hand-down: This judgment will be handed down remotely by circulation to the parties or their representatives by email and release to the National Archives. A copy of the judgment in final form as handed down should be available on the National Archives website shortly thereafter but can otherwise be obtained on request by email to the Judicial Office (press.enquiries@judiciary.uk)."

3. At the published date and time the judgment will be sent by e-mail by the clerk to the Lord/Lady Justice responsible for hand-down to the parties or their representatives, under cover of letter in the following terms:

"In accordance with the Practice Guidance dated 16 December 2021, I attach the judgment in this case by way of hand-down, which will be deemed to have occurred at [Listed Time and Date]."

4. At the same time a copy will be sent to the National Archives and, until April 2022, to BAILII.

5. The final/approved version of the judgment will have this wording on the front page:

Until April 2022

"Remote hand-down: This judgment was handed down remotely at [time] on [date] by circulation to the parties or their representatives by email and by release to BAILII and the National Archives."

From April 2022

"Remote hand-down: This judgment was handed down remotely at [time] on [date] by circulation to the parties or their representatives by email and by release to the National Archives."

6. If the Court decides that judgment should be handed down in open Court rather than remotely, the cause list will so indicate; and the parties or their representatives will be informed by the clerk to the presiding Lord/Lady Justice whether or not their attendance is required and of any matters on which their submissions may be required.

7. This guidance affects only the mode of hand-down. It does not affect anything in Practice Direction 40E.

PRACTICE NOTE: COMMERCIAL COURT & ADMIRALTY COURT: TRIAL LISTING. On 16 December 2021, the Judge in Charge of the Commercial Court and the Admiralty Judge issued a Practice Note setting out the approach to be taken in both courts to trial listing. The Practice Note sets out the procedure that will operate as from January 2022. It will be incorporated into the next edition of the Commercial Court Guide. A copy of the Practice Note is reprinted here:

PRACTICE NOTE: TRIAL LISTING

From January 2022, the practice in the Commercial Court and the Admiralty Court of listing trials with a first sitting day at the beginning of a working week and allocated pre- reading time in the previous working week(s), will be discontinued. Trials will be fixed on the basis of a single estimate inclusive of reading time (X days/weeks, including reading time), typically commencing at the beginning of a working week.

It will be a matter for PTRs, or pre-trial correspondence if there is no PTR, to consider how the trial, including reading time, is organised. If the decision at that stage is for there to be initial reading time prior to any first sitting day, that initial reading time will be taken on (or start from) the listed first day of trial, not before.

Therefore, at CMCs from January 2022, generally the court will discuss with the parties and direct a single trial estimate, inclusive of reading time, rather than specifying separately an estimate for the trial and an estimate for pre-reading.

As will be reflected in the 11th Edition of the Commercial Court Guide when it is issued in January 2022, the start of a trial (for the purposes of the timing of various final pre-trial steps) will be either (a) the listed first day of trial for trials listed under the new practice described above, or (b) the (first) day of allocated pre-reading time for trials listed under the previous practice.

PRACTICE NOTE – SENIOR COURTS COST OFFICE – DEDUCTIONS FROM DAMAGES. On 2 December 2021, the Senior Costs Judge issued a Practice Note setting out the practice that is to apply in the Senior Courts Cost Office when: (i) costs are awarded to a child or protected party; and (ii) the parties thereafter reach agreement on the amount of costs to be paid. A copy of the Practice Note is reprinted here:

APPROVAL OF COSTS SETTLEMENTS, ASSESSMENTS UNDER CPR 46.4(2) AND DEDUCTIONS FROM DAMAGES

CHILDREN AND PROTECTED PARTIES

PRACTICE NOTE BY THE SENIOR COSTS JUDGE

1. This note sets out the procedure to be followed in the Senior Courts Costs Office where the court has awarded costs to a child or a protected party and the parties have subsequently reached agreement as to the amount to be paid by the paying party (normally, the Defendant).

2. CPR 21.10 provides that, where a claim is made on behalf of a child or protected party, no settlement, compromise or payment in respect of that claim shall be valid without the approval of the court.

3. CPR 46.4(2)(a) provides that where money is ordered or agreed to be paid to, or for the benefit of, a child or protected party, the court must order a detailed assessment of the costs payable by, or out of money belonging to, the child or protected party (in other words, the costs and disbursements payable to the child or protected party's legal representatives). The amount payable to the legal representatives by the child or protected party will, by virtue of CPR 46.4(4), be limited to that amount.

4. CPR 46.4(2)(b) provides that on assessing those costs the court must also assess the costs payable by the paying party (unless a Default Costs Certificate has been issued or fixed costs apply).

5. CPR 46.4(5) provides that where the costs payable by the child or protected party comprise only a CFA success fee or the balance payable under a DBA, the court may direct a summary assessment. (Such costs, if incurred in respect of a child in a claim for damages for personal injury, should be assessed summarily only where the damages do not exceed £25,000: CPR 21.12(1A).)

6. CPR 46.4(3) and Practice Direction 46 at paragraph 2.1 create a number of further exceptions to CPR 46.4(2), notably where the child or protected party's legal representatives have waived any claim to costs or disbursements not recovered from the paying party or where there is no need to order detailed assessment to protect the interests of the child or protected party or their estate.

7. CPR 21.12 makes parallel provision for a litigation friend, on application, to recover costs and expenses incurred on behalf of the child or protected party. Such costs and expenses must have been reasonably incurred and be reasonable in amount and will in any event be limited to the amount recovered by reference to CPR 46.4.

8. Ordinarily the Court approving settlement of the claim (or awarding damages) will have incorporated in its costs order either provision for the detailed assessment of any costs claimed by the child or protected party's representatives, or will have dispensed with detailed assessment on one or more of the grounds provided for at Practice Direction 46, paragraph 2.1.

9. If the costs order does not dispense with detailed assessment as between the child or protected party and their legal representatives, then it may provide for detailed assessment subsequently to be dispensed with if the criteria set by Practice Direction 46 at paragraph 2.1 are met.

10. Where the court has ordered detailed assessment, the costs payable by the paying party have subsequently been agreed and the child or protected party's legal representatives have waived any further claim to costs, the costs settlement with the paying party can be approved under CPR 21.10. Application to the SCCO for approval should be made under CPR 23. Appendix 1 to this practice note is a model form of approval order based on waiver.

11. Where the criteria set by Practice Direction 46 at paragraph 2.1 are not met but the child or protected party's representatives seek payment only of a CFA success fee or the balance payable under a DBA (and summary assessment is not precluded by CPR 21.12(1A)), application to the SCCO may be made under CPR 23 for a summary assessment under CPR 46.4(5). Appendix 2 to this practice note is a model form of summary assessment order.

12. Applications for orders that the court "approves" or "certifies" the payment of costs by a child or protected party to their legal representatives are unlikely to be appropriate. If the legal representatives wish to dispense with detailed assessment on one or more of the grounds set out in paragraph 2.1 of Practice Direction 47 (other than waiver of any further claim to costs) they should make an application specifying the grounds relied on. The application must be supported by evidence.

13. Otherwise a request for a detailed assessment hearing must be filed in form N258 and a hearing fee paid by reference to Schedule 1, paragraph 5.2 of the Civil Proceedings Fees Order 2008.

14. It will not normally be necessary for the paying party to attend the detailed assessment hearing, because the receiving party's costs will usually be assessed at the agreed amount. The court's concern will be to assess the additional costs and disbursements claimed against the child or protected party.

15. Accordingly, on filing form N258, the legal representative should notify the court that costs have been agreed with the paying party and that the purpose of the hearing will be to assess the costs and/or disbursements sought by the child or protected party's legal representatives, and should provide a time estimate suitable for such a hearing. Appendix 3 to this practice note is a model form of directions for the hearing.

16. The assessing judge is likely to take as a starting point that the hearing has been arranged for the benefit of the legal representatives and that it is not incumbent upon the child or protected party to bear the attendant costs.

17. For that reason, unless the child or protected party's litigation friend or Court of Protection deputy takes issue with the costs sought by the legal representatives and participates in the detailed assessment of those costs, the court is likely to make no order as to the costs of the detailed assessment process beyond any figure agreed with the paying party.

18. Appendix 4 to this practice note is a model form of order following detailed assessment and authorising a further payment to the child or protected party's legal representatives.

PRACTICE GUIDANCE: GENERAL GUIDANCE ON ELECTRONIC COURT BUNDLES. On 29 November 2021 the Senior Presiding Judge, President of the Family Division and Judge-in-charge of Live Services issued new and updated guidance on the use of electronic court bundles. The new guidance replaces that which was issued in May 2020. The links in the guidance are as follows:

- QEB's guidance on bundles: *https://www.youtube.com/watch?v=Ij2Q-2sq5iI&list=PLPs6vztSaE0gtpFB62vq6tGT6flcRdRof&index=4* [Accessed 7 January 2022]; and
- St Philips Chambers' guidance on bundles: *https://st-philips.com/creating-and-using-electronic-hearing-bundles/* [Accessed 7 January 2022].

A copy of the Practice Guidance is reprinted here:

GENERAL GUIDANCE ON ELECTRONIC COURT BUNDLES

This general guidance is intended to ensure a level of consistency in the provision of electronic bundles ("e-bundles") for court hearings (but not tribunal hearings) in a format that promotes the efficient preparation for, and management of, a hearing.

It is subject to any specific guidance by particular courts or directions given for individual cases. It updates and replaces previous guidance published in May 2020.

1. *E-bundles must be provided in pdf format.*
2. *All pages in an e-bundle must be numbered by computer-generated numbering, not by hand. The numbering should start at page 1 for the first page of the bundle (whether or not that is part of an index) and the numbering must follow sequentially to the last page of the bundle, so that the pagination matches the pdf numbering. If a hard copy of the bundle is produced, the pagination must match the e-bundle.*
3. *Each entry in the index must be hyperlinked to the indexed document. All significant documents and all sections in bundles must be bookmarked for ease of navigation, with a short description as the bookmark. The bookmark should contain the page number of the document.*
4. *All pages in an e-bundle that contain typed text must be subject to OCR (optical character recognition) if they have not been created directly as electronic text documents. This makes it easier to search for text, to highlight parts of a page, and to copy text from the bundle.*
5. *Any page that has been created in landscape orientation should appear in that orientation so that it can be read from left to right. No page should appear upside down.*
6. *The default view for all pages should be 100%.*
7. *If a core bundle is required, then a PDF core bundle should be produced complying with the same requirements as a paper bundle.*
8. *Thought should be given to the number of bundles required. It is usually better to have a single hearing e-bundle and (where appropriate) a separate single authorities e-bundle (compiled in accordance with these requirements), rather than multiple bundles (and follow any applicable court specific guidance – see eg CPR PD52C Section VII (external link, opens in a new tab)).*
9. *The resolution of the bundle should not be greater than 300 dpi, in order to avoid slow scrolling or rendering. The bundle should be electronically optimised so as to ensure that the file size is not larger than necessary.*
10. *If a bundle is to be added to after it has been transmitted to the judge, then new pages should be added at the end of the bundle (and paginated accordingly). An enquiry should be made of the court as to the best way of providing the additional material. Subject to any different direction, the judge should be provided with both (a) the new section and, separately, (b) the revised bundle. This is because the judge may have already marked up the original bundle.*

Delivering e-bundles

Filename: *The filename for a bundle must contain the case reference and a short version of the name of the case and an indication of the content of the bundle – eg "CO12342021 Carpenters v Adventurers Hearing Bundle" or "CO12342021 Carpenters v Adventurers Authorities Bundle".*

Email: *If the bundle is to be sent by email, please ensure the file size is not too large. For justice.gov e-mail addresses the maximum size of email and attachments is 36Mb in aggregate. Anything larger will be rejected. The subject line of the email should contain the case number, short form case name, hearing date and name of judge (if known).*

Uploading bundles: *Bundles should be sent to the court in accordance with the court's directions. Where the bundle would otherwise be sent by email (rather than being uploaded to a portal) but is too large to be sent under cover of a single email then it may be be sent to the Document Upload Centre by prior arrangement with the court – for instructions see the Professional Users Guide (opens in a new tab).*

Unrepresented litigants

Ordinarily the applicant is responsible for preparing the court bundles. If the applicant is unrepresented then the bundles must still if at all possible, comply with the above requirements. If it is not possible for an unrepresented litigant to comply with the requirements then a brief explanation of the reasons for this should be provided to the court as far in advance of the hearing as possible. Where possible the litigant in person should suggest a practical way of overcoming the problem. If the other party is represented then that party should consider offering to prepare the bundle.

Other internet guidance

There is guidance available freely available on the internet on how to use software to create bundles. See, for example, this YouTube video (external link, opens in a new tab), prepared by QEB, and this video (external link, opens in a new tab) prepared by St Philips Chambers.

In Detail

WITNESS STATEMENT GUIDANCE

Practice Direction 57AC was introduced in January 2021 and applies to witness statements for trial after 6 April 2021. The product of work by the Witness Evidence Working Party, it was intended to improve the quality of witness statements and – importantly – reduce their cost. While explicitly limited to witness statements for trial used in the Business and Property Courts, it provides helpful guidance on best practice for preparing witness statements for use more generally. Since the Practice Direction came into operation it has been the subject of, as yet, limited judicial consideration. In early 2021, Sir Michael Burton in ***MAD Atelier International BV v Manes*** [2021] EWHC 1899 (Comm) concluded that it had not changed the law as it concerned admissibility of evidence. Towards the end of 2021, however, further guidance was given in ***Mansion Place Ltd v Fox Industrial Services Ltd*** [2021] EWHC 2747 (TCC) and ***Blue Manchester Ltd v Bug-Alu Technic GmbH*** [2021] EWHC 3095 (TCC).

Mansion Place Ltd v Fox Industrial Services Ltd [2021] EWHC 2747 (TCC)

In ***Mansion Place***, O'Farrell J summarised the background to and nature of the new Practice Direction and affirmed Sir Michael Burton's statement that the Practice Direction was not intended to change the law on admissibility (at [27]–[37]). On the contrary, its purpose was to *"eradicate the improper use of witness statements as vehicles for narrative, commentary and argument"*. As she went on to point out:

> *"[37] ... The Practice Direction explains that the purpose of trial witness statements is to further the overriding objective by helping the court to deal with cases justly, efficiently and at proportionate cost, including by helping to put parties on an equal footing, saving time at trial and promoting settlement in advance of trial. The Statement of Best Practice sets out the rules that should be followed to produce compliant statements."*

See further PD 57AC para.2.2. Given the importance of the Statement of Best Practice, contained in the Appendix to the Practice Direction, parties and their lawyers were *"urged to read"* the PD and the Statement (at [38]); in ***Mansion House*** one of the parties' lawyers was unaware that the PD had come into force (at [12]). That was in July 2021, some six months after the PD was introduced and three months after it came into force. There can be little excuse now for lack of awareness of the PD and its application; not least after this decision and that in ***Blue Manchester***. Moreover, O'Farrell J stressed the importance of using the Statement of Best Practice as a basis on which to ensure compliance. As she put it:

> *"[38] Anyone involved in producing a witness statement for a trial in the BPC is urged to read PD 57AC and follow the Statement of Best Practice. It should be used as a checklist by parties and their legal representatives to ensure that they do not unwittingly offend against the rules that restrict the use of trial witness statements for their proper purpose, that is, providing in writing the evidence that the witness would give as oral evidence in chief. The stipulation that witnesses must confirm their understanding and compliance with the rules in their statements, and specification of the form of certificate of compliance to be completed by the parties' legal representatives, serve an important function in demonstrating compliance with the restated practice, supported by the court's power to impose sanctions in the event of failure."*

While the court retains the full range of its sanctions, the Practice Direction particularly highlights that non-compliance may result in the court refusing or withdrawing permission to rely on, or strike out, a witness statement or part of it. It may, further, require the witness statement to be redrafted in compliance with the Practice Direction, make an adverse costs order against the non-compliant party or require a witness to give some or all of their evidence-in-chief orally. It may also strike out a witness statement that is not endorsed with a certificate of compliance; that being, as noted, a key feature of the new regime's approach to securing compliance with its requirements. See further PD 57AC para.5.

If the courts are to promote effective compliance with the new Practice Direction, consistently with CPR r.1.1(2)(f), no doubt they will take a robust approach to use of these sanction powers. As HH Judge Stephen Davies in ***Blue Manchester*** went on to explain, it was clear from O'Farrell J's judgment that:

> *"whilst the court will be astute to strike out offending parts of a trial witness statement it will not do so where that is not reasonably necessary":* ***Blue Manchester*** at [11].

Moreover, as he also put it:

> *"[10] ... it is to be hoped that as PD57AC becomes more familiar to practitioners and as the principles become clearer such heavily contested, time-consuming and expensive applications become the exception rather than the norm. Parties in Business and Property Court [BPC] cases who indulge in unnecessary trench warfare in such cases can expect to be criticised and penalised in costs."*

The test for relief from sanctions is, as expected, that set out in ***Mitchell*** and ***Denton***. Where witness statements are struck out for non-compliance and relief from sanction is not granted, it was noted that, amongst other things, that adverse consequence, and any injustice that might flow to them from it, was one that the parties had brought upon themselves: ***Blue Manchester*** at [50]. Turning specifically to that case.

Blue Manchester Ltd v Bug-Alu Technic GmbH [2021] EWHC 3095 (TCC)

In ***Blue Manchester***, HH Judge Stephen Davies noted O'Farrell J's guidance from ***Mansion Place***. He went on to provide further, and detailed, guidance on a number of aspects of the new Practice Direction, as well as CPR Pt 32 and its Practice Direction. O'Farrell J had, herself, also noted the general guidance concerning the approach to take to witness statements generally under Pt 32 provided by Sir Terence Etherton C in ***JD Wetherspoon Plc v Harris*** [2013] EWHC 1088 (Ch) at [38]–[41], as noted in ***Mansion House*** at [25]. As an overarching point, HH Judge Stephen Davies made clear that compliance with PD 57AC's requirements ought not be onerous and that the court should take a realistic approach to compliance: at [33].

First, he noted that it was necessary for witness statements to be written in the first person. It was, and is difficult, to justify any witness statement or any part of it being written in anything other than the first person: at [25]. Furthermore, witness statements must be written in the witness's own words. As such it is difficult to justify, i.e. is improper, for multiple witness statements for multiple, different witnesses to be drafted in identical language; a point underscored by the requirement they are to be written in the first person. That a lawyer can properly take lead responsibility for preparing witness statements cannot justify the use of identical language across witnesses' statements. As the judge put it:

> *"[25] ... In my judgment, the fact that a legal representative is permitted to take primary responsibility for drafting a witness statement does not justify departing from the clear requirement that the witness statement should, where practicable, be in the witness's own words assuming compliance with the detailed requirements of PD57AC pars. 3.9 to 3.13 in relation to the taking of witness statements for represented parties."*

Moreover, when a witness statement is written in, for instance, the third person it can tend to obscure the basis on which the witness is giving evidence. Writing the statement in that way can obscure which aspects of the statement are from the witness's own knowledge, which elements are based on third-party comment or otherwise. As was submitted in the present case:

> *"[27] [It was submitted that the witness statement was] all written in the third person and does not state whether it is from Mr Green's [the witness's] own knowledge or from information or belief, so that it is not possible to know whether each separate assertion is Mr Green's own evidence, based on his own knowledge, or comment put into his mouth by*

others. He complained that, even assuming it is from personal knowledge, it is unclear whether Mr Green is giving this evidence from his own unaided recollection or from having been referred to the contemporaneous documents and, if so, which. He complained for example that the reference to the 'intention from the outset' does not enable anyone to know whose intention is being referred to and, if not Mr Green's, whose and what basis Mr Green has for saying so. [Counsel] complained that he, or any other trial advocate, would have to waste valuable time in preparation for and in actual cross-examination in having to ascertain from Mr Green whether or not each assertion in this paragraph was or was not a statement of fact made from his own personal knowledge and, if so, the basis for the recollection."

As HH Judge Stephen Davies concluded in the light of this:

"[29] In my judgment this is a good example of the problems which arise when a witness statement is not prepared with the requirements of PD32.18 and PD57AC clearly in mind. I am prepared to accept that it is possible to make an educated guess that if Mr Green was asked about this paragraph he would say that is made from some combination of his own general recollection of events (albeit probably imperfect, since they go back almost 20 years now) and his having been referred to SHA's contemporaneous project documents, in particular no doubt the design team meetings and tender packages referred to in this paragraph. However, if PD32.18 and PD57AC are followed conscientiously, it ought not to be necessary for anyone reading this part of this witness statement to have to make an educated guess. I should say that, as will become clear, this is not an isolated paragraph; Mr Green's witness statement is replete with similar sections."

The clear message from PD 57AC was to ensure that witness statements were written in the first person and should ensure that they make clear the basis on which the witness sets out their evidence. Writing in the first person assists here. But the statement should ensure that it properly identifies which parts are based on the witness's general recollection and which are based on contemporaneous documents. Although, as the judge emphasised, that latter requirement did not require each paragraph of a witness statement to contain an introductory remark specifying whether what it said was based on the witnesses' knowledge, information available to them, or belief: see PD 32 paras 18.1 and 18.2 and PD 57AC. As he put it:

"[30] Complying with these requirements [PD 32 para 18 and PD 57AC] does not, ... mean that every section of every witness statement must contain a separate introduction, confirming whether it is made from personal knowledge or based on information or belief and, if so, stating the source, as well as stating whether it is made by reference to unaided recollection (and, if so, how good is the recollection) or by being referred to documents and, if so, identifying each one and when and how it was referred to."

Moving specifically to the requirements of PD 57AC, the judge next considered the requirement in its para.3.2, to:

"identify by list what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement."

It was clear that para.3.2 of PD 57AC required a list of documents to be contained within the witness statement; also see para.3.5 of the Statement of Best Practice. A composite list, i.e. one that listed all documents referred to in multiple witness statements, was generally impermissible although the judge accepted that exceptions to the rule could, exceptionally, be permitted. Any list of documents must be set out in the witness statement itself or in a document referred to in the witness statement that accompanies it: at [32].

Finally, the judge turned to the statement of compliance required to be signed by the witness: PD 57AC para.4.1. First, the fact that the witness had signed the statement was not determinative of the question whether there had been actual compliance with the terms of the Practice Direction. A

"witness cannot mark his own homework ... [not] least where it is obvious from the product of the homework that there is a real doubt whether or not the student has even properly attempted to answer the question asked".

Where a reasonable reader would be in real doubt as to what the witness was saying – an unacceptable aim or outcome under PD 57AC – the benefit of the doubt ought not to be given to the witness and reliance, thus, ought not to be given to the fact that the compliance statement had been signed: at [34]. As he went on to say:

"[35] ... if the witness statement had complied with PD32 and PD57AC as regards the statement about the intention from the outset, then it would have been easy to see at a glance whether this was based on personal knowledge or was pure comment, as well as whether the remainder of the paragraph was anything more than simply a retrospective narrative of and recital from documents."

In terms of the substantive content of witness statements, they should only contain reference to documents where they are *"relevant and the reference is necessary"*: at [37]. Lawyers had to be:

> "*prised away from the comfort blanket of feeling the necessity of having a witness confirm a thread of correspondence, because otherwise it might in some way disappear into the ether or be ruled inadmissible at trial*": at [38].

Old style "*narrative recital of and extracts from a series of meeting notes and correspondence*", for instance, was no longer a permissible approach.

Finally, the judge considered the approach to compliance with para.3.7 of the Statement of Practice, which requires that:

> "*On important disputed matters of fact, a trial witness statement should, if practicable –*
>
> *(1) state in the witness's own words how well they recall the matters addressed,*
>
> *(2) state whether, and if so how and when, the witness's recollection in relation to those matters has been refreshed by reference to documents, identifying those documents.*"

As the judge explained:

> "*[40] As to compliance with SBP par. 3.7, I accept that the obligation to state how well the witness recalls the matters addressed and providing details of documents used to refresh memory is only in relation to important disputed matters of fact and is qualified by the words 'if practicable'. However, in my view a witness cannot glibly assert that it is not practicable to comply so as to justify wholesale departure from this important requirement. If there is apparent non-compliance the witness would have to justify why it is not practicable to do so. Ms Ansell suggested that it would be impracticable when a witness has also been asked to assist at earlier stages, for example in replying to a pre-action letter of claim or in drafting the defence. For myself, I do not see why a witness who is asked for such assistance by legal representatives and who is provided with, or refers to, documents for such purpose should be unable, at the point of producing the trial witness statement, to comply regardless of whether they had also previously been provided with or referred to those documents.*
>
> *[41] Nor do I accept that a witness can rely on her own subjective view of what is important to avoid compliance. I also accept that the witness confirmation of compliance states that 'on points that I understand to be important in the case, I have stated honestly (a) how well I recall matters and (b) whether my memory has been refreshed by considering documents, if so how and when' (emphasis added). However, I am unable to accept the argument that compliance with this requirement means that it is solely for the witness herself to decide whether or not a point is important. It is understandable that a witness can and should only be asked to certify compliance in relation to points which she thinks important. However, that does not mean that the court cannot intervene where it is plain that in fact there has not been compliance in relation to a point which is, on any objective analysis, important. I am prepared to accept that the court should not be too ready to assume that a point is important if it appears, from an overall reading of the witness statement, that the witness has made a conscientious effort to comply. However, if there has been a failure to comply in relation to a number of obviously important disputed issues then it is difficult to see why the court should give the witness the benefit of the doubt more widely.*
>
> *[42] Finally, I do not accept that there is some principle that a witness against whom allegations are made, whether directly or indirectly, and whether in a professional negligence claim or otherwise, is thereby given carte blanche to disregard PD32 or PD57AC by replying to the allegations in a way which includes argument, comment, opinion and/or extensive reference to or quotation from documents. As Mr Darling observed, a trial witness statement is but one part of the material deployed by the party and available to the court at trial. The defence to the allegations will be pleaded. The allegations will be responded to in opening and closing submissions. Such submissions will also pick up the relevant material from the relevant documents which address such allegations. In heavy cases there may be some provision permitting the party, at some suitable time, to serve an additional chronological narrative derived from the documents and trial witness statements, suitably cross-referenced to both, so that the judge can see how the party puts its case at trial. There may also be expert evidence in response to such allegations. In any event, there is no justification for the trial witness statements to respond to the allegations other than in compliance with PD32 and PD57AC.*"

Undoubtedly further guidance on the correct approach to PD 57AC will be given during the course of 2022. It is to be hoped that detailed consideration of the guidance so far given will help to embed an understanding of the approach it requires and that, as a consequence, the use of witness statements will cease to generate disproportionate costs.

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