CIVIL PROCEDURE NEWS

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In Brief

Cases

Prime London Holdings 11 Ltd v Thurloe Lodge Ltd [2022] EWHC 79 (Ch), 18 January 2022, unrep. (Nicholas Thompsell sitting as a deputy Judge of the High Court)

Witness statement – non-compliance with Practice Direction requirements

CPR PD 57AC. Proceedings were brought under the Access to Neighbouring Land Act 1992. The claimant applied for an order declaring that the defendant's witness statement, prepared for trial, be declared inadmissible. The basis of the application was that the witness statement was alleged to have to comply with the requirements of PD 57AC. The defendant applied for relief from sanctions and to be able to rely upon a revised witness statement. **Held**, the witness statement was in breach of PD 57AC. It failed to comply with the formalities required by the Practice Direction. It did not include the confirmation, required by para.4.1, that, for instance, the statement is in the witness's own words. It also failed to include a Certificate of Compliance. In addition, it also breached para.3 of the Practice Direction, i.e. it had not been prepared in accordance with the Statement of Best Practice annexed to the Practice Direction. The approach to non-compliance had recently been considered in ***Mansion Place Ltd v Fox Industrial Services Ltd*** (2021) and ***Blue Manchester Ltd v BUG-Alu Technic GmbH*** (2021) (noted in ***Civil Procedure News*** No.1 of 2022). Considering the guidance in those cases, it was apparent that there was fault on both sides. The defendant ought to have ensured the witness statement was properly compliant with the terms of the PD. The claimant ought to have taken proper steps to identify the problems with the witness statement at an earlier stage than was done. The claimant also ought to have detailed the alleged defects with the witness statement, so as to agree a revised witness statement. As it was, the parties had put the court to considerable time (which it could have been noted was contrary to the overriding objective) (at [31]–[39]). In the premises, the approach in the two previous decisions would be applied. The claimant's application would be refused; striking out was, as clear in the two previous decisions, a matter for serious cases. Rather the court ordered that the original witness statement be replaced by the defendant's revised witness statement, which would be subject to further revision directed by the court. ***Mansion Place Ltd v Fox Industrial Services Ltd*** [2021] EWHC 2747 (TCC); 199 Con. L.R. 124, ***Blue Manchester Ltd v BUG-Alu Technic GmbH*** [2021] EWHC 3095 (TCC), 199 Con. L.R. 140, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.57ACPD.1.)

Helene v Bailey [2022] EWFC 5, 4 February 2022, unrep. (Peel J)

Committal proceedings – reliance on earlier judgment

CPR Pt 81. Committal applications were brought by the application against three respondents. The applications arose from family proceedings. The first respondent submitted that a previous judgment that arose in the proceedings was inadmissible in the contempt proceedings. The basis of the inadmissibility was said to be the rule in ***Hollington v F Hewthorn & Co Ltd*** (1943), i.e. that a judgment obtained in proceedings against specific parties cannot be relied upon as evidence in further proceedings against a stranger to the prior proceedings or in separate and distinct proceedings. **Held**, in the present case the judgment to be relied upon was not sought to be relied upon to a stranger to the prior proceedings, nor was it brought in separate or distinct proceedings. The prior judgment was thus admissible. In giving judgment Peel J reviewed and summarised the application of the rule to committal proceedings as follows:

> *"[17] In my judgment, the submission on behalf of H that the judgment in the financial remedy proceedings is not admissible in the subsequent committal proceedings before me is not well founded:*
>
> > *i) It is, it has to be said, a startling notion that the very judgment which gives rise to the order from which springs a committal application cannot be admitted in evidence. How else is a court to make sense of the order which has been made?*
> >
> > *ii) Logically, on H's case, no judgment in a final hearing conducted according to the civil standard of proof can ever be referred to within subsequent committal proceedings. Thus, in a family context, a judge hearing a contempt application would not be permitted to take account of, or refer to, or in any way rely upon, findings made at a substantive trial of financial remedy, or public law, or private law proceedings, or indeed any other part of the family jurisdiction. Further, H's submission that 'findings of fact by earlier tribunals are inadmissible in subsequent civil proceedings because they constitute opinion evidence' means that it would never be open to the court to be referred to the prior judgment upon a subsequent enforcement application of whatever nature. Moreover, following the logic through, a substantive judgment including findings as to, for example, periodical payments, could not be before the court upon a variation application under s31 of the Matrimonial Causes Act 1973 (as amended). All of this seems to me to be extremely doubtful.*

iii) Counsel for H were not able to point me to a single authority where a substantive judgment was ruled inadmissible in a subsequent committal application made in respect of the order springing from that very same judgment, whether in family proceedings or elsewhere in the civil jurisdiction. My personal experience (and I believe reflected in published judgments on committal in the Family Court or Family Division) is entirely to the contrary. The closest they came was brief obiter dicta by Sir James Munby P (who appears to have received no submissions by counsel on the point) in Re L (A child) [2016] EWCA Civ 173 where he said at paragraph 68:

> *'I referred in paragraph 50 above, to what McFarlane LJ had said in Re K about the circumstances in which a judge who had conducted the kind of hearing which took place in the present case before Keehan J on 8 October 2015 ought not to conduct subsequent committal proceedings. That issue, which was at the heart of the appeal in Re K, is not one which, in the event, arose for determination here, so I say no more about it. The point to which I draw attention, is simply this. Quite apart from the Comet principle, which, as we have seen, would prevent the use in subsequent committal proceedings of the evidence given by someone in Mr Oddin's position at a hearing such as that which took place on 8 October 2015, it is possible that the rule in Hollington v F Hewthorn and Company Limited and another [1943] KB 587[15] might in certain circumstances prevent the use in subsequent proceedings of any findings made by the judge at the first hearing. That is a complicated matter which may require careful examination on some future occasion; so, beyond identifying the point, I say no more about it'*

I do not read those short sentences as authority for the proposition advanced on behalf of H.

iv) The rule can be encapsulated in one sentence. Goddard LJ said at 596-597 of Hollington v Hewthorn that 'A judgment obtained by A against B ought not to be evidence against C'. It concerns different parties to different proceedings. As HHJ Matthews said in Crypto (supra) it concerns admissibility 'between different parties'. And Phipson (supra) describes the rule as applicable to issues between strangers, or between a party and a stranger.

v) So far as I can tell, and consistent with these propositions, the rule in Hollington v Hewthorn has been applied to exclude previous judgments only in cases of separate, distinct proceedings and/or involving different parties. Even then, as both Hoyle v Rogers and JSC BTA Bank v Ablyazov demonstrate, the earlier decision may be admitted (or, perhaps more accurately, not excluded) if fairness so requires. The decision in Hollington v Hewthorn itself prevented a criminal conviction for careless driving being admitted in civil proceedings brought by those injured in the collision. These were two, separate sets of proceedings, with different parties since.

vi) By contrast, the committal applications before me are part of the same set of proceedings, namely enforcement referable to the financial remedy claims, and they are between the same parties.

vii) I conclude that Hollington v Hewthorn is not authority for the proposition that the judgment in earlier proceedings between the same parties cannot be admitted in evidence for the purpose of a contempt application arising out of the earlier judgment, and order made thereon.

viii) The foundation of the rule is the fairness of the subsequent trial.

ix) Evidence presented in the earlier proceedings, and the contents of the judgment from the earlier proceedings, are, in my judgment, admissible in subsequent committal proceedings flowing from the earlier proceedings, and between the same parties.

x) The weight to be attached to the earlier proceedings, and judgment, will be a matter for the judge conducting the committal proceedings.

xi) None of the above derogates from long established principle that the applicant must prove the alleged contempt of court to the criminal standard."

Hollington v F Hewthorn & Co Ltd [1943] K.B. 587, CA, ***Rogers v Hoyle*** [2014] EWCA Civ 257; [2015] Q.B. 265, ***Crypto Open Patent Alliance v Wright*** [2021] EWHC 3440 (Ch), unrep., ***Re L (A Child)*** [2016] EWCA Civ 173; [2016] Fam. Law 668, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.81.4.3.)

- **Provimi France SAS v Stour Bay Co Ltd** [2022] EWHC 218 (Comm), 4 February 2022, unrep. (David Edwards QC sitting as a deputy judge of the High Court)

Disclosure – explanation of duty to retain documents

CPR PD 51U, Pt 31. The claimant issued proceedings in 2019 against the defendant in respect of the sale of allegedly defective animal feed. The defendant complained that there was a *"substantial lacunae"* in the claimant's disclosure. Documents that had been held on Outlook, which pre-dated 2016, had all been deleted in line with an applicable document retention policy. Deletion had taken place notwithstanding the obligation under PD 51U para.3, which requires a person:

> *"who knows that it is or may become party to proceedings to take reasonable steps to preserve documents within its control, imposing an obligation on legal representatives to take reasonable steps to advise a party to comply with its Disclosure Duties."*

Practice Direction 51U applied to the proceedings. It appeared that the failure to retain the documents arose from a misunderstanding, or failure to understand advice given by the claimant's English law firm, on the part of an in-house lawyer for the claimants, who was *"apparently unfamiliar with the procedure in common law jurisdictions"* (at [32]). That this was the case underscored the importance of ensuring that the nature of disclosure obligations under the CPR were properly explained to parties who were unfamiliar with the approach to disclosure in England and Wales. As the deputy judge put it:

> *"[33] ... Insofar as there was a misunderstanding, it serves to emphasise the importance of solicitors dealing with clients unfamiliar with English disclosure rules explaining the position fully. It may well be that an instruction simply to retain relevant documents, without explaining or ensuring that the client understands exactly what 'relevant' means, is not enough."*

(See ***Civil Procedure 2021*** Vol.1 at para.51UPD.3.)

- **Leave.EU Group Ltd v Information Commissioner** [2022] EWCA Civ 109, 8 February 2022, unrep. (Vos MR, Lewison and Asplin LJJ)

Court of Appeal – power to dismiss appeal upon non-attendance of party

CPR r.52.20, inherent jurisdiction. The appellant, a corporate body, did not attend the hearing of its appeal from a decision of the Upper Tribunal. The issue before the Court of Appeal was whether, in such circumstances, it should – as submitted by Counsel for the Respondent – either dismiss the appeal for non-prosecution or proceed to hear it on the basis of the appellant's written skeleton argument. The Respondent was neutral as to the options. The Court of Appeal noted that it had all the powers of the Upper Tribunal, and hence had its powers to proceed with a hearing where a party fails to attend: CPR r.52.20(1), Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) (UTR) r.38. It further had power on the same basis to strike out proceedings on the basis of the appellant's failure to co-operate with the court so that it could deal with the proceedings fairly and justly: UTR r.8(3)(b), which was noted to be analogous to CPR r.23.11. Furthermore, there was support for the proposition that while the Court of Appeal had no express jurisdiction to hear an appeal in the absence of a party, it had an inherent jurisdiction to do so: see ***Civil Procedure 2021*** Vol.1, para.52.21.6. **Held**, the Court of Appeal was satisfied that the appellant was aware of the hearing that it had not attended. It was neither just nor appropriate for the court to hear the appeal in the appellant's absence. The appeal was thus dismissed. In reaching its decision, the Court of Appeal (Vos MR giving the reasoned judgment, with which Lewison and Asplin LJJ agreed) held that the Court of Appeal had both the powers of the Upper Tribunal on the appeal from it and had the inherent jurisdiction to hear or dismiss an appeal when an appellant fails to appear at the appeal hearing. As Vos MR explained in respect of the court's inherent jurisdiction:

> *"[18] ... It would make the operation of the Court of Appeal impossible if no such jurisdiction existed, and the Court must be in control of its own procedures in order to give effect to the overriding objective of enabling the court to deal with cases justly and at proportionate cost (CPR Part 1.1) ..."*

It was not appropriate in the present case to hear the appeal in the appellant's absence. The issue on the appeal was an important one on an issue that rarely reached the Court of Appeal, which might justify proceeding on the basis of the appellant's written submissions. However, that that was the case called on the Court of Appeal to ensure that it only dealt with the issue after full, reasoned, adversarial argument. That latter point was all the more important to take note of as both the First-tier Tribunal and Upper Tribunal had agreed with the respondent's decision, which gave rise to the appeal. The Court of Appeal also concluded that an adjournment would not be justified. No application for an adjournment had been made. The court needed to ensure that it considered the needs of all other court users (e.g. CPR r.1.2(e)). There needed to be finality to litigation. The court could not adopt an approach that permitted parties to *"simply fail to show up for a hearing and then submit, after the event"* that they should have been allowed an adjournment, not least where that party could have instructed lawyers (at [19]–[21]). ***Connelly v DPP*** [1964] A.C. 1254, HL, ***Adeogba v General Medical Council*** [2016] EWCA Civ 162; [2016] 1 W.L.R. 3867, ***General Medical Council v Theodoropolous*** [2017] EWHC 1984 (Admin); [2017] 1 W.L.R. 4794, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.52.21.6.)

- **Mohammad v Churchill Insurance Co Ltd** [2022] 2 WLUK 182 (CC), 10 February 2022, unrep. (HH Judge Hassall)

Small claim – right to elect – note of judgment

CPR r.27.9. The claimant pursued a claim for damages for vehicle hire, recovery and storage following a road traffic accident. The claim proceeded on the small claims track. The claimant elected to have the claim determined in their

absence under CPR r.27.9. The parties had not agreed that the claim be determined entirely on the papers. As a consequence, only the defendant was represented at the small claims hearing. The claim was dismissed by a deputy District Judge. The claimant appealed from the dismissal. The appeal was heard in the County Court. The basis of the appeal was that the deputy District Judge failed to prepare a note of his reasons for dismissing the claim and send it to both parties under CPR r.27.9 and PD 27A para.5.4. **Held**, appeal dismissed. In dismissing the appeal HH Judge Hassall noted that there appeared to be no reported decision on the nature and extent of the duty to give reasons under CPR r.27.9. HH Judge Hassall ultimately concluded as follows:

"[100] For the reasons given, in my judgment:

a) The right of a party to elect not to attend the final hearing of a small claim pursuant to CPR 27.9 is absolute.

b) The court has no power to review or set aside a party's 27.9 election, whether on application or of its own initiative.

c) At the final hearing the court must give reasons for its decision, pursuant to CPR 27.8(6) and natural justice.

d) The obligation on the judge to provide a written note of the reasons for a decision taken at a hearing following a 27.9 election is absolute, pursuant to PD 27A, para 5.4.

e) An oral judgment cannot serve as a substitute for a written note of reasons.

f) The judge may not dismiss or strike out the claim due to disapproval of a party's 27.9 election, nor provide reasons for dismissal which amount to saying that the case is of a category unsuitable for a 27.9 election. Because suitability is not a matter for the court to rule upon, discussion of it cannot constitute reasons.

g) Although some 27.9 elections will put a party at a disadvantage, the disadvantage (if any, which will be case-specific) should be relative, eg, disadvantage in addressing or responding to evidential or legal points, or in convincing the court of a contested fact upon which there is competing evidence from the other party. The disadvantage should not lie in whether one's case is considered at all. A party who does not receive reasons for the court's decision cannot know whether their case was considered at all.

h) Reasons, whether given in an oral judgment or a written note, must meet the essential minimum requirements of natural justice. In the context of a small claim, applying PD 27A para 5.3 and CPR 1.1(2)(c)(i)–(iii), as a matter of law the judge must:

i) identify the issues requiring decision, ie, those that are both pleaded and relevant;

ii) determine the incidence of the burden of proof on each factual issue;

iii) decide each issue expressly, with reference (if factual) to whether the party bearing the burden of proof has discharged it to the civil standard;

iv) provide reasons for the court's decision on each issue, making the minimum brief and simple references to the evidence and law that the nature of the case allows.

i) The above is not a prescribed mechanical sequence, nor will otherwise good reasons be vulnerable to challenge merely because they omit to recite something obvious.

j) In many small claims the court's reasons may be very short and yet still meet the essential requirements, which are of scope not wordcount.

k) Where the only evidence in a small claim comes from a 27.9 claimant, either the claim will succeed or:

i) if the judge finds that the content of the witness evidence relied upon by the claimant would be sufficient, if accepted, to prove the claim, then dismissal of the claim will require written reasons that explain why that evidence has not been accepted, ie, why its accuracy has been found to be less than probable; alternatively

ii) if the judge finds the content of the claimant's witness evidence to be insufficient, on its face, to prove the claim, then the written reasons should identify the evidential or legal flaws."

Flannery v Halifax Estate Agencies Ltd [1999] EWCA Civ 811; [2000] 1 W.L.R. 377 ref'd to. (***See Civil Procedure 2021*** Vol.1 at para.27.9.1.)

■ **Rawet v Daimler AG** [2022] EWHC 235 (QB), 10 February 2022, unrep. (Dingemans LJ and Picken J)

Addition of claimant prior to service of claim

CPR rr.17.1 and 19.4. A question arose whether two individuals could be added as claimants to proceedings prior to service. Mann J had previously held, in ***Various Claimants v G4S Plc*** (2021) that CPR r.17.1 did not permit a claimant to

be added to proceedings by way of an amendment to a claim form in the period between issue and service of a claim and that, in respect of CPR r.19.4(4), its requirement that the party to be added consent in writing and that consent be filed with court was not satisfied by that additional party's solicitor signing a statement of truth on an amended claim form. The claimants in the present case invited the High Court to conclude that ***Various Claimants*** was wrongly decided on both points. **Held**, the two individuals were properly added as claimants. ***Various Claimants*** was wrongly decided. The starting point was that CPR r.17.1 applied to pre-service addition of parties to a claim and r.19.4 applied to post-service addition. The two rules provided a *"complete regime for adding parties"*, albeit r.17.1 differed from r.19.4 as – at that stage – the defendant had not yet been served (at [36]–[37]). It was difficult to see a justification for adopting a more restrictive approach to the addition of parties under CPR r.17.1, pre-service, than was applicable under r.19.4, post-service (at [38]). While CPR r.19.4 explicitly permitted the removal, addition or substitution of a claimant, r.17.1(1) did not do so: it simply stated that a party may amend their statement of case. There was nothing to suggest that CPR r.17.1(1) did not, however, permit the addition of a claimant. On the contrary, there was nothing that suggested, *"in principle"*, that a claimant could not be added under that rule (at [39]–[40]). As Picken J put it:

> *"[41] I respectfully, therefore, disagree with Mann J in G4S that there is the restriction in this respect which he suggested. Indeed, as I see it, the fact that CPR 17.1(3) itself specifically refers to amending a statement of case by 'removing, adding or substituting a party' in accordance with CPR 19.4 (at the post-service stage) reinforces the view that CPR 17.1(1) ought not to be read in so restrictive a fashion."*

Picken J did not go on to decide whether CPR r.17.1 permitted a person who was not a party to amend a claim form under that rule, as was permitted under CPR r.19.4 (at [42]–[43]). He did not need to do so. The present case involved group litigation. The solicitors for the additional, new, claimants were also the solicitors for existing claimants. As such, the court could proceed on the basis that the amendment sought was one made, *"at least in part"*, by existing claimants and thus was clearly within the scope of CPR r.17.1 (at [43]). Furthermore and contrary to the approach adopted in ***Various Claimants***, CPR r.17.1 permits the amendment of a statement of case, which is not to be interpreted as meaning their claim or claims set out in their statement of case (claim form) (at [44]–[45]): statement of claim is not to be conflated with the concept of a claim for relief. The approach taken in ***Various Claimants***, as it would entail claimants in group proceedings to issue separate proceedings each time additional claimants were to be added, was also inconsistent with the overriding objective (at [48]). In respect of CPR r.19.4, it was clear that it did not apply to amendments to which CPR r.17.1 applied (at [50]). Consequently, CPR r.19.4's procedural requirements concerning written consent did not apply to an amendment under CPR r.17.1. There was no basis to import the former's provisions into the latter provision. Nor was it apparent why the greater formality that was applicable to CPR r.19.4, which was justified due to it governing post-service amendments, should apply to amendments made pre-service not least because CPR r.17.2 already provided a basis to disallow pre-service amendments. Further support for the distinction between the two rules came from CPR PD 19, which also made provision for the need for written consent to post-service amendments, and the fact that there was no analogue to PD 19 for CPR r.17.1 (at [51]–[57]). While Picken J did not need to rule on the point, in *obiter*, he did agree with the approach taken in ***Various Claimants*** on one issue. As he put it:

> *"[57] ... I agree with what Mann J had to say in G4S at [114], namely that CPR 19.4(4) and Practice Direction 19A require that a separate document be filed for the purpose of expressing consent. That document must, furthermore, be filed before the addition which takes effect through the amendment which is sought be effected. The amending document itself (here, the claim form) cannot achieve that function. It follows that I agree with Mann J that a solicitor signing a claim form cannot count as a consent under CPR 19.4(4). Nonetheless, given our conclusion in relation to the non-applicability of CPR 19.4(4) to the pre-service stage, in this case the absence of separate written consent is immaterial."*

Dingemans LJ gave a concurring judgment. ***Various Claimants v G4S Plc*** [2021] EWHC 524 (Ch); [2021] 4 W.L.R. 46, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.17.1.1.)

■ **Rea v Rea** [2022] EWCA Civ 195, 21 February 2022, unrep. (Lewison, Newey and Snowden LJJ)

Fair trial – extent of judicial assistance to litigant-in-person

CPR r.3.1A. Proceedings were issued concerning a contested will. The trial of the action took place before a deputy Master. The defendants were unrepresented at trial, while the claimant was represented. The claim succeeded. The defendants appealed from that decision. They did so on the basis that the trial was unfair. The basis of the alleged unfairness was that the deputy Master had improperly curtailed their ability to cross-examine the claimant. The appeal was dismissed. A second appeal to the Court of Appeal was allowed. **Held**, the deputy Master had, due to a genuine mistake, restricted the defendants' cross-examination. The mistake was that he thought that the questions to be put in cross-examination had already been put by the defendants, when in fact they had been put to the claimant during examination-in-chief by her counsel. In reaching its decision the Court of Appeal gave guidance on the approach to be taken by a judge when approaching the evidentiary process during a trial, particularly when one of the parties is

a litigant-in-person. The court stressed that there was a clear difference between questions asked during examination-in-chief and cross-examination. That a judge concluded that a litigant-in-person would not carry out an effective cross-examination was unlikely to justify restricting the right to cross-examine. As Lewison LJ put it:

> *"[60] I have very real doubts that the prejudice of denying a litigant the fundamental opportunity to cross-examine his opponent's witness can be minimised or disregarded simply because the judge (or an appellate court) forms the view that such opportunity would not have been well-used because the litigant was not represented by, or had not shown himself to be, a good cross-examiner."*

More broadly, it was stressed that civil litigation in England and Wales is adversarial and not inquisitorial. A judge could assist a litigant-in-person to put their case to a witness in cross-examination, but that did not mean it was permissible for a judge to carry out that cross-examination. Questioning that a judge could properly put, due to its similarity to that put in examination-in-chief, was not a proper substitute for cross-examination, or the opportunity to cross-examine, by a party (at [63]–[67]). While CPR r.3.1A enabled a judge to put questions to a witness, it did not permit the judge to cross-examine or acted as a *"quasi-advocate"* for a litigant-in-person. The Equal Treatment Benchbook was not to be taken as suggesting otherwise. Any assistance provided by a judge had to be within the limit imposed by the requirement that they be impartial:

> *"[76] This rule clearly authorises a judge to put questions to a witness, but this is plainly not the only option, and there is no suggestion that a judge should do so on a free-range basis, acting as a quasi-advocate for the LIP. The structure of CPR 3.1A(5) envisages that the judge might ask questions of a witness, but after having ascertained from the LIP what evidence the LIP is endeavouring to elicit from the witness or what point he is seeking to make. It is also open to the judge to cause appropriate questions to be put to the witness, for example by asking the advocate for the represented party to do so, rather than the judge descending into the fray and doing so himself.*
>
> *[77] The caution inherent in CPR 3.1A(5) is also reflected in the authorities. In Drysdale v Department of Transport [2014] EWCA Civ 1083 at paragraph 49, Barling J observed that the appropriate level of assistance that a court or tribunal can give to a LIP must be constrained by the overriding requirement that the court must be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided. The particular difficulties for a judge of maintaining such neutrality and distance whilst asking questions were also commented upon by Asplin LJ in Global Corporate Limited v Hale [2018] EWCA Civ 2618 at paragraph 27, ...*
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> *[78] Against that background, it seems to me that the directly relevant paragraphs of the ETBB in relation to the assistance that a judge can give to a LIP in relation to cross-examination are paragraphs 68–72 which appear under the heading 'Advocacy', ...*
>
> *[79] Those paragraphs envisage that a judge might assist a LIP by, for example, reformulating the LIP's questions once the judge has understood the point they are trying to make. But they do not remotely suggest that a judge in a civil case should adopt an inquisitorial role or conduct a cross-examination of a witness in place of the LIP doing so.*
>
> *[80] Nor do I consider that this is what paragraph 65 of the ETBB envisages ...*
>
> *[81] As I read paragraph 65, the suggestion in the last sub-paragraph to which the Judge referred [**Adopting to the extent necessary an inquisitorial role to enable the LIP fully to present their case, (though not in such a way as to appear to give the litigant in person an undue advantage**)] is actually offered as one of the ways in which a judge might avoid a perception on the part of the LIP that the judge is not paying sufficient attention to the LIP's case, 'especially if the other side is represented and the judge asks the advocate on the other side to summarise the issues between the parties.' In that context, the suggestion that the judge might adopt an inquisitorial role can be understood as a suggestion that the judge might actively question the LIP during the openings at the start of the trial, as a means of teasing out what the LIP's case really is. But this has nothing to do with the judge acting as an inquisitor of witnesses during the subsequent evidential phase of a trial.*
>
> *[82] That point is reinforced by considering other areas of the law in which it might be necessary for a judge to adopt an inquisitorial role at the evidential stage of proceedings. Such areas include, for example, cases in the family courts where parties are often unrepresented, and where there are serious and sensitive issues to be addressed at fact- finding hearings, sometimes requiring the examination of vulnerable witnesses. The difficulties inherent in the judge taking an active role in such cases were discussed by Dyson MR in Re K and another (Children) [2015] 1 WLR 3801 and by Hayden J in S v P (unrepresented party: cross-examination) [2018] EWHC 1987 (Fam) [2018] 4 WLR 119. The cases show that it is possible for a judge to adopt the role of questioner during an evidential hearing, but where that is necessary there are detailed procedures to be followed. These may, for example, require the LIP to submit in advance and in writing the questions that he wishes to see asked, and the holding of a separate 'ground rules hearing' (GRH) at which the judge considers the suitability of those questions, if necessary conferring with the LIP to establish the key points that they wish to see explored with the witness.*

[83] The contrast between the brief wording of paragraph 65 of the ETBB and the complexities of such procedures for the protection of all concerned simply underlines that paragraph 65 is most unlikely to be encouraging judges to adopt an inquisitorial role at the evidential phase of ordinary civil trials." (Text in bold inserted.)

Michel v The Queen [2009] UKPC 41; [2010] 1 W.L.R. 879, ***Drysdale v Department of Transport (Maritime and Coastguard Agency)*** [2014] EWCA Civ 1083; [2014] C.P. Rep. 43, ***Re K (Children) (Unrepresented Father: Cross-Examination of Child)*** [2015] EWCA Civ 543; [2015] 1 W.L.R. 3801, ***S v P (Unrepresented Party: Cross-examination)*** [2018] EWHC 1987 (Fam); [2018] 4 W.L.R. 119, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.3.1A.1.)

Practice Updates

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 141st Update. This Practice Direction Update came into force on **1 March 2022**. As from that date it omits Practice Direction 51S – The Online County Court Pilot Scheme. It has, functionally, been overtaken by PD 51ZB – The Damages Claims Pilot Scheme. A saving and transitional provision maintains the Practice Direction for those claims that commenced under the pilot scheme prior to the date of its omission, e.g. on or before 28 February 2022.

PRACTICE GUIDANCE

CHANCERY GUIDE. On 7 February 2022, an updated edition of the Chancery Guide was issued. The revisions update judges and clerks' contact details (Ch.2); guidance concerning filing draft orders for Masters (Ch.22) and the introduction of contact details for Chancery Business outside London (Ch.30). The updated Guide is available here: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051246/ChanceryGuide_updated_28_January_2022__002_.pdf* [Accessed 7 March 2022].

QUEEN'S BENCH MASTERS LISTING AND ACTION DEPARTMENT INFORMATION FOR COURT USERS. On 14 February 2022, revised Queen's Bench Masters Listing and Action Department Information was issued. The revised guidance provides, for instance, that hearings of more than an hour in duration will, as a general rule, be in-person. Parties may request such a hearing to be a remote hearing. The approach to dealing with possession claims has been updated. The guidance further sets out the approach taken by the Queen's Bench Division to the use of electronic signatures on documents under PD 5A para.2.1. It ought to be expected that the civil courts, as a whole, should take a consistent approach to this issue and, hence, ought properly to follow this practice. The full guidance is available here: *https://www.judiciary.uk/wp-content/uploads/2022/02/QB-Masters-Action-Department-guidance-14-Feb-22-.pdf* [Accessed 7 March 2022].

PRACTICE NEWS

JUDICIAL ASSISTANTS IN THE COURT OF APPEAL. The Court of Appeal has recently issued its annual advert seeking applications for the position of Judicial Assistants to the Court of Appeal. Further information is available here: *https://www.judiciary.uk/announcements/judicial-assistants-in-the-court-of-appeal-civil-division/* [Accessed 7 March 2022].

In Detail

DRAFT JUDGMENTS GUIDANCE

(1) Introduction

It is a common practice for judges in the High Court and Court of Appeal to circulate a draft judgment to parties' legal advisers before it is finalised and formally handed down (see ***Civil Procedure 2021*** Vol.1 para.40.2.1.2). Such a draft will be provided in confidence, further to the provisions of Practice Direction 40E – Reserved Judgments. Paragraph 2.4 of that Practice Direction specifies the following in respect of such drafts:

"A copy of the draft judgment may be supplied, in confidence, to the parties provided that—

(a) neither the draft judgment nor its substance is disclosed to any other person or used in the public domain; and

(b) no action is taken (other than internally) in response to the draft judgment, before the judgment is handed down."

Paragraph 2.7 of the Practice Direction further provides that where either the parties or their legal advisers are in doubt as to whom copies of the draft judgment may be given, they should seek the guidance of the judge or, in the case of the Court of Appeal, the presiding judge in the constitution that had heard the appeal. Breach of the requirements set out in para.2.4 may amount to a contempt of court and be treated accordingly: see para.2.8 of the Practice Direction.

In ***Crown Prosecution Service v P (No.2)*** [2007] EWHC 1144 (Admin); [2008] 1 W.L.R. 1024, Smith LJ and Gross J (at [3]–[9]) provided guidance on the correct interpretation and application of the restrictions imposed on circulation of draft judgments by para.2.7 of the Practice Direction. In particular, Smith LJ (with whom Gross J agreed), emphasised that until 2005 only parties' legal advisers were provided with copies of draft judgments. No further disclosure was permissible. The rationale for this was that the legal advisers could assist the court by considering if the draft contained any typographical errors or *"minor errors of fact"*, and – rarely – to provide a basis for further submissions on the substance of the claim. That restriction was relaxed, to a limited degree, in 2005 so that – as provided for in para.2.7 of the Practice Direction – the parties' legal advisers could provide a copy of the draft judgment to the party instructing them. This change was effected to enable legal advisers, and only those legal advisers *"directly involved in the case"* or individual lawyers supervising them, to seek instructions from the party instructing them

> *"on consequential matters such as whether to seek permission to appeal and also to enable the parties to reach agreement on costs and the form of the order."*

Disclosure to other persons was thus impermissible.

(2) *R. (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy*

In ***R. (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy*** [2022] EWCA Civ 181, the Court of Appeal considered a breach of the restrictions, imposed by para.2.4 of the Practice Direction, on disclosure of a draft judgment. The substantive claim concerned an application by the Counsel General for Wales, who sought permission to bring judicial review proceedings in respect of provisions of the United Kingdom Internal Markets Act 2020 (see ***R. (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy*** [2022] EWCA Civ 118). The draft judgment had been provided to Counsels' clerks. It was sent on *"usual terms"*, which specified, as Vos MR noted that at [2]:

> *"This draft is confidential to the parties and to their legal representatives. Neither the draft nor its substance may be disclosed to any other person or made public in any way. The parties must take all reasonable steps to ensure that it is kept confidential. No action is to be taken (other than internally) in response to the draft before judgment has been handed down in court. A breach of any of these obligations may be treated as a contempt of court."*

In addition to that statement, which was set out in the email to Counsels' clerks, the draft judgment also contained express reference to the application of Practice Direction 40E. The court was subsequently informed that, inadvertently by way of an administrative oversight, a press release prepared by the Chambers of some of the Counsel instructed had been posted online, albeit it was taken down shortly thereafter when the error was noticed (at [4] and [14]). While the draft judgment was not posted online, the press release did state the court's decision, i.e. the outcome of the appeal.

Counsel quite properly and promptly apologised to the court for this error. Having sought further details and held a further hearing in respect of the disclosure, the Court of Appeal reviewed the approach to be taken by legal advisers to draft judgments. It did so not only as a consequence of the present accidental disclosure but, as Vos MR put it at [21], because he had:

> *" ... become aware formally and informally of other breaches in other cases. It seems, anecdotally at least, that violations of the embargo on publicising either the content or the substance of draft judgments are becoming more frequent."*

Significantly, he did so because – in the light of this judgment – legal advisers and parties to whom draft judgments had been provided ought to expect to be subject to proceedings for contempt of court in respect of any future breaches of the restrictions imposed by para.2.7 of the Practice Direction. As Vos MR put it at [21]:

> *" ... The purpose of this judgment is not to castigate those whose inadvertent oversights gave rise to the breaches in this case, but to send a clear message to all those who receive embargoed judgments in advance of hand-down that the embargo must be respected.* ***In future, those who break embargoes can expect to find themselves the subject of contempt proceedings as paragraph 2.8 of CPR PD40E envisages.****"* (Emphasis in bold added.)

(3) Guidance

Vos MR first noted at [17] that there were only two judgments (that it was aware of) where breach of the restriction on disclosure had been in issue. The first, ***Baigent v Random House Group Ltd*** [2006] EWHC 1131 (Ch), was handed down shortly after Practice Direction 40E was introduced but before the Administrative Court's judgment in ***Crown Prosecution***

Service v P (No.2) (2007) (which was not referred to by the Court of Appeal). In that case Peter Smith J stressed that future breaches of the restriction might result in *"quite severe consequences"*; a point that Vos MR, as noted above, has now made more than clear. The second case was ***HM Attorney General v Crosland*** [2021] UKSC 58. In that case the UK Supreme Court, noting that the purpose of providing drafts subject to restrictions in similar terms to that used to justify the provision of draft judgments of the High Court and Court of Appeal, concluded that the restriction on disclosure of draft judgments, which it had imposed in that case, were necessary and proportionate for the purposes of art.10 of the European Convention on Human Rights. Such restrictions were necessary to maintain the authority of the judiciary and judicial decisions. They were, furthermore, a proportionate means of so doing. As Vos MR put it at [19], the UK Supreme Court's:

> *" ... comments apply as much to that case as to this one, and to draft judgments handed down in the Court of Appeal under CPR PD40E as to the equivalent process in the Supreme Court."*

Having noted this, Vos MR, while accepting that mistakes will happen, provided the following guidance on the approach to be taken in future. He did so with the warning that were it to be the case that the requirements of the Practice Direction were not to be strictly complied with in future, *"far stricter measures"* may need to be put in place (at [20]).

First, the provision of draft judgments to legal advisers and parties was for a limited purpose only. It is for the correction of errors in the judgment, to enable parties to make submissions and agree consequential orders. It is also to enable parties to prepare for publication of the judgment. It was not provided for any other purpose and was not to enable the parties to disseminate the judgment or its substance: ***R. (Counsel General for Wales)*** at [24]. While Vos MR did not refer to it, it can also properly be said that it is not provided to enable parties to attempt to reargue the substantive issues: see Lord Hoffmann in ***R. (Edwards) v Environment Agency (No.2)*** [2008] UKHL 22; [2008] 1 W.L.R. 1587 at [66].

Secondly, Counsel's clerks are only provided with a copy of the draft judgment in order for it to be passed on to Counsel. Counsel's clerk can also, properly, transmit to the court any corrections, submissions or draft orders on behalf of Counsel to the judge's clerk. No one else in Chambers, or analogously in a solicitor's firm, should be provided with *"a summary of [the draft judgment's] contents"*. (***R. (Counsel General for Wales)*** at [25].)

Thirdly, draft judgments are not to be used by legal advisers to draft press releases for publicity purposes. That is not a legitimate activity. However, a party to proceedings may do so, as they may have to prepare themselves for publication of the judgment. Legal advisers may assist their client in the preparation of their client's press releases. (***R. (Counsel General for Wales)*** at [26].)

Fourthly, access to a draft judgment should be limited. It should be provided to *"one named clerk"*, who is to act as the link between the court and Counsel. Access is not to be provided to other members of a chambers' *"administrative machine"* without good reason. The good reason must be connected to the legitimate purposes for which the draft judgment is provided. (***R. (Counsel General for Wales)*** at [27].)

Fifthly, security measures taken by legal advisers to protect the confidentiality of draft judgments must be effective. And moreover:

> *" ... Counsel and solicitors are personally responsible to the court for ensuring that these mandatory requirements [i.e. the ones in para.2.4 of Practice Direction 40E] are adhered to. It is their duty to explain those same obligations on the parties to their clients."* (***R. (Counsel General for Wales)*** at [28].)

(4) Summary of Guidance

As Vos MR summarised the guidance at [31], in a useful checklist for Counsel and solicitors:

> *" ... (i) it is not appropriate for persons in the clerks' rooms or offices of Chambers to see the draft judgment or to be given a summary of its contents, (ii) drafting press releases to publicise Chambers is not a legitimate activity to undertake within the embargo, (iii) it should be sufficient for one named clerk to provide the link between the court and the barrister or barristers, (iv) proper precautions and double-checks need to be in place in barristers' Chambers and solicitors offices to ensure that errors come to attention before the embargo is breached, and (v) in future, those who break embargoes can expect to find themselves the subject of contempt proceedings as envisaged in paragraph 2.8 of CPR PD40E."*

It is readily apparent from both the tenor of Vos MR's judgment, with which both Nicola Davies and Dingemans LJJ agreed, that individual Counsel and solicitors will need to ensure that they, and their chambers and offices, have in place, and operate, sufficiently robust processes to comply with this guidance.

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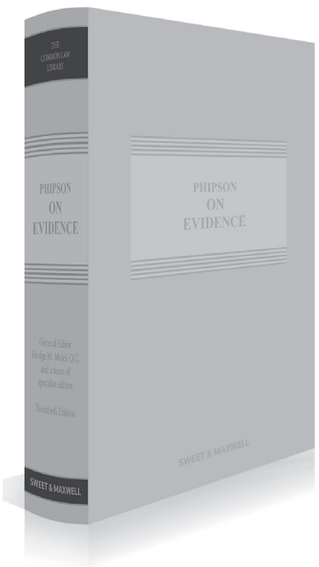

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