CIVIL PROCEDURE NEWS

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■ **Business Mortgage Finance 4 Plc v Hussain** [2022] EWHC 449 (Ch), 2 March 2022, unrep. (Miles J)

Contempt of court – power to waive procedural defects and dispense with display of penal notice

CPR r.81.4(2)(e). In dealing with proceedings for contempt of court, Miles J set out a helpful summary of the principles governing such matters (at [37]–[42]). Having done so the judge then went on to consider whether CPR Pt 81 provided a basis on which the requirement, in CPR r.81.4(2)(e), that an application notice set out confirmation that the alleged contemnor had allegedly breached or disobeyed an order containing a penal notice, could be waived. He concluded that, implicitly, it did.

> *"[49] There is no express power in CPR 81 to dispense with the requirements set out in CPR 81.4(2)(e). I am nevertheless satisfied that the court has such a power for the following reasons:*
>
> > *i) There was such a power under the old Part 81 and PD81: see, e.g., Gill v Darroch [2010] EWHC 2347, where the test was whether the defect had caused any injustice to the alleged contemnor, with the onus of persuasion being on the claimant.*
> >
> > *ii) The editors of the White Book at para 81.4.4 consider that there is a power to waive defects concerning penal notices and they refer to the test set out in the earlier case law (as set out above).*
> >
> > *iii) It would be contrary to the overriding objective if an otherwise compliant committal application could be defeated by a technical procedural defect which could be shown to have caused no injustice to the defendant. The court has a general power under CPR 3.1(2)(m) to take any step or make any order for the purpose of managing the case and furthering the overriding objective. I consider that the court can exercise this power where there is no injustice to the defendant to waive a defective penal notice and thereby further the overriding objective.*
> >
> > *iv) The claimants also relied on CPR 3.10, which provides the court with a general power to remedy errors of procedure. Ideal Shopping Direct Ltd v Mastercard Incorporated [2022] EWCA Civ 14 shows that this rule cannot be used as a default power where there is more specific provision of the CPR covering the relevant procedural issue. That restriction on the scope of CPR 3.10 does not bite here as there is no relevant express specific provision. I accept the claimants' submission that this power can also be exercised to remedy errors concerning penal notices where there is no injustice to the defendant.*
> >
> > *v) The court has an inherent jurisdiction to make appropriate gap-filling orders where necessary to further the due and fair administration of justice and I consider that, if needed, this power would also allow the court to waive defects in procedure under CPR 81, including concerning penal notices. If the power cannot be found elsewhere in the CPR to my mind the court must have this residual jurisdiction. It cannot be the case that committal applications which are otherwise fairly and properly brought should be stymied by technical procedural defects or slips.*
> >
> > *vi) CPR 81 was intended to simplify and clarify the procedures for contempt applications. There is nothing in it to suggest it was intended to remove the power of the court to ensure that contempt proceedings are conducted fairly and justly in accordance with the overriding objective (including by allowing the court to waive or correct technical defects). CPR 81.1(2) states that '[t]his Part does not alter the scope and extent of the jurisdiction of courts determining contempt proceedings, whether inherent, statutory or at common law.' I agree with the obiter views of Cockerill J in Deutsche Bank AG v Sebastian Holdings Inc [2020] EWHC 3536 (Comm), at [148] that the omission of an express power to waive defects should not be read as abolishing the existing powers of the court."*

Miles J then went on to hold that CPR Pt 81 continued, despite the fact it did not repeat r.81(1) or (2) of the pre-2020 Pt 81 nor did it repeat PD 81 para.16.2, express power to dispense with personal service of the order that was alleged to have been breached. He did so for the following reasons:

> *"[57] I am nevertheless satisfied that the court has a power to dispense with personal service of the order if there is no injustice to the defendant;*
>
> > *i) CPR 81.4(2)(c) and (d) presuppose that the Court has the power to dispense with personal service. There is therefore a dispensing power.*
> >
> > *ii) On a strictly literal reading these rules might be thought to require that an order dispensing with service must*

have been made before the committal application is issued as there must be a statement of 'the terms and date of the court's order dispensing with personal service': CPR 81.4(2)(d)).

iii) However the CPR are to be read purposively: CPR 1.2 provides that the court must seek to give effect to the overriding objective when it interprets a rule. I do not think that the overriding objective would be promoted by reading rules 81.4(2)(c) and (d) as restricting the power to dispense with personal service to cases where this occurs before the application is issued. Sensible case management may dictate that it is best to decide whether to dispense with service at the hearing of the committal application itself: the defendant's knowledge of the order is relevant both to the substantive application for committal and to dispensing with personal service. There are examples of this happening in the cases decided under the old Part 81: see e.g. Masri and Khawaja. It may also be necessary in some cases to issue a committal application urgently so that there would be no opportunity to make a prior application to dispense with service.

iv) I therefore consider that on its proper interpretation CPR 81 contains an express power to dispense with personal service and that there is no warrant for reading it as applying only to cases where the application for dispensation is made before the issue of the committal application itself.

v) Moreover, for reasons already given above, I do not think that in framing the new simplified CPR 81 the Civil Rules Committee intended to abolish the useful powers of the Courts to waive or dispense with procedural defects in committal applications. Again I agree with the obiter comments of Cockerill J in Deutsche Bank AG v Sebastian Holdings Inc at [148].

vi) I also consider that the court has a power under CPR 3.1(2)(m) or the gap-filling inherent jurisdiction of the court to dispense with personal service in an appropriate case for the reasons already given.

vii) I record that the claimants did not seek to rely on CPR 3.10 in this context as they submitted that the power to dispense with service is specifically covered expressly by CPR 81 (as explained above) and therefore the general dispensing power in CPR 3.10 is not available. In light of my conclusion that the court has the necessary power elsewhere I shall say nothing more about this possibility.

[58] The test under the previous rules was whether injustice has been caused to the defendant by the applicant's failure to effect personal service (and not for instance whether the circumstances are exceptional): see e.g. Khawaja at [40]. I consider that the court should continue to apply that test, which accords with the overriding objective. I shall return to the exercise of the power after I have reached a conclusion about Mr Hussain's awareness of the Injunction."

Gill v Darroch [2010] EWHC 2347 (Ch), unrep., ***Gulf Azov Shipping Co Ltd v Idisi*** [2001] EWCA Civ 21, unrep., ***Masri v Consolidated Contractors International Co SAL*** [2011] EWHC 1024 (Comm), unrep., ***JSC BTA Bank v Ablyazov (No.8)*** [2012] EWCA Civ 1411; [2013] 1 W.L.R. 1331, ***Deutsche Bank AG v Sebastian Holdings Inc*** [2020] EWHC 3536 (Comm), unrep., ***Kea Investments Ltd v Watson*** [2020] EWHC 2599 (Ch), unrep., ***Navigator Equities Ltd v Deripaska*** [2021] EWCA Civ 1799; Times, 7 February 2021, ***Ideal Shopping Direct Ltd v Mastercard Inc*** [2022] EWCA Civ 14; [2022] 1 W.L.R. 1541, ref'd to. (See ***Civil Procedure 2022*** Vol.1 at paras 35.4.2, 35.12.2.)

■ **Andrews v Kronospan Ltd** [2022] EWHC 479 (QB), 7 March 2022, unrep. (Senior Master Fontaine)

Revocation of permission to rely upon expert evidence

CPR rr.35.4 and 35.12, PD 35 para.9. The defendant applied to revoke permission granted to the claimants to rely on expert evidence from an expert in dust analysis and monitoring in group litigation. Parties' experts had been engaged in the process to prepare a joint statement (CPR r.35.12). It became apparent that the claimants' expert had been in contact with the claimants' solicitors during that process and that the latter had provided comment to their expert only, rather than to him and the defendant's expert. The claimants acknowledged that:

"[12] ...

i) it was inappropriate for the Claimants' solicitors to have provided comment solely to [their expert], and that [their expert] should not have responded to those comments;

ii) it is wrong for an expert to solicit input from their instructing solicitors during the process of drawing up a joint statement, just as it is wrong for those solicitors to provide that input;

iii) there was a serious transgression of the rules by the Claimants, by reference to the terminology in the case of BDW Trading Ltd v Integral Geotechnique (Wales) Ltd [2018] EWHC 1915(TCC);

iv) the court has power to revoke permission to rely on an expert."

In the light of those points, the issue was what was the appropriate consequence. The claimants submitted that it would be disproportionate to revoke permission to adduce evidence from their expert. The defendant submitted that revocation, while a drastic consequence, was justified as the expert had, by his conduct, demonstrated that he was not an independent expert (at [13]–[14]). **Held**, permission to rely on the expert was revoked. There had been continuous contact between the expert and solicitors, including the "*soliciting and provision of comments on the various progressive drafts of the joint statement, and provision of information on the joint discussions*" and, "*at least 16 comments relating to 'advice and suggestions as to content' in respect of the joint discussions/draft joint statement*" (at [24]–[26]). The material before the court led to the strong suggestion that the expert viewed himself to be an advocate for the claimants (at [31]). The court could not be confident that the expert would act consistently with the duties imposed on expert witnesses in the light of his serious and the claimants' solicitors' serious transgressions of those duties. As the Senior Master concluded:

> *"[34] ... The basis upon which the Claimants received permission to rely upon Dr Gibson as an expert witness, namely his duties under CPR 35.3, 35PD paras. 2.1 and 2.2, has been undermined. Accordingly I consider that it is appropriate, and not disproportionate, to revoke the Claimants' permission to rely on his evidence. I consider that it must follow that permission to rely on Dr Gibson as a dust modelling expert is also revoked. The fact that this is group litigation does not dissuade me from that course. It is important that the integrity of the expert discussion process is preserved so that the court, and the public, can have confidence that the court's decisions are made on the basis of objective expert evidence. This is particularly important where, as here, the expert evidence is of a very technical nature so that the court is heavily reliant on the expert evidence being untainted by subjective considerations."*

BDW Trading Ltd v Integral Geotechnique (Wales) Ltd (2018) noted to be of general application (at [21]). ***BDW Trading Ltd v Integral Geotechnique (Wales) Ltd*** [2018] EWHC 1915 (TCC); [2019] T.C.L.R. 1, ***Dana UK Axle Ltd v Freudenberg FST GmbH*** [2021] EWHC 1413 (TCC); [2021] B.L.R. 500, ref'd to. (See ***Civil Procedure 2022*** Vol.1 at paras 35.4.2, 35.12.2.)

■ **Farrar v Miller** [2022] EWCA Civ 295, 11 March 2022, unrep. (Simler, Arnold, Phillips LJJ)

Assignment of cause of action – damages-based agreement – champerty

Solicitors Act 1974 s.59; Courts and Legal Services Act 1990 ss.58, 58AA. The Court of Appeal considered the question whether a solicitors' firm could take a valid assignment of their client's cause of action in circumstances where they had been acting for them further to a damages-based agreement (DBA). Three propositions were noted as being well-established: first, that a bare cause of action may only be validly assigned where *"the assignee has a genuine commercial interest in enforcing the claim"* (at [22]); secondly, that a solicitor *"who has the conduct of litigation may not take an assignment of their client's cause of action prior to judgment"* (at [23]–[27]). That rule was recognised by s.59 of the Solicitors Act 1974; thirdly, the rule against champerty continues to apply to agreements to remunerate solicitors on a conditional fee basis except where that is permitted by legislation (at [29]–[38]). **Held**, the Court of Appeal declined to develop the law to permit an assignment in such circumstances. Arnold LJ (with whom Simler and Phillips LJJ agreed) did so on the following basis:

> *"[51] The first is that this Court is bound by its previous decision in Pittman v Prudential that a solicitor acting for a client in legal proceedings may not validly take an assignment of the client's cause of action prior to judgment. The second is that this Court is bound by its previous decisions in Awwad v Gerachty and Rees v Gately Wareing, reinforced by the powerful obiter dicta in Factortame and Sibthorpe v Southwark, that a champertous agreement not sanctioned by the 1990 Act remains contrary to public policy and is therefore unenforceable.*
>
> *[52] When confronted with the problem of precedent during the course of argument, counsel for CANDEY's response was to argue that this Court was not bound by its own precedents in circumstances where statute demonstrated that the underlying public policy had changed. He was unable to cite any authority in support of this submission, however. In any event, Awwad v Gerachty and Rees v Gateley are recent decisions of this Court which establish that there has been no relevant change in public policy. Even if it was open to this Court to depart from the previous authorities, I would not do so. I consider the reasoning in those cases and in Factortame and Sibthorpe v Southwark to be entirely convincing. Section 58(1) of the 1990 Act is explicit that conditional fee agreements that do not comply with all the relevant conditions are unenforceable. The same is true of section 58AA(2) of the 1990 Act and damages-based agreements. It is no answer to this point that the Assignment is neither a conditional fee agreement nor a damages-based agreement: what section 58(1) and section 58AA(2) show is that Parliament, being well aware of the common law rules, decided to go so far towards relaxing them as sections 58 and 58AA provide and no further."*

Pittman v Prudential Deposit Bank Ltd (1896) 13 T.L.R. 110, CA, ***Trendtex Trading Corp v Credit Suisse*** [1982] A.C. 679, HL, ***Awwad v Geraghty & Co*** [1999] EWCA Civ 3036; [2001] Q.B. 570, ***Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (Costs) (No.2)*** [2002] EWCA Civ 932; [2003] Q.B. 381, ***Sibthorpe v Southwark LBC*** [2011] EWCA Civ 25; [2011] 1 W.L.R. 2111, ***Rees v Gateley Wareing (A Firm)*** [2014] EWCA Civ 1351; [2015] 1 W.L.R. 2179, ref'd to. (See ***Civil Procedure 2022*** Vol.2 at paras 7A-3 to 7A-7.)

■ **Bott & Co Solicitors Ltd v Ryanair DAC** [2022] UKSC 8, 16 March 2022, unrep. (Lord Briggs, Lady Arden, Lords Leggatt and Burrows, Lady Rose)

Solicitor's equitable lien for costs

The Supreme Court considered the basis on which a solicitor could recoup costs of litigation from their client through an equitable lien. Such a lien in:

> *"[1] ... its traditional form, ... entitles a solicitor who assists a client to recover money (or other property) through litigation to recoup the costs of doing so out of the money recovered. Any proceeds of a judgment or settlement will normally be paid to the solicitor's firm, which can then deduct its costs before accounting to the client for the balance. But if the opposing party pays the money directly to the solicitor's client despite knowing or being on notice of the solicitor's interest in the debt, and the client then fails to pay the solicitor's costs, the court may order the opposing party to pay those costs to the solicitor – in addition to the payment already made to the solicitor's client."*

The majority (Lord Leggatt and Lady Rose dissenting) accepted that it was no longer necessary for litigation to have commenced for an equitable lien to arise. That was a consequence of the Supreme Court's previous decision in ***Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd*** (2018), which had implicitly rejected the approach taken by the Court of Appeal in ***Meguerditchian v Lightbound*** (1917) (at [78]–[84]). The approach set out in ***Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd*** (2018), which set out a *"a clear, principled and easy-to-apply test that does not turn on whether there was a dispute"*, (at [77]) was followed. Promoting access to justice lay at the heart of the approach in that case. As Lord Burrows explained:

> *"[87] ... In Gavin Edmondson, Lord Briggs said, at para 1, that the motivation for recognising a solicitor's equitable lien was promoting access to justice. He went on:*
>
> > *'Specifically it enables solicitors to offer litigation services on credit to clients who, although they have a meritorious case, lack the financial resources to pay up front for its pursuit.'*
>
> *The interpretation of Gavin Edmondson that I am adopting can readily be seen to promote access to justice in the sense being talked about by Lord Briggs. The vindication of a client's legal rights, through the making of claims, is more likely to be effective if solicitors know that they have the security of a lien to recover their costs. Moreover, on the particular facts of this case, there is a reasonable argument that access to justice has been promoted in the sense that the solicitors have been acting in a way that has enhanced the general prospects of consumers obtaining the flight compensation to which they are entitled from Ryanair (albeit by paying the solicitors' costs as agreed)."*

The test applicable to determine whether a solicitor's equitable lien arose was, in the light of this, as follows:

> *"[88] ... assuming that the solicitor is acting for a potential claimant rather than a potential defendant, the appropriate test for a solicitor's equitable lien is whether a solicitor provides services (within the scope of the retainer with its client) in relation to the making of a client's claim (with or without legal proceedings) which significantly contribute to the successful recovery of a fund by the client. That seems to me to be the best interpretation of what Gavin Edmondson laid down. It is a clear and simple test to apply. Solicitors (and potential defendants) will know exactly where they stand. Although, given the context, further elaboration of the test seems unnecessary, one might add, lest there be any doubt, that by 'claim' one is referring to a claim asserting a legal entitlement or, as one can also describe it, a legal claim."*

Lord Burrows further noted the following concern arising from situations where solicitors charge fees in circumstances where an individual could make a claim for compensation without incurring legal fees, e.g. through a fee-free online portal. As he put it:

> *"[98] There is a further linked concern as to whether it is acceptable for solicitors to charge fees in a context where a person could very easily make a claim and recover compensation without incurring any legal fees. Clearly it is important that people are not misled by solicitors and, in certain situations, it may be strongly argued that any reputable solicitor would first advise a prospective client that he or she should utilise an online claims procedure without incurring any legal costs. In so far as it is thought that a system of online compensation is being abused by solicitors to charge unnecessary fees, this would be a matter for the Solicitors' Regulation Authority to investigate. In relation to an equitable lien, there is a well-established equitable doctrine that could be invoked to prevent any abuse, namely that the solicitor asserting the lien would need 'to come to equity with clean hands' (see, generally, Graham Virgo, The Principles of Equity and Trusts , 4th ed (2020), p 32). But although Mr Kennelly put forward, as a fall-back submission, that, in the exercise of the court's general equitable discretion, the equitable lien for Bott should be refused, it has not been suggested before us or in the courts below that the conduct of Bott was such that it was barred by the 'clean hands' doctrine from asserting an equitable lien. In any event, we do not have the factual basis on which we could now consider applying such a bar and I do not think it would be appropriate to remit the proceedings back on an issue that was not specifically argued."*

In the present case a solicitors' firm provided services relating to claims for compensation for airline delay under EU Reg.261/2004. The airline had also provided a fee-free online compensation process. Claims referred to the airline through that scheme via that online process, if accepted, resulted in compensation being paid directly to the solicitors' clients. Applying ***Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd*** (2018):

> *"[86] ... Assuming that the solicitor is acting for a potential claimant rather than a potential defendant, the best interpretation of Gavin Edmondson is that, for there to be an equitable lien, the solicitor must provide services (within the scope of the retainer with its client) in relation to the making of a client's claim (with or without legal proceedings) which significantly contribute to the successful recovery of a fund by the client. The equitable lien secures, by a charge over that fund, the solicitor's costs. The making of a claim by a client, with or without legal proceedings, is the essence of the services provided by 'litigation and dispute resolution' solicitors (acting for claimants). In this case, the solicitors have provided such services in relation to the making of claims for compensation for flight cancellations and delays payable under Regulation (EC) No 261/2004 ('Regulation 261'). Provided their services have significantly contributed to the successful recovery of compensation, they are, in my view, entitled to an equitable lien over that compensation. Although I have had some doubts whether, on these facts, one can say that their contribution has been sufficiently significant (and I return to consider this point further at para 97 below), I am ultimately satisfied that that requirement is met not least because, as I have said, the threshold is a low one ..."*

Meguerditchian v Lightbound [1917] 2 K.B. 298, CA, ***Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd*** [2018] UKSC 21; [2018] 1 W.L.R. 2052, ref'd to. (See ***Civil Procedure 2022*** Vol.1 at para.C13A-010.)

■ **R. (Duke of Sussex) v Secretary of State for the Home Department** [2022] EWHC 682 (Admin), 24 March 2022, unrep. (Swift J)

Irrelevant evidence – publication

CPR r.32.1. The claimant issued proceedings challenging a decision of the defendant concerning the provision of security while he is in the UK. The present application concerned the question whether certain information concerning the proceedings should remain confidential. In considering the application, the court raised the question whether certain evidence filed by the claimant in support of his case ought to be excluded, under CPR r.32.1, on the basis that it was irrelevant or duplicative. It was accepted that some aspects of the evidence were duplicative, and the court held that other aspects of it were irrelevant and, as such, inadmissible. The judge's reasons for that conclusion were set out in a confidential schedule to his judgment. The claimant made further submissions, after a draft judgment was circulated, seeking the reasons to be set out in the public judgment. The judge rejected that submission. He did so on the following basis:

> *"[27] After the draft of this judgment went to the parties for the usual purpose of checking for typographical or other minor errors, the Claimant volunteered further written submissions to the effect that reasons for my conclusion that irrelevant evidence had been filed should appear in this part of the judgment, not the Confidential Annex. I do not accept this submission. Submissions on the relevance issue were made in the part of the hearing that took place in private because any other course would have defeated the purpose of the exercise. The Claimant did not suggest otherwise. The course the Claimant now suggests would require the publicly available part of the judgment to include reference to the substance of the irrelevant information. That too would defeat the purpose of the exercise while serving no public interest.*
>
> *[28] Legal proceedings do not exist for the purpose of permitting parties to put irrelevant matters in the public domain, and the court must be astute to ensure that proceedings, legitimately pursued, do not become the occasion to publicise irrelevant material. The Claimant relies on the open justice principle. But no part of that principle requires irrelevant material be the subject of a reasoned public judgment simply for the purposes of explaining why it is irrelevant and ought not to have been part of the proceedings at all.*
>
> *[29] Next, the Claimant relies on the fact that the irrelevant material, having been excluded from the proceedings, would no longer fall within the provision to be included in the Order consequent on this judgment that the parties will not, without permission of the court, provide to any non-party any copy of any witness statement or exhibit filed in the proceedings. That submission is correct so far as it goes, but it says nothing to support the contention that irrelevant material need be the subject of detailed consideration in a public judgment, and for the avoidance of doubt, nothing in this judgment, and nothing that has occurred in these proceedings provides reason (for the Claimant or anyone else) to disclose the material now excluded from these proceedings."*

(See ***Civil Procedure 2022*** Vol.1 at para.32.1.4.)

Practice Updates

STATUTORY INSTRUMENTS

THE CORONAVIRUS ACT 2020 (DELAY IN EXPIRY: INQUESTS, COURTS AND TRIBUNALS, AND STATUTORY SICK PAY) (ENGLAND AND WALES AND NORTHERN IRELAND) REGULATIONS 2022 (SI 2022/362). In force from **24 March 2022**. The statutory instrument extends the duration of s.55 of and Sch.25 to the Coronavirus Act 2020 to 25 September 2022. As a consequence the provisions that that section and Schedule inserted, as ss.85A to 85D, into the Courts Act 2003 will remain in force until that date. It is anticipated that these provisions will be replaced by a new s.85A of the 2003 Act, which is to be inserted by what is currently cl.196 of the Police, Crime, Sentencing and Courts Bill 2021.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 143rd Update. This Practice Direction Update affects two amendments. The first amendment is to Practice Direction 51Y – Video or Audio Hearings During the Coronavirus Pandemic. The Practice Direction remained in force while the Coronavirus Act 2020 was in force, i.e. until 25 March 2020. The amendment, which is in force from **22 March 2022**, maintains until 25 March 2023 the first sentence of the third paragraph of the Practice Direction. That sentence provides that:

> *"Where a media representative is able to access proceedings remotely while they are taking place, they will be public proceedings."*

It is anticipated that prior to 25 March 2023 that provision will be formally incorporated into the CPR. The second amendment comes into force on **1 June 2022**. It introduces a new Practice Direction 51ZC – Small Claims Paper Determination Pilot. This pilot scheme is to apply to six County Court hearing centres: Bedford, Cardiff, Guildford, Luton, Manchester, and Staines. It applies to small claims, except those concerning housing disrepair, and those where proceedings have commenced following application of the process set out in the Pre-Action Protocol for Personal Injury Claims below the Small Claims Limit in Road Traffic Accidents. Claims within the scope of the pilot are to be subject to a power for the court to direct, without requiring party consent, that it be determined without a hearing, i.e. on the papers only. Again, it is anticipated that should this pilot scheme prove successful it will form the basis of a new mandatory power applicable to, for instance, any future digital small claims procedure. The pilot scheme is to run until 1 June 2024.

CPR PRACTICE DIRECTION – 142nd Update. This Practice Direction came into force on **4 April 2022**. As from that date it amends Practice Direction 51ZB – The Damages Claims Pilot. It does so by amending its paras 1.2 and 1.6. The consequence of the amendments is to mandate the use of the pilot scheme for those claimants that are legally represented, where their claim comes within the pilot scheme's ambit.

PRE-ACTION PROTOCOLS

PRE-ACTION PROTOCOL FOR LOW VALUE PERSONAL INJURY (EMPLOYERS' LIABILITY AND PUBLIC LIABILITY) CLAIMS, PRE-ACTION PROTOCOL FOR RESOLUTION OF PACKAGE TRAVEL CLAIMS. On **6 April 2022**, Sir Geoffrey Vos MR approved amendments to the Employers' Liability and Public Liability Pre-Action Protocol and the Package Travel Claims Pre-Action Protocol. The amendments apply to claims where either the date on which the cause of action accrues or date of knowledge of the person injured was on or after 6 April 2022. The amendments raise the value of the claims to which the Protocols apply from £1,000 to £1,500.

PRACTICE GUIDANCE

PRACTICE GUIDANCE – ANONYMISATION OF PARTIES TO ASYLUM AND IMMIGRATION CASES IN THE COURT OF APPEAL. On 23 March 2022, Sir Geoffrey Vos MR and Underhill LJ (VP) issued guidance on the approach to be taken to the anonymisation of parties to asylum and immigration cases in the Court of Appeal. The Guidance replaces Practice Note (Anonymisation In Asylum and Immigration Cases In the Court of Appeal) [2006] EWCA Civ 1359, which placed less weight on the principle of open justice that was arguably justifiable. The new guidance places greater weight on the principle of open justice and specifically requires the maintenance of any anonymisation of proceedings to be subject to scrutiny where permission to appeal is granted, and then to further scrutiny thereafter. The guidance is available at: *https://www.judiciary.uk/publications/practice-guidance-anonymisation-of-parties-to-asylum-immigration-cases-in-the-court-of-appeal/* [Accessed 4 April 2022]. It is also reprinted below.

PRACTICE GUIDANCE – ANONYMISATION OF PARTIES TO ASYLUM AND IMMIGRATION CASES IN THE COURT OF APPEAL

1. *This guidance replaces the Practice Note issued on 31 July 2006.*
2. *The starting point for the consideration of anonymity orders is open justice. This principle promotes the rule of law and public confidence in the legal system. Given the importance of open justice, appellants should generally expect to be named in proceedings in the Court of Appeal. Any departure from this principle will need to be justified.*
3. *The Court will apply CPR 39.2(4) which provides that the court must order that the identity of a party shall not be disclosed if, but only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party.*
4. *This may require the weighing of the competing interests of a party and their rights (for example, under Articles 3 or 8 of the ECHR or their ability to present their case in full without hindrance) against the need for open justice. The interests of children and the effect of them being identified should be considered.*
5. *The Court of Appeal will continue its long-standing practice of anonymising judgments in most appeals raising asylum or other international protection claims, provided it is satisfied that the publication of the names of appellants in such cases may create avoidable risks for them in the countries from which they have come.*
6. *Judgments will also be anonymised where there is a statutory prohibition on naming an individual, for example, a victim of a sexual offence or a victim of trafficking (sections 1 and 2 of the Sexual Offences Amendment Act 1992, as amended) or a child subject to family law proceedings (section 97(2) of the Children Act 1989).*
7. *When a new immigration or asylum case is issued in the Court of Appeal, it will initially be anonymised if it was anonymised in the lower court or Tribunal or involves a protection claim. Where a decision is required on permission to appeal the judge granting permission will consider whether the initial anonymisation should be continued.*
8. *Hearings will continue to take place in open court unless the court otherwise directs. Where judgment is given in an anonymised appeal (or a permission to appeal application where the judgment is released from the usual restriction on citation), the Court will reassess at that stage whether continued anonymity is required.*
9. *Where the case was anonymised in the lower court or Tribunal any continued anonymisation in the Court of Appeal will be in the same form. Otherwise, anonymised cases will be assigned three random initials and the country of origin, for example, XYZ (Turkey), unless a judge gives a specific direction to contrary effect. Such cases will then be listed and referred to solely by reference to this "name" and the reference number allocated to them in the Civil Appeals Office.*

The Master of the Rolls
Underhill LJ
22 March 2022

PRACTICE NOTE – COMMERCIAL COURT: TIME ESTIMATES AND CONDUCT OF HEARINGS 2022. On 29 March 2022, Cockerill J, the judge in charge of the Commercial Court issued a Practice Note concerning time estimates for hearings in the Commercial Court. The Practice Note draws attention to problems that have arisen due to parties underestimating the time they are likely to need to make their submissions, not least in longer applications and in trials. It stresses the need for time estimates to be accurate, and the adverse consequences that may arise where an inadequate estimate is given. The guidance is available at: *https://www.judiciary.uk/wp-content/uploads/2022/03/Practice-Note-time-estimates-and-conduct-of-hearings-2022.pdf* [Accessed 4 April 2022]. It is also reprinted below.

Notice from the Judge in Charge of the Commercial Court

In September 2020 HHJ Pelling QC and I raised concerns about the noticeable increase in the number of applications and trials for which inaccurate reading and hearing time estimates have been provided. That Notice focussed particularly on the issue of half day hearings and it is fair to say that the Court has seen some improvement in relation to these shorter hearings.

However, a considerable issue remains as regards longer applications and trials. In particular, the number of points and authorities being sought to be raised is often – and increasingly – completely out of step with the hearing time listed. The result is that on a number of occasions counsel have either taken submissions at excessive speed (as noted, for example, in Libyan Investment Authority v Credit Suisse International [2021] EWHC 2684 (Comm) [139–140] – where experienced transcribers were unable to keep up with the pace of speech) or have sought to conduct legal argument by giving the judge a note of key passages in authorities which they would wish the judge to read and consider in depth after the completion of the hearing.

These practices are unacceptable. The lists are always very busy and judges have very limited time available. The oral hearing is the occasion when arguments must be raised and adequately ventilated by the parties. Judges' judgment writing time is limited and is for writing judgments. Judgment writing time is not sufficient to permit it to be used as an extension of the time allocated for oral argument.

Parties should therefore note that:

- *Careful consideration needs to be given to what is to be covered in the hearing time, the pace at which documents/ authorities can be taken and the time needed for oral argument on the issues raised.*
- *This consideration should extend to (i) the number of issues which can properly be dealt with in oral argument and (ii) the number of authorities actually required in order to establish the legal propositions relied upon (see here also Guide F12.1, F12.4, J5.3).*
- *Inaccurate hearing estimates may result in a case being stood out of the list (either before the hearing or part heard) and relisted for a realistic time estimate with no expedition of the relisting. There may also be costs consequences.*

The Judges of the Court would also urge parties - in the interests of proportionate litigation - to give careful consideration to the number of points which are run, whether peripheral points will realistically lead anywhere if the primary points fail and which legal arguments are realistically open for argument at first instance.

Mrs Justice Cockerill
Judge in Charge of the Commercial Court

PRACTICE NOTE – UK SUPREME COURT MARCH 2022. On 30 March 2022, Lord Reed PSC issued a Practice Note concerning the UK Supreme Court and Judicial Committee of the Privy Council. The Practice Note rescinds the Covid Practice Note issued in March and September 2020 (***Civil Procedure 2022*** Vol.2 para.4A-273). It sets out guidance on filing documents, orders, urgent applications, and on hearings. The Practice Note is available here: *https://www.supremecourt.uk/docs/new-practice-note-march-2022.pdf* [Accessed 4 April 2022]. It is also reprinted below.

THE SUPREME COURT OF THE UNITED KINGDOM
THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
Practice Note March 2022

Lord Reed, as President of the Supreme Court and Chairman of the Judicial Committee, issued a Covid Practice Note in May and September 2020. The Covid Practice Note is now rescinded, and the guidance set out in this Practice Note should now be followed, together with the relevant Rules and Practice Directions.

Papers for filing
All documents, forms and notices etc should be sent to the registry electronically. For the avoidance of doubt, paper copies are no longer required except where explicitly requested in the PD for appeal hearings, and filing should be done solely electronically where possible.

Papers under 10MB in size can be sent to the relevant Registry attached to an email. For documents over 10MB see SharePoint guidance in the Annexes to UKSC PD 14 and JCPC PD 9. Please email the relevant registry if you require a link to the upload area; registry@supremecourt.uk or registry@jcpc.uk

Orders
Orders which are signed by the Registrar may be issued electronically as usual but may not be sealed. Unsealed orders are to be treated as authentic and are to take effect as if they have been sealed.

Urgent applications (out of hours)
Parties should contact the relevant registry if an application is genuinely urgent and requires action out of Court hours. The respondent should be copied into the email. Where possible advanced notice of an urgent application should be given during Court hours.

Hearings
Although WebEx may still be used, hearings will be in person unless there are exceptional reasons to justify a hybrid hearing.

Practice Directions
Updates to the Practice Directions may be published in due course.

Lord Reed of Allermuir
March 2022

In Detail

CPR PD 40E – RESERVED JUDGMENTS – FURTHER GUIDANCE

(1) Introduction

CPR Practice Direction 40E, concerning reserved judgments, continues to raise issues regarding its application. ***R. (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy*** [2022] EWCA Civ 181, noted in ***Civil Procedure News*** No.3 of 2022, highlighted the importance of compliance with its requirements concerning circulation of draft judgment, as set out in para.2.4 of the Practice Direction. That issue has been further highlighted by two recent decisions. Additionally, guidance has also been given in ***Preston v Beaumont*** [2022] EWHC 440 (Ch), by Richard Farnhill, sitting as a deputy judge of the High Court, on Practice Direction 40E's interplay with applications for costs, specifically with respect of its para.4.4.

(2) Further guidance on circulation of draft judgments

In ***Public Institution for Social Security v Banque Pictet & Cie SA*** [2022] EWCA Civ 368, the Court of Appeal revisited the guidance given no more than a short time earlier by Vos MR in ***R. (Counsel General for Wales)*** (2022). In this case, a draft judgment had been inadvertently circulated in breach of the prohibition contained in para.2.4 of the Practice Direction to a WhatsApp group, created for social purposes, of international lawyers rather than to a closed group of equity partners by a lawyer to whom it had been properly provided. It had not, however, gone further than that and remedial steps had been taken to ensure no further circulation. The lawyer apologised to the court for the inadvertent breach, and the court took no further action against him. It should be noted that the intended circulation to equity partners would equally have been a breach of the embargo as they were not lawyers engaged in the litigation (at [16]).However, and separately, a further breach of the embargo on circulation had also occurred, as details of the draft judgment were also published via a series of tweets in the local media. The court considered that taking steps to ascertain by whom and how the embargo was breached would be complex, expensive and in all likelihood fruitless. As such it also took no further steps (at [15]).

Carr LJ did, however, re-emphasise the importance of applying the approach set out by Vos MR in ***R. (Counsel General for Wales)*** (2022) and provided the following further guidance. As she put it:

> *"[18] The facts of this matter confirm the anecdotal information to which the Master of the Rolls referred in CGW at [21], namely that violations of court embargoes on publicising either the content or the substance of draft judgments have been becoming more frequent. All recipients need to understand clearly:*
>
> > *i) The importance and breadth of such embargoes. They are orders of the court which prohibit communication for any purpose other than the legitimate exercise of making suggestions for the correction of errors, preparing submissions, agreeing orders on consequential matters and preparation for the publication of the judgment. Informing other lawyers within the same organisation who are not involved in the conduct of the litigation and whose input is not necessary for the purpose of carrying out these legitimate exercises will be a breach of the court's order;*
> >
> > *ii) The need for utmost care in communicating the content or substance of a draft judgment in the digital age. The use of electronic messaging requires greater, not lesser, attention to detail so as to ensure that errors of the type that occurred in this instance are not repeated;*
> >
> > *iii) Any breach of an embargo must be drawn to the court's attention as soon as it is identified."*

While Carr LJ highlighted the importance of not circulating draft judgments to other lawyers in the same firm who are not involved in the immediate litigation, as is apparent from Vos MR's judgment in ***R. (Counsel General for Wales)*** (2022), the prohibition on circulation goes wider than that; a point underscored in the reporting of Swift J's approach to the provision of a draft judgment to a non-lawyer partner in a law firm (Law Gazette, *Duke of Sussex's lawyers criticised for embargo breach*, 24 March 2022) following his judgment in ***R. (Duke of Sussex) v Secretary of State for the Home Department*** [2022] EWHC 682 (Admin). Given the Court of Appeal's two recent decisions, it is increasingly apparent that lax compliance with the requirements of para.2.4 of PD 40E will be met with ever decreasing indulgence by the courts.

(3) Guidance on applications consequential on the judgment

In ***Preston v Beaumont*** (2022) a draft judgment was circulated to the parties in February 2022. The parties were asked at that time if a hearing was required to deal with consequential issues. While the parties attempted to agree costs, they were unable to do so. As a consequence no sealed order was issued. Two issues arose for determination at a subsequent

hearing. The first concerned an application for the summary assessment of costs. The second concerned an application for an extension of time to file an appellant's notice. First, costs. The substantive issue was whether the court had jurisdiction to deal with costs. It was submitted by the appellant that as no application for costs had been made prior to the hand-down of the judgment, such an application could not be made. The first respondent made three points in response: first, that as no sealed order had been issued, the court remained seised of the proceedings (***Re Barrell Enterprises*** [1973] 1 W.L.R. 19). As such the court was not *functus officio* and had jurisdiction to make consequential orders. Secondly, the court had not specified a time by which the parties were to inform it if a hearing was required to deal with consequential matters. And, thirdly, while PD 40E para.4.4 specified that applications for consequential orders *"should"* be made by 12 noon the day before the hand-down, that was not fatal to the application for costs. It was not because the court retained jurisdiction to deal with such applications.

The deputy judge rejected the first respondent's submissions. As he put it:

> *"[10] The insurmountable difficulty with that approach is that it is entirely inconsistent with the terms of paragraph 4.4 of PD 40E. This provides:*
>
>> *'Where a party wishes to apply for an order consequential on the judgment the application must be made by filing written submissions with the clerk to the judge or Presiding Judge by 12 noon on the working day before handing down.' (my emphasis)".*

Contrary to the respondent's submission the paragraph was in mandatory terms: *"must"*, not *"should"*. Non-compliance with such a term, particularly where it specified a time by which compliance had to be effected, meant that *"no application can be made after that time"* (see [11]). Consequently, non-compliance could only be cured by an application for relief from sanctions under CPR r.3.9. No such application had been made, nor was there evidence before the court to support one, although the deputy judge noted that an such application would have faced *"significant obstacles"*.

The deputy judge further rejected the first respondent's first and second submissions. The ***Re Barrell Enterprises*** jurisdiction did not assist: it did not create jurisdiction where there was none. It would, however, have potentially been relevant if the deputy judge had exercised it to alter his judgment. In which case, that may have provided a basis on which para.4.4 of the Practice Direction would apply to the *"revised judgment"*. That would then have had the effect of *"resetting the clock"* (at [15]).

And, the fact that no time frame had been specified for a hearing of consequential matters was beside the point. The relevant time frame was set out in para.4.4 of the Practice Direction:

> *"[13] ... Paragraph 4.4 of PD 40E is by reference to the time of the handing down, which did not require a hearing on consequential matters and has now happened."*

As the first respondent was required to have made an application for costs, the default position being no order to costs (CPR r.44.10(1)(a)), and had not done so in the required time frame and not sought relief from sanctions, it was too late to seek costs.

The second issue concerned the time for filing an appellant's notice. It was clear that the 21-day filing period for an appellant's notice, under CPR r.52.12(2)(b), ran from the date when a decision is *"formally announced in court"* (***McDonald v Rose*** [2019] EWCA Civ 4 at [13]). CPR r.52.12(2)(b) applied in the present case, as no other time limit had been specified at any hearing within the terms of CPR r.52.12(2)(a). That was because no such hearing had taken place. Any application to vary a time limit for filing had to be made to the appeal court: see CPR r.52.15(1). The appellant submitted that notwithstanding those points, the deputy judge had jurisdiction to extend time, as no sealed order had been received by the parties and CPR PD 52B paras 4(2)(b) and 4.3 required there to be such an order before an appellant's notice could be filed. The first respondent also submitted that the deputy judge had jurisdiction to extend the time limit. He did so again in reliance on the ***Re Barrell Enterprises*** jurisdiction. The deputy judge rejected these points. CPR PD 52B did not apply. The issue here was an appeal to the Court of Appeal, which was dealt with by PD 52C not PD 52B. While PD 52C requires a copy of a sealed order to accompany an appellant's notice, it also sets out, in its para.4, the process for requesting a retrospective extension of time. In other words, it made provision for situations of the type in the present case, and did so by reference to the Court of Appeal determining such applications. It was clear therefore that the only court that had jurisdiction to extend time was the Court of Appeal; the deputy judge thus had no residual jurisdiction to do so (at [24]–[26]). In respect of the ***Re Barrell Enterprises*** jurisdiction, reliance on that failed for the same reason as it did in respect of the costs issue (at [22]).

Both the application for costs and to extend time to appeal were thus dismissed. And as the deputy judge noted, both issues highlighted the signal importance of compliance with mandatory terms of the CPR, a point that the courts have been at pains to emphasise more generally in respect of compliance with the requirements of CPR PD 40E.

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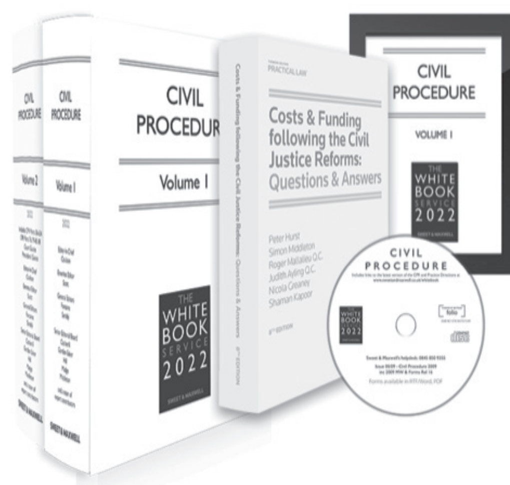

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The First Supplement is due to publish in the summer.

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