CIVIL PROCEDURE NEWS

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Test to set aside judgment for fraud

Proceedings were brought by the claimant, which amongst other things sought to have a judgment set aside on the basis of fraud. Leech J considered the three-limb test applicable to such proceedings. As Leech J noted, the three limbs are as follows:

> *"[11] ...: first, the successful party (or someone for whom it must take responsibility) committed conscious and deliberate dishonesty ('Limb 1'); secondly , the dishonest conduct was material to the original decision ('Limb 2'); and, thirdly, there was new evidence before the Court (which was either not given or not disclosed in the earlier proceedings) ('Limb 3'). The principal issues between the parties were the test for materiality under the Limb 2 and the way in which the Court should approach new evidence deployed under Limb 3."*

The leading authorities, which set out the test are: ***Takhar v Gracefield Developments Ltd*** (2020) and, particularly, ***Royal Bank of Scotland Plc v Highland Financial Partners LP*** (2013) at [106]. The latter articulates the relevant principles. Leech J then went on to consider the three limbs (at [14]–[35]). In doing so he made a number of points in respect of the second and third limbs. In terms of the second limb, he noted there was an apparent difference in approach to materiality. In ***Royal Bank of Scotland Plc v Highland Financial Partners LP*** (2013) it was:

> *"suggested that the dishonest conduct had to be material in the sense that: 'the fresh evidence would have entirely changed the way in which the first court approached and came to its decision'"* (at [20]).

In ***Hamilton v Al Fayed (No.4)*** (2001) an, apparently, "*lower standard for materiality, namely, that there was a real danger that the dishonest conduct had affected the outcome*" had been applied (at [20]). Leech J did not consider that there was any real practical distinction between the two approaches (at [21]). If, however, there was a "*real difference*" between them and a choice had to be made, Leech J preferred the approach taken in the former decision (at [23]).

Furthermore, as a general rule where it is said that witness evidence was false, the question for the court is how the judge's conclusions may have been affected by evidence said to have been concealed through the giving of the alleged false evidence: ***Coghlan v Bailey*** (2014) at [46] (at [25]). However, while Leech J accepted this as a general principle, he went on to add that:

> *"[46] ... in my judgment, there will be cases in which the new evidence is so fundamental to the credibility of the witness that it will be material even though it is not directly relevant to the substantive issues. For example, if a solicitor gives evidence that she is a solicitor and holds a valid practising certificate but conceals from the Court that she has been struck off for mortgage fraud, I would consider evidence of the striking off to be material. Likewise, where two witnesses conspire together to mislead the Court, I would consider evidence of the conspiracy to be material."*

Turning to the third limb, Leech J considered the approach to be taken to new evidence. Is it permissible, where there is new evidence, to rehear and re-determine issues that the trial judge in the original proceedings determined? The answer to that was no. Leech J concluded that the correct approach to new evidence was as follows:

> *"[33] ... My function was to hear and evaluate the new evidence and then decide whether the Judge's findings could stand in the light of it. It was not to hear and decide the same issues again with the benefit of both the old and the new material and then ask myself in the round whether the witnesses must have deceived the Judge. Moreover, there is a real danger of injustice in a second court reaching different conclusions based on hearing part only of the evidence before the Court ...*
>
> *[34] ... As Laws J pointed out in Tuvyahu v Swigi, there is no burden on [the defendant] to justify the Judgment or to prove that the Judge got it right. In approaching the Judgment, therefore, I am entitled to assume that the Judge decided the issues correctly on the evidence before him in the absence of a successful appeal. The task for me then was to hear and evaluate the new evidence, decide whether Limb 1 is satisfied and, if so, whether the Judgment could stand in the light of that evidence by applying the test under Limb 2."*

Owens Bank Ltd v Bracco [1992] 2 A.C. 443, HL, ***Tuvyahu v Swigi*** 26 October 1998, unrep., QBD, ***Hamilton v Al Fayed (No.4)*** [2001] E.M.L.R. 15, CA, ***Royal Bank of Scotland Plc v Highland Financial Partners LP*** [2013] EWCA Civ 328; [2013] 1 C.L.C. 596, CA, ***Coghlan v Bailey*** [2014] EWHC 924 (QB), unrep., QBD, ***Takhar v Gracefield Developments Ltd*** [2019] UKSC 13; [2020] A.C. 450, ref'd to. (See ***Civil Procedure 2022*** Vol.1 at para.3.1.17.2.)

- **Valley View Health Centre v NHS Property Services Ltd** [2022] EWHC 1393 (Ch), 8 June 2022, unrep. (Edwin Johnson J)

Trial following application for judgment on admission – abuse of process – cause of action estoppel

CPR r.14.3. A party may apply for judgment following an admission by another party under CPR r.14.3. It has, apparently, not been previously determined what is the effect of a decision on such an application, where it is dismissed (at [567]). In proceedings brought by five claimants against a common defendant, each of which sought declaratory relief concerning the question whether policies concerning service charges had been incorporated into their tenancies, the High Court considered this issue. In particular, it considered if having applied for a judgment on an admission, which had been rejected, it was either an abuse of process to continue with the claim or the claim was subject to cause of action estoppel. **Held** (at [562]–[587]), the rejection of an application for a judgment on an admission neither gave rise to an abuse of process for the applicant to continue with the claim subject to the application (at [584]), nor did it create a cause of action estoppel (at [585]–[586]). There is a fundamental difference between an application for a judgment on an admission and a trial. The former was an interim application. It resulted in the dismissal of an application, not the dismissal of a claim. It was based on limited evidence. Neither party could, or should be expected, to treat such an application as equivalent to a trial in terms of argument and evidence, i.e. they could not be expected to deploy the same evidence that they would ordinarily be expected to adduce at a trial. The application was not, nor was it treated as, a hearing of a preliminary issue (at [576]–[578]). The applicant, in particular, was seeking to establish their entitlement to judgment not on the basis of contested evidence and argument, but on an admission. The court's task was also therefore different from that which it carries out at trial: the application and a trial were fundamentally different exercises (at [582]). ***Fidelitas Shipping Co Ltd v V/O Exportchleb*** [1966] 1 Q.B. 630, CA, ***Laemthong International Lines Co Ltd v Artis (The Laemthong Glory) (No.1)*** [2004] EWHC 2226 (Comm); [2004] 2 All E.R. (Comm) 797, Comm., ***Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd*** [2013] UKSC 46; [2014] A.C. 160, UKSC, ref'd to. (See ***Civil Procedure 2022*** Vol.1 at para.14.3.2.)

- **Curtiss v Zurich Insurance Plc** [2022] EWHC 1514 (TCC), 17 June 2022, unrep. (HH Judge Keyser QC sitting as a judge of the High Court)

Breach of requirements for witness statements – costs – satellite litigation

CPR PD 57AC. Proceedings were brought by approximately 150 claimants against the defendant seeking damages for deceit. The claim arose from the sale of flats. Forty-nine witness statements were served by the claimants. The defendant applied to strike out four witness statements and to strike out parts of another 29 witness statements. The application was made on the basis of what were said to be multiple breaches of the requirements of CPR PD 57AC and its Statement of Best Practice. The defendant had, prior to the application, identified the alleged breaches in a 109-page document provided to the claimants. The judge granted the application in part. The question was how to determine the costs of the application. The judge noted that, in his view, the application had been "*fundamentally inappropriate*" and ought never to have been brought (at [15]). Moreover, as the application was well outside the norm, costs would be awarded against the defendant on an indemnity basis. As the judge put it:

> *"[21] ... If parties make such oppressive and disproportionate applications, resulting in the incurring of very substantial and quite unnecessary costs, they can hardly be surprised if their conduct is marked by an award of costs on the indemnity basis."*

The judge reached this decision notwithstanding the fact that the defendant succeeded on some aspects of their application. But, as he noted:

> *"[15] ... If one makes hundreds of points, there are almost bound to be some good ones. That does not show that the application was justified. In giving my judgment on 1 June, I said that the application was not worth the candle. I remain of that view."*

In reaching his decision the judge emphasised that parties should not adopt an approach to the requirements of PD 57AC that led them to use it, and compliance with it, as a means to engage in satellite litigation, the aim of which was to seek tactical advantage over an opponent. As he put it:

> *"[19] ... applications for the imposition of sanctions for breach of the Practice Direction should not be used as a weapon for the purpose of battering the opposition. ... [moreover] when assessing how to respond to a failure to comply with the Practice Direction, a party must use common sense and have regard to proportionality."*

That the authorities have been at pains to emphasise that applications to strike out witness statements for non-compliance with the requirements of PD 57AC should only be made where it was reasonably necessary for such a course of action to be taken underscored this approach. In many cases, it was also noted, rather than striking out the witness statement, the better – and hence more proportionate – course of action would be for the court to place either no or less

weight on the witness evidence where it failed to comply with the Practice Direction (at [19]). It was also not the case that there was "*any general principle that it is never convenient or appropriate to leave matters of non-compliance with PD57AC until trial*" (at [19]). While, again, there was no general principle that applications to strike out should only be brought where there was a substantial breach of the Practice Direction, bearing that in mind would help to reduce the prospect of "*disproportionate satellite litigation*" (at [20]): ***Greencastle MM LLP v Payne*** (2022) and ***Lifestyle Equities CV v Royal County of Berkshire Polo Club Ltd*** (2022) considered. ***Greencastle MM LLP v Payne*** [2022] EWHC 438 (IPEC), unrep., IPEC, ***Lifestyle Equities CV v Royal County of Berkshire Polo Club Ltd*** [2022] EWHC 1244 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2022*** Vol.1 at para.57ACPD.0.1.)

- **Bank of America Europe DAC v Citta Metropolitana Di Milano** [2022] EWHC 1544 (Comm), 20 June 2022, unrep. (Foxton J)

Setting aside automatic stay – relief from sanctions

CPR rr.3.9(1), 15.11. Proceedings were commenced in the Commercial Court in respect of a number of interest rate swaps. The proceedings were subject to an automatic stay under CPR r.15.11, i.e. a stay imposed in order "*to avoid there being claims which continue in being but are not being progressed nor otherwise subject to judicial case management*" (at [5]). Specifically, the issue was whether the test for relief from sanctions set out in ***Denton v TH White Ltd*** (2014) applied or whether some less stringent test applied (at [6]). In support of the argument that a less stringent test should apply it was submitted that a stay under CPR r.15.11 was not a sanction, and the test should only apply where there had been a breach of a rule, practice direction or court order. That was said not to be the case where an automatic stay was imposed. A number of authorities were said to support this approach, e.g. ***King v Stiefel*** (2021), ***Football Association Premier League Ltd v O'Donovan*** (2017), ***Citicorp Trustee Co Ltd v Al-Sanea*** (2017), ***McLinden v Lu*** (2018) and ***Bank of Beirut (UK) Ltd v Sbayti*** (2020). To the contrary, it was noted in ***New Zealand Cricket (Inc) v Neo Sports Broadcast Pvt Ltd*** (2016) that an application to lift an automatic stay was subject to the test for relief from sanctions. To similar effect were decisions on the automatic stay provision under CPR PD 51, which applied when the CPR was introduced, e.g. ***Neo Investments Inc v Cargill International SA*** (2001), ***Audergon v La Baguette Ltd*** (2002), ***Flaxman-Binns v Lincolnshire CC*** (2004) and ***Woodhouse v Consignia Plc*** (2002). **Held**, the applications to lift the automatic stays imposed in the proceedings were lifted. In respect of the issue of principle, Foxton J concluded that the applicable test was the test for relief from sanctions. That was the case because the imposition of the automatic stay arose due to the parties failing to comply with their obligations to assist the court in its duty to manage cases further to the overriding objective. As Foxton J put it:

> *"[22] ... In my view, adopting the approach approved by the Court of Appeal in Audergon, the stay imposed when the conditions of CPR 15.11(1) are met will result from the failure of the parties to perform their obligation to help the court further the overriding objective by bringing the case before the court for case management, and therefore a breach of the CPR. If I am wrong in that conclusion, then the circumstances which engage CPR 15.11 are sufficiently close to a breach of a 'rule, practice direction or court order' to justify the court applying the Denton test by analogy to applications (by a claimant or a defendant) to lift the stay.*
>
> *[23] However, I am doubtful whether the debate about the appropriate test will prove as significant in resolving the applications as the parties' submissions presuppose. The Denton test is sufficiently flexible to take account of those features of CPR 15.11 which distinguish it from the more conventional case where a rule or practice direction requires a party to take a particular step by a particular date and it fails to do so: the fact that it is a combination of the failure of both parties to take a particular step which brings the automatic stay into operation, and the difficult choice which a claimant who has brought proceedings in order to anticipate a claim which a defendant has intimated but not commenced may face if the defendant chooses not to engage in those proceedings. For that reason, the question of whether the Denton test applies under CPR 15.11(2) may well be one of those procedural points destined to live out its litigation life in a limbo of obiter observations."*

In reaching that conclusion, Foxton J also emphasised that where parties wished to place a claim "*on hold*" the proper approach would be for them to seek the consent of the other parties and, where necessary, obtain the court's approval (at [21]). ***Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*** [1998] 1 W.L.R. 1426, CA, ***Neo Investments Inc v Cargill International SA*** [2001] 2 Lloyd's Rep. 33, Comm., ***Audergon v La Baguette Ltd*** [2002] EWCA Civ 10; [2002] C.P. Rep. 27, CA, ***Woodhouse v Consignia Plc*** [2002] EWCA Civ 275; [2002] 1 W.L.R. 2558, CA, ***Flaxman-Binns v Lincolnshire CC*** [2004] EWCA Civ 424; [2004] 1 W.L.R. 2232, CA, ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, CA, ***New Zealand Cricket (Inc) v Neo Sports Broadcast Pvt Ltd*** [2016] EWHC 3615 (Comm), unrep., Comm., ***Football Association Premier League Ltd v O'Donovan*** [2017] EWHC 152 (Ch); [2017] F.S.R. 31, ChD, ***Citicorp Trustee Co Ltd v Al-Sanea*** [2017] EWHC 2845 (Comm), unrep. Comm., ***McLinden v Lu*** [2018] 4 WLUK 569, unrep. QBD, ***Alibrahim v Asturion Foundation*** [2020] EWCA Civ 32; [2020] 1 W.L.R. 1627, CA, ***Bank of Beirut (UK) Ltd v Sbayti*** [2020] EWHC 557 (Comm), unrep., Comm., ***King v Stiefel*** [2021] EWHC 1045 (Comm); [2022] 1 All E.R.

(Comm) 990, Comm., ref'd to. (See ***Civil Procedure 2022*** Vol.1 at paras 3.9 and following and 15.11.1.)

Practice Updates

STATUTORY INSTRUMENTS

THE REMOTE OBSERVATION AND RECORDING (COURTS AND TRIBUNALS) REGULATIONS 2022 (SI 2022/705). In force from **28 June 2022**. The statutory instrument gives effect to ss.85A and 85B of the Courts Act 2003 (as amended). It applies to all bodies that exercise the judicial power of the state, which include the courts in England and Wales. It enables a court, including the County Court, High Court and Court of Appeal, to direct that specified proceedings can be transmitted so that they may be observed by members of the public, including reporters and other members of the media, online. The making of such a direction is a judicial function. It cannot therefore be made administratively by HMCTS. Regulations 3 and 4 make provision for matters that the court must be satisfied before making such a direction and matters it must consider before doing so. Regulation 5 requires any such direction to include provision controlling access to view such proceedings online.

PRACTICE GUIDANCE

PRACTICE GUIDANCE ON REMOTE OBSERVATION OF HEARINGS – NEW POWERS. On 28 June 2022, Lord Burnett CJ and Sir Keith Lindblom SPT issued Practice Guidance concerning new powers to permit reporters and other members of the public to view court (and tribunal) hearings online. The powers were introduced by s.85A of the Courts Act 2003, as inserted by s.198 of the Police, Crime, Sentencing and Courts Act 2022, and the Remote Observation and Recording (Courts and Tribunals) Regulations 2022 (SI 2022/705). The guidance set out is primarily aimed at the judiciary. It explains the approach to be taken by them to the exercise of this new power, albeit it is a power that replaces a similar temporary power that was inserted into the Courts Act 2003 via the Coronavirus Act 2020. The guidance makes clear that the new powers under the new s.82A do not apply to participants in proceedings, e.g. parties and witnesses, but to individuals who are observing proceedings. They are thus powers that facilitate the achievement of open justice. The guidance stresses that these powers are additional means to secure open justice. If the powers are not exercised, open justice can be secured in the traditional way. The Practice Guidance is available on the website of the Judiciary of England and Wales at: *https://www.judiciary.uk/wp-content/uploads/2022/06/Practice-Guidance-on-remote-observation-final.pdf* [Accessed 4 July 2022].

ADMINISTRATIVE COURT: INFORMATION FOR USERS. On 27 June 2022, HMCTS issued updated Administrative Court users' information. The information, which will remain in place until further notice, replaces previous guidance, issued on 24 November 2020. The new guidance therefore replaces that which is published at ***Civil Procedure 2022*** Vol.1 Section AA para.A.9. The guidance is available on the website of the Judiciary of England and Wales at: *https://www.judiciary.uk/wp-content/uploads/2022/06/ACO-guidance-27.06.22.pdf* [Accessed 4 July 2022].

CONSULTATION

CIVIL JUSTICE COUNCIL COSTS CONSULTATION. On 30 June 2022, the Civil Justice Council launched a review of litigation costs; in essence a 10-year review of aspects of the Jackson Cost Reforms. The consultation focuses on four key areas: costs budgeting; the Guideline Hourly Rates; costs that arise under the Pre-Action Protocols and portals, and under the 'digital justice system'; and the consequences of the extension of fixed recoverable costs. The consultation is open until 30 September 2022 and is available on the website of the Judiciary of England and Wales at: *https://www.judiciary.uk/wp-content/uploads/2022/06/CJC-Costs-consultation-paper-FINAL-June-2022.pdf* [Accessed 4 July 2022].

In Detail

APPROACH TO RECONSIDERATION OF AN UNSEALED JUDGMENT

It is well-established that judgments are effective from the date on which they are handed down, but that the court retains jurisdiction to alter its judgment after that time and until the judgment is perfected (***Holtby v Hodgson*** (1889) 24 Q.B.D. 103; ***Re Barrell Enterprises*** [1973] 1 W.L.R. 19). In ***Re L-B (Children) (Care Proceedings: Power to Revise Judgment)*** [2013] UKSC 8; [2013] 1 W.L.R. 634, the Supreme Court affirmed this power to alter a judgment and, further, held that use of the power was not limited to there being exceptional circumstances (see ***Civil Procedure 2022*** Vol.1 para.40.2.1). In ***AIC Ltd v Federal Airports Authority of Nigeria*** [2022] UKSC 16, the Supreme Court revisited the courts' jurisdiction to reconsider a judgment that had been handed down but not yet sealed.

Civil proceedings were commenced to enable a foreign arbitral award to be enforced in England and Wales under the New York Convention. The arbitration had taken place in Nigeria and had resulted in an award to the appellant of US$48.13 million (plus interest). The respondent applied to adjourn the enforcement proceedings. It did so due to there being proceedings in Nigeria, within which it sought to set aside the arbitral award. A deputy judge adjourned the enforcement proceedings but did so on condition that the respondent provided security of US$24 million. Following further procedural litigation concerning the nature of the security, the deadline by which it had to be given expired. At a subsequent hearing, and without the security having been provided, permission to enforce the arbitral award was given via an oral judgment and order. The enforcement order was not, however, sealed. The respondent thereafter obtained a bank guarantee in respect of the security and informed the appellant that it intended to apply to re-open the judgment and enforcement order. It also applied for relief from sanction in respect of the failure to provide security in time.

The enforcement order was subsequently set aside, relief from sanction was granted, further time to provide security was given, and the application to enforce the arbitral award was adjourned pending the outcome of the Nigerian proceedings to set aside the award. The appellant appealed from that order. The Court of Appeal allowed the appeal. It did so on the basis that the judge granting the order had erred in their approach to reconsidering the unsealed order. It held that the judge erred by failing to take a two-stage approach, which first required consideration of whether:

> *"it was right in principle to entertain the application to re-consider at all and then, but only if that produced an affirmative answer, to consider the application on its merits at the second stage"* (at [4] and [15]).

The Supreme Court allowed the appeal in part. In doing so it considered and restated the approach to be taken to applications to re-open unsealed judgments or orders. As Lords Sales and Briggs in a joint judgment (with whom Lords Hodge DP, Hamblen and Leggatt agreed) put it:

> *"[1] A judge delivers judgment in open court and makes an appropriate order. A few hours, or days, later, but before the formal written minute of the order has been sealed by the court, the judge receives a request from one of the parties to re-consider both the judgment and the order. What should the judge do? This problem may arise at all levels in civil litigation, from interim and case management hearings, to final orders made at the end of a trial and even to orders made, but not yet sealed, on appeal. There is no doubt that the judge has power to re-open the judgment and order at any time until the order has been sealed, but the question raised by this appeal is by what process, and in accordance with what principles, should the judge decide whether or not to exercise that power?"*

In considering this question the Supreme Court reviewed previous authorities on the issue, and particularly ***Re L-B (Children) (Care Proceedings: Power to Revise Judgment)*** (2013) (at [20]–[29]). In doing so it noted that that decision concerned interim proceedings brought under the Family Procedure Rules, whereas the present case was brought under the CPR and concerned an enforcement order, a final order. In that latter context there was "*a strong public interest in the finality of litigation ... under the Overriding Objective in the CPR*" (at [28]).

The principles applicable to the power to re-open were considered at [29]–[40]. The first issue considered was the relevance of the CPR's overriding objective. The Supreme Court explained, at [29]–[31], that the principle of finality was inherent in it: see ***Sainsbury's Supermarkets Ltd v Visa Europe Services LLC*** [2020] UKSC 24; [2020] Bus. L.R. 1196 at [238]–[239].

As a consequence:

> *"[30] ... the task of a judge faced with an application to reconsider a judgment and/or order before the order has been sealed is to do justice in accordance with the relevant Overriding Objective. We have set out the Overriding Objective in CPR Part 1.1 ... the Overriding Objective was amended by the addition of enforcing compliance with rules, practice directions and orders: see CPR 1.1(2)(f). This tends to emphasise, in the present context, the importance of finality attaching to the hearing on 6 December 2019 and the Enforcement Order ...*

[31] As stated in Sainsbury's Supermarkets, the Overriding Objective implicitly affirms and reinforces the long-standing principle of finality, which had been an objective of civil procedure for at least 175 years: see eg Henderson v Henderson. Litigation cannot be conducted at proportionate cost, with expedition, with an appropriate share of the court's resources and with due regard to the rules of procedure unless it is undertaken on the basis that a party brings his whole and best case to bear at the trial or other hearing when a matter in dispute is finally to be decided (subject only to appeal). As Lewison LJ said in FAGE UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; [2014] FSR 29, at para 114:

> *'The trial is not a dress rehearsal. It is the first and last night of the show.'*

In that respect we are in full agreement with Coulson LJ, in the Court of Appeal at para 50, when he said:

> *'The principle of finality is of fundamental public importance ... The successful party should not have to worry that something will subsequently come along to deprive him or her of the fruits of victory.'"*

In the light of this, the Supreme Court stated that, as a matter of principle, a judge approaching an application to reconsider a final judgment or order before it is sealed (or perfected) should "*not start from anything like neutrality or evenly-balanced scales*" (at [32]). When faced with such an application a judge should:

"[32] ... ask herself whether the application should even be entertained at all before troubling the other party with it or giving directions for a hearing. It may be a perfectly appropriate judicial response just to refuse the application in limine after it has been received and read, if there is no real prospect that the application could succeed. Judges should not re-open proceedings just to allow debate on the point if it is already clear that the judgment or order should not be re-opened. That would defeat the Overriding Objective in the CPR that cases be decided 'justly' and 'at proportionate cost'."

However, that is not to say that there is a two-stage test or process to be applied. Adopting a strict two-stage process would impose a straitjacket upon the judicial exercise of a:

"discretionary jurisdiction which is contrary to the way in which it was addressed in Re L and alien to the essentially flexible nature of the judge's task when weighing competing considerations of potentially limitless variety against each other" (at [33]).

It may, furthermore, be impossible to separate out factors relevant to the question whether to depart from the principle of finality and from those that go to the merits of re-making the order or revising the judgment (at [34]). In essence a judge will need to make a single decision: "*do I set aside the order which I have already made and replace it with a different order?*" (at [34]). Furthermore:

"[34] ... the importance of the finality principle is better reflected in recognising that it will always (and especially in the case of a final order) be a weighty matter in the balance against making a different order, than in requiring slavish adherence to a two-stage process of analysis."

The weight given to finality will, inevitably, vary depending on the nature of the judgment or order. It will be at its highest where final orders, such as those made at the end of a trial are concerned. Interim orders or case management orders will require less weight to be given to finality, particularly those that contain permission to apply to vary the order after it is sealed. That being said, finality applies as soon as the order is made, not when it is sealed. When an order is sealed, however, the "*finality principle applies in a more absolute way*" and is only subject to, for instance, permission to apply, applications under CPR r.3.1(7) or the slip rule (at [35]).

Finally, the court deprecated reference to "*exceptional circumstances*" or similar terms to describe the weight to be given to the finality principle when considering an application to re-open an order or judgment (at [36]–[40]). On the contrary, an evaluative judgment is required, which rests on consideration of the finality principle in the context of the judgment or order. Ultimately:

"[39] ... The question is whether the factors favouring re-opening the order are, in combination, sufficient to overcome the deadweight of the finality principle on the other side of the scales, together with any other factors pointing towards leaving the original order in place.

[40] It would also be wrong to attempt to identify a list of factors prima facie qualifying for inclusion as being in principle sufficient to displace the finality principle. Subsequent cases will always reveal that the list has proved to be inadequate, and the peculiarities of the present case could hardly have been imagined in advance. Some, such as judicial change of mind, have already been the subject of analysis in the authorities, but even they are of widely variable weight. It is perhaps easier to advance factors that will have no significant weight, such as a desire by counsel to re-argue a point lost at trial in a different way."

The Supreme Court went on to conclude that due to errors on the part of both the Court of Appeal and judge at first instance it could re-exercise the discretion to re-open the order (at [44]–[49]).

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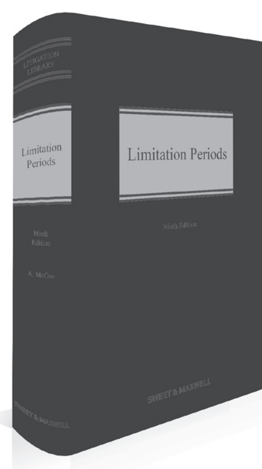

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