CIVIL PROCEDURE NEWS

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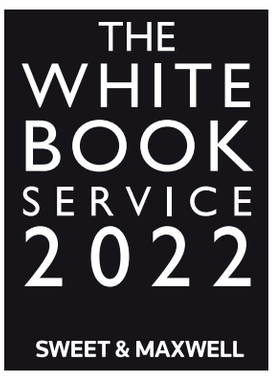

In Brief

Cases

■ **Anwer v Central Bridging Loans Ltd** [2022] EWCA Civ 201, 25 February 2022, unrep. (Coulson and Birss LJJ, Zacaroli J)

Sealed order not required to appeal – request for transcript at public expense not an application subject to a civil restraint order

CPR r.52.14. The appellant sought a transcript of a judgment at public expense. He did so to determine whether he had grounds for appeal. This matter, that ought to have been capable of simple resolution, descended into what Coulson LJ described as a procedural tangle that would have horrified lawyers and non-lawyers both (at [1]). There were, however, two specific issues on appeal that the court determined: whether a sealed order was a necessary pre-requisite for a party to bring an application for permission to appeal; and whether a request for a transcript at public expense came within the terms of a civil restraint order (CRO) such that permission was required before a party subject to restraint could make such a request. **Held**, a sealed order was not a pre-requisite for seeking permission to appeal as under the CPR appeals were from and against "*outcomes*" (at [22]). Requiring a sealed order as a pre-requisite had no legal basis and was contrary to CPR r.40.3(1)(c) and PD 52C para.6.1 (at [21]). Furthermore, that, in this case, s.77(1) of the County Courts Act 1984 provided that a party could appeal against a judge's determination did not alter that position: determination, decision, order, and judgment were to the same effect under the CPR (at [16]). The court further held that CPR r.52.14 enabled parties to request a transcript at public expense. A request was not the same as an application. Civil restraint orders controlled, and restricted, the ability of those subject to them to make applications. As a request for a transcript was not an application, it was not therefore subject to the terms of a CRO. The appellant did not, therefore, need to obtain permission before making a request for a transcript (at [32]–[37]). ***Barder v Caluori*** [1988] A.C. 20, HL, ***Re B (A Child) (Split Hearings: Jurisdiction)*** [2000] 1 W.L.R. 790, CA, ***Compagnie Noga d'Importation et d'Exportation SA v Abacha (No.3)*** [2002] EWCA Civ 1142; [2003] 1 W.L.R. 307; ***Re L-B (Children) (Care Proceedings: Power To Revise Judgment)*** [2013] UKSC 8; [2013] 1 W.L.R. 634, UKSC, ref'd to. (See ***Civil Procedure 2022*** Vol.1 at paras 52.0.6 and 52.14.1.)

■ **D'Aloia v Persons Unknown** [2022] EWHC 1723 (Ch), 24 June 2022, unrep. (Trower J)

Service by non-fungible token (NFT)

CPR r.6.15. Proceedings were brought by the claimant in respect of alleged fraudulent misappropriation (including fraudulent misrepresentation and deceit, unlawful means conspiracy, and unjust enrichment) of cryptocurrency. The claimant sought an interim injunction, disclosure and ancillary relief against several of the defendants (at [1]). The question arose whether service could be effected by non-fungible token (NFT) as a form of alternative service. **Held**, alternative service by NFT was a novel form of service. However, it was a permissible form of service, and could be approved in this case due to it carrying with it an increased prospect that service would come to the attention of the relevant defendants. As Trower J put it:

> *"[38] I then move on to the application for service by an alternative method or at an alternative place on the first defendant. The application for service by alternative means on the first defendant is sought, both in relation to service by email, and, also, service by what is called the 'non-fungible token', which is a form of airdrop into the tda-finan wallets in respect of which the claimant first made his transfer to those behind the tda-finan website.*
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> *[39] [Counsel for the claimant] says that this is a novel form of service, and has explained to me that its advantage is that, in serving by Non-Fungible Token (NFT) the claimant will, what she described as 'embrace the Blockchain technology', because the effect of the service by NFT will be that the drop of the documents by this means into the system, will embed the service in the blockchain. I may not have expressed that very happily but that is the essence of what [counsel for the claimant] said. There can be no objection to it; rather it is likely to lead to a greater prospect of those who are behind the tda-finan website being put on notice of the making of this order, and the commencement of these proceedings.*
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> *[40] I am satisfied that, in this particular case, it is appropriate for service to be effected by NFT in addition to service by email. I think that the difficulties that would otherwise arise and the complexities in relation to service on the first defendant mean that good reason has been shown I do not think it is appropriate, nor, indeed did [counsel for the claimant] ask me, to make an order for service by alternative means in circumstances in which it would be sufficient, without serving by email as well. However, I am content to make an order for service by alternative means by those two additional routes. I am also satisfied that there is good reason for service on the exchange defendants to be by the alternative means on the face of the order."*

(See ***Civil Procedure 2022*** Vol.1 at para.6.15.1.)

■ **Begum v Barts Health NHS Trust** [2022] EWHC 1668 (QB), 5 July 2022, unrep. (Master Thornett)

Part 36 – no power to vary period for acceptance of offer

CPR rr.3.1(2)(a), 36.3(g). The claimant issued proceedings for clinical negligence against the defendant NHS Trust. Breach was admitted, but causation denied. Loss and damage were not admitted. The defendant made a Part 36 Offer. The claimant applied to the court for an order extending the 21-day time period, the "*relevant period*" as provided for under CPR r.36.3(g), for acceptance of the offer. The issue of principle before the court was whether or not it had jurisdiction to vary that time period. **Held**, application dismissed. The Master held that the court had no jurisdiction, under either CPR Pt 36 or the general power to vary time limits under CPR r.3.1(2)(a), to vary the 21-day time period provided by CPR r.36.3(g) (at [10] and [11]). CPR Pt 36 provided no such power explicitly or inherently. As it was a self-contained code, CPR r.3.1(2)(a) did not apply to Pt 36, additionally r.3.1(2)(a) was concerned with the variation of time for compliance with court rules and orders: CPR r.36.3(g) was a time period, not a time for compliance. In dismissing the application, the Master also rejected reliance on the pre-April 2015 version of CPR Pt 36 (at [8]). Previous authorities cited to the court were also of no assistance in helping to determine the issue of principle (at [9]). ***Matthews v Metal Improvements Co Inc*** [2007] EWCA Civ 215; [2007] C.P. Rep. 27, CA, ***Briggs v CEF Holdings*** [2017] EWCA Civ 2363; [2018] 1 Costs L.O. 23, CA, ***RXL v Oxford University Hospitals NHS Foundation Trust*** [2021] EWHC 1349 (QB), unrep., QBD, ***MRA v The Education Fellowship Ltd*** [2022] EWHC 1069 (QB), unrep., QBD, ref'd to. (See ***Civil Procedure 2022*** Vol.1 at para.36.3.2.)

■ **Candey Ltd v Tonstate Group Ltd** [2022] EWCA Civ 936, 6 July 2022, unrep. (Males, Arnold and Andrews LJJ)

Defendant to a claim or counterclaim – DBA unavailable

Courts and Legal Services Act 1990 Pt II s.58AA(3), Damages-Based Agreements Regulations 2013 (SI 2013/609). The Court of Appeal considered whether an agreement by a defendant to a claim or counterclaim may enter into a damages-based agreement. Such an agreement is clearly unlawful at common law. The court considered whether such an agreement was lawful further to s.58AA of the Courts and Legal Services Act 1990 and the Damages-Based Agreements Regulations 2013 (SI 2013/609). **Held**, such an agreement was not a valid agreement under the 1990 Act and 2013 Regulations. As such, it was unlawful and could not be enforced. It could not be inferred that Parliament had intended to render such agreements lawful: that there was nothing in the Jackson Costs Review, the Parliamentary debates, which related to s.58AA of the 1990 Act as inserted by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, or the 2012 Act's explanatory memorandum was a "*powerful indication*" that Parliament had no intention of rendering such agreements lawful. The Jackson Costs Review was, to the contrary, focused on permitting successful claimants recovering under such agreements (at [51]). Furthermore, it was clear that such agreements were not lawful due to the wording of s.58AA(3) of the 1990 Act, which requires any payment to a "*recipient of services*" under a DBA if they obtain a "*specified financial benefit*" from proceedings (at [52]). As Andrews LJ explained:

> *"[54] ... [a] successful defendant is financially no better off than he was at the start of the litigation. Indeed he may be considerably worse off, because he may have had to pay something to the claimant, even if the claim did not succeed in full. ...*
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> *[55] In my judgment, the language of the statute is clear. I accept that the draftsman chose to refer to the 'recipient of the services' rather than to the 'claimant' – possibly to cater for the possibility that a DBA might be made in respect of ... an 'outgoing' claim by a defendant, i.e. a counterclaim. I also accept that the phrase 'specified financial benefit' is not confined to damages. Thus the expression 'damages-based agreement' cannot be interpreted literally, as only applying to cases in which damages are paid (and not to debts or other forms of financial recovery). However, the word 'obtains' envisages the litigant acquiring something that they do not already possess – by necessary implication, from the opposing party. That language is not apposite to describe a situation in which the defendant retains money or other assets of value, or is not required to make a payment or transfer of assets to the opposing party, even if this is the consequence of successfully resisting a claim for debt or damages, or a claim to those assets.*
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> *[56] As Lord Justice Arnold observed in the course of the oral argument, a defendant facing a claim for £12 million who only has to pay £5 million under a judgment or settlement agreement, is still £5 million worse off than he was at the start of the litigation. Moreover it cannot be sensibly contended that he has 'obtained' £7 million in connection with the litigation from which to pay his lawyers up to 50% – i.e. £3.5 million. It is no answer to my Lord's point that if, in such a case, the client did not in fact have £7 million, the lawyers would not be paid.*
>
> *[57] An agreement between a defendant and his solicitors which makes provision for payment to the latter of a percentage of any sum (or of the value of any asset) which is claimed from him, and which in consequence of the outcome of the litigation he does not have to pay or transfer to the opposing party, is not a 'damages-based agreement' as defined by section 58AA(3). Because it is not permitted by the statute such an arrangement is unlawful and unenforceable. Therefore, there is no need to consider whether an agreement of that nature satisfies the conditions in*

subsection (4), including whether it meets the requirements of the 2013 Regulations.

[58] However, and as one might expect, the language of the Regulations is entirely consistent with that interpretation of section 58AA. 'Payment' is defined in Regulation 1(2) [of the [2013 Regulations] as 'that part of the sum recovered in respect of the claim or damages awarded that the client agrees to pay the representative' ... Regulation 4 (1) [of the [2013 Regulations] prohibits a DBA from requiring an amount to be paid by the client other than the payment (as so defined) net of costs, disbursements or expenses recoverable from another party to the proceedings. Regulation 4(3) [of the [2013 Regulations] puts the matter beyond doubt by restricting the payment to a percentage of 'the sums ultimately recovered by the client'.

[59] As the Judge held at [50], that means it is a necessary prerequisite to the entitlement of a representative to payment under a DBA that the client has made a recovery from the other side to the litigation. As he said, the other materials to which he referred at [46], including the Explanatory Memorandum and the Explanatory Note, and Lord McNally's statement, are consistent with that conclusion, but do not need to be relied on in order to reach it."

(See ***Civil Procedure 2022*** Vol.2 at paras 7A-3 and 7A-5.)

■ **Doyle v M&D Foundations & Building Services Ltd** [2022] EWCA Civ 927; [2022] Costs L.R. 1055 (Baker, Phillips and Edis LJJ)

Parties can contract out of fixed costs

CPR Pt 45 Section IIIA. The claimant brought proceedings seeking damages for personal injury. The claim fell within the scope of the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims. Following issue of the claim, the claim was allocated to the fast track. The claim concluded by consent order. Further to that order, the appellant was ordered to pay the respondent damages in a specified sum and to pay the respondent's costs, which were "*such costs to be the subject of detailed assessment if not agreed*". The respondent subsequently sought a detailed assessment on the standard basis. The appellant contested that. It did so on the basis that, as a claim to which the Protocol had applied, it was subject to CPR Pt 45 fixed costs. It further argued that the reference in the consent order to detailed assessment was, in the context, reference to determination of fixed costs and disbursements by detailed assessment (at [2]). **Held**, the appeal was dismissed. The Court of Appeal noted that, while there was no specific rule within the CPR that provided for parties to contract out of fixed costs, there was no basis on which to prevent them from doing so (at [19]): ***Solomon v Cromwell Group Plc*** (2011) at [22]; ***Adelekun v Ho*** (2019) at [11]. In ***Adelekun*** the same phrase, concerning detailed assessment, as that used in the consent order had been construed by the court to the effect that the parties had not contracted out of the fixed costs regime. That case, however, concerned a Part 36 offer. It was, accordingly, distinguishable from the present situation. In the present case, the parties had contracted out of the fixed costs regime: that they had was a consequence of the natural and ordinary meaning of "*subject to detailed assessment*" in the consent order. The order was to be given its natural and ordinary meaning (at [25]–[30]): see ***Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd*** (2017). As Phillips LJ put it:

"[44] In my judgment, and contrary to the appellant's contention, there is no ambiguity whatsoever as to the natural and ordinary meaning of 'subject to detailed assessment' in an agreement or order as to costs. The phrase is a technical term, the meaning and effect of which is expressly and extensively set out in the rules. It plainly denotes that the costs are to be assessed by the procedure in Part 47 on the standard basis (unless the agreement or order goes on to provide for the assessment to be on the indemnity basis). The phrase cannot be read as providing for an 'assessment' of fixed costs pursuant to the provisions of Part 45 unless the context leads to the conclusion that the wrong terminology has been used (by the parties or by the Court) so that the phrase should be interpreted otherwise than according to its ordinary meaning.

[45] This is abundantly clear from consideration of the rules themselves:

i) First and foremost, rule 44.3(4)(a) expressly provides that, where an order for costs, or for assessment of costs, does not indicate the basis of assessment, the costs will be assessed on the standard basis. In other words, the effect of an order which provides for costs 'subject to detailed assessment' is, by simple and direct application of the rules, an order that costs will be assessed on the standard basis. An agreement to the same effect, intended to be embodied in an order, must have the same natural and ordinary meaning.

ii) Second, rule 44.6(1), in setting out the court's power to assess costs (either summarily or by way of a detailed assessment), expressly provides that such power does not relate to fixed costs. Fixed costs under Part 45 are dealt with separately in rule 44.6(2) and are stated to be recoverable 'in accordance with that Part'. It could not be clearer that an agreement or order for the detailed assessment of costs does not (unless something has 'gone wrong') relate to fixed costs.

iii) Third, that same clear distinction is apparent from rule 45.29 itself. In circumstances where the court will consider a claim for an amount of costs greater than fixed costs under rule 45.29J, it may do so by assessing the costs (summarily or by way of detailed assessment). Such an assessment must necessarily be on the standard basis unless the court specifically directs that the indemnity basis should be used. Rule 45.29K then draws a distinction between the costs so assessed ('the assessed costs') and the fixed recoverable costs, requiring the court to award the latter unless the assessed costs are 20% greater. Again, it could not be clearer that costs assessed summarily or under Part 47 are not the same as (and cannot include) fixed recoverable costs."

Solomon v Cromwell Group Plc [2011] EWCA Civ 1584; [2012] 1 W.L.R. 1048, CA, ***Broadhurst v Tan*** [2016] EWCA Civ 94; [2016] 1 W.L.R. 1928, CA, ***Sharp v Leeds City Council*** [2017] EWCA Civ 33; [2017] 4 W.L.R. 98, CA, ***Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd*** [2017] EWCA Civ 1525, unrep., CA, ***Hislop v Perde*** [2018] EWCA Civ 1726; [2019] 1 W.L.R. 201, CA, ***Adelekun v Ho*** [2019] EWCA Civ 1988; [2019] Costs L.R. 1963, CA, ref'd to. (See ***Civil Procedure 2022*** Vol.1 at para.45.16.1.)

■ **UCP Plc v Nectrus Ltd** [2022] EWCA Civ 949, 11 July 2022, unrep. (Sir Geoffrey Vos MR, Underhill VP, Lewison LJ)

Reopening application for permission to appeal on a second application to reopen

CPR r.52.30. The Court of Appeal and High Court when acting as a final appeal court have jurisdiction to reopen applications for permission to appeal and appeals under what was the ***Taylor v Lawrence*** (2002) jurisdiction, which is now codified in CPR r.52.30. In circumstances where there had been two separate applications made under r.52.30, the Court of Appeal allowed the second application to reopen an application for permission to appeal. The first application to reopen had been refused by the judge who refused the permission to appeal application. The Court of Appeal allowed the second application to be reopened on the basis that the judge, in the particular and unusual circumstances of the case, ought not to have dealt with the second application to reopen. It did so on the basis of apparent bias. In doing so the court noted that reopening a second application made under r.52.30 would be truly exceptional. As Vos MR, Underhill VP and Lewison LJ put it in a joint judgment:

"[20] We emphasise, as CPR Part 52.30(1)(b) provides, and as the authorities emphasise, that final decisions on permission to appeal applications will only be re-opened in exceptional circumstances. That is even more so, where the court is faced with a second Part 52.30 application as in this case. We have nonetheless decided ... that the judge's first Part 52.30 decision should be set aside for apparent bias. The judge ought, in the very unusual circumstances of this case, to have recused himself from hearing the first Part 52.30 application, in essence because his own fairness in making earlier procedural decisions was under direct challenge ..."

The court emphasised that its judgment should not be taken to suggest that judges who refused permission to appeal applications should routinely recuse themselves from dealing with applications to reopen such decisions, albeit they should consider carefully whether they ought to do so:

"[35] In the course of hearing this application, we have had the opportunity to consider the appropriateness of the standard form response (see [12] and [29] above) that the Civil Appeals Office makes when parties suggest that a CPR Part 52.30 application should be heard by a judge other than the one who decided the original appeal or permission to appeal. That response seems to us to be an appropriate first response, but it should not be thought of as a substitute for a proper judicial consideration of whether the judge should recuse himself ... in all the circumstances of the case.

[36] As the standard response itself says: a professional judge will have no difficulty changing his or her mind if new material or arguments justify doing so. Judges asked to recuse themselves should be careful to identify the grounds on which they are asked to do so. In this case, the grounds included allegations of repeated procedural unfairness to one party. That is a circumstance that may, if there is any substance to it, be thought to raise at least the possibility that recusal would be appropriate. Cases turn on their particular facts and we would not wish to lay down cumbersome and unworkably prescriptive rules. We would, however, urge judges to think carefully about whether it is appropriate for them to hear a CPR Part 52.30 application in any case where their own procedural decisions are under attack on the grounds of fairness. Moreover, in refusing an application to recuse, judges should give reasons for doing so, even if they are brief. That said, we see no reason to change the standard practice of the Civil Appeals Office. Successful applications under CPR Part 52.30 are rare. In our experience, many such applications make unsubstantiated and repetitive allegations which can both conveniently, efficiently and justly be dealt with by the judge most familiar with the case."

Taylor v Lawrence [2002] EWCA Civ 90; [2003] Q.B. 528, ref'd to. (See ***Civil Procedure 2022*** Vol.1 at para.52.30.4.)

■ **Abbott v Ministry of Defence** [2022] EWHC 1807 (QB), 14 July 2022, unrep. (Master Davison)

Group litigation – joinder

CPR rr.7.3, 19.1. An application for permission to appeal was issued and refused in group litigation brought against the Ministry of Defence. The Master released his judgment for publication on the basis that it raised issues that may affect other cases, implicitly authorising its citation under para.6.1 of ***Practice Direction (Citation of Authorities)*** [2001] 1 W.L.R. 1001. Two groups pursued claims. In the first group, or cohort, there were approximately 250 claims. Those claims were issued on a single claim form and not subject to a Group Litigation Order (GLO). They were stayed. A second group issued claims, and the question whether it was permissible for those claims to be joined on a single claim form was raised by the Senior Master. The question was raised as the claims had very little in common. A similar point was then raised with Master Davison regarding the first group. Further claims were issued concerning a third group. This time, some 3500 claims were included on the claim form. Again the question arose whether it was permissible to join multiple claimants where they had "*widely differing claims*" (at [5]). **Held**, it was not permissible to set out such disparate claims in a single claim form, as CPR r.7.3 provides that claims can be joined to a single claim form where they can be "*conveniently disposed of in the proceedings*." That was not the case here due to the disparate nature of the claims. More was needed than a common defendant and a number of common themes (at [6]). In such a case it was clear, as pointed out by counsel, that it would simply not be possible to have a single trial of the claims. Moreover, their management would require multiple track allocation and trials. Placing 3,500 claims on a single claim form would also place an "*impossible strain*" on CE-File, which cannot create sub-files for individual claims (it is to be hoped that at some point CE-File will be sophisticated enough to remove this as a valid justification for refusing joinder) (at [8]). (See ***Civil Procedure 2022*** Vol.1 at para.7.3.2.)

■ **Ingenious Games LLP v Revenue and Customs Commissioners** [2022] EWCA Civ 1015; [2022] S.T.C. 1391 (Phillips and Nugee LJJ, Sir David Richards)

Application to reopen appeal – time within which to bring application

CPR r.52.30. An application for permission to bring a second appeal was brought from a decision of the Upper Tribunal. Seven grounds of appeal were raised in the application. Permission was granted on two grounds and refused on the other five. After the substantive appeal arising from the two grounds on which permission was granted, the appellants applied to reopen the permission to appeal application – specifically the grounds on which permission to appeal was refused. The Court of Appeal refused the application. Having done so, Nugee LJ noted that the question had been raised whether the application to reopen should have been brought before the substantive appeal of the grounds on which permission had been granted had taken place. In obiter, Nugee LJ was clear that such an application ought properly to be made before such a hearing. As he explained it:

> *"[17] The question is whether that application should have been brought before the substantive appeal was heard, that is between February 2020 and March 2021. [Counsel for the applicants] said No; that it was a pre-condition of an application under CPR r 52.30 that the decision could be said to cause injustice; and that this could not be said until it was known whether the appeal on Grounds 1 and 3 succeeded or not, as unless and until that had happened it could not be said that any injustice had been caused.*
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> *[18] I unhesitatingly reject that submission. Where permission to appeal has been granted on some grounds but not others so that an appeal will take place in any event, an application under CPR r 52.30 on the basis that the refusal of permission on the refused grounds should be reopened must in my judgment be brought as soon as possible and (assuming of course that the relevant facts were then known to the applicants) well before the hearing of the substantive appeal so that if the CPR r 52.30 application succeeds there can be a single hearing of the appeal rather than two. This is particularly so if, as here, it is suggested that the refused grounds should have been permitted precisely because they were all bound up with the grounds on which permission to appeal was granted. Here the LLPs knew the terms of the limited permission granted ... and could at that stage have worked out the potential consequences were their appeal on Grounds 1 and 3 to succeed. It was in those circumstances wholly wrong in my judgment to keep the CPR r 52.30 application back until after they saw whether their appeal on Grounds 1 and 3 succeeded or not. I would have been prepared to refuse this application on that ground alone, although, for the reasons I have given, it does not in fact arise.*
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> *[19] I add that even if there had been justification for waiting until the outcome of the appeal was known, it is very difficult to see any justification for delaying from 4 August 2021 to 11 March 2022 before bringing the application. It is true that CPR r 52.30 does not contain any specific time limits. That is understandable, as in some cases it may take a long time for matters justifying reopening to come to the attention of the applicant. But that does not mean that where the applicant does know the grounds on which he wishes to make his application he can be as leisurely as he likes about it."*

The court directed that its decision could be cited further to para.6.1 of the ***Practice Direction (Citation of Authorities)*** [2001] 1 W.L.R. 1001. (See ***Civil Procedure 2022*** Vol.1 at para.52.30.4.)

■ **Diag Human SE v Volterra Fietta (A Firm)** [2022] EWHC 2054 (QB); [2022] Costs L.R. 1209 (Foster J sitting with Master Simon Brown as a Costs Assessor)

Enforceability of non-compliant conditional fee agreements

Courts and Legal Services Act 1990 ss.58 and 58A. The High Court dismissed an appeal from a decision of Master Rowley that a conditional fee agreement (CFA) was unenforceable. In doing so, it affirmed that there had been no change in public policy concerning their enforceability: either a CFA satisfied the statutory requirements and was thus enforceable, or it did not satisfy them and was not enforceable. ***Zuberi v Lexlaw Ltd*** (2021) did not support the opposite conclusion, i.e. that there had been a shift in public policy (at [86]–[103]). ***Zuberi v Lexlaw Ltd*** [2021] EWCA Civ 16; [2021] 1 W.L.R. 2729, CA, ref'd to. (See ***Civil Procedure 2022*** Vol.2 at paras 7A-3 and 7A-5.)

■ **MBR Acres Ltd v McGivern** [2022] EWHC 2072 (QB), 2 August 2022, unrep. (Nicklin J)

Permission requirement for contempt applications arising from "persons unknown" injunctions

CPR Pt 81. An interim injunction was granted against protestors, including persons unknown, enjoining them from entering the claimant's premises, gathering and remaining in an area of land near the premises, parking vehicles in that area, or obstructing access to that area. The claimant issued an application for contempt against the respondent, a solicitor, on the basis that she had had parked her car in the area specified in the injunction, entered the prescribed area, and obstructed access to the claimant's premises (at [23]). It was alleged that the defendant fell within the scope of "*persons unknown*" against whom the injunction was granted: ***Cuciurean v Secretary of State for Transport*** (2021). The respondent submitted that she attended the area in a professional capacity and had entered the prescribed area inadvertently and that the contempt application was an abuse of process (at [31]). **Held**, the contempt application was "*wholly frivolous*", the alleged breaches were "*trivial or wholly technical*". It was dismissed and certified as being totally without merit (at [96]). Having disposed of the application, Nicklin J went on to explain that the court would ordinarily expect a party in whose favour an injunction against persons unknown had been obtained to ensure that they considered carefully whether bringing contempt proceedings against a third party, who inadvertently came within the scope of such an injunction, was justified and particularly whether it was a proportionate use of the court's resources. The claimant could not be trusted to do so. As such, while there was no basis to impose a civil restraint order on the claimant, the court could, under its inherent jurisdiction and case management powers, impose a requirement that the applicant obtain the court's permission before it pursued any further contempt applications (at [98]–[104]). A party against whom such a requirement is imposed must satisfy the court that the proposed contempt application: (i) has a real prospect of success; (ii) does not rely upon wholly technical or insubstantial breaches; and (iii) is supported by evidence that the respondent had actual knowledge of the terms of the injunction they are alleged to have breached (at [102]). ***Cuciurean v Secretary of State for Transport*** [2021] EWCA Civ 357, unrep., CA, ref'd to. (See ***Civil Procedure 2022*** Vol.1 at para.81.3.10.)

Practice Updates

STATUTORY INSTRUMENTS

CIVIL PROCEDURE (AMENDMENT NO.2) RULES (SI 2022/783). In force, generally from **1 October 2022**. Amendments to CPR Pts 55, 56 and 65 come into force on **1 December 2022**. Amendments to CPR Pt 45, to omit the entries for its Section IV, and to Pt 46, in so far as it applies to scale costs in the IPEC, apply to claims made on or after 1 October 2022 only. The Amendment (No.2) Rules effect a large number of changes to the CPR. The most significant amendments include: the substitution of a new, simplified, Pt 15; a new Pt 49, which now deals with specific rather than specialist proceedings and gathers together a number of Practice Directions from across the CPR (see Practice Direction Update 149); the insertion of a new section of Pt 54 that deals with environmental review; and amendments to Pts 55, 56 and 65 consequent on the Renting Homes (Wales) Act 2016. It also revises and moves scales costs in IPEC cases from Pt 45 to Pt 46 and makes clarificatory amendments to Pt 61 concerning service of statements of case in collision claims and default judgment. It makes further revisions to Pts 2, 3, 4, 6, 7, 8, 12, 16, 38, 52, 63 and 81. Practitioners should note that the Amendment (No.2) Rules anticipate that the omission of Practice Direction 3D by CPR PD Update 149 was accompanied by the renumbering of PDs 3E, 3F and 3G. CPR PD Update 149 (July 2022) did not, however renumber those Practice Directions: see the amendments to CPR rr.3.12, 3.15 and 3.20. No doubt this oversight will be rectified in a subsequent PD Update before 1 October 2022.

PRACTICE DIRECTION

CPR PRACTICE DIRECTION – 149th Update. This Practice Direction effects a wide range of amendments, the majority of which come into force on **1 October 2022**. Amendments to PDs 55A, 55B, 56A, and 65 come into force on **1 December 2022**. The most significant amendments made are the omission of: PD 2D (References in the Rules to Actions Done by the Court); PD 4 (Forms); PD 15 (Defence and Reply); PD 49B (Order Under Section 127 Insolvency Act 1986); and PD 51U (Disclosure Pilot Scheme). PD 51U is formally incorporated, in substantially the same form albeit with some clarifications and revisions, into the CPR by a new PD 57AD (Disclosure in the Business and Property Courts). Other significant amendments are: the substitution of a new PD 7A (How to Start Proceedings) and a new PD 16 (Statements of Case); the amendment of Pt 49 so that it now focuses on "*specific proceedings*" rather than "*specialist proceedings*"; and the transfer of a number of PDs from other parts of the CPR to Pt 49. The PDs moved to Pt 49 are: PD 3D (Mesothelioma Claims), which becomes a new PD 49B; PD 7B (Consumer Credit Act 2006 – Unfair Relationships), which becomes PD 49C; PD 7D (Claims for the Recovery of Taxes and Duties), which becomes PD 49D; PD 8A (Alternative Procedure for Claims), which becomes PD 49E; and PD 8B (Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents and Low Value Personal Injury (Employers' Liability and Public Liability) Claims – Stage 3 Procedure), which becomes PD 49F. Amendments are also made to: PD 6B, to simplify the process for service of documents out of the jurisdiction consequent upon service, with the court's permission, of a claim form out of the jurisdiction; a new PD 56A, consequent upon statutory reform introduced by the Renting Homes (Wales) Act 2016; and amendments to IPEC costs in PD 45 and PD 46.

PRACTICE GUIDANCE

THE CHANCERY GUIDE 2022. On 29 July 2022, the Chancellor issued the new Chancery Guide 2022. It replaces the previous Chancery Guide 2016 (as amended). It is given effect by the Chancery Court Practice Note 2022, albeit Court Guides have historically taken effect through their own publication with the approval of the relevant Head of Division and/or the Master of the Rolls or Lord Chief Justice. It is unclear why a degree of formality has been introduced into the publication of the new Guide. The Guide's publication also anticipates a growth in local practices in Chancery Division district registries. As the announcement concerning its publication makes clear:

> *"Further guidance will be published on the Judiciary website reflecting local differences in practice in the District Registries, but subject to that, the Chancery Guide applies in full."*

A number of factors are arguably behind this: an acceptance that district registries operate in different ways from the Royal Courts of Justice; experience during the COVID-19 pandemic when circuits had to adapt their practices to meet local conditions and needs; and, perhaps, a broader trend away from the Woolf reforms' idea of uniformity in practice across civil justice that can be seen through the development of discrete practices applicable only to the Business and Property Courts, e.g. PD 57AC (Trial Witness Statements in the Business and Property Courts) in contrast to CPR Pt 32 and PD 57AD (Disclosure in the Business and Property Courts) in contrast to CPR Pt 31. What we may be seeing here is the start of a long-term trend away from a unified code of civil procedure to the reintroduction of two procedural codes: one applicable to the Business and Property Courts, and one applicable to other forms of civil claim.

The Guide itself has been fully revised to take account of the move to digital working practices, including full use of hypertext links within the Guide to relevant material, as well as to make the text, in content and style, more closely similar to that of the Commercial Court Guide. In so far as possible, its guidance is consistent with guidance for other courts within the Business and Property Courts. One particular, and important, innovation is the inclusion of a significant number of Annexes, each of which includes and draws together model orders (draft ENE Order), standard forms (e.g. the standard form Freezing Injunction and Search Order) as well as practice guidance on skeleton arguments, bundles and remote and hybrid hearings. Further innovations include Appendix Z, which sets out an up-to-date Protocol for Remote Hearings in the Business and Property Courts; it is likely to prove helpful for such hearings in other courts.

THE CHANCERY COURT PRACTICE NOTE 2022. On 29 July 2022, the Chancellor of the High Court issued a new Chancery Court Practice Note, which accompanied the Chancery Guide 2022 (see above). The 2022 Practice Note provides that, apart from specific Practice Notes listed in its Schedule, all other Chancery Practice Notes and Directions are revoked. There is an ambiguity in the reference to "*Directions*". It could, no doubt mistakenly, be thought to refer to Practice Directions. Clearly that could not have been the intention as Practice Directions can only be revoked by subsequent Practice Direction Updates: see, for instance, CPR Practice Direction Update 148, which revoked Practice Direction Update 145. Were the 2022 Practice Note to have revoked any Practice Directions it would either have had to have been issued by the Master of the Rolls with the concurrence of the Lord Chancellor, or by the Chancellor with the concurrence of the Master of the Rolls and Lord Chancellor: Civil Procedure Act 1997 s.5 and the Lord Chief Justice's

Statutory Delegations No.1 of 2020. As it was not issued further to the Practice Direction-making power, the reference to "Directions" in the Practice Note ought properly to be interpreted as a reference to other forms of sub-Practice Direction guidance, e.g. Practice Statements, Practice Guidance, Practice Notes, etc. relevant to the Chancery Division where they were not issued under the Practice Direction-making power: a point made clear by the Note's reference to its Schedule as containing "*Practice Notes and Directions*", when it contains no Practice Directions. The evident intention of the Practice Note in revoking these various forms of guidance, apart from the guidance referred to in its Schedule, is to simplify the available guidance and ensure that practitioners use the Chancery Guide 2022 as a "one-stop-shop" for best practice in the Chancery Division. The Schedule refers to the following, which remain in force: *Practice Note: Variation of Trusts*; *Practice Note: Disclosure PD51U Applicability to Part 8*, which ought properly to have been revised to refer to PD 57AD; *Practice Note: Disclosure PD51U Applicability in the ICC, Chief ICC Judge's Practice Note*; which ought also to have properly been revised to refer to PD 57AD; *Practice Note: Witnesses Giving Evidence Remotely*; *Practice Note: Companies Court: Unfair Prejudice Petition Directions; Practice Note: Companies Court: Company Restoration*; *Practice Statement: Patents Court trial listing; Practice Statement: Listing of Cases for Trial in the Patents Court*; and *Practice Note: Business and Property Courts in Manchester and Leeds (in person hearing of Friday applications)*.

In Detail

Ministry of Justice – Consultation on Mandatory Mediation in Small Claims

On 26 July 2022, the Ministry of Justice launched a consultation exercise concerning mandatory mediation. The consultation, *Increasing the use of mediation in the civil justice system*, runs until 4 October 2022. It raises two significant proposals. First, that a mandatory mediation stage be introduced to proceedings allocated to the small claims track in the County Court. Secondly, and a longer-term consideration, the integration of mandatory mediation across all civil claims. In setting out these proposals, it raises the following questions:

1. We propose to introduce automatic referral to mediation for all small claims (generally those valued under £10,000). Do you think any case types should be exempt from the requirement to attend a mediation appointment? If so, which case types and why?

2. Do you think that parties should be able to apply for individual exemptions from the requirement to attend mediation, assessed on a case-by-case basis by a judge? If so, why? And what factors do you think should be taken into consideration?

3. How do you think we should assess whether a party who is required to mediate has adequately engaged with the mediation process?

4. The proposed consequences where parties are non-compliant with the requirement to mediate without a valid exemption are an adverse costs order (being required to pay part or all of the other party's litigation costs) or the striking out of a claim or defence. Do you consider these proposed sanctions proportionate and why?

5. Please tell us if you have any further comments on the proposal for automatic referral to mediation for small claims.

6. Do you have experience of the Small Claims Mediation Service?

7. Did you receive information about the Small Claims Mediation Service? If you received information, how useful was it?

8. How can we improve the information provided to users about this service?

9. What options should be available to help people who are vulnerable or have difficulty accessing information get the guidance they need?

10.What else do you think we could do to support parties to participate effectively in mediation offered by the Small Claims Mediation Service?

11. Does there need to be stronger accreditation, or new regulation, of the civil mediation sector? If so what – if any – should be the role of government?

12. Which existing organisation(s) could be formally recognised as the accreditation body for the civil mediation profession and why?

13. What is your view on the value of a national Standard for mediation? Which groups or individuals should be involved in the development of such a Standard?

14. In the context of introducing automatic referral to mediation in civil cases beyond small claims, are there any risks if the government does not intervene in the accreditation or regulation of civil mediators?

15. Some mediators will also be working as legal practitioners, or other professionals and therefore subject to regulation by the relevant approved regulator e.g. solicitors offering mediation will already be regulated by the Solicitors Regulatory Authority. Should mediators who are already working as legal practitioners or other regulated professionals be exempt from some or any additional regulatory or accreditation requirements for their mediation activities?

The consultation document is available online at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1093682/mediation-consultation-web.pdf/* [Accessed 7 September 2022].

Responses to it can be submitted online at: *Disputeresolution.enquiries.evidence@justice.gov.uk*.

Comment

The consultation ought to raise no surprises. The movement towards mandatory civil mediation, while it has been a slow one in England and Wales, has gained significant impetus over the last two years. Policy makers have moved, over that time, a significant distance from Lord Woolf's conclusion in the *Access to Justice Reports* that mandatory mediation was not to be recommended; albeit he then slightly qualified his conclusion after observing the operation of mandatory mediation in Australia, noting that it was something that required further consideration given results there. As he put it:

> *"In most jurisdictions in Australia they are making mediation compulsory in cases where it is considered that it would help. I have not gone so far as that in my Interim Report, but certainly having learnt what I have I'm encouraged to think that that is something which I should look at again"* (Lord Woolf, *A New Approach to Civil Justice,* Law Lectures for Practitioners Vol. 1996 (Hong Kong Law Journal Special Edition) (Sweet & Maxwell, Asia) at 11).

Via Blackburn J's approval of mandatory mediation and his conclusion that it was implicit in CPR r.1.1 and could be applied consistently with art.6 of the European Convention on Human Rights in ***Shirayama Shokusan Co Ltd v Danovo Ltd (No.2)*** [2004] EWHC 390 (Ch); [2004] 1 W.L.R. 2985, and then the Court of Appeal's much criticised mis-step in ***Halsey v Milton Keynes General NHS Trust*** [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002 which, without discussion of ***Shirayama***, inexplicably and incorrectly concluded that mandatory mediation was contrary to art.6, policy makers and the judiciary have moved to the position that mandatory mediation is not only lawful but beneficial to litigants and the court system as a whole. This can most clearly be seen from recent reports by the Civil Justice Council, which concluded that it was lawful and that it ought to be implemented for very low value cases (*Compulsory ADR* (June 2021); *The Resolution of Small Claims – Final Report* (January 2022)). The movement towards mandatory mediation can also be seen from both the approaches taken by Vos MR and his promotion of "*integrated dispute resolution*" (the idea that ADR ought to be an integral part of the civil justice system), which is echoed by the Justice Minister in the consultation (at 3). On Vos MR, see for instance, preface to *Civil Procedure* (2020); *Online Courts: Perspectives from the Bench and the Bar* at [13] (20 November 2020) and *The Future for Dispute Resolution: Horizon Scanning* (17 March 2022).

Given this, and the nature of the consultation, the intention on the part of both government and judiciary is clear: mandatory small claims mediation is the first step towards mandatory civil mediation generally. Implicit in all this, and particularly the consultation, is an echo of Blackburn J's view that mandatory mediation is a proper means to deal with cases justly and at proportionate cost. It thus appears that England and Wales is now at a point, based on an international comparison carried out by the Scottish Government (*An International Evidence Review of Mediation in Civil Justice*[1] cited in the consultation at 8–9), where many other jurisdictions around the world have been for some considerable time: mandatory ADR is as permissible as it is beneficial. It is the same point also reached by the Court of Appeal where early neutral evaluation carried out as part of case management is concerned (***Lomax v Lomax*** [2019] EWCA Civ 1467; [2019] 1 W.L.R. 6527). And it is the same point underpinning the Civil Procedure Rule Committee's piloting of automatic referral to opt-out mediation in the Online Money Claims pilot scheme under CPR PD 51R.

While the consultation focuses on a wide range of practical issues, three broader points call for consideration. First, the consultation is focused on mediation only. There are many other beneficial forms of ADR that could usefully be piloted as part of mandatory ADR schemes. There is an implicit assumption in the consultation, and its antecedents, that mediation either is ADR or that it is the optimum form of ADR. While there is a cost and utility-based justification for applying mediation as the default form of ADR to very low value small claims, there may well be benefit to applying other forms of ADR, such as ENE or collaborative law, to higher value small claims. Moreover, ENE and collaborative law could properly form part of a suite of ADR methods where a mandatory ADR scheme is introduced across the board for all civil claims. The potential risk that focusing on mediation poses is that if it is introduced as mandatory for all claims, a sub-optimal

1 Available at *https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2019/06/international-evidence-review-mediation-civil-justice/documents/international-evidence-review-mediation-civil-justice/international-evidence-review-mediation-civil-justice/govscot%3Adocument/international-evidence-review-mediation-civil-justice.pdf* [Accessed 7 September 2022].

form of ADR is mandated for those claims that would have benefited more fully from another form of ADR. The danger for policy makers is that by focusing on mediation they fail to take proper notice of the needs of different types of claims and of more effective ways to deal with them justly.

The second issue is one of piloting. English civil procedure has a history of reform that is neither evidence-based nor tested. Since the Jackson Costs reforms there has been some movement towards testing; the greater use of CPR Pt 51 pilot schemes since 2016 is a case in point, as is the testing of mandatory opt-out mediation in the online procedure pilot schemes. Notwithstanding the results of the current consultation, where mandatory mediation is introduced, it ought properly to be introduced via a pilot scheme. Such a pilot scheme ought to test, at least, its effectiveness in general and by reference to specific categories of claim. It ought to test the cost, both the individual litigants and the state, and benefits of the scheme. Where any scheme is introduced, as it ought to be as part of online procedure, the cost of designing, maintaining, and operating that scheme ought to be carefully considered and fully and effectively fully, both in the short and the long term. It is likely to be the case that a full understanding of the costs will only become apparent when such a system is up and running, albeit an effective pilot will flesh them out to a significant extent. And in assessing the costs and benefits of mandatory mediation, or ADR more generally, consideration ought to be given to the views of litigants and the public in general. The consultation could benefit from wider publicity and targeting to the public in this respect. User-centred design ought to focus more clearly on the widest range of potential users.

Finally, while focusing on mediation and ADR, reform ought not to be distracted from one point that Lord Woolf was at pains to stress during the Access to Justice reforms: reform should not undermine, but rather secure, equality before the law. One of the reasons he opposed mandatory mediation then was a suspicion that it would undermine equal access to the courts. Were the focus on mediation to do that, it could raise the risk that public confidence in the civil courts would be undermined. Care will need to be taken to ensure that, particularly where small claims are concerned, the introduction of mandatory mediation does not come at the expense of maintaining a fully accessible, well-designed and operated "*litigation track*", one that is both seen to be and is fully accessible. That will need further work on the online procedural reforms to ensure that mediation and litigation do fit together seamlessly as two parts of an integrated whole.

EDITOR: **Dr J. Sorabji,** Barrister, 9 St John Street
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