CIVIL PROCEDURE NEWS

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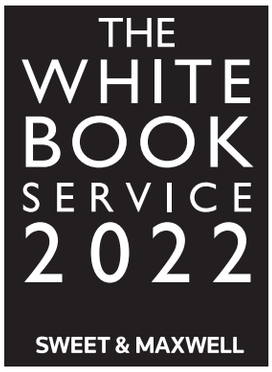

In Brief

Cases

- **Children's Ark Partnerships Ltd v Kajima Construction Europe (UK) Ltd** [2022] EWHC 1595 (TCC), 22 June 2022, unrep. (Joanna Smith J)

Multi-tier dispute resolution clause

CPR rr.3.4(2), 11(1). The defendants applied to strike out a claim or have it set aside. They did so based on alleged non-compliance by the claimants with a contractually binding multi-tier dispute resolution clause, which was said to require the parties to refer disputes to a liaison committee, thereafter mediation, and thereafter adjudication before court proceedings could be commenced. The basis of the application was that prior to there being compliance with the dispute resolution clause, the court had no jurisdiction over the defendant or should decline to exercise its jurisdiction (CPR r.11(1)) or, in the alternative, it should strike out the claim under CPR r.3.4(2)(a) or (b). **Held**, the application was refused. Having considered ***Ohpen Operations UK Ltd v Invesco Fund Managers Ltd*** (2019), Joanna Smith J concluded that it was not the case, as decided in ***Ohpen***, that it was necessary for such a dispute resolution clause to operate as a condition precedent to commencing proceedings. Such a clause simply needed to create a mandatory obligation viz.:

> *"[48] ... In my judgment the relevant authorities dealing with court proceedings support the proposition that the court has an inherent jurisdiction to stay such proceedings for the enforcement of an alternative dispute resolution provision where the clause creates a mandatory obligation and where it is enforceable ..."*

To create a mandatory obligation such a clause would have to satisfy three of the four conditions identified in ***Ohpen***:

> *"[32] ...*
>
> *i) The Agreement must create an enforceable obligation requiring the Parties to engage in alternative dispute resolution.*
>
> *...*
>
> *iii) The dispute resolution process to be followed does not have to be formal but must be sufficiently clear and certain by reference to objective criteria, including machinery to appoint a mediator or determine any other necessary step in the procedure without the requirement for any further agreement by the Parties.*
>
> *iv) The court has a discretion to stay proceedings commenced in breach of an enforceable dispute resolution agreement. In exercising its discretion, the court will have regard to the public policy interest in upholding the Parties' commercial agreement and furthering the overriding objective in assisting the Parties to resolve their disputes.'"*

In this case the clause was to be interpreted as providing a condition precedent (at [58]). However, it was not drafted with sufficient clarity and certainty to create an enforceable obligation to take part in the dispute resolution process set out in the contract. As a consequence it could not form the basis of a stay of proceedings or a decision by the court not to exercise its jurisdiction under CPR r.11(1)(b) (at [56]–[66]). In obiter, Johanna Smith J noted that CPR r.11(1)(a) was not engaged in circumstances where mandatory ADR clauses were concerned (at [74]–[78]). She also considered that a clause that created a condition precedent would give rise to a jurisdictional issue; a mandatory clause would not (at [79]). It was important, where condition precedents were concerned, that there was a public interest in not only giving effect to dispute resolution clauses but for the court to also *"seek to give effect to bargains struck by commercial parties"*. As such there was no reason why a clause that amounted to a valid condition precedent should not engage CPR r.11(1)(b) (at [79]). Furthermore:

> *"[82] Assuming for these purposes that CPR 11(1)(b) is engaged, it is clear from the authorities to which I was referred that even in cases where claims are commenced in breach of a mandatory jurisdiction provision, the default remedy under CPR 11(6) is a stay, with the remedy of setting aside a claim form being reserved for cases where proceedings have not been validly served (see IMS). Accordingly, in cases involving an ADR clause which is an enforceable condition precedent to litigation, there may often be no difference between the approach that the court will take in refusing to exercise its jurisdiction under CPR 11(1)(b) and granting a stay and the approach it will take in exercising its discretion to determine whether to stay proceedings under section 49(3) of the Senior Courts Act 1981 or pursuant to its inherent jurisdiction (see Ohpen at [57]). I understood [counsel for the defendants] to accept this in his reply submissions, pointing out, however, that the additional relief available under CPR 11(6) might come into sharper relief in a case involving limitation.*

[83] Of course, the court will need to consider, in any given case, whether the circumstances of the case merit more stringent relief. ..."

Finally, Joanna Smith J noted that if the question had arisen, she would not have exercised her discretion to do anything other than stay the proceedings. This was because the claim had been commenced as a protective measure, re limitation, and to enable compliance with the pre-action protocol (at [89]–[92]). Consideration of the reasons why the application to strike out failed was set out at [93]–[106]. ***Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*** [1993] A.C. 334, HL, ***Cable & Wireless Plc v IBM United Kingdom Ltd*** [2002] EWHC 2059 (Comm); [2002] 2 All E.R. (Comm) 1041, Comm., ***Hoddinott v Persimmon Homes (Wessex) Ltd*** [2007] EWCA Civ 1203; [2008] 1 W.L.R. 806, CA, ***Wah v Grant Thornton International Ltd*** [2012] EWHC 3198 (Ch); [2013] 1 All E.R. (Comm) 1226, ChD, ***Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd*** [2014] EWHC 2104 (Comm); [2015] 1 W.L.R. 1145, Comm., ***IMS SA v Capital Oil and Gas Industries Ltd*** [2016] EWHC 1956 (Comm); [2016] 4 W.L.R. 163, Comm., ***Ohpen Operations UK Ltd v Invesco Fund Managers Ltd*** [2019] EWHC 2246 (TCC); [2020] 1 All E.R. (Comm) 786, TCC, ***NWA v FSY*** [2021] EWHC 2666 (Comm); [2021] Bus. L.R. 1788, Comm., ref'd to. (See ***Civil Procedure 2022*** Vol.2 para.14-25.)

- **McKinney Plant & Safety Ltd v Construction Industry Training Board** [2022] EWHC 2361 (Ch), 20 September 2022, unrep. (Richard Farnhill sitting as a deputy High Court Judge)

Non-compliance with PD 57AC – indemnity costs

CPR PD 57AC. An issue arose at a pre-trial review concerning compliance with the requirements of PD 57AC in respect of a supplemental witness statement. The defendant argued that the claimant had failed to comply with the PD's requirements. The witness statement was said to have included extensive commentary and submissions (at [10]–[12]). The claimant's submissions concerning the witness statement set out significant revisions to it; only seven out of 102 paragraphs of the witness statement would have been left unaltered in the light of those suggested revisions (at [13] and [16]). The defendants sought their costs concerning the matter on an indemnity basis. **Held**, costs were awarded on an indemnity basis as the breach of PD 57AC's requirement was a serious one, as the *"overwhelming majority"* of the witness statement *"needed to be deleted or amended"* and the claimant had not engaged with the defendant on the issue until late in the day and, when it had, it had wrongly sought to minimise the non-compliance and not otherwise adopted a constructive approach (at [25]–[26]). ***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); [2022] F.S.R. 22, ChD, ref'd to. (See ***Civil Procedure 2022*** Vol.1 para.57ACPD.0.1.)

- **Gorbachev v Guriev** [2022] EWCA Civ 1270, 30 September 2022, unrep. (Nicola Davies, Males, Lewis LJJ)

Disclosure ordered against a third party out of the jurisdiction

CPR PD 6B para.3.1 Gateway 20, r.31.17; Senior Courts Act 1981 s.34. The Court of Appeal considered the question whether there is jurisdiction to order disclosure of documents held by a third party outside England and Wales. Differing conclusions on the point had been reached in the decision from which the appeal arose and that of Cockerill J in ***Nix v Emerdata Ltd*** (2022). **Held**, the court had jurisdiction to order such disclosure where the documents sought were within the jurisdiction even though the third party was outside the jurisdiction; ***Nix v Emerdata Ltd*** (2022) distinguished. Where documents are within the jurisdiction, the principle of territoriality, which would ordinarily limit the ability to obtain documents held by third parties abroad, has little to no application. Moreover, application of the ordinary process, whereby the letter of request procedure would ordinarily be used, would not be circumvented where the documents were within the jurisdiction. Nor would directing disclosure of such documents infringe principles of international comity between states (at [81]–[92]). As such, the court held:

"[88] ... that section 34 of the SCA allows an application to be brought against a third party out of the jurisdiction for an order to produce documents which are located within England and Wales. I see no difficulty in interpreting the words 'any documents' in section 34(2) as referring to any documents present within England and Wales."

It went on to leave for future decision whether the court had jurisdiction to make such an order where the documents and the third party were abroad. It did note, in obiter, that if such jurisdiction existed it could only be exercised exceptionally given the existence of the letter of request procedure, for reasons given by Cockerill J in ***Nix v Emerdata Ltd*** (2022) (at [90]). Having held that there was jurisdiction to make the order, the court also held that service could be effected outside the jurisdiction under CPR PD 6B para.3.1 Gateway 20 (at [12]–[37] and [92]). ***Nix v Emerdata Ltd*** [2022] EWHC 718 (Comm), unrep., Comm., ref'd to. (See ***Civil Procedure 2022*** Vol.1 paras 6BPD.3, 31.17.2.1; Vol.2 para.9A-115.)

■ **Business Mortgage Finance 4 Plc v Hussain** [2022] EWCA Civ 1264, 4 October 2022, unrep. (Arnold, Stuart-Smith and Nugee LJJ)

Contempt of court – dispensing with personal service

CPR r.81.4(2). The appellant had been held to be in contempt of court and had been committed to prison. He appealed from those decisions. Personal service of the contempt proceedings had been dispensed with retrospectively. Various issues arose concerning the contempt proceedings. First, the Court of Appeal considered the approach to dispensing with personal service. It held that there was power to dispense with personal service both prospectively and retrospectively (at [57]–[73], [82]). The post-2016 CPR Pt 81 did not differ in this respect, despite being drafted differently from the preceding Pt 81 (at [70]–[73]). It was not, however, clear where the power to dispense with service arose from: the post-October 2016 CPR Pt 81 did not make that clear. Without deciding the point, it was clear from CPR r.81.4(2)(c) and (d) that the court had such a power, the basis of which could well lie in either CPR rr.1.2(b), 3.1(2)(m), 3.10, 6.28 or the court's inherent jurisdiction (at [77]). In summary:

> *"[78] Where does this leave us? In my view the position is as follows. In general an application for committal for breach of an injunction can only be brought where there has been personal service of the injunction which is sought to be enforced. That is not expressly provided for by Part 81, or anywhere else in the rules, but it is recognised by CPR r 81.4(2)(c) which presupposes that this is the general rule. As Arnold LJ pointed out in the course of argument this must be because of the underlying requirement for due process before a person is committed to prison; that requirement for due process means that there are certain procedural safeguards required for the benefit of the respondent; one of those safeguards is that the respondent should have proper notice of the injunction before he is at risk of being committed for breach of it; and in general proper notice requires personal service of the injunction. This requirement appears to long pre-date the CPR, and indeed the Judicature Acts: see the detailed historical survey by Nicklin J in MBR Acres Ltd v Maher [2022] EWHC 1123 (QB) at [67]-[97], who came to the same conclusion.*
>
> *[79] But as that survey also shows, the requirement for personal service was never an absolute one if it could be shown that the respondent had actual knowledge of the terms of the order: see for example at [74] where Nicklin J refers to such cases as Hearn v Tennant (1808) 14 Ves 136 where Lord Eldon LC held that it was sufficient if the respondent was present when the order was made, and ex parte Langley (1879) 13 Ch D 110 where this Court accepted that a telegram might in a suitable case be sufficient notice of an injunction to sustain proceedings for contempt. We were not taken to any of these old cases but CPR r 81.4(2)(c) clearly presupposes that the Court has power to dispense with personal service, and in my judgment that is a reflection of the long-standing practice of the Court under which the Court would not insist on personal service where it could be shown that the respondent had actual knowledge of the injunction.*
>
> *[80] There is nothing in the language of CPR r 81.4(c) and (d) which suggests that such service can only be dispensed with prospectively and not retrospectively. In my judgment therefore the power to dispense with personal service of the injunction which is recognised by those rules can indeed be exercised retrospectively. ...*
>
> *[81] For the sake of completeness I note that on the wording of the rules, an alternative argument might have been made that although the power to dispense with service could be exercised retrospectively (and hence did not need to be exercised before breach), it nevertheless had to be exercised before the committal application was brought. [Counsel] did not in fact make that submission. In my judgment he was wise not to do so. Once it is accepted, as I have, that there is no requirement for the power to dispense with service to be exercised before breach, it makes no sense to interpret the rule as requiring it to have been exercised before a committal application is brought. As [was] pointed out, the question whether service should be dispensed with will involve an investigation as to whether the respondent had actual knowledge of the injunction, which is a matter that the Court has to be satisfied of on the substantive application to commit. To require a separate application for dispensation to be made first and decided before the committal application was launched would therefore lead to unnecessary duplication and extra cost with no apparent benefit to anyone."*

Secondly, where the question of particularisation of the committal application was concerned, CPR r.81.4(2)(h) only required a brief summary of the facts. It did not require full particularisation. What it required was *"more akin to a count on an indictment"* than a pleading and as such must only *"leave the defendant in no doubt as to the substance of the breaches alleged ..."*. It need do no more than that (at [89]). ***Harmsworth v Harmsworth*** [1987] 1 W.L.R. 1676, CA, ***Group Seven Ltd v Allied Investment Corp Ltd*** [2013] EWHC 1509 (Ch); [2014] 1 W.L.R. 735, ChD, ***Re L (A Child)*** [2016] EWCA Civ 173; [2017] 1 F.L.R. 1135, CA, ***Deutsche Bank AG v Sebastian Holdings Inc*** [2020] EWHC 3536 (Comm), unrep., Comm., ***MBR Acres Ltd v Maher (aka Thibeault)*** [2022] EWHC 1123 (QB), unrep., QBD, ref'd to. (See ***Civil Procedure 2022*** Vol.1 para.81.4.1.)

■ **Belsner v CAM Legal Services Ltd** [2022] EWCA Civ 1387, 27 October 2022, unrep. (Sir Geoffrey Vos MR, Sir Julian Flaux C, Nugee LJ)

RTA Portal – non-contentious business – settlement at stage 1 or 2

CPR r.46.9(2); Solicitors Act 1974 s.74(3). The claimant was injured in a road traffic accident. She entered into a conditional fee agreement with solicitors who issued her claim through the RTA Portal under the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. The CFA provided, amongst other things, that the solicitors' charges could exceed the fixed costs recoverable from the other party (at [27]–[29]). The success fee was set at 100% subject to the statutory cap of 25%. The claim settled. It did so after medical reports had been obtained at stage 2 of the RTA Portal process. The defendants paid £1,917 in damages. They also paid the fixed costs of £500 plus disbursements and VAT (at [32]–[33]). The solicitors paid the claimant her damages minus the fixed costs and the success fee. The solicitors had estimated that the likely costs of settling the claim while it was within the RTA Portal was £2500. The claimant's position was that she had not been made aware that the actual costs would be five times the amount of the fixed costs (at [11]). The central question that ultimately arose from this situation was summarised by the Court of Appeal as follows:

> *"[7] The core question in the appeal is actually whether the ... section 74(3) of the Solicitors Act 1974 (section 74(3)) and CPR Part 46.9(2) (Part 46.9(2)) applied to cases brought through the RTA portal, where no county court proceedings are actually issued. ... That issue turns broadly on whether the claims made within the pre-action portals are properly to be regarded as 'non-contentious business' (as the Solicitors contend), or as 'contentious business' (as the Client contends). That distinction has been entrenched in statute for many decades."*

Section 74(3) of the 1974 Act provides that:

> *"the amount which may be allowed on the assessment of any costs ... in respect of any item relating to proceedings in the county court shall not, except in so far as rules of court may otherwise provide, exceed the amount which could have been allowed ... as between party and party in the proceedings."*

CPR r.46.9(2) provides that fixed costs do not apply where there is an express written agreement to that effect. **Held**, s.74(3) of the 1974 Act did not apply to the claim. The section applied to contentious business only. In the absence of proceedings being commenced in the County Court, disputes that were within the RTA Portal were non-contentious business (at [50]–[56]). CPR r.46.9(2) did not alter that fact and it too did not apply to the claim (at [59]–[60]). In obiter Vos MR was highly critical of the current distinction between contentious and non-contentious business. He also forcefully suggested that costs disputes such as the present ought properly to be dealt with not by litigation, but by referring the matter to the Legal Ombudsman. A significant signal was thus provided both to the government, that the Solicitors Act 1974 is in urgent need of reform, and to the litigants, that alternative forms of dispute resolution ought to be the primary forum for resolving solicitor-party costs disputes arising from proceedings resolved via the RTA, and other Portals. As he put it:

> *"[15] As will also appear, however, I have concluded that the current position is unsatisfactory in a number of respects. First, the distinction between contentious and non-contentious costs is outdated and illogical. It is in urgent need of legislative attention. Secondly, there is no logical reason why section 74(3) and Part 46.9(2) should now apply to cases where proceedings are issued in the County Court and not to cases pursued through the pre-action portals. Thirdly, it is unsatisfactory that, in RTA claims pursued through the RTA portal (and perhaps the Whiplash portal), solicitors seem to be signing up their clients to a costs regime that allows them to charge significantly more than the claim is known in advance to be likely to be worth. The unsatisfactory nature of these arrangements is not appropriately alleviated by solicitors deciding, at their own discretion, to charge their clients whatever lesser (and more reasonable) sum they may choose with the benefit of hindsight. Fourthly, it is illogical that, whilst the distinction between contentious and non-contentious business survives, the CPR should make mandatory costs and other (e.g. Part 36 and PD8B) provisions for pre-action online portals, but otherwise deal only with proceedings once issued. Section 24 of the Judicial Review and Courts Act 2022 will allow the new Online Procedure Rules (sic) Committee (OPRC), in due course, to make rules that affect claims made in the online pre-action portal space. It would obviously be more coherent for the OPRC to make all the rules for the online pre-action portals and for claims progressed online. Finally, it is also unsatisfactory that solicitors like checkmylegalfees.com can adopt a business model that allows them to bring expensive High Court litigation to assess modest solicitors' bills in cases of this kind. The Legal Ombudsman scheme would be a cheaper and more effective method of querying solicitors' bills in these circumstances, but the whole court process of assessment of solicitors' bills in contentious and non-contentious business requires careful review and significant reform."*

Re Simpkin Marshall [1959] Ch. 229, ChD, ***Bott & Co Solicitors Ltd v Ryanair DAC*** [2022] UKSC 8; [2022] 2 W.L.R. 634, UKSC, ref'd to. (See ***Civil Procedure 2022*** Vol.1 para.46.9.2.)

Practice Updates

PRACTICE DIRECTION

CPR PRACTICE DIRECTION – 150th Update. This Practice Direction came into force on 15 September 2022. It follows on from the revoked PD Update 145 (revoked by PD Update 148). It introduces provisions into PD 51ZB – The Damages Claims Pilot scheme, which mandate use of the Damages Claims Portal by defendants who are legally represented where a claim falls within the pilot scheme's scope.

PRACTICE GUIDANCE

THE KING'S BENCH DIVISION GUIDE 2022. In October 2022, Dame Victoria Sharp PKBD reissued the Queen's Bench Division Guide 2022 as the King's Bench Division Guide 2022.

THE ADMINISTRATIVE COURT GUIDE 2022. In October 2022, the Judge in Charge of the Administrative Court issued the new Administrative Court Judicial Review Guide 2022. Amendments include the Guide stressing the importance of complying with the need for statements of case and skeleton arguments to be concise and the need for parties to give proper consideration to whether or not an application is urgent or not (see ***DVP v Secretary of State for the Home Department*** [2021] EWHC 606 (Admin); [2021] 4 W.L.R. 75) and the sanctions for non-compliance. It also includes a new chapter on closed material proceedings (Ch.19).

TECHNOLOGY AND CONSTRUCTION COURT GUIDE 2022. On 12 October 2022, the Judge in Charge of the Technology and Construction Court reissued the Technology and Construction Court Guide. The Guide has been generally updated to ensure that TCC practices align, in so far as possible, with those of the Commercial Court and Chancery Division. The intention being that Business & Property Courts' practice should be *"substantially the same"*. Specific amendments reflect changes to the CPR, e.g. updates concerning PD 57AC and PD 57AD and the use of CE-File.

INTELLECTUAL PROPERTY ENTERPRISE COURT GUIDE 2022. On 12 October 2022, Sir Julian Flaux C reissued the Intellectual Property Enterprise Court Guide. Updates were made primarily to its guidance on cost capping and case management, including orders made at case management conferences.

PRACTICE NOTE – REMOTE HAND-DOWN OF JUDGMENTS. On 5 October 2022, the Chancellor of the High Court issued a Practice Note, which set out the procedure to be adopted within the Chancery Division for the hand-down of reserved judgments. The Practice Note confirms that remote hand-downs will, as a general rule, be maintained for such judgments. It sets out the procedure that will be adopted for such hand-downs. The Practice Note is reprinted below.

PRACTICE NOTE – REMOTE HAND-DOWN OF JUDGMENTS

During the COVID-19 pandemic, reserved judgments in the Chancery Division were in most cases handed down remotely. The procedure worked well, and it seems sensible to retain it in most cases notwithstanding that the Courts have resumed routine sitting at the Rolls Building. The practice from now on will be as follows:

1. *Unless otherwise directed, reserved judgments in the Chancery Division will be handed down remotely, in accordance with the procedure at paragraphs 2–4 below.*
2. *Notice of hand-down of reserved judgments will be given in the published daily cause list, as follows:*

   "Remote hand-down: This judgment will be handed down remotely by circulation to the parties or their representatives by email and release to The National Archives. A copy of the judgment in final form as handed down should be available on The National Archives website shortly thereafter but can otherwise be obtained on request by email to the Judicial Office (press.enquiries@judiciary.uk)."
3. *At the published date and time, the judgment will be sent by the clerk to the Judge, Master or ICC Judge attached to an e-mail in the following terms:*

   "In accordance with the Practice Guidance dated 5 October 2022, I attach the judgment in this case by way of hand-down, which will be deemed to have occurred at [Listed Time and Date]."
4. *At the same time a copy will be sent to The National Archives.*
5. *The final/approved version of the judgment will have this wording on the front page:*

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

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

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

The Rt. Hon. Sir Julian Flaux
Chancellor of the High Court, 5 October 2022

PRACTICE NOTE ON DISCLOSURE IN THE INSOLVENCY AND COMPANIES LIST (ChD). On 6 October 2022, the Chief Insolvency and Companies Court Judge reissued the Practice Note in relation to the operation of PD 51U – Disclosure Pilot for the Business and Property Courts. The new Practice Note, which does not differ in substance from the previous one, was issued to take account of the formalisation of PD 51U as PD 57AD. The Practice Note is reprinted below.

Practice Note on Disclosure in the Insolvency and Companies List (ChD)

This practice note replaces the practice note in relation to the operation of PD51U – Disclosure Pilot for the Business and Property Courts, issued in February 2019, following the coming into force of PD57AD – Disclosure in the Business and Property Courts on 1st October 2022.

1. *PD57AD does not directly apply to Part 8 claims because Part 8 contains its own regime for the disclosure of documents that are relied on by the parties.*

2. *Forms of originating process familiar to users of the Insolvency and Companies List, such as petitions and Insolvency Act applications, are not "statements of case" for the purpose of PD57AD.*

3. *The only statement of case in a Part 8 claim is the claim form. The parties attention is drawn to Paragraph 1.4 (7) and 5.1 of the Practice Direction.*

4. *PD57AD Paragraph 1.12 provides the court with a power to apply the Practice Direction in proceeding under Part 8.*

5. *The Court may, as part of its case management powers, consider it appropriate to order disclosure in accordance with PD57AD.*

6. *Petitions issued for relief under section 994 of the Companies Act 2006 will be subject to disclosure.*

7. *Where a party requests disclosure they will need to identify the issues for disclosure and the Model or Models that apply. It is not expected that the full procedure for extended disclosure, including completion of all elements of the Disclosure Review Document, will be required.*

8. *Standard disclosure is no longer available.*

Chief Insolvency and Companies Court Judge Briggs
6 October 2022

PRACTICE NOTE BY THE CHANCELLOR OF THE HIGH COURT: THE CHANCERY GUIDE 2022. On 28 October 2022, Sir Julian Flaux reissued the Practice Note: Chancery Guide 2022, which had initially been issued in July 2022. The reissue amends the Practice Note to include Practice Notes that are to remain valid that were not included in the July version, e.g. the Practice Statement: Patents Court trial listing, issued by Meade J. It also includes new Practice Notes that were issued subsequent to the July version of the Practice Note. The reissued Practice Note maintains the ambiguity over the question of whether it revokes Practice Directions, which it cannot. It also suggests that Practice Directions can be issued by a range of senior judges. Such directions would, however and in so far as they are Practice Directions, need to be approved according to the procedure set out in the Constitutional Reform Act 2005 before they were to come into force. The reissued Practice Note is reprinted below for ease of reference.

Practice Note by the Chancellor of the High Court: The Chancery Guide 2022

1. *The new Chancery Guide was published on 29 July 2022. This Practice Note accompanies the first update published in October 2022.*

2. *The Chancery Guide is now available online with hyperlinks on the Courts and Tribunals Judiciary website. It has been substantially rewritten and revised compared with previous versions of the Chancery Guide and so merits careful reading by judges and practitioners alike.*

3. *The new Chancery Guide seeks so far as possible to bring the practice in the Chancery Division into line with the practice in the other Business and Property Courts. The new Chancery Guide also applies in the District Registries out of London, save where local guidance is necessary.*

4. *Apart from the Practice Notes, Guidance and Directions listed in the Schedule attached to this Practice Note, all other Chancery Division Practice Notes, Guidance and Directions are revoked, on the basis that so far as relevant they are otherwise incorporated in the new Chancery Guide.*

5. *Practice Notes, Guidance and Directions may be issued from time to time by the Chancellor, Supervising Judges, Chief ICC Judge or Chief Master and will take effect from the date they are issued.*

6. *Nothing in this Practice Note or the Chancery Guide substitutes or overrides the CPR including relevant Practice Directions.*

Sir Julian Flaux
Chancellor of the High Court
July 2022
Reissued October 2022

Schedule

The following Practice Notes, Guidance and Directions remain in force:

1. *PN: Companies Court: Company Restoration*
   12 November 2012
   See Appendix D of the Company Restoration Guide

2. *PN: Companies Court: Unfair Prejudice Petition Directions*
   1 May 2015

3. *PN: Variation of Trusts*
   9 February 2017

4. *PN: Chief Master and the Senior Master's joint Practice Note*
   30 September 2017

5. *PN: Witnesses Giving evidence remotely*
   11 May 2021

6. *Practice Statement: Patents Court trial listing issued by Meade J*
   Practice Statement: Listing of Cases for Trial in the Patents Court
   1 February 2022

7. *PN: Remote hand-down of judgments*
   5 October 2022
   Chancellor's Practice Note Remote hand-down of judgments

8. *PN: Disclosure in the Insolvency and Companies Court List (ChD)*
   6 October 2022
   Chief ICC Judge's Practice Note

Practice Notes, Guidance and Directions issued by the Supervising Judges:

PN: Business and Property Courts in Leeds, Liverpool, Manchester, and Newcastle
29 July 2022
VC Practice Note July 2022

PN: Business and Property Courts in Manchester and Leeds
27 October 2022
Applications Lists: VC Practice Note Applications List

PRACTICE NOTE: BUSINESS AND PROPERTY COURTS IN MANCHESTER AND LEEDS. On 27 October 2022, the Vice-Chancellor of the County Palatine of Lancaster issued a Practice Note concerning Friday Application Lists in the Business and Property Courts in Manchester and Leeds. The Practice Note replaced one previously issued on 26 May 2022. Practitioners, particularly those who do not appear regularly in these courts should take notice of this local practice. The Practice Note is reprinted below for ease of reference.

Practice Note: Friday Application Lists

1. *This Practice Note revokes and replaces Practice Note: Business and Property Courts in Manchester and Leeds dated 26 May 2022.*
2. *The default position for applications to be heard before s.9 Judges in Manchester and Leeds in Friday Applications lists in the Business and Property Courts is that they are heard in person unless, in the discretion of the Judge, a fully remote or hybrid hearing is considered appropriate. Any party seeking a direction that their application should be heard remotely or on a hybrid basis must apply at the earliest possible time by email marked "Urgent: Friday Application" to bpc.manchester@justice.gov.uk in Manchester or bpc.leeds@justice.gov.uk in Leeds for a direction. The email should be copied to any respondent, if the application is on notice.*
3. *All other applications, hearings or trials in the Business and Property Courts will continue to be dealt with in accordance with the Chancery Guide (and section 4.3 of the Technology and Construction Court Guide and paragraph F3 of the Circuit Commercial Court Guide 2022), so that hearings of half a day or less will be presumed to be remote hearings, and longer hearings presumed to be in person hearings, but with the Judge having a discretion to direct otherwise.*

Mr Justice Fancourt
Vice-Chancellor of the County Palatine of Lancaster
Supervising Judge of the Business and Property Courts for the Northern & North-Eastern Circuits
October 2022

UK SUPREME COURT PRACTICE NOTE. On 3 October 2022, Lord Reed PSC issued a Practice Note noting that a number of UK Supreme Court Practice Directions have been reissued to take account of HM King Charles III's accession. The main changes are to nomenclature. The Practice Note is reprinted here for ease of reference.

Practice Note – October 2022

Lord Reed, as President of the Supreme Court and Chairman of the Judicial Committee, has issued the following practice note in respect of the United Kingdom Supreme Court (UKSC) and Judicial Committee of the Privy Council (JCPC):

Following the death of Her Majesty Queen Elizabeth II on 8 September 2022, and the accession of His Majesty King Charles III, it is necessary to re-issue some of the Practice Directions in each of the respective Courts so as to refer to His Majesty and The King. There are also changes to refer to the The King's Bench Division of the High Court and King's Council (sic, "Counsel"). The changes are to the following PDs:

UKSC PD 1

UKSC PD 3

UKSC PD 12

UKSC PD 13

JCPC PD 1

JCPC PD 8

There are no substantive changes to the Practice Directions.

For the avoidance of doubt, no changes are made to the UKSC Rules or the JCPC Rules. This is because of Section 10 of the Interpretation Act 1978, which provides:

> *"In any Act a reference to the Sovereign reigning at the time of the passing of the Act is to be construed, unless the contrary intention appears, as a reference to the Sovereign for the time being."*

Although it refers to "any Act", it also applies to subordinate legislation by virtue of section 23 of the 1978 Act. Accordingly, any references in the UKSC and JCPC Rules to "The Queen" or "Her Majesty" can automatically be read as references to "The King" or "His Majesty", as applicable.

CPR FORMS AND MISCELLANEOUS UPDATES

CPR FORM AMENDMENTS. The Civil Procedure Rule Committee has approved amendments to the CPR Forms to reflect the accession of His Majesty King Charles III. The amendments include replacing: references to *"Elizabeth the Second"* with references to *"Charles the Third"*; references to Queen with references to King; and, references to the Queen's Bench Division with references to the King's Bench Division (the neutral citation in judgments of EWHC (QB) is prescribed by para.2 of ***PD (Judgments: Neutral Citations)*** [2002] 1 W.L.R. 346 and will therefore require an amendment to that PD before it can properly be replaced).

COURT SEAL. Following the accession of His Majesty King Charles III the court seal will be replaced. Until a new seal is authorised, the existing seal continues in use.

COURT FUNDS – INTEREST RATE. On 2 September 2022, the Lord Chancellor announced a variation to the interest rate payable on sums held by the Court Funds Office. As from that date, interest paid on sums held in the basic account rose from 0.94% to 1.313%, while interest paid on sums held in the special account rose from 1.25% to 1.75%. The announcement is available at: *https://www.gov.uk/government/news/interest-rate-increased-on-the-court-funds-office-special-and-basic-accounts* [Accessed 28 October 2022].

In Detail

Access to an Interpreter

In ***Shuker v Inspecs Ltd*** [2022] EWHC 2668 (Ch), HH Judge Matthews, sitting as a deputy judge of the High Court, considered the approach to be taken to applications by a party for the appointment of an interpreter. The application arose in proceedings arising from an alleged distribution contract entered into by the claimant and defendant. The claim was originally pursued in Israel by the claimant. It was dismissed there on the basis that there was no contract. The dismissal was ultimately upheld by the Supreme Court of Israel (at [1]). The instant claim sought an order annulling the decision of the Israeli courts. It further sought damages. The English claim was struck out for want of jurisdiction on application by the defendant. At the application hearing the claimant acted in person. The claimant applied for permission to appeal that decision. Pending the hearing of that application, the claimant applied for a number of other orders, including an application to stay the order striking out the claim pending the appeal and an application for an extension of time to file an appeal bundle. Those applications were refused on paper. The claimant subsequently applied for an oral rehearing of those decisions. Prior to that rehearing, the claimant applied, informally, for the provision by the court of an interpreter. HH Judge Matthews refused that application, although he granted permission for the claimant to engage an interpreter at his own expense (at [21]). In doing so, the judge reviewed the authorities on an area of procedure that is rarely considered.

Statutory authority and art.6 of the European Convention on Human Rights

HH Judge Matthews first noted that there is no automatic right to an interpreter in English and Welsh civil procedural law, albeit specific provision is made for proceedings that take place in Wales or involve Welsh speakers: the Welsh Language Act 1993 and Practice Direction relating to the use of the Welsh Language in the Civil Courts in or having a Connection with Wales para.5 (at [5]). Neither applied to the present case. He further noted the position under art.6 of the European Convention on Human Rights. While it requires the provision of interpretation where criminal proceedings are concerned under art.6(3)(e), art.6(1) as applicable to civil proceedings makes no comparable provision. Were there to be a right to an interpreter or to interpretation, it would therefore have to come under either the general right to fair trial or under CPR Pt 1 (at [5]). Here, however, HH Judge Matthews noted a limit. First, the art.6(1) right to fair trial only applied to hearings that are determinative of rights (at [6]). The present application, as an interim hearing, was not determinative of rights. Therefore, it could not be relied upon. Secondly, and in any event, art.6(1), and particularly the right to equality of arms, could not be relied upon as a basis for the right to receive the services of an interpreter. As HH Judge Matthews put it:

> *"[7] In the recent case of Brake v Chedington Court Estate Ltd [2021] EWHC 2700 (Ch), dealing with article 6, I said:*
>
> > *'13. ... Article 6 implies the principle of "equality of arms" (which also appears in CPR rule 1.1(2)(a) as part of the overriding objective), but this does not mean equality of resources. In the civil context it really means equality of opportunity in an adversarial process, for example to adduce evidence, comment on evidence and cross-examine witnesses in appropriate cases. For a recent example, see MacDonald v Animal Plant and Health Agency [2021] EWHC 2325 (QB), [46].'*

[8] In the earlier decision of Hak v St Christopher's Fellowship [2016] ICR 411, EAT, Langstaff J had said:

> *'41. ... It must, however, be remembered that article 6 itself does not speak directly of a party having an absolute right to the services of an interpreter. AB v Slovakia speaks of affording a reasonable opportunity to present the case. Natural justice does not guarantee the party an absolute right to present a case in court, but (in context) a reasonable opportunity to do so.'*

In my judgment, Article 6 does not of itself imply the need for an interpreter, although there may be exceptional cases where this is necessary for a fair trial to take place. Even if it did, it would only apply when the hearing 'determined' civil rights or obligations, and not every hearing does so. In my judgment, the forthcoming hearing will not do so."

Additionally, CPR Pt 1 did not provide a basis for there being a right to receive the assistance of an interpreter. The court would, in the present case, be able to deal justly with the applications even were it to be the case that the claimant, acting in person, would not be able to provide the court with as much assistance as a native English speaker (at [9]–[12]).

Discretion

Having determined that there was no right to receive the assistance of an interpreter, HH Judge Matthews then considered if there was a discretion to do so. There were two previous authorities on the issue, as noted in ***Citibank NA v Ercole Ltd*** [2001] EWCA Civ 1562 at [20]. Those authorities, ***Re Trepca Mines Ltd*** [1960] 1 W.L.R. 24 and ***In the Estate of Fuld (Deceased) (No.1)*** [1965] 1 W.L.R. 1336, establish that the court has a wide discretion where this question is concerned. The latter set it out this way:

"[14] ... in Re Fuld [1965] 1 WLR 1336, Scarman J said this (at 1340–41):

> *'[P]arties must be given a proper opportunity of developing their case and of attacking their opponent's case, and of hearing and understanding the evidence. Once those opportunities are given it is a matter for the parties to decide whether to exercise their rights or waive them.*
>
> *In the present case, upon the withdrawal of counsel for Karl Saueracker, and with the unofficial aid of the lady solicitor in court who was able to speak the German language, I invited Saueracker to consider his position, and to obtain the services of an interpreter. I indicated to him that I would certainly not take any part of the case which concerned him until the following day at the earliest. Saueracker was present in court this morning, and it is clear from answers that he has given from the well of the court through an interpreter that he has not equipped himself with an interpreter, and he has not done so because he considers himself unable to bear the cost of that step. Nevertheless, the court has given him that opportunity.*
>
> *[...]*
>
> *It seems to me, therefore, that the matter is now entirely one of discretion, the rights of natural justice as I have defined them having been, in my judgment, accorded to Saueracker. There is no reason at all why he should not be in court with an interpreter who would make it possible for him to follow the evidence. There remains no reason why at a suitable moment, if he wishes to present his case by giving evidence, he should not go into the witness-box and give his evidence with the aid of an interpreter. Nevertheless, there are certain other matters about which I should say something since they have arisen and they require a statement of my views. I think in the ordinary course of litigation it is undesirable that the court should be addressed from the well of the court through an interpreter.'"*

In the circumstances of the present case, the discretion would not be exercised. The claimant had a sufficient command of English for the purposes of the oral rehearing. That hearing was not of the permission to appeal application, but rather of the procedural applications that had already been determined in the papers. The claimant was fully aware of the reasons why those applications were dismissed and had already prepared his arguments why they ought not to have been dismissed. That the discretion was not exercised did not, however preclude the claimant from engaging and paying for an interpreter, albeit permission would not be granted to the interpreter to make submissions on the claimant's behalf (at [15]–[21]).

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