CIVIL PROCEDURE NEWS

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SWEET & MAXWELL

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Cases

■ **Correia v Williams** [2022] EWHC 2824 (KB), 11 September 2022, unrep. (Garnham J)

Witness statement – non-compliance with rules – inadmissible

CPR r.32.8, PD 22 para.2.4, PD 32 paras 18, 19, 20 and 25. In proceedings in the County Court, a judge held that the claimant's witness statement was inadmissible. The claimant was Portuguese. He was not fluent in English. His witness statement was, however, written in English rather than in Portuguese. It contained a statement of truth, again written in English (at [24]). It had apparently been written from notes taken in English by the claimant's lawyer. The County Court judge held that the witness statement and statement of truth ought to have been written in the witness's own words and in his own language: PD 32 paras 18.1, 19.1, 20.1 and PD 22 para.2.4. Consequently, the County Court judge held that the statement was not a witness statement as it did not comply with the procedural requirements set out in PDs 22 and 32. It was thus inadmissible. The claimant appealed. He did so on the basis that PD 32 para.25 provided a discretion to admit a defective witness statement (at [27]). **Held**, the appeal was dismissed. CPR r.32.8 requires witness statements to comply with PD 32 (at [39]). The PD requires witness statements to be drafted in a witness's own words, in so far as practical, and language. There is no qualification on the requirement that the statement must be in the witness's own language. That is a mandatory requirement (at [39]). The statement of truth must also be in the witness's own language (at [40]). The rationale for this is obvious: it is to ensure the court and other parties can be confident that the evidence in the witness statement is that of the witness, not the drafter (at [41]). The necessity of compliance is further borne out by the need to file a translation. That is to ensure the accuracy of the translation can be checked (at [42]). Due to the witness statement being defective it was inadmissible subject to the court granting permission to adduce it (at [43]–[45]). The County Court judge was entitled to exercise the discretion to refuse to admit the witness statement (at [46]). As Garnham J concluded:

> *"[47] In my judgment, he was. In all the respects identified by the judge, this witness statement failed to meet the requirements of the rules. The rules about the provision of witness statements by those who are not fluent in English provides an important discipline for litigants and their advisers and are not lightly to be ignored. The judge correctly identified the reasons why to have allowed this witness statement to be admitted would have been grossly unfair. In particular, the Respondent had provided a witness statement which complied with the rules, and, as a result, the Appellant knew the evidence to which he has to respond. By contrast, the Respondent had only the account of events drafted by the Appellant's solicitor, in a language in which the Appellant was not fluent. The difficulties that would have faced the Respondent's counsel in cross examination on such a witness statement are obvious. As the judge observed, one of the purposes of requiring the service in advance of trial of witness statements are to tie the witness down to one account of events; to have allowed in this statement would have enabled the Appellant to escape that constraint."*

The following cases were considered by Garnham J: ***Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd*** (2012); ***N v Z (Fact-finding: Stranded Spouse)*** (2013); ***Frenkel v Lyampert*** (2017), ***Diamond v Secretary of State for the Home Department*** (2020); and ***Bahia v Sidhu*** (2022). Graham J went on to note that in no case had non-compliance with the Rules led to the relevant evidence being held to be inadmissible. The judgments were of marginal value. In none of them had the question whether defects rendered the witness statement inadmissible been considered (at [32]). ***Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd*** [2012] EWHC 616 (Ch); [2012] R.P.C. 29, ChD, ***N v Z (Fact-finding: Stranded Spouse)*** [2013] EWHC 2261 (Fam); [2016] 4 W.L.R. 9, Fam, ***Frenkel v Lyampert*** [2017] EWHC 2223 (Ch), unrep, ChD, ***Diamond v Secretary of State for the Home Department*** [2020] EWHC 3313 (Admin), unrep., Admin, ***Bahia v Sidhu*** [2022] EWHC 875 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2022*** Vol.1 para.1APD.1.)

■ **AXX v Zajac** [2022] EWHC 2463 (KB), 5 October 2022, unrep. (Master McCloud)

Request for court record – disclosure of details of person making request refused

CPR PD 1A. Proceedings arose from personal injuries incurred by the claimant. The claimant's case was that he had suffered traumatic brain injury as a result of being run into while he was on a bicycle by a vehicle driven by the defendant. The defendant denied that the claimant's condition was caused or contributed to by the accident. The claimant acted through a litigation friend. The issue before the Master was whether to order a split trial, with the question of causation being tried first (at [9]). The application engaged the recently introduced vulnerability provisions contained in CPR PD 1A. The Master noted that there was, as yet, no reported guidance on how the court should approach the application

of these provisions (at [1]–[3]). The present judgment thus provides the first such guidance. **Held**, a separate trial was ordered. There was no dispute that the claimant was a vulnerable person for the purpose of PD 1A para.4(d). The Master agreed that, without prejudging the issue, the claimant's vulnerability appeared to impede his participation in proceedings: PD 1A para.3 (at [22]). It was important to consider the likely impact that the specific vulnerability may have on the claimant's ability to participate effectively in proceedings. Hence the factors set out in PD 1A para.5(a)–(f) needed to be considered (at [23]). Those require consideration of the impact the vulnerability may have on the claimant's ability to:

> *"(a) understand the proceedings and his role in them, (b) express himself throughout the hearing, (c) put his evidence before the court, (d) respond to or comply with any request of the court, or to do so in a timely manner, (e) instruct representatives and (f) attend any hearing."* (at [23]).

Assessing those factors, the Master held:

> *"[24] He has a litigation friend to give instructions to representatives which deals with (e) proportionately. In terms of attendance at any trial, such issues should be considered in terms of any possible adapted procedure or listing, or venue, nearer the time however it appears at present that he would be too unwell to attend given his condition and lack of medication, hence likely meaning that there is no currently proportionate modification which would deal with (f) for the causation hearing but consideration should be given to a CVP remote hearing attendance being set up for him in case nearer the time of the liability trial he becomes willing or able to watch remotely. He refuses to engage much or at all with his father (the litigation friend) and hence at present, again given his medical condition and lack of medication that appears likely to be a real obstacle to achieving understanding of the proceedings ie point (a). It is not intended that he would give evidence directly at the trial and hence expressing himself at the liability trial appears not to be engaged here (point (b)).*
>
> *[25] As to points (c) and (d), namely putting his evidence before the court and responding to any request from the court at all or in a timely manner, these aspects were engaged with in argument especially. As noted, the Claimant's submission was that 'putting his evidence before the court' is not limited to a party's personal evidence in a formal sense (witness statement, affidavit or oral evidence at court) but that it should be read as also meaning putting his experts' evidence before the court in the form of what I shall summarise as being 'best evidence', and in that context should, it was said, include as far as possible being put in a position to speak with experts and answer the experts' questions when medically examined so that the experts can opine on his condition and no doubt summarise or quote his answers and describe his state in the reports.*
>
> *[25] I agree that point (c) within the vulnerability Practice Direction can appropriately be read that way, which is consistent with the Claimant's Article 6 rights under the Convention and also consistent with equalities duties and the basic requirement of the Overriding Objective to attempt to place parties as far as possible on an equal footing.*
>
> *[26] Accordingly to 'put their evidence before the court' in PD1A.1 (5)(c) in my judgment includes doing so indirectly by way of cooperating with and speaking to medical experts for the purpose of expert reports for the Court."*

The Master went on make the following general points.

> *"[33] I shall make some observations on the approach to PD1A taken here. The vulnerability provisions essentially spell out in the form of a 'structured reasoning tool' the process which the court should go through and the factors to consider in every case so as to ascertain whether a person is vulnerable, how it may affect their role and position in the claim, and what steps to take to assist that person to participate. It does not replace the existing provisions in cases where a party actually lacks capacity to conduct litigation, but it can and should inform the court as to steps to take where a witness is vulnerable – which could for example include situations where a party can be enabled to have capacity to do certain other things such as attend a hearing and cooperate with experts in a medical examination.*
>
> *[34] It will be apparent that the approach I have taken sees the new provisions as a part of the wider duty of the Court to ensure hearings, and the management of cases, are fair and to have regard to and apply equalities duties and the principles of Article 6 of the Convention. Whilst I have taken a 'structured' approach to applying the listed criteria and categories of vulnerability, this is on the footing that the Practice Direction is a useful reasoning tool but is neither an exhaustive set of provisions nor intended to be construed narrowly as if a statute. Hence my reading of the provision as to enabling a person to put his evidence before the court is a purposive one and not a narrow one.*
>
> *[35] It is I think generally known that an innovation introduced by myself many years ago suitable for some cases is the 'disability adaptations appointment' appropriate to complex cases with disabilities which need to be accommodated, by which, away from the argument and heat of a contentious hearing, the parties can attend before the court on what amounts to a 'mention' to discuss in a non-judgmental way how to plan a trial and what adaptations need to be made. In my judgment where especially vulnerable litigants are involved, consideration of disability adaptations may become*

relevant to the application of the vulnerability guidance in PD1A and the two are complementary."

Finally, the Master noted that the Equal Treatment Bench Book provided *"clear guidance on ensuring fair hearings"* and provided *"a wealth of information across a wide ranges of areas which can give rise to vulnerability ..."* (at [36]). (See ***Civil Procedure 2022*** Vol.1 para.32.8.1.)

■ **R. (Tax Returned Ltd) v Revenue and Customs Commissioners** [2022] EWHC 2515 (Admin); [2022] B.T.C. 29 (Heather Williams J)

Service by email – requirement to nominate single email address

CPR PD 6A para.4.1. Judicial review proceedings were commenced against the respondents. An issue arose concerning the validity of service of the proceedings. The claimants had purported to effect service via email. Prior to the attempt to effect service, the respondent had informed the claimant in writing that service via email could be made by emailing documents *"via email to newproceedings@hmrc.gov.uk and [to the email address of the lawyer with conduct of the proceedings for the respondent]"* (at [29]). It also indicated a physical address for service. The lawyer subsequently went on leave and a second lawyer took over conduct of the proceedings. The claimant sent the sealed claim form to the lawyer who had taken over conduct of the proceedings. It was not, however, emailed to the *"newproceedings"* email address or the nominated physical address for service (at [39]). The respondent also invited the claimant to send them a physical copy of the claim form at an address other than the nominated physical address for service, which the claimant did (at [36]). The question arose whether there had been valid service. **Held**, service had not been effected validly. However, the court authorised service by an alternative method (at [82]–[85]). In considering the question whether service via email was valid in this case, the High Court considered, for the first time, whether CPR PD 6A para.4.1 required a party to nominate a single email address for service. In the present case the respondent had specified that service was to be effected by emailing the claim form to two email addresses (at [72]). The court held that para.4.1 required a party to nominate a single email address for service: service was a singular event (at [74]). It further held that were a party to provide two email addresses, the claimant was not put in the position that they could elect which address to use for service:

> *"[75] However, this construction of PD 6A para 4.1 is not sufficient for the purposes of [Counsel's] argument ... she submits that I should imply into para 4.1 words to the effect that if more than one email address is provided by the other party, the serving party has the right to elect between them. Furthermore, she submits that this election can be made without communicating it to the other party. I do not accept this submission. Firstly, it involves reading significant words into para 4.1 that are not present and I am not persuaded that there is any warrant for doing so. Secondly, this approach would itself be a recipe for uncertainty and confusion in an area that requires clarity.*
>
> *[76] In my judgement the consequence of the other party failing to provide a single email address (or fax number or other electronic identification) is not to give rise to a right to elect between two or more addresses that have been provided ... The purpose of PD 6A para 4.1 is not to mandate a form of service (by fax or other electronic means), rather it is to provide an option of effecting service in this way if the stipulated information is provided. Where the other party gives more than one email address for service, para 4.1 has not been complied with, in that the stipulated information has not been properly provided. In these circumstances the serving party cannot, as matters stand, undertake good service by electronic means. They have two options: either they can serve the Claim Form by one of the prescribed means in CPR Part 6 or they can ask the other party to clarify which is the one email address that they may use to effect service, so that para 4.1 is then satisfied. No clarification of that kind was sought in this case."*

(See ***Civil Procedure 2022*** Vol.1 para.6.20.3.)

■ **Re G (Court of Protection: Injunction)** [2022] EWCA Civ 1312, 11 October 2022, unrep. (Baker, Philips, Nugee LJJ)

Injunctive relief – just and convenient test

Senior Courts Act 1981 s.37(1), Mental Capacity Act 2005 ss.16(5) and 47(1). The question arose in Court of Protection proceedings as to the correct test to apply for the grant of injunctive relief under the Mental Capacity Act 2005. The Court of Appeal **held** as follows. Under s.47(1) of that Act, the Court of Protection has all the powers and jurisdiction of the High Court. It thus has the jurisdiction to grant injunctive relief provided to the High Court under s.37(1) of the Senior Courts Act 1981 (at [28]–[29]). When the Court of Protection were granting an injunction under s.16(5) of the 2005 Act, it was therefore exercising the power to grant injunctive relief provided for by s.37(1) of the 1981 Act (at [49]). As such, the Court of Protection could grant injunctive relief when it was *"just and convenient"* to do so according to the principles applicable to that test (at [49]–[50]). The Court of Appeal noted that the authorities on the application of that test had recently been reviewed by the Privy Council in ***Broad Idea International Ltd v Convoy Collateral Ltd*** (2021), specifically in Lord Leggatt's judgment at [4]–[58] (at [54]). While noting that Privy Council decisions are not binding, the Court of Appeal, authority provides that they may be viewed as being of *"great weight and persuasive value"* and

should normally be followed unless there is a decision of a superior court to the contrary: see ***Willers v Joyce*** (2016) at [12] (at [58]). The Court of Appeal held that there was no basis to persuade it not to follow the decision:

> *"[61] ... we should follow the majority decision in Broad Idea unless persuaded otherwise. But as we have said no attempt was made to persuade us not to follow it. Having regard to its source we would in any event have given it very great weight, but having read and considered the authorities for ourselves, we regard Lord Leggatt's analysis as compelling and unanswerable. It is not necessary to repeat his reasoning. It is sufficient to say that we respectfully agree with it. In these circumstances in our judgment we should follow Broad Idea and decide that it now represents the law of England and Wales as to the circumstances in which the Court may grant an injunction, or in other words what the 'just and convenient' test in s.37 of the 1981 Act requires."*

Having decided that ***Broad Idea*** represented the law of England and Wales, the Court of Appeal summarised the test as follows:

> *"[54] ... the whole question of the ambit of the s.37 power has since then been comprehensively re-examined by the Privy Council in Convoy Collateral Ltd v Broad Idea International Ltd [2021] UKPC 24 ('Broad Idea'): see at [4]–[58] per Lord Leggatt JSC giving the majority judgment of the Board (with the agreement of Lords Briggs, Sales and Hamblen JJSC). Having examined The Siskina and other cases in detail at [4]–[51], Lord Leggatt's conclusion on what Lord Diplock said in The Siskina can be found in [52] as follows:*
>
> > *'52. The proposition asserted by Lord Diplock in The Siskina and [Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd [1981] AC 909] on the authority of [North London Railway Co v Great Northern Railway Co (1883) 11 QBD 30] was that an injunction may only be granted to protect a legal or equitable right. There can be no objection to this proposition in so far as it signifies the need to identify an interest of the claimant which merits protection and a legal or equitable principle which justifies exercising the power to grant an injunction to protect that interest by ordering the defendant to do or refrain from doing something. In Beddow v Beddow (1878) 9 Ch D 89, 93, Sir George Jessel MR expressed this well when he said that, in determining whether it would be right or just to grant an injunction in any case, "what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles." As described above, however, within a very short time after The Siskina was decided, it had already become clear that the proposition cannot be maintained if it is taken to mean that an injunction may only be granted to protect a right which can be identified independently of the reasons which justify the grant of an injunction.'*
>
> *[55] This identifies two requirements before an injunction can be granted: (i) an interest of the claimant which merits protection and (ii) a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something.*
>
> *[56] After some further consideration of the cases Lord Leggatt went on to endorse the summary of the position as stated in Spry as follows (at [57]):*
>
> > *'57. As an exposition of the court's equitable power to grant injunctions, it would be difficult to improve on the following passage in Spry, Equitable Remedies, 9th ed (2014), at p 333:*
> >
> > > *"The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate."*
> >
> > *This passage (stated in the same terms in an earlier edition of Spry's book) was quoted in Broadmoor Special Health Authority v Robinson [2000] QB 775, para 20, by Lord Woolf MR, who described it as succinctly summarising the correct position. It was again quoted and endorsed as a correct statement of the law by Kitchin LJ (with whom Briggs and Jackson LJJ agreed on this point) in [Cartier International AG v British Sky Broadcasting Ltd (Open Rights Group intervening) [2016] EWCA Civ 658], para 47 . The Board would likewise endorse it.'"*

Willers v Joyce [2016] UKSC 44; [2018] A.C. 843; UKSC, ***Broad Idea International Ltd v Convoy Collateral Ltd*** [2021] UKPC 24; [2022] 2 W.L.R. 703, PC, ref'd to. (See ***Civil Procedure 2022*** Vol.1 para.25.1.10.)

■ **Elias v Wallace LLP** [2022] EWHC 2574 (SCCO), 12 October 2022, unrep. (Senior Costs Judge Gordon-Saker)

Statute Bill – email equivalent to a letter

Solicitors Act 1974 ss.68, 69(2A)(b). Proceedings were brought for the delivery of a bill under s.68 of the Solicitors Act 1974. The defendant solicitors, whilst acting for the claimant, issued six invoices. They were sent as attachments to emails rather than as enclosures with a physical letter. A number of issues arose, not least whether the sending of emails came within the scope of s.69(2A)(b) of the 1974 Act. That provision requires bills to be *"enclosed in, or accompanied by, a letter which is signed ... and refers to the bill."* The specific issue was whether the email was a letter for the purposes of that provision. **Held**, the defendant had already delivered a final such bill (at [1]) and the email was a letter for the purposes of s.69(2A)(b) of the 1974 Act (at [37]). In reaching the latter decision, the Senior Costs Judge noted that *"letter"* was not defined in the 1974 Act (at [31]). He further noted that, without applying an updating construction to the 1974 Act, it would be difficult to construe an email to be a letter for its purposes (at [32]). In that respect he then noted that:

> *"[33] It is clear that the courts will apply an updating construction to legislation unless the particular Act is intended to apply as it was passed and without change: Bennion, Bailey and Norbury on Statutory Interpretation (8th ed) section 14.1. There is nothing to suggest that Parliament intended that the 1974 Act should be preserved in aspic. Indeed the amendments which recognised the use of electronic signatures make that clear."*

There was nothing before the Senior Costs Judge to suggest that the provision in the 1974 Act was intended to apply as it was passed and without change (at [35]). As such, an email was held to be a letter for the purposes of the Act (at [37]):

> *"[36] ... the purpose of s.69(2A) is to convey to the client that the bill has been authorised by the solicitor. That can be done by either a signature on the bill or a signature on the communication that accompanies the bill. In my experience solicitors' bills are sent to clients either by post, usually with an accompanying letter, or by email. Sometimes they are sent by both means. It would ... be absurd if a solicitor, sending a bill by email, were required to send, as another attachment, a letter in pdf form which contained no more information than that contained in [an] email."*

Additionally, the Senior Costs Judge held that the electronic signatures on the emails were also signatures for the purposes of s.69(2A)(b) of the 1974 Act: a wet signature was not required. This was the case because they were evidently applied to the email with an *"authenticating effect"*: (at [26]–[30]). This was to be compared with the electronic signatures on the invoices that were attached to the emails. In respect of them, there was no evidence that the person whose name was affixed electronically was the solicitor or person authorised by the solicitor to sign it (at [20]–[25]). ***Attorney General v Edison Telephone Co of London Ltd*** (1880) 6 QBD 244, Exch. Div., ref'd to. (See ***Civil Procedure 2022*** Vol.2 para.7C-108.)

■ **Hayden v Associated Newspapers Ltd** [2022] EWHC 2693 (KB), 28 October 2022, unrep. (Nicklin J)

Request for court record – disclosure of details of person making request refused

CPR rr.5.4B(2) and 5.4C(1). The claimant applied for an order that HM Courts and Tribunals Service disclose the identify of a non-party who had requested a copy of a document that was held on the court file and which as a consequence was accessible to the public. The application was made under CPR r.5.4B, in the alternative, under the ***Norwich Pharmacal*** jurisdiction or the court's inherent jurisdiction. The purpose of the application was to obtain documents that would enable the claimant to identify the non-party's name and contact details. **Held**, the application was refused. First, to obtain a copy of the non-party's request required there to be a *"communication between the court and ... another person"*. The request was such a communication (at [62]). Secondly, however, the request needed to form part of the *"records of the court"*. The CPR did not, contrary to the UK Supreme Court's recommendation in ***Cape Intermediate Holdings Ltd v Dring*** (2019), contain a definition of that term. Nicklin J echoed the Supreme Court's recommendation that the Civil Procedure Rule Committee rectify that situation: there is a clear need, both in terms of principle and practice concerning open justice, that it is clear what are records of the court (at [68]). Absent a clear definition within the CPR, applying the guidance set out in ***Cape Intermediate Holdings Ltd v Dring*** (2019), the request document did not form part of the records of the court (at [63]). As Nicklin J held:

> *"[63] However, in my judgment, this document is not part of the 'records of the court'. I accept [the] submission that it is properly to be classified as an administrative document that is received by the Court in order to enable the discharge of the obligation to provide third-party access to documents of the Court required to be publicly accessible. Although when initially received, a request for documents under CPR 5.4C(1) is processed using CE-File, that is for good reasons of practicality. Importantly, once the request has been satisfied, the form is no longer available on the electronic court file relating to this case. That is the position in this case. X's original request for the Davison Order is no longer available on CE-File.*
>
> *[64] Applying Dring, requests for documents from the Court file under CPR 5.4C(1) have no bearing on the litigation;*

they are wholly unconnected to it. They are not required to be kept – and as a matter of fact are not kept – as a long-term record of what has happened in the claim. Although the Claimant attached importance to the note that appears in the Guide (see [42] above), in my judgment this cannot alter the position. The statement that a party may request to know who has accessed documents relating to the case is, at one-level, stating nothing more than the obvious. All that the note states is that such a request must be referred to the Master 'for directions'. The conclusion of my judgment is that, were such a reference to be made in respect of requests for documents under CPR 5.4C(1), the answer that would be given is that the party is not usually entitled to receive the information.

[65] The principles of open justice support this conclusion. CPR 5.4C(1) plays an important role in open justice. It declares that, absent the Court ordering some restriction on access, the documents specified in the rule are to be publicly accessible. They are the documents required to be available on the public record to enable the public scrutiny that is an essential feature of open justice. At least in respect of requests for documents that are required to be publicly accessible under CPR 5.4C(1), I can see no basis on which a person requesting copies of the documents can be required to provide a reason why s/he wants them. That is to be contrasted with applications by a non-party for other documents from the records of the Court under CPR 5.4C(2) in respect of which the reason why the relevant document is sought is a relevant factor to be considered by the Court when considering whether to grant access: Dring [45]. Equally, those who wish to exercise the right under CPR 5.4C(1) to obtain documents required to be publicly available should not usually face the prospect of details of their inquiries – and their identity – being provided to the parties (or more widely). The fact that such a person must provide his/her name and address when requesting the documents, is simply to enable the relevant documents to be sent to them. A person attending to watch court proceedings is not required to provide his/her name in order to be permitted to exercise their right to sit in the public gallery of proceedings conducted in open court. A justification would be required before a Court required a person to identify him/herself.

[66] The fact that the Respondent, in fact, has nevertheless retained a copy of the original request by X for a copy of the Davison Order does not make it a 'record of the court'. As Dring held, not everything that happens to have been 'generated in connection with a case and filed, lodged or kept for the time being at the court' is a 'record of the court' within the meaning of CPR 5.4B(2) or 5.4C(2). Depending upon their contents, some communications with the Court from third parties may become 'records of the court'. For example, if a letter were sent to the Court from a third-party complaining that a party to a claim had been intimidating witnesses in a forthcoming trial, that would be likely to become a 'record of the court'. Realistically, the Court would be likely to send such a document to the parties, without waiting for a request for a copy of the document under CPR 5.4B(2), but its classification as a 'record of the court' would nevertheless be important in respect of any application for a copy made by a non-party under CPR 5.4C(2)."

Turning to the ***Norwich Pharmacal*** jurisdiction, Nicklin J concluded that the requirement to demonstrate wrongdoing was not made out (at [70]). It was also clear that HMCTS's involvement in the alleged wrongdoing was not sufficient to justify the grant of an order. HMCTS was *"a mere witness, par excellence"* (at [66]). Finally, the court had no residual inherent jurisdiction to make the order. Given the existence of CPR r.5.4B(2) and the ***Norwich Pharmacal*** jurisdiction there was no further such jurisdiction. As Nicklin J explained, if there were an inherent jurisdiction, there would be no need for applications to be made under either of the other two jurisdictions and thus there would be no need to meet the requirements they set for obtaining documents (at [87]). ***Cape Intermediate Holdings Ltd v Dring*** [2019] UKSC 38; [2020] A.C. 629, UKSC, ref'd to. (See ***Civil Procedure 2022*** Vol.1 para.5.4B.3.)

- **Royal & Sun Alliance Insurance Ltd v Tughans (A Firm)** [2022] EWHC 2825 (Comm), 9 November 2022, unrep. (Foxton J)

Approach to consequentials hearings

Judgment was given in a challenge to an arbitration award. Judgment was handed down on 14 October 2022. On 9 November 2022, a further, reserved, judgment was given on a number of matters that arose consequential to the initial judgment. Those matters had generated 50 pages of submissions and had meant the consequentials hearing did not take place until seven weeks after the initial judgment in draft (at [15]). Foxton J took the step of handing down a reserved judgment on the consequential issues due to concerns that had arisen about the approach taken to such matters, and particularly hearings to deal with them, in the Commercial Court. As Foxton J put it:

"[16] Dealing with consequential issues arising from a judgment following a short hearing in this way is not conducive to the efficient conduct of litigation in this court. Time is not reserved in judges' diaries to deal with lengthy disputes about consequential matters, a task which becomes more time-consuming the longer the period which has elapsed from the provision of the draft judgment to the parties. The process of resolving consequential issues on the basis of written submissions is not intended to involve a substantial departure from the way in which these issues are traditionally dealt with at short oral hearings immediately following the handing down of judgment. Nor is it appropriate or realistic to expect the court to grapple with lengthy written submissions on permission to appeal which far exceed the length of the submissions addressing those issues filed for the hearing. It is not difficult to discern a link between these

two issues (delay in resolving consequential matters after judgment and lengthy written submissions on permission to appeal): the increased time available is used for the purpose of seeking to re-argue the case in retrospect."

Noting that Jacobs J had raised similar concerns in ***Contra Holdings Ltd v Bamford*** (2022), Foxton J summarised and applied the approach to be taken in future to consequentials hearings:

"[19] As Mr Justice Jacobs observed, going forward, judges of the Commercial Court judges will be astute to ensure that consequential issues are resolved promptly after hand-down, and in a proportionate manner. This will involve:

i) Hand-downs of judgments taking place promptly after the provision of the draft judgment to the parties.

ii) Consequential matters being determined much more frequently at short oral hearings, of the order of an hour for hearings other than significant trials, which the Court will look to fix within 7 to 14 days of hand-down. It should not be assumed that such a hearing will be fixed for the convenience of all counsel involved, where this would be incompatible with a prompt determination of any consequential issues.

iii) If consequential issues are to be dealt with on paper, then for most hearings this will be on the basis of a timetable which will be completed within the same period.

iv) The fixing of strict page limits on the length of skeletons and submissions. In particular, the 15 page limit for ordinary applications of half a day or less should be sufficient in most cases to deal with consequential issues other than those arising after significant trials."

Contra Holdings Ltd v Bamford [2022] EWHC 2799 (Comm), unrep., Comm., ref'd to.

Practice Updates

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 151st Update. This Practice Direction came into force on 16 November 2022. It amends PD 51R (Online Civil Money Claims Pilot). It contains clarificatory amendments relating to the non-availability of Help with Fees to those parties that are legally represented.

CPR PRACTICE DIRECTION – 152nd Update. This Practice Direction Update comes into force on 1 December 2022. It renumbers CPR PDs 3E, 3F and 3G as PDs 3D, 3E and 3F respectively. The renumbering is consequent on the effect of PD Update 149, which relocated PD 3D to Pt 49. This Update also introduces a new PD 51Z – County Court Officers Pilot Scheme. The new pilot scheme is to run from 1 December 2022 to 30 November 2024. It provides for court officers, authorised by the Lord Chief Justice or their nominee, i.e. the Master of the Rolls (see Lord Chief Justice's Authorisation of court staff to exercise judicial functions and Delegation of Authorisation Function, 31 March 2020), to exercise the County Court's jurisdiction as provided for in the PD. PD 51Z authorises such court officers to issue standard form case management directions in specified claims allocated to the small claims and fast tracks. Specified claims are those defined in para.3(3) of the PD.

PRACTICE GUIDANCE

KING'S BENCH DIVISION COURT USER INFORMATION. On 8 November 2022, the Judicial Office published updated guidance concerning the reopening of the King's Bench Division counter service in the Royal Courts of Justice on 14 November 2022. The guidance is reprinted below. It is also available at: *https://www.judiciary.uk/kings-bench-division-information-for-court-users/* [Accessed 22 November 2022].

King's Bench Division: Information for court users

From 14 November 2022, the King's Bench counter service will be reopening to the public on an appointment only basis.

The following services will be available:

- *King's Bench Issues:*
  – Assistance for claims (non-represented litigants only – professional users must use CE-File)
  – Swearing Affidavits
- *King's Bench Enforcement:*

– *Stay of Execution* ***only***

- *Deeds Poll:*
  – *Swearing of Declarations*
  – *Assistance with Deed Polls applications*

Attending the Counter
The Counter is open to the public between the hours of 10am and 4.30pm, Monday to Friday (except bank holidays)

Access to counter, appointment only basis
An appointment to attend the counter can be made by contacting the required department via telephone or via email, (see contact details) between the hours of 10am and 4pm, Monday to Friday (except bank holidays). Court users must wait for confirmation of their appointment before attending the counter.

Once an appointment has been booked, court users are advised to enter the Royal Courts of Justice through the main entrance and to make their way directly to Room WG07 in the West Green Building.

General Enquiries
For general enquiries, please contact the relevant office by telephone between the hours of 10am and 4pm, Monday to Friday (except bank holidays) or email the designated email address.

Telephone:
King's Bench Division – 0203 936 8957. Please listen out for the office you require and select the relevant number from the options provided.

Email addresses:
King's Bench Issues – KBEnquiries@justice.gov.uk

King's Bench Enforcement – KBEnforcement@justice.gov.uk

Deed Polls – KBDeedspoll@justice.gov.uk

MISCELLANEOUS UPDATES

CIVIL JUSTICE COUNCIL – COSTS CONSULTATION. The Civil Justice Council has reopened its Costs Consultation following the Court of Appeal's judgment in ***Belsner v CAM Legal Services Ltd*** [2022] EWCA Civ 1387 (***Civil Procedure News*** No.9 of 2022). The reopened consultation now runs to 12.00pm on 15 December 2022. It is available here: *https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/costs/* [Accessed 22 November 2022].

In Detail

QOCS – MEANING OF PROCEEDINGS

In ***Achille v Lawn Tennis Association Services Ltd*** [2022] EWCA Civ 1407, 27 October 2022, unrep. the Court of Appeal (Baker, Males and Edis LJJ) considered the meaning of *"proceedings"* within CPR r.44.15. That rule forms part of the Qualified One-way Costs Shifting regime (QOCS). The question arose in the context of a mixed claim, which sought damages for alleged psychiatric, i.e. personal, injury and for injury to feelings; the latter of which is not a personal injury (***Brown v Commissioner of Police of the Metropolis*** [2019] EWCA Civ 1724; [2020] 1 W.L.R. 1257 at [13]). The claim for personal injury had been struck out, with costs awarded to the defendant. The injury to feelings claim was still live and to be determined. The defendant wished to enforce the costs award. It did so on the basis that CPR r.44.15, when it referred to *"proceedings"* referred to the personal injury claim and therefore the costs order could be enforced. The claimant argued that the costs order could not be enforced as *"proceedings"* in that rule applied to all claims brought. Thus enforcement could not arise until all claims were determined, and as the injury to feelings claim had not yet been determined the question of enforcement was premature. When all claims had been determined, enforcement was then submitted to be a matter of discretion under CPR r.44.16 (at [8]).

The Court of Appeal considered three issues on the appeal: the meaning of *"proceedings"* generally; the meaning of proceedings for the purposes of CPR r.44.15; and the exercise of discretion in mixed claims under CPR r.44.16.

Meaning of proceedings generally

The starting point is that the CPR does not provide a definition of *"proceedings"*. Its meaning is to be derived from its *"statutory context and [its] underlying purpose"*: in ***Plevin v Paragon Personal Finance Ltd*** [2017] UKSC 23; [2017] 1 W.L.R. 1249, UKSC at [19] (at [20]). That judgment confirmed that the natural meaning of the term was to the effect that *"proceedings are synonymous with an action, which is not concluded until all matters before the court have been concluded."* However, that was just the starting point of an analysis of *"proceedings"* in the current context (at [21]).

It is well-established by the authorities that where the QOCS regime is concerned *"proceedings"* does not bear its natural meaning. This is required to give full effect to that regime (at [22]): see, for instance, ***Wagenaar v Weekend Travel Ltd*** [2014] EWCA Civ 1105; [2015] 1 W.L.R. 1968, where it was held not to apply to a defendant's claim for personal injury against a third party or their contribution claim against another defendant. Such qualifications on its meaning were:

> *"[22] ... appropriate because such claims or counterclaims have nothing to do with the purposes of the QOCS regime, which are, first, to promote access to justice in personal injury cases by removing the deterrent of potential liability for a defendant's costs and, second, to deter frivolous personal injury claims."*

In determining then the meaning to be given to *"proceedings"* where the QOCS regime was concerned, the approach set out by Vos LJ in ***Wagenaar*** was endorsed:

> *"[24] In Wagenaar Lord Justice Vos (with whom Lord Justices Laws and Floyd agreed) said at [38] that 'the proper meaning of the word "proceedings" in CPR Pt 44.13 has to be divined primarily from the rules on QOCS themselves'. I respectfully agree. It is these rules which provide the context within which, and demonstrate the purpose for which, the term is used. It is therefore unlikely to be helpful to seek the meaning of the term 'proceedings' as used in the QOCS provisions elsewhere in the Civil Procedure Rules, where the usage is not necessarily consistent.*
>
> *[25] Lord Justice Vos concluded:*
>
> > *'40. Thus, in my judgment, CPR r 44.13 is applying QOCS to a single claim against a defendant or defendants, which includes a claim for damages for personal injuries or the other claims specified in CPR r 44.13(1)(b) and (c) , but may also have other claims brought by the same claimant within that single claim. Argument has not been addressed to the question of whether QOCS should apply to a subsidiary claim for damages not including damages for personal injuries made by such a claimant against another defendant in the same action as the personal injury claim. I would prefer to leave that question to a case in which it arises. CPR r 44.13 is not applying QOCS to the entire action in which any such claim for damages for personal injuries or the other claims specified in CPR Rule 44.13(1)(b) and (c) is made.'*
>
> *[26] This is a clear decision that the term 'proceedings' in CPR 44.13 refers to all of the claims made by a claimant against a single defendant, when one such claim is a claim for personal injury. Thus, in a mixed claim case, QOCS applies pursuant to the basic rule in CPR 44.14, unless one of the exceptions in CPR 44.15 or CPR 44.16 applies."*

Meaning of proceedings in CPR r.44.15

Turning to CPR r.44.15, in general the court should approach the question of its meaning on the basis that it should be read consistently with its meaning as generally applicable to the QOCS regime. That was the case unless the contrary could be shown. As such "*[t]he natural meaning of the term 'proceedings' should not be qualified further than the context and purposes of the QOCS regime require*" (at [29]). CPR r.44.15 had however, amongst other things, the aim of deterring frivolous claims, i.e. those claims that are struck out on one of the three grounds set out in the rule, i.e. the claim disclosed no reasonable grounds for bringing the proceedings, the proceedings were an abuse of process, or the claimant or someone acting on their behalf and their claimant's knowledge was likely to obstruct the just disposal of proceedings (at [30]–[31]). Where a claim is struck out in those circumstances r.44.15 applies, i.e. because it should never have been brought. Having set this out the court went on to hold that:

> *"[32] In my judgment it is not necessary to interpret 'proceedings' in CPR 44.15 as referring to the personal injury claim alone in order to give effect to this deterrent purpose. CPR 44.16 enables this purpose to be achieved in a mixed claim case where the personal injury claim is struck out. Mr Lyon accepted and indeed urged this analysis upon us, albeit that this was contrary to the position taken by the claimant in the court below. Thus, in a mixed claim case where the personal injury claim is struck out at an early stage but the proceedings continue, CPR 44.16(2)(b) enables the court to order that a costs order made against the claimant may be enforced to its full extent. That is because such a case is one where 'a claim is made for the benefit of the claimant other than a claim to which this Section applies', that is to say, a non-personal injury claim is made (Brown v Commissioner of Police at [31] to [33]).*
>
> *[33] There is, therefore, no reason why the judge striking out the personal injury claim should not make an order for costs and assess those costs summarily, if it is appropriate to do so. That will often be the convenient course. The ques-*

tion of enforcement of the order can then be deferred to the conclusion of the proceedings, to be dealt with pursuant to CPR 44.16 – or, if the surviving claim succeeds, by being set off against any damages pursuant to CPR 44.14.

[34] It is true that in such a case the permission of the court must be obtained before enforcement under CPR 44.16 can take place, and that permission will only be given to the extent that the court considers it just to do so. Accordingly, it follows that a claimant in a mixed claim case where the personal injury claim is struck out is not in quite as good a position as a claimant where a personal injury claim is struck out and there is no other claim. However, as the court has power in the mixed claim case to make whatever order it considers will meet the justice of the situation, it is impossible to say that the claimant's interpretation results in injustice or defeats the purpose of the QOCS rules."

Discretion under CPR r.44.16

Finally, CPR r.44.16 provides the court with a discretion, in mixed claim cases where a personal injury claim has been struck out – as was the case here – to make any order it considers to be just (at [36]). The correct approach to exercising that discretion was explained in ***Brown v Commissioner of Police of the Metropolis*** (2019) at [57]–[58]. That made clear that the availability of QOCS protection remained a *"relevant and often important factor"* to be taken into account when assessing exercise of the discretion (at [37]). As a consequence, as the Court of Appeal concluded:

*"[38] It is clear from [the guidance in **Brown**] that, when the court comes to consider what order to make under CPR 44.16 at the conclusion of the present proceedings, it will be able to take account of the fact that the personal injury claim was struck out on one of the grounds identified in CPR 44.16 and make whatever order is just in the light of that fact, together with all the other circumstances of the case."*

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