CIVIL PROCEDURE NEWS

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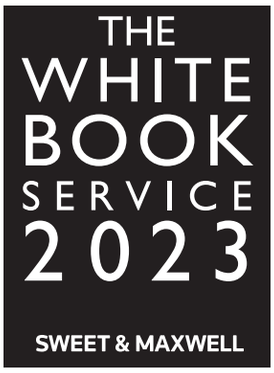

In Brief

Cases

■ **Harrington Scott Ltd v Coupe Bradbury Solicitors Ltd** [2023] EWHC 294 (Ch), 12 January 2023, unrep. (HHJ Hodge KC sitting as a judge of the High Court)

Inappropriate time estimate – no order as to costs

CPR r.44.2. The defendant in proceedings in the Business and Property Courts applied for summary judgment and/or strike out under either CPR r.3.4 or the court's inherent jurisdiction. The application was successful. Prior to the application being determined, it was listed for hearing before a deputy Master, with a time estimate of twelve and a half hours. That first hearing was adjourned by the deputy Master who heard it so that it could be relisted before a High Court judge with a time estimate of four to five days, with an additional day for pre-reading (at [8]). The deputy Master reserved the question of costs of the adjourned hearing. Following that hearing, where the application succeeded, that costs question was considered. The claimant submitted that both parties should bear the costs of the adjourned hearing on the grounds that the defendant had failed to estimate the hearing length properly, had failed to identify the appropriate level of judiciary for the hearing, and the defendant's leading counsel's request for personal reasons for more time (at [25]). The defendant resisted that submission on the basis that the claimant's, then, solicitors had not objected to the time estimate, that the hearing fell within the jurisdiction of a Master, and hence deputy Master, and it had not previously been suggested the application should be heard by a High Court judge. **Held**, no order as to the costs thrown away by the adjourned application. There was force in the submission that both parties ought to have considered whether the time estimate was adequate. Furthermore, the defendant ought to have considered properly whether to limit the matters in issue in the application to those that could have been determined in the time estimate originally given (at [27]–[28]). (See ***Civil Procedure 2023*** Vol.1, para.44.2.6.)

■ **Vodafone Group Plc v IPCom GmbH & Co KG** [2023] EWCA Civ 113, 10 February 2023, unrep. (Lewison, Asplin, Arnold LJJ)

Power to vary final order

CPR r.3.1(7). The Court of Appeal made a final order in an appeal in patent proceedings. The order was sealed. The question arose whether the order could be varied under CPR r.3.1(7). The Court of Appeal reviewed the various authorities on the operation of that rule and concluded as follows:

> *"[54] The overwhelming thrust of the authorities is that the court's power under CPR rule 3.1 (7) to vary or revoke orders either cannot or should not be used to discharge a sealed final order. The only limited exception thus far even contemplated in civil proceedings is the case of a continuing order (such as a final injunction)."*

It then noted, in *obiter*, the following concerning the application of the power to re-open final appeal, or permission to appeal, decisions under CPR r.52.30: *obiter* as the issue was note raised by the applicant. The question considered was whether CPR r.52.30 could be relied on, in principle, where there was an extant application for permission to appeal to the UK Supreme Court (at [58]). In *Taylor v Lawrence* (2002), which established the jurisdiction to re-open, the Court of Appel noted that – in theory – the power might be relied on where it was satisfied that the House of Lords, now UK Supreme Court, would not give permission to appeal (at [59]–[63]). The Court of Appeal said no more about the application of CPR r.52.30 in the present case, i.e., it said nothing about its potential application on the facts of the appeal. ***Taylor v Lawrence*** [2002] EWCA Civ 90; [2003] Q.B. 528. (See ***Civil Procedure 2023*** Vol.1, para.52.30.2.)

■ **GKE v Gunning** [2023] EWHC 332 (KB), 17 February 2023, unrep. (Ritchie J)

Vulnerable witness – guidance – evidence

CPR r.1.6, PD 1A. The claimant issued proceedings against the defendant seeking damages for personal injury arising out of an alleged breach of trust. The claimant applied for, and was granted, a vulnerable witness order (at [82]). In so far as cross-examination of the claimant was concerned, the order provided that:

> *"[82] . . . required the Defendant to serve and file a list of questions by the 31st of January 2023. The order specifically permitted the Claimant to raise any objections to the cross examination questions at the start of the trial. The Claimant was permitted to attend the trial by video link and the Defendant was barred from cross examining the Claimant directly. The trial judge was required to verbalise the Defendant's questions from the list. . ."*

The judge noted, however, that the defendant drafted 86 questions, which were sent to the court and the claimant. During re-examination of the claimant, it became apparent that both the claimant's lawyers and the claimant had seen the

questions and that – as the judge noted – the claimant had potentially gone through the questions with her lawyers (at [82]). The judge went on to note that the provisions concerning vulnerable witnesses were introduced as a result of a report by the Civil Justice Council on Vulnerable Witnesses. That report did not contain any suggestion that the claimant, who was neither a child nor had learning difficulties, should be provided with written cross-examination questions in advance (at [83]). The judge went on to hold:

> *"[84] Whilst I make no criticism of the Claimant's lawyers for interpreting the wording of the vulnerable witness order made in this case as permitting them to take instructions on the written questions. It is my view that giving the questions to the Claimant in advance [...] was not fair to the Defendant and created an unlevel playing field and degraded her evidence. The Defendant was not provided with the cross examination questions from the Claimant's counsel in advance. When this issue arose and during his closing submissions the Defendant expressed his astonishment and disbelief that this could have occurred and submitted in the strongest terms that it was unfair. I have sympathy with that submission. As a result I have taken great care to approach the Claimant's cross examination answers with the unlevel playing field in mind."*

Additionally, the claimant gave evidence by video link from counsel's chambers. She was accompanied by her solicitor. It appeared that no specific arrangements had been put in place under CPR r.32.2: see ***Navigator Equities Ltd v Deripaska*** (2020) at [9]. Furthermore, the claimant initially gave evidence off screen. No direction permitting that had been made within the vulnerable witness order. Following discussions between the judge and counsel, arrangements were made for the claimant to give evidence on screen so as to be seen by the judge and counsel, but not the defendant (at [85]–[86]). ***Navigator Equities Ltd v Deripaska*** [2020] EWHC 1798 (Comm), unrep., Comm., ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.1.6.1.)

■ **Mundy v TUI UK Ltd** [2023] EWHC 385 (Ch), 21 February 2023, unrep., (Collins-Rice J)

Part 36 Offer – 90/10 offers to settle

CPR r.36.17. A practice has developed where parties make offers to settle liability under CPR Pt 36 on the basis of a 90%/10% basis. Such an offer was made in this claim, in which the claimant sought damages for personal injury. The basis of the claim was alleged food poisoning said to have been suffered whilst on holiday. Two Pt 36 Offers were made. Each offer was rejected by the defendant. The second of the two offers was made on a 90%/10% basis. The defendant made a Pt 36 Offer of its own, which was also not accepted. The judge identified the key issues in the case as how CPR r.36.17 in such circumstances. As she put it:

> *"[18] The Part 36 self-contained procedural code about offers to settle pursuant to the procedure set out is a balanced system of financial incentives to settle claims, issues or parts of claims, without recourse to litigation. Where a settlement offer is accepted, CPR 36.13-14 makes provision for a claim to be stayed on the terms of the agreement and for the costs consequences which are to follow. Where an offer is rejected, however, and the claim goes forward to trial, then there is an exercise to be done at the end of the proceedings in comparing the rejected benefits with the benefits achieved by the trial. If the comparison favours the rejected offer – the offer has not been 'beaten' – adverse costs and other financial consequences are automatically visited on the rejecting party unless a court is prepared to say that would be 'unjust' (a high bar).*
>
> *[19] This appeal puts a spotlight on the operation of the principal provision dealing with rejected offers – CPR 36.17 – and how it plays out in relation to a factual matrix involving both (a) competing financial settlement offers, both of which were rejected and unbeaten and (b) a claimant's rejected '90/10' liability offer."*

The judge went on to note the growth and purpose of 90%/10% Pt 36 Offers:

> *"[26] Counsel before me agreed with Foxton J [in observations made when he gave permission to appeal in this case] that the practice of making 90/10 liability offers, to secure costs advantages, has indeed become widespread. They were also unaware of any existing authority on precisely how these offers fit in to CPR 36.17 if they are rejected.*
>
> *[27] As [Counsel] explained the general mechanics, the idea of these offers is that a claimant who is confident of success on liability will make a 90/10 liability offer to induce a defendant to concede liability and agree for the case to proceed to trial (or negotiation) on quantum alone. It is intended to incentivise a defendant to agree to the saving of the time and expense of a liability trial. If accepted, it means that quantum, if not agreed, can be dealt with at a comparatively simple disposal hearing. It proceeds on the basis that a defendant who agrees to this offer will have the reward of retaining 10% of the damages ultimately awarded or negotiated. But [Counsel] says as well as this carrot, there is a stick: a defendant who rejects this offer, and then goes on to lose on liability, will face the adverse consequences of CPR 36.17."*

Where CPR r.36.17 was concerned, it was "*directed to a like for like comparison*" where monetary offers were made to settle proceedings (at [38]). The 90%/10% offer did not come within the scope of this scheme. As Collins-Rice J explained it:

"[40] [The] 90/10 liability offer was not an offer to settle the claim, or a quantifiable part of or issue in the claim. It is difficult to fit into the Part 36 scheme altogether. If accepted, in what sense will that produce the result that 'the claim will be stayed' (CPR 36.14(1))? If rejected, in what sense does that produce a quantifiable proposition capable of being compared with what a claimant got 'in money terms' from a judgment – that is, from the judgment itself and not from a private algorithm pre-attached to the judgment? A simple case like this in which liability is not fought on a distinct issues basis but in its entirety cannot produce anything other than a 100% result on liability either way; the value of a win on liability 'in money terms' is difficult if not impossible to separate from the quantum of damages awarded, and that will always and axiomatically be more advantageous to a claimant than 90% of it. There is a problematic degree of artificiality in all of this.

[41] [The claimant] had made a money settlement offer at the same time as his 90/10 liability offer. He had also made a proposal about how the two offers fitted together – the offer to settle for £20,000 was to be 'net of acceptance of any liability offer'. That was a proposal about the effects of acceptance. Whether to accept a 90/10 liability offer will be a matter for a defendant's commercial judgment (the proportions on offer, however, may be unlikely to be attractive outside an issues-based claim; it is an offer likely to be attractive only to a defendant clinging on to an outside chance of winning). But the effects of rejection of the liability offer do not speak for themselves. And the effect proposed by [the Claimant] in this appeal goes far beyond incentivising the avoidance of a liability trial. It makes a 90/10 liability offer into a means for a claimant, who fails to beat a money offer to settle his claim, to recoup a substantial premium for 'winning' the case nevertheless. It is an attempt at a unilaterally imposed insurance policy to reverse the losses otherwise provided for by CPR 36.17. It is, in other words, an attempt to use CPR 36.17 against itself, contrary to both its letter and its spirit.

[42] I am unpersuaded this rejected 90/10 liability offer can be fitted in to the terms of CPR 36.17(1)(b) consistently with the wording, integrity and practicality of the CPR 36.17 mechanism. Trying to do so strains the language of the provision, undermines its careful balance, and introduces a degree of complexity and uncertainty which I am not persuaded is within its contemplation. It is a provision that relies on its clarity, simplicity and predictability for the incentivising effects which puts it at the heart of the Part 36 code.

[43] How, then, does this 90/10 liability offer fit into the scheme of CPR 36.17, if not in the manner suggested by [Counsel]? The simplest answer to that lies in CPR 36.17(5). In a case like this – an otherwise straightforward CPR Part 36.17(1)(a) case in which a claimant has failed to beat a defendant's offer – a court considering whether it would be unjust to visit the subsection (3) consequences on the claimant must take into account all the circumstances of the case. I can see that in an appropriate case – and whether or not a 90/10 liability offer counts as 'any Part 36 offer' for the purposes of CPR 36.17(5)(a) – a court may be invited to consider any injustice arising by virtue of the defendant having rejected that offer."

(See ***Civil Procedure 2023*** Vol.1, para.36.17.2.)

■ ***National Highways Ltd v Persons Unknown*** [2023] EWCA Civ 182, 23 February 2023, unrep. (Sharp PKB, Flaux C, Lewison LJ)

Final anticipatory injunction – test for summary judgment

CPR Pt 24. The appellant had sought summary judgment in respect of final anticipatory prohibitory injunctions against individuals who had been involved in demonstrations on motorways and road. The application was dismissed in part. The appellant appealed from the dismissal. In determining the appeal, the Court of Appeal considered the appropriate test for summary judgment on such applications. **Held**, appeal allowed save in respect to one specific aspect of the injunction. When seeking summary judgment for a final anticipatory injunction an applicant is not required to demonstrate, for each defendant, that that defendant has committed the tort of trespass or nuisance and that there was no defendant to a claim that the tort had been committed (at [37]). Furthermore,

"[38] . . . it is not a necessary criterion for the grant of an anticipatory injunction, whether final or interim, that the defendant should have already committed the relevant tort which is threatened. . .

[39] There is certainly no requirement for the grant of a final anticipatory injunction that the claimant prove that the relevant tort has already been committed. The essence of this form of injunction, whether interim or final, is that the tort is threatened and, . . . for some reason the claimant's cause of action is not complete. . ."

It was also noted that the summary of authorities set out in ***Vastint Leeds BV v Persons Unknown*** (2018) drew a distinction between final prohibitory and final mandatory injunctions. The distinction was not relevant to the present appeal, as it only concerned a final prohibitory injunction (at [38)]. In so far as the test for summary judgment was concerned, the Court held:

"[40] The test which the judge should have applied in determining whether to grant summary judgment for a final anticipatory injunction was the standard test under CPR Part 24.2, namely whether the defendants had no real pros-

pect of successfully defending the claim. In applying that test, the fact that (apart from the three named defendants to whom we have referred) none of the defendants served a defence or any evidence or otherwise engaged with the proceedings, despite being given ample opportunity to do so, was not, as the judge thought, irrelevant, but of considerable relevance, since it supported NHL's case that the defendants had no real prospect of successfully defending the claim for an injunction at trial."

The Court also deprecated the judge's approach to the respondents' failure to serve a defence or evidence:

"[41] It is no answer to the failure to serve a defence or any evidence that, as the judge seems to have thought (see [35(5)] of the judgment), the defendants' general attitude was of disinterest in Court proceedings. Whatever the motive for the silence before the judge, it was indicative of the absence of any arguable defence to the claim for a final injunction. Certainly it was not for the judge to speculate as to what defence might be available. That is an example of impermissible 'Micawberism' which is deprecated in the authorities, most recently in King v Stiefel. If the judge had applied the right test under CPR 24.2 and had had proper regard to CPR 24.5, he would and should have concluded that none of the 109 named defendants had any realistic prospect of successfully defending the claim at trial and that accordingly, NHL was entitled to a final injunction against those defendants."

Vastint Leeds BV v Persons Unknown [2018] EWHC 2456 (Ch); [2019] 4 W.L.R. 2, ChD, ***King v Stiefel*** [2021] EWHC 1045 (Comm), unrep., Comm., ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.24.2.3.)

■ **Ellison Road Ltd v Mian (t/a HKH Kenwright & Cox Solicitors)** [2023] EWHC 375 (Ch), 28 February 2023, unrep. (Master Brightwell)

Service of claim form where individual sued in a business name

CPR rr.6.9(2), 6.9(3), PD 7, paras. 5C.1, 5C.2, PD 16, para.2.6. A solicitor was sued in his own name, trading as the full name of the business he previously carried out as a sole practitioner. The claim form was served at, what was believed to be, his current place of business. An issue arose whether service was effective. Specifically, the question was whether, in such circumstances, service had to be effected at the defendant's usual or last known residence, as required by CPR r.6.9(2). This appears to be the first authority on the point. **Held**, the defendant was sued in the name of a business and, therefore, service had to have been effected at his principal or last known place of business or the address as provided for in CPR r.6.9(3) (at [23]–[26]). Furthermore, in considering the relationship between PD 7, paras 5C.1 and 5.C.2 and PD 16, para.2.6, the Master provided the following guidance:

"[21] [It was argued], consistent with the notes in the White Book (2022) at 7APD.9, that paragraph 5C enables proceedings to be brought against a business name even if the name of the individual who carries on that business is not known, providing the trading name is known. Where the name of the individual is known, however, the provisions of Practice Direction 16 paragraph 2.6 are mandatory.

[22] [Counsel] also relied on the case where a self-employed person carries on business in their own name (as would be the case with a barrister, for instance), arguing that the question of how service is to be effected cannot just depend on how the defendant is described in the claim form; one also has to consider the contents of the claim. This way this point was put cannot be right. Although it was not cited to me, I would note that it is clear on authority that an individual is sued in the name of a business only when he is sued in the name of a business which is not his personal name: see Murrills v Berlanda [2014] EWCA Civ 6 at [19] (Sir Stanley Burnton). That does not resolve the issue in the present case.

[23] However, I agree . . . that the difference between the provisions of the two Practice Directions can be explained in the way suggested in the White Book. Practice Direction 7A paragraph 5C permits claims against an individual to be brought solely in the (different) name of a business, from which it must follow that this is permitted in certain circumstances. It also refers back to claims against a partnership which, by paragraph 5A.3, must be brought against the name of the partnership, unless it is inappropriate to do so. Practice Direction 16 paragraph 2.6 states that the full name of each defendant must be given as described in each sub-paragraph, 'in each case where it is known'. It is those words which distinguish the two Practice Directions and explain the difference between them. I would note that, even though this sub-paragraph does not refer to Practice Direction 7A, there are words in parentheses at the end of paragraph 2, directing the reader to consider Practice Direction 7A. The two are to be read so as to be consistent with one another. Where the full unabbreviated name of an individual defendant sued in the name of a business is known, that name must be used, together with the title by which they are known and the full trading name. Where the full unabbreviated name of such an individual defendant is not known, the claim may be brought against the business name alone and indeed in practice must so be brought for the claimant will have no alternative."

Murrills v Berlanda [2014] EWCA Civ 6, unrep., CA, ref'd to. (See ***Civil Procedure 2023*** Vol.1, paras.6.9.2–6.9.3.)

■ **R (Isah) v Secretary of State for the Home Department** [2023] EWCA Civ 268, 14 March 2023, unrep. (Bean, Asplin, Nugee LJJ)

Summary assessment – to be carried out by judge conducting immediate hearing

CPR rr.1.2, 3.1(2)(m), 44.1(1), 44.6(1), PD 44, paras 8.1, 9.2, 9.7. The Court of Appeal considered who ought to carry out a summary assessment of costs. Specifically it considered, for the first time, "*whether a judge is permitted to order costs to be summarily assessed in a different court by a different judge or whether a summary assessment must be undertaken by the judge making the order for summary assessment, whether at the same time or at some point in the future*" (at [1]). It noted that, as referred to in the Senior Courts Costs Office, *Guide to the Summary Assessment of Costs* (2021), the High Court had held that notwithstanding the wording of CPR r.44.1, which provides that a summary assessment is one where costs are assessed by the judge who dealt with the immediate matter, a summary assessment could be carried out by a different judge (at [16]): see, ***Transformers and Rectifiers Ltd v Needs Ltd*** (2015) at [19]. **Held**, the wording and meaning of CPR r.44.1, to which the judge in ***Transformers and Rectifiers Ltd v Needs Ltd*** (2015) was not referred, were clear: only the judge who dealt with the immediate matter could carry out a summary assessment either at the conclusion of the relevant hearing or at a later date. Any suggestion to the contrary in PD 44 could not supplant or modify rules in CPR Pt 44. Nor did CPR r.1.2 or 3.1(2)(m) override, in the case of the former rule, or provide otherwise, in the case of the latter rule, that position. While it may be the case that in certain situations, such as the unavailability of the judge who dealt with the immediate hearing, that it might be preferable for there to be a power to permit another judge to deal with the summary assessment, the CPR did not provide for that possibility. If such an alternative were to be adopted it would require an amendment to the CPR brought forward by the Civil Procedure Rule Committee. As Asplin LJ concluded:

> *"[41] . . . the Rules as drafted leave the court in an inflexible position in which only the judge who heard the matter can make the summary assessment. There is no power to do otherwise. I accept, however, that there might be circumstances in which a judge who had not heard the original matter is in a position to carry out the broad-brush exercise which is the hallmark of summary assessment and it would be proportionate and just for him or her to do so. The circumstances in which Coulson J found himself might be one such circumstance. Another might be where the judge who heard the matter is likely to be unavailable for a considerable time. In those circumstances, of course, the delay must be weighed against the additional cost involved in another judge considering the matter and the question of whether in the circumstances of the case, it would be just for someone who had not heard the matter to undertake the broad-brush exercise. In any event, the Rules as they stand do not allow for it. It seems to us that this is a matter which it might be appropriate for the Rules Committee to consider."*

Transformers and Rectifiers Ltd v Needs Ltd [2015] EWHC 1687 (TCC); [2015] 3 Costs L.R. 611, TCC, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.44.6.3.)

Practice Updates

STATUTORY INSTRUMENTS

STATE IMMUNITY ACT 1978 (REMEDIAL) ORDER 2023 (SI 2023/112). On 2 February 2023, the State Immunity Act 1978 (Remedial) Order 2023 was laid before Parliament. It came into force on 23 February 2023. It amends ss.4(2)(b) and 16(1) of the 1978 Act to render it compatible with rights guaranteed under arts 6 and 14 of the European Convention on Human Rights. It thus remedies an incompatibility identified by the UK Supreme Court in ***Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*** [2017] UKSC 62; [2017] 3 W.L.R. 957. The incompatibility concerned a restriction on certain claimants bringing employment claims.

MISCELLANEOUS UPDATES

CIVIL PROCEDURE RULE COMMITTEE CONSULTATION – CPR Pt 24. The Civil Procedure Rule Committee is currently carrying out a consultation on revisions to CPR Pt 24 as part of its ongoing rule simplification project. The consultation document is available at: *https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about*. Consultation responses, following an extension of time for submission, can be submitted by 28 April 2023 at: CPRCRollingConsultations@justice.gov.uk. The main thrust of the proposed revisions is to revoke PD 24, while transferring a number of provisions from it to a revised CPR Pt 24. Pt 24 will also undergo some minor revisions intended to simplify it and its language. No substantive amendment is proposed.

In Detail

CONSTRUCTION OF COURT ORDERS

In ***Banca Generali S.P.A. v CFE (Suisse) SA, Sovereign Credit Opportunities SA*** [2023] EWHC 323 (Ch), Richards J considered, in the context of a mandatory injunction, the approach to interpreting court orders. The injunction required the defendants to provide documents to the claimant relating to transactional documents relating to securitisations. A question arose concerning the interpretation of part of the injunction. Richards J noted that the proper approach to the construction of court orders has been considered on a number of occasions.

The starting point for considering the proper construction of a court order was identified by Lord Sumption in ***Sans Souci Ltd v VRL Services Ltd (Jamaica)*** [2012] UKPC 6. Construction requires the court, as part of a single, coherent process, to consider the order in its context, and particularly in that latter regard the reasons given by the court that granted the order are of fundamental importance in determining the context. As he put it,

> *"[13] . . . the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.*
>
> *[14] It is generally unhelpful to look for an 'ambiguity', if by that is meant an expression capable of more than one meaning simply as a matter of language. True linguistic ambiguities are comparatively rare. The real issue is whether the meaning of the language is open to question. There are many reasons why it may be open to question, which are not limited to cases of ambiguity.*
>
> *[15] As with any judicial order which seeks to encapsulate in the terse language of a forensic draftsman the outcome of what may be a complex discussion, the meaning of the order . . . in this case is open to question if one does not know the background . . ."*

While the court construing the order should properly consider the context as identified in the court's reasons for granting the order, a different approach should be taken to parties' submissions concerning the context. Richards J noted that such submissions should be treated with caution, at best. As he put it at [21]:

> *"[21] The authorities indicate that caution should be exercised in using the parties' submissions in a case as providing context that illuminates the meaning of an order. In SDI Retail Services Ltd v Rangers Football Club [2021] EWCA Civ 790, Phillips LJ and Baker LJ, who were in the majority, expressed caution on this matter, with Phillips LJ saying:*
>
> > *'Engaging in an excavation and analysis of the parties' submissions to discover their motives for seeking particular orders seems to me to be a difficult and dubious exercise, with parallels to admitting evidence of negotiations in construing a contract. As far as I am aware, such an approach finds no support (even if not expressly forbidden) in the authorities."'*

When carrying out this task the court should not delve into matters concerning whether or not the order should have been granted. Nor should it consider on what terms the court considers the order should have been granted. Those matters, as highlighted by Lord Clarke in ***JSC BTA Bank v Ablyazov (No. 10)*** [2015] UKSC 64; [2015] 1 W.L.R. 4754 at [16], are not relevant to the question of construction. Where construction is concerned, the sole issue is what the order means. And in that regard, words set out within the order should be given their ordinary meaning. It is that ordinary meaning that should then be considered in context: ***JSC BTA Bank v Ablyazov (No. 10)*** (2015) at [21]–[26]. Importantly, where the construction of an injunction is concerned, and for that matter any order that carries with it penal consequences, the order should be construed restrictively.

As Richards J noted this approach had been helpfully summarised by Flaux LJ in ***Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd*** [2017] EWCA Civ 1525. As Richards J put it:

> *"[18] . . . I will apply the principles that are set out in paragraph 41 of Flaux LJ's judgment in Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd & Ors [2017] EWCA Civ 1525. Flaux LJ's summary drew on the judgment of Lord*

Clarke in the Supreme Court's judgment in JSC BTA Bank v Ablyazov (No. 10) [2015] UKSC 64 and that is the 'judgment' referred to in the following quote:

> *'1. The sole question for the Court is what the Order means, so that issues as to whether it should have been granted and if so in what terms are not relevant to construction (see [16] of the judgment).*
>
> *2. In considering the meaning of an Order granting an injunction, the terms in which it was made are to be restrictively construed. Such are the penal consequences of breach that the Order must be clear and unequivocal and strictly construed before a party will be found to have broken the terms of the Order and thus to be in contempt of Court (see [19] of the judgment, approving inter alia the statements of principle to that effect in the Court of Appeal by Mummery and Nourse LJJ in Federal Bank of the Middle East v Hadkinson [2000] 1 W.L.R. 1695).*
>
> *3. The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order (see [21]–[26] of the judgment, again citing with approval what Mummery LJ said in Hadkinson).'"*

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