CIVIL PROCEDURE NEWS

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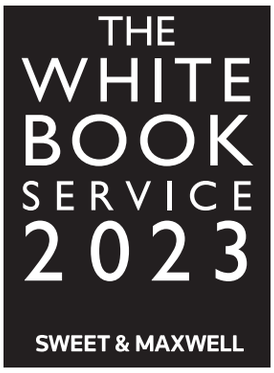

In Brief

Cases

■ **Khan v Burke** [2023] EWHC 534 (Ch), 10 January 2023, unrep. (Leech J)

Unless order – need for compliance date

CPR PD 40B, para.8.1. The applicants renewed orally their application for permission to appeal against bankruptcy orders. The bankruptcy orders had arisen as a consequence of costs ordered on the making of a disposal order. The disposal order arose following non-compliance with an unless order in 2017. The issue before the court was what was the effect of the fact that the unless order did not contain a date by which there had to be compliance with its terms. **Held**, permission to appeal was granted on condition. In reaching that decision the judge noted that unless orders must contain compliance dates: CPR PD 40B, para.8.1 (at [21]). The absence of a compliance date in the unless order meant it was fundamentally flawed. Consequently, as neither counsel nor the court had identified the absence of the compliance date, its absence amounted to a serious injustice to the appellants if the effect of the order was upheld (at [22]). (See ***Civil Procedure 2023*** Vol.1, para.40BPD.8.)

■ **Baxter v Doble** [2023] EWHC 486 (KB), 8 March 2023, unrep. (Cavanagh J)

Conduct of litigation – scope

Legal Services Act 2007, ss.12, 14, Sch.12(2), para.4. The applicant applied to commit the respondents for contempt of court. The basis of the application was that the respondent carried out the conduct of litigation when they were not entitled to do so: Legal Services Act 2007, s.12(2). Such conduct is an offence, subject to the accused being able to demonstrate that they did not know and could not reasonably have been expected to know they were committing an offence: Legal Services Act 2007, ss.14(1), (2). Where an individual is guilty of such an offence they are also guilty of contempt of court: Legal Services Act 2007, s.14(4). The first respondent was a graduate member of the Chartered Institute of Legal Executives. The respondents accepted that they were not entitled to carry out the conduct of litigation. They denied that they had done so or, in the alternative, if they had done so they did not know nor could reasonably have known they were doing so (at [4]). The issues in the present case were noted as being of potentially general public importance: the operating model adopted by the respondents was also used by other businesses (at [6]). **Held**, the respondents were conducting litigation. The statutory defence was, however, made out (at [235]). The statutory language concerning what was and what was not the conduct of litigation was not clear (at [173]), a point that could well be noted to be particularly problematic given that it could give rise to the committal of a criminal offence. Consideration of the scope of what was conduct of litigation had to be considered by reference to the 2007 Act's statutory objectives, not least that it was intended to widen access to justice while ensuring that certain legal services were only provided by properly qualified or authorised individuals (at [175]). The definition of conduct of litigation in Sch.2, para.4 of the 2007 Act does not provide much detail, although it was apparent that:

> *"[177] . . . Under the 2007 Act, the conduct of litigation includes functions which are ancillary to the commencement, prosecution, and defence of proceedings before any Court in England and Wales."*

Having considered the authorities, four points of principle could be identified that assisted in determining what conduct amounted to the commencement, prosecution and defence of proceedings, which was the main issue in the case (at [178]). Those were:

> *"[181] The first is that the starting-point must be the statutory language itself, and the statutory words must be given their natural and ordinary meaning.*
>
> *[182] The second is that it must be borne in mind that this is penal legislation, which may result in a conviction for an offence with a maximum sentence of two years (or for committal for contempt with the same maximum penalty: Contempt of Court Act 1981, section 14(1)). In Agassi, at paragraph 56, the Court of Appeal said that, because there are potential penal implications, the very obscurity of the statutory language means that the words should be construed narrowly. However, that was said at a time when the defence that the person accused did not know, and could not reasonably have known, that they were engaged in reserved legal activities did not apply. That defence was introduced by section 14(2) of the 2007 Act. This matters, in my view, because the grounds for a very strict and narrow construction are now less compelling. It is no longer a strict liability offence. Nonetheless, as the Court of Appeal made clear in Ndole, it must still be borne in mind, when interpreting the legislation, that this is penal in nature.*
>
> *[183] The third key point comes from the Court of Appeal's judgment in Ndole. This is that substance must prevail over form (judgment, paragraph 67).*

[184] The final point is that the question is one of fact and degree in every case (paragraph 68). The Court of Appeal said that an approach permitting individual assessment of the activity undertaken in an individual case is likely to achieve justice."

With these points in mind, the court held that actions the respondents took in relation to statements of case amounted to the conduct of litigation (at [191]). Those included, drafting the claim form and particulars, preparing enclosures, checking the bundle to be sent to the court, paying the court fee, ensuring documents were drafted and filed so as to be CPR-compliant. It was noted that the respondents did not go on the record, sign the claim form or particulars, use their letter head on covering letters or use the online claims process (at [187]–[188]). They also took various steps in respect of the reply, defence and counterclaim, e.g., drafting, sending for review by an advocate, arranging for delivery to the claimant's solicitors, determined to serve by hand rather than post and ensured time limits were met: ***Ndole Assets Ltd v Designer M&E Services UK Ltd*** (2018) applied (at [189]–[200]). It was the case, however, that the provision of legal advice did not fall under the conduct of litigation: ***Agassi v S Robinson (HM Inspector of Taxes) (No. 2)*** (2005) applied (at [203]). Drafting notices under the Housing Act 1998, ss.8 and 21 did not do so either. It was also unlikely that service of the notice of issue amounted to the conduct of litigation when taken on its own (at [204]–[205]). No step taken prior to issue or commencement can amount to the conduct of litigation either: ***Ndole Assets Ltd v Designer M&E Services UK Ltd*** (2018) applied (at [206]). It was noted, however, that the giving of legal advice and taking steps prior to issuing proceedings could, when considered in the round be relevant to consideration of the question whether the conduct of litigation had been carried out [at [207]. In this regard:

"[208] In my judgment, the answer is that the court should look at the entirety of the activities undertaken by the Respondents to assist their client and then decide whether, taken in the round, they amount to the conduct of litigation. To do otherwise would be to lose sight of the context in which things are being done, and would lead to the risk of a misleading impression being gained. It would also run the risk of form being prioritised over substance.

[209] The authorities show that it is the totality of the activities that have been undertaken that should be focused upon. In Ndole, in the context of consideration of whether service of documents amounted to the conduct of litigation, the Court of Appeal expressly took account of the whole course of events, including correspondence that had passed from the consultants to the defendant in the proceedings (judgment, paragraph 71). Similarly, in Gill v Kassam, the judge looked at the 'package of services' that were provided by the advisors to the client (paragraphs 47 and 48). A similar approach was adopted in Peter Schmidt.

[210] It is true that this marks a difference from the position under the 1990 Act. Under that Act, as the Court of Appeal said in Agassi, an activity would only fall within the definition of the conduct of litigation if it was a formal step in the proceedings. However, in my view this no longer applies, because the additional wording introduced in the 2007 [Act], which includes the prosecution and defence of proceedings, is not apt to cover formal steps in the proceedings and nothing else. The words used in the 2007 Act, referring to 'prosecuting' and 'defending' the proceedings, are not words that Parliament would have used if it had intended only to refer to narrow or technical steps."

Piper Double Glazing Ltd v DC Contracts Co [1994] 1 W.L.R. 777, QBD, ***Agassi v S Robinson (HM Inspector of Taxes) (No. 2)*** [2005] EWCA Civ 1507; [2006] 1 W.L.R. 2126, CA, ***Malik v Wales*** [2012] EWHC 4281 (QB), unrep., QBD, ***Heron Bros Ltd v Central Bedfordshire Council (No. 2)*** [2015] EWHC 1009 (TCC); [2015] B.L.R. 514, TCC, ***Ellis v Ministry of Justice*** [2018] EWCA Civ 2686, unrep., CA, ***Gill v Kassam*** [2018] P.N.L.R. 3, CC, ***Peter Schmidt Theater Rock GmbH v Event Moves Ltd*** [2018] EWHC 260 (Ch), unrep., ChD, ***Ndole Assets Ltd v Designer M&E Services UK Ltd*** [2018] EWCA Civ 2865; [2019] B.L.R. 147, CA, ***JK v MK*** [2020] EWFC 2 (FC); [2020] 1 W.L.R. 5091, FC, ***Solicitors Regulation Authority v Khan*** [2021] EWHC 3765 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2023*** Vol.2, para.13.3.)

■ **Owen v Black Horse Ltd** [2023] EWCA Civ 325, 24 March 2023, unrep. (Baker, Elisabeth Laing, Eddis LJJ)

Small claims hearing – attendance by representative

CPR r.27.9(2). A small claim was struck out where the claimant did not attend in person. They had, however, been represented at the hearing. The claim was struck out under CPR r.27.9(2). The Court of Appeal considered whether the claimant had to attend in person. **Held**, it was good law that a party attended a hearing if they were represented: ***Falmouth House Ltd v Abou-Hamdan*** (2017). As the Court of Appeal concluded:

"[105] The essential point is that a party to litigation is entitled to represent himself, or to be represented by a legal representative or representatives. Part 27 does not expressly impinge on that right. . ."

Falmouth House Ltd v Abou-Hamdan [2017] EWHC 779 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.27.8.2.)

■ **Seale v Seale** [2023] 3 WLUK 539 (Ch), 30 March 2023, unrep. (Bacon J)

Power to control abusive conduct by litigant

CPR rr.1.3, 3.1, 3.3. The appellant was subject to an extended civil restraint order (ECRO). She engaged in voluminous correspondence, which was noted as being "*highly inappropriate*" with court staff (at [6]). Particularly the appellant sought legal opinions from court staff and exhorted them to secure permission under the ECRO, its revocation, discharge, setting aside or variation (at [6]–[7]). Court office case workers were also sent lengthy emails and letters requiring correspondence to be put before the Chancellor of the High Court. Those emails, which were copied to a wide range of individuals within the court, included accusations against a Court of Appeal judge. They threatened court staff with serious adverse consequences if they were not complied with. Accusations of misconduct were also levelled against court staff (at [11]–[16]). In the light of the appellant's conduct, Bacon J exercised the court's case management powers to restrain the appellant's activities. **Held**, the court had the power to restrain individuals from abusing its processes. That power, whether under the inherent jurisdiction or under CPR r.3.1, enabled it to "*control the activities of litigants who have abused or attacked court staff or have generally wasted the time of the court staff*" (at [26]): see ***Bhamjee v Forsdick (No. 2)*** (2003). The judge could also have relied upon ***Binder v Binder*** (9 March 2000, CA, unrep.); ***Attorney-General v Ebert*** [2001] EWHC 695 (Admin) at [35]–[41]; ***Agarwala v Agarwala*** [2016] EWCA Civ 1252; [2017] 1 P. & C.R. DG17. Exercising the jurisdiction Bacon J: (i) prohibited the appellant, until further order, from communicating with court and any individual member of the court staff directly. Communication could only be made through the court's generic email address. Court staff were instructed to delete and ignore any email sent in breach of this order; (ii) communications sent to the generic email address were limited to routine administrative matters. Where they did not they were not to be responded to; (iii) any applications made by the appellant had to be made on the proper court form, with payment of the appropriate court fee, i.e., informal applications were not to be made or, if they were, they were not to be considered or responded to; (iv) the order giving effect to these directions was to contain a penal notice (at [31]–[34]). ***Bhamjee v Forsdick (No. 2)*** [2003] EWCA Civ 1113; [2004] 1 W.L.R. 88, CA, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.1.3.4.)

■ **Williamson v Bishop of London** [2023] EWCA Civ 379, 5 April 2023, unrep. (Baker, Simler, Popplewell LJJ)

Civil proceedings order – nullity

Senior Courts Act 1981, s.42. The appellant was subject to a civil proceedings order: Senior Courts Act 1981, s.42. The order prohibited the appellant from commencing proceedings in any court or tribunal without first having obtained the High Court's permission. The appellant commenced proceedings in the Employment Tribunal without obtaining such permission (at [2]). The High Court granted permission retrospectively. The Employment Tribunal, however, held that as the proceedings were issued in such circumstances they were a nullity: hence retrospective permission was of no effect (at [10]–[12]). An appeal from that decision was dismissed by the Employment Appeal Tribunal (EAT). On appeal from the EAT to the Court of Appeal the appellant argued that issuing proceedings without first obtaining permission did not render them a nullity. On the contrary, it was argued, the breach was a procedural bar, e.g., a procedural irregularity, which could be cured by order. It was further argued that were it necessary to protect the interests of respondents and of courts, generally, proceedings commenced in breach of the permission requirement could be struck out or stayed (at [4]). **Held**, the appeal was dismissed. The proceedings were a nullity. In reaching its decision the Court noted that this was the first time that this issue had been considered in respect to an order under s.42 of the 1981 Act, although the point had been considered, indirectly, in respect of an analogous provision under s.139(2) of the Mental Health Act 1983: ***Seal v Chief Constable of South Wales Police*** (2007). Proceedings brought in breach of a permission requirement under that provision were held to be a nullity. In ***Attorney General v Edwards*** (2015), Wilkie J held to the same effect where proceedings were brought, as in the present case, in breach of the permission requirement under s.42. It was important to note in considering the context in which civil proceedings orders can be made that the court's ordinary case management powers have been proved to be insufficient a means to control the litigant's conduct (at [35]). Once made such an order is intended to regulate access to the court (at [37]). Consequently, Simler LJ held:

> *"[38] It seems to me that the filter is intended to ensure that neither respondents nor the courts and tribunals, are required to respond to, or otherwise deal with, claims sought to be brought by vexatious litigants unless and until the vexatious litigant has satisfied the High Court that the proceedings are not an abuse of process and there are reasonable grounds for instituting them (section 42(3) SCA 1981). This can only be achieved if permission is sought before proceedings are instituted. The requirement of permission will not operate as a filter or a safeguard against vexatious litigation if it can be given retrospectively (as this case demonstrates). Moreover, if proceedings can be instituted without permission, the onus will fall on others (instead of the vexatious litigant who is well aware of the restriction) to take the initiative and raise the question of permission. This reverses the deliberate onus provided for by section 42, and may undermine altogether the protection intended by section 42 SCA 1981.*
>
> *[39] Thus the consequences of proceedings instituted in breach of a CPO made under section 42(1A) being a nullity do not involve any unfair prejudice or disproportionate breach of fair trial or access to justice rights. In particular, the*

vexatious litigant is afforded the safeguards just described. Further, the vexatious litigant will know that a CPO has been made and can apply timeously for leave. Even in the context of a relatively short limitation period of three months for proceedings to be commenced in the employment tribunal, I am in no doubt that this allows ample time to apply for and obtain leave to institute proceedings in the ordinary case. Moreover, an application can be made and heard urgently where necessary, for example in cases where urgent interim relief is sought. It is also the case that the fact that a vexatious litigant took reasonable steps to seek the permission of the High Court in good time before the expiry of the relevant limitation period, is likely to be a relevant consideration in deciding whether to extend time in relation to a fresh claim if that becomes necessary.

[40] Finally in this context, I reject Mr Wynne's argument that respondents might suffer prejudice in fighting and winning a claim in ignorance of a CPO, and then not being able to recover costs on the grounds that the proceedings were a nullity. This should not arise. CPOs are gazetted and respondents always have the means available to discover whether a CPO is in force in respect of a litigant believed or known to be vexatious.

[41] On the other hand the adverse consequences of potential retrospective validation, where the claim is abusive, are considerable. Respondents and the court will have to incur the time and expense of being involved in that process. It may involve repeated applications as to when and how the stay application is to be heard. If the proceedings are not a nullity, the respondent will have to apply to strike out or stay the proceedings, and the vexatious litigant can invoke all sorts of procedures abusively, in relation to that application. In the experience of members of this court, lengthy written evidence, recusal applications, adjournment applications, disclosure and third party disclosure applications, applications to cross examine, consolidation with other applications are all weapons in the armoury used regularly by vexatious litigants intent on abusing the court's processes. Respondents are also potentially exposed to having to engage with the substance of the claim because they can never be sure whether a discretionary retrospective validation will be sought and granted later. The deterrent of having to apply for leave first and pay a fee for it is altogether undermined."

Furthermore, that the Employment Tribunal did not have a provision that rendered claims nullities was not relevant to the question before the court. The issue whether proceedings started there were a nullity was a matter of construction of s.42 (at [42]). Additionally, reliance on a power to stay proceedings did not support the argument that proceedings brought in breach of the permission requirement were a procedural irregularity. Not all courts would have the relevant power (at [43]). Nor could reliance be placed upon the approach taken to civil restraint orders to determine the question (at [44]–[46]). Finally:

"[50] There are good reasons why as a matter of general principle procedural failures should not lead to proceedings being a nullity. But that does depend on the purpose and importance of the provision in its statutory context. It seems to me to be evident for all the reasons I have given, that the express terms of section 42 SCA 1981, read in context and in light of the object and purpose of the section, impose a jurisdictional (and not merely a procedural) barrier on a litigant subject to a CPO wishing to institute proceedings. In my judgment Parliament intended to make leave under section 42 SCA 1981 a jurisdictional bar to the institution of effective proceedings where a CPO has been made. Neither the prospective respondent nor the court is required to take action where a proposed claim is made by a vexatious litigant unless and until the proceedings have the required leave of a High Court judge. As with section 139(2) MHA and as Lord Brown observed in Seal, the very inflexibility of the provision is an integral part of the protection it affords."

Seal v Chief Constable of South Wales Police [2007] UKHL 31; [2007] 1 W.L.R. 1910, HL, ***Attorney General v Edwards*** [2015] EWHC 1653 (Admin), unrep., Admin., ref'd to. (See ***Civil Procedure 2023*** Vol.2, para.9A-152.5.)

■ **Linemile Properties Ltd v Plater** [2023] EWHC 810 (Ch), 5 April 2023, unrep. (Sweeting J)

Jurisdiction to grant injunctive relief – affirming of Broad Idea

CPR r.25.1.(1)(a). The claimants were granted injunctive relief in proceedings concerning the use and condition of a right of way. The defendants appealed from the order. The defendants submitted that the injunction should not have been granted as it was not protective of any right of the parties to the litigation. They thus relied on ***The Siskina*** (1979) at [256], that interim injunctions could only be granted "*in protection or assertion of some legal or equitable right which [the court] has jurisdiction to enforce by final judgment.*" The claimants submitted that ***The Siskina*** (1979) was no longer good law in this regard: see ***Broad Idea International Ltd v Convoy Collateral Ltd*** (2021) (at [15]–[18]). **Held**, the appeal was dismissed. In reaching that decision Sweeting J noted, at [23], that ***Broad Idea International Ltd v Convoy Collateral Ltd*** [2021] was a Privy Council decision. It was thus not binding. Lord Leggatt JSC, giving the leading, majority, judgment had, however, reviewed the relevant authorities and did so with a view to deciding, via obiter dicta, issues of principle concerning the grant of injunctive relief (at [24]–[30]). In doing so he made clear that ***The Siskina*** (1979) was no longer good law and, as such, it was no longer necessary to demonstrate an injunction is in support of a legal or equitable right (at [30]–[31], [33]–[37]). As a consequence, as Sweeting J noted:

"[32] Broad Idea is likely in practice [to] be the starting point from now on in relation to the ambit of interim injunctive relief. The decision is persuasive authority that the restrictions on the power to grant interim injunctions, as set out in The Siskina, are not legally sound."

And see [38]–[42]. ***Siskina v Distos Cia Naviera SA (The Siskina)*** [1979] A.C. 210, HL, ***Fourie v Le Roux*** [2007] UKHL 1; [2007] 1 W.L.R. 320, HL, ***Broad Idea International Ltd v Convoy Collateral Ltd*** [2021] UKPC 24; [2023] A.C. 389, PC, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.25.1.10.)

■ **Al Sadeq v Dechert LLP** [2023] EWHC 795 (KB), 5 April 2023, unrep. (Murray J)

Litigation privilege – application to non-party

CPR Pt 31. The claimant applied for a determination "*whether the defendants are entitled to withhold inspection, in whole or in part, of various documents on the basis of legal professional privilege and related relief*" (at [1]). Various issues arose. Particularly,

> *"[187] . . . whether litigation privilege can be claimed in relation to criminal proceedings by the putative victim of any offence or offences that are the subject of those proceedings. . ."*

In ***Minera Las Bambas SA v Glencore Queensland Ltd*** (2018) Moulder J accepted

> *"[31] . . . that it is an established principle that litigation privilege can only arise in favour of a person who is a party to the litigation in question and the policy underlying this is as stated in Hollander (12th edition para 18 – 01) that a party should be free to seek evidence without being obliged to disclose the results to the other side. This rationale does not extend to a non-party. . . "*

Murray J, while noting at [188] the approach that ought to be taken to prior High Court decisions, was persuaded that he should not follow Moulder J's decision. As he put it,

> *"[188] . . . I am persuaded . . . that she was wrong to conclude that it is an established principle that litigation privilege can only arise in favour of a person who is a party to the actual or prospective litigation in question. . .'*

Furthermore, Murray J noted that, while three text books support the proposition accepted by Moulder J (*Hollander on Documentary Evidence* (12th edition), *Thanki on Privilege*, *Passmore on Privilege* (at [192]–[197])), they each do so relying on different authority and those authorities appear not to support the proposition (at [189]). Moreover, there appeared to be no basis in principle or policy to support such a proposition. On the contrary, ***Guinness Peat Properties Ltd v Fitzroy Robinson Partnership*** (1987) and ***Winterthur Swiss Insurance Co v AG (Manchester) Ltd (In Liquidation)*** (2006) both supported the proposition that "*a non-party to litigation may, in appropriate circumstances, be entitled to assert litigation privilege in relation to litigation in which the non-party had, for the purposes of each of those cases, a sufficient interest*" (at [200]). Furthermore:

> *"[211] Where a non-party is a victim of fraud, the non-party (especially, as in this case, if it is a governmental entity) is likely to have a real interest in seeing that the fraud is successfully criminally prosecuted. This is all the more the case where . . . the non-party may make a civil claim for damages in the criminal proceedings.*
>
> *[212] . . . the question is not whether the relevant non-party has a legitimate interest, namely, an interest that must meet some qualitative threshold, however formulated, before it is recognised for this purpose. (But, if a legitimate interest were required, a victim would have a legitimate interest in the successful conviction of the perpetrator of the crime against it.) What is necessary (if not sufficient), in my view, in order for litigation privilege to be available to a non-party to relevant actual or prospective litigation is the non-party's having a sufficient interest in prospective or actual litigation such that it seeks legal advice and, in connection with that legal advice, communicates with third parties (directly or through its lawyer) and obtains documents to ensure that the legal advice is properly founded. The policy underlying litigation privilege clearly applies to this situation."*

Guinness Peat Properties Ltd v Fitzroy Robinson Partnership [1987] 1 W.L.R. 1027, CA, ***Winterthur Swiss Insurance Co v AG (Manchester) Ltd (In Liquidation)*** [2006] EWHC 839 (Comm), unrep., Comm., ***Minera Las Bambas SA v Glencore Queensland Ltd*** [2018] EWHC 286 (Comm), unrep., Comm., ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.31.3.8.)

Practice Updates

PRACTICE DIRECTIONS

UK Supreme Court Practice Direction Update. On 12 April 2023, Lord Reed PSC issued a Practice Note, which set out planned amendments to UK Supreme Court and Judicial Committee of the Privy Council Practice Directions. The various amendments are to come into effect on 6 June 2023. The amendments provide for: further guidance on interventions on appeals and on judgments in UKSC PD 6 and JCPC PD 6; further guidance on costs in UKSC PD 13 and JCPC PD 8. The amendments are available at: *https://www.supremecourt.uk/news/practice-note-april-2023.html*.

MISCELLANEOUS UPDATES

Civil Justice Council Costs Review. In April 2022, the Civil Justice Council established a working group to consider four aspects of the approach to civil costs. Those were: costs budgeting; Guideline Hourly Rates; Pre-Action and digitisation; and, the consequences of the extension of fixed recoverable costs. On 10 May 2023, the CJC issued its final report on those issues. In issuing the report, Vos MR indicated that the report marked a move away from the "once a decade" approach to civil justice reviews, which are carried out by senior judges. Future reforms are thus likely to arise from targeted reviews of discrete aspects of civil procedure.

The review considered that there was now evidence to show that costs budgeting was well-understood and had contributed to improved case management and, as a consequence costs proportionality. Its abolition was only recommended by a small number of respondents to the working party's consultation on the issue. The Report's principal representation on the issue was that costs budgeting be retained. Its retention "*should be [coupled with the] acceptance of the hypothesis that 'one size does not necessarily fit all'.*"

Consequently, a more tailored approach to costs management should be adopted. The recommendation thus seeks to give effect to what ought properly to have been the approach adopted when costs management was introduced, i.e., to give effect to it in a way consistent with proportionality through matching the approach to the nature of the dispute, its value, complexity etc. Differential approaches could, it was recommended, be taken to personal injury and clinical negligence work where it was covered by qualified one-way cost shifting, claims that proceed in the Business and Property Courts as well as other forms of specialist work. In so far as cases where QOCS applies, by a majority the Report recommended, that, except where the court orders it, full costs budgets be dispensed with for defendants, with Precedent H front sheet only being supplied to the claimant and the court. A pilot scheme to assess this was recommended.

Further pilot schemes were recommended to test the utility of "costs budget lite" in the Business & Property Courts. Consideration for reform to budgeting was also recommended for Mesothelioma and for Media and Communications claims. Sensibly, the report also recommended reform to facilitate a staged approach to costs and case management hearings, such that they need not take place at the same time.

Where Guideline Hourly Rates were concerned, it was apparent that there was no real support for their abolition. Abolition would, it was reported, likely "*lead to uncertainty, create difficulties for judges when assessing costs and leave the consumer exposed.*" The report thus recommended their retention, noting that it appeared that they were generally working well. The key point was to ensure, however, that they were kept up to date and properly reflected, in so far as they do, the legal services market. The rates ought therefore to be retained, but uprated annually by reference to a suitable annual index. In five years, and thereafter at five yearly intervals, the rates as a whole should be subject to a detailed review.

The first five year review should consider the impact of index-linked annual uprating, the effect that further digitisation of civil justice has had on the legal services market, and any requirement to vary geographical banding. In addition to these longer term recommendations, several immediate recommendations were made: first, to uprate the rates by index linking for 2021; secondly, the creation of a new banding for complex, high value commercial work; provision for counsel's fees to be assessed by reference to the rates to be introduced; and the development and application of a clear, standard test to be applied where the court is considering departing from an applicable hourly rate.

Where pre-action and digitisation was concerned, the report noted that no respondent identified any utility in retaining a distinction between contentious and non-contentious costs, as provided for by the Solicitors Act 1974. The Law Commission ought to give consideration to reform to the 1974 Act. Other recommendations included: consideration by the Law Society whether an effective scheme for non-contentious costs could be created by way of a general order under s.56 of the 1974 Act. Where the Online Procedure Rule Committee makes provision for digital pre-action processes via digital portals, they should seek to ensure that there be limited pre-action costs recovery.

Consideration should also be given to the question whether the Civil Procedure Rule Committee has the vires to make a rule that deems a claim to be issued when parties engage in pre-action conduct further to a Pre-Action Protocol, thus eliding the distinction between contentious and non-contentious costs. In all likelihood, such a rule change would require an amendment to the Civil Procedure Act 1997 to give the CPRC the vires to make such a rule, as it would in reality extend the application of rules of court to a point in time prior to the court being formally seized of a dispute. Such a deeming provision would also raise questions, as the report identified of limitation, but also, which it did not, of jurisdictional challenges. The report recommended that consideration be given to revising CPR r.46.14 so that it provided the court with the power "*in some or all cases or case types, to decide questions about the incidence of costs between the parties ('inter partes') costs in a case in which the parties have settled the rest of their dispute but not the costs.*"

Finally, in respect of the implications of fixed recoverable costs, the report made one substantive recommendation. That was for consideration to be given by the CPRC to introduce a cost cap of £500,000 in patent cases that are within the

shorter trial scheme. In doing so it noted, that the question of implementation of the extension of fixed recoverability was already in train and the report was not to revisit the recommendations that led to its introduction.

Court Funds Office – Interest Rates on Special and Basic Accounts. On 21 April 2023, the Lord Chancellor increased the interest rates payable on funds held in the special and basic accounts. The interest rate payable on funds held in the basic account increased from 3.00% to 3.188%. The interest rate payable on funds held in the special account increased from 4.00% to 4.25%. The rates were increased to both cover the Court Funds Office's running costs and to ensure that an increased rate of interest was payable. It comes after the Bank of England increased the base rate on 23 March 2023.

Fixed Recoverable Costs – Implementation. Following the March meeting of the Civil Procedure Rule Committee, the Ministry of Justice has published the draft amendments that are intended to implement the extension of fixed recoverable costs and the new intermediate track. The expected implementation date is 1 October 2023, subject to formal ratification. Amendments will be made to CPR Pts 26, 28, 36 and 45; the last of which will undergo substantial revision. Further amendments will be made to CPR PDs 26, 28 and 45. The draft amendments are available at: *https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about*.

In Detail

COSTS – NON-PARTY DISCLOSURE

In ***Gorbachev v Guriev*** [2023] EWCA Civ 327 the Court of Appeal considered costs of non-party disclosure. In that case proceedings arose out of a dispute concerning an interest in a Russian fertiliser business. One issue in the dispute centred on how, and why, the first respondent (Gorbachev) was supported financially through two Cypriot trusts. The first respondent's case is that the trusts are operated by trustees operated by close associates of the third respondent (Guriev). The trustees were the appellants. They were represented by English solicitors. The first respondent applied for non-party disclosure against the solicitors. He did so under s.34 of the Senior Courts Act 1981 and CPR r.31.17. Permission was granted to join the appellants to the application. Permission was also granted to serve the application on the appellants outside the jurisdiction under CPR PD 6B para 3.1(20). The appellants subsequently applied to set aside permission to serve out of the jurisdiction. That application was dismissed. The appellants were ordered to pay the costs of the set aside application on the basis that this was a self-standing application and therefore CPR r.46.1 did not apply. The question before the Court of Appeal was whether this was correct, and specifically whether CPR r.46.1(2) applied.

Having reviewed the authorities, Popplewell LJ, with whom Males LJ agreed, summarised the principles that applied to applications under CPR r.46.1. They were as follows:

> *"[27] These authorities suggest that the same costs principles should apply to applications for disclosure under CPR 46.1 as to Norwich Pharmacal applications and other applications against innocent third parties. The principles are that:*
>
> *(1) it is reasonable for an innocent third party to seek to protect private information by resisting a court order;*
>
> *(2) as between an innocent claimant and an innocent third party it is more unjust for the third party to bear the costs than the claimant, because it is the claimant who is invoking the legal process to obtain a benefit, and the fact that the benefit is one to which he is legally entitled is not enough to justify an innocent third party having to be out of pocket;*
>
> *(3) in general the costs should be recovered from the wrongdoer, not the innocent third party, which the third party has no means to achieve;*
>
> *(4) the principle does not treat a third party as entitled to do no more than adopt a neutral position before it is at risk of having to bear or pay the costs of resisting the application; active opposition, albeit unsuccessful, is not of itself unreasonable behaviour or sufficient to deprive the third party of the benefit of the general principle that the applicant should pay its costs;*
>
> *(5) if it is reasonable for the third party to resist disclosure, it is entitled to decide on what basis to do so, and with what evidence, without losing its costs protection, provided that it does take an unreasonable course which unnecessarily increases the costs;*
>
> *(6) there may be cases which require a different order but that will not usually be the case (a) where the third party had a genuine doubt whether the applicant was entitled to disclosure; or (b) where the third party was under a legal obligation not to disclose; or (c) where the legal position was not clear; or (d) where the third party could be subject to legal proceedings or might suffer damage if it gave voluntary disclosure; or (e)*

where disclosure would or might infringe a legitimate interest of another.

[28] It is these principles which are reflected in the general rule in CPR 46.1(2) and the displacement rule, rule 46.1(3)."

CPR rr.46.1(2) and (3) provide as follows:

"46.1 (1) This paragraph applies where a person applies –

. . . (b) for an order under –

(i) section 34 of the Senior Courts Act 1981; or

(ii) section 53 of the County Courts Act 1984,

(which give the court power to make an order against a non-party for disclosure of documents, inspection of property etc.).

(2) The general rule is that the court will award the person against whom the order is sought that person's costs –

(a) of the application; and

(b) of complying with any order made on the application.

(3) The court may however make a different order, having regard to all the circumstances, including –

(a) the extent to which it was reasonable for the person against whom the order was sought to oppose the application; and

(b) whether the parties to the application have complied with any relevant pre-action protocol."

Popplewell LJ went on to hold that CPR r.46.1 applies to the "costs of the application", which is the application referred to in CPR r.46.1(2). That application is one under s.34 of the Senior Courts Act 1981 and CPR r.31.17. Costs incurred in respect of the application to serve out of the jurisdiction were such costs. They were costs of the non-party disclosure application. That was right "*both as a matter of the letter and the spirit of the rule*" (at [31]–[32]). As he went on to hold:

"[33] Disclosure was the substantive relief sought by the amendment of the application notice issued against Forsters [the English solicitors] to add the Trustees, which HHJ Pelling KC granted. Thereafter the Trustees wished to resist disclosure on two cumulative bases, first that there was no jurisdiction to make the order sought; and secondly that, if there were, disclosure should not be granted. The costs of both aspects were incurred in order to defeat the disclosure sought by the disclosure application, albeit that as a matter of form they fell to be heard sequentially, and that one did so on a jurisdictional basis and one on a merits basis. It is apt to describe the costs of the jurisdiction application as part of the costs of the disclosure application against the Trustees because the jurisdiction challenge was one of two bases on which the Trustees resisted giving disclosure.

[34] [The] argument, that jurisdiction disputes are separate from merits disputes, as a matter of substance as well as form, and arise as a separate and prior inquiry, is not an answer to the point. A third party may legitimately seek to protect the privacy of its information by challenging jurisdiction as well as, or instead of, challenging the merits of the application. The jurisdiction challenge, if successful will have that effect. The disclosure application will thereby be dismissed. I do not see any reason as a matter of language or logic why costs incurred in such an endeavour are not within the rubric of costs of the disclosure application.

[35] To hold otherwise would favour form over substance. If it is not unreasonable for an innocent third party to resist disclosure, I can see no justification for having a different costs rule where the resistance is on the grounds that the Court has no power to make the order from that where there is resistance on any other grounds. Both are legitimate means by which the third party may seek to protect the privacy of its information. Indeed it may be that in a particular case its only grounds for protecting that privacy involve objecting to the court's jurisdiction because it is clear that if the English court assumes jurisdiction, it will grant the relief sought, although no such relief would be available in another forum.

[36] This gives effect to the rationale for the general rule in CPR 46.1(2), which applies in this case. Mr Gorbachev is seeking disclosure against innocent third parties, and the general rule is that he should bear and pay the costs of establishing his entitlement to the documents sought. Establishing that the Trustees are amenable jurisdictionally to an order for production is part of the process of establishing that entitlement.

[37] Moreover as between the innocent Trustees and the innocent Mr Gorbachev (assuming him to be so), it is right that the costs should if appropriate be recoverable by Mr Gorbachev from Mr Guriev as costs of the action, rather than costs which the Trustees must bear and which are irrecoverable by them from Mr Guriev.

[38] I would add, although it is not essential to my reasoning, that it is not inevitable that in third party disclosure applications the hearing of a jurisdiction challenge will be separate from, and determined prior to, the merits hearing, although that will usually be the case. One can imagine circumstances in which an imminent trial date would dictate a single hearing date, and a jurisdictional challenge which included an argument that there was no serious issue to be tried on the merits which would involve consideration of evidence and argument going to the merits for both purposes at the hearing. That is not this case, but the possibility undermines [the] argument that the two are always substantively and logically distinct, such that costs incurred in respect of a jurisdiction challenge are always separate from costs incurred in respect of the merits of a disclosure application. Indeed preparatory legal costs may be referable to both, even where there are sequential and distinct hearings, given the place played in a jurisdiction dispute of the merits threshold of a serious issue to be tried.

[39] For these reasons I am of the view that the Judge fell into error in treating the jurisdiction application as a 'self-standing' application which took the costs outside the scope of CPR 46.1."

Furthermore, there was no basis to displace CPR r.46.1(2) under CPR r.46.1(3) (at [41]–[42]).

Finally, all of the judges agreed that, as Males LJ put it, that:

"[51] . . . it should not be thought that our decision necessarily gives an overseas third party who seeks to challenge the jurisdiction of the English court a 'free ride' to do so at the expense of an applicant. CPR 46.1(3) enables the court to depart from the general rule in CPR 46.1(2) when it is appropriate to do so having regard to all the circumstances, including in particular whether the third party has acted reasonably. . ."

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