CIVIL PROCEDURE NEWS

Issue 7/2023 11 July 2023

CONTENTS

In Brief

Cases

■ **International Game Technology Plc v The Gambling Commission** [2023] EWHC 1420 (TCC), 4 May 2023, unrep. (O'Farrell J)

Collateral use of documents – two actions managed together

CPR rr.31.22, 32.12. An application for permission for the collateral use of documents that had been served in two separate claims that were being case managed jointly and were to be tried together was made. International Game Technology (IGT) were the claimants in one of the claims. Camelot were the claimants in the other. The claims had not been consolidated and thus remained separate proceedings. As part of the joint case management of the claims, it had been ordered that each party should give disclosure and witness statements should be served by each party. As O'Farrell J noted:

> *"[32] . . . No one raised any concern or attached any caveat to the basis on which Camelot disclosed documents, not only to the defendant but also to the other parties, including the IGT claimants. The IGT claimants gave disclosure not only to the defendant, and the other parties, but also to Camelot. No concern was raised by the fact that Camelot served its witness statements on the IGT claimants as well as the other parties, and the IGT claimants served their witness statements on Camelot as well as the other parties. The matter has only arisen because Camelot has now discontinued its proceedings against the defendant. The issue is whether the IGT claimants are entitled to continue to make use of the disclosed documents and witness statements provided by Camelot."*

Held, O'Farrell J concluded that collateral use should be permitted applying the test set out in ***Tchenguiz v Serious Fraud Office*** (2014) at [66]. She did so on the basis that: (i) while the parties had been acting in separate proceedings they had been acting in the same litigation. But for Camelot discontinuing its claims, they would have continued to do so; (ii) case management directions concerning all documents were made on the basis that they would be served on all parties. No caveats were suggested at any stage on this; (iii) disclosure and witness statements were provided to all parties on the understanding that they could be relied on by all parties; (iv) if IGT were not permitted to use the documents that had been disclosed by Camelot it would suffer significant prejudice. This arose due to the alignment of their pleadings and the fact that IGT had incorporated and relied on significant elements of Camelot's pleadings; (iv) any prejudice to the claimants in the Camelot litigation by having to maintain legal representation to protect their position regarding their documents was relatively small, not least when compared to the significant prejudice that IGT would suffer if not able to use the disclosed documents (at [37]–[43]). O'Farrell J also considered, albeit did not decide that: (i) IGT was entitled to use the disclosed documents, in any event, as the two claims were subject to orders made by the court on a common understanding that they were be treated as joint proceedings. As a consequence, any documents disclosed were disclosed for use in both sets of proceedings; (ii) a suggestion that disclosure was subject to implied consent for IGT to read and review the documents, while not being able to make further use of them without Camelot's consent or the court's permission, did not accord with the basis on which the parties had been conducting the proceedings (at [34]). ***Tchenguiz v Serious Fraud Office*** [2014] EWCA Civ 1409, unrep., CA, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.2.6.1.)

■ **Walton v Pickerings Solicitors** [2023] EWCA Civ 602, 6 June 2023, unrep. (Asplin, Nugee and Falk LJJ)

No power to backdate claim form

CPR rr.2.6, 7.2. The appellant attended a court office on 20 July 2020 to issue a claim form. He paid the issue fee. He did not, however, receive a sealed claim form from the court until 7 December 2020. The claim form was backdated by the court so that it was said to have been sealed on 20 July 2020. The appellant thereafter served the claim form. As Nugee LJ noted, notwithstanding the fact he served the claim form following receipt of it from the court, service was out of time as – due to the seal being backdated – the four-month time period for service had already expired. The appellant applied for a retrospective extension of time to serve. The application was refused. An appeal from the refused was dismissed. The appellant appealed to the Court of Appeal. **Held**, the appeal was allowed. In reaching its decision, the Court of Appeal accepted that the court had no power to backdate when a claim form was sealed. The date given must be the actual date the claim form was issued and sealed: issuing and sealing a claim form were a single, unitary act. That the claim form was received on 20 July

2020 did not mean it was issued on that date. It was apparent that the court did not issue, and hence seal, the claim form until sometime between 30 November and 7 December 2020. Hence when served it was served in time. As Nugee LJ put it:

> "*[25] The submission of Mr Richard Turney, who appeared for Mr Walton (and who did not appear below) was a very simple one. The rules treat the act of sealing the claim form and the issue of the claim form as a single act which takes place at the same time. There is no express power to seal the claim form with a date other than that on which it is in fact sealed. CPR r 7.2(2) is not to be read as conferring a discretionary power on the Court to enter some different date on the claim form, but as requiring the Court to enter the date when the claim form is in fact issued.*
>
> *[26] I accept these submissions which seem to me to be well founded. As appears from r 7.2, proceedings are not 'started' until the Court issues the claim form. On issue the Court must seal the claim form (r 2.6(1)(a)), and the very purpose of the seal is to indicate that the claim form has been issued by the Court (see the Glossary). So until the claim form is marked with the seal the document has not been issued and the proceedings have not been started.*"

And see [39]. (See ***Civil Procedure 2023*** Vol.1, para.2.6.1.)

■ **Horn v Knott** [2023] EWHC 1351 (Comm), 7 June 2023, unrep. (Foxton J)

Costs jurisdiction – contribution

Senior Courts Act 1981, s.51, CPR r.44.2. The Commercial Court considered the jurisdiction to order one party to a joint and several costs award to make a specified contribution to another party who had made a payment further to the order. It noted three possible bases for the jurisdiction (at [1]). Those were: the court's general costs jurisdiction under Senior Courts Act 1981, s.51(3), CPR r.44.2 and its inherent jurisdiction; a claim for contribution in restitution at common law or in equity; or, a claim under Civil Liability (Contribution) Act 1978. Where the last was concerned, the judge was not persuaded that there was any basis to apply its provisions to a costs order made by the Court of Appeal, as was the case here. The judge did, however, hold that the court had power to determine the level of contributions to be made by respondents to a joint and several costs award under its costs jurisdiction. As such a party seeking a contribution was not limited to having to make out a claim for contribution at common law. Moreover, the court's power to determine such costs ousted any inconsistent common law right to contribution (at [28]–[30]). In determining the level of any contribution, the court should take account of the factors in CPR r.44.2(4) and (5) subject to the following limitations:

> "*[32] The only obvious limitations are:*
>
> *i) Clearly the court cannot determine the issue of contribution between the joint and several respondents on a basis which would be inconsistent with the reasons why the joint and several costs order had been imposed.*
>
> *ii) Costs determinations must be assessed on a pragmatic basis, and it will frequently be necessary to make costs determinations when the final outcome of the proceedings, and therefore the ultimate economic significance to particular parties of success or failure on a particular point, are not known.*
>
> *iii) The fact that a party does not have means to pay a costs order is not a reason not to impose one, albeit a party may be able to raise its inability to pay the costs order at the present time in support of a claim for a stay of execution: Bank St Petersburg PJSC v Arkhangelsky [2018] EWHC 2817 (Ch), [41]-[42].*"

Bank St Petersburg PJSC v Arkhangelsky [2018] EWHC 2817 (Ch); [2018] 6 Costs L.R. 1303, ChD, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.2.6.1.)

■ **Pitalia v NHS England** [2023] EWCA Civ 657, 9 June 2023, unrep. (Underhill, Bean and Nicola Davies LJJ)

Strike out application – rectification for non-compliance – jurisdiction challenge

CPR rr.3.10, 7.5, 11(1). A dispute arose between several GPs and NHS England. An issue arose concerning service of the claim form. The specific issue that the Court of Appeal considered was simply stated as follows:

> "*[1] A sealed claim form is served after the expiry of four months from its issue. The defendant acknowledges service and applies to challenge jurisdiction within 14 days, but fails to do so expressly under CPR 11. Can the court remedy the defendant's error and strike out the claim?*"

Having reviewed the authorities, the Court of Appeal dismissed what was a second appeal. **Held**, it was apparent from the application to strike out, which the defendant had made, that it was challenging jurisdiction. The failure to indicate

that jurisdiction was being challenged expressly on the acknowledgement of service was a technical error that could be cured by CPR r.3.10. As Bean LJ put it:

"[32] The following principles emerge from the authorities in this area:

(i) Barton v Wright Hassall LLP makes clear the particular importance attached by the Supreme Court to the timely and lawful service of originating process. Failure to comply with the Rules about such service is to be treated with greater strictness than other procedural errors. . .

(ii) On the other hand, the principle established in Vinos and followed in cases such as Ideal Shopping is that CPR 3.10 cannot be used to override an express prohibition in another Rule. An example of such an express prohibition is in CPR 7.6(3). If a claimant applies retrospectively for an order to extend the time for service of a claim form the court may make such an order only if the remaining conditions laid down by the rule have been fulfilled. If they have not been fulfilled then Rule 3.10 is simply not available. But the Vinos principle must not be expanded into saying that CPR 3.10 cannot be used to rectify any breach of the CPR. Otherwise the Rule would be deprived of its utility. When CPR 3.10 is invoked it presupposes that some error of procedure has been made. Without it civil litigation would be even more beset by technicalities than it is already.

(iii) There is a valid distinction between making an application which contains an error, and failing to make a necessary application at all. Steele v Mooney [2005] 1 WLR 2819 is a useful illustration. In that case the claimants sought the defendants' consent to a draft order extending time for service of the Particulars of Claim. That consent was forthcoming, but the extension of time was useless since the claimants had omitted to refer to the claim form. This court, distinguishing Vinos, held that the application for an extension of time was clearly intended to be for service of the claim form as well as the particulars. The subsequent application for relief was not in substance an application to extend time for service of the claim form, but an application to correct the application for an extension of time which had been made within the time specified for service and which by mistake did not refer to the claim form.

[33] Hoddinott lays down that if a Defendant acknowledges service without making an application under CPR 11(1) for an order declaring that the court has no jurisdiction (or should not exercise its jurisdiction) to try the case, this is taken to be an acceptance of jurisdiction. Whatever one might think of Hoddinott, the decision is binding on us, and like the judge I do not consider that it has been impliedly overruled by Barton. The judge was also right to reject the argument, based on the use of the word 'expired' in Barton, that there is an analogy between the expiry of a claim form and the death of a living creature. Plainly in some circumstances an expired claim form can be revived: see CPR 7.6(3).

[34] I agree with the judge that the failure of the Defendant's solicitors, when completing the acknowledgment of service form, to tick the box indicating an intention to contest jurisdiction is not fatal to their application for relief. Even if the box had been ticked an application would still have been required to be made within 14 days. CPR 11(1) does not say that a box on a form must be ticked: it says that an application must be made. As the judge put it, a tick in the box is neither necessary nor sufficient as a basis for challenging jurisdiction.

[35] The critical question, therefore, is whether the Defendant's [strike out] application . . . can, by the use of CPR 3.10, be treated as having been made under CPR 11(1). I do not accept [the] argument that such rectification would offend against the Vinos principle. CPR 11(1) does not contain clear mandatory wording equivalent to that laid down by CPR 7.6 (3) that a retrospective extension of time may be granted 'only if' certain conditions are fulfilled.

[36] The failure to make express reference to CPR 11(1) in the letter of 21 January 2020 [relating to the acknowledgment of service] or the [strike out] application . . . was in my view an error capable of rectification under CPR 3.10. The three documents - the acknowledgment of service, the covering letter and the application to strike out supported by witness statements - together made the Defendant's intentions clear. This was in substance an application to stop the case on the grounds that the Claimants had failed to serve the claim form in time. The case is much closer to Steele v Mooney than to Vinos or Hoddinott . . ."

Vinos v Marks & Spencer Plc [2001] 3 All E.R. 784, CA, ***Steele v Mooney*** [2005] EWCA Civ 96; [2005] 1 W.L.R. 2819, CA, ***Hoddinott v Persimmon Homes (Wessex) Ltd*** [2007] EWCA Civ 1203; [2008] 1 W.L.R. 806, CA, ***Barton v Wright Hassall LLP*** [2018] UKSC 12; [2018] 1 W.L.R. 1119, UKSC, ***Ideal Shopping Direct Ltd v Mastercard Inc*** [2022] EWCA Civ 14; [2022] 1 W.L.R. 1541, CA, ref'd to (See ***Civil Procedure 2023*** Vol.1, para.11.1.9.)

■ **Abbott v Ministry of Defence** [2023] EWHC 1475 (KB), 16 June 2023, unrep. (Dingemans LJ, Andrew Baker J)

Joinder of multiple parties on claim form

CPR rr.7.3, 19.1. In June 2021 a claim form was issued in proceedings against the Ministry of Defence. The claim was commenced on behalf of Mr Abbott and 3559 other, named, individual claimants. This was later amended to reduce the number of named claimants to 3449. The basis of the claims alleged that the claimants who all were or are either employees or members of the Armed Services had suffered injury resulting from exposure to excessive noise during the course of the employment or service, i.e., they sought to pursue noise-induced hearing loss claims. A Master subsequently held at a case management conference that the claims ought not to have been brought via a single claim form as that was not permitted by either CPR r.7.3 or r.19.1 (at [11]–[14]). The High Court allowed an appeal from the decision. In doing so it noted that one practical effect would be that one issue fee would be due for the single claim form rather than, if individual claim forms had to be issued for each claimant, and that that would have an impact on fee income for the courts. It explained that this was not a relevant factor in considering whether the CPR permitted multiple claims to be issued via a single claim form. As Andrew Baker J put it:

> *"[20] . . . fees are a matter for the Lord Chancellor under s.92 of the Courts Act 2003. They are not a matter for the Civil Procedure Rules (sic) Committee. I do not see how the meaning of the CPR provisions with which this appeal is concerned could properly be affected by the choices the Lord Chancellor has made or might make from time to time over the setting of issue fees, having regard inter alia to the need to maintain access to justice (see s.92(3) of the 2003 Act).*
>
> *[21] The court fees policy the Lord Chancellor has adopted has not been that the cost per claimant of commencing High Court proceedings should be similar, though the number of claimants per claim form may vary, or that the cost of commencing proceedings that are similar in general nature should be similarly expensive as a proportion of the sums at stake. Under the Civil Proceedings Fees Order 2008, as it has been amended from time to time to date, a claim form for the pursuit of damages not limited to £200,000 or less attracts a single issue fee of £10,000, whether there is one claimant or there are many claimants, and whether the claim is a little over that limit (say, £250,000) or larger by orders of magnitude (say, £2 billion). The question whether, in the present case, the 3,000+ Abbott et al claimants were properly joined as co-claimants to a single claim form depends on the meaning and effect of CPR 7.3 and 19.1, not on any view that might be formed of how much in issue fees such a large cohort of claimants ought to pay."*

On the substantive issue, the court held as follows: (i) CPR r.19.1 permits a single claim form to be used by any number of claimants to commence proceedings against any number of defendants (at [43]); (ii) the question whether claimants or defendants can properly be joined depends on the application of the test of convenience under CPR r.7.3, i.e. can the claims be conveniently disposed of in the same proceedings. This does not mean they must all be capable of being determined in a single trial (at [47]–[64]); the degree of commonality between the claims will, generally, be the most significant factor in determining whether it would or would not be convenient to join the claims to a single claim form (at [71]). The court also rejected the view that any potential problems that might be caused to CE-File through issuing a single claim form in respect of so many claimants was a relevant factor to consider in assessing the question. The issue was to be resolved by interpreting the CPR (at [40], [86]). Additionally, it was noted that where Group Litigation Orders were concerned, and the present case did not concern such orders, there was no requirement that each claim that formed part of a GLO had to be issued on a separate claim form (at [87]). (See ***Civil Procedure 2023*** Vol.1, para.19.1.1.)

■ **Clewer v Higgs & Sons (A Firm)** [2023] EWHC 1556 (Ch), 27 June 2023, unrep. (Adam Johnson J)

Claimant to comply with requirements to serve sealed claim form

CPR r.7.7(3). The claimant brought proceedings in negligence against the defendants, his former solicitors. The claim form was issued on 1 July 2020. It was not served and the defendants obtained an order requiring service. Service had then to be effected by 21 July 2020. The claim was not served by that date. Subsequently, the defendants applied to have the claim struck out. The claimant applied to amend the claim form. The applications were heard by the Deputy Master in October 2020. The claimant's application was refused on the basis that permission to amend was not needed as the claim form had not been served. The defendant's application was also refused, although the Deputy Master did issue an unless order. The unless order required the claim form and particulars of claim to be served by 1 November 2020. It also required an additional court fee to be paid, which reflected the fact that the amendment the claimant wished to make was one that would increase the value of the amount claimed (the amount set out on the claim form originally was set at too low an amount in error). The 1 November 2020 was also the date following which the claim form would expire, it being four months after 1 July 2020. The claimant served an unsealed version of the claim form. At a subsequent hearing, the claim was struck out for non-compliance with the unless order. The claimant appealed. **Held**, the appeal was dismissed on this point, the consequence of which was that the strike out remained in place. In reaching his decision the judge explained that the statement of principle articulated in ***Ideal***

Shopping Direct Ltd v Mastercard Inc (2022), that service of a claim form must be service of a sealed claim form, was one of general application. As he put it:

> *"[67] To start with, I think it entirely plain on the basis of recent Court of Appeal authority that what Mr Clewer was required to do by 4pm on 1 November 2022 was to serve a sealed Claim Form. An unsealed Claim Form would not do.*
>
> *[68] This point was authoritatively determined in Ideal Shopping Direct Ltd v. Mastercard Inc. [2022] EWCA Civ 14, [2022] 1 WLR 1541. That case was concerned with questions of service under the Electronic Working Pilot Scheme (PD 51O), which does not apply here since at the relevant time the Clewers were litigants in person (see [13] above). All the same, the reasoning of the Court of Appeal was that the same basic approach applied to cases within the Scheme as to other cases outside the Scheme. As [137], Sir Julian Flaux, C described the general position as follows:*
>
> > *'In relation to the first ground of appeal, I agree with the defendants that the starting point under the CPR, in a case where Electronic Working does not operate, is that the general rule is that the claim form must be sealed before it can be validly served. Reading rules 2.6(1) and 7.5 together, the claim form that is issued and served must by definition be a sealed one. This is not only the court practice as accurately stated by the notes at paras 6.2.3 and 6.3.2 of the White Book, but is reflected in the case law. The general rule that what is served must be an original sealed claim form is made absolutely clear from the passage in para 57 of the judgment of this court in McManus v Sharif, one of the cases reported with Cranfield [2003] 1 WLR 2441 which I cited at para 100 above. Although that case was decided under the previous version of the CPR, the same general rule applies under the current version of the CPR, as is clear from the decision of Ramsey J in Hills [2014] 1 WLR 1 which was correctly decided.'"*

The onus was thus on a claimant to ensure that a sealed order was served in time. Adam Johnson J also explained that the consequence of the decision in ***Ideal Shopping Direct Ltd v Mastercard Inc*** (2022) was that a claimant was required to take such procedural steps as necessary to ensure that service could be effected in time or, if there were difficulties in securing service, to take any such steps as available to, for instance, extend time to serve or serve via an alternative method. If, there were no such avenues open to the claimant due, for instance, to their being subject to an unless order, that was a manifestation of the principle of finality. As he put it:

> *"[86] As I read it, the logic of the decision in Ideal Shopping was that it is the Claimant's responsibility to ensure that a Claim Form is served before it expires. Service means having a sealed Claim Form in hand which can be provided to the Defendant. That being so, a Claimant faced with a looming deadline for service must take action, and has limited procedural options if concerned the deadline may not be met. They are essentially (i) to apply under CPR, rules 6.15 or 6.16 for an order for alternative service or for an order dispensing with service, or (ii) to apply under CPR, rule 7.6(2) for an Order extending time for service. If the time for service has already passed, the Claimant can apply to extend time retrospectively under CPR, rule 7.6(3).*
>
> *[87] None of those things happened here. Mr Wolman submitted it was very unlikely, given the nature and purpose of the unless Order made by Deputy Master Hansen, that the Clewers would have been able to obtain relief in any of the forms described, and so in reality they were not options that were open to them. That may be correct, but is not an answer to the underlying point, which is that there needs to be finality in litigation, and if a litigant finds himself in a position where no procedural escape route is available to him, that is not a signal of unfairness but a signal he has reached the end of the road. I think that is what happened here. The effect of Deputy Master Hansen's Order was to give the Clewers a final chance to do what they should have done months before. Regrettably, they failed to take it. They left things too late and the consequence was that the deadline for service was not met. That is the conclusion Deputy Master Marsh arrived at and I consider he was correct to do so. . ."*

Ideal Shopping Direct Ltd v Mastercard Inc [2022] EWCA Civ 14; [2022] 1 W.L.R. 1541, CA, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.7.6.1.)

Practice Updates

STATUTORY INSTRUMENTS

JUDICIAL REVIEW AND COURTS ACT 2022 (COMMENCEMENT NO 3) REGULATIONS 2023 (SI 2023/631). In force from **28 June 2023**. The statutory instrument brings into force the provisions in the Judicial Review and Courts Act

2022, which create an Online Procedure Rule Committee (the OPRC) and which creates the power to issue Practice Directions concerning online proceedings. The creation of this committee has had a long gestation. Its creation was originally to have been enacted via the Prison and Courts Bill 2017 and then via the Courts and Tribunals (Online Procedure) Bill 2019. The OPRC will specifically create rules of court for online proceedings for civil, family and tribunal proceedings. It will also be responsible for developing online pre-action procedures. The members of the OPRC are: Sir Geoffrey Vos MR (chair), Sir Andrew McFarlane PFD, Sir Keith Lindblom SPT, Brett Dixon, Sarah Stephens and Gerard Boyers.

PRACTICE GUIDANCE

Practice Note – Chancery Guide 2022. On 29 July 2023, Sir Julian Flaux, Chancellor of the High Court, issued an updated Practice Note to supplement the second update to the Chancery Guide 2023. The Practice Note continues to identify Guidance outside the Chancery Guide, in various forms, which remains in force. For ease of reference the updated Practice Note is reprinted below. It is available at *https://www.judiciary.uk/wp-content/uploads/2023/06/CHC-Practice-Note-Chancery-Guide-Update-June-2023.pdf*.

Practice Note: The Chancery Guide 2022

1. *The new Chancery Guide was published on 29 July 2022. This Practice Note accompanies the second update published in June 2023.*
2. *The Chancery Guide is now available online (PDF) with hyperlinks on the Courts and Tribunals Judiciary website. It has been substantially rewritten and revised compared with previous versions of the Chancery Guide and so merits careful reading by judges and practitioners alike.*
3. *The new Chancery Guide seeks so far as possible to bring the practice in the Chancery Division into line with the practice in the other Business and Property Courts. The new Chancery Guide also applies in the District Registries out of London, save where local guidance is necessary.*
4. *Apart from the Practice Notes, Guidance and Directions listed in the Schedule attached to this Practice Note, all other Chancery Division Practice Notes, Guidance and Directions are revoked, on the basis that so far as relevant they are otherwise incorporated in the new Chancery Guide.*
5. *Practice Notes, Guidance and Directions may be issued from time to time by the Chancellor, Supervising Judges, Chief ICC Judge or Chief Master and will take effect from the date they are issued.*
6. *Nothing in this Practice Note or the Chancery Guide substitutes or overrides the CPR including relevant Practice Directions.*

Sir Julian Flaux

Chancellor of the High Court

July 2022

Reissued October 2022 and June 2023

Schedule

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

1. *PN: Companies Court: Company Restoration*

   12 November 2012

   See Appendix D of the Company Restoration Guide (external link)
2. *PN: Companies Court: Unfair Prejudice Petitions Directions*

   1 May 2015
3. *PN: Variation of Trusts*

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

   30 September 2016

5. *PN: Witnesses giving evidence remotely*

   11 May 2021

   Practice Note: Giving Evidence Remotely

6. *Practice Statement: Patents Court trial listing issued by Meade J*

   Practice Statement: Listing of Cases for Trial in the Patents Court

   1 February 2022

7. *PN: Remote hand-down of judgments*

   5 October 2022

   Chancellor's Practice Note Remote hand-down of judgments

8. *PN: Disclosure in the Insolvency and Companies Court List (ChD)*

   6 October 2022

   Chief ICC Judge's Practice Note

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

PN: Business and Property Courts in Leeds, Liverpool, Manchester, and Newcastle

29 July 2022

VC Practice Note July 2022

PN: Business and Property Courts in Manchester and Leeds

27 October 2022

Applications Lists: VC Practice Note Applications List

Practice Note – Intellectual Property Enterprise Court (IPEC) Small Claims Track. On 9 June 2023, the Presiding Judge of the Intellectual Property Enterprise Court issued a Practice Note concerning changes to the procedure for processing claims filed in the IPEC's small claims track. The changes are in force from **3 July 2023**. The change focuses on case management. From that date all such claims filed via CE File or filed in person in London are to be transferred to the Manchester Civil Justice Centre for case management by District Judges. Thereafter such claims will, ordinarily, be tried in Manchester either in person or via video-link. The Practice Note is reprinted below for ease of reference. It is available at: *https://www.judiciary.uk/guidance-and-resources/practice-note-intellectual-property-enterprise-court-ipec-small-claims-track/*.

Practice Note: Intellectual Property Enterprise Court (IPEC) Small Claims Track.

From 3 July 2023, there will be a change in how cases filed in the Small Claims Track (SCT) of the Intellectual Property Enterprise Court (IPEC) will be processed.

From that date, all claims filed either on CE File or in person in London (at the Rolls Building) will be transferred to Manchester. They will be case managed by District Judges in the Manchester Civil Justice Centre. It is expected that most such claims which go to trial will have the trial heard either in person in Manchester or, where the parties prefer, by video link with the Manchester court.

Parties will have the right to apply to have a claim transferred from Manchester to any other court centre which hears IPEC SCT cases, including London. The relevant centres outside London are Bristol, Birmingham, Cardiff, Leeds, Liverpool and Newcastle.

It follows that IPEC SCT trials pursuant to a claim filed on CE File or in person at the Rolls Building from 3 July 2023 will only be heard in London if transferred from Manchester. Claims will only be transferred to London for case management or trial if there are good reasons to do so, in particular where there is a need for a trial in person and potential difficulty in having a trial in Manchester.

There will be no change to IPEC SCT claims filed in any of the centres outside London. These will be case managed and trials will be heard at the place of filing unless transferred elsewhere.

There will be no change to IPEC SCT claims filed before 3 July 2023. Where filed on CE File or at the Rolls Building, they will be dealt with by District Judges of the County Court at Central London unless transferred elsewhere.

None of the foregoing affects claims filed in the IPEC Multi-Track.

Judge Hacon

Presiding Judge of the Intellectual Property Enterprise Court

In Detail

SETTING ASIDE A JUDGMENT FOR FRAUD

Background

In ***Tinkler v Esken Ltd*** [2023] EWCA Civ 655, the Court of Appeal (Sir Geoffrey Vos MR, Popplewell and Snowden LJJ) considered the approach that should be taken to setting aside a judgment alleged to have been secured by fraud. The appeal arose out of boardroom dispute. The appellant had been the CEO of Esken Ltd, which was formerly known as Stobart Group Limited. In June 2018, Mr Tinkler was dismissed for alleged misconduct. He was subsequently re-elected as a director by the company's shareholders. He was then, once more, removed from office by the company's directors. These matters were the subject of proceedings, which resulted in a trail in November 2018. As the Court of Appeal noted, the company's claims in that action were broadly upheld at trial and Mr Tinkler's cross-claims were dismissed (at [1]).

Mr Tinkler subsequently issued fresh proceedings seeking to set aside the original judgment. The basis of those proceedings was that there was new evidence, which had deliberately been withheld from the trial judge in the original proceedings. That new evidence was said to demonstrate that witnesses had lied to the trial judge. It was further said that had that evidence been disclosed, it would have inevitably led to a different approach to the assessment of evidence at trial and changed the trial judge's approach to the original judgment. The set aside proceedings were dismissed.

It was common ground between the parties that the test to set aside a judgment for fraud had three limbs. Those were that: the successful party, or someone for whom they were responsible, committed a conscious and deliberate dishonesty; the dishonest conduct was material to the original decision (the materiality test); and, that there was new evidence (at [3]). The parties, however, differed in their approaches to the materiality test. The appellant submitted that the judge who dealt with the proceedings to set aside for fraud had wrongly followed the materiality test as set out in ***Royal Bank of Scotland Plc v Highland Financial Partners LP*** [2013] EWCA Civ 328; [2013] 1 C.L.C. 596. It was argued that the test in ***Hamilton v Al-Fayed (No.4)*** [2001] E.M.L.R. 15 ought to have been followed. The appellant also argued that the judge had erred by failing to treat the set-aside proceedings as an independent cause of action in fraud. The Court of Appeal dismissed the appeal.

An action for fraud an independent cause of action

The Court of Appeal explained that an action to set aside a judgment for fraud was not a procedural application. It was an independent cause of action: see ***Flower v Lloyd*** (1877) 6 Ch. D. 297 at [299]–[300] and ***Takhar v Gracefield Developments Ltd*** [2019] UKSC 13; [2020] A.C. 450 at [60]–[61]. As the Court of Appeal went on to explain:

> *"[12] In modern terms, we can perhaps regard the action to set aside a judgment for fraud as akin to an action for deceit. The only significant differences are that the court, rather than the opposing party to the first action, has to be shown to have been deceived, deliberate dishonesty is required, and materiality rather than simple reliance must be shown. If the elements are made out (misrepresentation or misleading conduct, made or undertaken fraudulently, with reliance for deceit and materiality for an action to set aside a judgment), the contract or the judgment can be rescinded or set aside.*
>
> *[13] The precise analogy is not important. It is, however, important to understand what the court is doing in trying a free-standing action to set aside a judgment for fraud. It is quite different from an application to adduce fresh evidence after judgment under the principles enunciated in Ladd v. Marshall [1954] 1 WLR 1489 . . .*
>
> *[14] The judgments in Flower show, as Lord Sumption in Takhar also made clear, that it is the fraud and the materiality that need to be proved (see also Lord Buckmaster in Jonesco v. Beard [1930] AC 298 at pages 300-1). It must be shown that the judgment was obtained by the fraud, and that the court was induced to make a potentially wrong judgment by the fraud. The party that lost as a result of the fraud must prove the fraud 'wholly free from ... any of the matters originally tried'."*

The Court of Appeal went on to conclude that the judge had properly approached the matter as a freestanding, independent, cause of action (at [40]).

The materiality test

It was not the role of the judge dealing with the set-aside proceedings to seek to retry the issues that had been considered and determined by the original trial judge. That being said, for the judge to determine the question of materiality, as a matter of practice, difficulties can arise for the judge such that they cannot but "trespass" to some extent on the matters considered by the trial judge (at [42]). The judge ought to consider whether the new evidence impugns the trial judge's conclusions. Was its concealment an operative cause of the original judgment (at [44]). That may require consideration of the evidence that was before the trial judge, i.e., to facilitate consideration of whether the new evidence showed that the trial judge had been misled (at [45]).

In so far as the materiality test was concerned, the Court of Appeal clarified the appropriate test. It was noted that the Court of Appeal had, in two cases and in *obiter*, recently suggested that the approach taken in ***Hamilton v Al-Fayed (No.4)*** (2001) was to be preferred to that set out in ***Royal Bank of Scotland Plc v Highland Financial Partners LP*** (2013). Those cases were ***Salekipour v Parmar*** [2017] EWCA Civ 2141; [2018] 2 W.L.R. 1090 at [93]-[94] and ***Terry v BCS Corporate Acceptances Ltd*** [2018] EWCA Civ 2422 at [37]–[38]. Neither case decided the point.

The appropriate test was that set out in ***Royal Bank of Scotland Plc v Highland Financial Partners LP*** (2013). ***Hamilton v Al-Fayed (No.4)*** (2001) was not an action based on fraud. It was an application seeking to adduce new evidence, i.e., it was concerned with the application of the test in ***Ladd v Marshall*** [1954] 1 W.L.R. 1489. Moreover:

> *"[20] ... I have concluded that the judge was justified in preferring the formulations of the materiality test enunciated in Highland over that in Hamilton. The preponderance of decided cases support what was said in Highland, and the cases that express a preference for Hamilton were obiter. Moreover, the hurdle of materiality which enables a party to defeat a final judgment must be set high (see the Ampthill Peerage Case [1977] AC 547 per Lord Wilberforce at page 569D-E). Even if the judge was right to think that in this case there was no practical difference between the formulations (which I consider below at [52]-[53]), the judge expressly considered both tests. Finally, even if Mr Tinkler were right to submit that the judge ought to have asked the materiality questions on the premise that he was wrong about the fraud, that has no effect on the outcome, now that this court has upheld the judge's findings that no fraud was proved."*

In the premises the applicable test for materiality is that set out in ***Royal Bank of Scotland Plc v Highland Financial Partners LP*** (2013) at [106], viz.:

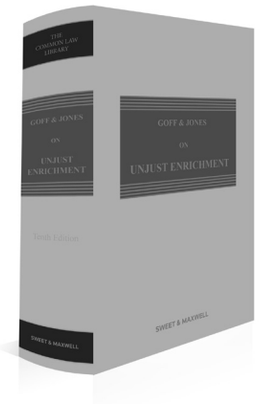
> *"[106] There was no dispute between counsel before us on the legal principles to be applied if one party alleges that a judgment must be set aside because it was obtained by the fraud of another party. The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned.* ***Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was****. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence." (Emphasis in bold added.)*

Goff & Jones on Unjust Enrichment

10th Edition

Professor Charles Mitchell KC (Hon) FBA, Professor Paul Mitchell and Professor Stephen Watterson

Goff & Jones is the leading work on the law of unjust enrichment. The new 10th Edition is completely up-to-date and contains detailed discussion of important decisions since the last edition. Several chapters have been wholly or substantially rewritten to take account of significant new cases, and their impact on topics including the recovery of benefits from remote recipients, the recovery of benefits transferred on a condition that fails, the recovery of ultra vires payments by public bodies, the limitation rules governing claims in unjust enrichment and interest awards on such claims.



The 10th edition deals with the following six key matters in relation to making a claim:

- Explains how a claim in unjust enrichment can be precluded where a defendant's enrichment is mandated by a statute, judgment, natural obligation, or contract
- Analyses the principles governing the identification and valuation of enrichment, and explains how these apply to claims for different types of benefit
- Considers the requirement that a defendant's gain has been acquired at the claimant's expense
- Discusses the different grounds for restitution: lack of consent and want of authority; mistake; duress; undue influence and unconscionable bargains; failure of basis; free acceptance; necessity; secondary liability; ultra vires receipts and payments by public bodies; etc
- Examines defences including change of position; ministerial receipt; bona fide purchase; estoppel; counter-restitution impossible; passing on; limitation; legal incapacity; illegality
- Details the personal and proprietary remedies for unjust enrichment

Hardback
9780414101913
November 2022
£380
This title is also available on Westlaw UK and as an eBook on Thomson Reuters ProView™

The new edition contains detailed discussion of the following cases of major importance:

- *Investment Trust Companies (in liq.) v HMRC* [2018] A.C. 275;
- *Swynson Ltd v Lowick Rose LLP (in liq.)* [2018] A.C. 313;
- *Littlewoods Retail Ltd v HMRC (No.2)* [2018] A.C. 869;
- *Prudential Assurance Co Ltd v HMRC* [2019] A.C. 929;
- *Vodafone Ltd v Office of Communications* [2020] Q.B. 857;
- *Test Claimants in the FII Group Litigation v HMRC* [2022] A.C. 1;
- *Test Claimants in the FII Group Litigation v HMRC* [2021] 1 W.L.R. 4354;
- *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] 3 W.L.R. 727;
- *School Facility Management Ltd v Christ the King College* [2021] 1 W.L.R. 6129;
- *Samsoondar v Capital Insurance Co Ltd* [2021] 2 All E.R. 1105;
- *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2022] 1 All E.R. (Comm.) 1244;

ORDER TODAY... **sweetandmaxwell.co.uk** **+44 (0)345 600 9355**

SWEET & MAXWELL THOMSON REUTERS®

EDITOR: **Dr J. Sorabji,** Barrister, 9 St John Street
Published by Sweet & Maxwell Ltd, 5 Canada Square, Canary Wharf, London, E14 5AQ
ISSN 0958-9821

Typeset by Thomson Reuters
Printed by Hobbs The Printers Ltd, Totton, Hampshire.

43120436