CIVIL PROCEDURE NEWS

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■ **Afzal v UK Insurance Ltd** [2023] EWHC 1730 (KB), 9 June 2023, unrep. (Freedman J)

Multilingual witness – language in which evidence can be given

CPR 32, PD 32, para.18.1. The appellant was refused permission to adduce his evidence at trial in a language other than English. Permission had been sought on the basis that English was not the appellant's "own language". The appellant appealed to the High Court on the basis that the judge in the County Court

> "*[3]. . . misconstrued CPR 32, PD 18.1, both in insisting in finding that the evidence as a matter of fact and/or law that the witness evidence had to be in Urdu and that the Judge should have permitted the claimant in any event to rely upon his written statement.*"

At the hearing before the Circuit Judge in the County Court, in what was the underlying injury claim arising out of a road traffic accident, the judge had enquired what was the appellant's own language. It was apparent that the appellant spoke both English and Urdu, with the latter stated to be his "own language". The appellant had, however, put in a witness statement written in English (at [6]–[8]). There was thus an apparent breach of PD 32 para.18.1, which required a witness statement to be written in the witness's own language. **Held**, it was apparent that the Circuit Judge misunderstood the requirements of PD 32 para.18.1

> "*[33] . . . as giving rise to a view that each person has their 'own language'. Further it appears that her understanding is that the language would be the original language of the person, or the mother tongue or native language i.e. the language in which they are most fluent.*"

That was not the case. Read in context, and by reference to clarifications of its meaning in various Court Guides, most particularly the Business and Property Courts Guide, PD 32 para.18.1 was to be interpreted to mean that:

> "*[43] . . . a witness's own language includes any language in which the witness is sufficiently fluent to give oral evidence including under cross-examination if required.*
>
> *[44] It therefore follows that in my judgment the Judge was wrong to reach a conclusion that the language of the witness statement had to be the first language of the claimant, and that it was highly relevant that the claimant read, understood, conversed and gave instructions in English. If there were doubts about the proficiency of the claimant as to whether the claimant was sufficiently fluent, then that could have been tested with a view to considering whether the evidence should be excluded. . .*"

(See ***Civil Procedure 2023*** Vol.1, para.32.8.1.)

■ **FMA v Secretary of State for the Home Department** [2023] EWHC 1579 (Admin), 27 June 2023, unrep. (Swift J)

Redaction of names, job titles, recipients in disclosed emails – judicial review proceedings

Justice and Security Act 2013, s.8. Two issues arose in judicial review proceedings brought against the Secretary of State for the Home Department. The first issue concerned disclosure in closed material proceedings under s.8 of the 2013 Act. The application specifically sought disclosure of documents to special advocates only. The application was not determined as the court concluded the documents that would be subject to the application were not disclosable. The court went on, in *obiter*, to explain that great care needed to be taken in considering and assessing a party's disclosure obligations under s.8 of the 2013 Act, not least to ensure that it was carried out consistently with the CPR's overriding objective. As Swift J put it:

> "*[46] In all proceedings, and not least claims for judicial review, the court must, in the first instance, rely on the parties, conscientiously to comply with disclosure obligations, where necessary with the assistance of their professional advisers. In every case that is the first and always the most important stage of the disclosure process, notwithstanding the possibility later, for applications for specific disclosure. Conscientious compliance requires accurate understanding and application of disclosure principles; exorbitant disclosure works against the interests of justice as much as disclosure that errs in the opposite direction. As hard as it may be, the first stage in any disclosure process is that the parties must strive accurately to meet their obligations, no less and no more. This need for prudence is particularly apparent when proceedings are subject to closed material procedures such as those under the 2013 Act. It is essential that when a*

section 8 application is made in judicial review proceedings, the party making the application is satisfied that each document covered by the application, applying the ordinary principles that apply to disclosure in judicial review claims, is disclosable. Determination of section 8 applications is laborious; the process can be painstaking. The parties' obligation under CPR 1.3 to help the court give effect to the overriding objective, requires that resort is had to section 8 of the 2013 Act only to the extent necessary for the fair and just determination of the issues in a case."

The second issue concerned the approach that should be taken to the redaction of civil servants' names and job titles from emails that were subject to disclosure in judicial review proceedings generally. Swift J noted, and deprecated, routine redaction of such details. Consistently with the open justice principle such details should not be redacted except upon application to the court. As Swift J explained the correct approach to redaction is as follows:

"*[48] . . . The Home Secretary's initial open disclosure included documents redacted to remove the names of the civil servants who had written them, including redaction of the names of the officials who had prepared the March 2022 consideration minute and the January 2023 consideration minute. The redactions were said to be on the ground of 'relevance'. Documents were served in that form without the permission of the court. These redactions should not have been made. It is one thing for a document that genuinely deals with different matters, some relevant to the litigation others irrelevant, to be redacted on grounds of relevance. It is another matter entirely for a document that is relevant to be edited to remove information that goes to explain the document's provenance and context. One example which has recently become common is when emails are redacted to remove details such as the name of the sender, names of recipients, or the names of persons copied into the message. Such information should not be redacted on grounds of relevance. Such redactions, at the least, make the significance of documents more difficult to understand and, in some instances, they may obscure the significance of a document almost completely. If a party wishes to redact such information from disclosable documents, an application to the court should be made and the application should explain the reason for the proposed redaction, and when necessary set out supporting evidence. In this case, the names and job details of the civil servants who had assessed the information relevant to the not conducive to the public good question in the consideration minutes were redacted. That information was not irrelevant and ought not to have been redacted. If, to any extent, a practice is developing by which such information is routinely removed from documents that are disclosable in judicial review proceedings, that practice should cease.*"

(See ***Civil Procedure 2023*** Vol.1, para.82.2.1.)

■ **Major v Kirishana** [2023] EWHC 1593 (KB), 30 June 2023, unrep. (Cotter J)

Litigation friend – ceasing to act when no longer consent to doing so

CPR r.21.4(3). On an appeal from an interim case management decision, the High Court considered the approach to take to an application by a litigation friend that they cease acting as such. **Held**, the appeal was allowed and the litigation friend was discharged. It was axiomatic that the question whether to discharge a litigation friend required consideration whether the factors set out in CPR r.21.4(3) were met and whether the litigation friend consented to their continuing to act as such (at [129]). In the absence of those matters being satisfied, exceptional circumstances were required for the appointment to continue (at [129], [136] and [140]). It must be recognised that consent, while not expressly referred to in CPR r.21.4(3), is a fundamental requirement of a litigation friend's appointment. It is difficult to envisage circumstances where an individual could be so appointed absent their consent (at [130]): ***Bradbury v Paterson*** (2015) applied. Withdrawal of consent does not, however, necessarily lead to the discharge of an appointment,

"*[132] . . . it must be a key factor both in its own right (because the court faces forcing someone to do something which they no longer wish to do) and also due to the risk that the presence of an unwilling, non-consenting litigation friend poses to the fairness of the proceedings and to the safeguarding of the protected party's interests.*"

On its own the loss of a trial date was noted as a factor that could not ordinarily outweigh loss of consent to refuse to discharge a litigation friend. The same point was noted concerning the fact that the other procedural requirements for the appointment of a litigation friend were no longer present (at [137]). ***Bradbury v Paterson*** [2014] EWHC 3992 (QB); [2015] C.O.P.L.R. 425, QBD, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.21.4.1.)

■ **Norman v Adler** [2023] EWCA Civ 785, 7 July 2023, unrep. (Bean, Thirlwall, Nicola Davies LJJ)

Permission to bring proceedings for contempt of court – no recklessness test

CPR r.81.3. Applications for permission to apply for committal orders were made against two police officers. The basis of the applications was an allegation that the police officers had either knowingly or recklessly misled the Crown Court in search warrant applications. The application was refused initially on the papers. It was then refused subsequently at a hearing. The appellants appealed from that refusal to the Court of Appeal. **Held**, the appeal was dismissed. In reaching its decision the Court of Appeal provided guidance on the proper approach to applications for permission under CPR r.81.3(8). Such applications should first be considered on the papers. While there is no express provision to that effect

within CPR Pt 81, such an approach enabled such applications to be considered quickly and cost-effectively. It was an approach that also enabled the court to deal effectively with claims that were bound to fail. Where an application was dismissed on the papers, the applicant could always apply to set it aside under CPR r.3.3(5) (at [27]–[28]). Where the application was issued in the King's Bench Division, it should be heard by King's Bench Division judges and should not be transferred to the Administrative Court (at [24]). On the substantive issue on the appeal, the Court of Appeal held that recklessness did not form part of the test for permission to bring contempt proceedings. It confirmed at [39] and [62] that the test for permission remained as that set out in ***KJM Superbikes Ltd v Hinton*** (2008):

> "*[39] . . . the practical starting point when considering permission to bring proceedings for contempt in the public interest is whether there is a strong case (capable of being proved to the criminal standard) that the alleged contemnor made a statement to the court knowing it to be untrue and knowing that it would be relied upon by the court. Sometimes there is reference to a strong prima facie case (self evidently something more than a prima facie case). In KJM Superbikes the phrases were used interchangeably. They mean the same thing: a case in which the evidence is sufficiently strong, without more, to satisfy the criminal standard of proof.*"

Berry Piling Systems Ltd v Sheer Projects Ltd (2013) and ***Tinkler v Elliott*** (2014) had not established that recklessness formed part of the test (at [40]–[63]). ***Berry Piling Systems Ltd v Sheer Projects Ltd*** [2013] EWHC 347 (TCC); [2013] T.C.L.R. 4, TCC, ***Tinkler v Elliott*** [2014] EWCA Civ 564, unrep., CA, ***KJM Superbikes Ltd v Hinton*** [2008] EWCA Civ 1280; [2009] 1 W.L.R. 2406, CA, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.81.3.11.)

■ **Braceurself Ltd v NHS England** [2023] EWCA Civ 837, 14 July 2023, unrep. (Coulson, Simler, Whipple LJJ)

Guidance on when a Respondent's Notice is a cross-appeal

CPR r.52.13, PD 52C, para.8.1. In proceedings brought against NHS England for alleged breaches of statutory procurement provisions, the Court of Appeal addressed the question when a Respondent's Notice was in fact a cross-appeal. The point was noted to be one where there was little authority. It was also noted to be an important question as permission is required to bring a cross-appeal, whereas permission is not required for a genuine Respondent's Notice. **Held**, permission was not required. In reaching this decision the Court of Appeal considered four prior authorities: ***Lake v Lake*** (1955); ***Re B (A Minor)*** (2000); ***Cie Noga SA v Australia & New Zealand Banking Group*** (2002); and, ***Trinity Logistics USA Inc v Wolff*** (2018). Coulson LJ, who gave the judgment of the Court summarised the principles to be derived from those authorities both generally and in respect of Respondent's Notices:

> "*[30] The principles relating to appeals generally which are of some relevance to this appeal can be summarised as follows:*
>
> *(a) Generally, an appeal lies against a judgment or order, not against a finding of fact or some element of the court's reasoning (Lake v Lake).*
>
> *(b) An order is not always required: what matters is whether the court's findings would or could have a significant effect on the subsequent rights and obligations of the parties (In Re B).*
>
> *(c) If the decision was or could have been recorded in a formal order in such a way that the would-be appellant could not or would not seek to challenge or vary it, there was no jurisdiction to entertain an appeal (Noga 3).*
>
> *[31] The principles relating to Respondent's Notices which are of relevance to this appeal can be summarised as follows:*
>
> *(a) CPR 52.13 and paragraph 8 of PD52C draw a clear distinction between a respondent seeking to challenge or vary the order, on the one hand, and a respondent seeking to uphold it on different grounds, on the other. The latter, which requires no permission, is a recognition of the special position of a respondent "simply defending the decision in his or her favour" (Noga 3 at [35]).*
>
> *(b) There is no general prohibition against a respondent raising challenges to the judge's findings of fact in a Respondent's Notice (Noga 3 at [36]). But, in an exceptional case, the overriding objective at CPR 1.1 may permit the court to prevent a 'defensive' respondent from re-running complex and time-consuming issues of fact (Noga 3 at [54-55]). It was also common ground in the present case that an appellant could seek to strike out a respondent's notice if it was frivolous or vexatious.*
>
> *(c) The general rule, that what matters for these purposes is the court order and whether there is a challenge to it, will not be enforced so strictly as to ignore the reality of what a respondent is trying to do. So the effect of a particular order or disposal is to be determined as a matter of substance and not merely form (Wolff).*

. . ."

Lake v Lake [1955] 3 W.L.R. 145, CA, ***Re B (A Minor)*** [2000] 1 W.L.R. 790, CA, ***Cie Noga SA v Australia & New Zealand Banking Group Group*** [2002] EWCA Civ 1142; [2003] 1 W.L.R. 307, CA, **Trinity Logistics USA Inc v Wolff** [2018] EWCA Civ 2765; [2019] 1 W.L.R. 3997, CA, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.52.13.2.)

■ ***Jaldhi Mideast DMCC v Al Ghurair Resources LLC*** [2023] EWHC 1889 (Comm), 21 July 2023, unrep. (Christopher Hancock KC sitting as a deputy judge of the High Court)

Challenging findings for contempt

CPR r.81.10. The Commercial Court considered whether there was jurisdiction under CPR r.81.10, which provides the power to discharge a committal order, to enable findings of contempt to be challenged. It was argued that the court could reopen the factual findings as there was nothing in CPR r.81.10, precedent, or the commentary in *Civil Procedure*, to support the view that the court had no jurisdiction to do so (at [13]). **Held**, where factual findings were to be challenged, the proper route to challenge was by way of appeal: ***Sahara Energy Resource Ltd v Rahamaniyya Oil & Gas Ltd*** (2022) distinguished. As Christopher Hancock KC explained:

> "*[25] The Claimant submitted that the purpose of CPR 81.10 was to provide a mechanism by which contemnors can be released, before they have served the entirety of their prison sentence, in cases where they have 'purged' their contempt by belated compliance with the Court's order and/or the offer of an undertaking to comply. It was not to provide an alternative route for challenging the correctness of the Court's earlier decision on the contempt application. The proper route for any such challenge would be an appeal.*
>
> *[26] I consider that the Claimant is correct in relation to this issue. In my judgment, where, as here, the essential contention is that, by reference to evidence which was available at the time of the original hearing, the ruling made at that hearing should be overturned, the appropriate forum for such a challenge must be the Court of Appeal. I do not consider that it is open to me to overturn the decision of Knowles J, given that there is no suggestion that the evidence now relied on could not have been put in front of him. The fact is that, if Mr Al Ghurair wished to make these arguments, he needed to attend in front of Knowles J to do so.*"

Sahara Energy Resource Ltd v Rahamaniyya Oil & Gas Ltd [2022] EWHC 3285, unrep., CA, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.81.10.1.)

■ ***Gopee v Southwark Crown Court*** [2023] EWCA Civ 881, 25 July 2023, unrep. (Sir Geoffrey Vos MR, Nicola Davies and Birss LJJ)

Civil restraint order – power to make or set aside without an oral hearing

CPR r.3.11(2), PD 3C. The Court of Appeal considered whether there was power to make or set aside a civil restraint order without a hearing. **Held**, the court had such a power. Neither the common law nor art.6 of the European Convention on Human Rights provide an unfettered right to receive an oral hearing (at [28]): ***R (Ewing) v Department for Constitutional Affairs*** (2006). The CPR makes express provision for courts to make orders on their own initiative, with parties able to apply to set aside or vary such orders: CPR rr.3.3(4) and (5). In the present case, an order was made by the court of its own initiative (at [29]–[31]). Furthermore,

> "*[33] . . . the CPR itself contemplates that the court's powers include the ability to make a civil restraint order on its own initiative, without notice and without a hearing. There are a number of express provisions in the rules which provide that where a statement of case or application is struck out or dismissed and is totally without merit, the court order must specify that fact and the court must also consider whether to make a civil restraint order. We refer to CPR Part 3.4(6) (striking out in general), CPR Part 3.3(7) (striking out on the court's own initiative), and CPR Part 23.12 (dismissing applications). Similar provisions apply on appeal, at CPR Part 52.20(6) (where the appeal court refuses an application for permission to appeal, strikes out an appellant's notice or dismisses an appeal). These rules all apply equally to occasions when a judge is dealing with a matter in an oral hearing and also to decisions made without an oral hearing. They do not, for example, require that if a judge were deciding without a hearing to strike out an application as totally without merit, and then turned to consider whether to make a CRO, that judge would be required to direct a hearing. The CPR clearly envisages that the full range of options is available to a judge in that case. Those options include making no CRO at all, directing a hearing to take place for a respondent to show cause why a CRO ought not to be made, and making a CRO there and then on the court's own initiative, without notice and without a hearing, provided it includes a right to apply to set the CRO aside (CPR Part 3.3(5)).*"

As a starting point, the court should not make an order without an oral hearing unless doing so was justified by the circumstances. This did not mean making an order without an oral hearing was an exceptional course of action (at [36]). It was not correct to characterise ***R (Kumar) v Secretary of State for Constitutional Affairs*** (2006) at [74] –[75] as holding

that exercise of the power to make a CRO without an oral hearing as exceptional (at [34]): ***Deeds v Various Respondents*** (2013) deprecated on this point. Where a CRO is made without an oral hearing, the ability to apply to set it aside, which does not require permission on the part of the individual subject to the CRO, is the means to secure procedural fairness. It ensures that where matters go awry where the order is imposed, they can properly be scrutinised and rectified (at [36]). In the present case, the appellant had asked that the application to set aside be determined without an oral hearing. He could not therefore challenge the fact that it was therefore determined without an oral hearing (at [40]). Where a party applies to set aside a CRO, made without an oral hearing, and requests that the set aside application be determined at an oral hearing, an oral hearing will, "*in normal circumstances, be so directed*" (at [44]). ***R (Ewing) v Department for Constitutional Affairs*** [2006] EWHC 504 (Admin); [2006] 2 All E.R. 993, CA, ***Deeds v Various Respondents*** [2013] EWCA Civ 1678, unrep., CA, ***R (Kumar) v Secretary of State for Constitutional Affairs*** [2006] EWCA Civ 990; [2007] 1 W.L.R. 536, CA, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.3.11.1.)

■ **FXF v English Karate Federation Ltd** [2023] EWCA Civ 891, 26 July 2023, unrep. (Sir Geoffrey Vos MR, Nicola Davies and Birss LJJ)

Application of Denton tests to applications to set aside default judgment

CPR r.13.3. The claimant issued a claim for damages for personal injury arising from alleged sexual abuse. Default judgment was issued in September 2020. The judgment was subsequently set aside. The claimant appealed from that decision and did so on the basis that the test for relief from sanction set out in ***Denton v TH White Ltd*** (2014) had not been applied to the question whether the default judgment should be set aside. It was argued that the judge erred in not applying the Court of Appeal's approach, albeit it was set out in *obiter*, in ***Gentry v Miller*** (2016) at [24], where Vos LJ stated that as such an application was one for relief from sanction the ***Denton*** tests applied after there had been consideration of the tests set out in CPR r.13.3. The contrary view was that set out by Lord Dyson MR in the Privy Council's decision in ***The Attorney General for Trinidad and Tobago v Matthews*** (2011), where it was held that an application to set aside a default judgment was not an application for relief from sanctions. That approach had been supported by the High Court in, for instance, ***Cunico Resources NV v Daskalakis*** (2018) and ***PXC v AB College*** (2022). **Held**, the appeal was dismissed. The Master who determined the application to set aside properly applied both the test under CPR r.13.3 and the test for relief from sanction. In reaching this decision the Court of Appeal held the ***Denton*** tests applied to such set aside applications (at [7] and [63]). There were five reasons why this was the case:

> "*[64] First, just as Moore-Bick LJ held analogously in Hysaj, it is now far too late to depart from the position enunciated clearly by the Court of Appeal in Hussain, Piemonte, Gentry, and Family Channel. Piemonte was a default judgment case and decided expressly that the Denton tests applied. The words at [40] in Piemonte that I have just mentioned did not detract from that decision. 'All the circumstances' and the overriding objective are directly relevant at the third stage of the Denton analysis.*
>
> *[65] Secondly, Matthews was not a case about setting aside a default judgment. Rule 26.7 of the Trinidad and Tobago CPR is in a different form from our CPR Part 3.9, in that it provides that the court may 'grant relief only if it is satisfied' of three prescriptive matters: (a) the failure to comply was not intentional, (b) there is a good explanation for the breach, and (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions. Lord Dyson's reasoning that I have summarised at [32(ix)] above drew attention to the difference between these conditions and the requirements of rule 13.3. It may be, as Lord Dyson said in Matthews, and Moore-Bick LJ accepted in Hysaj, that the reasoning on rules 26.6(2) and 26.7 of Trinidad and Tobago's CPR applied 'with equal cogency to CPR 3.8 and 3.9'. To spell it out, rule 26.7(2) and CPR Part 3.9 provide expressly that 'where a party has failed to comply with' rules or court orders, 'any sanction for non-compliance imposed by the rule or the court order has effect' unless relief from the sanction is obtained. This formulation contemplates the sanction in question being imposed by the same rule or court order with which the party has failed to comply. In the case of a default judgment, the 'sanction' is imposed by a subsequent court order made when the default judgment is obtained. Like Moore-Bick LJ, however, I do not think that this logic is conclusive. CPR Part 3.9 was amended for the reasons and in the manner explained in Denton and Mitchell. It was intended to send a general signal to the legal community that there would be a 'tougher, more robust approach to rule-compliance and relief from sanctions' in support of the revised overriding objective. This was the origin of the Denton tests deriving, as they do, from the express words of CPR Part 3.9. Accordingly, I do not think that this court would now be justified in preferring the reasoning in Matthews to that, taken together, in the 6 forceful decisions of this court in Hussain, Mitchell, Denton, Piemonte, Gentry, and Family Channel.*
>
> *[66] Thirdly, the Denton tests are actually peculiarly appropriate to the exercise of the discretion required once the two specific matters mentioned in CPR Part 13.3 (merits and delay in making the application to set aside) have been considered. The first two tests focus attention on the delay in complying with the requirements of CPR Part 15.2, which provides that '[a] defendant who wishes to defend all or part of a claim must file a defence', and the third test brings*

> *into consideration all the circumstances of the case including the two critically important stated factors. What we said at [34] in Denton bears repetition:*
>
> > *'Factor (a) makes it clear that the court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief. Factor (b) emphasises the importance of complying with rules, practice directions and orders. This aspect received insufficient attention in the past. The court must always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated.'*
>
> *[67] Fourthly, as I indicated at [51] above, Gentry actually provides an example of how the exercise under CPR Part 13.3 and the application of the Denton tests ought to be undertaken. The merits are dealt with first at [28]. Next, the delay in making the application to set aside is dealt with at [29]-[35]. I turned then to consider the Denton tests, dealing with the pre-judgment delay and the excuses for it at [36], and 'all the circumstances of the case, so as to enable [the court] to deal justly with the application, including [factors (a) and (b)]' at [37]. In some – perhaps many – cases, additional factors included in the overriding objective (or even other relevant factors) will need to be considered at this stage when the court is exercising its discretion. The relevant factors are not closed. What is critical, however, I can repeat once again for yet further emphasis, is the need to focus on whether the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, and the need to enforce compliance with rules and orders.*
>
> *[68] My fifth reason must be stated without it being meant to be unduly critical. The judges in Cunico and PXC seem to me to have adopted an unduly academic approach to the problem with which they were faced. The default judgment entered under CPR Parts 15.3 and 12.3 is obviously a sanction 'imposed for any failure to comply with any rule', in the sense that it would not have been granted if the defendant had filed its defence in compliance with the mandatory provisions of CPR Part 15.2. These decisions took an unduly nit-picking approach to what has been deliberately intended to change the culture of civil litigation. Parties to civil proceedings and their solicitors need fully to understand that flouting rules and court orders will simply not be tolerated."*

The Attorney General for Trinidad and Tobago v Matthews [2011] UKPC 38, unrep., PC, ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, CA, ***Gentry v Miller*** [2016] EWCA Civ 141; [2016] 1 W.L.R. 2696, CA, ***Cunico Resources NV v Daskalakis*** [2018] EWHC 3382 (Comm); [2019] 1 W.L.R. 2881, CA, ***PXC v AB College*** [2022] EWHC 3571 (KB), unrep., KBD, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.13.3.5.)

Practice Updates

STATUTORY INSTRUMENTS

CIVIL PROCEDURE (AMENDMENT NO. 3) RULES 2023 (SI 2023/788). The latest statutory instrument effecting amendments to the CPR introduced, as from **14 August 2023**, amendments to CPR Pts 3, 7, 13, 14, 26, 71, 72, 73, 83, 84 and 89. Those amendments give effect to the replacement of the County Court Business Centre with the Civil National Business Centre. Further amendments, all of which come into force on **1 October 2023** immediately after those effected by Civil Procedure (Amendment No. 2) Rules 2023 come into force. The most significant of those amendments are: the substitution of new, simplified Parts 14 and 24; the simplification of CPR Pts 22 and 23; and, amendment of CPR Pt 52 to deal with the lacunae concerning appeals from contempt of court proceedings identified in ***R (Kearney) v Chief Constable of Hampshire Police*** [2019] EWCA Civ 1841.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 158th Update. This Practice Direction Update effected amendments to various PDs. As from **14 August 2023** it introduced amendments to replace reference to the County Court Business Centre with reference to the Civil National Business Centre across all PDs. All other amendments effected by this Update come into force on **1 October 2023**. Significant amendments include: the simplification of PD16; the revocation of PDs 14, 23B and 24; the introduction of a revised PD23B as a new PD49G; and the introduction of a standalone PD (Practice Direction – Claims relating to EU and EEA EFTA Citizens' Rights Under Part 2 Of The Withdrawal Agreement and Part 2 of the EEA EFTA Separation Agreement), which makes provision for the monitoring of claims concerning the rights of EU and EFTA citizens.

CPR PRACTICE DIRECTION – 157th Update. This Practice Direction Update effected amendments to PD 51R – the Online Civil Money Claims Pilot and PD 51ZB – the Damages Claim Pilot. The amendments extended, as from 11.00 a.m. on 17 July 2023 the validity of both pilot schemes until 1 October 2024. They also, as from 11.00 a.m. on 27 July 2023, effected a small number of changes to correct typographical errors and simplify the PDs. Further amendment provided for additional means to make payments under the Damages Pilot scheme.

PRE-ACTION PROTOCOLS

Pre-Action Protocol Update. In June 2023, Sir Geoffrey Vos MR approved amendments to the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents and the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims. They are to come into force on **1 October 2023** immediately after amendments effected by the Pre-Action Protocol Update of May 2023 come into force. The amendments correct several minor typographical and cross-referencing errors.

PRACTICE GUIDANCE

Senior Courts Cost Office Guide. On 4 July 2023, the Judiciary of England and Wales published the Senior Courts Cost Office Guide 2023. The bulk of the revisions focus on simplifying the text and updating cross-references to the CPR. Noteworthy amendments are updates to Chapter 19 on bills of costs (including to the precedents in the Appendix to the Guide) and Chapter 27, which concerns costs in Court of Protection proceedings.

MISCELLANEOUS UPDATES

Court Funds Office – Interest Rates on Special and Basic Accounts. On 23 August 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 3.375% to 5.00%. The interest rate payable on funds held in the special account increased from 4.50% to 6.00%. 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.

Automatic referral to Mediation for Small Claims. On 25 July 2023, the Ministry of Justice announced its intention to introduce automatic referral to mediation for small claims with a value of less that £10,000. The proposed process will provide an hour-long telephone mediation session with an HMCTS provided mediator. The process will be free of charge. Parties will be required to take part in the process before their dispute is permitted to progress to a hearing before a judge. The Ministry of Justice intends to implement this reform during the present Parliament (Ministry of Justice, *Consultation Response – Increasing the use of mediation in the civil justice system: Government response to consultation*, (4 August 2023) at [72]).

In Detail

LITIGATION FUNDING AGREEMENTS AS DAMAGES-BASED AGREEMENTS

Representative proceedings in the civil courts and collective proceedings in the Competition Appeal Tribunal (CAT), as with any form of litigation, depend upon effective funding being made available for both claimants and defendants. With representative forms of proceedings, this is all the more important given their very nature. In ***R (PACCAR Inc) v Competition Appeal Tribunal*** [2023] UKSC 28, the Supreme Court, by a majority, reached the, generally surprising, decision that third party-litigation funding agreements – the main form of funding for such proceedings – came within the scope of damages-based agreements (DBAs). This is surprising as DBAs were introduced, following the Jackson Costs Review, as an alternative form of conditional fee agreements (CFA), which a party could enter into with their legal representative. Third party litigation funding agreements, whether calculated by reference to damages or not, were not intended to be conditional fee agreements as they do not fall within the scope of ss.58 and 58A of the Courts and Legal Services Act 1990. If anything they fall within the scope of s.58B of the Courts and Legal Services Act 1990, which has never been brought into force, and the common law. As Sir Rupert Jackson put it, when advocating the introduction of what would be called DBAs, they were a form of contingency fee agreement entered into between parties to litigation and their lawyers. As he concluded:

". . . both solicitors and counsel should be permitted to enter into contingency fee agreements with their clients on the Ontario model. In other words, costs shifting is effected on a conventional basis and in so far as the contingency fee exceeds what would be chargeable under a normal fee agreement, that is borne by the successful litigant.

. . .

Both solicitors and counsel should be permitted to enter into contingency fee agreements with their clients. However, costs should be recoverable against opposing parties on the conventional basis and not by reference to the contingency fee." (***Jackson Final Costs Report***, Ch.12)

DBAs were thus intended to be, and are, the English and Welsh equivalent of contingency fee agreements common in other jurisdictions, which are entered into by litigants and their legal representatives. They were intended to be a broadening out of CFAs to enable remuneration for lawyers to arise under them by reference to damages; a point implicit – at the least – through both Sir Rupert's treating third party litigation funding separately from both CFAs and DBAs and the manner in which he defined contingency fee agreements as relating to funding agreements between lawyer and client where the lawyer's fees are only paid in the event of success by way of a share of the damages. Whatever the merits of the majority in the Supreme Court's judgment, that third party litigation funding agreements where remuneration is calculated by reference to damages are now to be understood as a form of DBA was never intended to be the case. There is thus an urgent need for a review of the current legislation to make clear that third party litigation funding is not a form of DBA. As a consequence, effective statutory regulation of LFAs may now be necessary. That there is an urgent need is perhaps best illustrated by the point noted by Lady Rose and made by Susan Dunn, chair of the Association of Litigation Funders:

"[243] 'These consequences [of holding LFAs to be DBAs] will extend to all or most litigation funding agreements that have been agreed since litigation funding began in England and Wales. This would be massively damaging both for the administration of justice in relation to the existing cases which involve funding by litigation funders, and the future access to justice of parties who would otherwise have employed litigation funding agreements to fund their cases. It would bring to an abrupt end hundreds of funded claims with potentially catastrophic financial consequences for all involved in the case. It would have a major impact on the development of group litigations before the English Courts (including but not limited to Collective Proceedings Orders before the Competition Appeals Tribunal), given the interrelationship between that group litigation and the litigation funding industry. This would have enormous financial consequences: there is estimated to be over £500 million of costs incurred annually by litigation funders in the UK alone. It would also have huge policy implications for the litigation funding industry, which ALF is best-placed to address.'"

Background

Proposed collective proceedings were pursued in the CAT by UK Trucks Claim Ltd and the Road Haulage Association, which sought compensation for damages said to arise from EU competition law breaches as determined by the European Commission in 2016. Applications for a collective proceedings order were made under s.47B of the Competition Act 1998. The CAT took, as a preliminary issue, the question whether the representative parties had adequate funding in place. The funding arrangements in place took the form of third party litigation funding agreements (LFAs), under which

"[6] . . . funder's maximum remuneration is calculated with reference to a percentage of the damages ultimately recovered in the litigation."

The issue that arose concerning the funding arrangements was whether or not they constituted DBAs within the meaning of s.58AA of the 1990 Act. If they were, they were unenforceable as they did not comply with the formal requirements that arose under that provision. If unenforceable no collective proceedings order could be made as adequate funding arrangements would not be in place (at [7]). The CAT held that the LFAs were not DBAs for the purposes of s.58AA, and hence they were enforceable (at [8]). A Divisional Court of the High Court dismissed a judicial review of the CAT's decision, agreeing with the CAT's conclusion on the nature of the LFAs (at [9]).

Statutory background

Section 58AA provides as follows:

"(1) A damages-based agreement which satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.

(2) But (subject to subsection (9)) a damages-based agreement which does not satisfy those conditions is unenforceable.

(3) For the purposes of this section—

(a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that—

(i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and

(ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained;

. . .

In this section—

'. . .

"claims management services" has the same meaning as in the Financial Services and Markets Act 2000 (see section 419A of that Act).'"

Section 419A of the 2000 Act replaced what was originally reference to s.4 of the Compensation Act 2006, both of which define claims management services in the same way. They defined such services as including the "*provision of financial services or assistance*'.

The Majority Decision (Lord Reed PSC, Lords Sales, Leggatt and Stephens)

The majority allowed an appeal from the Divisional Court, the consequence of which, as it noted, was that most LFAs would be rendered unenforceable (at [13]).

The basis of the argument that the LFAs were unenforceable was that they failed to comply with ss.58AA(3) and (7) of the 1990 Act; specifically that they amounted to the provision of claims management services as defined in ss.4(2)(b) and 493 of the Compensation Act 2006 and comparable provision in s.419A of the Financial Services and Markets Act 2000.

"[50] The words used in section 4(2) and (3) to define 'claims management services', read according to their natural meaning, are apt to cover the LFAs in this case, as the respondents and the Divisional Court accepted. Subsection (2) (b) defines 'claims management services' to mean advice 'or other services in relation to the making of a claim'. Subsection (3)(a)(i) states in terms that for the purposes of section 4 'a reference to the provision of services includes ... [a reference to] the provision of financial services or assistance.' Under the LFAs Therium and Yarcombe are to provide financial services or assistance to their respective counterparties, . . . , in relation to the making of the claims they wish to bring. Of course, that would also be true of an ordinary bank which lent money to its customer for the purpose of assisting the customer to bring a claim. . ."

The existence of s.58B of the 1990 Act did not suggest that LFAs were not within the scope of claims management services. At the time the 2006 Act was introduced, there had been significant development of litigation funding, mainly through funding to secure insurance or loans (at [59]). It was intended to provide a general power to regulate such, and other matters, relating to claims management in a way that went beyond, what Lord Sales, referred to as the blunt instrument of s.58B of the 1990 Act, which had in any event not been brought into force (at [60]–[72]). It is not entirely clear that that was the case, the main problem that existed in the run-up to 2006 was the so-called Cost Wars, which focused on CFAs, including the funding and recovery of ATE insurance policies. Little if any notice was taken at the time of LFAs not least as ***Gulf Azov Shipping Co Ltd v Idisi*** [2004] EWCA Civ 292 and ***Arkin v Borchard Lines Ltd (Nos 2 and 3)*** [2005] EWCA Civ 655; [2005] 1 W.L.R. 3055, which formed the basis of the development of common law LFAs, had only just been decided; a point noted in Lady Rose's dissent (at [201]). In any event, as Lord Sales put it:

"[71] . . . it can be seen that section 4 of the 2006 Act and section 58B do not operate in the same way. Section 4 was designed to address a world of third party funding which had developed in significant ways beyond that for which section 58B had been devised. Section 4 has a different purpose and function. Furthermore, even to the extent that the provisions overlap in terms of their coverage, there is nothing inherently untoward in this. The statute book is not neat and tidy and there is no particular reason why statutory powers contained in different enactments should be regarded as mutually exclusive. Parliament included the reference to 'financial services or assistance' in section 4 simply as one type of services within the purview of the general regulatory power conferred by that provision, where it might be found to make sense in future to regulate them from the perspective of section 4 (potentially alongside other services) without reference to section 58B.

[72] To sum up, therefore, I conclude that the statutory purpose of Part 2 of the 2006 Act was to provide a broad power to allow the Secretary of State to decide what targeted regulatory response might be required from time to time as information emerged about what was then a new and developing field of service provision to encourage or facilitate

> *litigation, where the business structures were opaque and poorly understood at the time of enactment. The wide language used in section 4, and the degree of parliamentary control for the future exercise of the section 4 power, which is a feature of the scheme of Part 2, are strong indications of this. The Explanatory Notes also indicate that this was the purpose of the provision. Viewed in this light, there is good reason to think that Parliament used wide language in section 4 deliberately and with the intention that the words of the definition of 'claims management services' should be given their natural meaning."*

Furthermore, the explanatory memorandum to the 2006 Act supported

> *"[76] . . . the interpretation of section 4 of the 2006 Act as conferring a wide power to regulate on the Secretary of State, which was to be targeted on particular areas of activity giving rise to concern as and when they might emerge. It also shows that it was appreciated that one area of concern might be the making of loans, ie the provision of financial assistance. It is again relevant that the statutory scheme is framed in terms of a power to regulate types of activity rather than particular actors."*

Events that post-dated the introduction of the 2006 Act could not alter its interpretation, and hence the scope of its application. Reference to the Jackson Costs Report, the introduction of s.58AA of the 1990 Act and regulations made under it from 2013, for instance, did not assist. The problem for the argument that LFAs were not claims management services was one that arose from the incorporation of reference to them, and hence the 2006 Act, into s.58AA of the 1990 (at [88]–[94]).

The Dissenting Judgment (Lady Rose)

Lady Rose took a different view. The provision of funding via an LFA was not a claims management service. It was, on the contrary, an ancillary service to claims management services.

> *"[222] I would therefore hold that section 4(3)/419A(2) properly construed means that claims management services include the ancillary services commonly provided by claims managers listed so that those ancillary services may also be regulated activities and subject to the supervision and standard setting role of the Regulator. It was not intended to elevate those ancillary services into claims management services in and of themselves, when they are undertaken outside the context of a claims management business. That is all that the section needed to achieve and that is, in my judgment, what it achieved both in its original version in section 4 of the 2006 Act and in its new version in section 419A of FSMA."*

As an ancillary service, provision of litigation funding via an LFA did not amount to a claims management service and this did not amount to a DBA. As she put it, the fact that those who provide claims management services also sometimes provide financial assistance to those they provide with such services does not mean that the provision of financial assistance entails that the financial services provider is providing claims management services (at [219]–[220]).

Additionally:

> *"[236] It seems to me, as it seemed to the Divisional Court, most improbable that Parliament intended that damages-based litigation funding agreements would all be rendered unenforceable by section 58AA without any mention of this fact. Given the Secretary of State's duty to consider whether to bring section 58B into force, one would expect the Appellants to be able to point to some explanation given by the Government as to why the 2010 and 2013 DBA Regulations were drafted so as to be the mechanism by which all damages-based litigation funding agreements were rendered unenforceable, rather than revising and implementing the mechanism for regulation of such agreements that Parliament had enacted in section 58B.*
>
> . . .
>
> *[253] Everything in the scheme of Part II of CLSA 1990 as amended over the years, in the pre-legislative materials, the 2010 and 2013 DBA Regulations and in the case law which Parliament is assumed to know shows that Parliament did not intend by enacting section 58AA suddenly to render unenforceable damages-based litigation funding agreements. Parliament must have read section 4/419A ... so as not covering the litigation funding agreements at issue in these proceedings. There is no need, therefore, to frustrate the will of Parliament in that regard, under the banner (to adopt Lord Bingham's phrase) of loyalty to the will of Parliament."*

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