CIVIL PROCEDURE NEWS

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In Brief

Cases

■ **Ras Al Khaimah Investment Authority v Azima** [2023] EWHC 2108 (Ch), 21 August 2023, unrep. (Michael Green J)

Setting aside default judgment in non-money claims

CPR r.12.3. The counterclaimant (Azima) pursued two counterclaims against various parties and sought default judgment against the sole defendant to one of the counterclaims. While they were not parties to that counterclaim, two additional defendants to the other counterclaim opposed the grant of default judgment. The defendant to the counterclaim's defence had to be served by 2 December 2022. The defendant had failed to serve a defence. The counterclaimant applied for default judgment in June 2023. It was submitted, as the requirements for default judgment set out in CPR r.12.3(1) were satisfied and none of the exceptions in r.12(3)(2) applied, that the counterclaimant was entitled to default judgment (at [9]–[10]). The court considered recent guidance given by the Privy Council where default judgment for a remedy other than money was sought. The Privy Council had, in ***Lux Locations Ltd v Yida Zhang*** (2023), considered provision in the Eastern Caribbean Civil Procedure Rules for the grant of default judgment that was based on the CPR (at [11]). Michael Green J explained that:

> *"[11] . . . Lord Leggatt, giving the judgment of the Board, said that the court always retains a discretion as to whether to enter default judgment or not 'if the court considers that it would be unjust to do so' – see [56]. And in [51] Lord Leggatt explained why an applicant such as [the counterclaimant] has to apply to the court:*
>
> > *'The underlying policy reason for requiring the safeguard of judicial scrutiny where a remedy other than money is claimed must be that granting such a remedy potentially involves greater interference with rights and freedoms of the defendant (and perhaps others) than entering a money judgment which the defendant can apply to set aside.'*
>
> *[12] That seems to me to be particularly apposite where [as in this case] the default judgment being sought would result in [earlier judgments] being set aside on the grounds that they were procured by fraud. The point of requiring [the counterclaimant] to apply to the Court for such a default judgment is so that there can be judicial scrutiny as to whether, despite the default of the defendant, it is appropriate, fair and just to grant the relief at that time and in those circumstances. Lord Leggatt recognised that such a default judgment, even if the claimant is prima facie entitled to it, may interfere with the 'rights and freedoms' of persons other than the defendant against whom the judgment would be entered.*
>
> *[13] In [72], Lord Leggatt set out what the Board considered to be the 'proper approach to an application for default judgment where the claim is for some other remedy', and [Counsel for the counterclaimant] did not suggest that this did not apply to the applications before me. After stating that the Court needed first to determine if the relevant conditions were satisfied (there is no dispute as to this in this case), Lord Leggatt said as follows:*
>
> > *'(ii) Even if the relevant conditions are satisfied, the court should not grant a default judgment if there is material before the court at the hearing of the application which would justify setting such a judgment aside.*
> >
> > *(iii) If there is no such material, the court should proceed to determine what remedy (if any) the claimant is entitled to on the statement of claim. For this purpose, the court will treat the allegations made in the statement of claim as true and legally valid unless (and to the extent that) it appears to the court that the statement of claim does not disclose any reasonable ground for bringing the claim or is an abuse of the process of the court.'"*

Held, default judgment was not granted. The additional defendants would have been directly affected by the grant of default judgment as they sought to uphold the earlier judgment that would be set aside for fraud if default judgment was granted. ***Lux Locations Ltd v Yida (Antigua and Barbuda)*** [2023] UKPC 3, unrep, PC, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.12.3.3.)

■ **IBM United Kingdom Ltd v LzLabs GmbH** [2023] EWHC 2142 (TCC), 24 August 2023, unrep. (O'Farrell J)

Oversight of disclosure – solicitor does not need to be physically present

CPR Pt 31, PD 57AD, para.12 and Appendix 4. The claimant sought declaratory relief, injunctive relief and damages from the defendants for alleged breaches of a software licencing agreement. Disclosure was sought. A question arose whether the solicitor who signed an Extended Disclosure certificate (PD 57AD para.12.6, Appendix 4), which stated

that they were responsible for oversight of the disclosure process, had to actually (actively) participate in the process (at [48]). The judge noted such a question was not a sufficient basis on which to challenge the certificate. As O'Farrell J put it:

> *"[48] [Counsel for the defendant] accepted that he could not go so far as to say that the CSP disclosure was carried out contrary to the court's order but expressed concern that [the claimant's solicitor] signed the extended disclosure certificate stating that he was responsible for overseeing the process in circumstances where he did not actively participate in the CSP documents extraction exercise, which was carried out by sixteen IBM Corp employees as explained in [the claimant's solicitor's] statement.*
>
> *[49] This is not a proper basis on which to seek to go behind the disclosure certificate signed by a solicitor with conduct of the case. The CPR does not require a solicitor overseeing disclosure, particularly on the scale of these proceedings, to be physically present and actively supervise each stage of the exercise. In the absence of any identified gaps or errors in the disclosure, it is purely speculative and without merit."*

(See ***Civil Procedure 2023*** Vol.2, para.2AA-90.)

■ **Celebrity Speakers Ltd v Daniel** [2023] EWHC 2158 (KB), 25 August 2023, unrep. (Jason Beer KC, sitting as a deputy judge of the High Court).

Summary of approach to proof of damage where judgment on liability granted

Jason Beer KC, sitting as a deputy judge of the High Court, in proceedings where judgment was entered on liability following the strike out of the defendant's defence, summarised the approach taken to causation and damages. It was noted that the general approach was that articulated by Carr J in ***New Century Media v Makhlay*** (2013). In that case, Carr J explained that where judgment on liability is given following a strike out of a defence, the Particulars of Claim are a proxy for a reasoned judgment setting out the basis on which liability was established. While a defendant cannot then seek to go behind the matters on liability set out in the Particulars of Claim they may still properly contest damages, which still require proof. In doing so a defendant may raise matters that are not inconsistent with any matters in the Particulars of Claim that establish liability (at [38]). Causation could thus also be subject to challenge. Summarising the case law on the proper approach to questions of causation where default judgment or a strike out of a defence was granted, Beer KC stated that:

> *"[40] The question of the extent to which a default judgment (or similar) establishes the causation of some loss and damage has been addressed many times in the past:*
>
> *a. In John Turner v P.E Toleman (1999), unrep., 15th January the late Simon Brown LJ, admittedly in a judgment refusing permission to appeal to the Court of Appeal on a renewed oral application for permission, had cause to consider the effect of obtaining summary judgment – with damages to be assessed – in a claim for damages for personal injuries in circumstances where the claimant argued that the judgment determined not just liability issue, but also causation, including the question of the attributability of the claimant's injury to the accident. Simon Brown LJ profoundly disagreed, holding 'No doubt defendants must acknowledge some injury to a plaintiff before judgment could properly be entered against them, otherwise the cause of action is not complete ... That is a far cry from saying that they are liable for each and every aspect of loss and injury which the plaintiff in his pleaded claim asserts he suffered ... That has everything to do with quantification and nothing to do with basic liability.['']*
>
> *b. In Lunnun v Singh (1999), unrep., 1st July the Court of Appeal (Clarke LJ, Peter Gibson LJ and Jonathan Parker J) approved Turner in circumstances where judgment in default, with damages to be assessed, had been entered on a claim alleging a water and sewage leak which had caused damage to a neighbouring property. The defendant subsequently sought to argue that issue was taken not merely with the quantum of the damage claimed, but also with causation – namely the allegation that there was a causal link between the damage and the leak. The Court of Appeal agreed, Jonathan Parker J holding '... it is ... inherent in the default judgment that the defendants must be liable for some damage ... but that, in my judgment, [...] the full extent of the issues which were concluded or settled by the default judgment ... [all] questions going to quantification, including the question of causation in relation to the particular heads of loss [...] claimed by the claimant, remain open to the defendants at the damages hearing ...' Clarke LJ agreed: 'The defendant cannot ... contend that his acts or omissions were not causative of any loss to the plaintiff. But he may still be able to argue, in the assessment, that they were not causative of any particular items of alleged loss ... Moreover he may do so even if the statement of claim alleges a particular item was caused by the tort.'*
>
> *c. Turner and Lunnun have been consistently followed since they were decided – see e.g. Pugh v Cantor Fitzgerald International [2001] CP Rep 74, Enron (Thrace) Exploration and Production BV v Clapp [2005] EWHC 401*

(Comm), Strachan v The Gleaner Co Ltd [2005] 1 WLR 3204, and Symes v St George's Healthcare NHS Trust [2014] EWHC 2505 (QB)."

John Turner v P.E Toleman (15th January, 1999) unrep., CA, ***Lunnun v Singh*** [1999] C.P.L.R. 587, CA, ***Pugh v Cantor Fitzgerald International*** [2001] EWCA Civ 307; [2001] C.P. Rep. 74, CA, ***Enron (Thrace) Exploration and Production BV v Clapp*** [2005] EWHC 401 (Comm), unrep., Comm, ***Strachan v Gleaner Co Ltd*** [2005] UKPC 33; [2005] 1 W.L.R. 3204, PC, ***Symes v St George's Healthcare NHS Trust*** [2014] EWHC 2505 (QB); [2014] Med. L.R. 449, QBD, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.12.8.3.)

■ **Deutsche Bank AG v Sebastian Holdings Inc** [2023] EWHC 2234 (Comm), 1 September 2023, unrep, (Bryan J)

Contemnor outside jurisdiction – unable to give evidence by video-link

CPR rr.3.1(2)(c), 32.3, Pt 81. A suspended custodial sentence for contempt of court was in place against an individual who was outside the jurisdiction. The contemnor was required to attend court in person to be examined by Deutsche Bank AG (DBAG) further to CPR Pt 71. The contemnor applied to attend court via video-link from the USA. DBAG submitted that the discretion to permit a person to give evidence by video-link should not be exercised in this instance due to the construction of the contempt order. It was submitted that the order required attendance in person as both a means to help secure the contemnor's effective compliance with the requirement to provide effective answers to the examination. It was said to also be the means by which the court could exercise effective control of the examination. Additionally, in-person attendance was also said to be necessary as the contemnor had "*a long history of dishonesty and attempts to the Court's orders*". It was also submitted that there was no good reason, in any event, to permit remote attendance (at [9]–[11]). It was necessary for the contemnor to show that there was a good reason, which serves a legitimate aim, why he should be permitted to give evidence via video-link: CPR r.32.3 and ***Three Mile Inn Ltd (formerly Rivergrant Ltd) v Daley (Liquidator of New Northumbria Hotel Ltd)*** (2012) at [12], CPR PD 32, para.2. This remained the case post-Covid (at [45]–[48]). No good reason had been demonstrated in the present case. While there had been a suggestion in a skeleton argument in support of the contemnor's application, albeit he had not provided a witness statement, that he would not attend in-person if the application to attend by video-link were not granted, the court could not accede to that suggestion. The judge concluded that to submit to that suggestion would be for the court to bow to blackmail (at [62]). Moreover, the judge also noted that there was no evidence to the effect that the contemnor would, in fact, fail to attend in-person (at [62]). Given that the applicant was a contemnor who had repeatedly given evidence that had been disbelieved and had been ordered to pay indemnity costs on several occasions, this was a situation where in-person examination was entirely appropriate, absent a good reason otherwise. That video-link evidence was regularly used in the Commercial Court and High Court generally did not alter that conclusion (at [81]). No good reason to vary the requirement to attend in person had been advanced by the contemnor (at [82]–[95]). Furthermore, there was no reason to expose DBAG to the possibility of technological failure, or procedural shortcomings due to time lag and overlapping questions and answers, if the hearing was to take place via video-link. **Held**, the application was refused. The contemnor was ordered to attend further to the court's case management powers under CPR r.3.1(2)(c). ***Three Mile Inn Ltd (formerly Rivergrant Ltd) v Daley (Liquidator of New Northumbria Hotel Ltd)*** [2012] EWCA Civ 970, unrep., CA, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.32.3.2.)

■ **Jones v Tracey (Re Costs)** [2023] EWHC 2256 (Ch), 12 September 2023, unrep. (deputy Master Marsh)

Part 36 – application to Probate claims

CPR Pts 36, 57. Deputy Master Marsh (sitting in retirement) considered the question of CPR Pt 36's application to probate proceedings. He drew the conclusion that there was no basis for concluding that Pt 36 should not apply to such proceedings. As he put it:

"[23] As I observed in the judgment delivered at the end of the trial, probate claims are not entirely on all fours with mainstream litigation in which the interests of the parties are predominant. However, I can see no basis for concluding that Part 36 does not apply to probate claims for the following reasons:

(1) CPR rule 57.11 (1) and (2) make provisions for the disposal of a probate claim leading to a grant of probate. The claim may be discontinued or dismissed. Paragraph 6 of PD57 provide further guidance about how a probate claim may be resolved after the parties have agreed to settle. It is right that a probate claim cannot simply be stayed because it would leave the estate in limbo. There must either be a discontinuance or dismissal of the claim and/or counterclaim or a grant in solemn form or under section 49 of the Administration of Justice Act 1985.

(2) It is right that the provisions of CPR rule 36.14(1) provide that if a Part 36 offer is accepted the claim will be stayed. Under rule 36.14(2) if the offer relates to the whole of the claim the stay will be upon the terms of

the offer and under rule (5) the court has power to enforce the terms that have been agreed. It is also right that before proceedings are issued there is no claim to stay. However, it cannot seriously be suggested that the acceptance of a pre-issue Part 36 offer is outside the provisions of Part 36. Although Part 36 primarily functions in money claims it is capable of operating in other claims and it would be wrong to give its terms a narrow reading that limit its effect when the CPR encourages parties to use its provisions to resolve claims. In that sense probate claims are no different to other litigation before the courts. There is however a difference in the steps that must be taken upon terms having been agreed.

(3) The provisions of Part 36 and Part 57 need to be read together. One is providing a mechanism for making offers that have specified interest and costs consequences. The other is seeking to ensure that an estate can be administered. Those aims are not inconsistent.

(4) After issue of the claim, acceptance of a Part 36 offer will have the effect of staying the claim in a limited way. Neither party will be entitled to pursue the claim to a trial. But the court is not deprived of all powers to ensure that there is a proper disposal of the probate claim by a grant being made or the claim being dismissed.

(5) It has not been suggested in any authority drawn to my attention that a probate claim cannot be subject to valid Part 36 offers and there is a good reason for that. In fact, it has been assumed in at least one reported decision that Part 36 applies in a probate claim: see the decision of HHJ Behrens sitting as a High Court judge in Ritchie v Joslin [2011] 1 Costs L.O. 9."

Ritchie v Joslin [2011] 1 Costs L.O. 9, ChD, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.36.2.1.)

■ **Invest Bank PSC v El-Husseini** [2023] EWHC 2302 (Comm), 20 September 2023, unrep. (Stephen Houseman KC sitting as a deputy judge of the High Court)

Non-proliferation of citation of authorities

Stephen Houseman KC, sitting as a deputy judge of the High Court, dealt with one application and two preliminary issues in proceedings concerning the enforcement of personal guarantees given to a bank. Having dealt with those matters, the deputy judge commented critically on the number of authorities that were provided to the court (at [11] and [97]–[98]). The thrust of the deputy judge's concern was the citation of large numbers of unnecessary authorities, many of which concerned or explained the development of well-known principles. Practitioners may wish to be mindful of the deputy judge's call for greater discipline in citation, not least as a failure to follow it could call into question compliance with the overriding objective. The deputy judge's concerns were put as follows:

"[97] I wish to express concern at the proliferation of cited authorities in hearings in the Commercial Court. It is not reasonable to expect a judge in a three day hearing, whether or not involving cross-examination of expert witnesses on foreign law, to assimilate over 150 authorities. By way of isolated example, it is not necessary to cite Denton & others v. TH White – Practice Note [2014] EWCA Civ 906; [2014] 1 WLR 3926 (as well as Court of Appeal authorities considering its application) at a hearing taking place in mid-2023. Practitioners can assume that part-time and full-time judges are aware of these fundamental principles by now, intended as they were to 'change the culture of civil litigation' in this jurisdiction: see FXF (above) at [68]. The principles are comprehensively discussed in the 2023 White Book at Volume 1, pp.126-141.

[98] Greater discipline is required by advocates to limit the citation of authority to what is strictly necessary and indeed permissible. This in turn involves an understanding on the part of court users and other practitioners. Time estimates are required to assume that the court will be taken through authorities relied upon during the hearing. I shudder to think how long that would have taken in this instance without my injunction to counsel to address me only on those authorities they felt were absolutely necessary for me to understand. I doubt the transcriber would have appreciated the speed at which it would have been done if covering any more of the cited authorities, or that I would have gained a meaningful understanding of each case during such forensic speed-dating exercise. Far too many authorities were cited."

(See ***Civil Procedure 2023*** Vol.1, para.40MPD.4)

■ **Sycurio Ltd (formerly Semafone Ltd) v PCI-Pal PLC** [2023] EWHC 2361 (Pat), 25 September 2023, unrep. (Bacon J)

Expert witness – scope of expertise

CPR Pt 35, PD 35 para.2.2. The claimant, proprietor of a patent that concerned the processing of telephone calls, brought proceedings alleging infringement of its patent. Expert evidence was adduced. Bacon J noted that there was no dispute that CPR Pt 35 applied to patent proceedings. She also noted that CPR Pt 35 and PD 35 para.2.2 require experts

to give evidence within their expertise. To do so the expert may be required to conduct further research "to enhance their existing knowledge" in their field of expertise (at [10]–[11]). They may not, however, give evidence on matters outside their expertise, which they have taken steps to educate themselves about for the purpose of the proceedings. Their evidence should be limited to matters within their specific expertise. As Bacon J put it:

> *"[11] . . . An expert may also wish to do background reading in relation to a related field in which they do not profess specific expertise, so as to be able to understand the context of the questions which they are asked which do fall within their field of expertise, and thereby to give useful answers to those questions.*
>
> *[12] What the expert should not, however, do is to give evidence on the basis that they have sought to read in and educate themselves in the relevant field for the purposes of the case in question. A person does not become an expert by virtue of having acquired knowledge in the course of the case itself. Nor should an expert give evidence on a subject which falls outside their expertise, but which they consider they understand 'well enough' to express a view on the matter. An expert is not instructed for court proceedings on the basis that they believe that they have 'sufficient' grasp of the matter to express a view, or are able to teach themselves what they need to know in the course of preparing their evidence. They are instructed on the basis that they are a genuine expert in the relevant field, whose opinions may be relied upon and given weight by the court."*

Bacon J also noted that it was agreed that the approach to preparation of an expert's report in patent proceedings was correctly summarised in paras 99 to 114 of ***Medimmune Ltd v Novartis Pharmaceuticals UK Ltd*** (2011). In particular, experts in such cases – due to the nature of such proceedings – needed to be provided with a "*high level of instruction by lawyers*", with lawyers often drafting the experts' reports based on what the experts told them. Such drafts are then subject to amendment by the expert as appropriate. Care must, however, be taken in adopting this approach so that the expert does not, as a consequence of it, breach their duties to the court. As Bacon J put it:

> *"[14] That process [as outlined in Medimmune] must not, however, obscure the duties of the expert as set out in CPR Pt 35 and Practice Direction 35. In particular it must not lead to an outcome where the expert strays into giving evidence on matters falling outside their expertise, on the basis that they have been asked questions by their solicitors which they have endeavoured to answer. That is an outcome which both the expert and their instructing legal team must be vigilant to avoid. The instructing solicitors should not simply assume that the expert will understand the requirements of CPR Pt 35 and the Practice Direction. It is their responsibility to ensure that the expert has the necessary expertise and is aware of the duties imposed on an expert witness."*

Medimmune Ltd v Novartis Pharmaceuticals UK Ltd [2011] EWHC 1669 (Pat), unrep., Pat, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.35.3.3)

■ **Innovate Pharmaceuticals Ltd v University of Portsmouth Higher Education Corp** [2023] EWHC 2394 (TCC), 28 September 2023, unrep. (Constable J)

Adjournment application – trial bundle size and preparation

The court considered an application to adjourn a trial. At the heart of the application was a complaint about the timing and content of the trial bundles (at [6]). **Held**, the application was refused. In refusing the application the judge noted that trial bundles were, largely, now electronic, but that that was no good reason for parties adopting a lazy attitude to their preparation (at [11]). Moreover, he emphasised the following:

> *"[12] The trial bundle should contain, and contain only, those documents which are likely to be referred to at the trial. It is not difficult to prepare and it is a source of amazement how often parties are unable to co-operate constructively over the preparation of an appropriately relevant set of documents for trial. The starting point for inclusion within a chronological run of documents within a trial bundle will be those documents referred to within the pleadings, witness statements or expert reports. This is likely to contain the majority of documents that will be referred to at trial (indeed, it could contain substantially more, but where they have been referred to by a witness, factual or expert, the default position is that their inclusion should generally be unobjectionable). In addition, each side may wish to rely upon some documents from their own disclosure (although it is likely that such documents will already have been included in one of the foregoing categories if it is probative) and, more likely, some documents taken from the other sides' disclosure which are considered to be helpful to their own case and which are likely to be deployed in cross-examination. No proper criticism can be made that such an assessment may be conservative, and it is inevitable that the trial bundle will contain some documents that will never be referred to. However, in a case lasting 3 weeks, it is improbable that more than a few hundred documents will in fact be referred to in Court, whether by way of submission or in examination of witnesses, and a well prepared chronological trial bundle should reflect this."*

(See ***Civil Procedure 2023*** Vol.1, para.39.5.1.)

Practice Updates

STATUTORY INSTRUMENTS

The Court Funds (Amendment) Rules 2023 (SI 987/2023). In force from **27 October 2023**. This statutory instrument amends the Court Funds Rules 2011, which concern the management of funds in court. The amendments effect various changes to reflect amendments to the CPR. The principal amendments enable funds to be paid into and out of court digitally.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 159th Update. This Practice Direction Update effected amendments to Practice Direction 51R – Online Civil Money Claims Pilot and Practice Direction 51ZB – the Damages Claims Pilot. The amendments to both Practice Directions came into effect at **11.00 a.m.** on **19 September 2023**. A single amendment was made to the former Practice Direction. It made provision for notice of change of legal representative to be effected online within the Online Civil Money Claims process. Amendments to the latter Practice Direction related to notification of claims to defendants, notification of change of representation, and an update to replace reference to the County Court Money Claims Centre with reference to the CNBC.

MISCELLANEOUS UPDATES

Department for Business and Trade Update on Litigation Funding Agreements. On 31 August 2023, the Department of Business and Trade issued the following statement in response to the Supreme Court's decision in ***R (PACCAR Inc) v Competition Appeal Tribunal*** [2023] UKSC 28; [2023] 1 WLR 2594:

> *"The Department is aware of the Supreme Court decision in Paccar and is looking at all available options to bring clarity to all interested parties."*

It may be anticipated that the necessary clarity may involve measures to give effect to the minority judgment in that decision.

Taking and giving evidence by video link from abroad – Guidance. On 1 August 2023, the Foreign, Commonwealth and Development Office issued guidance on the process by which evidence in English and Welsh civil proceedings can be given or taken from abroad. The guidance particularly provides advice on when citizens or residents of various states may give evidence in such proceedings via video-link from outside the UK. The guidance is available at: *https://www.gov.uk/guidance/taking-and-giving-evidence-by-video-link-from-abroad*.

In Detail

POST-JUDGMENT FREEZING INJUNCTIONS

In ***John E Griggs & Sons Ltd v High Firs Penthouses Ltd*** [2023] EWHC 2231 (TCC) Pepperall J considered the approach to post-judgment freezing injunctions.

Background

The claimant and defendant had entered into a construction contract. A dispute arose concerning an interim payment under the contract, which was referred to adjudication. The adjudicator found in favour of the claimant. The defendant failed to make payment to the claimant under the award. Consequently, the claimant commenced proceedings against the defendant seeking enforcement of the adjudicator's award. Judgment was, ultimately, entered by consent. Judgment was entered against the defendant for approximately £140,000. The defendant subsequently gave notice that it entered to bring a cross-claim for some £443,000 approximately against the claimant. It indicated that it would not make payment further to the consent judgment, but would give credit for the amount. It also, amongst other things, indicated that it would sell the last remaining property developed under the construction contract.

The claimant sought a freezing injunction. It did so on the basis that if the last remaining property were sold there was a real risk of dissipation of the defendant's assets. It was submitted that that was the only valuable asset that the defendant had. Should the defendant sell the property, it was further submitted that there was a real risk that the defendant would render itself judgment proof by transferring the proceeds or sale or otherwise dissipating them. Additionally, the claimant submitted that the application be heard on a without-notice basis. It was submitted, in that respect, that notice would enable the defendant to take steps to frustrate the application.

Decision

Pepperall J dismissed the application. In doing so he considered first the application to proceed on a without-notice basis. He accepted that there were good reasons for applying without notice. In doing so, however, he rejected a submission that urgency justified proceeding in this way. The application had not been filed until 25 August, with a skeleton argument in support not filed until 5 September. This following the defendant indicating its position by letter on 20 June 2023. Furthermore, Pepperall J noted that, while it was generally the case, that freezing injunctions could be frustrated by giving notice, the position was not so clear where the subject of the application was not money in a bank account but, rather, was an interest in land. In the present case, as the application was not limited to physical property it was appropriate to apply the general approach (at [13]).

The implication was clear that practitioners should be mindful of considering whether proceeding without-notice was justified where the assets to be subject to the injunction were not as readily disposable as money.

In so far as the delay was concerned, that did not speak against exercising the court's discretion in favour of the claimant to grant the injunction. The delay had also not prejudiced the defendant, the claimant had a valid judgment in its favour and not just an arguable case (i.e., the basis for the grant of an injunction was stronger in this case as it was sought post-judgment) (at [15]–[16]).

Pepperall J also highlighted the need for evidence to be provided as required by CPR PD 32, para.1.4(2). In the present case evidence was not given by way of affidavit, as required by that provision. Notwithstanding that non-compliance, the evidence was considered as it had been given by a solicitor and confirmed by a statement of truth and that it would be refiled in the required fashion (at [14]).

In determining whether to grant the freezing injunction, the court had to consider whether there was a real risk of the judgment not being satisfied through the improper dissipation of the defendant's assets. That was well-established. It remained the case notwithstanding the fact that a freezing injunction is sought post-judgment. That remained the position following the decision in ***Michael Wilson and Partners Ltd v Emmott*** [2019] EWCA Civ 219; [2019] 4 W.L.R. 53. There was nothing in that case to suggest otherwise (at [19]–[24]). It was important to note, however, that it *may* well be easier to satisfy the test post-judgment than prior to judgment. As Pepperall J put it:

> *"[24] While this is a post-judgment application, it is therefore still necessary to consider whether there is a real risk of the judgment not being satisfied because of an unjustified dissipation of [the defendant's] assets. Gee observes, at para. 12-040, that what might have been justifiable before judgment might become unjustifiable once there is a judgment and the judgment creditor is entitled to be paid. Thus the hurdle remains even if it is more easily overcome."*

On the facts in the present case there was no proper grounds for granting the freezing injunction. There was no evidence to suggest that the defendant was attempting to sell the property at an undervalue or that it was intended to do anything other than realise the full value of the property. There was no evidence before the court as to what the defendant intended to do with the proceeds of sale or, more importantly, of any intention or attempts to be made to dissipate them (at [25]–[30]). Moreover, it was neither just nor convenient to make an order. Granting the injunction would likely frustrate the sale of the property (at [31]). It was also the case that the injunction had, to a degree, been sought due to the claimant being unable to progress an application for a charging order over the property. Given that there had been ample time to obtain a more focused form of relief, the charging order, it would not be just or convenient to grant the injunction (at [32]–[33]). Care should therefore be taken to ensure that parties seeking such injunctions explore less draconian options, particularly more focused ones, and do so with alacrity, before considering making applications for freezing injunctions, not least post-judgment ones.

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