# CIVIL PROCEDURE NEWS

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# In Brief

## Cases

■ **Riniker v Al-Turk** [2023] EWHC 2910 (KB), 17 November 2023, unrep. (Ellenbogen J)

*Applications to set aside orders made on the court's own initiative*

**CPR r.3.3(5), Pt 23**. The applicant sought to challenge a final charging order by way of appeal. The appeal was struck out. An appeal from the strike out was allowed. In allowing the appeal, Ellenbogen J provided guidance on the approach to take to applications where a party sought to challenge an order made by the court on its own initiative. While that guidance concerned the pre-October 2023 versions of CPR Pt 23 and its practice direction, the matters discussed remain substantively the same under the post-October 2023 rules. It was clear that applications under CPR r.3.3(5)(a) to set aside orders made on the court's own initiative are required to comply with the provisions of CPR Pt 23. As the judge explained,

> *"[21] I reject the appellant's submission that an application made under CPR 3.3(5)(a) need not comply with Part 23, both as a matter of principle and having regard to the wording of the rules and practice directions considered above. The distinction for which she contends between an application to set aside an order made of the court's own motion and an application on the applicant's initiative is misconceived. First, the court is not acting in breach of the CPR by making an order without hearing from the parties; it is acting in accordance with the power expressly conferred by rule 3.5(4). Secondly, there is good reason for the requirement that an application have the content prescribed by Part 23 and PD 23A, in the absence of which it is likely to be difficult for the court and other parties to proceedings to understand the nature and bases of the application being made. Thirdly, there is no reason why a fee should not be payable where an applicant applies to set aside orders which, properly considered, might well have substantive merit. None of the authorities on which the appellant relied was concerned with the way in which an application under CPR 3.5 is to be made, as distinct from the substantive right to bring it. The fact that an application is required to comply with Part 23 does not render the rule which confers the entitlement to make it redundant."*

(See ***Civil Procedure 2023*** Vol. 1, para.3.3.2.)

■ **Otto v Inner Mongolia Happy Lamb** [2023] EWHC 2920 (Ch), 20 November 2023, unrep. (HHJ Paul Matthews sitting as a judge of the High Court).

*Withdrawal of an interim injunction – non-application of provisions concerning discontinuance*

**CPR r. 3.1(2)(m), Pt 38**. Proceedings were brought further to the Companies Act 2006, concerning allegations of unfair prejudice. The petitioners applied for an interim injunction. They subsequently sought to withdraw the application. An issue arose as to whether the withdrawal of the application was a discontinuance further to CPR Pt 38. **Held**, CPR Pt 38 applied to the withdrawal of a claim, and not the withdrawal of an application within proceedings. As the judge put it,

> *"[15] . . . . I accept, of course, that an application for an interim remedy is not part of the final relief sought in the prayer of the claim. But it does not follow that that application represents a separate 'claim' within the meaning of rule 38.1, and thus attracts the rules about discontinuance. In my judgment, the claim for the purposes of Part 38 is whatever is the subject of the claim form or other originating process, here a petition under the Companies Act 2006. That complains of conduct unfairly prejudicial to the petitioners, and seeks relief from that conduct, inter alia in the form of an order requiring some or all of the first five respondents to acquire their shareholdings in the sixth to eight respondents at their fair values, and also damages. It is a claim created by statute. The application in that claim for an interim injunction is not itself part of that claim. As it happens, and unlike the trespass example, there is no claim to a permanent injunction either. It is simply part of the procedures available to preserve the position until the trial of the petition and the possible grant of a permanent remedy.*
>
> *[16] In my judgment, where an application for an interim remedy in an existing claim or other originating process is deliberately not pursued, that does not amount to a discontinuance of a claim or a part of a claim within Part 38 of the CPR. Accordingly, it is not necessary to serve notice of discontinuance, and the costs consequences set out in rule 38.6 do not apply. Instead the applicable rules must be found elsewhere."*

Furthermore, as there was no specific provision that governed the withdrawal of interim applications, the court's discretion fell under the general case management power set out in CPR r.3.1(2)(m):

> *"[17] The question therefore arises as to the appropriate mechanism, if any, by which an interlocutory application not proceeded with may be formally brought to an end, if the answer is not discontinuance. Sometimes an application not proceeded with is simply dismissed, as where the applicant does not attend court, and the respondent applies for dismissal. Here, however, the applicants seek to withdraw their application. Both counsel agreed that (if discontinu-*

*ance did not apply) no rule provided expressly for this case. They also said they had not found any relevant caselaw. I referred to CPR rule 3.1(2)(m). This provides as follows:*

> *'Except where these Rules provide otherwise, the court may –*
>
> *[ ... ]*
>
> *(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective...'*

*[18] In the recent case of Parrot Pay Ltd v Goddington Pierce Ltd [2023] EWHC 2774 (Ch), where the same question of power to terminate an application arose, I said this:*

> *'9. ... CPR rule 3.1(2)(m) does allow the court to take any step or make any order for the purpose of managing the case and furthering the overriding objective. I have on at least one previous occasion (Agents Mutual v Moginnie James Ltd [2016] EWHC 3384 (Ch)) held that this power extends to permitting amendments to be made to applications once issued. I can see no reason why the width of those words would not extend to permitting an application to be withdrawn, instead of simply amended. So, I hold that that is possible. Of course, any permission given by the court to withdraw an application would be on such terms as the court might consider appropriate, including costs or other consequential matters.'*

*I adhere to that view. In my judgment, the court has power to permit the withdrawal of an interim application under rule 3.1(2)(m), and on such terms as it may think fit. The applicants seek to withdraw the application, and the respondents do not object. I will therefore permit that withdrawal."*

***Parrot Pay Ltd v Goddington Pierce Ltd*** [2023] EWHC 2774 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2023*** Vol. 1, paras. 3.1.13, and 38.5.2.)

■ **UK P&I Club NV v Republica Bolivariana de Venezuela** [2023] EWCA Civ 1497, 20 December 2023, unrep. (Vos MR, Popplewell and Phillips LJJ)

*State immunity – injunctive relief and specific performance*

**State Immunity Act 1978 s.13(2)(a)**. A Venezuelan navy patrol boat sank in 2020 following a collision with the RCGS Resolute, which was insured by the first claimant/appellant: UK P&I Club NV. Proceedings were brought by Venezuela in both Dutch Curaçao and Venezuela against, amongst others, the Resolute's P&I insurer. The applicable insurance contract provided for claims to be resolved via arbitration in London. In March 2021, the High Court granted an anti-suit injunction on a without-notice basis against Venezuela. The question arose whether Venezuela could claim state immunity in respect of the injunction. The High Court held that it was able to claim state immunity and, as such, a permanent anti-suit injunction could not be granted against Venezuela (***UK P&I Club NV v Republica Bolivariana de Venezuela (RCGS 'Resolute')*** [2022] EWHC 1655 (Comm)). An appeal to the Court of Appeal was dismissed. The Court of Appeal **held** s.13(2)(a) of the 1978, which prohibits the grant of injunctions and specific performance against States, is compatible with art.6 of the European Convention on Human Rights. It is as it falls within "*a range of possible rules consistent with international practices*" (at [36]–[43]): ***Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*** (2017) distinguished. Furthermore, there was no rule of customary international law that would classify injunctive relief, including anti-suit injunctions, as part of the court's enforcement jurisdiction (at [51]). If there were, they would not have been subject to the application of state immunity (at [44]). The Court also held that s.13(2)(a) of the 1978 Act was also justifiable, as a proportionate restriction on art.6 of the ECHR, by reference to UK domestic policy (at [52]–[56]). Finally, it noted *obiter* that, in any event, if s.13(2)(a) of the 1978 Act were incompatible with art.6 of the ECHR the court had no power to read it down under s.3 of the Human Rights Act 1998, so as to recraft it to enable injunctions to be awarded in such circumstances (at [57]–[60]). ***Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*** [2017] UKSC 62; [2019] A.C. 777, UKSC, ref'd to. (See ***Civil Procedure 2023*** Vol. 1, para. 40.10.1; Vol.2, para.2D-20.)

■ **Galliani v Sartori** [2023] EWHC 3306 (Comm), 21 December 2023, unrep. (Philip Marshall KC sitting as a deputy judge of the High Court)

*Entry of judgment – meaning*

**CPR r.12.3(1)(a), r.13.12**. Default judgment was entered following the defendant's failure to file an acknowledgment of service. The defendant subsequently applied for relief from sanction, an extension of time to serve the acknowledgement of service, and an order setting aside the default judgment. **Held**, the default judgment was set aside. No order was made on the other two applications. In reaching his decision, the deputy High Court judge considered if the default judgment was a regular judgment. He noted that default judgment must be set aside if it was not entered regularly. One reason why it may not have been entered regularly was that "at the date judgment is entered" the defendant had not filed an acknowledgement of service: CPR r.12.3(1)(a), r.13.12 (at [30]). In the present case, the acknowledgement of service

was filed on the same day the order for default judgment was made. As a consequence, it was necessary to consider what was meant by "entry of judgment" in CPR r.12.3(1)(a) (at [32]). As the deputy High Court judge noted, entry of judgment refers to the drawing up and sealing of a judgment. As he put it,

> *"[33] The meaning accorded to 'entry of judgment' prior to the CPR was explained in Holt v Hodgson (1889) 24 QBD 103 by Lord Esher MR at 107 where he stated: 'Pronouncing judgment is not entering judgment; something has to be done which will be a record, and so the judgment that the judge has pronounced is the judgment which is to be entered'. This approach underlies the analysis in cases such as In re Barrell Enterprises Limited [1973] 1 WLR 19 and (post-CPR) in Stewart v Engel [2000] 1 WLR 2268 and Re L-B (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 63, which explain how the court may revise a judgment between the time at which it is pronounced and the time at which an order is drawn up and sealed.*
>
> *[34] The process of entry of judgment has long been equated with perfecting a judgment which is now carried out by the process of drawing up and sealing as provided for in CPR rule 40.2(2)(b) (see Millenstead v Grosvenor House (Park Lane) Limited [1937] 1 KB 717, at 726, Pittalis v Sherefettin [1986] QB 868 and Paulin v Paulin [2010] 1 WLR 1057, at [30])."*

Given this, the default judgment was an irregular judgment. It was so as the order had been drawn up and sealed when an acknowledgement of service had been filed, albeit it was filed on the same day as the decision to grant default judgment was made (at [35]). ***Holtby v Hodgson*** (1889) 24 Q.B.D. 103, CA, ***Millensted v Grosvenor House (Park Lane) Limited*** [1937] 1 K.B. 717, CA, ***In re Barrell Enterprises*** [1973] 1 W.L.R. 19, CA, ***Pittalis v Sherefettin*** [1986] Q.B. 868, CA, ***Stewart v Engel*** [2000] 1 W.L.R. 2268, CA, ***Paulin v Paulin*** [2009] EWCA Civ 221; [2010] 1 W.L.R. 1057, CA, ***Re L-B (Children) (Preliminary Finding: Power to Reverse)*** [2013] UKSC 8; [2013] 1 W.L.R. 634, UKSC, ref'd to. (See ***Civil Procedure 2023*** Vol. 1, para. 13.2.1.1.)

■ **Westrop v Harrath** [2023] EWCA Civ 1566, 22 December 2023, unrep. (Lewison, Moylan and Coulson LJJ).

*Suspended committal order – no public hearing required*

**CPR r.71.8**. The respondent sued the appellant for libel successfully. The respondent subsequently applied under CPR Pt 71 for the appellant to attend court to be questioned concerning his financial position. Subsequent to the appellant's non-attendance, a suspended committal order was made. The appellant appealed on various grounds based on alleged non-compliance with the requirements of CPR Pt 71, as well as matters said to flow from his being a resident of the United States of America, the consequence of which was that he had not received notice of the procedure. **Held**, the suspended committal order was set aside by the Court of Appeal. In reaching that decision, Coulson LJ concluded that there had been several ways in which the appellant, a litigant-in-person, had failed to comply with the requirements of CPR r.71.3 and r.71.5. While the appellant was not to be criticised for these issues, they did amount to material non-compliance, as they included a failure to personally serve the appellant and no affidavit of service. Coulson LJ also noted that there was no requirement in CPR r.71.8, contrary to the suggestion in the commentary in ***Civil Procedure 2023***, Vol. 1 para. 71.8.3, that a suspended committal order had to be made at a hearing. As Coulson LJ put it,

> *"[39] The first point to decide is whether or not the making of an order under r.71.8 requires a hearing in public. The rule does not say so. It contains none of the provisions which one would expect if such a hearing was required. So the highest it can be put is by reference to r.81.8(1), which provides that 'all hearings of contempt proceedings shall, irrespective of the parties' consent, be listed and heard in public unless the court otherwise directs.' The note in the White Book at r.81.7.3 suggests that, in consequence, any consideration of an order under r.71.8 should be in public.*
>
> *[40] I respectfully disagree with that passage in the commentary in the White Book. When r.71.8 is read as a whole, I think it is plain that it was not intended that a suspended committal order should be made at a public hearing. First, r.71.8(1) and (2) explain that the matter is referred to a High Court Judge or Circuit Judge by an administrative process. It is not an application by any party. Secondly, there is no requirement in r.71.8 that the parties be notified in advance that the matter is being considered by a judge, or that the matter should be listed in open court. Thirdly, r.71.8(3) makes clear that any such committal order will be suspended, provided that the judgment debtor attends court at the time and place specified. The suspended committal order will not come into force unless the judgment debtor fails to attend court. That also suggests that the making of the suspended order itself, although requiring consideration by a judge, is part of an administrative function and does not require a hearing in open court.*
>
> *[41] That also appears to have been the conclusion of this court in Broomleigh. At [22(a)], the court concluded that the debtor's rights under Article 6 were not infringed by this process, since the debtor had the opportunity to challenge the order before it was enforced. As part of the r.71.8 process, this court said that the judge must provide written reasons for the suspended committal order (to be included as a recital in the order). The need for written reasons therefore replaced the usual judgment in open court. Furthermore, at [22(b)(i)], the court talked about the judge giv-*

*ing directions for a hearing, which necessarily assumed that the suspended committal order itself was made without such a hearing."*

That position accords with the approach taken prior to the revision of CPR Pt 81, as was made clear in para.8 of the ***Practice Guidance: Committal for Contempt of Court – Open Court*** (24 June 2015). Coulson LJ went on to explain that, where a suspended committal order is made, it is: i) necessary to list the documents that the court has considered in making that order (at [45]); ii) the process whereby a court makes such an order is one where the court acts on its own initiative (at [47]); iii) where a suspended committal order is wrongly made it can be set aside as of right. Accordingly, such orders must contain the notice required by CPR r.3.3(5) (at [48]); iv) while CPR Pt 71 and Pt 81 are separate processes and ought to be kept separate, a suspended committal order ought to make reference to the right to representation and/or to legal aid (at [50]–[55]). ***Broomleigh Housing Association Ltd v Okonkwo*** [2010] EWCA Civ 1113; [2011] C.P. Rep. 4, CA, ref'd to. (See ***Civil Procedure 2023*** Vol. 1, para. 71.8.3.)

■ **Phones 4U Ltd (in administration) v EE Ltd** [2023] EWHC 3378 (Ch), 12 January 2024, unrep. (Roth J)

*Monetary award in euros – interest applicable on costs*

**CPR r.44.2(6)(g)**. Claims in long-running litigation were dismissed. An issue arose as to the rate of interest to be applied to the second and third defendants' costs. Those costs were paid in euros. Ordinarily, the pre-judgment interest rate applied, when costs are payed in sterling, is that set by the Bank of England's rate plus a percentage that is determined by reference to the class of borrower that the receiving party belongs to (at [4], noting ***Civil Procedure 2023***, Vol. 1, para. 44.2.29). That rate was noted as not being applicable where the receiving party is based abroad and has incurred their litigation costs in a foreign currency. Applicable principles governing the approach are the same for interest on costs as they are for the award of interest on damages (at [5]): see, for instance, ***The "Pacific Colocotronis"*** (1981) at 46. The majority of the authorities on interest on damages deal with the situation where interest is calculated by reference to the US dollar. There were apparently no authorities where interest on damages was calculated by reference to the euro (at [6]). However, in ***Slocom Trading Ltd v Tatik Inc*** (2013) interest on pre-judgment interest on a judgment given in euros was awarded at 1% over the European Central Bank (ECB) base rate. The parties to the present case accepted that ECB rates were applicable to the immediate question. The ECB has various rates that could have applied. Roth J determined that the relevant rate, which was, it appears, the one also applied in ***Slocom Trading Ltd v Tatik Inc*** (2013), was the ECB's "main refinancing operations rate" or MRO rate plus 1.5%, as both parties fell into the category of first class borrowers (at [7]–[9]). Turning to post-judgment interest on costs, Roth J noted that the Judgment Act 1838 applies to interest where judgment is given in sterling. By way of contrast, s.44A of the Administration of Justice Act 1970 applies where judgment is given in a currency other than sterling, and that the interest rate applicable is to be determined by the court as it thinks fit. As the costs in the present cases were, following detailed assessment, to be in euros, s.44A applied. As such, it was for Roth J to determine the interest rate applicable. In doing so the compensatory principle was the appropriate starting point: see ***Novoship (UK) Ltd v Nikitin*** (2014) at [133]–[136]. Roth J accepted that in the present case it would be unjust to arrive at a conclusion that would see a strong divergence between the parties who are receiving their costs in euros and those that receive theirs in sterling. As such, the appropriate post-judgment interest rate was the MRO rate plus 2.5% (at [10]–[13]). ***The "Pacific Colocotronis"*** [1981] 2 Lloyd's Rep. 40, CA, ***Secretary of State for Energy and Climate Change v Jones*** [2014] EWCA Civ 363, unrep., CA, ***Novoship (UK) Ltd v Nikitin*** [2014] EWCA Civ 908, unrep., CA, ***Slocom Trading Ltd v Tatik Inc*** [2013] EWHC 1201 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2023*** Vol. 1, para. 44.2.29.)

■ **Al Sadeq v Dechert LLP** [2024] EWCA Civ 28, 24 January 2024, unrep. (Underhill VP, Males and Popplewell LJJ)

*Legal professional privilege – iniquity exception – test – non-extension of Three Rivers principle to litigation privilege*

The Court of Appeal considered the threshold test for the application of the iniquity exception to legal professional privilege. As LPP is a single, unitary privilege, it thus considered the threshold test as the iniquity exception applied to both legal advice privilege and litigation privilege. In doing so it provided a clear summary of the nature of the iniquity exception, and of the relevant authorities (at [52]–[107]). In ***Kuwait Airways Corporation v Iraqi Airways Co (No 6)*** [2005], Longmore LJ, concluded that the approach to the iniquity exception was as follows:

*"[60] . . .*

> *'42. I would therefore summarise the position thus: (1) the fraud exception can apply where there is a claim to litigation privilege as much as where there is a claim to legal advice privilege; (2) nevertheless it can only be used in cases where there is a strong (I would myself use the words "very strong") prima facie case of fraud, as there was in Dubai Aluminium Co Ltd v Al-Alawi [1999] 1 WLR 1964 and there was not in Chandler v Church 137 NLJ 451; where the issue of fraud is not one of the issues in the action, a prima facie case of fraud may be enough as in the Hallinan case [2005] 1 WLR 766.'"*

Popplewell LJ, with whom Underhill and Males LJJ agreed, expressed concern about the second limb of Longmore LJ's test. It left the law uncertain as to what was meant by prima facie case, strong or very strong prima facie case (at [61]). As he put it,

> *"[62] It is highly desirable for the efficient conduct of both civil and criminal litigation, to both of which the iniquity exception applies, that the parties and their legal advisers who are involved in disclosure should be provided with as much clarity as possible on this question. In other interlocutory contexts, expressions have been used on which authoritative guidance has been given. In summary judgment applications it is 'real prospect of success' on which there is plentiful authority: see e g Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15]. In the interim injunctions jurisprudence there must be a serious issue to be tried as to the merits. In jurisdictional disputes there must be a serious issue to be tried on the merits and a good arguable case as to whether the claim comes within one of the jurisdictional gateways, both of which expressions have received extensive judicial interpretation: see e.g. AK Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC [2012] 1 WLR 1804 at [71], Brownlie v Four Seasons Holdings Inc.[2017] UKSC 80 [2018] 1 WLR 192 at [4]-[8]."*

Having reviewed the authorities, Popplewell LJ concluded that the appropriate formulation for the threshold merits test for the iniquity exception, the second limb of Longmore LJ's test, was a prima facie test to, generally, be determined on the balance of probabilities. As he put it,

> *"[63] I have reached the conclusion that save in exceptional cases, the merits threshold for the iniquity exception is a balance of probabilities test: the existence of the iniquity must be more likely than not on the material available to the decision maker, whether that be the party or legal adviser determining whether to give or withhold disclosure, or the court on any application in which the issue arises; and that in an interlocutory context there is no distinction to be drawn between cases in which the iniquity is one of the issues in the proceedings and those where it is not. This, in my view, is what the cases speaking of a prima facie case have had in mind, and what is meant by a prima facie case in this context (whatever it may mean in other contexts)."*

Also see [108]. Additionally, the Court of Appeal had to consider whether the ***Three Rivers*** principle applied to litigation privilege: see ***Three Rivers District Council v Governor and Company of the Bank of England (No 5)*** (2003). That principle was noted (at [33(4)]) as being the

> *"proposition that it was not all communications with representatives of the client which attracted legal advice privilege, but only those which took place with employees and representatives who were specifically authorised to seek and receive the advice".*

It was noted that the principle had been much criticised and not followed in other jurisdictions, see, for instance, "SFO v ENRC at [123]-[130]; R (Jet2.com) v Civil Aviation Authority [2020] EWCA Civ 35 [2020] QB 1027 at [47]-[58]; and Hollander on Documentary Evidence 14th edn. 17-10 to 17-11" (at [222]). While the Court of Appeal was bound by the decision in ***Three Rivers (No 5)*** (2003), it declined to extend its application to litigation privilege. As Popplewell LJ put it,

> *"[223] Its rationale does not, however, apply to litigation privilege. Legal advice privilege is confined to communications which the lawyer has with its client (either directly or through the intermediate agent of either), and does not extend to communications with third parties. It is necessary, therefore, to have a rule for the purposes of legal advice privilege as to which natural persons qualify as 'the client' where the client is an entity with legal personality, such as a company. By contrast, litigation privilege extends to communications with third parties, and all legal and natural persons come within the scope of that description; it encompasses any legal or natural person who is not the client. It would include employees of the client, communication with whom fell outside the scope of legal advice privilege in application of the Three Rivers (No 5) principle because they were not authorised to seek or receive legal advice on behalf of the client. If an individual who receives the instructions at a third party company to provide information is not authorised to do so, that individual is still a third party, just as much as an individual not authorised to give or receive legal advice."*

And see [224]–[225]. ***Three Rivers District Council v Governor and Company of the Bank of England (No 5)*** [2003] EWCA Civ 474; [2003] Q.B. 1556, CA, ***Kuwait Airways Corporation v Iraqi Airways Co (No 6)*** [2005] EWCA Civ 286; [2005] 1 W.L.R. 2734, CA, ref'd to. (See ***Civil Procedure 2023*** Vol. 1, paras. 31.3.6, 31.3.19.)

# Practice Updates

## STATUTORY INSTRUMENTS

**Civil Procedure (Amendment) Rules 2024 (SI 2024/106)**. The latest statutory instrument effecting amendments to the CPR comes into force on 6 April 2024. It makes several amendments to update internal cross-references in CPR Pts 8,

15 and 19. Additionally, it makes further amendments to Pts 26, 28, 31 and 45 consequent upon the introduction of the intermediate procedural case management track. Important amendments include: further provision in CPR Pt 26 for the allocation of clinical negligence claims and trespass claims against public authorities to the intermediate track; provision in Pt 28 for case management conferences in claims allocated to the intermediate track to be discretionary rather than mandatory; clarification that changes to the table for fixed recoverable costs in table 12, 14 and 15 of PD 45 apply to orders for costs made on or after 6 April 2024 in claims issued before that date. It also clarifies that Pt 45 does not apply to costs incurred in, or in connection with, inquests. The Amendment Rules also amend CPR Pt 54 and Pt 81. The former amendments, amongst other things, highlight the time limit that arises under the Public Service Obligations in Transport Regulations 2023, while also making provision for judicial review claimants to file a reply to an acknowledgment of service. The latter amends the requirement concerning penal notices in CPR r.81.4(e) consequent to the decision in ***Re Taray Brokering Ltd*** [2022] EWHC 2958 (Ch), clarifying that the notice does not form part of the order.

## PRACTICE DIRECTIONS

**CPR PRACTICE DIRECTION – 163rd Update.** This Practice Direction Update introduces a range of amendments. It introduces, as from the day after the Update was agreed (albeit no date is specified on the published Update as to when that was. It is assumed agreed at some point prior to its publication on 1 February 2024), new examples of civil restraint orders as part of PD 34C. It also extends, as from 1 February 2024, PD51O's duration to 1 November 2024. It also extends, as from that date, that pilot scheme's application to the Administrative Court. It makes further amendments, as from 6 April 2024, to PD 23A, 28, 44, 45, 46, 52C, 52D, 54A, 54D, and 57AC. The amendments to PD28, 45 and 46 concern fixed recoverable costs, and particularly respond to matters that the Ministry of Justice consulted on in 2023 (see ***Fixed Recoverable Costs Consultation Response***, which is available at: *https://assets.publishing.service.gov.uk/media/65ba6a20f51b10000d6a7e30/fixed-recoverable-costs-consultation-response.pdf*). The amendments to PD 52D clarify the time limit for appealing from decisions of the Investigatory Powers Tribunal. Amendments to PD 54A and 54D are consequent on the amendments made to CPR Pt 54, noted above. The amendment to PD 57AC exempt pension rectification scheme deeds, rules or other governing documents from its ambit.

**UK Supreme Court Practice Directions**. On 22 January 2024, Lord Reed PSC issued a Practice Note setting out amendments to the UKSC Practice Directions. Amendments were made to PD 3, 4, 6 and 7. The amendments generally concern the consolidation of changes that have previously been made to the Supreme Court's practice, particularly concern the shift to greater use of electronic documents. Comparable amendments were made to the Privy Council Practice Directions. The Practice Note is published here: *https://www.supremecourt.uk/docs/practice-note-january-2024.pdf*. A tracked changes version of the practice directions is published here: *https://www.supremecourt.uk/docs/pd-amendments-uksc-jan-2024.pdf*.

## PRACTICE GUIDANCE

**Practice Note – London Circuit Commercial Court**. On 5 February 2024, the judge in charge of the London Circuit Commercial Court reissued a Practice Note concerning the issue of proceedings in that court. It was originally issued on 7 December 2023, see ***Civil Procedure News No. 1 of 2024***. It again reminds practitioners that claims with a financial value of less than £500,000 ought to be issued in an appropriate County Court centre and not the London Circuit Commercial Court and that the practice adopted in ***Gordiy v Dorofejeva*** [2023] EWHC 3036 will be applied rigorously to claims that are issued in the latter court rather than the former. The reissued guidance is reprinted below.

### *Practice Note – London Circuit Commercial Court*

1. *In Section B.7(b) of the current edition of the Circuit Commercial Court Guide, practitioners were informed that the current practice of the LCCC is to transfer claims with a financial value of less than £500,000 or the foreign currency equivalent (exclusive of interest and costs) to an appropriate County Court unless retention is justified by reason of the factors set out in CPR r. 30.3(2). Notwithstanding that indication, practitioners have continued to attempt to issue claims in the LCCC with a value of less than £500,000 even though none of the factors set out in CPR r. 30.3(2) justify either issue in or retention of the case by the LCCC, and defendants to such actions have not themselves raised the issue of transfer with the court, but often issued their own applications.*

2. *In Gordiy v. Dorofejeva and another (external link) [2023] EWHC 3036 (Comm), Foxton J addressed a similar problem faced by the Commercial Court. Foxton J indicated that in future cases that should not have been commenced in the Commercial Court would be transferred out, however close to a hearing the case might be (whether on the application of a claimant or a defendant), once the proceedings come to the attention of a judge. He added that Parties " ... who*

*are keen to avoid the delay which might follow from having to re-fix a hearing in the court to which the claim has been transferred will only have themselves to blame, by failing to raise the issue of transfer at an appropriately early stage."*

3. *Whilst cases commenced in the LCCC should all be triaged on issue, there may be cases where this step has not been taken as a result of administrative oversight or because an application is made without notice before the Claim can be triaged. The practice identified by Foxton J in Gordiy v. Dorofejeva and another (ibid.) will be firmly applied in the LCCC with immediate effect to any case with a value of less than the figure identified in Paragraph 1 above unless retention is justified by reason of the factors set out in CPR r. 30.3(2).*

4. *This Practice Note has been issued with the concurrence of the Judge in Charge of the Commercial Court.*

*Mark Pelling*
*His Honour Judge Pelling KC,*
*Judge in Charge of the London Circuit Commercial Court*

**Practice Note (Admiralty: Assessors' Remuneration) 2024**. On 16 January 2024, Andrew Baker J, the Admiralty Judge, issued the Practice Note (Admiralty: Assessors' Remuneration) 2024. This Practice Note updates the guidelines on remuneration and replaces Practice Note (Admiralty: Assessors' Remuneration) of 30 July 2021 (see ***Civil Procedure 2023*** Vol.2, para.2D-120). The Practice Note took effect on 1 January 2024 and applies to all actions and appeals that commenced on or after that date. The 2021 Practice Note continues to apply to those actions and appeals that commenced before 1 January 2024.

The Practice Note is reprinted below.

### *Practice Note (Admiralty: Assessors' Remuneration) 2024*

1. *This guidance sets out the remuneration terms which should normally apply to Trinity Masters and nautical and other assessors summoned to assist the Court of Appeal, the Admiralty Court on the trial of an action, or a Divisional Court of the King's Bench Division, in the absence of special directions given in a particular case. It is issued as a Practice Note by Mr Justice Andrew Baker, with the agreement of Sir Geoffrey Vos, Master of the Rolls, and Dame Victoria Sharp, President of the King's Bench Division.*

2. *By way of fees:*

   - *Reading time spent on or from the (first) day allocated to the judge for reading time (or earlier if approved by the judge on request), but not exceeding the reading time allocated to the judge: £175 per hour up to £875 per day;*
   - *Full day's attendance at hearing:* £875;
   - *Half day's attendance at hearing:* £437.50;
   - *Attendance at court when case is not heard: £175 per hour;*
   - *Consultation with the court on a day when there is no hearing:* £437.50;
   - *Attendance to hear reserved judgment (including any consultation with the court on the same day):* £218.75;
   - *If attendance is cancelled less than two days before the hearing: £437.50.*

3. *By way of expenses:*

   - *Reimbursement of reasonable travel expenses;*
   - *If resident too far from Court for it to be reasonable to commute for and during the hearing, reimbursement of reasonable sums for overnight accommodation and a reasonable allowance for overnight subsistence.*

4. *Where there is a cross appeal, or where appeals are heard together, or where actions are consolidated or tried together, the proceedings should be treated as one appeal or action.*

5. *Fees and expenses should be paid by the appellant or the claimant without prejudice to any right to recover from any other party the amount so paid on assessment.*

6. *The guidance in this Practice Note takes effect from 1 January 2024 and applies to all actions and appeals the hearing of which begin on or after that date. For guidance concerning actions and appeals the hearing of which began before 1 January 2024 see the preceding Practice Note of 30 July 2021.*

7. *This guidance is subject to periodic adjustment, but will not be adjusted more often than every two years.*

*Mr Justice Andrew Baker*
*16 January 2024*

**UK Supreme Court – Help with fees guidance**. On 25 January 2024, the Supreme Court issued guidance on how to apply for help with fees. It is issued consequent on changes to fee remission set out in the Courts and Tribunals (Fee Remissions and Miscellaneous Amendments) Order 2023 (SI 2023/1094). It applies where a fee relates to an application made or fee paid on after 27 November 2023. The guidance is published at: *https://www.supremecourt.uk/docs/uksc-help-with-fees-guidance.pdf*.

## MISCELLANEOUS GUIDANCE

**Bar Council – Guidance to barristers on the use of ChatGPT**. On 30 January 2024, the Bar Council issued guidance to members of the Bar on the appropriate use of ChatGPT and other such forms of generative artificial intelligence. It provides essential guidance on such assistive technology, not least through elaborating some problems that may arise from its use, e.g., the possibility that it will generate so-called hallucinatory judgments (fictitious ones). It also highlights the need for lawyers to continue to exercise independent judgment when using such technology, not least to ensure they maintain confidentiality and legal professional privilege. It also notes the need to keep up to date with rule changes and new Practice Directions, not least given the possibility that provision may (as it should) be introduced to require parties and their representatives to inform the court that they have used such technology in the preparation of their cases, not least in identifying authorities. The guidance is published at: *https://www.barcouncilethics.co.uk/wp-content/uploads/2024/01/Considerations-when-using-ChatGPT-and-Generative-AI-Software-based-on-large-language-models-January-2024.pdf*.

# In Detail

## GUIDANCE ON THE APPLICATION OF CPR r.3.9

In ***Warren v Yesss (A) Electrical Ltd*** [2024] EWCA Civ 14, the Court of Appeal (Asplin, Males and Birss LJJ) gave important guidance on the court's approach to applications for relief from sanctions made under CPR r.3.9. The specific issue in the appeal concerned the application for relief from sanctions under CPR r.3.8 and r.3.9 where a late application had been made for permission to rely on expert evidence. That evidence concerned an area that had not been dealt with in previously made directions. The application was granted as it was held that the application for permission was not one for relief from sanctions. That decision was the subject to the appeal before the Court of Appeal. The application arose in a claim for damages for personal injury alleged to have arisen when the claimant was loading goods into a van during the course of his employment.

The Court of Appeal dismissed the appeal (Birss LJ gave the reasoned judgment, with which Asplin and Males LJJ agreed). The application did not involve a breach that gave rise to application for relief from sanctions. CPR r.3.9 did not apply. Notwithstanding that, it was apparent that there had been breaches of orders made on allocation and at costs and case management conferences (CCMC), and those breaches were serious such as to raise the question whether permission to adduce the expert evidence should have been refused further to the CPR's overriding objective, e.g., CPR r.1.1(2)(e) and (g). Those breaches arose from the failure on the claimant's part to raise the issue of additional expert evidence earlier. That being said, it was within the wide ambit of the district judge's discretion to permit the claimant to adduce the additional expert evidence. That decision might properly have been different if the claim had been listed for trial. However, by apparent administrative error it had not. It could reasonably be said that matters would have been different if the matter had been listed for trial at the time the application was made (at [48]–[50]).

In giving the lead judgment, Birss LJ provides welcome guidance on the approach to take to determining whether a sanction for non-compliance arises, and thus where CPR rr.3.8 and 3.9 apply.

### Approach to CPR r.3.9

The starting point in assessing whether CPR r.3.9 is engaged is to determine if there has been a breach of a rule, practice direction or court order (at [25]). Birss LJ emphasised this, as obvious as it might sound, as the term "relief from sanctions" had–wrongly–been used to refer to the more robust approach to compliance with case management obligations, ushered in following the Jackson reforms and particularly ***Mitchell*** and ***Denton***. What is correct to say is that the "modern approach" to case management places a greater weight than previously to "compliance and the need for efficient conduct of litigation at proportionate cost". As Birss LJ went on to explain,

> *"[25] . . . . There is recognition that the need for efficiency and proportionate cost applies both in the given case and in relation to knock on effects on other cases. The basis in the rules for this general approach, as I mentioned in [Luf-*

*thansa Technik v Panasonic Avionics Corp [2023] EWCA Civ 1273] at [23], is not r3.9 and relief from sanctions, rather it is that the two principles identified are now embedded in the overriding objective ( r1.1(2)(e) and (f) ) and they play an important part in its application. That is why it can be said that the 'ethos' of Denton applies even when r3.9 (relief from sanctions) is not engaged (c.f. [FXF v Ishinryu Karate Association [2023] EWCA Civ 891] paragraph 76)."*

CPR r.3.8 and r.3.9 do not, therefore, create sanctions. They apply where a sanction has been applied (at [26]).

If a breach has been identified, the next step is to identify if a sanction has been imposed. If there is no sanction then, necessarily, there is no basis on which to seek relief from sanction (at [26]). If no sanction arises, then the issue comes to be considered by reference to the CPR's overriding objective, as would be illustrated by the situation in the present case concerning the failure to seek permission to adduce expert evidence (see below). As Birss LJ elaborated,

*"[32] . . . Rule 3.9 either applies or it does not and if not then the application will be governed by the modern approach to the overriding objective, which will in appropriate circumstances bring in the 'ethos' of Denton. . ."*

Sanctions may either be express or implied (at [26]). If express, they will be specifically set out in a rule, practice direction or order. Implied sanctions may arise in specific situations, such as those identified in ***Altomart Ltd v Salford Estates (No.2) Ltd*** [2014] EWCA Civ 1408; [2015] 1 W.L.R. 1825 and ***Sayers v Clarke Walker*** [2002] EWCA Civ 645; [2002] 1 W.L.R. 3095 (at [26]), e.g., where permission is needed to proceed where, for instance, there has been a failure to file a document such as a notice of appeal in time. Additionally, there is another, a third, type of sanction, i.e., that identified in ***FXF v English Karate Association Ltd*** [2023] EWCA Civ 891 at [59]–[60], i.e., where a step needs to be taken consequent upon non-compliance. The example given in that case was the need to take a step following entry of default judgment or the striking-out of a claim for non-attendance at trial.

In considering implied sanctions, it is important to ascertain if the rule, etc. in question can properly be said to imply one. As Birss LJ went on to explain,

*"[29] In relation to implied sanctions counsel referred to the judgment of Martin Spencer J in Mark v Universal Coatings & Services [2019] 1 WLR 2376 (QB) . In that case the judge (at [54]) made the point that the fact a provision breached used the word 'must' does not mean there must be a sanction for non-compliance. I agreed with this in Lufthansa at [22] and still do. Putting it another way, not every rule, PD or order made or applicable in the civil justice system, even if it is couched in mandatory terms, has or needs to have a sanction already built in somewhere in the rules (or PDs or anywhere else) which is triggered when that provision is breached.*

*[30] However the judgment in Mark v Universal Coatings & Services also sought at [52] to identify the difference between the circumstances when a breach with no express sanction might attract an implied sanction, and those when a breach did not attract any sanction at all. The conclusion was that the answer depended on the significance of the circumstances the applicant found themselves in for the purposes of the litigation. While I sympathise with the attempt to identify a principled distinction to explain the cases in which implied sanctions have been identified, I cannot agree with that approach. It is too uncertain. I should say that I do agree with the judge that the degree of importance of breaches of all the rules, PDs and case management orders made by judges is variable. That is why in some cases sanctions are provided for (expressly) and in other cases they are not. Where I part company is in using that measure as a way of identifying unexpressed implied sanctions.*

*[31] Bearing in mind the importance of clarity in the procedural framework to be followed by court users, the hurdle for identifying something as an unexpressed but implicit sanction must be a high one. It has been identified in the two circumstances mentioned in the cases above. I prefer to say that the scope for identifying any further implied sanctions over and above these two must be very narrow. Bearing in mind that the Denton 'ethos' may apply even when r3.9 is not engaged, the need for further extensions of this concept is likely to be very limited."*

It was not the case, therefore, that whether a sanction was to be implied depended on the circumstances in which the parties found themselves in the litgation (at [30]). ***Mark v Universal Coatings and Services Ltd*** [2018] EWHC 3206 (QB); [2019] 1 W.L.R. 2376, which had held to that effect, was thus wrongly decided.

Birss LJ went on to summarise the approach as follows,

*"[33] In summary, in my judgment, the general approach to working out whether a case is covered by r3.9 is to start by identifying if a rule, PD or order has been breached. If there is none then the rule does not apply. If there has been a breach then the next task is to identify any sanction for that breach which is expressly provided for in the rules, PDs or in any order. If there is no such express sanction then, outside the third category identified in FXF and the specific recognised instances of implied sanctions identified in Sayers, and Altomart (i.e. notices of appeal and respondent's notices), there is no relevant sanction for the purposes of r3.9, and so that rule does not apply. Only if there is both a breach and a sanction does r3.9 apply. It is worth noting that these circumstances are all concerned with sanctions*

*which take effect as a result of a breach without further intervention. The court can always decide later to impose a sanction for a breach, such as a fresh order expressed as an unless order or an order for costs thrown away, but for either of those things to happen, a fresh decision would been needed.*

*[34] I would also add this, just because a rule, PD or order provides that a party needs permission to take a step, does not mean that that need for permission has been imposed as a sanction for breach of something. There are cases in which a permission requirement has indeed been imposed as an sanction – such as r32.10 as it applies to witness statements - but there are other cases in which the need for permission under the rules is plainly not there as a sanction for breach. An example which springs to mind is the general requirement for permission to amend statements of case."*

Finally, lest it be thought that the judgment could be interpreted as the Court of Appeal stepping back from the approach adopted in ***Mitchell*** and ***Denton***, Birss LJ stressed that it should not be interpreted in that way:

*"[35] Some might misunderstand this reasoning as a signal of some kind of rowing back from the modern approach to timeliness and procedural compliance. Not so. The structure of the rules, PDs and for that matter the directions orders made by judges all the time, are aimed at taking a modulated approach to case management. Mandatory provisions in orders, rules and PDs are meant to be adhered to. Full stop. The point is that the system can and does accommodate a scheme in which some provisions have sanctions for breach expressly provided for, and others do not."*

## Does CPR r.35.4 require an application for relief from sanctions

Birss LJ then went on to consider if there had been breaches that gave rise to an application for relief from sanction. Concluding that analysis, he turned to the question whether CPR r.35.4(1) amounted to a sanction. That rule provides that the court's permission is required before a party can either call an expert witness or adduce in evidence an expert's report. The question before the Court of Appeal was whether this provision could be categorised as a sanction. It could not. It is a condition that must be fulfilled before a party can do something. It is not a consequence arising from a failure to fulfil some other procedural obligation. To conceive of it as a sanction would be to commit a category mistake.

As Birss LJ explained it,

*"[44] The question then is whether r.35.4 is a sanction for the breaches identified. In my judgment it is not. The fact that the claimant needs permission under r.35.4 to call the pain management expert is not a consequence imposed for a breach of a rule, PD or order. The requirement for permission is imposed by the rules to control expert evidence. Parties always need that permission. The court's role in controlling expert evidence is a more searching one than in relation to fact evidence and r.35.4 plays a key role in that control. But it is not there to impose a sanction for non-compliance . . ."*

In the present case, it would have made no difference if the claimant had complied or not with orders made on allocation or at the CCMC or not. Permission to call the expert would still have been required (at [45]). It was readily apparent that CPR r.35.4 is a paradigm example of a provision that does not have a built in sanction for non-compliance. Non-compliance with the rule, as Birss LJ noted, may have negative consequences, e.g., the party seeking to call the evidence may not be permitted to do so. That, however, is a consequence of non-compliance that flows from the fact that permission had not been sought or granted. Where a rule, practice direction or court order requires permission to be obtained before a step can be taken (unlike where permission is needed following the failure to comply with an obligation, such as filing a notice of appeal), as under CPR r.35.4, that is not a sanction for non-compliance (at [46]–[47]). As such, the question whether to grant permission is one that is governed by reference to CPR r.1 (at [48]–[50]).

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