CIVIL PROCEDURE NEWS

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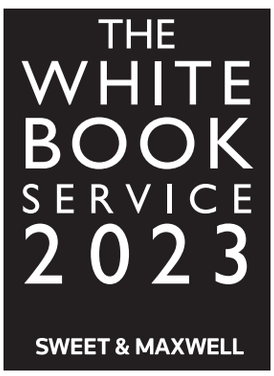
CONTENTS



In Brief

Cases

■ **ADM International Sarl v Grain House International SA** [2024] EWCA Civ 33, 25 January 2024, unrep. (Singh, Popplewell and Snowden LJJ)

Company directors – liability for civil contempt

CPR Pt 81. The Court of Appeal considered the effect that the revisions to CPR Pt 81 had on the potential liability of company directors for civil contempt. Singh LJ summarised the issue as follows,

> *"[51] A person to whom a court order is addressed is guilty of a contempt of court if they breach the court order, in accordance with principles which are helpfully summarised by Christopher Clarke J in Masri v Consolidated Contractors Intl Co SAL & Ors [2011] EWHC 1024 (Comm) at [144]-[147]. Third parties who have notice of a court order may also be guilty of contempt if they do something which is a wilful interference with the administration of justice: Seaward v Paterson [1897] 1 Ch 545, 555-6, Attorney-General v Times Newspapers Ltd [1992] 1 AC 191, 218-9. The former is often described as a civil contempt and the latter a criminal contempt. Although these labels are controversial and in some circumstances misleading, it is convenient to adopt them for the purposes of the issues which arises in this case. A criminal contempt is committed if the third party aids and abets a breach of the court order. It provides the mechanism whereby, for example, freezing orders are made effective against foreign defendants with money in English bank accounts: notice to the bank puts the bank at risk of committing a criminal contempt if it facilitates transfer of the funds, and so the account is effectively frozen.*
>
> *[52] The principal difference between civil and criminal contempt in the present context is the mental element involved in establishing the contempt, as Lord Oliver explained in Attorney-General v Times Newspapers at pp. 217-218. For a civil contempt the position was accurately summarised by Briggs J in Sectorguard Plc v Dienne Plc [2009] EWHC 2693 (Ch) at [32]: 'The mental element required of a contemnor is not that he either intends to breach or knows that he is breaching the court order or undertaking, but only that he intended the act or omission in question, and knew the facts which made it a breach of the order.' By contrast, for a criminal contempt by a third party what is required is a wilful interference in the administration of justice, which in the case of a court order requires an intention that it be breached.*
>
> *[53] Directors and officers of a corporation have been treated as a special category where the order is made against the corporation. At least since 1860 and at least until 2020 they could be treated as responsible as civil contemnors for breach of an order made against the corporation where they were culpably responsible for the corporation's failure to comply with the order in accordance with principles laid down in Attorney General of Tuvalu v Philatelic Distribution Corp Ltd [1990] 1 WLR 926 and Dar Al Arkan v Refai. An issue arises in relation to Contempt 5 as to whether the principle pre-dated 1860, and whether it survived a revision to the Civil Procedure Rules in 2020."*

Singh LJ went on to carry out a compendious review of the authorities and concluded that the contempt jurisdiction concerning company directors was a matter of substantive and not procedural law. As such it had survived the revisions to CPR Pt 81 made in 2020 (at [138]–[149]). His reasons for this, amongst others, were: (i) the power to punish for disobedience to court orders derived from the court's inherent jurisdiction to secure the administration of justice. It was thus a matter of substantive law and not derived from procedural law or legislation. Nor could it therefore be amended by rules of court; (ii) reference to substantive law in procedural rules does not render the rules the source of the substantive law nor does it indicate their source; (iii) the liability of responsible persons (directors and other company officers) was long-established and had been recognised by rules of court but not defined by such rules; (iv) the law in this area had since 1883 developed not through construction of the rules of court but through authorities concerned with the court's inherent jurisdiction concerning contempt; (v) the 2020 revision to Pt 81 did not intend to effect a change to the substantive law of contempt. Removal of what was then CPR r.81.4(3) concerning this form of liability must have been deliberate and must have been done on the understanding that it was a matter of substantive and not procedural law. In conclusion,

> *"[149] . . . The Court's jurisdiction to make orders against directors and other officers in respect of breaches of the court's orders addressed to corporate bodies is inherent; and it is based on law independent of the former CPR 81.4 and indeed of its predecessors in rules of court and the [The Common Law Procedure Act 1860]."*

Seaward v Paterson [1897] 1 Ch. 545, ChD, ***Attorney General of Tuvalu v Philatelic Distribution Corp Ltd*** [1990] 1 W.L.R. 926, CA, ***Attorney General v Times Newspapers Ltd*** [1992] 1 A.C. 191, HL, ***Masri v Consolidated Contractors International Co SAL*** [2011] EWHC 1024 (Comm), unrep., Comm., ***Sectorguard Plc v Dienne Plc*** [2009] EWHC 2693 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.81.1.2.)

■ **Gorbachev v Guriev** [2024] EWHC 247 (Comm), 31 January 2024, unrep. (HHJ Pelling KC, sitting as a judge of the High Court)

Special examiner – procedure guidance

CPR r.34.13(4). A joint application was made by the claimant and defendant that evidence from the defendant and his son be taken at the DIFC court in Dubai by the judge sitting as a special examiner. Two issues arose: first, whether the court could direct that a trial judge be appointed as a special examiner to take evidence overseas in the course of the trial; and, secondly, whether such an order can be made if the jurisdiction existed. On the first issue, it was noted that there had previously been no doubt that there was such a jurisdiction (at [8]). It was assumed to exist, for instance, in ***Peer International Corporation v Termidor Music Publishers Limited*** (2005) at [8]–[14] and ***Attorney General of Zambia v Meer Care & Desai*** [2006) at [48]–[49]. The judge also explained that Andrew Baker J in ***Skatteforvaltningen v Solo Capital Partners LLP*** (2024) (the *SKAT judgment*), in his examination of the authorities, assumed that there was such jurisdiction. The judge did, however, identify two possible points from that judgment, which might point to there being no jurisdiction to make the order sought. As he put it, concluding that the jurisdiction did exist,

> *"[11] The first is the proposition at paragraph 20 of the SKAT judgment that there is no power to make the orders sought because of the effect of CPR r.34.8, which, when read in conjunction with CPR r.34.13, is that such evidence could only be taken on commission before the start of and not during the trial. In my judgment, this would be an unduly narrow approach to those provisions since they have to be read both in conjunction with CPR 3.1(d) and (m) which to my mind enable a court to do what is appropriate in this area; and also because it ignores the role played in issues such as those I am now considering by the inherent power of the court to make appropriate orders in the management of its own procedures and the case management of the cases before it – see by analogy the approach of Chitty J in Ross v Woodward [1894) 1 Ch 38. Andrew Baker J did not in the end find it necessary to decide this point both because the parties had not addressed the point in the case before him, and because he did not need to do so, given the conclusions he reached concerning applying his discretionary analysis but he recognised that the court's general case management powers may provide an answer to any jurisdictional concerns based on the effect of CPR r. 34.8 on the scope of CPR r. 34.13 - see paragraph 21.*
>
> *[12] The other point mentioned in SKAT that might concern jurisdiction was the suggestion that by making the order the judge was giving him or herself unauthorised leave of absence. Andrew Baker J did not, and did not need to, reach any final conclusions on that point either - see paragraph 25 of his judgment. I do not immediately see how directing that evidence is to be taken by a trial judge sitting overseas as a special examiner constitutes unauthorised leave. This is not something that any of the judges who have made orders to this effect in the past, including Lindsay J and Gloster LJ, considered created an insuperable jurisdictional difficulty. I do not see that the order sought is one that involves the trial judge taking an unauthorised leave of absence. Rather it seems to me that in making the order and then carrying it into effect the judge is performing an incidental function in the course of the duties of a trial judge. In any event, along with other circuit judges, I am entitled to take leave by arrangement when I choose to do so, and if necessary the four or five days involved in the exercise that is proposed by the parties is leave which I can take without that being unauthorised."*

Having concluded that the jurisdiction existed, the judge went on to decide that, exceptionally, in the present case, taking evidence overseas via a special examiner was the least sub-optimal solution for evidence-taking (at [15]). The other and exceptionally more sub-optimal route, in this case, was taking evidence via video-link. As he noted,

> *"[13] . . . in all cases the choices between evidence being given by video link during the course of the trial on the one hand and the taking of evidence abroad by a judge using the special examiner procedure is not a choice between a sub-optimal and an optimal solution, but in truth involves deciding which of two sub-optimal solutions is the most appropriate in the circumstances of any particular case."*

Ordinarily, factors identified in the *SKAT judgment* would point to the discretion being exercised to take the evidence by video-link (at [13] and [18]) (e.g., the cost and inconvenience of a judge travelling abroad to take evidence, the absence of powers to control the evidence or the questions taken or to compel witnesses to attend for examination, the fact that it is disruptive of the trial process and inconvenient to other litigants, see *SKAT judgment* at [34]). In this case the main or sole reason to take the evidence via the special examiner process was due to witness evidence being the main or, potentially, sole means to establish the substantive issue,

> *"[14] . . . This case is concerned with a disputed oral declaration of trust for which, by definition, there are no contemporaneous documents which assist directly on the issue that has to be resolved. The factors identified by Andrew Baker J, as leading him to prefer that evidence be given by video link rather than by using the special examiner procedure, are likely to be powerful factors in most cases, particularly since the quality of video links is now much better than was the case 20 or so years ago, and judges, advocates and court officials, are much more familiar with the taking of evidence by video link. In most cases in the modern era it is highly likely that the balance will favour evidence being given by video link on cost and convenience grounds. Indeed, I make it clear that in this case, but*

for the factors that I have referred to in passing already and refer to in more detail below, that would have been my preferred choice in this case.

[15] In my judgment, exceptionally in this case the balance comes down in favour of the sub-optimal solution of taking evidence overseas using the special examiner procedure. That is so for following reasons:

i) Each of the witnesses is Russian, and either speaks no, or no sufficient English to enable their evidence to be given in English. There is no suggestion of such a linguistic problem in SKAT. It follows that in this case questions will have to be translated from English to Russian, and the answers from Russian to English, using a simultaneous translation procedure, which typically involves interpreters being located both in London to translate the questions, and then either London or Russia to translate the answers. Again, anyone with any experience of evidence being given in this way by video link will appreciate the difficulties that can arise even if no technical interruptions occur.

ii) This is not a conventional commercial claim in which the alleged commercial arrangement, an alleged oral declaration of trust, is the subject of extensive contemporaneous written material. The central allegation will depend upon a careful assessment of the oral evidence of the defendant and his witnesses, as well as that of the claimant. In such a case, the opportunity of seeing the witness give evidence in person is likely to be significantly more important than it would be in many, and perhaps most, commercial trials, where essentially for the reasons identified by Andrew Baker J in SKAT at paragraph 34, the risk of something being lost in the course of a video link would not arise in the same way. In this case, therefore, the risk of something being lost is significantly more important than it would have been in SKAT. In my judgment, that point is all the more significant given that the claimant and his witnesses will be giving evidence in court in England, so there will not in that sense be a level playing field unless the order sought is made.

iii) The point made in (ii) above, is all the more significant in this case for two reasons:

a) Firstly, as I have explained, the defendant is a foreign national who is being sued in England against his will. Given the nature of the claim, it would be wrong and contrary to the overriding objective to force upon such a defendant a method of giving evidence that would place him at a potential disadvantage.

b) Secondly, it is all the more significant because the application before me is one that is jointly made, or at least actively supported by the claimant, who is concerned that the effectiveness of cross-examination will be blunted unless it takes place face to face."

In this case it was in the witnesses' best interests to attend the special examination and answer questions. In the event that inappropriate questions were asked and answered, while there was no power to prevent that under this procedure, that could be dealt with, on application, on the trial's resumption in London by considering whether to strike out the question and answer formally (at [16]–[17]). ***Ross v Woodward*** [1894) 1 Ch. 38, ChD, ***Peer International Corp v Termidor Music Publishers Ltd*** [2005] EWHC 1048 (Ch), unrep., ChD, ***Attorney General of Zambia v Meer Care & Desai*** [2006] EWCA Civ 390, unrep., CA, ***Skatteforvaltningen v Solo Capital Partners LLP*** [2024] EWHC 19 (Comm), unrep., Comm., ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.34.13.1.)

■ **AS v AB** [2024] EWFC 14 (B), 1 February 2024, unrep. (Mr Recorder Jack)

Note of judgment – appeal by rehearing

CPR rr.39.9(5), 52.21, FPR PD 30A, paras 5.23, 5.25. An application for permission to appeal was made in proceedings in the Family Court. Directions had been given for the appellant to obtain a transcript of judgment of the decision in respect of which permission to appeal was sought. The hearing had, however, been heard remotely and the judgment, due to a technical problem, had not been recorded. The court's backup recording was also inaudible. It was not feasible, given the time that had passed since the judgment, which was ex tempore, was given, to ask the judge to recall what they said without the assistance of a contemporaneous note made by the parties' representatives at the hearing. It appeared that no note was available from either parties' representatives. The Recorder noted that prior to the introduction of audio-recording of proceedings, counsel understood that they were under a duty to "take a full note of an ex tempore judgment" (at [9]). There appeared to be no such duty now referred to in the Bar Code of Conduct. Nor was there a clear rule requiring such a note to be taken under FPR PD 30A. CPR r.39.9(5) also did not provide for such a duty. In the light of the absence of guidance within the relevant procedure rules, the Recorder concluded,

"[11] . . . Making a full note of a judgment is onerous. In my judgment it is a matter for counsel how full a note they should make of a judgment. It is only in cases where they know no recording will be made of a judgment that an exception should be made, so that counsel are under a duty to make a full note."

No blame was to be attached to the appellant, or their counsel, for the failure to take a note of judgment. This was not a situation where the parties knew a recording of judgment was not to be taken. In this situation, the court had to consider the approach to be taken on the appeal in the present case (the appellant having a right to appeal). The absence of a transcript of judgment, and additionally the absence of a transcript of evidence that was heard at the hearing to be appealed from, the Recorder concluded that the appeal should proceed by way of rehearing rather than review. As the Recorder put it,

> *"[20] No transcript of the judgment is available. Nor (in the light of the recording difficulties) is any transcript of the evidence heard by the learned district judge likely to be available. In these circumstances, this is in my judgment one of those rare cases where under FPR rule 30.12(1)(b) it is in the interests of justice for the appeal court to hold a rehearing. (See Audergon v La Baguette Ltd [2002] EWCA Civ 10, [2002] CP Rep 27, cited in Civil Procedure 2023 at para 52.21.1 the relevant principles.) The extent to which any oral evidence stands to be given under FPR rule 30.12(2)(a) or updating evidence under FPR rule 30.12(2)(b) is a matter for the judge hearing the appeal, but the parties should make themselves available to give oral evidence if the Court so orders."*

Audergon v La Baguette Ltd [2002] EWCA Civ 10; [2002] C.P. Rep. 27, CA, ref'd to. (See ***Civil Procedure 2023*** Vol.1, paras 39.9.2, 52.21.1.)

■ **Excelerate Technology Ltd v West Midlands Ambulance Service NHS University Foundation Trust** [2024] EWHC 177 (TCC), 1 February 2024, unrep. (Pepperall J)

Disclosure guidance hearings outside PD 57AD

CPR Pt 31, PD 31, para.17, PD 57AD, para.11.2. Unlike PD 57AD, CPR Pt 31 does not make provision for disclosure guidance hearings, notwithstanding the clear benefits they have in proceedings to which the former PD applies. In public procurement proceedings, to which PD 57AD did not apply, Pepperall J provided guidance on the approach parties should take to guidance concerning disclosure under CPR Pt 31. First, he noted that PD 31, para.17 made provision for parties, who are unable to agree on matters concerning e-disclosure, to seek directions from the court and to do so at the earliest date. Secondly, he noted that PD 57AD, para.11.2 provided useful guidance that could beneficially be drawn on where disclosure was taking place under Pt 31 generally. As he put it,

> *"[6] Paragraph 11.2 of Practice Direction 57AD provides that disclosure guidance is obtained by issuing an application notice identifying the point upon which guidance is sought and confirming that the point is one on which (a) there is a significant difference between the parties; (b) the parties require the court's guidance without a formal determination; and (c) the point is suitable for guidance either on the papers or, save in substantial claims, within a one-hour hearing with no more than 30 minutes' pre-reading time. While there is no similar provision in Practice Direction 31B, the practice of the Business & Property Courts gives useful guidance which parties should consider following even in cases under Part 31. Most fundamentally, the parties should issue an application notice clearly identifying the disclosure issue on which guidance or further directions are sought."*

The Civil Procedure Rule Committee may wish to consider whether CPR Pt 31 should be revised to incorporate such beneficial, and other such beneficial, guidance from PD 57AD. It would appear to be difficult to justify maintaining two separate disclosure regimes where the specialist regime contains practice and procedure that could beneficially be applied under the general regime. As it is, this judgment is a useful indication that parties should consider whether and, if so, how provisions and guidance in PD 57AD may usefully be applied to disclosure exercises under CPR Pt 31, not least as a means to give effect to CPR r.1. (See ***Civil Procedure 2023*** Vol.1, para.31.1.1).

■ **Infrastructure Services Luxembourg SARL v Kingdom of Spain** [2024] EWCA Civ 52, 1 February 2024, unrep. (Vos MR, Flaux C, Snowden LJ)

Conditions on appeal – non-applicability of respondent's notice

PD 52C, para.19(1). An arbitral award was made against the Kingdom of Spain in ICSID arbitration proceedings. Cockerill J subsequently registered the award as a judgment of the High Court. Fraser J then dismissed an application to set aside that registration. Spain sought permission to appeal from Fraser J's order. The appellants filed a statement under PD 52C, para.19(1) setting out brief reasons why permission should be refused. The question then arose whether Spain should be required to provide security as a condition of their being granted permission to pursue their appeal. **Held**, the Court of Appeal refused to order security. In doing so, Vos MR, with whom Flaux C and Snowden LJ agreed, considered whether a party could apply within a respondent's statement made under PD 52C, para.19(1) for conditions on permission to appeal to be imposed. Vos MR held that it was not the proper means by which conditions should be sought. As he put it,

> *"[19] Spain's primary propositions are that: (a) the Claimants made their first application for an order that any permission to appeal granted to Spain should be subject to a condition in its Statement, and (b) Males LJ decided that question when he granted permission to appeal on paper. In my judgment, both those propositions are wrong.*

[20] As to whether or not the Claimants made a formal application for a condition to be imposed in their Statement, it is clear they did not. First, there are several indications in [19] of PD52C that point clearly towards a respondent's statement not being a proper vehicle for an application for conditions to be imposed upon the grant of permission to appeal. [19(1)(a)] is only an encouragement, not a requirement, that such a statement should be served. The respondent's statement envisaged is short and to be directed to the relevant threshold test for the grant of permission to appeal. Insofar as conditions are concerned, [19(1)(c)] provides that it 'should identify ... any conditions to which the appeal should be subject' (emphasis added), cross-referencing CPR Part 52.6(2) (see [13] above). The reference to the exceptional filing of evidence by the respondent in [19(2)(b)] concerns any additional applications in addition to the application for permission to appeal made by the appellant. The words 'for that purpose' in [19(2)(b)] refer to [19(2)(a)]. [19(2)(b)] does not envisage respondents filing evidence at large, let alone evidence in support of an application for conditions to be imposed. Finally, in this regard, and perhaps most significantly, [19(3)] expressly provides that '[u]nless the court directs otherwise, a respondent need take no further steps when served with an appellant's notice prior to being notified that permission to appeal has been granted'. Following that instruction and identifying in a respondent's statement a condition that a respondent might later apply to be imposed on a permission to appeal later granted, cannot deprive the respondent of the right to apply formally for such a condition under CPR Part 52.18. Secondly, identifying a condition that might be imposed (which is what the Claimants did in the Statement – see its terms at [3] above) is not the same as making an application to the court for that condition to be imposed. Thirdly, Males LJ, when he dealt with Spain's application for permission to appeal, plainly did not understand that he had a separate application for a condition to be imposed before him, since he made no mention of it. I conclude that the Claimants did not make a formal application for a condition to be imposed in their Statement.

[21] I would leave open the question whether a respondent can apply formally for conditions to be imposed either in its statement or at all before permission to appeal has been granted. We heard limited argument on the point and I do not think we need to decide it in this case. Plainly, however, CPR Part 52.18 does not have a temporal limitation on its face, but it does inhibit a repeat application for conditions if they have been argued for at a 'hearing'. It may be that the terms of that inhibition are left over from the days of oral renewals and could perhaps benefit from the attention of the Civil Procedure Rules (sic) Committee."

(See ***Civil Procedure 2023*** Vol.1, para.52.18.1.)

■ **YM (Care Proceedings) (Clarification of Reasons)** [2024] EWCA Civ 71, 8 February 2024, unrep. (Baker, Green and Males LJJ)

Clarification of judgment

CPR Pt 40. In an appeal to the Court of Appeal in care proceedings, the Court considered the approach that should be taken where a party seeks to invoke the court's jurisdiction to clarify its judgment. Baker LJ initially noted the basis of the jurisdiction was the Court of Appeal's decision in ***English v Emery Reimbold & Strick Ltd*** (2002), where Phillips MR explained that, where a ground of appeal was a lack of reasons set out by a trial judge in their judgment, the judge in question ought to consider whether they can rectify the situation by amplifying their reasons (at [2]). He then noted how this approach had been applied in family proceedings, in which the approach had developed—through Court of Appeal guidance—that advocates ought to draw a judge's attention to any material omission in their judgment when it is delivered or handed down. They should also raise any query or ambiguity (at [3]–[4]). This guidance had, however, led to a notable and noted increase in appeals arising from such cases (at [5]–[8]). Baker LJ deprecated this development. As he put it, and civil practitioners ought to bear this in mind when considering any application made further to the jurisdiction in ***English v Emery Reimbold & Strick Ltd*** (2002),

"[8] It is right, of course, as Peter Jackson LJ said in Re B (A Child) (Adequacy of Reasons) [2022] EWCA Civ 407 at paragraph 60, that 'a judgment that does not fairly set out a party's case and give adequate reasons for rejecting it is bound to be vulnerable.' But a judgment in family proceedings, like any other civil judgment, does not have to cover every aspect of the evidence nor every point raised in submissions. In Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 at paragraph 115, Lewison LJ expressed this well-established practice in these terms:

> *'The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted.'*

[9] The delivery of a judgment is not a transactional process. Its contents are not open to negotiation. Just as the trial is 'not a dress rehearsal' but rather 'the first and last night of the show' (per Lewison LJ in Fage UK Ltd v Chobani UK Ltd, supra, at paragraph 114), so the judgment is not a draft paper for discussion but the definitive recording of the judge's decisions and the reasons for reaching them. It is therefore inappropriate to use a request for clarifications to reiterate submissions or re-argue the case, or to cite a part of the evidence not mentioned in the judgment and on the basis of that evidence ask the judge to reconsider the findings. In my view it is also inappropriate to couple a request for clarifications with a warning that an application for permission to appeal will be made if the clarification is not provided. I regret to say that this case provides examples of all of these inappropriate requests.

[10] The danger is that an unchecked and ill-disciplined process may lead the judge to make statements by way of attempted clarification that water down, undermine or even contradict findings made in the judgment. That is precisely what the appellant local authority, supported by the child's guardian, contend has happened in this case. As a result, they seek a retrial of the fact-finding hearing. In circumstances where the previous fact-finding hearing lasted fourteen days, and to date the proceedings have been ongoing for over two years, that is an alarming proposition."

Also see the concurring judgment of Males LJ at [94]–[97]. Green LJ agreed with both judgments. ***English v Emery Reimbold & Strick*** [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409, CA, ***Fage UK Ltd v Chobani UK Ltd*** [2014] EWCA Civ 5; [2014] F.S.R. 29, CA, ***Re B (A Child) (Adequacy of Reasons)*** [2022] EWCA Civ 407; [2022] 4 W.L.R. 42, CA, ref'd to. (See ***Civil Procedure 2023*** Vol.1, para.40.2.8.)

■ **Roberts v Jones** [2024] EWCA Civ 118, 14 February 2024, unrep. (Stuart-Smith, Birss and Snowden LJJ)

Judgment creditor appeal from committal – route of appeal from Circuit Judge

Administration of Justice Act 1960 s.13, CPR rr.71.2, 71.8. The question arose as to whether an appeal from a committal for contempt lay to the High Court or the Court of Appeal where the committal was made by a Circuit Judge under CPR Pt 71. In considering this question, Birss LJ with whom Stuart-Smith and Snowden LJJ agreed, considered approvingly the summary of the guidance concerning committal under CPR Pt 71 recently set out by Coulson LJ in ***Westrop v Harrath*** (2023): see Birss LJ at [10]–[13]. **Held**, the appropriate route of appeal from a Circuit Judge making an order of committal under CPR Pt 71 was to the High Court. As a consequence, the Court of Appeal adopted the approach set out in ***Massie v H and M*** (2011) at [11]. It thus declared its lack of jurisdiction, transferred the appeal to the High Court with Birss LJ continuing to deal with the matter as a High Court judge (at [27]–[28] and see ***Roberts v Jones*** [2024] EWHC 290 (KB)). On the question of the Court of Appeal's jurisdiction, and hence why the appeal properly lay to the High Court, Birss LJ held:

"[24] The question whether this appeal ought to have been brought to the Court of Appeal at all turns out to be a difficult one. The normal route of appeal for an order made by a circuit judge in the county court would be to the High Court. That is because a circuit judge is a judge specified in s5(1)(a) of the County Courts Act 1984, and by paragraph 5(1) of the Access to Justice Act 1999 (Destination of Appeals) Order 2016 (SI 2016/917), the route of appeal from a decision of a judge specified in s5(1)(a) of that Act is to the High Court.

[25] In addition there is a distinct alternative route of appeal, direct to the Court of Appeal, which is applicable in many contempt proceedings (see Hurst v Barnet [2002] 4 All ER 457). As a result defendants found to be in contempt in the county court will sometimes bring their appeal to the Court of Appeal. This is provided for by s13 of the Administration of Justice Act 1960. The relevant words are:

> *'13 Appeal in cases of contempt of court.*
>
> *(1) Subject to the provisions of this section, an appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt); and in relation to any such order or decision the provisions of this section shall have effect in substitution for any other enactment relating to appeals in civil or criminal proceedings.*
>
> *(2) An appeal under this section shall lie in any case at the instance of the defendant and, in the case of an application for committal or attachment, at the instance of the applicant; and the appeal shall lie—*
>
> *[...]*
>
> *(b) from an* order or decision of the county court ... to the Court of Appeal;'

[26] The Court of Appeal office is used to dealing with committal appeals from the county court which are brought under this section, which is no doubt why the point was not picked up. However it is not obvious that the present appeal falls within the terms of s13(2). The appellant Mr Roberts is not the defendant who has been punished for contempt of court and so for this appeal to fall within the section would require the order punishing the defendant for contempt to have involved 'an application for committal'. However there is no such application. This appeal re-

lates to a committal arising under the Part 71 procedure. That involves an application for an order to attend court for questioning under CPR 71.2, but that is not an application for committal. A finding of contempt and the making of a suspended order for committal under CPR 71.8(2) follows on a referral by the court following a judgment debtor's non-attendance. Mr Roberts is therefore not the applicant in an application for committal and in my judgment the section does not apply to his appeal. This would not have prevented Ms Jones from appealing to the Court to Appeal as the defendant in this case, just as it did not prevent Mr Westrop from doing so in Westrop v Harrath but it seems to me that s13 of the 1960 Act cannot be read as giving the judgment creditor in a Part 71 case a right to a first appeal to the Court of Appeal."

Hurst v Barnet LBC [2002] EWCA Civ 1009; [2003] 1 W.L.R. 72, CA, ***Chadwick v Hollingsworth*** [2010] EWCA Civ 1210; [2011] C.P. Rep. 8, CA, ***Massie v H and M*** [2011] EWCA Civ 115, unrep., CA, ***Westrop v Harrath*** [2023] EWCA Civ 1566, unrep., CA. (See ***Civil Procedure 2023*** Vol.1, paras 52.4.1, 71.8.1).

Practice Updates

Practice Directions

CPR PRACTICE DIRECTION – 164th Update. This Practice Direction Update, which was issued on 7 March 2024, introduced amendments to PD 51R – The Online Civil Money Claims pilot scheme and PD 51ZD – The Damages Claims Portal pilot scheme. The amendments came into effect at 11.00 a.m. on 29 February 2024. The amendments to PD 51R broaden the application of its opt-out mediation scheme, so that it applies to claims where both parties are legally represented and to claims where one party is legally represented and the other is a litigant-in-person. It also makes provision for trial readiness certificates and trial bundles to be filed online in specific courts (early adopted courts). Both PDs are also updated to enable general applications to be made.

In Detail

Open Justice Consultation

In ***Cape Intermediate Holdings Ltd v Dring*** [2019] UKSC 38; [2020] A.C. 629, the Supreme Court stressed the importance of the open justice principle. It did so in the context of a consideration of access to written documents submitted in proceedings. In doing so, Lady Hale PSC, giving the judgment of the court, added the following postscript to it,

"[51] We would urge the bodies responsible for framing the court rules in each part of the United Kingdom to give consideration to the questions of principle and practice raised by this case. About the importance and universality of the principles of open justice there can be no argument. But we are conscious that these issues were raised in unusual circumstances, after the end of the trial, but where clean copies of the documents were still available. We have heard no argument on the extent of any continuing obligation of the parties to co-operate with the court in furthering the open justice principle once the proceedings are over. This and the other practical questions touched on above are more suitable for resolution through a consultative process in which all interests are represented than through the prism of an individual case."

The particular concerns that arose in that case surrounded non-party access to documents submitted in proceedings. On 1 December 2023, the Civil Procedure Rule Committee commissioned a consultation that arose from the Supreme Court's concerns. That consultation was issued in February 2023. The consultation encompasses a short explanatory note and a draft of a proposed new CPR r.5.4C. A copy of the consultation is available at: https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about#court-documents-consultation.

The consultation is not only a response to the Supreme Court's decision in ***Cape v Dring*** (2019), but is also said to be "*set in the context of the Lady Chief Justice's broader agenda of looking at transparency issues*" (*Consultation, Explanatory Note*). Lady Carr LCJ articulated that transparency agenda in her first annual press conference, which is available at: https://www.judiciary.uk/wp-content/uploads/2024/02/Transcript-LCJ-Press-Conference-06.02-v2.pdf. It might well be anticipated that access to documents, just as access to courts, for non-parties and, particularly, the media will form a focus of that agenda and the Transparency Committee, which is to be established to look into it. At the present no details are available concerning the Committee's specific remit. As such it might be that the current draft may need to be revisited once it has started its work.

In terms of the current consultation, the CPRC proposes several changes to CPR r.5.4C, which are intended to improve access to documents for non-parties. The proposed improvements are set out in a proposed new CPR r.5.4C, which is set out below.

The Proposed New CPR r.5.4C

The consultation draft of the proposed new CPR r.5.4C is as follows:

Supply of documents to a non-party from court records

5.4C.—(1) A person who is not a party to proceedings (a non-party) may—

(a) subject to paragraphs (4) to (7), obtain from the court records a copy of any of the documents in relation to the proceedings listed in paragraph (3), without the permission of the court;

(b) obtain at a hearing a copy of a skeleton argument or witness statement as provided for by paragraphs (8) to (10).

(2) A non-party may, if the court gives permission, obtain from the court records a copy of any other document filed by a party, or communication between the court and a party or another person.

(3) The documents referred to in paragraph (1) are—

(a) judgments or orders of the court other than those given or made in private;

(b) claim forms, but not any documents filed with or attached to the claim form, or intended to be served with it;

(c) other statements of case, but not any documents filed with or attached to the statement of case, or intended to be served with it;

(d) skeleton arguments;

(e) witness statements and affidavits, but not any exhibits or annexures to the statement or affidavit;

(f) expert reports (except for medical reports or where a rule or practice direction provides otherwise).

(4) In relation to any document referred to in paragraph (3)(b) to (f), the court may, on the application of any person–

(a) order that a non-party may not obtain a copy of such document under paragraph (1);

(b) restrict the persons or classes of persons who may obtain a copy of such document;

(c) order that persons or classes of persons may only obtain a copy of such document if it is edited in accordance with the directions of the court; or

(d) make such other order as it thinks fit.

(5) A person wishing to apply for an order under paragraph (4) must file an application notice in accordance with Part 23, and a non-party may not obtain a copy of the document until that application has been determined.

(6) Where the court makes an order under paragraph (4), a non-party who wishes to obtain a copy of the document, or to obtain an unedited copy of it, may apply on notice to the party or person identified in the document who requested the order, for permission.

(7) A non-party may obtain a copy of a document under paragraph (1) only if—

(a) where there is one defendant, the defendant has filed an acknowledgment of service or a defence;

(b) where there is more than one defendant, either

(i) all the defendants have filed an acknowledgment of service or a defence;

(ii) at least one defendant has filed an acknowledgment of service or a defence, and the court gives permission;

(c) the claim has been listed for a hearing; or

(d) judgment has been entered in the claim.

(8) A non-party who has at or in advance of the hearing requested a copy of a skeleton argument shall be entitled to it at the start of the hearing for which the skeleton argument was filed, subject to any order or pending application under paragraph (4) or any directions restricting access to the hearing.

(9) A non-party who has at or in advance of the hearing requested a copy of a witness statement shall be entitled to it (but not any exhibit or annexure to it) when the relevant witness is called and the witness statement stands as their evidence

in chief, subject to any order or pending application under paragraph (4), any direction that the witness statement should not be open to inspection, or any directions restricting access to the hearing.

(Rule 32.13 covers the circumstances in which the court may direct that a witness statement should not be open to inspection.)

(10) Unless the court directs otherwise, it is the responsibility of the party who filed the skeleton argument or relies on the relevant witness's evidence to provide the copy of the skeleton argument or witness statement under paragraph (8) or (9).

Comment

The proposed new rule is a significant advance on the current rule, which was the subject of consideration in ***Cape v Dring*** (2019). It makes clear that non-parties may obtain a much wider range of documents from the court than is currently specified in the CPR. Rather than being limited to statements of case and judgments or orders, as is currently the case under CPR r.5.4C(1), the proposed new rule provides explicitly for access to those documents and skeleton arguments, witness statements and affidavits and expert reports. The clarity this provides should be welcomed.

As long as the court holds such documents within its records, access to them is to be provided for in the new rule. This raises a point that the consultation, and the draft, does not deal with: the length of time the court is to hold such documents in its records. That timeframe is currently set by a series of Records and Retention Policies set by HMCTS and published by the Ministry of Justice. They are available at: https://www.gov.uk/government/publications/record-retention-and-disposition-schedules. The question could properly be asked why the retention period is not specified within the CPR itself rather than being something determined administratively by HMCTS. At the very least, reference to those schedules ought to be set out within the new CPR r.5.4C to enable non-parties to identify easily whether the documents they seek will be such that are likely to still be held by the court. This could straightforwardly be achieved by the addition of a further signpost at the end of the rule after the signpost to CPR r.32.13.

The proposed new rule also specifies that a non-party may obtain access to witness statements and skeleton arguments by requesting, i.e., not through making a formal application, a copy of them at or in advance of a hearing. Such documents will then be made available at the hearing. In the latter case, they will be available when the witness is either called to give evidence or their witness statement stands as the evidence-in-chief. As a matter of principle this is the correct approach, as both documents form part of the public trial process in such circumstances. In that way at the hearing itself they ought to be available on the same basis that oral submissions and oral evidence would have been available to an individual who was in court at that time. Access to such documents after the conclusion of hearings, where they are held in the court records, is also provided for, subject to an application from any person to restrict access. This would appear to strike the right balance between non-party access and the right of parties and others to restrict access for valid reasons.

Consultation responses should be submitted by 8 April 2024 via CPRCconsultation@justice.gov.uk.

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