CIVIL PROCEDURE NEWS

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In Brief

Cases

Williams v Williams [2023] EWCA Civ 1465, 23 November 2023, unrep. (Newey and Nugee LJJ)

Permission to appeal decision – correction via slip rule

CPR rr.40.12, 52.5, 52.6. The appellant brought claims against his siblings concerning ownership of two farms. The claims were dismissed. The appellant sought permission to appeal on seven grounds from the Court of Appeal. Permission was granted on the fifth ground. It was not, however, clear if it had been granted on the third ground. All other grounds were dismissed. Due to the wording of the permission decision, i.e., its ambiguity, the respondents wrote to the court office seeking clarification of whether permission had in fact been granted on that ground. The Court of Appeal Office, by email reply, confirmed that Lewison LJ, who had dealt with the application on the papers, had confirmed that permission on that ground had not been granted. The appellant subsequently submitted an appeal skeleton, which argued both the third and fifth grounds of appeal. Due to that appeal skeleton being a replacement for a previous one, the appellant needed an extension of time to file it. Lewison LJ dealt with the extension of time application. An extension was granted, but on the basis that the appeal skeleton was limited to setting out matters related to the fifth ground of appeal. In doing so, Lewison LJ explained that it was an abuse of process to attempt to sidestep the limited grant of permission to appeal by attempting to re-open the issue of the third ground of appeal by way of submission of an appeal skeleton. The Court of Appeal was asked to review that decision. **Held**, the review application was dismissed. Where permission was granted on limited grounds, unless an application can properly be made out under CPR r.52.30, the Court of Appeal will not reopen, at the appeal hearing, the issue on which permission has already been refused by a single judge of the Court of Appeal (at [28]–[41]). In this regard, decisions, such as ***McHugh v McHugh*** (2014), in which Lewison LJ at [14] held that where permission to appeal was given on limited grounds it was not a matter for an appellant to enlarge those grounds at the appeal hearing, remained good law. In reaching this decision, Nugee LJ, with whom Newey LJ agreed, held that: (i) the decision to grant and refuse permission to appeal was clearly a court order (see CPR r.52.5 and r.52.6), and thus within the ambit of the slip rule in CPR r.40.12. It was thus open to Lewison LJ to correct the accidental error in his original permission decision (at [17]–[22]). In reaching this decision, Nugee LJ rejected reliance on ***Lane v Esdaile*** (1891) to the effect that Lewison LJ's permission decision was not an order,

> *"[23] In all those circumstances it seems to me that the decision made by Lewison LJ was an order and could be amended under the slip rule. The suggestion that it is not an order depends partly on some passing remarks by Lord Halsbury in Lane & Ors v Esdaile & Ors [1891] AC 210, which were not actually the grounds of decision, and in any event were concerned with the construction of different statutory provisions in what must be admitted were very different times procedurally; and partly on an argument which was, to my mind, quite convoluted and difficult to follow, to the effect that decisions made on paper by a judge do not count as real decisions of a Court. That just seems to me to be wrong. What the rules envisage is that decisions of the Court can be made on paper, and in particular, as we have seen under CPR r 52.5, that these decisions, decisions by the Court of Appeal whether permission to appeal should be granted, will usually be made on paper by a single Lord or Lady Justice. That, contrary to a submission of Mr Adams, seems to me to be plainly an exercise of judicial decision making and not an administrative or executive decision in any sense at all.*
>
> *[24] It is true that in many cases decisions made on paper by Courts are subject to the right by the person affected to have them reviewed, often at an oral hearing. But that does not mean that the decision on paper was not a judicial decision, and to my mind a decision made by a judge exercising judicial power, reached on paper and stamped with the Court's seal, is an 'order', which indeed is how it is described on its face. Any alternative view would mean that there was no power to correct accidental slips in orders made without a hearing, which I think would cause serious inconvenience.*
>
> *[25] Orders on paper are constantly being made at every level of judicial hierarchy up and down the land, and I have no doubt that accidental slips, such as a date (as indeed it appears Lewison LJ himself made in his most recent order) or a decimal point being put in the wrong place, or an order putting Claimant for Defendant and vice versa (a very common error), are frequently made, and no doubt frequently corrected. No sensible purpose would be served by construing CPR r 40.12 as not extending to such decisions.*
>
> *[26] I therefore conclude that Lewison LJ had the power to correct his original order, and exercised that power. We cannot go behind his statement that his original order contained an accidental slip, and we have been given, in my judgement, no reason at all to revisit that aspect of his order."*

Lane v Esdaile [1891] A.C. 210, HL, ***McHugh v McHugh*** [2014] EWCA Civ 1671, unrep., CA, ref'd to. (See ***Civil Procedure 2023*** Vol.1, paras 40.12.1, 52.5.1, 52.6.1.)

- **Palladian Partners LP v Republic of Argentina** [2024] EWCA Civ 139, 22 February 2024, unrep. (Phillips LJ)

Imposition of conditions on permission to appeal

CPR rr.52.6(2)(b), 52.18(1)(c). Permission to appeal was granted on the papers in proceedings concerning the proper construction of terms contained in EUR-denominated GDP-linked securities. A condition was also granted on permission to appeal. The respondent applied for the condition's imposition to be reconsidered. In deciding to maintain the condition, Phillips LJ provided a helpful summary of the applicable principles,

> *"[5] CPR 52.6(2)(b) provides that an order giving permission to appeal may be made subject to conditions. Whilst that rule does not identify the test to be applied, CPR 52.18(1)(c) provides that the appeal court may impose or vary conditions upon which an appeal may be brought, CPR 52.18(2) stating that the court will only exercise that power where there is 'compelling reason' to do so. In Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 2065, Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd [2004] EWCA 993 and Sunico A/S v Commissioners for HMRC [2014] EWCA Civ 1108 this Court proceeded on the basis that the compelling reason requirement also applies to the imposition of a condition under CPR 52.6(2)(b). Neither party in the present case suggested departing from that approach.*
>
> *[6] As explained by Briggs LJ in Sunico at [22], the 'compelling reason' test reflects the fact that a condition such as to pay or secure payment of the judgment debt is not routinely applied. Indeed, in Dumford Trading AG v. OAO Atlantrybflot [2004] EWCA Civ 1265 at [9] the imposition of a condition was described as 'unusual, perhaps rare', an approach recently adopted by Sir Geoffrey Vos MR in Infrastructure Services Luxembourg SARL & Anr v Kingdom of Spain [2024] EWCA Civ 52 at [10].*
>
> *[7] In Sunico, Briggs LJ (with whom Patten and Underhill LJJ agreed) emphasised at [23] that the existence of a compelling reason was only a necessary rather than a sufficient factor. The imposition of a condition remained a matter for exercise of the court's discretion.*
>
> *[8] At [25] Briggs LJ identified certain factors which, depending on the overall circumstances, may point to the imposition of a condition:*
>
> *'i) Difficulties of enforcement of the court's judgment in a foreign jurisdiction;*
>
> *i) An apparent sufficiency of resources to enable the judgment debtor to continue to fund litigation;*
>
> *ii) The absence of convincing evidence that the appellant lacks the resources, or access to the resources, which would enable it to pay the judgment debt;*
>
> *iii) Inadequate disclosure by the appellant of its financial affairs, or a lack of confidence on the part of the court that it has been shown the truth;*
>
> *iv) The combination of*
>
> *a) A deliberate breach of an order to pay the judgment debt*
>
> *b) The refusal of a stay, and*
>
> *c) Ability to pay, but a failure to do so cynically based upon the difficulties for the respondent in enforcing the judgment in a foreign jurisdiction.'*
>
> *[9] Briggs LJ further identified, at [26], that the main factor which is likely to tell against the imposition of a condition, if sufficiently demonstrated, is where to do so would stifle the appeal."*

(See ***Civil Procedure 2023*** Vol.1, paras 52.6.4, 52.18.2.)

- **Stoop (t/a Warwick Risk Management) v Johnson** [2024] EWHC 286 (Ch), 23 February 2024, unrep. (Elizabeth Jones KC sitting as a deputy judge of the High Court)

Damages-based agreement – requirement to provide justification for setting level of payment

Damages Based Agreements Regulations 2013 reg.3(c). The claimant ran a claims management business. He brought a claim against the defendant seeking to recover the success fee that arose under a Damages-based agreement (DBA). Clause 3 of the DBA provided for: (i) no fee to be payable other than the success fee; (ii) a success fee of 50% of any compensation realised (at [24]). Regulation 3(c) of the 2013 Regulations requires a DBA to specify the reason why the success fee is set at the level agreed by the parties to the DBA (at [43]). The deputy judge accepted

that the reason given in a DBA was the "true reason" why a success fee was set at the specified level (at [45]). The claimant's case was that the true reason was that set out in clause 5 of the DBA. That was specified as the risks of litigation (at [24][vii], [46]). **Held**, the evidence did not support the claimant's case. On the contrary, it demonstrated that the true reason the success fee was set as at 50% was due to the claimant seeking to recover for past and future work. As the deputy judge concluded,

> *"[47] I consider that the evidence set out above plainly points to a conclusion, on the balance of probabilities, and I therefore find, that the reason for the payment being set at the level of 50% of any compensation obtained was that Mr Stoop wished to be remunerated for the work he had done in the previous 10 years as well as the work he was going to do in the future, and further, even if I am wrong about that, that the reason for the payment being set at that level was not because of the risks set out in clause 5 of the Agreement."*

Moreover, the deputy judge, in any event, also rejected the claim that clause 5 set out a reason for setting the success fee level (at [55]). In the premises, the failure to specify a reason and, a fortiori, the true reason for setting the success fee level was a material breach of the 2013 Regulations (at [56]). (See ***Civil Procedure 2023*** Vol.2, para.7A-29.1.)

- **Isbilen v Turk** [2024] EWHC 505 (Ch), 5 March 2024, unrep. (Sir Anthony Mann sitting as a judge of the High Court)

Use of intermediary – contempt of court – reliance on witness statement – cross-examination

CPR rr.81.4, 81.7. An application to commit the defendant for contempt of court arising from alleged non-compliance with a freezing injunction raised several issues. First, it was noted, albeit not by reference to CPR r.1.6, that the defendant was a vulnerable party: he had disclosed a psychiatric report that demonstrated he had attention deficit hyperactive disorder (ADHD). To assist him, he was permitted to have the assistance of an intermediary. A Ground Rules Hearing took place at the start of the contempt hearing, it not being possible to hold one earlier due to the issue only arising at a late stage in the proceedings. Procedures put in place to enable the defendant to take part in the proceedings effectively were: breaks as necessary during his evidence; the assistance of the intermediary during the hearing for the court and counsel, and to draw to the court's attention any relevant matters during the hearing; provision of advice by the intermediary to the claimant's counsel prior to the commencement of his cross-examination so as to assist his understanding of how to tailor his questioning (at [9]–[11]). Secondly, an issue arose as to whether the defendant could rely upon a witness statement without being cross-examined on it. While the question did not need to be determined because, in the event, the defendant gave oral evidence and was cross-examined, Sir Anthony Mann queried whether it was correct that a defendant could rely upon a witness statement but not be cross-examined. In doing so, he queried whether the decision in ***Discovery Land Co LLC v Jirehouse*** (2019) could properly be said to support that proposition, as was taken to be the case in ***Civil Procedure 2023*** Vol.1, para.81.7.5. As Sir Anthony put it,

> *"[50] . . . I did not have to consider whether Mr Turk was entitled to adopt the course of putting the witness statement before the court without swearing as to its accuracy or submitting himself to cross-examination. The proposal that he should do so gains some support from a note in the White Book, and further support in a footnote in the supplement to Grant and Mumford on Civil Fraud. I confess to not understanding the juridical basis on which that would be allowed in committal proceedings and would wish to say something about it because the note in the White Book might otherwise be said to be a little misleading.*
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> *[51] The note in the White Book at para 18.7.5 (sic) states:*
>
> > *'In Discovery Land Co LLC v Jirehouse [2019] EWHC 1633 (Ch) at [23]–[30], it was held that notwithstanding the terms of the pre-2020 CPR r.81.28, an alleged contemnor could not be compelled to submit to cross-examination even if they had tendered an affidavit into evidence in the contempt proceedings, nor would they be put to an election as to whether to submit or forgo reliance on the affidavit.'*
>
> *[52] A note in the supplement to Civil Fraud says:*
>
> > *'35-063 ... In Discovery Land Company LLC v Jirehouse [2019] EWHC 1633 (Ch) a defendant served an affidavit in response to a committal application. The claimant's application to cross-examine him on the affidavit under CPR r.32.7 was refused. The result is that a defendant may tender (and rely upon) written evidence to the court but decline to be cross-examined on it. Of course the weight to be given to such an affidavit in such circumstances is likely to be (very) limited. It follows that a defendant cannot be compelled to make an election as to (i) deploying at the hearing any affidavit he has served and becoming liable to be cross-examined on it; and (ii) not deploying the affidavit at the hearing. The defendant may deploy the affidavit and yet refuse to be cross-examined on it.'*
>
> *[53] It is not wholly clear that that is what Henry Carr J was saying in Jirehouse. The affidavits on which he did not compel cross-examination were filed in the context of the committal application, but at least one of them was an attempt at compliance (see para 13) and it is not wholly clear that the affidavits were clearly intended to be served as a*

defence to the committal proceedings as opposed to being further attempts to comply with the original order. If they were the latter then one can see why they should not necessarily be treated as full evidence in opposition to the committal proceedings on which cross-examination becomes available, but I do not see why that goes so far as justifying the broad proposition in the text book or the White Book.

[54] Henry Carr J relied on the decision of Whipple J in VIS Trading v Nazarov [2015] EWHC 3327 (QB) in support of his reasoning, and principally in support of the proposition (not contested by Mr Counsell) that the court could draw adverse inferences from silence. It does not appear to me that Whipple J's judgment provides the wider right referred to in the text book extracts and which was originally to be relied on by Mr Turk in this case. She does seem to have been considering the effect of evidence filed in purported compliance, which contained statements that there had been full compliance, rather than the wider right. Obviously such material cannot be ignored, because an applicant complaining about non-compliance must demonstrate such purported compliance as there has been, and the court will have to form a view as to whether or not there has been adequate compliance. In that context it may have to consider (as did Whipple J) whether explanations given are plausible. Again in that context, it would seem that the contemnor is not to be subjected to cross-examination merely because he has put in such material. However, that is not the same thing as saying that the alleged contemnor has the right to serve a witness statement (or affidavit) in the committal proceedings by way of defence and put it before the court without subjecting himself/herself to cross-examination on it.

[55] Mr Counsell (who, with his junior Miss Pugh, carried out a certain amount of research into the point at my request, for which I am grateful) did not find any other clear authority which supported his stance. It seems to me that it is contrary to principle and has no real foundation. If it ever had a foundation as being a parallel to the old right in a criminal trial to do something similar, then that right in criminal cases was abolished by section 72 of the Criminal Justice Act 1982, and bearing in mind the partial adoption of criminal principles in contempt cases it would be anomalous if it now existed in the latter cases. This view would seem to be consistent with those of Elisabeth Laing LJ in Wilding v Forest of Dean District Council [2021] EWCA Civ 1610 at paras 75-80.

[56] Had it mattered, therefore, I would be likely to have ruled that Mr Turk could not rely on his witness statement without submitting to being cross-examined on it, but since he chose to go into the witness box and swear as to its contents the point did not arise for actual decision. However, it did not seem right to me to allow the proposal to go unchallenged when the starting point is a potentially inaccurate statement of principle in the White Book."

Also see, at [64]–[69], comment on the wording of penal notices. ***Discovery Land Co LLC v Jirehouse*** [2019] EWHC 1633 (Ch), ref'd to. (***Civil Procedure 2023*** Vol.1, paras 81.4.5, 81.7.5.)

Patel v Awan [2024] EWHC 464 (Ch), 7 March 2024, unrep. (Master Kaye)

Interim payment on account of costs – enforceability as a money judgment

CPR rr.44.2(8), 70.2. A Pt 8 claim for an order for sale of property was pursued by the claimants. The claim was based on a charging order granted in February 2019, which secured an interim payment order that was unpaid. It was accepted that the interim payment on account of costs under the order was not paid. It was argued that the order was not enforceable. This was said to be the case because the order created a contingent liability, as prior to a detailed assessment of costs the sum due could not be ascertained properly (at [23]–[26]). It was well-established that "*unassessed costs are a contingent liability and not a liquidated sum*" (at [57]). Furthermore, it was stated that

"[62] What is clear from the authorities . . . is that there is a distinction to be drawn between unassessed costs which are a contingent liability and those which have been determined. Furthermore the authorities, understandably and consistently, distinguish between unassessed and contingent liabilities which could not be secured by way of a charging order because they were not ascertained and due and interim payments which could be secured."

With this in mind, Master Kaye then considered the nature of an interim payment on account of costs under CPR r.44.2(8). Having considered the process by which the court would arrive at an order under that rule (at [65]–[78]), the Master concluded,

"[79] The determination of what sum is a reasonable sum to award under CPR 44.2(8) . . . is a binding judicial determination of a reasonable sum based on all the circumstances of the case and the factors raised by the parties as to the likely level of recovery taking into account the nature and quality of the evidence available in relation to quantum. In under that judicial determination the court determines whether to make any award at all and if so in what amount.

[80] An interim payment on account of costs is therefore a final judicial determination or decision of a reasonable sum to be paid by the paying party to a receiving party.

. . .

[85] . . . Once the payment has been ordered it represents a final determination by the court and is an enforceable order for a payment of costs by the date specified."

As a consequence, such orders for interim payment are not contingent liabilities. They are a "*final judicial determination*" (at [92]). As an order for payment, by a specified date, of a sum of money it was thus capable of enforcement further to the provisions set out in CPR Pt 70 (at [94]), and hence could be enforced via a charging order. ***Monte Developments Ltd (In Administration) v Court Management Consultants Ltd*** [2010] EWHC 3071 (Ch); [2011] 1 W.L.R. 1579, ChD, ***Magiera v Mageria*** [2016] EWCA Civ 1292; [2017] Fam. 327, CA, ***Pluczenik Diamond Co NV v W Nagel (A Firm)*** [2019] EWHC 3126 (QB); [2019] Costs L.R. 2117, QBD, ref'd to. (***Civil Procedure 2023*** Vol.1, para.70.2.1.)

Practice Updates

STATUTORY INSTRUMENTS

Supreme Court Fees Order 2024. On 15 February 2024, the Supreme Court Fees Order 2024 (SI 2024/1148) was laid before Parliament. It is **in force** from 1 April 2024. It revokes the Supreme Courts Fees Order 2009 (SI 2009/2131). It consolidates and uprates fees. Uprating is by reference to the Consumer Price Index. As part of the consolidation it merges the fees payable for civil appeals and devolution appeals, so that one fee is applicable to both types of appeal. A saving provision makes specific provision for those situations where a notice of appeal or a notice of intention to proceed with appeal was filed before 1 April 2024. The Order is available at: *https://www.legislation.gov.uk/uksi/2024/148/pdfs/uksi_20240148_en.pdf*.

PRACTICE GUIDANCE

Practice Note – Encouraging Greater Participation of Junior Counsel in the UK Supreme Court. On 7 March 2024, Lord Reed PSC issued guidance encouraging greater participation of junior counsel in appeals before the UK Supreme Court. The guidance mirrors that which was issued in respect of the courts and tribunals by the Heads of Division and the Senior President of Tribunals on 8 November 2023 (see ***Civil Procedure News*** No. 10 of 2023). The guidance is available at: *https://www.supremecourt.uk/docs/practice-note-march-2024.pdf*. It is reprinted below.

Practice Note - 7 March 2024

Lord Reed, as President of the Supreme Court, has issued the following practice note in respect of the United Kingdom Supreme Court.

In former times it was common for junior counsel to participate in oral argument before the highest court. In recent times that has become less common. Nevertheless, experience in advancing oral argument is essential if junior counsel are to progress, and experience of advocacy in the highest court can have a particular value. The Supreme Court therefore wishes to encourage parties to give junior counsel opportunities to advance oral argument before it.

Giving opportunities to junior counsel to speak will not always be possible, and will depend upon the nature of the argument and the length of the hearing, as well as on whether junior counsel are instructed. However, in all suitable cases, the Supreme Court expects consideration to be given to a speaking part for junior counsel. From 9 April 2024, when parties provide counsel's agreed speaking times, the Supreme Court will also expect to receive confirmation, in instances where junior counsel are instructed but will not speak, that consideration has been given to whether junior counsel should have a speaking part.

Lord Reed of Allermuir

7 March 2024

MISCELLANEOUS UPDATES

Civil National Business Centre – Mailbox Update. His Majesty's Courts and Tribunals Service has issued an update concerning email contact details for the National Business Centres in the light of the creation of the single Civil National Business Centre (CNBC) in Northampton. As from 28 February 2024 new email boxes to contact the CNBC have been in operation. The update, including the new email addresses, is reproduced below.

Mailbox Closures for the Civil National Business Centre in Northampton (CNBC) from 28th February 2024

Following the merger of the 2 National Business Centres, into the CNBC, we have conducted a review of the collective mailboxes.

An exercise has taken place to reduce the duplication of email traffic into the CNBC by rebranding the mailboxes and clarifying what needs to be filed in which location.

With users filing email contact at more than one mailbox address, we are seeing an increase in duplicate receipts by 25%. As a result, the backlog isn't reducing as quickly as it should be, causing follow-up emails, which are in turn, further duplication.

The stability of the mailboxes because of the increased email traffic is a concern and a priority for us. Internally we are getting IT advice from our supplier, and looking at different applications that might help us manage our email better.

In the interim please support us by reviewing this list of new mailboxes and updating your contacts, using only one mailbox per query.

The new mailboxes will be open from 28th February 2024 and at that point any mailboxes not in this list will be closed, with signposting information on the auto-reply.

Mailboxes in place from 28th February 2024

Claims in the Paper journey and Claims in the Money Claim Online (MCOL) Journey, where documents cannot be filed via MCOL.	
Low Value Road Traffic Accident	*LVRTA@justice.gov.uk*
Notifications of a Defendant entering Breathing Space	*Breathingspace.CNBC@justice.gov.uk*
Acknowledgement of Service, AOS	*AOS.CNBC@justice.gov.uk*
Claim Response, N9A, N9B, Defence, MCOL response queries, N225a intention to proceed, Counterclaims, Replies to defence	*ClaimResponses.CNBC@justice.gov.uk*
Directions Questionnaire, N180, DQ	*DQ.CNBC@justice.gov.uk*
A request for Judgment, N225, or N225a - requesting Judgment	*Judgments.CNBC@justice.gov.uk*
Notice of Acting / Notice of Change / Address Changes, Certificate of Service, COS, Confirmation of settlement or payment, request for claimants' details to be confirmed.	*CaseProgression.CNBC@justice.gov.uk*
Help with Fees queries, EX160 forms if filed retrospectively	*HWF.CNBC@justice.gov.uk*
If there is an ongoing Attachment of Earnings order where deductions are being made from wages and • *There is a problem.* • *You have a question about this month's payment.* • *You need to change the address of an Employee or Solicitor attached to this application*	*CAPs@justice.gov.uk*
An application or query in relation to a Charging Order	*Chargingorders.CNBC@justice.gov.uk*
An application or query in relation to an Attachment of Earnings Application	*AE.CNBC@justice.gov.uk*
An application or query in relation to Warrants or Writs of Control	*Writs.CNBC@justice.gov.uk*

Report a problem or delay about issuing a new claim. *File or query: An application with a fee payable, N244, N245, Request for certificate of satisfaction, Consent and Tomlin Orders*	*Applications.CNBC@justice.gov.uk*

Claims on the Reformed Digital Platforms - OCMC (Online Civil Money Claims) and Damages Claims Portal (DCP).	
General queries regarding Digital Unspecified Claims (Damages Claims Portal - DC case reference)	*DamagesClaims@justice.gov.uk*
Technical queries or to report a fault with the Damages Claims Portal	*DCPtechsupport@justice.gov.uk*
General queries regarding Digital Specified Claims (OCMC - MC case reference)	*ContactOCMC@justice.gov.uk*
Technical queries or to report a fault with the Online Civil Money Claims (OCMC) Portal	*OCMCLR@justice.gov.uk*
Queries regarding your 'My HMCTS' account or log on issues	*MyHMCTSsupport@justice.gov.uk*
Queries regarding your Fee Account.	*FeeAccountQueries@justice.gov.uk*
To lodge documents such as - Judgment requests, and Applications, on cases with an MC reference that cannot be progressed through the Online Civil Money claims (OCMC) portal	*OCMCNton@justice.gov.uk*

Other ways to support –

- *If you have filed a notice of acting or notice of change during the life of the claim, enclose a copy of it with any subsequent request.*
- *If you are sending in multiple document types, for example a defence with a notice of acting, please send it to the lead mailbox for your query. Do not use multiple mailboxes. In this example you would use – ClaimResponses.CNBC@justice.gov.uk*
- *If you have a general query or require an update – check our latest performance figures on GOV.uk before escalating with the relevant team via the mailbox for that work area.*

  https://www.gov.uk/government/publications/hmcts-civil-business-centres-performance-information
- *If you need to report a problem, or an unexpected delay - use the mailbox in relation to that area of work. If you are lodging a complaint under our complaint's procedure, use our online form.*

  https://hmcts-complaint-form-eng.form.service.justice.gov.uk
- *Ensure your email complies with Practice Direction 5B and ensure the claim number is in the subject line.*
- *Documents not complying will not be accepted in the new mailboxes, in particular if it is over 10MB or 25 printed sheets in size.*

  https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part05/pd_part05b

Erratum. In ***Civil Procedure News*** No. 3 of 2024, Singh LJ was wrongly referred to as giving the substantive judgment in ***ADM International Sarl v Grain House International SA*** [2024] EWCA Civ 33. The reference ought to have been to Popplewell LJ, who gave the leading judgment. Singh and Snowden LJJ concurred with Popplewell LJ's judgment.

In Detail

RECENT COSTS DEVELOPMENTS

The courts have recently dealt with a number of cases that concern costs. The issues raised cover third party costs orders, costs where multiple claims are issued through a single claim form, and interest on costs and limitation.

Third party costs orders

The first issue, concerning third party costs orders, arose in an appeal before Turner J in ***Kindertons Limited v Murtagh*** [2024] EWHC 471 (KB). In this case, a non-party costs order (NPCO) had been made against a credit hire company in a claim arising from a road traffic accident. The trial judge found that the damages claimed by the claimant had not been caused by the accident. He further found that the claimant and her husband had been fundamentally dishonest. While the claimant and her husband were ordered to pay the costs of the action, the costs went unpaid. An NPCO was then applied for by the defendant's insurer. That application was, regrettably, not dealt with by the trial judge, a point that Turner J noted critically in the judgment. As he put it,

> *"[29] It is regrettable that the trial judge did not hear the costs application and that neither side took the issue below. Particular care should be taken not to list NPCO applications to be heard before a judge who did not sit on the trial without a compelling reason. None was identified in this case. Nevertheless, this court is now presented with a fait accompli and no purpose consistent with the overriding objective would be served by doing anything other than re-emphasising that this should not have happened before moving on to determine the appeal."*

The judge who dealt with the application granted it, having referred himself to CPR r.44.16(2) and PD 44 para.12. The credit hire company appealed from that decision. It did so on six grounds, three of which were: (i) that it did not benefit from the claim; (ii) that it did not have the power to control the litigation; and (iii) that the respondent could not prove that the appellant had caused costs to be incurred. Turner J dismissed the appeal.

In his judgment Turner J noted that it was a bold claim to suggest that the appellant had not benefited from the litigation (at [38]). On the contrary,

> *"[39] In common with credit hire companies generally, the whole purpose of Kindertons providing credit hire facilities is to make a commercial profit out of the client's legal claim. In cases of accidents involving impecunious parties, the provision of such facilities is capable of providing a fair and useful mitigation of the difficulties which would be faced by claimants unable to afford to pay the lower Basic Hire Rate [BHR] up front."*

See further ***Amjad v UK Insurance Ltd*** [2023] EWHC 2832 (KB) at [58]–[61]. It was clear that the appellant "*had a very strong financial stake in the litigation*" (see [43]). It was also clear that it had a high degree of control over the litigation (at [44]–[47]). In respect of control, Turner J explained,

> *"[44] There is a danger that the concept of 'control' is wrongly treated as if it were a traffic light, governing access to the exercise of court's discretion to make a non-party costs order, which is showing either red or green. Control is almost invariably a matter of degree. As a concept, it is relevant to the extent that, in any given case, the greater the level of control exercised by the non-party the more likely it will be that the court will exercise its discretion in favour of making a NPCO.*
>
> *[45] As the Court of Appeal held in Deutsche Bank AG v Sebastian Holdings [2016] 4 WLR 17 at para 62:*
>
> > *'We think it important to emphasise that the only immutable principle is that the discretion must be exercised justly. It should also be recognised that, since the decision involves an exercise of discretion, limited assistance is likely to be gained from the citation of other decisions at first instance in which judges have or have not granted an order of this kind.'"*

Finally, Turner J rejected the appellant's argument that it was necessary for the respondents to prove causation of costs on a *but for* basis. It was clear on authority that causation was not a necessary pre-condition for the making of an NPCO: ***Total Spares & Supplies Ltd v Antares SRL*** [2006] EWHC 1537 (Ch) at [54] and ***Turvill v Bird*** [2016] EWCA Civ 703; [2016] T.C.L.R. 7. Turner J further rejected reliance on Lord Briggs' judgment in ***XYZ v Travelers Insurance Co Ltd*** [2019] UKSC 48; [2019] 1 W.L.R. 6075, which it was said supported the view that causation was required. As Turner J explained at [51]–[57], it was clear from Lord Briggs' judgment, especially at [30]–[31] of his Lordship's judgment, that he was not setting out any generally applicable principles concerning causation that was applicable to NPCO applications. Turner J further distinguished the decision in ***XYZ v Travelers Insurance Co Ltd*** (2019) on the basis that Lord Briggs' judgment concerned liability insurance where the liability insurer is typically an involuntary litigation funder. In this case, it was clear that the credit hire company was a voluntary funder, which enthusiastically funded the litigation expecting to profit from it (at [54]).

Costs where two claims are commenced using a single claim form

The second issue, concerning cost orders involving multiple claims, arose in ***Heathcote v Asertis Ltd*** [2024] EWCA Civ 242. The underlying action concerned two claims brought by the respondent, a litigation funder, as assignee of a company that had gone into liquidation. Both claims were commenced using a single claim form.

The first claim alleged that the appellant had benefitted under an employee benefit trust tax avoidance scheme (the rewards claim). It failed. However, before the trial of the rewards claim, the first appellant (Heathcote) repaid an overpayment of £7,800, which did not form part of the pleaded claim. The second claim concerned an alleged preference

payment of £65,000 made by the first and second appellants (Heathcote and Servico Contract Upholstery Ltd) (the payments claim). It succeeded.

At the costs hearing, the judge found that the respondent was entitled to judgment on the claim as well as the £7,800 repayment. Although the respondent had lost the second claim, the judge found that the claim was not unreasonable or exaggerated and awarded the respondent 75% of its costs. The upshot of this was that the second appellant was liable to pay 75% of the respondent's costs of the first claim despite the fact that it was never a claim advanced against it, and the first appellant was liable to pay 75% of the respondent's costs of the first claim, even though that claim failed entirely on the pleaded basis.

At the appeal, the appellant argued that the judge had expressly recognised that he was dealing with "two separate claims" but in his costs judgment he wrongly rolled them into a single claim. The respondent argued that the appellants did not invite the judge to distinguish between the rewards claim and the payment claim for the purpose of a costs order and had invited the judge to deal with the proceedings as a whole. It also argued that the conduct of the proceedings had been based on treating the claims as one unified package and the judge could not be criticised for not having exercised his wide discretion in a way which he was never asked to do (at [17]–[20]).

The appeal was dismissed. In doing so, the first point noted by Lewison LJ was that it was clear on authority that a judge cannot be criticised for having failed to take into account a factor which, if relevant, was known or available to all parties and which no party invited him to consider as part of the process of exercising his discretion (at [21]–[23]). As he noted,

> *"[21] In Allen v Bloomsbury Publishing Ltd [2011] EWCA Civ 943 (a case about security for costs) Lloyd LJ said at [17] :*
>
> > *'In our adversarial system of litigation, in a case where each party was professionally represented with plenty of opportunity to formulate and put to the court all points considered to be relevant on a particular point, it seems to me questionable for a judge to be criticised for having failed to take into account a factor which, if relevant, was known or available to all parties and which no party invited him to consider as part of the process of exercising his discretion. It would be one thing if, through inadvertence, the judge overlooked a point of law which should affect his reasoning ... but otherwise what is said here is that there was a relevant consideration which the judge failed to take into account. It does not seem to me to be fair either to the judge or to the opposing party or parties for an unsuccessful litigant to be able to challenge the exercise of the court's discretion for failure to take account of a factor which was not in any way hidden and which, if it really is relevant, the exercise of reasonable professional diligence could have brought to light but which was not suggested to the judge as being relevant. This strikes me as being wrong in principle.'*
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> *[22] To similar effect, in Samsung Electronics Co Ltd v LG Display Co Ltd [2022] EWCA Civ 423 (a case about service out of the jurisdiction) Males LJ said at para 5:*
>
> > *'Further, it is important to say that the function of this court is to review the decision of the court below. The question is whether the judge has made a significant error having regard to the evidence adduced and the submissions advanced in the lower court. Just as the trial of an action is not a dress rehearsal for an appeal..., neither is an application to set aside an order for service out of the jurisdiction. In general an appellant will not be permitted to rely on material which the judge was not invited to consider or to advance an entirely new basis for saying that the judge's evaluation on the issue of appropriate forum was wrong. A judge can hardly be criticised for not taking something into account if he was never asked to do so. Although no doubt this principle will be applied with some flexibility, bearing in mind that the ultimate Spiliada question is concerned with 'the interests of all the parties and ... the ends of justice', good reason will be required for taking a different approach.'*
>
> *[23] Both these passages were approved by this court in Secretary of State for Transport v Cuciurean [2022] EWCA Civ 661, [2022] 1 WLR 3847 (a case about costs)."*

Having noted that, Lewison LJ went on to state that when considering exercising the jurisdiction to award costs under CPR r.44.2, the first question for the court to decide is whether to make a costs order at all after which the court must identify the successful and unsuccessful party (at [25]). He further noted that generally the court will approach questions of costs by taking a global approach. In a single claim this is done by identifying the successful party, i.e., the one who succeeded overall. As Ward LJ noted in ***Day v Day*** [2006] EWCA Civ 415; [2006] C.P. Rep. 35 at [17], this was usually done in pure monetary claims by determining who was to pay the cheque to whom at the end of the case. The one paying the cheque was the unsuccessful party.

Where there were multiple claimants and defendants advancing or responding to distinct claims matters may, however, be different (at [27]). For example, in ***Flitcraft Ltd v Price*** [2024] EWCA Civ 136 the deputy judge refused to look at costs in the round where the first claimant had lost his patent claim and the second claimant had succeeded as the exclusive licensee of the patent. The Court of Appeal agreed with the judge and held that the claims were two separate and distinct claims which, if successful, would have resulted in two separate judgments. Additionally, in

"[30] . . . Sirketi v Kupeli [2018] EWCA Civ 1264, [2018] 1 WLR 1235 multiple claimants brought proceedings against Cyprus Turkish Airlines seeking compensation for cancelled flights. The claims were joined and managed together. 14 claims were allowed, 32 were transferred to the County Court for determination and 792 were dismissed. The trial judge held that the claimants were the successful party because they would receive a cheque from the defendant. This court reversed her decision. Hickinbotham LJ said at [60]:

> *'... in a group claim such as this, whilst the defendant may be unitary, the claimants are not. In his submissions, Mr Bradley referred to this group claim as a "unitary claim"; but that is to misdescribe it. In this case, there were 838 individual claims, albeit joined and managed together because, without that mutual support, clearly none would be viable.'*

[31] Although those observations were directed to joint claimants, I consider that they apply equally to co-defendants against whom separate claims are advanced.

[32] If the judge had considered the two claims separately, he might well have concluded that Mr Heathcote (and Upholstery) had succeeded on the rewards claim; and Asertis had succeeded on the payment claim. He might well then have made an order requiring Asertis to pay the costs of the rewards claim; and an order requiring the two defendants to pay the costs of the payment claim. But is that what he was asked to do?"

Lewison LJ then turned to consider what the judge was asked to do regarding costs (at [33]–[38]). It was clear from the skeleton argument before the judge that the respondent had brought two claims against the appellants. The judge was then asked to order the respondent to pay all of the appellants' costs on the standard basis. The appellants' skeleton argument pointed out that the respondent had succeeded on the second claim but that the appellants had succeeded in defeating the rewards claim. It was on that basis that the judge was asked to treat the appellants as the successful party. Furthermore, it was not possible to read into this the proposition that the judge was invited to consider each claim separately. It was directed at persuading the judge to treat the appellants as the overall winners. It did not, for example, acknowledge that the appellants were both liable for the costs of the second claim, and there was no reference to the separate position of the second appellant. Additionally, the appellants' skeleton argument canvassed the possibility of a percentage costs order. That was inconsistent with any suggestion that the judge was asked to treat the two claims separately. Finally, there was no suggestion that it was ever pointed out to the judge that the effect of his order was to make the second appellant liable for 75 per cent of the costs of a claim that was never made against it. In the premises, there was no basis to criticise the judge's approach to the exercise of his discretion given the way the matter was advanced before him (at [40]).

Limitation, interest and costs

The third issue concerned a short but important point of construction relating to s.24(2) of the Limitation Act 1980. It was considered in ***Deutsche Bank AG v Sebastian Holdings Inc*** [2024] EWCA Civ 245. Section 24 of the 1980 Act provides that

(1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.

(2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

The specific issue before the court was when time commences to run for limitation purposes on interest on costs where the order is for costs to be assessed (at [1]). Particularly, the question focused on the meaning of "due" in s.24(2).

It was common ground that: (i) an order for costs to be assessed is a judgment debt for the purposes of the Judgment Act 1838. It thus carries interest per s.17 of that Act; (ii) interest accrued from the date of the order; and (iii) a costs order is not enforceable as a judgment until the costs liability has been quantified following a detailed assessment (at [5]). In this case a costs order was made in November 2013. The judge held that interest accrued from that date, as "*due*" in s.24(2) of the 1980 Act meant "*the date on which the interest liability accrues*" (at [6]). The appellant argued that this was the wrong approach to take. As Popplewell LJ summarised it,

"[7] DB contends that the Judge was wrong to treat 'due' in s. 24(2) as referring to the date on which the interest liability accrues. It submits that 'due' means payable (in the sense of enforceable, which is the sense in which I will use the word); and that no interest on costs was payable until the costs had been quantified in the Final Costs Certificate in May 2023. In the alternative, DB contends that if the Judge was correct in her construction of s. 24(2), the relevant date is not that of the Costs Order in 2013 but that of the NPCO in 2016, because the NPCO is the judgment debt which it is seeking to enforce against Mr Vik, and it was only upon the NPCO in 2016 that Mr Vik's liability arose for costs payable under the Costs Order and interest thereon."

The appeal was allowed. First, Popplewell LJ explained that, as a matter of language, devoid of context, "due" may mean owing or payable. As he put it "*If a lease provides for rent to accrue from day to day but to be payable monthly in arrears, one might equally say that the rent falls due daily or that it falls due at the end of the month. Either is a natural use of language.*" (at [14]). It was not, however, the same with "*arrears*". It was not neutral in the same way as "*due*". As he went on to state,

> *"[18] The word 'arrears', however, is not neutral in the same way as 'due', and its place in s. 24(2) supports DB's construction. There are no 'arrears' of an amount owing until it has become payable. In an interest only mortgage with interest accruing daily but payable in arrears at the end of the month, one would not speak of there being arrears of interest unless and until there was a failure to pay the interest at the end of the month. As Mann CJ put it in the Australian case of Paice v Ayton [1941] VLR 63, 68: 'The word arrears presupposes a time fixed for payment of a sum of money and the lapse of time thereafter without payment.'*
>
> *[19] Section 24(2) bars recovery of 'arrears of interest'. That which must have become due in order to commence time running is 'the interest', which is a reference back to the 'arrears of interest', recovery of which is precluded by the subsection. In other words the starting point for the commencement of the running of time which is identified in the subsection is 'the date on which the [arrears of] interest became due.' That can only mean when the interest became payable, rather than owing, because there are no arrears of interest unless and until the interest is payable."*

He went on to explain that if "due" in s.24(2) meant payable then it would become necessary to use a different word in s.24(1) because that sub-paragraph applied to judgments of all kinds, and was not confined to money judgments. Conversely, the word "enforceable" could not have been used in s.24(2) in place of "due" without recasting the language of the section. Further support for the appellant's construction lay in the use of the word "due" in s.19 of the 1980 Act, which is concerned with "arrears of rent" and ss.20(5) and 22, which also use the word "due" for the purposes of commencing time running in relation to the recovery of interest. For these reasons, Popplewell LJ held that the language of s.24(2), in its surrounding context of the 1980 Act, dictates that "due" means payable (at [22]–[36]).

Popplewell LJ also considered the policy underpinning the English law of limitation of action as a guide to interpretation (at [42]–[58]). He noted that the law on limitation of actions had been subjected to regular criticism for its uncertainty, complexity and lack of coherence, albeit attempts to reform it had come to nothing (at [42]). He then noted several key policy considerations which justified the limitation of actions: (i) for defendants, evidentiary considerations could put them at a disadvantage in meeting claims after a lapse of time. Limitation gives certainty for a defendant after a lapse of time (at [45]); (ii) as to the interest of the state, one of the justifications for limitation periods is the concern that after a lengthy period of time it will no longer be possible to have a fair trial (at [46]); (iii), and finally, in respect of claimants, statutes of limitation have been seen as a means of encouraging claimants to take steps within a reasonable period of time to enforce their rights which may be described as a "*use it or lose it*" jurisdiction (at [47]). These policy considerations further supported the construction that "*due*" meant payable in s.24(2) (at [48]). It did so because: (i) s.24(2) only applied once there was a judgment that established a defendant's liability. Matters of evidence no longer applied. Where a judgment created a judgment debt that was payable immediately, the paying party should pay it. Where money was owed but not yet payable, e.g., because it was yet to be assessed, a payment on account could be made. If that was done then the paying party would prevent interest accruing (at [48]); (ii) there was "*no statutory limitation period for the execution of judgments generally, to which s. 24(1) does not apply*" (at [49]); (iii) nor is there "*any statutory limitation period within which the receiving party has to commence or conclude a detailed assessment of costs.*" (at [50]); (iv) it was in the interest of the state that judgment debts should be paid, and hence that judgments and orders should be obeyed (at [51]); and, (v) "*the use it or lose it rationale dictates that time should not start to run until that party is in a position to enforce their rights. Until the conclusion of the assessment, the receiving party cannot enforce the right to interest. This dictates that time should not start to run in s. 24(2) until the interest is payable*" (at [52]). Finally, Popplewell LJ concluded that this was not a case where it was necessary to resort to the legislative history to help determine the question of interpretation. If it had been there was, however, nothing in it to support a conclusion other than the one reached (at [59]–[60]).

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