CIVIL PROCEDURE NEWS

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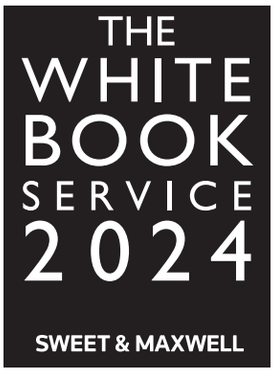

In Brief

Cases

- **Various Claimants v Mercedes-Benz Group Ag** [2024] EWHC 695 (KB), 25 March 2024, unrep. (Cockerill and Constable JJ)

Disclosure – documents – disclosure – funding agreements

CPR rr.25.14(2)(b), 31.22(2). The managing judges of the ***NOx Emissions Group Litigation*** (2023) considered two applications. The first concerned an application by the defendant, Mercedes-Benz Group Ag, which sought an order under CPR r.31.22(2) prohibiting collateral use of documents that had been disclosed in the proceedings and referred to at a public hearing. The second concerned applications, under CPR r.25.14(2)(b), from the defendants seeking disclosure from the claimants of details of funding agreements that they had entered into concerning the proceedings. **Held**, both applications were dismissed, although in respect of the funding disclosure application, the court noted that it would revisit the question after, amongst other things, the costs budgets for 2025 being fixed (at [33] and [59]). In so far as the first application was concerned, the court noted that the leading authority was ***Lilly ICOS Ltd v Pfizer Ltd (No. 2)*** (2002) (at [11]). The defendant sought the order on three bases, although it focused its submissions on the first two. They were that: the documents in question contained material that was commercially sensitive and not generally available; there was a real risk of harm to the defendant, not least through the risk that the material could be exploited in other jurisdictions if collateral use were permitted; and the court could not determine whether the principle of open justice required the documents to be publicly available prior to trial. The court held that the defendant had failed to demonstrate good reasons to justify derogating from the principle of open justice concerning the application (at [14]–[25]). In doing so, the court noted that:

> *"[25] . . . A genuine justified concern about collateral use of specific material whose commercial sensitivity is properly made clear could be justified – particularly if the role of that material at trial were dubious. There may also be some force in restricting publication of truly sensitive details of extant systems which are not already in the public domain. However, any such application must be properly particularised and evidenced. Paragraphs 64 to 68 of the De-designation Judgment apply with equal force here."*

The De-designation Judgment is ***Cavallari v Mercedes-Benz Group AG*** [2024] EWHC 190 (KB).

In terms of the submission concerning potential exploitation in other jurisdictions, it was submitted by the defendant that all the documents subject to the application were confidential according to German law and that the German civil courts had not enforced any obligation to disclose the documents in Germany, subject to one exception that is subject to an appeal (at [26] –[28]). The court stated, however, that the German proceedings were distinct from those in England and Wales, and they were not relevant to the present claim. Nor were the English and Welsh courts bound by the outcome of the German appeal proceedings. As they put it,

> *"[28] . . . There appears to be no basis for an English court to, in effect, give precedence to a foreign decision which is not part of English proceedings."*

More broadly, it concluded that while the court could take account of the approach to the status of documents in other jurisdictions in considering an application under CPR r.31.22, the English and Welsh courts could not simply give effect to restrictions to the application of the principle of open justice on the basis of the approach to confidentiality in other jurisdictions. As the judges put it,

> *"[29] So far as the wider point is concerned, the confidential status of documents in other jurisdictions may in principle be taken into account, but the weight given to that factor must depend on the circumstances of the case and the jurisdiction in question. In this case, Mr Bennett's evidence simply seems to be that litigants in Germany are not entitled to disclosure of most of the documents covered by this application.*
>
> *[30] It is entirely understood that, this being the case, the Mercedes Defendants find this court's approach to confidentiality and disclosure to be uncongenial. But those are the rules which apply in this court, to all litigants - domestic or international. It cannot sensibly be the case that an English court engaging with claims made against some of the same defendants in England is obliged to restrict the principle of open justice (which is the starting point, as all parties accept) by reference to purported confidentiality protections in foreign jurisdictions."*

Turning to the application under CPR r.25.14(2), the defendants sought copies of all finance, credit and funding agreements or documents that explain the basis on which funding was being provided to the claimants' lawyers, as well as information concerning the distribution of damages. They did so as they were considering making an application for

security for costs (at [34]). It was submitted that the court had power to make such an order for the provision of the documents and information as it had power to make orders ancillary to relief under CPR r.25.14(2)(b) (at [36]). It was noted by the judges that it was made clear in ***Re Hellas Telecommunications (Luxembourg)*** (2017) that the court had an inherent power, or alternatively there was power implicit in CPR r.25.14, for the court to make orders to enable an effective application under that rule to be made (at [39]). Whether such an order should be made is a matter of discretion, which will turn on the facts (at [41]). Also see: ***Reeves v Sprecher*** (2007); ***Re RBS (Rights Issue Litigation)*** (2017). Specifically, the court found that there was no good reason to limit the application of the court's power under CPR r.25.14 to situations where a non-party (such as a funder) had a direct contractual relationship with a claimant. It could not thus be the case that creating a means by which funding was channelled through a vehicle between the claimant and the funder, such as a law firm, could frustrate the power in that rule (at [52]). In the present case, funding was provided directly to the claimants' law firm by funders. As the judges went on to state,

> *"[53] Turning then to the substance, the Claimants' claims can only be advanced, self-evidently, because of the provision of funding during the progression of the litigation. That funding is provided directly to Pogust Goodhead by the Funders, rather than to the Claimants and from the Claimants to Pogust Goodhead by way of fees. It is unrealistic, however, to suggest that this routing of funds is, in and of itself, sufficient to mean that the arrangements can in no circumstances amount to 'contributing or agreeing to contribute to' the claimant's costs for the purposes of the first limb of rule 25.14(2)(b).Whether security for costs might be ordered against a funder will turn on an analysis of, amongst other things, whether there is a sufficient link between the funding and the costs for which recovery is sought (as indicated by Hildyard J in the passage quoted above). Such a link may or may not exist, but it is not answered determinatively simply by looking at whether the funding is provided directly to the Claimants.*
>
> *[54] It may well be that the appropriate characterisation of the funding mechanism in the present case is, as Mr Williams says, merely the provision of working capital to a solicitors' firm, akin to a secured bank overdraft, the effect of which is to permit a solicitor to offer CFAs. However, if the arrangement should more properly be objectively regarded as, in substance, a vehicle through which commercial lenders are seeking to fund litigation from which they take a share of the recovery, this is precisely the type of non-party against whom rule 25.14(2)(b) was intended to bite, in support of the general policy that it would be unjust for a funder who purchases a stake in an action for a commercial motive to be protected from all liability for the costs of the opposing party if the funded party fails in the action. As Hildyard J said in RBS, the range of funding arrangements will sit on a spectrum. Where a particular arrangement is on that spectrum is a question of fact, and, in our judgment, where such a question arises it is one which can only be ascertained in substance by examining the arrangements in question."*

Moreover, there was evidence that weighed in favour of disclosure (at [55]). That being said, the court concluded that it would revisit the question of disclosure at a later date, after a three day-costs management conference, while refusing to make an order disclosure on the present application (at [58]–[59]). ***Lilly ICOS Ltd v Pfizer Ltd (No. 2)*** [2002] EWCA Civ 2; [2002] 1 W.L.R. 2253, CA, ***Reeves v Sprecher*** [2007] EWHC 3226 (Ch); [2009] 1 Costs L.R. 1; ***Re RBS (Rights Issue Litigation)*** [2017] EWHC 1217 (Ch); [2017] 1 W.L.R. 4635, ChD, ***Re Hellas Telecommunications (Luxembourg)*** [2017] EWHC 3465 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2024*** Vol.1, paras 25.14.3, 31.22.1.)

Taylor v Savik [2024] EW Misc 15 (CC), 5 April 2024, unrep. (HHJ Matthews)

Trial by jury

County Courts Act 1984 s.66. The second respondent applied for the trial of their action to be held before a judge and jury in the County Court. The application arose in respect of an application under the Insolvency Act 1986, which sought a declaration that residential property was held on trust by the first respondent for the second respondent. Section 66(2) and (3)(a) provide a discretion to direct trial by judge and jury in the County Court where "a charge of fraud" is alleged against the party who makes an application for trial by judge and jury. That discretion arises against a background presumption that there will be a trial by judge alone (at [20]). It was noted that if this matter had been brought in the High Court, as it would have been heard in the Chancery Division, such an application could not have been brought. Trial by judge and jury is only available in the King's Bench Division: see Senior Courts Act 1981 s.69 (at [19]. **Held**, the first point to determine was what was meant by "charge of fraud" in s.66(3)(a). On authority, which was binding on the judge,

> *"[38] . . . a 'charge of fraud' within section 66(3) of the 1984 Act is not merely one of the making of a false statement, but instead one of the complete tort of deceit, including the allegation of loss suffered by the victim as a result. But section 66(3)(a) applies only where the 'charge of fraud' is made against the person applying for the jury trial (ie the second respondent in this case)."*

Where the matter involved a charge of fraud it ought to be tried by a jury unless the trial required "any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a

jury". The factors to be taken into account in determining whether that was the case were noted to have been stated by Lord Bingham CJ in ***Aitken v Preston*** (1997) as follows:

> *"[45] . . .*
>
> *'(i) The basic criterion, viz that the trial requires a prolonged examination of documents, must be strictly satisfied, and it is not enough merely to show that the trial will be long and complicated (Rothermere v Times Newspapers Ltd [1973] 1 All ER 1013, [1973] 1 WLR 448). However, the word "examination" has a wide connotation, is not limited to the documents which contain the actual evidence in the case and includes, for example, documents which are likely to be introduced in cross-examination (Goldsmith v Pressdram Ltd [1987] 3 All ER 485, [1988] 1 WLR 64).*
>
> *(ii) "Conveniently" means without substantial difficulty in comparison with carrying out the same process with a judge alone. This may involve consideration of several factors, for example:*
>
> *(a) the additional length of a jury trial as compared with a trial by judge alone;*
>
> *(b) the additional cost of a jury trial taking into account not only the length of the trial but also the cost of, for example, additional copies of documents;*
>
> *(c) any practical difficulties which a trial by jury would entail, such as the handling of particularly bulky or inconvenient files, the need to examine documents alongside each other, and the degree of minute scrutiny of individual documents which will be required;*
>
> *(d) any special difficulties or complexities in the documents themselves (Beta Construction Ltd v Channel Four Television Co Ltd [1990] 2 All ER 1012, [1990] 1 WLR 1042 especially per Stuart Smith LJ at page 1047 of the latter report and per Neill LJ at page 1055 H, referred to and applied in the recent case of Taylor v Anderton (Police Complaints Authority Intervening) [1995] 2 All ER 420, [1995] 1 WLR 447).*
>
> *(iii) The ultimate exercise of discretion will in each case depend substantially on the circumstances of each individual case, and it would be idle to attempt to enumerate all the factors which might arise.'*
>
> *[46] But Lord Bingham also went on to identify four factors to take into account:*
>
> *'(1) The emphasis now is against trial by juries, and this should be taken into account by the court when exercising its discretion (Goldsmith v Pressdram (supra) at page 68 of the latter report per Lawton LJ with whom Slade LJ expressly agreed). This conclusion is based on s.69(3), which was a new section appearing for the first time in the 1981 Act to replace s.6(1) of the Administration of Justice (Miscellaneous Provisions) Act 1933, the provision in force at the date when Rothermere v Times Newspapers was decided.*
>
> *(2) An important consideration in favour of a jury arises where, as here, the case involves prominent figures in public life and questions of great national interest (Rothermere v Times (supra)).*
>
> *(3) The fact that the case involves issues of credibility, and that a party's honour and integrity are under attack is a factor which should properly be taken into account but is not an overriding factor in favour of trial by jury (Goldsmith v Pressdram(supra) at page 71 H per Lawton LJ).*
>
> *(4) The advantage of a reasoned judgment is a factor properly to be taken into account (Beta Construction v Channel Four Television (supra)).'"*

A charge of fraud, concerning VAT, was contained in the pleadings in the present case (at [53]–[57]). Thus, trial should be by jury, unless the matter could not be tried conveniently before a jury. Scrutiny of the evidence, particularly in this case bank statements, meant that it could not be conveniently tried before a jury (at [58]–[62]). As a consequence, the matter had to be tried before a judge alone. HHJ Matthews went on to consider whether he could order a trial by jury under the general discretion provided for under s.66(2) of the 1984 Act. His overall view was that, having concluded as he had on the s.66(3) point, he had no residual discretion to exercise (at [63]). However, in the event that he had a residual discretion, he would have declined to exercise it in favour of trial by jury. In reaching that conclusion, he concluded that it would not be right to refuse to do so purely on the basis that trial by jury would take longer and cost more than trial by judge alone. Such matters could be taken into account in considering how to exercise the discretion, as could the fact that trial by judge alone provides benefits to effective case management (at [63]). The judge also rejected submissions in favour of exercising the discretion that were to the effect that a jury would be more sympathetic to the applicant. As HHJ Matthews summarised it,

> *"[64] The second respondent makes two points in particular in relation to trial by jury. First, he says that 'my status as a convicted criminal me leaves me wondering if I can be dealt with even-handedly by a single judge'. I do not see this as an argument in favour of having a jury over a judge alone. There is no a priori reason to suppose that a professional*

judge would be less sympathetic to a convicted criminal than a popular jury, and the second respondent adduces no evidence or other material in support of such a view. Indeed, some might say that any possible prejudice was the other way round. Moreover, a professional judge must give reasons for the decision, which can if appropriate be examined at appellate level. A jury gives none, and an appeal is thus rendered more difficult.

[65] The second reason given by the second respondent is that 'a judge has little discretion to take a holistic view of a major fraud that now spans 10 years'. But the fact-finding function is exactly the same, whether the tribunal is a popular jury or a judge sitting alone. Neither form of tribunal has any more or less "discretion" in the finding of facts than the other. There is therefore nothing in this point.

[66] The third reason given by the second respondent, following on from this, is that a 'jury of my peers is more likely to lend weight to the horror of what has happened overall'. If what he means is that he considers that a jury is more likely than a judge to ignore the law, or the legal duties laid upon a fact-finder, then in my judgment that is an irrelevant, indeed illegitimate, consideration. If what he means is that a non-lawyer, or non-judge, is more likely to pay attention to purely human considerations, then I disagree. We professional judges are human too."

Aitken v Preston [1997] E.M.L.R. 415, CA, ref'd to. (See ***Civil Procedure 2024*** Vol.2 para.9A-548.)

Williams-Henry v Associated British Ports Holdings Ltd [2024] EWHC 806 (KB), 10 April 2024 (Ritchie J)

Fundamental dishonesty – substantial injustice – test

Criminal Justice and Courts Act 2015 s.57. The claimant pursued a claim for personal injury against the defendant. Liability was settled on a two-thirds basis in the claimant's favour. Quantum was determined at trial. At the trial an issue was whether the claimant had been fundamentally dishonest and, if so, whether dismissing the claim would cause the claimant a substantial injustice. **Held**, the claimant was held to have been fundamentally dishonest. Except in so far as not being required to reimburse the defendant in respect to some interim payments (at [203]–[206]), it was further held that dismissing the claim would not cause the claimant a substantial injustice. As a consequence, the claimant's claim for what would have been quantum of approximately £600,000 was dismissed. In reaching this decision, Ritchie J noted his previous summary of the steps to be taken in dealing with s.57. As he put it,

"[172] In Cojanu v Essex [2022] EWHC 197 (QB) I summarised the necessary steps to consider in a S.57 case as follows:

'47. . . . there are 5 steps to be taken by a trial judge when faced with a defence under S.57 before a finding can be made of fundamental dishonesty:

i) the S.57 defence should be pleaded;

ii) the burden of proof lies on the Defendant to the civil standard;

iii) a finding of dishonesty by the Claimant is necessary (more on this below);

iv) as to the subject matter of the dishonesty, to be fundamental it must relate to a matter fundamental in the claim. Dishonesty relating to a matter incidental or collateral to the claim is not sufficient;

v) as to the effect of the dishonesty, to be fundamental it must have a substantial effect on the presentation of the claim.

. . .

'49. I take from this ruling that the test for the trial judge to apply when considering making a finding of dishonesty is:

(A) firstly to find on the evidence as a fact what the Claimant's state of mind was at the relevant time on the relevant matters; and

(B) secondly to apply an objective standard to decide whether the Claimant's conduct was dishonest as alleged. Therefore my step (iii) above has two parts to it: A & B.'"

In terms of the first step, concerning pleading the s.57 defence, he noted that there was no absolute requirement to plead the defence. As he explained it,

"[173] I should clarify that I used 'should' not 'must' in the pleading ruling. Subsequent authorities have polished the pleading point. S.57 can be raised late in the day, even if there is no pleading, if it has reasonably only arisen late. . . . "

Having considered Knowles J's approach to the question of substantial injustice in ***London Organising Committee of the Olympic and Para Olympic Games (In Liquidation) v Sinfield*** (2018) and ***Woodger v Hallas*** (2022), Ritchie J sum-

marised the approach to be applied in determining whether a claimant would suffer substantial injustice if their claim were to be dismissed following a finding of fundamental dishonest. As he put it,

> *"[177] The principle to be applied is that fundamental dishonesty will result in the Claimant losing her genuine damages. This penalty is intended by Parliament. So, the starting point is that a dishonest claimant is not suffering an injustice per se by being deprived of his/her genuine damages. Once fundamental dishonesty has been found by the Judge then the Court must consider whether the dismissal will cause SI. However, trying to identify whether dismissing a claim for damages with a properly assessed genuine quantum of say £600,000 would cause any or even a substantial injustice to a claimant, whilst ignoring the very dismissal which is the only operative cause of any potential injustice, is imposing a blindfold on the Judge which the Act itself does not impose. I do not understand how a Judge will know injustice when she/he sees it, with the blindfold put on. If that is what Knowles J. was saying then I respectfully do not agree with his ruling on the interpretation of SI. The plain words of the Act tie the responsibility to assess any resulting SI to the dismissal of the claim. In my judgment it is the dismissal of the claim for damages that is the trigger for the analysis of whether a substantial injustice will occur if no damages are awarded. One cannot ignore the very thing which S.57(3) takes away when considering the injustice of the taking away. I accept, of course, that the aim of the section is to punish dishonesty by the dismissal of the claim. But this is tempered by Parliament's inclusion of S.57(2). This section gives the Judge discretion which, is to be exercised fairly and only if a threshold with two parts is reached. Part one is a finding of injustice to the Claimant. Part two is a finding that the injustice is substantial.*
>
> *[178] I consider that the correct approach when deciding whether a substantial injustice arises is to balance all of the facts, factors and circumstances of the case to reach a conclusion about SI. The relevant factors in my judgment are all of the circumstances and include:*
>
> *(1) The amount claimed when compared with the amount awarded. If the dishonest damages claimed were small or moderate compared to the size of the assessed genuine damages which were substantial or very substantial this will weigh more heavily in favour of an SI ruling.*
>
> *(2) The scope and depth of that dishonesty found to have been deployed by the claimant. Widespread and gross dishonesty being more weighty against SI than moderate or minor dishonesty.*
>
> *(3) The effect of the dishonesty on the construction of the claim by the claimant and the destruction/defence of the claim by the defendant. This would be measured by considering all matters including the costs consequences of the work done in relation to the dishonesty compared with the work done had there been no dishonesty.*
>
> *(4) The scope and level of the claimant's assessed genuine disability caused by the defendant. If the claimant is very seriously brain injured or spinally injured, then depriving the claimant of damages would transfer the cost of care to the NHS, social services and the taxpayer generally and that would be more unjust than if the claimant had, for instance, a mild or moderate whiplash injury. The insurer of the defendant (if there is one) has taken a premium for the cover provided. Why should the taxpayer carry the cost?*
>
> *(5) The nature and culpability of the defendant's tort. Brutal long term sexual abuse, intentional assault or drug fuelled, dangerous driving being more culpable than mere momentary inadvertence.*
>
> *(6) The Court should consider what the Court would do in relation to costs if the claim is not dismissed. The Judge should ask: will the Court award most of the trial and/or pre-trial costs to the defendant in any event because fundamental dishonesty has been proven? Also, will the claimant have to pay some or all of his/her own lawyers' costs out of damages if the claim is not dismissed? These both aim towards answering the question: "what damages will be left for the claimant after costs awards, costs liabilities and adverse costs insurance premiums are satisfied?" If the genuine damages to be received by the claimant will be substantially reduced or eradicated by the adverse costs awards, then it is less likely that SI will be caused by the dismissal.*
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> *(7) Has the defendant made interim payments, how large are these and will the claimant be able to afford to pay them back?*
>
> *(8) Finally, what effect will dismissing the claim have on the claimant's life. Will she lose her house? Will she have to live on benefits, being unable to work?"*

London Organising Committee of the Olympic and Para Olympic Games (In Liquidation) v Sinfield [2018] EWHC 51 (QB), unrep., QBD, ***Woodger v Hallas*** [2022] EWHC 1561 (QB), unrep., QBD, ref'd to.

- **Morris v Williams & Co Solicitors** [2024] EWCA Civ 376, 18 April 2024, unrep. (Vos MR, Lewison and Falk LJJ)

Multiple claimants – use of a single claim form

CPR rr.7.3, 19.1. The Court of Appeal considered the question whether 134 claimants had properly issued their claims by using a single claim form. This required consideration of CPR r.19.1, which provides that any number of claimants or defendants may be joined as parties to a claim. It also required consideration of CPR r.7.3, which provides that a single claim form can be used to start all claims that can conveniently be joined together. In considering the meaning of these provisions, the court considered the approach taken in ***Abbott v Ministry of Defence*** (2003). **Held**, the appeal was dismissed. In reaching that decision, Vos MR held that the correct interpretation of the two provisions needed to be considered against the background of the pre-CPR position. He further held that the approach taken in ***Abbott*** on the test for joinder was wrong in law .

> *"[8] I have decided that both the Solicitors' construction of 19.1 and 7.3 and the tests adumbrated in Abbott are incorrect in law. The regime allowing multiple claimants to bring their claims in one claim form under 19.1 has to be construed against the background of the previous regime established under the Rules of the Supreme Court (RSC) in general and Order 15 rule 4 of the RSC 1999 in particular (O15 r4). Even though the judge applied the Abbott test, he was right to allow the Claimants' claims to proceed in one set of proceedings. O15 r4 allowed multiple claimants where, amongst other things, 'some common question of law or fact' arose. This formal requirement was not carried over into the CPR. It seems to me that the Civil Procedure Rules (sic) Committee (the CPRC) could usefully look again at whether it would have been better if it had been."*

It was clear that the word "claimant" in CPR r.7.3 could read as including the plural. That was the effect of s.6(c) of the Interpretation Act 1978. Equally, it was clear that "claim" in CPR r.19.1 meant "proceedings". Furthermore, after amendments to the RSC effected in 1896 (on which see [36]–[43]),

> *"[47] . . . it was never doubted that any number of claimants could be joined as parties to a single set of proceedings. Lord Woolf's report did not suggest that the introduction of the CPR was intended to make any such radical change."*

The next question concerned the proper construction of CPR r.7.3. In respect of that, Vos MR held,

> *"[48] . . . the next issue is as to the proper meaning of 7.3, which provides that claimants 'may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings'. I do not think that the courts need to define the meaning of a simple English word such as 'conveniently'. 'Convenience' is a most ordinary word, as Andrew Baker J pointed out at [53] in Abbott. It was first used in our procedural rules more than 100 years ago. The question is rather: in what circumstances can multiple claims be conveniently disposed of in the same proceedings? It seems to have been common ground at the end of the hearing that the answer to that question included the circumstances described in O15 r4. I entirely agree with that proposition for several reasons. First, it is obviously the case that claims can be conveniently disposed of in the same proceedings if common questions of law or fact arise in all the claims brought and if the claims are in respect of or arise out of the same transaction or series of transactions. Secondly, nobody ever suggested when the CPR was introduced that a radical departure was intended from the previous position as to group actions, save for the introduction of GLOs. Thirdly, the concept of 'convenience' appeared many years ago in Order 15 rule 5 where it was provided that if two or more plaintiffs were parties and the court thought that their joinder might embarrass or delay the trial or was otherwise inconvenient, separate trials could be ordered. It is this rule that seems to have been used as a foundation for the simplified words in 7.3. The intention of the CPR was to make the procedural rules intelligible to non-lawyers as well as lawyers. Finally, for the reasons given in the Guide, amongst others, interpreting 7.3 as excluding the cases brought by multiple claimants within O15 r4 would not serve the overriding objective of enabling the court to deal with cases justly and at proportionate cost."*

Finally, in terms of the three tests set out in ***Abbott***, they were wrong in law. As Vos MR explained,

> *"[49] I turn next to the question of whether any of the three tests promulgated in Abbott are correct. I have described the three tests as the real progress test, the real significance test and the test that requires that the determination of common issues in a claim by multiple claimants under 19.1 would bind all parties. I do not think any of these tests is appropriate to exclude cases from the ambit of 19.1. It seems to me that 19.1 and 7.3 must be construed as meaning what they say: any number of claimants or defendants may be joined as parties to proceedings, and claimants may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings. There is no exclusionary rule of real progress, real significance or otherwise. The court will determine what is convenient according to the facts of every case.*
>
> . . .
>
> *[51] I accept that multiple claims will probably be capable of being conveniently disposed of in the same proceedings where common issues will bind all or most of the claimants (see [31], [33] and [35] above), but I do not think that is currently a requirement of the CPR. Nor, therefore, is it the correct test. There is no test beyond the words of rule 7.3, even if it is clear that cases within the old O15 r4 and cases where common issues will bind all the claimants will obviously be capable of being conveniently disposed of in the same proceedings. The case management tools of ordering*

lead claims and more than one trial, whether of preliminary issues or otherwise, are very much part of proceedings brought by multiple claimants under 19.1. Lead claims are often chosen specifically to resolve specific issues that arise in claims made by some claimants and not others. The current CPR does not restrict the flexibility of 19.1 and 7.3 by imposing a requirement that one or more issues has to be common to or bind all or even most of the other parties. As I said at [8] above, however, I would think it very useful if the CPRC were to consider whether it would have been better and clearer if a requirement for common issues of the kind found in O15 r4 had been carried over into the CPR.

[52] Accordingly, I would also reject the Claimants' submission in its Respondents' Notice that Abbott ought to have decided (if it did not) that the trial of common issues in proceedings brought by multiple claimants would 'produce a binding determination' on all parties. That is not something that can be spelled out of 19.1 and 7.3. Nor is it the current test of whether it would or would not be convenient to dispose of claims by multiple claimants in the same set of proceedings.

[53] I should mention for the sake of completeness that I do not accept in this case that it is inconvenient or unfair for the Claimants' claims to be grouped together in one claim form. The judge found that there were the common issues that I have identified at [17] above.

[54] I do, however, accept that defendants to group actions initiated by a single claim form may face potential unfairness in the absence of active case management. For example, the circumstances that justify a single claim form may not be clearly identified, and the page and document limits in [5.3(3)] of CPR PD57AD (which apply to initial disclosure in the Business and Property Courts cases) may operate to allow the claimants to withhold key documents at the early stages of the case. Every possible step should be taken in such a situation to ensure that each claimant's case is properly explained so that the defendant knows the case it has to meet, and so as to facilitate early dispute resolution."

Hannay & Co v Smurthwaite [1893] 2 Q.B. 412, CA, and [1894] A.C. 494, HL, ***Abbott v Ministry of Defence*** [2023] EWHC 1475 (KB); [2023] 1 W.L.R. 4002 (KB), ref'd to. (See ***Civil Procedure 2024*** Vol.1 paras 7.3.5, 19.1.1.)

Practice Updates

STATUTORY INSTRUMENTS

THE COURT AND TRIBUNAL FEES (MISCELLANEOUS AMENDMENTS) ORDER 2024. On 1 May 2024, the Court and Tribunal Fees (Miscellaneous Amendments) Order 2024 (SI 2024/476) came into force. It amends, amongst other things, the Enrolment of Deeds (Fees) Regulations 1994 (SI 1994/601) and the Civil Proceedings Fees Order 2008 (SI 2008/1053). The amendments, generally, effect a 10% increase in fees (rounded up). It also omits the fee for applicant-in-person search fees in respect of the 1994 Regulations. In the 2008 Order it omits the definition of the LSC and inserts a new provision concerning fee exemptions relating to domestic abuse protection orders.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 166th Update. This Practice Direction Update comes into force on 22 May 2024. It introduces a new CPR pilot scheme: Practice Direction 51ZE – Small Claims Track Automatic Referral to Mediation. The pilot scheme will run from 22 May 2024 to 21 May 2026. It will apply to all claims issued on or after 22 May 2024 where CPR r.26.6, as modified by the pilot scheme, applies to it. Specifically, it will apply to small claims where the only remedy claimed is, or purports to be, a specified monetary sum. It will not apply to claims started via the Online Civil Money Claims procedure. Nor will it apply to road traffic accident or personal injury claims. The Update makes provision for such claims to be referred, automatically, to the Small Claims Mediation Service, which is provided by HMCTS. It makes further provision for consideration of the imposition of sanctions at the trial of any claim subject to referral where the parties failed to attend mediation provided by the Small Claims Mediation Service. Further consequential amendments are made to CPR Pt 27, PD 27A and Pt 45.

CPR PRACTICE DIRECTION – 165th Update. This Practice Direction Update came into force on 6 April 2024 immediately after the updates effected by the 163rd Practice Direction Update came into force. This Update effected amendments to PD 28 and PD 45. It made a number of amendments to provision for fixed recoverable costs. The most significant change it effected was to make provision for the recovery of VAT in addition to the recovery of fixed costs. It also made further provision for the calculation of trial advocacy fees.

PRACTICE GUIDANCE

KING'S BENCH DIVISION GUIDE 2024. On 19 April 2024, the 10th edition of The King's Bench Division Guide was issued by the President of the King's Bench Division. It provides updated guidance on a range of issues. In particular, it provides updates to guidance for litigants-in-person (ch.2), open justice and anonymity, non-disclosure orders (chs 4, 15, 17), contempt of court (ch.23) vulnerable witnesses and resources available to them (at [9.89]), an updated allocation notice (Annex 6) and hearing directions and Masters' clerks' details (Annex 5).

PRACTICE NOTE: LONDON CIRCUIT COMMERCIAL COURT – LODGING BUNDLES AND SKELETONS FOR APPLICATIONS. On 17 April 2024, HHJ Pelling as judge in charge of the London Circuit Commercial Court, with the agreement of Foxton J (judge in charge of the Commercial Court) issued guidance on filing bundles and skeleton arguments in respect of applications. The key concern in the guidance is to ensure that parties file their documents early and avoid piecemeal filing. The guidance draws parties' attention to the relevant provisions in the Commercial Court Guide and Circuit Commercial Court Guide. The Practice Note is available at: *https://www.judiciary.uk/guidance-and-resources/practice-note-for-the-london-circuit-commercial-court-lodging-of-bundles-and-skeletons-for-applications/*. It is reprinted below.

LONDON CIRCUIT COMMERCIAL COURT – LODGING OF BUNDLES AND SKELETONS FOR APPLICATIONS.

1. There has been an ever increasing habit of parties lodging materials for use in connection with applications late and piecemeal. This has disrupted pre reading for applications and has resulted in applications over running.

2. The Practice is that set out in Paragraph F6.3 of the Commercial Court Guide, which applies to applications in the London Circuit Commercial Court by operation of Paragraph F1.1 of the Circuit Commercial Court Guide. In summary this requires that:

a. An application bundles and the Case Management Bundle must be lodged by no later than 12 noon one clear day before the date fixed for the hearing. Authorities bundles must be lodged at the same time. For hearings listed in the Friday Applications List this means that they must be lodged by no later than 12 noon on the Wednesday prior to the hearing;

b. Skeletons must be provided by no later than 12 Noon on the working day before the date fixed for the hearing. For hearings listed in the Friday Applications List this means that they must be lodged by no later than 12 noon on the Thursday prior to the hearing;

The London Circuit Commercial Court operates electronically by default. For that reason what must be lodged are electronic hearing CMC and authorities bundles.

3. Each bundle must be prepared in accordance with Appendix C of the Circuit Commercial Court Guide. Particular attention is drawn to (a) the need to ensure that PDF page numbering matches the pagination of the bundle concerned (Appendix C, Para.2); (b) The need for bookmarking (Appendix C, Para.3) and the need to ensure that each page of each document included in the bundle has been subjected to OCR conversion (Appendix C, Para. 4) so as to enable highlighting of the pages concerned or parts of it. Skeletons must be lodged in Word format.

4. In future strict adherence to the timings referred to in Paragraph 2 above will be required. It is likely that where these timings are not complied with the application will be removed from the list and will be refixed on the first available date that is convenient to the Court and/or a cost sanction imposed.

5. Where bundles do not comply with Appendix C and in particular those parts identified in Paragraph 3 above, it is likely that a costs sanction involving disallowing some or all of the costs of preparing the bundle concerned will be disallowed.

6. The practice of lodging revised bundles outside the time limits referred to above will not be permitted. Only supplemental bundles containing documents that have been served or supplied or the need for which has become apparent after expiry of the time limits referred to in Paragraph 2(a) above will be permitted to be lodged after expiry of the time limits referred to in Paragraph 2(a).

7. This Practice note has been issued with the concurrence of the Judge in Charge of the Commercial Court.

HH Judge Mark Pelling KC

Judge in Charge, London Circuit Commercial Court

TRANSPARENCY AND OPEN JUSTICE BOARD. On 30 April 2024, the terms of reference of the Lord Chief Justice's Transparency and Open Justice Board were published. They are available at: *https://www.judiciary.uk/wp-content/uploads/2023/06/Terms-of-reference-and-key-objectives-of-Transparency-Open-Justice-Board.pdf.* The Board, which is chaired by Nicklin J, will work in partnership with the Ministry of Justice and His Majesty's Courts and Tribunals Service. Its primary aim is to provide overarching leadership and co-ordination of the approach across both the courts and tribunals to issues concerning open justice. A stakeholder committee to assist the Board's work is to be established in due course. The Terms of Reference are reprinted below.

Transparency & Open Justice Board

Membership and Terms of Reference

Justice must be done, and it must be seen to be done. The public has a right to know what happens in their Courts and Tribunals.

For all Courts and Tribunals, the overriding objective is to deal with cases justly. Confidence in that process is built on the principles of transparency and open justice.

The Lady Chief Justice has created the Transparency & Open Justice Board ("the Board") and appointed the Chair and Members set out below.

A: Membership

Chair: *Mr Justice Nicklin (KBD)*

Members: *Lisa Allera (Head of News, Judicial Office)*

Mrs Justice Cockerill (KBD, Commercial Court & BPC)

Judge Barry Clarke, President of Employment Tribunals

His Honour Judge Robert Harrison (Designated Civil Judge, Wales)

Mr Justice Johnson (KBD)

His Honour Judge Kearl KC (Resident Judge, Leeds Crown Court)

Mrs Justice Lieven (Family Division)

Amy Shaw (Deputy Director, Communications Judicial Office)

Lord Justice Snowden (Court of Appeal)

Mrs Justice Thornton (KBD, Chair of Judicial Communications Committee)

Observer: *Sarah Rose, Deputy Director, Open Justice and Transparency, Ministry of Justice*

B: Terms of Reference

1. *To lead and coordinate the promotion of transparency and open justice across the Courts and Tribunals in England & Wales.*
2. *To establish a Stakeholder Committee to assist the Board.*
3. *Following wide engagement with interested parties, to finalise the Key Objectives.*
4. *To promote the Key Objectives across Courts and Tribunals in England & Wales.*
5. *To identify (and if necessary, establish) appropriate sub-committees in each of the jurisdictions in the Courts and Tribunals in England & Wales who, reporting to the Board, will:*
    a. *assess that jurisdiction's current delivery of transparency and open justice against the Key Objectives, identifying areas for improvement;*
    b. *identify any obstacle(s) to achieving the Key Objectives (e.g. jurisdictional/legal or practical/resources); and*
    c. *identify any risk(s) that the Key Objectives would pose to the relevant Court/Tribunal/Jurisdiction; and*
    d. *propose a programme of changes to achieve the Key Objectives.*
6. *In partnership with HMCTS and MoJ, to support and coordinate that programme across the Courts and Tribunals in England & Wales to achieve the Key Objectives*

In Detail

CPRC CONSULTATION ON ADR AMENDMENTS TO THE CPR

In ***Churchill v Merthyr Tydfil County Borough Council*** [2023] EWCA Civ 1416, the Court of Appeal confirmed that the courts have the power to mandate the use of alternative dispute resolution (ADR) processes (***Civil Procedure News*** No. 1 of 2024). An anticipated consequence of that decision was that the CPR would need to be amended to take account of it. This was particularly the case given the CPR's current focus on making provision for the courts to encourage but, apart from early neutral evaluation, not mandate the use of ADR.

In April 2024, the Civil Procedure Rule Committee (CPRC) issued a consultation concerning proposed amendments to the CPR in the light of the Churchill decision. The consultation is available at: *https://www.gov.uk/government/organisations/civil-procedure-rules-committee/about#alternative-dispute-resolution-consultation*. The consultation runs until 28 May 2024. Background to the consultation and details on how to respond to it are available here: *https://assets.publishing.service.gov.uk/media/661e2f2c0b9916e452bd3d4a/adr-consultation-document.pdf*.

Proposals

The consultation proposes amendments to CPR Pts 1, 3, 28, 29 and 44. The amendment to Pt 1, proposes inserting reference to "using and promoting alternative dispute resolution" as a new CPR r.1.2(f) and amending r.1.4(2)(e) to provide for the court to be able to both encourage and order the use of ADR by parties to litigation. Pt 3 is to be amended to insert a new r.3.1(2)(o), which is to specify that the court's case management powers include the power to "order the parties to participate in alternative dispute resolution". A better approach would have been to move reference to early neutral evaluation from what is currently r.3.1(2)(m) (to become r.3.1(2)(p)) to the new r.3.1(2)(o), so that all references to ADR and the court's role in respect of it were then in a single, ADR focused, provision. The proposed amendment to CPR r.29 intends to insert a new r.29.1A requiring the court to consider whether to order or encourage ADR for claims on the multi-track. Unlike other amendments it does not seek to renumber the provisions in the rule. CPR rr.28.7, 28.14 and 29.1 are to be amended to provide for the court to provide directions concerning whether to order or encourage the use of ADR. In referring to "ordering" and "encouraging" the proposed amendments reverse the order in which the two are put, leading with ordering. The proposed amendment to CPR r.1.4(2)(e) leads with "encouraging". Undoubtedly nothing turns on this and it is simply a matter of drafting. It might be beneficial if the order were consistent across the three provisions to eliminate the possibility that meretricious applications might be made arguing that the reversal highlights a considered distinction. Finally, CPR r.44.2(5) is to be amended to insert a new CPR r.44.2(5)(e), which will provide for the court to take account of a failure to comply with an order for ADR or an unreasonable failure to participate in ADR proposed by another party as part of its assessment of party conduct when assessing costs.

The draft amendments

The draft amendments to the rules, which eschew replacing the term "alternative dispute resolution" with the neologism coined in Churchill of "non-court-based dispute resolution", are available here: *https://assets.publishing.service.gov.uk/media/661e2f42d4a839725cbd3d48/adr-rule-amendments.pdf*. They are reprinted below as the CPR would appear if they were accepted, i.e., the text accepts the consequential amendments, which are highlighted in bold, that would flow from amendments being accepted.

PART 1

The overriding objective

1.1.—(1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is

practicable –

(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases;

(f) using and promoting alternative dispute resolution(GL); and

(g) *enforcing compliance with rules, practice directions and orders.*

. . .

Court's duty to manage cases

1.4.—(1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes –

(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;

(b) identifying the issues at an early stage;

(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

(d) deciding the order in which issues are to be resolved;

(e) encouraging ***or ordering*** *the parties to use an alternative dispute resolution(GL) procedure if the court considers that appropriate and facilitating the use of such procedure;*

(f) helping the parties to settle the whole or part of the case;

(g) fixing timetables or otherwise controlling the progress of the case;

(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;

(i) dealing with as many aspects of the case as it can on the same occasion;

(j) dealing with the case without the parties needing to attend at court;

(k) making use of technology; and

(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

PART 3

*The court's general powers of managem***ent**

3.1.—(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(2) Except where these Rules provide otherwise, the court may –

(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);

(b) adjourn or bring forward a hearing;

(c) *require that any proceedings in the High Court be heard by a Divisional Court of the High Court;*

(d) *require a party or a party's legal representative to attend the court;*

(e) *hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;*

(f) *direct that part of any proceedings (such as a counterclaim) be dealt with as separate proceedings;*

(g) *stay(GL) the whole or part of any proceedings or judgment either generally or until a specified date or event;*

(h) *consolidate proceedings;*

(i) *try two or more claims on the same occasion;*

(j) *direct a separate trial of any issue;*

(k) *decide the order in which issues are to be tried;*

(l) *exclude an issue from consideration;*

(m) *dismiss or give judgment on a claim after a decision on a preliminary issue;*

(n) *order any party to file and exchange a costs budget;*

(o) order the parties to participate in alternative dispute resolution(GL);

(p) *take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case.*

(3) When the court makes an order, it may –

(a) make it subject to conditions, including a condition to pay a sum of money into court; and

(b) specify the consequence of failure to comply with the order or a condition.

(3A) Where the court has made a direction in accordance with paragraph (2)(c) the proceedings shall be heard by a Divisional Court of the High Court and not by a single judge.

. . .

PART 28

Directions

28.7.—(1) The matters to be dealt with by directions under rule 28.2(1) include—

(a) disclosure of documents;

(b) service of witness statements;

(c) expert evidence; ***and***

(d) whether to order or encourage the parties to participate in alternative dispute resolution(GL).

(Rules 28.2(3) and (4) deal with orders for disclosure.)

(Rule 26.9(6) deals with limitations in relation to expert evidence and the likely length of trial in fast track cases.)

(2) Directions to be given under rule 28.2(1) shall be in the form set out at http://www.justice.gov.uk/courts/procedure-rules/civil, unless the court orders otherwise.

Directions

28.14.—(1) The matters to be dealt with by directions under rule 28.2(1) include—

(a) disclosure of documents;

(b) service of witness statements;

(c) expert evidence;

(d) whether to fix a pre-trial review;

(e) listing the case for trial; ***and***

(f) whether to order or encourage the parties to participate in alternative dispute resolution(GL).

(2) The following provisions apply in respect of directions in the intermediate track—

(a) oral expert evidence is limited to one witness per party, save where the oral evidence of a second expert for any party is reasonably required and is proportionate; and

(b) the trial time estimate must not exceed 3 days.

. . .

PART 29

Case management

29.2.—(1) When it allocates a case to the multi-track, the court will –

(a) give directions for the management of the case and set a timetable for the

steps to be taken between the giving of directions and the trial; or may

(b) fix –

(i) a case management conference; or

(ii) a pre-trial review, or both, and give such other directions relating to the management of the case as it sees fit.

(1A) When giving directions, the court must consider whether to order or encourage the parties to participate in alternative dispute resolution(GL).

(2) The court will fix the trial date or the period in which the trial is to take place as soon as practicable.

. . .

PART 44

Court's discretion as to costs

44.2.—(1) The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

(3) The general rule does not apply to the following proceedings –

(a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or

(b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue;

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim;

(e) whether a party failed to comply with an order for alternative dispute resolution(GL), or unreasonably failed to participate in alternative dispute resolution proposed by another party.

. . .

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