# CIVIL PROCEDURE NEWS

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## Cases

- **WH Holding Ltd v E20 Stadium LLP** [2024] EWHC 817 (Comm), 20 March 2024, unrep. (HHJ Pelling KC sitting as a judge of the High Court)

*Non-party access to statements of case*

**CPR r.5.4C(4)(d)**. The claimant applied for an order under CPR r.5.4C(4)(d). The order sought to bar non-parties from obtaining copies of any statement of case filed in the proceedings without further order of the court, with that order being made on a with-notice application. This is the first decision to deal with this issue (at [8]). HHJ Pelling KC noted that the general rule, under r.5.4C, is that statements of case may be obtained without the need for a court order: r.5.4C(1) and (3). This is a clear and mandatory general rule that gives effect to the principle of open justice (at [8] and [9]); the rule is mandatory as it is administrative and "*operated generally by HMCTS officials without any judicial oversight of involvement*." (at [9]). What is a statement of case is made clear by CPR r.2.3(1). Where a Pt 8 claim form is used and the questions required to be set out in it are in a separate document annexed to it, they are to be treated as forming part of the claim form. This is the case because the claim form would be defective absent the questions set out in the document annexed to it: CPR r.8.2(b) (at [7]). The general rule in CPR r.5.4C(1) is engaged where a defendant files an acknowledgement of service. It does not, therefore, require there to have been any judicial engagement with the claim; that is not the jurisdictional trigger for the rule's engagement (at [9]). While noting that, as the defendant was neutral on the application, there was no opposing argument, HHJ Pelling set out what he considered to be, "*probably*", the correct approach to an application to derogate from the general rule under r.5.4C(4)(d),

> *"[11] First, as I have said, CPR r.5.4C(1) establishes a very clear default principle. Secondly, if that very clear general default principle is to be departed from, it will require clear justification. Thirdly, the circumstances that may justify a departure are acutely fact-sensitive and are not closed but are likely to include and probably most likely to be established by reference to one or more of the matters set out in CPR r.39.2(3)(a)-(g). Fourthly, given the underlying reasons for the general rule, it is likely to be departed from only if and to the extent it is shown to be necessary to do so in order to both secure the proper administration of justice and/or to protect the interests of the party whose application is being considered. Finally, even if in principle it is shown that some intervention is necessary, any such intervention must, by definition, be no more than is proportionate; that is, the minimum interference with the general rule necessary to protect the interests of the applicant. Subject to these qualifications, I accept that in principle if a statement of case contains material shown to be confidential or which, by its nature, is confidential and it is shown, or can be readily inferred, that publicity would damage that confidentiality then a court might in principle consider making one of the orders identified in CPR r.5.4C(4)."*

***R (Guardian News and Media Limited) v City of Westminster Magistrates' Court*** [2012] EWCA Civ 420; [2013] Q.B. 618, CA, ref'd to. (See ***Civil Procedure 2024*** Vol.1, para.5.4C.4.)

- **Invest Bank PSC v El-Husseini** [2024] EWHC 996 (Comm), 30 April 2024, unrep. (Adrian Beltrami KC sitting as a deputy judge of the High Court)

*Disclosure – Business and Property Courts - guidance*

**CPR PD 57AD paras 17, 18**. Issues arose in long running commercial litigation concerning the application of CPR PD 57AD. First, it was submitted that in order to engage para.17, which sets out the consequences of a failure to comply with an order for extended disclosure, it was not necessary for the court to hold that there had been or might be a breach of an order. It was suggested that all that was necessary was a finding that there had been or might be a "*failure adequately to comply*" with an order. The deputy High Court judge deprecated the submission concluding that it "*appeared to [him to be] a distinction without a difference, if it was a distinction at all.*" (at [20.a].) He further went on to conclude that the application of para.17 was not intended to be employed in a way that called for fine distinctions to be made. That being said, it was not the case that failure adequately to comply with one aspect of an order for extended disclosure provided a basis for the court to apply the provisions in para.18 to parts of the order where there had been no non-compliance or there was no case to support the view that there would be non-compliance. As he put it,

> *"[20] Mr Delehanty also contended that it was enough to establish a failure adequately to comply in any one respect as regards Extended Disclosure, at which point orders could be made under paragraph 17 which attached to any aspect of Extended Disclosure (whether or not there had been or might have been a failure adequately to comply in that respect). Mr Venkatesan argued for a more limited application of the paragraph. I agree that the wording employed is broad, no doubt deliberately so, and that there should not be room for fine distinctions. However, paragraph 17 is*

*explicitly directed to a failure adequately to comply with an order for Extended Disclosure. I do not consider that the paragraph is available to revisit aspects of Extended Disclosure for which there has been no, or no case that there might have been a, failure adequately to comply. Such a case would have to be brought under paragraph 18."*

The deputy High Court judge then considered the approach to be taken to para.17.2 and para.18.2. The former provides that "*The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4).*" The latter provides that "*The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4).*" In interpreting the two, the deputy High Court judge followed the approach taken by Richard Salter QC in ***Ventra Investments Ltd v Bank of Scotland*** (2019). As he put it,

*"[21] The court's power under paragraph 18 is also broadly expressed, and there is no requirement of prior non-compliance. The test under [18.2] is slightly different to that under [17.2], in that any order must be not only reasonable and proportionate (as in [17.2]) but also 'necessary for the just disposal of the proceedings'. Mr Venkatesan directed me to the decision of Mr Richard Salter QC, sitting as a Judge of the High Court, in Ventra Investments Ltd v Bank of Scotland plc [2019] EWHC 2058 (Comm), a case under the predecessor to PD 57AD, in which the Judge observed at [35] that the difference in approaches under the two paragraphs was 'at most a difference in emphasis' which had no practical effect in the particular circumstances of the case before him. Those circumstances were a relatively late application (which was being heard 6 months before the trial date) and which would if successful increase the burden on the parties in the lead up to trial. Against that background, the Judge concluded that there were 'no circumstances in which it would be reasonable and proportionate for me now to make an order for disclosure – even to rectify a failure adequately to comply with the earlier order for disclosure – unless that order was one that was necessary for the just disposal of the proceedings.'"*

It was also argued that the principle in ***Chanel Ltd v FW Woolworth & Co Ltd*** (1981) applied to applications under PD 57AD para.18. That is the principle that, if a party does not take a point that they could properly take on an interim application, they cannot then take it at a subsequent interim hearing where the same or similar relief is sought in the absence of a significant, material change in circumstances. The deputy High Court judge rejected the application of that principle to applications under para.18. He did so on the basis that para.18 provided an explicit power to vary orders and it would not be appropriate to import a general restriction on the exercise of that power into the rule. He did so in reliance on the approach taken in ***Vannin Capital PCC v RBOS Shareholders Action Group Ltd*** (2019) (at [24]–[25]). That being said, he went on to explain,

*"[25] . . . Paragraph 18 grants the court express power to vary existing orders for Extended Disclosure, subject to the requirements of necessity, reasonableness and proportionality. In my judgment it would not be right to import into that regime a further hard precondition, under the Chanel principle, to an applicant's ability to access that power. That said, in the court's exercise of the power, it will no doubt often be relevant, and perhaps in any given case determinative, to explore why a variation is being sought and whether it could and should have been raised at an earlier stage. The obvious relevance of such an enquiry is, indeed, apparent from the terms of [18.3], which gave rise to the second aspect of disagreement."*

Finally, the deputy High Court judge considered whether the requirement that an application made under para.18 be supported by a witness statement, as required by para.18.3, was a "*threshold condition*" was correct. ***Brake v Lowes, in re Stay in Style*** (2020) had held it to be so, and that in the absence of a witness statement the court had no jurisdiction to make an order under para.18. It was submitted that a different approach was taken in ***Cocoa SDN BHD v Maersk Line A/S*** (2023), where on the absence of a witness statement but where other evidence was before the court, a variation was granted. In that case the approach in ***Brake v Lowes*** was suggested to be merely a technical failure and was not followed. The deputy High Court judge, while doubting whether there was a difference in approach between the two cases, preferred the approach taken in ***Brake v Lowes***. As he put it,

*"[29] Insofar as there is a difference between these two approaches, I prefer that of His Honour Judge Paul Matthews. In my opinion, the wording of [18.3] is clear and the distinction with [17.3] is telling. The information specified is of obvious materiality to the application and I see no reason to dilute the express requirement. In any event, I was not taken to any other material which provided an explanation for why it was that privilege schedules had not been sought at the CMC but were nevertheless being sought now".*

The difference in wording between paras 17.3 and 18.3 is that the former requires the application to "*normally be supported by a witness statement*", whereas the latter provides that an application "*must be supported by a witness statement*". The deputy High Court judge was also critical of the manner in which the parties conducted the application, noting that they had also been subject to critical comment on this issue in several previous applications. He stressed the need to conduct litigation, even hard-fought litigation, consistently with the overriding objective (at [6]–[8]). ***Chanel Ltd v FW Woolworth & Co Ltd*** [1981] 1 W.L.R. 485, CA, ***Ventra Investments Ltd v Bank of Scotland*** [2019] EWHC 2058

(Comm), unrep., Comm., ***Vannin Capital PCC v RBOS Shareholders Action Group Ltd*** [2019] EWHC 1617 (Ch), unrep., ChD, ***Brake v Lowes, in re Stay in Style*** [2020] EWHC 538 (Ch), unrep., ChD, ***Cocoa SDN BHD v Maersk Line A/S*** [2023] EWHC 2168 (Comm), unrep., Comm., ref'd to. (See ***Civil Procedure 2024*** Vol.2, paras 2AA-72.1, 2AA-73.1, 2AA-73.2.)

**LLC EuroChem North-West 2 v Societe Generale SA** [2024] EWHC 1084 (Comm); 8 May 2024, unrep. (Cockerill J)

*Interested party – submission to the jurisdiction*

**CPR Pt 11**. An Italian construction company (Tecnimont) had entered into a long-running financial facility agreement, which extended credit to it. One particular agreement was with the Milan-based branch of ING (ING Milan). Tecnimont entered into a contract with a Russian company. A performance bond was issued at its request by ING Milan. The bond concerned the contract with the Russian company. A dispute arose, which resulted in the Russian company issuing proceedings in England and Wales against ING. Tecnimont successfully applied to be joined to those proceedings as an interested party (as a no-cause of action defendant or NACD) (at [25]). ING subsequently issued, on a without-notice basis, an application to join the Italian construction company as a Part 20 defendant to the proceedings (at [28]). The application was granted (at [32]). Tecnimont company applied to contest jurisdiction under CPR Pt 11 (at [32]–[34]). One question that arose was whether the Italian construction company had submitted to the jurisdiction. It was argued by ING, for instance, that there had been submission to the jurisdiction as Tecnimont had applied to be and had been permitted to be joined to the proceedings as an NACD (at [43]). It was agreed between the parties that there was no direct authority on the issue (at [39]). **Held**, the application was dismissed. In reaching that decision Cockerill J was clear that the authorities established that a willing participant in proceedings could not then turn round and claim to not have submitted to the jurisdiction. Having taken the benefit of joining proceedings for one purpose, a party could not then turn round and object to taking the disbenefit that arose from doing so (at [35]–[45]). As she put it,

> *"[42] On this issue I am quite persuaded that ING is correct. The authorities seem clear that for the willing participant submission cannot be done by halves. A good example can be seen in the case of Glencore International A.G. v Exter Shipping Ltd [2002] EWCA Civ 528. That was a case where there were proceedings in England and an anti-suit was sought on the basis that US proceedings were vexatious in that they duplicated issues in the English proceedings in which all of the respondents were involved and were claiming or counterclaiming against the applicant. The respondents argued that the court had no jurisdiction to grant such an injunction since, as a result of various settlements and discontinuances, the issues raised in the US proceedings no longer formed any part of the English proceedings. At [45] Rix LJ said:*
>
> > *'In my judgment a distinction has to be made between the case of a foreign party who invokes the jurisdiction of the English court by claiming here, and the case of a foreign party who is brought to this jurisdiction by answering a claim within England's long-arm statute (formerly RSC Order 11 and now CPR 6.20). In the first case the foreign claimant submits himself willingly to the jurisdiction. He does so, and in my judgment must do so, without reservation, and is subject, so far as territorial jurisdiction is concerned, to all the incidents of litigation in this country, including, for instance, his amenability to a counterclaim. He cannot say: "I came here only for the purpose of my claim. I am not willing to accept this jurisdiction for the purpose of my defendant's counterclaim." ... In the second case, however, the foreign defendant is brought here against his will and ... can limit his submission to the jurisdiction and prima facie is regarded as doing so on a claim by claim basis. I believe that the authorities to which the court has been expressly or implicitly referred in this appeal are consistent with this distinction.'*
>
> *[43] There is force in ING's argument that those who start or consent to join proceedings in England and Wales are willing participants, and it is that willingness which justifies a more expansive approach to 'submission' than the claim by claim analysis applied to unwilling participants in proceedings.*
>
> *[44] Reference was made to sections of Briggs [Briggs Civil Jurisdiction and Judgments (7th ed)] dealing with foreign judgments, where the author posits that while in general a claimant will be taken to have opened himself to a counterclaim, there may be limits to the principle, particularly in circumstances where it may be mere happenstance whether a party is claimant or defendant. Briggs in this context suggests a quasi 'plums and duff' approach:*
>
> > *'It would be rational to limit the extent of this automatic or deemed submission to claims which are in some way related to the claim made ... to those matters to which a fair minded [person] would say that [it] had laid itself open.'*
>
> *[45] Standing back and viewing this case in the light of the principles, there is no reason why a litigant who applies to join as a defendant should be in a different position. Like a claimant that litigant has volunteered to be part of proceedings here. Like a claimant it thereby renders itself amenable in principle to such claims as the Court considers ought to be heard against it simultaneously. This approach of calibrating by willingness was urged by ING and was not really disputed as an approach by Tecnimont, its submission being that it was not willing in the right sense. But if willingness is indeed the right dividing line – as the authorities would seem to suggest, Tecnimont offered no principled division to calibrate between relevant and irrelevant willingness. This is not a promising start."*

***Glencore International A.G. v Exter Shipping Ltd*** [2002] EWCA Civ 528; [2002] 2 All E.R. (Comm) 1, CA, ref'd to. (See ***Civil Procedure 2024*** Vol.1, para. 11.1.10.)

### ■ **Challis v Bradpiece** [2024] EWHC 1124 (SCCO), 13 May 2024, unrep. (Deputy Costs Judge Roy KC)

*Detailed assessment – qualified one-way costs shifting*

**CPR r.44.13(1)(a)**. The court considered the question whether, in a claim for personal injury damages, qualified one-way costs shifting (QOCS) applied to detailed assessments. It was, it appears, the first time the issue has been considered by the court. The claim, which arose from alleged clinical negligence, settled via a Tomlin order. Detailed assessment was commenced as the parties could not agree the costs to which the claimant was entitled under the Tomlin order. Subsequently, the claimant failed to beat the defendant's CPR Pt 36 offer in respect of the detailed assessment. The defendant thus became entitled to their costs regarding the detailed assessment. The specific issue therefore was whether the QOCS regime applied so as to preclude enforcement of the costs order in the detailed assessment. QOCS does, however, only apply to proceedings which include a claim for damages for personal injuries where CPR r.44.13(1)(a) is concerned. The question then became whether detailed assessment proceedings were proceedings that included a claim for damages for personal injury. As the deputy Costs Judge put it,

> *"[23] The[ issue] is therefore a binary one of whether or not DAs arising from PI claims fall within this definition."*

**Held**, detailed assessment proceedings that arise out of a claim for personal injury are within the scope of CPR r.44.13(1)(a). As such they only apply to proceedings that include a claim for damages. The defendant could not, therefore, enforce their costs (at [73]). The deputy Costs Judge granted permission to appeal from his judgment. The defendant submitted that there were strong grounds to support the conclusion that detailed assessments did not come within the scope of that rule (at [25]–[43]). In essence, the argument was that detailed assessments are a distinct proceeding from the underlying claim that gives rise to costs liability. Hence a detailed assessment *"is not simply a continuation of the substantive PI proceedings. . ."* (at [25]). Moreover, detailed assessment proceedings are proceedings concerning costs and not proceedings concerning damages (at [32]–[33]). The claimant argued that "proceedings" in CPR r.44.13(1)(a) had to be given a broad and purposive interpretation (at [43]–[51]). Additionally, to adopt the defendant's interpretation would be contrary to the purpose of the QOCS regime, contrary to the approach taken by the UK Supreme Court in ***Ho v Adelekun*** (2021). It would leave the claimant with a net liability to the defendant for their costs (at [52]–[53]). Further arguments were set out by the claimant: see [54]–[62]. The deputy Costs Judge preferred the claimant's arguments. In that respect the strongest point against the defendant was that the approach they set out was wholly contrary to the Supreme Court's approach in ***Ho*** (at [63]–[74]). Furthermore, a purposive approach to the provision supported the claimant's approach: at [70]–[72].

***Sharp v Leeds City Council*** [2017] EWCA Civ 33; [2017] 4 W.L.R. 98, CA, ***Cartwright v Venduct Engineering Ltd*** [2018] EWCA Civ 1654; [2018] 1 W.L.R. 6137, CA, ***Brown v Commissioner of Police of the Metropolis*** [2019] EWCA Civ 1724; [2020] W.L.R. 1257, CA, ***Ho v Adelekun*** [2021] UKSC 43; [2021] W.L.R. 5132, UKSC, ***Serbian Orthodox Church v Kesar & Co*** [2021] EWHC 1205 (QB); [2021] Costs L.R. 709, QBD, ***Best v Luton & Dunstable Hospital NHS Foundation Trust*** [2021] EWHC B2 (Costs), unrep., SCCO, ***Achille v Lawn Tennis Association Services Ltd*** [2022] EWCA Civ 1407; [2023] 1 W.L.R. 1371, CA, ***Hassam v Rabot*** [2024] UKSC 11; [2024] 2 W.L.R. 949, UKSC, ref'd to. (See ***Civil Procedure 2024*** Vol.1, para.44.13.1.)

### ■ **Francois v London Borough of Waltham Forest** [2024] EWHC 1162 (KB), 16 May 2024, unrep. (Yip J, sitting with Costs Judge Whalan as an assessor)

*Unregistered barrister's fees – not recoverable by litigant-in-person*

**CPR r.46.5(3)**. The appellant pursued judicial review proceedings. She received advice and assistance via the Bar direct access scheme. The barrister who acted for the appellant advised in conference and prepared various documents. He also attended a renewed application for permission to bring judicial review. His fees were £3,200. The respondent was ordered to pay the appellant's fees, which were limited to her barrister's fees. It transpired that her barrister did not, through inadvertence, have a valid practising certificate for the majority of the period when he was assisting her. The question arose whether the fees could be recovered under CPR r.46.5(3)(b), i.e., whether *"fees charged by a barrister in respect of work undertaken when he did not have a valid practising certificate [where] recoverable."* (at [1].) **Held**, on appeal before Yip J, the fees were not recoverable under CPR r.46.5(3) (at [53]). In ***Campbell v Campbell*** (2018), the Court of Appeal had held that a foreign lawyer, in that case an individual who had previously been a solicitor in England but then subsequently came off the roll and qualified as an advocate in Jersey, did not qualify as a lawyer or as someone who could therefore provide legal services in England and Wales for the purposes of CPR r.46.5(3)(b) (at [23]–[28]). Having considered this and arguments focused on the approach to regulation of unregistered barristers by the Bar Standards Board, Yip J held as follows:

> *"[40] I am invited to determine whether, as a general proposition, a litigant in person may recover the fees of an unregistered barrister pursuant to CPR r. 46.5(3)(b). It seems to me that charges made by an unregistered barrister do not fall*

*within the scope of the rule, as interpreted by the Court of Appeal in Campbell v Campbell and [United Building and Plumbing Contractors v Kajla (2002) and Agassi v Robinson (Inspector of Taxes) (No2) (2005)].*

*[41] An unregistered barrister is not entitled to provide legal services as a barrister. The BSB Guidance requires that this is made clear to the person obtaining the services. The Guidance also makes it clear that the legal services which an unregistered barrister may supply are services that may be supplied by anyone and which are not subject to special statutory regulation. Unregistered barristers are not required to have insurance or to keep up to date with professional development. They are not subject to the complaints process operated by the Legal Ombudsman.*

*[42] Given that an unregistered barrister cannot act as a barrister, they are to be treated as no different to any other professional such as the debt collector, tax adviser or foreign lawyer, all of whose services have been found not to qualify for recovery under r. 45.5(3)(b). The policy underpinning the rule is the unbundling of legal services, allowing a litigant to seek some legal assistance without committing to the costs of full representation. It is not to expand the classes of those whose fees for providing assistance with litigation may be recovered. As the Court of Appeal have said, those who provide advice and assistance in connection with litigation must be properly qualified, regulated and insured. The logical extension of the appellant's arguments is that once someone qualifies as a barrister, they would for evermore be regarded as someone for whose services an unsuccessful opposing party could be expected to pay. That was not the case for the solicitor in Campbell and I am unable to accept that the limited regulation of unregistered barristers by the BSB creates any meaningful distinction. As the BSB Guidance states, the main objective is that clients should be aware that 'unregistered barristers are not subject to the same regulatory safeguards that would apply if they instructed a practising barrister'."*

This decision, on appeal to the High Court, appears to be the first decision on this issue. ***United Building and Plumbing Contractors v Kajla*** [2002] EWCA Civ 628, unrep., CA, ***Agassi v Robinson (Inspector of Taxes) (No.2)*** [2005] EWCA Civ 1507; [2006] 1 W.L.R. 2126, CA, ***Campbell v Campbell*** [2018] EWCA Civ 80; [2018] 1 W.L.R. 2743, CA, ref'd to. (See ***Civil Procedure 2024*** Vol.1, paras 46.5.2, 46.5.3.)

■ **Gupta v Shah** [2024] EWHC 1189 (Ch), 17 May 2024, unrep. (Nicholas Thompsell, sitting as a deputy judge of the High Court)

*Applications heard in absence of parties – application of CPR r.39.3*

**CPR r. 39.3**. Several applications came before the High Court in long-running litigation. Three of the six defendants were not present at the hearing of the applications. The question arose whether the court should continue to hear the applications in their absence. Whether to do so was a matter of discretion, see CPR r.3.1 and 23.11 (at [14]). In considering the discretion, the deputy High Court judge noted that it was doubtful whether CPR r.39.3, which makes provision for the court to continue to hear a trial in the absence of a party, strictly applied to this situation: see ***Howard v Stanton*** (2011) (at [16]–[17]). Notwithstanding that, the deputy High Court judge applied the approach set out in that rule. He did so on the basis that it ought to apply in circumstances where the court is determining the substantive rights of parties. As he put it,

*"[18] The principle in rule CPR 39.3 is that where there is a trial where a person is not present or represented, that person should have a special ability to challenge a judgment made against that person. In my view this principle is one for the court to consider also when it is exercising its discretion in other circumstances where the court is making a judgment that might have a very substantial effect in bringing an action to a conclusion against an absent party, such as a hearing where it is proposed that summary judgment is given or in proceedings to debar that person from continuing with its defence or claim. It may be noted that a similar principle applies under a CPR rule 3.3(5) where a court makes an order of its own initiative without hearing the parties or giving them an opportunity to make representations. Under Practice Direction 20 3A, paragraph 11.2, where a court deals with an application without a hearing (in accordance with CPR rule 23.8) the rule in CPR rule 3.3(5) is to be applied there also."*

He was bolstered in his view by the decision in ***Levy v Ellis-Carr*** (2012), which held that the fact that an absent party could apply to set aside an order made at trial under CPR r.39.3 meant that proceeding in such a fashion would not breach art.6 of the European Convention on Human Rights (at [19]), i.e., that an interim application that determined substantive rights because it would bring proceedings to a conclusion would itself come within ambit of the right to a fair trial. In the light of this, the deputy High Court judge concluded that the absent parties would be in the same position as if they had been absent from a trial, i.e., they would be able to apply to set aside any order made in the hearing on the basis that orders made at trial in the absence of parties could be set aside under CPR r.39.3 (at [15]). ***Howard v Stanton*** [2011] EWCA Civ 1481, unrep., CA, ***Levy v Ellis-Carr*** [2012] EWHC 63 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2024*** Vol.1, para.23.11.2.)

■ **Thakkar v Mican** [2024] EWCA Civ 552, 20 May 2024, unrep. (Lady Chief Justice Carr, Asplin and Coulson LJJ)

*Indemnity costs – fundamental dishonesty*

**CPR rr.44.13, 44.14, 44.15, 44.16**. The claimant brought proceedings seeking damages for personal injury arising from a road traffic accident. The defendant raised issues of fundamental dishonesty. The claimants succeeded at trial. The trial judge made no findings concerning dishonesty. The trial judge declined to make an order for indemnity costs concerning those costs that arose in respect of the failed allegation of fundamental dishonesty. An appeal from that decision failed in the High Court. A second appeal was brought on the point before the Court of Appeal. Specifically, the Court of Appeal considered *". . . whether there is some form of default entitlement to indemnity costs on the part of a claimant (or at least a presumption to that effect), in circumstances where a defendant has unsuccessfully suggested that the claim is fundamentally dishonest."* (at [1]). Coulson LJ gave the leading judgment. He first noted that, as a personal injury claim, it came within the qualified one-way costs shifting (QOCS) regime and was thus subject to CPR rr.44.13 to 44.16. Fundamental dishonesty may take a claim outside the QOCS regime (at [15][–16]). Where indemnity costs are concerned, from a successful claimant's perspective, Coulson LJ took the view that they would always been seen as "*more advantageous than any other sort of costs order*" (at [17].) As he put it,

> *"[17] . . . I incline to the view that an order for indemnity costs will usually represent a significant victory for any receiving party. That is because r.44.3(3) provides that, if indemnity costs have been ordered, doubts as to whether the item of cost in question was reasonably incurred or reasonable in amount are resolved in favour of the receiving party. Its potential value is, of course, the reason why the courts must ensure that an order for indemnity costs is only made in an appropriate case."*

Having summarised the relevant authorities concerning indemnity costs awards (at [18]–[25]), Coulson LJ considered the specific issue that arose on the appeal. In that respect he rejected the argument that there was a principle or law or practice that tilted the balance of a judge's discretion in favour of making an award of indemnity costs. It did not matter whether the argument was one that proposed that there was a presumption in favour of indemnity costs when allegations of fundamental dishonesty had been made and rejected by a judge or whether it was expressed a starting point, which reversed the burden of proof, so that the paying party had to persuade the court that indemnity costs were not appropriate (at [26]–[27]). Coulson LJ held there was no such presumption or starting point (at [28]). It was clear from the approaches taken in ***Clutterbuck v HSBC Plc*** (2015) at [16], ***Natixis S.A. v Marex Financial Limited*** (2019) at [49], ***Bishopsgate Contracting Solutions Limited v O'Sullivan*** (2021) at [15(iv)], and ***Libyan Investment Authority v Roger Milner King*** [2023] at [9], of which he approved, that there was no such presumption or starting point. As he put it,

> *"[29] . . . Their analysis makes plain that there is no such presumption or reversal of the ordinary burden of proof. It will always depend on the circumstances of the particular case, and the judge retains a complete and unfettered discretion. It may be that, in an appropriate case (like Natixis), the failure might be the starting point for any consideration of those circumstances but, as Miles J noted in Libyan Investment, that does not, in some way, reverse the burden of proof, or put the burden on the paying party to explain why indemnity costs are not appropriate. Bryan J did not suggest anything of the sort in Natixis, and he applied no presumption or reversal of the usual burden. The default position is always that standard costs will be assessed and paid, unless the party seeking indemnity costs can demonstrate why they are appropriate in all the circumstances.*
>
> *[30] I consider that any other conclusion would fetter the court's broad discretion in respect of costs in any given case, and would give rise to the very danger which Lord Woolf warned against at [32] of Excelsior. . .: the court must avoid the temptation to create rules which cannot be found in the CPR."*

In ***Excelsior Commercial & Industrial Holdings Limited v Salisbury*** (2022) at [32], Lord Woolf had given the following warning, "*In my judgment it is dangerous for the court to try and add to the requirements of CPR which are not spelt out in the relevant parts of the CPR. This court can do no more than draw attention to the width of the discretion of the trial judge. . .'*" While rejecting the submission, Coulson LJ did, however, stress that his judgment should in no way be seen as detracting from what he took to be a statement of the obvious, i.e.,

> *"[28] . . . that, because the making of a dishonest claim will very often attract an indemnity costs order against a claimant, a failed allegation of dishonesty will very often lead to the making of an indemnity costs order against the defendant, on the simple basis that 'what is sauce for the goose is sauce for the gander': see Tomlinson LJ in Manna v Central Manchester University Hospitals NHS Foundation Trust [2017] EWCA Civ 12; [2017] 1 Costs L.R. 89 at [42]. A defendant who makes allegations of this kind therefore runs a very significant risk that, if the allegations fail, indemnity costs will be awarded against them."*

***Excelsior Commercial & Industrial Holdings Ltd v Salisbury*** [2002] EWCA Civ 879; [2002] C.P. Rep. 67, CA, ***Excalibur Ventures LLC v Texas Keystone Inc (Costs)*** [2013] EWHC 4278 (Comm), unrep., Comm, ***Clutterbuck v HSBC Plc*** [2015] EWHC 3233 (Ch); [2016] 1 Costs L.R. 13, ChD, ***Manna v Central Manchester University Hospitals NHS Foundation Trust*** [2017] EWCA Civ 12; [2017] 1 Costs L.R. 89, CA, ***Bates v Post Office Ltd (No.2)*** [2018] EWHC 2698 (QB), unrep., QBD, ***Natixis SA v Marex Financial Ltd*** [2019] EWHC 3163 (Comm); [2020] 2 All E.R. (Comm) 867, Comm., ***Collier v Bennett*** [2020] EWHC 1884 (QB); [2020] 4 W.L.R. 116, QBD, ***Bishopsgate Contracting Solutions Ltd v O'Sullivan*** [2021] EWHC 2628 (QB); [2021] Costs L.R. 1357, QBD, ***Libyan Investment Authority v King*** [2023] EWHC 434 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2024*** Vol.1, para.44.16.1.)

# Practice Updates

## STATUTORY INSTRUMENTS

**THE CIVIL PROCEDURE (AMENDMENT NO. 2) RULES 2024**. On 2 May 2024, the Civil Procedure (Amendment No. 2) Rules 2024 were laid before Parliament. They come into effect on the day on which the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the Hague Judgments Convention) comes into force in the United Kingdom. It is anticipated that the UK Government will ratify that Convention in June 2024, and hence the Amendment No. 2 Rules will come into effect in or around June 2025, depending on the actual date of ratification. On the date on which the Amendment No. 2 Rules enter into force they will amend CPR Pt 74 both to introduce provision to give effect to the Judgments Convention and to amend its existing rules concerning the Hague Choice of Court Convention, so that the two Conventions are treated in a comparable manner.

## PRACTICE DIRECTIONS

**CPR PRACTICE DIRECTION – 169th Update**. This Practice Direction Update came into force on 18 May 2024. At that time, the Ministry of Justice Civil Procedure Rules website did not contain a working link to the Update, which while no doubt the result of a technical error poses something of a problem for compliance with the law, and hence more widely with the rule of law. The technical error was rectified on 20 May 2024. The Update amends Practice Direction 51R (the Online Civil Money Claims Pilot scheme). The amendment enables litigants-in-person to use the digital notice of change to provide details of their legal representative in those situations where they move from being unrepresented to represented. Neither CPR Update 167 nor 168 were published prior to the publication of this Update.

**CPR PRACTICE DIRECTION – 168th Update**. This Practice Direction Update was issued on 6 June 2024, albeit it was in force from 31 May 2024. It extends the operation of the PD 51ZC – The Small Paper Determination Pilot to 1 December 2024. It also introduces several amendments to CPR PD 74A concerning the Hague Judgments Convention. These amendments do not come into force until the amendments to CPR Pt 74 concerning the Convention come into force.

**CPR PRACTICE DIRECTION – 167th Update**. This Practice Direction Update introduced a new CPR pilot scheme, which came into force on 9 May 2024, albeit as with CPR Update 169 it was not made public before the end of May. The new pilot scheme is Practice Direction 51ZF – Part 3 of the Domestic Abuse Act 2021: Provision during Piloted Commencement. It applies to proceedings in the County Court that are brought under the 2021 Act, while that Act is in its piloted commencement phase. It adopts the same practice in the County Court as applies in the Family Court under Practice Direction 36ZG of the Family Procedure Rules 2010.

## MISCELLANOUS UPDATES

**Court Funds Office – Dormant Funds – 1 June Claim Deadline**. On 1 June 2024 the 30-year rule came into effect for dormant funds held in the Court Funds Office. From that date any funds held in the CFO in a dormant account will be paid into the Consolidated Fund and any future rights over them will be extinguished further to r.41A of the Courts Funds Rules 2011 (as amended): The Court Funds (Amendment No. 2) Rules 2023 (SI 2023/1356).

**Litigation Funding Agreements (Enforceability) Bill**. With the dissolution of Parliament on 30 May 2024, the Litigation Funding Agreements (Enforceability) Bill, which was intended to reverse the effect of ***R (PACCAR Inc) v Competition Appeal Tribunal*** [2023] UKSC 28; [2023] WLR 259 fell. Consequently, it remains the case that third party funding agreements that make provision for payment to the funder from any damages awarded are damages-based agreements and must therefore comply with the provisions of the Damages-Based Agreements Regulations 2013 (SI 2013/609). It is more than likely that comparable legislation will be considered by Parliament after the general election in July 2024.

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