CIVIL PROCEDURE NEWS

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In Brief

CASES

- **Northamber Plc v Genee World Ltd** [2024] EWCA Civ 428, 1 May 2024, unrep. (Lewison, Arnold, Phillips LJJ)

Cost sanctions, failure to respond to offer to mediate

CPR r.44.2. Proceedings were pursued by the claimant (Northamber Plc) alleging breach of an exclusivity agreement. The claimant succeeded at trial on a limited number of issues. The claimant thereafter appealed on five grounds. One ground, the fifth ground of appeal, concerned the costs order made. In that respect the claimant challenged the costs order. It did so on the basis that the order did not properly reflect two of the defendants' failure to respond to an offer to mediate. In giving judgment on costs the judge took into account the absence of any evidence that the claimant had pursued the defendants for a reply to the offer (at [99]–[102]). The claimant submitted on the appeal that it was well-established that "*silence in the face of an invitation to participate in mediate is, as a general rule, of itself unreasonable even if a refusal might have been justified by the identification of reasonable grounds*". In the absence of any explanation by the defendants, which there was not, as to why they had not responded, the claimant submitted that the judge ought to have held that the defendants' silence amounted to unreasonable conduct and that ought to have been taken account of in the costs order (at [103]). **Held**, the appeal allowed on this point. Arnold LJ put it,

> *"[104] I agree that the judge fell into error. [The defendants] were silent in the face of an offer to mediate. That was in itself unreasonable. To compound matters, they breached an order of the court requiring them to explain their failure to agree to mediation. If breaches of such orders are ignored by courts when deciding costs, parties will have no incentive to comply with them. That would undermine the purpose of making them, which is robustly to encourage parties to mediate."*

Moreover, as Arnold LJ made clear, the judge appeared to take the view that there was an onus that lay upon the claimant to chase up the defendants in the light of their silence. There was no such onus. Once a clear offer to mediate has been made, it is for the party or parties to whom the offer has been made to respond (at [105]). ***Halsey v Milton Keynes General NHS Trust*** [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002, CA, ***PGF II SA v OMFS Co 1 Ltd*** [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386, CA, ref'd to. (See ***Civil Procedure 2024*** Vol.1, para.44.2.4.)

- **Solicitors Regulation Authority Ltd v Khan** [2024] EWCA Civ 531, 23 May 2024, unrep. (Newey, Arnold and Nugee LJJ)

Capacity to litigate, contempt proceedings

CPR rr.3.3(5), 23.8(c), 52.24(6), Pt 81. The Court of Appeal provided guidance on several issues concerning contempt proceedings in long-running litigation. It did so in an appeal where the main issue before the court was whether the respondent to contempt proceedings had the capacity to litigate. **Held**, where civil contempt proceedings brought in the civil courts is concerned, the correct test to apply to determine if an alleged contemnor has capacity to conduct proceedings is that set out in ss.2(1) and 4 of the Mental Capacity Act 2005. The test, which is applicable to whether an individual is fit to plead in criminal proceedings, in ***R v Pritchard*** (1836), does not set out the test in this situation. In assessing capacity in contempt proceedings, that test may, however, assist the court (at [43]–[58]). As Nugee LJ put it,

> *"[57] In summary, the position seems to me to be this. The criminal test of fitness to plead, and the Pritchard criteria, are not directly applicable to contempt proceedings, where the test for capacity to conduct proceedings is that in the 2005 Act. But the Pritchard criteria may nevertheless assist the Court in assessing whether a defendant to contempt proceedings lacks capacity under the 2005 Act as illustrations of the sort of decisions that such a defendant is likely to have to take in order to be able to defend the proceedings."*

A further issue arose concerning the nature of the evidence that was necessary to establish lack of capacity. In the present case the judge dealing with the application had not considered the expert evidence submitted as demonstrating a lack of capacity. He had not, however, gone on to adjourn the proceedings to enable further evidence to be obtained (at [60]). He had also gone on to consider if there was a real prospect of his being persuaded of the lack of capacity in the light of further evidence. He concluded that there was no such prospect. Nugee LJ approved of this approach. As he put it,

> *"[72] But it is important to note that he did not simply stop there and conclude that because he was unpersuaded by the evidence currently before him that was the end of the question. I do not propose to decide if that would have been open to him, as that is not what he did. I think there is some force in [the] submission that if the evidence that a party may lack capacity to conduct proceedings is insufficient to persuade a judge on the balance of probabilities, but*

nevertheless does leave him in real doubt whether a party has capacity or not, it may be appropriate for the application to be adjourned for further and better evidence to be obtained, in line with what was said in Teinaz and Solanki. To proceed on the basis that a person has capacity when there is a real doubt about it may not only be unfair to the party concerned but cause problems for the proceedings as a whole, because if a party does in fact lack capacity, then no party may take any further step without the Court's permission until the party without capacity has a litigation friend, and any step taken before then has no effect unless the Court orders otherwise: see CPR r 21.3(3) and (4).

[73] But in the present case what Leech J did . . . was to go on to consider whether there was any real prospect of his being persuaded to accept the conclusions in [the expert evidence that was before the court on the question of capacity] even with the benefit of further evidence and cross-examination. He concluded that there was not. That is the critical conclusion for the current question. If he was entitled to reach that conclusion, then I do not see that he erred in refusing to adjourn for such further evidence or cross-examination. There was no advantage to anyone in putting off the proceedings further if there was no real prospect of further evidence persuading him to accept the conclusions in [the expert evidence]."

A further question arose concerning an alleged contemnor's right to silence. Nugee LJ noted that the court is under a duty to warn the alleged contemnor of their right to silence and of the risk of adverse inferences. That was well-established. It was submitted that where those matters had been raised with the alleged contemnor by counsel for the applicant the court did not need to go on to also warn the alleged contemnor. Nugee LJ deprecated that submission.

"[102] I do not doubt that it is the duty of the Court 'to ensure that the accused person is made aware of [the right to remain silent] and also of the risk that adverse inferences may be drawn from his silence': Inplayer Ltd v Thorogood [2014] EWCA Civ 1511 at [40] per Jackson LJ. Mr Ahlquist submitted that it is not however necessary for a judge himself to give a warning if, as here, it has been specifically and sufficiently given by counsel for the applicant. I am not sure about that: warnings from the bench are likely to carry more weight than what counsel says, however clear, and whether or not it is always strictly required, I think the better practice is for the judge to address the point himself. . ."

Nugee LJ also noted, but declined to comment on, the differing views on the question whether a contemnor can put in evidence affidavits but decline to give oral evidence. As he put it,

"[109] Nor is it necessary to deal with another point which was touched on in argument which is whether it is open to a defendant to a committal application to put in evidence affidavits in answer to the application, but still decline to give oral evidence and expose themselves to cross-examination. There is a certain amount of authority on the point but the position is not as clear as it might be: compare for example Discovery Land Co, LLC v Jirehouse [2019] EWHC 1633 (Ch) at [23]-[30] per Henry Carr J with the recent decision of Sir Anthony Mann in Isbilen v Turk [2024] EWHC 505 (Ch) at [50]-[56]. We did not receive full argument on the point, and the latter decision was indeed not available at the time of the hearing. The point cannot assist Ms Khan in the present case as she was in fact able to rely on her affidavits without being cross-examined, which, even if technically wrong, cannot have been to her disadvantage, and in those circumstances I prefer to leave its resolution for a case where it matters and where the point can be fully argued."

Finally, the court considered the approach to be taken to the reconsideration of decisions taken by a single Lord or Lady Justice on the papers: see CPR r.52.24(6). That rule only provides for reconsideration by single Lord or Lady Justices of decisions taken by court officers. It does not provide a power to reconsider the judge's reconsideration (at [140]). Nor is there power to reconsider, vary or set aside the reconsideration under CPR r.3.3(3), and nor is there power to do so under CPR rr.3.1(7) or 3.1(2)(m) (at [144]–[153). In reaching this decision, Nugee LJ noted a correction that was necessary to the understanding of CPR r.23.8(c), which makes provision for the court to deal with applications without a hearing where it considers it appropriate to do so. As he put it,

"[147] I note that there is a note in Civil Procedure (The White Book) 2024 vol 1 at §23.8.1 which reads as follows:

> *'Where r.23.8(c) applies the court will treat the application as if it were proposing to make an order on its own initiative. The effect of para.11.2 here is to bring into play r.3.3 (Court's power to make order of its own initiative). The particular significance of this is that, where the court makes an order on an application, having dealt with it without a hearing on the basis of r.23.8(c), the right to apply to the court to have the order set aside, varied or stayed conferred by r.3.3(5) accrues to a party affected by the order.'*

I consider that this note is not entirely accurate, and, for the reasons I have given, should read 'having dealt with it without a hearing and without giving the parties an opportunity to make representations...'."

R v Pritchard (1836) 7 Car. & P. 303, CtKB, ***Teinaz v Wandsworth LBC*** [2002] EWCA Civ 1040; [2002] I.R.L.R. 721, CA, ***Inplayer Ltd v Thorogood*** [2014] EWCA Civ 1511, unrep, CA, ***Solanki v Intercity Telecom Ltd*** [2018] EWCA Civ 101; [2018] 1 Costs L.R. 103, CA, ***Discovery Land Co, LLC v Jirehouse*** [2019] EWHC 1633 (Ch), unrep., ChD, ***Isbilen v Turk*** [2024] EWHC 505 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2024*** Vol.1, paras 23.8.1, 52.24.2, 81.4.8, 81.7.5.)

Commercial Bank of Dubai PSC v Al Sari [2024] EWCA Civ 643, 12 June 2024, unrep. (Nicola Davies, Males and Elisabeth Laing LJJ)

Contempt of court, alternative service

CPR r.81.5. The appellants appealed against an order that committed them to prison for 24 months for contempt of court. The order was challenged on the basis that service of the order listing the hearing of the contempt application had been served via alternative service. The listing order had been served via text message on one of the two appellants. It was served by email on the other (at [17]). Earlier in the proceedings, and prior to the contempt proceedings, an order had been made authorising "*all further documents in these proceedings*" via these two methods (at [10]). It was not suggested that service by an alternative method was impermissible *per se* in contempt proceedings (at [35]). The specific challenge to service was that "*an order permitting [alternative] service in a previous phase of the proceedings did not apply to contempt proceedings, and that the question whether service by alternative means should be permitted in contempt proceedings needed to be specifically address by the court in view of the special considerations applicable to such applications*" (at [35]). Those special considerations had previously been articulated by Lady Justice Carr, as she then was,

> *"[34] . . . in Navigator Equities Ltd v Deripaska [2021] EWCA Civ 1799, [2022] 1 WLR 3656:*
>
> > *'79. Contempts of court have traditionally been classified as being either criminal or civil. Proceedings for civil contempt are sometimes described as "quasi-criminal" because of the penal consequences that can attend the breach of an order (or undertaking to the court). They are criminal proceedings for the purpose of Article 6 of the European Convention on Human Rights ("Article 6"). The charges raised have to be clear; the criminal standard of proof applies; and the respondent has a right to silence. There must be a high standard of procedural fairness.'"*

This issue had not been raised by the appellants prior to the appeal proceedings. They therefore needed permission to raise it as a new point of law. The Court of Appeal refused permission for them to do so (at [72]). **Held**, the appeal was dismissed. Notwithstanding that, Males LJ decided—as *obiter dictum*—the substantive question concerning alternative service. He did so as the issue was of some general importance and it had been fully argued (at [40]). The starting point was that the contempt application and supporting evidence had been validly served on the appellants' solicitors further to CPR r.81.5(2) (at [41]–[42]). CPR r.81.5 did not, however, only apply to contempt applications and their supporting evidence. Thus it was not permissible to rely upon orders permitting alternative service made earlier in proceedings where service of documents in contempt proceedings was concerned. This was due to the need to maintain the high standard of procedural fairness in contempt proceedings. As Males LJ put it,

> *"[43] Although CPR 81.5 applies in terms only to the contempt application and evidence in support, basic fairness requires that its provisions should apply equally to other documents which a defendant to the application needs to have in order to defend itself. These include documents such as the Listing Order. Self-evidently, if the defendant does not know when the hearing will take place, it cannot properly defend itself. Accordingly such documents must either be served personally, or must be served on the defendant's legal representative on the record, or an application must be made for a direction 'otherwise in accordance with Part 6', which may include an order for service by alternative means or even, in an appropriate case, that service be dispensed with.*
>
> *[44] In principle, I would hold that such an application must be made in the contempt proceedings, and that it is not sufficient that an order for service of 'all other documents' by alternative means has been made in an earlier phase of the proceedings. I accept the submission, summarised at [35] above, that because of the 'high standard of procedural fairness' required in contempt proceedings, it is necessary for the court to consider specifically whether service by alternative means is appropriate to bring the documents in question to the defendant's attention in proceedings (or a phase of proceedings) which are essentially penal and where their liberty is at stake."*

Aldous v Whetton, 29 November 1978, unrep, CA, ***The Eastern Venture*** [1985] 1 All E.R. 923, CA, ***Chiltern District Council v Keane*** [1985] 1 W.L.R. 619, CA, ***Frame Investments Ltd v Airh Ltd***, 26 May 1988, unrep, CA, ***ICBC Standard Bank Plc v Erdenet Mining Corporation LLC*** [2017] EWHC 3135 (QB), unrep, QBD, ***Navigator Equities Ltd v Deripaska*** [2021] EWCA Civ 1799; [2022] 1 W.L.R. 3656, CA, ref'd to. (See ***Civil Procedure 2024*** Vol.1, para.81.5.1.)

Jarvis v Metro Taxis Ltd [2024] EWHC 1452 (KB), 14 June 2024, unrep. (Pepperall J)

Appeal from Circuit Judge to High Court, whether a second appeal

CPR r.52.7. The claimant, a taxi driver, brought proceedings against a taxi company for alleged underpayment. The claim was dismissed at trial by a District Judge. The claimant appealed. The appeal was heard by a Circuit Judge. The appeal was allowed. Rather than remit the matter for a fresh trial before a District Judge, the Circuit Judge went on to deal with the claim on its merits. The claim was again dismissed. The claimant sought to appeal from the Circuit Judge to the High Court. Turner J held that the High Court did not have jurisdiction to hear the proposed appeal as it was a second appeal.

As he had not heard legal argument on the point, he specified that any application to vary or set aside his order should be made via CPR Pt 23. The claimant thereafter made an application to set aside Turner J's order. **Held**, the application to set aside was refused: the proposed appeal was a second appeal and hence only the Court of Appeal had jurisdiction to grant permission to appeal and hear any such appeal. In dismissing the application, Pepperall J considered the basis on which it could be said the proposed appeal was a second appeal. It is well-established that any appeal from a decision made on an appeal is a second appeal and that only the Court of Appeal can grant permission to appeal in such a situation: CPR r.52.7(1) and s.55 of the Access to Justice Act 1999 (at [9]–[12]). The question in the present case was whether the decision made on the rehearing was one that was made on the appeal, and hence one that came within the scope of the second appeal provisions (at [13]). It was argued that the only decisions made on the appeal before the Circuit Judge were to allow the appeal and that the claim be reheard. Hence the rehearing, which could have been heard as a small claim by a District Judge but which was heard by the Circuit Judge who allowed the appeal, was not a decision made on the appeal (at [15]). It was clear, although Pepperall J also noted that he had not heard legal argument on the point (both parties were litigants-in-person), that authority supported the conclusion that where an appeal was allowed and the appellate court remade the decision that was subject to appeal, i.e., by way of hearing the matter afresh itself rather than remitting it to the court below to hear it afresh, that decision was one made on the appeal. In reaching this decision, the judge applied by analogy the decision ***JD (Congo) v Secretary of State for the Home Department*** (2012), which reached the same conclusion in a similar situation where the Upper Tribunal having allowed an appeal from the First-tier Tribunal went on to remake the decision rather than remit it for rehearing (at [16]–[24]). ***JD (Congo) v Secretary of State for the Home Department*** [2012] EWCA Civ 327; [2012] 1 W.L.R. 3273, CA, ref'd to. (See ***Civil Procedure 2024*** Vol.1, para.52.7.2.)

- **Terna Energy Trading doo v Revolut Ltd (Re Consequential Matters)** [2024] EWHC 1524 (Comm), 18 June 2024, unrep. (HHJ Matthews sitting as a judge of the High Court)

Jurisdiction to grant permission to appeal when hand-down adjourned to written procedure

CPR rr.52.3(a), 52.12(2). An application for reverse summary judgment and/or strike out was dismissed. The parties were invited by the judge to agree the wording of the order. They were invited to do so by email before the hearing. In the absence of agreement the parties were invited to submit written submissions on consequential matters, including permission to appeal (at [1]–[2]). The applicant sought permission to appeal. The respondent challenged the permission application both on its merits and on the basis that the judge had no jurisdiction to grant permission to appeal. The jurisdictional challenge was based on CPR r.52.3(2)(a), which provides that the court that gave the judgment can only grant permission to appeal at the hearing at which the judgment was made or at any adjournment of that hearing (at [4]). **Held**, the application for permission was granted. In reaching that decision, the judge held that the court had jurisdiction to grant permission to appeal. This was the case because the judge had adjourned the hand-down hearing. He had done so to a written procedure rather than to an oral hearing (at [11]). This was a formal adjournment. It was adjourned notwithstanding the fact the judge did not use the express words "I hereby adjourn this hearing". The judge did, however, refuse an extension of time to file an appellant's notice. He did so on the basis that no good reason was provided justifying an extension. Specifically, the judge held,

> *"[24] In my judgment, the mere fact that counsel already or previously instructed in a matter is wholly or partly unavailable in the next 21 days to prepare and appellant's notice is not of itself a good reason for extending time, let alone for extending it by a further 21 days after the period of unavailability has come to an end. And, as the respondent points out, the court commitments of junior counsel are not specified, and there is nothing to show that he would not be in a position to prepare drafts for review by leading counsel after he has completed his appeal in the Court of Appeal this week. In these circumstances, I decline to extend time for service of the appellant's notice."*

Claydon Yield-O-Meter Ltd v Mzuri Ltd [2021] EWHC 1322 (IPEC), unrep., IPEC, ***McDonald v Rose*** [2019] EWCA Civ 4; [2019] 1 W.L.R. 2828, CA, ***Chedington Events Ltd v Brake*** [2023] EWHC 3094 (Ch), unrep., ChD, ***Chedington Events Ltd v Brake*** [2024] EWHC 384 (Ch); [2024] 4 W.L.R. 22, ChD, ref'd to. (See ***Civil Procedure 2024*** Vol.1, paras 52.3.7, 52.12.3.)

- **Abram v Union des Associations Europeennes de Football** [2024] EWHC 1518 (KB), 18 June 2024, unrep. (Pepperall J)

Expert evidence, jurisdictional challenge, management

CPR r.35.12. A claim was pursued by 887 supporters of Liverpool FC seeking damages for personal injury arising from events that took place at the final of the UEFA Champions League in Paris in 2022. UEFA disputed the English and Welsh court's jurisdiction. It did so on the basis that the claims would require the court to determine issues of lawfulness of acts of the French state under French law. Directions were sought by UEFA concerning a meeting of the parties' French law experts, preparation of joint statements and service of any supplemental reports (at [1]–[4]). Both parties had previously

obtained permission to rely on their own expert reports on the issue (at [7]). In granting permission, the court had not limited either party's expert to deal with specific issues of French law: permission granted was general. Directions concerning the experts' meeting and the preparation of a joint report to narrow issues had also been refused (at [8]). UEFA subsequently applied to adjourn the hearing on jurisdiction, with further directions concerning the experts' meeting, preparation of a joint statement, and exchange of supplemental reports (at [10]). **Held**, the application was refused. In refusing permission, the judge explained that UEFA ought not to have sought general permission for expert evidence. On the contrary, issues of French law ought to have been formulated with permission sought for expert evidence on those issues. Such an approach would better assist the court on a jurisdiction challenge. Effective case management of the expert evidence ought to have been sought from the outset (at [20]). Moreover, as the judge explained,

> *"[21] Rule 35.12 provides that the court may, at any stage, direct a discussion between experts of like discipline for the purpose of requiring them to identify and discuss the expert issues; and, where possible, reach an agreed opinion on those issues. Directions for such discussions, the preparation of joint reports identifying the areas of agreement and disagreement together with the reasons for their disagreement, and for supplemental reports are common in litigation. The principal reason for giving such directions is to identify and then narrow areas of dispute between experts with a view to saving time and costs at trial. Such approach, together with a party's right to ask written questions of their opponent's expert under r.35.6, is of particular value in avoiding the need for some experts to give oral evidence at all and in limiting the oral expert evidence that is required in other cases.*
>
> *[22] While the court undoubtedly has the power under both Part 3 and r.35.12 to direct joint discussions and the filing of a joint statement and supplemental reports at any stage of a case, it is not, however, standard practice for the court to exercise that power in advance of an interim hearing. [BB Energy (Gulf) DMCC v. Al Amoudi (2018)] and [Gulf International Bank BSC v Aldwood (2019)] are not authorities as to the making of orders directing joint discussions between experts and the filing of a joint statement and supplemental reports. That is not, however, to suggest that such directions might not be appropriate in some jurisdiction challenges.*
>
> *[22] While the court undoubtedly has the power under both Part 3 and r.35.12 to direct joint discussions and the filing of a joint statement and supplemental reports at any stage of a case, it is not, however, standard practice for the court to exercise that power in advance of an interim hearing. BB and Gulf are not authorities as to the making of orders directing joint discussions between experts and the filing of a joint statement and supplemental reports. That is not, however, to suggest that such directions might not be appropriate in some jurisdiction challenges.*
>
> *[23] A challenge to the jurisdiction of the court is necessarily heard before the court has made any findings of fact. Such challenges are to be determined on the assumed facts set out in the Particulars of Claim, save in cases where such facts are demonstrably untrue or unsupportable. It is not the court's task to conduct a mini-trial: [Okpabi v Royal Dutch Shell plc ([2021)], at [22], [107] and [109]; and [Belhaj v Straw (2017)], at [2].*
>
> *[24] I accept that narrowing disputes between expert witnesses can be helpful at any stage of a case, but the court must consider whether such directions at the interim stage are necessary and proportionate given the fact that the jurisdiction challenge is not, and should not be treated as if it were, a trial. Furthermore, the court must consider whether it is practicable for any such directions to be complied with in the limited period of time before the hearing."*

Furthermore, adjourning the jurisdiction hearing to enable additional case management directions to be given would not further the overriding objective. It would cause delay and additional cost and cause prejudice to other litigants and the administration of justice (at [26]). ***Belhaj v Straw*** [2017] UKSC 3; [2017] A.C. 964, ***BB Energy (Gulf) DMCC v Al Amoudi*** [2018] EWHC 2595 (Comm), unrep., Comm., ***Gulf International Bank BSC v Aldwood*** [2019] EWHC 1666 (QB), unrep., QBD, ***Okpabi v Royal Dutch Shell Plc*** [2021] UKSC 3; [2021] 1 W.L.R. 1294, UKSC, ref'd to. (See ***Civil Procedure 2024*** Vol.1, paras 52.3.7, 52.12.3.)

■ **Prospect v Evans** [2024] EWHC 1533 (KB), 20 June 2024, unrep. (Steyn J)
Jurisdiction, strike out

CPR r.3.4, Pt 11. The claimant, a trade union, brought a claim against the defendant for defamation and malicious falsehood. The defendant applied for a declaration under CPR Pt 11 that the court had no jurisdiction to hear the defamation claim. The basis of the application was that, it was submitted, as a trade union the claimant had no standing to pursue a defamation claim. The defendant also sought to rely on CPR r.3.4. There was no issue concerning the right to bring a claim in malicious falsehood. **Held**, the application for a declaration and/or to strike out the claim was dismissed. In reaching that decision Steyn J held that the correct approach to take to the question posed by the defendant was via CPR r.3.4 and not Pt 11. As she put it,

> *"[7] In my judgment, whether or not a trade union is entitled to bring a claim for defamation, the court has jurisdiction to determine this defamation and malicious falsehood claim. As the claimant has correctly identified, if as a trade*

union it has no right to bring a defamation claim, that cause of action would fall to be struck pursuant to CPR 3.4(2)(a). The latter provision gives the court power to strike out a statement of case if it appears to the court 'that the statement of case discloses no reasonable grounds for bringing ... the claim'. The proper procedural route for challenging the claimant's right to bring a claim in defamation is CPR 3.4(2)(a) rather than CPR 11."

(See ***Civil Procedure 2024*** Vol.1, para.3.4.2.)

Practice Updates

STATUTORY INSTRUMENTS

THE CIVIL PROCEDURE (AMENDMENT) RULES 2023. In June 2024, a correction slip was issued concerning the Civil Procedure (Amendment) Rules 2023 (SI 2023/105). It is available here: *https://www.legislation.gov.uk/uksi/2023/105/pdfs/uksics_20230105_en_001.pdf*. It corrects a typographical error in an amendment it made to CPR r.19.2. It specifically makes clear that its reference to amending CPR r.19.2(a), was and is meant to amend CPR r.19.2(4)(a). It thus clarifies that the "and" in that rule has been deleted: see *Civil Procedure 2024*, Vol.1, para.19.2.1.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 170th Update. This Practice Direction Update came into force on 18 July 2024 (NB: while the Ministry of Justice website states it came into force at 11.00 a.m. on 18 July, the Practice Direction does not itself specify the time at which it came into force). The Update amends PD 51R (Online Civil Money Claims Pilot) and PD 51ZB (The Damages Claims Pilot). It extends the duration of both pilot schemes to 1 October 2025. It also extends the use of case progression and other features of the schemes to all county court hearing centres other than to the County Court at Birmingham. In respect of that hearing centre, roll-out will occur at a later point. The Update also makes a number of other amendments including clarificatory and stylistic ones.

PRACTICE GUIDANCE

Practice Note: The Chancery Guide 2022. On 10 July 2024 the Chancellor of the High Court issued the July 2024 update to this Practice Note, which specifies those Practice Notes and other forms of guidance that remain in force notwithstanding the fact they are not included in the Chancery Guide. The updated Practice Note makes reference to a new Practice Note, issued on 22 May 2024, concerneding Rrobes. That Practice Note is not publicly available. It is assumed that the fact it has not been published is an oversight and that it will be published shortly.

MISCELLANEOUS UPDATES

Hague Judgments Convention. The UK Government has now ratified, and deposited its instrument of ratification, of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. The Convention will enter into force in the UK on 1 July 2025. Amendments to CPR Pt 74 and to CPR PD 74A, effected by the Civil Procedure (Amendment No. 2) Rules 2024 and CPR Update 168 (see **Civil Procedure News** No. 6 of 2024) will, consequently, enter into force on 1 July 2025.

In Detail

EXPERT EVIDENCE – SINGLE JOINT EXPERTS, LITERATURE REVIEWS

Expert evidence has been in the spotlight recently. It has formed the substance of judgments both in the High Court's Chancery Division and the Court of Appeal. In issue in the judgments was the approach to be taken to expert reports by parties and the approach to be taken to expert evidence and research literature by the judiciary. The former issue was considered by Adam Johnson J in ***Seneschall v Trisant Foods Ltd*** [2024] EWHC 1380 (Ch). The latter issue was considered by Baker, Phillips and Elisabeth Laing LJJ in ***D and A (Fact-Finding: Research Literature)*** [2024] EWCA Civ 663.

Reliance on expert reports

The issue in ***Seneschall v Trisant Foods Ltd*** [2024] concerned a petition under s.994 of the Companies Act 2006 (an unfair prejudice petition). The petitioner was a minority shareholder in the defendant company. He had obtained a judgment on liability against various parties, including the majority shareholder of the defendant company. Remedies were to be dealt with at a separate trial. A single joint expert had been appointed. The expert was to provide a valuation of the petitioner's shareholding. Notwithstanding the fact that the expert used several different formula to calculate the value of the shares, each produced a valuation of £nil (at [13]). The petitioner sought advice from a further expert. Questions were then put to the single joint expert. The petitioner concluded they were unsatisfactory and instructed his own expert to produce a summary report on valuation (at [18]). That report produced a share valuation of between £1.3 and £1.14 million (at [19]). The petitioner subsequently applied for permission to rely on the summary report, to instruct his expert to produce a more detailed report, for the two experts to meet and, if necessary, for permission to call the two experts to give oral evidence at trial (at [20]). The application was dismissed. The petitioner appealed from that order. Prior to the appeal the remedies hearing had taken place. The only evidence on value was provided by the single joint expert, whose evidence was accepted (at [23]). Permission to appeal from that decision was subsequently granted, with the appeal on remedies to follow on from the appeal from present appeal (at [23]). Adam Johnson J allowed the appeal.

Parties should take a staggered approach where they are considering reliance on their own expert consequent upon the appointment of a single joint expert

In reaching his decision Adam Johnson J emphasised that the petitioner was seeking to adopt the correct approach to the situation. In that respect he was attempting to follow the approach articulated by Lord Woolf in ***Daniels v Walker (Practice Note)*** [2000] 1 W.L.R. 1382. In dismissing the application, the judge had not, however, followed that approach, when he ought to have done so (at [29]). In allowing the appeal therefore, Adam Johnson J emphasised the importance of taking account of and following the approach articulated in ***Daniels v Walker*** (2000). He summarised that approach as follows,

> *"[1] In Daniels v. Walker (Practice Note) [2000] WLR 1382, one of the early cases under the Civil Procedure Rules, Lord Woolf MR set out some detailed guidance about the approach the Court should take, when a single joint expert has been appointed, but then one of the parties wishes to rely on evidence from their own, independently appointed expert.*
>
> *[2] Even in cases where a substantial sum of money is involved, Lord Woolf suggested (p. 1387G) that the starting point, wherever possible, should be for a joint report to be obtained. His hope (p. 1387D-E) was that in the majority of cases, appointment of a single expert would be not only the first step but the last step.*
>
> *[3] All the same, Lord Woolf was realistic enough to accept that that would not always be so. He said at p. 1387 C-D that just because a party may have agreed to instruction of a joint expert, that should not prevent a party from being allowed facilities to obtain a report from another expert or, if appropriate, rely on such a report.*
>
> *[4] Lord Woolf though emphasised the benefits of a staggered approach (see at p. 1387H-1388A).*
>
> *[5] To begin with, he suggested 'there would be an issue as to whether to ask questions or whether to get your own expert's report' (p. 1387H). As I understand it, this was an encouragement to see first whether asking questions of the joint expert might solve the problem.*
>
> *[6] Lord Woolf though went on: 'If questions do not solve the matter and a party, or both parties, obtain their own expert's reports, then that will result in a decision having to be reached as to what evidence should be called'. Consistent with his idea of a staggered approach, Lord Woolf sounded a note of caution about the appropriate timing of such a decision. He said at p. 1388A: 'That decision should not be taken until there has been a meeting between the experts involved.'*
>
> *[7] It seems to me clear that the reason for Lord Woolf's suggested approach was to give maximum opportunity for agreement, or at least for the narrowing of issues, before finally deciding whether to require attendance of experts for examination at trial. One can see that from the following passage, at p. 1388A-B:*
>
>> *'It may be that agreement could then be reached; it may be that agreement is reached as a result of asking the appropriate questions. It is only as a last resort that you accept it is necessary for oral evidence to be given by the experts before the court. The cross-examination of expert witnesses at the hearing, even in a substantial case, can be very expensive.'"*

In the present case, in considering the petitioner's application, the judge had focused on whether the trial of the matter would need to be adjourned if the petitioner's expert were to be given permission to give oral evidence (at [29]). That

was the wrong issue. The judge should have started by focusing on Lord Woolf's staggered approach. By not following that approach, the judge did not have all the necessary information before him to decide the question whether the trial needed to be adjourned. If the staggered approach had been followed, and the experts had met, etc, the judge would have been in a proper position to consider if the trial needed to be adjourned and, if so, for how long and on what basis (at [31]). By taking the approach he did, the judge was not in a proper position to determine what the effect of permitting the petitioner to rely on his expert's evidence would be. As Adam Johnson J explained,

> *"[32] . . . that ultimately the matter for him was one of case management; and it is also true that an appeal Court should be slow to interfere with case management decisions made by Court below. But one of the grounds on which it will do so is if, in making its decision, the Court below did not take into account all the information relevant to that decision. I think that describes the present case, and necessarily so, because the Judge was not in a position to know clearly what the effect would be of permitting reliance on Mr Nissan's proposed evidence, until after the experts had met. I think that is why, in Daniels v. Walker at p. 1388A, Lord Woolf said: 'That decision should not be taken until there has been a meeting between the experts involved.' The decision Lord Woolf was referring to was just the decision the Judge was faced with here: i.e., whether or not to admit further expert evidence, in a case where there was already a report from a single joint expert. The reason for deferring the decision is so that the output of the experts' discussion can be known, before a final view is taken. In this case, following the staggered approach advocated by Lord Woolf would have allowed that to happen, and then a fully informed decision could have been made – albeit very close to the start of the trial – about what case management consequences should follow, having regard to the overall need to deal with the case justly and at proportionate cost. Such consequences need not necessarily have involved having to adjourn the whole of the trial on remedies: other permutations might have been available, for example adding an extra day or half-day of hearing time, depending on the nature of the disagreement between the experts."*

Adam Johnson J also concluded that given the fact that the potentially critical importance of the new expert's evidence as to valuation to the just determination of the question as to remedies, very strongly favoured an adjournment, not granting the application gave rise to an injustice. It was of such a nature that it could properly be said that the judge was wrong to dismiss the application (at [33]–[34]).

Literature Reviews and Expert Evidence

The appeal in ***D and A*** (2024) arose in family proceedings. It specifically concerned care proceedings concerning two boys. Several experts gave evidence. Within their evidence extensive reference to medical research literature was made. On the appeal it was submitted that the judge erred by acting as her own expert and had conducted her own analysis of the medical literature (at [69]). Specifically, it was argued that,

> *"[70] . . . the judge elevated her own analysis of the literature to a status far above other evidence, and used that as the prism through which she evaluated all the other evidence in the case. The judge tried to find the answer buried within literature and, having found what she thought was the answer, applied it to the case. As a result she failed to analyse or give any proper weight to the totality of the expert evidence, . . . The consequence was that she made findings which were wrong when the answer was quite straightforward."*

The Court of Appeal allowed the appeal. In doing so it reviewed the approach that should properly be taken to research literature. It noted in this regard that the rules concerning expert evidence in both the Family Procedure Rules and the CPR, while different in terms of their detail, did not differ in any material way (at [81]–[82]).

Guidance on the approach to research literature

Baker LJ first noted that the role played by research literature in respect of expert evidence was clearly set out in ***R v Abadom*** [1983] 1 W.L.R. 126 at 129 to 131 (at [80]). In the case Kerr LJ explained that,

> *"In the context of evidence given by experts it is no more than a statement of the obvious that, in reaching their conclusion, they must be entitled to draw upon material produced by others in the field in which their expertise lies. Indeed, it is part of their duty to consider any material which may be available in their field, and not to draw conclusions merely on the basis of their own experience, which is inevitably likely to be more limited than the general body of information which may be available to them . . . [T]he process of taking account of information stemming from the work of others in the same field is an essential ingredient of the nature of expert evidence . . . Once the primary facts on which their opinion is based have been proved by admissible evidence, they are entitled to draw on the work of others as part of the process of arriving at their conclusion. However, where they have done so, they should refer to this material in their evidence so that the cogency and probative value of their conclusion can be tested and evaluated by reference to it."*

Further detail is set out on how experts ought to complete the reports and how research literature should be taken into account in FPR Pt 25 and CPR Pt 35 (at [81]–[82]). Where published scientific work is concerned, while such evidence was admissible at common law and under s.7(2)(a) of the Civil Evidence Act 1995,

> *"[83] . . . the long-established practice is for such works to be admitted through the evidence of expert witnesses rather than simply quoted by counsel or consulted by the judge: Collier v Simpson (1831) 5 C & P 73. Research literature only becomes part of the evidence if it is cited by an expert in their report or put to them in cross-examination. But as Phillips LJ pointed out during the hearing, any literature cited in this way becomes part of the evidence in the case. Medical research literature, in the form of peer-reviewed articles and occasionally textbooks, is frequently cited by expert witnesses as part of their opinion evidence in fact-finding hearings in the family court."*

Where research literature is cited to the court, Baker LJ explained, the following approach ought to be taken. It is an approach that requires judges to proceed with caution. As he put it,

> *"[84] . . . As Kerr LJ observed in Abadom, the reason for requiring an expert to refer to the research material on which they have relied in expressing their opinion is so that the cogency and probative value of their conclusion can be tested and evaluated by reference to it. The judge is therefore entitled and, where necessary, required to scrutinise the research cited when assessing the expert's opinion evidence. The reliability of an expert's opinion may be enhanced if it supported by research literature. On the other hand, it may be undermined if it is contrary to the research literature. This is all part of the overriding principle that the judge must reach her decision on the totality of the evidence.*
>
> *[85] In considering the research literature, however, the judge must exercise caution. First, she should not use analysis of research as a stand-alone method of trying to decide what happened. It can help to confirm the accuracy or reliability of the expert's opinion. It is not a tool for the judge to use herself independently when analysing the evidence. She is not the expert.*
>
> *[86] Secondly, in areas of scientific controversy and uncertainty (such as causation of intracranial bleeding in infants), there is a risk that the judge may be drawn into too extensive an analysis which will distract from the central issue in the case. There is a danger that the obligations on the expert in [FPR] Practice Direction 25B to identify the literature and research material they have relied on in forming their opinion and to summarise the range of opinion on any question to be answered will lead the judge into an unnecessarily detailed analysis of the material.*
>
> . . .
>
> *[88] Fourthly, when a large volume of research is cited, there is a danger that it may obscure other important parts of the evidence. As Peter Jackson J observed in Re BR (Proof of Facts) [2015] EWFC 41 at paragraph 8, (cited by the judge at paragraph 169 of her judgment) 'the medical evidence is important, and the court must assess it carefully, but it is not the only evidence'. In A County Council v K D & L [2005] EWHC 144 (Fam) at paragraph 39, Charles J observed,*
>
>> *'It is important to remember (1) that the roles of the court and the expert are distinct and (2) it is the court that is in the position to weigh up the expert evidence against its findings on the other evidence.'"*

The third reason, set out at [87] focused specifically on issues relating to research literature on causation of intracranial bleeding in infants. As such it was of general application only in so far as it highlighted the need to take particular care where research literature in a specific area evidences difficulties, such as: an absence of empirical research data; that the literature is based on relatively few cases that provide unequivocal evidence on the issue at hand; where there are questions concerning the reliability of the evidence; where there are concerns regarding the degree to which the research is based on self-selected cases; or where there is a polarisation in the literature (at [87]). Both practitioners and judges ought to bear in mind this guidance when approaching the assessment of research literature and expert evidence in civil proceedings to the same extent that it is applicable in family proceedings.

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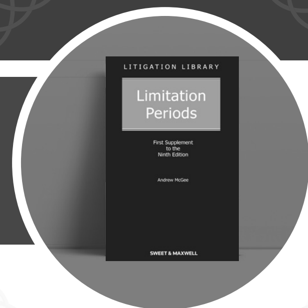

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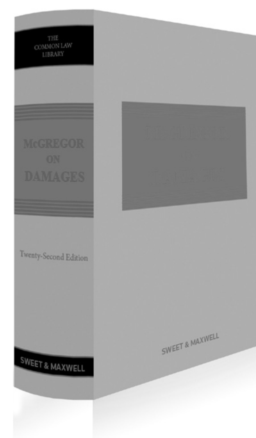

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