CIVIL PROCEDURE NEWS

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In Brief

CASES

Tai Mo Shan Ltd v Persons Unknown [2024] EWHC 1514 (Comm), 17 May 2024, unrep. (HHJ Pelling KC sitting as a judge of the High Court)

Alternative service out of the jurisdiction by NFT

CPR r.6.40(4), PD 6B, para.3.1. The claimant had permission to serve their claim form and particulars of claim outside the jurisdiction by an alternative means. The claim was to enforce a judgment of the New York state court. An issue, amongst other things, arose concerning service. The defendants were not known to the claimant. Hence their location was also unknown. As a consequence, an application was made to serve the claim via non-fungible tokens (NFTs) being placed into a blockchain at various addresses. HHJ Pelling KC was satisfied that service in this way was permissible,

> *"[13] I am entirely satisfied, first of all, that that is in accordance with a growing body of authority permitting service by that alternative means in cryptocurrency frauds of this nature and by necessary incremental development to the enforcement of foreign judgments relating to such claims. In relation to crypto currency fraud claims before the courts of England and Wales, This approach has been adopted by Lavender J in Osborne v Persons Unknown [2023] WHC 39, by Trower J in d'Aloia v Persons Unknown [2022] WHC 1723 and by me in a number of cryptocurrency cases in the last year."*

HHJ Pelling KC noted that there was a risk that a defendant may be in a jurisdiction where service by way of NFT is unlawful. As a consequence of that, it was necessary to impose a condition on permission to serve via NFT.

> *"[15] I am certainly prepared to make the order sought but it seems to me that on the face of the order there ought to be a qualification which makes clear that service will not be effective in any country where service by the alternative means I am authorising is contrary to the law of the country where the defendant is located at the time when service is effected or deemed to be effected. This is necessary because this issue goes to the comity of the English court with other courts around the world and it could be a source of difficulty unless an express qualification to that effect was not imposed".*

The order also provided for a 31 day period to respond. This was a pragmatic decision as the defendant's location was unknown and it was a longer period than that applied where service was effected in North Korea; there was limited evidence to suggest the defendants might be connected with that jurisdiction (at [17]). Finally, documents were served that contained "*a significant amount of full and frank disclosure*". To protect any such documents that would not be available to non-parties on demand, i.e., without a court order granting access, they would be password protected. As HHJ Pelling KC put it,

> *"[18] The final issue to be resolved therefore is whether or not the documents which are to be served need protection by passwords. There is a significant amount of full and frank disclosure which is contained in the material inevitably and the point which is made by Mr Yeo is that the Civil Procedure Rules distinguish between documents which are available to non-parties on demand and documents which can only be obtained by further order of the court. The risk, in serving by the method proposed, is that non-parties may be tempted to open or gain access to the documentation. I agree with the approach adopted by the claimant, therefore, which is to distinguish between documents which are available on demand, for which no relevant protection is necessary, and those which could only be obtained by further order, for which password protection is appropriate, providing the order includes within it directions which make clear how with relative ease access to the password can be obtained. The order has catered for that point."*

D'Aloia v Persons Unknown [2022] EWHC 1723 (Ch), unrep., ChD, ***Osbourne v Persons Unknown*** [2023] EWHC 39 (KB), unrep., KBD, ref'd to. (See ***Civil Procedure 2024*** Vol.1, para.6.40.4.)

Invenia Technical Computing Corp v Hudson [2024] EWHC 1481 (KB), 14 June 2024, unrep. (Knowles J)

Unreasonable refusal to agree extension of time

CPR r.1.1(3). The parties were engaged in litigation concerning an alleged breach of fiduciary duty. The defendant applied for a payment on account of costs consequent upon an interim hearing. Directions were given for evidence to be filed. The respondent requested a "*modest*" extension of time from the applicant (at [104]–[105]). The applicant refused to agree to the extension (at [106]). The respondent subsequently applied to the court for an extension of time, which was granted (at [107]). **Held**, the applicant should pay the costs of the application. In reaching that decision Knowles J emphasised that litigation requires parties to behave reasonably and that it was unreasonable to refuse the modest exten-

sion sought. Underpinning his conclusion was the implicit point that the failure to agree the extension was the need for parties to assist the court in managing proceedings proportionately consistent with the overriding objective. As he put it,

> *"[108] In Denton v TH White Ltd [2014] 1 WLR 3926, [43], the Court emphasised that an unreasonable refusal to agree to an extension of time should be punished in costs. I consider that the Applicant's refusal was unreasonable. He said it was not, but I disagree. He was prepared to agree a short extension, but only if Invenia agreed his payment on account application be dealt with on the papers. They refused. They were entitled to do so, given what was at stake. Even if they had agreed, it is highly unlikely that any judge would have dealt with the application without a hearing, given the sums of money being claimed.*
>
> *[109] I understand that this litigation is hotly contested. But as I said during the hearing, civil litigation in the modern era requires parties to behave reasonably and that may include, on occasion, agreeing to requests for short extensions of time by the other side even if they are not especially happy to do so. Fighting a war of attrition over every inch of ground is unreasonable and not the way civil litigation should be conducted. The extension sought in this case related to a minor sub-branch of the litigation. The extension sought was modest; good reasons had been put forward; there was no prejudice to the Applicant; and Master Gidden granted it in any event. Costs should therefore follow the event."*

Denton v TH White Ltd [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, CA, ref'd to. (See ***Civil Procedure 2024*** Vol.1, para.1.3.1.)

- **Tradin Organic Agriculture BV v Gold Grain Gida Tarim Urunleri Sanayi Ve Ticaret Anonim Sirketi** [2024] EWHC 1562 (KB), 24 June 2024, unrep. (Master Sullivan)

Validity of service of claim form where not paginated properly

CPR rr.13.2, 13.3. The parties, one a Turkish company (Gold Grain), the other a Dutch company (Tradin), entered into a series of agreements for the supply of organic food. A dispute arose between them concerning the agreements in or around 2021. Pre-action disclosure was sought in the Netherlands. In December 2022, Tradin sent a letter before claim to Gold Grain's lawyers who acted for them in the Dutch litigation. They also enquired if service of a claim in England and Wales would be accepted. Gold Grain disputed the claim and that England and Wales had jurisdiction. It did not authorise its English solicitors to accept service. Proceedings were issued by Tradin in England in December 2022. Gold Grain subsequently issued proceedings in the Netherlands in February 2023. The claim form and other documents in the English proceedings were served in Turkey in May 2023. No acknowledgment of service or defence was subsequently filed. Default judgment was sought and then entered in November 2023. An application was subsequently issued in December 2023 seeking to set aside the default judgment and/or seeking to strike out the claim. **Held**, the application was dismissed. In considering the application under CPR r.13.2, the Master noted that the claim form and other documents were sent via the Foreign Process Section to a Turkish government operated electronic messaging service (the UETS inbox). This was in accordance with the relevant Convention. The particulars of claim when they arrived in the UETS inbox were not paginated properly. It was submitted that this meant that service was invalid as *"as not all pages of the particulars of claim were verified by a statement of truth and therefore the judgment was wrongly entered."* (at [17]). The Master rejected this argument,

> *"[18] I do not accept that service was invalidated by reason of the order of the pages. The particulars of claim was internally numbered, both by paragraph numbers and pagination. The last page of it, page 5, was signed and so verified with a statement of truth. Whatever the reason for the jumbled pages, that does not mean it is not a particulars of claim verified by a statement of truth. Whilst I am sure it was annoying and may have been difficult to sort out, all pages were served. In my judgment the jumbling of the pages does not invalidate the service on 3 May 2023 and the application under CPR 13.2 fails."*

The application under CPR r.13.3 was also rejected. (See ***Civil Procedure 2024*** Vol.1, para.13.2.1.1.)

- **Pan NOx Emissions Litigations, Re** [2024] EWHC 1728 (KB), 5 July 2024, unrep. (Constable J, Senior Costs Judge Gordon-Saker)

Costs budgeting guidance – group litigation

CPR rr.3.15(1), 44.3(5). The court gave guidance on costs budgeting in long running group litigation concerning allegations that a number of specified car manufacturers took steps to subvert regulatory requirements concerning environmental emissions. It was as follows,

> *"[20] The Court's power to approve budgeted costs for a particular phase is . . . limited to phases where budgeted costs have not been agreed. Agreed budgeted phases are outside the scope of the Court's approval function, but it is clear that the Court has a right nevertheless to comment if it has reservations about the agreed amount: Various Claimants v Scott Fowler Solicitors (A Firm) [2018] EWHC 1891 (Ch), per Chief Master Marsh at [17] and Woolley v*

Ministry of Justice [2024] EWHC 304 (KB), per Kerr J at [43]. Once budgeted costs for a particular phase have been agreed, the making of a costs order does not require the Court to approve the agreed phase totals. Indeed, CPR 3.15(2) expressly provides that a costs management order will 'record' the extent to which costs are agreed between the parties. If agreement is reached before the costs management hearing, the Court and the parties are bound by it: Woolley at [78].

[21] On the ordinary application of those principles therefore, the Court cannot approve or disapprove phase totals for budgeted costs which have been agreed; and nor can it substitute a different approved figure for an agreed phase total for budgeted costs. The limit of the Court's facility, in the event that it disapproves of agreed phase totals, is to decline to make a costs management order (see Friston on Costs (Fourth Edition) (2023) at [12.46]). In declining to make a costs management order, the Court may order the parties to file revised budgets: see Group Seven Ltd v Nasir [2016] EWHC 620 (Ch); [2016] 2 Costs L.O. 303 per Morgan J at [64] and Associated Newspapers Ltd v Buckingham Group Contracting Ltd [2022] EWHC 2767 (TCC); [2022] Costs LR 1659 per Mr Roger Ter Haar KC at [52].

[22] Notwithstanding this, in the present case, at the invitation of the Court, it was accepted by the Claimants and Defendants that it would be appropriate for the Court to substitute an approved phase total in place of an agreed phase total in this case (albeit, subject to the qualification by Counsel for the Defendants, that such an approach 'might not strictly ordinarily be possible' under the rules).

[23] We consider that the agreement of the parties is particularly sensible where the impact of the Court's proposed approach in practical terms is similar to the Court refusing to make a costs management order and ordering the parties to file revised budgets. Given the number of budgets, the scale of the budgeting exercise, and the significant time and resources invested by the parties and the Court, it would have been far from ideal (and contrary to the overriding objective) to have declined to make a costs management order, leaving elements unbudgeted pending a further round of revised budgets and thereafter further consideration (and potential further non-approval) by the Court.

. . .

[25] The exercise of costs management is not an advance detailed assessment (PD 3D, paragraph 12). It is explicitly not the role of the Court to fix or approve the hourly rates claimed, or to fix or approve specific hours and disbursements (Yirenki v Ministry of Defence [2018] 5 Costs LR 1177 per Jacobs J). The underlying detail is intended to assist the Court in fixing the budget. It is for the Court to approach the claimed costs on a phase-by-phase basis.

[26] CPR 3.15 makes no provision for the Court to approve incurred costs, but the Court may record comments in respect of incurred costs which are to be taken into account in any subsequent assessment proceedings (CPR 3.15(4)). The Defendants have expressly invited this Court to do so. In light of the scale of the costs incurred, we feel bound to accept that invitation.

[27] As for future costs, an approved budget will stand, in respect of budgeted costs, as the costs to be allowed on detailed assessment in the absence of good reason to depart from that budget (CPR 3.18). The consequence of this is that, as the Defendants point out, the costs management process in which the parties have engaged is their opportunity to challenge the claimed costs (should in due course they be liable to pay any proportion of them), unless a good reason may later be shown."

Turning to consider proportionality the court considered that that had to be approached by reference to CPR r.44.3(5),

"[31] . . . , a simple comparison between spend and recovery is not the only measure of proportionality. It must be seen in the context of all the factors set out in CPR 44.3(5):

(a) the sums in issue in the proceedings;

(b) the value of any non-monetary relief in issue in the proceedings;

(c) the complexity of the litigation;

(d) any additional work generated by the conduct of the paying party; and

(e) any wider factors involved in the proceedings, such as reputation or public importance.

[32] The Court is well aware that this large-scale litigation involves not just large sums, but has layers of complexity caused by the need for co-ordination, in each of the Claimants'/Defendants' camps, and inter se; that the litigation is reputational for the Defendants; and that it concerns matters of public importance. However, that does not give any of the parties a blank cheque for the purposes of recoverable costs. As Waksman J observed in the CMC hearing dealing with what was then a 'judicial eye-brow raising' £10m cost budget for the claimants in the context of a two-week legal and technical preliminary issue in the VW litigation, 'the number of claimants in my judgment doesn't really affect the budget and it certainly doesn't affect it for the preliminary issues which aren't, for example, dealing with questions of

causation and loss'. It is of note that, in that case, the original budget submitted by the Claimants was £10.2m, and following Waksman J's request for a revised (and lower) budget, it was amended to £5.3m and then approved at £3.6m. Whilst we accept that there are logistical and administrative burdens in dealing with a large cohort of Claimants, the number of itself provides little justification for the extraordinary costs claimed in many phases, in which the scope of work required is largely or completely unrelated to the number of Claimants. In reality, the function of the number of Claimants is to increase the individual costs, rather than the common costs. The Claimants tend, therefore, significantly to overstate the complexity of the tasks they face which – in respect at least of Tranches 1 and 2 – boil down to the resolution of discrete issues of law and regulatory/statutory construction coupled with the type of technical investigation which will focus on independent expert evidence of a type the High Court is entirely familiar with. The sums budgeted are wholly disproportionate when seen in this light.

[33] Moreover, proportionality is, of course, not the sole benchmark against which recoverability is measured: costs have also to be reasonable. The costs claimed have to bear some resemblance to the work reasonably required to properly, but efficiently, advance these claims. As explored more fully below, there appears to be little effort – nor, it seems, incentive – to run this litigation in a manner so as to minimise, as far as is reasonably possible, the number of lawyers and the hours they suggest they need to work in order sensibly to progress this litigation."

Finally, the court gave guidance on the allocation of costs between firms representing parties in the GLO. It put it this way,

"[47] The Claimants say that, notwithstanding the provisions of the GLO, there should be no criticism of hours being allocated to firms other than the allocated Lead Firms. We do not agree. As the Defendants submit, the purpose of the provision within the GLOs is to ensure that there are one, or two, firms effectively exclusively responsible for the proceedings. This is to maximise efficiency and minimise potential duplication. That does not mean that, where there is a proper explanation, particular costs may not be incurred by a different firm (an explanation was given of a particular Milberg cost in the expert phase), but being outside the norm expected, and indeed required, by the GLOs themselves, without proper explanation, there will be an assumption that such allocations are the breeding ground for inefficiency and potential unjustifiable duplication.

[48] The Defendants also criticise the Leigh Day differing working practices, when compared with the Pogust Goodhead model. The different approaches are set out in the Claimants' skeleton, which give the following explanation in the context of attendance at the Fortnightly Meetings and some hearings (and the consequent allocation to different parts of the budget):

(1) Leigh Day fee earners generally attend on behalf of the Claimants in a particular GLO. A partner from the Ford team will attend on behalf of the Ford Claimants – and that cost therefore appears in the Ford-specific budget.

(2) However, at Pogust Goodhead (PG), attendance is often consolidated so that on rotation, a single partner team may often attend on behalf of the Claimants in multiple GLOs. A partner in one of the Emissions teams may attend on behalf of both the Peugeot-Citroën and FCA Claimants (for example) – and that cost therefore appears in the Pan-NOx budget.

[49] The Court readily accepts that this is an extremely brief explanation of what may be considerably more complex and nuanced organisation. It is, in addition, not for the Court in the context of costs-budgeting to tell parties' solicitors how they may, or may not, organise their firms. It is also readily accepted that in relation to some information, the separate confidentiality rings within different GLOs may require particular silos to exist which necessitate a degree of inefficiency, if not strict duplication, where a single task must have involvement from a number of different solicitors which may not happen absent that complication.

[50] However, not least by reason of the huge number of hours that are claimed, the Court has formed a clear view that such enormous numbers could only be generated by wildly inefficient resourcing and what might be referred to, using less blunt language than that deployed in the Defendants' submissions, as over-lawyering. This may well be contributed to by a structure where each aspect of the case is looked at by separate groups whilst ignoring the commonality which will plainly exist. It also requires significant quantities of intra-firm co-ordination which is not objectively justifiable."

Group Seven Ltd v Nasir [2016] EWHC 620 (Ch); [2016] 2 Costs L.O. 303, ChD, ***Various Claimants v Scott Fowler Solicitors (A Firm)*** [2018] EWHC 1891 (Ch), unrep., ChD, ***Yirenkyi v Ministry of Defence*** [2018] EWHC 3102 (QB); [2018] 5 Costs L.R. 1177, QBD, ***Associated Newspapers Ltd v Buckingham Group Contracting Ltd*** [2022] EWHC 2767 (TCC); [2022] Costs L.R. 1659, TCC, ***Woolley v Ministry of Justice*** [2024] EWHC 304 (KB), unrep., KBD, ref'd to. (See ***Civil Procedure 2024*** Vol.1, para.3.15.1.)

■ **Invest Bank PSC v El-Husseini** [2024] EWHC 1804 (Comm), 12 July 2024, unrep. (Calver J)

Latest date for serving notices to prove

CPR r.32.19(2)(a). An application was made for relief from sanctions regarding a Notice to Prove in respect of a "*divorce agreement*". An issue arose whether an application for relief was necessary given the terms of CPR r.32.19. CPR r.39.12(2)(a) provides that a notice to prove must be served by the "*latest date for serving witness statements*". It was argued that it was unnecessary as the deadline for serving supplemental witness statements was 17 June 2024; the deadline for service of witness statements themselves having expired on 1 March 2024. Notices to prove were purported to have been served on 14 March 2024, hence prior to the date for service of supplemental witness statements. The issue was therefore whether the apposite date for service for notices to prove was the deadline for service of witness statements or the deadline for service of supplemental witness statements. **Held**, the notice was served out of time and hence application for relief from sanctions was necessary. The relief application was refused. In respect of the first issue Calver J held as follows,

> *"[7] Whilst CPR 32.19 is poorly worded (and requires consideration by the rules committee), I consider that it simply means 'by the latest date for serving the primary witness statements', not supplemental witness statements. Were it otherwise, a party would be left in doubt as to which of their documents might ultimately be challenged by a notice to prove, because supplemental witness statements could potentially be ordered to be served at any time up until shortly before trial; and it might be too late at that stage for the recipient of the Notice to Prove to gather the necessary evidence to establish the genuineness of the challenged document(s).*
>
> *[8] The 'latest date for serving witness statements' in the present case was 1 March 2024. On 2 March 2024, the Bank was deemed to have admitted the authenticity of the Divorce Agreement (and the Divorce Papers). An admission takes effect when it is made or deemed to have been made. The Bank's admission is not and cannot be withdrawn impliedly by a subsequent direction of the court for supplemental witness statements. The Bank must be deemed to have admitted the authenticity of the Divorce Agreement (and the Divorce Papers) absent a successful application for relief.*
>
> *[9] This construction of CPR 32.19 is reinforced by the Commercial Court Guide, Paragraph E4.1(a) which reads:*
>
> > *'Where the authenticity of any document disclosed to a party is not admitted, that party must serve notice that the document must be proved at trial in accordance with rule 32.19. That rule requires notice to be served within 7 days of disclosure of the document or, if later, by the latest date for serving witness statements. The latter time limit will typically apply, unless the document is disclosed late, but as a matter of proper practice notice under rule 32.19 should normally be served well before the deadline for witness statements so that the party required to prove the document can take that into account when considering what witness statement evidence to obtain.'*
>
> *[10] This emphasises the point that the purpose of the rule is that timely notice is given of any challenge to authenticity so that the party whose document is so challenged can determine what evidence it is necessary to obtain to meet the challenge. If the respondent only has from the time of service of supplemental statements to adduce that evidence it may very well be too late for it to do so.*
>
> *[11] It is interesting to note that a similar point was addressed by Julian Knowles J in Tuke v JD Classics Ltd [2018] EWHC 531 (QB). There, the deadline for witness statements to be served was 24 August 2017, which was complied with. Having heard an application for specific disclosure by the claimant on 30 January 2018, Walker J struck out the witness statements served on 24 August 2017 and ordered the parties to produce schedules of facts and matters relied upon, with further witness statements directed at the matters disputed in those schedules be served by 20 February 2018. The claimant served a Notice to Prove on 7 February 2018, which the defendant contended was out of time since it should have been served by 24 August 2017.*
>
> *[12] Relevantly for present purposes, the claimant argued that where more than one round of factual witness statements is contemplated, the 'latest date for serving witness statements' for the purposes of CPR 32.19(2)(a) was the date for serving the final round of those witness statements. Furthermore, it was submitted that Walker J's decision to strike out the witness statements and set a fresh deadline for the service of replacement statements had the effect of setting aside the claimant's deemed admission of authenticity. The defendant contended that this was not a case where more than one round of factual witness evidence was contemplated, and in any event the claimant was deemed to have admitted the matter unless and until that admission was withdrawn. The judge (at [108]) agreed with the defendant's construction of CPR 32.19(2)(a) and also rejected the claimant's submission that: 'the decision of Walker J in January 2018 to strike out the bulk of the existing witness statements and to set a fresh deadline for the service of replacement statements had the effect of setting aside the deemed acceptance by the Claimant of the invoices' authenticity which occurred once the date of 24 August 2017 passed'.*
>
> *[13] I agree with this approach and it follows that the Notice in the present case was served out of time. Since the Notice was not served in time, the Bank requires the court to grant an extension of time pursuant to CPR 3.1(2)(a) and relief from sanctions under CPR 3.9 following the three-stage test set out in Denton v TH White Limited [2014] 1 WLR*

795. The Bank did not issue an application on 14 March 2024 when it served the Notices; instead it belatedly issued such an application on 14 June 2024."

Tuke v JD Classics Ltd [2018] EWHC 531 (QB), unrep., QBD, ref'd to. (See ***Civil Procedure 2024*** Vol.1, para.32.19.1.)

- **Adams v Ministry of Defence** [2024] EWHC 1966 (KB), 31 July 2024, unrep. (Garnham J and Master Davison)

Omnibus claims – test of convenience and disaggregation

CPR rr.1.1(2)e), 3.1(2), 7.3. Various claims against the Ministry of Defence have been pursued through so-called omnibus claim forms, i.e., where multiple claimants have been joined in a single claim form. The nature of such joinder has been subject to recent consideration by the Court of Appeal in ***Morris v Williams & Co Solicitors*** (2024). It concluded that, in assessing the question of joinder under CPR r.7.3, "*the acid test*" of joinder was whether it was "*convenient*" to do so. Garnham J and Master Davison summarised the approach as follows,

"[11] The acid test is convenience. In Morris, Sir Geoffrey Vos M.R. stated at paragraph 48:

> *'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...The question is rather: in what circumstances can multiple claims be conveniently disposed of in the same proceedings?' [paragraph 48]*

[12] The question of 'convenience' is a matter of broad judicial discretion. Sir Geoffrey Vos M.R. stated:

> *'The court will determine what is convenient according to the facts of every case.' [paragraph 49]*
>
> *'Many matters will be relevant to that question. But the matters that are most relevant to the ultimate question of convenience will vary across the wide spectrum of cases that have been and will in the future be brought under 19.1. This court would not wish to confine the discretion of judges in deciding that question under rules that are written in plain English.' [paragraph 56]*

[13] Convenience does not require that the trial of common issues brought by multiple claimants should produce a binding determination on all parties: see Morris at paragraphs 33, 35 and 49. To the extent that binding determinations are required or desirable, that may be achieved by joinder of multiple claimants. But . . . it may be achieved by other means too, which, assuming common case management of the cohort of claims, might include a simple order so directing.

[14] Convenience does not require 'a single final trial hearing to be possible or practicable': see . . . Morris at paragraph 31.

[15] No gloss is to be put on the meaning of convenience. Accordingly, the Court of Appeal in Morris ruled that the three tests set out by the Divisional Court in [Abbott v Ministry of Defence [2023]] were not correct:

> *'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.'*

[16] The factors set out at paragraphs 13 and 14 above, and the three tests promulgated in Abbott as referred to at paragraph 15 above, may be relevant factors to be taken into account as part of the Court's broad judicial discretion as to convenience, but they are not mandatory: see Morris at paragraphs 51 and 56."

Having summarised the Court of Appeal's approach, Garnham J and Master Davison went on to note two further points concerning the test of convenience. First, in assessing convenience the court was not to simply and exclusively focus on the parties' perspective. As is required generally under the CPR, and specifically due to the application of CPR r.1.1(2)(e), the court is required to take "*into account the convenience and capacities of the court and the court system*" (at [18]). Convenience then is not party-focused but goes wider than that. Secondly, it was apparent that under CPR r.7.3's predecessor under the RSC, Ord.15 r.5, the court could order the disaggregation of an omnibus claim, i.e., it could order separate trials or other such orders where joinder of causes of action or of parties would "*embarrass or delay the trial or [was] otherwise inconvenient.*" That power was not replicated in CPR r.7.3. However, as they put it

"[19] The power to order separate trials or make such other order as might be expedient is now contained in the very wide case management powers listed in CPR r.3.1(2). The point to note is that it was in the direct contemplation of

RSC O.15 r.5 and, in our judgment, remains in the contemplation of CPR r.7.3, that claims that were originally properly joined to one Claim Form may be disaggregated if that has become inconvenient."

Disaggregation due to limitations in CE-File was a relevant factor in determining convenience. It related to the court and the court's systems that needed to be taken into account ([at 22]). (That is not to say that limitations in CE-File having been identified, that should be the end of the story. Such limitations ought properly to be addressed.) Finally, the judges noted by way of postscript to their judgment the following,

"[26] Omnibus Claim Forms are topical at the moment. When such orders were made in this cohort of claims, the judges concerned did not have the benefit of argument nor the benefit of the cases cited above, which have given valuable guidance on the subject. As a result of the decisions in Abbott and Morris, omnibus Claim Forms and CPR r.7.3 are the subject of consideration by the Civil Procedure Rule Committee. In these circumstances, we make just one further, short observation.

[27] Where it appears at the outset that claims which are sought to be joined to an omnibus Claim Form will not, via trial of lead cases, be dispositive or at least largely dispositive of the cohort, that is a relevant factor in deciding whether to issue an omnibus Claim Form. To put that differently, if it can be anticipated that a stage will be reached where the cases in the cohort will all require individual determination, then a court may be hesitant to approve the use of an omnibus Claim Form because of the practical difficulties that may be encountered and as are exemplified by this case. To put that differently again, the convenience of such a Claim Form may be short-lived."

Abbott v Ministry of Defence [2023] EWHC 1475 (KB); [2023] 1 W.L.R. 4002, KBD, ***Morris v Williams & Co Solicitors*** [2024] EWCA Civ 376, unrep., CA, ref'd to. (See ***Civil Procedure 2024*** Vol.1, para.7.3.2.)

Practice Updates

STATUTORY INSTRUMENTS

CIVIL PROCEDURE (AMENDMENT NO.3) RULES 2024 (SI 2024/839). The latest statutory instrument update was made on 29 July 2024. It comes into force on 1 October 2024. It makes a wide range of amendments. It introduces amendments to CPR Pts 1, 3, 28 and 44 to give greater emphasis to the court's powers concerning ADR, not least to codify the power to mandate ADR. It amends Pt 2 to remove the anomaly which left Masters out of the definition of judges. Various costs related amendments were made to Pts 3, 44 and 45, including the insertion of a new Section X in Pt 45 concerning recoverable costs following hearings. Provision is made in Pt 52 for a time limit for seeking permission to appeal to the UK Supreme Court from the Court of Appeal. A new Pt 68 is inserted to make provision for the procedure governing references to higher courts further to ss.6A and 6C of the European Union (Withdrawal) Act 2018 in matters concerning assimilated law. CPR Pt 73 is amended to replace references to the Designated Civil Judge for Greater Manchester with references to the relevant Designated Civil Judge, which will enable a broader range of judges to consent to legal advisers exercising jurisdiction under that Part. Further updating amendments were also made.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 171st Update. This Practice Direction Update comes into force on 1 October 2024, except for amendments it effects to the Practice Direction – Application for a Warrant Under the Competition Act 1998. Amendments to that PD come into force when Parts 1 and 2 and Chapter 2 of Part 5 of the Digital Markets, Competition and Consumers Act 2024 do so. The Update effects various amendments that correct cross-references and to ensure PDs are consistent with amendments effected to the CPR by the Civil Procedure (Amendment No. 3) Rules 2024 (SI 2024/839). It also updates PD 51O (The Electronic Working Pilot Scheme) to extend its duration to 1 November 2025.

PRACTICE GUIDANCE

EQUAL TREATMENT BENCH BOOK. On 25 July 2024 the Judicial College issued a revised and updated version of the Equal Treatment Bench Book. Copies are available at: *https://www.judiciary.uk/wp-content/uploads/2024/07/Equal-Treatment-Bench-Book-July-2024.pdf*. It has been comprehensively updated. Significant revisions have been made to: chapter 3 (Physical disability), chapter 4 (Mental disability), chapter 6 Sex), chapter 8 (Racism, cultural/ethnic differences, anti-Semitism and Islamophobia), and chapter 12 (Trans people).

CHANCERY GUIDE. On 10 July 2024, the June 2024 update to the Chancery Guide 2022 was issued. Amendments have been made to, amongst other things: Part 4, service out of the jurisdiction; Part 6, case and costs management and skeleton argument page limits; Part 7, transferring claims between the Business and Property Courts and the Insolvency and Companies List; Part 10, power to stay for ADR; Part 14, skeleton argument page limits; Part 15, urgent and without notice applications. It is available at: *https://www.judiciary.uk/wp-content/uploads/2023/06/Chancery-Guide-2024-web-17-7-24.pdf*.

MISCELLANEOUS UPDATES

Court Funds Office – Interest Rates on Special and Basic Accounts. On 18 July 2024, the Ministry of Justice made public the fact that the Lord Chancellor had, with effect from 12 June 2024, decreased the interest rates payable on funds held on money held in the special and basic accounts. The interest rate payable on funds held in the basic account decreased from 5.00% to 3.94%. The interest rate payable on funds held in the special account decreased from 6.00% to 5.25%. The decrease was effected to enable the Court Funds Office to be maintained whilst enabling clients' funds to be managed and protected effectively.

Civil Justice Council – Call for Evidence on Enforcement. On 11 July 2024 the Civil Justice Council issued a call for evidence concerning enforcement. The call for evidence is open until 11.59pm on 16 September 2024. It covers four main areas: respondents' experience and awareness of the enforcement process; the provision of information about enforcement to potential judgment debtors; the provision of support for debtors; and suggested improvements to the enforcement process. The Civil Justice Council will also be holding three webinars on the issues. They are to take place on 22 July, 5 August, and 5 September 2024. The call for evidence and webinar registration details are available at: *https://www.judiciary.uk/wp-content/uploads/2024/07/July-2024-CJC-Enforcement-Call-for-Evidence.pdf*.

In Detail

LAW COMMISSION CONSULTATION – CONTEMPT OF COURT

The Law Commission launched a consultation on the reform of the law of contempt of court on 9 July 2024.

The Consultation Paper is available at: *https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2024/07/Contempt-of-Court-Consultation-Paper-9-July-2024-Web-1.pdf*.

A summary of the consultation is also available. It can be accessed at: *https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2024/07/24.97_LC_Contempt-of-Court_Summary_v5_WEB.pdf*.

Consultation aim

The rationale underpinning the consultation is that the substantive law of contempt is "disorganised and, at times, incoherent". As with many aspects of English and Welsh law it has evolved over time. It has developed concepts and distinctions that are not necessarily as clear as they could be, such as the distinction between civil and criminal contempt. Moreover, the manner in which it is given effect is a reflection of its historic development with, as the consultation notes, not all courts and tribunals having sufficient power to deal with contempt. Additionally, the consultation is concerned that the evolution of new means by which technology can be used to undermine the administration of justice calls for not only greater clarity and simplicity in the law of contempt but also more effective sanction powers. As the consultation puts it,

"A clearer and more coherent set of laws and rules governing contempt – addressing liability for contempt, the powers of courts, procedure, and the imposition of sanctions – would help to ensure that this very significant area of law operates in a principled, comprehensible, and effective way." (Consultation Summary Paper at 5.)

Proposals

The principal proposal made is that the established categories of civil and criminal contempt should be abolished. In their place it is suggested that three new, broad categories of contempt should be introduced. These are: general contempt, which is divided into two subcategories, general contempt by publication and general contempt by conduct other than publication; contempt by breach of court order or undertaking; and contempt by publication when proceedings are active.

General contempt. This is intended to encompass all forms of non-trivial interference with the administration of justice, including conduct that creates a substantial risk of such an interference. Where general contempt by publication is concerned, it would be necessary to demonstrate intention. It would not be sufficient to demonstrate that the alleged contemnor was reckless in their conduct. The consultation does, however, raise the question whether, where general contempt by conduct other than publication is concerned, it should be sufficient to demonstrate recklessness. General contempt would encompass a wide range of conduct from abusing court staff to disrupting hearings. It is not, however, suggested that it encompass conduct that has been dealt with by the courts under the inherent jurisdiction, such as sending abusive communications to court staff and members of the judiciary, and making abusive or offensive phone calls. The courts have dealt with these by the development of a jurisdiction that they have acknowledged is akin to the contempt jurisdiction but is not based on it, e.g., ***Attorney-General v Ebert*** [2001] EWHC Admin 695 at [35]–[41]; ***Bhamjee v Forsdick (No. 2)*** [2003] EWCA Civ 1113; [2004] 1 W.L.R. 88 at [14]–[15]; ***Agarwala v Agarwala*** [2016] EWCA Civ 1252; [2017] 1 P. & C.R. DG17. A comprehensive reappraisal of contempt and the creation of a general category of contempt by conduct might usefully incorporate this jurisdiction both to rationalise it and make it more accessible.

Contempt by breach of a court order or undertaking. This form of contempt replicates the current approach to civil contempt. It would thus, for instance, apply to breaches of interim and freezing injunctions. The Law Commission, however, propose that it goes wider than that and that it "*would bring breaches of any court order within its scope (not just those made for the benefit of a party in litigation)*". Care will need to be taken here to maintain the jurisdictional difference between contempt proceedings, which as Zuckerman notes, deal with non-compliance with court orders that concern substantive rights or the proper administration of justice, and non-compliance with court orders or undertakings that only concern procedural matters (A. Zuckerman, *Zuckerman on Civil Procedure*, 4th edn (London: Sweet & Maxwell, 2021) at pp.692–693). If that distinction is not maintained the new formulation of contempt, as a form of substantive law, would overlap with procedural law, particularly the CPR's approach to rule compliance and relief from sanctions. The proposal appears to acknowledge this as it suggests that this form of contempt should be triggered where an order or undertaking specifies that its breach would constitute contempt. Such a formulation ought to maintain the distinction as long as it is adopted in the Law Commission's recommendations.

Contempt by publication when proceedings are active. This is to be similar to the approach taken by s.1 of the Contempt of Court Act 1981. The proposal does not replicate that provision. Rather than the approach under the 1981 Act, which is strict liability subject to defences, the proposal here is that this form of contempt should be explicitly fault-based. This is suggested to be comparable to the 1981 Act, on the basis that the application of defences to its strict liability approach is, in reality, de facto fault-based. This form of contempt would require a publication to give rise to a substantial risk that the administration of justice in specific, live proceedings would be seriously impeded or prejudiced. Recklessness, the fault element, on the part of the publisher would also have to be demonstrated. Most obviously, this would apply to media and, increasingly, social media reporting of active proceedings.

The consultation also proposes statutory clarification of which courts and tribunals are able to exercise contempt powers, thus improving the current position where there is uncertainty as to which have which powers. It further proposes the introduction of new interim coercive measures that can be utilised to promote compliance with court orders or undertakings. The intention with this is to reduce the time and cost, both to parties and the court, of contempt proceedings where there would currently be a need to resort to such proceedings to promote compliance. Reforms are also suggested to the sanctions available when contempt is established. In this regard the consultation raises the important question of the lack of available data on the imposition of contempt and the use of sanctions. Greater transparency is proposed. In that regard consideration ought properly to be given to reinstating the requirement that was imposed until 2012, when it was abolished by the Lord Chancellor for financial reasons whilst ignoring the fundamental role it played in promoting the administration of justice, for the Official Solicitor to be provided with the details of anyone imprisoned for contempt (***Devon County Council v Kirk*** [2016] EWCA Civ 1221; [2017] 4 W.L.R. 36 at [45]–[49]).

Responses

The consultation is open until 8 November 2024. Responses to it can be submitted via online response form at: *https://consult.justice.gov.uk/law-commission/contempt-of-court*; via email to, contempt-of-court@lawcommission.gov.uk; or via post to, Contempt of Court Team, Law Commission, 1st Floor, 52 Queen Anne's Gate, London, SW1H 9AG.

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