CIVIL PROCEDURE NEWS

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Immunity from suit

In proceedings against Sussex police questions arose concerning the scope of different forms of immunity to suit. Ritchie J defined the various forms of immunity as follows:

> *"[20] I am going to define some terms which I shall use in this judgment. I do so for clarity of expression and understanding. I also do so because many of the authorities do not clearly define the terms used in the judgments and this has enfranchised counsel (quite properly) to make competing submissions on the scope of various immunities due to the generality of the words used. Likewise, the Judge used terms in general ways, so for instance she used 'Witness Immunity' to cover claims against persons who are not witnesses.*
>
> - ***Judge's Immunity at Court [AC]****: immunity from civil suit arising from being the judge presiding over a trial or hearing.*
> - ***Witness Immunity at Court [AC]****: immunity from civil suit arising from being a lay or expert witness who gives evidence at a trial or hearing.*
> - ***Witness Immunity before Court [BC]****: immunity from civil suit arising from being a lay or expert witness who may give evidence at a trial or hearing but has not done so yet.*
> - ***Advocates Immunity at Court [AC]****: immunity from civil suit arising from being an advocate who appears at a trial or hearing representing a party. This has also been called forensic immunity.*
> - ***Advocates Immunity before Court [BC]****: immunity from civil suit arising from being an advocate who may appear at a trial or hearing to represent a party but has not done so yet.*
> - ***Legal Proceedings Immunity before Court [BC]****: immunity from civil suit arising from being a lawyer, police officer or administrative staff member working on a criminal or civil case, for the prosecution/claimant or for the defence, in preparation for a trial or hearing."*

He then set out a detailed examination of the jurisprudential development of the immunities [at [66]–[104]. He then turned to the approach now taken to consideration of the immunities and their application,

> *"[105] . . . When considering the immunities . . . the appellate Courts have arguably stated that the correct approach to claimed immunities beyond the core ones (Witness Immunity AC, Judges Immunity AC and parts of Advocates Immunity AC relating to the evidence in the case), is to grant or permit them 'grudgingly', because they undermine the key principle that every wrong should have an appropriate redress in law. It is clear to me from the case law that, when considering, on a strike out application, whether a defendant is entitled to a claimed immunity, which will operate as an absolute threshold bar to a class of claimants (in this case victims of domestic abuse) and is unqualified by the need for a pleaded defence, if there are relevant issues in relation to the facts of the case which may make the claimed immunity 'unsettled' concerning the scope of or the justification for the claimed immunity, the justification should be analysed on the necessary evidence to see if it makes immunity necessary in the public interest.*
>
> *[106] I reach this view because of the movement in the last 25 years in the appellate case law has been away from absolutism, towards careful consideration of whether the facts of each case actually do fit with the claimed 'immunity' by reference to whether the long-established justifications for the immunity apply. This appears partly to be due to implementation of Art.6 of the ECHR but also modernity in society. The absolutism approach requires that where there is a core and settled immunity covering functions carried out at Court by an advocate, in reference to the evidence in the case, then no inquiry may be needed and the claim will be struck out for falling foul of the absolute immunity. However, the justification approach which was applied in Taylor; Darker; Hall; Singh and Daniels shows that the old absolutism approach is not required in law by the appellate Courts in all cases, particularly in non-core cases. It is clear to me that in cases where the Appellant properly raises lack of any proper justification for the claimed immunity, particularly in BC cases, but also in non-core AC cases, the Court is required to look at the function performed not just the category of person who has performed it. The Court must also look at the way that function was performed and the effects, in particular on witnesses and justice. The Courts will analyse whether the actions undermined the justifications for the claimed immunity.*

[107] To effect this process, the correct questions need to be asked. Too often these were in the past limited to:

- *'is there a settled immunity?', the answer to which may be 'yes, there are 3 categories of settled immunities: for Judges, witnesses and advocates and these may be sub categorised as AC (at Court) and BC (before Court)'. If so then:*
- *'is the person sued within a settled immunity?', the answer to which may be: 'yes if they are a judge, witness or advocate and may also be if they are a lawyer or police officer gathering evidence BC'. If so then:*
- *'are the facts of the case within a settled immunity?' the answer to which may be: 'yes if they arose at Court or before Court but concern the production of evidence'. If so then:*
- *'is the immunity absolute?', the answer to which may be: 'yes if the case comes within it, but not if the case lies outside it'.*

It seems to me that, based on the more recent justification approach of the appellate Courts, the better questions, where the Appellant asserts that the immunity is unjustified or the facts are outside its scope, appear to me to be:

(1) 'does the behaviour of the Defendant and the function being performed by the Defendant put the behaviour: (a) prima facie inside or outside the scope of the immunity? If inside, does it (b) support or undermine the justifications for the claimed immunity?'

To address those questions the Court will look at the facts and determine:

(2) what the function being performed was; and

(3) whether the function performed may come within the claimed immunity, and then

(4) whether the way in which the function was performed fulfilled the justifications for the claimed immunity or undermined them.

Then, if the Defendant has passed through these gateways there is a balancing exercise to be carried out to determine whether the way the function was performed so undermined the justifications for the claimed immunity that the swings and roundabouts argument should be rejected and the immunity should not be granted. Overall, in such cases the Courts will look at the justifications behind the 'unsettled' immunity to see whether, on the facts, it is appropriate 'grudgingly' to grant immunity, all of the time keeping in mind the principle that the Courts require that wrongs are to be redressed. . ."

Taylor v Director of the Serious Fraud Office [1999] 2 A.C. 177, HL, ***Darker v Chief Constable of West Midlands Police*** [2001] 1 A.C. 435, HL, ***Arthur JS Hall & Co v Simons*** [2002] 1 A.C. 615, HL, **Reading Borough Council v Singh** [2013] EWCA Civ 909; [2013] 1 W.L.R. 3052, CA, ***Daniels v Chief Constable of South Wales Police*** [2015] EWCA Civ 680, unrep, CA, ref'd to.

■ **Pentagon Food Group Ltd v B Cadman Ltd** [2024] EWHC 2513 (Comm), 9 August 2024, (HHJ Tindal sitting as a judge of the High Court)

Mediation agreement – without prejudice privilege – no wider mediation privilege

A claim for damages for alleged misrepresentation and breach of a settlement agreement raised a question concerning the scope and application of without prejudice privilege. The first issue considered was whether in the light of recent developments concerning the promotion of ADR, and particularly the recognition of the court's power to compel parties to engage in an ADR process, mediation privilege (going wider than without prejudice privilege should be recognised). The judge declined to recognise such a privilege:

"[58] Before turning to that, I should address the relevance of mediation. Phipson on Evidence, 20th Edition (2024) at paras 24-51–24-54 notes that some ADR commentators have suggested a different type of privilege to 'without prejudice' and going further, called 'mediation privilege'. Mr Isaacs QC in Brown v Rice at [19]–[20] set out the argument:

> *'Counsel for Mrs Patel argued for the existence of a so-called mediation privilege, distinct from the without prejudice rule, under which (at least) a mediator could not be required to appear as a witness or produce documents and under which the parties could not waive the mediator's entitlement not to give evidence in respect of the contents of a mediation...*
>
> *He sought to build on [the matrimonial exception discussed in Unilever] . . . Counsel for ADR Group also referred to a budding 'mediation privilege' in this and other jurisdictions. In that context, he drew attention to Jacob L.J.'s observation in Reed v Reed [2004] 1 WLR 3026 (CA)] at [30], that the line between a third-party assisted ADR and party-to-party negotiations might be 'fuzzy'. However, I do not myself find support in that*

particular observation for the existence of a distinct mediation privilege . . . Counsel for both ADR Group and Mrs Patel accepted, however, that this case could be decided under the existing without prejudice rule. In particular, this was because it was common ground between the parties that the court could not properly require [the mediator] to give evidence and, consistently with cl.7.4 of the agreement to mediate, neither party was intending to issue a witness summons against him. I agree that this case can be decided under the existing without prejudice rule. It may be in the future that the existence of a distinct mediation privilege will require to be considered by either the legislature or the courts but that is not something which arises for decision now.'

[59] Of course, much has happened in the field of ADR since Brown v Rice in 2007. At that time, the leading case was Halsey v Milton Keynes NHS Trust [2004] 1 WLR 3002, where Dyson LJ, later Master of the Rolls, had suggested that the Court could not require as opposed to strongly encourage, parties to submit to mediation if they were unwilling. However, recently in Churchill v Merthyr Tydfil BC [2024] 1 WLR 3827 (CA), the current Master of the Rolls (with whom Birss LJ and Lady Chief Justice Carr agreed) explained Dyson LJ's comments in Halsey were obiter and the Court did have the power to compel ADR, but it was circumscribed. Sir Geoffrey Vos MR summarised at [65]:

'The court should only stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made does not impair the very essence of the claimant's right to proceed to a judicial hearing and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost.'

Of course, that last point chimes with the Overriding Objective in CPR 1.1, which will soon be amended to include promoting or using alternative dispute resolution.

[60] This begs the question whether the undoubted enhanced importance of mediation and ADR generally justifies a more enhanced form of 'mediation privilege' beyond traditional 'without prejudice privilege' e.g. with narrower exceptions. The learned editors of Phipson are not convinced by that and I respectfully agree with them. The authorities do not – at least yet – support the view that 'mediation privilege' is distinct from 'without prejudice privilege'. Nevertheless, the contractual and formal context of mediation means that it is a particularly clear – certainly not now 'fuzzy' – example of 'without prejudice privilege', which can be enhanced by the parties' mediation contract and conduct by the imposition of superadded duties of confidentiality. These can even be raised by the mediator if they are called upon to give evidence, even if the parties both waive 'without prejudice privilege': Farm Assist v DEFRA [2009] EWHC 1102 (TCC)."

Additionally, and in *obiter*, the judge extended the application of the ***Oceanbulk*** exception to without prejudice privilege to apply to the implication of contractual terms (at [75]–[83]). As he concluded,

"[83] In my judgment, justice does clearly demand that implication of terms should be able to draw on the same material as interpretation of terms in the Oceanbulk exception, which would avoid not create artificial distinctions and promote not frustrate settlement. Indeed, since implication of terms must not involve re-writing the contract, but only implication that is necessary to make the contract work (as Lord Neuberger said in BNP Paribas and Lord Hughes repeated in Ali), access to without prejudice material is just as, if not more, likely to enable the Court to implement what the parties really agreed by their settlement. That reassurance is more likely to promote settlement and for parties to negotiate freely than anxiety that they must be incredibly precise in their settlement agreement as the Court will take a pedantically literal approach to interpretation or implication of its terms."

The judge also, again in *obiter,* agreed with the "*provisional view"* that Richards LJ had reached in ***Berkeley Square Holdings v Lancer Property*** (2021) at [47], that the exception to without prejudice privilege that renders evidence of negotiations to be admissible to show that a settlement agreement "*should be set aside on grounds of misrepresentation, fraud or undue influence"*, applied to negligent misrepresentation (at [63]–[64]). ***Cutts v Head*** [1984] Ch. 290, HL, ***Rush & Tompkins v GLC*** [1989] A.C. 1280, HL, ***Unilever v Procter & Gamble*** [2000] 1 W.L.R. 2436, CA, ***Ofulue v Bossert*** [2009] UKHL 16; [2009] 2 W.L.R. 749, HL, ***Farm Assist v DEFRA*** [2009] EWHC 1102 (TCC); 125 Con. L.R. 154, TCC, ***Oceanbulk Shipping v TMT*** [2010] UKSC 4; [2011] 1 A.C. 662, UKSC, ***Marks & Spencer v BNP Paribas*** [2015] UKSC 72; [2016] A.C. 742, UKSC, ***Ali v Petroleum Company of Trinidad and Tobago*** [2017] UKPC 2; [2017] Bus. L.R. 784, UKPC, ***Berkeley Square Holdings v Lancer Property*** [2021] EWCA Civ 551; [2021] 1 W.L.R. 4877, CA, ref'd to. (See ***Civil Procedure 2024*** Vol.2, para.14-21.)

- **Dos Santos v Unitel SA** [2024] EWCA Civ 1109, 30 September 2024, unrep. (Sir Julian Flaux C, Popplewell and Faulk LJJ)

Freezing injunction – good arguable case test and costs

CPR r.25.1(1)(f). In an appeal concerning a worldwide freezing injunction the Court of Appeal considered two questions of principle: first, the meaning of the "good arguable case" element of the test for granting such an injunction; and,

secondly, whether, in applications for worldwide freezing injunctions, it was a general rule that costs were reserved. On the first question, Flaux C, with whom Popplewell and Faulk LJJ agreed, held as follows,

> *"[96] In my judgment, the correct test as to what constitutes a good arguable case for the purposes of the merits threshold for the grant of a freezing injunction is that formulated by Mustill J in The Niedersachsen, applied by first instance judges many times over the last forty years and endorsed by at least three more recent decisions of this Court. A 'good arguable case' in the freezing injunction context is not to be assessed by reference to the three-limb test derived from Brownlie to determine whether a claim falls within one or more of the jurisdictional gateways for the purposes of permission to serve out of the jurisdiction and the recent decisions in Harrington and Chowgule which adopt that test were wrong to do so."*

He reached that conclusion for several reasons (at [97]–[114]), which included: that it was well-established in the authorities that while "good arguable case" could be the test in different contexts, e.g., as here, cases assessing whether it was permissible to serve out of the jurisdiction and cases assessing whether to grant a freezing injunction, there was no reason why the term should have the same meaning in both contexts; where freezing injunctions were concerned, the context was that of a merits threshold test, which differed from the context for service-out cases; and the overwhelming weight of Commonwealth authority, other than Canada, on the appropriate test was that it was the test articulated in *The Niedersachsen*. In so far as the second question was concerned, the general rule concerning the costs of interim applications applied, i.e., there was no general rule that they be reserved to the trial judge. Freezing injunction costs were not generally to be reserved as was the case for interim injunctions. As Flaux C explained,

> *"[115] In relation to the second ground of appeal I am very firmly of the view that this Court should not interfere with the judge's order that Ms dos Santos should pay the costs of the freezing injunction application.*
>
> *[116] In so far as there is a general rule as to the costs of contested interlocutory or procedural applications, it is that a party who contests an application and fights it tooth and nail on every point, thereby causing the successful party to incur costs which would not otherwise be incurred, should be ordered to pay the successful party's costs at the conclusion of the application. This is clear from CPR 44.2(2) and is the general rule applied in the Business and Property Courts in relation to contested interlocutory applications. The Court will not usually reserve costs to the trial judge of, for example, a contested jurisdiction or disclosure application which the defendant has lost, merely because the defendant points out that it might succeed in defeating a claim at trial. Were it otherwise trial judges and, in turn costs judges, would be inundated with having to make rulings on costs of interlocutory applications which had been reserved by the judges who heard the applications.*
>
> *[117] Of course the Court has a discretion to make a different order on a contested interlocutory application, including reserving the costs to the trial judge, as CPR 44.2(b) provides. One situation in which the Court will usually make an order that the costs be reserved is in the case of an American Cyanamid interim injunction as the authorities from Desquenne onwards establish. However, that is because, on the balance of convenience, the Court is prepared to grant an interim injunction which allows a party to rely upon a right or obligation, the existence of which has yet to be established, effectively holding the ring pending the trial. If at trial the right or obligation is established then the injunction can be made final and permanent or other relief granted. However if the claimant's case fails at trial, then it can generally be said that the interim injunction should not have been granted, since the right or obligation did not exist or was not established. Hence it is generally more appropriate for the costs of the application for the interim injunction to be reserved to the trial judge.*
>
> *[118] However, the position is different in the case of a freezing injunction. If the claimant establishes the three criteria referred to in [6] above: (1) a good arguable case on the merits; (2) a real risk that a future judgment would not be met because of an unjustified dissipation of assets; (3) that it would be just and convenient in all the circumstances to grant the freezing injunction, then the Court will grant the injunction. When granted it is not 'interim' or dependent on the balance of convenience like an American Cyanamid injunction, nor will the Court make the injunction final at trial, as in the case of an interim American Cyanamid injunction. As Edwin Johnson J pointed out at [29] of his costs judgment in Harrington there is no such thing as a final freezing order. Subject to any subsequent application to vary or discharge it, the freezing injunction remains in place until trial. If the claim succeeds the Court may continue the injunction post judgment but that is not the making of a final injunction. The purpose of the freezing injunction remains as set out at [85] of Convoy Collateral: 'to facilitate the enforcement of a judgment or order for the payment of a sum of money by preventing assets against which such a judgment could potentially be enforced from being dealt with in such a way that insufficient assets are available to meet the judgment.'*
>
> *[119] Another important distinction between a freezing injunction and an American Cyanamid injunction is that whereas, in the case of the latter, if the relevant right or obligation is not established at trial it can generally be said that the interim injunction should not have been granted, in the case of the former even if the claim fails at trial, it does not follow*

that the freezing order was not correctly granted on the basis that the claimant satisfied the three criteria for the grant of the freezing injunction. This point was made by Martin Spencer J at [52] of Bravo (cited at [60] above) and by Edwin Johnson J at [29] of Harrington (cited at [67] above) and I agree with their analysis, which I consider is to be preferred to that of HHJ Davis-White QC in Al Assam (although I recognise that his decision on costs may have been justified on the facts of that case). I also note that in a recent judgment handed down since the hearing of the appeal, Cancrie Investments Ltd v Haider [2024] EWHC 2302 (Comm), Nigel Cooper KC (sitting as a Deputy High Court Judge) preferred the analysis in Bravo and Harrington to that in Al-Assam: see [20] to [31] of that judgment. In my judgment, Mr Margolin KC's 'fundamental' point set out at [59] above, that if the claim failed at trial, the freezing injunction should not have been granted in the same way as in the case of an interim American Cyanamid injunction, is misconceived."

Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH ("The Niedersachsen") [1983] 1 W.L.R. 1412, CA, ***Richardson v Desquenne et Giral UK Ltd*** [2001] F.S.R. 1, CA, ***Brownlie v Four Seasons Holdings Inc*** [2017] UKSC 80; [2018] 1 W.L.R. 192, UKSC, ***Harrington & Charles Trading Co Ltd v Mehta*** [2022] EWHC 2960 (Ch), unrep., ChD, ***Broad Idea International v Convoy Collateral*** [2021] UKPC 24; [2023] A.C. 389, UKSC, ref'd to. (See **Civil Procedure *2024*** Vol.2, para.15-23.)

Practice Updates

STATUTORY INSTRUMENTS

THE RETAINED EU LAW (REVOCATION AND REFORM) ACT 2023 (COMMENCEMENT NO.2 AND SAVING PROVISIONS) (REVOCATION) REGULATIONS 2024 (SI 2024/976). This statutory instrument came into force on 18 September 2024. It revoked previous provision that would have brought into force s.6 of the Retained EU Law (Revocation and Reform) Act 2023 on 1 October 2023. A new CPR Pt 68 was to also come into force on 1 October 2024. It was to provide the basis for procedural steps to be taken further to s.6. The new CPR Pt 68 remains in force notwithstanding the revocation of the instrument bringing s.6 into force. Until further provision is made concerning s.6, the new CPR Pt 68 is functionally redundant.

SUPREME COURT RULES 2024 (SI 2024/949). On 11 September 2024, the Supreme Court Rules 2024 were laid before Parliament. They come into force on 2 December 2024. The previous rules will continue to apply to those appeals that commenced prior to that date. The new rules will be supplemented by new Practice Directions, which will be issued in due course. The main changes in the rules make provision for the use of the court's digital case management system, referred to as "the portal". Other changes reflect changes to the court's ways of working and to its jurisdiction.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 173rd Update. This Practice Direction Update effected amendments to PD 51R – the Online Money Claims Pilot. It came into effect on 8 October 2024. Its amendments apply to all matters proceeding through the pilot scheme submitted to the court on or after that date. It amended the pilot scheme to enable claimants who are litigants-in-person to issue their claim in Welsh. It made further amendments to enable claims to be issued against litigants-in-person up to the value of £25,000.

CPR PRACTICE DIRECTION – 172nd Update. This Practice Direction Update effected amendments to PD 51R – Online Civil Money Claims Pilot and PD 51ZB – The Damages Claims Pilot. It came into force on 18 September 2024. The amendments removed the limitation on the pilots applying to the County Court in Birmingham.

PRACTICE GUIDANCE

INTELLECTUAL PROPERTY OFFICE – GUIDANCE ON NOTIFYING IPO OF A COURT CLAIM. On 3 September 2024 the IPO issued guidance on the requirement to notify it, under CPR r.63.14(3), when claims concerning registered intellectual property rights commence. It notes that compliance with this provision in the CPR is both necessary and important as it is the means through which the IPO can determine if it wishes to take part in the proceedings. As the guidance notes, this is necessary as such cases could raise important issues of law, practice or procedure, or they may engage the public interest. The guidance is issued as it had become apparent that in some cases effective notification further to the rule was not being given. The guidance goes on to provide advice on how to comply with the rule and how parties can provide the IPO with effective notice. The Guidance is available at: *https://www.gov.uk/guidance/notifying-the-intellectual-property-office-of-a-court-action*.

MISCELLANEOUS UPDATES

ADMINISTRATIVE COURT E-FILING PILOT. On 1 October 2024, the Administrative Court commenced its pilot of E-Filing, as part of CE-File. E-Filing is now available 24 hours a day in the Administrative Court in London, enabling documents to be issued, evidence to be filed, court fees to be paid, and cases tracked online. At present use of E-Filing is not mandatory. At a future date notice will be given when it is to become mandatory for professional court users. Where the Administrative Court in London is concerned urgent applications (Form N463), extradition appeals and urgent extradition applications should not be filed via E-Filing. They should continue to be filed via the existing dedicated email inboxes. Urgent applications outside London should also not be filed by E-File but should continue to be filed further to PD 54B and PD 54C. A copy of the guidance is available at: *https://www.judiciary.uk/guidance-and-resources/e-filing-pilot-goes-live/*.

In Detail

WITNESS STATEMENTS – PD 57AC – NON-COMPLIANCE

(1) Background

PD 57C was introduced in 2021 to promote improvements in the quality of witness evidence in the Business and Property Courts. (It remains an open question whether it ought properly to be extended to civil procedure more generally.) Early guidance was given emphasising the importance of complying with its provisions: see, for instance, ***Mansion Place Ltd v Fox Industrial Services Ltd*** [2021] EWHC 2747 (TCC); 199 Con. L.R. 124. It has, however, become apparent to the court that both the intention underpinning the Practice Direction that it should improve the quality of witness evidence and the court's previous emphasis on the importance of compliance with its requirements have not been taken to heart. On the contrary, as HHJ Pearce, sitting as a judge of the High Court, noted in ***KSY Juice Blends UK Ltd v Citrosuco GmbH*** [2024] EWHC 2098, non-compliance with the PD's requirements was commonplace. As he explained,

> *"[22] During his opening submissions, Mr Corby for the Defendant accepted that the witness statements in this case, particularly those for the Claimant, contained a considerable amount of inadmissible opinion evidence on the issue of the construction of the contract. In reply to a comment from me, he stated that PD 57AC is more honoured in the breach than the observance. Both he and Ms Lahti [counsel for the claimant] were astute neither to rely on inadmissible evidence from their own witnesses nor to cross examine on such evidence in the statements adduced by the opposing party. That is greatly to their credit and meant that the trial was dealt with efficiently. But the mere fact that more was not made of the issue of non-compliance with PD 57AC does not mean that it should go without mention. As Fancourt J said in Greencastle v Payne [2022] EWHC 438 (IPEC) at [22],*
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>> *'The whole purpose of Practice Direction 57AC is to avoid a situation where the witness statements are full of comment, opinion, argument and matters asserted that are not within the knowledge of the witness, which have to be disentangled at trial by protracted cross-examination.'*
>
> *Further it is not for the parties alone to determine how the court deals with non-compliance (see paragraph 34 of his judgment in the same case). With respect, I agree. There is far too much lip service paid to PD 57AC by those preparing and certifying witness statements. Whether they see this as a way of managing their clients' desire to be given a voice on the issues in the case or as a convenient way to summarise material, they should not work on the assumption that non-compliant witness statements will not have consequences, whether simply by way of unfavourable costs orders or through the range of sanctions in PD 57AC including their being ruled inadmissible."*

While HHJ Pearce did not need to consider the consequences of non-compliance, in two subsequent judgments the High Court has done so. Both judgments emphasise the serious adverse consequences that can flow from significant non-compliance with the PD's provisions.

(2) Non-compliance leading to no weight being given to the witness statement

In ***Fulstow v Francis*** [2024] EWHC 2122 (Ch), handed down shortly after HHJ Pearce's judgment was handed down, David Stone, sitting as a deputy judge of the High Court, considered sanctions for non-compliance with PD 57AC's requirements. The claim centred on an urban regeneration scheme near Swindon. The claimants had applied for declarations as to their beneficial interest in shares in a company (*Capital Land (EDA) Swindon Ltd*), which owned the land subject to development under the scheme. An issue arose at trial concerning three of the claimants' witness statements (at [21]). Counsel for the defendant submitted that they should either be struck out by the court of its own motion or,

in the alternative, afforded no weight. The basis of the submission was their alleged non-compliance with PD 57AC's requirements.

The deputy judge first determined that the witness statements should not be struck out. To do so would, in the circumstances of the case, not further the overriding objective. A strike out would either leave the claimants with no evidence or would require evidence to be given orally; the latter would in turn extend the length of the trial (at [51]). The question then became whether the evidence should be given no weight. In considering that question, the judge noted the length of time the PD had been in force, hence implicitly making the point that the parties ought to have been well-aware of and familiar with its provisions. He stressed how it makes clear that witness statements for use at trial,

> *"[22] . . . must set out only matters of fact of which the witness has personal knowledge that are relevant to the case, and must identify by list what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in the trial witness statement."*

Further elaboration as to witness statement contents and, particularly, what they should not contain was noted to be set out in the PD's Statement of Best Practice. For instance, it is clear that witness statements should not "*seek to argue the case . . . set out a narrative derived from the documents . . . or include commentary on other evidence in the case*." (at [23]). Further guidance had been given concerning compliance with the PD in a series of High Court judgments. As he summarised it,

> *"[24] . . . various judgments of this court have provided more detailed guidance on PD 57AC: Blue Manchester Ltd v BUG-Alu Technic GmbH [2021] EWHC 3095 (TCC); Mansion Place Ltd v Fox Industrial Services Ltd [2021] EWHC 2747 (TCC); Greencastle MM LLP v Alexander Payne and ors [2022] EWHC 438 (IPEC); Prime London Holdings 11 Ltd v Thurloe Lodge Ltd [2022] EWHC 79 (Ch); Curtiss v Zurich Insurance Plc, East West Insurance Company Limited [2022] EWHC 1749 (TCC); Cumbria Zoo Company Ltd v The Zoo Investment Company Ltd [2022] EWHC 3379 (Ch); Bastholm and others v Peveril Securities (Dalton Park Retail) Ltd and others [2023] EWHC 438 (Ch); and McKinney Plant & Safety Ltd v The Construction Industry Training Board [2022] EWHC 2361 (Ch)."*

The deputy judge held that the witness statements did not comply with PD 57AC and that given the nature of the non-compliance no weight could be placed on them (at [25], [29]). Additionally, he held that the claimant's solicitor's certificate of compliance, which formed part of two of the witness statements (the third did not contain the required certificate of compliance) contained a false declaration that the witness statements were compliant with PD 57AC. As the deputy judge put it,

> *"[35] . . . Ms Rodrigues' witness statement does not include a Certificate of Compliance signed by the Claimants' legal representative. There is a Certificate of Compliance at the conclusion of Mr Fulstow's and Mr Woods' fourth witness statements. That certificate, in identical terms in each case, is largely in the usual form, but mentions expressly that the purpose and proper content of trial witness statements 'have been discussed with and explained to Timothy Fulstow, Robert Woods and Connie Rodrigues'. Normally, only the relevant witness making the statement would be named. The Certificate is signed by Mr Rooney.*
>
> *36. As will be apparent from what I have set out above, I consider Mr Rooney's declaration that the witness statements are PD 57AC compliant to be false. He was not cross-examined before me, and so has not had an opportunity to explain himself. However, I cannot see on the basis of what is before me that Mr Rooney can have been satisfied that the purpose and proper content of trial witness statements and the proper practice in relation to their preparation had been explained to the three witnesses. I cannot see how he can have believed that the two (or three) witness statements complied with PD 57AC – because they clearly and obviously do not, and any solicitor properly practising in this court ought to have known that."*

The witness statements themselves were non-compliant for two main reasons. They failed to include a statement made by the witnesses that they were compliant with PD 57AC. They did not contain, as required, a list of documents to which the witness had been referred. They sought to argue the case and comment on other evidence within the proceedings. One contained legal submissions. One contained evidence on matters of which the witness had no direct knowledge. One appeared to have been copied from one of the other witness statements [at [26]]. The deputy judge also noted that the defendant's solicitors had pointed out to the claimants some of these defects in time for them to be remedied, but no such remedial action had been taken (at [27]).

In addition to these mistakes, as there had been a waiver of privilege over some of the claimants' correspondence with their lawyers, the deputy judge was able to see how the witness statements had come to be written, at least in part. This formed the basis of the second reason why he held them to be non-complaint (at [28]). The correspondence showed that the drafting of one of the witness statements was not a product of the witness's "independent recollection". Rather it was "a recitation of the (then) written record" with added commentary from the witness added after he had consulted his solicitor. Inconsistent evidence was also adduced as to where the witness statement

was prepared and parts of it were clearly identical to wording in the particulars of claim (at [28]). As the deputy judge concluded,

> *"[29] . . . In my judgment, Mr Fulstow's fourth witness statement was based heavily on advice received from his solicitors as to what he should and should not say. It is not his independent recollection of events. It is a carefully constructed analysis of the documents then available to the Claimants. I can place no reliance on it. Mr Woods' fourth witness statement was copied from Mr Fulstow's, and, again, does not represent his independent recollection of events. Ms Rodrigues' second witness statement is the result of what she was told by Mr Fulstow to say, and, again is not her independent recollection of events. Where the contents of these witness statements are not corroborated by other sources (such as contemporaneous documents), I can have no confidence that the statements are truthful."*

Given such serious and significant non-compliance it ought not to have been surprising that no weight could be given to the witness statements. The deputy judge also declined to grant the claimants permission to adduce fresh witness statements, that were to have corrected the mistakes in those on which no weight could be placed: the replacements were also non-compliant; in respect of non-compliance with the requirements of para.3.5 of the PD (which governs the requirement to provide a list of documents), the non-compliance was both clear and blatant (at [30]–[34]).

(3) Non-compliance leading to the witness statement having to be rewritten

Shortly after the judgment in ***Fulstow v Francis*** (2024) was handed down, Chief Master Shuman handed down judgment in ***IlliquidX Ltd v Altana Wealth Ltd*** [2024] EWHC 2191 (Ch). The proceedings concerned various claims alleging breach of contract, breach of confidence, breach of trade secrets and copyright infringement (at [1]). The claim is itself listed for trial in late 2024. Various procedural issues arose before the Chief Master, including the one concerning compliance with PD 57AC.

Witness statements had been exchanged in March 2024. The defendants submitted that two witness statements put in by the claimants failed to comply with PD 57AC. They thus sought an order that the claimant be barred from relying on them and that the claimant redraft the statements so that they were compliant (at [132]). They also sought an order that the claimant's solicitor explain the process through which the non-compliant statements came to be prepared. The Chief Master, echoing deputy judge Stone, noted the length of time that the PD had been in force. She also emphasised its purpose,

> *"[133] PD 57AC was introduced for all Business and Property Court trial witness statements signed on or after 6 April 2021. It was designed to address the increasing problem of trial witness statements being over-long and over-lawyered so that they often no longer reflected the evidence in chief that that witness of fact could realistically give. This problem was acute in well-funded, document heavy business disputes in the Business and Property Courts. As Mr Justice Baker observed in his Implementation Report of the Witness Evidence Working dated 31 July 2020,*
>
> > *'17. Thus, witnesses are too often asked to sign off by way of witness statement a detailed factual narrative that does not resemble the evidence in chief they could or would give, if required to do so without providing a witness statement first, and on which they are therefore exposed to lengthy, detailed cross-examination. This is not fair on the witnesses. Nor is it an efficient or helpful proxy for simple argument as to disputed elements of the factual narrative, by reference to the documents, where in reality the dispute is or should be one for argument and not for witness testimony.'"*

The Chief Master went on to note how the PD sets out the principles applicable to the preparation of trial witness statements (at [134]) and the requirements imposed on parties who prepare such statements (at [135]–[138]): see PD 57AC paras 2, 3.2, 4.1 to 4.3 and the Statement of Best Practice. She also noted that the PD explicitly highlights the fact that the court retains the full range of sanction powers for non-compliance with its provisions (at [141]). She also noted, as submitted by the claimant, that reliance on the PD's requirements should not be used as a basis for procedural litigation or "*trench warfare*" (at [142]): see ***Lifestyle Equities v Royal County of Berkshire Polo Club Ltd*** [2022] EWHC 1244 at [98]. As in ***Fulstow v Francis*** (2024), attempts had been made by the defendants to alert the claimants to the defects they had identified in the witness statements, albeit the Chief Master noted that they had done so without success (at [155]).

The problem in this case was that the witness statements appeared to have resulted from consideration of documents and that, in parts, they speculated on what the other party thought. As the Chief Master put it,

> *"[151] I am very cautious about permitting such a forensic critique of the witness statements, and the risk of weaponizing PD 57AC, but the overall sense one gets when reading these witness statements is that they have been constructed by reference to documents. Of course, a witness can refresh their memory but the documents leading the recollection of events is what PD 57AC was designed to avoid. Ultimately the court needs the best evidence from the witness, what the witness actually remembers of events, so that it can ascertain the truth through accurate fact finding. As Phipson on Evidence at paragraph 45-01 observes, 'the appreciation of evidence involves*

> *what can be described as a triangular balancing act between the three concepts of relevancy, admissibility and probative value.'*
>
> *[152] In some parts of the statements the witnesses speculate on what might have been in the mind of the other party. . ."*

In the present case given the defects in the witness statements, the claimants were required to amend them so that they were compliant with PD 57AC. Such an order was intended to ensure that the PD's purpose was not undermined (at [157]).

The Chief Master did not, however, make the order against the claimant's solicitor that was sought. As she put it,

> *"[158] Additionally, the defendants seek an order that . . . the partner who signed both the certificates of compliance, should provide a witness statement setting out information that is focused on the role of documents in the witness statement and the process of preparation. The defendants submit that this is open to the court under its extensive case management powers. Whilst I accept it might be, the court should be reluctant to embroil the solicitor with conduct of the claim into the arena. That is what this order will amount to. I also cannot see the utility in making such an order when I have already directed that the trial witness statements be rewritten."*

(4) Consideration

The three recent judgments, which follow a series of earlier judgments in 2021 and 2022, concerning the application of and compliance with the requirements of PD 57AC would appear to show that the PD has not as yet achieved its aim of generally improving the quality of witness statements. Nor does it yet appear to have ensured that such trial witness statements cover only those matters that it specifies. That the PD was noted as being observed more in the breach only underscores that conclusion.

While it is clear that the High Court, particularly via Chief Master Shuman's judgment, wishes to ensure that questions of compliance and alleged non-compliance do not become an area of satellite procedural litigation – that the PD does not become weaponised contrary to the CPR's overriding objective – it is all too apparent that the court is at pains to promote compliance with the PD. It would also seem to be apparent that the courts are at pains to make clear that where one party highlights non-compliance to another, the allegedly non-compliant party should take more care to consider what if any revisions should be taken to bring the statement into compliance with the PD's requirements.

Given that the full range of sanctions for non-compliance, including strike out, are available to the court, and that – as deputy judge Stone demonstrated – even where strike out is refused the court is willing to place no weight on non-compliant witness statements, it is in parties' best interests to comply with the PD's requirements. It is noteworthy that the Court of Appeal has not yet provided guidance on the PD and the use of sanctions for non-compliance in respect of its provisions. Continued problems with compliance may result in it looking at the issue and perhaps taking a more robust approach to the imposition of sanctions.

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