CIVIL PROCEDURE NEWS

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In Brief

CASES

Re McAleenon, Application for Judicial Review (Northern Ireland) [2024] UKSC 31; [2024] 3 W.L.R. 803 (Lords Lloyd-Jones, Briggs, Sales and Stephens, Lady Simler)

Judicial Review – suitable alternative remedy – party responsibility for determining who to proceed against and on what basis

CPR Pt 54. Ms McAleenon raised complaints concerning alleged nuisance from a landfill site that was near to her home. She raised the complaints with the Lisburn and Castlereagh City Council, Northern Ireland Enforcement Agency, the Northern Ireland Department of Agriculture, Environment and Rural Affairs, and did so further to two regulatory schemes. Ms McAleenon was not satisfied by their various responses and commenced judicial review proceedings. The Court of Appeal in Northern Ireland held that Ms McAleenon could not properly bring judicial review proceedings as there were other, alternative remedies available to her, i.e., potential claims against the firm that was responsible for the landfill site either by way of civil claim for nuisance or a private prosecution. **Held**, the Supreme Court explained the court's role in respect of judicial review and determined that a civil claim or private prosecution against a private party did not amount to a suitable, alternative remedy to judicial review proceedings against the defendants. As Lords Sales and Stephens put it, in a joint judgment with which Lords Lloyd-Jones, Briggs and Lady Simler agreed,

> *"[40] Judicial review is directed to examination of whether a public authority has acted lawfully or not. This means that the general position is that the focus of a judicial review claim is on whether the public authority had proper grounds for acting as it did on the basis of the information available to it. This may include examination of whether the authority should have taken further steps to obtain more information to enable it to know how to proceed: Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014, 1065B (Lord Diplock). Accordingly, it is for the public authority to determine on the information available to it the facts which are relevant to the existence and exercise of its powers, subject to review by a court according to the usual rationality standard. The court has a supervisory role only. (We leave aside cases where public law powers are conditional upon the existence of a fact which is to be determined objectively by the court itself, ie what is called a precedent fact).*
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> *[41] Judicial review is supposed to be a speedy and effective procedure, in respect of which disputes of fact which have a bearing on the legal question to be determined by the court - that is, whether the public authority has acted lawfully - do not generally arise. A public authority is subject to a duty of candour to explain to the court all the facts which it took into account and the information available to it when it decided how to act.*
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> *[42] Given the nature of the legal question to be determined by the court and the duty of candour, the usual position is that a judicial review claim can and should be determined without the need to resort to procedures, such as cross-examination of witnesses, which are directed to assisting a court to resolve disputed questions of fact which are relevant in the context of other civil actions, where it is the court itself which has to determine those facts. In judicial review proceedings the court is typically not concerned to resolve disputes of fact, but rather to decide the legal consequences in the light of undisputed facts about what information the public authority had and the reasons it had for acting. (This is not to say that such procedures are not available in judicial review: cross-examination is available and will be allowed 'whenever the justice of the particular case so requires': O'Reilly v Mackman [1983] 2 AC 237, 283 per Lord Diplock; but usually, given the issues which arise in a judicial review claim, the justice of the case does not require it).*
>
> *[43] There is no suggestion in this case that the LCCC, the NIEA and the Department have failed to comply with their duty of candour. They have given full accounts of what they did and of the information available to them. There is no doubt about the information available to the LCCC, the NIEA and the Department. It is on the basis of the information available to them that the lawfulness of their conduct is to be assessed.*
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> *[44] With respect, the Court of Appeal fell into error in its assessment of the position in relation to the judicial review claim:*
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> *(i) The Court of Appeal considered that it had to make definitive findings of fact about whether the offensive odours emanated from the Site, the concentrations of H2S in the air and so forth, hence its reference to the comment in Lewis, op cit (para 25 above), about the onus of proof. But this is not correct. As is common when regulators have to decide whether to take action, the defendants were confronted with a situation in which there was a significant degree of uncertainty about these matters, which is precisely why they conducted investigations. The investigations did not eliminate all uncertainty, but reduced it to a level where the defendants considered that they could take a decision about how to proceed and determined it was not ap-*

propriate for them to take regulatory action. The question for the court was whether they had done enough to justify that decision in the light of all the circumstances, applying the usual rationality standard and (so far as relevant) the test appropriate for proportionality analysis in relation to article 8.

(ii) The Court of Appeal assumed that the reviewing court was faced with a choice between simply accepting the defendants' evidence, with the result that Ms McAleenon's claim would have to be dismissed, or allowing it to be challenged by way of cross-examination, which had not been sought. In other words, the judicial review claim, if pursued effectively, would have to involve a civil trial with oral evidence from experts on each side who would be subjected to cross-examination. This is not correct either. Arising from point (i) above, the correct approach for a reviewing court would have been to subject the information available to the defendants to critical analysis to see whether they could lawfully make the decisions they did on the basis of it. That exercise did not require oral evidence and cross-examination. To repeat the point, there was no factual dispute regarding the information available to the defendants which called for resolution. Nor was the reviewing court simply obliged to dismiss the judicial review claim in the absence of challenge to the defendants' expert evidence by cross-examination. Its role was to evaluate the quality of the information available to the defendants (including such information as Ms McAleenon put before them) in order to assess the lawfulness of their conduct. The model which the Court of Appeal thought was relevant, of a civil trial in which the court itself would have to determine the facts on the basis of the balance of probabilities, the onus of proof on particular issues, and cross-examination of witnesses, was simply inappropriate in this context.

[45] The addition of the claim based on article 8 does not change this basic picture regarding the role of the reviewing court, even though the test for the lawfulness of the conduct of the defendants under section 6 of the HRA taken with article 8 is different from the test under general domestic principles of public law. . .

[48] The mistakes made by the Court of Appeal affected its assessment regarding the availability of a suitable alternative remedy for Ms McAleenon. The Court of Appeal's assumption that Ms McAleenon's judicial review claim would in principle require resolution by the court of contentious disputes of fact and cross-examination of experts, as in an ordinary civil action or in criminal proceedings, but for which the judicial review procedure was ill-suited, led it to hold that a civil claim for nuisance or a private prosecution . . . would better meet her objectives and would be fairer in terms of enabling the court to weigh up and resolve the disputes between the experts. . . .

[49] However, in our judgment, this was not the relevant comparison. Ms McAleenon brought a judicial review claim against the defendant regulators in order to compel them to fulfil the public law duties to which she maintained they were subject, for which claim the judicial review procedure was well adapted and appropriate. The fact that she could have brought other proceedings, of a different nature (a nuisance claim or a private prosecution), directed against another party . . ., in which different issues would arise and in light of which different procedures would have been required to be followed to resolve those issues did not show that she had a suitable alternative remedy with regard to the claim she did wish to bring, which was to challenge the conduct of the defendant regulators."

The Court went on to conclude that it was a matter for Mrs McAleenon to determine which particular claim would best achieve her objective and to determine that bringing proceedings against the respondents, who had regulatory responsibility, was her best option (at [54]). It furthermore stressed that it was no role of the courts to determine which of several different types of claim an individual should or should not pursue. As Lord Sales and Stephens put it,

"[55] The Court of Appeal made an assessment of Ms McAleenon's objective in bringing her judicial review claim at too high a level of generality. The immediate objective of that claim is to seek to compel the defendant regulators to carry out what Ms McAleenon maintains are their public law duties as regulators, not to seek relief from Alpha. As a matter of principle, in civil litigation it is for a claimant to choose which form of claim to assert and against which party to assert it. The court then rules upon that claim; it has no role to say that the claimant should have sued someone else by a different claim. The question of whether a claimant has a suitable alternative remedy available to them falls to be addressed by reference to the type of claim the claimant has chosen to bring and what relief they have sought against the particular defendant.

[56] Viewed from that perspective, it seems clear that neither a private prosecution. . . nor a civil claim for nuisance against [the company responsible for management of the landfill site] could be regarded as an alternative remedy in relation to Ms McAleenon's judicial review claim against the defendant regulators (still less a suitable one). Her complaint against them was that they were failing to comply with their public law duties, and those other types of action would neither address that issue nor give a remedy in relation to it."

Kay v Lambeth LBC [2006] UKHL 10; [2006] 2 A.C. 465, HL, ***R (Glencore Energy UK Ltd) v Revenue and Customs Commissioners*** [2017] EWCA Civ 1716; [2017] 4 W.L.R. 213, CA, ***R (Watch Tower Bible & Tract Society of Britain) v Charity Commission*** [2016] EWCA Civ 154; [2016] 1 W.L.R. 2625, CA, ref'd to. (See ***Civil Procedure 2024*** Vol.1, para.54.3.1.)

■ **Elphicke v Times Media Ltd** [2024] EWHC 2595 (KB), 14 October 2024, unrep. (Master McCloud)

Costs – discontinuance – mandatory ADR

CPR r.38.6. Defamation proceedings brought against the defendant were discontinued. The defendant applied for an interim payment on account of costs of £260,000. This was further to it becoming entitled to a deemed costs order, given discontinuance, under CPR r.38.6. The claimant applied to the court for an order varying the deemed costs order and for its replacement with an order that each side bear their own costs of the claim (at [19]). The Master noted that a novel issue arose on the application to vary the deemed costs order,

> *"[5] . . . The novel point arises as to reliance on misconduct by a party happening after the date of discontinuance as a ground for disapplying the 'default' costs rule that the party who discontinues pays the other side's legal costs, and generally questions arise as to how to exercise discretion in this area."*

Held, there was nothing in either CPR r.38.6 or the case law to preclude the court from taking account of post-discontinuance conduct in considering whether to depart from the usual deemed costs order:

> *"[103] I do not see anything in the wording of CPR 38.6 quoted earlier in this judgment or in the case law such as Brookes which fetters the court's discretion in principle to depart from the default costs order*
>
> *[104] It is certainly likely to be the case that the usual situation for application of CPR 38.6 is where some event took place (a change of circumstances) – such as very late production of a deed in the case of Hewson v Wells where the Claimant was caused to discontinue by reason of the event or conduct prior to discontinuance. But there is nothing in the rule to imply that conduct after discontinuance cannot be relevant and the Brookes decision does not require (but merely envisages that 'usually') a change of circumstances of that sort. Neither a change of circumstances nor a causal linkage are mandated by the rule or the authority even if those would be the norm (and Mr Elphicke's express position was that this case is very far from the norm, involving as it does misuse of statement for collateral purposes and, he says, other matters making this not a 'usual' case).*
>
> *[105] I do not accept that the reference in CPR 44.2(5) to conduct including 'conduct before or during' proceedings is sufficient to suggest that conduct whether for CPR 44.2 or CPR 38.6 cannot include conduct technically after proceedings have ended by discontinuance rather, whereas the effect of CPR 38.5 is to end proceedings that in my judgment must be read as subject to the right of a party to apply for an order departing from the default costs order, and where such an application is made then the proceedings cannot yet be said to be 'at an end': they are live for the purposes precisely of considering the costs question in the application and reopening the default costs order which arose on date of discontinuance.*
>
> *[106] The rules committee could have but did not include provision limiting the factors to be considered to the period prior to discontinuance. A reading in this form avoids any risk of a 'lacuna'. This is also strengthened by the position under CPR Part 44 that a costs judge conducts the assessment in accordance with the substantive form of costs order made. A narrow approach to CPR 38.6 would mean that there was no scope for a departure from the substantive form of the default costs order, since that would not be available at Detailed Assessment either."*

Moreover, there was nothing in CPR r.44.2(4)(a) to preclude the court from taking into account conduct that occurred after proceedings and from considering such behaviour when assessing costs. It was, however, necessary for the court to decide to depart from the deemed costs rule under CPR r.38.6 for the court to gain its usual cost jurisdiction under CPR r.44.2: the rules concerning discontinuance had to be seen as a "gateway" (at [112]–[113]). Furthermore and in obiter, CPR r.44.11 also applies to consideration of post-discontinuance conduct, as it deals with conduct at any stage of proceedings, which includes "*proceedings after the conventional end of the case and the detailed assessment, for otherwise that rule would suffer from a lacuna and parties could behave as poorly as they wished during that period and be immune from the jurisdiction of the Costs Judge*" (at [114]). In considering whether there was such conduct as justified departing from the usual deemed costs order, the Master held

> *"[123] In my judgment, failures of ADR and alleged failures of other pre-action conduct if established in this case would not reach the level of being cogent reasons for departing from the usual position in relation to the default costs rule. They are by contrast matters very apt to be considered either by a trial judge (in this case there was none) or by the Costs judge who will have the full opportunity to consider the material such as letters, attendance notes and so forth in detail and if necessary use her powers under CPR 44.11. Such matters arise commonly and especially in the case of failures of efforts at ADR (whether as part of pre or post issue conduct) are, rightly, being taken very seriously in the light of current case law (eg, Churchill v Merthyr Tydfil BC [2023] EWCA Civ 1416, Worcester v Hopley [2024] EWHC 2181 (KB), Jenkins v Thurrock Council [2024] EWHC 2248 (KB), Worcester v Hopley [2024] EWHC 2181 (KB)) but do not at least in this instance satisfy the gateway of CPR 38.6.*
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> *[124] Failures to preserve evidence when on notice to do so, and wrongful collateral use of witness statements, neither of which appear to be meaningfully disputed in this case, on the other hand are not matters which require significant*

consideration of documents and attendance notes: they go to the heart of the fairness of proceedings and in the case of misuse of witness statements I accept can have implications for the wider administration of justice. They are, thankfully also unusual. It seems to me that the allegations made here are conduct by the Defendant which justifies me in determining that the gateway of CPR 38.6 is 'open' such that I may consider making an order departing from the default order."

Finally, the Master made a mandatory ADR order as long, expensive detailed assessment proceedings were in prospect. Such an order was noted to be to the benefit of the operation of the civil courts. The Master also noted her expectation that such orders where long, expensive detailed assessments were in prospect were likely to become the norm. Should the parties not engage in ADR further to the mandatory order, they would need to be able to justify their lack of engagement when costs were considered (at [131]–[136]). As the Master put it,

"[137] . . . Good reason will need to be shown if the form of that dispute resolution is at any less engaged a level than mediation via Costs Lawyers given that the Bill here more than justifies Costs Lawyer input. The time for commencing detailed assessment is to be extended until conclusion of any such mediation, or the point at which either party indicates it is not prepared to proceed and wishes to go to assessment. Any party which decides not to engage in ADR, as above or to 'call it off' must be in a position to justify that non-engagement to the Costs Judge and be alert to the provisions of CPR 44.11 and indeed the developing common law since Churchill."

Brookes v HSBC Bank Plc [2011] EWCA Civ 354, unrep., CA, ***Churchill v Merthyr Tydfil CBC*** [2023] EWCA Civ 1416; [2024] 1 W.L.R. 3827, CA, ***Worcester v Hopley*** [2024] EWHC 2181 (KB), unrep., KBD, ***Jenkins v Thurrock Council*** [2024] EWHC 2248 (KB), unrep., KBD, ref'd to. (See ***Civil Procedure 2024*** Vol.1, para.38.6.1.)

■ **Titan Wealth Holdings Ltd v Okunola** [2024] EWHC 2641 (KB), 18 October 2024, unrep. (Hill J)

Novel injunction pursued on behalf of a third party – permission to appeal

CPR r.52.6(1)(b). The claimants pursued a claim for breach of confidence, breach of contract and harassment against a former employee. The claimants applied for a protective injunction concerning the defendant's communications with their lawyers. The order sought would have specifically prohibited the defendant from

"[13] . . . 'publishing any message to or about the Claimants' lawyers, or any person acting for, on behalf, or at the instruction of the Claimants' lawyers which abuses, belittles, demeans, or insults any such person'; and (ii) 'using profane or otherwise grossly offensive language or imagery in communications address to the Claimants' lawyers, or in which they were copied'."

The proposed order would have specifically excluded the application of its restrictions to documents formally being filed in legal proceedings and their subsequent use (at [14]). The judge accepted that, on the evidence before him, the claimants' conduct was sufficient to have formed the basis of a credible claim for harassment (at [30]). However, the order sought was novel as the claimants pursued it not on their behalf but on that of their lawyers. As Hill J put it,

"[31] . . . the conceptual novelty of, and difficulty with, the application is that although brought in the name of the Claimants, it relates to the conduct of the Defendant towards different people, namely their lawyers."

Held, the application was refused. There was no cause of action or anticipated cause of action between the claimants' lawyers and the defendant. The lawyers had brought no claim or application against the defendant and the judge had been informed that they did not intend to do so (at [35]). No authorities had been submitted to show that an order in similar circumstances had previously been issued or that the current situation came within an accepted exception to the requirement that an applicant show there was an extent or intended cause of action (at [35]–[45]). In the absence of authority on this novel point, the judge granted permission to appeal his refusal on the basis that there was a compelling reason for an appeal to be heard (at [55]). ***American Cyanamid v Ethicon Ltd*** [1975] A.C. 396, HL, ref'd to. (See ***Civil Procedure 2024*** Vol.1, paras 25.1.10, 52.6.2.)

■ **Tendring District Council v AB** [2024] EWCA Civ 1248, 21 October 2024, unrep. (Nicola Davies and Stuart-Smith LJJ, Cobb J)

Appeal proceedings – discontinuance

CPR r.38.3(5), PD 52A, para.6.1. An issue arose in appeal proceedings before the Court of Appeal in respect of an application to part-discontinue the appeal. The appellant sought permission to discontinue against the first respondent. It did so further to CPR r.38.3(5), using Form N279. CPR Pt 38 enables a claimant to discontinue all or part of their claim, which *"includes the cause of action or part of one"*. It was submitted that CPR Pt 38 did not apply to discontinuance of appeals as *"an appeal is not a claim"* (at [28]). Save that a claim is to be distinguished from a remedy (***Galazi v Christoforou*** (2019)), there is no prior authority on what comes within the ambit of "claim" (at [28]). **Held**, the Court of Appeal

concluded that CPR Pt 38 did not apply to appeals. Removal of the first respondent to the appeal could be effected under CPR r.19.3. It held as follows,

> *"[33] We regard the points made on behalf of the Official Solicitor [for the respondent] as sound. We agree that an appeal does not appear to fall within the provisions of CPR 38 which refer to a claim. CPR 38 contemplates many situations in which permission of the court is not required to discontinue a claim; indeed Tendring only apparently sought permission because it had applied to discontinue against AB on an adapted form N279. A different rule appears to apply once a 'claim' reaches appellate level (see 52APD.15 (6.1)). We are satisfied that it is in AB's best interests for him to be removed as a party to these proceedings as he has no substantive part to play in this appeal given the unappealed finding that he is liable for overpaid housing benefit. Continuance as a party in these proceedings puts AB at risk of an order for costs, which are considerable, and that cannot be in his best interests. We agree with the views expressed on behalf of AB by the Official Solicitor that the appropriate course to be taken is that pursuant to CPR 19.3 namely that the court should order that AB should cease to be a party as it is not desirable for him to continue as a party in these proceedings."*

Galazi v Christoforou [2019] EWHC 670 (Ch), unrep., Ch.D, ref'd to. (See ***Civil Procedure 2024*** Vol.1, paras 38.2.1, 52APD.15.)

- **Parsdome Holdings Ltd v Plastic Energy Global SL** [2024] EWCA Civ 1293, 29 October 2024, unrep. (Lewison, Stuart-Smith and Zacaroli LJJ)

Security for costs – cleared funds

CPR r.25.12(3). Proceedings were commenced by the appellant alleging fraudulent misrepresentation by the respondent. The appellant is a company incorporated in the British Virgin Islands. Orders for security for costs were made. An issue arose as to whether the orders were complied with by the appellant as they were purported to have been complied with by payments made by cheque, albeit the cheques did not clear. **Held**, the Court of Appeal concluded that where a party is ordered to provide security by costs, and they may do so by cheque, then the order is complied with if: (i) the cheque is received by the date specified in the order; and (ii) the funds to be paid by cheque subsequently clear. As Zacaroli LJ explained, relying on ***ENE Kos 1 Ltd v Petroleo Brasiliero SA*** (2009),

> *"[37] Nevertheless, the supporting reasons provided by the Court of Appeal in ENE Kos, in particular by reference to the general law relating to payment by cheque, compel the conclusion that an order requiring payment in by a certain date, and which permits the payment to be made by cheque, without more, is complied with if the cheque is received by the CFO by the deadline and the cheque subsequently clears. It follows that if, at the time the matter comes before a court it remains possible that the cheque could clear, it is wrong to conclude that there has been a failure to comply with the order for payment in by the deadline on the ground that cleared funds were not received by that date."*

The supporting reasons referred to from ***ENE Kos 1 Ltd v Petroleo Brasiliero SA*** (2009) were those given by Dyson LJ in his judgment in that case. They were that there was good reason to require the effective date of lodgement of security to be the date of receipt of the cheque as there needed to be certainty as to that date. Were the effective date to be the date on which funds cleared there would be no certainty for the paying party as to the effective date. Hence, the paying party would not know whether they had complied with an order requiring security to be provided by a specified date (at [29]). Secondly, this approach was consistent with the general law concerning payment by cheque. In such cases, satisfaction of the debt in that way is subject to a condition subsequent, i.e., the condition that once the cheque clears and actual payment is made, the payment relates back to the date on which the cheque was given (at [30]). Zacaroli LJ went on to hold that the court could, when ordering security for costs under CPR r.25.12(3), direct that cleared funds must be received by the Court Funds Office by a specified date,

> *"[43] There is no reason in principle why the court, in directing the manner in which, and the time within which, security is to be given, cannot order that a payment into court must result in cleared funds being received by the CFO within the deadline. That is particularly so where time is of the essence. It is only upon the receipt of cleared funds that security is provided: until then, the other party will continue to incur costs in the action, at risk that they will not be paid.*
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> *[44] It is true that this may mean, where the paying party chooses to comply with the order by payment by cheque, that the satisfaction of the order lies beyond its control. It is always open to the paying party, however, to comply with the order by means, such as bank transfer, which provide greater certainty as to the receipt of cleared funds. Any remaining uncertainty for the paying party is outweighed by the need for the other party to have the certainty of being secured before incurring the relevant costs. Arden LJ made the same point at §51 of ENE Kos."*

ENE Kos 1 Ltd v Petroleo Brasiliero SA [2009] EWCA Civ 1127; [2010] 1 W.L.R. 1361, CA, ref'd to. (See ***Civil Procedure 2024*** Vol.1, para.25.12.8.)

Practice Updates

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 177th Update. This Practice Direction Update was issued on 1 November 2024 and came into force on that day. It was issued prior to both the 175th and 176th Practice Directions being issued. The Update clarified the application of the amendments effected by CPR Update 174. It made clear that the amendments made by the 174th Update only apply to claims submitted on or after 11 am on 5 November 2024.

CPR PRACTICE DIRECTION – 176th Update. This Practice Direction Update was issued on 18 November 2024. It came into force on that date. The Update amended Practice Direction 51ZC – The Small Claims Paper Determination Pilot to extend its operation until 31 October 2025.

CPR PRACTICE DIRECTION – 175th Update. This Practice Direction Update was issued on 18 November 2024. It came into force on 20 November 2024. It amended PD 51ZB – The Damages Claims Pilot scheme to correct an inconsistency between the terms of the Practice Direction and the manner in which the Digital Claims Pilot scheme's digital service was operated via MyHMCTS. The PD is updated to ensure that claimants must, within four months of the date of issue of a claim, notify both the defendant of the claim and notify the DCP scheme that they have done so.

CPR PRACTICE DIRECTION – 174th Update. This Practice Direction Update effected amendments to PD51ZE – Small Claims Track Automatic Referral to Mediation Pilot Scheme. It was issued on 21 October 2024. Its amendments took effect on 5 November at 11 am. Those amendments affect both PD51ZE and modify PD 51R – the Online Money Claims Pilot Scheme. The latter amendments are effected via the amendments to PD51ZE and not through direct amendment to PD51R itself. The amendments extend the automatic referral to mediation scheme to claims within the Online Money Claims Pilot Scheme.

PRACTICE DIRECTION 51ZF – PART 3 OF THE DOMESTIC ABUSE ACT 2021: PROVISION DURING PILOTED COMMENCEMENT. This Practice Direction was introduced by CPR Update 167. Its commencement is tied to the commencement of the piloted commencement of Part 3 of the Domestic Abuse Act 2021. On 18 November 2024, the Domestic Abuse Act 2021 (Commencement No.6 and Saving Provisions) Regulations 2024 was made. It provides that Pt 3 of the Act is in force from 27 November 2024 to 25 November 2025. See regs 2 and 3 of the 2024 Regulations for detail concerning the extent of Pt 3's application.

PRACTICE GUIDANCE

PRACTICE NOTE – LISTING AND CRITERIA FOR TRANSFER OF WORK (2024). On 18 November 2024, the Chief Insolvency and Companies Court Judge issued a new Practice Note concerning the listing and transfer of work between the Royal Courts of Justice sitting in the Rolls Building, London and the County Court at Central London. The Practice Note replaces all previous such Practice Notes. It takes effect on 6 January 2025. It is reproduced below. It is also published at: *https://www.judiciary.uk/wp-content/uploads/2024/11/Practice-Note-Listing-and-transfer-of-cases-from-ICC-to-CLCC-181124.pdf.*

PRACTICE NOTE

Practice Note – Listing and Criteria for Transfer of Work (2024)

This Practice Note shall come into force on 6 January 2025 and shall replace all previous Practice Notes relating to the criteria for transfer of work between the Royal Courts of Justice sitting in the Rolls Building, London and the County Court at Central London – Listing and Criteria for Transfer of Work (26 March 2015).

1. The effect of s.117(2A) Insolvency Act 1986 is that winding up petitions shall not be issued in the County Court at Central London.

2. All bankruptcy petitions allocated to the London Insolvency District under rule 12.5(a) (i) to (iv) or (b), must be presented, in accordance with rule 10.11 Insolvency (England & Wales) Rules 2016, to—

(a) the High Court where the debt is £50,000 or more; or

(b) the County Court at Central London where the debt is less than £50,000.

3 Insolvency proceedings which are to be listed before an ICC Judge in accordance with the Practice Direction – Insolvency Proceedings will continue to be issued and listed in the Royal Courts of Justice sitting in the Rolls Building.

In each case consideration will be given by an ICC Judge at an appropriate stage to whether the proceedings will be heard in the High Court or County Court at Central London.

4. When deciding where the proceedings should be heard, the ICC Judges and Judges in the County Court at Central London shall have regard to CPR 1.1 and the following factors:

4.1 The complexity of the proceedings;

4.2 Whether the proceedings raise new or controversial points of law;

4.3 The length of the hearing;

4.4 Public interest in the proceedings;

4.5 The sums in issue in the proceedings.

5. Nothing in paragraph 4 shall preclude a party from making an application to the either the High Court or County Court for transfer. Any such application should refer to the paragraph 4 factors.

6. Subject to paragraph 4, the matters contained in paragraphs 7 to 9 shall be transferred to be heard in the County Court at Central London.

7. Personal Insolvency

7.1 Applications for a bankruptcy restrictions order where it appears likely that an order will be made for a period not exceeding five years.

7.2 Private examinations ordered to take place under s.366 Insolvency Act 1986;

7.3 Public examinations;

7.4 Applications issued for the purpose of enforcement;

7.5 Bankruptcy petitions where the petition debt is £500,000 or less;

7.6 Applications to set aside statutory demands where issued in the High Court and the debt claimed in the demand is £500,000 or less.

8. Corporate Insolvency

The following matters where the County Court has concurrent jurisdiction under s.117(2) Insolvency Act 1986:

8.1 Private examinations ordered to take place under s.236 Insolvency Act 1986;

8.2 Public examinations;

8.3 Applications issued for the purpose of enforcement;

8.4 Applications to extend the term of office of an administrator (para. 76 Sch. B1 Insolvency Act 1986);

8.5 Applications for permission to distribute the prescribed part (para. 65(3) Sch.B1 Insolvency Act 1986);

8.6 Applications made to fix the basis of or rate of remuneration under rules 18.23 and 18.24 Insolvency (England and Wales) Rules 2016.

9. Company law claims and Claims made to disqualify directors

9.1 Claims made to disqualify a director and applications for a bankruptcy restrictions order where it appears likely that an order will be made for a period not exceeding five years;

9.2 Applications issued for the purpose of enforcement;

9.3 Claims for the restoration of a company to the register (s.1029 Companies Act 2006);

9.4 Claims to extend the period allowed for the delivery of particulars relating to a charge (s.859F Companies Act 2006);

9.5 Claims to rectify the register (s.1096 Companies Act 2006), by reason of omission or mis-statement in any statement or notice delivered to the registrar of companies (s.859M Companies Act 2006) or to replace an instrument or debenture delivered to the registrar of companies (s.859N Companies Act 2006).

Chief ICC Judge Briggs
18 November 2024

MISCELLANEOUS UPDATES

CIVIL JUSTICE COUNCIL CONSULTATION – LITIGATION FUNDING. On 31 October 2024, the Civil Justice Council's working party on litigation funding issued its Interim Report. The report sets out a range of issues concerning third party litigation funding, its regulation and approaches to its regulation in other jurisdictions. It also examines the relationship between costs and funding and considers other means of litigation funding, e.g., legal expenses insurance, conditional and damages-based agreements, and crowdfunding.

The Interim Report is accompanied by a consultation paper, which seeks responses on matters relating to all the issues it raises. Consultation responses should be submitted by 31 January 2025. The responses will inform the working party's Final Report, which is expected to be published in the summer of 2025. Further details are available here: *https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/third-party-funding/*.

In Detail

ASSESSING WITNESS EVIDENCE

In ***Jaffe v GreyBull Capital LLP*** [2024] EWHC 2534 (Comm), 7 October 2024, Cockerill J considered the assessment of witness evidence. The issue arose in a claim alleging fraudulent misrepresentation concerning the origin of funds that were paid into a company. At the heart of the dispute was a question concerning whose evidence should be preferred. As Cockerill J put it,

> *"[4] The case is in some respects a classic one, in that at its heart it involves a clash of recollection between two sets of witnesses as to the content of oral statements made at an in-person meeting some years ago. It is also quite unusual in that it requires me to decide, as between the evidence of two equally patently honest and truthful witnesses, which of their recollections is to be preferred."*

The essential issue was focused on whether the alleged fraudulent misrepresentations had been made eight years prior to the trial (at [195]). The witnesses accepted that their "unrefreshed" memories of the events were "either non-existent or unreliable." They also agreed on the obvious point that recollection is fallible and that it was necessary for the court to consider contemporaneous documents, the parties' motives and the inherent probabilities (at [195]). Against that background Cockerill J considered the approach to take, noting at the outset that, as fraud was alleged, the claimant had to satisfy a heightened burden of proof (at [196]).

Cockerill J started by noting the classic statement concerning the caution needed when approaching witness evidence of what was said at meetings and the need to place factual findings on contemporaneous documents,

> *"[197] Reference was equally predictably made to the now classical passage in Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm), [2020] 1 CLC 428, at [22]:*
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> > *'... the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.'"*

The importance of reference to contemporary documents "as a means of getting to the truth", to a witness's motivation and their state of mind was also noted as having been stressed in ***Simetra Global Assets Ltd v Ikon Finance Ltd*** [2019] EWCA Civ 1413; [2019] 4 W.L.R. 112 at [48]. It particularly emphasised the importance of a party's internal documents on the basis that they tended to contain the party's "true thoughts" and that they were generally regarded as more reliable than oral evidence (at [198]). The greater weight to be given to documentary evidence was also noted to be important where oral evidence was given by a person in a language other than their first language. In such circumstances, it may be difficult to properly assess the person giving oral evidence's demeanour. Such a problem did not arise with documentary evidence (at [199] citing ***Avonwick Holdings Ltd v Azitio Holdings Ltd*** [2020] EWHC 1844 (Comm) at [102]–[103]).

Finally, Cockerill J cited Popplewell LJ's 2023 COMBAR lecture, which concerned memory and fact-finding (at [200]–[201]). She noted it as being of particular interest and as dealing with and going beyond the approach taken by the court in ***Gestmin SGPS SA v Credit Suisse (UK) Limited*** (2013), and particularly with the issue of the faulty encoding of memories, an issue that challenges reliance on documentary evidence. Cockerill J noted the lecture as follows,

"[201] Passages of particular interest (either to myself or the parties) include the following:

> *'10 ...determining what happened is not the only task. Commercial litigation often involves an inquiry into a witness' state of mind. That state of mind may be an essential ingredient of the cause of action, as for example where claims are framed in constructive trust. But more generally, it matters what the witness knew, or believed, or was thinking or intended at a particular point in the narrative of events because that casts light on the events themselves. Fact-finding is concerned not only with what happened, but just as much with why it happened....*
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> *36. ...When we encode our memories we don't photograph what is happening; we interpret what is happening, and that interpretation uses our schema. ... So experience and expertise can make a big difference to what goes into our memory.... "We don't see things as they are, but as we are"....*
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> *40. The semantic memory can also corrupt a recollection by affecting it at the retrieval stage. Our beliefs, attitudes and approach, our worldview, our schema, changes over time. The recollection is affected by the schema at the time of retrieval, which may be different from that which applied at the time of the events in question.... As Leggatt J said in Gestmin "Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs."...*
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> *52. Further, encoding is often influenced by pride or wishful thinking. It is a common, although not universal, human tendency to want to portray our participation in events in a way which paints us in the best light. ... it can also infect how witnesses pictures events to themselves when first encoding the memory...*
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> *55. ... contemporaneous documents... may be produced near the time, but they are produced after the memory has been encoded, and if there is an encoding fallibility, which there may be for all these different reasons, it infects the so called contemporaneous record every bit as much as other reasons for the fallibility of recollection which affect it at the storage and retrieval stage.*
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> *66. One [other issue] is reconstruction from semantic memory. We assume that something happened because that is what we would expect to have happened. ... our memories fill in gaps by reference to what we assume we would have done or would not have done. The witness will respond in cross-examination that they are sure that something did not occur because "I would never have done that", or vice versa.*
>
> *67. The dangers here are several: things do not always happen as we expect them to, and may not have done so on this occasion. We are also applying our present semantic memory schema to our attitudes at a different time. A third is another common source of erroneous recollection, in my experience, which is, again, pride or wishful thinking. We like to suppose that we did or thought that which we now consider we ought to have done or thought.'"*

The importance of these passages came into sharp focus as it became apparent that the oral evidence given by witnesses could not be relied upon. On both sides, there were very credible witnesses. There recollection, unrefreshed, was "vestigal". It was simply a case that their individual truths, i.e., "what they either do (now) recall or what they honestly think they recall" differed (at [227]). The case thus would turn on the documentary evidence.

Reliance on the documentary evidence, which in this case was a contemporaneous note of the event in question, needed, however, to be tested by reference to the issue raised in Popplewell LJ's lecture, i.e., was the note a product of faulty encoding of memory. As Cockerill J put it,

> *"[230] However that is an argument (that is, one which relies on the contemporaneous note) which, . . ., neglects to take into account the possibility (again highlighted by the Popplewell Lecture) of a faulty impression or recollection being encoded at a very early stage and recorded in that document.*
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> *[231] Ultimately therefore the document can be taken as the basis for a compelling argument; but it itself must be tested against the facts in the full context. That context includes considering what was common to both parties in terms of knowledge, but also what (if anything) the parties were each focussing on which did not get communicated to the other side, which might affect both encoding and recording or which might affect how Mr Meyohas (the individual alleged to have made the representations that were in issue) expressed himself."*

Having examined the context in which the meeting took place, the motives of the parties at that meeting, and a consideration of counterfactuals, Cockerill J concluded that the contemporaneous note could not be relied upon as an accurate

account. It could not because it was the product of faulty encoding, i.e., the product of the innocent but faulty memory of the individual (Mr Hilz) who made the note (at [279]–[288]). As she concluded,

> *"[285] . . . Mr Hilz's record is in the critical respect (entirely innocently) inaccurate. Mr Hilz was reconstructing what was said in his second language from handwritten notes which were necessarily incomplete. It was a fairly lengthy meeting. The Note is not the live transcription with which we have been blessed at trial. It is a reinterpretation of his manuscript notes which he took at the time. The format of the note suggests that those manuscript notes were sketchy and not word for word.*
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> *[286] The positioning of this issue also suggests that this was not the main focus of interest. There is scope for 'Chinese whispers' both in the taking of a note and in its interpretation, particularly when there is discussion immediately afterwards. While the natural tendency is to imagine a note written up later in the same day or the next morning is as good as a transcript the evidence on the fall off of memory in the immediate aftermath of an event is clear and clearly collated in the speech of Popplewell LJ.*
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> *[287] It is likely that coming to the meeting with Wirecard's discussed agenda in his mind Mr Hilz encoded and interpreted what was said in a way which deviated slightly but significantly from what was said and that in recording his recollections that small but significant deviation from accuracy became entrenched."*

In the light of this, and on the balance of probabilities, Cockerill J held that the alleged representations were not made (at [279]).

The judgment marks an important reminder that particular reliance can be given to documentary evidence, and particularly contemporaneous documentary evidence, as with oral evidence it is not infallible and should not be treated as such. Just as witness evidence may be both truthfully given and inaccurate, documentary evidence may also be innocently inaccurate. It too may be the product of faulty memory. It too may be the product of misunderstanding what was occurring at the time it was made. It too could be the product of interpretation, which renders it inaccurate through no active fault of the party responsible for the document. Care needs to be taken by parties seeking to rely on such evidence, just as it does where witness evidence is concerned, to consider its fallibility and accuracy.

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