A procedural round up

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Portal abuse

- *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 1015:
  - Proceedings issued under portal.
  - Two days before stay expired, C sought to exit portal and proceed as a Part 7 claim. Increasing value of claim to £2.2 million.
  - D sought strike out for abuse of process.
  - Held: C had abused court process by issuing a Part 8 claim form. However, this had not prejudiced D. Strike out was not a proportionate sanction.
  - Costs consequences: C should pay D indemnity costs up until the day before the hearing and C should recover no interest on special damages for the same period.

Strike out

- *Begum v Maran (UK) Ltd* [2020] EWHC 1846 (QB)
  - *"… in **an area of the law which was uncertain and developing** (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is **not normally appropriate to strike out**. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out."*

Part 18 requests

- *Kings Security Systems Ltd v King & Anor* [2019] EWHC 3620 (Ch):
  - *"Part 18 requests should be for the purpose of providing further information strictly necessary to understand another party's case"*
  - *"It is not reasonable or proportionate or in keeping with the overriding objective or efficient case management to require the defendant to produce what is going to be primarily fragmented witness evidence."*

Service

- Jovicic & Ors v The Serbian Orthodox Church-Serbian Patriarchy [2020] EWHC 2229 (QB):
  - Claim form served outside 4 month period.
  - The only reason C put forward for an extension of time for service was delay in obtaining medical reports.
  - Claim struck out: "*application was always going to succeed.*"
  - "*if the only reason an extension of time to serve the claim forms was required was to finalise the particulars of claim, the claim forms should have been served and an application made to extend the time for service of the particulars of claim under CPR 7.4(2).*" [27]

Service

- *Ivanchev v Velli* [2020] EWHC 1917 (QB):
  - Claim form served first in wrong mailbox but correct building, then handed to security guard who told process server that he would deliver it (but did not tell him to which apartment).
  - Neither service considered effective.
  - *The question of whether somewhere is a "usual or last known residence" does not even arise in respect of a property that is not the defendant's residence at all.* [39]
  - *What constitutes good service for a multiple occupancy building will often be fact-sensitive.* [44]

Service

- *Bec Construction -v- Melt Hythe Limited* [2020] EWHC 970 TCC.
  - Claim form left with receptionist of a dental practice located in the same building as D.
  - "*In effect, good service could have been obtained by putting the documents just inside the door, or leaving them unattended on the counter*". [17]
  - "*It seems to me that it cannot be the case that by taking steps to better alert the Defendant the Claimant should be prejudiced – and that is effectively what was done here out of an abundance of caution.*" [18]

Service

- *Gallagher v Hallows Associates* [2020] EW Misc 7 (CC); and
- *Piepenbrock v Associated Newspapers Ltd & Ors* [2020] EWHC 1708
  - Claim form served on solicitors is not good service unless they have been nominated by the defendant or have stated that they will accept service (CPR 6.7).
  - Correspondence with the other party's solicitor alone is not sufficient.

Relief from sanctions

- *Tully v Exterion Media (UK) Ltd & Anor* [2020] EWHC 1119 (QB)
  - *I need not summarise either Mitchell or the Denton case, the names of which are by now as ingrained passively in the paintwork of E117 as the smoke of long departed past Masters preceding me.* Master McCloud at [34]

Relief from sanctions

- Unsuccessful appeal following refusal to grant relief from sanctions: *Bromford Housing Association Ltd v Nightingale* [2020] EWHC 2648 at [64-65]:

  - *The starting point is that a Judge has a wide discretion under CPR 3.9 to decide whether to grant relief from sanctions by admitting a witness statement which had been served outside the time limit for serving such statements. An appellate court will not overturn the decision of the Judge below unless his or her decision was wrong in the sense of being unsustainable or was unjust because of a serious procedural irregularity (see, eg Abrahams v Lenton [2003] EWHC 1104 (QB)).*

Relief from sanctions

- Successful appeals following granting of relief *Magee v Willmott* [2020] EWHC 1378 (QB) at [37]:
  - *Although he purported to apply the test in CPR 3.9, as explained in Denton, his analysis in fact demonstrates a different approach, focusing on the Respondent's Article 6 right, asking whether it was "necessary" to deprive her of her right to a trial of her claim and "seeking so far as possible" not to deprive her of that right.*

- Successful appeals following refusal to grant relief: *Razaq v Zafar* [2020] EWHC 1236 (QB) at [31] :
  - *I consider that the lack of any real analysis of the seriousness of the breach impacted on the exercise of the judge's discretion. I also accept that the Claimant has identified material errors of fact in the judge's reasoning.*

Relief from sanctions

- *Core-Export Spa -v- Yang Ming Marine Transportation Corp* [2020] EWHC 425 (Comm):
  - Application to set aside default judgment.
  - Application 23 days after DJ – not considered prompt.
  - *In the circumstances, the existence of a realistically arguable defence is clearly outweighed by the history of delay, inaction, and non-engagement that is regrettably a feature of the way in which this litigation has been conducted and the pre-litigation interchanges as well.* [19]

Relief from sanctions

- Where a witness statement is served late but there is no express sanction contained in the order

- *Wolf Rock (Cornwall) Ltd v Langhelle* [2020] EWHC 2500 (Ch) at [26]:

  - *It would be wrong "to imply the need to apply for relief from sanctions in all cases where a rule or practice direction contains" the word 'must'. It is a question of construction and, as is well known, in questions of construction context is everything*

Relief from sanctions

- *Sivaji v Ministry of Defence* [2020] EWHC 2006 (QB):
  - When seeking to amend pleadings, a useful reminder of the importance of providing a draft copy of the amended pleadings.
  - "*It is one thing to permit without a draft a proposed amendment that is self-evident and uncontroversial such as an erroneously pleaded date or reference to the wrong document or even sometimes as to a name. It is quite another thing to amend upon an issue known to be controversial and going to the very core question of whether a liability in law arises.*"
- Better to appeal an order than seek relief from sanctions: *Chaplin v Ben Pistol Allianz Insurance Plc* [2020] EWHC 1543 (QB) at [25].

Evidence

- *Chaplin v Ben Pistol Allianz Insurance Plc* [2020] EWHC 1543 (QB):
  - Expert witness refused permission to rely on unpublished, non-peer reviewed data, not made available to the expert.
  - *There would be an obvious unfairness inherent in one party's expert relying on data which the opposing party is unable to examine.* [35]

- *Engie Fabricom (UK) Ltd v MW High Tech Projects UK Ltd* [2020] EWHC 1626 (TCC):
  - "*In his report as served, Mr Krangle included information gleaned from Wikipedia and other websites, without referencing the source of such information. This was contrary to paragraph 3.2 of Practice Direction 35, which provides that an expert's report should make clear which of the facts stated in the report are within the expert's own knowledge.*" [69]

Evidence

- *Griffiths v TUI UK Ltd* [2020] EWHC 2268 (QB)
  - Spencer J considered approach of court to uncontroverted expert evidence.
  - "*..what the court is not entitled to do, where an expert report is uncontroverted, is subject the report to the same kind of analysis and critique as if it was evaluating a controverted or contested report, where it had to decide the weight of the report in order to decide whether it was to be preferred to other, controverting evidence such as an expert on the other side or competing factual evidence*. ***Once a report is truly uncontroverted, that role of the court falls away. All the court needs to do is decide whether the report fulfils certain minimum standards which any expert report must satisfy if it is to be accepted at all***" [33]

Evidence

- *Domeney v Rees & Ors* [2020] EWHC 2115 (QB)
  - Consideration of necessity of accident reconstruction evidence at trial.
  - "*We do not have trial by expert in this country; we have trial by judge. In my judgment, the expert witnesses contributed nothing to the trial in this case except expense*" [21]
  - "*If there is no or no sufficient forensic material from which conclusions can be drawn, then experts are redundant.*" [18]

Evidence

- *Skatteforvaltningen (The Danish Customs And Tax Administration) v Solo Capital Partners LLP & Ors* [2020] EWHC 1624 (Comm):
  - "*Witness statements are not the place for argument.*"
- *Harlow v Aspect Contracts Ltd* [2020] EWHC 1488 (TCC):
  - "*I am satisfied that it would not be right to allow this witness statement to go into evidence [...] it contains, in material part, opinion evidence which it is not for Mr Clarke to give.*"

Evidence

- *De Sena & Anor v Notaro & Ors* [2020] EWHC 1031 (Ch):
  - *One of the most egregious and naked usurpation of the functions of the court that I have ever seen.*[159]
  - *Permission to adduce expert evidence on a topic […] is not a licence to ignore the rules as to what expert evidence is, and who can give it, or the conditions under which it is admissible in legal proceedings.* [163]

- *Crosby v Wakefield Metropolitan District Council* (2020) (Unreported, County Court, HHJ Belcher):
  - Failing to give a range of opinions was: "*bordering on arrogance. […] that shows a disregard for the proper and just disposal of proceedings.*"
  - Expert "*was guilty of seeking to be an advocate for the Defendant.*"

Evidence

- *PCP Capital Partners LLP & Anor v Barclays Bank Plc* [2020] EWHC 646 (Comm):

  - "*The purpose of the witness statement is in this context is to say, so far as the witness can say what happened, what the witness says he or she did, what he or she knew or thought or believed or intended, or, the meaning or content of documents to which they were a party where they can comment properly about them and where the meaning or content of that document has been called into question. Beyond that, they should not go.*" [10]

Evidence

- *Reminder that since April*
  - *Updated statement of truth*
  - *Statements must now set out the process by which they have been prepared, for example face-to-face, over the telephone, and/or through an interpreter*
  - *Specific provisions in relation to witnesses who do not speak English: statement must be in witness's own language and then translated in to English*

Costs

- *Terracorp Ltd v Mistry & Ors* (Rev 1) [2020] EWHC 2623 (Ch):
  - Appeal in which D sought some of their costs on the basis that C has failed on a number of issues.
  - "*… while the extra costs associated with failed points need to be considered, the court still has to stand back and look at the matter globally and consider the extent, if any, to which it is just to deprive the successful party of costs (see the guidance given in the Sycamore case). The exercise is not mechanical, and it involves an element of discretionary judgment. The ultimate question is what the just costs order is.*" [10]

Costs – Multiple Defendants

- *Oberholster v Optical Express Ltd & Anor* [2020] EWHC 2635 (QB):
  - C settled claim against D1 and sought costs from D2. The judge refused to strike out the claim against D2. It was held that there was no duty on the claimant to discontinue. The claimant was entitled to resolve the question of costs before having the claim dismissed. D2 was ordered to pay the costs of the claimant's proceedings against them.
  - D2 appealed, seeking Bullock or Sanderson Order.
  - " *Bullock and Sanderson orders might have been just if the Court was able to say that [D1] was the unsuccessful party vis-à-vis [D2]. The Court is unable to conclude success one way or the other as between [D1] and [D2], and so such orders in this case would have been unprincipled and unjustified*". [29]

Costs – Multiple Defendants

- *Jagger v Holland* [2020] EWHC 1197 (QB):
  - Costs allocation between three defendants.
  - Unsuccessful Ds ordered to pay successful D's costs.
  - *"Although D2 had issued third party proceedings against D3 claiming a contribution or indemnity which led to C joining D3 as an additional defendant, thereafter D1 made an additional claim against D3. In so doing D1 took on the costs risk of so doing."*
  - "*D1 did not adopt a passive role at trial. His counsel called evidence, cross examined D3 and his witnesses and made closing submissions that D3 was liable*."

Costs – Wasted Costs

- *Razaq v Iqbal & Ors* [2019] EWHC 3924 (QB):
  - D sought wasted costs against sols C for their failure to pass on an offer of a "drop hands" settlement to the claimant.
  - Refused: D had not established that C would have acted any differently if he had been given that information.
  - "*The fact that the Claimant had pursued a dishonest case to trial and done so in spite of being advised that his claim was weak were matters which the Judge was entitled to take into account. In the same position, I too would have found it impossible to be satisfied on balance that the Offer would have been accepted by the Claimant.*" [26]

Costs – Counsel's Fees

- *Finsbury Food Group Plc v Dover* [2020] EWHC 2176 (QB)
  - Claim exited portal. Counsel provided advice after claim left portal. Claim settled for £70,000.
  - D argued that C's fees not recoverable as matter had been in portal.
  - C counsel fee held to be recoverable.
  - "*I do not accept that leaving the legal costs of valuing a claim which has fallen outside the Protocol unfixed and subject to assessment in the usual way, is an absurd outcome.*" [24]
- Coleman -v- Townsend (SCC Senior Court Costs Office 13th July 2020):
  - Case settled the day before the hearing.
  - Counsel's brief fee and skeleton argument costs were not recoverable under the fixed costs regime.

Costs -Budgets

- *Kuznetsov, R (On the Application Of) v London Borough of Camden* [2019] EWHC 3910 (Admin)
  - Reminder about consequences of failing to file costs schedule.
  - "*It is my practice in such circumstances, where the court is charged with a duty to bring closure by summary assessment, and where there is a positive duty to file a Form N260, the legal advisers having failed to do so they, having made that bed, must lie in it and they will not get an award of costs.*" [39]

- *Utting v City College Norwich* [2020] EWHC B20 (Costs):
  - "*The first issue, put broadly, was* ***whether a so-called 'underspend' in respect of budgeted sums is of itself a "good reason" to depart from a budget*** *pursuant to CPR 3.18; the second, in the event that I were to accept that this amounted to a "good reason", was* ***whether I should reduce the sums claimed*** *for the respective phases. I* ***found for the Claimant on both issues****.*"
  - *"If an underspend were to be a good reason for departing from a budget it would be liable to substantially undermine the effectiveness of cost budgeting."*

Costs -Budgets

- *Amended budgeting rules and PD came in to force at the beginning of October*
- *Mainly a tidying up exercise*
- *<u>But</u> new provisions for variations of budgets and a new form: Precedent T*

Costs - issue based costs order

- *Scales v Motor Insurers' Bureau* [2020] EWHC 1749 (QB):
  - Consideration of whether issue based costs order appropriate
  - "*I do not think that it would be just, or appropriate, to treat the argument on the points of law on which Mr Scales was unsuccessful as being a discrete aspect of the case. The reality of the position was that Mr Scales, through counsel and his Spanish law expert, was advancing two alternative arguments, respectively embodying a more ambitious and a less ambitious position, and he was successful on the less ambitious of his two alternative arguments.*" [12]

Part 36 offers

- *Essex County Council v UBB Waste (Essex) Ltd (No. 3)* [2020] EWHC 2387 (TCC):
  - Part 36 offer sent after 4.30pm on 7 March 2019.
  - D argued that it was not a valid Part 36 offer because offer dated 7 March and the 21 days for acceptance ran from the date of the letter.
  - Offer was valid.
  - "*It is not, in my judgment, a forced construction to describe the date of the making of an offer contained in a letter as the date of the letter.*"
  - However: "*In exercising the court's discretion under Part 44, the court cannot, however, treat an offer that is a "near miss" as if it were a compliant Part 36 offer.*" [30.3]

Part 36 offers

- *Blackpool Borough Council v Volkerfitzpatrick Ltd* [2020] EWHC 2128 (TCC):
  - D made part 36 then withdrew it. C failed to beat the offer.
  - Impact of withdrawn offer considered:
  - "*the crucial question is whether the offeree acted reasonably or unreasonably in failing to accept the offer while it was on the table.*" [17]
  - *"(a) the court must put itself into the position of the claimant at the time and not simply decide the case by reference to hindsight; but (b) the focus must be on the reasonableness of the refusal by reference to the facts and matters relevant to the merits of the claim as they ought reasonably to have appeared to the claimant at that time, not by reference to wider commercial factors.*" [74]

Part 36 offers

- *Young v AXA Insurance UK* (Unreported, Nottingham County Court, 4 April 2019):
  - C accepted D's offer. D did not pay in relevant period. C made application for judgment. D paid sum due after application made. C sought cost of application. Dispute arose as to whether costs recoverable under fixed costs regime.
  - *I consider that it should be exceptional in a Part 36 settlement case to have to make an application for entry of judgment for the settlement sum and costs. Thus the CPR **45.29J gateway** for the court to consider a claim for costs greater than those allowed in the FRCR is **engaged**.* [41]
  - "*That said, the Claimant's solicitors were very quick off the mark to make this application as soon as the funds failed to arrive – there seems to have been no approach to the defendant's solicitors to ask "where is the money?" Whether a single chasing call or email would have produced a prompter payment (maybe within another two days) I cannot tell but it should have been tried. **Simply to issue an application without warning strikes me as precipitate**.*" [42]

Part 36 offers

- *Calonne Construction Ltd v Dawnus Southern Ltd [2019] EWCA Civ 754*
  - *Part 36 offer may make provision for interest after expiry of the relevant period*
  - *Claimants should consider this if making early Part 36 offers*

Calderbank offer

- *MEF v St George's Healthcare NHS Trust* [2020] EWHC 1300 (QB)
  - C accepted an offer during the assessment in a serious injury case. D disputed that their offer was still valid.
  - Held: an offer made by D remained capable of acceptance even part way through a hearing.
  - "*It was always open to the Defendant to put a time limit on the offer. Equally it was open to it to withdraw the offer at any time. This is so even once the hearing had started.*" [43]

COVID

- *Ludlow -v- Buckinghamshire Healthcare NHS Trust & BMI Healthcare Ltd* [2020] EWHC 1720 (QB)
  - Court allowed application to adjourn on grounds trial could not be held remotely.
  - Application to amend the Particulars and to rely on a new expert refused. C was not allowed to take advantage of the fact that an adjournment was being granted.
  - The issue in relation to the new expert was to be decided on the *Denton* criteria.

COVID

- *Stanley v London Borough of Tower Hamlets* [2020] EWHC 1622 (QB)
  - Default judgment obtained as result of health crisis set aside.
  - "*It would be unconscionable in my view for the Claimant to benefit from the unprecedented health emergency which prevailed at the end of March (and which is still subsisting today).*"

Remote hearings

- *Navigator Equities Ltd & Anor v Deripaska* [2020] EWHC 1798 (Comm):
  - "*If a witness is to* ***give evidence remotely, where he or she will be and who (if anyone) will be with them, and why, should be discussed between the parties in advance.*** *That is always so, in my view, but especially it is so if the arrangement may be such that there could be interaction with the witness during their evidence that will not be visible to the court.* ***Any arrangement other than that the witness will be on their own during their evidence should be approved by the court,*** *in advance if possible, and parties should not assume that an arrangement will be approved just because (if it is) it is agreed between them.*"

Remote hearings

- *Tailby , Re TPS Investments (UK) Ltd* [2020] EWHC 1135 (Ch):
  - Electronic bundles should confined to essential documents.
  - "*The intention underlying the use of the word "essential", and the rationale for the restriction, was to relieve the burden cast, not only upon the judges of assimilating material in often user-unfriendly electronic bundles, but also upon the legal professionals, and any support staff, responsible for compiling the electronic bundles, by reducing the volume and scope of the documentation to be included within them*"

CONCLUSION

- Questions?

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King's Bench Walk