Procedural Updates

By Reanne MacKenzie and Hazel Jackson

There has been a recent flurry of procedural updates: some are related to the COVID-19 pandemic; some are part of the CPR annual updates; and some from new guidance handed down in recent case law. They provide a welcome reminder that the court system and judiciary are still thriving despite the Coronavirus and accompanying lockdown. We have collected some of the key updates here for ease of reference.

Remote Hearings and PD 51Y

1. Presently, civil hearings *must* be conducted remotely save for exceptional reasons as indicated in the Lord Chief Justice's Review of Court Arrangements due to Covid-19 on 23 March 2020.

2. PD 51Y headed *"Video or Audio Hearings During Coronavirus Pandemic"* clarifies the manner in which the court may exercise its discretion to conduct hearings remotely in private. It is a temporary measure which lasts as long as measures under the Coronavirus Act 2020, but it is far-reaching.

3. The PD clarifies that the court may exercise its power to hold a remote hearing in private where "*it is not practicable for the hearing to be simultaneously broadcast in a court building*" and where "*it is necessary to do so to secure the proper administration of justice*". The court may therefore derogate from the principle of open justice under this PD, in addition to the bases for doing so set out in CPR r 39.2.

4. Under CPR r 39.2(1), the default rule is that a hearing must be in public, unless the exceptions provided in CPR r 39.2(3) apply. CPR r 39.2(3)(g) provides that a hearing can be private where the court considers "*this to be necessary to secure the proper administration of justice*" (language echoed in PD 51Y as set out above).

5. The sudden switch from physical to remote courtrooms presents difficulties for the demands of open justice; one reason being due to the traditional hostility towards broadcasting hearings (prohibited by section 41 of the Criminal Justice Act 1925). However, in these exceptional times, broadcasting or livestreaming is the only practical means to ensure participation in, and access to, justice.

6. The remainder of PD 51Y seeks to addresses this issue. It provides that:

    a. The court may not conduct a remote hearing in private where arrangements can be made for a member of the media to access the remote hearing. In such circumstances, the court will be conducting the hearing in public.

    b. Where the court conducts a remote hearing in private, it must, where it is practicable to do so, order that the hearing is recorded. If the court has the power to do so, it may order the hearing to be video recorded, or otherwise it should be an audio recording. Any person may then apply to the court for permission to access the recording in a court building.

7. Available powers to order such hearings be recorded, and subsequently broadcast, apply to the Court of Appeal (Civil Division) through the Court of Appeal (Recording and Broadcasting) Order 2013, and more generally through section 85A of the Courts Act 2003 (temporarily inserted by Schedule 25 of the Coronavirus Act 2020, effective from 26 March 2020). Section 85A provides where the court directs that proceedings are to be wholly video or wholly audio proceedings, the court *may* direct that the proceedings are to be broadcast (in the manner specified in the direction), and *may* direct that recordings be made (as specified). Onward use of broadcasts, by unauthorised recording or transmission, is made a criminal offence (Courts Act 2003, sections 85B and 85C).

8. The speed at which remote hearings have become a new norm has been impressively swift - the first remote Commercial Court trial was completed on Zoom last week before Teare J in *National Bank of Kazakhstan & Anr v Bank of New York Mellon & Ors*. Teare J directed that the hearing was to be livestreamed on YouTube and that its details be provided on the Cause List. The links were also provided on the websites of the respective

solicitor's firms. But there was no warning when a user attended the livestream of the restrictions under which such material was made available.

9. The extent to which courts will use their discretionary powers to permit livestreaming, and how to address the practicalities of attending each live stream (e.g. copyright issues) presents impending challenges. Individual judges will have to make considered, yet very quick, decisions on what is a delicate balance of ensuring open justice whilst in an uncertain climate far removed from physical hearings in a court building.

56 Day Extension of Time

10. PD 51ZA (effective from 2 April 2020 to 30 October 2020) temporarily displaces the normal rules for time extensions under the CPR.

11. The general position under CPR r 3.8(4) is that parties can agree an extension of time up of to 28 days, providing that any such extension does not put at risk any hearing date. PD 51ZA allows parties to agree an extension of up to 56 days without formally notifying the court. During the period in which PD 51ZA is in force, the reference to 28 days in CPR r 3.8(4) should be read as a reference to 56 days.

12. Any extensions of time beyond 56 days require permission of the court. An application for such permission will be first considered on the papers, and any order made must, on application, be reconsidered at a hearing. Paragraph 4 of the PD provides that the court is required to take into account the impact of the pandemic in considering such applications, as well as applications for adjournment and relief from sanctions. It seems undesirable for courts to grant extensions *beyond* 56 days, aside from in exceptional cases, given the need to avoid a backlog when the Covid-19 restrictions are lifted.

13. PD 51ZA also clarifies PD 51Y (as discussed above) by making it clear that a person seeking permission to listen to or view a recording of a hearing may do so by *request* and is not required to make a *formal application* under the CPR.

Tomlin Orders

14. In a judgment handed down on 25 March 2020, (*Zenith Logistics Services (UK) Ltd and others v Coury* [2020] EWHC 774 (QB)), Mr Justice Warby confirmed that it is compatible with requirements of open justice for the court to make an order staying proceedings on terms contained in a confidential schedule to the order or in a confidential agreement, even where the court has not seen such terms.

15. The issue arose as Master Davison, below, had adopted a practice of not making Tomlin orders with confidential schedules "*unless confidentiality is justified on the usual grounds*" and that, failing that, requested the parties should submit an order with an open schedule.

16. Mr Justice Warby held that the schedule to the order was not part of the order. Rather, it recorded the terms of settlement, which amounted to a contract between the parties. The principle of open justice did not require parties to make their settlement agreements public. Further, mentioning the agreement in an order did not give rise to any right of inspection.

17. Mr Justice Warby further held at [67] that as a rule: "*this Court should not demand to see a settlement agreement which the parties have designated as confidential. The position may be different where one or more parties is a litigant in person, or in other cases excluded from the scope of CPR 40.6. But generally, it would seem that there is no need to do so. The Court has no power to amend or vary the terms of the agreement. A Tomlin order, if made, does not represent endorsement or approval of those terms, or a conclusion that they are enforceable. The Court will normally have no business inspecting the terms unless and until an issue is raised on an application to enforce. And the general rule laid down by CPR 40.6 is at odds with any such practice.*"

18. It is worth noting that this hearing was conducted remotely by video link with judgment also handed down by video link. This is a helpful indication that the courts and judiciary are coping well with the new systems that have been put in place.

Witness statements and Statements of Truth – PD 22 and PD 32

19. There have been a number of amendments to witness statements, with a particular focus on how they have been prepared and changes to the statement of truth.

20. PD 32 paragraph 18.1 now states that not only must the witness statement be in the witness's "*own words*" but "*in any event be drafted in their own language*". This is confirmed by the addition of PD 32 paragraph 19.1(8) that a witness statement should "*be drafted in the witness's own language*".

21. PD 32 paragraph 18.5 has been updated to state that the body of the witness statement must include the process by which the witness statement was prepared, such as face-to-face, over the telephone or through an interpreter.

22. PD 32 paragraph 23.2 now states that where a witness statement is in a foreign language, the party wishing to rely on it must have: (i) have it translated; (ii) file the foreign language version with the court; and (iii) the translator must sign the original statement and must certify that the translation is accurate.

23. This package of reforms is aimed at dealing with those cases where a witness statement is presented in English but where, notwithstanding signature of the statement, the witness cannot speak English and the statement is not necessarily "in their own words". The changes aim to make it possible for such cases to be identified much earlier in the process

24. Further the required wording of the statement of truth has been updated. PD 32 paragraph 20.1 states that "*A witness statement is the equivalent of the oral evidence which that witness would, if called, give in evidence; it must include a statement by the intended witness in their own language that they believe the facts in it are true.*" Paragraph 20.2 confirms the new wording for the form of the statement of truth: "*I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.*"

25. This new form of words is also set out in PD 22 paragraph 2.2. The statement of truth now explicitly recognises that making a false statement could result in criminal proceedings being brought.

Entry of Default Judgments - CPR r 12.3

26. From 6 April 2020 by statutory instrument ("the Civil Procedure (Amendment) Rules 2020"), CPR r 12.3 (conditions to be satisfied before a claimant can apply for default judgment) has been updated.

27. Accordingly, the new rule states that a claimant may obtain default judgment in default of an acknowledgment of service or a defence if at the date on which judgment is entered no such document has been filed and the time for doing so. The modified rule makes clear that where an acknowledgment of service or a defence is filed before judgment is entered this will be a bar to the entry of judgment in default.

Costs - PD 44

28. The Civil Procedure (Amendment) Rules 2020 also makes changes to PD 44. This follows from the case of *Brown v. CPM* [2019] EWCA Civ 1724 (at paragraph 57 of the judgment) regarding the possibility of QOWCS protection in personal injury claims, in "mixed" claims (i.e. those claims with both personal injury and non-personal injury elements).

29. The court held that automatic QOWCS protection applies to claims for damages in respect of personal injuries, and that this would include all claims consequential upon that personal injury, including a claim for lost earnings as a result of the injury and the consequential time off work. The court held that claims for other types of damages did not attract automatic protection.

30. Coulson LJ commented that if proceedings can fairly be described in the round as a personal injury case then, unless there are exceptional features of the non-personal injury claims, he would expect the judge deciding costs to exercise his or her discretion in order to achieve a 'cost neutral' result.

31. The Court in *Brown* considered the wording of paragraph 12.6 of Practice Direction 44 to be wrong and to require urgent amendment. The amendment changes the reference to proceedings being ones "to which rule 44.16 applies" with a narrower and more accurate reference to "in a case to which rule 44.16(1) or rule 44.16(2)(a) applies."

Disclosure of Part 36 offers on appeal

32. Further, the statutory instrument makes changes to CPR r 52.22, which provides for the non-disclosure of Part 36 offers on appeal (and on applications for permission to appeal). The rule applied to Part 36 offers made on appeal and Part 36 offers made in other circumstances; the only exception being if they were relevant to the substance of the appeal. *Garrett v Saxby* [2004] EWCA 341 was the only case on the rule and it emphasised the importance of the principle that Part 36 offers should not be disclosed in an appeal on the merits.

33. However, in *Garrett* the only appeal was on the merits, not costs. Although it is more difficult to appeal costs, because they are discretionary, appellants can appeal both the merits and the costs ruling and do so in a single Notice of Appeal with a single appeal bundle which includes the Part 36 material. This seems to have taken place in a number of cases (e.g. *Dickinson v Cassillas* [2017] EWCA Civ 1254; *Shalaby v London North West Healthcare NHS Trust* [2018] EWCA Civ 1323) and thus might be contrary to CPR r 52.22.

34. The amendment in the statutory instrument now makes it clear that, unless the appeal court orders otherwise, the court may have a hearing of both substantive issues and costs issues and that, in such circumstances, the usual restrictions on informing the court of a Part 36 offer are removed.

Routes of Appeal - PD 52A

35. Finally, the 113th Update to the CPR includes amendments to PD 52A concerning routes of appeal. It came into force on 6 April 2020 as follows.

36. First, the general principle is restored that the destination of an appeal is governed by the rank of Judge who dealt with the case at first instance. This amendment is directed to the issue raised by *Topping v Ralph* [2017] EWHC 1854 which considered the appropriate route of appeal from a County Court decision made by a district judge exercising the power of a circuit judge with the permission of the designated civil judge. Kerr J held the correct route of appeal was to the High Court because Table 1 of PD 52A.3.4 provides that County Court decisions by a circuit judge should be appealed to the High Court. The route of appeal should not depend on the "*happenstance*" that a circuit judge was not available to hear the case, which had been heard at "*circuit judge level*" (at paragraph 33 of the judgment).

37. Second, the restriction is removed limiting the class of judge able to deal with directions and applications to those able to hear the appeal.

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