serlespeak
ISSUE NO.22

Service of the claim form: no room for error

Proper service of the claim form on the defendant is fundamental. In the not infrequent case where the claim form is issued shortly before the expiry of a limitation period and service is not attempted until shortly before the claim form expires, making a mistake can mean the end of the claim. Following the recent decisions in *Barton v Wright Hassall LLP* [2018] UKSC 12 and *Phoenix Healthcare Distribution Ltd v Woodward* [2018] EWHC 334 (Ch), claimants should be aware that the courts will rarely exercise the power in CPR r 6.15(2) to retrospectively validate improper service.

In Barton, Mr Barton purported to serve the claim form on the final day of its validity on the defendant's solicitors, Berrymans Lace Mawer, by email. Berrymans had indicated that they were authorised to accept service but not that they were willing to do so by email. Accordingly, pursuant to CPR r 6.3(1)(d) and PD6A paragraph 4.1, the purported service was invalid. By the time Mr Barton was alerted to his mistake the claim form had expired and his claim had become statute-barred.

By a bare majority, the Supreme Court held that there was no *'good reason'* to order, pursuant to CPR r. 6.15, that *"steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service"*.

Lord Sumption, giving the majority judgment, held that the fact that the claim form had been brought to the attention of the defendant or its solicitors was not in itself sufficient to justify an order. The court must also enquire whether the claimant had taken reasonable steps to effect service in accordance with the rules and what, if any, prejudice the defendant would suffer if the claim form were retrospectively validated. In the instant case Mr Barton had made no effort to ascertain the rules or to serve in accordance with them, and Wright Hassall would be deprived of an accrued limitation defence if the claim form was validated (paragraphs [10], [16], [19], 23]).

Berrymans had not been 'playing technical games' with Mr Barton. That phrase was used in *Abela v Baadarani* [2013] UKSC 44 to describe the conduct of a defendant who had deliberately obstructed service by declining to disclose an address at which service could be effected. Berrymans had not done anything to obstruct service and, even if they had realised that service was invalid in time to alert Mr Barton to his mistake before the claim form expired, they could not properly do so without taking their client's instructions (paragraph [22])

In *Phoenix Healthcare v Woodward* [2018] EWHC 2152, the claimants purported to serve the claim form on the defendant's solicitors. Neither they nor the defendant had indicated that they were authorised to accept service. The defendant was aware of the claimants' mistake, but decided not to alert them until after the claim form had expired.

HHJ Hodge QC rejected the submission that the overriding objective and CPR r. 1.3 imposed a duty on a party who had not contributed to a mistake made by his opponent to alert them to the mistake (paragraph [170]). It was not 'playing a technical game' to allow the claim form to expire in such circumstances (paragraph [186]).

Barton and *Phoenix Healthcare* demonstrate that claimants who fail to afford proper care to the service of the claim form are likely to find little assistance from CPR r 6.15, and that such claimants cannot expect the defendants to put them right if they have gone wrong.

MARK WRAITH joined chambers in October 2018 following successful completion of his pupillage. Mark is currently on a 6-month secondment at Peters & Peters.

I am very pleased to introduce this new edition of Serlespeak on topics in civil procedure. I begin the edition by examining the court's innovative development of ancillary orders in the pursuit of alleged fraudsters. Dan McCourt Fritz and James Weale both consider recent developments in the law relating to security for costs – Dan focuses on the court's attitude to the argument that security will "stifle" the claim of an impecunious claimant, while James highlights the Court of Appeal's rejection of a "sliding scale" correlating the quantum of security with the degree of risk of non-enforcement. Stephanie Thompson then looks at when it may be possible for a claimant in a civil fraud claim to obtain access to documents arising out of a parallel criminal investigation. Finally, Mark Wraith highlights the court's reluctance to exercise its jurisdiction retrospectively to validate improper service of the claim form.

Richard Walford

Hide and seek

THE INGENUITY OF (ALLEGEDLY) FRAUDULENT DEFENDANTS IN FINDING WAYS OF CONCEALING THEIR WEALTH HAS CALLED FOR NEW FORMS OF ORDER ANCILLARY TO INJUNCTIONS IN ORDER TO ENSURE THOSE INJUNCTIONS' EFFECTIVENESS.

As long ago as 1989, following the collapse of the International Tin Council, the Court of Appeal ([1989] Ch 286) agreed that, to ensure the effectiveness of any prior order, the Court had the power, under s.37 of the Senior Courts Act 1981, to order **disclosure of information** including about the Respondent's assets. Such orders are now a commonplace, found in the standard forms of freezing and search order. Care is nevertheless required: in *Tullett Prebon v BGC Brokers* [2009] EWHC 819 (QB), the Claimant was held entitled to information either to assist in giving effect to the injunctive relief, or to assist in undoing the harm unlawfully done, but not to information simply to assist in establishing its claims.

Passport Orders, whilst of similar vintage (from at least *Bayer v Winter* [1985] 1 WLR 497), have remained quite rare until the upsurge of oligarch cases. For example, in *Pugachev* [2015] EWHC 2623 (Ch), the Court sought to ensure compliance with its order to disclose what had happened to some hundreds of millions of missing dollars: it restrained Pugachev from leaving the jurisdiction until after he had served the required affidavit and required him to deliver up to the Claimants' solicitors all passports and other travel documents.

Solicitors are not immune: a **"Client Details Disclosure Order"** was made in *BTA Bank v Solodchenko (No 3)* [2013] Ch 1 against solicitors who were acting for an alleged fraudster who was the subject of a freezing order, and who, upon being personally served, went to ground and failed to comply with the information disclosure ordered. The Defendant continued to instruct solicitors by e-mail under conditions that his whereabouts remained confidential, and despite these conditions, the

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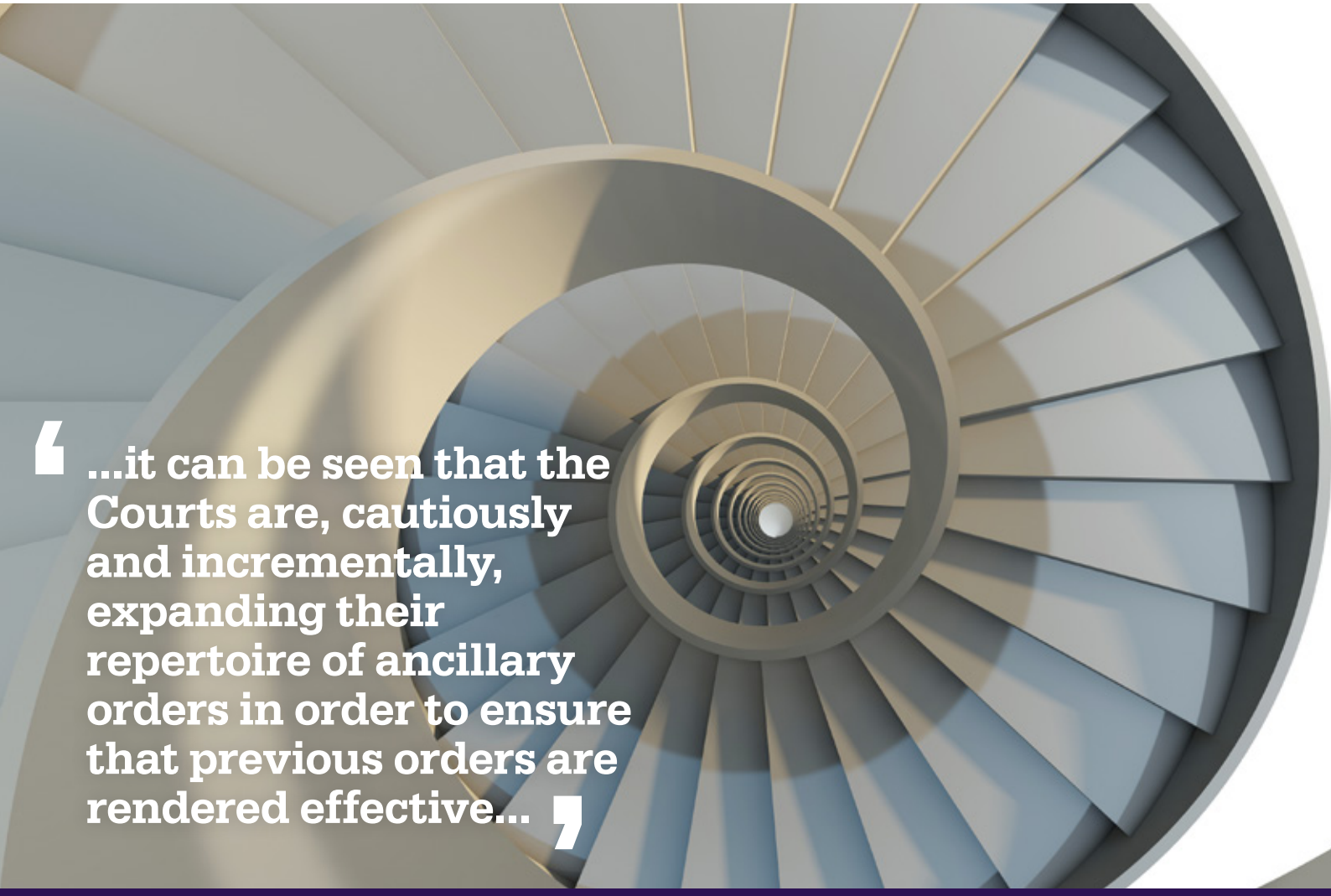

> **...it can be seen that the Courts are, cautiously and incrementally, expanding their repertoire of ancillary orders in order to ensure that previous orders are rendered effective...**

Claimant obtained an order that the solicitors disclose all contact details, past or present, that they had for the Defendant. The Court declined to order that the solicitors should disclose what they knew of the Defendant's assets.

The Court has the power to include within the injunction a **"Self-Identification Order"** where a "person unknown" Defendant hides behind anonymity: this requires such a person to identify him/herself and provide an address for service. So far, these orders appear to have been made only in threatened unlawful publication cases. *PML v Person(s) Unknown (responsible for demanding money from the Claimant on 27 February 2018)* [2018] EWHC 838 (QB). Freezing orders can be made against persons unknown: *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm).

A **"Source of costs disclosure order"** was obtained in *BTA Bank v Ablyazov* [2018] EWHC 1368 (Comm): the Claimant asserted that the Defendant's legal expenses were not (as he claimed) being met by his mother, but from funds frozen by a non-proprietary freezing order. The bank sought an order that the Defendant, Mr Khrapunov, supply further detail and supporting documentation as to the source of the funding of his legal expenses, to the best of his ability and having made reasonable inquiries (including of his mother). The burden of showing that this is arguable is on the Claimant.

Care is also needed when seeking an **Electronic Devices Order:** when pursuing alleged fraudsters, it is tempting to seek wide orders for delivery up of or inspection of computers and electronic storage devices. The Courts, however, have been cautious in granting such orders. For example, in *McLennan v Jones* [2014] EWHC 2604 (TCC), the Court said that: (i) the scope of the investigation must be proportionate and limited to what is reasonably necessary; (ii) the likely contents of the device needs consideration: any search should exclude possible disclosure of privileged documents, or of confidential documents which are irrelevant; (iii) regard must be given to the human rights of people whose information is on the device; (iv) only rarely will the Court authorise a complete imaging of a hard drive which is not dedicated to the project to which the case relates; (v) the Court usually requires confidentiality undertakings from any expert or other person who is given access. In *CBS v Brown* [2013] EWHC 3944 (QB), the Claimant obtained a without notice order to allow images of the Defendant's computer drives to be made, but the Court refused to make an order for inspection without notice. A subsequent on-notice application to inspect was declined.

When a Defendant whose assets have been frozen wants to make use of frozen funds to meet their **legal expenses** in non-proprietary cases, and such use is opposed, the Defendant must demonstrate that it has no other assets available to finance the defence, that no one else is willing to fund legal advice and representation, and that it would be in accordance with the overall justice of the case to permit it to use funds caught by the order: credible evidence from the Defendant is needed to discharge this burden because (i) it is the Defendant who knows the facts about the available assets, and (ii) the Court has already concluded that justice requires that the Defendant's freedom to dispose of its own assets should be restrained (or the injunction would never have been granted in the first place): *Tidewater Marine v Phoenixtide* [2015] EWHC 2748 (Comm).

From the above, it can be seen that the Courts are, cautiously and incrementally, expanding their repertoire of ancillary orders in order to ensure that previous orders are rendered effective, although most of the advances are permitted only when there have been prior breaches. Nevertheless, care is required, especially at the ex parte stage, to ensure that all necessary requirements have been met.

RICHARD WALFORD is regularly instructed on injunction matters, for both Applicants and Respondents. He is the Specialist Editor of *"The White Book"* (Sweet & Maxwell's "Civil Procedure") for Injunctions and Interim Remedies.

A false sense of security? The burden of proving 'stifling'

In the recently compromised *Accident Exchange* litigation, the defendants applied for security for costs shortly before trial, having discovered that the claimants' promised refinancing had not materialised. The claimants opposed the applications, contending that granting security would probably "stifle" the claimants' claims in circumstances where they were borderline insolvent. The claimants adduced no evidence as to the means of their ultimate owner (an investment fund), saying only that "consent" would have to be given by the partners in the fund to meet an order for security.

In a robust extempore judgment (*Accident Exchange Limited v. McLean and others* [2018] EWHC 1533 (Comm), Teare J roundly rejected the claimants' "stifling" argument, and ordered them to provide security equal to 60% of the applicants' incurred and future projected costs (totalling over £9 million). The learned judge described the absence of any evidence about the partners in the fund (at [22]) as a "gaping hole" in the claimants' case, and held (at [28]) that *"the claimants have wholly failed to show that [they] could not, on the balance of probabilities, obtain funding from those associated with them".*

The result in *Accident Exchange* reinforces the essential obligation of a respondent to a security for costs application that invokes a "stifling" argument to adduce full and frank evidence as to their ability to raise funds. Without such evidence, the argument should fail in limine. An applicant met with a "stifling" argument supported by inadequate evidence would generally be well advised to probe the gaps in the evidence in correspondence in advance of the hearing (as the defendants did in *Accident Exchange:* see [25] of the judgment). The Court is likely to be more receptive to criticisms of the "stifling" evidence if they are raised in time to enable a proper response rather than sprung as an ambush.

There is a more fundamental point. Where a claimant runs a "stifling" argument, the policy behind requiring evidence as to the means of those who stand to gain from the proceedings is to prevent them from engineering themselves a one-way bet. Litigation should not be conducted on a "heads I win, tails you lose" basis. Unwillingness, rather than inability, to pay should not avail a respondent to an application for security. In *Goldtrail Travel Ltd v. Onur Air Tasimacilik AS* [2017] 1 WLR 3014, Lord Wilson displayed a healthy streak of commercial scepticism in saying (at [24]) that the Court should not take even *"an emphatic refutation"* by a company or its owner that security would not be provided *"at face value"*. Arguably, the Supreme Court in ***Goldtrail*** only moved this "can pay, won't pay" problem that this scepticism was designed to address a little further down the road: if, after a company is ordered to provide security, its owners hold their nerve and do not provide it, then applying ***Goldtrail*** the claim is unlikely to be struck out. The claimants in *Accident Exchange* did not test this hypothesis: having said that they could not provide security, they promptly did just that. An entity with a sufficiently strong stomach may yet do so.

DAN MCCOURT FRITZ and Charlotte Beynon both led by Hugh Norbury QC acted for one of the successful applicants in *Accident Exchange*.

Security for costs against overseas claimants: the Court of Appeal rejects a "sliding scale" test

THE COURT OF APPEAL HAS PROVIDED WELCOME CLARITY TO THE TEST APPLICABLE TO SECURITY FOR COSTS AGAINST CLAIMANTS RESIDENT IN NON-CONVENTION STATES AND, IN SO DOING, HAS ADOPTED AN APPROACH WHICH FAVOURS APPLICANTS.

The requirements in CPR 25.13 for security against overseas claimants are beguilingly simple:

"The Court may make an order for security for costs under rule 25.12 if – The claimant is resident out of the jurisdiction; but not resident in a Brussels Contracting State [or a State bound by various other international treaties (a "Convention State")]"

However, the case law establishes that the above requirements are merely a jurisdictional threshold. Once satisfied, the Court has a discretion which must be exercised in a way that does not discriminate against claimants from non-Convention States. In practice, this means that security must be based on *"objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned"* (*Nasser v United Bank of Kuwait* [2002] 1 WLR 1868 at [61])

The non-discrimination requirement gives rise to two further questions: (i) What is the evidential burden on the applicant? (ii) To what extent is the Court entitled to consider the nature and extent of the risk in determining the quantum of security?

The first question was answered by the Court of Appeal in *Bestfort Developments Ltd v Ras Al Khaimah* [2016] 2 C.L.C. 714 (in which **Philip Marshall QC** and **James Mather** appeared for the successful appellants): a claimant need only establish a "real risk" (rather than a likelihood) that enforcement would be difficult or impossible.

The second question was the subject of the recent judgment in *Danilina v Chernukhin* [2018] EWCA Civ 1802. At first instance, Cockerill J was satisfied that a "real risk" of non-enforcement had been established ([67]), but further concluded that the Court could (and, on the facts, it did) reduce the quantum of security by applying a sliding scale which took into account the nature and extent of the risk ([71]&[77]).

Despite the superficial attraction of quantifying security by reference to the probability of a risk, that approach was decisively rejected by the Court of Appeal. First, it would undermine the "clear and simple" test in *Bestfort* if an applicant were effectively required to meet a higher standard in order to obtain full security ([59]). Second, it would have the undesirable consequence of increasing the volume of evidence and complexity of security for costs applications ([60]). Third, grading risk to arrive at an appropriate discount is a *"difficult and speculative exercise"* ([61]).

The cumulative effect of the Court of Appeal's judgments in *Bestfort* and *Danilina* is to provide a clear, simple and (arguably) pro-defendant scheme. Once a "real risk" of non-enforcement is established then, however low that risk, the defendant should (at least as a starting point) be entitled to full security for the costs of the action.

JAMES WEALE led by Jonathan Crow QC of 4 Stone Buildings, appeared for the First and Second Appellants in *Danilina.*

Chambers news

People
We are delighted to welcome three new tenants to Chambers on completion of their pupillage. Jamie Randall, Stephanie Thompson and Mark Wraith are the newest members of Serle Court taking the number of barristers to 67.

Conferences and seminars
Serle Court held its summer client party at the Tate Modern on Wednesday 27th June, with over 300 of our clients attending. Stunning views, excellent company and plenty of champagne were enjoyed by all.

In May, a team from Serle Court including Philip Jones QC, Richard Wilson QC and Gareth Tilley gave seminars on "Trust Busting" to firms in Hong Kong. This was followed up in September by Richard Wilson QC and Zahler Bryan speaking on the same subject to other firms both international and local.

We ran a seminar covering "Hot Topics in Insolvency", with Lance Ashworth QC covering retail CVA's, James Mather speaking on the proposals for UK Insolvency law reform and Matthew Morrison on when and how directors are required to take account of creditors interests.

We conducted a series of seminars with firms in Jersey over a two-day period with barristers speaking on a range of relevant cases. Elizabeth Jones QC, Dakis Hagen QC, Will Henderson, Kathryn Purkis, Giles Richardson, Tim Collingwood, James Brightwell and Gregor Hogan spoke on a range of areas in the field of trusts law, including confidentiality orders, insolvent trusts, and the impact of recent cases on legislation in Jersey.

We held a Partnership and LLP breakfast seminar, chaired by John Machell QC with Jennifer Haywood and James Mather speaking on "Restrictive Covenants and Damages" and James Weale on "The demise of Negotiated Damages" in light of *'Morris Garner v One Step (Support) Ltd* [2018] UKSC 20'.

We held a property roadshow in Norwich in November with Chris Stoner QC speaking on "Easements of Recreation", Rupert Reed QC on "Issues of construction that arise in respect of service charge provisions", Andrew Bruce speaking on "States of Mind and Adverse Possession" and Amy Proferes on "Mistake in land registration".

We hosted our third International Trusts and Commercial Litigation Conference in New York on Monday 19th November and we had a full house with guests attending from London, Channel Islands, Cayman Islands, BVI, Bermuda, Bahamas, Turks and Caicos and the USA.

Books & Publications
Andrew Moran QC launched his book in October *Commercial Litigation in Anglophone Africa* with representatives from High Commissions in London joining a range of clients for the event.

The 1st Supplement to *Tudor on Charities,* 10th ed. (Sweet & Maxwell, 2015) by Will Henderson and Jonathan Fowles, together with Julian Smith of Farrer & Co., is due to be published in December

Awards
We are delighted to announce that Constance McDonnell won Chancery Junior of the Year at the Chambers Bar Awards on 26th October 2018. Congratulations to Constance and also to Dakis Hagen QC for being shortlisted for Chancery Silk of the Year and Simon Hattan for Banking Junior of the Year. Chambers was also nominated for Chancery Chambers of the Year.

Serle Court has also been shortlisted for the Chambers High Net Worth Awards Private Client Tax & Trusts set of the Year. The awards dinner is taking place on 22nd November 2018.

LinkedIn
We have 4 discussion groups on LinkedIn to enable Serle Court members and clients to discuss topical issues in Partnership and LLP Law, Fraud and Asset Tracing, Contentious Trusts and Probate, and Competition Law; please join us.

Serlespeak is edited by JONATHAN FOWLES

When it takes the police to catch a thief - using police documents in civil fraud claims

Where the police are conducting a criminal fraud investigation in parallel to a claimant's own civil fraud claim, the claimant may well wish to access documents and witness statements obtained in the investigation. While such an application was recently refused in *Barley v Muir* (unreported, 22 November 2017), several cases from different contexts indicate the factors which are likely to persuade a court to order non-party disclosure from the police once the threshold CPR r 31.17 conditions have been met (see *Mitchell v NGN Ltd* [2014] EWHC 1885 (QB); *Andrew v NGN Ltd* [2011] EWHC 734 (Ch); *Frankson v Home Office* [2003] 1 WLR 1952).

First, the court must balance the public interest of maintaining the confidentiality of those who co-operate with police against the public interest of courts trying civil claims on the basis of all the relevant material. Applicants should therefore join the witnesses whose statements they seek to their application (as in *Frankson*) or inform the witnesses of the application and invite them to make representations to the court (as in ***Mitchell***, where disclosure was refused until this step was taken). A disclosure order is also more likely where the statements are highly relevant to the civil claim (as where the criminal investigation virtually mirrors the civil claim) and where the civil claim involves a matter of public interest.

Second, while courts will be concerned about possible prejudice to a criminal investigation, if the police object to disclosure that is not the end of the story. Vos J in *Andrew* was clear that *"very cogent evidence is required if documents are to be withheld on the ground that they would hamper a police investigation"*, particularly where *"one might say, perhaps ungenerously, that the police have had many years to investigate"*. Prejudice may also be minimised by imposing stringent conditions on disclosure: documents might be prohibited from entering the public domain and disclosed on a solicitor-only basis, with court permission required for disclosure to clients. Evidence could also be heard in private or using an agreed code system (as in *Andrew*).

Third, the documents, particularly any transcripts, will inevitably be personal data of both those being investigated and the interviewee, and courts are likely to seek reassurance that disclosure is consistent with data protection principles. The position was relatively straightforward under the Data Protection Act 1998: the applicant could simply contend that disclosure was *"necessary for the purpose of … any legal proceedings"* (sch 3). The position under the Data Protection Act 2018 is more complex. Section 36(4) of the Act provides that personal data collected for law enforcement purposes (i.e. a criminal investigation) may not be processed for other purposes (i.e. a civil claim) unless that is authorised by law; that begs the question of whether a court would order disclosure. The Supreme Court in *RFU v Consolidated Services Ltd* [2012] UKSC 55 observed that it is only in *"some limited instances"* that the right to privacy with respect to personal data will outweigh the benefits of making that data available for civil proceedings. It remains to be seen whether the courts will adopt the same approach under the 2018 Act.

These decisions illustrate that while it is certainly possible for claimants to obtain documents from police investigations – even ongoing ones – it is vital to take the steps outlined above to maximise the chances of success.

STEPHANIE THOMPSON became a tenant at Serle Court on 1 October 2018. Her main areas of practice are civil fraud, trusts and general commercial litigation.

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