"Approved Transcripts" of Ex Tempore Civil Court Judgments: An Issue for Future Case Law?

1. Court transcripts serve as the official record of what transpired during court proceedings, capturing every audible word spoken in court.

2. However, litigants and their representatives should be aware that sometimes judges amend the transcript of what was said in court when giving an ex tempore judgment, and present it as an "*approved transcript*" (or similar). Such amendments may in practice be material, and made after any orders arising from the judgment have been sealed, without advising the parties of the changes made, and without indicating the amendments within the text.

Concerns which May Arise

3. The presentation of text as an "approved transcript" of a judgment handed down ex tempore, in which the words in the text are (to whatever extent) not those which were said in court, may give rise to concerns:

    1) **Potential for Bias**: There may be concern that a judge could amend a transcript in a way which favours one party over another, in circumstances where this is done in private and there has been no opportunity to seek clarification. This could undermine the fairness of the proceedings.

    2) **Lack of Oversight**: There is little if any oversight of the amendments. Access to an unadulterated transcript may be limited once an "approved transcript" has been provided.

    3) **Impact on Appeals**: Appellate courts rely on transcripts to determine whether any errors were made by the lower court(s). The potential for the *transcript* of an ex tempore judgment to be amended creates uncertainty in the appeals process. The parties to the proceedings will often have to make any application for permission to appeal based on their notes and recollections of what was said in the judgment, rather than what might later appear in an "approved transcript". An "approved transcript" may not be provided until after the date by which permission to appeal must be sought, has passed. If an approved transcript differs from what the judge said in court, this may affect whether the parties decide to seek permission to appeal, the basis of that appeal, or the prospects of

success. It may be too late to seek permission to appeal, or to vary the grounds of appeal, by the time the parties have received the "approved transcript" and it has been checked (so far as possible) for accuracy by the person who attended the hearing and took notes.

4) **Erosion of Trust**: Judges unilaterally altering transcripts could potentially erode trust in the judicial system. Parties involved in proceedings may feel that their words, actions and legal positions reflected in the transcript are not accurately represented, leading to a sense of injustice.

5) **Judges' Professional Duties**: Judges who are barristers or solicitors will need to consider the code of conduct set by their regulators. This may have a bearing on whether a transcript can be amended and then still be presented as an "approved *transcript*".

4. By way of example, amendments may be made to remove a judge's acknowledgement of inexperience/unfamiliarity in hearing the type of case before him/her; diminish intemperate criticisms or amplify criticisms (such amendments may sound in costs); or alter the text of what was said to make it consistent with an order arising from the judgment which has already been sealed. An example of a judge ostensibly removing comments which he later regretted can be found in *Duo v Osborne (formerly Duo)* [1992] 1 W.L.R. 611, 618H.

5. It is unclear how common the practice is of amending the transcript of what was actually said, and nevertheless presenting the resultant text as the transcript. The parties may not realise that they have not been given the transcript. It may be difficult for the parties to discover whether amendments have been made to a transcript, and if so, what those amendments are. The parties will only be able to access unadulterated transcripts and recordings in limited circumstances, once a document presented as an "approved transcript" has been provided to them by the court.

6. For completeness, it is worth pointing out that transcription companies – which produce a written record of the words spoken – often offer different levels of transcription. The differences are based on whether the transcript will include details such as pauses, stutters, sounds such as coughing, sighs or laughter, self-corrections, and fillers such as "uh" or "erm". Such differences should not

involve material alterations to the words actually spoken, and are not the issue addressed in this article.

The Civil Procedure Rules

7. In the civil courts, rule 40.12 of the Civil Procedure Rules allows judges to correct *an accidental slip or omission* in a *judgment* or *order*:
   "Correction of errors in judgments and orders
   (1) The court may at any time correct an accidental slip or omission in a judgment or order.
   (2) A party may apply for a correction without notice."

8. Case law in respect of CPR 40.12 provides parameters establishing how far judges can go in correcting a *judgment* or *order*, and in what circumstances a correction can be made. In a written judgment, a correction may involve, for example, remedying a typographical error. CPR 40.12 can be used to correct genuinely accidental errors or omissions, and does not permit the court to have second or additional thoughts or to add a provision having substantive effect which was not in the contemplation of the parties or the court at the hearing (*Santos-Albert v Ochi* [2018] EWHC 1277 (Ch), [2018] WLR (D) 315, [2018] 4 WLR 88 at [27]; applied in *Re X and Y (Children: Adoption Order: Setting Aside)* [2025] EWCA Civ 2 at [66]; see also the White Book at 40.12.1).

9. CPR 40.12(1) is equally applicable to oral judgments. When giving a lengthy judgment ex tempore, this may not be done perfectly or without stumbling. Judges should not be expected to be infallible. Where an ex tempore judgment is later put into writing as a *judgment*, it may be amended in reliance on CPR 40.12 to the extent permitted by that rule.

10. However, CPR 40.12 does not provide a power to amend a *transcript* (a record of what was said), or to apply for a correction of a *transcript*.

11. In respect of amending judgments, the utility of CPR 40.12 appears to be limited to correcting slips or omissions in the judgment *after* the order arising from the judgment has been sealed. Before sealing, more extensive amendments may be made in reliance on case law (see below).

Legal Precedents and Guidelines

12. *Re L and B (Children)* [2013] UKSC 8; [2013] 1 WLR 634 concerned a judge changing her mind following a judgment given orally. The transcript of the judgment given orally was amended before the order arising from it was sealed, and the resultant text presented as a "perfected judgment". It was thereby presented as a judgment rather than a transcript. The Supreme Court held that a *judgment* can be amended *before* the order arising from it is perfected by sealing it (see at [16]-[19], and [20]-[27] for the considerations which apply). There is also a power, following a further hearing or development in the proceedings, to make a finding in judgment which is at odds with one made earlier in the proceedings, and a power to vary or revoke an order made earlier (see at [32]-[41]). The court declined to express a view on whether it should be possible to amend a judgment *after* the order arising from it has been sealed (see at [42-45]).

13. The High Court has addressed the question of amending *transcripts* and presenting the resultant text as an "approved transcript". In *Bath v Escott* [2017] EWHC 1101 (Ch), the court dealt with an application, dated 26 April 2017, for an audio recording of a judgment handed down almost 3 years earlier – on 18 August 2014. The application was made on the bare assertion that the *transcript* – generated one year after the judgment was handed down, and presented as a transcript – was not true to what was said in court. There was no evidence in support of that assertion. No explanation was given by the applicant as to what parts of the text were said to be inaccurate. *Bath* was decided without a hearing, and in the absence of adversarial argument.

14. It was held obiter in *Bath* at [6]:
"Nevertheless, whatever the position, the mere fact that the transcript of the judgment, as approved by the judge, and sent to the parties, is in any way different from the reasons actually pronounced by the judge at the time of giving judgment, is not wrong in law. Nor does it in itself even give rise to concern. It is an entirely lawful and proper practice for a judge, on receiving a transcript of what was said at the time in giving judgment, to alter that transcript, not only to correct garbled or incorrect transcriptions, spelling and grammatical mistakes, and even matters of style, but also so that the reasons recorded accurately reflect why the judge made the decision that he or she made, even if they were not then properly or fully articulated."

15. It was held further obiter in *Bath* at [13]:
"*What all this means is that, if a judge on later reading the transcript of an oral judgment already delivered considers that what is written there does not accurately represent his or her reasons for the decision, the judge may and indeed should alter it so that it does accurately record the reasons that the judge had for that decision. More, if the judge changes his or her mind as to the reasons for a decision or (in certain cases) changes the actual decision, then the judgment can be altered too. As a result, it does not matter if the approved transcript adds to or differs from the actual words used by the judge at the time of giving judgment. What matters is only that it has been considered, revised if necessary, and then approved by the judge. And that is what appears to have happened in the present case.*"

16. In *Bath*, the court seemingly treated the transcript it was considering as the *judgment itself* and in so doing found that the transcript of what was said in court could be amended. At [10] the court purported to rely, in support of its decision, on the finding in *Re L and B (Children)* that a *judgment* (c.f. a *transcript*) could be amended at any time before the order arising from it had been drawn up and sealed. However, in *Bath* it seems likely (though it is not confirmed expressly) that the order arising from the oral judgment under consideration had already been sealed before the "transcript" of that judgment was generated and altered: the transcript was generated one year after the oral judgment was given – see at [1]. Aside from the apparent error in treating the transcript and the judgment as the same, *Re L and B (Children)* does not provide authority for amending a *judgment* after the order arising from it has been sealed. The distinction between a *transcript* and a *judgment*, and that the order arising from the ex tempore judgment had likely already been sealed, was seemingly not considered in the judgment in *Bath*.

17. Could the judge in *Bath* now go back and amend his written judgment? The obiter finding in *Bath* is that what may be the sole available record (the *transcript*) of a judgment can be amended after the judgment has been handed down ex tempore (and likely after the order arising from the judgment has been sealed). Would that also apply to purely written judgments such as that in *Bath*? Surely not: it would put the legal system in disarray, since no written judgment could ever be regarded as finalised.

18. Judgments in other cases have included similar findings to those in *Bath*, albeit the findings were obiter and/or did not apply *Re L and B (Children)* and/or pre-date *Re L and B (Children)* and/or involve circumstances in which a judge was attempting to amend a *judgment* by amending a *transcript* and/or involve circumstances in which the judge, in amending a *transcript*, was seeking to amend a judgment *before* any order arising from it was sealed. In other cases, the courts have commented that a *transcript* was amended, but then made no finding in respect of it. Relevant cases include *R (on the application of Rachel Nettleship) v NHS South Tyneside Clinical Commissioning Group, NHS Sunderland Clinical Commissioning Group* [2020] EWCA Civ 46 at [85]; *MRH Solicitors Ltd v The County Court Sitting at Manchester & Ors* [2015] EWHC 1795 (Admin) at [25]-[26]; In *Day v Royal College of Music* [2013] EWCA Civ 191 at [79]-[80] and *Secretary of State for Trade and Industry v Rogers* [1996] 1 W.L.R. 1569, 1758B; 1758E.

19. Since the proposition that judges can present a non-transcript as a "transcript" (albeit preceded by the word "approved") is not based on statute, it is based on case law or practice alone. Some may consider it an unsightly development of the common law for the judiciary to be able to routinely declare something to be that which it is not. It may be that the senior courts will review the position in due course, within the ratio of a judgment. A review by the senior courts of the case law in the area, and the practice, would be beneficial.

An Application for an Unaltered Transcript, or a Copy of the Recording?

20. If an "approved transcript" differed from a party's notes, and it came to making an application for an unadulterated transcript or audio recording of proceedings, it is likely that the party's notes are all that could be relied upon as evidence for the making of such an application. Such an application may benefit from those notes (suitably redacted in respect of other content) being put into formal evidence pursuant to CPR 23.7. This would involve giving a witness statement that the exhibited notes were taken at the time of, or shortly after, the judgment being given ex tempore.

21. If the notes were those of counsel, and the same counsel were instructed in respect of the application for an unadulterated transcript, one approach could be for a solicitor to give a witness statement exhibiting counsel's (suitably redacted) attendance note or other notes if the attendance note did not mention

the matter in question. Such witness evidence would be hearsay, though, which might undermine its credibility – though it should at least be persuasive hearsay.

22. Should counsel themselves give evidence? Ideally, it may be best avoided. The Bar Council recognizes that it may be appropriate in exceptional circumstances where giving evidence will not threaten counsel's independence.[1] The question of what was actually said or not by a judge in an ex tempore judgment in open court is a simple question of fact. The evidence from counsel's notes would not go to determining what was actually said in the ex tempore judgment, but may determine whether an unadulterated transcript or recording is ordered. It could have a bearing on whether proceedings are delayed, though this could be dealt with by way of a costs order – potentially "costs reserved", so that a judge could consider upon obtaining the transcript whether the delay was justified. The judge, or counsel, could ask opposing counsel about the contents of his/her note of the judgment; however, such notes would be privileged, and if a response were received it seems unlikely in any event that the opposing party's notes would be entered into evidence. In line with the Bar Council's guidance, the decision needs to involve consideration of relevant factors, which may include that the person who can give evidence may also be the best placed to represent the client, due to their familiarity with the case, and that an application may need to be made at short notice.

23. These considerations are, perhaps, beside the point of principle. The courts are an open, public forum at which anyone could attend and take notes (though no audio recording may be made without the leave of the court – s.9 of the Contempt of Court Act 1981). It should in principle not be problematic for the parties to obtain an unadulterated transcript of what was said in judgment, though the courts may not share this view.

24. On occasion, a copy of the official audio recording (c.f. a transcript) may be required, for example if there was doubt about the accuracy or fullness of an "approved transcript", or a particular point turned on the *way* something was said – given that intonation (see for example *Re G (Child)* [2015] EWCA Civ 834 at [27]), or the rapidity of a reply or temporal frequency of intervention, for example, may not be readily apparent from a transcript. The practice and procedure

[1] https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Advocates-called-as-witnesses-1.pdf

governing access to *recordings* is set out in the *Practice Direction: Access to Audio Recordings of Proceedings* dated 14 February 2014.[2] This provides in effect that the parties will only be granted access to a recording in exceptional circumstances, for example where there is cogent evidence that the official transcript may have been *wrongly transcribed*. It does not provide expressly for access to be granted where there is cogent evidence that the judge has amended the transcript of what was said, in order to produce an "approved transcript".

Conclusion / Recommendations

25. The practice of amending the transcript of an ex tempore judgment and nevertheless presenting it as a "transcript" is problematic. It may give rise to concerns about the potential for bias, lack of oversight, and impact on the integrity of the judicial process.

26. There may be some confusion over, or misapplication of, terminology. A judgment is an enunciated decision (with reasons) in respect of a claim or a matter arising in the claim. A transcript is a written or printed copy of the exact words spoken orally in court. If the text in a document is a transcript of the exact words that the judge used in giving an ex tempore judgment, and the judgment was not subsequently amended before any order arising from it was sealed, it will be both a judgment and a transcript. A document containing a judgment only ever given in writing does not contain a transcript: it is not a record of what was said orally in court.

27. If a judge seeks to amend a *judgment*, he/she should do so before any order arising from it is sealed. In the case of oral judgments, this should be done by creating a document separate to the transcript which records the finalised judgment, or by clearly marking comments or amendments to a transcript (which should then not be presented anywhere in the document as a transcript). The transcript itself should remain untouched; it is no longer a transcript if it does not contain a record of the words spoken. If a transcript of what was said in judgment is amended prior to the sealing of an order, the resultant text could still be called the *judgment*, but it would no longer be a transcript.

[2] https://www.judiciary.uk/guidance-and-resources/practice-direction-access-to-audio-recordings-of-proceedings/

28. Where a transcript of an ex tempore judgment is requested by the parties, it should be independently transcribed and provided unadulterated (perhaps save for any words misheard or misspelled by the transcriber – the judicial corrections of such words could be shown as amendments, commented to explain the amendments, or delineated separately in a separate document) irrespective of whether any separate judgment is also provided. If the application for the transcript was made before the court sealed the order arising from the judgment, and the judge wished to amend the judgment before sealing the order, it would be appropriate for both the unadulterated transcript, and the judgment itself, to be provided to the parties. In any event, the court should indicate whether any separate judgment exists to go alongside the transcript provided; otherwise, the parties and any appellate court may assume that the transcript of the ex tempore judgment also serves as the final judgment, which may not be the case if the judgment has been amended from what was said ex tempore before any order arising from it has been sealed.

29. Where a judgment is handed down ex tempore then later amended and given in written form, the written form may need to be accompanied by a declaration or evidence from the court that any amendment, relative to what was actually said, was made before the order arising from the judgment was sealed.

30. It may be helpful to have clarification in the Civil Procedure Rules of the relevant processes and terminology.

31. Greater use of any automatic transcription facilities could be considered, such that the parties and the court access a transcript in real time.

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