CIVIL PROCEDURE NEWS

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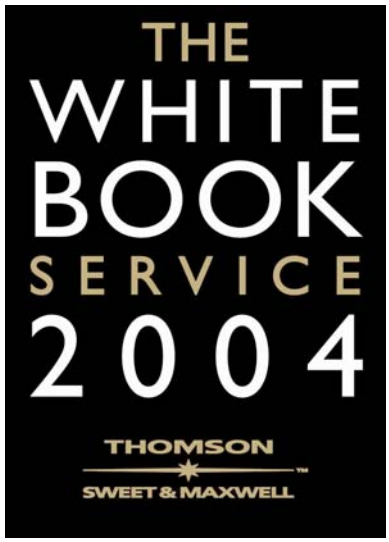

IN BRIEF

Cases

- **BOTHAM v. KHAN** [2004] EWHC 2602 (QB), November 12, 2004, unrep. (Richards J.)

CPR rr.44.14 & 47.8—in defamation claim, costs orders made in favour of defendant (D) in relation to certain issues on which he succeeded—seven years after judgment, D serving on claimants (C) bill of costs and notice of detailed assessment proceedings—D conceding that, on basis of prior agreement between parties, he should be disallowed interest—C making application for order that all D's costs be disallowed under r.44.14(2) so as to bring the assessment proceedings to an end—held, dismissing application, a fair assessment was still possible (see *Civil Procedure 2004* Vol. 1 paras 44.14.1 & 47.8.3)

- **CROUCH v. KING'S HEALTHCARE N.H.S. TRUST** [2004] EWCA Civ 1332, 154 New L.J. 1616 (2004), CA (Waller & Mance L.JJ. and Sir Christopher Staughton)

CPR 36.1, 36.3, 36.11, 36.20 & 44.3(4)—claimant (C) bringing personal injury claim against NHS trust (D)—D making written offer of settlement, but not making payment in—damages awarded at trial not exceeding offer—D ordered to pay all of C's costs — held, allowing D's appeal, the form of the offer made by D in this case "was as sound as a payment in" and the judge should have treated it in the same way as an offer made by way of a Pt 36 payment (see *Civil Procedure 2004* Vol.1 paras 36.0.2, 36.1.1, 36.20.1, 44.3.10)

- **GRAVAARD v. ALDRIDGE & BROWNLEE**, *The Times* December 2, 2004, CA (May & Arden L.JJ.)

CPR r.40.7, Practice Direction (Appeals) para.15.1—trial judge dismissing claimant's (C) negligence claim against solicitors—C making appeal to Court of Appeal—following receipt of Court's draft judgment, counsel making further written submissions—in dismissing appeal, Court (1) stating that in these circumstances counsel would only rarely be allowed (a) to reopen contentious matters, or (b) to attempt to add to their case or make a new case, and (2) indicating that it would take account of counsel's submissions and make modest changes to the text before releasing the judgment (see *Civil Procedure 2004* Vol.1 paras 40.2.1, 40.2.5, B5-001 & B6-001)

- **REED EXECUTIVE PLC. v. REED BUSINESS INFORMATION LTD**. [2004] EWCA Civ 887, [2004] 4 All E.R. 942, CA (Auld, Rix & Jacob L.JJ.)

CPR 44.3(8)— first instance judge ordering defendant (D) to make interim payment towards costs of claimant (C)—subsequently Court of Appeal allowing D's appeal ordering C to repay that payment—parties unable to agree appropriate rate of interest on repayment—held, interest should be paid, not at the judgment debt rate, but at the commercial rate (see *Civil Procedure 2004* Vol.1 paras 40.8.1, 40.8.6 & 44.3.13)

- **ARROW TRADING AND INVESTMENTS v. EDWARDIAN GROUP LIMITED** [2004] EWHC 1319 (Ch), May 25, 2004, unrep. (Blackburne J.)

CPR rr.31.6 & 31.10, Practice Direction (Disclosure and Inspection) para. 4, Companies Act 1985 s. 459—minority shareholders (C) bringing s.459 petition for protection against unfair prejudice in relation to substantial private company (D1)—respondents to petition including D1 and majority shareholders (D2) of whom one (Z) was the driving force behind D1—C alleging inter alia that remuneration paid to certain directors in excess of market value—C claiming by way of relief, a buy-out order at a fair and proper valuation—D2 serving two lists of documents signed by Z, and apparently prepared by him on behalf of others, with disclosure statements included—D1, principally at the instigation of two non-shareholder, independent directors (X and Y), indicating that it wished to participate in the proceedings, principally for purpose of justifying its remuneration policy—C applying for injunction restraining D1 from expending its moneys and actively participating in the petition in the manner indicated—in granting application, judge finding that D1 had no independent position in relation to the remuneration issue between C and D2—C amending petition to plead that expenditure incurred by D1 in seeking to participate in the proceedings reduced D1's assets, and therefore reduced the proportion to which they (C) are entitled—in their defence, D2 averring that, in acting as they did, X and Y acted quite independently—judge granting C's applications for disclosure by D1 (1) of documents relating to actions taken by the company giving rise to the amended plea (such documents having a relevance going beyond the question whether D1 was encouraged by D2 to participate in the proceedings), and (2) of certain financial information—C also applying as against D2 for full standard disclosure in accordance with r.31.10—held, granting the application, (1) the purpose of r.31.10 is to bring home to each party his individual responsibility for giving standard disclosure, (2) except to the extent permitted by the rules, it requires the party himself to make the disclosure statement, (3) the disclosure statement served by D2 was inadequate, (4) in particular (a) none of the par-

ties giving disclosure (with the exception of Z) had deposed that he was aware of and understood the duty of disclosure, (b) none of them (with the exception of Z) appeared personally to have carried out that duty, (c) it was not clear what (if any) search any of the shareholder respondents (D2) had made to locate documents which were to be disclosed, and (d) it was not clear which documents had been (and had not been) disclosed by each of them (see ***Civil Procedure 2004*** Vol.1 paras 31.6.3, 31.10.1, 31.10.5 & 31PD.4)

- **COMMISSIONERS OF CUSTOMS AND EXCISE v. BARCLAYS BANK PLC**. [2004] EWCA Civ 1555, 154 New LJ 1831 (2004), CA,. (Peter Gibson & Longmore L.JJ. and Lindsay J.)

CPR r. 25.1(1)(f), Supreme Court Act 1981 s.37(3)—Customs and Excise (C) bringing proceedings against company (X) to recover VAT—judge granting freezing order for £1.8m—C serving copy of order on X's bank (D)—by letter to C, D acknowledging receipt—before letter received by C, D permitting X to make withdrawals from account totalling £1.2m—C obtaining judgment against X for £2.2m—judgment debt then exceeding amount in frozen account by £1.7m—C bringing claim in negligence against D—on preliminary issue, judge holding that D owed C no duty of care ([2004] EWHC 122 (Comm))—held, allowing C's appeal, (1) in the proceedings between C and X, D were not in a quasi-adverse relationship with C, (2) accordingly, the judge was wrong to hold that there could be no proximity between them without an express assumption of responsibility by D, (3) on a correct application of the modern tests for negligence, D owed C a duty of care, (4) it is fair, just and reasonable for banks to be expected to exercise reasonable care to help preserve money in a frozen account—observations on rule that law does not recognise a duty of care by one adverse party (or his legal representative) to another party (paras 26 & 59)—***Z. Ltd. v. A-Z***, [1982] Q.B. 558, CA, ref'd to (see ***Civil Procedure 2004*** Vol.1 para.25.1.27, and Vol.2 para.9A-111)

- **DIAN AO v. DAVIS FRANKEL & MEAD** [2004] EWHC 2662 (Comm), October 11, 2004, unrep. Moore-Bick J.)

CPR r.5.4, Practice Direction (Court Documents) paras 4.1 to 4.4—company (P) bringing proceedings against Russian company (A) in courts of British Virgin Islands alleging breach of share sale agreement—in that litigation, A applying for security for costs of an appeal by P—in that application, issue emerging as to possible unlawful activities of Russian national (R) affecting financial health of P—in course of preparing for the application, A learning of action in England between company and firm in which allegations made concerning R's involvement in sale of shares in a Russian company—that action commenced in 1994 and in 1996 stayed on terms of Tomlin order—A applying under r.5.4 for permission to inspect and take copies of the documents on the court file in the English action—P making a similar application—in error, court staff providing A with copies of some of the pleadings—held, granting the application to the extent of allowing A the right to search for, inspect and copy a particular affidavit and certain classes of documents (including the pleadings), (1) r.5.4(5) proceeds on the footing that, subject to limited exceptions, a member of the general public has no right of access to court files without permission, (2) such a person is not entitled to ask for permission to search the whole of a court file, but must identify with some precision the documents or class of documents which he wishes to search for, inspect and copy, (3) r.5.4(5)(b) gives the court a discretion which is to be exercised after taking into account all the circumstances, including the applicant's reasons and whether the documents sought were read as part of the decision-making process, (4) a non-party's application to use a court file as a source of potentially useful information to assist in other litigation does not engage the principle of open justice—***Dobson v. Hastings***, [1992] Ch. 394, ***Law Debenture Trust Corp. (Channel Islands) Ltd. v. Lexington Insurance Co.***, [2003] EWHC 2297 (Comm), 153 New L.J. 1551 (2003), ref'd to (see ***Civil Procedure 2004*** Vol.1 paras 5.4.1 & 5PD.4)

- **I.N. NEWMAN v. ADLEM** [2004] EWCA Civ 1492, November 11, 2004, CA, unrep. (Jacob L.J.)

CPR rr.32.4 & 44.3(2)(b), Practice Direction (Appeals) para.4.11—under case management order, parties required to exchange witness statements by January 16, 2004—because they wanted disclosure, claimant company (C) not exchanging witness statements in time—statements eventually served on May 20, 2004, five weeks before date fixed for trial—defendant (D) taking point that statements should not be admitted—C then making application for permission to serve the statements out of time—application opposed by D—in granting application judge (1) finding that it would be entirely inappropriate and disproportionate to refuse to admit the evidence, and (2) ordering D to pay C's costs—held, dismissing D's application for permission to appeal against the costs order, (1) the judge's order was in the wide discretion as to costs, (2) no error of principle was shown and there was no reasonable prospect of success of an appeal, (3) it was D who caused the costs of C's application—by consent, this application for permission dealt with by single lord justice on paper (see ***Civil Procedure 2004*** Vol.1 paras 32.4.9, 44.3.1, 52.1.3, 52.3.5 & 52PD.8)

- **JACKSON v. MARLEY DAVENPORT LTD** [2004] EWCA Civ 1225, [2004] 1 W.L.R. 2926, CA (Peter Gibson, Tuckey & Longmore L.JJ.)

CPR rr.35.10 & 35.13—employee (C) injured at work bringing claim against employers (D) for breach of duty—district judge directing that each party should

be permitted to put in evidence an expert's report in the field of pathology—such evidence likely to offer opinions as to circumstances of accident (which were obscure to both parties) derived from the nature of C's injuries—accordingly, C instructing forensic pathologist (R)—R preparing report for conference with C's legal advisers (interim report)—R subsequently preparing a report to be exchanged (exchanged report)—upon inspecting exchanged report, D surmising that R had made interim report and that it contained (at least in some respects) different opinions to those expressed in exchanged report—on ground that C had not fully complied with r.35.10(3), district judge granting D's application for order that C should disclose the interim report—circuit judge allowing C's appeal—single lord justice granting D permission to appeal—held, dismissing appeal, (1) an expert's report intended to be relied on at trial must contain material instructions (r.35.10(3)), (2) such instructions are not privileged against disclosure (r.35.10(4)), (3) reports prepared by an expert for the purpose of enabling a party's legal advisers to advise their client, and drafts of a report to be exchanged, are covered by litigation privilege, (4) the exchanged report was the only document containing the opinion of R on which C wished to rely, (5) r.35.13 does not provide a power to order disclosure of expert reports made earlier than the expert report disclosed for the purposes of trial—***Carlson v. Townsend***, [2001] EWCA Civ 511, [2001] 1 W.L.R. 2415, C.A, ref'd to (see ***Civil Procedure 2004*** Vol.1 paras 35.10.3, 35.10.5 & 35.13.1)

- **KOHANZAD v. CHIEF CONSTABLE OF DERBYSHIRE** [2004] EWCA Civ 1387, October 8, 2004, CA, unrep. (Potter & Buxton L.JJ.)

CPR r.30.3, County Courts Act 1981 s.40—claimant (C) subject to civil proceedings order given permission to commence claim in district registry of High Court against police (D) claiming £5m damages for assault—C acting in person—at case management conference, which C, because he was in prison, unable to attend, judge (1) vacating date for High Court trial, (2) transferring case to a county court, and (3) ordering C to pay D's costs of hearing—held, dismissing C's appeal, (1) in all the circumstances of the case, the transfer order was plainly right and the judge did not need C's presence to assist him towards that conclusion, (2) as both parties had 7 weeks' notice of the case management hearing, C had ample time in which to apply for it to be adjourned until his release from prison, (3) if he had reason to object to the order made in his absence, C could have applied for a further hearing after his release (see ***Civil Procedure 2004*** Vol.1 para.30.3.1, and Vol.2 para.9A-553)

- **LANGTREE GROUP PLC. v. RICHARDSON** [2004] EWCA Civ 1447, October 14, 2004, CA, unrep. (Waller L.J. & Sir Charles Mantell)

CPR rr.3.5, 3.8, 3.9, 29.9 & 31.10—company (C) bringing claim against individual (D) on lease—claim allocated to multi-track—under case management directions made by district judge, parties required to give standard disclosure by August 28, 2003—upon C not complying with this direction, D writing letter of complaint to court—on September 19, 2004, acting on own motion and in absence of parties, district judge ordering that unless C complied with this direction by October 1, 2003, their "claim will be struck out without further order"—arguable that C not fully complying with direction until October 6, 2004—but D (acting in person) not filing request for judgment under r. 3.5(2)—in response to letter received from C, court refusing to strike out D's defence and ordering that claim be listed in trial window—in subsequent exchanges between C and D about inspection, D making no effort to enforce unless order and parties proceeding on basis that trial would be held (exchanging witness statements etc)—at opening of trial, D in effect applying for judgment to be entered in his favour on basis that C had not complied with unless order—judge (1) apparently dismissing this application (making scant if any reference to r.3.9), (2) proceeding to try C's claim and (3) giving judgment for C—single lord justice granting D permission to appeal—held, dismissing appeal, (1) the judge, having regard to what had happened after October 1, took a clear view that it would not be right to confirm any order striking out C's claim, (2) any trial judge, faced with the actual circumstances that existed, would not have entered judgment for D, (3) D allowed the case to proceed to trial and suffered no prejudice, (4) it was not necessary to consider D's arguments that r.3.5 did not apply because (a) the unless order had the automatic effect of striking out C's claim, and (b) he was not seeking a judgment "with costs" (see ***Civil Procedure 2004*** Vol.1 paras 3.5.2 & 29.9.1)

- **SCHERING CORPORATION v. CIPLA LTD**. [2004] EWHC 2587 (Ch), *The Times* December 2, 2004 (Laddie J.)

CPR rr.3.4(2)(a) & 63.9, Practice Direction (Patents and Other Intellectual Property Claims) para.11.1—company (D) writing "without prejudice" letter to patent owner (C)—letter suggesting that C's patent was invalid and proposing that revocation proceedings could be avoided if a commercial solution acceptable to both parties could be found—C not replying but commencing infringement proceedings, basing its allegation of infringement solely on the letter—D applying to have proceedings struck out—held, granting the application, (1) an opening shot in negotiations can amount to a without prejudice communication and hence be privileged, (2) in the circumstance of this case, D's letter fell into that category, (3) accordingly, there was no material that C could rely upon for its claim—***South Shropshire DC v. Amos***, [1986] 1 W.L.R. 1271, CA, ref'd to (see ***Civil Procedure 2004*** Vol.1 paras 3.4.2 & 31.3.40, and Vol.2 paras 2F-13, 2F-53 & 2F-93)

■ **SHAHAR v. TSITSEKKOS** [2004] EWHC 2659 (Ch), *The Times* November 30, 2004 (Mann J.)

CPR rr.6.20, 20.3. 20.5 & 20.7—Ukranian (C1) and Russian (C2) bringing claim against Israeli (D1) and company (D2) owned by D1 for declaration as to ownership of shares in foreign company—D1 defending and bringing counterclaim against C1 and C2 for damages for conspiracy—D1 applying for order adding foreign bank (B) as a defendant to the counterclaim—judge granting application and giving D1 permission to serve his defence and counterclaim (and other documents) out of the jurisdiction in a non-Regulation State on B—judge also ordering that "the requirement (if any) to file and serve a Part 20 claim form on B is waived"—following service on B of statement of case, B applying to set aside service on substantive and procedural grounds—held, rejecting B's procedural objections but granting their application and setting service aside on substantive grounds, (1) D1's claim against B did not fall within any of the grounds stipulated in r.6.20, and even if it did England would not be the appropriate forum, (2) the court's extended jurisdiction is exercised by the service abroad of a claim form (r.6.20), (3) there is such a thing as a "Part 20 claim form" (r.20.7(2)), (4) the document which D1 was permitted to serve on B was not a Part 20 claim form, (5) under r.6.20 "claim form" includes a petition and an application notice but not, apparently, a Part 20 claim form (r.6.18(h)), (6) that omission would appear to be a defect in the rules which may be remedied by construction, (7) "claim form" in r.6.20 should be construed as including a "Part 20 claim form", and (8) a court hearing an application for joinder should treat the counterclaim as if it were a claim form within r.6.20 (see ***Civil Procedure 2004*** Vol.1 paras 2.3.18, 6.21.11, 20.3.2 & 20.5.1)

Statutory Instruments

■ **COMMUNITY LEGAL SERVICE (FINANCIAL) (AMENDMENT) REGULATIONS 2004 (S.I. 2004 No. 2899)**

Community Service Legal Service (Financial) Regulations 2000 (S.I. 2000 No. 516), Council Directive 2002/8/EC of January 27, 2003—inserts new reg.5D—provides for waiver in certain circumstances of financial eligibility criteria and requirement to pay contributions where client domiciled or habitually resident in another Member State applies for funded services in cross-border dispute—in reg.19 substitutes "carer's allowance" for "invalid care allowance"—in force November 30, 2004

■ **COMMUNITY LEGAL SERVICE (FUNDING) (AMENDMENT NO. 2) ORDER 2004 (S.I. 2004 No. 2900)**

amends Community Service Legal Service (Funding) Order 2000 (S.I. 2000 No. 627) art. 5 and Sched. (maximum rates of remuneration in contracts between LSC and suppliers)—amends art.7 to enable LSC to fund services provided in relation to the preparation of applications for legal aid for transmission to the authorities of another Member State under provisions of Council Directive 2002/8/EC of January 27, 2003—in force November 30, 2004

■ **COURTS AND LEGAL SERVICES ACT 1990 (COMMENCEMENT NO. 11) ORDER 2004 (S.I. 2004 No. 2950)**

brings into force Courts and Legal Services Act 1990 s.53 & Sched.8 Pt I (the Council for Licensed Conveyancers) to extent not yet in force, and s.55 (preparation of probate papers, etc.; exemption from Solicitors Act 1974 s.23(1))— in force December 7, 2004

IN DETAIL

Waiver of payment in

CPR Part 36 contains rules as to offers to settle and payments into court. This Part also contains rules as to the consequences that may arise (including as to costs) where an offer to settle or payment into court is made in accordance with the provisions of the Part.

The scoping provision in Part 36 (r.36.1) expressly acknowledges the possibility that a party may make an offer to settle otherwise than in accordance with the provisions of the Part.

One way in which a defendant in a money claim may make an offer to settle not in accordance with the provisions of Part 36 is by failing to act in accordance with r.36.3; that is to say, by making a written offer but failing (either deliberately or inadvertently) to follow it up with a payment into court (see also r.36.10). For purposes of exposition this could be called "a non-payment offer". (This is not a term of art, but it is submitted that, in the context of money claims, it is better than describing such offers as "*Calderbank offers*").

This then raises the question as to whether the consequences that may flow from an offer to settle made in accordance with Part 36 also flow where it is made otherwise than in accordance with the Part. Rule 36.1(2) seems to answer that by stating that, if an offer is not made in accordance with this Part "it will only have the consequences specified in this Part if the court so orders." (This is another of the small number of "only if" provisions found in the CPR.)

However, it has to be noted that the consequences that r.36.1(2) talks about are limited to consequences "specified in this Part". Legal consequences following the making of an offer to settle (whether accepted or not) are found elsewhere. In particular, in r.44.3(4) where it is stated that, in deciding what order (if any) to make about costs, the court must have regard to all the circumstances including (amongst other things) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention, whether or not made in accordance with Part 36 (r.44.3(4)(c)).

Where a defendant makes an offer to settle which is not accepted within the time limit stipulated by r.36.11 (generally, 21 days), the consequence he yearns for is that the claimant will not better that offer at trial, with the result that he (the defendant) will get the benefit of r.36.20. That provision states that, unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the offer could have been accepted (as calculated in accordance with r.36.11) without needing the permission of the court.

In the recent case of ***Crouch v. King's Healthcare NHS Trust***, [2004] EWCA Civ 1332, 154 New L.J. 1616 (2004), CA, the facts were that a claimant (C) brought county court proceedings against an NHS trust (D) for damages for personal injury. The judge awarded C damages. It was then drawn to the attention of the judge on the question of costs that by letter D had deliberately made a non-payment offer which C had not accepted and, in the event, had not beaten. In terms, the offer purported to put C at risk as to costs if it was not accepted within 21 days. Apparently, it was the practice of D to do so in cases such as this because of the financial implications for them of paying into court substantial sums of money in a number of claims being defended simultaneously.

The judge held that, by their non-compliance with r.36.3, D had not successfully protected their position on costs and ordered them to pay all of C's costs. The Court of Appeal allowed D's appeal.

In adopting the practice of making non-payment offers D, and other NHS trusts copying the practice, travelled hopefully. Their primary hope was that in the event of claimants not bettering offers made in particular cases they would be able to persuade the courts to exercise their discretion under r.36.1(2) and to make the same orders for costs in their favour in accordance with the presumption in r.36.20 as if they had complied with r.36.10 and made payments into court. Failing that, they hoped that, in the exercise by the courts of their discretion under r.44.3, the circumstance that they had made an offer (expressly referred to in r.44.3(4)(c)) would tell significantly in their favour, perhaps even to the same effect as if the court had exercised its discretion under r.36.1(2).

The object of this appeal was to obtain the approval of the Court of Appeal for this practice so that the NHS trusts' primary hope was not, and would not be, in vain.

Waller L.J. said there was no reason in principle why parties to a money claim should not by agreement treat a non-payment offer as if it had been backed up by a payment in so as to bring into play the Part 36 consequences.

It may be commented that the payment in requirement provides assurance to a claimant minded to accept the offer (and give up his claim) that his money recovery to the extent of the offer is secured. Presumably, a claimant may take the view that the defendant is sufficiently substantial for there to be no risk to this effect. The idea that parties by agreement may waive court rules when it suits them is not likely to be encouraged nowadays, but perhaps this is an exception to be allowed where the agreement is express. However, it is not the hard case. The hard case is where there is no such agreement between the parties.

Waller L.J. also said there was no reason in principle why a claimant should not, during the currency of proceedings, seek a direction from the court that his non-payment offer should be treated as if it had been backed up by a payment in and brought within Part 36. That course would involve costs being incurred in circumstances where the outcome might be uncertain.

Turning then to the hard case, Waller L.J. (with Mance L.J. and Sir Christopher Staughton concurring) held that the judge had misdirected himself and was plainly wrong in ignoring D's offer. His lordship said that the form of the non-payment offer made by D in this case "was as sound as a payment in" and the judge should have treated it in the same way as an offer made by way of a Part 36 payment. Such offers should be so treated "unless there was some factor special about the case" (e.g. where the offer was a sham or non-serious in some way). In exercising its discretion, the court should have regard to all the circumstances of the case and ask whether it was right to apply the presumption in r.36.20, thus giving proper effect to the fact that a payment into court had not been made. His lordship doubted whether there was any real difference between the court exercising its discretion under r.44.3 as opposed to r.36.1(2).

In exercising their discretion afresh, the Court ruled that C should pay D's costs as from 21 days after the date of D's letter.

Disallowing costs for detailed assessment delay

In ***Botham v. Khan***, [2004] EWHC 2602 (QB), November 12, 2004, unrep., the facts were that in 1994, two claimants (B) and (L) commenced separate defamation proceedings against the same defendant (K). The actions were tried together in July 1996. At the conclusion of the trials, B was ordered to pay K's costs, save that K was ordered to pay B's costs of, and occasioned by, K's plea of justification, and L was ordered to pay K's costs. Before trial, K was ordered to pay the costs of certain interlocutory applications.

The costs ordered to be paid as between the parties were not promptly subject to taxation or detailed assessment. Early in 1997, in the hope that agreement as to the bills might be reached, it was agreed "that all parties should have a general extension of time to lodge bills for taxation" on the basis that interest would not run during the period of extension, there should be a continued general extension of time. Thereafter, nothing substantial happened until October 2003, over seven years after the judgment, when new solicitors now acting for K formally went on record and served on the solicitors for B and L a bill of costs and a notice of commencement of detailed assessment proceedings.

In July 2004, B and L responded with an application that the assessment proceedings either be stayed or struck out on grounds of delay or, alternatively, that K's costs of both actions be disallowed under CPR r.44.14(1). The first of these grounds was not pursued before the judge as B and L conceded that, in the context of the specific rules of the CPR (explained below), want of prosecution cannot appropriately be relied upon as a separate application in these circumstances.

CPR r.47.7 requires detailed assessment proceedings to be commenced within three months after the date of the relevant judgment or order. Rule 47.8 provides that where the receiving party fails to commence detailed assessment proceedings within the period specified (a) in r.47.7, or (b) by the direction of the court, the paying party may apply for an order requiring the receiving party to commence detailed assessment proceedings within such time as the court may specify. Where such an application is made by the paying party, the court may direct that, unless the receiving party commences detailed assessment proceedings within the time specified by the court, all or part of the costs to which the receiving party would otherwise be entitled will be disallowed.

If, as was the position in this case, (a) the paying party has not made such an application, and (b) the receiving party commences the proceedings later than the period specified in r.47.7, the court may disallow all or part of the interest otherwise payable to the receiving party under the Judgments Act 1838 s.17, or the County Courts Act 1984 s.74, but the court must not impose any other sanction except in accordance with r.44.14 (see further below). The effect of all this is repeated in para.40.7(2) of the Practice Direction (Costs) (see ***White Book*** para.47PD.13).

Rule 44.14 is headed "Court's powers in relation to misconduct" and states that, in certain circumstances, the court may (amongst other things) disallow all or part of the costs which are being assessed. One of (the two) circumstances in which the court may make an order under this rule is where a party or his legal representative, in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or court order.

It was not in dispute that there was a breach of the requirement to commence assessment proceedings within three months. That was sufficient to trigger the power of the court to disallow interest under r.47.8. But the question of disallowing interest did not arise. This was because K did not claim interest, as he accepted that it was a term of the general extension of time agreed by the parties that interest would not run. And so the question became whether the court should exercise its powers under r.44.14, specifically under r.44.14(2) and disallow all of K's costs so as to bring an end to the assessment proceedings.

Richards J. dismissed the claimants' application and allowed K's assessment proceedings to continue. His lordship noted the dearth of authority on the manner in which the court should exercise its powers under r.44.14 in circumstances such as those presented in this case. A key consideration in assessing the significance of the delay was the effect that had upon the ability of B and L to deal with the K's bill of costs. His lordship accepted that B was prejudiced to an extent by the fact that some papers held by a firm of solicitors who had acted for him before 1998 were unavailable (the firm having been dissolved in 2001). But his lordship was not satisfied that all reasonable efforts had yet been made to track down those papers. In any event, that problem was a greater disadvantage in the preparation by B of his own bill of costs for detailed assessment, rather than in dealing with K's bill of costs in the existing assessment proceedings.

Richards J. concluded that a fair assessment was still possible. The delay, though deeply regrettable, ought not in the circumstances cause the court to impose any greater sanction than that already conceded by K in the form of disallowance of interest.

Rates of interest

The case of ***Reed Executive plc v. Reed Business Information Ltd.***, [2004] EWCA Civ 887, [2004] 4 All E.R. 942, CA, was referred to in the In Brief section of Issue 07/04 of ***CP News*** (July 28, 2004).

The account given there was confined to the main point raised by the appeal, that is to say, whether the court, following judgment on liability can, in relation to the question of costs, compel the parties to disclose the details of "without prejudice" negotiations. In disposing of the appeal, Jacob L.J. gave a detailed judgment and Rix L.J. and Auld L.J. indicated that they agreed with it.

That decision followed upon an earlier decision of the Court of Appeal handed down on March 3, 2004 ([2004] EWCA Civ 159) where the Court allowed the defendant's appeal on the merits in a trade mark case. The later decision was made necessary because the parties were unable to agree certain outstanding matters.

At the beginning of his judgment in the later appeal, under the heading "The Minor Points", Jacob L.J. dealt with some "minor disagreements" between the parties to the appeal (paras 2 to 7). (This passage of the judgment is not included in the report of the case at [2004] 1 W.L.R. 3026, CA.)

The last of the minor points dealt with by Jacob L.J. is worthy of note. The point arose in this way. In the course of the proceedings, the defendants (D) were ordered by the trial judge to make an interim payment of costs to the claimants (C) in the sum of £350,000. D complied with this order. Following its determination of the appeal on the merits, the Court of Appeal ordered that that payment should be repaid by C to D. Obviously, D expected to be repaid the sum of £350,000 plus interest. The parties could not agree the rate of interest. Should it be the statutory judgment debt rate (currently 8%), or should it be the commercial rate (normally 1% above base rate)? Needless to say, D argued for the former rate and C for the latter.

The judgment debt rate is fixed by statute; in particular by statutory instruments made under the Judgments Debt Act 1838 s.17 and the County Courts Act 1984 s.74. The current rate was last fixed in 1993 (Judgment Debts (Rate of Interest) Order 1993 and the County Court (Interest on Judgment Debts) Order 1991 (as amended) (*see* ***White Book*** Vol.1 para.40.8.1, and Vol.2 para.9A-649)). As Jacob L.J. pointed out (para.6), base rates have fallen a lot since then. His lordship said the judgment debt rate is an "artificial" rate that must be imposed where there has been judgment for a sum as provided by the legislation. He saw no reason for it to be imposed except in those cases where it must be (para.7). The Court ruled that the commercial rate was the appropriate rate to be applied to the circumstances of this case.

It may be noted that it has been suggested that the maintenance since 1993 of the comparatively high rate of 8% for judgment debts indicates a recognition by the responsible authorities that, in reality, a rate of simple interest lower than that figure is unlikely to provide adequate compensation for a party being kept out of money which ought to have been paid (***Marchday Group plc. v. British Telecommunications plc.***, [2003] EWHC 2627 (Judge Richard Seymour QC)).

The Supreme Court Act 1981 s.35A and the County Courts Act 1984 s.69 provide that when a court awards interest under those sections on debts or damages, it must award simple, not compound interest (White Book Vol.2 paras 9A-103 and 9A-632). In these circumstances, no interest rate is fixed by statute. In sub-para.(e) of para.7.0.17 in the ***White Book***, comment is made on the appropriate rate of interest on damages for the period from the date of cause of action to the date of judgment. It is suggested there, on the basis of ***Pinnock v. Wilkins & Sons***, *The Times* January 29, 1990, CA, that the statutory rate payable on judgment debts "is a convenient starting point".

It could be argued that, if Jacob L.J. was right in saying in the Reed Executive case that the judgment debt rate should not be imposed except in those cases where it must be, no such "starting point" for interest on debts and damages should be assumed. Such an approach may have been sensible in the days when the disparities between

the statutory judgement debt rate and other rates were not as great as they are today. Instead the court should approach the question of interest on debts and damages with an open mind, fixing whatever rate of simple interest is appropriate in the circumstances. Support for such a flexible approach is offered by the decision of the Court of Appeal in ***Jaura v. Ahmed***, [2004] EWCA Civ 210, *The Times* March 18, 2002, CA, where the authorities are reviewed by Rix L.J. (and where the issue was whether the interest rate on damages should reflect cost of borrowings made by the successful party).

Draft judgments

In Section 1 (General principles about appeals) of **Practice Direction (Appeals)**, supplementing CPR Part 52, there are a number of special provisions relating to the Court of Appeal. Among them are paras 15.12 to 15.14. As re-issued by TSO CPR Update 35 (May 2004) with effect from June 30, 2004, they now appear under the heading "Availability of reserved judgments before hand down".

These paragraphs apply where the presiding lord justice is satisfied that the result of the appeal will attract no special degree of confidentiality or sensitivity (para.15.12). The practice is that a copy of the written judgment will be made available to the parties' legal advisers by 4 p.m. on the second working day before the judgment is due to be pronounced or such other period as the Court may direct. This can be shown, in confidence, to the parties but only for the purpose of obtaining instructions and on the strict understanding that the judgment, or its effect, is not to be disclosed to any other person. (For an example of a judgment being made available to a litigant in person, see ***Perotti v. Colyer-Bristow (No. 2)***, [2004] 4 All E.R. 72, CA.) For these purposes, "a working day" is any day on which the Civil Appeals Office is open for business (para.15.13). The appeal will be listed for judgment in the cause list and the judgment handed down at the appropriate time (para.15.14).

Arrangements for the making available of High Court and Court of Appeal reserved judgments before hand down were first made in April 1998 by Lord Bingham L.C.J. in **Practice Statement (Supreme Court: Judgments)** para.2 [1998] 1 W.L.R. 825 (see ***White Book*** Vol.1 para.B5-001) and, in November 1998, were refined in **Practice Statement (Supreme Court: Judgments) (No. 2)** [1999] 1 W.L.R. 1 (*ibid.* para. B6-001). In December 2001, Lord Phillips M.R. gave further directions, confined to the availability before hand down of reserved judgments in the Court of Appeal in **Practice Note (Court of Appeal: Handed Down Judgments)** [2002] 1 W.L.R. 344, CA (*ibid.* para. B7-001). These practice notes and statements, none of which have been revoked, do not supplement the CPR but stand alone. However, it may be noted that paras 15.12 to 15.14 of Practice Direction (Appeals), which is a supplementing practice direction, seem to be substitutes for paras 1 to 3 of the Practice Note issued by Lord Phillips M.R. in December 2001. Presumably, paras 1 to 3 are in effect revoked and replaced by paras 15.12 to 15.14 (which do not apply to the High Court).

The practice of making judgments (whether trial or appeal) available to counsel before hand down has a number of practical advantages. It enables counsel receiving judgment to come prepared with draft consequential orders and with settled applications for costs and for permission to appeal. It also provides a mechanism for ensuring that the judgment does not contain slips (misdescriptions of events, errors in dates, etc.) which the judge would have to correct after handing down.

However, there is a temptation to regard a judgment made available before hand down as a "draft" judgment, and this can encourage the idea that the judge is still open to submissions by counsel to persuade him away from conclusions reached in the "draft". Nowadays, it is not uncommon to find in handed down judgments paragraphs in which it is obvious enough that the judge is responding to further written submissions made by counsel following their receipt of the "draft". And there have been cases where a judge has re-considered his judgment and made significant changes to it in the light of such submissions (*e.g.* ***Robinson v. Bird***, [2003] EWCA Civ 1820, *The Times* January 20, 2004, CA). In recent years, the power of a court to recall its judgment after handing down but before orders carrying it into effect have been perfected or sealed has been considered in a number of cases (see ***White Book*** para.40.2.1). It would be expected that a "draft" judgment might be reconsidered in wider circumstances than the limited circumstances in which a handed down judgment might be recalled.

In some recent cases, the Court of Appeal has attempted to discourage attempts by counsel to make further submissions following their perusal of judgments made available to them before hand down. These cases are referred to in commentary in the ***White Book***, in particular in para. 40.2.1. The Court of Appeal returned to this matter in the recent case of ***Gravgaard v. Aldridge & Brownlee***, *The Times* December 2, 2004, CA. In that case, May L.J. referred to his judgment in ***Robinson v. Bird*** (*op. cit.*), and said that, after a judgment has been circulated before hand down, counsel would only rarely be allowed to reopen contentious matters. His lordship added that it would rarely be appropriate for the parties to attempt to add to their case or make a new case. In the event, the Court took account of counsel's submissions and made modest changes to the text before releasing the judgment.

CPR UPDATE

AMENDMENTS TO PRACTICE DIRECTIONS

In August, 2004, a number of changes to provisions in certain CPR practice directions were published in TSO CPR Update 36 (see Issue 08/04 of ***CP News***, October 25, 2004). Subsequently, what are described as "amendments" to Update 36 were issued.

These further amendments relate to **Practice Direction (Appeals)** supplementing CPR Pt. 52 (see First Supplement to the ***White Book*** 2004 Edition para.52PD.1, p.29), and to Practice Direction (Applications Under the Companies Act 1985 etc.) (see ***White Book*** Vol.2, para.2G-1 *et seq.*). They came into effect on October 8, 2004.

Practice Direction (Applications Under the Companies Act 1985 etc.) is the sole remaining "specialist jurisdiction" referred to in CPR Pt 49 (see ***White Book*** Vol.1 para.49.1.1). The amendments to this practice direction are designed to make provision for two types of application. First, applications relating to the formation of European public limited-liability companies, and secondly, to applications under the Criminal Justice and Police Act 2001 s.59 relating to property seized in connection with a company investigation under Pt XIV of the Companies Act 1985.

The amendments to **Practice Direction (Appeals)** deal with appeals to the High Court against a decision of the Secretary of State or a national financial supervisory authority to oppose certain step being taken in relation to a European public limited-liability company.

These various amendments are set out below. Paragraph and page references are to volume 2 and Supplement 2 of the ***White Book*** 2004 Edition as indicated.

Practice Direction (Applications under the Companies Act 1985 etc.)

para.2G-1, Vol. 2, p.551

In sub-para. (1) of para. 1, after the definition of "the Act" insert:
"the CJPA" means the Criminal Justice and Police Act 2001;"

After the definition of "the court" insert:
"the EC Regulation" means the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE);

At the end of definition of "the Rules" substitute a semicolon for the full-stop and then insert:
"SE" means a European public limited-liability company (Societas Europaea) within article 1 of the EC Regulation.

para.2G-2, Vol. 2, p.551

For sub-para. (1) of para. 2 substitute:
"(1) Except in the case of the applications mentioned in sub-paragraph (4) below—
(a) every application under the Act, whether made in the High Court or in the county court;
(b) every application under Part VII FISMA;
(c) every application under Articles 25 and 26 of the EC Regulations; and
(d) every application under section 59 of the CJPA,
must be made by the issue of a claim form and the use of the procedure set out in CPR Part 8, subject to any modification of that procedure under the practice direction or any other practice direction relating to applications under the Act."

para.2G-3, Vol. 2, p.552

In para. 3, for "applications under the Act or under Part VII FISMA" substitute "applications to which this practice applies"

After para. 3, insert new para. 3A as follows:

"Applications under the EC Regulation
3B.(1) An application for a certificate under Article 25(2) of the EC Regulation must—
(a) be issued in the Chancery Division of the High Court;
(b) identify the pre-merger acts and formalities applicable to the applicant company, and be accompanied by evidence that those acts and formalities have been completed;
(c) be accompanied by copies of:
(i) the draft terms of merger as provided for in Article 20 of the EC Regulation;
(ii) the entry in the Gazette containing the particulars specified in Article 21 of the EC Regulation;
(iii) a report drawn up and adopted by the directors of the applicant company containing the same information as would be required by paragraph 4 of Schedule 15B to the Act if there were to be a scheme of arrangement under sections 425 and 427A of the Act;
(iv) the expert's report to the members of the applicant company drawn up in accordance with paragraph 5 of Schedule 15B to the Act or Article 22 of the EC Regulation; and
(v) the resolution of the applicant company approving the draft terms of merger in accordance with Article 23 of the EC Regulation.
(2) Attention is drawn to Article 26(2) of the EC Regulation. Where it is proposed that the registered office of an SE should be in England or Wales, each of the merging companies is required, within 6 months

after a certificate is issued in respect of that company under Article 25(2), to submit the certificate to the High Court in order that it may scrutinise the legality of the merger.
(3) Where a merging company is required to submit a certificate to the High Court under Article 26(2) of the EC Regulation, if no other merging company has commenced proceedings under Article 26, that company shall commence such proceedings by issuing a claim form in the Chancery Division.
(4) The claim form must—
(a) identify the SE and all of the merging companies;
(b) be accompanied by the documents referred to in paragraph 3B(6); and
(c) be served on each of the other merging companies.
(5) Where a merging company is required to submit a certificate to the High Court under Article 26(2) of the EC Regulation and proceedings under Article 26 have already been commenced, that company shall—
(a) file an acknowledgment of service not more than 14 days after service of the claim form, and serve the acknowledgment of service on each of the other merging companies; and
(b) file the documents referred to in paragraph 3B(6) within the time limit specified in Article 26(2), and serve copies of those documents on each of the other merging companies.
(6) Each merging company must file and serve the following documents in proceedings under Article 26 of the EC Regulation—
(a) the certificate issued under Article 25(2) in respect of that company;
(b) a copy of the draft terms of merger approved by that company;
(c) evidence that arrangements for employee involvement have been determined by that company pursuant to Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees; and
(d) evidence that the SE has been formed in accordance with the requirements of Article 26(4) of the EC Regulation.
(7) Proceedings under Article 25 and Article 26 of the EC Regulation will be heard by a High Court judge.
(8) Paragraphs 10 to 13 of this practice direction apply to proceedings under Article 25 and 26 of the EC Regulation."

para.2G-10, Vol. 2, p.556

In para. 10, for "Every application under the Act or under Part VII FISMA" substitute "Every application to which this practice applies"

para.2G-13, Vol. 2, p.557

After para. 13, insert new para. 13A as follows:

"Applications under section 50 of the CJPA
14.(1) This paragraph applies to applications under section 59 of the CJPA in respect of property seized in the exercise of the power conferred by section 448(3) of the Act (including any additional powers of seizure conferred by section 50 of the CJPA which are exercisable by reference to that power).
(2) An application to which this paragraph applies should be made to a judge of the Chancery Division.
(3) The defendant to an application under section 59(2) or 59(5)(c) of the CJPA shall be the person for the time being having possession of the property to which the application relates.
(4) On an application under section 59(2) or 59(5)(c) of the CJPA, the claim form and the claimant's evidence must be served on—
(a) the person for the time being having possession of the property to which the application relates;
(b) in the case of an application under section 59(2) for the return of seized property, the person specified as the person to whom notice of such an application should be given by any notice served under section 52 of the CJPA when the property was seized;
(c) in the case of an application under section 59(5)(c), the person from whom the property was seized (if not the claimant); and
(d) in all cases, any other person appearing to have a relevant interest in the property within the meaning of section 59(11) of the CJPA.
(5)An application under section 59(2) or 59(5)(c) of the CJPA must be supported by evidence—
(a) that the claimant has a relevant interest in the property to which the application relates within the meaning of section 59(11) of the CJPA; and
(b) in the case of an application under section 59(2), that one or more of the grounds set out in section 59(3) of the CJPA is satisfied in relation to the property.
(6) The defendants to an application under section 59(5)(b) of the CJPA by a person for the time being in possession of seized property shall be—
(a) the person from whom the property was seized; and
(b) any other person appearing to have a relevant interest in the property to which the application relates within the meaning of section 59(11) of the CJPA.
(7) If an application to which this paragraph applies would not otherwise be served on the person who seized the property, and the identity of that person is known to the applicant, notice of the application shall be given to the person who seized the property.
(8) In all applications to which this paragraph applies, when the court issues the claim form it will fix a date for the hearing."

Practice Direction (Appeals)

para.52PD.117, Supplement 2, p.103

In para. 23.1, after sub-para. (17) insert:
(18) regulation 74 of the European Public Limited-Liability Company Regulations 2004.

para.52PD.124, Supplement 2, p.107

After para. 23.8B insert the following new paragraph:

"Appeals under regulation 74 of the European Public Limited-Liability Company Regulations 2004

23.8C (1) In this paragraph—

(a) 'the 2004 Regulations' means the European Public Limited Liability Company Regulations 2004;

(b) 'the EC Regulation' means Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE);

(c) 'SE' means a European public limited-liability company (Societas Europaea) within the meaning of Article 1 of the EC Regulation.

(2) This paragraph applies to appeals under regulation 74 of the 2004 Regulations against the opposition—

(a) of the Secretary of State or national financial supervisory authority to the transfer of the registered office of an SE under Article 8(14) of the EC Regulation; and

(b) of the Secretary of State to the participation by a company in the formation of an SE by merger under Article 19 of the EC Regulation.

(3) Where an SE seeks to appeal against the opposition of the national financial supervisory authority to the transfer of its registered office under Article 8(14) of the EC Regulation, it must serve the appellant's notice on both the national financial supervisory authority and the Secretary of State.

(4) The appellant's notice must contain an application for permission to appeal.

(5) The appeal will be a review of the decision of the Secretary of State and not a re-hearing. The grounds of review are set out in regulation 74(2) of the 2004 Regulations.

(6) The appeal will be heard by a High Court judge."

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