CIVIL PROCEDURE NEWS

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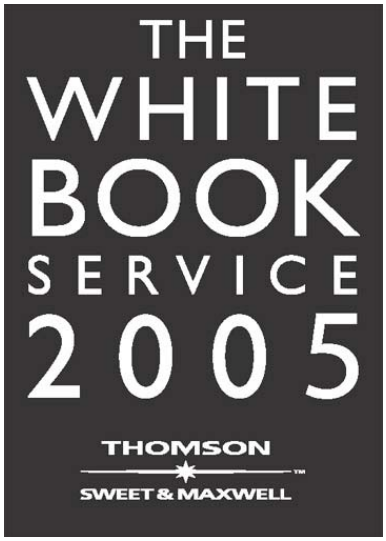

IN BRIEF

Cases

- **ALLI v. LUTON & DUNSTABLE N.H.S. TRUST** [2005] EWCA Civ 551, April 27, 2005, CA, unrep. (Auld, Latham & Jacob L.JJ.)

CPR rr.3.1(2(i), 36.10, 36.21(3) & 44.3(4)(c)—in personal injury claim, before proceedings commenced, claimant (C) making offer to settle liability issue—offer not accepted by defendant (D)—at separate trial of liability, judge finding D 100% liable but making no order for costs—held, allowing C's appeal, (1) the judge's conclusion that C had succeeded on a case that had materially changed was wrong, (2) D should pay C's costs on the indemnity basis with enhanced interest from the date of C's offer (see ***Civil Procedure 2005*** Vol. 1 para. 36.21.1 & 44.3.12)

- **HSS HIRE SERVICES GROUP PLC. v. BMB BUILDERS MERCHANTS LTD** [2005] EWCA Civ 627, *The Times*, May 31, 2005, CA. (Waller & Mance L.JJ. and Sir William Aldous)

CPR rr.3.1(2)(i), 36.19 & 44.3—company (C) bringing claim for breach of agreement against another company (D)—D's offer by way of payment into court not accepted by C—subsequently, issue of liability ordered to be tried separately—judge determining liability in favour of C—on question of costs, fact of D's offer revealed to judge—judge ordering that D should pay C's costs of the trial—held, allowing D's appeal, the question of costs should be reserved pending determination of quantum (see ***Civil Procedure 2005*** Vol. 1 paras 36.19.1 & 44.3.12)

- **WRIGHT v. SULLIVAN** [2005] EWCA Civ 656, May 27, 2005, CA, unrep. (Brooke, Dyson & Lloyd L.JJ.)

CPR rr.3.1(2)(m), 25.7 & 35.3—pedestrian (C) bringing claim for damages for serious personal injuries against motorist (D)—liability compromised on basis that D 70% liable—C in need of continuing care—C applying for interim payment, partly for purpose of enabling a clinical case manager (B) to be engaged to assist her—judge granting application—held, dismissing D's appeal, the judge had not erred in refusing to make the order subject to a condition that any communications involving B, and covered by C's litigation privilege, should be disclosed to D (see ***Civil Procedure 2005*** Vol. 1 paras 25.7.1, 25.7.16 & 31.3.12)

- **FOURIE v. LE ROUX** [2005] EWCA Civ 204, *The Times* April 25, 2005, CA (Sir Andrew Morritt V-C, Mance & Jonathan Parker L.JJ.)

CPR rr.25.1(1)(f) & 25.4, Civil Jurisdiction and Judgments Act 1982 s.25, Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 para. 2, Insolvency Act 1986 s.426—South African court (1) making order for the compulsory winding-up of a company (X) incorporated in that country, (2) appointing liquidator (F) and authorising him to institute proceedings in England against controlling shareholder (L) of X to recover property, and (3) issuing letter of request to English High Court to act in aid of the South African court—F obtaining ex parte freezing order to value of £3.4m and serving originating application under s.426—judge setting aside freezing order (first order) on ground of want of jurisdiction ([2004] EWHC 2260 (Ch))—F then immediately issuing claim form against L seeking relief on various statutory and non-statutory grounds based on South African and English law—in these proceedings, in which X was joined as co-claimant, judge granting X freezing order (second order) to value of £750,000, on the basis that X had an arguable non-statutory claim against L actionable in England ([2004] EWHC 2557 (Ch))—held, dismissing appeals by F and L (except to the extent of increasing the value of the second order to £900,000), (1) in relation to the first order (a) the English High Court has jurisdiction to grant interim relief where "proceedings" have been commenced in a foreign jurisdiction as provided by s.25, but (b) in this case, the winding-up order of the foreign court, taken together with the issuing of the letter of request, were not "proceedings" within the meaning of that section, and (2) in relation to the second order (a) the limitation of the interim relief to the non-statutory claim by X was correct, because (b) the s.426 application (whether with or without the letter of request) did not constitute a connection between foreign proceedings and asset freezing orders sought in the English court sufficient to found jurisdiction for a wider order—***Hughes v. Hannover Ruckversicherungs-Aktiengesellschaft***, [1997] 1 B.C.L.C. 497, CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 25.1.27 & 25.4.2, and Vol. 2 para. 5-26)

- **GLIDEPATH B.V. v. THOMPSON** [2005] EWHC 818 (Comm), May 4, 2005, unrep. (Colman J.)

CPR rr.5.4, 32.13, 62.2(1) & 62.10, Practice Direction (Arbitration) para. 4.5, Arbitration Act 1996 s.9—company (C) and shareholders bringing claim against C's management team and others (D) alleging receipt of secret profits in fraud of C—C applying for and obtaining freezing orders and third party disclosure orders against D—subsequently, by consent, C's claim stayed by court order under s.9 pending arbitration—C's allegations in part involving transaction transferring part of business of one company (X) to another (Y)—in separate legal proceedings, former employee (O) of X making claims against X in part arising out of the

transfer to Y—in C's claim against D, O applying for permission to inspect the particulars of claim, the notices of applications and respective orders made and granted before C's claim was stayed, and any witness statements filed with the court in those proceedings—D opposing O's application—held, dismissing the application, (1) O was "any other person" within r.5.4(5), and was a stranger to the arbitration and to the s.9 application, (2) in the absence of the consent of C and D, the court's discretion should be exercised by reference to the principles of confidentiality attaching to arbitral proceedings, (3) in the circumstances, O should not be granted permission to inspect as he had failed to show that inspection (a) was reasonably necessary to protect or establish the legal rights he was seeking to enforce in the separate legal proceedings, or (b) was otherwise in the interests of justice—private and confidential character of proceedings ancillary to the arbitral process and before stay ordered under s.9 considered and explained—***Science Research Council v. Nasse***, [1980] A.C. 1028, H.L., ***Ali Shipping Corporation v. Shipyard Trogir***, [1999] 1 W.L.R. 314, CA, ***Department of Economic Policy and Development of the City of Moscow v. Bankers Trust Co.***, [2004] EWCA Civ 314, [2004] 3 W.L.R. 533, CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 5.4.8 & 5.4.16, and Vol. 2 paras 2E-44 & 2E-99)

■ **PEROTTI v. WESTMINSTER CITY COUNCIL [2005] EWCA Civ 581, *The Times* May 30, 2005, CA, unrep. (Brooke & Mance L.JJ.)**

CPR r.52.11(3), Practice Direction (Appeals) paras. 3.2 & 5.12(3), Practice Direction (Citation of Authorities) [2001] 1 W.L.R. 1001, para. 6.1—litigant in person (C) bringing High Court claim for damages against local authority (D)—claim making allegations arising out of D's bringing misconceived proceedings against C for council tax arrears—D applying to strike out claim and for summary judgment—at hearing, C permitted to make personal tape recording of the proceedings—Master granting D's application—in addition Master refusing C's applications that (1) he be provided at public expense with a transcript of the Master's judgment, and (2) he be granted permission to appeal—D applying for permission to appeal to a High Court judge—D's Notice of Appeal alleging violation of Convention rights but not setting out clearly grounds of appeal (as required by para. 3.2 and r.52.11(3))—D applying for a stay of the appeal until he had applied for an order that he be provided with a transcript of the Master's judgment—Cox J. ordering (1) that D provide grounds of appeal, and (2) that D's application for a transcript should be considered only after he had done so—upon D's not complying with this order, Hughes J. dismissing D's application for permission to appeal—D (who was made subject to a civil restraint order) applying to Court of Appeal for permission to appeal against the order of Cox J.—held, refusing permission, (1) in the circumstances, D was not entitled to demand as of right that a transcript of the Master's judgment be provided at public expense, (2) C had his own tape recording and, in addition, could have taken advantage of D's counsel's duty to make his note of the judgment available to him (para. 5.12(3))—Court giving judgment in open court and releasing it for citation because it raised some procedural points of general application—Court commenting that it is important that care should be taken to ensure that litigants in person understood what was meant when a Notice of Appeal was "listed for dismissal"—Court stating (para. 24) that transparency as to the procedure being adopted is particularly important in this context because, although it has no jurisdiction to entertain an appeal against a refusal of permission to appeal by a lower court on the merits, it does have jurisdiction if the complaint being made by the appellant is that the lower court should not have imposed a sanction on him for failing to comply with a procedural requirement in connection with his appeal (see ***Civil Procedure 2005*** Vol. 1 paras 2.3.7, 52PD.3, 52PD.24 & B4-001)

■ **R. (KARKUT) v. LEWISHAM LONDON BOROUGH COUNCIL [2005] EWHC 354 (Admin), February 17, 2005, unrep. (Collins J.)**

CPR rr.54.8 & 54.13—council (C) bringing possession proceedings against squatters (D)—county court judge refusing to adjourn proceedings—High Court judge ordering (1) that C should be permitted to proceed in a claim for judicial review of D's decision to commence the possession proceedings, and (2) that D should file and serve an acknowledgment of service before time limits stipulated by r.54.8—judge's order containing term giving parties liberty to apply to discharge or vary the order—D applying to set aside order—held, granting the application, (1) C's claim was unarguable and permission to proceed should not have been granted, (2) although r.54.13 states that a defendant may not apply to set aside an order giving permission to proceed, the court retains an inherent power to set aside if satisfied that it is in the interests of justice to do so, (3) a stay of inferior court proceedings should not be made contingent on the granting of permission to proceed with judicial review claim, (4) where a stay is necessary the required protection can be given by an interim order, (5) if there is a real need for urgency, the court may indicate that the time limits in r.54.8 should be abridged, but it would never be appropriate for the court to direct that an acknowledgment of service be lodged within a particular time, or at all—***R. (Webb) v. Bristol City Council***, [2001] EWHC Civ 696, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 54.13.1, 54.8.1 & 54.10.2)

■ **R. (R.W.) v. SHEFFIELD CITY COUNCIL [2005] EWHC 720 (Admin), April 14, 2005, unrep. (Gibbs J.)**

CPR rr.1.1, 3.1(2)(b) & 54.3, Housing Act 1996 s.184—local authority (W) deciding that it was under no duty to house homeless person (C) because he had no local connection—appeal by C to a county court

pending—another local authority (D), with whose area C did have connection, offering C accommodation in their area—C unwilling to accept that offer—D refusing to pay for suitable accommodation for C in W's area - C granted permission to bring claim for judicial review against D and W joined as interested party—held, (1) the claim should be adjourned, and (2) pending the disposal of the county court appeal, D should continue to provide temporary accommodation for C in W's area—in making this interim order, judge stating (para. 36) he was guided by the overriding objective; in particular, he was seeking (a) to avoid a multiplicity of proceedings, and (b) to ensure (i) that C's case is dealt with on an equal footing to those of D and W, and (ii) that the matter is finally disposed of expeditiously and fairly (see ***Civil Procedure 2005*** Vol. 1 paras 1.4.15 & 3.1.3)

■ **SECRETARY OF STATE FOR TRADE AND INDUSTRY v. PAULIN** [2005] EWHC 888 (Ch), *The Times* May 26, 2005 (Sir Andrew Morritt V-C)

CPR rr.2.1(2), 52.2 & 52.3(1), Access to Justice Act 1999 (Distribution of Appeals) Order 2000 art. 2, Practice Direction (Insolvency Proceedings) paras 1.1(5), 17.2(1) & 17.6, Company Directors Disqualification Act 1986 ss.6 & 21(2), Insolvency Rules 1986 rr.7.47 & 7.49, Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987 r.2—registrar granting Secretary of State's (C) application for order disqualifying director (D) of insolvent company under s.6 (1)—held, (1) appeals from disqualification orders under s.6 are regulated by rr.7.47 and 7.49 and lie to a single judge of the High Court (first appeal) and thence to the Court of Appeal, (2) because they are so regulated, such appeals are properly characterised as "insolvency proceedings" within para. 1.1(5), (3) therefore a first appeal falls within para. 17.2(1) and, by operation of para. 17.6, may be made without the permission of any court—***In re Tasbian Ltd (No. 2)***, [1990] B.C.C. 322, ***In re Probe Data Systems Ltd (No. 3)***, [1992] B.C.C. 110, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 2.1.4 & 52.3.1, and Vol. 2 paras 3E-1, 3E-17 & 9A-882)

■ **U. v. LIVERPOOL CITY COUNCIL** [2005] EWCA Civ 475, *The Times* May 16, 2005, CA (Brooke, Rix & Dyson L.JJ. and costs assessor)

CPR rr.43.2 & 44.3A, Practice Direction (Costs) paras 11.7 & 11.8(2), Courts and Legal Services Act 1990 s.58, Conditional Fee Agreements Regulations 1990 reg. 3—child (C) bringing tripping claim in a county court against local authority (D)—in October 2001, C entering into CFA with solicitors with single stage success fee of 100%—on April 10, 2003, D filing defence to claim—on August 1, 2003, claim settled on basis that D pay £2,500 and costs on the standard basis—on detailed assessment, lump sum costs agreed, but district judge ruling that success fee was reasonable for period to April 10, 2003, but thereafter should be reduced to 5% for the substantive proceedings and the detailed assessment proceedings—on C's appeal, circuit judge holding that the 100% success fee should apply throughout—Court of Appeal granting D permission to appeal—held, dismissing appeal, (1) the court has no power to direct that a success fee is recoverable at different rates for different periods of the proceedings, (2) in so far as para. 11.8(2) suggests otherwise, it is wrong, (3) practice directions provide invaluable guidance on matters of practice, but (a) they have no legislative force, and (b) in so far as they contain statements of the law which are wrong, they carry no weight at all—Court stating that a single stage success fee of 50% would have been reasonable on C's CFA at the time it was made—***Atack v. Lee***, [2004] EWCA Civ 1712, December 16, 2004, CA, unrep., ***Halloran v. Delaney***, [2002] EWCA Civ 1258, [2003] 1 W.L.R. 28, CA, ***Godwin v. Swindon Borough Council***, [2001] EWCA Civ 1478, [2001] 4 All E.R. 641, CA, ***In re C. (Legal Aid : Preparation of Bill of Costs)***, [2001] 1 F.L.R. 602, CA, ***Leigh v. Michelin Tyre plc.***, [2003] EWCA Civ 1766, [2004] 1 W.L.R. 846, CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 2.3.4, 44.3A.3, & 44PD.5, and Vol. 2 para. 7A-36)

Statutory Instruments

■ **COURT OF PROTECTION (AMENDMENT) RULES 2005 (S.I. 2005 No. 667)**

amend Court of Protection Rules 2001—amend r.24 (Notification of application for appointment of receiver, etc.), r.78 (Administration fee), r.79 (Transaction fee) & r.82 (Winding up fee), insert r.79B (Estate account fee), omit r.58 (Lodgement of security)—amends Appendix and changes various fees therein—transitional provision—in force April 1, 2005 (see ***Civil Procedure 2005*** Vol. 2 paras 6B-250, 6B-284, 6B-304A, 6B-308 & 6B-318)

■ **COURT OF PROTECTION (ENDURING POWERS OF ATTORNEY) (AMENDMENT) RULES 2005 (S.I. 2005 No. 668)**

amend Court of Protection (Enduring Powers of Attorney) Rules 2001 r.26 (Schedule of fees)—also changes various fees in Sched.2—transitional provision—in force April 1, 2005 (see *Civil Procedure 2005* Vol. 2 paras 6B-418 & 6B-412)

■ **INSTITUTE OF TRADE MARK ATTORNEYS ORDER 2005 (S.I. 2005 No. 240)**

Courts and Legal Services Act 1990 ss.27 & 28—designates the Institute of Trade Mark Attorneys as an authorised body for purposes of ss.27 & 28 - rights of audience and right to conduct litigation—in force April 1, 2005 (see ***Civil Procedure 2005*** Vol. 2 paras 9A-612 & 9B-346)

IN DETAIL

Interim Payment Order

In ***Wright v. Sullivan***, [2005] EWCA Civ 656, May 27, 2005, C.A., unrep., a pedestrian (C) brought a claim in the High Court for personal injuries against the driver of a car (D). Liability was compromised on the basis that D was 70% liable and the proceedings continued on the issue of damages. C had suffered serious injuries in the accident and had some pre-existing conditions that may or may not have been aggravated by the accident. She was going to be in need of continuing care, but the appropriate care arrangements remained to be settled. It was clear that the assessment of damages was not going to be a straight-forward matter. C's affairs were administered by the Court of Protection, and a partner in the firm of solicitors acting for her had been appointed receiver. C's mother acted as her litigation friend.

C's predicament strongly suggested that a clinical case manager should be engaged and that an appropriate care regime should be set up under the manager's auspices and supervision. The parties agreed that an occupational therapist (B) would be an appropriate manager. C applied to a judge for an order under the Supreme Court Act 1981 s.32 and CPR r.25.7 requiring D to make an interim payment to C, partly for the purpose of enabling B to be engaged.

In negotiations with C before this application was heard, D proposed that if a person such as B were appointed as C's clinical case manager, she should be instructed jointly by the parties to consider C's needs and to prepare a report. D's insurers were prepared to fund this process. D proposed that the question of an interim payment should be deferred until after the report was ready. These arrangements were not acceptable to C.

At the hearing of the application, D proposed that any order for an interim payment should be made conditional on the case manager receiving joint instructions from the parties and reporting to them jointly. It seems that D was anxious that neither party should be permitted to have "behind closed doors" access to B and that the process of arriving at an appropriate care regime for C should be conducted in a spirit of openness. A judge made an interim payment order in the sum of £50,000, but declined to make it subject to the conditions sought by D. D appealed against the order. The Court of Appeal (Brooke, Dyson & Lloyd L.JJ.) dismissed D's appeal.

On the appeal, D argued that the order for interim payment should have attached to it the following directions:

(i) The representatives of both parties and their expert witnesses have liberty to communicate with the case manager in relation to matters relevant to likely issues in the claim;

(ii) The substance of all communications between the representatives of either party and their expert witnesses and the case manager in relation to matters relevant to likely issues in the claim be recorded and disclosed immediately.

It was the second of these directions that occasioned difficulty; principally because, in effect, D was contending that he was entitled to the disclosure of communications which would ordinarily be the subject of litigation privilege.

Brooke L.J. explained the role of the clinical case manager, as it has emerged in modern times, and referred to the principles and guidelines for case management best practice issued in January 2005 by the British Association of Brain Injury Case Managers. His lordship said he found it impossible to accept D's submissions. It seemed to him inevitable that the clinical case manager "should owe her duties to her patient alone". She must win the patient's trust and if possible her cooperation in what is being proposed, and while it will be in her interests that she should receive a flow of suggestions from any experts who have been instructed in the case, "she must ultimately make decisions in the best interests of the patient and not be beholden to two different masters" (para. 26).

Brooke L.J. explained that any communication the case manager may have with the C's expert witnesses whose dominant purpose is not one which attracts litigation privilege "will be disclosed as a matter of course", and added (para. 27):

"But if the clinical case manager considers that it is in her client's interests that she should attend a conference with legal advisers at which advice is being sought, then the privilege is not hers to waive, and I do not consider that the court would have any power to direct such waiver."

When granting C's application for an interim payment order, the judge also directed that any witness statement made by B to be tendered by a party at the assessment of damages hearing, should recite that, although she is a witness of fact, she should treat herself as owing the same duties to the court in the making of the statement as if she were an expert reporting to the court. C appealed against this direction. The Court allowed the appeal. Brooke L.J. said (para. 33) the role of B, if she is called to give evidence, will clearly be one of a witness as to fact. Her evidence would be directed at explaining what she did and why she decided to do it. She will not be giving evidence of expert opinion and the regime of CPR Pt 35 will not therefore relate to her evidence. His lordship did not deal directly with the point whether, in the circumstances of this case and in the interests of openness, it would have been appropriate to subject the case manager as a witness to some of the duties routinely imposed on expert witnesses.

Effect of payment in on costs of trial on liability

In ***HSS Hire Services Group Plc. v. BMB Builders Merchants Ltd***, [2005] EWCA Civ 627, *The Times* May 31, 2005, CA., the claimant company (C) brought a claim for breach of contract. The court ordered that the issue of liability should be tried separately from the issue of damages. Before this order was made, the defendant company (D) made an offer by way of a payment into court (a Part 36 payment). This offer was not accepted by C. At the trial of the liability issue, the judge found in favour of C.

The judge was informed of the fact that a payment into court had been made (but not of the amount offered). The judge ordered that D should pay C's costs of the trial of the liability issue. The judge said that, under the CPR, the courts are encouraged to adopt an "issues-based" approach to costs. In this case, the separate trial of liability was "a completely separate issue". C had expended money on pursuing it and had won. The judge noted that among the cost orders that a court may make under CPR r.44.3 is an order that a party must pay "costs relating only to a distinct part of the proceedings" (r.44.3(6)(f)). The question whether D may have to pay C by way of damages more or less than they had offered in their Part 36 payment did not affect the matter.

The Court of Appeal (Waller & Mance L.JJ. and Sir William Aldous) gave D permission to appeal, and held that the judge was not entitled to deal with costs in the way he did. Waller L.J. said parties should be encouraged to make Part 36 payments in and they should also be encouraged to try preliminary points if that could lead to the saving of costs overall. His lordship added (para. 29):

"If payments in are to be totally ignored at the conclusion of the trial of a preliminary issue, that will discourage applying for the trial of the same, and may even discourage Part 36 offers where preliminary issues have been ordered. The proper approach at the conclusion of a trial of a preliminary issue where there has been a Part 36 payment in or a Part 36 offer should therefore normally be to adjourn the question of costs pending the resolution of all the issues including damages, at which stage the quantum of the Part 36 offer can be revealed and the discretion in relation to costs exercised in the knowledge of it."

CPR r.36.19(2) states that the fact that a Part 36 payment has been made shall not be communicated to the trial judge until all questions of liability and the amount of money to be awarded have been decided. But r.36.19(3) provides that r.36.19(2) does not apply:

"(a) where the defence of tender before claim has been raised;

(b) where the proceedings have been stayed under rule 36.15 following acceptance of a Part 36 offer or Part 36 payment; or

(c) where—

(i) the issue of liability has been determined before any assessment of the money claimed; and

(ii)the fact that there has or has not been a Part 36 payment may be relevant to the question of the costs of the issue of liability."

In this case, it was on the basis of para. (c) of r.36.19(3) that D's Part 36 payment was revealed to the judge trying the liability issue. In the Court of Appeal, Waller L.J. considered the meaning and purpose of para. (c). His lordship said this provision must be construed together with CPR r.44.3, and in particular with sub-rule (4). That sub-rule provides that, in deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including:

"(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) 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)."

Waller L.J. concluded that r. 36.19(3)(c) does not allow for the disclosure of the amount of the payment in. It allows simply the disclosure of the fact that there has been one or the fact that there has not. His lordship added (para. 35):

"The consequences of that being the correct interpretation ... seem to me to be as follows. If the court is told that there has been no payment in, then the court is free to exercise its discretion to award costs in relation to the preliminary issue and there is no difficulty with r. 44.3(4)(c). If however it is told that there has been a payment in, then, in any but perhaps the most exceptional case, I find it very difficult to think that there could be circumstances where if the issue of damages remains to be decided, the judge can do otherwise than to reserve the question of costs until after the determination of that issue."

The Court held that this was not an exceptional case. The Court concluded that the judge should have reserved the question of costs pending determination of quantum and held that his order should be reversed to reflect that conclusion.

Costs where liability judgment more advantageous than offer

In ***Alli v. Luton & Dunstable N.H.S. Trust*** [2005] EWCA Civ 551, April 27, 2005, C.A., unrep., the facts were that on January 17, 2001, a nurse (C) was injured at work. She fell whilst descending a flight stairs which, she said, were inadequately lit. Her employers (D) said the stairs could be lit by manual switches, to be operated by persons going up and down the stairs. C replied that, because of the lack of light from adjacent corridors at the time of the accident, the manual switches themselves could not be seen. D disputed that.

On August 11, 2003, before the issue of her claim letter, C offered to settle the issue of liability on the basis that she was 20% contributorily negligent. D did not accept that offer or make a counter offer. On November 5, 2004, the issue of liability was tried in a county court. At the trial, C and an eye-witness were closely cross-examined by counsel for D. On the issue of fact as to the visibility of the manual switch at the top of the stairs, counsel successfully countered the allegation that it was not visible. As the evidence emerged it became apparent that C's case was that the staircase was in darkness towards the bottom of the flight where she fell.

The judge found as a fact that there was sufficient light to see the manual switch at the top of the stairs, but concluded that that was not sufficient to discharge D's statutory obligations (in particular, under the Workplace (Health, Safety and Welfare) Regulations 1992 reg. 8.1). He rejected the argument that C was contributorily negligent in failing, once she found herself in darkness when descending the stairs, to then ascend the stairs to operate the manual switch. Accordingly, the judge found D 100% responsible for the accident.

On the question of costs, it was revealed to the judge that, before the commencement of proceedings, C had made an offer to settle the liability issue (see r.36.10). On the basis of this offer, C argued that D should pay C's costs on the standard basis until September 3, 2003, and thereafter on the indemnity basis, together with penalty interest, as provided for in CPR Pt 36 (r.36.21(3)). The judge decided that there should be no order for costs. In the judge's opinion, in the course of trial the factual basis upon which C asserted D's liability had changed. There was no application for the matter to be adjourned on the basis that the pleadings needed to be amended and the judge proceeded to give judgment on the basis of the evidence. In reaching his conclusion on costs the judge took the view that the case presented at trial was very different from the case which D originally had to meet and in the light of which they rejected C's offer to settle.

It may be noted that in ***Beoco Ltd v. Alfa Laval Co. Ltd*** [1995] Q.B. 137, C.A. (a pre-CPR case), Stuart-Smith L.J. said that, as a general rule, where a claimant makes a late amendment to his pleadings, which substantially alters the case the defendant has to meet, the defendant is entitled to the costs of the action down to the date of amendment. It is possible that the judge had authorities such as this in mind, as well as those post-CPR cases dealing with the argument that, on the basis of change of circumstances, the time for accepting an offer should not be extended (e.g. ***Capital Bank Plc. v. Stickland*** [2004] EWCA Civ 1677, [2005] 2 All E.R. 544, C.A.).

C appealed against the judge's decision to make no order for costs and the Court of Appeal (Auld, Latham & Jacob L.JJ.) allowed the appeal. Latham L.J. said (para. 28):

"The issue was, and always had been, whether or not the appellant's fall at the bottom of the stairs was one which had resulted in a breach of the obligations either at common law or under the regulations. That remained her case throughout. The judge found for her on that issue, which was the critical issue, and found that she fell because it was dark at that point, which is what she had always asserted. The question of what the lighting was at the top of the stairs was ancillary to that issue, and in effect went to the respondent's case, that is to their argument that there was no breach of the regulation because the switches were clear and visible and that of itself sufficiently discharged and established contributory negligence."

His lordship concluded (para. 31) that the change in C's account of the accident in no way justified the conclusion that in some way or another her conduct could justify departing from the normal rule as to costs as set out in CPR r.44.3. D simply misjudged the strength of their own case. The Court ordered that D should pay C's costs below on the indemnity basis with enhanced interest from August 3, 2004.

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