CIVIL PROCEDURE NEWS

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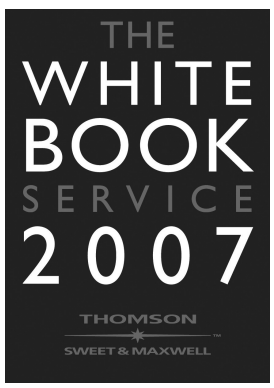

THOMSON
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In Brief

Cases

■ **JACKSON v THAKRAR** [2007] EWHC 626 (TCC); 157 New L.J. 483 (2007) (Judge Peter Coulson Q.C.)

Non-party's liability for costs—whether sufficient causal link

CPR r.48.2, Supreme Court Act 1981 s.51. In substantial claim involving several claimants (including trustees) and defendants (both individual and corporate) and complex issues, defendants applying for declaration to effect that a chain of letters between the parties constituted a binding compromise agreement in sum of £20.1m. At three-day hearing, burden of application carried by one of the corporate defendants (D1), being the only defendant with substantial assets. In addition, counsel for one of the individual defendants (D2) making oral submissions and conducting minimal cross-examination. D2's counsel funded in large part by a non-party (X), D2's wife. Judge dismissing application, holding that there had been no compromise ([2007] EWHC 271 (TCC)). At subsequent costs hearing, judge ordering that defendants should pay claimant's costs of the application on the indemnity basis. Principal claimants (C) (D2's trustee in bankruptcy), now applying under s.51 for order to join X in the proceedings for costs purposes. **Held**, dismissing the application, (1) C would have incurred precisely the same costs, whether or not X had funded D2's representation at the compromise hearing, (2) there was, therefore, no causal link between (on the one hand) X's funding of D2's representation and (on the other) the costs which were the subject of C's application, (3) in any event, there is a presumption that, unless there is good reason to do so, a section 51 order will not be made against a "pure funder", (4) in this case, though it was unclear whether X had any personal or financial interest in the outcome of the compromise issue, she was in a position at least akin to a "pure funder" as described in the authorities. ***Aiden Shipping Co Ltd v Interbulk Ltd*** [1986] A.C. 965, HL, ***Fulton Motors Ltd v Toyota (GB) Ltd***, July 23, 1999, CA, unrep., ***Dymocks v Franchise Systems (NSW) Pty Ltd v Todd*** [2004] UKPC 39; [2004] 1 W.L.R. 2807, PC, ***Hamilton v Al Fayed (No.2)*** [2002] EWCA Civ 665; [2003] Q.B. 1175, CA, ***Koninklijke Philips Electronics NV v Aventi Ltd*** [2003] EWHC 2589 (Pat); [2004] B.C.L.C. 50, ref'd to. (See ***Civil Procedure 2007*** Vol.1 para.48.2.2, and Vol.2 para.9A–265.)

■ **JANI-KING (GB) LIMITED v PRODGER** [2007] EWHC 712 (QB), March 30, 2007, unrep. (Mackay J.)

Unless order—debarring order—relief from sanction

CPR rr.3.9 & 52.11. Contractual claim brought against franchisee (D) by franchisors (C). D setting up substantial counterclaim, but failing to give adequate disclosure of his business accounts etc. At CMC, stringent specific disclosure order made by consent against D. Subsequently, C granted unless order on same terms (again by consent). On ground that D had not complied with that order, C applying for order debarring D from pursuing his counterclaim. Master (1) taking an adverse view of D's attempts to complete disclosure, (2) concluding that his default was not excusable, and (3) granting the application. D appealing to judge against debarring order and, as alternative, making application under r.3.9. for relief from that sanction. D contending that a debarring order cannot be made where there is a mere failure to comply with the full terms of an order, and an attempt to comply has been made in good faith. **Held**, dismissing appeal but granting the application, (1) this was a case management appeal limited to a review of the Masters's decision, (2) the appeal had serious consequences for D, but there was no basis for ordering that the appeal should be by way of re-hearing, (3) an unless order is a "last chance" order, and where there has not been complete compliance (subject only to de minimis exceptions) the sanction should be imposed, (4) in the circumstances, it was appropriate to grant D relief from the debarring sanction on terms that D give full disclosure within 28 days, (5) C were entitled to their costs of both the appeal and the application. ***Hytec Information Systems Ltd v Coventry City Council*** [1997] 1 W.L.R. 1666, CA, ***Realkredit Danmark A/S v Montague Ltd***; *The Times*, February 1, 1999, CA, ***RC Residuals Ltd v Linton Fuel Oils Ltd*** [2002] EWCA Civ 911; [2002] 1 W.L.R. 2782, CA, ***Scottish & Newcastle plc v Raguz [2004]*** EWHC 1835 (Ch), July 27, 2004, unrep., ***Woodhouse v Consignia Plc [2002]*** EWCA Civ 275; [2002] 1 W.L.R. 2558, ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 3.4.4, 3.9.1, 52.11.1.)

■ **LONDON AND QUADRANT HOUSING TRUST v ANSELL** [2007] EWCA Civ 326; *The Times*, April 25, 2007, CA (Chadwick & Lloyd L.JJ. and Stanley Burnton J.)

Second proceedings for possession—whether permissible

CPR r.55.3, Sch.2 CCR O.26, r.17, Housing Act ss.82 & 85, Housing Act 1988. In February 2001, on grounds of arrears social landlord (C) obtaining suspended possession order against secured tenant (D). In that order, March

19, 2001, given as specified date for giving possession. Because D in breach of order before that date, tenancy coming to an end, but D remaining in possession. In February 2006, C bringing new proceedings against D for possession. This time, C contending (1) that since the termination of her secure tenancy D had occupied the property as a trespasser, or (2) by conduct of parties since such termination, D had acquired a new assured shorthold tenancy which C were entitled to determine, and had determined by notice under the 1988 Act on grounds of nuisance and annoyance. After ruling on preliminary issue, county court judge granting C possession order enforceable without warrant. Judge finding as fact that, as a result of housing benefits and other payments, D's account with C going temporarily into credit for short period following October 26, 2004. **Held**, dismissing D's appeal, (1) the tenancy came to an end on March 19, 2001, because that was what s.82(2) provided, (2) the earlier possession order was not enforceable (and since October 26, 2004, had not been enforceable) by the issue of a warrant for possession under that order, (3) in the circumstances, the court's extended discretion powers under s.85 did not remain exercisable, (4) had they remained so, the second proceedings would have been misconceived, (5) it was open to C to commence new proceedings on the basis that D, as a trespasser whose occupation was no longer tolerated, had no right to remain in occupation. ***Swindon Borough Council v Aston*** [2002] EWCA Civ 1850; [2003] H.L.R. 42, CA, ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 55.8.9 & cc26.17.2, and Vol. 2 paras 3A–378 to 3A–379.1.)

■ **ORTON v COLLINS** [2007] EWHC 803 (Ch), April 23, 2007, unrep. (Mr. Peter Prescott Q.C.)

Part 36 offer—acceptance not creating enforcable contract

CPR r.36.11 [formerly r.36.15], Law of Property (Miscellaneous Provisions) Act 1989 s.2. Claimant's Pt 36 offer including term for disposition of property. Offer accepted by defendants. On appeal from Master, **held**, (1) the agreement was unenforceable as a contract as it did not comply with formalities required by s. 2 for such disposition, (2) however, the court had power under its inherent jurisdiction to order the parties to satisfy the terms of s.2 by signing a single document incorporating the terms of the agreement. (See ***Civil Procedure 2007*** Vol.1 para.36.11.1.) See further "In Detail" section of this issue of CP News.

■ **SHEPHERDS INVESTMENTS LIMITED v WALTERS** [2007] EWCA Civ 292, April 3, 2007, CA, unrep. (Mummery, Smith & Toulson L.JJ.)

Separate trial of liability—whether immediate order for costs

CPR rr.36.21 [36.14] & 44.3. Company (C) bringing claim against former employees (D) for breach of fiduciary duty etc. At separate trial of liability, judge giving judgment for C on certain claims. Before trial, C making offer to settle for £1 plus their costs (estimated at £99,000). Before trial of quantum, C applying for order for costs on indemnity basis (with interest) on ground that D had rejected a Pt 36 offer. D disputing that the offer was valid. On assumption that the offer was a valid Pt 36 offer, in exercise of discretion judge declining to make order and reserving costs until outcome of an account of profits was known. Single lord justice giving C permission to appeal. **Held**, dismissing appeal, where there has been a separate trial of liability, a judge is not required to make an immediate decision as to costs at that stage, but has a discretion to put it off until quantum has been finally determined, (2) there may be circumstances in which it is premature to make an order for costs of a liability trial ahead of the findings on an inquiry on damages or an account of profits, (3) it was preferable that the question whether the offer was valid should be determined by the judge who decides the costs after the result of the account is known. ***J.J. Harrison Properties Ltd v Harrison***, December 7, 2000, unrep., ***Weill v Mean Fiddler Holdings Ltd*** [2003] EWCA Civ 1058, July 25, 2003, CA, unrep., ***HSS Hire Services Group plc v BMB Builders Merchants Ltd*** [2005] EWCA Civ 627; [2005] 1 W.L.R. 3158, CA, ***Intense Investments Ltd v Development Ventures Ltd*** [2006] EWHC 1628 (TCC), June 29, 2006, unrep. (See ***Civil Procedure 2007*** Vol.1 paras 36.14.1, 44.3.1, 44.3.6, 44.3.8, 44.3.11 & 44.3.12.)

■ **SMITHKLINE BEECHAM PLC v AVERY** [2007] EWHC 948 (QB), April 27, 2007, unrep. (Teare J.)

Interim injunction—representative party—permission to enforce

CPR rr.19.6 & 25.1(1(a), Protection from Harassment Act 1997 s.3. Customers (C) of scientific research company (X) bringing claim for injunction to protect their employees from harassment. Claim brought against individual (D) as representative party for members etc of unincorporated association opposed to work undertaken by X. Judge granting injunction without notice. Injunction containing exclusion zones with rights to demonstrate at certain times and places preserved. At with notice hearing for continuation of injunction until trial, C submitting that the order should contain a particular term to the effect that C be permitted to enforce the order "against the protestors pursuant to CPR r.19.6(4)(b)". **Held**, continuing the injunction but without the particular term, (1) injunctions under s.3 may be enforced, not only by the usual civil remedies of contempt, but also by the criminal law, (2) under r.19.6(4)(b), the order would be binding on all persons represented by D, but would not be

enforceable against a person who was not a party without the permission of the court, (3) permission to enforce the injunction could not be granted to C in advance and without their identifying the natural persons against whom, in addition to D, it may be enforced. ***Huntingdon Life Sciences Group v Stop Huntingdon Animal Cruelty*** [2007] EWHC 522 (QB), March 15, 2007, unrep., ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 19.6.4 & 65.27.2.)

■ **STRAKER v TUDOR ROSE** [2007] EWCA Civ 368, April 24, 2007, CA, unrep. (Waller, Tuckey & Jacob L.JJ.)

Successful party's costs—compliance with pre-action protocol

CPR r.44.3. Investor in property (C) bringing claim against former solicitors (D) for damages. Before commencement of proceedings, D making an offer to settle of £9,000. After commencement, D making a payment into court of this amount. At trial, judge awarding C damages of £11,688. As to costs, judge (1) finding that (a) C had failed to enter into pre-action negotiations, and therefore (b) had not complied with the relevant pre-action protocol, and (2) ordering that D should pay C's costs only up to a date some months prior to the commencement of proceedings. **Held**, allowing C's appeal and ordering D to pay 60% of C's costs from the date of the offer, (1) the judge misdirected himself as to the applicability of the general rule that the unsuccessful party should pay the costs of the successful party, (2) the judge was right to consider (amongst other things) the extent to which the pre-action protocol had been adhered to, however (3) to reduce the recovery by C of his costs (in effect) to nil for failure to comply with the protocol was wrong and so seriously wrong as to be outside the generous ambit within which reasonable disagreement is possible. ***Johnsey Estates (1990) Ltd v Secretary of State for the Environment, Transport and the Regions*** [2001] EWCA Civ 535, ***Painting v University of Oxford*** [2003] EWCA Civ 402, ***Barnes v Time Talk (UK) Ltd*** [2003] EWCA Civ 402, ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 44.3.8 & 44.3.13.)

■ **WPP HOLDINGS ITALY SRL v BENATTI** [2007] EWCA Civ 263; *The Times* April 16, 2007, CA (Sir Anthony Clarke M.R., Buxton & Toulson L.JJ.)

Judgments Regulation—invalid service of process—whether court deemed to be first seised

CPR r.11, Council Reg.1348/2000 (Service Regulation) Arts 5 & 14, Council Reg.44/2001 (Judgments Regulation) Arts 5, 23 & 30). On January 11, 2006, C1 (an Italian company) issuing claim form against Italian businessman (D) making contractual and equitable claims. On February 15, on C1's application (and without notice to D), Master joining two other companies as claimants (C2 & C3). Claimant companies all members of same group. Amended claim form served on D personally in Italy on February 18. In the meantime, on February 1, D issuing originating process in Italy for purpose of bringing proceedings against C1 and C2, but C2 misnamed. On that date, D lodging this process with appropriate Italian authority for service on defendants in England, but because of misnomer and because all formalities not complied with, service effected on defendants in England invalid. These defects rectified and valid service effected on March 30, 2006. Subsequently, D making application challenging English court's jurisdiction. Application dismissed by judge (see [2006] EWHC 1641 (Comm); [2006] 2 Lloyd's Rep. 610). **Held**, allowing D's appeal in part, (1) the English court was first seised of the claims by C1 and C3 against D, however (2) the Italian court was first seised of the claim between D and C2, and therefore had jurisdiction to determine that claim, (3) the English court became seised of the latter claim on February 15, 2006, but the Italian court had become seised of it at the earlier date of February 1, when the originating process was lodged by D with Italian authority responsible for service with a request for service on the defendants, (4) according to Italian law, the process was effective for instituting proceedings and its invalid service in England (not rectified until after February 15, 2006) did not prevent the Italian court from being first seised. Distinction and relationship between seisin of jurisdiction and service of process explained. Buxton L.J. deprecating court and party resources absorbed in this case in dealing with the jurisdictional issues for which the Judgments Regulation was supposed to provide an easy solution (para.73). (See ***Civil Procedure 2007*** Vol.1 para.6BPD.26, and Vol.2 para.5–243.1.)

Practice Directions

■ **PRACTICE DIRECTION (APPLICATIONS) TSO CPR Update 44**

CPR Pt 23. With effect from April 6, 2007, para.6 (Telephone Hearings) substituted in expanded form. Practice Direction (Pilot Scheme for Telephone Hearings) (23BPD) revoked. (See ***Civil Procedure 2007*** Vol.1 para.23PD.6.) See further "CPR Update" section of this issue of CP News.

In Detail

Enforcing settlement agreement

CPR Pt 36 contains rules about offers to settle and about the consequences where an offer to settle is made in accordance with the provisions of that Part. If one looks back (to RSC O.22 and beyond), it can be seen that the procedural scheme now found in Pt 36 had rather modest beginnings in 1933. Until quite modern times it was confined to cases in which the claim was for debt and damages and the offer was made by a defendant. From its inception the scheme, which was designed to encourage parties to settle, had three significant features. First, the offer had to be made in the form of a payment into court. Secondly, the procedural effect of the acceptance of an offer was that the proceedings were automatically stayed. Thirdly, where the offer was accepted the court's discretion as to costs was restricted, and it was also restricted where it was not accepted but at trial the offeree failed to better the offer. It may be noted (because it relates to what is said below) that in ***Cumper v Pothecary*** [1941] 2 K.B. 58, CA, Goddard L.J. said there was nothing contractual about a payment into court (see also ***Gorse v Tinkler*** [1997] P.I.Q.R. Q120, CA). It was wholly a procedural matter and had "no true analogy to a settlement arranged between the parties out of court, which, of course, does constitute a contract". (That was said in response to the argument that a notice of payment in was an offer which the plaintiff could accept at any time up to the eve of trial.)

During the 1970s the courts responded to the argument that, in actions other than those covered by RSC O.22, a party willing to make an offer ought to be able to obtain the advantages that the payment into court scheme provided in actions for debt and damages. At the time it was not thought that any changes to the RSC were required. But later on (in 1986) amendments concerning "written offers 'without prejudice save as to costs'" were made to the costs provisions in the RSC (O.62) and a rather odd addition (r.14) dealing with the matter was made to RSC O.22. One of the strange things about r.14 was that it did not have the effect of automatically staying proceedings (and therefore staying the further incurring of costs) where such an offer was accepted. But this was consistent with judicial opinion at the time. For example, in ***McDonnell v McDonnell*** [1977] 1 W.L.R. 34, CA, Ormrod L.J. said it would be wrong to equate a "written offer 'without prejudice save as to costs'" precisely to a payment into court as there would be "no advantage in the court surrendering its discretion in these matters as it has to all intents and purposes done where a payment into court has been made".

With the coming of the CPR, though much remained the same, much was changed. Offers to settle, whether made in claims for debt or damages or in other cases were knocked together in Pt 36, and provision was made for offers to settle made by claimants as well as by defendants. And in very recent times, the requirement that a defendant's offer to settle a claim for debt or damages should be backed up by a payment into court has been abandoned.

Among the innovations made by Pt 36 were express provisions referring to the court's power to enforce the terms of an accepted offer. These provisions are now found (in slightly altered form) in r.36.11. They are designed to make clear that, generally, where an offer is accepted the automatic stay imposed by the rules does not prevent the court from exercising such power as it may have to entertain an application to enforce the terms of the offer.

The nature and extent of that particular power fell for consideration in the recent case of ***Orton v Collins*** [2007] EWHC 803 (Ch), April 23, 2007, unrep., a case decided before the recent amendments to Pt 36 (but nothing significant turns on that). In this case the facts were that one member (C) of a partnership gave notice purporting to dissolve the partnership and commenced proceedings against the other partners (D) in which he claimed, amongst other relief, declarations and an order for sale of partnership property. A partnership deed provided for the sale of an outgoing partner of his share in any freehold or leasehold property of the partnership at a valuation. Such property included the partnership's office premises.

On C's behalf, his solicitors made a written offer complying with the terms of Pt 36 in which, amongst other things, it was proposed that C would dispose of his interest in the office premises at a valuation. The offer also made a proposal concerning an indemnity for C against losses suffered by the partnership. By an email communication, D's solicitors accepted the offer.

Subsequently, a dispute arose as to the terms of the offer insofar as it related to the indemnity. It seems that, in terms, the indemnity was not as far-reaching as C intended or would have wished. C raised the temperature of this dispute by contending that, although C had made a Pt 36 offer and D had accepted it, there was no settlement agreement. Therefore, so C argued, he was not bound by any of the terms of the agreement. D made an application to a Master.

The particular point raised by C, and on which he succeeded before the Master, was that the agreement that the parties had reached was caught by s.2 of the Law of Property (Miscellaneous Provisions) Act 1989. That section

states that a contract for the sale or other disposition of land must satisfy two criteria. First, it can only be made in writing, and secondly, only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each. The documents exchanged by C and D, that is to say C's written offer and D's emailed notice of acceptance, though they satisfied the formalities stipulated by Pt 36, did not satisfy the s.2 criteria. Therefore, so C argued (and the Master ruled) there was no enforceable agreement. As the Master explained, s.2 requires the agreement to be in one document signed by both parties; here there were two, the offer signed by or on behalf of C and the acceptance signed by or on behalf of D. That was a technical objection but it was fatal. Because there was no enforceable agreement, the power of the court to entertain an application to enforce the terms of the offer, alluded to in r.36.15 and, since the very recent amendments, found in r.36.11, could not be exercised in D's favour. D appealed to a judge.

Both the deputy judge on the appeal (Mr. Peter Prescott Q.C.) and the Master were of the opinion that, assuming there was a Pt 36 settlement, and supposing it to be a contract, it was for the disposition of an interest in land and was therefore within the terms of s.2. On the appeal this was not disputed by D.

D's principal argument was that the acceptance of a Pt 36 offer need not create a contract at all. Rather it creates an obligation sui generis that the court can enforce. Where one party refuses to implement a settlement reached under the Pt 36 procedure (so the argument ran), his opponent may apply to the court for an order requiring the parties to do what is necessary to implement the settlement. In a case such as this, that obligation may be enforced by the court ordering the parties to enter into a contract that does comply with s.2. In reply, C contended that the Civil Procedure Rules do not confer substantive rights. They merely regulate practice and procedure. Therefore a party cannot be ordered to implement a settlement unless it was a binding contract in the first place.

The deputy judge accepted D's submissions and held that the court had jurisdiction on the application of a party to enforce a Pt 36 acceptance, being an acceptance that, for some reason, created no contract. That jurisdiction could be exercised in this case by an order requiring the parties to satisfy the terms of s.2 of the 1989 Act by signing a single document incorporating the terms of the settlement. In reaching this conclusion the deputy judge called in aid the inherent jurisdiction of the court and the objectives underlying the Pt 36 scheme (as buttressed by the overriding objective), a scheme devised to encourage settlement.

The question decided in this case is important, as settlements involving dispositions of property falling within the terms of s.2 of the 1989 Act are an everyday occurrence. The deputy judge's decision is a bold one, albeit one that will be welcomed. Nevertheless, though a decision on appeal, it is a decision of a single judge. Doubtless, in settling claims on terms involving transfers of interests in land, prudent practitioners will take steps to ensure that they are spared the trouble that the parties got into in this case.

In conclusion it may be noted (as the deputy judge noted) that, before the recent amendments to Pt 36, r.36.15(6) stated that, where a Pt 36 offer had been accepted (that is to say, an offer that was not backed up by a payment into court), and a party alleged (a) that the other party had not honoured the terms of the offer, and (b) that he was "therefore entitled to a remedy in breach of contract", the party could "claim the remedy" by applying to the court without the need to start a new claim unless the court ordered otherwise. When introduced, this was a sensible innovation. It was designed to deal with the situation where the acceptance of a Pt 36 offer had created a contract between the parties and one party sought a remedy for the other party's alleged breach of the contract. Obviously, seeking a remedy for such breach (e.g. an award of damages) is not the same thing as seeking an order enforcing the terms of the agreement. In ***Hollingsworth v Humphrey***, December 10, 1987, CA, unrep., the aggrieved party sought a remedy in damages for breach of an agreement compromising proceedings set out in a Tomlin order and it was held that, in these circumstances, the remedy had to be pursued in a separate action, and not by way of application in the compromised proceedings. The effect of r.36.15(6) was to make a separate claim unnecessary (thereby avoiding unnecessary costs and delays), unless the court ordered otherwise. As a result of the recent amendments to Pt 36, r.36.15(6) is now found in r.36.11(8), and the wording of the provision has changed. The provision now states that, where a Pt 36 offer (or parts of such offer) is accepted and a party alleges that the other party has not honoured the terms of the offer, that party may apply "to enforce the terms of the offer" without the need for a new claim. In this provision there is no mention of the requirement that the aggrieved party should, because of his opponent's failure to honour the agreement, be "entitled to a remedy in breach of contract". Further, the new provision speaks of an application "to enforce the terms of the offer", and not (as previously) of claiming a remedy for breach of contract. One wonders whether the omission of this requirement and the change of wording were advised and, if not, whether the decision of the Court of Appeal in ***Hollingsworth v Humphrey*** has been inadvertently revived. In the instant case, it was not suggested that the position of the defendants would have been strengthened had the new r.36.11(8) been in place when the claimant's offer was accepted by the defendants.

CPR Update

Amendments to Rules and Practice Directions

TELEPHONE HEARINGS

Until recently, Practice Direction (Pilot Scheme for Telephone Hearings) was one of several practice directions supplementing CPR Pt 23 (General Rules About Applications for Court Orders). Further provisions as to telephone hearings were found in Practice Direction (Applications), also supplementing Pt 23, in particular, in para.6 of that practice direction.

By a series of amendments the pilot scheme provided for in the first of these practice direction was extended down to April 5, 2007. By TSO CPR Update 44, that practice direction was omitted (the pilot scheme having come to an end) and, with effect from April 6, 2007, para.6 of Practice Direction (Applications) was substituted in an extended form.

The terms of the new para.6 are set out below. They replace the former version of that paragraph as printed in Vol.1 para.23PD.6 (p.555) of the 2007 edition of the ***White Book.***

"Telephone hearings

Interpretation

6.1 In this paragraph—

(a) 'designated legal representative' means the applicant's legal representative (if any), or the legal representative of such other party as the court directs to arrange the telephone hearing; and
(b 'telephone conference enabled court' means—
(i) a district registry of the High Court; or
(ii) a county court,
in which telephone conferencing facilities are available.

When a hearing is to be conducted by telephone

6.2 Subject to paragraph 6.3, at a telephone conference enabled court the following hearings will be conducted by telephone unless the court otherwise orders—

(a) allocation hearings;
(b) listing hearings; and
(c) interim applications, case management conferences and pre-trial reviews with a time estimate of less than one hour.

6.3 Paragraph 6.2 does not apply where—

(a) the hearing is of an application made without notice to the other party;
(b) all the parties are unrepresented; or
(c) more than four parties wish to make representations at the hearing (for this purpose where two or more parties are represented by the same person, they are to be treated as one party).

6.4 A request for a direction that a hearing under paragraph 6.2 should not be conducted by telephone—

(a) must be made at least 7 days before the hearing or such shorter time as the court may permit; and
(b) may be made by letter,

and the court shall determine such request without requiring the attendance of the parties.

6.5 The court may order that an application, or part of an application, to which paragraph 6.2 does not apply be dealt with by a telephone hearing. The court may make such order—

(a) of its own initiative; or
(b) at the request of the parties.

6.6 The applicant should indicate on his application notice if he seeks a court order under paragraph 6.5. Where he has not done so but nevertheless wishes to seek an order, the request should be made as early as possible.

6.7 An order under paragraph 6.5 will not normally be made unless every party entitled to be given notice of the application and to be heard at the hearing has consented to the order.

6.8 If the court makes an order under paragraph 6.5 it will give any directions necessary for the telephone hearing.

Conduct of the telephone hearing

6.9 No party, or representative of a party, to an application being heard by telephone may attend the judge in person while the application is being heard unless every other party to the application has agreed that he may do so.

6.10 If an application is to be heard by telephone the following directions will apply, subject to any direction to the contrary—

(1) The designated legal representative is responsible for arranging the telephone conference for precisely the time fixed by the court. The telecommunications provider used must be one on the approved panel of service providers (see Her Majesty's Courts Service website at www.hmcourts-service.gov.uk).

(2) The designated legal representative must tell the operator the telephone numbers of all those participating in the conference call and the sequence in which they are to be called.

(3) It is the responsibility of the designated legal representative to ascertain from all the other parties whether they have instructed counsel and, if so, the identity of counsel, and whether the legal representative and counsel will be on the same or different telephone numbers.

(4) The sequence in which they are to be called will be—

(a) the designated legal representative and (if on a different number) his counsel;
(b) the legal representative (and counsel) for all other parties; and
(c) the judge.

(5) Each speaker is to remain on the line after being called by the operator setting up the conference call. The call shall be connected at least ten minutes before the time fixed for the hearing.

(6) When the judge has been connected the designated legal representative (or his counsel) will introduce the parties in the usual way.

(7) If the use of a 'speakerphone' by any party causes the judge or any other party any difficulty in hearing what is said the judge may require that party to use a hand held telephone.

(8) The telephone charges debited to the account of the party initiating the conference call will be treated as part of the costs of the application.

Documents

6.11 The designated legal representative must file and serve a case summary and draft order no later than 4pm on the last working day before the hearing—

(a) if the claim has been allocated to the multi-track; and
(b) in any other case, if the court so directs.

6.12 Where a party seeks to rely on any other document at the hearing, he must file and serve the document no later than 4 p.m. on the last working day before the hearing."

OFFERS TO SETTLE

As is explained in para.36.0.2 of the 2007 edition of the ***White Book***, Pt 36 was wholly replaced by the Civil Procedure (Amendment No.3) Rules 2006 (SI 2006/3435) with effect from April 6, 2007. That statutory instrument contained, in r.7, a quite elaborate scheme for the transition of the effect of the old rules in Pt 36 to the effect of the new.

Regular users of the ***White Book*** will know that, wherever statutory instruments making amendments to the CPR having transitional provisions are enacted, such provisions are explained in the commentary in Pt 51 (Transitional Arrangements and Pilot Schemes). Thus r.7 of the recent statutory instrument is outlined at the end of para.51.1.7. From a practical point of view, some transitional provisions are rather more important than others. Rule 7 is important as it has the effect of enabling rules in the old version of Pt 36 to survive for a period. So, for the convenience of subscribers, that whole text of that rule is set out in the commentary to Pt 36 itself, in particular, in para.36.0.3 of the new edition. As is explained there, a new practice direction supplementing Pt 36 explains how the transitional provisions will operate. That practice direction is found in para.36BPD.1 *et seq*. of the new edition.

As is well known, the provisions of Pt 36 do not apply to claims allocated to the small claims track. That is expressly stated, not in any provision in Pt 36, but in r.27.2(1)(g). (The statement to the contrary in para.36.1.3 is an error for which the publishers apologise.) It is interesting to note that, in the old version of Pt 36, r.36.2(5) stated that a Pt 36 offer (or payment) "shall not have the consequences set out in this Part while the claim is being dealt with on the small claims track unless the court orders otherwise". This provision did not simply duplicate the effect of r.27.2(1)(g) but was designed to cope with the fact that, in the course of its progress, a claim in which an offer to settle was made may have been allocated to the small claims track and later re-allocated to the fast track and vice versa. No such express provision appears in the new version of Pt 36, but presumably the position remains the same.

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