CIVIL PROCEDURE NEWS

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CPR rr.44.3 and 44.18. Under GLO, CFA-funded claimants (C) bringing claim against company (D) for negligence and nuisance. D applying under r.44.18 for order capping future costs at limit of ATE. **Held**, refusing application but making a costs order under r.44.3, (1) there was no substantial risk that, without a CCO, costs would be disproportionately incurred by C, but (2) in the circumstances, it was appropriate to order that any recovery by C from D at the end of trial of future base costs should not exceed the amount of C's current estimate of such costs. Rules and relevant authorities on costs capping explained and principles summarised. ***Willis v Nicolson*** [2007] EWCA Civ 199; [2007] P.I.Q.R. P22; ***Corby Group Litigation*** [2008] EWHC 619 (TCC), April 1, 2008, unrep.; ***Peacock v MGN Ltd*** [2009] EWHC 769 (QB), April 8, 2009, unrep.; ***Leigh v Michelin Tyre plc.*** [2003] EWCA Civ 1766; [2004] 1 W.L.R. 846, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 44.18.4, 44.19.1 and 48.15.7.)

EWEIDA v BRITISH AIRWAYS PLC [2009] EWCA Civ 1025, October 15, 2009, C.A., unrep. (Maurice Kay, Lloyd and Moses L.JJ.)

Costs capping order — risk that costs will be disproportionately incurred

CPR rr.44.3 and 44.18. On paper, single lord justice ordering that costs recoverable by employers (D) against employee (C) on an appeal from the EAT to the Court of Appeal should be capped at £25,000. On re-consideration at oral hearing, **held**, discharging the order, a CCO should not be made because C could not satisfy the r.44.18(5) conditions. Rules and authorities on PCOs and CCOs explained. ***Wilkinson v Kitzinger*** [2006] EWHC 835 (Fam); [2006] 2 F.L.R. 397; ***Smart v East Cheshire NHS Trust*** [2003] EWHC 2806 (QB); [2004] Costs L.R. 124; ***King v Telegraph Group Ltd (Practice Note)*** [2004] EWCA Civ 613; [2005] 1 W.L.R. 2282, CA; ***Peacock v MGN Ltd*** [2009] EWHC 769 (QB), April 8, 2009, unrep., ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 44.18.4, 44.19.1 and 48.15.7.)

AF v BG [2009] EWCA Civ 757; 159 New L.J. 1105 (2009), CA (Lloyd and Rimer L.JJ.)

Pt 36 offer — unpleaded counterclaim — whether costs consequences attached to both claim and counterclaim

CPR rr.20.2, 20.3, 36.2, 36.3 and 36.10. In offer letter from defendant (D) to claimant (C), D intimating a counterclaim, to be incorporated into his pleadings by way of amendment in the future if required, and offering to accept from C payment of a sum in full and final settlement of D's contemplated counterclaim and the whole of C's claim against D. Letter stating expressly that it was intended to have the consequences "of a claimant's offer to settle" in accordance with Pt 36. In proceedings in the Court of Appeal (initiated by both parties), on C's application question arising as to whether those proceedings had, as D submitted, been the subject of a binding compromise to which, as a result of D's offer letter and C's letter in response thereto, the Pt 36 consequences of acceptance by C would apply. **Held**, rejecting C's submission that D's offer was not a Pt 36 offer, but accepting the submission that the offer had not been accepted, (1) a Pt 36 offer (a) must, amongst other things, state whether it takes into account any counterclaim (r.36.2(2)(e)), and (b) shall have the consequences set out in Pt 36 "only in relation to the costs of the proceedings in respect of which it is made" (r.36.3(4)), (2) D's offer (a) did so state, and would therefore settle both D's liability on C's claim and C's liability on D's proposed counterclaim, and (b) "the proceedings in respect of which" it was made included the claim and the proposed counterclaim, and were not restricted to the latter, (3) a Pt 36 offer may be made before the commencement of proceedings (r.36.3(2)), so the fact that D's counterclaim had not been formulated or pleaded did not of itself matter, (4) these conclusions were not inconsistent with r.36.10(6), as, by operation of r.20.2(2), references in that provision to claimant and defendant include a party bringing or defending a counterclaim. (See ***Civil Procedure 2009*** Vol.1 paras 20.3.2, 36.2.1, 36.3.1 and 36.10.1.)

FORCELUX LTD v BINNIE [2009] EWCA Civ 854, October 21, 2009, CA, unrep. (Ward and Jacob L.JJ. and Warren J.)

Party not attending Pt 55 hearing — application to set aside order — court's discretion

CPR rr.1.4(2)(c), 3.1(2)(m), 3.1(7), 3.9, 39.3 and 55.8. Leaseholder (D) of flat, under long lease at a ground rent containing forfeiture provision for non-payment of rent or charges, falling into arrears. In November 2006, landlords

(C) obtaining default judgment against D for £893 for the arrears (including £599 in respect of unpaid insurance premiums) and costs. Upon D not satisfying judgment, in July 2007, C commencing possession proceedings under Pt 55. On September 11, 2007, at "hearing" fixed in accordance with r.55.5(1), and not attended by D, district judge proceeding to "decide the claim" (r.55.8(1)(a)) and making possession order. On October 27, 2007, after C had entered into possession, D first becoming aware of proceedings against him and of the order. Four months later, on February 25, 2008, D applying (1) to set aside the order, and (2) to obtain relief from forfeiture. District judge (1) holding that, although D had not had notice of the proceedings, the claim form was deemed served (in accordance with rules then applying), (2) finding that D had acted promptly, (3) in purported exercise of discretion under r.39.3(3), granting D's application, and (4) granting C permission to appeal. Circuit judge dismissing C's appeal. Single lord justice granting C permission to make second appeal. **Held**, dismissing appeal, (1) where, an application is made under r.39.3(5) by a party "who failed to attend the trial" to set aside an order or judgment given against him, the court may grant the application "only if" (amongst other things) the applicant "acted promptly" (r.39.3(5)(a)), (2) where (as here), a defendant does not appear at a "hearing" to which r.55.8 applies, and the court opts to decide the claim (r.55.8(1)(a)), the court may (being satisfied that service has been validly effected) on the basis of the evidence before it make an order for possession, (3) however, such a process of determination and decision at such a "hearing" cannot sensibly be called a "trial", either as a matter of the ordinary use of the word or within the meaning of r.39.3, (4) consequently, the hearing before the district judge on September 11, 2007, was not a trial and the provisions of r.39.3 did not apply to D's application to set the possession order aside, (5) in such circumstances, r.3.1(2)(m) was amply wide enough to give a court power to set aside a possession order if, in its discretion, it considered that the interests of justice demand it, (6) in exercising that discretion it was appropriate to apply the r.3.9(1) criteria so far as relevant by way of analogy, (7) accordingly, the need to act promptly was not an absolute requirement imposed on D but simply a factor to be taken into account, (8) in the circumstances, it was open to the Court to exercise the discretion itself, (9) the discretion should be exercised in favour of D, principally because D had a compelling case for relief from forfeiture and, even if it were assumed that D had not acted promptly, his delay was not so long as to disentitle him from relief. D's application to adduce additional evidence refused. Explanation of possession claim procedures and comparison with other summary procedures in CPR, and examination of CPR provisions throwing light on meaning of "trial" in various contexts. ***Estate Acquisition and Development Ltd v Wiltshire*** [2006] EWCA Civ 533; [2006] C.P. Rep. 32, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 1.4.5, 3.1.9, 3.9.1, 39.3.1, 39.3.7.1 and 55.8.2.)

■ **MASRI v CONSOLIDATED CONTRACTORS INTERNATIONAL (UK) LTD (NO.4)** [2009] UKHL 43; [2009] 3 W.L.R. 385, H.L.

Oral examination of officer of foreign debtor company — jurisdiction —service

CPR rr.6.38 and 71.2, Practice Direction B (Service Out of the Jurisdiction) para.3.1(10). Businessman (C) obtaining judgment on liability and quantum in proceedings against two Lebanese companies (D1 and D2) in the Commercial Court. Defendants refusing to pay judgment debt amounting to US$64m, and manifesting intention to avoid payment at all costs. C applying under r.71.2 without notice for an order requiring an officer of D1 (X) to attend for examination in respect of D1's means. X chairman, general manager and director of D1 (but not a party to the proceedings) and habitually resident in Greece. On paper, Master granting application but subsequently, on application of X, setting order aside, primarily on grounds of lack of jurisdiction. Court of Appeal allowing C's appeal ([2008] EWCA Civ 876; [2009] Bus LR 246, CA). An Appeal Committee granting X leave to appeal. **Held**, allowing appeal, (1) r. 71.2 does not permit an order for examination to be made against an officer of a judgment debtor company who was outside the jurisdiction, (2) Pt 71 is concerned with obtaining information in aid of the enforcement of a private judgment in private civil litigation, (3) as properly construed, r.6.38 and para.3.1(10) do not enable service out of the jurisdiction of an order under Pt 71 which had been made against a non-party. ***Vitol SA v Capri Marine Ltd*** [2008] EWHC 378 (Comm); [2009] Bus LR 271, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 6.38.1, 6BPD.3 and 71.2.6.)

■ **MUSCAT v HEALTH PROFESSIONS COUNCIL** [2009] EWCA Civ 1090, October 21, 2009, CA, unrep. (Longmore, Smith and Maurice Kay L.JJ.)

Additional evidence — appeal from tribunal with review powers — public interest

CPR r.52.11(2), Health Professions Order 2001 arts 29, 30 and 33. Health Professions Council (D) referring two misconduct allegations against practitioner (C) (made independently by two patients) to panel of the Conduct and Competence Committee. Panel finding allegations well-founded and on recommendation of panel Committee making order striking C off the relevant register. C exercising right of appeal to High Court under art.29(9). High Court judge refusing C's application to adduce additional evidence in the form of the report of an expert not before the panel, and dismissing C's appeal. Single lord justice granting C permission to appeal. **Held**, dismissing appeal, (1) there was no excuse for C's failure to adduce the additional evidence for the panel hearing and, when that evidence was considered, it was not of great significance, (2) the fact that it is not in the public interest that a qualified health

professional, capable of giving good service to patients, should be struck off his professional register, was a factor to be taken into account, and the judge's failure to mention it made his decision open to review, (3) under arts 30 and 33 of the 2001 Order, the Committee had power, on an application by a person struck off, to review its own decision in relation to a strike off order if new evidence became available, (4) the existence of that power (which was not drawn to the attention of the judge) greatly reduced the significance of the public interest factor in this case, (5) taking all the factors into account, in the exercise of discretion the additional evidence should not be received. ***Ladd v Marshall*** [1954] 1 W.L.R. 1489, CA; ***Hamilton v Al Fayed*** December 21, 2000, CA, unrep.; ***Marchmont Investments Ltd v BFO SA*** [2007] EWCA Civ 677, June 13, 2007, CA, unrep., ref'd to. (See ***Civil Procedure 2009*** Vol.1 para.52.11.2.)

- **NATIONAL AMUSEMENTS (UK) LTD v WHITE CITY (SHEPHERDS BUSH) LLP** [2009] EWHC 2524 (TCC), October 16, 2009, unrep. (Akenhead J.)

Transfer of proceedings — basis upon which discretion exercised

CPR rr.1.1, 30.5 and 60.1, Technology and Construction Court Guide para.3.6.1, Senior Courts Act 1981 ss.64 and 65, Law of Property (Miscellaneous Provisions) Act 1989 s.2. Entertainment company (C) entering into an agreement with developers (D) for lease of new build to be constructed to agreed specification. C purporting to rescind agreement for D's non-compliance with certain requirements specified in the agreement and D purporting to treat this as a repudiation. C commencing proceedings in Chancery Division against D. D entering defence and making counterclaim. C alleging that they were entitled to rescind and claiming £1.6m. D's defence raising issues of estoppel and waiver (anticipated in C's statement of claim) and rejecting C's factual allegations concerning discrepancies between the specification and the work completed. D making application to TCC judge for order transferring the claim to the TCC. C opposing the application, partly on ground that the case raised difficult and unsettled issues of law (principally the extent to which estoppels or waiver can validate transactions to which s.2 applies). **Held**, granting the application and transferring the proceedings to the TCC, (1) in proceedings to which the CPR apply, under r.30.5 a judge of any Division of the High Court has jurisdiction to order the transfer of proceedings to another Division, (2) a TCC judge has jurisdiction to order proceedings to be transferred to or from the TCC list, whether from or to any Division of the High Court, (3) under this jurisdiction a judge has a discretionary power, to be exercised to secure the just disposition of the case in accordance with the overriding objective, (4) a judge to whom application for transfer is made is entitled to have regard to the relative appropriateness of the different Divisions or sub-divisions, (5) this involves ascertaining (if possible) where and within what areas of judicial expertise and experience the preponderance of the issues lies, (6) other material factors include whether transfer would enable the case to be dealt with significantly greater expedition and savings in costs. ***Lumbermens Mutual Casualty Company v Bovis Lend Lease Ltd*** [2004] EWHC 1614 (Comm); 15 New L.J. 1107 (2004), ref'd to. (See ***Civil Procedure 2009*** Vol.1 para.30.5.1 and Vol.2 paras 2C–56 and 9A–244.)

- **ONAY v BROWN** [2009] EWCA Civ 775, June 10, 2009, CA, unrep. (Carnwath, Toulson and Goldring L.JJ.)

Apportionment of liability — costs consequences of acceptance of offer

CPR rr.36.2, 36.10 and 44.3. Personal injury claim in which defendant (D) admitted liability compromised. Consent order stating that judgment should be entered for the claimant (C) "with damages and the issue of contributory negligence, if any, to be assessed". Shortly before trial of contributory negligence issue, after offers and counter-offers, C accepting D's offer that D's negligence should be limited to 75 per cent. County court judge deciding that C should pay D's costs on that issue. In doing so, judge making no express finding in respect of Pt 36. **Held**, allowing C's appeal, (1) on its proper construction, D's offer was a r. 36.2 offer and C's entitlement to costs arose under r.36.10 accordingly, (2) an offering party who does not want the r.36.10 consequences to apply should put the offer in some other way (as is permitted by r.36.2), (3) the reality was that C was the successful party on the issue, (4) in exercising his discretion under r.44.3 the judge adopted an approach that was too narrow. ***Fleming v Chief Constable of Sussex Police Force*** [2004] EWCA Civ 643, May 4, 2004, CA, unrep., ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 36.2.1, 36.10.1 and 44.3.5.)

- **RICHARDSON ROOFING COMPANY LTD v THE COLMAN PARTNERSHIP LTD** [2009] EWCA Civ 839, February 13, 2009, CA, unrep. (Jacob, Aikens and Sullivan L.JJ.)

Agreed costs order — jurisdiction of court to give guidance to costs judge

CPR rr.3.1(7), 40.12 and 44.7, Senior Courts Act 1981 s.51. In claim by roofing contractors (C) against various parties, including site owner's architects (D), trial of preliminary issue involving C and D adjourned. Parties agreeing that C should pay D's costs incurred and thrown away by the adjournment and order made to that effect. In preparation for detailed assessment, D serving bill for their costs and, on ground that there was now no prospect of the main action being pursued by C, applying to judge for further order directing that the costs so payable to them by C should

include their entire costs of preparation and attendance at the adjourned trial. Judge giving guidance as to how, in the circumstances, "the costs incurred and thrown away" should be determined and directing that the costs judge conducting the detailed assessment should determine that matter in accordance with that guidance ([2008] EWHC 1806 (TCC), July 25, 2008, unrep.). Single lord justice granting C permission to appeal. **Held**, allowing the appeal (discharging the judge's order and making no order) (1) the costs order was a consent order to which the parties had in effect contractually agreed, (2) no application had been made to vary it (under r.3.1(7)), and there was no slip in it capable of correction (under r.40.12), (3) it was highly doubtful whether the judge had jurisdiction (in effect) to vary it on D's application, (4) in the first instance, where it arises the issue on which the judge purported to give guidance is one that should go to a costs judge, (5) in any event, if the judge had jurisdiction to give guidance he should not have exercised it, (6) judgments are not orders but reasons for orders, (7) any order of a court should be clear on its face, and the practice of incorporating by reference in an order paragraphs of a judgment is improper and should stop. (See ***Civil Procedure 2009*** Vol.1 paras 3.1.9, 40.1.1 and 40.9.3.)

SCIEZKA v POLAND [2009] EWHC 2259 (Admin), June 4, 2009, unrep. (Sullivan L.J. and Wilkie J.)

Extradition appeal — service of notice of appeal on respondent — compliance with practice directions

CPR rr.1.1, 3.10 and 52.4, Practice Direction (Court Documents) para.5.3(9), Practice Direction (Appeals) para.5.21, Extradition Act 2003 s.26(4). On January 12, 2009, magistrates' court judge ordering extradition of individual (C) to Poland. On morning of January 19, on ground that statutory time limit had expired, Administrative Court office refusing to accept notice of appeal which C's solicitors attempted to file. On afternoon of January 19, C's solicitors (1) faxing notice of appeal to the Court office, and (2) faxing unsealed copy of C's notice of appeal to CPS (as representative of the respondent). On January 20, hard copy of notice of appeal lodged at Court office by C's solicitors and sealed, and copy of sealed notice served on CPS. On January 21, House of Lords handing down judgment in Mucelli case. D contending that C had not given notice of appeal within time and signifying intention to remove C on January 26, 2009. On January 23, a Divisional Court granting C interim injunction preventing removal and directing that substantive application for injunctive relief should be listed for hearing separately from C's appeal under the 2003 Act. At hearing of C's application for injunctive relief, **held**, granting application (1) whether C was entitled to injunctive relief depended on the question whether he made a valid application to appeal within the seven-day period fixed by s.26(4), (2) that seven-day deadline for filing notice of appeal with the court and serving copy of notice of appeal on the CPS expired at midnight on January 19, (3) with the benefit of hindsight, the decision in the Mucelli case made it clear that the refusal of the Court office to accept the notice of appeal tended on the morning of January 19 was wrong, (4) in those circumstances, C's solicitors filing of the notice of appeal by fax was justified, as they were confronted with "an unavoidable emergency" within the meaning of para.5.3(9), (5) there was no doubt that the notice of appeal was faxed to (and received by) the Court office and the CPS within the seven-day period, (6) the notice of appeal so faxed to the CPS was unsealed and therefore did not comply with para.5.21(1), but that was a failure as to the manner (not timing) of service and was a procedural error which (under r.3.10) the appeal court could, and in the circumstances should, remedy, (7) accordingly there was a valid appeal and C was entitled to injunctive relief until such time as his appeal was dealt with by the court. ***Mucelli v Government of Albania***, [2009] UKHL 2; [2009] 1 W.L.R. 276, HL, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 3.10.3, 5PD.6 and 52PD.32.)

SPY ACADEMY LTD v SAKAR INTERNATIONAL INC [2009] EWCA Civ 985, July 23 2009, CA, unrep. (Sedley L.J. and Sir Simon Tuckey)

Directions for costs security application — order made in ignorance of reasons for respondent's failure to comply

CPR r. 25.13. Impecunious English company (C) bringing claim against US company (D) under licensing agreement. D applying for order for security for costs and, at hearing not attended by either party, judge making order giving directions. Order posted by court to address provided by C but not sent to, or seen by C, with consequence that C did not comply with directions therein for filing of evidence by particular date. C (acting in person), when alerted to what had happened, filing and serving witness statement. At later hearing, in ignorance of reasons for letter not reaching C, judge (1) (in strict compliance with the terms of the order) refusing to admit C's late filed statement, and (2) making order for security for costs against C. Single lord justice granting C permission to appeal. **Held**, allowing the appeal and setting aside the security order, (1) the judge's refusal to admit the statement was a serious procedural error and rendered his decision unjust, (2) in the circumstances, the Court should exercise the discretion under r.25.13 afresh, (3) C's claim was bona fide with a reasonable prospect of success, (3) the evidence now before the Court was sufficient to satisfy the Court that an order for security would unfairly stifle a valid claim. ***Keary Developments Ltd v Tarmac Construction Ltd*** [1995] 1 All E.R. 534, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 25.13.1 and 25.13.12.)

■ **MASOOD v ZAHOOR** [2009] EWCA Civ 650, July 3, 2009, CA, unrep. (Mummery, Dyson and Jacob L.JJ.)

Striking out for abuse of process — application in course of trial

CPR rr.1.1(2)(e) and 3.4(2). Following breakdown of commercial relationship between businessman (D) engaged in steel industry and financier (C), C and his companies bringing proceedings against D and his companies. C's claims including a claim of beneficial entitlement under an agreement to shares in a certain company controlled by D. D contending that documents underpinning C's claim were forged and C contending that D had forged documents to bolster his defence. Trial judge (1) finding that both parties (by forgery and perjury) had abused, obstructed and attempted to undermine the legal process in which they were participating, (2) rejecting D's submission that C's claim should be struck out by reason of his attempts in the litigation to deceive the court and to support the claim with forged documents, and (3) holding that C had a good claim to some of the shares to which he claimed entitlement ([2008] EWHC 103 (Ch)). Single lord justice granting D permission to appeal. **Held**, allowing appeal, the judge (1) had erred in deciding the shares claim in favour of C on a basis which was never pleaded, proved or argued, but (2) was right in rejecting D's strike out submission, (3) where a claimant is guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute his claim, then the claim may be struck out for that reason, (4) the sole question is whether the claimant, by reason of his conduct, has forfeited the right to have an adjudication of his claim, (5) the misconduct of the defendant (if any) is not relevant to that question, and is not a bar to the exercise of the power to strike out on this basis, (6) one of the objects of striking out a claim is to stop proceedings continuing to determination at trial, thereby preventing the further waste of precious resources, consequently, (7) it must be a very rare case where it would be appropriate for a judge at the end of trial to strike out a case on misconduct grounds, rather than to dismiss it on the merits in the usual way. ***Arrow Nominees Inc v Blackledge*** [2000] 2 BCLC 167, CA; ***Ul-Haq v Shah*** [2009] EWCA Civ 542, June 9, 2009, CA, unrep., ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 1.3.3, 3.4.1, 3.4.3.6 and 3.4.5.)

■ **MIRESKANDARI v THE LAW SOCIETY** [2009] EWCA Civ 864, July 8, 2009, CA, unrep. (Lord Clarke M.R. and Longmore L.J.)

Case management decision — made while recusal application pending

CPR rr.28.2 and 29.2. Law Society (D) intervening in solicitors' practice. Solicitor (C) commencing proceedings to set aside the intervention and to lift the suspension of his practising certificate. Chancery Division judge holding series of case management hearings and giving directions. On March 27, 2009, C making application inviting judge to recuse himself on ground of apparent bias. On paper, judge considering and rejecting submissions made by C in support of the application and giving directions for a hearing to permit oral argument. On May 8, judge refusing C's application for an extension of time for complying with an unless order. At oral hearing, on May 18, on basis of evidence then before him, judge deciding that he should recuse himself. C applying for permission to appeal against the judge's decision of May 8. **Held**, granting permission to appeal but dismissing appeal, (1) in determining the recusal application, for compelling and unchallenged reasons the judge rejected all of the grounds put forward by C of which he was aware between March 27 and May 8, (2) the judge recused himself on the basis of a ground coming to his attention subsequently, and in doing so adopted a precautionary approach, (3) there was no principle pursuant to which it could be said that the judge was under a duty to stop giving case management directions pending the oral hearing, or that he erred in principle in continuing to do so in the particular circumstances of this case, (4) the disposal of C's appeal did not require the resolution of questions of the status of case management directions made whilst a recusal application is pending (should orders made in the meantime be set aside as of right, or is there a more general discretion and, if so, in accordance with what principles should it be exercised?). ***Porter v Magill*** [2001] UKHL 67; [2002] 2 A.C. 357, HL; ***Millar v Dickson*** [2002] UKPC D4; [2002] 1 W.L.R. 1615, PC; ***AWG Group Ltd v Morrison*** [2006] EWCA Civ 6; [2006] 1 W.L.R. 1163, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 28.2.1and 29.2.1, Vol.2 para.9A-48.)

In Detail

COSTS CAPPING ORDERS

Rules 48.18 to 44.20 deal with costs capping orders (CCOs) and were inserted in the CPR with effect from April 6, 2009, by the Civil Procedure (Amendment No.3) Rules 2008. The power of the courts to make such orders was confirmed by the Court of Appeal in *King v Telegraph Group Ltd (Practice Note)* [2004] EWCA Civ 613; [2005] 1 W.L.R. 2282, CA, and in that and in other decisions (both at first instance and on appeal) some of the necessary detail for regulating the circumstances in which CCOs may be made were worked out. The insertion in the CPR of rr.44.18 to 48.20 was another example of the Rule Committee taking up and providing rules of court for procedural innovations emanating from the courts (see further *White Book 2009* Vol.2 para.9A–746). There is nothing new in this. Examples of rules following in the wake of judicial reactions to the emergence of identified procedural needs pre-date the CPR. But perhaps it can be said that since the CPR came into effect the Court of Appeal has been rather more adventurous in blazing new trails in controversial procedural areas than in years gone by (and there is nothing more controversial than costs) and the steadying hand of the Rule Committee has become important. Unfortunately, once rules are enacted in controversial procedural areas they tend to become the subject of detailed analysis and give rise to forensic cottage industries.

Rule 44.19 deals with the procedure for applying for a CCO, and r. 44.20 with varying such an order. The key provisions as to the circumstances in which a CCO may be made (largely reflecting the innovative case law) are found in r. 44.18. Recently, provisions in r. 48.18 have fallen for consideration both at first instance and on appeal, notably in *Barr v Biffa Waste Services Ltd (No.2)* [2009] EWHC 2444 (TCC), October 2, 2009, unrep. (Coulson J.), and *Eweida v British Airways plc* [2009] EWCA Civ 1025, October 15, 2009, C.A., unrep. (outlined below). (A third case, referred to in the other two but not dealt with below, is *Peacock v MGN Ltd* [2009] EWHC 769 (QB) (Eady J.)).

Rule 44.18(1) states that a CCO is an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made. In this context "future costs" means costs incurred in respect of work done after the date of the CCO but excluding the amount of any "additional liability", that is to say, any percentage increase under a CFA or ATE insurance premium (see r.43.2(1)(o)).

Rule 44.18(3) states expressly that these provisions do not apply to protective costs orders (PCOs). A PCO is an order made by the court to protect a party (almost always a claimant) against liability for the other party's costs in public law litigation. The basis of the two powers is quite distinct, even though the effect may in some cases be similar, in that a PCO may not always exclude all of a party's liability for the other side's costs but may simply limit that liability to a stated amount. The source of the court's power to make a PCO lies in the court's general powers as to costs (see Senior Courts Act 1981 s.51) and in modern case law, notably in *R. (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600, CA, and other decisions. It is quite separate from the source of the court's power to make CCOs.

From an operational point of view, for CCOs the important provisions are in paras (5) and (6) of r.44.18. Paragraph (5) sets out the criteria which have to be satisfied before a CCO may be made. Paragraph (6) is concerned with the exercise of the court's discretion.

Paragraph (5) of r.44.18 states that a CCO can be made at any stage of the proceedings, but only if the three conditions (two positive and one negative) are all fulfilled. The positive conditions are that it is in the interests of justice to make the order (r.44.18(5)(a)), and that there is "a substantial risk" that without an order capping future costs "costs will be disproportionately incurred" (r.44.18(5)(b)). The negative condition is that the court is not satisfied that the substantial risk "can be adequately controlled" by case management directions or orders, or by the detailed assessment of costs (r.44.18(5)(c)). The first of these conditions does not provide any real assistance. In a contested application, the second and third provide the battleground.

Paragraph (6) of r.44.18 states that, in considering whether to exercise its discretion, the court will consider all the circumstances of the case, including four particular circumstances. They are: (a) whether there is "a substantial imbalance between the financial position of the parties", (b) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation, (c) the stage which the proceedings have reached, and (d) the costs which have been incurred to date and the future costs. The first of these particular circumstances is the difficult one. The sentiment underlying the second is clear enough (and is evident elsewhere in the CPR) but its operational effectiveness may be doubted. The third has the advantage of being easy to determine. In a given case, the facts relevant to the fourth are likely to be disputed by the parties, requiring the judge to determine them.

Rules 44.18 to 44.20 are supplemented by s.23A of Practice Direction (Costs) (see *White Book 2009* Vol.1 para.44PD.18). Paragraph 23A.1 states that the court will make a CCO, "only in exceptional circumstances".

Now to the two cases referred to above. In both there are learned summaries of the relevant law (but in neither case is para.23A.1 mentioned). In *Barr v Biffa Waste Services Ltd (No.2)* the facts were that, under a GLO, 163 householders (C) brought claims against a waste disposal company (D) for negligence and nuisance. C had benefit of a CFA with (disclosed under court order) £1m ATE policy. D applied under r.44.18 for an order capping at £1m future costs of C for which D would be liable in the event of C succeeding at trial. C estimated their future costs at £1.4m (and stated that costs to date were £500,000). D estimated their total costs at £3.3m. C's recovery if successful was likely to be £1m (about £6,000 for each of the claimants).

Coulson J. refused D's application but made a costs order under r.44.3. In outline his lordship noted that in considering whether to exercise its discretion under r.44.18, the circumstances considered by the court should include "whether there is a substantial imbalance between the financial position of the parties" (r.44.18(6)(a)), and found that in this case there was such an imbalance, because, whatever the result of the trial, D would be out of pocket in costs by a large sum (possibly as much as £2.3m if C failed and £7.3m if C succeeded), whilst C's liability would be almost non-existent.

However, his lordship also found that, when contrasted with D's expenditure on costs, there was no substantial risk that, without a CCO, costs would be disproportionately incurred by C, even when measured against the likely recovery (r.44.18(5)(b)), and even if there were such risk, on the evidence it could not be said that it could not be adequately controlled by case management directions and detailed assessment of costs (r.44.18(5)(c)). Further, the fundamental imbalance in the overall position between the parties would not be significantly redressed by a CCO in the terms sought by D, as that imbalance was a product, not of future costs to be incurred, but of the terms of the GLO, the CFA, and the ATE policy.

Coulson J. said (at [42]) that the critical issue arising on D's application was: what does "disproportionate" mean? Disproportionate to what? In the reported cases, a CCO has been sought by a defendant concerned about the claimant's expenditure on costs, arguing that it was disproportionate either as against the value/worth of the litigation and/or when measured against the costs that the defendant is incurring. In this case, D's submission was different. Their complaint was about the significant inequalities that necessarily arose as a result of the GLO and the manner in which the claimants were funded.

So C's application under r.44.18 for a CCO failed. However, D did not go away empty handed. Coulson J. held that, in the circumstances, it was appropriate to make an order under r.44.3 directing that, subject to safeguards, any recovery by C from D at the end of trial of future base costs should not exceed the amount of C's current estimate of such costs.

In *Eweida v British Airways plc*, a decision of the Court of Appeal handed down after the *Barr* case, the facts were that an Employment Tribunal dismissed an employee's (C) discrimination claim against employers (D) and the EAT dismissed C's appeal. On paper, a single lord justice granted C permission to appeal, and ordered that costs recoverable by D against C on the appeal should be capped at £25,000. D's costs were estimated at £36,800. The appeal raised an issue of general importance relevant to indirect discrimination. C was not entitled to public funding and her legal representatives acted under a CFA. D exercised their right to have the costs order in favour of C reconsidered at an oral hearing.

The Court (Maurice Kay, Lloyd and Moses L.JJ.), discharged the order. The Court said it appeared that the order was made, not on a PCO basis, but rather as a CCO. The Court explained that, in the circumstances of this case, a PCO could not be granted as the proceedings were not public law litigation, but a private claim by a single employee against her employer, and C's private interest was too significant to make it appropriate to treat the case within the Corner House principles.

On turning to r.44.18(5) (to which the single lord justice was not referred), the Court found that C could not satisfy all of the conditions therein. There was no particular element in D's draft bill which was unreasonable or disproportionate in itself, and C's concerns about the hourly rates charged by D's solicitors and their estimates of hours to be devoted to the appeal were matters that could be adequately controlled by the costs judge.

In both of the cases outlined above, the applicants were unable to overcome the formidable hurdle in para.(5)(c) of r.44.18.

EDITOR: **Professor I. R. Scott**, University of Birmingham.
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