CIVIL PROCEDURE NEWS

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Judgments Regulation — exclusive jurisdiction — "regardless of domicile"

CPR rr.6.33 and 6.36, Council Regulation (EC) No.44/2001 (Judgments Regulation) arts 1(2) and 22(1), Civil Jurisdiction and Judgments Act 1982 s.42. Business of company (X), incorporated in England and maintaining registered office in London, carried on wholly in India and assets situated there. Affairs and management of company subject to orders made by Indian Companies Court, including orders staying winding-up. Immediately after returns filed at Companies House in respect of allotments of shares in X to another company (Y), two directors (C) of X, issuing an application notice in the matter of intended proceedings against a third (managing) director (D), domiciled and resident in India, and against X. After judgment reserved on that application, C issuing claim form against D, X and Y. In judgment, judge (1) finding (a) that X was domiciled in England, and (b) that the proceedings fell within art.22(2), and (2) holding that, therefore, the English court had exclusive jurisdiction (which it was precluded from declining), (3) granting interim injunction against D, and (4) giving pre-trial directions ([2009] EWHC 314 (Ch)). On ground that judge erred in law in concluding that the English court had to accept jurisdiction, D applying for permission to appeal. **Held**, allowing appeal and setting aside the interim injunction, (1) it was not possible to say that the proceedings which C sought to bring against D fell within the art.1(2)(b) exclusion (proceedings "relating to" winding up or analogous proceedings) and that for that reason the Judgments Regulation could not apply, (2) under art.22, the court of a Member State has exclusive jurisdiction "regardless of domicile" where the proceedings fall within any of the categories of proceedings enumerated in that article, (3) in this context, the words "regardless of domicile" negate the effects that a party's domicile in another Member State would otherwise have on the issue of jurisdiction, (4) accordingly, art.22 does not found jurisdiction in respect of a person (such as D) who is not domiciled in a Member State, (5) in any event, the proceedings against D did not fall within any of the art.22 categories, (6) in the light of these conclusions, permission for C to serve the claim form on D and Y out of the jurisdiction was a necessary pre-requisite for the assumption of jurisdiction over those parties, (7) in the circumstances, it was inappropriate for the Court of Appeal to determine whether such permission should be granted. Court explaining that, given its conclusions, it was not necessary to resolve the question whether there is any room at all for a Court having exclusive jurisdiction under the Judgments Regulation to stay proceedings on forum non conveniens grounds, even in a case where that jurisdiction arises in respect of a person who is not domiciled in a Member State. ***Owusu v Jackson*** (Case C-281/02) [2005] Q.B. 801, ECJ; ***Speed Investments Ltd v Formula One Holdings Ltd*** [2004] EWCA Civ 1512; [2005] 1 B.C.L.C. 455, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 para.6.33.25 and Vol.2 para.5–270.)

ENE KOS 1 LTD v PETROLEO BRASILIEIRO SA [2009] EWCA Civ 1127; *The Times* November 5, 2009, CA (Waller, Arden and Dyson L.JJ.)

Payment into court order — compliance — date of lodgment in Court Funds Office

CPR Pt 37, Practice Direction (Miscellaneous Provisions About Payments Into Court) para.1.1, Court Funds Rules 1987 rr.16(6) and 38. Following failure of charterers (D) to make advance hire payment, shipowners (C) withdrawing vessel from hire and commencing proceedings against D for declaration that withdrawal was valid and lawful. D defending and making counterclaim for damages for breach of charter. By order dated February 13, 2009, judge conditionally refusing C's application for summary judgment "on strict terms" that, for the purpose of protecting C against the possibility that the defence advanced in resistance to the application for summary judgment should fail, D should pay US$500.000 into court by 5pm on February 27, 2009. At 4.30pm on the due date, D depositing with the Court Funds Office a US dollar cheque for the full amount and on that day Office sending D temporary acknowledgement of receipt. Cheque not cleared until March 6. In meantime, on ground that mere delivery of the cheque in time was not sufficient to comply with the February 13 order, C reinstating their summary judgment application. Judge (1) granting application, holding that the effect of the order was to require that cleared funds must be held by the Office by the time stipulated, and (2) giving D permission to appeal. **Held**, dismissing the appeal, (1) the judge erred in holding that D had not complied with the order because (a) under r.16(6), the effective date of lodgement in the case of a cheque is the date of its receipt, and not the date when the funds are cleared, and (b) there is no reason for reading that provision as being limited to sterling cheques; however (2) no useful purpose would be served in allowing D's appeal, since C's claim was bound to succeed at trial. Court suggesting that question whether

the court has power to make an order for a payment into court whose meaning and effect differs from that prescribed or permitted by the CPR and CFR should be considered by the Rule Committee. (See further "In Brief" section of this issue of *CP News*.) ***Homes v Smith***, February 2, 2000, CA, unrep., ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 37.0.2, 37PD.1 and Vol.2 paras 6A–60 and 6A–90.)

■ **H v N** [2009] EWHC 640 (Fam); [2009] 1 W.L.R. 2335 (Pamela Scriven Q.C.)

Writ of sequestration — application for directions — whether writ "wholly executed"

CPR Sch.1, RSC Ord.46 rr.1, 4, 5 and 8. In children proceedings, court finding defendant (D) in contempt of court (for breach of court orders) and ordering that the claimant (C) should have leave to issue a writ of sequestration (r.5). Shortly after writ issued on May 23, 2006, (1) court directing sequestrators (S) to pay C sum out of sequestered assets, and (2) S taking possession of bank accounts and property in D's name. On May 22, 2008, S applying for directions in order to obtain realisation of the assets under their control. **Held**, granting the application, (1) in the first instance, "a writ of execution" is valid for 12 months beginning with the date of issue for "the purposes of execution" (r.8(1)), (2) where a writ "has not been wholly executed" the court may extend the validity of the writ (r.8(2)), (3) in this context, "execution" does not mean the completion of the process for enforcing and giving effect to an order of the court, but refers to the sequestrators' act of taking possession of goods or property, (4) accordingly, as the writ was executed within 12 months of issue, it was not necessary for S to apply for renewal of the writ before making their application of May 22, (5) in the circumstances it was not necessary to determine the question whether, in any event, r.8 did not apply because a writ of sequestration is not "a writ of execution" within the context of that rule (r.1). ***Re Overseas Aviation Engineering (GB) Ltd*** [1963] Ch. 24, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras sc46.5.3 and sc46.8.1.)

■ **JSC BTA BANK v ABLYAZOV (NO.2)** [2009] EWCA Civ 1125, October 27, 2009, CA, unrep. (Pill, Sedley and Moses L.JJ.)

Asset disclosure order — compliance before freezing order return date

CPR r.25.1(1)(g). In proceedings in which they made a proprietary claim, claimants (C) granted ex parte freezing order. Pending return date, C applying for order requiring defendants (D) to make an asset disclosure statement. At inter partes hearing of that application, on ground that they had had insufficient opportunity to consider whether disclosure should be resisted on ground of self-incrimination, D submitting that the determination of the application should be adjourned to the return date hearing. Judge rejecting that submission and granting the application. Single lord justice granting D permission to appeal. At hearing of appeal, C conceding that disclosure should be confined to their solicitors and counsel. **Held**, dismissing appeal, (1) on the evidence available to him, the judge was entitled to attach considerable weight to the need for a disclosure order to make the freezing order effective, (2) the judge was not obliged to defer D's obligation to comply with the disclosure order until after the return date hearing, (3) in the circumstances, disclosure should be confined to those of C's legal representatives directly concerned with the case. Observations on potential for orders confining the product of disclosure to particular legal representatives causing serious professional and juridical difficulties. ***Motorola Credit Corp v Uzan*** [2002] EWCA Civ 989; [2002] 2 All E.R. (Comm) 945, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 25.1.26 and 31.3.31 and Vol.2 para.15–77.)

■ **MAHER v GROUPAMA GRAND EST** [2009] EWCA Civ 1191, November 12, 2009, CA, unrep. (Mummery, Moore-Bick and Etherton L.JJ.)

Direct action against insurers of wrongdoer domiciled in Member State — pre-judgment interest on damages — choice of law

CPR r.16.4(2), Senior Courts Act 1981 s.35A, Private International Law (Miscellaneous Provisions) Act 1995 s.11, Council Regulation No.44/2001 (Judgments Regulation) arts 2 and 11. Following a collision on a road in France between two vehicles, one driven by an individual (C) domiciled in the United Kingdom and the other by an individual (X) domiciled in France, in which X was killed, C commencing proceedings in High Court bringing a direct action against X's French insurers (D) for damages for personal injuries suffered in the accident. At trial of preliminary issues before trial of quantum (liability being admitted), judge holding (1) that damages were to be assessed by reference to English law (*lex fori*), and (2) that both English and French law (*lex causae*) were potentially relevant to the award of pre-judgment interest on any damages awarded, depending on the facts ([2009] EWHC 38 (QB); [2009] 1 W.L.R. 1752 (Blair J.)). **Held**, dismissing D's appeal, (1) the proper characterisation of C's claim against D was that it was not (as D submitted) a contractual claim but a claim in tort, (2) the proper law of the tort was French law (the *lex causae*), (3) under English conflict of laws rules and s. 11, the assessment of damages in tort is a procedural matter and, therefore, is governed by the *lex fori*, (3) the existence of a legal right to claim interest is properly to be classified as a substantive matter to be determined by reference to the *lex causae*; however (4) s.35A does not create a substantive legal right to interest but merely gives the court a discretionary power to award interest on damages as a remedy in appropriate cases,

(5) in exercising that discretionary power in this case, the factors to be taken into account may well include any relevant provisions of French law relating to the recovery of interest on damages (including, for example, provisions as to rate of interest). Court considering arts 2 and 11 and stating (obiter) that C would have been entitled to join X's estate as a co-defendant in his direct action against D in the English court. (See further "In Brief" section of this issue of *CP News*.) ***Macmillan Ltd v Bishopsgate Investment Trust Plc (No.2)***, [1996] 1 W.L.R. 387, CA; ***Midland International Trade Services Ltd v Al Sudairy***, April 11, 1990, unrep.; ***Kuwait Oil Tanker Co SAK v Al Bader*** [2000] 2 All E.R. (Comm) 271, CA, [1970] 2 Q.B. 130, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 7.0.4, 7.0.17 and 7.0.22 and Vol.2 paras 5–259 and 9A–124.)

■ **MSA v CROYDON LBC** [2009] EWHC 2474 (Admin), October 12, 2009, unrep. (Collins J.)

Order against public body — enforcement — whether endorsement of penal notice necessary

CPR Sch.1 RSC Ord.45 rr.5 and 7(4) and Ord.52 r.1. In claim brought in Administrative Court (AC), claimant requesting judge to direct that a penal notice should be endorsed on an order made against local authority defendant. **Held**, refusing to give such direction, (1) a judgment or order may be enforced by (inter alia) committal of an individual or, where the order is directed at a body corporate, of a director or other officer or sequestration of its assets (r.5), (2) a prerequisite to such enforcement is that a penal notice must be displayed on the copy of the order served (r.7(4)), (3) prima facie, these provisions apply where an order to take or to abstain from taking any action is made against a local authority; however (4) it had not been the practice of the AC to include penal notices in orders against public bodies, because (5) where the contemnor is a public body, the court's making of a finding of contempt should suffice without the imposition of a punitive sanction, (6) in general, a penal notice was not needed to enable the court to deal with public bodies by means of proceedings for contempt or sequestration for failures to comply with its orders, (7) accordingly there was no need for the AC to change its present practice, either generally or in the instant case. ***M v Home Office*** [1994] 1 A.C. 377, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras sc45.5.4 and sc45.7.6.)

■ **OMAR v SECRETARY OF STATE FOR THE HOME DEPARTMENT (PRACTICE NOTE)** [2009] EWCA Civ 383; [2009] 1 W.L.R. 2265, CA (Moses, Hughes and Sullivan L.JJ.)

Immigration appeal — appellant's notice — extension of time for filing

CPR rr.52.4 and 52.6, Practice Direction (Appeals) para.21.7(3). Secretary of State (D) serving on individual (C) notice of order for deportation made on conducive to public good ground. AIT, on reconsideration at D's request, allowing C's appeal against the order. On error of law grounds, Senior Immigration Judge (SIJ) granting D permission to appeal to Court of Appeal. Time for filing Notice of Appeal expiring on November 23, 2007 (para.21.7(3)). D filing Notice of Appeal out of time (on Septenber 1, 2008) and applying to Court under r.52.6 for extension of time for appealing. **Held**, refusing the application, (1) there is a presumption that the Court should hear asylum and immigration appeals where the AIT has granted permission to appeal, (2) for present purposes it could be assumed that that presumption should apply equally in the case as an appeal by D (as here) as in an appeal by a claimant to refugee status; (3) however, in this case, the presumption had little force because, although one of the three reasons given by the SIJ for granting permission to appeal had merit, the other two could easily be displaced, (4) D was under an obligation to set an example in the speedy conclusion of appeals since fair and effective immigration control requires a stringent approach to delay caused by those responsible for that control, (5) in this case, D's delay (a) contradicted D's motive for persisting in attempts to deport C, (b) had a direct bearing on the merits of the appeal D sought to pursue, and (c) had harmful effects on C and his family. Observations on effects of contrasting positions of a refugee claimant and the Secretary of State when applying the *BR (Iran)* principles. ***BR (Iran) v Secretary of State for the Home Department (Practice Note)*** [2007] EWCA Civ 198; [2007] 1 W.L.R. 2278, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 52.4.1, 52.6.3 and 52PD.106.)

■ **SIR JOHN FITZGERALD LTD v MACARTHUR** [2009] EWHC 2659 (QB), October 28, 2009, unrep. (Stadlen J.)

Trial judgment in absence of defendant — appeal — application to set aside

CPR rr.3.1(3), 32.2, 39.3 and 52.4, Practice Directions (Miscellaneous Provisions Relating to Hearings) para.2.2, Practice Direction (Appeals) para.2A.2. In July 2006, service industry company (C) bringing claim in a county court against company supplying motor vehicles and against the managing director and owner of that company (D). Company going into creditors' voluntary liquidation. C obtaining judgment against company for £89,000. D defending C's claim against him for damages of £85,000 for misrepresentation or inducing breach of contract. Claim allocated to multi-track. In April 2007, (1) D emigrating to Australia, and (2) court fixing September 3 as date for two-day trial. Before trial, D (acting in person) in communication with the court and making various requests (including request that trial date be vacated and fresh pre-trial directions given). At trial, in absence of D, circuit judge (1)

finding that there was no good reason for adjourning the trial, (2) striking out D's defence (r.39.3(1)(c)), and (3) giving C judgment for the monetary sum claimed. D filing notice of appeal and High Court judge granting D permission to appeal. On appeal in High Court, D (now represented) submitting (1) that the judge's exercise of discretion under r.39.3(1)(c) was wrong, and/or (2) that the judgment against him should be set aside under r.39.3(3), and (3) that the monetary judgment for C was wrong. In course of appeal hearing, C agreeing that D's second ground of appeal should be treated as an application to set aside the judgment (an application that should normally be made to the trial court). **Held**, setting aside judgment, (1) the satisfaction of the three requirements in r.39.3(5) is a necessary but not sufficient condition for granting an application under r.39.3(3), as the court has a discretion as to whether or not to grant the application, (2) in the circumstance of this case, D had satisfied the requirements and the discretion should be exercised in his favour, (3) the judge's conclusion that there was no good reason for an adjournment was flawed in certain respects, (4) although on a number of occasions and in a number of respects, D had failed to observe proper pre-trial procedures, his conduct did not demonstrate an absence of good faith and could not fairly be characterised as "flouting" them , (5) accordingly, it was not appropriate to impose (under r.3.1(3)), as a condition for setting aside the judge's orders, a requirement that D should pay into court money, either as security for C's costs or as security for the sums claimed, (6) the judge's monetary judgment in favour of C was "a final decision" within para.2A.2, (7) accordingly, the High Court lacked jurisdiction to deal with D's third ground of appeal (against that judgment), as the appropriate route for that appeal was, not to the High Court, but to the Court of Appeal. Judge observing that an appeal against a county court judge's decision to strike out a defence would be to a single judge of the High Court, and noting potential for procedural confusion as to a defendant's remedies where the defence is struck out, not in exercise of the court's powers under r.3.4, but under r.39.3(1)(c). Also, observations on proper procedure for a trial judge to adopt when proceeding with trial and determining whether the claimant has proved his claim in circumstances where an absent defendant's defence has been struck out under r.39.3(1)(c)). ***Tennero Ltd v Arnold*** [2006] EWHC 1530; [2007] 1 W.L.R. 1025; ***Regency Rolls Ltd v Carnall*** [2000] EWCA Civ 379, October 16, 2000, CA, unrep.; ***Watson v Bluemoor Properties Ltd*** [2002] EWCA Civ 1875, December 10, 2002, CA, unrep.; ***Brazil v Brazil*** [2002] EWCA Civ 1135; [2003] C.P. Rep. 7, CA; ***Ali v Hudson*** [2003] EWCA Civ 1793; [2004] C.P. 15, CA; ***Olatawura v Abiloye*** [2002] EWCA Civ 998; [2003] 1 W.L.R. 275, CA. (See ***Civil Procedure 2009*** Vol.1 paras 3.1.5, 39.3.1, 39.3.7, 39.3.7.2, 39PD.2, 52.0.11 and 52PD.3.)

■ **THOMSON v BERKHAMSTED COLLEGIATE SCHOOL** [2009] EWHC 2374 (QB); 159 New L.J. 1440 (2009) (Blake J.)

Non-party costs order application — jurisdiction to make ancillary orders

CPR r.48.2, Senior Courts Act 1981 s.51. Former pupil (C) of school (D), with benefit of legal representation, bringing claim against D claiming damages for negligence between 1996 and 2002. In course of trial, C discontinuing claim. Judge dismissing claim and making order for costs in favour of D. D estimating their costs at in excess of £250,000. D then applying for non-party costs order against C's parents (X) and joining X as parties in the proceedings for costs only purposes. D applying for orders requiring C and X to file and serve disclosure statements relating to various classes of documents, including communications with C's solicitors, counsel and expert witnesses. For the purpose of reducing costs and expediting hearing of the main application, and to simplify D's application for disclosure orders, judge inviting C to waive any legal professional privilege he may have in relation to any documents sought. C declining this invitation. **Held**, granting the application, (1) D's application for a non-party costs order against X had reasonable prospects of success on the merits, (2) in determining that application, the principal issue was likely to be whether, and to what extent, X controlled and made decisions in the proceedings brought by C, (3) it would be unjust and unfair to deprive D of the use of any documents sought shown to be probative and admissible in relation to that issue. Basis of court's jurisdiction to grant ancillary orders in non-party costs applications, and relevant considerations for exercise of that jurisdiction where disclosure of documents is sought, explained. (See further "In Brief" section of this issue of *CP News*.) ***Dymocks Franchise Systems (NSW) Pty Ltd v Todd*** [2004] UKPC 39; [2009] 1 W.L.R. 2807, PC, ref'd to. (See ***Civil Procedure 2009*** Vol.1 para.48.2.1 and Vol.2 para.9A–203.)

Statutory Instruments

■ **CIVIL COURTS (AMENDMENT) ORDER 2009** (SI 2009/2455)

Civil Courts Order 1983, Companies Act 2006 s.1156, Limited Liability Partnerships Act 2000 ss.15 and 17. In 1983 Order, inserts art.10A and amends Sch.3. Has effect of excluding specified county courts from having jurisdiction to deal with certain matters under the 2006 Act and regulations made under the 2000 Act by confining such jurisdiction to county courts presently with bankruptcy as additional jurisdiction under the Order. In force October 1, 2009. (See ***Civil Procedure 2009*** Vol.2 paras 9A–410 and AP–5+.)

In Detail

ANCILLARY ORDERS IN NON-PARTY COSTS ORDER APPLICATION

Applications for costs orders against non-parties have become common-place. Perhaps this ought to have been predicted when the first tentative steps towards establishing and defining the scope of the court's jurisdiction to grant such orders were taken following the decision of the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] A.C. 965, HL. In that case it was held that the general discretion of the court as to costs, as restated in the Senior Courts Act 1981 s.51, includes a power to award costs against a person who is not a party to the proceedings.

CPR r.48.2 states that, where the court is considering whether to exercise this power against (or in favour of) a non-party, that person must be added as a party to the proceedings for the purposes of costs only (r.48.2(1)(a)), and that person "must be given a reasonable opportunity to attend a hearing at which the court will consider the matter further" (r.48.2(1)(b)).

The nature of the jurisdiction and the attendant procedures were examined by Blake J. in *Thomson v Berkhamsted Collegiate School* [2009] EWHC 2374 (QB); 159 New L.J. 1440 (2009). (For facts, see "In Brief" section of this issue of *CP News*.) His lordship said that the general principles relevant to the exercise of the court's discretion in this case were as follows:

(1) The order for payment of costs by a non-party would always be exceptional and any application should be treated with considerable caution.

(2) The mere fact that persons had funded proceedings ("pure funders"), who

(a) had no personal interest in the proceedings; did not stand to benefit from them;
(b) were not funding them as a matter of business; and
(c) in no way sought to control their course; would generally be insufficient to support an application that they pay the costs of the successful party, and normally the discretion would not be exercised against them.

(3) Most of the decided cases on the exercise of the court's discretion have concerned commercial funders or corporate bodies closely associated with the party who incurred the costs liability which they were unable to satisfy. In the family context, the courts have been reluctant to impose non-party costs orders against those family or friends who in the interests of access to justice assist a party to come to court for philanthropic and disinterested reasons.

(4) The conduct of the non-party in the course of the proceedings and other than as a pure witness of material fact is of relevance and potential weight.

(5) It is relevant but not decisive that the defendant had warned the non-party of the intention to seek costs or that the non-party's funding had caused the defendant to incur the costs it would not otherwise have had to incur.

In relation to the procedure for the handling of applications for non-party costs orders, Blake J. noted that r.48.2 (see above) required little by way of procedural formality. In elaborating on the procedure to be followed his lordship made the following points:

(1) It is reasonably plain from the case law (summarised in the White Book at para.48.2.1 of Vol.1) "that what is intended is a summary procedure for the determination for such an application".

(2) The application should normally be determined by the trial judge who could give effect to any views he had expressed as to the conduct of the non-party without constituting bias or the appearance of bias.

(3) In determining the application the court must exercise its case management powers to ensure that the application does not turn into satellite litigation that results in prolonged, complex and over-extended arguments about costs about costs. For that reason the inherent strength of the application is always a relevant factor.

Blake J. further explained that no formal procedure is set out for applications for ancillary orders in relation to applications for non-party costs orders. His lordship stated that this is because any ancillary orders that the court considers necessary (e.g. for disclosure, cross-examination, service of skeleton arguments and the like) are to be made in accordance with the court's discretionary judgment in pursuit of its inherent jurisdiction, having regard to the overriding objective and the intended summary nature of the proceedings. The fact that the procedure is described as a "summary" procedure does not prohibit the court from making whatever orders the court might consider necessary for the expeditious and fair determination of the substantive issue (at [14]).

In the instant case, the particular ancillary order issues arising for determination by the judge were (1) whether the non-party could be required to make disclosure of documents, and (2) how the court should deal with any claim for

legal professional privilege that may arise in the course of such disclosure. The parties were agreed that the court had jurisdiction to grant a disclosure order, but made competing submissions as to the issues to which the judge should direct himself in the exercise of discretion. On this matter Blake J. concluded as follows (at [16]).

> "I am un-persuaded that the appropriate course is to identify the nearest appropriate practice rule applicable to a full trial and add or subtract from the requirements of that rule. I consider that I should apply a high test of what is considered necessary for the fair determination of proceedings that are essentially summary in nature and should be determined speedily after the conclusion of the trial by the trial judge and bearing in mind the over-riding objective. I further recognise that the court's powers are limited where documents are the subject of litigation or legal professional privilege, which it has no power to override. If the court decides that it is necessary and in the interests of justice to make a disclosure order, it may proceed to give a detailed order within its general powers under the CPR to remove outstanding issues that may be the source of delay and further expense if unaddressed. Such an order may include inspection of documents by the court where there is a clear issue as to whether privilege attaches to them."

PAYMENT INTO COURT

In *ENE Kos 1 Ltd v Petroleo Brasilieiro SA* [2009] EWCA Civ 1127; *The Times* November 5, 2009, CA, the claimant's application for summary judgment was refused but the defendants were required to pay a substantial sum into court by a particular date. The question which arose for consideration by the Court of Appeal was whether the defendant had met the "effective date of lodgement" within the meaning of the Court Funds Rules 1987 r.16(6) (see the *White Book* Vol.2 para.6A–61). The determination of this question involved a consideration, not only of r.16(6), but also of provision in CPR Pt 37 (Miscellaneous Provisions About Payments Into Court). (For further facts and summary of Court's decision, see "In Brief" section of this issue of *CP News*.)

On the appeal, the principal judgment was given by Dyson L.J. (with whom Waller and Arden L.JJ. agreed). In the course of his judgment his lordship said (at [25]):

> "When the words "pay into court" or "payment into court" are used by a judge, they are intended to refer to payments into court whose meaning and effect are governed by the CPR and the CFR. I doubt whether there is power in the court to make an order for a payment into court whose meaning and effect differs from that prescribed or permitted by those rules. But if a judge does have such power, he will not be taken to have exercised it unless it is clear, whether by the use of express language or by necessary implication, that he intended that it should have that different meaning and effect."

It was not necessary for the Court to resolve this doubt (the Court had not heard argument on the point). Nevertheless, Arden L.J. made some observations on the point, expressing her provisional views and making practical suggestions. (Waller L.J. commended them to the Rule Committee for consideration.) Her ladyship stated as follows (at [50] to [54]).

> "51. The circumstances of a particular case may make it just for the court to craft a special form of order. In many situations the paramount interest will be that of the maker of the payment in knowing for certain the time when his payment into court is made. But there may be cases where that interest has to be balanced against the interests of the other party. Suppose for instance that the claimant is ordered to make a payment into court in order to provide security for costs to be incurred by the defendant. It might be very unfair to the defendant, especially in the current economic situation, if he has to incur substantial costs at a time when the cheque by which payment into court was made is still in the process of being cleared because he is then forced to take the risk of the cheque not being cleared.
>
> 52. How can this practical problem be met? In my judgment, neither the CPR nor the CFR require the court to give the maker of the payment every option for making a payment into court available under the CPR or CFR. It is open, as I see it, to the court in an appropriate case to restrict the options open to the maker of the payment and to specify the mode or modes of payment which the maker of the payment must adopt, provided that … the specified mode of payment is one permitted by the CPR and the CFR. Thus the order of the court could provide in an appropriate case that the payment in should be made either in cash or by banker's draft, as these methods would seem to offer the best chance of shortening the period otherwise required for clearing a cheque, particularly a non-sterling cheque.
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> 53. I further consider that it is also open to the court to specify that any payment in should not be effective for the purposes of its order unless the payment is for value received by a certain date. Obviously any such order would have to give the maker of the payment a reasonable opportunity of making the payment in by that date and it would have to be clear and unambiguous. But under this form of order it would be the maker of the payment who would take the risk of the cheque or other instrument representing payment not being met on presentation. He would have to make sure that he made the payment into court sufficiently quickly to meet the

conditions in the order. If the date specified in the order is exceeded without any fault on the maker's part, I would expect the court to extend the time. Otherwise an order would have to be made for payment out of any funds actually paid into court. The Court Funds Office would not be required to take any step not otherwise required to be taken by it and thus it would not be for them to secure the implementation of any special term in an order requiring a payment into court to be for value received by a certain date.

54. In other words, I consider that the courts will be able to address problems that may arise from this court's decision without the necessity of any amendment to the CPR or the CFR."

PARTY JOINDER IN DIRECT ACTION CLAIMS

In *Maher v Groupama Grand Est* [2009] EWCA Civ 1191, November 12, 2009, CA, unrep., claimants (C) domiciled in the United Kingdom, who had been injured in a road accident in France, brought a direct action in the High Court against the insurers of the French tortfeasor, who had been killed in the accident. (For further facts and summary of Court's decision, see "In Brief" section of this issue of *CP News*.)

In the course of proceedings in the Court of Appeal (and before the judge), the contention of the insurers (D) that C's right to recover damages was contractual and not tortious (from which certain consequences then followed) was rejected. For reasons that need not be explained here, it was asserted in support of this part of D's argument that it would not be possible for C to join the deceased's estate as an additional defendant in their English proceedings (as the deceased or his estate could only have been sued in France). The judge expressed the preliminary view that there might be some merit in that argument, but found it unnecessary to decide the point (see [2009] EWHC 38 (QB); [2009] 1 W.L.R. 1752, at [22] to [26]). The Court of Appeal (Mummery, Moore-Bick and Etherton L.JJ.) also found it unnecessary to decide the matter. Nevertheless, in delivering the principal judgment of the Court, Moore-Bick L.J. examined D's submission at length and rejected it (at [14] to [21]).

Moore-Bick L.J. said that the basic rule, enshrined in art.2(1) of the Judgments Regulation is that a person domiciled in a Member State can only be sued in the courts of that state. But the Regulation contains a number of exceptions to that rule, many of which are designed to avoid the risk of conflicting decisions being reached in the courts of different Member States. That risk is expressly recognised in para.(15) of the Preamble to the Regulation. In that paragraph, it is stated that there must be "a clear and effective mechanism for resolving cases of *lis pendens* and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending". In his lordship's opinion, this express reference to proceedings to which the provisions of s.9 of the Judgments Regulation apply (*lis pendens* and related actions) does not detract from the fact that the threat to the harmonious administration of justice by irreconcilable judgments is of a much broader nature, and the desirability of avoiding it is something that must be borne in mind when seeking to interpret other parts of the Regulation, including those provisions in s.3 (Jurisdiction in Matters Relating to Insurance) which entitled C to bring their direct action against D's insurers in England.

The particular provision in s.3 which was relevant in this case was para.(3) of art.11. That paragraph states:

"If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them."

In this case D, submitted that art.11(3) only permits the joinder of the insured as a third party at the suit of the insurer. The Court rejected that submission. Moore-Bick L.J. agreed that, under that provision, insurers may join the insured as a third party to a direct action brought against them by the injured party if the law governing the action permits, but rejected the submission that art.11(3) was confined to such circumstances. His lordship said (at [21]):

"I think there is a strong argument for holding that the proper administration of justice makes it essential that the claimant should be able to join both insurer and insured in the same action where it is necessary to do so to avoid the risk of irreconcilable judgments."

Accordingly, in his lordship's opinion, in the present case C would be entitled to join the deceased insured or his estate as an additional defendant in their proceedings against D in England.

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