CIVIL PROCEDURE NEWS

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SWEET & MAXWELL

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Costs — winning party's misconduct — depriving costs

CPR r.44.3. Insurers (C), believing themselves to be the victims of a widespread and organised fraudulent scheme, defending claims which they suspected to be in execution of the scheme brought against them by several claimants. C joining as Pt 20 defendants persons whom they believed to be the originators of, and main participants in, the fraud including, amongst others, a man (D1) and his sister (D2). C alleging that the Pt 20 defendants (all of whom were on legal aid) participated in a joint design to defraud, and seeking to recover as against them all sums paid out in consequence of the false claims. At trial of the Pt 20 proceedings, C largely succeeding. However, although finding that D2 gave knowing assistance to D1, judge holding that C had failed to prove the asserted common design as against her. D2, who had made a Pt 36 offer and who had incurred costs of £450,000, applying for costs order against C. On ground that D2 told untruths in her witness statement, had lied in two respects in her oral evidence at trial, and had given knowing assistance to D1, judge awarding her only one-third of the costs to which she would normally be entitled. Single lord justice granting D2 permission to appeal. **Held**, dismissing appeal (Sedley L.J. dissenting in part), (1) in the light of D2's conduct, the judge was entitled to make an order depriving her of some part of the costs she would otherwise recover, (2) the order made was not outside the wide area of the judge's discretion, (3) the judge was entitled to express his disapproval of D2's lies, (4) there was no need for the judge to distinguish between lies which prolonged the trial, and lies of which he merely disapproved, (5) although previously decided cases in which parties had been deprived of some of their costs for misconduct occasionally contain useful statements of principle, usually it is not helpful to compare factual details in one case with factual details in another, (6) it is not permissible to conclude that, because a party lied in one previous case and forfeited a particular proportion of his costs, so it should happen in another. ***Widlake v BAA Ltd*** [2009] EWCA Civ 1256, November 23, 2009, CA, unrep.; ***Grupo Torras S.A. v Al-Sabah*** July 5, 1999, unrep., ref'd to. Court commenting that elaborate judgments on costs are to be discouraged and deprecating excessive reliance on authorities. (See ***Civil Procedure 2009*** Vol.1 paras 44.3.2 and 44.3.8.)

BELLETTI v MORICI [2009] EWHC 2316 (Comm), September 24, 2009, unrep. (Flaux J.)

Chabra order — in support of foreign proceedings — jurisdiction

CPR rr.6.37 and 25.4, Practice Direction 6B (Service Out of the Jurisdiction) paras 3.1(3) and 3.1(5), Civil Jurisdiction and Judgments Act 1982 s.25, Judgments Regulation art.31, Senior Courts Act 1981 s.37. Italians (C) applying for and granted by English court worldwide freezing order against an individual (D) domiciled in England (within the meaning of the Judgments Regulation) in support of substantive proceedings brought by them against D in Italy. Subsequently, C suspecting that D had concealed assets in Monaco and had sought to transfer and dissipate them through various BVI and Panamanian corporate entities (made defendant to the proceedings) and that D's parents (P) (resident in Italy) had assisted in these transactions. C amending claim form and applying ex parte for order (a Chabra order) restraining P from dealing with or disposing of D's assets, assets held by the corporate defendants, or assets acquired by them from D or the corporate defendants since the freezing order began. In addition, order requiring P to give disclosure of all assets held by them on behalf of D and to deliver up assets to a receiver under s.37. Judge granting order and giving C permission under para.3.1(5) to serve the claim form on P in Italy. P refusing to comply with the orders against them (specifically the obligations to give disclosure) and, on ground that court had no territorial jurisdiction over them, applying for the orders to be set aside or discharged. **Held**, granting the application (1) it was right that the court should hear P's application notwithstanding their continuing contempt and their expressed intention to remain in contempt should it be refused, (2) the rule that, with the permission of the court (r.6.37), a claim form may be served out of the jurisdiction on a person who is a necessary or a proper party (para.3.1(3)) is limited to cases where the substantive dispute is before the English courts, (3) that rule cannot be relied on in a case where the substantive dispute is before a foreign court and the jurisdiction of the English court against the principal defendant is only engaged by virtue of s.25 and art.31, (4) in order to justify permission to serve P out of the jurisdiction, C had to satisfy both (a) the criteria relevant to the question whether it was "inexpedient" within the meaning of s.25(2) for the court to make an order (as derived from English authorities), and (b) the criteria as to the circumstances in which art.31 can be invoked (as derived from ECJ rulings), (5) the absence of any connection between P and the jurisdiction, the fact that the assets were not located in England, and the impracticality of enforcing the order against them made it inexpedient for the court to grant it, (6) further there was no "real connecting link"

between the subject matter of the order and the territorial jurisdiction of the English court. ***Motorola Credit Corp v Uzan (No.2)*** [2003] EWCA Civ 752; [2004] 1 W.L.R. 113, CA; ***Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line (Case C-391/95)*** [1999] Q.B. 1225, ECJ; ***Banco Nacional de Comercio Exterior SNC v Empressa de Telecommunicaciones de Cuba S.A.*** [2007] EWCA Civ 662; [2008] 1 W.L.R. 1936, CA; ***Masri v Consolidated Contractors International (No.2***) [2008] EWCA Civ 303; [2009] 2 W.L.R. 621, CA; ***Mobil Cerro Negro v Petroleos de Venezuela*** [2008] EWHC 532 (Comm); [2008] 1 Lloyd's Rep. 684, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 6.30.5, 6.33.30, 6.37.15, 6.37.28, 6.37.33, 6BPD.3 and 25.4.2 and Vol.2 paras 5–27, 5–279, 9A–130, 15–5, 15–63, 15–79 and 15–83.)

JSC BTA BANK v ABLYAZOV [2009] EWHC 3267 (Comm), December 12, 2009, unrep. (Teare J.)

Worldwide freezing order — standard wording restraining respondent — variation

CPR rr.3.1(7), 25.1(1)(f) and 40.12, Practice Direction 25A (Interim Injunction) Annex, Admiralty and Commercial Courts Guide Appendix 5. Before handing down judgment dismissing defendant's (D) application to discharge a freezing order and continuing the order obtained by the claimants (C) without notice, judge providing parties with draft judgment ([2009] EWHC 2840 (Comm)). C preparing draft order, to which D objected on ground that it differed in two respects from original order. At handing down on November 12, 2009, judge acceding to that objection and ordering that the wording of the original order should not be altered. C's draft order amended for purpose of meeting D's two objections and, on November 20, 2009, sealed in those terms. Subsequently, D discovering that the order differed in yet a third respect from the original order. In particular, whereas the original order did not restrain D from disposing of or dealing with assets outside the jurisdiction so long as the value of all his assets "whether in or outside the jurisdiction" remained above £175 million, the sealed order only allowed D such freedom so long as the value of all his assets "in the jurisdiction" remained above that sum. D applying for order to correct or amend the sealed order. C contending that, in the event that the court acceded to D's application, the order should be varied so as to be in same terms as that sealed by the court on November 20, 2009, and making cross-application to that effect. **Held**, (1) granting D's application, (a) good practice requires that, at a return date hearing, the claimant should draw to attention of court and defendant the respects (if any) in which the draft order differs from the original order made without notice, (b) at the hearing on November 12, the court and D were innocently misled by C, (c) in the circumstances the slip rule was engaged and the order could be amended under that provision, (d) alternatively, the court had jurisdiction under r.3.1(7) to vary the order; **further held**, (2) granting C's application, (a) the original order followed the standard wording and that wording should be followed unless there was good reason to vary it in the manner sought by C, (b) in the instant case, there was a good reason for doing so, in particular there was a real risk that the liberty provided by the standard wording to deal with foreign assets might be used by D to put assets out of reach of C. (See further, "In Detail" section of this issue of *CP News*.) ***Lloyds Investment (Scandinavia) Ltd v Ager-Hanssen*** [2003] EWHC 1740, July 15, 2003, unrep.; ***Collier v Williams*** [2006] EWCA Civ 20; [2006] 1 W.L.R. 1945, CA; ***Z Ltd v A-Z and AA-LL*** [1982] 1 Q.B. 558, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 3.1.9, 25.1.25.6, 25.1.25.9 and 40.12.1 and supp.2 para.2A–162, and Vol.2 paras 15–68 and 15–82.)

MULLOCK v PRICE [2009] EWCA Civ 1222, October 15, 2009, CA, unrep. (Ward, Sedley and Smith L.JJ.)

Default judgment — application to set aside — duty of applicant to act promptly

CPR rr.1.3 and 13.3. In June 2006, woman (C) commencing county court proceedings for personal injury claim against occupier (D) of licensed premises. Both before and after issue of claim form, D committing defence of claim to his insurance brokers (X) and relying on them to protect his interests. C's solicitors taking care to communicate both with D and X in progressing C's claim. Because (unbeknownst to D) nothing was done by X to make arrangements for the defence of the claim, on August 18, 2006, C obtaining judgment in default of acknowledgment of service. D receiving copy of judgment and passing it to X. In April 2007, X satisfying order for £3,000 interim payment obtained by C in November 2006 (of which D was aware), but otherwise continuing to fail to represent D's interests in the proceedings. At disposal hearing on January 8, 2008, judgment for £13,000 and costs of £25,000 entered against D and served on him. In April 2008, D discovering that X were under police investigation (with FSA becoming involved) and that it was possible that his liability insurance policy placed for him by X was fraudulent. D thereupon instructing solicitors and, on July 24, 2008, making application under r.13.3 to set aside default judgment of August 18, 2006. Circuit judge holding that D had a real prospect of defending the claim (r.13.3(1)(a)), and on that ground allowing D's appeal from a district judge's refusal of his application. Single lord justice granting C permission to appeal limited to the ground whether the circuit judge was correct in upholding the district judge's decision that D's application had been made promptly (r.13.3(2)). **Held**, allowing C's appeal, (1) D was under a personal duty to deal expeditiously with the claim, and in particular to act promptly from the time that he was aware of the default judgment against him, (2) the inaction of X from that time must be treated as the inaction of D himself, (3) in determining whether

D had acted promptly, the circuit judge took into account an irrelevant factor, namely D's misplaced reliance on X to protect his interests, and therefore fell into error in the exercise of his discretion, (4) in the circumstances the discretion should be exercised in favour of C and the default judgment should stand. ***Regency Rolls Ltd v Carnall*** [2004] EWCA Civ 379, October 16, 2000, CA, unrep.; ***Training in Compliance Ltd v Dewse*** [2001] C.P. Rep. 46, CA, ref'd to. (See further, "In Detail" section of this issue of *CP News*.) (See ***Civil Procedure 2009*** Vol.1 paras 1.3.2, 3.9.2 and 13.3.3 and Vol.2 para.11–14.)

■ **NEARY v ST ALBANS GIRLS' SCHOOL** [2009] EWCA Civ 1190, *The Times* November 23, 2009, CA (Ward, Sedley and Smith L.JJ.)

Employment tribunal proceedings — relief from procedural sanction — effect of CPR

CPR r.3.9, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 reg.3 and Sch.1 r.13(2). Teacher (C) bringing proceedings in employment tribunal against a school and an education authority (D) alleging disability and sexual orientation discrimination. On application of D, employment judge (EJ) making order under r.13(2) stating that, unless C provided further information (as required by an earlier order) by September 26, his claim would be struck out. On October 8, following taking effect of unless order, EJ refusing C's application for a review of the strike out order. On C's appeal to the Employment Appeal Tribunal, judge (1) holding that, because the EJ had failed to consider some of the factors set out in r.3.9(1) relevant to his decision to refuse C's application for a review, that decision was erroneous, and (2) remitting the matter to the tribunal for consideration by a different EJ. Single lord justice granting D permission to appeal. **Held**, allowing the appeal, (1) in the High Court and in a county court, when a judge is considering relief from a sanction, he is under a positive duty to consider all the factors set out in r.3.9(1) as well as any other factors which appear to him to be relevant, (2) in an employment tribunal the same detailed requirements are not to be expected of an EJ considering an application for a review of a sanction, (3) r.3.9 has not been incorporated into the rules governing the practice and procedure of employment tribunals, (4) cases in which it had been held that EJs were required to consider the r.3.9(1) factors had been wrongly decided, (5) when the decision was analysed, it could not be shown that the EJ had misapplied the law, or taken into account an irrelevant factor, or left out of account a relevant factor, or had reached so surprising a conclusion that the court was bound to infer that he had not weighed the factors properly. Observations on r.3.9(1) criteria. ***Maresca v Motor Insurance Repair Research Centre*** [2005] ICR 197, EAT; ***Southwark LBC v Afolabi*** [2003] EWCA Civ 15; [2003] I.C.R. 800, CA; ***James v Blockbuster Entertainment Ltd*** [2006] EWCA Civ 684; [2006] I.R.L.R. 630, CA; ***Bansal v Cheema*** March 2, 2000, CA, unrep.; ***Jones v Williams*** [2002] EWCA Civ 897, May 27, 2002, CA, unrep., ref'd to. (See ***Civil Procedure 2009*** Vol.1 para.3.9.1.)

■ **R. (MOHAMED) v SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS (NO.1)** [2008] EWHC 2048 (Admin); [2009] 1 W.L.R. 2579, DC (Thomas L.J. and Lloyd Jones J.)

Norwich Pharmacal relief — principles to be applied

CPR r.31.18. Former United Kingdom resident (C) facing criminal proceedings in United States in part based on confession evidence. Secretary of State (D) deciding to refuse C's request to disclose to him information known to the UK government which might support C's defence that the confessions were induced by torture. C bringing claim for judicial review of that decision. **Held**, granting C's application for disclosure, but adjourning the proceedings pending a further hearing to consider any claim by D to public interest immunity in respect of documents to be disclosed, (1) if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoer (*Norwich Pharmacal* relief), (2) the court's jurisdiction to grant such relief is an exceptional one and one which is only exercised when the court is satisfied that it is necessary that it should be exercised, (3) in determining whether the exercise of the jurisdiction was necessary the court was entitled to have regard to all the circumstances and an applicant was not required to show (a) that the information sought (i) was vital to a decision to plead, or (ii) could not be obtained by any other practicable means, or (b) that all other avenues through which the information might be obtained had been exhausted, (4) C had advanced an arguable case of wrongdoing by or on behalf of the US government, (5) it was not necessary for C to establish anything more than innocent participation by D through his agents in that wrongdoing and certainly not knowledge of it. (Open judgment in redacted form first handed down on August 21, 2008; revised version of that judgment still in redacted form handed down on July 31, 2009.) ***Norwich Pharmacal Co v Customs and Excise Commissioners*** [1974] A.C. 133, HL; ***Ashworth Hospital Authority v MGN Ltd*** [2002] UKHL 29; [2002] 1 W.L.R. 2033, HL; ***Mitsui and Co Ltd v Nexen Petroleum UK Ltd*** [2005] EWHC 625 (Ch); [2005] 3 All E.R. 511; ***Nikitin v Richards Butler LLP*** [2007] EWHC 173 (QB), February 9, 2007, unrep.; ***Campaign Against Arms Trade v BAE Systems plc*** [2007] EWHC 330 (QB), February 26, 2007, unrep., ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 31.18.2 to 31.18.9.)

R. (MOHAMED) v SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS (NO.2) [2009] EWHC 2549 (Admin); [2009] 1 W.L.R. 2653 at 2689, DC (Thomas L.J. and Lloyd Jones J.)

Redacted open judgment handed down — application to court to reopen judgment

CPR r.39.2. On August 21, 2008, in redacted open judgment, Divisional Court granting individual applicant's (C) application for disclosure of documents against Foreign Secretary (D) on *Norwich Pharmacal* and other grounds ([2009] EWHC 2048 (Admin)). Subsequently, on February 4, 2009, in a further open judgment, Court (1) noting principle that, whether proceedings are open or closed, decisions and reasons should be made public, but (2) holding that certain of the redactions made to the earlier judgment (on the basis of PII certificates issued by D) should not be restored ([2009] EWHC 152 (Admin)). C making application requesting Court to reopen the latter judgment and reconsider its decision. In a judgment handed down on October 6, 2009, and revised on November 19, 2009, **held**, granting the application and restoring the redacted paragraphs, but granting D permission to appeal, (1) the Court's conclusion that the redacted paragraphs should not be made public in an open judgment was made on the understanding that such publication would pose a serious risk of substantial harm to the national security of the United Kingdom, (2) since the change in administration in the United States following the elections there in November 2008, it had become clear that that understanding was no longer correct, (3) in these circumstances the Court was plainly entitled to reopen that aspect of the earlier judgment, (4) in the light of the evidence now before the Court, the redacted paragraphs should be made public. Applicable principles in relation to the reconsideration and reopening of a judgment after it has been handed down, but not perfected, explained. Court noting growing number of cases involving closed hearings and closed judgments and acknowledging the difficulties faced in the law reporting of closed proceedings. ***Robinson v Bird*** [2003] EWCA Civ 1820, December 19, 2003, CA, unrep.; ***Paulin v Paulin (Note)*** [2009] EWCA Civ 221; [2009] 3 All E.R. 88, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 39.2.9, 40.2.1 and 40.2.1A.)

PD TEESPORT, RE; PNPF TRUST CO LTD v TAYLOR [2009] EWHC 1693 (Ch), July 10, 2009, unrep. (Proudman J.)

Defendant joinder application — representation of applicant by others

CPR rr.1.1, 19.2, 19.4, 19.7 and 64.4, Human Rights Act 1998 Sch.1 art.6. Trustee (C) of fund for pension scheme with 53 participating bodies (including X) and 1,800 individual members. Scheme falling into deficit and C required to formulate recovery plan. C commencing Pt 8 proceedings against selected parties (r.64.4) for purpose of obtaining court's rulings on questions of construction raising issues about C's powers and about who may be liable to contribute to the Scheme in certain circumstances. C proposing to apply under r.19.7 for orders under which (1) selected participating bodies (not including X) and individual members would be made representative defendant parties in a manner which would ensure that all issues to be raised in the claim were contested, and (2) X's interests in the issues affecting them would be represented by several of those defendants. X (who had previously indicated that they did not want to be a representative defendant) applying under r.19.4 to be added as defendants. X's application not supported by other parties and opposed by C on grounds of convenience, proportionality, delay and costs. **Held**, granting X's application, (1) the representation procedure is intended to include people within the ambit of the action rather than to exclude them, and not to shut out someone who is willing to appear to represent his own interests at his own risk as to costs, (2) in this case it was very likely that some form of representation orders would be made for the purposes of the main hearing, (3) where a person has no direct access to the court, but only access through a representative, there is no breach of art.6 for that reason alone, even where the representative is not of the person's own choosing, further (4) there is no general rule that a party who did not wish to be represented would necessarily succeed in an application to be joined as a party; however (5) X had a direct and very substantial interest in the outcome of the claim, and it was plainly desirable that they should be engaged in the argument and be bound by the court's decision, (6) were it not for the possibility that X could be adequately represented (albeit against their will) through the representative party arrangements proposed by C in their pending r.19.7 application, X's application to be added as a defendant was bound to succeed, (7) in the circumstances, although X belonged to a class having "the same interest in the claim", the court could not be satisfied that a judge dealing with C's pending application would, in the face of X's objections, (a) find that the representation of X by others would, within the meaning of para.(2)(d)(ii) of r.19.7, "further the overriding objective", and (b) exercise his discretion to grant the order in the terms sought, (8) X's presence as a party was, within r.19.2, desirable in the interests of resolving all the matters in dispute in the proceedings, and the court's discretion under r.19.4 should be exercised in their favour. Relevant pre- and post-CPR authorities on representation orders reviewed. Observations on necessity for representation orders in complex proceedings, in particular complex pension litigation. ***John v Rees*** [1970] Ch. 345; ***Irish Shipping Ltd v Commercial Union Assurance Co Plc*** [1991] 2 Q.B. 206, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 para.19.7.3.)

■ **WIDLAKE v BAA LTD** [2009] EWCA Civ 1256, November 23, 2009, CA, unrep. (Ward, Smith and Wilson L.JJ.)

Costs — successful party exaggerating claim

CPR rr.36.14 and 44.3. Employee (C) bringing claim against employers (D) for personal injuries (particularly injury to back). D admitting liability and making £4,500 Pt 36 payment. At trial of quantum, consequences of C's injuries and level of special damages disputed. C claiming £11,000 for pain and suffering, etc. and £24,000 specials, and D contending that the appropriate figures were, respectively, £3,250 and £2,000. On those claims, judge awarding C damages of, respectively, £3,500 and £2,000 plus agreed interest. Judge (1) finding that C had misled certain experts as to aspects of her medical history, (2) noting that C had made no counter-offer, and (3) ordering C to pay D's costs of the action. **Held**, setting aside the judge's order (on ground that he misdirected himself) and making no order for costs, (1) where a court is exercising its discretion as to costs it is to "have regard" to the conduct of the parties, and that includes "whether it was reasonable for a party to raise, pursue of contest a particular allegation or issue" (r.44.3(5)(b)), and "whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim" (r.44.3(5)(d)), (2) the manner in which the court is to "have regard" to such conduct is principally to enquire into its causative effect, in particular, to the extent to which the conduct caused the incurring or wasting of costs, (3) in determining such effect there may be no need for the court to determine which party was the "winner" on a particular point falling for decision by the trial judge, (4) where the causative effect of an exaggerated claim by a successful party is to put the other party to the incurring or wasting of costs, some compensation to that other party should be granted, (5) in addition, where the court finds that the misconduct was so egregious that a penalty should be imposed, it may deprive the offending party of costs by way of punitive sanction, (6) in the instant case there was, as the judge found, gross exaggeration by the successful claimant, and that was conduct to be taken into account in disapplying the general rule as to entitlement to costs (r.44.3(2)(a)). Court stating (at [21]) that, because the court must take into account all the circumstances of the case when exercise its discretion as to costs, every case will depend on its own facts; consequently, although points of principle may be derived from decided cases, generally a close analysis of the facts of such cases will not be very enlightening. ***Molloy v Shell UK Ltd*** [2001] EWCA Civ 1272, July 6, 2001, CA, unrep.; ***Painting v University of Oxford*** [2005] EWCA Civ 161; [2005] Costs L.R. 394, CA; ***Jackson v Ministry of Defence*** [2006] EWCA Civ 46, January 12, 2006, CA, unrep.; ***Straker v Tudor Rose*** [2007] EWCA Civ 368; [2007] C.P. Rep. 32, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 para.44.3.10.)

Statutory Instruments

■ **CIVIL JURISDICTION AND JUDGMENTS REGULATIONS 2009** (SI 2009/3131)

CPR Pts 6, 25 and 74, European Communities Act 1972 s.2 and Sch.2 para.1A, Council Regulation (EC) No.44/2001. Amend legislation, including CPR (service of documents and enforcement of judgments), to reflect Convention agreed between EC, Iceland, Norway, Switzerland and Denmark with provisions generally parallel in nature to those in the Judgments Regulation (EC) No. 44/2001. Amended legislation includes Civil Jurisdiction and Judgments Act 1982 (inserting ss.4A, 5A, 6A, 11A, 41A, 43A and 44A), and Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 2007. Also contains provisions relating to authentic instruments and court settlements and saving provision. In force January 1, 2010. (See ***Civil Procedure 2009*** Vol.1 paras 6.31, 6.33, 12.11, 25.13, 74.1 to 74.6, 74.8, 74.10, 74.11 and 74.12 and Vol.2 paras 5–20, 5–23, 5–35, 5–39, 5–41 and 5–162.)

In Detail

SETTING ASIDE DEFAULT JUDGMENT

A judgment obtained in default of an acknowledgment of service where the conditions stated in r.12.3 are satisfied, and entered under Pt 12, may be set aside by the court under r.13.3 where the defendant has a real prospect of successfully defending the claim. Rule 13.3(2) states that, in considering whether to grant an application under that rule "the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly". That provision is open to the interpretation that an applicant's failure to apply promptly would not necessarily be fatal to the application. The court's duty is to have regard to promptness, not to give that factor determinative weight. However, as a practical matter an application that was not made promptly is not likely to succeed. In *Regency Rolls Ltd v Carnall* [2004] EWCA Civ 379, October 16, 2000, CA, unrep., Simon Brown L.J. stated that "promptly" in this context did not require that the applicant be innocent of any needless delay "but rather that he acted with all reasonable celerity in the circumstances". In the recent case of *Mullock v Price* [2009] EWCA Civ 1222, October 15, 2009, CA, unrep., the Court of Appeal (per Ward L.J.) said that, if it were thought that the plain and obvious meaning of the word "promptly" required any elaboration, that dictum provided it.

In the *Mullock* case, on July 24, 2008, the defendant (D) applied to have set aside a judgment in default of acknowledgment of service against him obtained by the claimant (C) on August 18, 2006. A district judge, and on appeal a circuit judge, were both prepared to hold that the application, though made after a delay of nearly two years, had been made promptly.

As the account of this case in the "In Brief" section of this issue of *CP News* shows, the facts were rather unusual. The claim brought by C was for personal injuries suffered on D's premises. D believed that any liability on his part would be covered by an insurance policy effected on his behalf through insurance brokers (X). It appears that, once the claim was intimated, and after proceedings were commenced, D assumed (and not without reason) that X were protecting his interests in the proceedings and that letters from C's solicitors (also posted to X) and documents from the court received by him (including a copy of the default judgment) required no direct response from him but would be dealt with by X. In his evidence D said that, whenever he received documents from the court, he faxed them to X and communicated with them. Perhaps D might have guessed that things were not going as they should when, in April 2007, bailiffs turned up on his doorstep to enforce a £3,000 interim payment order (an incident that caused an immediate and direct exchange between D and X resulting in X satisfying the order). In January 2008, at a disposal hearing, C obtained judgment on quantum.

In April 2008, D experienced a number of nasty surprises (described by Ward L.J. as "a bombshell") which demonstrated that his assumptions that he was indemnified against liability under a valid insurance policy, and that X had been and were protecting his interests appropriately, were completely unfounded. D faced the possibility of having to meet a judgment of £35,000 (including costs) personally, though there was the prospect of his receiving compensation from the Financial Services Compensation Scheme. D then instructed solicitors and, on July 24, 2008, made an application under r.13.3 to set aside the default judgment of August 18, 2006. D's application was made nearly two years after the judgment. The district judge and, on appeal, the circuit judge, had to deal with the question whether it had been made promptly. Both decided that it had. The district judge approached that question on the basis that what had to be determined was whether D had acted promptly after the "bombshell". The circuit judge upheld the district judge's conclusion, but was content to say that, because of D's misplaced reliance on X, there was no delay. The Court of Appeal held that that was an error and approached the matter afresh; the "silent default" of X (as Sedley L.J. put it) was an irrelevant factor.

In delivering the principal judgment of the Court, Ward L.J. (with whom Sedley and Smith L.JJ. agreed) said the issue was whether a party (in this case D) can rely on the actions or inactions of those who represent him (in this case X). (Obviously, no blame attached to the solicitors whom D instructed after the "bombshell".) His lordship pointed out that r.3.9 (Relief from sanctions) states expressly that the court should consider the circumstance whether a party's failure to comply with any rule, practice direction or court order "was caused by the party or his legal representative" (r.3.9(1)(f)). That suggests that a failure by the legal representative may provide adequate excuse where a party seeks relief under that rule. His lordship noted that r.13.3 contains no such express provision and said that he was not satisfied that the rule should be read as if it does. His lordship said, for essentially two reasons, it was wrong that a party should shield behind his representatives. Those reasons are:

> "First, the language of r.13.3 is explicit: it requires "the person seeking to set aside the judgment" to make the application promptly. So it focuses on that person's action. Secondly, the Civil Procedure Rules in fact impose duties on the parties to the litigation, and it seems to me that must mean the parties themselves irrespective of the help and advice they are or are not receiving."

In taking up the second of these reasons, Ward L.J. said the duty imposed on parties by r.1.3 "to help the court to further the overriding objective" had the effect of making it the "personal duty" of D to ensure that the case was dealt with expeditiously and, in the particular circumstances of this case, to act promptly to set aside any judgment entered in default under r.12.3. His lordship concluded (at [24]):

> "Here it is beyond question that the defendant knew that judgment had been entered against him, he knew that there was an order for interim payment, he had as I said had the bailiffs there to enforce that order and he knew that it had been paid by the brokers. Furthermore he knew that application was being made and had been made successfully to enter a final judgment against him. In my judgment it behoved him to act promptly from the time that he was aware of the judgment having been entered against him. That was his obligation, to deal expeditiously with the matter. To delay for two years, or almost two years, can by no stretch of the imagination be a prompt application to set aside the judgment."

FREEZING ORDER—LIBERTY TO DEAL WITH FOREIGN ASSETS

An "example" of a freezing injunction is annexed to Practice Direction 25A (Interim Injunctions). Paragraph 6.2 of that practice direction states that the example may be modified as appropriate in any particular case. In para.F15.5 of the Admiralty and Commercial Courts Guide it is explained that a "standard form of wording" for a freezing injunction "adapted for use in the Commercial Court" is set out in Appendix 5 to the Guide, and it is stated that this standard form should be followed unless the judge hearing a particular application orders otherwise. The terms of the "example" annexed to Practice Direction 25A and of the "standard form" annexed to the Guide are drafted in a manner which permits them to be adapted for use either for "domestic" or "worldwide" freezing orders (but they are not in all respects the same). In both, related terms to be used for a "worldwide" order state (1) that if the total unencumbered value of the respondent's assets in England and Wales does not exceed the stipulated maximum sum, the respondent must not remove any of those assets from England and Wales and must not dispose of or deal with any of them, and (2) that if the respondent has other assets outside England and Wales, he may dispose of or deal with those assets outside England and Wales so long as the total unencumbered value of all assets *whether in or outside England and Wales* remains above the maximum sum (emphasis added).

In *JSC BTA Bank v Ablyazov* [2009] EWHC 3267 (Comm), December 12, 2009, unrep., where the respondents (D) did have assets outside the jurisdiction, the claimants (C) asserted that the second of these terms, by giving D liberty to deal with their foreign assets so long as their total assets did not fall below the stipulated maximum sum (£175 million), did not provide them with sufficient protection, and contended that the term should be amended so as to provide that D may dispose of or deal with those assets so long as the total unencumbered value of all assets *in England and Wales* remained above that sum (emphasis again added). (It was said that the D's assets within the jurisdiction were valued at less than the maximum sum.) C submitted that their dispute with D on this matter raised a point of principle as to the appropriate wording of worldwide freezing orders generally; in effect, the argument was that, in this respect, the "example" and the "standard form of wording" are wrong.

In dealing with this application, Teare J. first noted that it is usual to insert in a freezing order a maximum sum to be restrained, and explained that this was based on the principle that a respondent should not be restrained from dealing with assets he may have which exceed the claimant's claim (plus interest and costs). In his lordship's opinion, the amendment sought by C ran counter to that principle. Further, the effect of the amendment would be to put pressure on D to bring assets to England and Wales (presumably with the consent of C since otherwise such dealing with assets may be a breach of the order) so that the value of the assets in England and Wales reached the maximum sum thereby enabling D to deal with their other assets abroad. This ran counter to the principle that the purpose of a freezing order is to restrain dealings in assets and not to force a defendant to move assets into the jurisdiction (at [29]).

Teare J. also noted that C had established a real risk of dissipation of assets by D, and that the conduct which C wished to restrain by the amended order sought was conduct which a freezing order is designed to restrain; namely, the removal of assets from one foreign jurisdiction to another where enforcement of a judgment would be difficult (at [14] and [30]).

The result was, as his lordship explained, that "there was therefore a tension, or even conflict, between, on the one hand, those circumstances of the present case which suggest that the amended form of injunction sought by the claimant provides that protection which is reasonably necessary to protect the interests of the claimant and, on the other hand, those circumstances which suggest it is contrary to principle" (at [39]). In his lordship's opinion, in most cases the standard wording should be retained; the question was whether the circumstances of the present case were such that there was good reason to amend that wording in the manner suggested by C (at [41]). His lordship held that there was a good reason for doing so, in particular there was a real risk that the liberty provided by the standard form of freezing order to deal with foreign assets might be used by D to put assets out of reach of C. Any prejudice to D caused by the amended form can be avoided or at any rate alleviated by his ability to apply to the court for liberty to deal with any particular asset.

CPR Update

AMENDMENTS TO CPR RULES

The Civil Jurisdiction and Judgments Regulations 2009 (SI 2009/3131) came into force on January 1, 2010. Legislation amended by these Regulations include the Civil Jurisdiction and Judgments Act 1982 (see the White Book Vol.2 paras 5–7 et seq.), the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (see Vol.2 para.5–161) and the CPR (see further below).

In the Explanatory Memorandum accompanying this statutory instrument it is explained that, on October 30, 2007, the European Community, the Republic of Iceland, the Kingdom of Norway, the Kingdom of Denmark and the Swiss Confederation agreed on a convention to replace the 1988 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. This new Lugano Convention was ratified by the Council of Ministers on May 18, 2009, and entered into force for the European Community and Norway on January 1, 2010. The provisions of the new convention are generally parallel in nature to the equivalent provisions in Council Regulation No.44/2001 ("the Brussels I Regulation"). The commencement of the new convention thereby re-establishes the parallelism which had earlier existed between the 1988 Lugano Convention and the 1968 Brussels convention and which had been disrupted by the commencement of the Brussels I Regulation in March 2002.

The necessary amendments made by these Regulations to the CPR as a consequence of the new Lugano Convention are set out below.

The new Convention also requires amendments to CPR Practice Directions. Those amendments had been prepared but had not been published by January 1, 2010 (see further below). Presumably they will be published at some stage in coming weeks.

PART 6—SERVICE OF DOCUMENTS

Paragraph 6.31, p.196

In r.6.31 after the definition of "domicile" insert:

"(j) "the Lugano Convention" means the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark and signed by the European Community on 30th October 2007."

Paragraph 6.33, p.197

In r.6.33 for subsection (1) substitute:

"(1) The claimant may serve the claim form on the defendant out of the United Kingdom where each claim against the defendant to be served and included in the claim form is a claim which the court has power to determine under the 1982 Act or the Lugano Convention and—

(a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom or any other Convention territory; and

(b) (i) the defendant is domiciled in the United Kingdom or in any Convention territory;

(ii) the proceedings are within article 16 of Schedule 1 to the 1982 Act or article 22 of the Lugano Convention; or

(iii) the defendant is a party to an agreement conferring jurisdiction, within article 17 of Schedule 1 to the 1982 Act or article 23 of the Lugano Convention."

In r.6.33(3) after "the 1982 Act or" insert "the Lugano Convention or".

PART 12—DEFAULT JUDGMENT

Paragraph 12.11, pp.364 and 365

In r.12.11(4)(a) after "Judgments Act 1982 or" insert "the Lugano Convention or".

In r.12.11(6) after the definition of "the Judgments Regulation" insert:

"(f) "the Lugano Convention" means the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark and signed by the European Community on 30th October 2007."

PART 25—INTERIM REMEDIES AND SECURITY FOR COSTS

Paragraph 25.13, p.662

In r.25.13(2)(a)(ii) for "Lugano Contracting State" substitute "State bound by the Lugano Convention".

PART 74—ENFORCEMENT OF JUDGMENTS IN DIFFERENT JURISDICTIONS

Paragraph 74.1, p.1897

In r.74.1(5) after the definition of "the EEO Regulation" insert:

"(f) "the Lugano Convention" means the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark and signed by the European Community on 30th October 2007."

Paragraph 74.2, p.1898

In r.74.2(2)(a) after "the 1982 Act" insert "or the Lugano Convention".

Paragraph 74.3, p.1898

In r.74.3(1), for "(d) the Judgments Regulation," substitute:

"(d) the Judgments Regulation; and

(e) the Lugano Convention,".

Paragraph 74.4, p.1900

For r.74.4(6) substitute:

"(6) An application for registration under the Judgments Regulation or the Lugano Convention must, in addition to the evidence required by that Regulation or that Convention, be supported by the evidence required by paragraphs (1)(b) and (2)(e) of this rule."

Paragraph 74.5, p.1900

In r.74.5(2) after "the 1982 Act or" insert ", the Lugano Convention,".

Paragraph 74.6, p.1901

In r.74.6(3)(c)(ii) for "or under" substitute ", the Lugano Convention, or".

Paragraph 74.8, p.1909

In r.74.8(1) after "under the 1982 Act or the" insert "Lugano Convention or the".

Paragraph 74.10, pp.1911 and 1912

For paras (1) and (2) of r.74.10 substitute:

"(1) Registration of a judgment serves as a decision that the judgment is recognised for the purposes of the 1982 Act, the Lugano Convention and the Judgments Regulation.

(2) An application for recognition of a judgment is governed by the same rules as an application for registration of a judgment under the 1982 Act, the Lugano Convention or the Judgments Regulation, except that rule 74.4(5)(a) and (c) does not apply."

Paragraph 74.11, p.1918

For r.74.11 substitute:

"**74.11** The rules governing the registration of judgments under the 1982 Act, the Lugano Convention or the Judgments Regulation apply as appropriate and with any necessary modifications for the enforcement of—

(a) authentic instruments which are subject to—

(i) article 50 of Schedule 3C to the 1982 Act;

(ii) article 57 of the Lugano Convention; and

(iii) article 57 of the Judgments Regulation; and

(b) court settlements which are subject to—

(i) article 51 of Schedule 1 to the 1982 Act;

(ii) article 58 of the Lugano Convention; and

(iii) article 58 of the Judgments Regulation."

Paragraph 74.12, p.1918

In r.74.12(1)(d) after "the Judgments Regulation" insert "or under article 54 of the Lugano Convention".

AMENDMENTS TO CPR PRACTICE DIRECTIONS

As was explained above, amendments to CPR Practice Directions made necessary by the new Lugano Convention came into effect on January 1, 2010, but had not been published by that date. Drafts available at the time of writing are as explained below.

Practice Direction 12 (Default Judgment)

Paragraph 12PD.4, p.367

In para.4.3:

(a) in subparagraph (1) after "the Civil Jurisdiction and Judgments Act 1982," insert "or the Lugano Convention";

(b) in subparagraph (2)(b) after "the Act" insert "or the Lugano Convention"; and

(c) in subparagraph (2)(c) delete "or 3C" and before "paragraph 15" insert "Article 26 of the Lugano Convention,".

Practice Direction 74A (Enforcement of Judgments in Different Jurisdictions)

Paragraph 74PD.3, p.1929

In para.3(1), for sub-paras (c) and (d), substitute:

"(c) section 4 of the 1982 Act;

(d) the Judgments Regulation; or

(e) the Lugano Convention."

In para.3(2) after "the Judgments Regulation" insert "and article 54 of the Lugano Convention".

Paragraph 74PD.6, p.1931

After para.6.5, insert:

"Evidence in support of an application under the Lugano Convention: rule 74(4)

6A.1 Where a judgment is to be recognised or enforced in a Contracting State which is a State bound by the Lugano Convention, that Convention applies.

6A.2 As a consequence of article 38(2) of the Lugano Convention the provisions of Title III of that Convention relating to declaring judgments enforceable are the equivalent, in the United Kingdom, of provisions relating to registering judgments for enforcement.

6A.3 Title III of, and Annex V to, the Lugano Convention are annexed to this Practice Direction. They were originally published in the official languages of the European Community in the Official Journal of the European Communities by the Office for Official Publications of the European Communities.

6A.4 Sections 2 and 3 of Title III of the Lugano Convention (in particular articles 40, 53, 54 and annex V) set out the evidence needed in support of an application.

6A.5 The Civil Jurisdiction and Judgments (England and Wales and Northern Ireland) Regulations 2009 make amendments to the Civil Jurisdiction and Judgments Act 1982 in respect of the Lugano Convention."

Paragraph 74PD.7, p.1931

After para.7.4 insert:

"**7.5** In an application under the Lugano Convention, the certificate will be in the form of Annex V to the Convention."

Paragraph 74PD.9, p.1932

At the end of para.9.4 insert:

"After the commencement on 17 December 2009 of EC Regulation 593/2008 ("the Rome I Regulation") this Convention and Protocol will only apply to contracts concluded before that date."

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LEGAL TAXONOMY
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