CIVIL PROCEDURE NEWS

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In Brief

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Death of defendant to possession claim – appointment of representative

CPR r.19.8, Housing Act 1985 ss.82(2) and 85(2), Practice Statement (Judicial Precedent), [1966] 1 W.L.R. 1234, HL. Council tenant (D) failing to comply with terms of conditional suspended possession order made in proceedings commenced against him in 1986. Order becoming enforceable on March 4, 1987, but D remaining in premises as a tenant tolerated by the landlords (C) (paying rent plus an amount towards the arrears) until his death in February 2005. At time of his death, D's brother (X) living at the premises and remaining there subsequently. C serving notice to quit on X and commencing possession proceedings. X applying to a county court under r.19.8(1)(b) to be joined to the earlier possession proceedings by C against D that led to the loss of D's tenancy to represent the estate of D in order that, as such representative, he could exercise the right to apply to the court for revival of the tenancy under s.85(2). Judge refusing application, High Court judge dismissing X's appeal ([2007] EWHC 355 (QB)), and Court of Appeal dismissing X's further appeal ([2009] EWCA Civ 66). House of Lords granting X permission to appeal ([2009] 2 W.L.R. 372, H.L.) **Held**, allowing X's appeal, ordering that X should be appointed to represent the estate of D under r.19.8(1)(b), and remitting his application under s.85(2) for postponement of the 1987 possession order to a county court for determination, (1) the fact that a former secure tenant has died does not deprive a court of the jurisdiction under s.85(2)(b) to postpone the date of possession under a possession order, (2) such a tenant's statutory right to apply under that provision to postpone the date for possession, and thus revive the secure tenancy, survives death and passes to the estate of the deceased former tenant, (3) Court of Appeal authority to the contrary was wrongly decided, (4) in the circumstances of this case, X was a person who had an interest in a "claim" for the purposes of r.19.8 (i.e. the claim for possession that was issued against him in 1986) which in the events that had happened could be invoked by his estate. In context of correct construction of s.82(2), Deputy President explaining circumstances in which Supreme Court may depart from its own previous decisions or decisions of the House of Lords. ***Thompson v Elmbridge Borough Council*** [1987] 1 W.L.R. 1425, CA (pet dis [1988] 1 W.L.R. 320, HL), ***Burrows v Brent London Borough Council*** [1996] 1 W.L.R. 1448, HL; ***Brent London Borough Council v Knightley*** (1997) 29 H.L.R. 857, CA; ***Knowsley Housing Trust v White*** [2008] UKHL 70; [2009] A.C. 636, HL, ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 19.8.1 and 19.8.3, and Vol.2 paras 3A–348, 3A–384, 3A–402 and 12–54.)

BOTTOMLEY v EAST MIDLANDS STRATEGIC HEALTH AUTHORITY [2010] EWCA Civ 756, July 2, 2010, unrep., CA (Maurice Kay, Rix and Burnton L.JJ.)

Lump sum or periodical payments issue – addition as party of local authority providing care

CPR rr.19.2 and 41.7, Damages Act 1996 s.2. In May 2007, child (C), by next friend (R) bringing negligence claim against health authority (D) for injuries suffered at birth in December 1993. C in care of local authority (N) and R employed by N. D admitting liability and judgment entered with damages to be assessed. Trial as to damages fixed for June 10, 2010. On May 14, 2010, judge dismissing N's application under r.19.2 (opposed by C) to be joined as an additional party to the proceedings. **Held**, allowing N's appeal, (1) in determining whether periodical payments or a lump sum should be awarded the court is required to take into account all the circumstances of the case (r. 41.7), (2) in the instant case, those circumstances included the effects that such determination may have on the financial rights and liabilities of N arising from its past and future care of C, (3) the amount and form of the damages award was a matter in dispute and determining it involved establishing where C would be cared for, and whether and in what circumstances N would propose to charge for its services and expenditure, (4) accordingly, it was desirable that N should be added as a party so that the court could resolve all matters, including the issue of the amount and form of any award (r.19.2(2)), (4) the joinder of N disqualified R from continuing as C's litigation friend. ***B. (A Child) v Todd***, [2002] Lloyd's Rep. Med. 12, ***Ryan and Liverpool City Council v Liverpool Health Authority*** [2002] Lloyd's Rep. Med. 23; ***Crofton v National Health Service Litigation Authority*** [2007] EWCA Civ 71; [2007] 1 W.L.R. 923, CA; ***Peters v East Midlands Strategic Health Authority*** [2009] EWCA Civ 145; [2010] Q.B. 48, CA, ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 19.2.1 and 41.7.1.)

COMMUNITY CARE NORTH EAST v DURHAM COUNTY COUNCIL [2010] EWHC 959 (QB), April 29, 2010, unrep. (Ramsey J.)

Tomlin order – application to vary

CPR rr.1.1, 1.4 and 3.1(7). Partnership (C) and others (X) responding to local authority's (D) invitation to tender for the providing of care services. Upon D's notifying C that X had been successful but they had not, C commencing

proceedings against D for an injunction, alleging that D's handling of the interview stage of the procurement process failed to comply with EC law and domestic regulations. Before substantive hearing, parties reaching compromise and the proceedings stayed by a consent order in the form of a Tomlin order. C re-running interview stage and deciding that contracts would be awarded to C as well as to X. X then commencing proceedings against D challenging that decision. For various reasons, D anxious to settle X's claim against them. On ground that a particular term in the Tomlin order presented a significant obstacle to such settlement, D making application to vary that order. D contending that there had been a change of circumstances which could not have been foreseen. C opposing the application. **Held**, dismissing application, (1) the Tomlin order schedule contained a binding contract between C and D compromising their proceedings, (2) this arrangement had to be distinguished (a) from a consent order made at an interlocutory stage by which a claim was compromised on terms (including terms as to time for compliance), and (b) from a consent order which incorporated a binding contract as terms of the order, (3) such powers as the court may have (e.g. those derived from r.3.1(7) and other CPR provisions) to vary the terms of orders falling in these latter categories are not exercisable for the purpose of varying the terms of a contractual agreement in the schedule of a Tomlin order, (4) the terms of such a schedule are not an order made by the court, (5) there was no justification for a general power for the court to vary the terms of a Tomlin order schedule on the basis that there as been a material or unforeseen change of circumstances. Application of contractual remedies to agreements contained in Tomlin order schedules (e.g. rectification) explained. ***Weston v Dayman*** [2006] EWCA Civ 1165; [2006] B.P.I.R. 1549, CA; ***Ropac Ltd v Inntrepeneur Pub Co. (CPC) Ltd*** [2001] C.P. Rep. 31, ref'd to. (See **Civil Procedure 2010** Vol.1 paras 3.1.9, 40.6.2, 40.6.3 and 40.9.3.)

- **FIDDES v CHANNEL FOUR TELEVISION CORPORATION** [2010] EWCA Civ 730, June 29, 2010, unrep., CA (Lord Neuberger M.R., Maurice Kay and Sedley L.JJ.)

Libel claim – application for trial by judge alone

CPR r.26.11, Senior Courts Act 1981 s.69, Practice Direction 52 para.5.6. In December 2008, individual (C) bringing libel claim against TV company and persons involved in making of programme (D). Case assigned to High Court judge for case management and trial purposes. Judge giving rulings on several contested applications and, on October 7, 2009, giving directions, including direction (agreed by parties) that trial should be by judge and jury. June 14, 2010, fixed as day for start of trial (with 20 day estimate). On May 28, 2010, at hearing lasting 6 hours, judge granting D's application (made on May 12 and opposed by C), for order that trial should be by judge alone. C applying to Court of Appeal for permission to appeal. **Held**, granting permission but dismissing appeal, (1) the judge correctly identified the issues arising on the application and the applicable principles, (2) there was no ground for interfering with his conclusion that the trial would require a prolonged examination of documents which could not conveniently be made with a jury, (3) the judge took into account proper factors when exercising his residual discretion. Court re-stating, and in certain respects elaborating on, the principles relevant to s.69(1) as stated by Lord Bingham LCJ in ***Aitken v Preston*** [1997] E.M.L.R. 415, CA. Court stating (at para.13) that it is only in the most exceptional circumstances that parties should consider obtaining a full transcript of an interlocutory hearing for the purposes of an appeal. ***Viscount de Lisle v Times Newspapers Ltd*** [1988] 1 W.L.R. 49, CA; ***Goldsmith v Pressdram Ltd (Note)*** [1988] 1 W.L.R. 64, CA, also ref'd to. (See ***Civil Procedure 2010*** Vol.1 para.52.4.5 and Vol.2 para.9A–258.)

- **L.G. BLOWER SPECIALIST BRICKLAYER LTD v REEVES** [2010] EWCA 726, June 25, 2010, unrep., CA (Sir Anthony May PQB, Carnwath and Moore-Bick L.JJ.)

Part 36 offers – series of offers – withdrawal of some – effects

CPR rr.36.2, 36.3, 36.14 and 44.3. Corporate building contractor (C) bringing claim against householders (D) for work done and D counterclaiming for losses incurred, alleging poor workmanship, etc. On May 15, 2007, D making Pt 36 offer of £8,023 inclusive of interest. Subsequently, D making further, increased offers, and C making counter-offers, but parties unable to reach agreement. On January 9, 2008, D withdrawing all of their offers, but excluding the May 15, 2007, offer. At trial of claim and counterclaim in June 2009, district judge giving judgment for C in sum of £8,375 together with interest. Judge also making costs order in favour of C, but restricting it to 50% of its costs from January 8, 2008. On their appeal against the costs order, D contending that C's judgment was not materially "more advantageous" to it than the un-withdrawn May 15, 2007, offer and, therefore, the costs consequences stated in r.36.14(2) applied. Circuit judge dismissing D's appeal, holding that the un-withdrawn offer had been superseded by D's later (and withdrawn) offers. **Held**, dismissing D's further appeal, (1) provisions in Pt 36 state clearly how an offer may be made, how it may be varied, and how it may be accepted, (2) unlike ordinary common law principles, they do not provide for an offer to lapse or become incapable of acceptance on being rejected by the offeree, (3) once made, a Pt 36 offer remains open for acceptance until the start of trial or its withdrawal in the manner set out in r.36.3(7), (4) where a party makes several offers in different terms, a later offer does not revoke or vary an earlier offer, and all of them may be capable of acceptance at any one time, (5) in this case, the circuit judge erred in holding

that the un-withdrawn offer (which fell £586 short of the judgment) had been superseded, (6) when determining the costs, the district judge proceeded on the basis that the judgment was more advantageous to C than D's un-withdrawn Pt 36 offer, and was right to do so, (7) further, the district judge was right to assess costs in accordance with the Pt 44 principles and there was no ground for criticising his application of those principles. Observations on factors (including the risk of incurring unrecoverable costs and emotional stress) to be taken into account by court when determining whether a judgment is "more advantageous" than a Pt 36 offer. (See further, "In Detail" section of this issue of **CP News**.) ***Carver v BAA Plc*** [2008] EWCA Civ 412; [2009] 1 W.L.R. 113, CA; ***Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd (No.7)*** [2008] EWHC 2280 (TCC); ***Sampla v Rushmoor Borough Council*** [2008] EWHC 2616 (TCC), ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 36.1.2, 36.3.4, 36.14.1 and 44.3.9.)

- **GIBBON v MANCHESTER CITY COUNCIL** [2010] EWCA 726, June 25, 2010, unrep., CA (Sir Anthony May PQB, Carnwath and Moore-Bick L.JJ.)

Part 36 offers – acceptance of offer previously rejected

CPR r.36.9. In tripping claim, defendant local authority's (D) Pt 36 offer of £1,150 in settlement rejected by injured party (C). C's counter-offer of £2,500, plus repayment of any sums recoverable by CRU, and costs not accepted by D. D's subsequent further increased offers of £1,500 and £2,500 also rejected by C, but C not withdrawing her counter-offer. Upon D's then capitulating and accepting C's counter-offer, C purporting to withdraw it. D applying for declaration that it was entitled to accept the counter-offer and for judgment accordingly. District judge granting application and ordering D to pay C's costs up to the date of the counter-offer and C to pay D's costs thereafter. Circuit judge dismissing C's appeal, holding that, if an offeree does not want a Pt 36 offer to be available for acceptance, he must take positive steps to withdraw it. **Held**, dismissing C's further appeal, (1) a Pt 36 offer may be accepted at any time unless the offeror has withdrawn it by serving notice of withdrawal on the offeree (r.36.9(2)), (2) an offeree's rejection of such an offer does not render it incapable of later acceptance by the offeree, (3) to be effective, an offeror's notice of withdrawal of an offer should include an express reference to the date of the offer and its terms, together with some words making it clear that it is withdrawn. (See further, "In Detail" section of this issue of **CP News**.) ***Sampla v Rushmoor Borough Council*** [2008] EWHC 2616 (TCC), ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 36.3.4 and 36.9.1.)

- **LEXI HOLDINGS v PANNONE AND PARTNERS** [2010] EWHC 1416 (Ch), June 18, 2010, unrep. (Briggs J.)

Requests for information – whether necessary and proportionate – duty of parties

CPR rr.1.1, 1.3 and 18.1, Practice Direction 18 para 1.2. Company (C) bringing claim against former solicitors (D). Issues of bad faith and dishonesty arising in the claim. C re-amending particulars of claim and giving replies to D's request for further information (RFI). After D had served a full defence and given disclosure, C declining to give any replies to a further RFI from D, itemising 31 specific requests. D thereupon making application under r.18.1. Many of the requests arguably directly or indirectly relevant to C's allegations to effect (1) that D had actual or constructive knowledge of wrongdoing of former director of C, and (2) that D ought to have taken certain steps on the basis of such knowledge. D contending that they required the information sought for purpose of completing work on their witness statements and in order fully to understand the case which they will have to meet at trial. **Held**, granting application in part, (1) an RFI should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the requesting party to prepare his own case or to understand the case he has to meet (para.1.2), (2) the majority of the specific requests made by D failed to meet that test, but a sizeable minority passed it and C should provide further information concerning the requests in that category. Observations on need for parties to cooperate in making a real attempt to explore the significant narrowing of, or compromise of, purely procedural disputes to avoid disproportionate expense and taking up of excessive court time. Observations on differences between Pt 18 procedure and comparable pre-CPR procedure under RSC. (See further, "In Detail" section of this issue of **CP News**.) ***McPhilemy v Times Newspapers Ltd*** [1999] 3 All E.R. 775, CA, ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 1.3.1 and 18.1.2.)

- **OCENSA PIPELINE GROUP LITIGATION, IN RE; ARROYO v BP EXPLORATION CO (COLOMBIA) LTD** [2010] EWHC 1643 (QB), May 6, 2010, unrep. (Senior Master Whitaker)

Application for disclosure of ATE policy – court's jurisdiction – privilege

CPR rr.1.1, 3.1, 18.1, 44.15 and 44.3B, Practice Direction 19B para.12, The Costs Practice Direction Sect.19, Practice Direction—Pre-Action Conduct para.9.3, Access to Justice Act 1999 ss.27 and 29. Non-resident Colombian farmers (C) bringing group litigation action against company (D). For purpose of bringing the proceedings, C obtaining ATE insurance policy in specifically negotiated terms. In compliance with r.44.15 and Sect. 19, C providing information about the funding arrangements and in addition revealing to D the level of cover, but declining to clarify the conditions

and exceptions in the policy. D making application for order for specific disclosure by C of the terms of the policy (subject to certain redactions). D contending, inter alia, that they had a legitimate interest in knowing whether, in the event of a costs order being made in their favour, the amount of costs they might be able to recover from C, whether they should apply for an order for security for costs, and/or a costs capping order. C contending (1) that D's application did not fall within CPR provisions codifying requirements for the disclosure of information relating to funding arrangements, (2) that they would be prejudiced by disclosure and, (3) in any event, the policy was privileged. **Held**, refusing application, (1) the disclosure obligations in respect of litigation funding arrangements stipulated by r.44.15, Sect. 9 and para.9.3 do not create any general right for parties to be informed of their opponents' insurance resources in order to gauge their ability to satisfy judgments or costs orders, but apply only to parties who intend to seek payment of a success fee or an ATE premium as part of their costs, (2) those provisions balance the interests of parties with funding arrangements and the interests of those who face the claims for additional costs which result from them, (3) the former are entitled to be treated in the same way as other parties in civil proceedings and are not required to disclose information about their ability to meet costs orders which would give their opponents tactical advantage, (4) other provisions in the CPR that may conceivably be exercised by the court to require one party to make disclosures to another, e.g. r.3.1, r.18.1 and para.12, do not endow the court with jurisdiction to make the order sought by D, (5) the overriding objective does not require the court to exercise its case management powers so as to require a party to disclose what financial arrangements it has in place, or its ability to pay, an order for costs, (6) C's specifically negotiated ATE policy was covered by litigation privilege and its disclosure could not be compelled, (7) the very fact that the terms of the policy were negotiated suggested that it took into account specific litigation risk factors and the views and tactics of C's lawyers. Observations on disclosure of ATE polices under provisions in Pt 31 (paras 52 and 68). Also, observations on the use of extrinsic materials as aids to construction of enactments (paras 23 and 40) and on operation of the doctrine of precedent within the High Court (para.66). ***King v Telegraph Group Ltd (Practice Note)*** [2004] EWCA Civ 613; [2005] 1 W.L.R. 2282, CA; ***Henry v British Broadcasting Corporation*** [2005] EWHC 2503 (QB); [2006] 1 All E.R. 154, ***Hobson v Ashton Morton Slack*** [2006] EWHC 1134; ***West London Pipeline & Storage Ltd v Total UK Ltd*** [2008] EWHC 1296 (Comm); [2008] Lloyd's Rep. IR 688, ***Barr v Biffa Waste Services Ltd*** [2009] EWHC 1033 (TCC); (2009) 25 Const L.J. 547, ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 19BPD.20, 44.3B.1, 44.15.1, 44PD.13 and C1–008, and Vol.2 paras. 9A-823+, 9A-826+, 12–44 and 12–53.)

- **VERNON v SPOUDEAS** [2010] EWCA Civ 666, May 6, 2010, unrep., CA (Ward, Richards and Jackson L.JJ.)

"Unless" order – claim struck out – relief from procedural sanction – remittal for hearing

CPR rr.3.8, 3.9 and 23.8. In mid-2005, architect (C) engaged in the design and re-fitting of householders' (D) kitchen bringing claim against D to recover balances of professional fees (£5,370) and of costs of fittings supplied (£19,737). In course of interlocutory proceedings, on June 17, 2008, district judge making order, drawn and dated on July 17, requiring C to make a contribution of £500 to D's costs. Subsequently, by order dated October 14, 2008, deputy district judge dismissing C's application to have this order set aside, and (1) making unless order, extending to November 11, 2008, time for C's compliance with the July 17 order, and (2) ordering C to pay D's costs of various applications (assessed at £970) by December 14, 2008. C's £500 contribution to their costs received by D two days after November 11. On basis that unless order had taken effect and that C's claim had been struck out, C applying for order for their costs in the action. On December 12, C applying retrospectively for relief from sanctions and for extension of time. (C acting in person and indicating that he wanted his applications to be dealt with on paper.) On January 23, 2009, district judge (1) granting D's application and (2) refusing C's applications. On July 23, 2009, circuit judge dismissing C's appeals against district judge's decisions. Single lord justice granting C (now represented pro bono) permission to appeal. **Held**, (1) allowing C's appeal, (a) the district judge took the view that C's remedy lay in appealing the order of October 14 and did not consider C's relief from sanctions application on its merits, and (b) in upholding the district judge's decision, the circuit judge erred in concluding that the district judge had considered those merits, and (2) remitting the matter to the district judge (Jackson L.J. diss.) because (a) if the Court of Appeal were to exercise the discretion under r.3.9 afresh it would be necessary for the Court to determine the issue whether C's failure to comply with the unless order was intentional or not, (b) that was an issue which was hotly contested and as to which the evidence available to the Court was inclusive, (c) fairness required that C's sanctions relief application should be determined at an oral hearing at which that issue, and all other relevant considerations, could be examined and a reasoned judgment given. Observations on whether, in circumstances such as these, a court should accede to a request that an application be dealt with on paper. (See further, "In Detail" section of this issue of **CP News**.) ***Collier v Williams*** [2006] 1 W.L.R. 1945, CA; ***Marcan Shipping (London) Ltd v Kefalas*** [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864, CA, ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 3.4.4.1, 3.8.1, 3.9.1 and 23.8.1.)

In Detail

RELIEF FROM STRIKING OUT SANCTION

In the White Book commentary on CPR r.3.4 (Power to strike out a statement of case) attention is given in para.3.4.4.1 to the effects of an "unless order" imposing the striking out sanction. That commentary paragraph is frequently referred to by judges in judgments disposing of issues arising in these circumstances.

It is explained in that paragraph that r.3.1(3) states that, when the court makes an order, it may (a) make it subject to conditions, and (b) specify the consequence of failure to comply with the order or a condition. This provision and r.3.4(2)(c) (when put together) confirm that the court may make a conditional order in the form of an order stating that, unless by a particular date a party complies with a procedural order made by the court (e.g. a disclosure order, or an order to give security for costs), his statement of claim shall be struck out and his claim dismissed. (The existence of such power is assumed in r.3.5 (Judgment without trial after striking out) and r.3.8 (Sanctions have effect unless defaulting party obtains relief).) The consequence (i.e. the striking out and dismissal sanctions) follows automatically upon the party's failure to comply with the condition, without any further order of the court. In Practice Direction 3A (Striking Out a Statement of Case) (supplementing r.3.4) it is stated in para.1.9 (inserted in October 2005) that, where an order (or a rule or a practice direction) states that a statement of case "shall be struck out" or "will be struck out or dismissed", this means that the striking out or dismissal "will be automatic and that no further order of the court will be required".

The leading modern authority on automatic strike out, and relief therefrom, is the decision of the Court of Appeal in *Marcan Shipping (London) Limited v Kefalas* [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864, CA (summarised in the commentary in para.3.4.4.1). In that case the Court held (1) it has been the position, both before and after the CPR came into effect, (a) that a failure to comply in any material respect with an unless order causes the sanction (whatever it is) to become effective without any further order of the court, but (b) the court has jurisdiction to grant relief by extending time for compliance, (2) where the sanction imposed by an unless order is that a claim shall or will "be struck out or dismissed", the striking out or dismissal will be automatic upon default and no further order of the court will be required, (3) in such event, (a) in the circumstances provided for by r.3.5(2), the party against whom the claim was made may obtain judgment by filing a request for judgment, but (b) otherwise he must make an application in accordance with Pt 23 if he wishes to obtain judgment under r.3.5 (see r.3.5(5)), (4) on such application (a) the court's function is limited to deciding what order should properly be made to reflect the sanction which has already taken effect, and (b) the operation of the sanction does not lie in the discretion of the court, as it is only if there is an application under r.3.8 by the party whose claim was struck out or dismissed that the court is required to consider whether in all the circumstances, it is just to make an order granting relief from the sanction automatically imposed, (5) in making a conditional (i.e. an "unless") order for striking out or dismissal a judge should consider carefully whether that sanction is appropriate in all the circumstances of the case.

Where an unless order takes effect, and a party's claim stands struck out, that party may apply for relief under r.3.8 in which event the r.3.9 criteria (Relief from sanctions) apply. Such a case was *Vernon v Spoudeas* [2010] EWCA Civ 666, May 6, 2010, unrep., CA (for summary, see "In Brief" section of this issue of *CP News*). In the Court of Appeal, the judges (Ward, Richards and Jackson L.JJ.) were agreed that the claimant's (C) application for relief from sanction had not been considered in the court below and that his appeal should be allowed on that ground. A majority of the Court (Ward and Richards L.JJ.) went on to hold that the matter should be remitted to the district judge. The majority said that this was the appropriate disposal because (a) if the Court of Appeal were to exercise the discretion under r.3.9 afresh it would be necessary for the Court to determine the issue whether C's failure to comply with the unless order was intentional (see para.(c) of r.3.9(1)) or not, (b) that was an issue which was hotly contested and as to which the evidence available to the Court was inclusive, (c) fairness required that C's sanctions relief application should be determined at an oral hearing at which that issue, and all other relevant considerations, could be examined and a reasoned judgment given.

In agreeing with Ward L.J. on the question whether the matter should be remitted to a county court, Richards L.J. said that, on remittal, all the factors in r.3.9(1) would be in play, and, although any additional evidence was likely to be directed to the issue whether C's failure to comply with the order was intentional, the Court of Appeal should not seek in any way "to limit the issues to be examined by the judge in the county court or the evidence that can be deployed in relation to them". (It is important to note that the Court's conclusion was not that the court below had erred in applying the r.3.9 factors, but that the lower court had not considered them at all.)

In his dissent on the question whether the matter should be remitted to a county court, Jackson L.J. said that the matter should not be remitted, but that C's application for relief from procedural sanction "should be dealt with here and now by this Court and should be dismissed". His lordship said the litigation had been on foot for four years; it had achieved nothing for the benefit of any party "save to generate disproportionate costs and stress". Further, C had been in repeated breach of orders made by the court and it was quite clear that he did not have the means to meet any substantial award of damages or costs that may be made against him. His lordship was not troubled with the question as to whether C's failure to comply with the unless order was intentional (r. 3.9(1)(c)). In his opinion it clearly was.

One of the factors referred to in r.3.9(1) is "whether the trial date or the likely trial date can still be met if relief is granted" (para.(g)). Jackson L.J. disagreed with counsel for C's submission that, in the circumstances of this case, that factor was irrelevant because no trial date had yet been set. In rejecting this submission his lordship said: "The difficulty here is that this litigation has dragged on for four years and it has not yet been possible to fix a trial date. In my view the conduct of [C] has been a significant cause of that circumstance."

WITHDRAWAL OF PART 36 OFFERS

Appeals in the cases of *L.G. Blower Specialist Bricklayer Ltd v Reeves* and *Gibbon v Manchester City Council* were heard together by the Court of Appeal ([2010] EWCA 726, June 25, 2010, unrep., CA). Both were appeals from county courts, but they were quite different claims (the former a claim for work done and a counterclaim for poor workmanship, and the latter a "tripping" claim). The particular issues raised by the appeals were quite different, but they were heard together because they had a broad issue in common. This was whether CPR Pt 36 embodies a self-contained code or is subject to the general law of offer and acceptance insofar as it fails expressly to provide otherwise.

As may be seen from the summaries of these cases given in the "In Brief" section of this issue of *CP News*, in the *L.G. Blower* case, the defendants made a series of Pt 36 offers, but then purported to withdraw all but one of them (and that one was not the ultimate one); and in the *Gibbons* case, in the course of a series of offers made by the defendants (none of which the claimant accepted), the claimant made a counter-offer which the defendants had rejected but subsequently had purported to accept. In the former case the question for the lower court was whether, after trial, the defendants' un-withdrawn offer remained extant and was an offer that could have costs consequences favourable to them under r.36.14. The county court judge held that it was not (accepting the submission that the purportedly un-withdrawn offer had been superseded by the subsequent (and expressly) withdrawn offers). The Court of Appeal held that the judge had erred in this respect. In the latter case the question for the lower court was whether the claimant's counter-offer was capable of acceptance. The county court judge held that it was (rejecting the submission that the defendant's earlier rejection of the claimant's offer rendered it incapable of acceptance in accordance with general principles of contract law). The Court of Appeal upheld this decision.

In giving the lead judgment of the Court of Appeal in this case, Moore-Bick L.J. explained that Pt 36 contains a carefully structured and highly prescriptive set of rules dealing with formal offers to settle proceedings which have specific consequences in relation to costs in those stated. In seeking to settle proceedings, parties are not bound to make use of the mechanism provided by Pt 36, but if they wish to take advantage of the particular consequences for costs and other matters that flow from making a Pt 36 offer, they must follow its requirements.

His lordship added (para.5) that Pt 36 is drafted "as a self-contained code" and prescribes in some detail the manner in which an offer may be made and the consequences that flow from accepting or failing to accept it. His lordship further explained (para.6):

"Basic concepts of offer and acceptance clearly underpin Part 36, but that is inevitable given that it contains a voluntary procedure under which either party may take the initiative to bring about a consensual resolution of the dispute. Such concepts are part of the landscape in which everyone conducts their daily life. It does not follow, however, that Part 36 should be understood as incorporating all the rules of law governing the formation of contracts, some of which are quite technical in nature. Indeed, it is not desirable that it should do so. Certainty is as much to be commended in procedural as in substantive law, especially, perhaps, in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation. In my view, Part 36 was drafted with these considerations in mind and is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended."

The principal holdings of Moore-Bick L.J. in his judgment disposing of the appeal in the *L.G. Blower* case were (1) that, unlike ordinary common law principles, the provisions in Pt 36 do not provide for an offer to lapse or become incapable of acceptance on being rejected by the offeree, (2) that once made, a Pt 36 offer remains open for acceptance until the start of trial or its withdrawal in the manner set out in r.36.3(7), and (3) that where a party makes

several offers in different terms, a later offer does not revoke or vary an earlier offer, and all of them may be capable of acceptance at any one time. In disposing of the appeal in the *Gibbons* case his lordship's principal holdings were, (1) that a Pt 36 offer may be accepted at any time unless the offeror has withdrawn it by serving notice of withdrawal on the offeree (r.36.9(2)), and (2) that an offeree's rejection of such an offer does not render it incapable of later acceptance by the offeree.

COMPROMISE OF PROCEDURAL DISPUTES—PARTIES' DUTIES

CPR r.18.1 states that the court may at any time order a party to (a) clarify any matter which is in the dispute in the proceedings, or (b) give additional information in relation to any such matter, whether or not the matter is contained in or referred to in a statement of case. The rule is supplemented by Practice Direction 18. The terms of this practice direction are not always properly appreciated. It is provided in para.1.1 that, before making an application to the court for an order the party seeking clarification or information ("the first party") should first serve on the party from whom it is sought ("the second party") a written request stating a date by which a response to the Request should be served. The date must allow a reasonable time for a response. Paragraph 1.2. states that a Request "should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or understand the case he has to meet". Rule 18.1 is cast in broad terms and invites abuse. Paragraph 1.2 attempts to prevent that. But, in a hotly contested case, what is and what is not reasonably necessary and proportionate is likely to be subject to understandable disagreement.

In *Lexi Holdings v Pannone and Partners* [2010] EWHC 1416 (Ch), June 18, 2010, unrep., the second party (the claimants (C)) declined to give replies to a further request for information (RFI) from the first party (the defendants (D)) and D made an application to the court under r.18.1. Mr. Justice Briggs applied the "necessary and proportionate" test and went through the 31 separate questions raised by D's RFI and directed that C should provide answers to a sizeable minority of them. (For further summary of this case, see "In Brief" section of this issue of *CP News*.)

In his judgment, Briggs J. noted that, in their letter responding to D's RFI request, C declined to provide any of the information requested on the grounds that they did not comply with para.1.1, and that their claim was more than adequately particularised in the particulars of claim, reply, points of reply and responses to previous RFIs. Before the judge, C complained that D's conduct of the case thus far "had been characterised by an extravagant, improper and inappropriate attitude", including excessive requests for early disclosure, a misconceived summary judgment application, and repetitive requests for information.

His lordship said that the application had incurred disproportionate use of court time and of expense to the parties. Neither party was solely to blame for this. On the one hand, D's RFI went well beyond what is contemplated in Pt 18 in many respects and was pursued in full in face of correspondence from C which should have led to a substantial reduction in the information sought. Nonetheless, some of the requests were properly made. On the other hand, C's decision to oppose the provision of any further information was inappropriate, at least without a serious attempt to identify what might sensibly be provided, at modest cost, by way of response, or some real prior attempt "to explore a procedural compromise" in relation to "a purely procedural dispute".

Speaking generally, Briggs J. stated (para. 7):

"It ought not to be necessary, more than ten years after the introduction of the overriding objective and the CPR, to have to say that such an approach to the resolution of interim procedural disputes is wholly unacceptable. The litigation of issues of bad faith and dishonesty may of course generate intense feelings of bitterness on both sides, and a determination to leave no stone unturned, regardless of cost, and all the more so in high value cases such as this one. Nonetheless the parties and their legal teams are obliged by CPR r.1.3 to help the court to further the overriding objective. While a case is being prepared for trial this requires the parties and in particular their legal teams to put on one side their understandable feelings of mutual outrage and hostility, and to cooperate with each other in a process of preparation for trial which incurs only proportionate costs and uses no more than an appropriate share of the court's resources."

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