CIVIL PROCEDURE NEWS

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CONTENTS

In Brief

Cases

■ **ABELA v BAARDARANI** [2011] EWHC 116 (Ch), January 28, 2011, unrep. (Sir Edward Evans-Lombe)

Service out of jurisdiction – retrospective validation of alternative method of service

CPR rr.6.15, 6.36, 6.37(5)(b)(i) & 6.40. Claimant (C) commencing claim against individual (D) and company owned by him. C alleging that he had been the victim of fraudulent conspiracy in relation to a share purchase contract and seeking to recover losses of US$12m. Judge granting C permission to serve claim form and associated documents on D at an address in Beirut, and, as an alternative to such service through consular/judicial channels, directing that C may serve untranslated service documentation on D at that address. In the event, service of these documents not effected on D by either method, but, on October 22, 2009, documents delivered by a Lebanese court official to D's Lebanese lawyer (X) at another address in Beirut. X not instructed to accept service on D's behalf, but holding a power of attorney, which enabled him to conduct proceedings, including proceedings in England, on D's behalf. X signing for the papers, retaining them for four months, but then returning them to C's solicitors. On April 14, 2010, judge giving C permission to serve the claim form by alternative means, namely on D's English and Lebanese solicitors at their addresses in this country and in the Lebanon. Subsequently, service effected on D's English solicitors accordingly, who acknowledged service on D's behalf. D then applying under Pt 11 to set aside the order of April 14, 2010, and C applying under r.6.37(5)(b)(i) for an order declaring that the steps taken by him to bring the claim form to the attention of D before effecting service by an alternative means amounted to good service. **Held**, dismissing D's application, but granting C's application, (1) where the court gives permission to serve a claim form out of the jurisdiction it may under r.6.37(5)(b)(i) give directions as to the method of service, (2) where a claim form is to be served within the jurisdiction, the court has power under r.6.15(1) to give directions about alternative methods of service, and under r.6.15(2) to order that steps already taken to bring the claim form to the attention of the defendant by an alternative method is good service, (3) r.6.37(5)(b)(i) should be construed as giving the court the same powers where the claim form is to be served out of the jurisdiction, (4) thus the court has power (similar to that conferred by r.6.15(2)) which it can exercise when considering whether events surrounding the service of claim forms and accompanying documents abroad are capable of constituting proper service in the sense that the court can be satisfied that the proceedings have properly been brought to the attention of the defendant, (5) r.6.40(4) stipulates that the method of service directed must not constitute an illegal act under the law of the host state, but that rule need not be read as requiring any method of service directed by the court under r.6.37(5)(b)(i) to be a method of service prescribed by that state's rules. (See further "In Detail" section of this issue of CP News.) ***Brown v Innovatorone Plc*** [2009] EWHC 1376 (Comm), [2010] C.P. Rep. 2, ***General Medical Council v Benjamin*** [2010] EWHC 1761 (Admin), Jue 15, 2010, unrep., ***Amalgamated Metal Trading Limited v Baron*** [2010] EWHC 3207 (Comm), December 21, 2010, unrep., ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 6.15.5, 6.15.7, 6.37.1 & 6.40.5).

■ **AMALGAMATED METAL TRADING LTD v BARON** [2010] EWHC 3207 (Comm), December 21, 2010, unrep. (Judge Chambers Q.C.)

Service out of jurisdiction – permitted methods of service – service by alternative means

CPR rr.11, 6.15, 6.37 & 6.40. Company (C) obtaining permission to serve claim form on individual (D) in Peru bringing claim for losses of US$5.5m alleged to have been suffered as a result of misrepresentations as to the solvency of another company. In circumstances that were disputed, C attempting to effect personal service on D in Peru. Subsequently, (1) on June 4, 2010, D filing acknowledgment of service and making application under r.11 for an order that (a) the court should not exercise jurisdiction, and (b) setting aside service of the claim form, and (2) on September 15, 2010, on C's application validity of claim form extended for six months commencing on September 29, 2010. D submitting that the service of the claim form was defective, and producing expert evidence to the effect that, under Peruvian law, service must be through judicial channels in a prescribed form. C submitting (1) that a method of service is "permitted" within the meaning of r.6.40(3)(c) if it is a method that is not contrary to the law of the country where the claim form is to be served, and that, in this sense, the method of service adopted by them was a "method permitted" by the law of Peru within that provision, and alternatively, (2) that under r.6.15 or r.6.37(5)(b)(i) the court had power to direct that service of the claim should be effected by an alternative means, in particular by service on D's solicitors in London. **Held**, granting D's application, but extending validity of claim form for service for a further 12 months, (1) the purported personal service on D was defective, (2) a claimant cannot say that where a state expressly provides for a method or methods of service within its jurisdiction, but does not expressly provide that service by other means is illegal, then it is to be inferred that service by other means is permitted for the purposes of r.6.40(3)(c), (3) in cases of service of a claim

form out of the jurisdiction, the court has power to order service by an alternative method, (4) such power cannot be derived from r.6.15, but the words of r.6.37(5)(b)(i) are wide enough to confer it, alternatively such power should be regarded as inherent in the rules, (5) in the circumstances of this case this power should not be exercised on favour of C. (See further "In Detail" section of this issue of CP News.) ***Arros Invest Limited v Rafik Nashanov*** [2004] EWHC 576 (Ch), [2004] I.L.Pr. 41; ***Shiblaq v Sadikoglu*** [2004] EWHC 1890 (Comm), [2004] C.P. Rep. 41; ***Habib Bank v Central Bank of Sudan*** [2006] EWHC 1767 (Comm), [2007] 1 W.L.R. 470; ***Brown v Innovatorone Plc*** [2009] EWHC 1376 (Comm), [2010] C.P. Rep. 2, ***GMC v Balouch*** [2010] EWHC 1380 (Admin), May 25, 2010, unrep., ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 6.15.7, 6.37.1 & 6.40.5.)

AMIN v MULLINGS [2011] EWHC 278 (QB), February 17, 2011, unrep. (Slade J.)

Road traffic claim – CFA fixed percentage increase – whether claim "concludes at trial"

CPR rr.20.3, 45.15, 45.16 & 45.17. Following road accident, with benefit of CFA providing for 100 per cent uplift, owner of car (C2) and driver of it (C1) bringing claim (allocated to fast track) against other driver (D) for, respectively, damage to the vehicle and related expenses, and for personal injuries. D bringing counterclaim against C1 for financial loss, including for hire of vehicles pending payment of write-off value for his vehicle. On morning of day fixed for trial, parties finally agreeing liability on 50/50 apportionment, and resolving all other outstanding matters with the exception of D's vehicle hire claim, and trial restricted to that remaining issue. Trial judge (1) determining quantum of D's counterclaim, and (2) making costs orders. As to costs, judge making order in favour of C1 and C2 on their claims, assessed at £22,256, including VAT and 100 per cent uplift for their solicitors' and counsel's fees, and in favour of D on the counterclaim. In doing so, judge rejecting D's submission that C1 and C2's claims had not been concluded "at trial", but had been agreed beforehand, and therefore the uplift should be 12.5 per cent for the solicitors and 50 per cent for counsel. **Held**, allowing D's appeal, (1) a counterclaim is an "additional claim" and, for the purposes of the CPR, is to be treated as if it were a claim, (2) it is clear from r.45.15(6)(b) that "at trial" means at a contested hearing, (3) for the purposes of r.45.16, it is immaterial whether the claim is concluded on the date fixed for trial but before it start or at some earlier date, (4) on the proper construction of r.45.17(1), a settlement of a claim achieved at the day of a hearing but before the hearing commences gives rise to an entitlement to an uplift in counsel's fees of 50 per cent. (See ***Civil Procedure 2010*** Vol.1 paras 20.3.2, 45.16.1 & 45.19.1.)

BRADY v NORMAN [2011] EWCA Civ 107, February 9, 2011, CA, unrep. (Sir Anthony May PQB, Smith & Aikens L.JJ.)

Defamation claim – disapplication of limitation period – prejudice to defendant

Limitation Act 1980 ss.2, 4A, 11, 32A & 33. On June 30, 2009, defamation proceedings commenced against union official (D) by former official of same union (C) on basis of publication on June 5, 2006. Master dismissing C's application under s.32A for disapplication of the one-year limitation period fixed by s.4A , and judge dismissing C's appeal ([2010] EWHC 1215 (QB)). Both Master and judge prepared to assume that C did not have actual knowledge of the publication until September 2008. On further appeal, C contending that, in the light of Court of Appeal authority on provisions in the 1980 Act parallel to ss.4A and 32A, but applicable to personal injury claims (viz ss.11 and 33), the judge was wrong to hold that the Master was entitled to proceed on the basis that the loss of a limitation defence can itself constitute prejudice to a defendant. **Held**, dismissing appeal, (1) in a personal injury case, where the defendant has had proper opportunity to investigate the facts and has admitted liability, the loss of a fortuitous windfall limitation defence will often, depending on the facts, be regarded as of little or no prejudicial weight and likely to be outweighed by the prejudice to the claimant by losing his claim, (2) circumstances arising for consideration in defamation claims where s.32A is invoked are likely to be different, (3) the instant case was not a case in which the prejudice to the defendant from the loss of the limitation defence was so fortuitous that it was balanced out of existence by prejudice to the claimant in losing a claim which the defendant ought in justice and fairness meet. ***Thompson v Brown*** [1981] 1 W.L.R. 744, HL, ***Hartley v Birmingham City Council*** [1992] 1 W.L.R. 968, CA, ***Steedman v British Broadcasting Corporation***, [2001] EWCA Civ 1534, [2002] E.M.L.R. 17, CA, ***Cain v Francis*** [2008] EWCA Civ 1451, [2009] Q.B. 754, CA, ref'd to. (See ***Civil Procedure 2010*** Vol. 2, paras 8-87, 8-91 & 8-92.)

CAMPBELL v THE QUEEN [2010] UKPC 26, *The Times* November 25, 2010, P.C.

Privy Council – leave to appeal to Commonwealth appeal court refused – whether appeal to Privy Council against that refusal

Judicial Committee (Appellate Jurisdiction) Rules 2009 r.10, Judicial Committee Act 1833 s.3, Judicial Committee Act 1844 s.1, Constitution of Jamaica s.110. Defendant (D) convicted of murder. D's application for permission to appeal to the Court of Appeal of Jamaica refused by that Court. D applying to Privy Council for special leave to appeal against that decision of the Court. **Held**, granting application, (1) an appeal lies from a decision of the CA on an appeal from a decision of a domestic court to the PC with the permission of the CA in the circumstances provided

for by s.110(2), (2) but s.110(3) states that nothing in that sub-section affects any right of the PC to grant under s.3 and s.1 special leave to appeal to it from such decisions of the CA, (3) s.110(3) does not grant any right to seek from the PC special leave to appeal, but preserves any such rights, (4) the language of s.110 as a whole cannot be said to make clear an intention to exclude the right to seek special leave from the PC in respects other than from decisions made by the CA on appeals from decisions of domestic courts, (5) consequently, it does not exclude any right contained in s.3 and s.1 to seek special leave from the PC to appeal to it from a decision of the CA refusing permission to appeal to it from a domestic court, (6) the broad language reflecting the royal prerogative power to grant special leave enacted in statutory form in s.3 and s.1 is not restricted by any rule to the effect that such leave should not be granted for appeals against refusals of permission to appeal, (7) the fact that a domestic court has refused leave will always be a relevant consideration for the PC to consider when deciding whether or not to grant special leave in such cases. ***Lane v Esdaile***, [1891] A.C. 210, HL, ref'd to. (See ***Civil Procedure 2010*** Vol.2 paras 4B-0.1 & 4B-10+.)

■ **CECIL v BAYAT** [2011] EWCA Civ 135, February 18, 2011, CA, unrep. (Rix, Wilson & Stanley Burnton L.JJ.)

Service of claim form – extension of period of initial validity – good reason

CPR rr.6.15, 6.36, 6.40, 7.5 & 7.6, Practice Direction 6B para.3.1. On May 19, 2008 individuals (C) issuing claim form (marked "Not for service out of the jurisdiction") against individual and foreign corporate defendants (D) making contractual claim for in excess of US$400m. Before expiry of four month period fixed by r.7.5(1), on ground that they needed time to secure funding for the proceedings, C applying ex parte under r.7.6 for and granted six-month extension of time for service to March 20, 2009. Within that further period (within which limitation period expiring), C applying ex parte for and granted a further extension of time for service of the claim form to April 30, 2009, and permission to serve it out of the jurisdiction by an alternative method (electronic transmission). On April 17, 2009, by which time a CFA had been agreed and ATE insurance procured, claim form despatched for service (11 months after issue). D acknowledging service, intimating limitation defence, and applying to set aside the orders extending period of validity of claim form for service and permitting service out of the jurisdiction. Judge dismissing D's application ([2010] EWHC 641 (Comm)), but granting permission to appeal. **Held**, allowing appeal, (1) the court may exercise its discretion to extend time for service under r.7.6(2) where there is good reason to do so and, generally, that reason must be a difficulty in effecting service, (2) without a CFA and ATE insurance it was not viable for C to take the proceedings to trial, but they could have commenced and served their proceedings without them, (3) C's deliberate decision to secure their position as to costs by delaying service until funding was in place for the whole of the proceedings did not provide a good reason for extending time under r.7.5(2), (4) in the circumstances, C should have served the claim form in the period of its initial validity and then, if they were not in a financial position to proceed with the claim immediately, applied inter partes for a stay, or an extension of the time for procedural steps to be taken, (5) the starting-point is that a defendant has a right to be sued, if at all, by means of originating process issued within the statutory period of limitation and served within the period of its initial validity for service, (6) generally, where an application is made to extend the period of validity for service of a claim form, in circumstances where there is doubt whether the claim has become statute-barred in the time since the date on which the claim form was issued, an extension should not be granted if the defendant shows that he will or might thereby be deprived of a limitation defence, (7) in a limitation case, unless the claimant can show, for example, that he has been delayed in service for reasons which he does not bear responsibility, or that he could not have known about the claim until close to the end of the statutory period, he is unlikely to have show good reason for an extension of time for service. Observations on whether delay inherent in service by methods permitted by r.6.40 provides good reason for service by an alternative method. (See further "In Detail" section of this issue of CP News.) ***Dagnell v J.L. Freedman & Co*** [1993] 1 W.L.R. 388, HL, ***Steele v Mooney*** [2005] EWCA Civ 96, [2005] 1 W.L.R. 2819, CA, ***Hoddinott v Persimmon Homes (Wessex) Ltd*** [2007 EWCA Civ 1203, [2008] 1 W.L.R. 86, CA, ***City & General (Holborn) Ltd v Royal Sun Alliance Plc*** [2010] EWCA Civ 911, July 29, 2010, CA, unrep., ***Aktas v Adepta*** [2010] EWCA Civ 1170, October 22, 2010, CA., unrep., ref'd to. (See ***Civil Procedure 2010*** Vol.1 para.6.15.7 & 7.6.2.)

■ **HYDROPOOL HOT TUBS LTD v ROBERJOT** [2011] EWHC 121 (Ch), February 4, 2011, unrep. (Arnold J.)

Application to commit for contempt – allegations of breach of mandatory orders and false statements

CPR r.32.14, Sch.1 RSC Ord.45, rr.5 & 7, RSC Ord.52, r.4, Sch2 CCR Ord.29, r.1. Company (C) bringing claim against former employee (D) for various wrongful acts involving mis-use of their customer information and applying for interim injunction. At hearing, judge making order temporarily restraining D from making use of the information and requiring D to swear an affidavit confirming various matters. In purported compliance with this order, and with subsequent orders made by the court (all of which were endorsed with a penal notice, but none of which was served personally on D), D swearing several further affidavits. Throughout, D represented by counsel and solicitors. C contending that in some respects matters attested to by D were untrue and, on grounds that D thereby had breached mandatory provisions of the court's orders, and had sworn false affidavits, applying to commit D for contempt. D

conceding that, in one of his affidavits, two paragraphs were false and amounted to a contempt of court, but otherwise contending that the affidavits were not knowingly false when sworn. D submitting that, although he was aware of the terms of the orders, because they had not been served on him personally, he was unaware of the consequences of disobeying them. Held, granting application, (1) a prerequisite to the enforcement of a judgment or order under r.5 is that a copy of the order has been served personally on the person required to do, or abstain from doing, the act in question, (2) the court may dispense with this requirement where the order is prohibitory (r.7(6)), and, if it thinks just to do so, where the order is mandatory (r.7(7)), (3) it was beyond reasonable doubt that D was aware, not only of the terms of the orders, but also of the consequences of disobeying them, (4) in the circumstances, it was appropriate for the court to dispense with personal service, (5) proceedings for contempt for making false statements may be brought under r.32.14, but only by the Attorney General or with the permission of the court, however (6) that rule has no application to an allegation of contempt by knowingly swearing a false affidavit, and there was no other procedural obstacle to C's relying on this ground of contempt, (7) in addition to that conceded by D, C had established several, but not all, of the contempts alleged against D, (8) the breaches of orders alleged were not trivial, and it was not suggested that they were committed inadvertently. ***Davy International Ltd v Tazzyman*** [1997] 1 W.L.R. 1256, CA, ***Malgar Ltd v R E Leach (Engineering) Ltd*** [2000] F.S.R. 393, ***Bell v Tuohy*** [2002] EWCA Civ 423, [2002] 1 W.L.R. 2703, CA, ***Attorney General v Smith*** [2008] EWHC 250 (Admin), January 16, 2008, DC, unrep., ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 32.14.1, sc45.7.1, sc45.7.7, sc52.4.5 & cc29.1.5.)

■ **JIH v NEWS GROUP NEWSPAPERS LTD.** [2011] EWCA Civ 42, 161 New L.J. 211 (2011), CA (Lord Neuberger M.R., Maurice Kay & Smith L.JJ.)

Principle of open justice – misuse of private information claim – anonymity order

CPR r.5.4C, 25.1(1) & 39.2(4), Human Rights Act 1989 s.12 and Sch.1 Pt.I arts 6, 8 & 10. Before commencing claim for injunction against media organisation (D) restraining misuse of private information, individual (C) applying for interim injunction. At hearing on notice, judge delivering non-public judgment (1) granting the application and, (2) pursuant to r.39.2(4) and in exercise of the inherent jurisdiction, making anonymity order (including order under r.5.4C(4) limiting information available to third parties from court file). Judge's order served on other media organisations. At return date hearing (after issue of claim form), C and D requesting judge to deliver non-public judgment granting consent order containing (amongst other things) two particular terms; viz term (a) that C be not named, and term (b) that D must not publish (i) all or any part of the information described in the confidential schedule attached to the order, or (ii) anything which might identify C as the person who had obtained the order. In public judgment, judge approving draft order, subject to the deletion of term (a) ([2010] EWHC 2818 (QB) and [2010] EWHC 2979 (QB)), but staying implementation of the order. Single lord justice granting C permission to appeal. **Held**, in public judgment after hearing in public, allowing appeal, (1) a judge presented with a draft order has an obligation to call for argument to persuade him to approve any part of it which restricts or prevents publication of any aspect of the proceedings and about which he has any doubts or worries, (2) in this case, the judge was right to conclude that the choice to be made was between revealing the identity of C or revealing the general nature of the information he was seeking to keep private, however (3) once the judge had called for argument as to the terms of the draft order so far as reporting restrictions were concerned, all aspects of the draft in that respect were up for consideration, (4) in assuming that C had not submitted that, if the reporting restrictions in the draft were to be reduced, term (b) should be amended to permit the reporting of the general nature of the information C was seeking to keep private, but term (a) should be retained, the judge had reached his conclusion on a mistaken basis, (5) in the circumstances it was appropriate for the Court determine the matter by carrying out the balancing exercise afresh, rather than sending the case back to the judge, and (a) to order that C be granted anonymity in connection with the proceedings until trial or further order in the meantime, and (b) to direct that information about the case be reportable, but limited to the facts and matters stated in the judgments of the Court and the judge. General principles to be applied where a party seeks protection by an anonymity order or other restraint on publication of details of a case which are normally in the public domain explained. (See further "In Detail" section of this issue of CP News.) ***Scott v Scott***, [1913] A.C. 417, HL, ***Re Guardian News and Media Ltd*** [2010] UKSC 1, [2010] 2 W.L.R. 325, SC, ***R. (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*** [2010] EWCA Civ 65, [2010] 3 W.L.R. 554, CA, ***Gray v UVW***, [2010] EWHC 2367 (QB), October 21, 2010, unrep., ***Donald v Ntuli*** [2010] EWCA Civ 1276, [2011] 1 W.L.R. 294, C.A., ref'd to. (See **Civil Procedure 2010**, Vol.1, paras 5.4C.10, 39.2.9 & 39.2.11, and Vol.2, paras 3D-48, 3D-76, 3D-78, 3D-80 and 15-40 to 15-45.)

■ **MASRI v CONSOLIDATED CONTRACTORS INTERNATIONAL CO SAL** [2011] EWCA Civ 21, January 21, 2011, C.A., unrep. (Sir Anthony May PQB, Smith & Aikens L.JJ.)

Committal application – affidavit in support – disclosure of documents

CPR. rr.31.12, 32.15, 40.20 & Sch.1 RSC Ord. 52, rr.1 & 4, Practice Direction 32, para.4.2, Practice Direction RSC 52 and CCR 29 – Committal Applications, para.3. In commercial claim against a Lebanese company (D), businessman

resident in Jordan (C) obtaining judgment for US$75m. D owned by an individual (X) and other members of his family. C attempting to enforce judgment debt by various means (all resisted by D), including by obtaining receivership orders. C applying (1) (under r.40.20) for declaration that, as judgment debtor, D were in contempt of court, and (2) (under RSC Ord.52) for orders that X be committed, and that D be fined, for acts of contempt of court. C making large number of allegations of contempt, including allegations that D had failed to cooperate with the receiver and had failed to comply with disclosure orders. In affidavit in support sworn by his solicitor, C revealing that, for the purpose of assisting the enforcement process, unnamed enquiry agents had been engaged who, using legitimate means, had searched for, found and made copies of, relevant documents. At CMC, D making various applications, including, in particular, applications for orders that C disclose the identity of enquiry agents (whom D contended had acted unlawfully) and disclose documents relevant to their activities. These particular (and other) applications refused by the judge ([2010] EWHC 2640 (Comm)), and, on paper, single lord justice refusing D permission to appeal. At oral hearing of renewed application, D granted limited permission to appeal. **Held**, allowing appeal in part, (1) para.4.2 provides that, where an affidavit states that statements within it are "matters of information or belief" the deponent must "indicate the source" of such matters, (2) the purpose of that provision is to ensure that a person against whom serious allegations are being made can investigate the source of any information or belief that is not within the deponent's own knowledge, (3) save in exceptional circumstances, if the source is a person the deponent must identify that person with sufficient certainty to enable the person against whom the affidavit is directed to investigate the information or belief in accordance with rules of court or other legal principles, (4) accordingly, C should identify the source of the information concerning the enquiry agents' activities in gathering documents as described in the affidavit, (5) the judge had not erred in holding that C should not be required to disclose documents under his control (a) relating to his instructions to the enquiry agents, or to reports received by him from them, or (b) relevant to the issue whether documents were obtained unlawfully by the enquiry agents. ***Jones v University of Warwick*** [2003] EWCA Civ 151, [2003] 1 W.L.R. 954, CA, ref'd to. (See ***Civil Procedure 2010***, Vol.1, paras 31.12.1, 32.4.5, 32.15.4, 32PD.4, sc52.4.6 & scpd52.3.)

■ **MASSIE v H** [2011] EWCA Civ 115, January 25, 2011, CA, unrep. (Maurice Kay, Thomas & Etherton L.JJ.)

Route of appeal – county court decision – claim instituted under CPR Pt.8

CPR rr.8.1(6)(a) & 40.2(4), Practice Direction 8 (Alternative Procedure for Claims) paras. 9.1 & 18.3, Practice Direction 52 (Appeals) para.2A.1, Access to Justice Act 1999 s.56, Access to Justice Act 1999 (Destination of Appeals) Order 2000 arts 3 & 4, Mental Health Act 1983 s.29. Approved mental health professional (C) commencing proceedings pursuant to Pt.8 in a county court for an order under s.29 with patient (D2) and relative of D2 (D1) as defendants. At hearing, circuit judge ruling that function of nearest relative be transferred from D1 so as to be exercisable by director of adult services of local authority. D1 filing appellant's notice in Court of Appeal seeking permission to appeal against the judge's decision. **Held**, (1) under art.3, the general rule is that an appeal from a decision of a county court shall lie to the High Court, (2) as this was a claim properly made using the Pt.8 procedure (and was not a claim made under Pt.7 and allocated to the multi-track), the Court did not have jurisdiction under art. 4 to entertain D1's appeal, (3) in the circumstances, the practical solution was (a) for the Court (i) to declare lack of jurisdiction, and (ii) to transfer the matter to the High Court, and (b) for one member of the panel to continue to sit as a High Court judge to consider whether D1 should be granted permission to appeal. (See ***Civil Procedure 2010*** Vol.1 paras 8PD.18, 40.2.7, 52.0.11 &52PD.3.1, and Vol.2, paras 9A-845 & 9A-900.)

■ **MORGAN v SPIRIT GROUP LTD.** [2011] EWCA Civ 68, February 2, 2011, CA, unrep. (Ward, Patten & Black L.JJ.)

Order for costs – order for payment of stated amount

CPR rr.44.3(6)(b) & 44.7. Individual (C) bringing personal injury claim against company (D) for fractured wrist suffered in slip on D's premises. C having benefit of CFA providing for 100% success fee. C claiming damages in excess of £40,000. Claim allocated to multi-track. D admitting liability. At trial of quantum, judge awarding C total of £13,500 inclusive of interest for general and special damages. At post-trial hearing as to costs, where C produced itemised bill for £99,200, including success fee and VAT, judge (1) making findings as to C's conduct of the claim, (2) determining that C's trial costs should be restricted to fast track costs, and (3) in apparent exercise of power under r.44.3(6)(b), making order for costs to effect that D should pay £25,000 in respect of C's costs. D conceding that, in arriving at that figure, judge (1) did not make his decision by reference to C's itemised bill, and (2) did not carry out a proper summary assessment of costs. **Held**, allowing appeal and directing a detailed assessment of costs, to be carried out as if the case had been allocated to the fast track, (1) under the CPR, summary or detailed assessment of costs is intended to be the normal procedure for calculating costs, except where the costs are otherwise fixed, (2) a court may not make a costs order, whether under r.44.3(6)(b) or otherwise, which, without any form of assessment, fixes a figure for costs payable to a receiving party. ***1-800 Flowers Inc v Phonenames Ltd*** [2001] EWCA Civ 721, [2002]

F.S.R. 12, CA, ***SCT Finance Ltd v Bolton*** [2002] EWCA Civ 56, [2003] 3 All E.R. 434, CA, ***Lownds v Secretary of State for the Home Department (Practice Note)*** [2002] EWCA Civ 365, [2002] 1 W.L.R. 2450, CA, ***Drew v Whitbread***,[2010] EWCA Civ 53, [2010] 1 W.L.R. 1725, CA, ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 44.3.14, 44.7.1 & 44.7.4.)

- **NORTH SHORE VENTURES LIMITED v ANSTEAD HOLDINGS LIMITED** [2011] EWHC 178 (Ch), February 7, 2011, unrep. (Floyd J.)

Disclosure of documents – order against third party – post-judgment application

CPR rr.25.1(1)(j) & 31.17, Senior Courts Act 1981 s.34(2). At trial, claimant company (C) obtaining judgment for US$50m against company (D1) and several individuals (D2). For purposes of enforcement, C obtaining order for cross-examination of D2 as to their assets. C also obtaining order requiring D2 to produce documents relating to trusts which they had set up. Whilst appeal to Court of Appeal against the latter order pending, C applying for an order requiring production of such of the same documents by third parties (X), who were beneficiaries under the trusts, as were in their possession or control. X disputing C's submission that the court had jurisdiction under s.34(2) and r.31.17 to grant the order sought. **Held**, granting the application, (1) the documents sought from X by C (a) were "relevant to an issue arising out of the said claim" within s.34(2), and (b) were likely "to support the case of the applicant" within the meaning of r.31.17, as there was no reason to restrict the operation of either of those provisions to proceedings before judgment, (2) in the circumstances it was necessary to make the order sought by C for the disposing fairly of the case and for saving costs. ***Maclaine Watson & Co v International Tin Council (No.2)*** [1989] 1 Ch. 286, CA, ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 25.1.31 & 31.17.4, and Vol.2, para.9A-115.)

- **R. (RS (SRI LANKA)) v SECRETARY OF STATE FOR THE HOME DEPARTMENT** [2011] EWCA Civ 114, January 24, 2011, CA, unrep. (Maurice Kay & Thomas L.JJ.)

Court of Appeal – decision made without a hearing – request for reconsideration

CPR r.52.16. At substantive hearing in High Court, judicial review claim brought by asylum-seeker (C) dismissed. C applying for permission to appeal to Court of Appeal. Appeal settled on terms (1) that it should be allowed by consent, and (2) that costs of the appeal should be determined by a judge on the basis of written submissions. Parties filing consent order to that effect. Single lord justice considering the submissions and deciding that there should be no order for costs. C making request under r.52.16(6) for reconsideration at a hearing of that decision. **Held**, refusing the request, (1) the consent order set out the terms agreed by the parties and was contractual in nature, (2) where parties clearly settle a case on terms that costs are to be determined by a judge on the papers, it objectively means that the parties are content to leave the matter to be so determined without further recourse to the court, (3) whatever may have been the subjective belief of C, objectively the agreement meant that C had waived the right to an oral hearing. ***Sirius International Insurance Co (Publ) v FAI General Insurance Limited*** [2004] UKHL 54, [2005] 1 W.L.R. 3251, HL, ref'd to. (See ***Civil Procedure 2010*** Vol.1 para.52.16.2.)

- **SIBTHORPE v SOUTHWARK LONDON BOROUGH COUNCIL** [2011] EWCA Civ 25, 161 New L.J. 173 (2011), CA (Lord Neuberger M.R., Lloyd & Gross L.JJ.)

Conditional fee agreement – solicitor indemnifying client – whether champertous

CPR 44.15, Courts and Legal Services Act 1990 s.58. Council tenant (C) bringing repairing obligation claim against local authority landlords (D). C entering into CFA with solicitors (S) providing for success fee and 10 per cent uplift. CFA also containing undertaking by S to indemnify C, in the event of the claim not succeeding, against any liability then incurred by her to pay D's charges and disbursements (the indemnity). Claim settled on terms that D carry out necessary repair work and pay C damages and costs. C claiming £2,600 and £9,200 (excluding VAT) for costs incurred, respectively, before and after CFA entered into. At detailed assessment, D submitting (1) on ground that initial retainer was in reality an unenforceable CFA, that C was not entitled to recover costs incurred before the CFA was entered into, and (2) on ground that the indemnity rendered the CFA champertous, that C was not entitled to recover costs incurred after the CFA was entered into. Costs judge accepting both submissions, but judge allowing C's appeal. **Held**, dismissing D's appeal, (1) a consequence of the inclusion of the indemnity was that S had a financial interest in the outcome of the claim, because they were thereby rendered liable for D's costs in the event of the claim failing, but not so liable if it succeeded, (2) there is no authority for the proposition that it is champertous for a person to agree to run the risk of a loss if the action fails without enjoying any gain if it succeeded, (3) the modern trend (illustrated by legal practice, judicial observations and legislation) is towards curtailing the scope of champerty, (4) to hold the indemnity in the present case champertous would involve extending the law of champerty. (See further "In Detail" section of this issue of CP News.) ***Giles v Thompson*** [1994] 1 A.C. 142, CA. & HL., ***Thai Trading Co v Taylor*** [1998] Q.B. 785, CA, ***Awwad v Geraghty & Co*** [2001] Q.B. 570, CA, ***R. (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No. 8)*** [2002] EWCA Civ 932, [2003] Q.B. 381, CA, ref'd to. (See ***Civil Procedure 2010*** Vol.1, paras 48.2.2 & 48.14.30, and Vol.2, paras 7A-1, 7A-5, 7A-16, 7A-18 & 7A-72.)

■ **M v HACKNEY BOROUGH COUNCIL** [2011] EWCA Civ 4, *The Times* February 17, 2011, CA (Sir Anthony May PQB, Toulson & Jackson L.JJ.)

Interpretation of legislation – compatibility with Convention rights

Human Rights Act 1998 s.3 & Sch.1 Pt I art.5, Mental Health Act 1983 ss.3, 6 & 139(1). Individual (C) detained under s.3 of 1983 Act on basis of application under s.6(3) by approved mental health professional (X), for whose actions local authority (D) responsible. C's detention unlawful because X's application, though made in good faith, was made without lawful justification. C bringing claim against D (1) for damages for unlawful detention and, (2) for a declaration that s.139(1) (which provided D with a defence) was incompatible with art.5. Judge dismissing C's claim ([2010] EWHC 1349 (Admin)). **Held**, allowing C's appeal, by s.3 of the 1998 Act, s.139(1) should be read down to permit a claim by a detained person for compensation. (See ***Civil Procedure 2010*** Vol.2 para.3D-16.)

■ **MGN LTD v UNITED KINGDOM (APPLICATION NO.39401/04),** *The Times* January 20, 2011, ECtHR

Conditional fee agreement – success fee – whether compatible with art.10

CPR rr.44.3 & 44.3B, Conditional Fee Agreements Order 2000 art.4, European Convention on Human Rights 1950 art.10. With benefit of CFA, individual (C) suing newspaper (D) for breach of confidence. C succeeding at trial and awarded damages £3,500) and costs. Costs including success fee amounting to stg1m. On D's appeal, House of Lords holding that CFA scheme was compatible with the Convention ([2005] UKHL 61, [2005] 1 W.L.R. 3394, HL). On D's application, **held**, (1) the success fee scheme was not initially set up for wealthy persons such as C whose access to justice was not restricted for financial reasons, (2) the success fee was disproportionate to the aim sought to be achieved by the scheme, (3) accordingly there had been a breach of art. 10. (See ***Civil Procedure 2010*** Vol.1 paras 44.3.11 & 44.5.4, and Vol.2 paras 3D-49, 3D-80, 7A-25, 7A-56, 11-10 & 15-41.)

Statutory Instruments

■ **FAMILY PROCEDURE (MODIFICATION OF ENACTMENTS) ORDER 2011** (Draft)

CPR rr.2.1 & 57.15. Made by Lord Chancellor under Courts Act 2003 s.80. Amends table following para.(2) of r.2.1(2) and text of para.(2) of r.57.15 to take account of the coming into force of, respectively, s.75 of the 2003 Act and the Family Proceedings Rules 2010, and for latter reason, amends Court of Protection Rules 2007 r.39. Also amends Courts Act 1971 s.52 to enable Pt.28 of the FPR relating to costs to apply to all family proceedings where an application is not proceeded with. Coming into force on April 6, 2011. (See ***Civil Procedure 2011*** Vol. 1 paras. 2.1 & 57.15, and Vol. 2 para. 6B-172+.)

Policy and Guidance

■ **GUIDANCE (CASES INVOLVING PROTECTED PARTIES IN WHICH OFFICIAL SOLICITOR INVITED TO ACT AS GUARDIAN AD LITEM OR LITIGATION FRIEND)** 161 New L.J. 100 (2011) **(Pauffley J.)**

Senior Courts Act 19891 s.90. Contains guidance on requests to official solicitor to act as guardian ad litem and as litigant friend for protected parties in proceedings relating to children, and role of official solicitor under Mental Capacity Act 2005. Refers to difficulties caused by backlog and severe budgetary constraints. Issued by Family Division (with endorsement of President and official solicitor) to courts and practitioners for purpose of ensuring that demands on official solicitor in these respects controlled. (See ***Civil Procedure 2010*** Vol.2 para.9A-311+.)

■ **POLICY ON THE USE OF LIVE TEXT-BASED COMMUNICATIONS (SUPREME COURT)** [2011] 1 All E.R. 604, SC.

Supreme Court of United Kingdom. Policy on communications from court rooms. Use of live text-based communications from a court room by member of public or member of legal team permitted, subject to exceptions. Exceptions explained. Use of mobile phone by anyone in a court room prohibited. (See ***Civil Procedure 2010*** Vol.2 para.4A-0.4.)

In Detail

SERVICE OUT OF JURISDICTION BY ALTERNATIVE METHOD

CPR Part 6 (Service of Documents) was completely re-cast, and in certain respects substantially amended, by the Civil Procedure (Amendment) Rules 2008 (SI 2008/2178) with effect from October 1, 2008. As re-structured, rules as to the service of claim forms within the jurisdiction were clearly separated from rules as to the service of claim forms out of the jurisdiction, with the former being collected in Section II (rr.6.3 to 6.19) and the latter in Section IV (rr.6.30 to 6.47).

As might have been expected, both of these Sections contain rules dealing with prescribed methods of service. It might also have been expected that both would have express rules about alternative methods of service. However that is not the case. In Section II such an express rule is found in r.6.15 (and also in r.6.27 in Section III in relation to service in the UK of documents other than claim forms); but there is no equivalent to that rule in Section IV. As is explained in the White Book 2010 (see Vol.1, para.6.15.7), this difference between the rules as to service of claim forms, on the one hand, within the jurisdiction and, on the other, without the jurisdiction, became apparent in Part 6 when former RSC Order 11 (Service of Process, etc., out of the jurisdiction) was brought into the CPR (as Section III of Part 6) by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221) (which came into effect on May 2, 2000), and marked a departure from the position that had prevailed whilst RSC Order 11 had remained in force. Subsequently, in *Knauf UK GmbH v British Gysum Ltd*, [2001] EWCA Civ 1570, [2002] 1 W.L.R. 907, CA, it was held that provisions in Part 6 as amended by SI 2000/221 could be construed in a manner which maintained the old position and that the courts therefore had power to order service by an alternative method of documents to be served out of the jurisdiction. However, as is explained in the White Book para.6.15.7 commentary, after the complete re-structuring of Part 6 by SI 2008/2178 that construction became unsustainable, with the result that "some other means will have to be found for providing a basis for the court's jurisdiction to order service by an alternative method of documents to which Section IV of this Part applies". In *Cecil v Bayat* [2011] EWCA Civ 135, February 18, 2011, C.A., unrep., this point was noted but did not have to be dealt with (see para.115 per Rix L.J.). The Court proceeded on the clear assumption that the judge at first instance had the necessary jurisdiction to permit service out of the jurisdiction by an alternative method, but, had it been necessary to do so, would have held that he had not exercised it correctly (see further below).

The question is: how can the rules in Part 6 as they now stand be interpreted so as to provide that, where a claim form is to be served out of the jurisdiction, the court may exercise alternative service powers similar to those given, where service is to be within the jurisdiction, by r.6.15 (Service of the claim form by an alternative method or at an alternative place)? The assumption behind the question is (as was accepted in the *Knauf UK GmbH* case) that the court should have such powers, and that it was never the intention of the Rules Committee that there should be any departure in this respect from the position that existed whilst RSC Order 11 remained in effect. This question has been tackled in a number of first instance cases, including (most recently) in *Amalgamated Metal Trading Ltd v Baron*, [2010] EWHC 3207 (Comm), December 21, 2010, unrep. (Judge Chambers Q.C.), and *Abela v Baardarani*, [2011] EWHC 116 (Ch), January 28, 2011, unrep. (Sir Edward Evans-Lombe) (for summaries of these cases, see "In Brief" section of this issue of CP News).

Para (1) of r.6.15 states that the court may order service by an alternative method where it is apparent to the court that there is "good reason" to do so. Para (2) of the rule states, on an application under para.(1), the court may order that "steps already taken" to bring the claim form to the attention of the defendant by an alternative method is good service (in effect retrospectively validating service an alternative method). In the *Amalgamated Metal Trading* case the specific question was whether, in a case of service out of the jurisdiction, the court has a power similar to that granted by r.6.15(1). In the *Abela* case the specific question was whether, in a case of service out of the jurisdiction, the court has a power similar to that granted by r.6.15(2). In each case it was held that the answer to the question was, "yes".

In both cases, attention was focussed on rr.6.36, 6.37 and 6.40.

Rule 6.36 states that a claimant may serve a claim form out of the jurisdiction if any of the grounds set out in para.3.1 of Practice Direction 6B apply. An application for such permission must comply with the terms of r.6.37.

Para.(5)(a) of r.6.37 states that, where the court gives permission it will specify the periods within which the defendant may (i) file an acknowledgment, (ii) file or serve an admission, (iii) file a defence), or (iv) file any other response or document required by a rule in another part, any other enactment or a practice direction (thereby varying if appropriate the time limits that would otherwise be imposed by CPR provisions).

Para.(5)(b) of r.6.37 states that, in addition, the court may (i) give directions about the method of service, and (ii) give permission for other documents in the proceedings to be served out of the jurisdiction.

Before Part 6 was completely re-cast, and in some respects substantially amended, by the Civil Procedure (Amendment) Rules 2008 (SI 2008/2178), the provisions now found in para.(5)(a) of r.6.37 were, with the exception of sub-para.(iv) of para.(a) (which was a new provision), found in r.6.21(4).

Before that event, there were no provisions in Part 6 equivalent to those now found in para.(5)(b) of r.6.37. The intention behind sub-para. (ii) of para.(5)(b) of r.6.37 is obvious enough. Rule 6.38 (former r.6.30 (2) & (3)) states that, subject to exceptions, where the permission of the court is required for the claimant to serve the claim form out of the jurisdiction, the claimant must obtain permission to serve any other document in the proceedings out of the jurisdiction. Sub-para.(ii) of para.(5)(b) of r.6.37 makes it clear that, in a given case, the permissions required by r.6.38 may be granted when the court grants permission for service out of the claim form.

But what is the intention behind sub-para.(i) of para.(5)(b) of r.6.37? In particular, what is the scope of the court's power to "give directions about the method of service" where it gives permission to serve a claim form out of the jurisdiction under r.6.36? In this context, para.(3) of r.6.40 contains "general provisions" about the methods of service of a claim form (or other document) on a party out of the United Kingdom, and states that such methods include service by any method "permitted by the law of the country in which it is to be served" (para.(3)(c)). And para.(4) of the rule states that nothing in para.(3) "or in any court order" authorises or requires any person to do anything "which is contrary to the law of the country where the claim form or other document is to be served". But, as was explained above there is no express provision giving the court power, in a case where service of a claim form is to be out of the jurisdiction, to exercise alternative service powers similar to those found in paras (1) and (2) of r.6.15. One possibility is that, subject to r.6.40(4), such power may be found in the court's power to "give directions about the method of service" granted by sub-para. (i) of para.(5)(b) of r.6.37. That construction commended itself to Judge Chambers Q.C. in the *Amalgamated Metal Trading* case, and his lordship's reasoning in this respect was adopted by Sir Edward Evans-Lombe in the *Abela* case. Judge Chambers Q.C. was prepared to hold that, if the words of r.6.37(5)(b)(i) are not wide enough to confer such power, it should be regarded as inherent in the rules as it is clear "that there is a lacuna in the wording of the rules".

As explained above, r.6.40(3)(c) states that service of a claim form (or any other document) out of the jurisdiction on a defendant may be effected by any method of service "permitted" by the law of the country in which it is to be served. And r.6.40(4) states that no order of the English court may authorise the doing of anything contrary to the law of the country where service is to be effected. It would seem to be clear that these provisions have to be taken into account in a case where, in order to effect service out of the jurisdiction, the claimant is relying on the court be prepared to exercise alternative service powers similar to those found in paras (1) and (2) of r.6.15.

Rule 6.40(4) is traceable to former RSC Order 11, r.5(2) and its effect in that context was considered by the Court of Appeal in *Ferrarini SpA v Magnol Shipping Co Inc (The Sky One)* [1988] 1 Lloyd's Rep. 238, CA. The Court held that, where service of a writ was purportedly made in a foreign country by a private person instructed by the plaintiff, and where the law of that country stipulated that service should be through official channels, the English court would not allow the purported service by an alternative method to stand; however, in a very strong and unusual case, the court might, in the exercise of the discretion now found in CPR r.3.10 (General power of the court to rectify matters where there has been an error of procedure), allow the service to stand.

In the *Amalgamated Metal Trading* case, the claimants submitted that a method of service is "permitted" within the meaning of r.6.40(3)(c), and is not rendered ineffective by r.6.40(4), if it is a method that is not contrary to the law of the country where the claim form is to be served, and that, in this sense, the method of service abroad adopted by them was a "method permitted" by the law of the foreign country concerned within that provision. Judge Chambers Q.C. rejected that submission, holding (para.40) that a claimant cannot say that, where a state expressly provides for a method or methods of service within its jurisdiction, but does not expressly provide that service by other means is illegal, then it is to be inferred that service by other means is permitted for the purposes of r.6.40(3)(c). However, it is always open to a claimant to lead evidence to the effect that, although the method of service they adopted was not expressly prescribed in the foreign country, it was permitted (ibid). In the *Abela* case, on the evidence before the judge the alternative method of service upon which the claimant sought to rely was a method permitted by the law of the country in which he sought to effect service, so no question of there being a possible breach of r.6.40(3)(c) or r.6.40(4) arose. However, in that case Sir Edward Evans-Lombe did say (para.65) that, although r.6.40(4) stipulates that the method of service directed must not constitute an illegal act under the law of the host state, that rule need not be read as requiring that any method of service directed by the court under r.6.37(5)(b)(i) must be a method of service prescribed by that state's rules.

In conclusion it should be noted that it can be argued that, as r.6.15 in Section II (Service of the claim form in the jurisdiction) and r.6.27 in Section III (Service of documents other then the claim form in the UK), both countenance service by an alternative method, the absence of such a provision in Section IV (Service of the claim form and other documents out of the jurisdiction) should not be regarded (contrary to the assumption made in the recent cases) as an oversight or an inadvertent omission, but as deliberate. And that it can be further argued that r.6.40(4) does not prohibit only acts that are illegal according to the law of the service country, but also prohibits methods of service of originating process that are (as art.7(1) of the Service Regulation states in a different context) incompatible with the law of that country. If the defendant is not in England, so that he cannot be served with originating process as of right, it is no small thing for English law to permit, for the purpose of founding jurisdiction, service on him overseas. And it might be expected that the exercise of such "long-arm" jurisdiction, which is derived from legislation, would be deliberately restricted by rules of court that allowed such service only with the permission of the court, and then only according to stipulated methods of service not capable of variation in individual cases by "alternative" methods. These arguments, if accepted, would point towards the conclusion that there is no lacuna in Section IV and that r.6.40(3) was intended to, and does, constitute a complete code. As explained above, in the recent case of *Cecil v Bayat*, the Court of Appeal proceeded on the assumption that, if there is a lacuna in Section IV, nevertheless, in a case to which that section applies, the court has jurisdiction to permit service of a claim form by an alternative method. But it should be noted that the Court held, obiter, that such permission should be given in special circumstances only (see para.57 et seq per Stanley Burnton L.J., and para.112 et seq per Rix L.J.). This would suggest that where Section IV applies the court should take a much stricter approach to applications for service by an alternative method than where other Sections of Part 6 are relevant.

SOLICITOR'S INDEMNITY FOR CLIENT'S COSTS

In *Awwad v Geraghty & Co* [2001] Q.B. 570, C.A., Schiemann L.J. said (at p.575):

"St Yves of Brittany, the patron saint of lawyers, used in the 13th century to act for nothing for the poor. Many lawyers still do. At the other extreme are those who will only act in return for payment. In the middle are those who would be prepared to act for nothing or less than usual if their client loses but wish to be paid if their client wins."

In the recent case of *Sibthorpe v Southwark London Borough Council*, [2011] EWCA Civ 25, 161 New L.J. 173 (2011), CA, the solicitors for the claimant of limited means fell into yet another category; a variation of the middle category identified by Schiemann L.J. They wished to be paid if their client won, but were prepared to act for nothing if their client lost, and in the latter event were even prepared to indemnify their client against any order for costs made against her. The variation of the middle category was the indemnity, and it was that which caused the trouble in this case. The question that arose for decision was whether the indemnity had the effect of rendering champertous the CFA arrangement the solicitors had with their client.

In *Giles v Thompson* [1993] 3 All E.R. 321, C.A., in the Court of Appeal Steyn, L.J. referred to earlier cases in which the law of maintenance and champerty had been explained in extenso and said (at p.328):

"In modern idiom maintenance is the support of litigation by a stranger without just cause. Champerty is an aggravated form of maintenance. The distinguishing feature of champerty is the support of litigation by a stranger in return for a share of the proceeds."

According to those simple definitions the arrangement the solicitors had with their client in the recent Sibthorpe case was not champertous, because they were not strangers supporting the proceedings without just cause (but, quite the reverse, they were lawyers acting for a client with a genuine claim), and they were not going to receive a share of the proceeds of the proceedings (but, quite the reverse, they were exposed to a financial loss under the indemnity). (For summary of this case, see "In Brief" section of this issue of CP News.)

But the law of maintenance and champerty has never been as simple as Steyn L.J. described, and its implications for the various fact situations that have arisen have never been straight-forward. Indeed, the position has been complicated by the enactment of statutory provisions designed to restrict the circumstances in which agreements are rendered unenforceable by reason of maintenance and champerty.

Section 58 of the Courts and Legal Services Act 1990 states that a conditional fee agreement (CFA) which satisfies all of the conditions stated in that section shall not be unenforceable by reason of its being a CFA, but any other CFA shall be unenforceable. In effect, that section lays down the rules as to which previously champertous agreements may be entered into by those conducting litigation and those providing advocacy services, and which may not. In the Sibthorpe case, Lord Neuberger M.R. (with whom Lloyd and Gross L.JJ. agreed) in giving the lead judgment explained (at para.34):

"Were it not for the inclusion of the indemnity, the CFA in the present case could not be attacked as being champertous,

even though it would result in the Solicitors plainly profiting from the litigation with which it is concerned, through the no win no fee arrangement and the 10 per cent uplift. That is, of course, because, at least in the absence of the indemnity, the CFA would have complied with the requirements of section 58 of the 1990 Act (as amended). However, the indemnity is not permitted by that provision, and therefore the issue is whether it is champertous for a solicitor to indemnify his claimant client against any potential liability for the defendant's costs."

There was no doubt that, as a result of the indemnity, the solicitors had an interest in the outcome of the client's claim, over and above their statutorily sanctioned interest due to the no win, no fee agreement, and the 10 per cent uplift.

The Master of the Rolls further explained (para.39) that the argument that, even is such an indemnity would have been held champertous in the past, it no longer should be so regarded so today, received support from the decision of the Court of Appeal in *Thai Trading Co v Taylor*, [1998] Q.B. 785, C.A., but, as had subsequently been found, the Court's judgment in the relevant respect in that case was clearly per incuriam.

In the event the Court concluded that the indemnity did not render the agreement champertous. This was because it has never been held to be champertous for a person to run the risk of a loss if the action fails, without enjoying any gain if the action succeeds. If the CFA in this case was to be found unenforceable it would have to be because, as Lloyd L.J. put it (at para.64), the indemnity itself was "unenforceable at common law under the rule against champerty". To hold that the indemnity was unenforceable for that reason would involve extending the law of champerty when it is apparent from judicial observations that its scope is to be curtailed rather than expanded. Section 58 neither struck down nor validated the indemnity provision.

REPORTING RESTRICTIONS – ANONYMITY ORDERS

In giving the lead judgment in the recent case of *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, *The Times* February 7, 2011, C.A., Lord Neuberger M.R. (with whom Maurice Kay and Smith L.JJ. agreed) explained that in cases involving public figures and the national media the courts are not infrequently asked to make orders preventing the publication of private information, concerning, for instance, the details of a person's finances, health, sexual activities, or family life. When considering what order to make on such applications, it is normally necessary for the court to balance two competing legal rights, in particular an individual's right to "respect for his private and family life", as stipulated in Article 8 of the European Human Rights Convention, and the more general right to "freedom of expression", laid down by Article 10 of the Convention, which also refers to the "right … to receive and impart information and ideas" (see White Book Vol.1 paras 5.4C.10, 39.2.9 & 39.2.11, and Vol.2, paras 15-40 to 15-45).

In this case, the judge at first instance granted the claimant's application for an interim injunction prohibiting the publication of certain confidential information, but refused to order that the claimant's identity be protected by an anonymity order. The Court of Appeal allowed the claimant's appeal. (For summary of the facts and the decision in this case, see the "In Brief" section of this issue of CP News.)

The Master of the Rolls examined the relevant authorities and summarised the principles that applied, in a case where the protection sought by a claimant was an anonymity order or other restraint on publication of details of a case which are normally in the pubic domain, as follows (para.21):

"(1) The general rule is that the names of the parties to an action are included in orders and judgments of the court.

(2) There is no general exception for cases where private matters are in issue.

(3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.

(4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.

(5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.

(6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less.

(7) An order for anonymity or for reporting restrictions should not be made simply because the parties consent: parties cannot waive the rights of the public.

(8) An anonymity order or any other order restraining publication made by a Judge at an interlocutory stage of an injunction application does not last for the duration of the proceedings but must be reviewed at the return date.

(9) Whether or not an anonymity order or an order restraining publication of normally reportable details is made, then, at least where a judgment is or would normally be given, a publicly available judgment should normally be given, and a copy of the consequential court order should also be publicly available, although some editing of the judgment or order may be necessary.

(10) Notice of any hearing should be given to the defendant unless there is a good reason not to do so, in which case the court should be told of the absence of notice and the reason for it, and should be satisfied that the reason is a good one."

EXTENSION OF TIME FOR SERVICE OF CLAIM FORM

The provisions in Part I of the Limitation Act 1980 give "ordinary time limits" for bringing actions of the various classes referred to in that Part. Thus, for example, s.5 states that an action founded on simple contract "shall not be brought" after the expiration of six years from the date on which the cause of action accrued. In the language of the CPR (in particular r.7.2), "shall not be brought" means that "proceedings" shall not be "started". Proceedings are started when the court issues a claim form at the request of the claimant. By ensuring that the claim form is issued within the ordinary time limits imposed by the statute, a claimant avoids the risk of a limitation defence being raised against him. It is the issuing of originating process that provides the protection, not the service of it.

Once issued, a claim form, if it is to be served within the jurisdiction, should be served within four months, and, if it is to be served out of the jurisdiction, within six months (r.7.5(1) and (2)). In the circumstance provided for by r.7.6, those "periods of initial validity for service" may be extended by the court on application by the claimant without notice. In practice, it is not unusual for these periods to be extended by such order (or a succession of them) for periods of a year or more after the expiry of the period of initial validity. Claimants often delay issuing the claim form until the eve of the expiry of the relevant limitation period. It is conceivable that, in a given case, the relevant limitation period may expire, after the date of issue of the claim form, but before service of it is effected, either within the initial period of validity, or within such extended period as the court may have granted under r.7.6.

In most cases, before the limitation period has expired, the defendant will be well aware that the claimant intends to issue, or has requested the issue of, a claim form and of the likely allegations that will be made in it and in the particulars of claim. But in some cases, the first notice that the defendant will have of the proceedings will be when he is served with the claim form. If it is the case (1) that the claim form was issued on the eve of the expiry of the limitation period, and (2) that the period of initial validity for service was extended by the court on without notice application (perhaps several times), the defendant will have first notice of the claim well after the expiry of the limitation period.

Cases have arisen in which defendants, in seeking to oppose (where they have notice of them) claimant's applications under r.7.6 for extensions of time, or to set aside service on the ground that such extensions should not have been granted, have submitted that the fact that the limitation period expired, either within the initial period of validity, or within such extended period for service as the court may have granted under that rule, was a weighty if not decisive factor in their favour. The matter was considered by the Court of Appeal in the recent case of *Cecil v Bayat*, [2011] EWCA Civ 135, February 18, 2011, C.A., unrep. (Rix, Wilson & Stanley Burnton L.JJ.), where the defendants argued successfully that the judge at first instance, in upholding an order extending time under r.7.6(2), had failed properly to consider and to take into account the effect of the order on their limitation defence. (For summary of this case, see "In Brief" section of this issue of CP News.)

CPR Update

CIVIL PROCEDURE (AMENDMENT) RULES 2011

The Civil Procedure (Amendment) Rules 2011 (SI 2011/88) were made on January 17, 2011, and come into effect on April 6, 2011. As is explained below, these Rules add provisions to the CPR relating to the service of documents, the award of fixed costs, and the enforcement of cross-border dispute mediation agreements. The amendments made by this statutory instrument in these respects will be included in the 2011 edition of the White Book (published on March 17, 2011), together with relevant commentary.

SERVICE OF DOCUMENTS

The EC Treaty prohibits any restriction on the provision of services which is based on nationality or on conditions of residence. This prohibition extends to the provision of legal services. Council Directive 77/249/EEC of March 22, 1997 contains measures to facilitate the effective exercise by lawyers of freedom to provide services. This Directive was implemented by the European Communities (Services of Lawyers) Order 1978 (S.I. 1978 No. 1910) (as amended). That Order has effect for the purpose of enabling a "European lawyer" (as defined) to pursue his professional activities in any part of the United Kingdom by providing, under the conditions specified in or permitted by the Directive, services otherwise reserved to advocates, barristers and solicitors.

A number of provisions in CPR Part 6 (Service of Documents) require that, in civil proceedings to which that Part applies, parties should provide addresses for service of documents, including initiating process. Such an address may be a party's own address or the address of the party's solicitor. The rules take account of the facts (a) that a party may be a litigant in person, resident and carrying on business, not in the UK, but in another EEA state, or (b) that a party may be represented (i) by a solicitor (as defined in r.6.2(d)) with a business address, not in the United Kingdom, but in another EEA state, or (ii) by a European lawyer with a business address, not in the United Kingdom, but in another EEA state. The European Commission has taken the view that, in certain respects, some of such provisions in Part 6 do not comply fully with Council Directive 77/249/EEC, principally where they insist that addresses of litigants in person or lawyers representing parties should be addresses within the jurisdiction should be provided.

Accordingly, by the Civil Procedure (Amendment) Rules 2011 (S.I. 2011 No.88), with effect from April 6, 2011, Part 6 is amended so as to allow, as an address for service, the address of a European lawyer in any EEA state, or, for a litigant in person, the litigant's normal residence or place of business in the UK or, failing that, any EEA state. For the purpose of accomplishing this end, substantial amendments are made to two rules in Section II of Part 6 (Service of the claim form in the jurisdiction); they are r.6.7 and r.6.8. Para (3) of r.6.7 is a new provision dealing with the situation where a defendant gives as his address for service of the claim form the business address of a European lawyer in any EEA state. And para.(a) of r.6.8, which heretofore has provided that a defendant may be served with the claim form at an address which he has given within the jurisdiction, is amended so as to provide the address given may be an address at which the defendant resides of carries on business within the UK or any other EEA state. In Section III of Part 6 (Service of documents other then the claim form in the United Kingdom), substantial amendments, comparable to those made to r.6.7 and 6.8, are made to r.6.23 (Address for service). In addition, minor or consequential amendments are made to numerous other rules in Part 6. By TSO CPR Update 55 (expected to be published in March 2011), necessary changes will be made to CPR supplementing practice directions and the 1978 Order will be annexed to Practice Direction 6A.

Provisions in the CPR creating schemes enabling claim forms to be issued online usually impose the condition that the defendant should have an address for service in England and Wales. As a result of concerns expressed to the Ministry of Justice by the European Commission to the effect that such provisions are not compliant with Council Directive 77/249/EEC they were re-examined. In the event it was decided that access to such schemes should be restricted to proceedings in which both parties have an address within England and Wales (the alternative solution of simply removing the condition not being available because of obstacles to electronic service in some Member States). As is explained immediately below, provisions in Practice Direction 7C (Production Centre), Practice Direction 7E (Money Claim Online), and Practice Direction 55B (Possession Claims Online) will be amended accordingly, with effect from April 6, 2011, by TSO CPR Update 55 (expected to be published in March 2011).

Para.2.3(7) of Practice Direction 7C (Production Centre) states that a claim form will not be issued by the Production Centre (see CPR r.7.10) for a claim where the defendant's address for service as it appears on the claim form is not in England and Wales. This provision is amended so as to state that the Centre will not issue a claim where a party's address is not in England and Wales.

Para.4(6) of Practice Direction 7E (Money Claim Online) states that a county court claim may be started using the Money Claim Online scheme (see CPR r.7.12) if it meets certain conditions, including the condition that the defendant's address for service is within England and Wales. This condition is amended so as to require that each party's address is in England and Wales.

Para.5.1(4) of Practice Direction 55B (Possession Claims Online) states that certain types of possession claim may be started by the claimant requesting the issue of a claim form electronically under the Possession Claims Online scheme (see CPR r.55.10A), provided the defendant has an address for service in England and Wales. This condition is amended so as to require that each party has an address in England and Wales.

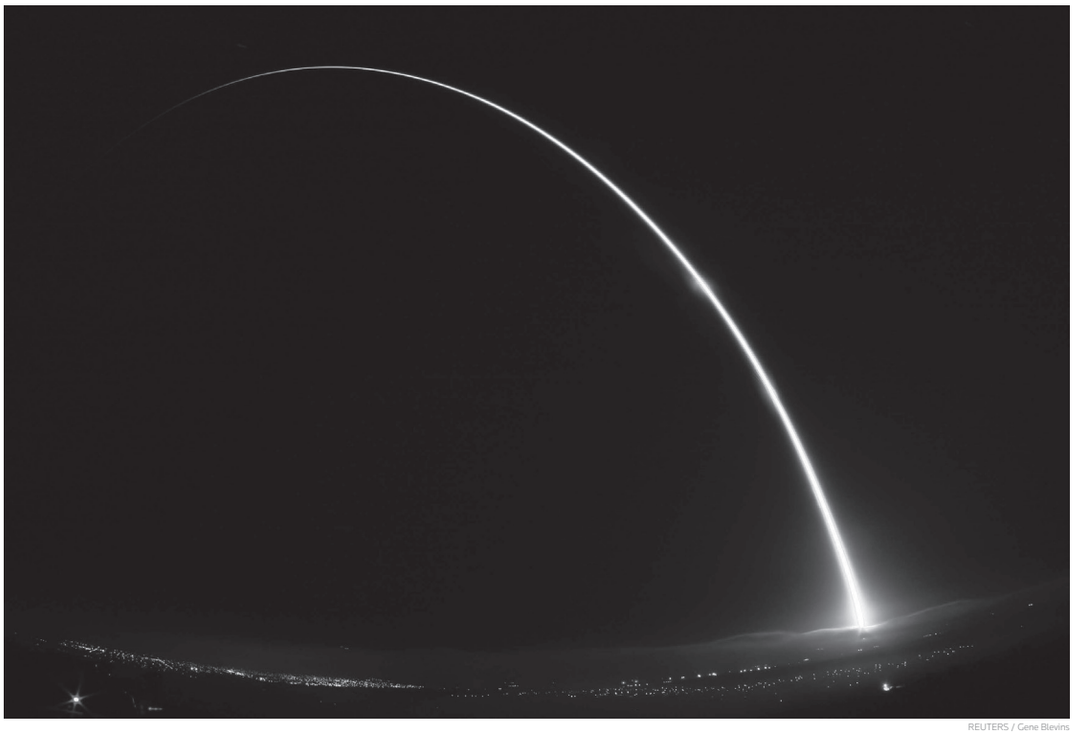
RECOVERY OF FIXED COSTS BY HM REVENUE AND CUSTOMS

By the Civil Procedure (Amendment) Rules 2011 (SI 2011/88) a further Section, Section VIII (rr.45.44 to 45.47), entitled "Fixed Costs: HM Revenue and Customs", is added to CPR Part 45 (Fixed Costs), for the purpose of providing a scale of fixed costs in proceedings where HM Revenue and Customs officers are successful in claims in county courts for the recovery of sums payable to the Commissioners for Revenue and Customs. Tables setting out the scale costs are found after r.45.45 and r.45.46. These new provisions, which come into effect on April 6, 2011, enable HMRC to recover the cost of work done by its non-legally qualified officers in conducting proceedings to recover debts, albeit only costs as fixed by the scales.

ENFORCEMENT OF MEDIATED CROSS-BORDER DISPUTES

Regulation (EC) No 1896/2006 created a European order for payment procedure and Regulation (EC) No 861/2007 created a European small claims procedure. Rules about those procedures are found in, respectively, Sections I and II of CPR Part 78 (European Order for Payment and European Small Claims Procedure).

By the Civil Procedure (Amendment) Rules 2011 (SI 2011/88) a further Section, Section III (rr.78.23 to 78.28), is added to this CPR Part for the purpose of implementing provisions in Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (O J Vol. 51, No.L 136/3). The aim of this Directive (the Mediation Directive) is to promote the use of mediation in certain cross-border disputes. In Section III, rr.78.24 and 78.25 relate to art.6 of the Directive (Enforceability of agreements resulting from mediation), and rr.78.26 to 78.28 to art.7 (Confidentiality of mediation). These rules will come into effect on April 6, 2011, and will apply only where the mediation of a cross-border dispute was commenced on or after that date. By the same instrument, Part 78 is re-titled as, simply, "European Procedures", and consequential amendments are made to rules in other CPR Parts, most significantly to r.5.4C (Supply of documents to a non-party from court records) and r.31.3 (Right of inspection of a disclosed document). By TSO CPR Update 55, expected to be published in March 2011, Practice Direction 78 will be amended by the addition of provisions supplementing r.78.24 (Making a mediation settlement enforceable) and dealing with the practice to be followed, and by the addition in an Annex thereto of a copy of the Mediation Directive (see r.78.23(2)).



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