CIVIL PROCEDURE NEWS

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CPR r.52.3(1)(a), Sch.1 RSC Ord.52. rr.1(1) & 9, Administration of Justice Act 1960 s.13(1), Access to Justice Act 1999 s.54. In Commercial Court proceedings, judge finding defendant company (D) in contempt of court for failure to comply with court orders ([2011] EWHC 1024 (Comm)). Pending hearing as to sanction, judge granting D permission to appeal against that finding, but subject to onerous conditions. On application to Court of Appeal, D submitting that permission to appeal was not required. **Held**, dismissing application, (1) as corporate entities cannot be committed to prison for contempt, an appeal to the Court of Appeal by a company against a decision that they were in contempt is not an appeal against "a committal order" within r.52.3(1)(a)(i), and (2) therefore such appeal may be made only with permission. ***Barnet London Borough Council v Hurst (Practice Note)*** [2002] EWCA Civ 1009, [2003] 1 W.L.R. 722, CA, ***Wilkinson v Lord Chancellor's Department*** [2003] EWCA Civ 95, [2003] 1 W.L.R. 1254, CA, ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 52.3.2 & sc52.1.42, and Vol.2 para.9B-18.)

■ **NML CAPITAL LIMITED v REPUBLIC OF ARGENTINA** [2011] UKSC 31, [2011] 3 W.L.R. 273, SC.

Service out of jurisdiction – defendant's exemption from State immunity – amendment of claim

CPR rr.3.10, 6.36, 6.37 [rr.6.20(9), 6.21] & 11.1, Practice Direction B (Service out of the Jurisdiction) para.3.1(10), Civil Jurisdiction and Judgments Act 1982 s.31, State Immunity Act 1978 ss.1, 2 & 11. Following debt default by sovereign state (D), Cayman Island company (C) (an affiliate of a New York-based hedge fund) bringing claim against D in US federal court (1) alleging breaches of an agreement between D and a bank pursuant to which a series of bonds were issued by D, and (2) seeking (a) accelerated payment of the principal amounts, and (b) interest due. C obtaining summary judgment and entering judgment for US$184m. C bringing action on this judgment in High Court and applying ex parte for permission to serve the claim form out of the jurisdiction on ground that the claim was made to enforce a judgment. In draft particulars of claim exhibited to their witness statement, C asserting, on the basis of two particular grounds stated therein, that D was not immune from suit. Judge granting permission. Following service of the claim form, D applying (1) for order setting aside the judge's order, and (2) for a declaration that the High Court had no jurisdiction in respect of the claim. On inter partes hearing of this application, D contending that the two particular grounds relied on by C for demonstrating D's non-immunity were wrong. C conceding this but now in addition submitting that the foreign court's judgment was capable of being recognised and enforced in the UK by virtue of s.31 (as the foreign court had jurisdiction over D under sovereign immunity rules corresponding to those applicable in the UK). In reply, D submitting that, in resisting their application to set aside the judge's order, it was not permissible for C to rely on a basis for non-immunity that was not set out and relied on in their application for permission to serve out of the jurisdiction. Judge refusing D's application ([2009] EWHC 110 (Comm), [2009] 2 W.L.R. 1332), but Court of Appeal allowing D's appeal ([2010] EWCA Civ 41, [2010] 3 W.L.R. 874, CA). On C's appeal to the Supreme Court, **held**, allowing appeal, (1) the effect of s.31 is to provide for the recognition in England (as well as in other parts of the UK) of a foreign judgment against a state where there exists a connection between the subject matter of that judgment and the forum state that is equivalent to one that would give rise to an exemption from immunity in this jurisdiction, (2) thus a foreign judgment against a state within s.31 is to be recognised and enforced by the English court if the judgment would be so recognised and enforced if it had not been given against a state and the foreign court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to such matters in the United Kingdom in accordance with ss.2 to 11 of the 1978 Act, (3) where at an inter partes hearing it becomes apparent that at the ex parte application the ground for service out of the jurisdiction (the jurisdictional "gateway") was incorrectly identified by the applicant, the court has power to grant permission to serve out on a fresh basis and to dispense with re-service, (4) however, such "gateway" issue did not arise in the present case as there was no basis for the Court of Appeal's conclusion that, because the basis for absence of immunity was incorrectly identified, the English court had no jurisdiction. ***Svenska Petroleum Exploration AB v Republic of Lithuania (No. 2)*** [2007] Q.B. 886, CA, ***Parker v Schuller*** (1901) 17 T.L.R. 299, CA, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2011*** Vol.1 paras 3.10.3, 6.33.11, 6.37.24, 11.1.1 & 40.10.2.)

■ **PANNONE LLP v AARDVARK DIGITAL LTD** [2011] EWCA Civ 803, July 12, 2011, CA, unrep. (Arden, Lloyd & Tomlinson L.JJ.)

Unless order by consent – extension of time for complying – relief from sanction

CPR rr.3.1(2)(a), 3.3(1) 3.8, 3.9 & 40.6. Solicitors (C) bringing county court claim against former client (D) for unpaid fees (£20,000). D defending and making counterclaim for professional negligence (£3.5m). District judge transferring claim to Chancery Division and giving directions, including a direction that, no later than 4pm on a particular Friday, C should file and serve a reply and a defence to counterclaim. Before that date, C's solicitors and D acting in person agreeing that that time limit should be extended until 1 pm on the following Monday on conditions that if C did not comply therewith their claim should be struck out and D have permission to enter judgment in full for the counterclaim. Thirteen days after the extended date, consent order to that effect filed and approved by district judge. Subsequently, at CMC D submitting that C had not complied with the consent order and that the conditions therein took effect. District judge (1) finding that, on the due day, C served the documents on D by e-mail and filed them at court by fax, but in doing so, by a matter of minutes, had not met the 1pm deadline in both instances, and (2) on own initiative, extending time limit under r.3.1(2)(a). Judge dismissing D's appeal and Court of Appeal granting D permission to make second appeal. **Held**, dismissing appeal, (1) the powers of the court (a) to extend time for compliance with a court order and (b) to grant relief from a sanction prescribed by such order as a consequence of a failure to comply therewith within a specified time, include circumstances where the order is expressed to have been made by consent, (2) in such circumstances, the presence of "unusual circumstances" is not a prerequisite to the court's exercise of those powers, (3) in exercising its discretion, the weight to be given to the parties' agreement will vary according to the nature of the agreement, (4) where the agreement is no more than a procedural accommodation in relation to case management (as distinct from the compromise of a substantive dispute) the weight to be given to the fact that it included an agreement as to consequences of non-compliance, though real and substantial, will only rarely be decisive. Observations on ambiguity in expressing an order to be made "by consent" and implications thereof. ***Ropac Limited v Inntrepreneur Pub Company Limited*** [2001] C.P. Rep. 31, ***Ferrotex Industrial v Banque Francaise de L'Orient*** [2001] EWCA Civ 1387, August 30, 2011, CA, unrep., ***Confetti Records v Warner Music (UK) Ltd*** [2003] EWCA Civ 1748, November 26, 2003, CA, ***Weston v Dayman*** [2006] EWCA Civ 1165, [2008] B.C.L.C. 250, CA, ***Fung Oi Chiu v Waitrose Limited*** [2011] EWHC 1356, May 26, 2011, ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 3.1.2, 3.8.1, 3.9.1, 3.9.2, 40.6.1 & 40.6.3.)

■ **R. (BAHTA) v SECRETARY OF STATE FOR THE HOME DEPARTMENT** [2011] EWCA Civ 895, July 26, 2011, CA, unrep. (Pill & Sullivan L.JJ. and Hedley J.)

Judicial review claim withdrawn by consent – order for costs – appeal

CPR rr.44.3 & 54.18, Senior Courts Act 1981 s.16. Pre-Action Protocol for Judicial Review para.3.1. In several unrelated proceedings, individuals (C) bringing judicial review claims challenging decisions by the Secretary of State (D) refusing them permission to work in the UK and/or indefinite leave to remain. In each and every case, (1) upon D's granting what they sought without the need for a contested hearing, Cs' applications withdrawn by consent, (2) in approving consent orders, judges giving directions as to how the decisions on costs were to be made, and (3) courts deciding that there should be no order as to costs. In conjoined appeals, **held**, allowing Cs' appeals, (1) the Court had jurisdiction to hear the appeals as plain words would be required in a consent order if the parties intended to exclude the right of appeal to granted by s. 16 and the directions given in the consent orders did not have that effect, (2) government departments (notwithstanding their heavy workloads and limited resources) are not exempt from the general rule that successful parties in legal proceedings are entitled to their costs, (3) when relief is granted in claims such as these, the defendant bears the burden of justifying a departure from the general rule, and that burden is likely to be a heavy one if the claimant has, and the defendant has not, complied with the Pre-Action Protocol, (4) in the case of publicly funded claimants, it is not a good reason to decline to make an order for costs against a defendant that those acting for them will obtain some remuneration even if no order for costs is made against the defendant. ***R. (Boxall) v Waltham Forest London Borough Council*** (2001) 4 C.C.L. Rep. 258, unrep., ***R. (Scott) v Hackney London Borough Council*** [2009] EWCA Civ 217, January 20, 2009, CA, unrep., ***In re appeals by JFS (Governing Body)*** [2009] UKSC 1, [2009] 1 W.L.R. 2353, SC, ***R. (RS (Sri Lanka)) v Secretary of State for the Home Department*** [2011] EWCA Civ 114, January 24, 2011, CA, unrep., ***Review of Civil Litigation Costs : Final Report*** (December 2009) Chp 30 paras 4.12 & 4.13, ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 44.3.7, 54.12.5 & C8-001, and Vol.2 para.9A-59.)

■ **R. (PR (SRI LANKA) v SECRETARY OF STATE FOR THE HOME DEPARTMENT** [2011] EWCA Civ 998, August 11, 2011, CA, unrep. (Lord Neuberger M.R., Sir Anthony May PBD & Carnwath L.J.)

Permission for second-tier appeal – test to be applied

CPR r.52.13, Access to Justice Act 1999 s.55, Tribunals, Courts and Enforcement Act 2007 s.13, Appeals from the Upper Tribunal to the Court of Appeal Order 2008 para.2. Applicants' appeals against decisions to deport and refusing asylum rejected by First-tier Tribunal and by Upper Tribunal. Applicants applying to Court of Appeal for permission to appeal. Held, refusing applications, (1) permission may be granted for a second-tier appeal where the appeal would raise an important point of principle or practice or where there is "other compelling reason" for the Court to hear it, (2) in this context, "compelling" means legally compelling, (3) the question is not whether the nature of an asserted claim would, if its factual basis were asserted, risk drastic consequences for the applicant, but whether there was a compelling why the issue on which the applicant had failed twice below should be subjected to a third judicial process. ***Uphill v BRB (Residuary) Ltd*** [2005] EWCA Civ 60, [2005] 1 W.L.R. 2070, CA, and ***R. v (Cart) v Upper Tribunal*** [2011] UKSC 28, [2011] 3 W.LR. 107, SC, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2011*** Vol.1 paras 52.3.10, 52.13.3, 52.13,4 & 52.13.6, and Vol.2 paras 9A-843 &9A-1007.)

Statutory Instruments

■ **COURT FUNDS RULES 2011** (SI 2011/1734)

Revokes Court Funds Rules 1987 and statutory instruments amending those Rules and provides new Rules made under the Administration of Justice Act 1982 s.38(7) for governing the way in which funds are paid into, dealt with in and paid out of court. Comes into force on October 3, 2011. Provides for continued application of Rules now revoked to such an extent as may be necessary for giving effect to any order, direction or request made before that date. (See ***Civil Procedure 2011*** Vol.2 para.6A-18 and Supplement 1 para.6A-17.2 et seq.)

■ **DISTRESS FOR RENT (AMENDMENT) RULES 2011** (SI 2011/1542)

Law of Distress Amendment Act 1888 s.8. Amends Distress for Rent Rules 1988 Appendix 3 to reflect closures of county courts. Also provides that West Cumbria and Guildford county courts are to be issuing county courts. In force for most courts affected on July 18, 2011, otherwise August 1 & 8, 2011).

■ **SUPREME COURT FEES (AMENDMENT) ORDER 2011** (SI 2011/1737)

Amends Supreme Court Fees Order 2009 Sch.1. Increases fee payable on filing of an application for permission to appeal from £800 to £1,000. The fee for an application to appeal in relation to the Court's devolution jurisdiction remains unchanged at £400. In force August 5, 2011. (See ***Civil Procedure 2011*** Vol.2 paras 4A-45.1 & 4A-114.)

In Detail

APPEAL TO COURT OF APPEAL FROM UPPER TRIBUNAL

As is explained in the White Book (Vol.1 para.52.13.1), in the Bowman Report it was recommended that one level of appeal should be the norm. This principle reflects the need for certainty, reasonable expense and proportionality. It was further recommended that a further (or "second" appeal) should only be allowed in special circumstances and this was adopted by the Access to Justice Act 1999 s.55 (see White Book 2011 Vol.2 para.9A-844).

Subject to a few exceptions, permission to appeal is always required. CPR r.52.3(6) states that permission may be given only where (a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason why the appeal should be heard. CPR r.52.13(1) expressly states that permission is required from the Court of Appeal for any appeal to that Court from a decision of a county court or the High Court "which itself was made on appeal" and r.52.13(2), following s.55 of the 1999 Act, states that the Court will not give permission in these circumstances unless it considers that (a) the appeal would raise an important point of principle or practice, or (b) there is some other compelling reason for the Court to hear it. In a number of cases, the Court of Appeal has attempted to give guidance on the meaning and application of, what may be called, "the second appeals test" as stated in r.52.13(2).

Section 13 of the Tribunals, Courts and Enforcement Act 2007 (see White Book Vol.2 para.9A-1007) provides a right of appeal from the Upper Tribunal on a point of law only, and subject to permission to appeal, to the Court of Appeal (where that Court is "the relevant court"). Permission may be given by the Upper Tribunal or by the Court of Appeal on an application by a party but such application may only be made to the Court of Appeal if permission has been refused by the Upper Tribunal. Section 13(6) of the 2007 Act states the test that should be applied to applications for permission to appeal in this context, and that test, which is repeated in para.2 of the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008/2834), is in the same terms as that stated in s.55 and r.52.13(2) (see White Book Vol.1 para.52.13.6).

In the recent case of *R. (PR (Sri Lanka)) v Secretary of State for the Home Department* [2011] EWCA Civ 988, August 11, 2011, CA, Carnwath L.J., in giving the judgment of the Court of Appeal, explained that it is clear that the intention of the legislature was to apply the same test for appeals from the Upper Tribunal to the Court of Appeal as applied to second appeals from the High Court and the county courts. However, in this context, by contrast to s.55 the 1999 Act, the more restrictive test is not in terms confined to "second appeals", that is cases where the decision of the Upper Tribunal was itself on appeal. In theory, at least, the same test applies even in cases where the Upper Tribunal is acting as a first instance tribunal. For this reason, it is convenient to refer to the test in s.13(6) of the 2007 Act and para.2 of the 2008 Order, not as the "second appeals test", but as the "second-tier appeals test".)

The appeal to the Court of Appeal in the *PR (Sri Lanka)* case involved several applicants whose appeals against decisions to refuse asylum and to deport had been rejected by both the First-tier Tribunal and by the Immigration and Asylum Chamber of the Upper Tribunal. They sought permission to appeal to the Court of Appeal on the basis that there was "some other compelling reason" for the Court to hear the appeal. The Court examined the authorities relevant to the "second appeals test" and to the "second-tier appeals test" (including, in particular, *Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60, [2005] 1 W.L.R. 2070, CA, and *R. (Cart) v Upper Tribunal* [2011] UKSC 28, [2011] 3 W.LR. 107, SC) and endeavoured to identify the principles underyling the second of those tests (see paras 33 to 43). The Court then applied those principles to the several applications for permission to appeal and in each case refused the application.

The principal argument raised by the applicants in this appeal was that their removal from the United Kingdom would expose them to the risk of serious harm and would be a violation of the UK's international obligations and these consequences provided "compelling reasons" sufficient to satisfy the second-tier appeals test. In rejecting this submission the Court stated that, in this context, "compelling" means *legally* compelling, rather than compelling, perhaps, from a political or emotional point of view, although such considerations may exceptionally add weight to the legal arguments (para.36). The Court explained that in many asylum cases, the person seeking asylum will assert a well-founded fear that his art.2 or art.3 (or perhaps arts 5, 6 or 8) Convention rights will be violated if he is removed from the United Kingdom and acknowledged that, if his fear is well-founded, the consequences could be drastic, if he is removed. The Court then stated (para.41):

"But the proceedings in the First and Upper Tiers of the Tribunal (from which permission for a second appeal is sought) have established by proper judicial process, put in place by Parliament, that his fear is not well-founded. The

question is not, therefore, whether the nature of the asserted claim would, if its factual basis were established, risk drastic consequences, but whether there is a compelling reason why the issue on which the claimant has failed twice should be subjected to a third judicial process. The two tiers of the Tribunal system are, and are plainly to be regarded as, competent to determine matters of this kind, and there is no case for saying that the United Kingdom would be in breach if its international obligations, if the decisions of the Upper Tribunal are only amenable to appeal in very restricted circumstances. In short, there is no case for contending that the nature of an asylum-seeker's case which has failed twice in the Tribunal system is a compelling reason for giving permission for a further appeal."

GROUNDS FOR SERVICE OUT OF THE JURISDICTION

CPR r.6.36 states that in any proceedings to which r.6.32 (Service of the claim from where the permission of the court is no required – Scotland and Northern Ireland) or r.6.33 (ditto – out of the UK) does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the "grounds" set out in para.3.1 of Practice Direction 6B (Service out of the Jurisdiction) apply. Para.3.1 lists a variety of claims, sometimes referred to colloquially as "jurisdictional gateways" rather than as "grounds", upon which a claimant may obtain from the court permission to serve out of the jurisdiction.

CPR r.6.37(1)(a) states that an application for permission must set out which ground in para.3.1 is relied on. The fact that the applicant has framed his claim so that, on its face, it falls within one of the gateways does not of itself foreclose the matter. There are other considerations, in particular the rule (recited in r.6.37(3)) that the court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.

For obvious reasons, generally the application for permission is made ex parte and without notice. If the application is successful and service abroad is effected it is conceivable that the defendant may challenge the grant of permission, either on the ground that the claim does not fall within one of the gateways or that permission ought not to have been granted for some other relevant reason. Where there is an inter partes hearing of a gateway challenge, and the defendant successfully submits that permission should not have been granted because the para.3.1 ground relied on by the applicant is, in the light of the particulars of claim, wrong or misconceived, a question which then arises is whether the applicant may seek to retrieve the situation by asserting that his claim falls within another of the para.3.1 grounds.

This question was considered by the Supreme Court in the recent case of *NML Capital Limited v. Republic of Argentina*, [2011] UKSC 31, [2011] 3 W.L.R. 273, SC (for summary of this case, see "In Brief" section of this issue of CP News). As is explained in the White Book (Vol.1 para.6.37.15.1) there is Court of Appeal authority for the proposition that the court must decide an application for permission to serve out of the jurisdiction on the basis of the cause or causes of action expressly mentioned in the pleadings and the claimant will not be allowed to rely on an alternative cause of action which he seeks to spell out of the facts pleaded if it has not been mentioned. This proposition is traceable to the decision of the Court of Appeal in *Parker v Schuller* (1901) 17 T.L.R. 299, CA, and would suggest that the answer to the question posed above is "no". That is an answer that commended itself to the Court of Appeal in the instant case.

On appeal to the Supreme Court, the Court held that, strictly speaking the question did not arise (the principal issue not being whether the claimant's claim fell within one of the jurisdictional gateways, but whether the foreign defendant fell within one of the exemptions from State immunity). Nevertheless, having heard full argument on the question, the Court held that the so-called "rule in *Parker v Schuller*" was wrong and should no longer be applied. The same approach should be taken to an application to amend a pleading that has been served out of the jurisdiction as is adopted to any other application to amend a pleading (at para.78 per Lord Phillips PSC); accordingly, where the ground for service out has been incorrectly identified, the court has power to grant permission to serve out on a fresh basis and to dispense with re-service (at para.137 per Lord Collins).

In giving his reasons for reaching this conclusion, Lord Phillips stated (para.75):

"Where an application is made to amend a pleading the normal approach is to grant permission where to do so will cause no prejudice to the other party that cannot be dealt with by an appropriate order for costs. This accords with the overriding objective. Where all that a refusal of permission will achieve is additional cost and delay, the case for permitting the amendment is even stronger. I can see no reason in principle why similar considerations should not apply where an application is made for permission to serve process out of the jurisdiction. It is, of course, highly desirable that care should be taken before serving process on a person who is not within the jurisdiction. But if this is done on a false basis in circumstances where there is a valid basis for subjecting him to the jurisdiction, it is not obvious why it should be mandatory for the claimant to be required to start all over again rather than that the court should have a discretion as to the order that will best serve the overriding objective."

CPR Update

AMENDMENTS TO RULES

The Civil Procedure (Amendment No.2) Rules 2011 (SI 2011/1979) were made on August 6, 2011. As explained immediately below, they make changes to CPR Pt.6 (Service of Documents), Pt.36 (Offers to Settle) and Pt.79 (Proceedings Under the Counter-Terrorism Act 2008 etc.).

Service of Documents

Before April 6, 2010, CPR r.6.7 (as substituted by the Civil Procedure (Amendment) Rules 2008 (SI 2008/2178) consisted of one paragraph and was confined to the service of a claim form on a solicitor with a business address within England and Wales. In terms the rule stipulated the circumstances in which a claim form must be served on the defendant's solicitor. Appropriately, the rule was entitled, simply, "Service of the claim form on a solicitor".

By the Civil Procedure (Amendment No.2) Rules 2009 (SI 2009/3390), with effect from that date, the rule was expanded by the addition of a second paragraph dealing with the service of a claim form on a solicitor with a business address in an EEA state (so as to comply with EC Directive 2006/123/EC) and the rule's title was amended accordingly ("Service of the claim form on a solicitor within the jurisdiction or in any EEA state".)

Then by the Civil Procedure (Amendment) Rules 2011 (SI 2011/88), with effect from April 6, 2011, the rule was substituted entirely in an amended form, the principal differences being the addition of a third paragraph (r.6.7(3)) dealing with service on a European lawyer with a business address in any EEA state (see White Book 2011 Vol.1 para.6.7.2) and the re-casting of paragraph (2) to include (together with a solicitor in an EEA state) a solicitor with a business address in Scotland or Northern Ireland (making explicit what was previously implied). In addition, r.6.8 was amended. (See Issue 3/2011 of CP News (March 15, 2011).)

The re-casting of para.(2) of r.6.7 by that statutory instrument was defective in one respect in that what had been sub-para (b) was inadvertently omitted (a provision comparable to r. 6.7(1)(b)) (see White Book 2011 Vol.1 para.6.7, pp.179 & 180). With effect from September 1, 2011, that is now put right by r.3 of the Civil Procedure (Amendment No.2) Rules 2011, by the addition of sub-para (aa) which reads as follows:

"(aa) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within Scotland or Northern Ireland;"

As was explained in Issue 3/2011 of CP News (March 15, 2011), as a consequence of the concerns that gave rise to the amendments made to r.6.7 and r.6.8 by SI 2011/88, provisions in Practice Direction 7C (Production Centre), Practice Direction 7E (Money Claim Online), and Practice Direction 55B (Possession Claims Online) creating schemes enabling claim forms to be issued electronically were also amended (by TSO CPR Update 55) with the result that access to these schemes were restricted to proceedings in which both parties have an address within England and Wales. By forthcoming TSO CPR Update 57, with effect from September 1, 2011, these Practice Directions are amended for the purpose of restoring the ability of claimants with an address for service in Scotland and Northern Ireland to use these schemes in bringing proceedings against defendants with addresses for service in England and Wales. (By SI 2011/1979 the parentheses rr.6.7, 6.8 and 23 are amended accordingly.)

Offers to settle

Para (1) of CPR r.36.14 (Costs consequences following judgment) states that that rule applies where, upon judgment being entered, (a) a claimant fails to obtain a judgment "more advantageous" than the defendant's Part 36 offer; or (b) judgment against the defendant is "at least as advantageous" to the claimant as the proposals contained in the claimant's Part 36 offer (see White Book 2011 Vol.1 para.36.14, pp.1103 & 1104). Generally, in the first of these circumstances the costs consequences are as stated in r.36.14(2), and in the second as in r.36.14(3).

In *Carver v BAA Plc* [2008] EWCA Civ 412, [2009] 1 W.L.R. 113, CA, the Court of Appeal considered the meaning of "advantageous" in this context (see White Book 2011 Vol.1 para.36.14.1). In that case the facts were that at trial in a personal injuries case the claimant (C) obtained judgment for an amount that exceeded the defendant's Part 36 offer, but only by £51. The trial judge held that, having regard to all the consequences of going to trial, it could not be said that the final outcome, although higher by that amount, was "more advantageous" than accepting the defendant's offer of £4,000 made a year previously. The Court of Appeal upheld that decision. Ward L.J. (with whom Rix and Keene L.JJ. agreed) stated that that "more advantageous" is an open-textured phrase which permits the court, "in deciding whether the judgment, which is the fruit of the litigation, was worth the fight", to take a wide-ranging

review of all the facts and circumstances of the case. His lordship held that the judge was correct in looking at the case broadly and was entitled to take into account that the extra £51 gained was more than offset by the irrecoverable cost incurred by the claimant's continuing to contest the case for as long as she did and was entitled to take into account the added stress to her as she waited for the trial and the stress of the trial process itself.

Lord Justice Jackson, in his *Review of Civil Litigation Costs : Preliminary Report*, Volume 2 (May 2009), expressed the opinion that the decision of the Court of Appeal in the Carver case "introduces an unwelcome degree of uncertainty into the Part 36 process" and also "puts unreasonable pressure on claimants to accept offers which are not quite high enough" and suggested that serious consideration be given to reversing that decision by rule change (*ibid* Chp 46 para.6.4).

Subsequently, his lordship confirmed his provisional view and recommended that the effect of the decision should be reversed either judicially (if an early opportunity arose) or by rule change making it clear that in any purely monetary case "more advantageous" in r.36.14(1)(a) means "better in financial terms by any amount, however small" (*Review of Civil Litigation Costs: Final Report* (December 2009) Ch.41 para.2.9).

This recommendation is carried into effect by r. 4 of the Civil Procedure (Amendment No. 2) Rules 2011. That rule inserts after r. 36.14(1) a new para.(1A) which states as follows:

"(1A) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, "more advantageous" means better in money terms by any amount, however small, and "at least as advantageous" shall be construed accordingly."

That provision comes into effect on October 1, 2011, and applies to offers to settle made in accordance with r.36.2 on or after that date.

Proceedings Under The Counter-Terrorism Act 2008 Etc.

CPR Pt 79 contains rules relating to proceedings under the Counter-Terrorism Act 2008 and Pt 1 of the Terrorist Asset-Freezing etc. Act 2010 (see White Book 2011 Vol.1 para.79.0.2, p 2198).

Amongst other things, the rules in Section 2 of this Part apply to applications to set aside "financial restrictions" decisions under s.63(2) of the 2008 Act or s.27(2) of the 2010 Act. By the 2010 Act, the Treasury is given power to make final and interim "designations" which have the effect that the designated person's funds and economic resources may not be dealt with except where a licence is granted. Under s.26 of the 2010 Act the person affected may appeal to the High Court. Section 3 of CPR Pt 79 contains rules of court which apply to such appeals (and to appeals to the Court of Appeal). These rules supplement and modify CPR Pt 52 (Appeals).

As is noted in the White Book (see Supplement 1 to the 2011 edition at para.79.14C.1, p 45), as enacted para.(2)(b) of r.79.14C stated that evidence "in support of the application" should be filed, when in fact s.26 does not provide for an "application" to the High Court, but for an "appeal" (cf s.27 (Review of other decisions by the court)). With effect from September 1, 2011, r.5 of the Civil Procedure (Amendment No.2) Rules 2011 corrects para.(2)(b) in this respect by substituting "appeal" for "application".

Section 4 of Pt 79 contains general provisions that apply to all proceedings specified in Sections 2 and 3 of that Part. Among them is r.79.23 (Search for, filing of and service of material). With effect from October 1, 2011, by r.5 of the Civil Procedure (Amendment No.2) Rules 2011, para.(1) of that rule is amended for the purpose of changing the obligations imposed on the disclosing party as to the filing and service on the other party (and any special advocate) material other than "closed material". In particular, the obligation to file and serve material "which adversely affects the other party's case" is removed, not only in proceedings to which Section 3 of Pt 79 applies, but also in proceedings to which Section 2 applies. This amendment renders para.(1A) of r.79.23 unnecessary and so it is now omitted.

NEW PRACTICE DIRECTIONS

In TSO CPR Updates 56 and 57 several new CPR Practice Directions are to be published. They are as follows.

Practice Direction 51F - Non-Disclosure Injunctions Information Collection Pilot Scheme

This pilot scheme consists of arrangements for the recording by the courts, and transmission to the Ministry of Justice for analysis, of certain data in relation to injunctions prohibiting publication of private or confidential information (a "non-disclosure injunction"). The required information is to be recorded by judges in the form annexed to the Practice Direction. The purpose of the scheme is to enable the Ministry of Justice to collate and publish, in anonymised form, information about applications for injunctions where s.12 of the Human Rights Act 1998 is engaged. The pilot scheme will operate initially from August 1, 2011, to July 31, 2012, and will apply in any civil proceedings in the High Court or Court of Appeal in which the court considers an application for an injunction prohibiting the

publication of private or confidential information, the continuation of such an injunction, or an appeal against the grant or refusal of such an injunction. The scheme does not apply to proceedings to which the Family Procedure Rules 2010 apply, to immigration or asylum proceedings, to proceedings which raise issues of national security or to proceedings to which Part 21 (Children and Protected Parties) applies.

Practice Direction 51G – Costs Management in Mercantile Courts and Technology and Construction Courts – Pilot Scheme

This pilot scheme consists of arrangements for the making by the courts involved of "costs management orders" with the objective of controlling costs in proceedings to which the scheme applies. (The scheme is similar to that already in operation under Practice Direction 51D for defamation proceedings (see White Book, 2011 Vol.1 para.51DPD.1, p.1610), and builds on experience gained under an informal pilot scheme set up during the Litigation Costs Review undertaken by Lord Justice Jackson.) Parties are required to file and exchange their respective costs budgets in the form set out in Precedent HB annexed to this Practice Direction. Modifications are made to Practice Direction 29 (The Multi-Track) and to Section 6 of the Costs Practice Direction. The scheme will operate in all Mercantile Courts and Technology and Construction Courts, initially from October 1, 2011, to September 30, 2012, and will apply to proceedings in which the first case management conference is held on or after October 1, 2011.

Practice Direction – County Court Closures

This is a "free-standing" Practice Direction, made by the Lord Chief Justice. It came into force on August 6, 2011. Under the Court Estate Reform Programme (CERP), established in 2010 for the purpose of providing a means for saving the Ministry of Justice substantial recurring expenditure, up to 50 county courts are to be closed. Many of them have already ceased operation. Necessarily, the implementation of this programme involves not only the enactment of appropriate statutory instruments under the County Courts Act 1984 but also arrangements for the transfer of work from county courts subject to closure ("closing" courts) to neighbouring county courts ("recipient" courts) that are not at risk of being closed. This Practice Direction sets out the detailed arrangements for the transfer before and at the date of closure of civil proceedings (generally), family proceedings, and insolvency proceedings. The Practice Direction puts on a formal basis, and presents in a convenient manner, procedures that have been used for the transfer of work where county courts have already been closed in the CERP.

AMENDMENTS TO PRACTICE DIRECTIONS

TSO CPR Updates 56 and 57 make amendments to several CPR Practice Directions.

Three practice directions for pilot schemes made under CPR r.51.2 are amended for the purpose of extending further the periods of operation of the schemes. The scheme in Practice Direction 51B (Automatic Orders Pilot Scheme) (see White Book 2011 Vol.1 para.51BPD.1, p.1608) is extended to March 31, 2012, and the schemes in Practice Direction 51D (Defamation Proceedings Costs Management Scheme) (see *ibid* para.51DPD.1, p.1610) and in Practice Direction 51E (County Court Provisional Assessment Pilot Scheme) (see *ibid* para.51EPD.1, p.1622) are both extended to September 30, 2012. In addition, with effect from October 1, 2011, some amendments are made to the text of Practice Direction 51D in the light of experience gained in the operation of that pilot scheme contained in that practice direction (see further below and White Book 2011 Supplement 2 para.51DPD.1 et seq).

As is explained in what follows, more substantial amendments are made to Practice Direction 27, Practice Direction 52, Practice Direction 64B and to the Costs Practice Direction.

Practice Direction 27 – Small Claims Track

CPR r.27.14 deals with costs on the small claims track. Para.(2)(e) of that rule states that the court may order a party to pay to another party a sum for any loss of earnings or loss of leave incurred by a party or witness in attending a hearing or staying away from home for the purpose of attending a hearing. The sum ordered to be paid must not exceed that specified in para.7.3(1) of Practice Direction 27 (see White Book 2011 Vol.1 para.27PD.7, p. 793). By TSO CPR Update 57, with effect from October 1, 2011, the specified sum stated therein is raised from £50 to £90.

Practice Direction 51D – Defamation Proceedings Costs Management Scheme

By TSO Update 57, with effect from October 1, 2011, amendments are made to the text of this practice direction (see White Book 2011 Vol.1 para.51DPD.1, p.1610, et seq), principally for the purpose of providing clarity in respect of costs previously incurred, and annexed Precedent HA (the costs budget form) is substituted. The textual amendments are as follows (see White Book 2011 Supplement 2 para.51DPD.1 et seq.).

In paragraph 2(3), in the paragraph modifying para.6.5 of the Costs Practice Direction, for "following" substitute "which substantially follows".

In paragraph 5.1, after "the reputational" insert "and public interest".

In paragraph 5.3, for "either by agreement between the parties or after hearing argument", substitute "to the extent the budgets are not agreed between the parties,".

After paragraph 5.3 insert –

"**5.3A** For the avoidance of doubt, the court cannot approve costs incurred before the date of the first costs management conference. However, the court may record its comments on those costs and should take those costs into account when considering the reasonableness and proportionality of all subsequent costs.

5.3B When approving or disapproving a budget, the court will not attempt to undertake a detailed assessment in advance, but will consider whether the budgeted totals for each stage of the work are with the broad range of reasonable and proportionate costs."

In paragraph 5.5, after "is not being" insert "or is likely to be".

For paragraph 5.6 substitute –

"**5.6** When assessing costs on the standard basis, the court –

(1) will have regard to the receiving party's last approved budget; and

(2) will not depart from such approved budget unless satisfied that there is good reason to do so."

Practice Direction 52 – Appeals

Paragraph 22.3 of Practice Direction 52 (Appeals) applies to appeals to the High Court under various statutes against decisions affecting the registration of architects and health care professionals. That paragraph deals with matters of practice and procedure affecting such appeals (including the identification of the appropriate respondents to appeals and service of appellant's notices) and in particular provides that every appeal to which it applies "will be by way of re-hearing". (CPR r.52.11(1) states that every appeal will be limited to a review of the decision unless a practice direction makes different provision for a particular category of appeal; see White Book Vol.1 para.52.11.1, p.1659.)

By TSO CPR Update 57, with effect from October 1, 2011, the range of statutory appeals affecting health care professionals to which para.22.3 applies is extended to include appeals under art.38 of the Health Professions Order 2011 and under art.58 of the Pharmacy Order 2010. By ensuring that such appeals are dealt with by way of re-hearing and are not limited to a review this amendment carries forward the policy of ensuring that regulatory systems in the several health care professions treat the same behaviour of persons subject to regulation in the same way.

Practice Direction 64B – Applications to the Court for Directions by Trustees in relation to the Administration of the Trust

Lord Justice Jackson, in his *Review of Civil Litigation Costs : Final Report* (December 2009), noted that CPR Part 64 and Practice Direction 64B "give only a mild steer towards dealing with Beddoe applications on paper" and recommended that for the purpose of saving costs the rules or the practice direction should be "firmed up" so as to provide that, save in exceptional cases, all such applications will be dealt with on paper (*ibid* Ch.28 paras 4.7 to 4.9 and 6.1).

In the light of this recommendation and further consultations, by TSO CPR Update 57, with effect from October 1, 2011, amendments designed to achieve this objective are made to paragraphs 6 and 7 of Practice Direction 64B (see White Book 2011 Supplement 2, Vol.1, paras 64BPD.6 to 64BPD.8).

Para 6 (Proceeding without hearing) consists of three sub-paragraphs (paras 6.1 to 6.3). The third stays as it is, but paras 6.1 and 6.2 are substituted and will now read as follows:

"6.1 (1) The court will dispose of the application without a hearing if it considers that to do so will save time or expense, and that a hearing is not necessary. The trustees must therefore consider whether a hearing is necessary and, if so, explain why in their evidence.

(2) When considering whether to hold a hearing, the court will take into account any dispute between the parties as to directions, but will not necessarily direct a hearing for that reason alone.

(3) If a defendant considers that a hearing is needed, and that the need is not sufficiently explained in the trustees' evidence, that defendant should so state in evidence, giving reasons why.

6.2 Where the court deals with an application without a hearing, it will in any order give the parties an opportunity, within a stated time, to apply to vary or discharge the order at an oral hearing."

Para.7 (Evidence and Consultation with Beneficiaries) consists of twelve sub-paragraphs (paras 7.1 to 7.12). Para.7.2 is now substituted, and as a consequence the first sentence in para.7.4 is omitted, and sub-sub-para.(2) of para 7.8 is also substituted (otherwise para.7 remains as it is).

As substituted, para.7.2 will now read as follows:

"**7.2** Applications for directions whether or not to take or defend or pursue litigation should be supported by evidence of the following matters –

(1) the advice of an appropriately qualified lawyer as to the prospects of success;

(2) an estimate in summary form of –

(a) the value or other significance to the trust estate of the issues in the proceedings;
(b) the costs likely to be incurred by the trustees in the proceedings, by reference to the principal stages in the proceedings; and
(c) the costs of other parties to the proceedings for which, if unsuccessful, the trustees may be exposed to liability;

(3) any known facts concerning the means of other parties to the proceedings; and

(4) any other factors relevant to the court's decision whether to give the directions sought."

As substituted, para.7.8(2) will now read as follows:

"**7.8** (2) In such a case the court will if possible deal with the matter without a hearing, and in deciding whether to do so will take into account the advice of an appropriately qualified lawyer supporting the continuation by the trustees of the pursuit or defence (as the case may be) of the proceedings."

The Costs Practice Direction – Costs Capping Orders

CPR r.48.6 deals with costs payable to a litigant in person. The rule is supplemented by Section 52 of the Costs Practice Direction (paras 52.1 to 52.5) (see White Book 2011 Vol.1 para.48PD.3, p.1493). CPR r.46.3 and r.48.6 deal specifically with the award of costs to a litigant in person. By TSO CPR Update 57, with effect from October 1, 2011, para.52.4 of the Costs Practice Direction is amended so as to provide that the amount which may be allowed to a litigant in person under r.46.3(5)(b) and r.48.6(4) is £18 per hour (up from £9.25). This amendment follows a recommendation made by Lord Justice Jackson in his *Review of Civil Litigation Costs : Final Report* (December 2009) at Ch.14 para.4.1.

Under CPR rr.44.18 to 44.20 the court may make a costs capping order (that is, an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made). These rules are supplemented by Section 23A of the Costs Practice Direction (see White Book 2011 Vol.1 para.44PD.18, p.1355).

By TSO CPR Update 57, with effect from October 1, 2011, Section 23B (Costs Capping Orders in Relation to Trust Funds) is added to this Practice Direction following Section 23A. (It is expected that, following upon this addition, Section 23A will be re-titled "Costs Capping Orders – General".) The purpose of the provisions of this new Section is to enable the court to set, at an early stage in proceedings concerning trust funds, the amount that may be recovered from such funds and implements (after further consultation) a recommendation to this effect made by Lord Justice Jackson in his *Review of Civil Litigation Costs : Final Report* (December 2009) in Chp. 28 at paras 4.5 and 6.1.

The text of the new Section 23B is as follows (see also White Book 2011 Supplement 2 Vol.1 para.44PD.19):

"SECTION 23B COSTS CAPPING ORDERS IN RELATION TO TRUST FUNDS

23B.1 In this Section "trust fund" means property which is the subject of a trust, and includes the estate of a deceased person.

23B.2 This Section contains additional provisions to enable –

(a) the parties to consider whether to apply for; and
(b) the court to consider whether to make of its own initiative, a costs capping order in proceedings relating to trust funds.

It supplements rules 44.17-20 and Section 23A of this Practice Direction.

23B.3 Any party to such proceedings who intends to apply for an order for the payment of costs out of the trust find must file and serve on all other parties written notice of that intention together with an estimate of the costs likely to be incurred by that party.

23B.4 The documents mentioned in paragraph 23B.3 must be filed and served –

(a) in a Part 7 claim, with the first statement of case; and
(b) in a Part 8 claim, with the evidence (or, if a defendant does not intend to serve and file evidence, with the acknowledgement of service).

23B.5 When proceedings first come before the court for directions the court may make a costs capping order of its own initiative whether or not any party has applied for such an order."

AMENDMENT TO PRE-ACTION PROTOCOL

Pre-Action Protocol for Low Value Personal Injury Claims

Paragraph 7.55 of this Pre-Action Protocol states that, where the parties do not reach agreement during the Stage 2 process, the claimant must send to the defendant to Court Proceedings Pack (Part A and Part B) Form which must contain the matters listed in sub-paras (a), (b) and (c) of that paragraph. By TSO CPR Update 57, with effect from October 1, 2011, for purposes of clarification and to avoid duplication sub-paras (a) and (b) are substituted as follows (sub-para (c) remains and is not amended):

"(a) in Part A, the schedule of the claimant's losses and the defendant's responses comprising only the figures specified in subparagraphs (1) and (2) above, together with supporting comments and evidence from both parties on any disputed heads of damage; and

(b) in Part B, the final offer and counter offer from the Stage 2 Settlement Pack Form and where relevant, the offer and any final counter offer made under paragraph 7.45."

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