CIVIL PROCEDURE NEWS

Issue 1/2012 January 30, 2012

CONTENTS

In Brief

Cases

ABELA v BAADARANI [2011] EWCA Civ 1571, December 21, 2011, CA, unrep. (Arden, Longmore & McFarlane L.JJ.)

Service out of jurisdiction – alternative method of service

CPR rr.6.15, 6.36, 6.37(5)(b)(i) & 6.40. Claimant (C) granted permission to serve out of jurisdiction claim form and associated documents at an address in Beirut, and also by an alternative method, for action against individual (D) and company owned by him. In the event, service of these documents not effected on D by either method, but documents delivered by a Lebanese court official to D's Lebanese lawyer (X) at another address in Beirut. Court 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 court's order, 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. High Court judge dismissing D's application, but granting C's application ([2011] EWHC 116 (Ch), January 28, 2011, unrep.). **Held**, allowing D's appeal, (1) r.6.37(5)(b)(i), which gives the court power to "give directions about the method of service", authorises the court in proceedings to which Sect.IV of Pt 6 applies to make an order for alternative service prospectively or retrospectively under r.6.15(1) and r.6.15(2), however (2) these powers should be regarded as exceptional and must be exercised cautiously, (3) usually it would be inappropriate for the court to validate retrospectively a form of service which was not authorised by an order of an English judge when it was effected and was not good service by local law. ***Cecil v Bayat***, [2011] EWCA Civ 135, [2011] 1 W.L.R. 3086, CA, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2011*** Vol.1 paras 6.15.5, 6.15.7, 6.37.1 & 6.40.5.)

ALI v ESURE SERVICES LTD [2011] EWCA Civ 1582, December 19, 2011, CA, unrep. (Mummery, Richards & Rimer L.JJ.)

Committal order – proceedings transferred to High Court

CPR rr.1.1, 32.14 and Sch.RSC Ord.52, r.1(2) & (3). Individual (C) bringing county court claim for damages suffered in road accident. Particulars of claim verified by statement of truth signed by solicitors then acting for C. Insurers (D) acting for defendant joined as second defendant and asserting that the named defendant was a fictitious identity and that C's claim was fraudulent. On D's application, district judge setting aside Notice of Discontinuance filed by C and transferring claim to the High Court. At trial, which C did not attend (and was not represented), High Court judge (1) dismissing C's claim, (2) granting D permission under r.32.14 to bring proceedings for contempt of court against C for causing a false statement to be made in the verified particulars, (3) finding that D's allegation was of a continuing contempt, beginning with the verifying of the particulars and lasting until the conclusion of the case, and (4) ruling that, in the circumstances, a High Court judge would have jurisdiction to proceed with the committal application. On appeal, C contending that only a Divisional Court of Queen's Bench Division would have jurisdiction. **Held**, dismissing C's appeal, (1) under r.1(3), an order for committal may be made by a single judge in the High Court where contempt of court is committed "in connection with any proceedings in the High Court", (2) in this case, the proceedings in the High Court were the very same proceedings that were in the county court from which they were transferred, (3) upon the transfer, the proceedings "in connection with" which the alleged contempt was committed did not become a different set of proceedings. ***Brighton and Hove Bus and Coach Co Ltd v Brooks*** [2011] EWHC 806 (Admin), February 16, 2011, DC, disapproved. (See ***Civil Procedure 2011*** Supp.2 para.sc52.1.31.)

HOWARD v STANTON [2011] EWCA Civ 1481, November 16, 2011, CA, unrep. (Ward, Tomlinson & Lewison L.JJ.)

Application for permission to appeal – oral hearing in absence of respondent

CPR rr.39.1, 39.3, 52.3, 52.10 & 52.13, Practice Direction 52 para.4.15. Former tenant (C) bringing county court claim against former landlord (D) for return of deposit. D entering defence and counterclaiming for damage not attributable to fair wear and tear. At trial, district judge giving judgment for C and dismissing counterclaim. D applying for permission to appeal to a circuit judge. In accordance with para.4.15, parties given notice of date for hearing of this application. Court not requesting C to attend that hearing. At the hearing, which C did not attend, judge granting D permission to appeal and allowing the appeal. Single lord justice granting C permission for second appeal to the

Court of Appeal. **Held**, allowing C's appeal and remitting D's appeal for re-determination by a county court judge, (1) by dealing with the application for permission to appeal and determining the substantive appeal on the same occasion, in the absence of C and without any request having been made for her attendance, the circuit judge adopted a procedure that was irregular and caused injustice to C, (2) it was doubtful whether C, instead of making an application for permission to appeal to the Court of Appeal, could have applied under r.39.3(3) for the circuit judge's judgment to be set aside. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2011*** Vol.1 paras 39.3.1 & 52.3.6.)

■ **OBSESSION HAIR & DAY SPA LTD v HI-LITE ELECTRICAL LTD** [2011] EWCA Civ 1148, October 13, 2011, CA, unrep. (Ward & Sullivan L.JJ.)

Permission to appeal – setting aside

CPR rr.3.1(2)(a), 52.6 & 52.9. In High Court claim brought in contract and negligence, judge, on December 11, 2008, giving judgment for claimants (C) on liability, and on November 8, 2010, giving judgment awarding C damages of £847,000. Claimants (C), (1) on November 29, 2010, filing notice of appeal against the quantum judgment, and (2) on December 9, 2010, filing notice of appeal against the liability judgment. On C's applications (on paper), single lord justice ordering (1) that time for the filing of the latter notice of appeal be extended, and (2) that C have permission to appeal against both judgments. In those applications, C contending that, until quantum trial, they were under mistaken impression that, at liability trial, they had succeeded, not only in contract, but also in tort. Defendants (D) applying under r.52.9(1)(b) to set aside those orders, asserting that there was no basis for such mistake and that, accordingly, the single lord justice had proceeded on a false basis. **Held**, dismissing D's application, (1) the authorities establish that applications under r.52.9(1)(b) should not be granted except in clear cases, (2) there is no inexorable rule that an order granted by a judge without knowledge of the full facts must be set aside, (3) the court has to take into account all the circumstances of the case, the gravity of the breach, the explanations for it, the culpability of it, and how the case can be dealt with justly in accordance with the overriding objective, (4) to an extent the single lord justice was misled by C, but clearly not deliberately, (5) C had acted in the genuine and reasonable belief that the tort liability issue had not been decided against them, (6) C could have, and perhaps should have, sought clarification from the judge of the liability judgment, but that failure was not fatal to their applications. ***Barings Bank Plc v Coopers & Lybrand*** [2002] EWCA Civ 1155; ***Emery English v Emery Reimbold Strick Ltd (Practice Note)*** [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409, CA, ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 3.1.2, 40.2.1.C, 52.6.2, 52.9.2 & 52.9.3.)

■ **QUEST ADVISORS LTD v MCFEELY** [2011] EWCA Civ 1517, December 9, 2011, CA, unrep. (Mummery, Stanley Burnton & Patten L.JJ.)

Construing order made on judgment – interim payment

CPR r.25.7. Company (C) entering into contract with individual (D) for sale to D of property for mixed commercial and residential development with leases back to C. Contract providing for staged contributions by C to D towards building costs. C purporting to assign their rights and obligations under the contract to another company. C and D falling into dispute as to whether C had repudiated the contract by failing to make stage payments, and D challenging the assignment. C commencing proceedings against D for declarations that there had been a lawful assignment and that D was obliged to grant the leases. At trial, judge giving judgment for C and making order declaring terms upon which D obliged to grant leases. Disagreement emerging between parties as to the meaning and effect of that order in relation to the contract terms. On parties' applications to resolve the matter, applications judge holding (1) that D not obliged to grant leases upon stage payments being made by C, and (2) by failing to make such payments C had not repudiated the contract. In addition, judge making order requiring C to pay D £600,000 on account of first two stage payments referred to in the contract. Both parties appealing against the judgment and against the order. **Held**, dismissing the appeals against the judgment, but allowing C's appeal against the order, (1) the judge's duty was to construe the trial judge's order in an objective fashion having regard to the judgment to which it was intended to give effect and to the matters to which it related, (2) counsel for C's recollections of what he intended to achieve were not admissible in relation to the construction of that order, (3) in the circumstances, the judge's order had to be treated as an order for an interim payment under r.25.7, (4) an order of that kind may be made only if one of the conditions set out in r.25.7(1) is satisfied, and none was obviously satisfied in this case, further (5) the judge should have left it to D to make an application for an interim payment, rather than dealing with the matter on a summary basis and without notice to either party. Court observing that it was unfortunate that the parties' disagreement as to the trial judge's order was not referred back to the judge himself. (See ***Civil Procedure 2011*** Vol.1 para.25.7.1, and Vol.2 para.15-100.)

■ **SMALES v LEA** [2011] EWCA Civ 1325, *The Times* November 21, 2011, CA (Lord Neuberger M.R., Jackson & Gross L.JJ.)

Documents for appeal – documents "extraneous to the issues to be considered"

CPR r.52.2, Practice Direction 52 para.5.6A(2). Limitation Act 1980 s.5. In 2008, surveyor (C) bringing claim for professional fees. At trial of preliminary issue, judge holding that C's claim was statute barred under s.5. At oral hearing, Court of Appeal granting C permission to appeal. **Held**, dismissing appeal (1) C's cause of action in contract against the defendant accrued in 1999, (2) entire performance of the contract was not a condition precedent to payment. Master of the Rolls stressing requirement that documents provided to appeal court must be limited to those which are necessary for the determination of the appeal. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2011*** Vol.1 para.52.2.1, and Vol.2 para.8-11.)

■ **SOLOMON v CROMWELL GROUP PLC** [2011] EWCA Civ 1584, December 19, 2011, CA, unrep. (Moore-Bick & Aikens L.JJ. and Senior Costs Judge Hurst)

Pre-action offer to settle road traffic accident claim – costs where damages not exceeding £10,000

CPR rr.36.10, 44.12, 44.12A, 45.7 & 45.8. In claim for damages suffered as a result of a road traffic accident, parties reaching agreement as a result of Pt 36 offers made by the defendant (D) for sum less than £10,000. D agreeing to pay claimant's (C) costs. Upon parties being unable to agree costs, C starting costs-only proceedings under r.44.12A. In these proceedings, question arising as to whether C entitled to recover (1) only the fixed costs allowed under Sect.II of Pt.45, or (2) by virtue of r.36.10 and r.44.12(1)(b), costs on the standard basis. In conjoined appeals, **held,** (1) steps taken in contemplation of proceedings are to be regarded as "proceedings" for the purpose of r.36.10(1), (2) consequently, the effect of a claimant's acceptance of a Pt 36 offer made before a claim has been issued is that the claimant is entitled to recover costs incurred in contemplation of the proceedings up to the date of acceptance insofar as they would have formed part of his recoverable costs if proceedings had already been issued, however (3) in proceedings to which Sect.II of Pt 45 applies, the provisions of that Section prevail over rules of general application, such as r.36.10. (See ***Civil Procedure 2011*** Vol.1, paras 36.10.1 & 45.9.1.)

Statutory Instruments

■ **CIVIL PROCEDURE (AMENDMENT NO.3) RULES 2011 (SI 2011/970)**

CPR Pt 80, Terrorism Prevention and Investigation Measures Act 2011. Inserts in CPR a new Pt 80 containing rules about proceedings under the 2011 Act. Introduces in accordance with the 2011 Act a procedure for bringing proceedings by TPIM notices in place of the control order regime provided for by Pt 76. Modifies application of certain other Parts of the CPR (e.g. Pt 52 (Appeals)) for the purpose of those proceedings. Imposes on courts duty to ensure that information is not disclosed contrary to the public interest and provides that the overriding objective, and so far as relevant any other rules, must be read and given effect in a way which is compatible with that duty. Makes provision for special advocates. In force December 15, 2011. (See ***Civil Procedure 2011*** Vol.1 para.1.2, 5.4C.9 & 52.1.1.)

■ **CIVIL PROCEDURE (AMENDMENT NO.4) RULES 2011 (SI 2011/3103)**

CPR Pts 2, 3, 12, 13, 14, 23, 26 & 30. Provides that the sole court of issue for all "designated money claims" started under Pt 7 will be the Northampton county court (for which court the National Civil Business Centre will act as the administrative office and will manage the preliminary stages of claims up to the filing of completed allocation questionnaires). Further provides for the transfer of such claims to other courts for particular procedural purposes. Makes consequential amendments. In force March 19, 2012. See further "CPR Update" section of this issue of CP News. (See ***Civil Procedure 2011*** Vol.1 para.23.2.3.)

In Detail

DOCUMENTS FOR APPEAL

CPR r.52.2 states that all parties to an appeal must comply with Practice Direction 52 (Appeals). Para.5.6 of that practice direction states that an appellant must file with the appeal court certain documents together with an "appeal bundle" (White Book Vol.1 para.52PD.19). Para.5.6A lists the documents that should be included in the bundle of documents filed for an appeal. Sub-para.(1)(l) states that, in addition the bundle should include "any other documents which the appellant reasonably considers necessary to enable the appeal court to reach its decision on the hearing of the application or appeal". Sub-para.(2) states that documents that are "extraneous to the issues to be considered" must be excluded and that affidavits, witness statements, summaries, experts' reports and exhibits may be included "only where these are directly relevant to the subject matter of the appeal". Para.6.3A(1)(d) states that, after permission to appeal has been granted, the appellant must add to the appeal bundle any document which the appellant and the respondent have agreed to add to it in accordance with para.7.11.

From time to time judges of the Court of Appeal have complained about the fact that, all too frequently, practitioners have scant regard for these provisions. In the recent case of *Smales v Lea* [2011] EWCA Civ 1325, *The Times* November 21, 2011, CA (Lord Neuberger M.R., Jackson & Gross L.JJ.), the Master of the Rolls referred to this matter (not for the first time). His lordship explained that the issue on this appeal involved a point of law concerning the effect of a contract which turned largely on the terms of a letter (and in particular one paragraph of that letter) which ran to two pages. The documents filed for the appeal included the judgment below, the formal court documents, the skeleton arguments and copies of the authorities, and in addition, a transcript of the hearing below and bundles running to over 700 further pages of documents including irrelevant correspondence.

His lordship said:

"The obtaining and provision of an unnecessary transcript of the hearing below and, even more, the copying and provision of a large number of unnecessary documents, are sadly familiar experiences to those hearing appeals in this court. Such a course is unfair on the parties as it increases the expense of any appeal. It is unfair on the court office and court staff as it involves receiving, dealing with, storing and distributing a massive amount of unnecessary documents. And it is unfair on the judges who hear the appeal, and often on counsel and solicitors (with consequences for their clients in terms of cost), as it can result in much irritatingly unnecessary work."

His lordship said that the objective is that the documents before the court should only be those that are necessary for the determination of the appeal. It was important that the Practice Direction requirements should be complied with, but they were being "routinely ignored". In many cases it was clear that court bundles included large numbers of documents "which no reasonable person would possibly believe could be relevant to the appeal".

His lordship concluded (at para.57) that, unless there is an improvement in relation to the extent of the documents included in appeal bundles, so that the requirements of the Practice Direction are complied with, "I will have to consider whether to propose some appropriate sanctions to ensure compliance with those requirements in the future".

ALTERNATIVE METHOD OF SERVICE

Section IV of Pt 6 contains provisions dealing with the service of the claim form and other documents out of the jurisdiction. That Section (as inserted in the CPR by the Civil Procedure (Amendment) Rules 2008 (SI 2008/2178)) contains no provision dealing with service "by an alternative method" of a claim form or any other document. This omission raises the question whether the court has power to order service by an alternative method where a claim form or other document is to be served out of the jurisdiction. Under the pre-CPR rules, and before the Civil Procedure (Amendment) Rules 2000 (SI 2000/221) came into effect, it was clear that the court's power to order substituted or alternative service extended to such documents. After SI 2000/221 came into effect, the CPR provision for alternative service, then r.6.8, was not expressly incorporated in the rules applying to service out of the jurisdiction, then found in Section III of Pt 6. However, in *Knauf UK GmbH v British Gypsum Ltd* [2001] EWCA Civ 1570; [2002] 1 W.L.R. 907, CA, the judge at first instance stated that the effect of r.6.1 (as it then stood) was to incorporate r.6.8 by reference in Section III ([2002] EWHC 739 (Comm); [2002] 2 Lloyd's Rep. 416, at para.28), and the Court of Appeal (obiter) agreed (op cit at para.38). As a result of the changes made to Pt 6 by SI 2008/2178 and taking effect on October 1, 2008, it was doubted whether the construction adopted in that case was sustainable. These doubts arose, partly because of the lack of any express provision in Sect.IV of Pt 6 comparable to r.6.15, and partly because of uncertainty as to the reach of r.6.40(4), which prohibits a person, in attempting to effect service abroad, from doing anything

"which is contrary to the law of the country where the claim form or other document to be served".

After that date, judges sitting at first instance were prepared to hold, or at least were prepared to proceed on the assumption, that where the provisions of Sect.IV of Pt 6 apply, the effecting of service of a claim form out of the jurisdiction may be permitted by an alternative method despite the omission from that Section of a rule equivalent to r.6.15 (Service of the claim form by an alternative method or at an alternative place), but were not always agreed on the reasons for reaching that conclusion. The Court of Appeal dealt with the matter in *Cecil v Bayat* [2011] EWCA Civ 135, [2011] 1 W.L.R. 3086, CA, but not conclusively (see "In Detail" section of CP News Issue 3/2011 March 15, 2011). In the recent case of *Abela v Baardarani* [2011] EWCA Civ 1571, December 21, 2011, CA, unrep., the Court of Appeal returned to the matter (for summary of this case, see "In Brief" section of this issue of CP News). In this case, the Court of Appeal adopted reasoning intimated in the Cecil case and explained that r.6.37(5)(b)(i), which gives the court power to "give directions about the method of service", authorises the court to make an order for alternative service prospectively or retrospectively under r.6.15(1) and r.6.15(2) and expressly approved obiter dicta in the Cecil case to the effect that permission for service of a claim form out of the jurisdiction by an alternative method is a power to be exercised in special circumstances only and should be regarded as exceptional. The Court explained that the fact that r.6.40(4) expressly states that nothing in any court order can authorise or require any person to do anything contrary to the law of the country in which the document is to be served, does not mean that it can be appropriate to validate under r.6.15 a form of service which, while not itself contrary to the local law in the sense of being illegal, is nevertheless not valid by that law and that it follows that (save perhaps where there are adequate safeguards) the claimant must show that the method of service is good service by local law, that is, it is a method permitted by that law in accordance with r.6.40(3)(c). This interpretation of paras (3) an (4) of r.6.40(3) indicates that the purpose of those rules is to ensure that a defendant in a foreign jurisdiction is served in accordance with local law or such international conventions as it has entered into. The view expressed in some first instance decisions that the function of r.6.40(3) is only to prevent service by a method forbidden by the law of the place of service so that another method which is not in accordance with that law but is not actually illegal may be adopted (*Shiblaq v Sadikoglu* [2004] EWHC 1890 (Comm); [2004] All E.R. (D) 428 (Comm)), and that it is implicit in r.6.40(4) that the court may permit any alternative method of service abroad so long as it does not contravene the law of the country where service is to be effected (*Habib Bank Ltd v Central Bank of Sudan* [2006] EWHC 1767 (Comm); [2007] 1 W.L.R. 470; [2007] 1 All E.R. (Comm) 53; [2006] 2 Lloyd's Rep. 412), must now be regarded as based on an incorrect interpretation of the effect of r.6.40(4). See also *BNP Paribas S.A. v Open Joint Stock Company Russian Machines* [2011] EWHC 308 (Comm) (Blair J.) at para.135, based on those authorities. The principles derived from the Cecil case were considered and applied in *JSC BTA Bank v Ablyazov* [2011] EWHC Civ 2988 (Comm), November 11, 2011, unrep. (Teare J.).

PERMISSION TO APPEAL APPLICATIONS

Para.4.11 of Practice Direction 52 states that applications for permission to appeal may be considered by the appeal court without a hearing. Paras.4.12 to 4.14 set out the practice to be followed where the appeal court either grants or refuses permission without a hearing and provides that, in the latter event, the disappointed applicant has the right to have the refusal reconsidered at an oral hearing. An appellant exercises that right by making a request to the appeal court (para.4.14). If an appellant making such a request is represented his advocate must comply with para.4.14A. The following paragraph in PD 52, that is para.4.15, states: "Notice of a permission hearing will be given to the respondent but he is not required to attend unless the court requests him to do so". Given the context in which it appears, it might be assumed that para.4.15 comes into effect only where there has been a determination of the application for permission to appeal without a hearing which has gone against the appellant and the appellant has requested a reconsideration at an oral hearing. However, it seems that para.4.15 is not so limited, and also takes effect in those cases where an application for permission to appeal is considered initially, not on paper, but at an oral hearing.

In the recent case of *Howard v Stanton*, [2011] EWCA Civ 1481, November 16, 2011, CA, unrep. (for summary of this case, see "In Brief" section of this issue of CP News) the Court of Appeal had reason to examine para.4.15. In this case, in accordance with para.4.15, a county court gave the parties notice of the date for an oral hearing of the defendant's (D) application for permission to appeal from the decision of a district judge, but the court did not request the claimant's (C) attendance at that hearing. At the hearing, which C did not attend, a circuit judge granted D permission to appeal and allowed the appeal. (Evidently the circuit judge was under the mistaken the impression that C was in some way at fault in having failed to attend the hearing before him.) The Court of Appeal gave permission for a second appeal, this time by C. The Court found that there had been a serious procedural regularity, allowed C's appeal and remitted D's appeal for re-determination by a county court judge.

A court may make an order to the effect that an application for permission to appeal should be determined at an oral hearing with the appeal to follow immediately if permission is granted. Given the issues raised in the instant case, that might have been an appropriate order for the court to have made. However, as the Court of Appeal pointed out, no such order was made.

CPR Update

DESIGNATED MONEY CLAIMS – NATIONAL CIVIL BUSINESS CENTRE

By the Civil Procedure (Amendment No.4) Rules 2011 (SI 2011/3103), amendments coming into force on March 19, 2012, are made to several CPR provisions for the purpose of carrying into effect the centralisation of some basic administrative functions relating to county courts proceedings, in particular proceedings in the form of claims now to be described as "designated money claims". These amendments are accompanied by new and altered practice direction provisions to be included in forthcoming TSO CPR Update 58 (likely to be published during February or March).

By an addition to para.(1) of r.2.3 (Interpretation), a "designated money claim" is a defined as a claim which (a) is started in a county court under Pt 7, (b) is only a claim for either or both a specified amount of money or an unspecified amount of money, and (c) is not a claim for which special procedures are provided in the CPR. By the addition of para.4A to Practice Direction 7A it is provided that, in all designated money claims, practice form N1 (Pt 7 (general) claim form) must be sent to: County Court Money Claims Centre, PO Box 527, M5 0BY. The claims will then be issued in Northampton County Court. The National Civil Business Centre (generally known as "the Business Centre") will act as the administrative office for that county court. The claimant must specify the "preferred court" (that is to say, the court to which proceedings should be transferred if necessary) on the practice form N1.

Under these arrangements, the preliminary stages of designated money claims up to the filing by the parties of their completed allocation questionnaires will be managed by the Business Centre (and not by the office of the county court in which the claim form was issued). New r.26.2A enables claims to be transferred automatically to the preferred court in certain circumstances. When the defendant files a defence, amendments made to r.26.3 as part of these new arrangements state that the court will serve a notice on each party and require each party to file an allocation questionnaire. Amongst other things, the notice served by the court will state the court to which the allocation questionnaire must be returned. Rules 3.5A, 12.5A and 14.7A (all inserted by the Civil Procedure (Amendment No. 4) Rules 2011 provide for the automatic transfer of designated money claims from the Northampton County Court to the preferred court in the circumstances described in those rules (they are, judgment without trial after striking out, request for default judgment, and request for judgment on admission). Consequential amendments are made, by the statutory instrument, to rules in CPR Parts 13, 14 and 23, and by TSO CPR Update 58, to Practice Direction 51D (Claims for the Recovery of Taxes and Duties).

DILAPIDATIONS PRE-ACTION PROTOCOL

A new pre-action protocol, entitled Pre-action Protocol for Claims for Damages in Relation to the Physical State of Commercial Property at Termination of a Tenancy, has been annexed to Practice Direction – Pre-Action Conduct (see White Book 2011 Vol.1 para.C1-001). The scope of this Protocol is apparent from its title. Inevitably, it will be known as the "Dilapidations Protocol." It will be included in forthcoming TSO CPR Update 58. The date of the publication of this Update is unknown, but presumably it will appear during February or March. The Protocol came into effect on January 1, 2012.

This Protocol consists of ten paragraphs. Paras 1 and 2 are introductory (Introduction and Overview). The operational parts are in paras 3 to 10. Annex A consists of a flow chart showing each of the stages that the parties are expected to follow before the commencement of proceedings. Para.3.1 states that the landlord should send the tenant a schedule in the form attached at either Annex B (Schedule of dilapidations where prepared by a surveyor) or Annex C (Schedule of dilapidations where prepared by the landlord). It should set out what the landlord considers to be the breaches, the works required to be done to remedy those breaches and, if relevant, the landlord's costings. Para.4.1 refers to the "Quantified Demand". (Earlier paragraphs in the Protocol give no clue as to what this might be; the relationship with the Schedule is unclear). Paras 4.2 to 4.6 indicate what the Quantified Demand, to which (apparently) the tenant should make a "Response", should include. It is expressly stated that the Quantified Demand and the Response are not intended to have "the same status" as a statement of case or defence in proceedings (paras 4.1 and 5.1). Para.6.1 states that disclosure will generally be limited to the documents "required to be disclosed with the Quantified Demand and the tenant's Response". In the paragraphs relevant to the Quantified Demand there is a reference to invoices and estimates, but otherwise no disclosure of documents is required. The Protocol encourages the parties to engage in negotiations and to consider ADR (paras 7 and 8). The next step in the Protocol process requires the landlord to provide the tenant with a Quantification of Loss (see para.9). Where the dispute remains unresolved the

parties should undertake a further review of their respective positions (see para.10 (Stocktake)).

FREEZING INJUNCTIONS AND SEARCH ORDERS – COMMUNICATION WITH THE CHANCERY DIVISION

Paras 6.1 and 7.1 of Practice Direction 25A state that "examples" of, respectively, a freezing injunction and a search order, are annexed to the practice direction. As is explained in para.25.1.25.12 and para.25.1.27.4 of Vol.1 of the White Book, at the end of the clauses in the bodies of each of those examples there is a section headed "Communications with the court" in which practitioners and persons affected are given useful information about contact room numbers and telephone numbers where the order is made at the Royal Courts of Justice. It is noted in para.25.1.25.12 that these communication details may be amended from time to time and that there may be some considerable delay before the versions of the examples as annexed to the Practice Direction (and as published elsewhere) are updated accordingly.

The current contact information, as set out para.25.1.25.12, needs to be varied for injunctions or search orders made in the Chancery Division. This follows the recent relocation of Chancery Chambers to the Rolls Building in Fetter Lane. Where the order is made in the Chancery Division communications (quoting the case number) should now be sent to the Senior Associate, Fifth Floor, the Rolls Building, 7 Rolls Building, Fetter Lane, London EC4A 1NL (tel. 020 7947 6733). The office is open between 10am and 4.30pm Monday to Friday.

As a result of the relocation of the Chancery Division, the Chancery Guide Appendix 1 (Addresses and Other Contact Details) has been replaced (see White Book Vol. 2 para.1A-192).

NEW CHANCERY ORDER PROCEDURE

For the purpose of making the drawing of orders more efficient, it has been directed that any party seeking an order in the interim applications court of the Chancery Division at the RCJ should submit an electronic draft of that order attached to an email. The email should be addressed to: chanceryinterimorders@hmcts.gsi.gov.uk. The emails and orders should sufficiently identify the case (not necessarily the full name), and should be in Word (.doc) format. It is expected that an addition to this effect will be made to the Chancery Guide.

CUMULATIVE INDEX to CIVIL PROCEDURE NEWS

issues Jan to Jul 2011 [1 to 7]

[references are to [year] issue/page]

LEGAL TAXONOMY
FROM SWEET & MAXWELL

The selection of headings in this index has been informed by Sweet & Maxwell's Legal Taxonomy. Subject headings in the index conform to keywords provided by the Legal Taxonomy. These keywords provide a means of identifying similar concepts in other Sweet & Maxwell publications and online services to which keywords from the Legal Taxonomy has been applied. Suggestions to *taxonomy@sweetandmaxwell.co.uk*.

REUTERS/Kim Kyung-Hoon

UNCOVER MORE ABOUT THE RULES OF DISCLOSURE

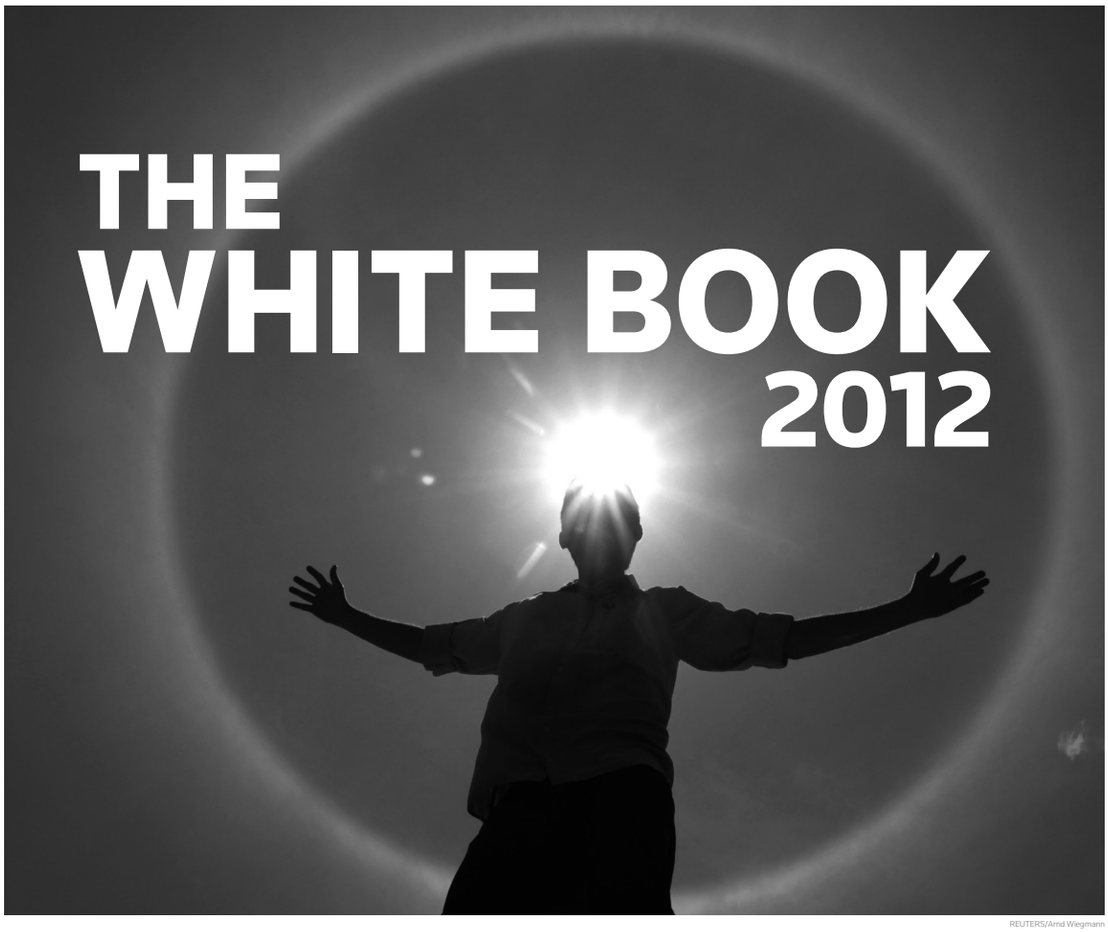
Now in its 4th edition, **Disclosure** examines both substantive law and procedure, and discusses the ins and outs of disclosure obligations and the implications of non-compliance.

- Includes documentary, non-documentary, pre-action and electronic disclosure
- Explains what must be disclosed
- Explores consequences of the failure to comply with obligations
- Discusses the impact of the Human Rights Act 1998
- Offers amended forms and precedents in-line with key changes in the law

To order your copy today visit **sweetandmaxwell.co.uk**

SWEET & MAXWELL

THOMSON REUTERS™



REUTERS/Arnd Wiegmann

LOOK AT IT THE WHITE BOOK WAY

MARCH 2012

sweetandmaxwell.co.uk/whitebook

SWEET & MAXWELL

THOMSON REUTERS™

EDITOR: **Professor I. R. Scott**, University of Birmingham.
Published by Sweet & Maxwell Ltd, 100 Avenue Road, London NW3 3PF.
ISSN 0958-9821
© Thomson Reuters (Professional) UK Limited 2011
All rights reserved
Typeset by EMS Print Design
Printed by St Austell Printing Company, St Austell, Cornwall

430635