CIVIL PROCEDURE NEWS

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CPR rr.6.9 & 7.6. On May 11, 2011, claimants (C) issuing claim form for libel. Relevant one-year limitation period expiring on May 17, 2011, and time fixed by r.7.5(1) for service of claim form expiring on September 11, 2011. Shortly before the latter date, C applying (without notice) for, and on August 30, 2011, obtaining from Master an order under r.7.6(2) extending time for service to November 11, 2011. After service effected on November 9, 2011, defendant (D) applying under r.23.10(1) to set service aside. A different Master, finding that C did not know D's address, having in late August become aware that she had left her known address, and holding (amongst other things) that this provided a good reason for an extension, refusing this application. High Court judge granting D permission to appeal. **Held**, allowing appeal, (1) where an application is made for an extension of time in the circumstances provided for by r.7.6(2), it will always be relevant for the court to determine and evaluate the claimant's reasons for not serving within the time fixed by r.7.5(1), (2) if there are very good reasons then an extension will usually be granted, (3) the fact that the practical effect of an extension would be to put the claimant in the position of not having to issue a fresh claim form to which the defendant might plead a limitation defence is also of importance, (4) in this case, the Master erred (a) in not properly taking that fact into account, and (b) in confining his attention to C's reasons for not effecting service in late August and disregarding the absence of evidence as to reasons for not effecting service before that period. Judge considering the matter afresh, and setting aside the order of August 30, 2011. ***Hashtroodi v Hancock*** [2004] EWCA Civ 652, [2004] 1 W.L.R. 3206, CA, ***Collier v Williams*** [2006] EWCA Civ 20, [2006] 1 W.L.R. 1945, CA, ***Hoddinott v Persimmon Homes (Wessex) Limited*** [2007] EWCA Civ 1203, [2008] 1 W.L.R. 806, CA, ***Cecil v Bayat*** [2011] EWCA Civ 135, [2011] 1 W.L.R. 3086, CA, ref'd to. (See ***Civil Procedure 2012*** Vol.1 para.7.6.2.)

JSC BTA BANK v ABLYAZOV [2012] EWCA Civ 639, May 16, 2012, CA, unrep. (Moore-Bick L.J.)

Appeal conditions – appeal by party in contempt

CPR rr.25.15 & 52.9, Sch.1 RSC Ord.52, r.1 & Ord.109, r.1, Administration of Justice Act 1960 s.13. At hearing of committal application brought in High Court proceedings by claimant (C) against defendant (D), judge (1) finding that D (who was represented but not present) was in contempt of court, principally for breaches of orders (including freezing order) made by the court, (2) committing D to prison for 22 months, and (3) ordering D to surrender to custody ([2012] EWHC 237 (Comm)). Judge also ordering D to pay C's costs of the committal proceedings and to make an interim payment in respect of them. In exercise of his right of appeal against the committal order, D filing notice of appeal in the Court of Appeal. C thereupon applying for order imposing conditions on D's appeal requiring him (1) to comply with the order to surrender to custody, (2) to make and file an affidavit as to dealings with assets subject to a freezing order, (3) to satisfy the interim costs order, and (4) to provide security for their appeal costs. **Held** (by single Lord Justice), dismissing C's application, (1) all but one of the conditions sought by C were made as a consequence of orders made by the judge as a consequence of the contempt finding, (2) in the circumstances, D ought to be allowed to challenge those orders along with the finding itself, notwithstanding his refusal to comply with them in the meantime, (3) it would not ordinarily be appropriate to require security for the costs of an appeal where the liberty of the subject is in question, (4) it would not be right to impose any of the conditions because the consequence of any failure on D's part to comply with them would be the dismissal of his appeal against the contempt finding and that would be disproportionately severe. Authorities on general rule that a court will not hear an application by a contemnor until the contempt is purged and the breadth of the court's discretion to depart from that rule examined. ***Hadkinson v Hadkinson*** [1952] P. 285, ***X Ltd v Morgan Grampian (Publishers) Ltd*** [1991] 1 A.C. 1, HL, ***Arab Monetary Fund v Hashim (No.10)*** *The Times*, June 17, 1993, ***Motorola Credit Corp v Uzan (No.6)*** [2003] EWCA Civ 752, [2004] 1 W.L.R. 113, CA, ***Omar v France*** (2000) 29 E.H.R.R. 210, ***Hammond Suddards Solicitors v Agrichem International Holdings Ltd*** [2001] EWCA Civ 2065, [2002] C.P. Rep. 21, CA, ***Taiga v Taiga*** [2004] EWCA Civ 1399, ***Masri v Consolidated Contractors International (UK) Ltd*** [2007] EWCA Civ 702, ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 23.0.16.1, 25.15.2, 52.1.2 & 52.9.4, and Vol.2 paras 3C-37 & 9B-18.)

JSC BTA BANK v GRANTON TRADE LTD [2012] EWCA Civ 564, May 1, 2012, CA, unrep. (Mummery, Moore-Bick & Tomlinson L.JJ.)

Failure to comply with unless order – order granting relief from debarring sanction – revocation of relief order

CPR rr.3.1(7), 3.8 & 3.9. Bank (C) bringing claim to recover very substantial sums alleged to have been unlawfully lent or misappropriated by individuals and companies with which they were associated. Following defendants' (D) failure to comply with disclosure orders, judge making order providing that, unless D complied by particular date, they should be debarred from defending the proceedings and C should be at liberty to enter judgment or, as appropriate, apply for judgment against them. Judge finding that D, though purporting to comply, had not complied, but granting D's application for relief from sanction (r.3.9). Subsequently, on ground that D had misled the court (in particular as to the identity of individuals owning, directing and controlling defendant companies), C applying for revocation of the order granting such relief (r.3.1(7)). Judge granting C's application ([2011] EWHC 2056 (Comm)). Single lord justice granting D permission to appeal on limited grounds, in particular, on ground that the judge should not have decided whether the court had been misled by D on the basis of their affidavit and documentary evidence alone without directing a trial of that issue, or directing that resolution thereof should itself await trial of the action. **Held**, dismissing the appeal, (1) there is no analogy between (a) an order revoking an order giving relief against the sanction of debarment of a defence, and (b) an order striking out a defence, (2) in this case, the judge asked himself whether he could fairly reach a conclusion, on the basis of the material before him, on the question whether the court had been misled, and was entitled to conclude on the evidence before him that he could and that the court had indeed been seriously misled, (3) the judge found that D had made false claims as to the identity of individuals owning, directing and controlling defendant companies, and in doing so correctly applied the ordinary civil standard of the balance of probabilities, (4) it was not necessary for the judge to determine whether, as C alleged, a particular defendant was the ultimate beneficial owner of the defendant companies. ***Marcan Shipping (London) Ltd v Kefalas*** [2007] EWCA Civ 463, [2007] 1 W.L.R. 1864, CA, ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 3.1.9, 3.4.4.1, 3.8.1, 3.1.9, 3.1.9.1 & 3.9.1.)

M v CROYDON LONDON BOROUGH COUNCIL [2012] EWCA Civ 595, May 8, 2012, CA, unrep. (Lord Neuberger M.R., Hallett & Stanley Burnton L.JJ.)

Costs after settlement before trial – where cases settle in Administrative Court

CPR r.44.3, Children Act 1989 s.20. Upon arrival in UK, minor (C) applying for asylum. Local authority (D), accepting responsibility for C pursuant to s.20. C asserting that he was aged 12, but D assessing his age as 14 (a difference

that affected the nature and extent of D's responsibilities). Dispute arising between C and D as to methodology for assessing age of minors. Within three months of D's age assessment decision, C commencing claim for judicial review challenging D's refusal to reconsider that decision and applying for permission to proceed. Subsequently, all age assessment claims, including C's, stayed pending determination (ultimately by the Supreme Court) of issues raised by such claims. As a consequence, law changed with the result that C's application in effect converted into an application to issue proceedings against D for an age assessment claim under the enhanced fact-finding jurisdiction of the Administrative Court. Following receipt of expert's report in these proceedings, D conceding that C's age was as he asserted and C withdrawing his claim, leaving the question of costs to be determined on paper by the court. Judge making no order for costs. Single lord justice granting C permission to appeal. **Held**, allowing appeal, in the circumstances it was appropriate for the court to order that D should pay 50 per cent of C's costs until the issue of proceedings and 100 per cent thereafter. Right approach to be adopted by the Administrative Court when asked to deal with costs in which the parties settle all the other issues explained. ***R. (Bahta) v Secretary of State for the Home Department*** [2011] EWCA Civ 895, [2011] C.P. Rep. 43, CA, ***R. (Boxall) v Waltham Forest London Borough Council*** (2001) 4 C.C.L. Rep. 258, ***Review of Civil Litigation Costs: Final Report (December 2009)*** Ch.30, paras 4.12 & 4.13, ref'd to. (See further "In Detail" section of this issued of CP News.) (See ***Civil Procedure 2012*** Vol.1 paras 44.3.7 & 54.12.5.)

SOCIÉTÉ GÉNÉRALE SA v SAAD TRADING, CONTRACTING AND FINANCIAL SERVICES CO.

[2012] EWCA Civ 695, May 23, 2012, CA, unrep. (Rimer & Aikens L.JJ.)

Permission to appeal – imposing conditions – security for appeal costs

CPR rr.25.13, 25.15 & 52.9. French financing company (C) bringing substantial High Court contractual claim against a Saudi Arabian limited partnership (D1) and an individual partner (D2) (a Saudi national owning 90 per cent of D1's share capital and guarantor of sums claimed by C). Trial judge giving judgment for C in sum of US$49m on joint and several liability basis with costs and making interim costs order. Single lord justice granting D1 and D2 permission to appeal to Court of Appeal. C applying to Court (1) for order imposing conditions on appeal requiring, in particular, that the defendants pay into court the whole of the amount of the judgment awarded and satisfy the interim costs award, and (2) for order for security for their costs of the appeal in sum of £330k. D1 and D2 opposing applications, principally on ground that their assets in Saudi had in effect been frozen by a Royal decree (the terms of which could not be disclosed). **Held**, granting C's applications (but in reduced amounts), (1) the Court has jurisdiction to make permission to appeal subject to a condition that the appellant pay either a part of or the whole of the judgment debt into court or secure it, (2) but such a condition may be imposed only where there is "a compelling reason for doing so", (3) even if there is a compelling reason, the court retains a discretion on whether or not to impose such condition, (4) the factors which may combine to constitute a compelling reason are to be derived from relevant case law and include, for example, (a) whether the appellant (i) is an entity against whom it will be difficult to exercise the normal mechanisms for the enforcement of judgment debts, (ii) has given adequate disclosure of its financial affairs, and (b) whether the imposing of the condition would "stifle" the appeal, (5) in exceptional circumstances, the court may also take into account the position of other legal persons "close to the appellant", for example where it has a "wealthy owner", (6) full and frank evidence had not been adduced by D2 as to his means or by D1 as to the whereabouts of its assets, (7) in the circumstances it was appropriate (a) to impose on the further prosecution of the appeal the condition that D1 and D2 pay into court the sum of US$5m, and (b) as both appellants fell within the prerequisites imposed by r.25.13, to order that they provide security for costs in the sum of £90,000. ***Hammond Suddard Solicitors v Agrichem International Holdings Ltd*** [2001] EWCA Civ 2065, [2002] C.P. Rep. 21, CA, ***Wittman (UK) Ltd v Willdav Engineering SA*** [2007] EWCA Civ 521, May 10, 2007, CA, unrep., ***Mahan v Blue Sky One Ltd*** [2011] EWCA Civ 544, May 11, 2011, CA, unrep., ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 25.13.1, 25.15.2 & 52.9.4.)

SUH v RYU [2012] EWPCC 20, May 3, 2012, unrep. (Judge Birss QC)

Patents County Court – jurisdiction – freezing orders and search orders

CPR rr.25.1(1) & 63.13, Practice Direction 63 para.16.1, County Courts Remedies Regulations 1991 regs 2 & 3, Copyright, Designs and Patents Act 1988 ss.287 & 291. Landlord of premises in which tenants (C) ran restaurant business peremptorily installing new tenants (D1) who carried on the business. C bringing claim against D1 for passing off, copyright infringement and conversion, and against a company (D2) for revocation of a trade mark (alleged by C to have been registered in bad faith). Claim proceeding in the Patents County Court (PCC) before a judge nominated under s.291. C applying ex parte for an asset freezing order. **Held**, granting the application, (1) a PCC held by a person nominated under s.291 has jurisdiction to make orders for "prescribed relief" within reg.3, (2) that jurisdiction is not confined to a PCC's special jurisdiction, but extends to the court's ordinary jurisdiction, (3) consequently, the remedies of interim freezing orders and search orders are available, not only in patents and design

cases and in aid of ancillary causes of action, but also in pure copyright or trade mark cases. ***McDonald v Graham*** [1994] R.P.C. 407, CA, ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 25.1.25.2 & 25.1.27.2, and Vol.2 paras 2F-14, 2F-17.10.0, 2F-33, 9B-77, 15-59 & 15-90.)

- **SULLIVAN v BRISTOL FILM STUDIOS LTD** [2012] EWCA Civ 570, May 3, 2012, CA, unrep. (Ward, Etherton & Lewison L.JJ.)

Abuse of process – disproportionate procedure – court resources – re-allocation of claims

CPR rr.3.4, 26.10, 63.1 & 63.13. Self-represented entertainer (C) bringing claim in High Court against film-making company (D), alleging infringement of copyright, of performance and moral rights, and "loss of chance". District judge dismissing D's application for summary judgment, allocating claim (valued by C at £800,000) to multi-track, transferring claim to Chancery Division, and directing trial of preliminary issues. C applying for injunction requiring C to deliver up all infringing materials, and D applying for claim to be struck out as an abuse of process. At hearing of those two applications, deputy judge dismissing C's but granting D's application. In doing so, judge (1) assuming that C would succeed on liability, (2) finding (a) that there was no further injunctive relief that C could obtain beyond that already secured by D's actions and undertakings, and (b) that the maximum possible damages recoverable by C would be £150, and (3) holding that the further pursuing of a claim which had the potential for the recovery of so little money, and which would take up so much court time, was a disproportionate use of the court's resources, would be unfair to D, and would constitute an abuse of process. Single lord justice granting C permission to appeal. C conceding that, if the judge was correct in his estimate of the damages, his claim should not go forward to trial. **Held**, dismissing the appeal, (1) the judge was right to approach the case on the basis that the recoverable damages were likely to be extremely modest, (2) it would not be right to strike out a claim as an abuse of process on the grounds identified by the judge where, in the circumstances, there was no proportionate procedure by which it could be adjudicated, (3) in the instant case, by maintaining throughout that his claim was of high value, C ruled out the re-allocation of the claim to a cost-effective and proportionate procedural route. Court explaining procedural mechanisms by which copyright claim may be re-allocated to small claims track. Observations on striking out of claims on abuse of process grounds generally. ***Jameel v Dow Jones & Co Inc*** [2005] EWCA Civ 75, [2005] Q.B. 946, CA, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2012*** Vol.1 paras 3.4.3.4 & 26.10.1, and Vol.2 para.2F-14.3.)

- **YEATES v AVIVA INSURANCE UK LTD.** [2012] EWCA Civ 634, May 15, 2012, CA, unrep. (Longmore, Rimer & Kitchin L.JJ.)

Notice of appeal – extension of time for filing – relief from sanction

CPR rr.3.1, 3.9 & 52.6. Householder (C) making claim on insurance policy for flood damage. Insurers (D) making some payments on the claim, but on grounds that it had been forfeited entirely by C's misleading them, then refusing to make further payments and seeking to recover those already made. C thereupon commencing claim against D in a Mercantile Court. D defending and making counterclaim for repayment. On September 23, 2010, judge (1) granting D's application for summary judgment, and (2) giving C permission to appeal. On June 9, 2011, after D had taken steps to enforce their judgment, C filing notice of appeal and applying for extension of time for applying for permission to appeal. In February 2012, C conceding (contrary to his previous assertions made when giving the Court reasons for his delay in filing the notice) that on October 1, 2010, he had been advised (by solicitors acting for him until the end of the Mercantile Court proceedings) of the effect of the appeal time limit fixed by r.52.4. In the light of the trial judge's granting C permission to appeal, D conceding that C had a real, as opposed to a fanciful, prospect of success upon any appeal. **Held**, dismissing the application, (1) where a party fails to file a notice of appeal within the r.52.4 time limit, the sanction suffered by that party, namely that no appeal will take place if the time limit is not varied by extension (rr.3.1(2)(a) & 52.6), is implied rather than express, (2) nevertheless, in determining an application for an extension, the check-list in r.3.9(1) applies, (3) that provision makes no reference either to the merits of the appeal or to the prejudice which will be suffered by a prospective appellant if the application is not granted, (4) however, the authorities show that, where the question of extending time is itself difficult to resolve, the merits will have to be considered, (5) in the instant case, that question was not difficult to resolve, as C did nothing to pursue his right of appeal until D took steps to enforce their judgment, and then falsely asserted (until the matter was pressed) that he was not aware of the r.52.4 time limit. ***Sayers v Clarke Walker (Practice Note)*** [2002] EWCA Civ 645, [2002] 1 W.L.R. 3095, CA, ***Bank of Scotland v Pereira (Practice Note)*** [2011] EWCA Civ 241, [2011] 1 W.L.R. 2391, CA, ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 3.1.2, 3.9.1, 52.4.1 & 52.6.2.)

In Detail

COSTS WHERE SETTLEMENT BEFORE TRIAL

CPR r.44.3(2) states that the "general rule" as to the incidence of costs is that (a) "the unsuccessful party will be ordered to pay the costs of the successful party", but (b) "the court may make a different order" if the circumstances demand. Rule 44.3(4) provides that such circumstances include (a) "the conduct of all the parties", (b) the extent to which the successful party has succeeded, and (c) any admissible offer to settle, including any offer under Pt 36. According to r.44.3(5), the reference to "conduct" in this context includes conduct before, as well as during, the proceedings, and includes (a) "the extent to which the parties followed the Practice Direction (Pre-Action Conduct), or any relevant pre-action protocol", (b) the reasonableness of raising or defending a particular issue, (c) the manner in which the litigation was conducted, (d) whether a successful claim had been exaggerated.

In the recent case of *M v Croydon London Borough Council* [2012] EWCA Civ 595, May 8, 2012, CA, unrep., the proceedings started life as a judicial review claim but, because of changes in the law wrought by a decision of the Supreme Court, were transmuted into a claim under the enhanced fact-finding jurisdiction of the Administrative Court. (For summary of this case, see "In Brief" section of this issue of CP News.) Before trial, the defendant local authority conceded the claimant's claim and a judge ruled that there should be no order for costs, following principles stated in *R. (Boxall) v Waltham Forest London Borough Council* (2001) 4 C.C.L.R. 258). The Court of Appeal (Lord Neuberger M.R., Hallett & Stanley Burnton L.JJ.) allowed the claimant's appeal. The Master of the Rolls gave the lead judgment.

The Boxall principles have proved to be controversial. In his costs review, Sir Rupert Jackson recommended that they should be modified so that in any judicial review case where the claimant has complied with the relevant pre-action protocol, if the defendant settles the claim after (rather than before) issue by conceding any material part of the relief sought, then the "general rule" as to the incidence of costs should be followed and the normal order should be that the defendant should pay the claimant's costs (see *Review of Civil Litigation Costs : Final Report (December 2009)* Ch.30, paras 4.12 & 4.13). The recent decision of the Court of Appeal in effect implements that recommendation. Parties in judicial review proceedings can no longer assume that the likely order is no order for costs, even where one party or another has conceded the whole, or substantially the whole, of the other side's case.

Sir Rupert Jackson noted that a modified rule along the lines he recommended would not prevent the court from making a different order in those cases where the circumstances warranted a different costs order. The particular value of the judgment of the Master of the Rolls lies in what his lordship says about the circumstances in which a departure from the general rule will be justified in Administrative Court cases.

The Master of the Rolls stated:

"60. Thus, in Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case, the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.

61. In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated, and, as the successful party, that he should recover his costs. In the latter case, the defendants can no doubt say that they were realistic in settling, and should not be penalised in costs, but the answer to that point is that the defendants should, on that basis, have settled before the proceedings were issued: that is one of the main points of the pre-action protocols. … …

62. In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. Given that there will have been a hearing, the court will be in a reasonably good position to make findings on such questions. However, where there has been a settlement, the court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. In many such cases, the court will be able to form a view as to the appropriate costs order based on such issues; in other cases, it will be much more difficult. I would accept the argument that, where the parties have settled the claimant's substantive claims on

the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs. … However, where there is not a clear winner, so much would depend on the particular facts. In some such cases, it may help to consider who would have won if the matter had proceeded to trial, as, if it is tolerably clear, it may, for instance support or undermine the contention that one of the two claims was stronger than the other. …

63. In case (iii), the court is often unable to gauge whether there is a successful party in any respect, and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win."

Having given such general guidance on costs issues in relation to Administrative Court

cases which settle on all issues save costs, the Master of the Rolls added that it was right to emphasise that, as in most cases involving judicial guidance on costs, each case turns on its own facts. A particular case may have an unusual feature which would, or at least could, justify departing from what would otherwise be the appropriate costs order.

Stanley Burnton L.J., in agreeing with the judgment of the Master of the Rolls, stated (para.77):

"Where the parties are unable to agree costs, and they are left to be determined by the court, it is important that both the work and costs involved in preparing the parties' submissions on costs, and the material the judge is asked to consider, are proportionate to the amount at stake. No order for costs will be the default order when the judge cannot without disproportionate expenditure of judicial time, if at all, fairly and sensibly make an order in favour of either party. This is not to say that there are not cases where the merits can be determined and no order for costs can be seen to be the appropriate order; but in such cases that order is not a default order, but an order made on the merits."

Lord Neuberger M.R. expressly agreed with this statement. It is important to notice that its sentiments apply not only to disputes about costs which arise in Administrative Court proceedings which have settled before trial, but in other civil proceedings as well. This was made clear by the Master of the Rolls in a part of his judgment where, in putting the Boxall principles in context by contrasting them with those applicable in ordinary civil proceedings, his lordship stated (para.47):

"It is open to parties in almost any civil proceedings to compromise all their differences save costs, and to invite the court to determine how the costs should be dealt with. The court has jurisdiction in such a case to determine who is to pay costs, but it is not obliged to resolve such a free-standing dispute about costs. Accordingly, by settling all issues save costs, the parties take the risk that the court will not be prepared to make any determination other than that there be no order for costs not only because that is the right result after analysing all the arguments, but also on the ground that such an exercise would be disproportionate."

ABUSE OF PROCESS

CPR r.3.4(2)(b) provides that the court may strike out a statement of case if it appears to the court that it is an abuse of process, or is otherwise likely to obstruct the just disposal of the proceedings. Rule 1.1(1) provides that in exercising any power given to it by the CPR the court must seek to give effect to the overriding objective of dealing justly with cases. In a given case this involves (amongst other things) allotting to the case an appropriate share of the court's resources, while taking account the need to allot resources to other cases.

In a number of different ways, modern English civil procedure seeks to ensure that claims are dealt with in ways that are proportionate to what is at stake. The distinctions between "structure", "process" and "behaviour", long ago recognised by writers as useful for understanding how commercial and industrial organisations work (but not registering in the literature on judicial organisations), are apparent. Thus civil claims are brought, depending on their seriousness or complexity, in "higher" or "lower" or "generalist" or "specialist" courts (structure); they are allocated to different case management tracks or perhaps to mediation routines (process); and by numerous means (e.g. directly by rules and indirectly by exhortation) efforts are made to influence the behaviour of lawyers (and the parties they represent), judges and court officials in a manner conducive to the proportionate and cost-effective disposal of cases. (In the last-mentioned respect the complicated "sticks and carrots" arrangements in the law of costs are notable.)

But it has to be conceded that the results are patchy and that in far too many instances the objective of proportionality is not met (as most of the reform proposals in the Jackson review of costs indicate). Doubtless, in some types of case it cannot be achieved.

The grossest examples of disproportionality tend to be cases in which "what is at stake" was a sum of money, and the claim was not pursued by a procedure which would, in the event, have been much cheaper for the parties

and consumed much less in the way of court resources. The intriguing question which arises is this: when a case is heading in that direction, does the court have power to strike out the claim on abuse of process grounds? In the commentary in the White Book on CPR r.3.4(2)(b) (see Civil Procedure 2012 Vol.1 para.3.4.3.4), the authorities on the point are explained. The point was also examined by the Court of Appeal in the recent case of *Sullivan v Bristol Film Studios Limited*, [2012] EWCA Civ 570, May 3, 2012, CA, unrep. (for summary of this cases, see "In Brief" sections of this issue of CP News).

In this case, the defendants, having had an application for summary judgment dismissed, later applied to have the claimant's claim struck out as an abuse of process under r.3.4(2)(b). The claim was for copyright infringement and was proceeding on the multi-track in the Chancery Division at a district registry. The judge directed himself by reference to *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] Q.B. 946, CA, and concluded:

"It seems to me that to pursue a claim which has the potential for the recovery of so little money and which would take up so much of the court time is a disproportionate use of the court's resources."

On the ground that this was an abuse of process, the judge granted the defendant's striking out application.

In the Court of Appeal the principal question was whether potentially the claim was worth, as the judge found, a maximum of £150, rather than, as the claimant claimed, £800,000. On the appeal, the claimant conceded that if the judge was right on the question of damages and he was wrong, there should not be a trial. The Court of Appeal held that the judge was right and therefore, because of the claimant's concession, did not have to determine the question whether the judge should have struck out the claim on abuse of process grounds. However, having heard argument on the point, in their judgments Etherton L.J. and Lewison L.J. both dealt with the matter. (Ward L.J. agreed with both judgments.)

Lewison L.J. stated (para.29):

"The mere fact that a claim is small should not automatically result in the court refusing to hear it at all. If I am entitled to recover a debt of £50 I should, in principle, have access to justice to enable me to recover it if my debtor does not pay. It would be an affront to justice if my claim were simply struck out. The real question, to my mind, is whether in any particular case there is a proportionate procedure by which the merits of a claim can be investigated. In my judgment it is only if there is no proportionate procedure by which a claim can be adjudicated that it would be right to strike it out as an abuse of process."

After noting that the Jameel case involved a defamation action and explaining that, by statute, the county courts are precluded from hearing such actions, Lewison L.J. investigated the question whether the claimant's claim in this case could or should have been brought in a county court. After analysing the relevant rules and practice directions his lordship concluded that, although the claim (being for copyright infringement) was initially properly allocated to the multi-track by virtue of r.63.1(3), it could have been re-allocated to the fast track or to the small claims track under r.26.10, as this was not a case where any CPR provision expressly stated that once it was allocated to the multi-track "that is where it must stay" (as, by contrast, is the position with mercantile claims and arbitration claims). His lordship added that if that is not the result that the Rule Committee intended the Committee should make that clear.

Lewison L.J. concluded that, in principle, a claim such as that made by the claimant in this case could have been tried in the Patents County Court "if it's true value had been recognised at the outset" and noted that the assessment of the value of a claim for case management purposes is a matter for the court, rather than for the parties (r.26.8(2)). His lordship added (para.32):

"When in future a judge is confronted by an application to strike out a claim on the ground that the game is not worth the candle he or she should consider carefully whether there is a means by which the claim can be adjudicated without disproportionate expenditure."

Etherton L.J. stated that the court must, in accordance with the overriding objective "consider at the earliest opportunity the most efficient, cost effective, proportionate and fair way of resolving the dispute" (para.44).

In essence, their lordships' judgments are a warning against the too hasty embrace by judges of dicta in the Jamel case and in other similar cases (referred to in para.3.4.3.4 of Vol.1 of the White Book 2012) on the power of courts to strike out for abuse of process.

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