CIVIL PROCEDURE NEWS

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Libel claim – mode of trial – judge's exercise of discretion

CPR r.26.11, Senior Courts Act 1981 s.69. Following death of a woman (X), man (C) prosecuted and, following trial by jury, convicted for her murder. On the basis of additional evidence, Court of Appeal (Criminal Division) quashing C's conviction and ordering retrial. At retrial, CPS offering no evidence and verdict of not guilty recorded by Crown Court. C bringing libel claim against police (D) alleging that the natural and ordinary meaning of words in a press release then issued by D meant and were understood to mean that he had killed X. D defending on bases of justification and qualified privilege. Master ordering, by consent, that claim should be listed for trial with a jury, subject to the right of either party to apply for trial by judge alone. At CMC, held after the time period within which any application by either party for trial with a jury should have been made, C applying for trial by judge alone. Judge granting C's application. **Held**, dismissing appeal, (1) as there had been no timely application under s.69(1) by any party for C's action to be tried with a jury, the action was, within the meaning of s.69(3), an action to be tried without a jury unless the court in its discretion ordered it to be tried with a jury, (2) when the discretion in s.69(3) falls to be exercised, there is a presumption in favour of trial by judge alone, (3) D had failed to show that no reasonable judge could, in the circumstances, have decided not to order jury trial. Observations on the relevance to the exercise of discretion of the public authority status of D, of the nature of the issues in the justification defence, and of the advantages of a reasoned judgment, and the weight to be given to those factors. Court explaining that, where a party seeking a jury trial fails to make an application within the period prescribed by r.26.11, the right to a jury deriving from s.69(1) is lost. ***Cook v Telegraph Media Group*** [2011] EWHC 763 (QB), March 29, 2011, unrep. (See ***Civil Procedure 2012*** Vol.1 para.26.11.1, and Vol.2 para.9A-258.)

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Possession proceedings – notice of decision to seek order – confirmation of decision

CPR r.55.3, Housing Act 1996 ss.128 & 129. Housing authority (C) granting individual (D) introductory tenancy of flat. On February 18, 2010, in compliance with s.128, C serving on D notice of their decision to apply to the court for a possession order, citing anti-social behaviour grounds. D requesting review under s.129. In letter to D of March 22, 2010, following the review, C stating (1) that the s.128 notice "was correctly and justifiably served", (2) that an application to the court for possession of the property should not be made "at this point in time", and (3) that alternatives to possession proceedings should be pursued with D. On April 19, 2010, C issuing proceedings for possession based on the notice of February 18, 2010. County court judge dismissing C's claim, holding that, in the circumstances, a fresh s.128 notice had to be served before possession proceedings could be brought. **Held**, dismissing C's appeal, (1) a s.128 notice is a jurisdictional document, (2) a properly served notice, confirmed on a s.129 review (where sought), is a prerequisite for possession proceedings, (3) the letter of March 22, 2010, did not, within the meaning of s.128(5), "confirm the original decision" to seek an order for possession. Court stating that review decisions should be expressed in clear terms and should not be encrusted with complex suspensory conditions if the intention is to preserve the jurisdictional effect of notice of the original decision. ***Cardiff City Council v Stone*** [2002] EWCA Civ 298, [2003] H.L.R. 47, CA, ***Forbes v Lambeth London Borough Council*** [2003] EWHC 222 (QB), [2003] H.L.R. 49, ***Ali v Birmingham City Council*** [2009] EWCA Civ 1279, [2011] H.L.R. 17, CA, ref'd to. (See ***Civil Procedure 2012*** Vol.2 paras 3A-1070, 3A-1095, 3A-1098 & 3A-1102.)

CHILAB v KING'S COLLEGE LONDON [2012] EWCA Civ 1178, August 15, 2012, CA, unrep. (Hughes & Tomlinson L.JJ.)

Security for costs of appeal – order against non-party

CPR r.25.14. Student (C) bringing claim for damages against college (D) arising out of his failure to obtain, or to be awarded, a particular post-graduate degree. County court judge dismissing claim. C granted permission to appeal. D applying to Court of Appeal for order joining C's wife (X) as a party to the appeal and requiring her to give security for their costs of the appeal. Common ground that X had in fact contributed substantially to C's costs below since C's legal aid was withdrawn (upon X coming into possession of a substantial lump sum). **Held**, dismissing the

application, (1) the Court was prepared to assume, but without deciding, that "the court" in r.25.14 includes a court in which an appeal is pending, (2) if the order sought was to be made it had to be on the basis of the second condition in r.25.14(2), (3) the fact that X hoped or expected that C would recover substantial damages if the appeal were successful, from which the whole family would benefit, did not make her contribution to C's costs a contribution made "in return for" a share in such recovery, (4) the inference that there was an agreement to share in any proceeds of the claim was not the natural inference to be drawn from the contribution that X had made to C's costs, (5) if there were any, the natural inference was that X had made the contribution out of "natural love and affection". (See ***Civil Procedure 2012*** Vol.1 paras 25.14.1 and 25.14.3.)

- **ROBERTS v COMMISSIONER OF POLICE OF THE METROPOLIS** [2012] EWCA Civ 799, April 3, 2012, CA, unrep. (Pill, Patten & Macfarlane L.JJ.)

Personal injury claim – discretionary exclusion of limitation period

CPR r.3.4, Limitation Act 1980 ss.11 & 33, Pre-Action Protocol for Personal Injury Claims paras 3.1 & 3.7. On April 22, 2007, whilst investigating an alleged domestic violence incident, police officers arresting and detaining a man (C). After his acquittal (on June 23, 2007) by magistrates for an assault on a police officer in the course of the arrest, on September 21, 2009, C's solicitors sending letter to police (D) intimating a civil claim (para.3.1), but D not replying until May 13, 2010 (para.3.7). On August 10, 2010, C commencing claim for damages against D alleging (1) actionable assault (excessive force to effect his arrest) occasioning personal injuries, (2) unlawful arrest and detention (no reasonable suspicion of an arrestable offence), and (3) malicious prosecution. Upon D's pleading that such of those claims within C's action as fell within s.11 were statute barred, D applying under s.33 for order disapplying the three-year time limit for bringing those claims and allowing them to proceed out of time. County court judge dismissing that application. Judge finding (amongst other things) (1) that (as C conceded) there was no real justification for C's failure to issue his claim within the primary limitation period, and (2) that D were prejudiced by the delay in relation to their ability to recollect the detail of the events of April 22, 2007, upon which C's serious allegations against the arresting officers involved were based, and concluding that there could not be a fair trial. Single lord justice granting C permission to appeal. **Held**, allowing appeal, (1) the discretionary power given to the court under s.33 was originally conceived (and enacted in 1975) as a power to be exercised in a residual class of exceptional cases, however (2) it is now settled by case law that the discretion is in fact a general one which has to be exercised to achieve a result which is fair and just between the parties having regard to the circumstances set out in s.33 and all other relevant circumstances, (3) in weighing up the prejudice which the defendant will suffer as a result of the making of an order under the section, the loss of a defence under the 1980 Act is not to be regarded as significant prejudice in itself, divorced from the ability of the defendant properly to defend the claim, (4) in most cases involving simply the late issue of a claim form outside the three-year limitation period, time will in practice be extended by the exercise of the s.33 discretion unless the defendant can show that the delay involved has had an adverse impact on his ability to have his defence fairly tried, (5) s.33(3)(b) is primarily concerned with measuring the effect of the delay after the expiry of the limitation period against what the position would have been had the claim been issued in time, (6) if the defendant's recollection has not been prejudiced by the further period of delay after the end of the limitation period then that period of delay is unlikely by itself to be a material reason for refusing to extend time, (7) the judge's primary reason for refusing to extend time was his belief that a claim based on allegations of assault by police officers should be brought within the primary three-year period because of the potentially serious consequences for the officers involved, (8) in this respect the judge erred by transposing his concern that allegations should be dealt with promptly out of fairness to the police officers into a finding that there could not be a fair trial. ***Horton v Sadler*** [2006] UKHL 27, [2007] A.C. 307, HL, ***Cain v Francis*** [2008] EWCA Civ 1451, [2009] Q.B. 754, CA, ***AB v Ministry of Defence***, [2012] UKSC 9,[2012] 2 W.L.R. 643, SC, ref'd to. (See ***Civil Procedure 2012*** Vol.1 para.C2-012, and Vol.2 para.8-92.)

- **SEIKO EPSON CORP v DYNAMIC CASSETTE INTERNATIONAL LTD** [2012] EWHC 1906 (Pat), July 6, 2012, unrep. (Floyd J.)

Application to vacate trial date – availability of leading counsel

CPR rr.3.1(2)(b) & 29.8, Practice Direction 28 para.7.4(6). In January 2012, court fixing date in June 2013 for trial of principal issues in patent infringement claim, with remaining issues, including all questions relating to relief, to be determined at a second trial thereafter. Parties not wholly agreed as to whether, or to what extent, the second trial would be dependent on the outcome of the first. Leading counsel (X) for defendants (D) (who had been instructed over a considerable period of time to act for D, but who had not been briefed) also engaged in another unrelated substantial IP case for which, in May 2012, court directing expedited trial on a date in June 2013. X concluding that, if the clash of trial dates which had emerged was unavoidable, in the circumstances, and in the light of the relevant professional conduct guidance, he should withdraw from acting for D. Because of this consequence, D applying to

vacate the trial date in the instant case, with likely effect being that the trial would be re-fixed for dates in November 2013, with second trial following after that. Application opposed by C. **Held**, refusing the application, (1) the grant of an adjournment where a case is being fixed for trial is an indulgence that the court will rarely grant, (2) the court diary operates on the basis that fixtures are fixtures and it requires goods reasons for a fixture to be broken, (3) the potential prejudice to C, and the fact that D had ample time in which to instruct alternative leading counsel, militated in favour of not vacating the trial date, (4) in the circumstances, the reasons were not sufficient and the trial date should be maintained. Matters to be weighed in the balance against the prejudice to D in losing their leading counsel explained. Judge observing that orders for expedition have a significant effect, not just on the parties to the litigation in which expedition is ordered, but also on the interests of other litigants. (See ***Civil Procedure 2012*** Vol.1 paras 3.1.3, 29.8.1 & 29PD.7.)

- **SG (A CHILD) v HEWITT** [2012] EWCA Civ 1053, August 2, 2012, CA, unrep. (Pill, Arden & Black L.JJ.)

Acceptance of non-withdrawn pre-action Pt 36 offer – claimant's costs after expiry of relevant period

CPR rr.21.10, 36.10 & 36.14. In March 2003, six-year old child (C) sustaining severe head injury and other injuries in traffic collision in which C was a passenger in one of the vehicles involved. In following six years, C regularly assessed by experts appointed by C and by the putative defendant (D), during which period, because of the risk of developing damage to C's frontal lobe emerging during his puberty, C's prognosis remained uncertain. On April 2, 2009, D making pre-action Pt 36 offer in the sum of £500,000 in full and final settlement. In August 2011, this offer accepted by C (having never been withdrawn in the meantime). On Pt 8 claim then made by C under r.21.10, judge approving settlement. On question of costs, (1) parties agreeing that D should pay C's Pt 8 claim costs and his costs of the main claim up to and including April 22, 2009 (21 days after the Pt 36 offer was made); and (2) judge ordering that C should pay D's costs incurred from April 23, 2009, including the costs relating to the issue over those costs. **Held**, allowing C's appeal against the judge's costs order, and substituting an order that C should have his costs throughout, including in relation to the period from April 23, 2009, (1) in the circumstances of this case (C having not obtained a judgment more advantageous than the D's offer), the effect of the relevant provisions in r.36.10 and r.36.14 was that, unless the court considered it unjust, the normal order for costs should be as the judge had determined; (2) it is for the offeree to satisfy the court that it is unjust for the court to make the normal order; (3) in deciding whether it was unjust to do so in such circumstances, a court must to take into account all the circumstances of the case including the matters expressly set out in r.36.14(4); (4) but they are not the only matters that fall for consideration and anything else which is relevant must be considered as well, including uncertainty as to the developing condition and prognosis of a claimant under disability; (5) although the judge acknowledged that C had acted reasonably throughout he did not give weight to particular features of this case which should have been put into the balance against the normal order; (6) the judge had erred in principle and the exercise of discretion was flawed; (7) in the circumstance it was unjust not to make an order other than the normal order. ***Abada v Gray*** June 25, 1997, CA, unrep., ***Matthews v Metal Improvements Co Inc*** [2007] EWCA Civ 215, [2007] C.P. Rep. 27, CA, ***Kunaka v Barclays Bank Plc*** [2010] EWCA Civ 1035, [2012] Costs L.R. 179, CA, ref'd to. (See ***Civil Procedure 2012*** Vol.1 para.36.14.4.)

- **SHARED NETWORK SERVICES LTD v NEXTIRAONE UK LTD** [2012] EWCA Civ 1171, July 13, 2012, CA, unrep. (Lewison L.J.)

Appeal – security for costs – appeal lacking real prospect of success

CPR rr.25.15 & 52.3(6). In commercial contractual claim, defendant (D) applying for summary judgment on ground that the claimant's (C) claim was barred by an exclusion clause in the contract between them. Judge granting D's application. C applying to Court of Appeal for permission to appeal. On paper single lord justice finding that, although the appeal had no real prospect of success (agreeing with the trial judge in this respect), there was a compelling reason for granting permission to appeal, in particular, a need for the resolution of a conflict in first instance High Court authority on exclusion clauses, and granting C permission to appeal accordingly. D then applying for security for costs of the appeal. **Held**, granting the application, (1) permission to appeal was granted in the interests of the authoritative clarification of English contract law by the Court of Appeal; (2) it did not follow that, although such clarification may be in the public interest, it should take place at the respondent's expense; (3) though the view that there was no reasonable prospect of success in the appeal was a provisional one, the application had to be approached on that basis; (4) there was no evidence that the appellant's shareholders and others who stood to gain from a success in the appeal were unable to contribute something towards the costs; (5) in the circumstances it was appropriate to make an order for security for costs yet to be incurred in the sum of £12,500. ***Keary Developments Ltd v Tarmac Construction Ltd*** [1995] 3 All E.R. 534, CA, ***Cherry Tree Investments Ltd v Landmain Ltd*** [2012] EWCA Civ 33, January 12, 2012, CA, unrep., ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 25.12.7, 25.13.1, 25.13.3 & 52.3.7.)

■ **SIMMONS v CASTLE** [2012] EWCA Civ 1288, October 10, 2012, CA, unrep. (Lord Judge L.C.J., Lord Neuberger M.R. & Maurice Kay L.J.)

Implementation of costs reforms – raising of level of general damages

Courts and Legal Services Act 1990 ss.58 & 58A, Legal Aid, Sentencing and Punishment of Offenders Act 2012 Pt 2. In county court personal injury claim in which defendant (D) admitted liability, judge awarding claimant (C) damages, including £20,000 in general damages, but dismissing C's claim for a provisional damages order. Appeal by C to Court of Appeal compromised on basis that judgment order should be varied to include provisional damages order. In giving consent to the variation, for purpose of discharging its duty to facilitate the implementation of Pt 2 and related legislation, Court of Appeal (1) making declaration (varying declaration previously made, see [2012] EWCA Civ 1039, July 26, 2012, C.A., unrep.) giving guidance on the level of general damages to be awarded by courts in certain proceedings upon the coming into effect of that legislation on April 1, 2013; (2) holding that the guidance should not apply where the claimant fell within s.44(6); and (3) indicating the effect that the guidance would have on the instant case had it been the subject of judgment after that date (assuming C did not fall within s.44(6)). (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2012*** Vol.2 paras 7A-5, 7A-7 & 7A-16.)

■ **TINKLER v ELLIOTT** [2012] EWCA Civ 1289, October 10, 2012, CA, unrep. (Maurice Kay, Munby & Lewison L.JJ.)

Judgment in absence of defendant – application to set aside

CPR rr.1.1 & 39.3. Company (C) bringing claim in High Court against former employee (D) for injunction. On March 15, 2010, judge proceeding with trial in absence of D and giving judgment for C. On December 8, 2011, D (acting in person) applying for permission to proceed with application under r.39.3(3). After permission obtained, judge granting application and setting aside judgment. Single lord justice granting C permission to appeal. **Held**, allowing C's appeal, (1) the element of discretion within r.39.3(5) comes into play only after the applicant has satisfied the three positive requirements in that provision, including that of promptness; (2) when determining whether an applicant "acted promptly" the court is not exercising a discretion but making an evaluation. Observations on relationship between a party's remedies under r.39.3 and by way of appeal. ***Regency Rolls Ltd v Carnall*** [2000] EWCA Civ 379, October 16, 2000, CA, unrep., ***Standard Bank Plc v Agrinvest International Inc*** [2009] EWHC 1692 (Comm), June 23, 2009, unrep., ***Bank of Scotland v Pereira*** [2011] EWCA Civ 241, [2011] 1 W.L.R. 2391, CA, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2012*** Vol.1 paras 39.3.7 & 39.3.7.1.)

■ **UNISON v KELLY** [2012] EWCA Civ 1148, July 17, 2012, CA, unrep. (Richards & Elias L.JJ.)

Permission to appeal – imposing conditions

CPR r.52.9(1)(c), Human Rights Act 1998 Sch.1 Pt I art.11. Trade union members (C), having been subject to disciplinary proceedings by their union (D), bringing claim against D in employment tribunal alleging that the proceedings were unjustified. D succeeding in that claim and EAT dismissing D's appeal. Single lord justice granting D permission to appeal to the Court of Appeal, principally for the purpose of enabling D to argue that the statutory provision on which C succeeded below was incompatible with art.11. C, represented by pro bono counsel, then applying to Court under r.52.9 for order imposing upon the grant of permission a condition to the effect that D should only be allowed to continue the appeal on the basis that it would not seek any of its costs against C if the appeal were successful. **Held**, granting application, (1) r.52.9(1)(c) provides that a court may impose conditions upon which an appeal may be brought, but only where there is a compelling reason to do so; (2) such conditions include conditions as to costs, including a costs condition in the form sought by C, or in the form of a PCO; (3) in the circumstances of this case, there was a compelling reason for imposing such condition; (4) those circumstances included the facts that (a) the principal point arising on the appeal was one of general public importance; (b) C were prepared to undertake that, if the condition were imposed, they would not to seek costs against D if the appeal were unsuccessful; and (c) for policy reasons generally proceedings in a tribunal and the EAT were costs-free and that policy would be undermined if respondents were exposed to costs risks on appeals to the courts. ***Eweida v British Airways Plc*** [2009] EWCA Civ 1025, [2010] C.P. Rep. 6, CA, ***Morris v Wrexham County Borough Council*** [2001] EWHC Admin 697, [2002] 2 P. & C.R. 7, ***Weaver v London Quadrant Housing Trust*** [2009] EWCA Civ 235, [2009] 6 Costs L.R. 875, CA, ref'd to. (See ***Civil Procedure 2012*** Vol.1, paras 52.3.15 & 52.9.4.)

In Detail

INCREASE IN GENERAL DAMAGES – QUID PRO QUO FOR LOSS OF SUCCESS FEES

Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (ss.44 to 48) contains primary legislation enacted for the purpose of facilitating reforms following upon the publication of *Review of Civil Litigation Costs: Final Report (2009)*. This legislation and the other legislation related to the procedure and costs reforms flowing from the Final Report and subsequent consultations are expected to come into effect on April 1, 2013.

Section 44 substantially amends ss.58 and 58A of the Courts and Legal Services Act 1990, which currently make provision for the regulation of conditional fee agreements (CFAs) and the recoverability of success fees (see White Book 2012 Vol.2 paras 7A-5 & 7A-7). The effect of the amendments is that a success fee under a CFA will no longer be recovered from a losing party. A lawyer will still be able to recover a success fee from a client under a CFA, but how it is to be calculated in certain proceedings will now be subject to new Regulations to be made by the Lord Chancellor. The key amendment is the substitution of subs.(6) of s.58A. As amended it states (completely reversing the present provision) that a costs order made in proceedings "may not include" provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement. This is subject to a transitional saving in s.44(6) of the 2012 Act (see further below).

Section 45 of the 2012 Act amends s.58AA of the 1990 Act (inserted by the Coroners and Justice Act 2009 s.154), which currently provides that damages-based (DBAs) agreements are enforceable only when they relate to employment matters (see White Book 2012 Vol.2 para.7A-8.1). The effect of these amendments is to enable the use of DBAs in most civil litigation by persons providing advocacy services, litigation services or claims management services. Section 46 of the 2012 Act revokes s.29 of the 1990 Act (recovery of insurance premiums by way of costs).

Sir Rupert Jackson, when recommending (in the Final Report op cit) that a lawyer's success fee under a CFA should no longer be recovered by the winning party from a losing party, considered the consequences that would result if that recommendation were implemented. In particular, his lordship asked himself whether any measures and, if so, what measures ought to be taken to assist claimants to meet the success fee which they will have to pay in successful cases out of damages or other sums recovered (Ch.10 para.5.1, p.112). The answers he gave (ibid., paras 5.3 to 5.11) were, in summary, (1) that in personal injury claims (a) the level of general damages for pain, suffering and loss of amenity should be increased by 10 per cent across the board; (b) the amount of success fee which lawyers may deduct should be capped at 25 per cent of damages, excluding any damages referable to future care or future losses; and (c) the reward for making a successful claimant's offer under CPR Pt 36 (i.e. an offer which the defendant fails to beat at trial) should be enhanced to 10 per cent of any financial sum awarded; and (2) that in claims brought by individual claimants in other forms of litigation the level of general damages for nuisance, defamation and any other tort which causes suffering to individuals should be increased by 10 per cent.

From what has been said above it can be seen that the implementation of these recommendations (which have been accepted, subject to modifications that do not have to be explained for present purposes) depends upon a change in approach to the measure of general damages in tort actions. That is not a matter that could be accomplished by legislation.

In *Simmons v Castle* [2012] EWCA Civ 1039, July 26, 2012, CA, unrep., the Court of Appeal, constituted by Lord Judge L.C.J., Lord Neuberger M.R. and Sir Maurice Kay (the Vice-President of the Court of Appeal) sat, apparently for the purpose of approving the settlement of an appeal brought from a county court in a personal injury action (a damages award consisting of general damages of £20,000 and special damages of £2,730.37). Because the terms of settlement involved the appeal being allowed, albeit through an agreed variation in the order made by the court below, it required the consent of the Court of Appeal. One might have thought that such an application did not quite merit the attention of such a distinguished bench. (Normally, such consent is given in writing by a single Lord Justice, without the need for a hearing.) The explanation for this is, as the Lord Chief Justice explained (in delivering the judgment), that the Court used the appeal as an opportunity, in anticipation of the implementation of the reforms outlined above, to give guidance "to the future approach to the general measure of damages in tort actions" to take effect, not immediately, but on April 1, 2013.

The Lord Chief Justice noted that in *Wright v British Railways Board* [1983] 2 A.C. 773, HL, Lord Diplock said that the Court of Appeal "with its caseload of appeals in personal injury actions" is "generally speaking, the tribunal best qualified to set guidelines for judges trying such actions, particularly as respects non-economic loss". Accordingly, from time to time, when particular cases have presented themselves, the Court of Appeal has given the appropriate

guidance. (The guidelines for awards of damages in all types of personal injury action are published by the Judicial College.) His lordship explained that it was clear that the Court of Appeal has not merely the power, but a positive duty, to monitor, and where appropriate to alter, the guideline rates for general damages in personal injury actions, and added that there was no reason why the Court should not give guideline rates for general damages in all tort cases.

His lordship stated (para.20) that the Court had concluded that, in the exercise of that duty, it should declare that, with effect from April 1, 2013, the proper level of general damages for (i) pain, suffering and loss of amenity in respect of personal injury; (ii) nuisance; (iii) defamation; and (iv) all other torts which cause suffering, inconvenience or distress to individuals, will be 10 per cent higher than previously.

The Lord Chief Justice explained that the Court recognised the peculiar nature of the circumstances in which this declaration was made. His lordship said that the declaration was attributable to the forthcoming change in the civil costs regime and added (para.16):

"This is, no doubt, an unusual basis on which to rest a judgment or to adjust guidelines. However the recommendation to adjust the level of damages arises from a report prepared by a judge, which was initiated by the judiciary (as it was Lord Clarke, who, as Master of the Rolls, initiated Sir Rupert's report) and which contains policy recommendations, which is itself unusual (and, we would add, can only be justified in relation to a topic as closely concerned with the administration of, and access to, justice, as legal costs). With the exception of the 10 per cent increase in general damages, the great bulk of those policy recommendations have been adopted in full by the legislature in an Act sponsored by the executive, on the clear understanding that the judges would implement the 10 per cent increase. It would therefore be little short of a breach of faith for the judiciary not to give effect to the 10 per cent increase in damages recommended by Sir Rupert."

As indicated above, the Court of Appeal said that the declaration took effect, not immediately, but "from April 1, 2013". What precisely did that mean? The Court anticipated that question and stated that the new guidance should apply "to all cases where judgment is given after April 1, 2013" (para.19).

Following upon the delivery of this judgment, applications were made to the Court by interested parties. The Association of British Insurers (ABI) submitted that the increase in damages should apply only to cases where the claimant's funding arrangements had been agreed after April 1, 2013, otherwise claimants who had entered into CFAs before that date would receive both the increased damages and the success fee. Other interested parties submitted that the Court should clarify the manner in which the heads of damages were described in the declaration or even extend them to non-tortious claims.

In a supplemental judgment ([2012] EWCA Civ 1288), delivered on October 10, 2012, the Court dealt with these applications. The Court revised what it had previously said about commencement and amplified the types of general damages to which the declaration applies. Accordingly, the Court amended the declaration to read as follows (para.50):

"that, with effect from April 1, 2013, the proper level of general damages in all civil claims for (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, (v) mental distress, or (vi) loss of society of relatives, will be 10% higher than previously, unless the claimant falls within section 44(6) of Legal Aid, Sentencing and Punishment of Offenders Act 2012."

As indicated above, s.44(6) of the 2012 Act is a transitional saving provision. It states that, notwithstanding the substitution of s.58A(6) of the Courts and Legal Services Act 1990, a costs order made in proceedings about a matter may continue to provide for the recovery of a success fee from the losing party where the success fee is payable under a CFA entered into for the purposes of that matter before the day on which that substitution comes into force, or where it is payable under a collective CFA under which advocacy or litigation services were provided to a person in respect of that matter before that day. From April 1, 2013, a claimant before that day entering into a CFA of the type described in s.44(6), will not get the benefit of the declaration.

As revised, the declaration is not restricted to general damages in tortious claims, but applies to "all civil claims".

A solicitor advising a client on the advantages and disadvantages of entering into CFA is under an onerous duty. The Court's declaration makes the discharge of that duty even more complicated than it was.

Clearly, throughout these were highly unusual proceedings. The Court acknowledged that, with the benefit of hindsight, it was apparent that representations from interested parties should have been invited before the earlier judgment was handed down. The Court said (para.19) that it had jurisdiction to entertain the ABI's application as it was open to them to make it through the defendant in the claim (the respondent in the appeal). In dealing with that

application it was right that the Court should deal with all relevant matters, including those submissions raised by the other interested parties. The Court stressed that the post-judgment procedure adopted by it in this case cannot be taken "as any sort of precedent signalling to disappointed litigants or others unhappy with a decision of this court that they may apply to a court to reconsider a decision". CPR r.52.17 remains the law.

FAILURE TO ATTEND TRIAL – SETTING ASIDE JUDGMENT

Generally, when the trial of a claim is called on, the claimant and the defendant will attend before the judge. Procedural law has to cater for the consequences that may or should follow where (1) one or the other of the parties does not attend; or (2) neither attends. The starting point is that, if one or the other of the parties attends, the court may proceed with the trial. That is what r.39.3(1) says. The implication is that if neither party attends, whatever else the court may do, it may not proceed with the trial. In those circumstances, the court may strike out the proceedings, but this is without prejudice to their subsequent restoration (r.39.3(1)(a) & (2)).

Where a court proceeds with a trial in the absence of a claimant the court may strike out his claim (and, if the defendant has made a counterclaim, any defence to that claim). Where a court proceeds with a trial in the absence of a defendant the court may strike out his defence and any counterclaim. Where, in either of these circumstances, the court exercises its power to strike out all or any part of the proceedings, it may subsequently restore those proceedings or that part (r.39.3(2)). Further, where, in either of those circumstances, the court gives judgment or makes an order against the party who failed to attend, that party may apply for the judgment or order to be set aside (r.39.3(3)).

One would expect that neither application under r.39.3(2) to restore, or under r.39.3(3) to set aside, should be had just for the asking. Before the CPR came to effect, the test that the courts were expected to apply on such applications was derived from case law. In the CPR the test was toughened up, simplified and spelt out. Accordingly, r.39.3(5) states an application may be granted "only if" the applicant (a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him; (b) had a good reason for not attending the trial; and (c) has a reasonable prospect of success at the trial.

The application of r.39.3(5) has been considered by the Court of Appeal on a number of occasions; most recently in *Tinkler v Elliott* [2012] EWCA Civ 1289, October 10, 2012, CA, unrep. (For summary, see "In Brief" section of this issue of CP News.) In this case, a High Court judge granted the defendant's (D) application under r.39.3(3). The Court of Appeal allowed the claimant's appeal against that decision.

In giving the judgment of the Court, Maurice Kay L.J. (with whom Munby and Lewison L.JJ. agreed) explained that the only issue arising was whether D had acted promptly. The judge's finding that, for health reasons, D had a good reason for not attending the trial was not contested, and it was conceded that there were triable issues in respect of which D had a reasonable prospect of success. His lordship reviewed the relevant authorities, in particular *Regency Rolls Ltd v Carnall* [2000] EWCA Civ 379, October 16, 2000, CA, unrep., and concluded that they support the following propositions: (1) promptness is a mandatory requirement; (2) it requires the applicant to act "with all reasonable celerity in the circumstances"; (3) only if the mandatory requirements are satisfied does the court have a discretion which, at that stage, is "somewhat narrow". His lordship held that it was in the application of the third proposition that the judge had erred. The element of discretion within r.39.3(5) ("the court may grant the application") comes into play only after the applicant has satisfied the three positive requirements, including that of promptness. When determining whether the applicant "had acted with all reasonable celerity in the circumstances" the judge is not exercising a discretion but making an evaluation.

His lordship added that, in effect, D's submission was that a court should approach the issue of promptness with a maximum of flexibility, imbued with the spirit of the overriding objective of dealing with the case justly, and that an application to set aside should be allowed where an applicant with a reasonable explanation for his original non-attendance and who has reasonable prospects of success at trial, should be given every opportunity to have his case considered on the merits, even after a delay such as the one in this case. His lordship said that the flaw in that approach is that "it invests the judicial decision with a degree of discretion which is contrary to the structure of r.39.3(5)".

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