CIVIL PROCEDURE NEWS

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CONTENTS

In Brief

Cases

ABBEY FORWARDING LTD v HONE [2012] EWHC 3525 (Ch), December 12, 2012, unrep. (Judge Pelling QC)

Freezing injunction undertaking – inquiry as to damages where injunction discharged

CPR r.25.1(1)(f). In February 2010, company (C1) in liquidation, the liquidator having been appointed on application of HMRC, commencing claim against former directors (D) and obtaining freezing order against D. That order containing usual cross-undertaking, and HMRC giving an indemnity in respect of any liability C might incur under it. Following the dismissal of the claim in support of which the freezing order had been made, judge discharging the order with effect from September 10, 2010, and directing inquiry as to damages. HMRC (C2) applying to be joined as claimant, and appearing as such in the inquiry. C2 conceding that losses incurred by the interim injunction would be recoverable by D, even though they were not foreseeable when the injunction was granted, provided that express notice of the post-injunction special circumstances had been given prior to the loss being suffered in sufficient time for the parties to agree an appropriate variation to the undertaking. On inquiry, **held** (1) generally, in assessing compensation the court has to proceed as if the cross-undertaking was a contract, and not by applying the principles applicable to an award for compensation for breach of fiduciary duty, (2) the loss caused by the injunction (as distinct from the underlying litigation) had to be reasonably foreseeable, (3) in the instant case, (a) it was not appropriate to depart from the conventional approach, (b) in respect of the specific heads of loss, the majority of D's claims failed on foreseeability and remoteness, but (c) D were entitled to recover general damages by reference to certain facts and matters. Judge reserving for further argument question whether D entitled to aggravated damages. Relevant authorities on cross-undertaking damages examined, including those relevant to issue whether damages for emotional distress may be recovered where respondents are individuals. ***F Hoffman La Roche & Co AG v Secretary of State for Trade and Industry*** [1975] A.C. 295, HL, ***Lilly Icos LLC v. 8PM Chemists Ltd*** [2009] EWHC 1905 (Ch), [2010] F.S.R. 4, ref'd to. (See ***Civil Procedure 2012*** Vol.1 para.25.1.25.10, and Vol.2 para.15-38.)

FINANCIAL SERVICES AUTHORITY v SINALOA GOLD PLC [2013] UKSC 11, February 27, 2013, SC, unrep.

Freezing injunction – law enforcement proceedings by public authority – applicant's undertakings

CPR r.25.1(1)(f), Senior Courts Act 1981 s.37, Financial Services and Markets Act 2000 s.380 & Sch.1 para.19, Practice Direction 25A para.5.1A. In exercise of statutory regulatory and enforcement powers, FSA (C) commencing proceedings in Chancery Division against individuals (D) alleging that they were involved in fraudulent scheme for sale of shares in company. C seeking declaration, injunction, and repayment of monies. C applying for (without notice) and granted worldwide freezing injunction restraining D from disposing of or dealing with assets up to value of £858k, including assets in a bank (B). Order containing term giving the standard form of undertaking by C to third parties, but not offering D a cross-undertaking in damages. When continuing the freezing order, judge expressing view that C's third party undertaking not limited to compensating for expenses incurred in complying with order, but operated also as an undertaking in damages in favour of innocent third parties as well. At adjourned hearing of freezing order application, C applying for variation by striking out third party undertaking term. Variation opposed by B. Judge refusing application, but granting C permission to appeal. Court of Appeal allowing C's appeal, holding that the judge was wrong in concluding that the usual practice was that the FSA should give a cross-undertaking in favour of third parties covering both the costs of compliance and other losses ([2011] EWCA Civ 1158). Supreme Court granting B permission to appeal. **Held**, dismissing appeal, (1) a distinction is to be drawn between (a) a law enforcement action, where a public authority is seeking to enforce the law in the interests of the public generally, often in pursuance of a public duty to do so, and enjoys only the resources which have been assigned to it for its functions, and (b) private litigation, (2) there is no general rule that an authority like C, acting pursuant to a public duty, should be required, when granted a freezing injunction, to give to the court a cross-undertaking in respect of losses suffered either by defendants or by third parties affected by the injunction, (3) there were no particular circumstances why C should be required to do so in the present case. Court explaining that there is a pragmatic basis for a distinction between a third party's specific costs and its general loss, and rejecting D's submission that, by conceding that they should give an undertaking as to B's expenses, they had conceded that the undertaking should extend to their losses. ***F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry*** [1975] A.C. 295, HL, ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 25.1.25.10 & 25APD.5, and Vol.2 para.15–54.)

■ **L. (CHILDREN) (PRELIMINARY FINDING: POWER TO REVERSE), IN RE** [2013] UKSC 8, [2013] 1 W.L.R. 634, SC.

Judgment – recalling before order perfected

CPR r.40.2. After first hearing (fact-finding trial) in child protection proceedings, judge giving judgment containing findings adverse to one parent. Before second hearing (welfare hearing), and before order for judgment sealed, judge giving further judgment altering those findings in significant respect. Court of Appeal restoring findings in first judgment. On further appeal by other parent, **held**, allowing appeal, (1) whether a judge should exercise the discretion to recall a judgment will depend upon all the circumstances of the case, (2) its exercise is not limited to "exceptional" circumstances. ***In re Barrell Enterprises*** [1973] 1 W.L.R. 19, CA, ***Stewart v Engel*** [2000] 1 W.L.R. 2268, CA, ***In re Blenheim Leisure (Restaurants) Ltd. (No. 3)*** *The Times,* November 9, 1999, ***In re S-B (Children) (Care Proceedings: Standard of Proof)*** [2009] UKSC 17, [2010] 1 A.C. 678, SC, ref'd to. See further "In Detail" section of this issue of CP News. (See ***Civil Procedure 2012*** Vol.1 para.40.2.1.)

■ **LLOYDS TSB BANK LTD v CROWBOROUGH PROPERTIES LTD** [2013] EWCA Civ 107, February 12, 2013, CA, unrep. (Mummery, Rimer & Lewison L.JJ.)

Compromise of claim – Tomlin order – rectification

CPR r.40.6. Bank (C) making £29m loan to development company (D1) owned by two individuals (D2) who gave guarantees. Loan to D1 and guarantees by D2 secured by charges over various parcels of land, including land owned by D1 (X acre) and land registered in names of D2 (Y acre). Upon D1 falling into financial difficulty, C appointing receivers and seeking to enforce all the charges. Upon challenge being made to the appointment, C commencing proceedings against D1 and D2 to enforce the charges. In course of trial, proceedings compromised and stayed on agreed terms scheduled to order made by court (Tomlin order). One of the terms of the schedule stipulating that, in return for their payment of £500k, D2 would be released from their guarantees. Upon realising that the effect of that term would be that their charges over Y acre would be discharged, C bringing claim for rectification of schedule so as to make clear that, notwithstanding D2's release from their guarantees, C were authorised to apply the proceeds of the sales of Y acre as well as X acre to the reduction of D1's indebtedness. Judge finding (1) that there was an assumption common to the parties that the charges over Y acre secured, not merely D2's liability as sureties, but also D1's indebtedness, (2) that that assumption was mistaken, because those charges secured only D2's liability, but (3) refusing rectification, principally on the ground that it would involve the granting of new, separate charges over Y acre (for which C could show no common intention) ([2012] EWHC 2264 (Ch)). **Held**, allowing C's appeal, (1) the compromise agreement was to the effect that C should retain its existing rights, (2) expressed in commercial terms, those rights were to sell X acre and Y acre for the purpose of discharging D1's indebtedness, (3) in any compromise of the claim, having the effect (in part) of releasing D2 from their personal liability, those existing rights could have been retained by various formulations, in effect placing a limitation on the release, not involving the granting of new charges, (4) the parties had agreed a limited release of D2 from their personal liability, but because of a drafting error, no such limitation was imposed by the Tomlin order, (5) the fact that the cause of that error was an erroneous assumption did not remove the error from the reach of rectification. ***Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd*** [1953] 2 Q.B. 450, CA, ***Swainland Builders Ltd v Freehold Properties Ltd*** [2002] EWCA Civ 560, [2002] 2 E.G.L.R. 71, CA, ***Chartbrook Ltd v Persimmon Homes Ltd*** [2009] UKHL 38, [2009] A.C. 1101, HL, ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 40.6.2 & 40.6.3.)

■ **OJSC TNK-BP HOLDING v LAZURENKO** [2013] EWCA Civ 137, February 21, 2013, CA, unrep. (Lewison L.J.)

Application for permission to appeal – respondent's costs

CPR rr.52.3, 52.7 & 52.10, Practice Direction 52C para.20. Company (C) bringing proceedings in Chancery Division against individual (D) to restrain publication of confidential information and obtaining interim injunction. At inter partes hearing, judge (1) discharging the injunction, (2) awarding D his costs on an indemnity basis, and (3) ordering £300,000 as an interim payment on account of costs to be made by October 30, 2012. C promptly filing an appellant's notice and single lord justice granting C's application for a stay of execution of the order discharging the injunction until disposal of the application for permission to appeal. C failing to make interim payment by due date. Subsequently, in dealing with the application for permission on the papers, another single lord justice (1) adjourning application for hearing by a two-judge court and (2) continuing stay, but subject to condition that it should lapse if the interim payment was not made by November 19. Upon receiving letter from Civil Appeals Office sent on November 16, D's legal team preparing for hearing on November 22 and expecting to attend. Before that date, C intimating that their appeal would be withdrawn. D applying for order for costs. **Held**, (1) para.20 provides that, in most cases an application for permission to appeal will be determined without the need for the respondent to file submissions or

attend a hearing, and in such circumstances an order for costs will not normally be made in favour of a respondent who voluntarily makes submissions or attends a hearing, but if the court directs the respondent to file submissions or attend a hearing it will normally order costs to the respondent if permission is refused, (2) although no direction had been made by the court, it was clearly contemplated that D and his legal team would at least be entitled to attend and be heard at the adjourned hearing, (3) further, because the order of the court below had been stayed, this was not a normal case, (4) in the circumstances D was entitled to his costs of dealing with the appeal from and including November 16 to be assessed and paid on an indemnity basis, but not including costs incurred in preparing for an anticipated application for security (as such application would not be necessary unless permission to appeal were granted). (See ***Civil Procedure 2012*** Vol.1 paras 52.3.17 & 52CPD.20.)

■ **SPACE AIRCONDITIONING PLC v GUY** [2012] EWCA Civ 1664, *The Times* February 28, 2013, CA. (Mummery, Rimer & Sullivan L.JJ.)

Erroneous finding of fact – whether irregularity in the proceedings – re-trial order

CPR rr.52.10(2)(c) & 52.11(3). Company (C) bringing claim against former sales manager (D1) and his new employer (D2). C alleging that D1 extracted, retained and used confidential information, and that D2 induced him to do so. Judge trying certain principal issues relevant to liability. In written judgment, handed down without having previously been made available to counsel in draft on the usual confidential basis, judge finding that C had not made out their case against D1, discharging interim injunction, and dismissing C's action ([2011] EWHC 2107 (Ch)). In refusing C permission to appeal, judge acknowledging that one of her findings of fact in her judgment "was plainly wrong". Single lord justice granting C permission to appeal. C submitting that the wrong finding gave rise to a real doubt as to whether the judge properly understood a central element of their claim, a misunderstanding that had consequences for other aspects of the judgment. **Held**, allowing the appeal and directing that the matter be remitted to the High Court to be re-tried by a different judge, (1) if a judgment contains what the judge acknowledges is an error when it is pointed out, the judgment should be corrected, unless there is some very good reason for not doing so, (2) a judgment should be an accurate record of the judge's findings and of the reasons for the decision, (3) it should not normally be necessary for a party to bring an appeal to correct an error, if it turns out that the parties and the judge agree that there is an error and that a correction should be made, (4) the judge's error in this case was on a material aspect of the case and was not merely typographical, (5) there was no point in remitting the matter to the judge for her to amplify her judgment, as she had already declined to do that when the error was pointed out and she decided not to make an amendment, (6) the retention of the erroneous finding in the judgment could properly be described as an "irregularity in the proceedings" which made the decision an "unjust" one within the meaning of r.52.11(3). (See ***Civil Procedure 2012*** Vol.1 paras 40.2.1, 52.10.7 & 52.11.4.)

■ **SYCAMORE BIDCO LTD v BRESLIN** [2013] EWHC 174 (Ch), February 14, 2013, unrep. (Mann J.)

Interest on damages awarded – interest end date

CPR r.40.8, Senior Courts Act 1981 s.35A, Judgments Act 1838 s.17, Admiralty and Commercial Courts Guide para. J14.1. Trial judge delivering two judgments (the second on January 15, 2013) awarding claimant (C) £5.25m by way of damages for breach of warranty in share purchase agreement (completed on November 9, 2007) against individual defendants (D). Period of over 2½ months elapsing between first judgment and final order. On matter of interest, C (1) noting that on February 5, 2009, base rate slumped to 1 per cent, followed by a further fall to 0.5 per cent a month later, and (2) submitting that they should be awarded s.35A interest on the award for the period November 9, 2007 (when the cause of action accrued), to January 15, 2013, at a rate of 3 per cent above base rate (with the latter date being the start date for s.17 interest). D contending for a variety of later start and end dates, and for an interest rate of 1 per cent above base rate. At extremes, difference of £1.3m apparent in the rival submissions. **Held**, (1) the power to award s.35A interest is discretionary, (2) generally, interest is to be awarded to compensate the claimant for being kept out of the money from the date when it has been established that it was due to him, (3) the word "judgment" in s.35A, s.17 and r.40.8 should be construed so as to mean the same thing in each provision, (4) in the instant case, the relevant "judgment" was the second judgment, as that was the judgment which finalised the amount of liability, (5) the start and end dates for s.35A interest should be as C submitted, (6) the appropriate rate of interest should be 3 per cent above base rate from time to time until February 5, 2009, and 2.5 per cent from that date up to the end date. Principles for award of s.35A interest explained and relevant authorities discussed (especially on postponement of start date). ***BP Exploration Co (Libya) Ltd v Hunt (No.2)*** [1979] 1 W.L.R. 783, ***Black Sea & Baltic General Insurance Co. Ltd. v Baker*** [1996] L.R.L.R. 353, CA, ***Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd*** [2012] EWHC 2429 (TCC), [2012] C.I.L.L. 3265, ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 40.8.8 & 40.8.9, and Vol.2 paras 2A–119.1 & 9A–124.)

■ **WALLACE v FOLLETT** [2013] EWCA Civ 146, March 7, 2013, CA, unrep. (Mummery, Richards & Lewison L.JJ.)

Structured settlement – periodic payments – terms of order – medical examinations

CPR r.41.8, Damages Act 1996 s.2A. Individual (C) suffering catastrophic injuries in a road traffic collision bringing negligence claim against insured driver (D). Judgment on liability entered in favour of C, subject to 30 per cent contributory negligence discount. On quantum, parties reaching agreement that damages should be paid by lump sum and periodical payments, but C and D's insurers (X) unable to agree certain details of terms to be included in the consent order. In particular, terms (1) as to C undertaking at request of X to submit to medical examinations at infrequent intervals, and (2) as to right of X to suspend payments where annual confirmation from C's GP that C still alive not forthcoming. District judge directing parties to submit alternative drafts for a court order. High Court judge determining the outstanding issues in C's favour, but granting permission to appeal. **Held**, allowing appeal, (1) X's commitment to making periodical payments to C, and also to other persons to whom X were similarly committed under other structured settlements, made it necessary for X to review and update regularly the reserves required to meet their total commitment, (2) current information on life expectancy of recipients of periodical payments would assist X in calculating a reasonably accurate reserve (a calculation not assisted by normal actuarial methods), (3) it was reasonable and proportionate for that purpose (or for purpose of obtaining an annuity cost quotation) to insert in the order a term to the effect that X were entitled, not more frequently than once every seven years, to require C to undergo a medical examination, limited to obtaining an opinion as to his general health, (4) there would be no virtue in requiring X to seek a court order before suspending payments where, in response to X's request, an annual confirmation of C still being alive had not been provided. Observations on jurisdiction of court to determine dispute between parties about the terms upon which they should settle litigation and whether court bound by the terms insofar as they are agreed. ***IB v CB*** [2010] EWHC 3815 (QB), ***Long v Norwich Union Insurance Ltd*** [2009] EWHC 715 (QB), ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 41.4.1 & 41.8.1, and Vol.2 para.3F–48.)

Statutory Instruments

■ **CIVIL COURTS (AMENDMENT) ORDER 2013** (SI 2013/415)

Civil Courts Order 1983. Amends Schs 1 & 3 to establish new county court named Chippenham and Trowbridge county court (C&TCC), and to discontinue Burton-on-Trent and Trowbridge county courts. Jurisdiction of closing courts transferred to receiving courts (including C&TCC) as named in directions made by the Lord Chancellor. By the Allocation and Transfer of Proceedings (Amendment) Order 2013 (SI 2013/421), C&TCC is designated as a family hearing centre. In force March 25, 2013. (See ***Civil Procedure 2012*** Vol.2 Appendix 1 paras AP–6+ & AP–9.)

■ **CIVIL LEGAL AID (PRELIMINARY PROCEEDINGS) REGULATIONS 2013** (SI 2013/265)

Legal Aid, Sentencing and Punishment of Offenders Act 2012 Sch.1 Pt 1 para.8 and Pt 4 para.5, Tribunals, Courts and Enforcement Act 2007 s.11(4)(a). Provide that for the purposes of para.5 proceedings for permission to appeal in accordance with s.11(4)(a) are not to be regarded as "preliminary" to proceedings described in para.8 (appeals relating to welfare benefits). Consequently, in cases relating to welfare benefits, applications to the First-tier Tribunal for permission to appeal a decision of the First-tier Tribunal to the Upper Tribunal will not be within the general scope of civil legal aid. In force April 1, 2013.

■ **CIVIL LEGAL AID (REMUNERATION) REGULATIONS 2013** (SI 2013/422)

Legal Aid, Sentencing and Punishment of Offenders Act 2012 ss.2, 5 & 41. Make provision about the payment by the Lord Chancellor to persons who provide civil legal services under arrangements made for the purposes of Pt 1 of the 2012 Act. Set out fees and rates and contain payment schemes for contracts between Lord Chancellor and providers of legal services. In force April 1, 2013.

■ **CIVIL PROCEDURE (AMENDMENT NO. 2) RULES 2013** (SI 2013/515)

CPR Pt 3 & Pt 44. Amend r.3.12 (Application of Section II (Costs Management) of Pt 3 (Case and Costs Management), and r.44.4 (Basis of assessment) in Pt 44 (General Rules about Costs), both as inserted in CPR by the Civil Procedure (Amendment) Rules 2013 (SI 2013/262), and as coming into effect on April 1, 2013. (See "CPR Update" section of this issue of CP News.)

■ **JUDICIAL COMMITTEE (APPELLATE JURISDICTION) RULES (AMENDMENT) ORDER 2013** (SI 2013/246)

Judicial Committee (Appellate Jurisdiction) Rules 2009. Introduces revised fee structure (r.42 and Appendix). Amends r.1 (Scope), r.13 (Notice of objection by respondent), r.18 (Form and filing of notice where permission not required), r.21 (The statement of facts and issues), r.29 (Judgments in open court), r.38 (Financially assisted persons)

and r.46 (Assessment of costs). In certain respects brings Judicial Committee procedure into line with Supreme Court procedure. Adds to 2009 Rules two new Parts, Pt 9 (Appeals against Pastoral Schemes) and Pt 10 (References under the Judicial Committee Act 1833 s.4). In force April 1, 2013. (See ***Civil Procedure 2012*** Vol.2 para.4B–0 et seq.)

- **LATE PAYMENT OF COMMERCIAL DEBTS REGULATIONS 2013** (SI 2013/395)

Late Payment of Commercial Debts (Interest) Act 1998, Directive 2011/7/EU. In 1998 Act, for purpose of implementing Directive on combating late payment in commercial transactions, amend s.4 (Period for which statutory interest runs), and s.5A (Compensation arising out of late payment). Introduces a right to compensation for the reasonable costs to the supplier of recovering a debt incurred if that amount exceed the fixed sums in s.5A(2), but does not affect rate of statutory interest in s.6. In force March 16, 2013. (See ***Civil Procedure 2012*** Vol.2 paras 9A–124, 9B–1338 & 9B–1343.)

- **LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012 (COMMENCEMENT NO. 6) ORDER 2013** (SI 2013/453)

Legal Aid, Sentencing and Punishment of Offenders Act 2012. Brings into force various provisions of the 2012 Act, including, in Pt 2 (Litigation funding and costs), on March 4, 2013, s.58 (Regulations by FSA), and s.60 (Referral fees: regulations), and, on April 1, 2013, s.56 (Rules against referral fees) and s.57 (Effect of rules against referral fees).

Practice Direction

- **PRACTICE DIRECTION 51I – THE SECOND MEDIATION PILOT SCHEME** (CPR Update 61 (forthcoming))

CPR Pt 51. Provides for a pilot scheme to operate in the CCMC, the Production Centre, and MCOL for a period of six months from April 1, 2013. Replaces Practice Direction 51H (The Mediation Service Pilot Scheme), which comes to an end on March 31, 2013, and which is now omitted. (See ***Civil Procedure 2012*** Second Cumulative Supplement, para.51HPD (p.40)).

In Detail

RECALLING AND RECONSIDERING JUDGMENT

The question whether, and if so, in what circumstances, a judge may recall and revise a judgment has been considered by the courts on number of occasions. The relevant authorities are summarised in the *White Book 2013* in Volume 1 at para.40.2.1 et seq. It is a question of some practical significance. It may be noted that it involves no exercise of any power given to judges by the CPR, or the interpretation of any rule therein, and therefore the need to give effect to the overriding objective stated in r.1.1 is not engaged. But this simple point is often over-looked in the case law, especially where one or other of the elements of the overriding objective can be called in aid (at least as a make-weight) of a decision either for or against recalling and reconsidering a judgment.

As is explained below, the question has now been considered by the Supreme Court of the United Kingdom in the context of child protection proceedings in the case of *In re L. (Children) (Preliminary Finding: Power to Reverse)*, [2013] UKSC 8, [2013] 1 W.L.R. 634, SC. Child protection proceedings are unusual, but the Supreme Court's decision is likely to have an impact on the way the question is approached in civil proceedings generally.

The facts were that, in care proceedings brought by a local authority (C) in a county court, a judge directed that the case should be listed for hearing for the purpose of determining certain facts about serious injuries suffered by a child (X) and the causes thereof (a preliminary fact-finding hearing). The main question to be tried was whether or not it was possible to identify either of X's parents, mother (M) or father (F), as the sole perpetrator of the injuries to X. The hearing was spread over 10 days between May and November 2011. Factual and expert evidence was tended, and written submissions were filed by the parties at the end of the hearing. (The trial was fragmented by the mother's mental illness and her fluctuating ability to participate in the proceedings.) The evidence concluded on November 25, and the judge directed written submissions to be filed by December 5, to enable her to give judgment on December 15.

On the latter date, the parties attended before the judge, as did a representative of the police (in order to pursue an application for the release of the judgment and other documentation). Contrary to what the parties anticipated, the judge did not hand down a written judgment, but gave an oral judgment. (When subsequently transcribed, it was headed "Preliminary outline judgment approved by the court".) In that judgment the judge found that F was the perpetrator of the injuries to X, he having snapped when under intolerable pressure, and exonerated M from responsibility. An order was drawn up (the "December order"), reflecting that judgment (describing it as a "summary judgment") and containing directions for further progress of the case to determine placement of the child. At a directions hearing on January 23, 2012, the judge directed that a hearing to determine the placement of X would commence on February 20, and also directed that, at the request of F, a written "perfected judgment" would be distributed by February 9 and would be deemed to have been handed down on that date.

In the event, the written "perfected judgment", was distributed on February 15. In that judgment the judge stated that she had "reconsidered the matter carefully" and had reached the view that "to identify a perpetrator would be to strain beyond the constraints of the evidence which I have both read and heard". Thus, the judge found that the injuries to X could have been caused either by F or by M. At a hearing on February 20, at the request of counsel for M for some clarification, the judge gave a further brief judgment and subsequently granted M permission to appeal. The appeal was pursued by the Official Solicitor, acting as M's litigation friend

The Court of Appeal, by majority, allowed the appeal, quashing the judgment of February 15, and ordering that the findings of the judgment of December 15 be restored. In the course of the hearing of the appeal, it was revealed to the Court that the December order was not sealed until February 24. This raised, for the first time in the instant proceedings, the question whether this was a case where the judicial power to reconsider and revise a draft judgment which had not yet been expressed in a perfected order had been properly exercised.

The majority consisted of Thorpe L.J. and Sir Stephen Sedley; Rimer L.J. delivered a dissenting judgment.

The judgment of Thorpe L.J. may be summarised as follows: (1) where, in child protection proceedings, there is a direction for a split trial, the purpose of the first hearing (the fact-finding trial) is to establish past events, thereby enabling professional and experts to assess future risks and benefits on the foundation of established facts, and the purpose of the second hearing (the welfare trial) is to settle the child's future, (2) although the first trial is not a separate exercise, but merely part of the whole process of trying the case, the purpose and objective of each trial are fundamentally different, however (3) the findings of facts stated in a judgment delivered at the first trial are not set out in stone so as to be incapable of being revisited at the second trial in the light of interim developments, but (4) such developments must be substantial, if not fundamental, (5) in this context, the principle that it is open to a judge to amend his judgment at any time before the order carrying it into effect is perfected generally does not license a judge,

where the order carrying into effect his fact-finding trial judgment has not been perfected, to amend that judgment before delivering his welfare trial judgment.

It may be noted, that Thorpe L.J. did not think that it was necessary to enter into a sustained discussion of the circumstances in which a judge may recall and amend a judgment before the order carrying it into effect is perfected. However, Sir Stephen Sedley, in agreeing with Thorpe L.J. in the result, and Rimer L.J in dissenting, both focussed on this matter and on the relevant leading cases, in particular *In re Barrell Enterprises* [1973] 1 W.L.R. 19, CA, *Robinson v Fernsby* [2003] EWCA Civ 1820, [2004] WTLR 257, CA, and *Stewart v Engel* [2000] 1 W.L.R. 2268, CA. Sir Stephen said there has to be a compelling reason for "re-opening" a judgment. There is a need "for some exceptional circumstance – something more than a change in the judges' mind – to justify reversal of a judgment". Rimer L.J. concluded that the circumstances were exceptional and that the Court "should support the judge's change of mind". His lordship explained (para.71):

"The judge's findings following the fact-finding hearing are directly relevant to the future care plans for the child. That consideration ought to be regarded as providing the key to the question before us. A court's determination of care proceedings such as these is amongst the most sensitive types of determination that a civil court is called upon to make: the circumstances of the case can, therefore, perhaps for that reason fairly be regarded as exceptional."

The Supreme Court granted F permission to appeal and reversed the Court of Appeal's decision. In summary, in a judgment given by Baroness Hale (with whom the other Justices agreed), the Court held as follows: (1) in giving judgment, a judge has jurisdiction to change his or her mind up until the order carrying the judgment into effect is drawn up and perfected, (2) under r.40.2(2)(b) an order is perfected by being sealed by the court, (3) whether a judge should exercise the discretion to recall a judgment will depend upon all the circumstances of the case, (4) its exercise is not limited to "exceptional" circumstances, (5) relevant considerations include (a) a plain mistake by the court, (b) the failure of the parties to draw the judge's attention to a plainly relevant fact or point of law, (c) the discovery of new facts after judgment was given, (d) whether any party has acted upon the judgment to his detriment (especially where this would be expected), but a carefully considered change of mind can be sufficient.

The Supreme Court disapproved of dicta in the cases of *In re Barrell Enterprises*, op cit, and *Stewart v Engel*, op cit, referring to "exceptional circumstances". As the commentary in the *White Book* referred to above indicates, the concern of the courts appears to have been to make clear that parties to ordinary civil proceedings should not have reason to believe that applications requesting judges to re-consider their judgments may be made routinely. Considered in that light, the insistence on something "exceptional" is perfectly understandable.

In modern times, not only in family and children proceedings, but in civil proceedings generally, there has been a growth in the instances in which cases are disposed of, not in a single trial judgment, but in a series of judgments. Sometimes the several judgments will deal with quite discrete matters, sometimes a latter judgment will supplement a former. Perhaps this tendency fosters both in judges and legal representatives the impression that judgments may be treated as "provisional". (The modern practice of circulating written judgments to advocates in confidence before handing down has probably aggravated the position.) That would be unfortunate. In the instant case, Baroness Hale stressed that a judge's best safeguard against having to revise a judgment is to give, in the first place, "a fully and properly reasoned judgment". The judgment given by the judge on December 15, variously described (as noted above) as a "preliminary outline judgment" or a "summary judgment", was not fully or properly reasoned, and the complications which arose stemmed from that.

It may be commented that, obviously, and for reasons elaborated by Thorpe L.J., it is particularly important that the risk of a judge having to revise a judgment should be kept to the minimum where the judgment is the first in the split trial of a child protection case. But it is also important in other proceedings where the disposal of the case by a series of trial judgments is necessary or convenient.

Perhaps another lesson to be learned from this case is that slackness in drawing up and perfecting court orders carrying into effect judgments given should be avoided. It seems that when argument in the instant case commenced in the Court of Appeal there was doubt as to whether the order carrying into effect the judge's judgment of December 15 had or had not been perfected by being sealed before the date of the judge's second judgment. Following inquiries then made, Thorpe L.J. was surprised when told that the court office involved "did not keep a record of the dates that orders are sealed" and that, until late February 2012, no one had bothered to ensure that the order was sealed. Sir Stephen Sedley, in casting doubt on the sense of making the question whether a judge can or cannot recall a judgment turn on whether an order had been sealed, said (para.74):

"Justice cannot depend on the functioning of an overworked and underfunded court office. Although the sealing of an order gives visible finality to a court's decision, it is the delivery of judgment which constitutes the decision. The drawing up of the consequent order is not unimportant (and before the days of mechanical recording and word processing was often critical), but it is not what gives finality to a judgment."

CPR Update

LATE CHANGES TO APRIL CPR AMENDMENTS

As was explained in this section in the last issue of CP News, the Civil Procedure (Amendment) Rules 2013 (SI 2013/262), laid before Parliament on February 12, come into force generally on April 1, 2013, subject to transitional provisions having various effects. It was further explained there that the new material contained in that statutory instrument and in CPR Update 60, which will contain amendments to and additions to practice directions (mainly as a consequence of the statutory instrument), will be included in a *White Book* Special Supplement due to be published on March 27, 2013.

At the time of writing, further changes to rules and to practice directions coming into effect on April 1, 2013, are in the process of being enacted or made. During the week beginning March 11, 2013, another statutory instrument, that is, the Civil Procedure (Amendment No.2) Rules 2013 (SI 2013/515), was enacted, and a further CPR Update, Update 61, was in the course of preparation. As a result of these late developments, the material to be published in the Special Supplement, though designed to provide *White Book* subscribers with access to all of the changes coming into effect on April 1, will not achieve that objective quite as adequately as was intended.

In what follows, an attempt is made to explain the further changes, insofar as they can be ascertained presently. In the Special Supplement they will be referred to in a Publisher's Note and Addendum but will not appear in the text of that Supplement in their appropriate places.

1. COSTS MANAGEMENT

In the last issue of CP News it was explained that, following the enactment and publication of SI 2013/262, it was announced that it had been decided that, before the commencement date, r.3.12(1) would be amended by a further statutory instrument adding a restriction to the scope of Section II (Costs Management) of Pt 3. That adjustment was made in the text of r.3.12(1) as presented in that issue of CP News. The adjustment has now been enacted in r.4 of the Civil Procedure (Amendment No. 2) Rules 2013 (SI 2013/515).

Thus, to repeat, r.3.12(1) reads as follows:

"(1) This Section and Practice Direction 3E apply to all multi-track cases commenced on or after 1st April 2013 except—

(a) cases in the Admiralty and Commercial Courts;

(b) such cases in the Chancery Division as the Chancellor of the High Court may direct; and

(c) such cases in the Technology and Construction Court and the Mercantile Court as the President of the Queen's Bench Division may direct,

unless the proceedings are the subject of fixed costs or scale costs or the court otherwise orders. This Section and Practice Direction 3E shall apply to any other proceedings (including applications) where the court so orders."

The result is that, in addition to not applying to multi-track cases commenced on or after April 1, 2013, Section II of CPR Pt 3 and Practice Direction 3E will also not apply to cases exempted by directions given by the Chancellor and the President of the Queen's Bench Division. The text of those directions was included in the last issue of CP News. The text of Section II of Pt 3 will be found in the forthcoming *White Book* Special Supplement.

2. BASIS OF COSTS ASSESSMENT

As was explained in the last issue of CP News, by the Civil Procedure (Amendment) Rules 2013 (SI 2013/262), the "Costs Parts" in the CPR are substantially re-arranged and numerous amendments are made. Part 43 (Scope of Costs Rules and Definitions) is omitted and Pts 44 to 48 are substituted entirely.

In the new Pt 44 (General Rules about Costs), what is at present r.44.4 (Basis of assessment), is now numbered r.44.3. As re-enacted, this provision differs in significant respects to its predecessor. The text of the rule will be found in the forthcoming *White Book* Special Supplement. The last of the sub-rules in r.44.3, sub-rule (7) is a transitional provision. It is being amended by the Civil Procedure (Amendment No.2) Rules 2013 so as to provide that certain provisions in the rule will not apply to costs incurred in respect of work done before April 1, 2013, as well as not applying to cases commenced before that date.

As amended, r.44.3 will read, in its entirety, as follows:

"**44.3.**—(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs—

(a) on the standard basis; or

(b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(Rule 44.5 sets out how the court decides the amount of costs payable under a contract.)

(2) Where the amount of costs is to be assessed on the standard basis, the court will—

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and

(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(Factors which the court may take into account are set out in rule 44.4.)

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

(4) Where—

(a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or

(b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis,

the costs will be assessed on the standard basis.

(5) Costs incurred are proportionate if they bear a reasonable relationship to—

(a) the sums in issue in the proceedings;

(b) the value of any non-monetary relief in issue in the proceedings;

(c) the complexity of the litigation;

(d) any additional work generated by the conduct of the paying party; and

(e) any wider factors involved in the proceedings, such as reputation or public importance.

(6) Where the amount of a solicitor's remuneration in respect of non-contentious business is regulated by any general orders made under the Solicitors Act 1974, the amount of the costs to be allowed in respect of any such business which falls to be assessed by the court will be decided in accordance with those general orders rather than this rule and rule 44.4.

(7) Paragraphs (2)(a) and (5) do not apply in relation to –

(a) cases commenced before 1 April 2013; or

(b) costs incurred in respect of work done before 1 April 2013,

and in relation to such cases, rule 44.4(2)(a) as it was in force immediately before 1 April 2013 will apply instead."

PRE-ACTION PROTOCOLS – PERSONAL INJURY CLAIMS

In CPR Pt 45 (Fixed Costs) as it presently exists, Section VI (rr.45.27 to 45.38) applies to claims that have been, or should have been, started in accordance with Practice Direction 8B, that is to say, in accordance with the provisions that state the procedure that constitute the "Stage 3 procedure" referred to in the RTA Pre-Action Protocol for low value personal injury claims (the "RTA Protocol") (see *White Book 2012* Vol.1 para.C13A-001).

As re-enacted in amended form by the Civil Procedure (Amendment) Rules 2013, with effect from April 1, 2013, what was Section VII is Section III (rr.45.16 to 45.29), and what was r.45.29 (Amount of fixed costs) is r.45.18. In r.45.18 it is stated that the fixed recoverable costs in relation to the RTA Protocol are, for Stage 1, £400, and for Stage 2, £800. In that respect, r.45.18 is no different to the former r.45.29.

However, it has been announced that, r.45.18 is to be amended by a forthcoming statutory instrument and that the fixed recoverable costs for Stage 1 and Stage 2 will be reduced to, respectively, £200 and £300. This reduction will come into force on April 30, 2013.

Until the end of February 2013, it was confidently expected that the RTA Protocol would be replaced by a new version, modifying the Stage 1 and Stage 2 processes in significant respects, and raising (from £10,000) the upper limit for claims falling within the Protocol to claims of up to £25,000, as valued by claimants, and that this new version would be brought into effect on April 1, 2013. Obviously, this would involve consequential amendments to certain CPR Parts (e.g. Pt 45 (Fixed Costs)) which would have to be made by the Rule Committee and be effected by a statutory instrument amending the CPR coming into force on the same date.

And it was also confidently expected that a new Pre-Action Protocol would be made, structured in a similar way to the RTA Protocol, but applying to personal injury claims where a claimant claims damages valued at no more than £25,000 in an employer's liability claim or in a public liability claim and also brought into effect on April 1, 2013 (the "EL/PL Protocol"). Again, obviously, this would involve consequential amendments to certain CPR Parts. And it would also involve the making of a practice direction similar to Practice Direction 8B.

In the event, those expectations were not fulfilled, and on February 27, 2013, it was announced that these developments were postponed. It is now expected that, in coming weeks, the revised RTA Protocol and the new EL/PL Protocol will be made (and published in a CPR Update) and that a statutory instrument making the necessary amendments to the CPR (including amendments to Pt 45 to provide for fixed costs payable in relation to claims to which the EL/PL Protocol applies) will be enacted, and will come into force on July 31, 2013.

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