CIVIL PROCEDURE NEWS

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In Brief

Cases

■ **CHALLINOR v JULIET BELLIS & CO** [2013] EWHC 620 (Ch), March 19, 2013, unrep. (Hildyard J.)

Interest included in sum for which judgment given – periods for which interest runs – appropriate rates

CPR rr.16.4(2) & 44.3(6) [r.44.2(6)], Senior Courts Act 1981 s.35A. In pursuit of property investment opportunity, group of investors (C) entering into arrangement under which their monies (£2.2m) were paid into client account of a solicitors' firm (D1) acting for special purpose vehicle set up under the scheme. C introduced to the scheme by a chartered surveyor (D2). C bringing proceedings against D1 for breach of contract and/or trust and against D2. D1 bringing Pt 20 claim against D2. Trial judge finding, amongst other things, that D1 had acted in breach of trust by paying out monies, giving judgment for C on their main claim, and dismissing D1's claim against D2 ([2012] EWHC 347 (Ch)). Parties making post-trial submissions on interest on the principal sum and interest on costs incurred. C claiming interest on the principal sum for two periods at different rates, (1) from the date of D1's receipt of funds (the earliest was August 21, 2007) to date on which money would have been returned to them but for the breach of duty (December 12, 2007), and (2) from December 13, 2007, to date of judgment. **Held**, (1) for the first period, the rate should not be that earned by D1 on their client account (as C contended), but one per cent above base rate, (2) for the second period: (a) neither the investment rate nor the unsecured borrowing rate was fair; (b) the appropriate rate was such rate as was reasonable to assume that persons in the position of C would have to pay for monies for geared investment; and (c) taking all considerations into account, the appropriate rate was not five per cent above base rate, as C contended, but three per cent above, (3) interest on costs was payable for the period starting with the date on which C paid the relevant invoices and ending on the date of judgment, and the appropriate rate of interest was five per cent above base rate. ***Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd***, December 11, 1987, CA, unrep., ***Attrill v Dresdner Kleinwort*** [2012] EWHC 1468, May 30, 2012, unrep., ***Sycamore v Bidco Ltd v Breslin*** [2013] EWHC 174 (Ch), February 14, 2013, unrep., ref'd to. (See ***Civil Procedure 2013*** Vol.1 paras 7.0.16, 40.8.9 & 44.3.14, and Vol.2 para.9A-124.)

■ **DICKINSON v TESCO PLC** [2013] EWCA Civ 226, March 19, 2013, CA, unrep. (Moore-Bick, Rimer & Aikens L.JJ.)

Appeal court's order for re-trial – correction of order – limiting issues to be re-tried

CPR rr.40.12(1), 52.10(2)(c) & 52.11(2). In four unrelated county court claims arising out of road traffic accidents in which claimant drivers (C) brought proceedings against other drivers (D), C claiming for (amongst other things) cost of hiring from company (X) on credit a replacement vehicle. In each case, D's insurers (Y) relying on information provided to them by another company (Z) (now in liquidation) as evidence (often tendered under a Civil Evidence Act notice) to dispute the hire costs claimed. In each case, in finding that the appropriate daily hire rate was less than that charged by X and claimed by C, courts relying on such evidence. X, suspecting that the information provided by Z in these and in many other cases was inaccurate, and collecting evidence which tended to show that, in the four cases, the information provided by Z to Y was dishonest and unreliable. C (at instigation of X) applying for permission to appeal and to adduce fresh evidence on the appeal. Court of Appeal, granting permission, allowing appeals, and ordering re-trials ([2013] EWCA Civ 36). At subsequent hearing, Court stating (1) that there was a discrepancy between the Court's judgment and the Court's order carrying it into effect, (2) that in exercise of the power given by r.40.12(1) the order should be corrected so as to make clear that no issue other than the rate of hire could be reopened at any re-trial, either in any of the four test cases or in other cases where, in the light of the Court's judgment, re-trials are ordered, thereby making it clear that such issues as the need for a replacement vehicle, or the length of the period of hire should not be reopened. (See ***Civil Procedure 2013*** Vol.1 paras 40.12.1 & 52.10.7.)

■ **EURO-ASIAN OIL SA v ABILO (UK) LTD** [2013] EWHC 485 (QB), March 12, 2013, unrep. (Burton J.)

Service of claim for out of jurisdiction – extension of time

CPR rr.6.40, 7.5 & 7.6, Practice Direction 7A para.8.2. On April 5, 2012, foreign company (C) issuing claim form against foreign individual (D3) and an English company (D1) (said to be controlled by D3) and against a Swiss bank (D2). C's allegations against D1 and D3 based on fraud in relation to transactions in which D2 were not involved but in relation to which it was alleged D2 had issued letters of indemnity. In June 2012, D2's London solicitors advising C that they had no instructions to accept service. Within six-month period for service

fixed by r.7.5, Commercial Court judge granting C's application (made ex parte without notice and dealt with on paper) for order under r.7.6 extending time for service of claim form on D2. D2 applying to set aside the order granting that extension. **Held**, granting the application, (1) C were responsible for the entirety of the delay in effecting service within the period fixed by r.7.5, caused by a concatenation of their deliberate decisions, some understandable but some for which there was no justification, (2) it would be entirely inappropriate and misconceived to ascribe any delay or fault in effecting service within time to the fact that D2 did not choose to instruct their London solicitors to accept service, (3) there is no principle to the effect that the court will extend time in the absence of a good reason for delay in service where (as in the instant case) no limitation issues arise and the defendant has received a copy of the claim form. Rules and authorities on the exercise of the discretion to extend to for service examined and explained. Observations on practice where respondent does not have due notice of ex parte application. ***Cecil v Bayat*** [2011] EWCA Civ 135, [2011] 1 W.L.R. 3086, CA, ***Hoddinott v Persimmon Homes (Wessex) Ltd*** [2007] EWCA Civ 1203, [2008] 1 W.L.R. 806, CA, ref'd to. (See ***Civil Procedure 2013*** Vol.1 paras 7.6.2 & 7APD.8.)

■ **GEOPHYSICAL SERVICE CENTRE CO. v DOWELL SCHLUMBERGER (ME) INC** [2013] EWHC 147 (TCC), January 18, 2013, unrep. (Stuart Smith J.)

Security for costs – whether reason to believe claimant unable to pay – claimant having benefit of ATE policy

CPR rr.25.12 & 25.13. Jordanian company (C) (a family business controlled by an individual) entering into joint venture agreement with Panamanian company (D) to bid for and, if successful, to perform contract with an oil company for the providing of exploration services. C commencing proceedings against D alleging breach of obligations under the agreement. D making counterclaim. C disclosing to D that they had benefit of ATE policy. D's estimate of their costs at £900k approved by the court. D applying for order requiring C to provide security for their costs in sum of £500k. **Held**, dismissing the application, (1) the burden was on D to show that there was "reason to believe" that C would be unable to pay their costs, but D were not required to prove upon a balance or probabilities that C were unable to pay, (2) an ATE policy may suffice so that the court is not satisfied that there is reason to believe that a claimant will be unable to pay a defendant's costs, (3) the question in this case was not whether the assurance provided by C's ATE policy was better security than cash or its equivalent, but whether there was reason to believe that C would be unable to pay D's costs despite the existence of the policy, (4) were it not for the policy, there would be reason to believe that C would be unable to pay, (5) there was no more than a theoretical risk that C would breach the conditions of the policy, (6) there was no evidence to support a submission that there were reasons to believe that there were ground on which the insurers could or would seek to argue that they were entitled to avoid or cancel the policy to the detriment of D, (7) in any event, if the insurers sought to cancel, they would still be liable to indemnify C against liability for costs incurred up to the date of cancellation, (8) in all the circumstances, it could not be said that it would be just to make the order sought by D. ***Michael Phillips Architects Ltd v Riklin*** [2010] EWHC 834 (TCC), [2010] Lloyd's Rep. I.R. 479, ***Nasser v United Bank of Kuwait*** [2001] EWCA Civ 556, [2002] 1 W.L.R. 1868, CA, ***Al-Koronky v Time-Life Entertainment Group Ltd*** [2006] EWCA Civ 1123, [2007] 1 Costs L.R. 57, CA, ref'd to. (See ***Civil Procedure 2013*** Vol.1 paras 25.13.1 & 25.13.3.)

■ **HENDERSON v ALL AROUND THE WORLD RECORDINGS LTD** [2013] EWPCC 18, March 27, 2013, unrep. (Judge Birss QC)

Patents county court costs capping regime – discretion to depart from – success fees and insurance premiums

CPR rr.43.2, 44.3, 45.41 & 45.42, Costs Practice Direction s.25C. Singer/composer assigning (C) copyright in her musical works to a corporation and registering a particular work with MCPS as 100 per cent her own. That work released by a record company (D1) and earning substantial royalties for D1, none of which were paid to C. Under a contract with another record company (D2) D1 obliged to share the royalties. C asserting that she did not consent to that release and that her rights had been infringed. With benefit of CFA and ATE insurance, C bringing claim in PCC against D1 pleading a claim for infringement of copyright and performer's rights in the work by D1. D1 issuing Pt 20 claim against D2. C conceding that copyright claim was misconceived and not pursuing it. At trial, judge finding that C had not consented or acquiesced to the release and holding that her performer's rights had been infringed. Judge awarding D1 their costs of the misconceived copyright claim and C her costs of the performer's rights claim. C submitting that the CFA success fee and the ATE premium were not covered by the PCC cost capping system. **Held**, rejecting that submission, (1) r.45.42(1) limits the total costs to be ordered at the final determination of liability as no more than £50,000, (2) the term "costs" is defined in r.43.2(1)(a) as including any additional liability incurred under a funding arrangement, (3) that includes ATE insurance premiums and CFA success fees (r.43.2(1)(l) & (m)), (4) further, not only are ATE premiums and CFA success fees covered by the

overall £50,000 cap, they are covered by the scale limits set out in Section 25C, (5) however, the court retains a discretion to depart form the costs cap, but to depart from the cap in anything other than a truly exceptional case (of which the instant case was not an example) would undermine the point of the PCC costs capping system. Judge assessing C's costs at £92,203 and ordering D1 to pay C £52,484. [Ed.: since April 1, 2013, r.45.41 & r.45.42 are, respectively r.45.30 & r.45.31.] ***Westwood v Knight*** [2011] EWPCC 11, May 11, 2011, unrep., ref'd to. (See ***Civil Procedure 2013*** Vol.1 paras 45.43.2 & 45PD.11.)

■ **NELSON'S YARD MANAGEMENT CO v EZIEFULA** [2013] EWCA Civ 235, March 21, 2013, CA, unrep. (Arden & Beatson L.JJ. and Ryder J.)

Discontinuance of proceedings – liability for costs – conduct of defendant

CPR rr.38.6 & 44.3 [r.44.2]. In January 2008, leaseholders of premises and owners of freehold reversion (C) bringing claim against freehold owner of neighbouring premises (D) seeking injunctive relief to restrain D from continuing further development of his property (in particular, excavation work) and to require D to allow their expert structural engineer access to inspect effect of excavation on their foundations, and damages. On May 3, 2008, D serving defence, disputing many of the matters asserted by C. Before commencement of proceedings, D failing to respond to C's pre-action correspondence. After commencement, parties entering into negotiations which continued intermittently during 2008 to 2011 with the proceedings being stayed from time to time. On March 29, 2012, with the permission of the court, C serving and filing a notice of discontinuance. C making application for costs. C submitting that D's egregious and unreasonable conduct before and after commencement of the proceedings provided cogent reasons for the court, in the exercise of its discretion as to costs, to depart from the default rule in r. 38.6(1). Judge dismissing the application. **Held**, allowing C's appeal, (1) although the judge referred to D's failure to respond to C's pre-action correspondence, he erred in principle in concluding that consideration of the consequences of this would involve him in a consideration of the merits of C's claim, (2) alternatively, as that failure was undoubtedly a relevant consideration in the exercise of the discretion to disapply the default rule in r.38.6(1), the judge erred in not taking it into account in determining whether C had satisfied the burden of showing that the rule should be disapplied, (3) generally, a claimant who discontinues must show some form of unreasonable conduct on the part of the defendant which provides a good reason for departing from the default rule, (4) in exercising the discretion afresh, the appropriate order was that D should pay C's costs to May 3, 2008 (when the defence was served) and that there should be no order for costs thereafter. ***Teasdale v HSBC Bank Plc*** [2010] EWHC 612 (QB), [2010] 4 All E.R. 630, ***Brookes v HSBC Bank Plc*** [2011] EWCA Civ 354, [2012] 3 Costs L.O. 285, CA, ***Messih v McMillan Williams*** [2010] EWCA Civ 844, [2010] C.P. Rep. 41, CA, ***Walker v Walker*** [2005] EWCA Civ 247, [2006] 1 W.L.R. 2194, CA, ref'd to. (See ***Civil Procedure 2013*** Vol.1 para.38.6.1.)

■ **WRIGHT v MICHAEL WRIGHT (SUPPLIES) LTD** [2013] EWCA Civ 234, March 27, 2013, CA, unrep. (Hughes L.J., David Richards J. & Sir Alan Ward)

Trial on documents – dispensing with oral evidence – procedural impropriety

CPR rr.32.1 & 52.10(2)(c). Individual (C) forming commercial company (D1). Under a sale agreement designed to enable an employee (X) to use future profits to buy the company, a new company (D2) in which C and X were shareholders created and purchasing C's shares in D1. C remaining involved in the business as a consultant and retaining benefit of director's loans. C making loans to D2. C and X falling into disagreement. C commencing two county court claims against D1 and D2; one for the repayment of loans and the other for consultancy fees and monies unpaid under the share sale agreement. Claims consolidated and transferred to the Chancery Division. C1 and X (representing D1 and D2) acting in person. At start of trial, judge presented with written evidence, including a detailed witness statement prepared by an accountant (Y) who had acted for the companies explaining the accounts. Judge adjourning trial, and, for purpose of enabling him to clarify the issues, directing parties to serve schedules dealing with the disputed matters item-by-item and indicating that thereafter he would direct whether "there should be a further hearing for evidence" or whether he should decide the case "on the basis of the written evidence". In the event, judge adopting latter approach and circulating to parties "draft" judgment favourable to C, but at handing down hearing, in light of X's submissions, adjourning proceedings and at subsequent hearing directing parties to make further written submissions directed to their respective positions on particular issues. Subsequently, judge giving judgment for C in which Y's evidence heavily relied on but not accepted entirely. On the defendants' appeal, **held**, allowing the appeal and remitting the matter for re-hearing by a different judge, (1) at no stage did X agree to dispense with a hearing at which oral evidence, in particular that of Y, could be heard, (2) the judge made findings against the evidence of Y which X wished to call, (3) the course adopted by the judge was procedurally improper. (Observations on burdens placed on court where parties unrepresented, and on question whether court should be able to direct stay for

mediation on own initiative.) ***Halsey v Milton Keynes General NHS Trust*** [2004] EWCA Civ 576, [2004] 1 W.L.R. 3002, CA, ref'd to. (See further, "In Detail" section of this issue of CP News.) See ***Civil Procedure 2013*** Vol.1 paras 26.4.1, 32.1.1 & 52.10.7.)

Statutory Instruments

CIVIL PROCEDURE (AMENDMENT NO. 3) RULES 2013 (SI 2013/789)

CPR r.45.18. Amount of fixed costs in relation to the RTA Protocol. Amends Table 6 to reduce Stage 1 costs from £400 to £200, and Stage 2 costs from £800 to £300. Provides that those reductions apply only to a claim where the Claim Notification Form is sent on or after April 30, 2013 (the date on which this statutory instrument comes into force). Corrects spelling error in para.(5)(b). (See ***Civil Procedure 2013 Special Supplement*** para.45n.18.)

RECOVERY OF COSTS INSURANCE PREMIUMS IN CLINICAL NEGLIGENCE PROCEEDINGS (NO. 2) REGULATIONS 2013 (SI 2013/739)

Courts and Legal Services Act 1990 s.58C. Made under s.58C, as inserted by Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.46(1). Revoke and replace the Recovery of Insurance Premiums in Clinical Negligence Proceedings Regulations 2013 (SI 2013/92). Recoverabilty of insurance premiums by way of costs in clinical negligence proceedings. New limitations on such recoverability. Do not apply to costs orders made in favour of a party to proceedings who took out a costs insurance policy before April 1, 2013 (s.46(3)). In force April 1, 2013. See further "In Detail" section of this issue of CP News. (See ***Civil Procedure 2013 Special Supplement*** paras 43n.15, 48nPD.4, 7A2-1, 7A2-11, 7A2-13 & 7A2-22.)

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012 (CONSEQUENTIAL, TRANSITIONAL AND SAVING PROVISIONS) REGULATIONS 2013 (SI 2013/534)

Legal Aid, Sentencing and Punishment of Offenders Act 2012 ss.25 & 149. In exercise of powers conferred by s.149, for purpose of reflecting replacement of the legal aid scheme under Pt 1 of the 2012 Act, makes consequential amendments to CPR rr.42.2, 46.9, 47.8, 47.18 & 74.13, and to heading to Section VI Pt 47. For same purpose, also amends provisions in Civil Proceedings Fees Order 2008 (SI 2008/1054) Sch.1, Court Funds Rules 2011 (SI 2011/1734) r.28, Non-Contentious Probate Fees Order 2004 (SI 2004/3120) Sch.1A, Court of Protection Rules 2007 (SI 2007/1744) rr.6 & 151, and Supreme Court Fees Order 2009 (SI 2009/2131) Sch.2. This statutory instrument amended by SI 2013/621. Made March 7, 2013, laid March 11, 2013, in force April 1 , 2013. (See ***Civil Procedure 2013*** Vol.1 paras 42.2 & 74.13, and ***Civil Procedure 2013 Special Supplement*** paras 46n.9, 47n.8, 47n.18.)

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012 (CONSEQUENTIAL, TRANSITIONAL AND SAVING PROVISIONS) (AMENDMENT) REGULATIONS 2013 (SI 2013/621)

Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.149. Amends SI 2103/534. Regulation 3 adds reg.9A (Costs) to make transitional provision in relation to the Civil Legal Aid (Costs) Regulations 2013 (SI 2013/611). Regulation 4 adds para.26 to Sch.2 to amend reg.5(2)(c)(i) of the Damages-Based Agreements Regulations 2013 (SI 2013/609) (funding information to be given before agreement is made) to reflect replacement of the legal aid scheme by Pt 1 of the 2012 Act. In force April 1, 2013. (See ***Civil Procedure 2013 Special Supplement*** paras 3F–251 & 7A2-30.)

Court Guides

A new edition of the Chancery Guide (7th edn, 2013) was published in March 2013 (replacing the 6th edition, see ***Civil Procedure 2013*** Vol.2 para.1A-1 et seq). The Admiralty and Commercial Courts Guide (9th edn, 2011) (see ibid., para.2A–39 et seq) was updated in certain respects in March 2013. The texts of these Guides as they appear in the *White Book* will be amended accordingly in Supplement 1 to the 2013 edition.

In Detail

COSTS INSURANCE IN CLINICAL NEGLIGENCE CLAIMS

Section 58C was inserted in the Courts and Legal Services Act 1990 by s.46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Section 58C(1) states that a costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy. But the implementation and effect of that sub-section are subject to important qualifications.

First, s.48 of the 2012 Act states that s.46 (and therefore s.58C of the 1990 Act) may not be brought into force in relation to diffuse mesothelioma proceedings until a review has been undertaken by the Lord Chancellor as to the effects on such proceedings of the abolition of the recoverability (as costs) of costs protection insurance premiums.

Secondly, the effect of arts 3 and 4 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013 (SI 2013/77) was to bring s.46 (and therefore s.58C of the 1990 Act) into force for civil proceedings generally on April 1, 2013, subject, not only to the statutory exception of diffuse mesothelioma proceedings provided for by s.48, but subject also to the saving that the section should not be brought into force on that date for the purpose of certain other civil proceedings (in particular, publication and privacy proceedings, and proceedings in respect of, and relating to, insolvency).

Thirdly, as was explained in Issue 2/2013 of CP News (February 28, 2013), s.58C(1) of the 2013 Act, though abolishing the recoverability as costs of costs protection insurance premiums, is subject to s.58C(2) which states that the Lord Chancellor may by Regulations provide that a costs order may include provision requiring the payment of an amount in respect of all or part of the premium of a costs insurance policy, where: (a) the order is made in favour of a party to clinical negligence proceedings of a "prescribed description"; (b) the party has taken out a costs insurance policy insuring against the risk of incurring a liability to pay for one or more expert reports in respect of clinical negligence in connection with the proceedings (or against that risk and other risks); (c) the policy is of a "prescribed description"; (d) the policy states how much of the premium relates to the liability to pay for such an expert report or reports, and the amount to be paid is in respect of that part of the premium.

The text of s.58C is set out in para.7A2–11 in the Special Supplement to *White Book 2013* (see also Vol.2 para.143.1+).

The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations 2013 (SI 2013/92) were made under s.58C, and are set out in para.7A2–22 et seq of the Special Supplement.

Those Regulations have been revoked and replaced by the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No. 2) Regulations 2013 (SI 2013/739). The latter Regulations were laid before Parliament on March 28, 2013, and came into effect on April 1, 2013.

The earlier Regulations were subject to criticism by the Parliamentary Joint Committee on Statutory Instruments on the ground that the operational part, that is, reg.2 (ibid. at para.7A2–24), was in breach of s.58C(2) in certain respects; in particular, that provision applied: (1) to all clinical negligence proceedings, and not (as s.58C(2)(a) states) only to clinical negligence proceedings "of a prescribed description"; and (2) to all costs insurance policies, and not (as s.58C(2)(c) states) only to policies "of a prescribed description".

In the new Regulations, reg.2 revokes the former Regulations, and reg.3 is the operational part. Regulation 3 is drafted in a manner designed to meet the comments made by the Joint Committee and states as follows:

"**3.** A costs order made in favour of a party to clinical negligence proceedings who has taken out a costs insurance policy may include provision requiring the payment of an amount in respect of all or part of the premium of that policy if—

(a) the financial value of the claim for damages in respect of clinical negligence is more than £1,000; and

(b) the costs insurance policy insures against the risk of incurring a liability to pay for an expert report or reports relating to liability or causation in respect of clinical negligence (or against that risk and other risks).

(2) The amount of the premium that may be required to be paid under the costs order shall not exceed that part of the premium which relates to the risk of incurring liability to pay for an expert report or reports relating to liability or causation in respect of clinical negligence in connection with the proceedings."

In the Special Supplement to *White Book 2013*, the Regulations made under s.58C(2) of the 1990 Act, but which are now revoked, are referred to in various commentary paragraphs for the purpose of bringing the terms of reg.2 of those

Regulations to the attention of subscribers. Those paragraphs are: para.43n.15 (pp.67 & 68), para.7A2–1 (p.213), and para.7A2–13 (p.220). The commentary therein should now be read in the light of reg.3 of the new Regulations as set out immediately above.

It may be noted that the earlier Regulations are referred to in para.4.2 of Practice Direction 48 (ibid. para.48nPD.4, p.193). Obviously, that reference should now be read as are reference to the later Regulations.

CASE ALLOCATION – FORMS AND DIRECTIONS

As a consequence of the numerous changes made to the CPR coming into effect on April 1, 2013, some new forms have been issued and some existing forms have been amended. Some of the new forms replace existing forms (which are phased out). Some of the amendments made to existing forms are substantial, but most are quite minor (e.g. those simply reflecting changed terminology).

In Issue 2/2013 of CP News (February 28, 2013) it was noted that amendments to CPR Pt 26 and Pt 29 and to practice direction provisions supplementing those Parts coming to effect on April 1, 2013, make significant changes to the procedures for the allocation of cases to case management tracks and the making of initial directions. The new material may be found in the Special Supplement to the 2013 edition of the *White Book*. New and amended forms accompanying the relevant CPR provisions (referred to below) will be published in future CPR Updates.

Under CPR r.26.3 and Practice Direction 26 para.2.1 (as recently amended), if a defendant files a defence a court officer will provisionally decide the track which appears to be most suitable for the claim and will serve a notice of proposed allocation on each party. That notice will be in Form N149A, N149B or N149C according to whether the provisional decision is to allocate the case to, respectively, the small claims track, the fast track or the multi-track.

In each instance, the notice will, amongst other things, require the parties to file a completed "directions questionnaire".

Where the claim is allocated to the small claims track, the appropriate form for the directions questionnaire is Form N180, and where it is allocated to either of the other two tracks it is Form N181.

As amended by r.10(a) of the Civil Procedure (Amendment) Rules 2013, r.29.1 states in sub-rule (2):

"When drafting case management directions both the parties and the court should take as their starting point any relevant model directions and standard directions which can be found online at *www.justice.gov.uk/courts/procedure-rules/civil* and adapt them as appropriate to the circumstances of the particular case."

Where the claim is provisionally allocated to the fast track or the multi-track, the notice of provisional allocation sent by the court to the parties will also require them to file proposed directions by a date specified in the notice. Form N181 states (in Section K) that all proposed directions for fast track cases "must be based on CPR Part 28" and all proposed directions for multi-track cases "must be based" on the directions to be found on the website now referred to in r.29.1(2). (In the parenthesis now following Practice Direction 26 para.2.3(2) the latter directions are referred to as "specimen directions".) On the website referred to above, standard directions for multi-track cases are found by clicking on "Standard Directions" and then on "Wish to Compose an Order?". There is then revealed a list of "standard directions orders" for multi-track cases beginning with directions "suitable for any simple case without experts and no more than standard disclosure", followed by directions suitable for specific types of claim (personal injury, clinical negligence etc) and cases that are not "simple". Although Form N181 states that proposed directions for multi-track cases "must be based" on the directions to be found on the website it should be remembered that all that r.29.1(2) requires is that if there are any relevant directions on the website, they should be used as "a starting point" and adapted as appropriate to the circumstances of the case. It is the terms of this rule and not those of Form N181 which governs. The recent amendments to rules and practice directions do not affect para.4 of Practice Direction 29 (directions on allocation in multi-track cases).

Form N181 states (in Section D2) that if in the directions proposed by the parties "a track which is not the normal track for the claim" is proposed brief reasons should be given for that choice. (Presumably, in Section D2 "a track attached which" should read "a track which".) This reflects para.2.2(1) of Practice Direction 26 which (as recently amended) states that if a party wishes to give the court further information which is believed to be relevant to allocation or case management it shall be given when the party files the directions questionnaire and copied to all other parties.

LITIGANTS IN PERSON AND MEDIATION

In *Wright v Michael Wright (Supplies) Ltd* [2013] EWCA Civ 234, March 27, 2013, CA, unrep., the Court of Appeal dealt with an appeal in a case where the parties were two businessmen who had fallen into serious disagreement

over the sale of a business (for summary, see "In Brief" section of this issue of CP News). Reluctantly, the Court held that the appeal should be allowed and a new trial ordered.

In giving the principal judgment, Sir Alan Ward stated that the case demonstrated two particular problems. The first was how to bring "order to the chaos" which litigants in person invariably, and wholly understandably, manage to create in putting forward their claims and defences. On this matter his lordship explained (at para.2):

"Judges should not have to micro-manage cases, coaxing and cajoling the parties to focus on the issues that need to be resolved. Judge Thornton did a brilliant job in that regard yet, as this case shows, that can be disproportionately time-consuming. It may be saving the Legal Services Commission which no longer offers legal aid for this kind of litigation but saving expenditure in one public department in this instance simply increases it in the courts. The expense of three judges of the Court of Appeal dealing with this kind of appeal is enormous. The consequences by way of delay of other appeals which need to be heard are unquantifiable. The appeal would certainly never have occurred if the litigants had been represented. With more and more self-represented litigants, this problem is not going to go away. We may have to accept that we live in austere times, but as I come to the end of eighteen years service in this court, I shall not refrain from expressing my conviction that justice will be ill served indeed by this emasculation of legal aid."

The other members of the Court, Hughes L.J. and David Richards J. expressly agreed with Sir Alan Ward on this matter.

The second problem that Sir Alan identified as being demonstrated by this case was that it is not possible for a court "to shift intransigent parties off the trial track onto the parallel track of mediation". On this matter his lordship explained (at para.3):

"Both tracks are intended to meet the modern day demands of civil justice. The *raison d'être* (or do I simply mean excuse?) of the Ministry of Justice for withdrawing legal aid from swathes of litigation is that mediation is a proper alternative which should be tried and exhausted before finally resorting to a trial of the issues. I heartily agree with the aspiration and there are many judgments of mine saying so. But the rationale remains a pious hope when parties are unwilling even to try mediation. Judge Thornton attempted valiantly and persistently, time after time, to persuade these parties to put themselves in the hands of a skilled mediator, but they refused. What, if anything, can be done about that? You may be able to drag the horse (a mule offers a better metaphor) to water, but you cannot force the wretched animal to drink if it stubbornly resists. I suppose you can make it run around the litigation course so vigorously that in a muck sweat it will find the mediation trough more friendly and desirable. But none of that provides the real answer."

His lordship suggested that it was perhaps time to review the rule in *Halsey v Milton Keynes General NMS Trust* [2004] EWCA Civ 576, [2004] 1 W.L.R. 3002, CA, where the Court of Appeal stated that to oblige truly unwilling parties to refer their disputes to mediation "would be to impose an unacceptable obstruction on their right of access to the court". His lordship added (ibid.):

"Does CPR r.26.4(2)(b) allow the court of its own initiative at any time, not just at the time of allocation, to direct a stay for mediation to be attempted, with the warning of the costs consequences, which *Halsey* did spell out and which should be rigorously applied, for unreasonably refusing to agree to ADR? Is a stay really "an unacceptable obstruction" to the parties right of access to the court if they have to wait a while before being allowed across the court's threshold? Perhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at *Halsey* in the light of the past 10 years of developments in this field."

It seems that the debate about the *Halsey* decision will continue. Lord Woolf and Lord Justice Jackson both concluded, in their respective reviews of civil justice, that mediation should not be mandatory in all proceedings. Further, Lord Dyson M.R. recently reaffirmed his view that he and the other members of the Court in the *Halsey* case (which included Sir Alan Ward) were right not to require mandatory mediation because otherwise the pressure of having to incur the cost of mediation could again persuade defendants to settle unmeritorious cases (Holdsworth Club Presidential Address, School of Law, University of Birmingham, March 15, 2013). Other distinguished members of the judiciary, however, have taken a different view. For example, Lord Clarke, when Master of the Rolls, expressed the opinion that it is "it is at least strongly arguable that the court retains a jurisdiction to require parties to enter into mediation" and went on to say "that the court has sufficient powers at present routinely to direct the parties to take part in a mediation process" (see *White Book 2013* Vol.2 para.14–9, p.2918). Might the increase of litigants in person force a review of *Halsey* and produce some clarity about the extent to which the court can require parties to enter into mediation?

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