CIVIL PROCEDURE NEWS

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■ **EMAILGEN SYSTEMS CORP v EXCLAIMER LTD** [2013] EWHC 167 (Comm), February 7, 2013, unrep. (Teare J.)

Undertaking by defendant in lieu of freezing order – release therefrom

CPR r.25.1(1)(f), Civil Jurisdiction a Judgments Act 1982 s.25. In a dispute over a joint venture agreement, Canadian company (C) commencing proceedings in a Canadian court against an English company (D) and applying ex parte to the English court for a freezing order in support of those proceedings. Judge granting application freezing D's assets to value of £520,000. Following negotiations before the return date, parties reaching an agreement under which it was agreed, amongst other things, that D would deposit with their solicitors and leave with them pending the outcome of the proceedings the sum of £520,000 as security against any award in those proceedings. At return date, court approving and, by consent, making order reciting the agreement and staying C's application to continue the freezing order with liberty to apply. Subsequently, D applying for an order releasing them their undertaking as to security. **Held**, dismissing application, (1) by the consent order, C's application to continue the freezing order was disposed of by D's undertaking, (2) this was not a case where such an application was to be determined at a later date, with the respondent's undertaking lasting only until that date, (3) in the circumstances, it was not open to D to seek release from its undertaking on the grounds that a freezing order ought never to have been granted ex parte, (4) D's right to argue that there was no basis for such an order had been compromised by the terms of their undertaking, (5) D could only seek release from or modification of the undertaking by showing "good cause" (normally changed circumstances making the continuation of the undertaking unnecessary, oppressive or unjust), (6) D had demonstrated no good cause. Distinction between adjournment and stay explained. ***Chanel Ltd v FW Woolworth & Co Ltd*** [1981] 1 W.L.R. 485, CA, ***Butt v Butt*** [1987] 1 W.L.R. 1351, CA, ***Pet Plan Ltd v Protect-A-Pet Ltd*** [1988] F.S.R. 34, CA, ***Esal (Commodities) Ltd. v Mahendra Pujara*** [1989] 2 Lloyd's Rep. 479, CA, ***In re Kingsley Healthcare Ltd***, September 25, 2001, unrep., ***Secretary of State for Trade and Industry v Bell Davies Trading Ltd (Note)*** [2004] EWCA Civ 1066, [2005] 1 All E.R. 324, CA, ref'd to. (See ***Civil Procedure 2013*** Vol.1 paras 3.1.3, 3.1.7 & 25.1.25.9, Vol.2 para.9A–180, and ***Supreme Court Practice 1999*** Vol.1 para.29/1A/34.)

■ **GERMANY v FLATMAN** [2013] EWCA Civ 278, April 10, 2013, CA, unrep. (Mummery, Richards & Leveson L.JJ.)

Liability of unsuccessful claimant's solicitors for costs – disclosure of funding arrangements

CPR rr.18.1 & 48.2 [r.46.2], Senior Courts Act 1981 s.51, Courts and Legal Services Act 1990 s.58. Individual (C) bringing claim against employers (D) on basis that they were vicariously liable for injuries sustained by him when assaulted by a third party. Claim brought with benefit of CFA and counsel engaged, but without ATE insurance. Trial judge dismissing claim with costs. D suspecting that the claim had been funded by C's solicitors (X), and for purpose of determining whether to make an application for a non-party costs order against X, D applying to judge for order requiring C to give further information as to how the claim had been funded. Judge dismissing application. High Court judge allowing D's appeal and ordering the providing of information and the disclosure of documents ([2011] EWHC 2945 (QB)). Single lord justice granting C permission for second appeal. Court of Appeal receiving evidence not before the lower courts, including evidence relevant to C's liability for disbursements incurred by X and of X's conduct of the claim. (Appeal joined with another appeal in a case raising similar issues and in which X acted for an unsuccessful claimant.) **Held**, upholding the judge's orders on different grounds and dismissing C's appeal, (1) within s.58(2)(a), an enforceable CFA is an agreement under which the " fees and expenses" of a person providing advocacy or litigation services are payable only in specified circumstances, (2) in that context, "expenses" includes own side's disbursements, (3) the relevant authorities establish (a) that a non-party may incur liability for costs where the circumstances show that he is either "the real party" to the proceedings, or the person "with the principal interest" in their outcome, or is acting "primarily for his own sake", and (b) that conduct which can give rise to an order for costs against a solicitor includes acts "outside the normal role" of a solicitor, (4) a solicitor is not liable for costs on either of those grounds where he has acted for an unsuccessful party in civil proceedings under an agreement whereby he funded disbursements on behalf of the client on the basis that the costs would be recovered from the other side in the event of success, but would not be recovered from the client if the claim failed, (5) the court has jurisdiction to order the disclosure of documents or information about funding arrangements to a successful defendant in a personal injury claim to enable the defendant to determine whether or not to pursue an application under r.48.2 (now r.46.2) for a non-party costs order against the claimant's solicitor where that is necessary for the

fair determination of the application, (6) in the instant case, the additional evidence provided a basis upon which it could be argued that X took a lead in the proceedings and effectively sought to "control its course" and justified the order for disclosure. Observations on procedural steps which successful defence insurers might take, without seeking disclosure of documents, to reveal extent to which proceedings supported by third party. Observations on extent to which solicitors can fund litigation without exposing themselves to non-party costs orders. (See further "In Detail" section of this issue of CP News.) ***Tolstoy Miloslavsky v Aldington*** [1996] 1 W.L.R. 736, CA, ***Dymocks Franchise Systems (NSW) Pty Ltd v Todd*** [2004] UKPC 39, [2004] 1 W.L.R. 2807, PC, ***Myatt v National Coal Board*** [2007] EWCA Civ 307, [2007] 1 W.L.R. 1559, CA, ***Jones v Wrexham BC*** [2007] EWCA Civ 1356, [2008] 1 W.L.R. 1590, CA, ***Thomson v Berkhamsted Collegiate School*** [2009] EWHC 2374 (QB), [2010] C.P. Rep. 5, ref'd to. (See ***Civil Procedure 2013*** Vol.1 paras 18.1.2, 48.2.2 & 48.2.2.1, and Vol.2 para.9A–203.)

■ **HERON v TNT (UK) LTD** [2013] EWCA Civ 469, May 2, 2013, CA, unrep. (Leveson, Beatson & Gloster L.JJ.)

Liability of unsuccessful claimant's solicitors for costs – solicitor failing to pursue ATE insurance

CPR r.48.2 [r.46.2], Senior Courts Act 1981 s.51. In November 2005, person injured at work (C) entering into CFA with solicitors (X) and bringing negligence claim against his employers (D). D admitting liability. In response to inquiry by D's insurers, X replying that there was no ATE insurance in place. Negotiations continuing between X and D's insurer's solicitors (Y). In November 2006, D making an initial Pt 36 offer of £14,000. In October 2010, upon receipt of D's offer to settle on basis that C retain interim payments of £17,700 and "drop hands" on costs, X advising C that, if the trial judge's award was less than the offer, (1) they would not recover costs for work done on his behalf, and (2) that he would not recover disbursements paid to date and would have to pay outstanding and future disbursements (particularly the costs of counsel attending the trial). C rejecting the offer. In January 2011, C paying X's invoice for £11,765.52 for disbursements incurred by X, at least in part, without being in funds. On February 7, 2011, Y putting X on notice that a non-party or wasted costs order might be sought against them. In response, X intimating that their costs could reach £250,000, and offering to settle all damages and costs for a further £65,000 (exclusive of the interim payments). Upon receipt of further medical evidence, on eve of trial counsel for C advising that award was likely to be less than £10,000. X withdrawing counsel's instructions and informing court that they would not attend trial. Trial judge awarding C £3,000 by way of general damages, and ordering him to pay D's costs from November 22, 2006 (the date of the first offer). Judge dismissing D's application under r.48.2 (now r.46.2) for a non-party costs order against X, holding (amongst other things), that X's failure to pursue ATE insurance for C did not motivate them to continue with the case in an effort to obtain an outcome by which C was not liable for D's costs. Judge refusing permission to appeal. Single lord justice granting D permission to appeal. **Held**, dismissing appeal, (1) a solicitor is entitled to act on a CFA for an impecunious client whom they know or suspect will not be able to pay own (or other side's costs) if unsuccessful, (2) a non-party costs order may be made against a person who had become a "real party" to the proceedings, was the person "with the principal interest" in its outcome, or was acting "primarily for his own sake", (3) the failure by X to obtain ATE insurance (and the subsequent failure to admit that fact to C), though arguably sufficient to give rise to a breach of duty to C, did not in addition demonstrate that X fell into any of those categories. (See further, "In Detail" section of this issue of *CP News*.) ***Dymocks Franchise Systems (NSW) Pty Ltd v Todd*** [2004] UKPC 39, [2004] 1 W.L.R. 2807, PC, ***Myatt v National Coal Board (No 2)*** [2007] EWCA Civ 307, [2007] 1 W.L.R. 1559, CA, ***Adris v The Royal Bank of Scotland Plc*** [2010] EWHC 941, [2010] 4 Costs L.R. 598, ref'd to. (See ***Civil Procedure 2013*** Vol.1 para.48.2.2 & 48.2.2.1, and Vol.2 para.9A–203.)

■ **GLATT v SINCLAIR** [2013] EWCA Civ 241, *The Times* May 8, 2013, CA (Maurice Kay, Moses & Davis L.JJ.)

Discharge of receivership – point of law as to receiver's entitlement to remuneration for acts after discharge – point raised for first time on appeal

CPR rr.52.4, 69.7 & 69.11, Practice Direction 69 para.9, Criminal Justice Act 1988 s.77. On the application of HMRC, on February 15, 2001, under s.77(8) licensed insolvency practitioner (C) appointed by High Court judge to be receiver and manager of the assets of individual (D) (then subject to restraint order). On April 25, 2006, by order made on D's ex parte application (made without notice to C and disposed of on paper), receivership order (and restraint order) discharged. That order saying nothing about the resolution of outstanding matters in the receivership or about remuneration. On December 3, 2009, C applying for permission to realise assets to meet his remuneration and costs (interest was also claimed). Interveners (X), being individuals or trusts connected with D, and who were said to be beneficial owners of various of the identified assets, joined as parties and adopting D's submissions. On December 14, 2010, judge granting C's application on terms and ordering that the amount of C's remuneration be assessed by a costs judge. In the course of the detailed assessment, costs judge referring to judge question raised by X as to scope and effect of his order. On June 29, 2012, judge ruling that, on its correct interpretation, his order did

extend to the receiver's post-discharge remuneration, expenses and disbursements ([2012] EWHC 2015 (Admin)). Single lord justice granting X permission to appeal against the orders of December 14, 2010 and June 29, 2012. On the appeal, X submitting for the first time in the proceedings, that that the court has no power to order payment of post-discharge remuneration, expenses and disbursements. **Held**, dismissing appeal on alternative grounds, (1) a pure point of law, not raised in the court below, may be taken in the appeal court, but the latter court retains a discretion to exclude it, (2) in the circumstances it would be unjust to permit X now to raise the proposed point of law as to the judge's jurisdiction to make the order of December 14, 2010, as he did; alternatively (3) it is established by authority (a) that a receiver ordinarily is entitled to look to the assets of the receivership estate to indemnify him for his remuneration, costs and expenses, and may have a lien over such assets for that purpose, and (b) that the right to an indemnity is not extinguished by discharge of the receivership order and the lien can continue to exist for that purpose after discharge, (4) these principles apply, not only to remuneration attributable to the acts of a receiver during the currency of his appointment, but also to remuneration for acts of a former receiver undertaken after the appointment has been discharged, (5) where a receivership order made under the1988 Act is discharged, the receiver continues to be an officer of the court (and subject to the supervision of the court) to the extent that he still has functions to perform with a view to a final conclusion of the administration of the receivership, (6) it would be a wholly unsatisfactory and arbitrary state of affairs were it to be otherwise, (7) r.69.11 expressly sets out certain matters which the court may require a receiver to carry out upon a receivership being discharged or terminated. ***Pittalis v Grant*** [1989] Q.B. 605, CA, ***Glatt v Sinclair*** [2010] EWHC 3069 (Admin), ***Boehm v Goodall*** [1911] 1 Ch 155, ref'd to. (See ***Civil Procedure 2013*** Vol.1 paras 52.8.2, 69.7.1 & 69PD.9.)

■ **JONES v SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE** [2013] EWHC 1023 (QB), May 3, 2013, unrep. (Swift J.)

Recovery of disbursements as costs – pre-judgment interest

CPR r.44.3 [r.44.2] Trial judge giving judgment for claimants (C) in lead claims brought in industrial disease group litigation. Judge ordering that defendants (D) should pay 80 per cent of Cs' costs of the action as agreed or assessed. Each of the CFAs entered into by the individual lead claimants containing provision that the claimant was liable for the payment of any disbursements incurred on his/her behalf, whether or not the claim was successful. Disbursements incurred by C (mainly experts' and counsels' fees) amounting in total to more than £787,500. Disbursements paid by C to their solicitors (X) under a "credit agreement", whereby X undertook to provide credit in such sums as were required from time to time to pay disbursements relating to each claimant's claim in return for a credit charge fixed at 4 per cent above base rate and payable out of damages in the event of success. Parties agreeing that the costs and disbursements to be paid by D would be subject to interest from the date of the judgment in the usual way. C applying for an order that D should also pay interest on the disbursements that had been paid from the date of payment of the relevant sums to the date of the judgment (an order for pre-judgment interest on disbursements). Judge granting, subject to limitations, D's application for an order for disclosure of various documents relevant to Cs' disbursements interest application. D conceding that C were in principle entitled to pre-judgment interest on disbursements, but disputing the rate of interest. **Held**, (1) r.44.3(6)(g) (now r.44.2(6)(g)) gives the court power to order payment of pre-judgment interest on costs, (2) the rate of interest to be awarded on costs is not fixed and is in the discretion of the court, (3) C were entitled to pre-judgment interest on disbursements at the rate charged under the credit agreements entered into with X for the purpose of funding the disbursements, (4) it was likely that the interest demanded by a third party for an unsecured loan in order to fund Cs' disbursements would have been significantly in excess of that rate, (5) the agreed rate of interest was not excessive or unreasonable. ***Jaura v Ahmed*** [2002] EWCA Civ 210, *The Times* March 18, 2002, CA, ***Bim Kemi AB v Blackburn Chemicals Ltd*** [2003] EWCA Civ 889, [2004] 2 Costs L.R. 201, CA, ref'd to. (See ***Civil Procedure 2013*** Vol.1 paras 7.0.17, 40.8.11 & 44.3.14.)

■ **KHANS SOLICITORS v CHIFUNTWE** [2013] EWCA Civ 481, May 8, 2013, CA, unrep. (Rix & Ryder L.JJ. and Sir Stephen Sedley)

Costs paid directly to receiving party by paying party – effect on entitlement of receiving party's solicitors to their costs

Judicial review claim brought by individual (D1) against Home Secretary (D2). D1 paying his solicitors (C) £1,500 on account of costs. Claim compromised on terms that D2 should pay D1's costs. Solicitors for D1 (C) submitting bill for £9,500 and D2 offering £6,000. D1 withdrawing instructions from C, accepting D2's offer and requesting D2 to pay their offered amount directly to him. C notifying D2's solicitor that they were taking steps to protect their interests and commencing judicial review claim challenging the £6,000 compromise. Three months after that claim had been struck out, during which period C had taken no further steps to protects their interests, D2 solicitors paying £6,000 to D1. C bringing claim against D1 and D2 for (a) a declaration that the costs compromise was not valid, and (b) either a charge or lien upon the (ex hypothesis) unpaid costs. D1 not defending or appearing in these proceedings. Before a

master, and on C's appeal to a judge ([2012] EWHC 2108 (QB)), D2 contending successfully that, in the absence of any proof that she had colluded with D1 to cheat C, she bore no further liability for costs. Single lord justice granting C permission for second appeal. **Held**, allowing the appeal in part, (1) the compromise of his costs at a figure of £6,000, which D1 reached on his own behalf, was binding, (2) D1 was free in principle both to compromise his claim for costs and to take payment of the agreed sum himself, (3) neither of those acts relieved him of his obligation to C in the full amount of his solicitor and client bill, less the £1,500 paid by him on account, (4) in principle it is unacceptable that a client can compromise his own solicitor's legitimate interests for any sum he chooses, leaving the solicitor to sue him for money which he has now taken and spent, (5) the relevant authorities establish (in accordance with that principle) that the court will intervene to protect a solicitor's claim on funds recovered or due to be recovered by a client or former client if (a) the paying party is colluding with the client to cheat the solicitor of his fees, or (b) the paying party is on notice that the other party's solicitor has a claim on the funds for outstanding fees, (6) in the instant case, although C had not taken procedural steps open to them in the compromised judicial review claim to secure payment, they had not forfeited their claim or resiled from or abandoned their clear notice to D2's solicitor, (7) his payment to D1 could not stand as a good discharge of C's claim and, after deduction of the £1,500 (to which D1 was entitled) had to be made again to C. ***Brunsdon v Allard*** 121 E.R. 8 (1859), ***The Hope*** (1883) 8 P.D. 144, CA, ***Ross v Buxton*** (1889) 42 Ch. D. 190, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2013*** Vol.2 para.7C–239+.)

■ **MURRAY v NEIL DOWLMAN ARCHITECTURE LTD** [2013] EWHC 872 (TCC), April 16, 2013, unrep. (Coulson J.)

Approved costs budget – application to rectify

CPR rr.1.1, 3.9, 3.12 & 3.18, Practice Direction 51G paras 3, 4, 6 & 8, Practice Direction 3E. In TCC claim proceeding initially in accordance with the costs management pilot scheme contained in PD51G, solicitors entering into CFAs with each claimant (C) providing for success fees and obtaining ATE insurance for each. Prior to first CMC on February 1, 2013, parties exchanging costs budgets. Claimant's budget approved in sum of £82,500. That figure not expressed as exclusive of success fee and ATE premium. On March 14, 2013, C applying under r.3.9 for relief from sanction, that is from the prospect that in the event of success in the claim they would not be able to recover as costs from the defendants a success fee or the ATE premium. **Held**, granting the application, (1) there was no sanction from which C required relief, as the consequence of costs recovery excluding a success fee and ATE in accordance with the relevant costs management provisions was contingent on costs assessment at the end of the proceedings, (2) the difficulty in which C found themselves arose from their inadvertence in relation to a relevant court form (subsequently revised to improve clarity), (3) on the particular and unusual facts of the case it would be in accordance with the overriding objective if permission to revise the approved budget were granted. ***Fred Perry (Holdings) Ltd v Brands Trading Plaza Ltd*** [2012] EWCA Civ 224, [2012] F.S.R. 807, CA, ***Henry v News Group Newspapers Ltd*** [2013] EWCA Civ 19, January 28, 2013, CA, ref'd to. Judge giving guidance on the circumstances in which approved costs budgets can be subsequently revised or rectified. (See ***Civil Procedure 2013*** Vol.1 paras 3.9.1 & 51GPD.6, and Vol.2 paras 2C–28.7, ***Special Supplement*** paras 3.12.1 & 3.18.1.)

■ **WM MORRISON SUPERMARKETS PLC v MASTERCARD INC** [2013] EWHC 1071 (Comm), May 3, 2013, unrep. (Field J.)

Stay of anti-competition claim – appeal against decision of EU institution pending

CPR rr.1.1 & 3.1(1)(f), Senior Courts Act 1981 s.49(3). Companies (D) operating credit and debit schemes in the EEA. European Commission initiating an investigation into cross-border "interchange fees" charged under an aspect of the schemes and which D claimed covered losses from fraud and defaulting cardholders. In December 2007, Commission deciding that the fees restricted competition. In August 2012, D commencing appeal from that decision in the ECJ. In May 2012, British retail company (C) commencing proceedings in the Commercial Court against D seeking (1) a declaration that the relevant interchange arrangements were void and unenforceable as being contrary to the relevant competition rules for the EU, the EEA and the UK; and (2) compensatory damages and/or exemplary damages. D applying for an immediate stay of these proceedings until their appeal to the ECJ had been determined. Identical claims against all defendants subsequently brought in eleven separate sets of proceedings by numerous other major high street retailers. C submitting that D should serve their defences and that there then should be a CMC to determine in the light of the pleadings what further steps if any ought to be taken in the proceedings. **Held**, accepting C's submission and dismissing D's application, (1) it was common ground (a) that the determination of C's claims must not be undertaken before the decision of the ECJ, but (b) that the court had jurisdiction to order that the action should proceed some way towards trial before it is stayed pending that decision, (2) the court had a general discretion to be exercised in the light of all the relevant circumstances having regard to the object to be attained, namely the avoidance of any decision running counter to that of the Commission or the community courts, (3) in

exercising its discretion the court was to have regard to the overriding objective to deal with the action justly, (4) on weighing the relevant considerations, the balance was against the imposition of an immediate stay, (5) considerations supporting that conclusion included the facts that the anti-competitive behaviour complained of began as long ago as 1992, the time and expense to which D will be put in pleading defences and preparing for a CMC were relatively modest, and there was an appreciable chance that C's action would continue even if the appeal to the ECJ resulted in the annulment of the Commission's decision. ***Masterfoods Ltd v HB Ice Cream Ltd (C-344/98)*** [2001] 4 C.M.L.R. 14, ECJ, ***National Grid Electricity Transmission Plc v ABB Ltd*** [2009] EWHC 1326 (Ch), [2009] U.K.C.L.R. 838, ref'd to. (See ***Civil Procedure 2013*** Vol.1 para.3.1.7, and Vol.2 para.9A–193.)

■ **ROCHE DIAGNOSTICS LTD v MID YORKSHIRE HOSPITALS NHS TRUST** [2013] EWHC 933 (TCC), April 19, 2013, unrep. (Coulson J.)

Public procurement claim – application for "early" specific disclosure

CPR rr.25.1(1)(i), 31.12 & 31.16, Senior Courts Act 1981 s.33(2). Hospital trust (D) initiating public procurement exercise by issuing invitation to tender (ITT) for laboratory services at several centres. Company (D) making bid, but unsuccessful. Subsequently, D providing C upon request with additional information about the evaluation of bids. On November 30, 2012, C commencing proceedings against D challenging the manner in which the exercise was conducted, in particular alleging that D did not properly evaluate financial information relevant to fixed costs provided by C. Before standard disclosure, C applying under r.31.12 for specific disclosure of certain categories of contemporaneous documents generated by, and relating to, the tender evaluation process. **Held**, granting the application and ordering specific disclosure of all but one of six categories of documents sought by C, (1) an order for specific disclosure can be made in advance of the standard disclosure of documents, if the court is persuaded that the documents sought are important and should be provided early on in the proceedings, (2) early specific disclosure is often necessary in procurement disputes, (3) the dispute between the parties could not be categorised as one of pure construction of the ITT, (4) the further information given by to C by D consisted of documents created after the evaluation process, as an *ex post facto* means of explaining how that evaluation process had been carried out, (5) those documents contained some errors and were inconsistent in certain respects, (6) C was entitled to reach its own conclusion on whether the evaluation was properly performed and could only do so by seeing the contemporaneous documents relating to the evaluation. (Judge also granting application for pre-action disclosure made by C in separate dispute between them and D arising from the granting to a rival company of an interim contract for providing laboratory services at a particular centre.) Broad principles applicable to applications for early specific disclosure in procurement cases explained. Applications (a) for pre-action disclosure (r.31.16) and (b) for early specific disclosure compared. ***Black v Sumitomo Corp*** [2001] EWCA Civ 1819, [2002] 1 W.L.R. 1562, CA, ***Alstom Transport v Eurostar International Ltd*** [2010] EWHC B32 (Ch) (Vos J.), November 10, 2010, unrep., ***Arsenal Football Club v Elite Sports Distribution Ltd (No. 1)*** [2002] EWHC 3057 (Ch), [2003] F.S.R. 26, ref'd to. (See ***Civil Procedure 2013*** Vol.1 paras 25.1.28 & 31.16.4, and Vol.2 para.9A–113.)

Practice Guidance

■ **PRACTICE GUIDANCE (COMMITTAL PROCEEDINGS: OPEN COURT)** [2013] 1 W.L.R. 1316, Sen Cts

Family Procedure Rules 2010 r.33.5, Court of Protection Rules 2007 r.188, RSC 1965 Order 52, r.6, Family Procedure Rules 2010 r.33.5, Court of Protection Rules 2007 r.188, RSC 1965 Order 52, r.6. Gives guidance on the procedure to be followed where in committal applications in the Court of Protection or in the Family Division the court exercises its discretion to sit in private. Issued by Lord Chief Justice and President. (See ***Civil Procedure 2013*** Vol.1 para.81.28.5, and Vol.2 paras 9B-15 & 6B-430+.)

■ **PRACTICE GUIDANCE (LITIGANTS IN PERSON: TERMINOLGY)** [2013] 1 W.L.R. 1316, Sen Cts

Guidance issued by the Master of the Rolls as Head of Civil Justice. In all proceedings in all criminal, civil and family courts "Litigant in Person" (LiP) should be the sole term used to describe individuals who exercise their right to conduct legal proceedings on their own behalf. The term "Self-Represented Litigant" should not be used. (See ***Civil Procedure 2013*** Vol.2 para.13–12.)

Statutory Instruments

■ **CIVIL PROCEEDINGS FEES (AMENDMENT) ORDER 2013** (SI 2013/734)

Civil Proceedings Fees Order 2008. Amends fee 2.1 in the table in Schedule 1 (fees to be taken) to the Order and the notes on that fee to add "or directions questionnaire" after "allocation questionnaire" in the several places where the latter expression appears. In force April 1, 2013. (See ***Civil Procedure 2013*** Vol.2 para.10–7.)

In Detail

SOLICITOR'S LIABILITY FOR NON-PARTY COSTS ORDER

Under the Senior Courts Act 1981 s.51, the court has jurisdiction to make a costs order against a person who is not a party to the proceedings. The procedure for making an application for a non-party costs order is now stated in CPR r.46.2 (which was r.48.2 before April 1, 2013). The circumstances in which a non-party costs order might be made have been elaborated in case law. The fact that the non-party has funded the litigation may be an important consideration pointing towards liability (see authorities referred to in *White Book 2013* Vol.1 para.48.2.2).

In *Germany v Flatman* [2013] EWCA Civ 278, April 10, 2013, CA, unrep., the Court of Appeal dealt with conjoined appeals where the common features were that a successful defendant in a personal injury claim was minded to bring proceedings to recover their costs from the solicitors who acted for the claimant under a CFA and made procedural applications to the court to further such proceedings. (For summary of this case, see the "In Brief" section of this issue of CP News.)

Underlying these limited procedural requests was an issue as to the extent to which solicitors acting on behalf of claimants can fund, or "pump prime", litigation for those of limited means when proceeding pursuant to a CFA, but with no "after the event" (ATE) insurance cover, without thereby exposing themselves to non-party costs orders should the claims fail.

Section 58 of the Courts and Legal Services Act 1990 (as amended) makes CFAs lawful. A CFA is defined by s.58(2)(a) as "an agreement with a person providing advocacy or litigation services which provides for his fees and expenses or any part of them to be payable only in specified circumstances". The term "expenses" is not defined by the 1990 Act. The principal issue in this appeal was its true meaning. What are the "expenses" that a solicitor may fund, and be prepared to risk not recovering in the proceedings, for the CFA to remain lawful? If the solicitor funds expenses that are not within s.58(2)(a) is it then arguable that he has acted in a manner that exposes him to non-party costs liability?

On the appeal, counsel for the defendant who had succeeded at trial argued that a disbursement is to be distinguished from a solicitor's expense and were not included in the permissible category of costs that may be made the subject of payment by the client conditional on success in a lawful CFA. That was not to say (so the argument ran) that the solicitor must insist on prepayment of disbursements by the client; the agreement, however, must require the client to remain responsible for them (whether or not the solicitor goes to the trouble and expense of pursuing repayment if the client, having lost his action, is impecunious). Counsel for the unsuccessful claimant argued that as a matter of ordinary language and on authority the word "expenses" includes own side's disbursements. Thus once the solicitor has paid the cost of a disbursement (such as a court fee or a medical report) it becomes an expense and can be subject to a prior agreement that it will not have to be reimbursed (as opposed to a subsequent decision that it is not worth pursuing).

The Court of Appeal rejected the defendant's submissions. In giving the principal judgment on the appeal Leveson L.J. (with whom Mummery and Richards L.JJ. agreed) stated that "the legislation does visualise that a solicitor might fund disbursements" and that payment by a solicitor of disbursements, without more, does not expose the solicitor to any potential liability for a non-party costs order. The fact that a litigant can (or cannot) afford, for example, an expert report or the court fee says nothing about his or her ability to fund the costs incurred by opponents in an unsuccessful claim. A solicitor could advance disbursements with a technical (albeit improbable) obligation for repayment. Solicitors are entitled to act on a normal fee or conditional fee for an impecunious client whom they know or suspect will not be able to pay own (or other side's costs) if unsuccessful.

With the coming into force of Pt 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 the law as to recovery of costs by successful parties having the benefit of CFAs is changed significantly. Further, the introduction by that legislation of the principal of qualified one-way costs shifting limits the recovery of costs by defendants' insurers in failed personal injury claims. The latter development may give rise to an increase in applications by successful defendants' insurers for non-party costs orders against solicitors acting for unsuccessful claimants. The decision of the Court of Appeal in this case should act as a brake on such applications.

In the later case of *Heron v TNT (UK) Ltd* [2013] EWCA Civ 469, May 2, 2013, CA, unrep., the Court of Appeal upheld a judge's decision refusing a successful defendant's application for a non-party costs order against a solicitor who acted for the unsuccessful claimant on a CFA. (For summary, see "In Brief" section of this issue of CP News.) The Court stated that the solicitor's failure to obtain ATE insurance in that case (and the subsequent failure to admit

that fact to their client), though arguably sufficient to give rise to a breach of duty to the claimant, did not in addition demonstrate that the solicitors had conducted themselves in a manner which exposed them to non-party costs liability.

Were it established that solicitors were in breach of duty for failing to obtain ATE insurance, conceivably the claimant would be able to look to them for an indemnity should he be pursued by the successful defendants for the costs owed by him to them. Whether the solicitors were obliged to indemnify and to what extent would raise, depending on the circumstances, questions of breach, causation, contributory negligence and quantum. Clearly, those are questions not best dealt with on an application for a non-party costs order which, is after all, meant to be a summary procedure.

COSTS PAYABLE TO SOLICITORS

In *Khans Solicitors v Chifuntwe* [2013] EWCA Civ 481, May 8, 2013, CA, unrep., the solicitors for the defendant (D), in a judicial review claim which had been compromised on terms that the defendant would pay the claimant's costs, received from the claimant's solicitors (C) their bill. It was for £9,500. D offered £6,000. The claimant withdrew instructions from C and accepted the £6,000 costs offer. C were concerned about recovering their costs. (They had received £1,500 on account.) They warned the claimant not to interfere and gave notice to D to their concerns. In the event, D innocently (as the Court of Appeal stressed) paid the £6,000 directly to the claimant. The questions for the Court of Appeal were whether the compromise as to costs was binding and whether the defendant remained liable to C for costs.

As is explained in the summary of this case given in the "In Brief" section of this issue of CP News, the Court of Appeal held that the compromise was binding and that the defendant remained liable. The latter question turned on the issue of the efficacy or inefficacy of the notice given by C to D not to pay the costs awarded directly to the claimant.

The appeal led the Court into a series of eighteenth- and nineteenth-century cases. In giving the Court's judgment, Sir Stephen Sedley (with whom Rix and Ryder L.JJ. agreed) concluded (para.28) that no authority inhibited the Court from holding that a paying party who is on notice that the receiving party's solicitor has a claim for fees upon part or all of the sum due pays the receiving party directly at his own risk; collusion is not necessary.

Sir Stephen acknowledged that such a principle leads to practical problems. His lordship explained (para.29):

"There is, first, the problem … if, as is frequently the case, there is a dispute between client and solicitor which affects entitlement to the funds in question, how is the paying party to know whom to pay? Following from this, what should the paying party do in order to discharge the debt without incurring interest charges by reason of delay? And what relevance do the paying party's knowledge and state of mind have? It is one thing to expect a solicitor to understand what is at issue when notice of entitlement is given by another solicitor; it may be another to expect a litigant in person to do so. Is implied or constructive notice sufficient for this purpose? Can the solicitor who has paid in breach of notice and has to pay again recover the debt from his client? If not, is it an insured or an insurable hazard?"

Sir Stephen said all of these questions are capable of being answered. His lordship explained (para.30):

"It may well be that, either in the concluded proceedings or in fresh ones, provision should be made for the paying party to lodge the outstanding funds in court to abide a decision as to their proper allocation, leaving solicitor and client to resolve any argument between themselves. As to this, the standard terms on which solicitors accept instructions may need revision. It may also be that the court should be prepared to deal compendiously with the quantification of costs as between the parties and their distribution as between solicitor and client."

The crucial question in this appeal was whether C, by their conduct, had forfeited their claim or abandoned the notice they had given to D. The Court found that they had not.

Experienced solicitors are well aware that they are vulnerable to devious clients, or former clients, who would wish to see them deprived of disbursements they have paid on their clients' behalf or denied the solicitor and own client fees that they have earned. In the instant case, the client made off with money that was not his, but was his solicitors'. If they have not been aware before, this case should make solicitors aware that they are also vulnerable if they pay costs directly to their client's opponent; they may find themselves having to make dual payment.

CPR Update

DELVING INTO CPR PART 44 – GENERAL RULES ABOUT COSTS

As originally enacted in the Civil Procedure Rules 1998 (SI 1998/3132), Pts 43 to 48 contained the main provisions as to cost and the way in which the court will award and assess costs. At the time those provisions first came into force, Pts 43 to 48 were supplemented by several practice directions, subsequently substantially amended and marshalled together in a single practice direction (the Costs Practice Direction).

The six CPR Costs Parts replaced the former RSC Order 62 and the structure of that Order informed the structure of the Parts. The broad distinction between rules about entitlement to costs on the one hand, and the assessment of costs on the other, was maintained. Provisions in the latter category have always been extensive, as they have to deal, not only with the basis of assessment, but also (in what was and has remained a discrete and extensive code) with the procedure for assessment and the review of assessments and the powers of costs officers. In the CPR, as originally enacted this broad discretion was maintained by rules about entitlement to costs and rule about assessment being placed in separate Parts, respectively in Pt 44 (General Rules About Costs) and in Pt 47 (Procedure for Detailed Assessment of Costs and Default Provisions). In both instances, as re-enacted the rules implement some important reforms recommended by Lord Woolf in his Access to Justice Review (e.g. as to summary assessment), but the bulk of the rules remained the same as they were before.

The Costs Parts in the CPR replaced, not only provisions in RSC Order 62, but also provisions in the CCR (insofar as the latter did not differ from the former). Both the RSC and the CCR contained rules as to fixed costs. In the CPR, they were brought together in Pt 45 (Fixed Costs).

In one respect, the structure of the CPR Costs Parts improved quite considerably on what had gone before, and that was by bringing together rules as to entitlement to costs and assessment of costs that applied in special situations, for example non-party costs and wasted costs. Previously they had been scattered hither and yon. They were re-enacted in Pt 48 (Costs—Special Cases), again in a manner that reflected some important recommendations made by Lord Woolf (e.g. as to pre-commencement costs).

When contrasted with what had gone before, one of the CPR Costs Parts as originally enacted was wholly innovative. And that was Pt 46 which contained provisions dealing with trial costs in cases allocated to the fast track. (Lord Woolf's recommendation that, for case management purposes, cases should be allocated to "tracks" was implemented, but in the event his recommendations as to costs in fast track cases were not fully implemented.)

Since 1998, the costs Parts and the practice directions supplementing them have been the subject of a good deal of amendment. And now, by the Civil Procedure (Amendment) Rules 2013 (SI 2013/362) the former Pts 43 to 48 are entirely replaced by new Pts 44 to 48. Former Pt 43 (Scope of Costs Rules and Definitions) contained only one rule of significance, r.43.2 (Definitions and Applications), and that rule is re-enacted in new r.44.1 (Interpretation and Application) with the definitions relevant to funding arrangements excised. The single Costs Practice Direction that supplemented those Parts is replaced by several practice directions, one for each of the five Parts.

Apart from the demise of Pt 43, the structure of the new Costs Parts remains much the same as it was except that the rules as to fast track trial costs are not contained in a discrete Part but are included, quite logically, in a section within the Part devoted to fixed costs.

The first four of the five new Parts are as follows:

Part 44—General Rules About Costs

Part 45—Fixed Costs

Part 46—Costs – Special Cases

Part 47—Procedure for Detailed Assessment of Costs and Default Provisions

The last of the new Parts, Pt 48, deals with complications arising from the fact that the provisions of the "old" Costs Parts, and the attendant provisions in the old Costs Practice Direction, will continue to apply to "pre-commencement funding arrangements", as they were in force immediately before April 1, 2013, with such modifications (if any) as may be made by a practice direction on or after that date. As is well-known, as a result of the implementation of recommendations made by Lord Justice Jackson in his Costs Review, the law as to funding arrangements, and in particular as to the recovery of costs and certain disbursements where a party has the benefit of such an arrangement,

has been changed significantly. But, for the time being at least, certain proceedings are exempted (e.g. clinical negligence claims). A "pre-commencement" funding arrangement is one entered into by a party for the purpose of funding proceedings falling into one or other of the exempted categories (whether entered into before or after April 1, 2013). There are not many provisions in the "old" Costs Parts or in the former Costs Practice Direction which apply where a funding arrangement is in place and only in those circumstances. Those that do have, for obvious reasons, been edited out of the new Costs Parts and the supplementing practice directions. For convenience, they are listed in para.1.4 of the practice direction supplementing Pt 48.

The new Costs Parts, including Pt 48, and the several practice directions supplementing them are included in the Special Supplement to the 2013 edition of the *White Book*. Tables showing the destinations of the old rules and the derivations of the new rules were printed on pp.45 to 60 of that Supplement. (A Cumulative Edition of that Supplement was published in May 2013.)

As explained above, the new Pt 44 in effect replaces the old Pt 44 shorn of provisions that applied only to funding arrangements (and, as is explained below, of some rules now found elsewhere). However, it does contain new rules reflecting reforms following upon Lord Justice Jackson's Costs Review. In particular this Part now contains, not only those rules that appeared in the former Pt 44, but also rules about qualified one-way costs shifting and about damages-based agreements. Thus, Pt 44 is now divided into three Sections: I General, II Qualified One-Way Costs Shifting, III Damages-Based Agreements.

Rules as to costs capping orders that formerly appeared in the old Pt 44 as rr.44.18 to 44.20 are now in CPR Pt 3 (The Court's Case Management Powers) (see Section II thereof (rr.3.19 to 3.21)). Further, five other rules have been found homes in the new Pt 46 (Costs—Special Cases); they are rr.44.3C, 44.9, 44.10, 44.11 and 44.12A. Of those five rules, only two have been significantly amended; they are r.44.11, now r.46.13 (Costs following allocation, re-allocation and non–allocation), and r.44.12A, now r.46.14 (Costs-only proceedings). To complete the picture it should be explained that former r.44.12C is now (unamended) in Pt 45 as r.45.29 (Costs-only application after a claim is started under Pt 8 in accordance with Practice Direction 8B). It should also be explained that rules in the old Pt 44 that apply where a funding arrangement is in place, and therefore which remain effective for the purposes dealt with by Pt 48 (as explained above) are rr.44.3A, 44.3B, 44.12B, 44.15 and 44.16 (see Practice Direction 48 para.1.4(b)).

So the position is that, in new Pt 44 (General Rules About Costs), provisions in Section I (General) (rr.44.1 to 44.12) replace most of the rules that formerly appeared in the old Pt 44.

The rules in Section I of Pt 44 are as follows. In relation to each, the former rules from which each is derived is indicated in square brackets.

Rule 44.1 Interpretation and application [rr.43.2, 43.3, 43.4]

Rule 44.2 Court's discretion as to costs [r.44.3]

Rule 44.3 Basis of assessment [r.44.4]

Rule 44.4 Factors to be taken into account in deciding the amount of costs [r.44.5]

Rule 44.5 Amount of costs where costs are payable under a contract [r.48.3]

Rule 44.6 Procedure for assessing costs [rr.44.6 & 44.7]

Rule 44.7 Time for complying with an order for costs [r.44.8]

Rule 44.8 Legal representative's duty to notify the party [r.44.2]

Rule 44.9 Cases where costs orders deemed to have been made [r.44.12]

Rule 44.10 Where the court makes no order for costs [r.44.13]

Rue 44.11 Court's power in relation to misconduct [r. 44.14]

Rule 44.12 Set off [r.44.3(9)]

The derivations of two of these rules lie outside the old Pt 44. Rule 44.1 picks up definitions from provisions in the former Pt 43, and r.44.5 is moved into Pt 44 from former Pt 48 (a more logical arrangement).

Of these rules, only two have been re-enacted in the new Pt 44 in a form that differs significantly from that in which they appeared in the old Pt 44 (and therefore in a form that renders *White Book 2013* commentary on the rules from which they were derived now not wholly accurate). These are the ones of which practitioners should take particular note. Those two rules are: r.44.2 (Court's discretion as to costs) and r.44.3 (Basis of assessment). They are printed in the Special Supplement at pp.73 to 76, and commentary on them is found in that Supplement in para.43n.02 (p.61).

So, what is different in r.44.2 and r.44.3, formerly r.44.3 and r.44.4 (for which extensive commentary in found in *White Book 2013* in paras 44.3.1 to 44.3.16 and in paras 44.4.1 to 44.4.6)?

In r.44.2 (Court's discretion as to costs), what was sub-rule (9) in the old rule is now r.44.12 (Set off), and is not amended (for commentary, see *White Book 2013* Vol.1 para.44.3.16). But sub-rules (7) and (8) are substantially amended and now state as follows:

"(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraphs (6)(a) or (c) instead.

(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

The contrast with sub-rules (7) and (8) of former r.44.3 (see *White Book 2013* Vol.1 p.1311) is obvious. What was mandatory in sub-rule (7) is now permissive, and what was permissive in sub-rule (8) is now mandatory. (For commentaries on these provisions, see *White Book 2013* Vol.1 paras 44.3.14 and 44.3.15.)

In r.44.3 (Basis of assessment), derived from former r.44.4 (see *White Book 2013* Vol.1 p.1352), sub-rule (2) is significantly amended, and sub-rules (5) and (7) are new. (This was explained in the "CPR Update" section of Issue 3/2013 of CP News, (March 22, 2013) and what follows largely repeats what was said there.) As amended and inserted these three (non-consecutive) sub-rules state (the new words in sub-rule (2) are italicised) (sub-rules (1), (3), (4) and (6) remain as they were):

"(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.)"

"(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."

"(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."

As is explained in the Special Supplement (para.43n.02), the principal object of the amendments made to (what is now) r.44.3 is to reverse the effect of the decision of the Court of Appeal in *Lownds v Home Office (Practice Note)* [2002] EWCA Civ 365, [2002] 1 W.L.R. 2450, CA. (That case is dealt with extensively in commentary in *White Book 2013* Vol.1 at para.44.4.2.) The fact that sub-rules (2) and (5) only apply as provided by sub-rule (7) means of course that *White Book* commentary based on the assessment of costs on the standard basis as provided for by former r.44.4(2), and in particular the application of the principle of proportionality thereto, will remain of value until the transitional effect of sub-rule (7) is exhausted, likely to be a matter of several years (see *White Book 2013* Vol.1 para.44.4.2).

The practice directions that formerly supplemented Pt 44, that is to say Sections 7 to 23B of the Costs Practice Direction, and which now supplement Section I of Pt 44, have been edited and revised to take account of rr.44.1 to 44.12 as they now stand, and appear in Section I of Practice Direction 44 paras 1.1 to 11.3 (see Special Supplement para.44nPD.1 et seq). In that Section there is no equivalent to Section 11 of the Costs Practice Direction (the Section that supplemented former r.44.5 (now r.44.4) and expanded on the matters to be taken to account in deciding the amount of costs), but there is a Subsection on the manner in which the court should take into account costs budgets when assessing the reasonableness and proportionality of costs claimed (Subsection 3 paras 3.1 to 3.7). These changes reflect the fact that r.44.4 now expressly states that, in deciding the amount of costs the court will have regard (amongst other things) to the receiving party's last approved or agreed budget (r.44.4(3)(h)).

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