CIVIL PROCEDURE NEWS

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■ **CAVENDISH SQUARE HOLDINGS BV v MAKDESSI** [2013] EWCA Civ 1540, November 26, 2013, CA, unrep. (Patten, Tomlinson & Christopher Clarke L.JJ.)

Application for permission to make committal application – relevant considerations

CPR rr.32.14 & 81.14. Company (C1) owning shares in a company (C2) of which a businessman (D) was founder, employee and non-executive director, entering into agreement to which D was a party for purchase of further shares in C2. C1 and C2 commencing proceedings against D alleging breaches of covenants in the agreement and of fiduciary duties, and seeking declarations, specific performance and damages. On April 28, 2011, in response to D's request, C1 providing D with further information in respect of their particulars of claim, including copies of certain e-mails. On February 25, 2012, D entering defence and making counterclaim, verified by statement of truth. On May 31, 2012, liability trial fixed for November 12, 2012. On October 12, 2012, D providing C1's solicitors with a draft re-amended defence and counterclaim in which D admitted a matter denied in his previous pleadings, in particular that he had at a certain time engaged in conduct falling within the definition of "defaulting shareholder" in the agreement. In effect, D thereby abandoning his denial of breach of fiduciary duty owed to C2, and consequently conceding, subject to his case that the covenants were not enforceable, that he was in breach of those covenants with C1. D's re-amended pleading verified by statement of truth and served on C1. C1 applying for permission to apply for an order committing D for contempt on ground that he made a false statement in a document verified by a statement of truth. After delivering judgment in the liability trial, in which judge held against D on the enforceability of covenants issue ([2012] EWHC 3582 (Comm)) (a decision subsequently reversed on appeal ([2013] EWCA Civ 1539)), judge hearing and granting C's permission application ([2012] EWHC 4305 (Comm)). D granted permission to appeal. **Held**, dismissing appeal, (1) the discretion to permit an application to commit should be approached with considerable caution, (2) permission should not be given unless it is in the public interest for committal proceedings to be brought, (3) whether it is or not will depend on a number of considerations, in particular that the case against the alleged contemnor is a strong prima facie case, (4) the extent to which a false statement was persisted in is a relevant consideration, but an application should not be considered inappropriate simply because the maker of it recants before trial, (5) the judge did not err in finding that D did not need to be reminded by C that false statements of truth were punishable by committal, (6) it is not in the public interest that applications to commit should become a regular feature in cases where at or shortly before trial it appears that statements of fact in pleadings supported by statements of truth may have been untrue, (7) although C1's affidavit referred to the e-mails provided to D by C1 on April 28, 2011(in response to D's request for further information) and were relied on by C, they were not exhibited and in that respect there was a failure to comply with r.81.14(1)(b), but it was not a failure that invalidated the judge's decision. ***Malgar v R.E. Leach (Engineering) Ltd*** [2000] F.S.R. 393, ***KJM Superbikes Ltd v Hinton (Practice Note)*** [2008] EWCA Civ 1289, [2009] 1 W.L.R. 2406, CA, ***Kirk v Walton*** [2008] EWHC 1780 (QB), [2009] 1 All E.R. 257, ***Barnes v Seabrook*** [2010] EWHC 1849 (Admin), [2010] C.P. Rep. 42, ref'd to. (See ***Civil Procedure 2013*** Vol. 1 para.81.14.5, and Vol. 2 para.3C-11.)

■ **CRUZ CITY 1 MAURITIUS HOLDINGS v UNITECH LIMITED** [2013] EWCA Civ 1512, November 22, 2013, CA, unrep. (Gloster L.J.)

Permission to appeal–appeal court imposing conditions

CPR rr.6.15 & 52.9, Arbitration Act 1996 ss.66 & 67. Company (C) entering into joint venture agreement with another company for the commercial development, management and operation of land in Indian city. For related reasons, C and the other company entering into agreements with two other companies. Upon disputes arising, in two separate London-based arbitrations, one commenced by C against two of the companies, and the other by the third company against C, awards made in favour of C. Commercial Court dismissing challenge to the first award made by the defendants (D) under s.67. As a result, C owed by the sum of US$300m plus costs with interest. Court granting C enforcement orders under s.66(1) and permitting service of the orders on London solicitors (S) who had acted for D. For purposes of enforcement, C issuing arbitration claim form, applying for order requiring disclosure of assets by D. Court granting C's application for permission under r.6.15 for alternative service on S of the claim form and supporting documents. S serving acknowledgment of service contesting claim and disputing jurisdiction and applying to set aside the service orders. At hearing of C's disclosure order claim, judge making disclosure order and dismissing Ds' application to set service aside. Single lord justice granting D permission to appeal against the disclosure order. C applying for condition to be attached to the permission to appeal to effect that D pay the whole or a substantial proportion of the sums due under the awards into court, or alternatively secure such payment. **Held**, granting the

application, (1) where an order giving permission to appeal is not made subject to conditions (s.52.3(7)(b)), the appeal court may impose conditions upon which an appeal may be brought where there is "compelling reason" for doing so (r.52.9(1) & (2)), (2) in circumstances where a judgment debtor (in respect of a debt that is no longer subject to appeal), who has participated in liability proceedings in this jurisdiction, is able to pay a judgment debt, but has no intention of doing so, and is taking all possible steps to avoid enforcement of the judgment against its assets, whether in this jurisdiction or elsewhere, the court may well consider that it is appropriate, in exercise of its powers under r.52.3(7)(b), to attach a condition of payment in full of the judgment debt, to the grant of any permission to appeal against a post-judgment enforcement order, (3) in circumstances where a judgment debtor is attempting to appeal the original judgment imposing liability upon him, is well able to pay the judgment debt, but is taking all steps open to him to avoid enforcement, there may well be a compelling reason for the imposition of a payment condition, (4) in the present case, several factors combined to constitute a compelling reason for making D either pay the judgment debt or secure it as a condition of permitting them to proceed with the appeal, (5) they included the factors (a) that D were clearly in a position to pay the substantial sums which they owe C under the awards, without undue disruption to their business, or concerns about insolvency, but had deliberately taken the decision not to do so and to disobey orders of the English court requiring payment, and (b) that D had thwarted, and would continue to thwart, C's attempts at enforcement, in a variety of different jurisdictions by placing every obstacle in the latter's way, (5) in the circumstances, it was appropriate in the exercise of discretion to order that the appellants pay the full amount of the sums due under the awards into court as a condition of their permission to appeal. ***Masri v Consolidated Contractors International Co SAL*** [2008] EWCA Civ 1367, November 13, 2008, CA, unrep., ***Masri v Consolidated Contractors International Co SAL*** [2009] EWCA Civ 36, [2009] 1 C.L.C. 82, CA, ***Hammond Suddards Solicitors v Agrichem International Holdings Ltd*** [2001] EWCA Civ 2065, [2002] C.P. Rep. 21, CA, ***Bell Electric Ltd v Aweco Appliance Systems GmbH & Co KG*** [2002] EWCA Civ 1501, [2003] 1 All E.R. 344, CA, ***Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd*** [2004] EWCA Civ 993, July 13, 2004, CA, unrep., ref'd to. (See ***Civil Procedure 2013*** Vol. 1 para. 52.9.4.)

- **MITCHELL v NEWS GROUP NEWSPAPERS LTD** [2013] EWCA Civ 1537, November 27, 2103, CA, unrep. (Lord Dyson M.R., Richards & Elias L.JJ.)

Failure to file costs budget – relief from sanction

CPR rr. 3.1, 3.9, 3.13 & 3.14, Practice Direction 51D para. 4.2. In defamation claim, claimant (C) failing to exchange and lodge costs budget not less than seven days before case management and costs budget hearing as required by para.4.2. As a result hearing proving abortive. Master finding that there was "really no adequate excuse" for the breach and ordering that C "shall be treated as having filed a budget comprising only court fees" ([2013] EWHC 2179 (QB)). Master dismissing C's application for relief from the sanction so imposed ([2013] EWHC 2355 (QB)). **Held**, dismissing C's appeals from both decisions, (1) the Master did not misdirect herself in any material respect or reach a conclusion which was not open her, (2) the Master had been entitled to be guided by r.3.14, as that rule indicates what constitutes a proportionate sanction for failure to file a costs budget in time unless the court otherwise orders, (3) the considerations to which the court should have regard when deciding whether it should exercise its power to order "otherwise" are likely to be the same as those which are relevant to a decision whether to grant relief under r.3.9, (4) the expectation is that the sanction in r.3.14 will apply unless the breach is trivial or there is a good reason for it. Court stating that following recent amendment to r.3.9 (and related amendments to rules), relief from sanctions should be granted more sparingly than previously, and giving guidance as to how the new approach should be applied in practice. ***F&C Alternative Investments (Holdings) Ltd v Barthelemy (No. 3)*** [2012] EWCA Civ 843, [2013] 1 W.L.R. 548, CA, ***Hashtroodi v Hancock*** [2004] EWCA Civ 652, [2004] 1 W.L.R. 3206, CA, ***Wyche v Careforce Group plc*** [2013] EWHC 3282 (Comm), ***Raayan Al Iraq Co Ltd v Trans Victory Marine Inc*** [2013] EWHC 2696 (Comm), ref'd to. (See further "In Detail" section of this issue of *CP News*.) (See ***Civil Procedure 2013 Cumulative Second Supplement*** paras 3.9.1, 3.13.1 & 3.14.1.)

- **NATIONAL MUSEUMS AND GALLERIES ON MERSEYSIDE v AEW ARCHITECTS AND DESIGNERS LTD** [2013] EWHC 3025 (TCC), October 11, 2013, unrep. (Akenhead J.)

Interest on damages – debt created by contractual obligation

CPR r.16.4, Senior Courts Act 1981 s.35A, Late Payment of Commercial Debts (Interest) Act 1998 ss.1 & 3. In TCC claim, trial judge giving judgment awarding damages to claimants (C). C contending that interest on the damages should be at the rate of 8% as allowed by the 1998 Act. Defendants (D) submitting that it should be at the usual discretionary rate, currently 0.5% plus 2%. **Held**, accepting D's submission, (1) the provisions of the 1998 Act apply to what is called any "qualifying debt" (s.1(1)), which is defined as a debt "created by virtue of an obligation under a contract to which this Act applies to pay the whole or any part of the contract price" (s.3(1)), (2) there is a very clear distinction to be drawn between the payment of "the contract price" and any liability for damages for breach of contract, because the latter does not usually arise as such pursuant to an obligation to pay "the contract price", further (3) in the case of a claim for breach of contract for (unliquidated) damages, that claimed entitlement can only convert

into a debt as a result of a judgment or arbitration award, but it does not become a debt until that stage and at that stage it attracts the specified judgment rate of interest for late payment of a judgment sum, (4) a contract could be drawn in a manner which brought what is or might otherwise be a liability for damages for breach of contract into the contractual machinery for the payment of the contract price, but the contract between the parties in this case contained no such provision. (See ***Civil Procedure 2013*** Vol. 1 paras 7.0.18, 16.4.2 & 40.8.9 and Vol. 2 para.9B-1336.)

■ **PGF II SA v OMFS CO** [2013] EWCA Civ 1288, October 23, 2013, CA, unrep. (Maurice Kay, Beatson & Briggs L.JJ.)

Refusal to engage in ADR–whether unreasonable–costs consequences

CPR rr.36.10 & 44.2, Technology and Construction Court Guide para.7.4. In October 2010, commercial landlords (C) commencing proceedings against lessees (D) for breach of repairing covenants claiming £1.9m. D denying liability entirely. Master giving standard directions for disclosure and expert evidence and transferring claim to TCC. In April 2011, C making Pt 36 offer of £1.25m and D making offer of £700,000. C proposing ADR in the form of mediation, preceded by a meeting of experts. Neither party accepting the other's offer. D making no response of any kind to C's mediation proposal. When C repeated the proposal in July 2011, D again making no response. Trial fixed for January 11, 2013. On day before trial, following D's intimation that they proposed to apply for leave to amend their defence, C accepting D's offer to settle for £700,000 (made in April 2011) save as to costs. Before judge, C submitting that, although the normal (automatic) consequences of their acceptance of D's offer would be that they should pay D's costs from May 2, 2011, until January 10, 2012, in the circumstances (1) no such order should be made in favour of D, and (2) D should be ordered to pay their costs for that (relevant) period. (Parties estimating that each had incurred costs of £250,000 during the period.) Judge (1) finding that D's silence (a) amounted to a refusal to mediate and (b) that the refusal was unreasonable, (2) accepting C's first submission, but rejecting the second, and (3) making costs order accordingly ([2012] EWHC 83 (TCC)). Single lord justice granting D permission to appeal and C making cross-appeal. **Held**, dismissing the appeal and the cross-appeal, (1) the normal (automatic) costs consequences specified by r.36.10 ensue "unless the court orders otherwise", and the court may order otherwise where it would be unjust not to do so, (2) where the injustice test is satisfied the judge has a wide discretion as to the form of costs order, (3) depriving D of the whole of their costs for the relevant was within the range of proper responses to the seriously unreasonable conduct of D which the judge had identified, (4) silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds, (5) a finding of unreasonable conduct constituted by a refusal to accept an invitation to participate in ADR or a refusal even to engage in discussion about ADR, produces no automatic results in terms of a costs penalty, but is simply an aspect of the parties' conduct which needs to be addressed in a wider balancing exercise, (6) the proper response in any particular case may range between the disallowing of the whole, or only a modest part of, the otherwise successful party's costs, (7) in principle, the court might go further and order the otherwise successful party to pay all or part of the unsuccessful party's costs, but that Draconian sanction should be reserved for only the most serious and flagrant failures to engage with ADR. ***Halsey v Milton Keynes General NHS Trust*** [2004] EWCA Civ 576, [2004] 1 W.L.R. 3002, CA, ref'd to. (See ***Civil Procedure 2013*** Vol. 1 para.44.3.13.1, and Vol. 2 paras 2C-87, 14-8 & 14-17.)

■ **R. (SINGH) v SECRETARY OF STATE FOR THE HOME DEPARTMENT** [2013] EWHC 2873 (Admin), September 17, 2013, unrep. (Hickinbottom J.)

Asylum and immigration judicial review claims–filing of acknowledgment of service–extension of time

CPR rr.3.1(2)(a), 54.8 & 54.9. In a number of claims brought against the Secretary of State (D) challenging asylum, immigration and temporary migration decisions, D applying for extensions of time for service of acknowledgements of service and summary grounds and court setting down those applications for an oral hearing. In all cases (except two where the judicial review claim was no longer contested) D filing acknowledgments of service before the oral hearing. **Held**, granting the extensions of time sought by D in those cases, (1) in each of the claims D had failed to file a response to the claim promptly, (2) in a claim for judicial review any person served with the claim form wishing to take part in the judicial review must file an acknowledgment of service within 21 days and must serve it on the claimant as soon as practicable, and in any event not later than seven days after filing (r.54.8(2)), (3) where the person filing it intends to contest the claim, the acknowledgment must set out a summary of grounds for doing so (r.54.8(4), (4) the time limits may not be extended by agreement between the parties, but may be extended by the court under r.3.1(2)(a), (5) the primary purpose of the defendant's summary grounds in the acknowledgment of service is to assist the court when the judge comes to consider the claimant's application for permission to proceed, (6) in the instant cases D's failure to file acknowledgments of service before permission hearings had resulted in wasted time and effort by the claimants and waste of court resources. Court noting significant and unexpected increase in judicial review claims challenging D's asylum and immigration decisions and giving guidance on manner in which Administrative

Court will approach applications for extension of time by D in similar cases during implementation of departmental plans designed to ensure that generally procedural time limits are met and such applications are not necessary. (See ***Civil Procedure 2013*** Vol. 1 paras 3.1.2 & 54.8.1.)

- **RESOLUTION CHEMICALS LTD v H LUNDBECK A/S** [2013] EWCA Civ 1515, November 25, 2013, CA, unrep. (Sir Terence Etherton C., Hallett & Sharp L.JJ.))

Recusal application in patent invalidity claim–judge and expert witness relationship

Human Rights Act 1998 Sch.1 Pt I art.6. On November 7, 2012, company (C) on grounds of obviousness bringing patent invalidity proceedings against patentees (D). Under directions order given on January 24, 2013, case assigned to one (of two) specialist patent judges (the other being disqualified for conflict of interest reasons). Trial due to commence in trial window commencing November 11, 2013. At an applications hearing before the assigned judge on March 14, 2013, C stating that they had an expert opinion from an academic chemist (X). Assigned judge thereupon revealing to the parties that, between October 1982 and May 1983, when the judge was an undergraduate at university studying natural sciences, X acted as the judge's research supervisor. On September 6, 2013, pursuant to directions, C formally notifying D that X would be one their expert witnesses. On September 11, 2013, D requesting assigned judge to recuse himself from hearing the trial of the claim on the ground that his past connection with X gave rise to a real possibility of apparent bias. C opposing request, both on the merits and on the ground of waiver. Accordingly, on September 30, D applying to assigned judge for variation of the directions order of January 24 so as to provide that the trial should not be listed before him. For benefit of the parties judge producing a note containing his recollections of his relationship with X. Judge refusing the application ([2013] EWHC 3160 (Pat)). **Held**, dismissing D's appeal, (1) there was no real possibility of a fair-minded and informed observer concluding that the judge would be subconsciously biased in his assessment of X's evidence, (2) the test for apparent bias, though certainly less rigorous than one of probability, is not one of "any possibility" but of a "real" possibility of bias, (3) cases of subconscious bias ultimately turn on the particular facts of the case, (4) though analogies with other cases may sometimes be of assistance, they must be viewed with care and caution, (5) it is plainly consistent with the policy underlying art.6(1) and common law principles that, on a recusal application, the judge should provide to the parties relevant information, but such information should not go beyond what is strictly necessary for a fair adjudication of the application. Principles relevant to recusal applications summarised. ***Porter v Magill*** [2001] UKHL 67, [2002] 2 A.C. 357, HL, ***Lawal v Northern Spirit Ltd*** [2003] UKHL 35, [2003] I.C.R. 317, HL, ***In re L-B (Children)*** [2010] EWCA Civ 1118, [2011] 1 F.L.R. 889, CA, ***JSC BTA Bank v Ablyazov*** [2012] EWCA Civ 1551, [2013] 1 W.L.R. 1845, CA, ref'd to. (See ***Civil Procedure 2013*** Vol. 1 para.9A-48.)

- **XYZ v VARIOUS; IN RE PIP BREAST IMPLANT LITIGATION** [2013] EWHC 3643 (QB), November 22, 2013, unrep. (Thirlwall J.)

Personal injury claim–disclosure of nature and extent of defendant's insurance cover

CPR rr.1.1, 3.1 & 18.1. Court making group litigation order for management of claims brought by approximately 1,000 women (C) against various defendants for damages for injuries and losses suffered from defective breast implants provided by a French company. Of the 1,000 claims, 670 of them brought against one health services company (D). For purpose of making possible resolution of all claims within the GLO, judge giving directions for trial of certain issues in four sample cases involving D. C applying for order requiring D to provide information as to the nature and extent of their liability insurance cover in respect of their potential liability in the proceedings to claimants on the group register. Application made on basis that the court had power to make the order sought either under r.3.1(2)(m) or r.18.1 and opposed by D on both grounds. **Held**, granting the application in part, (1) the court may make any order for the purpose of managing the case and furthering the overriding objective (r.3.1(2)(m)), (2) furthering the overriding objective involves dealing with the case justly and at proportionate cost (r.1.1(1)), and that further involves dealing with it in ways which are proportionate to the "financial position" of each party (r.1.1(2)(c)(iv)), (3) in the instant proceedings, whether or not D could fund its participation in the litigation to the completion of trial and the conclusion of any appeal affected the manner in which the case was to be managed, (4) if D's insurance was not adequate then the court's directions and pre-trial timetable (which had been fashioned with care and after significant expense had been incurred) would be placed in jeopardy, (5) r.3.1(2)(m) gave the court power to order D to provide to the court for case management purposes a witness statement setting out whether they have insurance cover adequate to fund its participation in the litigation to that extent, (6) the court had no power under r.18.1 to make the order sought by C because the insurance position of D was not a matter "in dispute in the proceedings" within the meaning of that rule. ***Harcourt v FEF Griffin*** [2007] EWHC 1500 (QB), [2008] Lloyd's Rep. I.R. 386, ***West London Pipeline & Storage Ltd v Total UK Ltd*** [2008] EWHC 1296 (Comm), [2008] C.P. Rep. 35, ref'd to. (See ***Civil Procedure 2013*** Vol. 1 paras 1.3.1, 18.1.2, and Vol. 2 para.11-10.)

In Detail

FAILURE TO FILE COSTS BUDGET

In October 2009, during the conduct of Lord Justice Jackson's costs review, Practice Direction 51D (Defamation Proceedings Costs Management Scheme) was brought into effect (see White Book 2013 Vol. 1 para.51DPD.1). This Practice Direction was made under CPR r.51.2 and provided for a pilot scheme designed to test ways for managing costs in proceedings to which the scheme applied with the objective of ensuring that "the costs of each party are proportionate to the value of the claim and the reputational issues at stake and so that the parties are on equal footing" (para.1.3). Paragraph 3.1 of PD 51D stated that each party must prepare a costs budget or revised costs budget in the form of Precedent HA in advance of any case management conference or costs management conference, and para.4.2 stated the parties must exchange and lodge with the court their costs budgets in the required form not less than seven days before the date of the hearing for which the costs budgets are required. Paragraph 5.6 stated that, when assessing costs on the standard basis, the court will have regard to the receiving party's last approved budget and will not depart from such approved budget "unless satisfied that there is good reason to do so". In October 2011, a similar costs management scheme was introduced for proceedings in Mercantile Courts and Technology and Construction Courts (Practice Direction 51G) (see White Book 2013 Vol. 1 para.51GPD.1). By the Civil Procedure (Amendment) Rules 2013 (SI 2013/262), in the light of experience gained through the operation on the two costs management pilot schemes, a new Section was added to CPR Part 3 containing rules for costs management involving the filing and exchange of costs budgets. Those rules (rr.3.12 to 3.14) are found on pp.14 to 19 of the Cumulative Second Supplement to the 2013 Edition of the White Book, together with extensive commentary. The rules in Section II of Part 3 apply to all multi-track cases commenced on or after April 1, 2013. They are supplemented by directions in Practice Direction 3E (para 3EPD1, p.21). Practice Direction 51D and Practice Direction 51G were withdrawn on April 1, 2013, by CPR Update 60 upon the coming into effect of new CPR costs rules. Rule 22(12) and (14) of SI 2013/262 states that any proceedings commenced before April 1, 2013, within the scope of either of the schemes provided for by those Practice Directions "will proceed and be completed in accordance with that scheme".

When taken together the rules in Section II of Part 3 and the directions in PD 3E generally are to the same effect as the provisions in the pilot scheme practice in Practice Direction 51D and Practice Direction 51G. (Under the rules, the times with which costs budgets must be filed and exchanged are fixed by r.3.13.) But they do differ in at least one significant respect. In terms the practice directions contained within them no provision dealing expressly with the consequences that might ensue if a party failed to comply with their provisions. In Section II of Part 3, r.3.14 (Failure to file a budget) states: "Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees."

The significance of that rule is apparent when it is read with r.3.18, a provision which is in similar terms to para.5.6 of PD 51D (referred to above), and states that, when assessing costs on the standard basis, the court will have regard to the receiving party's last approved budget "or agreed budget for each phase of the proceedings" and will not depart from such approved budget "unless satisfied that there is good reason to do so". (For commentary on r.3.14 and r.3.18, see Cumulative Second Supplement paras 3.14.1 and 3.18.1, pp.16 & 18.)

Thus, where a party fails to file a costs budget, that party will be treated as having filed a budget comprising only the applicable court fees and the court, when assessing costs on the standard basis, will not depart from that budget "unless satisfied that there is good reason to do so".

The effect of these provisions were examined by the Court of Appeal in *Mitchell v News Group Newspapers Ltd*, [2013] EWCA Civ 1537, November 27, 2103, CA, unrep. In that case, on March 7, 2013, a Member of Parliament (C) commenced defamation proceedings against a newspaper (D). A case management and costs budget hearing was listed for hearing, initially for June 10, 2013, but, as a result of the late notification of the date to the parties, was re-listed for June 18. Under para.4.2 of PD 51D the parties were required to exchange and lodge with the court their costs budgets in not less than seven days before that date. D lodged their budget on June 11. But C did not file his until June 17, the day before the hearing.

At the hearing the Master noted that PD 51D contained no express sanction for breach of para.4.2, and considered the range of sanctions available to the court generally for breach of practice direction provisions and that made available (since April 1, 2013) by r.3.14 specifically for failures to file costs budgets. The Master also noted that, under r.1.1 (as amended with effect from April 1, 2013), the court is enjoined to deal with cases justly and at proportionate cost, and that includes, so far as is practicable, "enforcing compliance with rules practice directions and court orders" (r.1.1(2)(f)). The Master found that there was "really no adequate excuse" for the breach of para.4.2 and held that, in the circumstances, it was appropriate to order that C "shall be treated as having filed a budget comprising

only court fees". The Master took the view that such an order was a "sanction" within r.3.8 and that C could apply for relief from it in accordance with r.3.9 ([2013] EWHC 2179 (QB)). As would be expected, C applied for such relief. The Master refused the application ([2013] EWHC 2355 (QB)).

C's appeal to a judge against both of the Master's decisions was transferred to the Court of Appeal. The Court of Appeal dismissed both appeals. In relation to the first decision, put shortly, the Court held that the Master had been entitled to be guided by r.3.14 "by analogy", as that rule "represented the considered view of the Civil Procedure Rule Committee as to what constituted a proportionate sanction for failure to file a costs budget in time unless the court otherwise ordered" (para.27). The Court rejected the submission that the Master's decision to impose the r.3.14 sanction by analogy was not in accordance with the overriding objective. The Court noted that the costs management hearing of June 18 proved to be abortive. At that hearing C was not in a position to invoke the saving provision in r.3.14 ("unless the court otherwise orders") and ask the Master to make an order relieving him from the sanction imposed by the rule itself. That was because his solicitors had not produced evidence which might have persuaded the court to adopt that course. The Court added (para.32) that the considerations to which the court should have regard when deciding whether it should exercise its power under r.3.14 to order "otherwise" are likely to be the same as those which are relevant to a decision whether to grant relief under r.3.9 (as recently amended). In each case, in deciding whether to "otherwise order", the court must give effect to the overriding objective (see r.1.2(a)).

As indicated above, the consequence for C of the Master's decision imposing the sanction, and of the Court of Appeal's upholding of it, was that, by operation of r.3.18, a court at a later stage in the proceedings when assessing costs on the standard basis would treat C as having filed a budget limited to court fees and would not depart from it "unless satisfied that there is good reason to do so" (r.3.18(b)).

Having dismissed C's appeal against the Master's decision imposing the sanction, the Court of Appeal then considered and dismissed C's appeal against the Master's second decision, that is the decision dismissing their application for relief from the sanction under r.3.9. (For a brief account of the Court's decision on this aspect of the appeal, see immediately below.)

RELIEF FROM PROCEDURAL SANCTION

As was explained in Issue 2/2013 (February 28, 2013) of CP News, by the Civil Procedure (Amendment) Rules 2013, r.3.9(1), with effect from April 1, 2013, was substantially re-cast. The nine criteria previously found therein (which reflected pre-CPR case law) are removed and the rule simply states that the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for litigation to be conducted efficiently and at proportionate costs, and (b) to enforce compliance with rules, practice directions and orders. This amendment followed recommendations made in *Review of Civil Litigation Costs: Final Report (December 2009)* Ch.39 para.6.7 (p.397) and is made for the reasons given there. In the instant case the Court of Appeal explained that this was intended to effect a "tougher, more robust approach to rule-compliance" which the Court now endorsed. The Court accepted that regard should be had to all the circumstances (because that is what the rule says), but added that, subject to guidance which the Court now gave, the other circumstances should be given less weight than the two considerations which are specifically mentioned.

That guidance is given in paras 40 and 41 of the Court's judgment. It should be studied carefully and in its entirety. Any effort to summarise it is likely to mislead. The highlights of the guidance are as follows.

"40. … It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly. …

41. If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. … The need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the *Jackson* reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event."

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