CIVIL PROCEDURE NEWS

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IN RE AN ARBITRATION CLAIM; STATOIL v SONATRACH [2014] EWHC 875 (Comm), April 2, 2014, unrep. (Flaux J.)

Enforcement of arbitration award as judgment–interest on judgment

CPR rr.6.15, 40.8 & 62.18, Arbitration Act 1996 ss.49, 66 & 68, Judgments Act 1838 s.17. In contractual dispute between Norwegian company (C) and Algerian company (D) submitted to arbitration, on April 30, 2013, arbitral tribunal making award in favour of C. Tribunal not awarding post-award interest under s.49(4) (for which C had made no claim) or pre-award interest. On July 11, 2013, on C's application under s.66, High Court judge making order (1) for the enforcement of the award in the same manner as a judgment of the court, (2) permitting service of claim form on D by an alternative method, and (3) requiring D to pay interest at 8% on the outstanding damages and costs from that date until payment. Subsequently, D making claim under s.68 challenging the award for serious irregularity, in particular on ground that the tribunal failed to comply with its general duty, and, in addition, applying to set aside judge's orders for alternative service and interest. Judge dismissing D's s.68 claim and validating retrospectively the order for alternative service. On question of interest, **held**, dismissing D's application, (1) there is no tension between s.49(4) and s.66, (2) unless the parties to an arbitration agree otherwise, by operation of s.49(4), the tribunal may award interest from the date of the award, (3) the court has no power to award interest on an award before judgment to enforce the award is entered, however (4) once judgment on an award has been entered under s.66, that judgment has the same characteristics as any other judgment of the court and interest will run under s.17 from the date of the judgment, as the obligation to honour the award has then merged into the judgment debt. ***Dalmia Cement Ltd v National Bank of Pakistan*** [1978] 2 Lloyd's Rep 223, ***Walker v Rowe*** [2000] 1 Lloyd's Rep. 116, ***Pirtek (UK) Ltd v Deanswood Ltd*** [2005] EWHC 2301 (Comm), [2005] 2 Lloyd's Rep 728, ***Gater Assets Ltd v Nak Naftogaz Ukrainiy*** [2008] EWHC 1108 (Comm), [2008] 2 Lloyd's Rep. 295, ref'd to. (See ***Civil Procedure 2014*** Vol.1 para.40.8.3, and Vol.2 paras.2E-214, 2E-254 & 9A-124.)

BHATIA BEST LTD v LORD CHANCELLOR [2014] EWHC 746 (QB), March 17, 2014, unrep. (Silber J.)

Legal aid–public law category of work

Senior Courts Act 1981 s.31, Legal Aid, Sentencing and Punishment of Offenders Act 2012 Pt 1 Sch.1 para.19(10), Housing Act 1996 s.204. Under Standard Civil Contract (SCC) between them and the Lord Chancellor (D), solicitors (C) providing publicly-funded services under the civil legal aid scheme for clients qualifying for aid. Before April 1, 2013, when the 2012 Act came into effect, under the "public law" category of work (as defined), and for which C held a "schedule authorisation", C receiving civil legal aid funding for its work while acting for clients in appeals to the County Court against homelessness decisions made by local authorities under s.204. However, applications for funding for such appeals made by C after that date refused by the Legal Aid Agency (LAA) on ground that they did not fall within the new public law category introduced as a result of 2012 Act. Under processes provided for by the SCC, LAA confirming that decision on review and C then referring the issue to the High Court. **Held**, dismissing C's claim, (1) before April 1, 2013, it was possible for providers to undertake at least some legally aided work in some categories of law in which they did not hold a schedule authorisation, but (2) since that date the scheme has changed to one of exclusivity of all categories, with the result that it is generally not possible for a provider to undertake work in a category unless the provider holds a schedule authorisation for that category, (3) since April 1, 2013, the public law category has been radically changed so that s.204 appeals are only within its scope if they meet the definition of "judicial review" in para.19, (4) that definition includes, in addition to the procedure for judicial review claims under s.31, any procedure in which a court is "required by an enactment to make a decision applying the principles that are applied by the court on an application for judicial review" (para.19(10)(b)), (5) on the proper construction of the relevant provisions, the procedure for s.204 appeals in the County Court is not one in which the court is "required" to apply judicial review principles, (6) there was no express requirement to that effect in s.204 and no other reasons for imposing such requirement, (7) consequently, C's claim failed because, since April 1, 2013, s.204 applications did not fall within the public law category of legal aid work. ***Nipa Begum v Tower Hamlets London Borough Council*** [2000] 1 W.L.R. 306, CA, ***Runa Begum v Tower Hamlets London Borough Council*** [2003] UKHL 5, [2003] 2 A.C. 430, HL, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 para.3A-1430 & 3A-1442.)

■ **CHARTWELL ESTATE AGENTS LTD v FERGIES PROPERTIES SA** [2014] EWCA Civ 506, April 16, 2014, C.A., unrep. (Laws, Sullivan & Davis L.JJ.)

Failure to serve witness statements within time specified by court–relief from sanction

CPR rr.3.1, 3.8, 3.9 & 32.10. Following sale of a London property owned by Panamanian company (D1) to individual, company providing estate agency services (C) bringing claim against D1 for £450k commission under an agency agreement, and against a solicitor (D2), on a joint and several basis, by reason of terms of business forming part of that agreement. D1 and D2 (D) disputing that there was any contractual obligation to make such payment. At CMC on October 17, 2013, Master ordering the simultaneous exchange of the statements of all witnesses of fact "by no later than 4 p.m. on November 22, 2013" (as agreed by the parties), and standard disclosure. Subsequently, case fixed for trial in a trial window commencing April 29, 2014. Before and after the CMC, and beyond November 22, parties in dispute as to whether documents disclosed by D sufficient to enable C to finalise their witness statements. Both sides failing to serve witnesses statements by due date, and neither party seeking an extension of time from the court. Eventually, on January 16, 2014, D giving an amount of the disclosure being sought by C (whilst repeating their view that the documents in question were not relevant to the matters in dispute). On January 27, 2014, C issuing an application notice seeking (among other things) (1) an extension of time for exchange of witness statements to February 10, (2) provision for supplementary statements, in the event of further disclosure, and (3) for relief to "the parties" from sanction under r.3.9 for failure to exchange witness statements by November 22, 2013, alternatively that "the parties" have permission under r.32.10 to rely upon the evidence of those witnesses whose statements were served by February 10, 2014. Application opposed by D. Judge granting an extension of time and relief from sanction to both sides ([2014] EWHC 438 (QB)). Single lord justice granting D permission to appeal. **Held**, dismissing appeal, (1) r.32.10 imposes a sanction in the event of failure to serve a witness statement within the time specified, (2) the phrase "unless the court gives permission" as contained in that rule cannot be applied in a free-standing way (leaving the exercise of judicial discretion at large), (3) in deciding whether to give permission, the court has to have regard to, and give effect to, other relevant rules such as r.3.1, and must give effect to rr.3.8 and 3.9, (4) the judge was justified in finding that the non-compliance on the part of C was not trivial and in finding that there was no good reason advanced to explain the non-compliance, (5) nevertheless the judge was still required, by the provisions of r.3.9, to consider "all the circumstances of the case" so as to enable him to deal with the application justly, (6) those circumstances included (a) the important fact that the trial date would not be lost if relief were granted and a fair trial could still be had, (b) the fact that no significant extra cost would be occasioned if relief were granted, and (c) the fact that D as well as C were in default, (7) the judge was also justified in taking into account and attributing importance to the circumstance that refusal to grant relief from the sanction stipulated in r.32.10 would effectively mean the end of the claim (since the burden of proof was on C to prove its case and it would have no evidence), (8) however, the fact that, in any given case, refusal to grant relief from sanction imposed by r.32.10 would in practice mean the end of the claim or the defence will by no means of itself necessarily warrant the grant of relief from sanction, (9) this was one of those cases in which, notwithstanding the paramount importance and the great weight to be given to the two matters specified in r.3.9, those two matters could reasonably be assessed as outweighed by all the other circumstances, (10) there was no proper basis for interfering with the judge's evaluation of the position and his exercise of discretion. ***Mitchell v News Group Newspapers Ltd (Practice Note)*** [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, CA, ***Durrant v Chief Constable of Avon and Somerset*** [2013] EWCA Civ 1624, [2014] C.P. Rep. 11, CA, ref'd to. (See ***Civil Procedure 2014*** Vol.1 paras.3.9.3, 3.9.4, 3.9.5 & 32.10.2.)

■ **DAR AL ARKAN REAL ESTATE DEVELOPMENT CO v AL REFAI** [2014] EWHC 1055 (Comm), April 11, 2014, unrep. (Andrew Smith J.)

Committal application–hearing before trial–recusal of judge

CPR r.81.28, Data Protection Act 1998 s.55. Saudi Arabian property development company (C1) and Bahraini bank (C2) bringing commercial proceedings against former CEO of C2 (D1), an English company (D2) providing investigatory and business intelligence services, and a chartered accountant (D3). C1 and C2 having common shareholders and directors, including a particular businessman (X) who was managing director of C1 and a director of C2. Claimants alleging that, after dismissal from his position, with the assistance of D2 and D3, D1 instigated a campaign (involving the disclosure of confidential information) to discredit, damage and destroy their business. Before issue, on their ex parte applications, claimants (C) granted (1) authorisation under s.55 to disclose and deploy in court certain "personal data" and (2) interim injunctive relief, including order preventing disclosure of confidential information and a worldwide freezing order. Defendants (D) applying to set aside those orders on the grounds (1) that, when they applied to the court, C did not make full and frank disclosure and misled the court in their evidence and submissions, and (2) that C had not complied with an associated undertaking to and order of the court, in particular to preserve and keep safe hard drives containing certain material referred to by X in

his affidavit and to deliver them up to the solicitors for the claimants for safe-keeping. On December 12, 2013, judge granting application ([2013] EWHC 3539 (QB)) and discharging the order, finding that X had knowingly and for ulterior motives deleted documents from the hard drives. D2 applying (1) for declaration that C1 and C2 were in contempt of court in that they broke their "preservation undertaking" and were in breach of the "drives delivery" order, and (2) for orders that they be fined and that X be imprisoned. Same judge ordering that there be a split trial of C's claims and that certain issues be tried first and listed to begin in March 2015, and directing that the committal application be provisionally listed for a hearing before him beginning on May 19, 2014. (On December 20, 2013, judge granting D2 permission to serve the committal application on X in Saudi Arabia under r.6.36, on grounds that he was a necessary or proper party to contempt proceedings and the English court was the proper forum ([2013] EWHC 4112 (QB)).) At further directions hearing relating to the committal application, C submitting that the application should be heard after the trial, and requesting that the judge should recuse himself. **Held**, refusing the first application but granting the request, (1) where it arises, the question whether a committal application should be heard before of after the trial is a decision for the judge's case management discretion and there is certainly no rule of law as to the timetable to be adopted, (2) in the circumstances of the present case, the committal application should be heard well before trial because that timetable was preferable in order to uphold the court's authority and to work fairness between the parties, (3) apparent bias is not demonstrated by the mere fact that a judge, earlier in the same case or a previous case, has commented adversely on a party or a witness, or found the evidence of a party or witness to be unreliable in the circumstances, (4) however, there are circumstances in which, a fair-minded observer might entertain a reasonable apprehension of bias by reason of pre-judgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact, (5) the judgment of December 12, 2013, contained detailed and specific views about the credibility of the witnesses and conclusions adverse to the claimants, not only on some questions that might arise on the hearing of the committal application, but on issues that were likely to be crucial and possibly on all the real issues that would arise. ***JSC BTA Bank v Ereshchenko*** [2013] EWCA Civ 1961, July 4, 2013, CA, unrep., ***JSC BTA Bank v Ablyazov (No 7)*** [2011] EWCA Civ 1386, [2012] 2 All E.R. 575, CA, ***Porter v Magill*** [2001] UKHL 67, [2002] 2 A.C. 357 H.L., ref'd to. (See ***Civil Procedure 2014*** Vol.1 para.81.28.2, and Vol.2 para.9A-48.)

■ **DUNHILL v BERGIN** [2014] UKSC 18, [2014] 1 W.L.R. 933, SC

Validity of compromise–test for capacity of protected party

CPR rr.21.1, 21.2, 21.4 & 21.10, Civil Procedure Act 1997 s.1, Administration of Justice Act 1969 s.12. In May 2002, pedestrian (C) bringing personal injury claim against motor-cyclist (D). On January 7, 2003, the day of the liability trial, county court judge ordering that, by consent, judgment should be entered for C in the agreed sum of £12,500 and costs. On February 11, 2009, by a litigation friend, C applying (1) for declaration that on January 7, 2003, she lacked capacity to enter into a compromise agreement, and (2) for order setting aside that judge's order of that day. At trial of preliminary issue, judge holding that C did have capacity and dismissing claim for declaration ([2011] EWHC 464 (QB)), but this decision reversed by the Court of Appeal ([2012] EWCA Civ 397), (1) holding that the proper question was, not whether the claimant had capacity to enter into that compromise but whether she had capacity to litigate, and (2) remitting to High Court question whether, in the circumstances, r.21.10 applied. Subsequently, judge holding that r.21.10 did apply, that therefore the settlement was void and the consent judgment should be set aside, but on D's application, granting certificate under s.12 for direct appeal against his decision to the Supreme Court ([2012] EWHC 3163 (QB), [2012] 1 W.L.R. 3739) (the Supreme Court having previously given D permission to appeal from the holding of the Court of Appeal). **Held**, dismissing both appeals, setting aside the consent order, and ordering that the case should go for trial, (1) the test of capacity to conduct proceedings for the purpose of Part 21 is the capacity to conduct the claim or cause of action which the claimant in fact has, rather than to conduct the claim as formulated by her lawyers, (2) judged by that test, it was common ground that C did not have the capacity to conduct her claim and should have had a litigation friend when the proceedings were begun, (3) the "compromise rule" in r.21.10 has the effect of altering the substantive law as to the avoidance of contracts entered into by parties lacking capacity, (4) as embodied in r.21.10 that rule is within the powers of the rule-making body and is not ultra vires, (5) where legal proceedings are settled or compromised without it being recognised that one of the parties lacked capacity (so that that party did not have the benefit of a litigation friend and the settlement was not approved by the court), the settlement and order are of no effect. ***Imperial Loan Co. Ltd v Stone*** [1892] 1 QB 599, CA, ***Dietz v Lennig Chemicals Ltd*** [1969] 1 A.C. 170, HL, ***Masterman-Lister v Jewell***, [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511, CA, ***Bailey v Warren*** [2006] EWCA Civ 51, [2006] C.P. Rep. 26, CA, ref'd to. (See ***Civil Procedure 2014*** Vol.1 paras.21.0.3, 21.3.1, 21.10.1 & 21.10.2, and Vol.2 paras.9A-768 & 12-4.)

IN RE GUIDEZONE; KANERIA v KANERIA [2014] EWHC 1165 (Ch), April 15, 2014, unrep. (Nugee J.)

Extension of time for filing defence – "in-time" application

CPR rr. 3.1(2)(a) & 3.9, Companies Act 2006 s.994. Shareholder in family company bringing unfair prejudice petition under s. 994. On December 13, 2013, Deputy High Court judge ordering trial of preliminary issues and giving directions, including direction that individual respondents should file a defence by February 14, 2014. Upon claimant (C) not agreeing to an extension of that time limit, on February 11, respondents (D) applying for an extension to March 14. C (1) opposing that application, submitting (a) that orders of the court are to be complied with, (b) that a party applying for an extension of time has to show a good reason for it, and (c) that no good reason had been shown by D, and (2) on March 3, 2014 issuing an application, seeking an order debarring D from defending the preliminary issues. **Held**, granting D's application, (1) a distinction may be drawn between an application for extension of time issued before the time for compliance has expired (an "in-time" application), and one which is made after the time for compliance has expired (an "out-of-time" application), (2) in a case where what is before the court is an application for relief from sanction under r.3.9, it is the duty of the court to follow the principles laid down by the Court of Appeal since the revisions of r.3.9 taking effect on April 1, 2013, (3) there is authority to the effect that a similar approach is applicable in a case where an out-of-time application for an extension of time is made, but there may be cases where, in the particular circumstances, that approach would not be appropriate, (4) further, for sound practical and policy reasons, supported by authority, that approach is not appropriate where (as here) an in-time application is made for an extension of time, because such an application is not, and should not be treated as, an application for relief from sanctions, (5) a court of first instance is bound (a) to regard an in-time application for an extension of time as neither an application for relief from sanction, nor as closely analogous to one, and (b) to exercise the discretion under r.3.1(2)(a) by applying the overriding objective (as revised) rather than the terms of r.3.9. ***Sayers v Clarke Walker (Practice Note)*** [2002] EWCA Civ 645, [2002] 1 W.L.R. 3095, CA, ***Robert v Momentum Services Ltd*** [2003] EWCA Civ 299, [2003] 1 W.L.R. 1577, CA, ***Kagalovsky v Balmore Invest Ltd*** [2014] EWHC 108 (QB), January 27, 2014, unrep. (See ***Civil Procedure 2014*** Vol.1 para.3.1.2.)

F H BRUNDLE v PERRY [2014] EWHC 979 (IPEC), April 2, 2014, unrep. (Judge Hacon)

Scale costs in IPEC claims–court's discretion

CPR rr.44.2, 45.31 & 63.26, Practice Direction 45 (Fixed Costs) para.3.2 & Table A, Enforcement Directive 2004/48/EC art.27. In patent proceedings started by claimant company (C) in Patents County Court on March 12, 2013, and continued in IPEC after October 1, 2013, trial judge, on March 6, 2014, (1) giving judgment for C on their claim, (2) dismissing defendant's (D) infringement counterclaim, and (3) dismissing D's Part 20 claim (also for infringement and started by D on December 20, 2013) against another company (X). In relation to costs, (1) X submitting that, as D's additional claim against them was not commenced before October 1, 2013, they were entitled to the scale costs in Table A as it stood from that date, and (2) D and X both submitting that, on ground of D's unreasonable behaviour, the costs cap and scale costs applied by r.45.31 should not be applied at all. **Held**, refusing second application (but making additional award) and granting first, (1) the overall discretion as to costs given to courts by r.44.2 applies to IPEC proceedings where r.45.31 applies, and allows the court to have regard to the conduct of the parties when assessing costs (r.44.2(4)(a)), however (2) on that ground, the IPEC should only depart from the total and maximum amounts fixed by r.45.31 in a "truly exceptional" case, (3) in the instant case, D's conduct "was not truly exceptional on the scale of unsatisfactory behaviour", but it was open to the court to take it into account provided that did not give rise to a total award in costs above £50,000, (4) in the circumstances it was appropriate to award C and X an additional £2,000 in costs each (yielding a combined total of £49,645), (5) the relevant transitional and savings provisions state that the amendments made to Table A, which had the effect of increasing the maximum amount of costs payable for "stages of a claim", only apply to "proceedings" started on or after October 1, 2013, (6) in that context, "proceedings" should not be interpreted as a collective term including all claims, counterclaims and additional claims arising, thus (7) although (as was accepted), the costs recoverable by C under Table A were restricted to the lower maximum rates payable in proceedings started before October 1, 2013, X's costs were not and should be awarded according to Table A as amended from that date. On C's application, judge directing that, for purpose of disseminating his trial judgment, a notice thereof should be published at D's expense (art.27). Observations on inconsistencies throughout CPR in use of terms "claims" and "proceedings". ***Liversidge v Owen Mumford Ltd*** [2012] EWPCC 40, [2013] F.S.R. 38, ***Henderson v All Around The World Recordings Ltd*** [2013] EWPCC 19, [2013] F.S.R. 42, ***Phonographic Performance Ltd v Hamilton Entertainment Ltd (No. 2)*** [2013] EWHC 3801 (IPEC), December 13, 2013, unrep., ***Samsung Electronics (UK) Ltd v Apple Inc*** [2012] EWCA Civ 1339, [2013] E.C.D.R. 2, CA, ref'd to. (See ***Civil Procedure 2014*** Vol.1 para.45.31.1, and Vol.2 paras.2F-9.15, 2F-17.10.0 & 2F-17.19.1.)

■ **KAZAKHSTAN KAGAZY PLC v ARIP** [2014] EWCA Civ 381, April 2, 2014, CA, unrep. (Longmore, Jackson & Elias L.JJ.)

Freezing injunction–whether applicant has "good arguable case"–applicant's disclosure duty

CPR r.25.1(1)(f). On August 1, 2013, six Kazakhstan companies and their parent company (registered in the Isle of Man) bringing substantial commercial claim against two former directors and shareholders (D1 and D2) and finance officer alleging two large frauds (amounting to US$135m) relating to construction projects in Kazakhstan. Defendants denying frauds altogether. On August 2, 2013, judge granting claimants (C) freezing injunctions against D1 and D2. Injunction against D1 replaced by undertaking on terms offered by him. D2 applying to judge for discharge of the injunction against him, and submitting (amongst other things) (1) that the claim for fraud against him was time-barred by Kazakh law (imposing three-year limit), in particular, on ground that, well before August 1, 2010, the subsidiary company claimants ought to have known that they had been defrauded, and (2) that in their without notice application, C had failed in their duty of disclosure. After three-day hearing, judge dismissing D2's application, finding (1) that C "had a much better argument" than D2, and (2) that C's disclosure failures were unintentional and ultimately not material. D2 appealing to Court of Appeal. By cross-appeal, parent company submitting (a submission rejected by the judge) that, apart from the subsidiary claimant companies, it had an independent claim against D2 which was not defeated by the principle of reflective loss and which was not time-barred by Manx law (imposing a six-year limit). **Held**, dismissing the appeal and the cross-appeal, (1) the appropriate test to be met by a claimant seeking a freezing injunction is that of "good arguable case", (2) the instincts of experienced commercial judges in assessing what is, and what is not, a good arguable case should be respected, and an appeal court should interfere only if it is clear that the judge was wrong, (3) the "much better argument" test applied by the judge was slightly more onerous, but did not in any way affect his conclusions, (4) there was force in D2's submission that, before August 1, 2010, the claimants ought to have been aware of the fraud, however (5) C's argument on limitation was more than barely capable of serious argument, even if it could not be said that they had much the better of the argument, (6) issues of non-disclosure or abuse of process in relation to the operation of a freezing order ought to be capable of being dealt with quite concisely, (7) generally, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, (8) the duty to disclose cannot mean that a party must rehearse before the judge at the without notice application a detailed analysis of the range of possible inferences which the defendant may seek to draw in support of a limitation defence, particularly when both the existence and the relevance of the underlying facts are disputed, (9) a judge has a wide discretion in relation to matters of non-disclosure, particularly if he himself made the initial freezing order, and the judge's decision in this case was well within the margin of discretion allowed to him and his decision could not be said to be plainly wrong, (10) on the evidence before him, the judge rightly held that C had no good arguable case on reflective loss. Court stating that it is very important that applications to discharge freezing injunctions do not turn into mini-trials, and that, unless the position is very clear, the question whether a foreign time limit applies cannot be determined on an interlocutory application. Explanation of differences between "good arguable case" test in context of applications (a) for freezing orders and (b) for service out of jurisdiction. Observations on effect of principle of reflective loss where claims of subsidiaries impaired by time-bars, especially where lapse of time caused by act of wrong-doer. ***Johnson v Gore Wood & Co*** [2002] 2 A.C. 1, HL, ***Crown Resources AG v Vinogradsky***, June 15, 2001, unrep., ***Lakatamia Shipping Company Limited v Nobu Su Limited*** [2012] EWCA Civ 1195, July 18, 2012, CA, unrep., ref'd to. (See ***Civil Procedure 2014*** Vol.1 paras.25.1.25.4, 25.3.5 & 25.3.7, and Vol.2 para.15-23.)

■ **LUCKWELL v LIMATA** [2014] EWHC 536 (Fam), February 13, 2014, unrep. (Holman J.)

Court sitting in public–power to exclude witnesses

CPR r.32.1, Family Procedure Rules 2010 rr.27.10 & 27.11. In application for financial provision after divorce, judge directing that the hearing should be in public. Effectively, the equity in a house given to the wife (W) by her father (F) constituting the only significant asset in the case. At commencement of cross-examination of W, counsel for the husband (H) (who had already given evidence), applying to judge for direction excluding F (who was to give evidence) from the court room for the duration of the first part of that examination. Counsel for H opposing the application. **Held**, granting the application, (1) the court has power to direct that a witness should be excluded until called for examination, (2) in family proceedings the power is recognised by, but not granted by, r.27.11(6), (3) it is desirable that the power should be exercised according to consistent principles in all courts, in family and civil proceedings in the County Court and in the several Divisions of the High Court when sitting in public, (4) if a court is sitting in public, no one who wishes to be present should be excluded, not even a witness, without good reason, (5) a judge should only exclude witnesses if satisfied, on the facts and in the circumstances of the particular situation, that it would, for good reasons, be an appropriate step to take, (6) in the instant case there were certain

important contested issues of fact concerning the circumstances under which, and the conditions on which, assets had been transferred from F to W to which the evidence of W and H were highly relevant, (7) their evidence, and more particularly that of F, would have greater value as evidence if F were not present whilst W gave her evidence concerning those issues and if F were not able to hear at the time what she has said before giving his own evidence. ***Tomlinson v Tomlinson*** [1980] 1 W.L.R. 322, DC, ref'd to. (See further "In Detail" section of this issue of CP News, ***Civil Procedure 2014*** Vol.1 para.32.1.4.2, and ***Supreme Court Practice 1999*** Vol.1 para.38/1/8.)

■ **MITCHELL v NEWS GROUP NEWSPAPERS LTD** [2014] EWHC 879 (QB), March 27, 2014, unrep. (Tugendhat J.)

Disclosure of documents–order against non-party–Convention rights

CPR r.31.17, Human Rights Act 1998 Sch.1 Pt. I art.8. Individual (A) commencing libel action against newspaper (B) in respect of a report published by B of an incident involving A and a police officer (C) in which, during a verbal exchange, A said to have abused C. C commencing libel action against A in respect of statements made by A concerning veracity of C's account of the exchange. Extensive investigations of the incident, involving police (D), undertaken by the Crown Prosecution Service and the Independent Police Complaints Commission. In first action, B serving defence, including truth and public interest privilege and parties awaiting CMC. In second action, defence and any reply thereto yet to be served. In first action and in second action, B and C respectively, making applications under r.31.17 for disclosure by D (not a party to either action) of certain categories of documents including documents coming into being in the course of the police investigations of the incident. A not opposing either application. D objecting to disclosing certain categories of documents and applicants not pursuing an order for any of them. In principle, D not resisting disclosure of another three categories of documents, including statements made by witnesses interviewed by the police and exhibits thereto, but informing court that a number of the witnesses would object to disclosure or would consent only on conditions. **Held**, refusing the applications, (1) in cases decided solely on the basis of the rights of the parties under the common law and equity, the courts have recognised that those who make statements to the police, or give information as witnesses, may do so in circumstances where an equitable obligation of confidence is owed to them, and that in determining whether disclosure should be ordered have to balance the public interest in preserving the confidentiality with the public interest of ensuring a fair trial, (2) in the instant case, the objections and conditions put forward by those who made the witness statements in question arguably raised issues, not only as to the equitable right to confidentiality, but also as to whether their Convention rights to their private and family lives may be engaged and interfered with if an order were to be made, (3) there may be cases where the court can be satisfied that an order for disclosure of witness statements and similar documents ought to be made, notwithstanding its possible effect on the Convention rights of persons not before the court, and without such persons having expressed their consent or having had formal notice of the hearing, but (4) if there are such cases the instant case was not one of them, because the material before the court was not sufficient to enable it to carry out the genuine case-by-case balancing exercise required where Convention rights are arguably engaged, (5) since the court may make an order under r.31.17 only where the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings, an order will rarely be made before a defence has been served, (6) in a libel action, where a reply may be called for, such an order will rarely be made before a reply has been served because only then will the court be able to see what the cases of each of the parties are. Judge explaining that his decision and reasons were not derived from adversarial argument, but "as is all too commonly the case" were derived from a course of his own motion which he decided was necessary to adopt in the face of powerful advocacy to the contrary. (See ***Civil Procedure 2014*** Vol.1 paras.31.17.1 & 31.17.4, and Vol.2 para.3D-78.)

■ **NEWLAND SHIPPING & FORWARDING LTD v TOBA TRADING FZC** [2014] EWHC 864 (Comm), March 26, 2014, unrep. (Leggatt J.)

Cost –Part 36 offer–successful party–judgment "at least as advantageous"

CPR rr.36.3, 36.14(3)(d) & 44.2(2). Company (C) commencing two actions against another company (D) making claims for damages under two different contracts. Court directing that actions should be tried together. On May 8, 2013, C making Part 36 to settle all claims and counterclaim in both actions for US$2.9m (including interest but excluding C's costs). Offer not accepted by D and expiring on May 29, 2013. On November 15, 2013, C obtaining judgments by default in both actions. On February 7, 2014, on D's application for relief from sanction, judge (1) refusing to set aside judgment in first action (but reducing judgment sum from US$7.2m, to US$6.6m), and (2) setting aside judgment in second action. At trial of second action, on March 12, 2014, judge giving judgment for C on their contractual claim for sums totalling US$334k and judgment for D on their counterclaim for sum of US$2.5m. When aggregated, judgments in the two actions yielding balance of US$4.4m in C's favour. On costs, C submitting that they should be awarded their costs of the whole of the second action, and that, in accordance

with r.36.14(3), their costs since May 29, 2013, should be paid on the indemnity basis together with interest on its claim and on its costs at 10% above base rate together with an "additional amount" (not exceeding £75,000). D submitting that they were the successful party and should be awarded their costs of the whole the second action (less a discount of 15%). Held, making order for costs (1) the general rule is that the unsuccessful party will be ordered to pay the successful party's costs, (2) as D obtained judgment for a sum of money which very substantially exceeded the sum which they were held liable to pay, they were the successful party and C were the unsuccessful party, (3) in determining costs, it was necessary to take into account (a) that C succeeded in their claim and (b) that, although that claim was for a much smaller sum of money than the counterclaim, the issues raised by C's claim occupied a much greater amount of time at the trial and must have accounted for a correspondingly larger proportion of the work involved in preparation, (4) having regard to all the circumstances, and leaving out of account C's Part 36 offer, a just order would be that C should pay 50% of D's costs, (5) on February 7, 2014, the proceedings entered a new phase in which all that was in issue was C's claim and D's counterclaim in the second action and C's Part 36 offer was no longer applicable, (6) accordingly, the costs consequences following judgment provided for by r.36.14 did not apply, (7) in any event, in the circumstances it would be unjust to make the costs order sought by C. Judge explaining (a) that, in accordance with r.36.14(1), whether C would be entitled (as they claimed) to interest and costs as prescribed by r.36.14(3) would depend on whether the judgment being entered against D was "at least as advantageous" to C (as construed under r.36.14(1A)) as the proposals contained in their Part 36 offer, (b) that it was impossible to say that the judgment entered against D in the second action was "at least as advantageous" to C as the proposal contained in their Part 36 offer, (c) that r.36.14 is not apt to cover a situation where two different judgments are given at different times in two separate actions so as to enable the judgments to be aggregated and treated as if they were one, accordingly (c) that it was not permissible for C to contend that the balance of US$4.4m owing to them in the two actions was a judgment "at least as advantageous" to them as their offer. ***ACT Construction v Mackie*** [2005] EWCA Civ 1336, October 25, 2005, CA, unrep., ref'd to. (See ***Civil Procedure 2014*** Vol.1 paras.36.3.4, 36.14.1 & 44x.3.19.)

■ **VITOL BAHRAIN EC v NASDEC GENERAL TRADING LLC** [2014] EWHC 984 (Comm), April 4, 2014, unrep. (Popplewell J.)

Service out of jurisdiction–"necessary or property party"

CPR rr.6.36 & 11, Practice Direction 6B para.3.1(3) & (6). Dispute arising as to whether company (D1), the sellers of oil to another company (C), under a contract with English law and jurisdiction provisions, had title to oil cargo stored at a UAE port. A third company (D2) beginning proceedings in UAE against owner of the storage facility asserting ownership of the cargo. D1 intervening in those proceedings and C subsequently joined as a party. C beginning proceedings in England, with D1 as defendants, seeking declaration that D1 had good title to the cargo. In those proceedings, (1) on ground that they were necessary parties, C joining D2 and a bank (with a security interest) as parties, (2) on November 16, 2012, C obtaining order under r.6.36 and para.3.1(6) permitting them to serve claim form on D2 out of the jurisdiction, and (3) after their joinder in the UAE proceedings, on May 24, 2013, C obtaining anti-suit injunction against D1 without notice. With exception of bank, all parties UAE companies. After service effected on them, D2 acknowledging service. On November 1, 2013, on ground that UAE was the natural forum for determining the issue of title, judge dismissing C's application to continue the anti-suit injunction. D2 applying to set order for service aside. D2 submitting, amongst other things that, by virtue of judge's decision of November 1, 2013, C were estopped from denying that UAE was the natural forum. **Held**, rejecting that particular submission but granting application, (1) where r.6.36 and para.3.1 apply, a claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given, (2) an application to set aside permission to serve out of the jurisdiction falls to be determined by reference to circumstances at the time permission is granted (in this case November 16, 2012), not by reference to circumstances at the time the application to set aside is heard, (3) the starting point when considering the necessary or proper party head of jurisdiction is to examine the nature of the claim which arises against the "anchor" defendant, as that is the claim to which it must be necessary or proper for the additional defendant to be party, (4) at this first stage, the approach requires consideration of such claim in isolation, that is to say assuming that there will be no joinder of the additional foreign defendant, (5) C had no claim it could pursue in England independently of a claim against D2, and had none when the application for permission was made, (6) thus, there was no independent claim to which D2 could be said to be a necessary or proper party, (7) it was open to C to have the issue of title in the cargo determined in the UAE proceedings, to which D1 and D2 were amenable, (8) whether or not C wanted to be a party, or had in fact remained joined as a party, in those proceedings was irrelevant, as a claimant cannot render an available and more appropriate forum unavailable or less appropriate by choosing not to participate in proceedings in that forum. (See ***Civil Procedure 2014*** Vol.1 paras.6.37.28 & 11.1.1.)

In Detail

EXCLUSION OF WITNESS FROM COURT

The facts of the case of *Moore v Lambeth County Court Registrar* [1969] 1 W.L.R. 141, CA, were these. At 10.30 am on Monday February 19, 1968, a bailiff attended at a flat in south-east London to execute a warrant for possession. There was an altercation with the result that proceedings were brought in the Lambeth County Court to commit the occupier (D) for contempt of court on the grounds that he had assaulted the bailiff. The judge made the order sought and ordered D to forfeit £20. D, acting in person throughout, appealed to the Court of Appeal (where Mr Gordon Slynn of counsel appeared for the respondent). One of his grounds of appeal was that, in the proceedings in the county court, natural justice was violated by witnesses being allowed to remain in court and thus in the sight and hearing of other witnesses as they gave their evidence. D submitted that that was so gross a departure from natural justice that the finding of contempt ought to be quashed.

The Court rejected this submission, holding that no rule of law requires that in a trial the witnesses to be called by one side must all remain out of court until their turn to give testimony arises. It was purely a matter within the discretion of the court. In giving the principal judgment, Edmund Davies L.J. (with whom Willmer and Phillimore L.JJ. agreed) stated that, if the court rules that witnesses should be out of court and a witness nevertheless remains inside, while the trial judge may well express his grave displeasure over such disobedience, he has no right to refuse to hear the evidence of such a witness. His lordship added (p 142):

"Whether or not witnesses are to remain in court being solely a matter of discretion, judges vary upon that as upon many other matters. If I may be purely personal for one moment, my own preference in cases which, if not actually arising under the criminal jurisdiction, yet, like contempt proceedings, are certainly on the fringe or savour of a criminal prosecution is for the witnesses to be out of court. But I know other judges who take exactly the opposite view; they prefer the witnesses to remain in court so that they may observe their reaction when they hear the evidence of other witnesses. It cannot rightly be said that, if witnesses are allowed to remain in court, justice cannot be done and I reject that ground of complaint."

The question whether witnesses should be excluded from the court room before giving their evidence has been dealt with in many reported cases, ancient and modern, but most ancient. It arose in the recent Family Division case of *Luckwell v Limata* [2014] EWHC 536 (Fam), February 13, 2014, unrep. (Holman J.) (for summary of that case, see "In Brief" section of this issue of CP News).

Summaries of the law in text books and more substantial legal works tend to be unsatisfactory, sometimes because they mislead by being incomplete, and other times because they tend to confuse by overreaching in attempt to include, not only the straight-forward circumstances involving lay witnesses as to fact arising in the Moore and Luckwell cases, but also more complicated circumstances in which the witnesses are the parties themselves, or are officials of institutional or corporate parties (in effect, attending court, not only for the purpose of giving evidence, but as the party), or are the legal representatives of parties, or are expert witnesses.

In *Tomlinson v Tomlinson* [1980] 1 W.L.R. 322, DC, the facts were that, on grounds that his former wife (D) was cohabitating with another man (X), a man (C) brought proceedings in a magistrates' court seeking the variation of a periodical payments order to a nominal order. At the hearing, C and then D gave evidence and X was present in court, a matter brought to the attention of the court by C when he gave his evidence. D did not pursue her intention of calling X as a witness, as she was told by the justices that, because he had been present she could not do so. The court made the order sought and the wife appealed, submitting (1) that there was no evidence before the justices that she was being maintained by X or as to X's income, and (2) that the justices were wrong in law, or in the exercise of their discretion, in refusing to permit D to call X in support of her contention that she was not being supported by him. A Divisional Court (Sir John Arnold P. & Wood J.) had no difficulty in concluding that the justices' ruling was quite wrong. The Sir John Arnold P. referred to the "various practices" that had been adopted by different courts for minimising the risk of witnesses trimming their evidence by the device of excluding them from the hearing until their turn to give evidence, so that their testimony will not be influenced by what they have heard and seen of the earlier witnesses. The President noted that, in the instant case, no order had been made by the court excluding X. In refusing to receive the evidence of X in the absence of an exclusion order the justices went beyond what, on any of the "various practices", could possibly be justified. That was enough to justify the allowing of D's appeal and to order that the case be re-heard. For the purpose of indicating what should be the practice in matrimonial proceedings in magistrates' courts (where parties are frequently unrepresented and likely to be unaware of the court's

power to exclude witnesses), his lordship gave guidance. The judgment in this case has been referred to regularly in subsequent cases (it was examined in Luckwell v Limata) and in practitioners' works (see *The Supreme Court Practice 1999* Vol.1 para.38/1/8).

In *R. (Elvington Park Ltd.) v. York Crown Court* [2011] EWHC 2213 (Admin), [2011] A.C.D. 121, the facts were that a local authority (D) served a noise abatement notice on a company (C). After an unsuccessful appeal against the notice to a magistrates' court, C made a further appeal to the Crown Court. At the beginning of the hearing, on D's application (not opposed by C's advocate (X)), the judge granted four officers of D, three of whom were to give evidence, permission to sit in the court-room. X made no similar application for permission for the company secretary (Y), a witness in the case, to remain in court. The judge dismissed C's appeal. C then brought a judicial review claim in the High Court challenging the Crown Court's decision on ground that their witnesses (in particular Y) were excluded from the court room whilst other persons were giving evidence and whilst witnesses for D were allowed to remain in court, with resulting unfairness in the proceedings. At a renewed oral hearing, a judge granted C permission to proceed.

The Administrative Court dismissed the claim. The judgment of Judge Langan Q.C. (in which *Tomlinson v Tomlinson* is referred to) may be summarised as follows: (1) Y absented himself from the court-room, apparently on the understanding (based on his inquiry made of the court usher) that, as a witness in the case, he should not remain, (2) the judge did not rule that Y should be excluded from the court-room, (3) the judge had no hesitation in ruling that D's officers could stay in court, and this should have encouraged X to make an application for Y to remain also, (4) X's failure to make such an application may properly be regarded as an election not to do so, (5) what occurred might be characterised as a procedural accident but was not an injustice or fundamental error which would justify intervention on judicial review.

An interesting feature of this case is that C submitted that Convention rights were engaged. Article 6 of the Convention provides parties to civil litigation with the right "to a fair and public hearing." Part and parcel of this right is the principle of "equality of

arms", a principle elaborated in the judgment of the Court of Appeal in *Jaffray v Society of Lloyds* [2002] EWCA Civ 1101. C contended that the principle had been breached with resulting quantifiable unfairness because, whereas D's witnesses remained in court, his did not. The judge held that what had occurred was "light years away" from the kinds of injustice or fundamental error which would justify intervention on "equality of arms" grounds.

It was explained above, that a complicating factor with which accounts of the practice relating to the exclusion of witnesses have to deal, arises where the witnesses are officials of institutional or corporate parties, in effect, attending court, not only for the purpose of giving evidence, but as the party. As was explained above, in the *Elvington Park Ltd* case, in the proceedings in the Crown Court the court ruled that officers of the defendant local authority who were to give evidence should have permission to remain in court. In the event, the rightness or wrongness of that ruling did not arise in the High Court judicial review proceedings. However, in his judgment Judge Langan Q.C. drew attention to the case of *Mobile Export 365 Ltd v Commissioners for HMRC*, [2010] UKFTT 367 (TC), August 8, 2010, unrep., where the First Tier Tribunal (Tax Chamber) referred to the decision in *Tomlinson v Tomlinson* and rejected an application by the Commissioners to have certain of the appellant companies' "key witnesses" kept out of court while other witnesses were giving evidence. The Tribunal "took the view that it was open to question whether it had the power to exclude any officer of a company from a hearing involving the company."

In the *Tomlinson* case, Sir John Arnold P. expressed the opinion that it would be very bad practice that there should be "different rules pertaining in different courts". After stating the practice that should be followed his lordship concluded by stating, in a passage much-quoted since: "This of course does not apply and never has applied to the parties themselves or their solicitors or their expert witnesses". Any suggestion that a party witness might be excluded, or suffer the consequences of not withdrawing, would encounter objections under both domestic law and under art.6 of the Convention. In a civil trial the risk that a party witness may trim his evidence in the light of what his own witnesses may say in examination-in-chief and in cross-examination may be reduced by requiring the party to give his or her evidence first. At that time of the Tomlinson case, the justifications for exempting experts from the effect of the court's power to order exclusion were two-fold; first, that experts were professional people and not partisan, and secondly, that their evidence would be more focussed if they had the advantage of hearing the testimony of other witnesses before giving their own. (The Commercial Court encouraged parties to agree that the experts for both sides should testify after all of the other witnesses for both sides in the case had been heard.) Since the Tomlinson decision the handling of expert evidence has undergone fundamental changes. The evidence of experts is exchanged in advance of trial, and experts may be required to meet and identify the matters on which they agree and disagree. These developments have added further justifications to the exemption of experts witnesses from the court's power to exclude witnesses.

SCOPE OF COSTS MANAGEMENT RULES

By the Civil Procedure (Amendment) Rules 2013 (SI 2013/262), with effect from April 1, 2013, Part 3 of the CPR was divided into Sections, the first containing the rules on case management as they then stood (rr.3.1 to 3.11), the second containing new rules on costs management (rr.3.12 to 3.18), and the third containing rules on costs capping (rr.3.19 to 3.21).

In r.3.12(2) it is stated that the purpose of costs management, and therefore of the rules in Section II of Part 3, "is that the court should manage both the steps to be taken and the costs top be incurred by the parties to any proceedings so as to further the overriding objective".

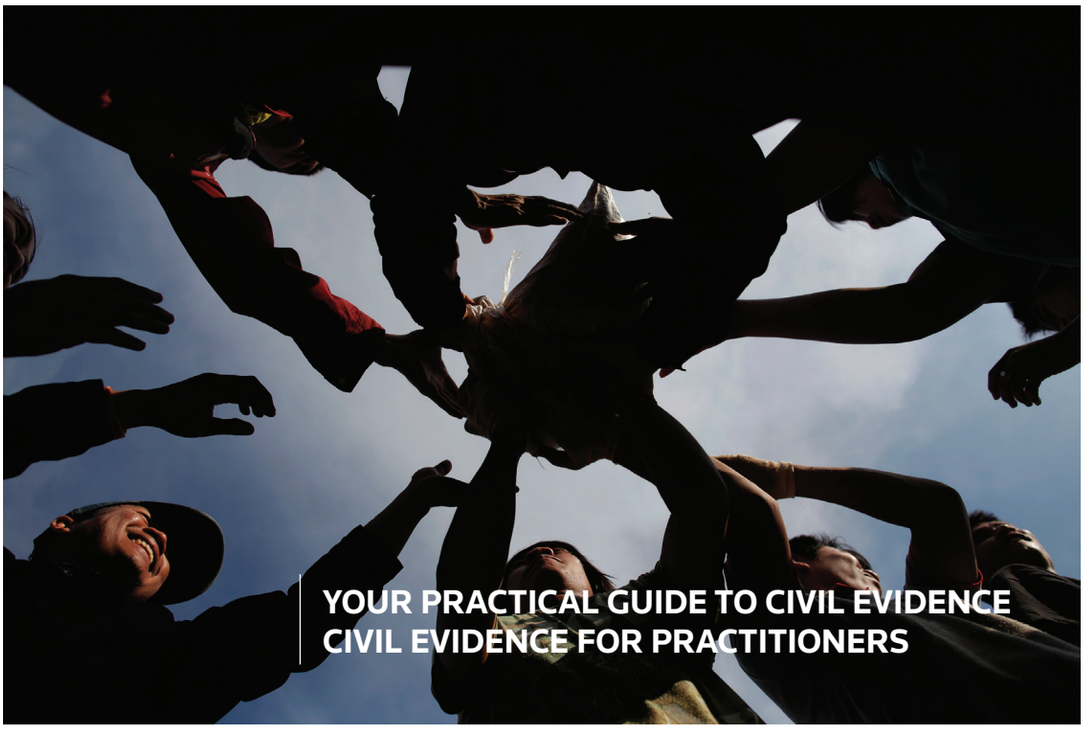
As enacted by that statutory instrument, r.3.12(1) stated that Section II and the Practice Direction supplementing the Section "apply to all multi-track cases" commenced on or after April 1, 2013, subject to the exceptions referred to in sub-paras. (a), (b) and (c) of r.3.12(1).

Obviously it is important that the extent of the application of the provisions of Section II should be clear; there should be no room for doubt as to the meaning of r.3.12(1). As was explained in the "CPR Update" section of CP News, since its first enactment by SI 2013/262, r.3.12(1) has been amended, first by the Civil Procedure (Amendment No. 2) Rules 2013 (SI 2013/515), and secondly by the Civil Procedure (Amendment No. 4) Rules 2014 (SI 2014/867).

One of the amendments made to r.3.12(1) by operation of the second of those statutory instruments, was the substitution therein for the phrase "apply to all multi-track cases" of the phrase "apply to all Part 7 multi-track" cases. The amendments made to r.3.12(1) came into effect on April 22, 2014. The transitional provision in SI 2014/867 states that r.3.12(1) shall continue to have effect as if it had not been amended in respect of any proceedings to which that rule applied and which were commenced before that date.

As Mr Justice Hickinbottom explained in the case of *Kershaw v Roberts* [2014] EWHC 1037 (Ch), April 10, 2014, unrep., the effect of the substitution of the phrase "apply to all Part 7 multi-track" for the phrase "apply to all multi-track cases" is that it makes clear that no Part 8 claim will be the subject of costs management (whether allocated to a case management track or not). His lordship said that the amendment made no substantive change to the scope of Section II as it had stood since April 1, 2013; it was a matter of clarification. The facts in this case were that, on September 13, 2013, a man with the benefit of CFA (C) brought proceedings in a county court under s.1 of the Inheritance (Provisions for Family and Dependents) Act 1975 for reasonable financial provision from a deceased's estate (X). The claim was brought as a Part 8 claim with, as defendants (D), X's personal representative and the beneficiary under the intestacy. The court gave the parties notice of a directions hearing to be held on November 21, 2013. On November 14, C served a costs budget by fax. D sent their costs budget by post on November 19. On the basis that the scheduled hearing was "the first case management conference" within r.3.12, C submitted that, as D had failed to serve their costs budget seven days before that hearing, their costs budget should be restricted to court fees only.

A district judge referred the matter to a "costs case management hearing". At that hearing (on January 30, 2014), a circuit judge ruled that the November 21 hearing was not a CMC and no obligation to file costs budgets then arose. C appealed to a High Court judge on the ground that the circuit judge was wrong to hold that the hearing before him was the first CMC. In part, C's submission relied on commentary in para.8.0.5 of White Book 2014. In dismissing the appeal, Hickinbottom J. held (1) that para.8.0.5 was wrong insofar as it is capable of suggesting (i) that any directions hearing in a Part 8 claim must be a CMC, and (ii) that the CMC provisions of Part 29 apply to Part 8 claims not in fact allocated by the court to the multi-track, (2) that, consequently, "track-unallocated Part 8 claims" will not usually be the subject of costs management. His lordship found support for his conclusion from the fact that it was in accord with clarification to r.3.12(1) made by SI 2014/867 explained above.



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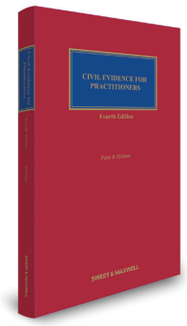

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