CIVIL PROCEDURE NEWS

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ABBEY FORWARDING LIMITED v HONE [2014] EWCA Civ 711, May 23, 2014, CA, unrep. (Arden, McCombe & Vos L.JJ.)

Interim injunction–cross-undertaking in damages–measure of damages

CPR r.25.1(1)(f). Three businessmen (D) major shareholders in and directors of company (C) carrying on freight forwarding and warehousing enterprise. In 2008 and 2009, HMRC (X) raising duty assessments against C totalling £7.5m. On X's application, liquidator (L) for C appointed. In C's name, L applying for and, on February 4, 2009, granted worldwide freezing order against D covering assets up to £5.95m. X providing C with an indemnity for the cross-undertaking. In C's name, L commencing proceedings against D claiming that they had either dishonestly or negligently broken their duties to C in permitting it to become subject to the assessments. At trial of that claim in July 2010, judge dismissing C's action, discharging the freezing order with effect from September 10, 2010, and giving D permission to proceed to an inquiry as to damages on the undertaking. X made party to the proceedings and taking over from L the defence of D's claims against C in the inquiry. (After trial and before the inquiry, (1) D granted permission to conduct an appeal against the assessments on C's behalf before the First-Tier Tribunal, and (2) upon X withdrawing their opposition to the appeal, assessments vacated.) At inquiry, judge awarding each of two of the defendants £8,000 and the third £11,463, in respect of losses they had suffered by reason of the freezing order ([2012] EWHC 3525 (Ch)). In doing so, in effect judge confining his attention to general compensatory damages for upset and stress and the effect on Ds' reputations. Single lord justice granting permission for appeal by D and for cross-appeal by C. On appeal, D contending, (1) that as entrepreneurial businessmen, they should be compensated for any loss shown to have been caused in a material way by the order (in particular loss of profits from business opportunities frustrated) irrespective of the foresight which L actually had, or reasonably ought to have had, of such loss, and (2) that they each should be awarded £9,000 for each month of the duration of the freezing order (principally for general business opportunity losses). **Held**, rejecting D's submissions as to the principles upon which compensation is to be given, but varying the awards to give each D £15,000, (1) the relevant authorities binding on the Court establish that the assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the claimant and the defendant that the claimant would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction, (2) but this is subject to the caveat that, because the court is not awarding damages for breach of contract, but (applying the words of the undertaking) compensating for loss for which the defendant "should be compensated", in a given case logical and sensible adjustments may well be required, (3) in compensating for loss caused by an injunction which was wrongly granted, the court will usually apply the useful rules as to remoteness derived from contract law, but because there is in truth no contract, there has to be room for exceptions, (4) for a loss to be recoverable, the remoteness rules only require that the claimant giving the undertaking should have reasonably foreseen loss of the type that was actually suffered by the defendant, and not the particular loss within that type, (5) a defendant wrongly injuncted should be compensated for losses that he should not have suffered, but a claimant should not be saddled with losses that no reasonable person would have foreseen at the time when the order was made, unless the claimant knew or ought to have known of other circumstances that were likely to give rise to the particular type of loss that occurred in the case at hand, (6) a claimant may, however, find himself liable for losses which would not usually be foreseen in particular cases. Authorities on the development of the law as to compensation in this context explained in detail (including modern first instance decisions doubting traditional compensation principles based on contract analogy). Observations on effects on level of compensation of claimant's "inappropriate policing" of an injunction. ***Smith v Day*** (1882) 2 Ch. D. 41, CA, ***Schlesinger v Bedford*** (1893) 9 T.L.R. 370, CA, ***Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry*** [1975] A.C. 295, HL, ***Air Express Ltd v Ansett Transport Industries (Operations) Proprietary Ltd*** (1979-1981) 146 C.L.R. 249, ***Cheltenham & Gloucester Building Society v Ricketts*** [1993] 1 W.L.R. 1545, CA, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 para.25.1.25.10 and Vol. 2 paras.15-33 & 15-38.)

CUTTING v ISLAM [2014] EWHC 1515 (QB), May 14, 2014, unrep. (Patterson J.)

Cost –successful part –late amendment–whether substantially altering case

CPR rr.17.3 & 44.2. Following death from disease of her husband (X) in January 2009, in January 2012 woman (C) commencing proceedings against a general practitioner (D) alleging negligence on the part of D in the treatment of X in April 2005 and claiming damages on her behalf and of X's estate. C contending that because of D's negligence X lost the opportunity to obtain a timely diagnosis with which he would have survived until April to October 2011. D denying liability, contending that even if earlier referral to a consultant had taken place there would have been no

extended life expectancy for X. On February 12, 2013, C amending particulars of claim deleting all allegations about prolongation of life and contending that with timely diagnosis and appropriate treatment X would have survived the disease. Parties subsequently agreeing that on the amended basis the value of the claim was £1.25m. On January 23, 2014, C offering to settle for £100,000 exclusive of costs and D offering to settle for that sum inclusive of costs. At start of liability trial, on January 27, judge granting C permission to re-amend the particulars of claim (as intimated to D on January 20) to re-instate the previously deleted prolongation of life allegation as an alternative basis of liability. Judge finding in favour of C on that alternative basis, and holding that with timely diagnosis and appropriate treatment X would have survived until May 2009. Parties agreeing damages at £50,000 (for four months loss of life). On costs, C submitting that she was the successful party and as such was entitled to 100% of her costs. D submitting (amongst other things) they should be entitled to their costs up to the late re-amendment. **Held**, making an order for costs, (1) although C recovered only 3% of her original claim she was the successful party because (a) she won an award of damages which she would not have won without fighting the action through to a finish, and (b) although D succeeded in defeating the claim on cure he did not succeed in denying C damages as a result of his breach of duty, (2) as a general rule, a defendant is entitled to its costs incurred up to and until the making of a late amendment where the amendment has the effect of substantially altering the case which the defendant had to meet and without which the action would have failed, (3) there may be special reasons why that general rule should not be applied, (4) in the instant case it could not be said that the re-amendment was an amendment which came within the general rule, because (a) the re-amendment preserved the case on causation of loss of life and the allegations of breach of duty but revived the alternative case of prolongation of life, (b) causation issues arising in the alternative case had been addressed by all of the relevant experts and its pleading did not substantially alter the case being run by either party nor require any change to the way the case was put at trial, and (c) although, in literal terms, without the amendment C's action would have failed, the prolongation claim raised almost identical issues to the claim that but for the negligence of D a cure would have been achieved; the point of difference was the date of death (a difference having clear financial implications in an award of general damages), (5) taking into account all the circumstances, including D's failure to make a Pt 36 offer, C should be awarded 75% of her costs. Judge stating that, whilst it is entirely for the defendant to make an assessment of the strength of its own case, if it fails to take into account the divergence of view amongst its own experts and make an offer that reflects the stance of one of them it must bear those consequences. ***Chadwick v Hollingsworth*** [2010] EWHC 2718 (QB), [2011] 6 Costs L.R. 931, ***Roache v News Group Newspapers Ltd*** [1998] E.M.L.R. 161, C.A., ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras.17.3.4, 44.2.10 & 44x.3.6.)

■ **DAR AL ARKAN REAL ESTATE DEVELOPMENT CO v AL REFAI** [2014] EWCA Civ 715, May 23, 2014, CA, unrep. (Richards, Beatson & Briggs L.JJ.)

Committal of company officer for breach of order by company–officer domiciled in non-Member State

CPR rr.6.2, 6.36, 81.4 & 81.10, Practice Direction 6B para.3.1(3), Judgments Regulation 44/2001 art.22(5), Civil Procedure Act 1997 s.1. Companies incorporated in Saudi Arabia and Bahrain (C) commencing proceedings in England claiming breach of confidence, defamation, conspiracy, and other economic torts against, an English company (D), a former CEO and managing director of one the claimant companies, and other individuals, alleging a campaign of blackmail undermining their businesses. C obtaining interim injunction prohibiting disclosure by defendants of certain information and containing undertakings by C. Following discharge of the injunction, D applying for a declaration that C were in contempt of court for breach of the undertakings and interim orders and for orders that they be fined, and that an individual (X), who was the managing director of one of the claimant companies and a director of the other and was domiciled in Saudi Arabia, be imprisoned. Judge (1) holding that the court's power to make a committal order against the officer of a company where an order may be enforced against the company by an order for committal (r.81.4(1) & (3)) extends to officers who are outside the jurisdiction, and (2) granting D permission to serve the committal application on X out of the jurisdiction under r.6.36 and PD 6B para.3.1(3)(b) on grounds that he was a necessary and proper party to the contempt proceedings against C and that the English court was the proper forum ([2013] EWHC 4112 (Comm), December 20, 2012, unrep.). For the purposes of these proceedings, X not disputing that he was the corporate officer responsible for the breaches of Cs' undertakings alleged by D. On X's appeal, **held**, dismissing the appeal, (1) the rule-making power in s.1 allows rules with an extra-territorial effect to be made, (2) the language and object of r.81.4 show that the legislative intention behind it is that extra-territorial effect is required and thus that the presumption against extra-territoriality is displaced, (3) where, under r.81.10(2), a committal application is made against a person who is not an existing party to the proceedings, the application notice is a "claim form" within the meaning of r.6.36. Discussion of question whether in the circumstances arising an English court would have jurisdiction under art.22(5). ***Choudhary v Bhattar*** [2009] EWCA Civ 1176, [2010] 2 All E.R. 1031, CA, ***Masri v Consolidated Contractors International Co SAL*** [2009] UKHL 43, [2010] 1 A.C. 90, HL, ***In re Seagull Manufacturing Co Ltd (No.1)*** [1993] Ch. 345, CA, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 1 paras.6.2.3, 6.33.25, 6.37.29, 81.4.5, 81.10.2, and Vol. 2 paras.3C-20, 3C-24.1, 5-270, 9A-739, 12-4 & 12-38.)

■ **HALEY v SIDDIQUI** [2014] EWHC 835 (Ch), February 28, 2014, unrep. (Judge Hodge Q.C.)

Order made of court's own initiative–procedural sanction–setting order aside

CPR rr.1.1, 3.1(2)(f), 3.3, 3.4(2)(c), 3.8, 3.9, 23.10 & 26.4(2). On July 10, 2013, district judge making order staying until November 13 High Court action arising out of dispute concerning a deceased's estate to permit negotiation (rr.3.1(2)(f) & 26.4(2)). Order stating (1) that, within seven days of the end of the period the parties should notify the court in writing of the outcome of negotiations and what, if any, directions were required, and (2) that failure to comply with this direction, or properly engage in negotiations, might result in the application of sanctions. On December 6, district judge noting that the period of stay had passed and that the court had received no notification from the parties, of own initiative and without a hearing (rr.3.3 & 23.8), making order (1) striking out the claimant's (C) claim (rr.3.4(2)(c) & 3.8) and (2) notifying parties of right to apply to have the order set aside or varied (rr.3.3(5) & 23.10). That order deemed to have been served on C on December 16. On December 19 C applying to set order aside. In evidence filed with the application, C explaining that, as a result of mediation taking place on November 13, a settlement had been agreed and deeds for varying a trust were being drafted and arrangements for separate representation of children affected were being made. Defendants neither opposing nor supporting C's application. District judge (1) treating C's application as an application for relief from sanction under r.3.9, (2) dismissing action, and (3) refusing C permission to appeal to a judge. On C's application to High Court judge for permission to appeal, **held**, granting permission and allowing the appeal, (1) the district judge fell into error in treating C's application as one to which r.3.9 applied, (2) r.3.8(1) states that a sanction imposed by a rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction, (3) that provision has no application where an order, made without a hearing and of the court's own initiative, imposed a sanction for the first time, (4) where an order has been made by the court of its own initiative, or without a hearing, the parties are entitled to apply to the court to have that order set aside or varied (r.3.3(5)), (5) on such application, (a) the restrictions customarily imposed on the court's general power to vary or revoke an order (r.3.1(7)) do not apply, (b) the restrictions upon applications for relief from sanction as stated in recent authorities following the revision of r.3.9 have no application, (c) the parties are entitled to invite the court to review whether it was appropriate to make the order in the first place. ***Marcan Shipping (London) Ltd v Kefalas*** [2007] EWCA Civ 463, [2007] 1 W.L.R. 1864, CA, ***Mitchell v News Group Newspapers Ltd (Practice Note)*** [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, CA, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras.3.3.1, 3.3.2, 3.8.1, 23.10.1 & 26.4.1.)

■ **HALLAM ESTATES LTD v BAKER** [2014] EWCA Civ 661, May 19, 2014, CA, unrep. (Jackson, Lewison & Christopher Clarke L.JJ.)

Detailed assessment proceedings–service of points of dispute–extension of time for

CPR rr.3.1(2)(a), 3.9, 23.5 & 47.9. In defamation claim brought by property management company (C) against individual (D), on May 15, 2012, trial judge giving judgment for D, making order for costs against C (with interim payment on account) and ordering detailed assessment. On April 18, 2013, D serving a notice of commencement of detailed assessment (with bill of costs for £86,000). By operation of r.47.9, period for service by C of any points of dispute ending on May 14. On May 16, by order made ex parte, costs judge granting C's application (received by the court on May 14 and issued the following day) for extension of that period to June 18 (D having previously declined to agree to an extension except on terms not acceptable to C). On May 29, costs judge (on paper) dismissing D's application to set that order aside. On June 17, C serving their points of dispute. On July 19, judge sitting in High Court allowing D's appeal, (1) finding that C had misled the costs judge when making their ex parte application, (2) holding (a) that r.47.9(3) imposed on C a procedural sanction and (b) that the costs judge erred in granting C relief from it, and (3) ordering that default costs certificate be issued ([2013] EWHC 2668 (QB)). On C's appeal to the Court of Appeal, in which their allegation of non-disclosure was withdrawn, **held**, allowing the appeal, (1) an application for an extension of the time allowed to take any particular step in proceedings is not an application for relief from sanctions, provided that the applicant files his application notice before expiry of the permitted time period, (2) since it was received by the court on May 14, 2013, C's application was made before the expiry of the time allowed for filing the points of dispute and the fact that the application was not date stamped by the court until the following day was immaterial (r.23.5), (3) on May 16, the costs judge was dealing with an in-time application to extend time under r.3.1(2)(a) and the principles concerning relief from sanctions r.3.9 were not applicable, (4) in the circumstances the costs judge was required to deal with C's application in accordance with the overriding objective (as recently amended), (5) his decision was a proper exercise of his case management discretion. Court noting that under r.47.9, if a receiving party wishes to obtain a default costs certificate, he must file his request (a) after expiry of the time permitted for serving the points of dispute and (b) before the points of dispute actually are served, and explaining that, were it necessary to do so, it would have held that, as the points of dispute were served on June 17, the judge did not have power on July 19 to direct that a default costs certificate be issued. ***Robert v Momentum Services Ltd***

[2003] EWCA Civ 299, [2003] 1 W.L.R. 1577, CA, ***Mitchell v News Group Newspapers Ltd (Practice Note)*** [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, CA, ***In re Guidezone Ltd*** [2014] EWHC 1165 (Ch), April 15, 2014, unrep., ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras.3.1.2, 23.5.1 & 47.9.2.)

■ **LAKATAMIA SHIPPING CO LTD v SU** [2014] EWCA Civ 636, May 14, 2014, CA, unrep. (Rimer & Tomlinson L.JJ. and Sir Bernard Rix)

Freezing order–definition of assets–assets of company controlled by respondent

CPR r.25.1(1)(f), Practice Direction 25A para.6.1, Admiralty and Commercial Courts Guide App 5. Two shipping trade businessmen (X and D1) each owner of several one-ship companies. One of the companies in X's group (C) entering into agreement for sale (by D1 to C) and buy back of freight forwarding agreements. On basis (1) that the agreement had been made with D1 personally on his own behalf and six of his companies (D2) (one acting as guarantor), and (2) that they were in breach of the agreement (principally for failure to buy back), C commencing Commercial Court claim against D1 and D2 and obtaining freezing injunction. Court of Appeal dismissing D1's appeal against that order (finding that there was a good arguable case against him) ([2012] EWCA Civ 1195). Defendants applying for declaration that assets (which a bank held but were prepared to release) of three of D1's companies (Y) which were not defendants in the action were not covered by the freezing order. Judge dismissing application, finding that D1 effectively controlled and indirectly owned Y, holding that the assets of Y were "directly affected" by the injunction, and ordering that, when released, Y may not deal with their assets without giving notice to C ([2013] EWHC 1814 (Comm)). On D1's appeal, **held**, dismissing the appeal, (1) D1's shareholdings (direct or indirect) in Y were his assets and were covered by the freezing order, (2) the judge was correct to hold that D1's control of Y was such as to enable him to achieve dealings with their assets that could or would cause a diminution in the value of his shareholdings in those companies, (3) a company owner will not be permitted to deplete the assets of his companies, thereby diminishing the value of his own assets in the form of his shareholdings, unless he can bring such dispositions within an order's exception for the ordinary course of business, (3) the notice requirements imposed by the judge were a justifiable fortification of the order restraining D1 from diminishing the value of his shareholdings in Y, (5) however, the judge was not correct in holding that the assets of Y were directly affected by the injunction, because the language of the standard form of freezing order is not intended to, and does not have the effect of, bringing within the definition of a defendant's assets the assets of a company which he controls. Terms in standard freezing order relating to assets covered examined and explained. ***JSC BTA Bank v Solodchenko*** [2010] EWCA Civ 1436, [2011] 1 W.L.R. 888, CA, ***Group Seven Ltd v Allied Investment Corp Ltd*** [2013] EWHC 1509 (Ch), [2014] 1 W.L.R. 735, ***JSC BTA Bank v Ablyazov***, [2013] EWCA Civ 928, [2014] 1 W.L.R. 1414, CA, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras.25.1.25.6 & 25APD.6, and Vol. 2 paras.2A-162, 15-55 & 15-68.)

■ **MCLEOD v GOLD HARP PROPERTIES LTD** [2014] EWCA Civ 532, April 9, 2014, CA, unrep. (Rimer & McFarlane L.JJ.)

Imposing conditions on permission to appeal–payment of outstanding costs

CPR r.52.9. In proceedings brought in a county court by several individuals (C) against owner of property freehold (D1) and a company (D2) to which lease had been assigned, on March 22, 2013, trial judge (1) finding that Cs' leases of building roof space in the property had not been forfeited by peaceful re-entry and that HM Land Registry should not have closed their titles, (2) adjourning proceedings to enable C to claim consequential relief, including rectification of the register, (3) ordering the joinder of additional corporate defendants, (4) making costs order against D1 and D2 and the additional defendants with payment on account of £30,000 to be made by April 5, and (5) giving C permission to join another individual (D3) (D1's father) for purpose of applying for costs order against him. In the rectification claim, on May 24, judge (1) giving judgment for C and making order having effect of re-instating Cs' long leases and giving them priority over D2's lease, (2) making order for costs against the defendants, and (3) giving C permission (again) to add D3 as a party for costs purposes. After D3 added as a costs party to the rectification claim, judge ordering him to pay C2's costs of the claim and, including the payment on account of £30,000 ordered on March 22, but D3 not complying with that order. On January 17, 2014, single lord justice granting D2 permission to appeal against the judge's orders of May 24. On February 7, C applying for order under r.52.9(1)(c) that D2's appeal (due to be heard on May 13) be made conditional on both D1 and D2 paying them, or paying into court, the £30,000 costs on account owing. **Held**, dismissing the application, (1) since only D2 (a company) was the appellant, it was only on that party that any condition could be imposed, although, in considering whether any condition ought to be imposed, it would be relevant for the court to have regard to the ability of D1 and D3, being individuals behind and associated with D2, to satisfy the order, (2) the court was prepared to draw the inferences that, were the requested condition to be imposed, D2 could and would satisfy it, if necessary by recourse to D1 and D3, and that its appeal would not thereby be stifled, (3) conditions upon which an appeal may be pursued can only be imposed if there is "a compelling reason to do so", (4) in the instant case there were none, in particular it could not be said that, were D2's appeal to fail, C would encounter

real difficulty in enforcing the costs order against those defendants against whom it had been made (including D3), further (5) the fact that the defendants were not facing any consequences as a result of their failure to comply with the court's costs orders did not amount to a compelling reason. ***Hammond Suddards Solicitors v Agrichem International Holdings Ltd*** [2001] EWCA Civ 2065, [2002] C.P. Rep. 21 CA, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 para.52.9.4.)

■ **NAB v SERCO LTD** [2014] EWHC 1225 (QB), April 16, 2014, unrep. (Bean J.)

Disclosure of documents–whether document referred to at a hearing–court's power to restrict use

CPR rr.5.4C, 31.22 & 39.2, Human Rights Act 1998 Sch.1 Pt. I art.8. On November 24, 2011, individual (C) issuing claim form bringing claim for damages (1) against operators of immigration centre (D1) for battery (on grounds that they were vicariously liable for sexual assaults on her by their employee (X)), (2) against the Home Office (D2) for false imprisonment, and (3) against the police (D3) for failure to conduct an effective investigation. Beforehand, internal report (IR) of investigation of C's allegations of inappropriate behaviour by X prepared by officer of D1 and produced to C. Claim against D3 settled at an early stage. On May 16, 2013, for purpose of recording steps taken by C to complain about X's actions and about investigations into her original complaint, C's solicitor (Y) making witness statement and exhibiting IR to that statement. On June 7, 2013, C's claim against D1 settled. In trial bundle for trial of C's claim against D2, IR exhibited to Y's witness statement, but not referred to in the skeleton arguments or reading lists for the judge. At trial during July 8 to 10, judge hearing evidence from witnesses, including Y, who adopted her witness statement and in examination-in-chief made brief reference to the existence of the IR but no direct references to it. Judge holding that C had been detained unlawfully for 14 days, but otherwise rejecting her claim for false imprisonment. On December 10, 2013, on without notice application made by a newspaper (Z), supported by a witness statement by Z's solicitor to which the trial judge's judgment was exhibited, Master ruling that the IR was, within the meaning of r.31.22(1)(a), a document "referred to at a hearing which has been held in public". Master's order stayed and D1 making cross-application under r.31.22(2) prohibiting C or Y from supplying the IR to Z. **Held**, refusing D1's application, (1) the general rule, subject to the exceptions provided for in r.31.22, is that a party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, (2) under r.31.22(2) the court has power to restrict the use of a disclosed document referred to at a public hearing and under r.31.22(1)(b) the court may give permission for a disclosed document not referred to at a public hearing to be used for other purposes, (3) in a case where documents have been placed before a judge and referred to in the course of proceedings, the default position should be that access should be permitted on the open justice principle, and where access is sought for a proper journalistic purpose the case for allowing it will be particularly strong, (4) in the instant case, although the IR was not relevant to the issues which the trial judge had to try between C and D2, and the calling of Y as a witness appeared to have been unnecessary, the IR had, within the meaning of r.31.22(1)(a) been "referred to" at a hearing in public, (5) in the exercise of the court's power under r.31.22, the facts (a) that D1 were no longer a party to the claim, (b) that the IR was no longer relevant to issues in the case, and (c) that the reference to it at the trial was only "marginal and gratuitous", were to be taken into account but were not decisive, (6) Z had a proper journalistic purpose in seeking to inspect the IR, which they believed might throw light on whether or not C's allegations were properly investigated and should be allowed access to it and should be free to publish its contents subject to the anonymity undertakings which the were prepared to give. Observations on circumstances in which Z might have had access to the IR under r.5.4C. ***Barings plc v Coopers & Lybrand*** [2000] 1 W.L.R. 2353, CA, ***In re Hinchliffe*** [1895] 1 Ch. 117, ***SmithKline Beecham Biologicals SA v Connaught Laboratories Inc*** [2000] F.S.R. 1, CA, ***GIO Personal Investment Services Ltd v Liverpool and London Steamship P & I Steamship Association Ltd*** [1999] 1 W.L.R. 984, CA, ***Lilly Icos Ltd v Pfizer Ltd (No. 2)*** [2002] 1 W.L.R. 2253, CA, ***R. (Guardian News and Media Ltd) v City of Westminster Magistrates' Court*** [2012] EWCA Civ 420, [2013] Q.B. 618, CA, ***R. (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*** [2010] EWCA Civ 158, [2011] Q.B. 218, CA, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras.5.4C.7, 31.22.1 & 32.13.1.)

■ **O'HARE v FINGLANDS COACHWAYS LTD** [2014] EWHC 1513 (QB), May 14, 2014, unrep. (Cranston J.)

Costs on standard basis–pre-April 2013 rules–dual test of necessity and reasonableness

CPR rr.44.3 & 44.4 [rr.44.4 & 44.5], Costs Practice Direction para.11.2. Following collision between car and bus, in which driver of car (C) suffered extensive brain injuries, C bringing claim against coach company (D) for £3m damages. Shortly before liability trial, following production of joint report by accident reconstruction experts, C discontinuing claim. In detailed assessment proceedings commenced on April 25, 2012, D serving bill of costs for £60,000 and C serving points of dispute, related to attendances, time spent on documents, and conferences with leading counsel. Costs judge assessing D's costs at £37,800 plus interest. D lodging appeal and submitting that the costs judge had misdirected himself in law by applying a test of necessity rather than reasonableness. **Held**, dismissing the appeal, (1) under the pre-April 2013 costs rules applicable in this case the starting point for assessing costs on a standard basis is that (a) the court will only allow costs proportionate to the matters in issue and (b) will resolve doubts as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour

of the paying party (r.44.4(2)), (2) the court is to have regard to all of the circumstances of the case and to certain specific factors, such as the value of a claim (r.44.5(3)(b)), (3) the authorities relevant to the costs rules applicable in this case establish that, even if a costs judge has reached the preliminary view that a bill overall does not appear to be disproportionate, he is not precluded from concluding that specific items in it are disproportionate and then applying the dual test of necessity and reasonableness to those items, (4) in the instant case, in considering the justification for the items challenged the costs judge was essentially considering whether they were proportionate and necessary for the conduct of the proceedings, (5) in his approach to individual items identified by D in their grounds of appeal it could not be said that the costs judge exceeded the generous discretion conferred on him or as wrong in his approach. ***Lownds v Home Office (Practice Note)*** [2002] EWCA Civ 365, [2002] 1 W.L.R. 2450, CA, ***Giambrone v JMC Holidays Ltd*** [2002] EWHC 2932 (QB), [2003] 1 All E.R. 982, ***Motto v Trafigura Ltd*** [2011] EWCA Civ 1150, [2012] 1 W.L.R. 657, C.A., ref'd to. (See ***Civil Procedure 2014*** Vol. 1 para.44x.4.2.)

■ **STOUTE v LTA OPERATIONS LTD** [2014] EWCA Civ 657, May 15, 2014, CA, unrep. (Rimer, Tomlinson & Underhill L.JJ.)

Service of claim form by court–whether "error of procedure"–extension of time for service of particulars of claim

CPR rr.3.1(2)(a), 3.9, 3.10, 6.4 & 7.6. For purpose of commencing county court claim for declaration, injunction and damages, against sporting governing body (D), on February 10, 2012, sportsman (C) attending a county court office where staff accepting claim form (not containing particulars of claim) and sending it to County Court Money Claims Centre (CCMCC) (staff having mistakenly advised C that the claim form had to be issued by the Centre). In letter accompanying claim form, for purpose of avoiding premature service, C requesting that, once issued, claim form should be returned to him for service (r.6.4(1)(b)). On March 8, CCMCC issuing claim form, and (ignoring C's request) posting it to D by post, with result that served deemed to have been effected on March 13 (r.6.14). Upon being advised by C that the claim form had been served contrary to his instructions, D treating service as ineffective. On May 14, C applying without notice under r.7.6 for an extension of four month time limit for service of the claim form (fixed by r.7.5 and ending on July 8). On August 28, by order district judge granting extension to November 16. On November 15, D serving claim form on D accompanied by particulars of claim. D applying (under r. 23.10) to set the order of August 28 aside. Following hearing on January 23, 2013, in written judgment handed down on February 6, district judge dismissing D's application, (1) holding that the service by the court (through the CCMC) (a) was not an "error of procedure" within r.3.10, but (b) though irregular, was effective, and had not been nullified by the court's ignoring of D's request under r.6.4(1)(b), (2) retrospectively extending to November 15 (from July 8) time for service by C of his particulars of claim, and (3) granting D permission to appeal. Judge allowing D's appeal and dismissing C's claim. Single lord justice granting C permission for second appeal. **Held**, allowing the appeal, (1) the service of the claim form by the court, in disregard of C's notification that he wished to effect service himself, constituted "an error of procedure" within the meaning of r.3.10, (2) in terms, r.3.10 is not confined to errors by a party and the policy considerations which underlie the rule would seem to be the same, whether the procedural mistake is a party's or the court's responsibility, (3) accordingly the service by the court of C's claim form, deemed to have been effected on March 13, 2012, constituted good service, and the judge was wrong to hold otherwise, (4) in considering whether to extend time for the service by C of his particulars of claim (from July 8 to November 15), the district judge was obliged to apply r. 3.9 (as it stood before April 1, 2013), (5) it was clear that the district judge considered all the circumstances, including such of the r. 3.9 factors as were relevant in the (rather unusual) circumstances of the case. ***Steele v Mooney*** [2005] EWCA Civ 96, [2005] 1 W.L.R. 2819, CA, ***Phillips v Nussberger*** [2008] UKHL 1, [2008] 1 W.L.R. 180, HL, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras.3.1.2, 3.9.2, 3.10.3, 6.4.1 & 7.4.3.)

■ **SUKHORUCHKIN v VAN BEKESTEIN** [2014] EWCA Civ 399, March 31, 2014, CA, unrep. (Sir Terence Etherton C., Macur L.J. & Sir Timothy Lloyd)

Applications for interim proprietary injunction and freezing order–disputed issues of fact and law

CPR rr.25.1(1)(a), 25.1(1)(f) & 52.11(2). On May 15, 2013, on an ex parte application made by four claimants, judge granting proprietary injunction restraining dealings with trust assets and a worldwide freezing order against five defendants. Claimants consisting of two individuals (C1 and C2) and two companies (C3) and C4) ultimately beneficially owned by each respectively. Defendants also consisting of two individuals (D1 and D2) and their companies (D3 and D4) and, in addition, another company (D5) owned by D3 and D4. In the proceedings claimants pleading (1) that in a joint venture entered into by the individual parties (C1, C2, D1 and D2) to conduct a "fund of funds" business, a corporate framework, involving two off-shore (Cayman Islands) companies, viz., a fund company and an investment advisory company (X), was created and operated, (2) that under that framework management and performance fees received by X which should have passed through the structure by way of dividends to the individual parties or entities ultimately owned by them, had instead, as a result of wrongdoing by D1 and D2, been paid to D5

under a bogus distribution agreement and by secret payments. Claimants alleging breach of fiduciary duty by D1 and D2 and claiming, among other things, (1) a declaration that the defendants were liable to account to them for all unauthorised benefits they had received from or in respect of the joint venture, (2) a declaration that the defendants held all such unauthorised benefits and their proceeds or assets representing the same as constructive trustees for the claimants, (3) equitable compensation, (4) damages for breach of contract, and (5) damages for conspiracy. On July 11, 2013, after hearing lasting four days, judge dismissing claimants' application to continue the injunction and freezing order ([2013] EWHC 1993 (Ch)), principally on grounds that claimants' claims of wrongdoing by D1 and D2 were barred by the no reflective loss principle (finding that there was a strong case that D1 and D2 were shadow directors of, and owed fiduciary duties to, X, and that X would have a claim for deceit against D1 and D2) and that the strength of the claimants' case that there was a serious issue to be tried was no more than "borderline". In granting claimants permission to appeal, single lord justice giving parties permission to adduce expert evidence on Cayman Islands law not before the judge. On the appeal, claimants adducing such a report. **Held**, allowing the appeal, (1) on an application for an interim injunction, the court should not attempt to resolve critical disputed questions of fact or difficult points of law on which the claim of either party may ultimately depend, particularly where the point of law turns on fine questions of fact which are in dispute or are presently obscure, (2) the application of the reflective loss principle (which was not clearly raised until the return hearing) is highly fact-dependent and in the instant case, (a) because of the current state of the disputed evidence, the claimants had a good arguable case that their claims for relief against D1 and D2 for breach of fiduciary duty, would not be barred by the principle, and (b) the judge was wrong in principle, at the interlocutory stage, to decide otherwise, (3) in particular, (a) the judge was not entitled to make the assumption that the law of the Cayman Islands on the issue of shadow directors and their fiduciary duties is the same as the law of England and Wales, (b) even if the law were the same the judge was not entitled at the interlocutory stage to come to the conclusion that there was a strong case for saying that, if the claimants succeeded at trial on their claims against D1 and D2 for breach of their fiduciary duties as co-venturers, X would also have a claim against them on the ground that they owed fiduciary duties as shadow directors and were in breach of those duties, (c) the contents of the expert report adduced on the appeal provided an additional reason for concluding that the judge was wrong in his assessment of the strength of a case that D1 and D2 were in breach of their fiduciary duties as shadow directors of X, (4) the claimants had a good arguable case for an outcome in which, although they would succeed in establishing dishonest breach of fiduciary duty by D1 and D3, X would not have a claim in deceit against them. Applicable tests for proprietary injunction and freezing injunction explained; law as to reflective loss principle outlined. ***American Cyanamid Co v Ethicon Ltd (No.1)*** [1975] A.C. 396, HL, ***Derby & Co Ltd v Weldon (No. 1)*** [1990] Ch. 48, CA, ***Ultraframe (UK) Ltd v Fielding*** [2005] EWHC 1638 (Ch), [2006] F.S.R. 17, ***Vivendi SA v Richards*** [2013] EWHC 3006 (Ch), [2013] B.C.C. 771, ***Ladd v Marshall*** [1954] 1 W.L.R. 1489, CA, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras.25.1.9, 25.1.11, 25.1.25.1 & 52.11.2, and Vol. 2 paras.15-7 & 15-54.)

■ **T & L SUGARS LTD. v. TATE & LYLE INDUSTRIES LTD** [2014] EWHC 1066 (Comm), April 10, 2014, unrep. (Flaux J.)

Service of claim form–distinction between "actual" service and "deemed" service

CPR rr.6.14 & 7.5. Principal purchaser (C) and principal seller (D) entering into share and business sale agreement. Agreement containing clauses taking effect after completion of the sale dealing with (1) notification of claims (cl 11.2), (2) time limitation for claims (cl 10.1), and (3) commencement of proceedings (cl 11.3). On March 27, 2013, claim form issued and sealed by court at request of C bringing several claim against D for breach of express or implied terms in the agreement, and, on that day, delivered by C (with particulars of claim) to D's solicitors (who had been instructed to accept service). On May 24, 2013, D serving defence contending (1) that, in the circumstances, by operation of cl 11.3, legal proceedings for C's claims had to have "been commenced by being both issued and served" by March 30, and (2) that C's claims were not issued and served in time and were therefore deemed to have been contractually withdrawn. In particular, D contending that, by operation of r.6.14 and r.7.5, the claim form, though delivered on March 27, was not deemed to have been served until April 2, 2014 (being two business days plus three Easter holidays after delivery). On trial of that particular issue as a preliminary issue, **held**, (1) on the proper construction of cl 11.3, "served" therein meant served in accordance with the procedural rules in force in England at the relevant time, that is, in accordance with the CPR, (2) r.7.5 and r.6.14, when taken together, draw a clear distinction between the date when service is actually effected, which is when the relevant "step" under r.7.5 has been completed, and the date two business days later when service is deemed to take place under r.6.14, (3) r.7.5 provides that a claim form to be served within the jurisdiction must be served within four months of issue and the provisions of that rule are concerned with how service in compliance with that time limit is to be accomplished, (4) r.6.14 has a different function and is concerned with the fixing of a clear starting date for the calculation of time standards for the progress of proceedings after service in accordance with relevant procedural rules, (5) in the instant case, by virtue of r.7.5, the "step required" was the delivery of the claim form to D's solicitors and actual service was effected on

March 27 when that step was taken, (6) the date of actual service was not extended or suspended by r.6.14 until the date of deemed service on April 2, (7) there was no justification for reading the word "served" in cl 11.3 as referring to deemed service under r.6.14 rather than actual service under r.7.5, (8) accordingly, C's claims were "issued and served" within the meaning of cl 11.3 by delivery to D's solicitors on March 27. ***Ageas (UK) Ltd v Kwik-Fit (GB) Ltd*** [2013] EWHC 3261 (QB), ***Rainy Sky SA v Kookmin Bank*** [2011] UKSC 50, [2011] 1 W.L.R. 2900, SC, ***Ener-G Holdings Plc v Hormell*** [2012] EWCA Civ 1059, [2013] 1 All E.R. (Comm) 1162, CA, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras.6.14.1, 6.14.3 & 7.5.1.)

■ **COLLINS v SECRETARY OF STATE FOR BUSINESS INNOVATION AND SKILLS** [2014] EWCA Civ 717, May 23, 2014, CA, unrep. (Jackson, Lewison & Macur L.JJ.)

Discretion to disapply limitation period–relevance of pre-limitation period delay

Limitation Act 1980 ss. 11, 14 & 33. In May 2002, individual (C) diagnosed as suffering from lung cancer. From 1947 until 1967 (when he was aged 47), C employed as dockworker in conditions in which he was exposed to asbestos. After treatment (apparently successful), C examined on numerous occasions until 2008 when discharged from further follow-up. On May 22, 2012, C issuing claim form against appropriate defendants (D) asserting that they had acted negligently and in breach of their statutory duties by exposing him to asbestos before 1967. On preliminary issue, judge deciding that C's claim was statute barred, holding (1) that, by mid-2003, C had constructive knowledge under s.14(3) of the possible link between his lung cancer and the exposure, (2) that C did not have actual knowledge until July 2009, and (3) that it did not appear equitable to disapply the provisions of s.11 ([2013] EWHC 1117 (QB)). **Held**, dismissing C's appeal, (1) the period of time elapsing between a tortfeasor's breach of duty and the commencement of the relevant limitation period (i.e. the claimant's date of knowledge) is part of "all the circumstances of the case" within the meaning of s.33(3), but (2) it is merely one of the relevant factors to take into account and both parties may rely upon it for different purposes, (3) in the instant case the judge was entitled to take the period of historic delay into account as a factor making it less equitable to extend time under s.33(1) and he did not attach undue weight to that consideration. ***Davies v Secretary of State for Energy and Climate Change*** [2012] EWCA Civ 1380, October 25, 2012, CA, unrep., ref'd to. (See ***Civil Procedure 2014*** Vol. 2 paras.8-37, 8-92 & 8-94.)

Statutory Instruments

■ **CIVIL PROCEDURE (AMENDMENT NO. 5) RULES 2014** (SI 2014/1233)

CPR r.3.8 & 54.22. Amends r.3.8 to provide that where a rule, practice direction or court order requires a party to do something within a specified time and specifies the consequences of failure to comply, the parties may, by prior written agreement, extend up to a maximum of 28 days the time for doing the act in question, provided that any hearing date is not put at risk as a result. Amends r.54.22 (as inserted by SI 2014/610) to provide that the President of the Queen's Bench Division will be responsible for nomination of both specialist planning judges and other judges to hear Planning Court claims. Also amends r.25(1) of SI 2014/867 to remove doubt as to effect of transitional provision therein affecting r.3.12 (costs management) as amended by that statutory instrument, and corrects typographical error in r.4(a) of SI 2014/407 (making substitutions in various rules following establishment of single County Court). In force June 5, 2014. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 1 paras.3.8, 3.8.1, and ***Second Cumulative Supplement*** paras.54.21.1 & 54.22.)

■ **COUNTY COURT REMEDIES REGULATIONS 2014** (SI 2014/982)

County Courts Act 1984 s.38. Revoke and replace the County Court Remedies Regulations 1991 (SI 1991/1222). Prescribe search orders as a remedy which is exempted from the power, granted to the County Court by s.38(1), to make any order which could be made in the High Court if the proceedings were in the High Court. Provide for transfer of application to and from High Court. Differ from 1991 Regulations in that they do not prescribe freezing orders, with effect that County Court jurisdiction in relation to that remedy not restricted under s.38. In force April 22, 2014. (See ***Civil Procedure 2014*** Vol. 1 paras.25.1.25.2 & 25.1.27.2, and Vol. 2 paras.9A-470, 9B-77 & 15-59.)

In Detail

COMMITTAL PROCEEDINGS AGAINST OFFICER OF FOREIGN COMPANY

In CPR Part 81 (Contempt of Court), in r.81.4 (Enforcement of judgment, order or undertaking to do or abstain from doing an act), para.(1) states that if a person (a) required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or (b) disobeys a judgment or order not to do an act, then, subject to the Debtors Acts 1869 and 1878 "and to the provisions of these Rules", the judgment or order may be enforced by an order for committal. Para.(3) of r.81.4 states that, if the person referred to in para.(1) is a company or other corporation, the committal order may be made against any director or other officer of that company or corporation. For a director or officer to be liable, it is necessary to show that he or she knew of and was responsible for the company's breach of the court order, undertaking to the court, or other contempt (see White Book 2014 Vol. 2 para.3C-24.1).

In *Dar Al Arkan Real Estate Development Co v Al Refai* [2013] EWHC 4112 (Comm), December 20, 2013, unrep. (Andrew Smith J.), where the claimants (C) were foreign corporations, the defendants (D) applied for a declaration that C were in contempt of court for breach of undertakings and interim orders and for orders that they be fined, and that an individual (X), who was the managing director of one of the claimant companies and a director of the other, be imprisoned. The judge held that contempt proceedings against X, who was domiciled in a non-Member State, were within the scope of r.81.4 and rejected the submission, made on X's behalf, that the principle against the extra-territorial effect of legislation meant that r.81.4(3) cannot be properly construed to enable a committal order to be made against a foreign director who is not within the jurisdiction and cannot be served in this country.

For the purpose of exercising jurisdiction over X the judge granted D's application for permission to serve the committal application on X out of the jurisdiction under r.6.36 (Service of the claim form out of the jurisdiction where the permission of the court is required) and Practice Direction 6B para.3.1(3)(b) on ground that he was "a necessary or proper party" to the contempt proceedings. CPR r.81.10(2) states that, where a committal application is made against a person who, as in this case, is not an existing party to the proceedings, it is made against that person by an application notice under Part 23. The judge said that such a notice is "a document in which the applicant states his intention to seek a court order" (r.23.1) and, by operation of r.6.2(c), it is also it a "claim form" within the meaning of r.6.36.

D had originally proceeded against the defendants alleged to be in contempt and against X claiming that the English courts had exclusive jurisdiction under art.22(5) of the Judgments Regulation (for which it is not necessary to obtain the permission of the court for service out of the jurisdiction). Article 22(5) gives the courts of the Member State in which judgment "has been or is to be enforced" exclusive jurisdiction regardless of domicile "in proceedings concerned with the enforcement of judgments". The judge, taking the view that he was bound by authority (which he doubted), held that the court had no jurisdiction under that provision.

X appealed to the Court of Appeal, contending that the judge had erred in applying r.81.4(3) and para.3.1(3)(b) of PD 6B, and D cross-appealed contending that the court had jurisdiction under art.22(5). The Court of Appeal dismissed the appeal, principally for the reasons given by the judge ([2014] EWCA Civ 715, May 23, 2014, CA, unrep.) (for summary, see "In Brief" section of this issue of CP News).

On the arguments raised in relation to the scope of r.81.4(3), Beatson L.J. (with whom Briggs and Richards L.JJ. agreed) explained that that provision, in terms, does not have extra-territorial effect. The crucial question was as to the legislative intention behind it: does the language and object of that rule show that such extra-territorial effect is required and thus that the presumption against extra-territoriality is displaced? His lordship concluded that the answer to that question was "yes". His lordship explained that the number of cases of an international nature brought in England involving off-shore companies and parties at the time Part 81 was introduced gives a practical reason for regarding the presumption against extra-territoriality as diluted or negated; but practical reasons alone will not suffice to displace the presumption unless they reflect an underlying reason of principle. Is there a principle to hand? Yes there is. His lordship said (para.38):

"The overriding objective is to enable the court to deal with cases justly. It includes enforcing compliance with rules, practice directions and orders (CPR r.1.1(1) and (2)(f)). I consider that the combination of that part of the objective, the need to ensure that the courts have the ability to control proceedings which are properly brought in this jurisdiction, and the anomalies that would result if the provision designed to provide such control for a corporation in contempt does not apply to foreign directors of that company which are responsible for its contempt, provide the underlying reason of principle for reading r.81.4(3) as including foreign directors out of the jurisdiction."

Beatson L.J. added that the approach to extra-territorial effect taken by the House of Lords in the case of *Masri v Consolidated Contractors International Co SAL* [2009] UKHL 43, [2010] 1 A.C. 90, HL, where the CPR provision under scrutiny was r.71.2 and the question was whether an order could be made requiring an officer of corporate judgment debtor to attend court to provide information, did not compel a different conclusion (paras.41 to 48).

On the arguments raised in relation to the service on X out of the jurisdiction of process commencing committal proceedings against him Beatson L.J. said the essential question was whether "proceedings" in para.(c) of r.6.2 (Interpretation) include an application for committal. That provision states that, in Part 6 (Service of Documents) "claim" includes "any application to commence proceedings". His lordship said that it is clear that an application for committal is the commencement of proceedings (para.55).

Paragraph 3.1(3) of Practice Direction 6B states that a claimant may serve a claim form out of the jurisdiction with the permission of the court under r.6.36 where there is between the claimant and the defendant a "real issue" which it is reasonable for the court to try and the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim. In the instant case, Beatson L.J. rejected X's submission that there was no "real issue" between him and the claimant. His lordship explained (para.58) that there was clearly a real issue between D and the corporate claimants in the action as to whether the companies fell within the scope of r.81.4(1). Further, there was clearly a real issue as to whether the jurisdiction to seek an order for the committal of X under r.81.4(3) existed.

In the circumstances, it was not necessary for the Court of Appeal to express a concluded view on the question whether, in circumstances such as those which obtained in the instant case, the English court would have jurisdiction under art.22(5) to entertain an application for committal for contempt. Beatson L.J. outlined the submissions (paras.61 to 63). His lordship explained that authority suggesting that the court does not have jurisdiction is found in the judgment of the Court of Appeal in *Choudhary v Bhatter* [2009] EWCA Civ 1176, [2010] 2 All E.R. 1031, CA, where it was stated (para.38) that "it is unnecessary–and wrong–to construe the words 'regardless of domicile' in art.22 as having any application to a case where the person to be sued is not domiciled in a Member State". Beatson L.J. said he shared the judge's doubts as to the correctness of that proposition. If it is wrong, and art.22(5) applies where the person to be sued is not domiciled in a Member State, there remains the question whether committal proceedings are, within the meaning of that provision, "proceedings concerned with the enforcement of judgments". On this question his lordship found the submissions of X's counsel to the effect that they were not to be "powerful" but not decisive.

PARTY AGREEMENTS TO EXTEND TIME LIMITS

The effects of the Civil Procedure (Amendment No. 5) Rules 2014 (SI 2014/1233) are summarised in the "In Brief" section of this issue of CP News.

From a practical point of view, the most important amendment made by these Rules is that made to CPR r.3.8 (Sanctions have effect unless defaulting party obtains relief) (see White Book 2014 Vol. 1 para.3.8, pp 106 & 107). That rule currently provides that where a party fails to comply with a rule, practice direction or court order, any sanction imposed by the court for that failure will have effect unless the party in default applies to the court for, and obtains, relief from the sanction. The rule also provides that where a party is required under a rule, practice direction, or court order to do something within a specified period, and specifies the consequences of failure to comply, the time for doing the act in question may not be extended by agreement between the parties. Thus a defaulting party is required to make an application to the court for the sanction to be lifted and for further time to file the required document.

Since the amendments made to the CPR coming into force on April 1, 2013, implementing the Jackson reforms, in particular the amendments to r.3.9 (Relief from sanctions), and the guidance given by the Court of Appeal as to the practical effects of those amendments, the courts have been faced with a sharp increase in applications for extensions of time by parties facing the prospect of sanctions taking effect. The amendment now made to r.3.8 came into effect on June 5, 214, and is designed to reduce the burden on the courts and to avoid increasing costs of parties. By adding para.(4) to the rule it provides that parties may agree, in writing, to an extension of time, up to a maximum of 28 days without an application to the court. The parties may not make such an agreement, if the court has ordered that such an agreement cannot be made, or if any extension of time agreed puts the hearing date at risk.

By CPR Update 73, consequential amendments are made to the variation of directions provisions in para.4.5(1) of Practice Direction 28 (The Fast Track) and to para.6.5(1) of Practice Direction 29 (The Multi-Track) (see, respectively, White Book 2014 Vol. 1 para.28PD.4 and para.29PD.6).

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