# CIVIL PROCEDURE NEWS

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# In Brief

## Cases

■ **DUFOO v TOLAINI** [2014] EWCA Civ 1536, November 27, 2014, CA, unrep. (Sir Terence Etherton C., Jackson & Gloster L.JJ.)

*Cost –several unsuccessful parties–contribution of some to other's costs liability*

**CPR rr.44.2 & 44.3.** On April 2012, two businessmen (C1 and C2) and a trustee company (C3) commencing proceedings in the Chancery Division against a third businessman (D1) and a company (D2) created for a property development project. In those proceedings (1) C1, C2 and C3 applying for a determination by the court as to what shares in D2 they and D1 were entitled to hold, and (2) C1 petitioning for winding-up of D2. In the application, D1 serving defence (denying allegations of misconduct and breach of contract) and making counterclaim. Subsequently, differences emerging between the claimants and from June 1, 2013, C2 and C3 separately represented. On September 19, 2013, C2, C3 and D1 compromising their claims and counterclaims and D1 agreeing to seek no order for costs against C2 and C3. Despite that agreement, action continuing to trial in October 2013 of issues outstanding between C1 and D1 and D2, with all parties still required to participate. In reserved judgment handed down by trial judge on December 4, 2013, on the shares application judge (1) finding in favour of C1 on the issue of his entitlement to shares in D2, but on other significant issue (as to terms upon which C1 and C2 loaned money) not accepting the case of any party in its totality, and (2) dismissing the petition. As to costs, judge (1) making no order as between C2 and C3, on the one hand, and D1 on the other (giving effect to the settlement agreement between those parties), but (2) as between C1 and the defendants ordering (a) C1 to pay 80% of D1's costs (reflecting their respective degrees of success on the issues between them) and (b) such costs to be assessed on the indemnity basis during the period up to May 31, 2013 (reflecting C1's misconduct of his case), and on the standard basis thereafter, and (3) rejecting C1's submission that C2 and C3 should make contribution to the costs that he was ordered to pay D1 (the contribution issue). **Held**, allowing C1's appeal on the contribution issue and remitting the matter to the judge for re-consideration, (1) the court has power under r. 44.2 in a multi-party action to order that one party should contribute to the costs payable by another to their mutual adversary, (2) when different parties advance the same unsuccessful case against their common adversary, the normal starting point for a court considering costs is that they should all contribute to the recoverable costs of the successful party, (3) in the instant case, up to May 31, 2013, D1 was incurring costs in resisting the largely successful claims pleaded by all three claimants in their joint points of claim, (4) the fact that C2 and C3 had entered into a "no costs" settlement agreement with D1 did not (a) preclude D1 from claiming his costs against C1, or (b) preclude the court from ordering that they should contribute in the event of C1 being ordered to pay such costs, (5) that fact was merely part of the circumstances of the case which the judge, in exercising his discretion under r. 44.2, had to take into account, (6) in the unusual facts of this case there was no good reason for exempting C2 and C3 from making such contribution. ***Stumm v Dixon & Co*** (1889) 22 Q.B.D. 529, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 para.44.2.7.)

■ **EXCALIBUR VENTURES LLC v TEXAS KEYSTONE INC** [2014] EWHC 3436 (Comm), October 23, 2014, unrep. (Christopher Clarke L.J.)

*Costs order against non-parties–assessment on indemnity basis*

**CPR rr.44.2, 44.3 & 46.2, Senior Courts Act 1981 s.51.** Delaware corporation (C) bringing claim in Commercial Court against several corporate defendants (D) for specific performance of an agreement pursuant to which C claimed its entitlement to an interest in oil fields in Kurdistan or to damages (said to be of the order of US $1.6 billion). C entering into CFA with London solicitors. After five-month trial, based on several causes of action, C failing on every point and judge giving judgment for D and ordering C to pay D's costs ([2013] EWHC 4278 (Comm)). On several grounds, including that C's claims were speculative and opportunistic and had been advanced in a way that was disproportionate, judge ordering that those costs be assessed on the indemnity basis. In addition, judge (1) ordering C to make a payment on account of costs in the sum of £10.7m in respect of one category of defendant and £6.8k in respect of another, to be satisfied (largely) by payment out of £17.5m previously paid into court by D as security for C's costs, and (2) ordering C to provide additional security for D's costs in the total sum of £5.6m. Upon the latter security not being provided, judge granting D permission to join as parties to the action an individual and several corporations (including subsidiary companies and their parent companies) who, at different times and in different amounts, had produced the monies (totalling £31.75m) necessary for C to start and, later, to continue the action, including by providing or contributing to the funds which were required to be paid into court by way of security for

costs (being £17.5m of the total). D applying (1) for an order for costs against the non-party funders making them jointly and severally liable to them for the costs of the action, and (2) for such costs to be assessed on the indemnity basis. D estimating that difference between costs they had recovered from the security and the costs to which they were entitled was about £4.8m, representing mostly and perhaps entirely, the difference between standard and indemnity costs. **Held**, granting the application, (1) between them the funders transformed C from a shell company owned by two individual businessmen who could not have brought the action unless it had been financed by others into a company fully resourced to carry on the litigation to the bitter end and on a massive and disproportionate scale, (2) there was nothing in the circumstances of the case (a) which precluded an order that the funders should pay the costs on an indemnity scale, or (b) which constituted a sufficient reason for not doing so, or (c) which made it unjust to make such an order, (3) further, there was no good reason to distinguish between the funders, (4) there is a distinction between a "professional" funder and a "pure" funder, (5) generally, the costs liability of a professional funder should be capped at the amount of the funding contribution (the "*Arkin* cap"), (6) that contribution consists of the monies that a funder has put up for a claimant's costs and expenses of prosecuting the action and does not include monies put up to enable a claimant to provide security for a defendant's costs of defending it, (7) the Arkin cap should be applied in the instant case insofar as it benefited those funders whose contributions were less than the £4.8m shortfall, (8) when different funders have contributed amounts at different times, they should be liable to the successful defendants only in respect of costs that the defendants incurred after they made their contribution. Judge rejecting submission that no order should be made against a funder to bear costs on an indemnity basis unless grounds for doing so are made out against them independently of any grounds that may exist for making such an order against those they have funded. ***Secretary of State for Trade and Industry v Aurum Marketing Ltd*** [2000] EWCA Civ 224, [2000] 2 B.C.L.C. 645, CA, ***Dymocks Franchise System (NSW) Pty Ltd v Todd*** [2004] UKPC 39, [2004] 1 W.L.R. 2807, PC, ***Arkin v Borchard Lines Ltd. (Nos 2 & 3)***, [2005] EWCA Civ 655, [2005] 1 W.L.R. 3055, CA, ***Goodwood Recoveries Ltd v Breen*** [2005] EWCA Civ 414, [2006] 1 W.L.R. 2723, CA, ***Globe Equities Ltd v Globe Legal Services Ltd*** [2000] C.P.L.R. 233, CA, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras 46.2.1 to 46.2.6 & 44x.4.3, and Vol. 2 para.9A-202.)

■ **LIBYAN INVESTMENT AUTHORITY v GOLDMAN SACHS INTERNATIONAL** [2014] EWHC 3364 (Ch), October 7, 2014, unrep. (Rose J.)

*Application for summary judgment unsuccessful–costs assessed on indemnity basis*

**CPR rr.24.2 & 44.2(2).** Foreign sovereign wealth fund (C) commencing action against investment bank (D) seeking to set aside nine transactions entered into by C with D between January and April 2008 and valued at US$1.2 billion. After service of particulars of claim but before service of defence, D applying for summary judgment (asserting that the claim had no real prospect of succeeding). C opposing application and filing and serving substantial witness statement. D thereupon withdrawing the application. On question of costs, **held** (1) C were entitled to their costs of the application because (a) the costs should be dealt with in the usual way, (b) the fact that C faced difficulties in proving their claim was not reason for not doing so, and (c) the general rule is that an unsuccessful party will be ordered to pay the costs of the successful party, (2) a costs order may stipulate that the costs should be assessed on the standard basis or on the indemnity basis, but the authorities establish that for an order for indemnity costs to be justified, there must be something in the conduct of the action or about the circumstances of the case in question which takes it out of the norm, (3) on the basis of C's particulars of claim as drafted, D's application for summary judgment should not have been brought because (a) it was speculative and involved a high risk of failure, (b) there was no "knockout" point of law, and (c) no justification for considering that C's claim was fanciful or wholly inconsistent with contemporaneous documents, (4) in the circumstances, D's making of the application was conduct out of the norm which should be marked by an award of indemnity costs. ***Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceuticals Company 100 Ltd*** [2006] EWCA Civ 661, May 26, 2006, CA, unrep., ***Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB*** [2012] EWHC 749 (Comm), March 30, 2012, unrep. (Gloster J.), ***Three Rivers District Council v Bank of England (No. 3)*** [2001] UKHL 16, [2003] 2 A.C. 1, HL, ***Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson*** [2002] EWCA Civ 879, [2002] C.P. Rep. 67, CA, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras 24.2.3 & 44x.4.3.)

■ **OOO ABBOTT v DESIGN AND DISPLAY LTD** [2014] EWHC 3234 (IPEC), October 10, 2014, unrep. (Judge Hacon)

*IPEC claim–determining value of claim where several defendants–costs consequences where Part 36 offer rejected*

**CPR rr.36.14, 45.30, 45.31, 45.42 & 63.17A.** Russian company (C), in single action in IPEC, bringing patent infringement claims against two UK companies (D1 & D2). Trial judge holding that C's patent had been infringed by both D1 and D2. C electing for an account of profits. D1 not accepting C's Pt 36 offer. On basis of their then

understanding of D2's infringing sales, C accepting D2's Pt 36 offer and account proceedings continuing against D1 alone with the issue of costs payable by D2 to C adjourned until their completion. Following judge's judgment in the account, parties agreeing that sum payable by D1 to C was £488,173. That judgment more advantageous to C than the offer rejected by D1. After the account, D2 advising C that their infringing sales had been much larger than previously indicated and consenting to the setting aside of their Pt 36 offer and to the lifting of the stay of the account proceedings against them. Parties agreed that that the amount payable to C by D1 under the completed account plus the amount C could expect to recover in the account against D2 would be well in excess of the £50k cap fixed by r.63.17A for IPEC claims. In these circumstances, C submitting that the court should order D1 to pay the sum due by them under the account, being an amount within the award cap, and give directions for an account of profits to be taken against D2. **Held**, rejecting the submission, (1) the £500k cap on claims for damages in the proceedings in the IPEC, or on a claim in an account of profits, is absolute unless the parties agreed otherwise, (2) where a claimant sues more than one defendant in an IPEC action the single cap of £50k applies, (3) parties are entitled to certainty with regard to damages just as much as with costs, (4) it is not the effect of r.63.17A to provide that, in those circumstances, the cap applies to the amounts recoverable from each defendant separately, (5) the "additional amount" payable by a defendant to a claimant pursuant to r.36.14(3)(d) (conduct of party with regard to giving information) where (as in the instant case) the judgment is more advantageous to the claimant than the offer rejected by the defendant is not a species of damages and therefore does not contribute towards the total damages which are subject to the £500k cap in r.63.17A but is a separate payment unaffected by the cap. Observations on procedure for transfer to Chancery Division of patent infringement claim where sales figures are highly inaccurate. ***Samsung Electronics (UK) Ltd v Apple Inc*** [2012] EWCA Civ 729, [2012] Bus. L.R. 1889, CA, ***FH Brundle v Perry*** [2014] EWHC 979 (IPEC), [2014] 4 Costs L.O. 576, ***Gimex International Groupe Import Export v Chill Bag Co Ltd*** [2012] EWPCC 34, [2012] 6 Costs L.R. 1069, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 para.36.14.1, and Vol. 2 paras 2F-17.10.0, 2F-17.10.2 & 2F-17.12.2.)

■ **OTKRITIE INTERNATIONAL INVESTMENT MANAGEMENT LTD v URUMOV** [2014] EWCA Civ 1315, October 14, 2014, CA, unrep. (Laws, Longmore & Moore-Bick L.JJ.)

*Committal for contempt proceedings–application to trial judge–recusal of judge*

**CPR rr.81.17 & 81.28.** In giving trial judgment in substantial commercial claim against corporate and individual defendants, judge finding that several defendants had conspired to defraud and had actually defrauded the claimant companies (C) in relation to two quite separate matters. In particular, judge making numerous damaging findings about the fraudulent deception of C by the first defendant (D), who was a senior employee and trader with C, and about his conduct of the interlocutory proceedings and the trial itself, and finding him personally liable for US$23m in respect of one of the frauds and for US$150m in respect of the other. After the trial, C initiating committal proceedings against a number of the individual defendants, including D. Grounds of contempt alleged against D placing much reliance on the trial judge's findings and consisting of a mixture of allegations for which permission to proceed was required for some but not for all, and including D's knowingly and deliberately making false statements of truth and false disclosure statements and breaching the terms of freezing orders. By application, D (acting in person) requesting that the trial judge, on grounds of apparent and/or actual bias should recuse himself in relation to C's application for permission to make a committal application against him and generally with regard to any committal proceedings against him. Judge (1) granting application, holding that the specific points relied on by D in support of actual bias (though entirely groundless) were so serious that recusal was the appropriate course, and (2) granting C permission to appeal ([2014] EWHC 1323 (Comm)). **Held**, allowing C's appeal, (1) in a case of any complexity it is obvious that a single judge should deal with all relevant matters, (2) in numerous case the courts have emphasised that the fact that a judge has made adverse findings against a party or a witness does not preclude him from sitting in judgment in subsequent proceedings and some cases have even emphasised the desirability of his doing so, (3) the general rule is that where a judge is hearing an application (or a trial) which relies on his own previous findings he should not recuse himself unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so, (4) although actual bias or a real possibility of bias must conclude the matter in favour of the applicant for recusal, there must be substantial evidence of bias of one form or the other before the general rule can be overcome, (5) there is a consistent body of authority to the effect that bias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case (in which a party has participated and been heard) unless it can be shown he is likely to reach his decision "by reference to extraneous matters or predilections or preferences", (6) it is important that judges should not recuse themselves too readily in long and complex cases otherwise the convenience of having a single judge in charge of both the procedural and substantial parts of the case will be seriously undermined, and the impression would be created that parties were able to select judges to hear their cases simply by criticising those they did not want to hear them, (7) if a judge himself feels embarrassed to continue, he should not do so, but if he does not so feel,

he should, (8) in the instant case the judge felt no personal embarrassment or discomfort in considering the contempt application and, although in the trial he had considered an enormous number of issues and sub-issues between the parties, he had not focussed solely or mainly on the issues that will have to decided on the contempt application, (9) there was no reason to suppose that the judge would not bring an objective mind to bear on the case, (10) the reasons given by the judge for his decision were defective and, even if he was right to hold that the allegations made by D were allegations of actual bias (which was doubtful), should be overturned. ***Bahai v Rashidian*** [1985] 1 W.L.R. 1337, ***Arab Monetary Fund v Hashim (No. 8)*** (1994) 6 Admin. L.R. 348, ***Locabail (UK) Ltd v Bayfield Properties Ltd*** [2000] Q.B. 451, CA, ***Summers v Fairclough Homes Ltd*** [2012] UKSC 26, [2012] 1 W.L.R. 2004, SC, ***JSC BTA Bank v Ablyazov*** [2012] EWCA Civ 1551, [2013] 1 W.L.R. 1845, CA, ***Triodos Bank NV v Dobbs*** [2005] EWCA Civ 468, [2006] C.P. Rep. 1, CA, ***Dar Al Arkan Real Estate Development Co v Al Refai*** [2014] EWHC 1055 (Comm), ref'd to. (See ***Civil Procedure 2014*** Vol. 1 para.81.13.6, and Vol. 2 paras 3C-35 & 9A-48.)

■ **SUGAR HUT GROUP LTD v AJ INSURANCE** [2014] EWHC 3775 (Comm), November 19, 2014, unrep. (Eder J.)

*Discretion as to costs–different order –conduct of successful party*

**CPR rr.36.2, 44.2 & 44.3.** Shortly before trial of liability in a fire insurance claim brought in the Commercial Court, in consent order defendants (D) conceding liability and agreeing to pay 65% of the claimant's (C) claim for loss of profits arising from business interruption (BI). In advance of trial of quantum, D making interim payments of £383k (on June 1, 2013) and £430k (on February 3, 2014). On May 23, 2014, in Part 36 offer made on basis that C's total loss of profit was £600k plus interest at 2.5%, and taking into account the interim payments, D offering (in full and final settlement) to make further payment of £250k inclusive of interest and to pay C's costs of the quantum trial. C not accepting this offer (which was open for acceptance until June 14, 2014) and asserting that their BI losses were £862k. At trial of quantum (lasting three days), at which a number of claims were raised, judge (1) making awards to C on some claims but nil awards on others, (2) holding that amount of principal due in respect of C's BI losses was £568k, and (3) overall giving judgment for C for £1.09m inclusive of interest (at 5%), leaving (taking into account the interim payments) an outstanding balance due of £277k. On costs, **held**, (1) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, (2) the circumstances that a court should take into account in determining whether it should make a different order reducing the successful party's costs include the circumstances that that party (a) has lost on one or more issues (r.44.2(4)(b)) and/or (b) has unreasonably pursued or contested a particular allegation or issue or exaggerated its claim (r.44.2(4)(a) and r.44.2(5)(b) & (d)), (3) in the instant case C was the successful party but there were very good reasons for departing from the general rule in two main respects, (5) first, the facts were (a) that claims on which C failed involved substantial amounts of money (totalling £320k) and gave rise to discrete issues involving not only disclosure but also both factual and expert evidence, and (b) on C's claim for BI losses C's submissions on a particular issue as to post-fire business turnover (to which much time, effort and money was expended by both parties), was rejected, (6) those matters should be reflected by a reduction of 30% in the costs to which C would otherwise be entitled, (7) secondly, although D's offer was not an admissible offer to settle C's claim for BI losses for £600k, C's claim of £862k for such losses was an exaggerated claim and it was not reasonable for them to pursue it in such an amount, (8) those matters should be reflected by ordering (subject to a qualification in relation to the assessment of interest) that C should be denied any costs from June 14, 2014, and that D should be entitled to their costs from that date. ***HLB Kidsons v Lloyd's Underwriters*** [2007] EWHC 2699 (Comm), [2008] 3 Costs L.R. 427, ***Hammersmatch Properties (Welwyn) Ltd v Saint-Gobain Ceramics & Plastics Ltd*** [2013] EWHC 2227 (TCC), [2013] B.L.R. 554, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 1 paras 44.2.6, 44.2.7, 44x.3.18 & 44x.3.20.)

■ **TCHENGUIZ v SERIOUS FRAUD OFFICE** [2014] EWCA Civ 1409, October 31, 2014, CA, unrep. (Jackson, Sharp & Vos L.JJ.)

*Disclosed document –application for use in unrelated proceedings*

**CPR r.31.22, Crime (International Co-operation) Act 2003 ss.7 & 9.** Individual (C), who had been subject to a criminal investigation which resulted in no charges being brought, bringing claim against SFO (D) for damages arising from unlawful use of search warrants. Other claimants including a Swiss company (X) (trustee of a trust of which C and his family principal beneficiaries). Documents disclosed to C by D including documents obtained by D in the course of the criminal investigation from third parties by letters of request made under s.6, in particular 22 documents constituting or recording communications between the SFO and authorities in Guernsey responding to the request (the Guernsey documents). C and X engaged in civil proceedings in Guernsey, being proceedings unrelated to their claim against D, and involving issues concerning liability for inter-company loans, and in which an appeal was pending. C applying under r.31.22(1)(b) for permission to use the Guernsey documents for purposes other than for use in the proceedings in which they had been disclosed; in particular (1) to give them to lawyers instructed by them in the Guernsey proceedings, (2) to

rely upon them in those proceedings (principally by seeking to have them received as fresh evidence on the appeal), and (3) to give them to counsel instructed by C to advise on whether criminal offences committed by an accountancy firm. D and Guernsey authorities (permitted to intervene) opposing the application. Judge granting permission for purposes (1) and (3) but refusing permission for purpose (2) ([2014] EWHC 2597 (Comm)). In doing so, judge proceeding on assumption that the Guernsey documents were not "evidence" within s.9 and therefore did not attract the absolute statutory prohibition imposed by that section on collateral use of documents (without the consent of the appropriate overseas authority) obtained pursuant to a request for assistance under s.7. On C's appeal to the Court of Appeal, X permitted to intervene and supporting the appeal. **Held**, dismissing C's appeal, (1) the court will only grant permission under r.31.22(1)(b) if there are special circumstances which constitute a cogent reason for permitting collateral use, (2) the absolute prohibition contained in s.9(2) signifies the high degree of importance which Parliament attaches to maintaining the co-operation of foreign states in the investigation of offences with an overseas dimension, (3) whether on an application under r.31.22 the strong public interest in facilitating the just resolution of civil proceedings warrants releasing a party from the collateral purpose rule depends upon the particular circumstances of the case, (4) there is a strong public interest in preserving the integrity of criminal investigations and protecting those who provide information to prosecuting authorities from any wider dissemination of that information, other than in the resultant prosecution, (5) in a given case, it is for the first instance judge to weigh up the conflicting public interests and the Court of Appeal will only intervene if the judge erred in law or failed to take proper account of the conflicting interests in play, (6) in the instant case, in rejecting C's submission that the Guernsey documents were "crucial or decisive" in the Guernsey proceedings the judge was not applying a test to that effect but merely rejecting a claim by C as to the importance of those documents, (7) the judge properly identified the conflicting public interests and gave adequate and proper reasons for his decision. ***Frankson v Home Office*** [2003] EWCA Civ 655, [2003] 1 W.L.R. 1952, CA, ***SmithKline Beecham Plc v Generics (UK) Ltd*** [2003] EWCA Civ 1109, [2004] 1 W.L.R. 1479, CA, ***Marlwood Commercial Inc v Kozeny*** [2004] EWCA Civ 798, [2005] 1 W.L.R. 104, CA, ***Gohil v Gohil*** [2012] EWCA Civ 1550, [2013] Fam 276, CA, ***IG Index Ltd v Cloete*** [2014] EWCA Civ 1128, July 31, 2014, CA, unrep., ref'd to. (See ***Civil Procedure 2014*** Vol. 1 para.31.22.1.)

■ **WEARN v HNH INTERNATIONAL HOLDINGS LTD** [2014] EWHC 3542 (Ch), October 29, 2014, unrep. (Barling J.)

*Abuse of process–want of prosecution*

**CPR rr.1.1, 1.3 & 3.4(2).** On October 4, 2000, legally aided individual (C) issuing claim form bringing claim against a company (D) alleging breaches of a commercial contract amounting to repudiation. D defending and bringing counterclaim. On October 12, 2001, judge giving directions for trial (then intended to take place in October 2002). In December 2011, C refused increased legal aid. In December 2012, C's legal aid certificate, which had been discharged in May 2012, re-instated on appeal but refusal to increase funding maintained. Claim coming before court for first time since December 2001 when, in August 2013, C sought directions for the continuance of the action including permission to amend the particulars of claim, exchange of experts reports, disclosure and service of evidence of witnesses of fact. On January 30, 2014, D making application for order striking out C's claim pursuant to paras (b) and/or (c) of r.3.4(2). **Held**, granting the application and striking out C's claim on both grounds, (1) the progress of the proceedings had been subject to inordinate delay to a quite extraordinary extent for which C in large measure was responsible, (2) for its part D was clearly at fault and contributed to some extent to the delay in "letting sleeping dogs lie" during two long periods, but their fault was on a considerably smaller scale, (3) delay, no matter how long or inexcusable, does not in the absence of other factors amount to abuse of process under r.3.4(2)(b), (4) in the instant case, factors which transformed the inordinate and inexcusable delay into an abuse of process included (amongst others) that C (a) acted with wholesale disregard for the rules and orders of the court with full awareness of the consequences, (b) sought to rely on expert evidence in a manner inconsistent with the requirements of Pt 35 in significant respects, and (c) overall conducted the claim in a manner in breach of paras. (d), (e) and (f) of r.1.1(2), (5) the delay was such as to be likely to obstruct the just disposal of the proceedings, as the prospect of a fair trial, now at a distance of nearly twenty years from the relevant events, was probably impossible and at the very least seriously impaired, (6) the circumstances gave rise to a discretion in the court to strike out C's claim under either para. (b) or para. (c) of r.3.4 or both, (7) there was no alternative sanction available, and certainly none that would be appropriate or proportionate in the light of the inordinate and largely inexcusable delay and C's disregard for orders of the court and rules in the CPR. Relevant authorities on striking out for delay and for abuse of use process examined and principles to be derived from each re-stated and the relationship between them explained. ***Asiansky Television Plc v Bayer-Rosin*** [2001] EWCA Civ 1792, [2002] C.P.L.R. 111, CA, ***Adelson v Anderson*** [2011] EWHC 2497 (QB), October 7, 2011, unrep., ***Grovit v Doctor*** [1997] 1 W.L.R. 640, HL, ***Habib Bank Ltd v Jaffer*** [2000] C.P.L.R. 438, CA, ***Audergon v La Baguette Ltd*** [2002] EWCA Civ 10, [2002] C.P. Rep. 27, CA, ***Owners and/or Bailees of the Panamax Star v Owners of the Auk*** [2013] EWHC 4076 (Admlty), [2014] 1 Lloyd's Rep. 606, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 1 paras 3.4.1, 3.4.3, 3.4.3.5 & 3.4.4.)

# In Detail

## RTA PROTOCOL–FIXED COST MEDICAL REPORT

In Issue 8/2014 (September 19, 2014) of CP News it was explained that by CPR Update 75, changes were made to the RTA Protocol, principally for the purpose of introducing a new regime for the recovery of costs allowed for medical reports in claims to which the Protocol applies and which fall within the definition of "soft tissue injury claim" given in para.1.1(16A). Under this new regime, "fixed cost medical report" is defined as a report in a soft tissue injury claim which is from a medical expert who, save in exceptional circumstances "(a) has not provided treatment to the claimant, (b) is not associated with any person who has provided treatment, and (c) does not propose or recommend that they or an associate provide treatment" (para.1.1(10A)). (See White Book 2014 Fourth Cumulative Supplement paras C13-001 et seq, p 163.)

For these purposes "associate" in respect of a medical expert was defined, by the addition to para.1.1 of the Protocol, of sub-para.(1A), to mean the following:

"any person whose business is linked to that expert or to any intermediary who commissions either the expert's report or any proposed medical treatment"

and it was further stated that "associated with" has the equivalent meaning.

That definition has now been amended, ostensibly for the purpose of making clearer the category of persons who, by reason of their being "associated" with a person providing treatment or recommended to do so, may not be the providers of fixed cost medical reports. In its entirety sub-para.(1A) of para.1.1 now reads as follows:

"(1A) 'associate' means, in respect of a medical expert, a colleague, partner, director, employer or employee in the same practice and 'associated with' has the equivalent meaning"

This amendment took effect as from November 18, 2014. It applies only to soft tissue injury claims where the Claim Notification Form is sent in accordance with the RTA Protocol on or after October 1, 2014.

## DELAY AND CASE MANAGEMENT

On December 16, 1997, the Court of Appeal handed down judgment in the case of *Arbuthnot Latham Bank Ltd v Trafalgar Holdings* [1998] 1 W.L.R. 1426, CA. The judgment dealt with appeals in two unrelated cases handled on appeal together because they raised an identical issue. That issue was the appropriateness of a court striking an action out where there had been considerable delay and the action, and other actions that the claimant might bring, were variously affected by different limitation periods. In giving the judgment of the Court, Lord Woolf M.R. (sitting with Waller and Robert Walker L.JJ.) anticipated the implementation of the case management reforms recommended in his Access to Justice–Final Report (July 1996) (in the event not fully implemented until April 26, 1999). His lordship explained that the courts were in the process of implementing changes requiring the parties to conduct their litigation with reasonable expedition. The appeals provided a convenient opportunity for the Court "to give some guidance for the assistance of the profession, as to the likely consequences in the future of excessive delay in the conduct of legal proceedings" (p 1429).

In the recent case of *Wearn v HNH International Holdings Ltd* [2014] EWHC 3542 (Ch), October 29, 2014, unrep., the delay in the conduct of the proceedings was, by any test, excessive and Mr Justice Barling had to examine carefully the authorities relevant to the circumstances in which an application to strike out a claim for delay amounting to an abuse of process might be granted (for summary of this case, see the "In Brief" section of this issue of CP News). In doing so his lordship referred to the judgment in the *Arbuthnot Latham Bank Ltd* case, in particular to what was said there about the practice of a party of its own initiative refraining from progressing a claim until it was convenient for the party to do so (so-called "warehousing" of proceedings). In the Court of Appeal's judgment Lord Woolf had noted that it was arguable that such practice was not an abuse of process but warned that all that was about to change. The Master of the Rolls explained (at p 1437):

"As case flow management is introduced, it will involve the courts becoming involved in order to find out why the action is not being progressed. If the claimant has for the time being no intention to pursue the action this will be a wasted effort. Finding out the reasons for the lack of activity in proceedings will unnecessarily take up the time of the court."

Clearly Lord Woolf was envisaging that the courts would monitor cases and would have information technology resources of sufficient sophistication to enable cases to be tracked (at least from the point where first case management directions were given) and would have the operational capacity to intervene where cases were not maintaining time standards. As is well-known, such resources (which are crucial to the effective operation of any case management system) were never provided (and now that the country has gone broke, probably never will be provided). The English experience since 1999 demonstrates that case management on the cheap does not work.

In the recent Wearn case, Mr Justice Barling had to consider the fate of an action begun nearly 14 years ago, in which the pleadings were not yet complete, disclosure had not taken place, and evidence had yet to be exchanged. In order to see how this regrettable situation had come about, it was necessary for his lordship to examine the history of the proceedings in great detail. That history showed that directions were given by a judge in October 2001, but thereafter, from the court's point of view, the case had completely disappeared until the claimant put on an application in August 2013. It is noteworthy that at no stage in the intervening 12-year period did the court, to use Lord Woolf's words, become involved "in order to find out why the action is not being progressed". So at least in this case, the court could make no complaint about its resources being wasted during that period in the effort of (as Lord Woolf put it) "finding out the reasons for the lack of activity" in the proceedings.

## DISCRETION AS TO COSTS–ADMISSIBLE OFFER TO SETTLE

In CPR r.44.2 (Court's discretion as to costs), para.(4) states that, in deciding what order (if any) to make about costs, the court will have regard "to all the circumstances". But para.(4) is not content to stop there. It goes on to state expressly that "all the circumstances" includes (a) the conduct of all the parties, (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful, and (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply. And matters that "the conduct of the parties" may include are elaborated in para.(5) of r.44.2.

In relation to para.(4)(c) a complication was introduced by the decision of the Court of Appeal in *Carver v BAA Plc*, [2008] EWCA Civ 412, [2009] 1 W.L.R. 113, CA, where it was in effect held that if (a) one party makes an admissible offer within (what is now) r.44.2(4)(c) (or indeed an offer under Part 36) which is nearly but not quite sufficient, and (b) the other party rejects that offer outright without any attempt to negotiate, then it might be appropriate to penalise the second party in costs. The effect of that decision was reversed by the enactment, with effect from October 1, 2011 (as part of the recommendations made by Jackson L.J. in the *Review of Civil Litigation Costs Final Report*), of r.36.14(1A) (see White Book 2014 Vol. 1 para.36.14.1). As is explained in para.44.2.7 of White Book 2014 (Vol. 1), subsequently, in *Hammersmatch Properties (Welwyn) Limited v Saint-Gobain Ceramics and Plastics Limited* [2013] EWHC 2227 (TCC), July 24, 2013, unrep., Ramsey J. stated that a court should not approach r.44.2(4)(c) on the basis that it supports a special "near miss" rule that may be invoked to penalise a successful party in costs, because, to do so, would be to seek to use r.44.2(4)(c) to give to "near miss" offers an effect similar to Part 36 offers, and would introduce an unwelcome degree of uncertainty (similar to that which existed in relation to Part 36 offers before r.36.14(1A) was enacted).

Paragraph (4)(c) of r.44.2 fell for consideration in the recent case of *Sugar Hut Group Ltd v AJ Insurance* [2014] EWHC 3775 (Comm), November 19, 2014, unrep. As the summary of that case in the "In Brief" section of this issue of CP News shows, the defendants (D) (who were the unsuccessful party) submitted that the terms of their Part 36 offer were highly relevant to the question whether the judge, in making an order for costs, should depart from the general rule that the unsuccessful party should pay the successful party's costs (r.44.2(2)(a)). Eder J. referred to the passage in para.44.2.7 of the White Book mentioned above and added that he fully agreed with the observations of Ramsey J. (at paras 30 to 36) in the Hammersmatch Properties case. However, his lordship concluded that, in the case before him, acceptance of D's submissions would not "reintroduce or at least support a 'near miss' rule by the back door". His lordship explained (1) that D's reference in their offer to the fact that it was based on a figure for loss of profit of £600k gross was not an "admissible offer to settle" within r.44.2(4)(c), (2) that the only "admissible offer to settle" was the offer of a further payment of £250k plus interest, (3) that there were very good reasons for denying the successful claimants some of their costs and which were not based on any "near miss" analysis.

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