CIVIL PROCEDURE NEWS

Issue 3/2015 March 17, 2015

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CPR r.46.2, Senior Courts Act 1981 s.51. Non-English speaking parents (D) opposing the making of adoption orders in relation to two of their children in proceedings brought by a local authority (C). Following order made by a County Court judge, including a direction that "HMCTS do provide 2 Slovak interpreters for the hearing on 7 May 2014", case called on for hearing before President at RCJ on that date with all parties represented. However, as no interpreters were provided on that occasion by the company (X) to whom the Ministry of Justice (MoJ) had outsourced responsibility for providing interpreters for court hearings, judge (1) adjourning the hearing until 15 May 2014, and directing that HMCTS should provide two interpreters for that hearing, and (2) reserving the costs of the aborted hearing to the adjourned hearing, including question whether X should pay such costs ([2014] EWHC 4 (Fam)). At adjourned hearing, for which interpreters were provided and at which final orders for adoption were made, C and D respectively making written submissions seeking non-party costs orders against X for costs of the first hearing. Judge adjourning hearing of costs for both hearings to a later date, on notice to X. At costs hearing, C and X appearing and represented. **Held**, granting C's application and making order for costs against X in sum of £13,338, (1) C had failed to discharge its obligations under the contracting-out agreement with the MoJ, (2) that failure, in principle, exposed X to a non-party costs order, (3) in the circumstances of this case, it was just to make such an order. Judge explaining that a failure by an interpreter (an independent contractor) to attend would not avail X unless the interpreter was prevented from attending by force majeure. ***R. v Applied Language Solutions Ltd*** [2013] EWCA Crim 326, [2013] 1 W.L.R. 3820, CA, ***Globe Equities Ltd v Globe Legal Services Ltd*** [1999] B.L.R. 232, CA, ***HB v PB*** [2013] EWHC 1956 (Fam), [2013] P.T.S.R. 1579, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 para.46.2.1, and Vol. 2 para.9A-202.)

CONLON v ROYAL SUN ALLIANCE INSURANCE PLC [2015] EWCA Civ 92, February 26, 2015, CA, unrep. (Jackson, Kitchin & Floyd L.JJ.)

Small claim–second appeal–re-allocation to multi-track–costs of appeal

CPR rr.26.10, 27.14, 27.15 & 46.13. Following vehicle collision on highway, blameless driver (C) bringing claim against insurer of other driver (D) to recover £7,600 for costs of replacement vehicle hired from a company (X) under credit agreement. Claim allocated to the small claims track. At trial, district judge making award in favour of C, but in an amount significantly less than claimed. On C's appeal (in which C supported by X), heard on July 11, 2014, and in which both parties represented, circuit judge increasing C's award. In August 2014, C filing notice of appeal for second appeal to Court of Appeal and, on ground that circuit judge had erred in his determination of the appropriate basic hire rate, single lord justice granting permission. After listing of appeal for hearing, on December 19, 2014, C making application under r.26.10 for re-allocation of appeal to multi-track, and for backdating of that re-allocation to the commencement of the appeal or to December 19, 2014. D then making offer to settle the appeal on bases that (1) they would pay the full sum sought by C, and (2) that there be no order as to costs either below or before the Court of Appeal. **Held**, dismissing C's application and making no order in respect of costs, (1) under r.26.10 and r.46.13, in a case such as this, the Court had power to re-allocate the claim to the multi-track and to backdate the re-allocation for costs purposes, but would need to be satisfied that there were good reasons for doing so, (2) in the instant case, C had failed to persuade the Court that it was appropriate to re-allocate the claim, (3) in a claim allocated to the small claims track, the court may not order a party to pay another's costs, subject to the exception that an award may be made where the former has behaved unreasonably, (4) the rule and the exception apply to a second appeal as well as to a first appeal, (5) that they apply to a second appeal was made clear (if it was not clear before) in a judgment handed down by the Court on July 8, 2014, (6) in the instant case, there was nothing unreasonable in D's behaviour, either in the first appeal or the second. ***Akhtar v Boland*** [2014] EWCA Civ 943, July 8, 2014, CA, unrep., ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras 27.14.1.1, 27.14.4, 27.15.1, 46.13.1 & 52.9A.1.)

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European order for payment –irregular service –remedies

CPR r.78.1, Regulation (EC) No 1896/2006 arts. 16, 18, 20 & 26. In two unconnected references by a German court to ECJ for preliminary rulings (joined for the purposes of the written and oral procedure and judgment) questions raised

concerning the Europe order for payment (EOP) procedure, in particular, the question (as re-formulated) whether the Regulation must be interpreted as meaning that the procedures referred to in arts. 16 to 20 are applicable where an order for payment has not been served in accordance with the minimum standards laid down in arts. 13 to 15. **Held**, (1) the Regulation must be interpreted as meaning that arts. 16 to 20 are not so applicable where there has been such irregularity, (2) where it is only after an EOP has been declared enforceable that such an irregularity is exposed the defendant must have the opportunity to raise that irregularity, which, if it is duly established, will invalidate the declaration of enforceability, (3) as, in such an event, the Regulation is silent as to the possible remedies available to the defendant, the procedural issues (as art. 26 provides) are governed by national law. (See ***Civil Procedure 2014*** Vol. 2 paras 3L5, 3L-72, 3L-74 & 3L-82.)

■ **JSC BTA BANK v ABLYAZOV** [2015] EWCA Civ 70, February 10, 2015, CA, unrep. (Tomlinson & Christopher Clarke L.JJ.)

Right of appeal–appellant in contempt of court

CPR rr.52.5(2)(b) & 52.9. In proceedings brought by bank (C) against an individual (D) and other defendants C obtaining substantial judgments against D. C applying for final charging order over the interest of D in a London property. In earlier proceedings, in which C successfully sought to commit D for contempt of court, D denying that he was the true beneficial owner of the property but judge holding, on the criminal standard of proof, that he was ([2012] EWHC 237 (Comm)). On that issue, judge disbelieving the evidence of D's business associate (S) (who was not a named party to those proceedings). On day before hearing of C's application, S issuing application notice for an order (1) that, for the purpose of asserting his claim to ownership of the property, he be added as a party to C's application, and (2) that the application should be adjourned pending trial of the issue who owned the property. Judge dismissing S's application and making the final charging order sought by C ([2013] EWHC 1836 (Comm)). In doing so judge determining that it would be an abuse of process to permit S to challenge the finding as to ownership of the property made in the contempt proceedings because that challenge amounted to a collateral attack which would bring the administration of justice into disrepute. On August 14, 2013, single lord justice granting S permission to appeal against that determination. Subsequently, on October 18, 2013, High Court judge committing S for contempt in respect of several breaches of court orders, in particular breaches of non-party disclosure orders made against him in the proceedings brought by C against D (and which related to the role which S performed at D's request as nominal beneficial owner of two Seychelles companies). By a respondent's notice issued on January 8, 2014, C (1) inviting Court to exercise its discretion not to hear S's appeal on the basis that he was now a committed contemnor whose contempts were unpurged, and (2) requesting Court to uphold judge's decision on different grounds. **Held**, refusing (1) but granting (2), (1) the question whether to decline to hear a contemnor (a course which will almost invariably lead to his appeal or application being dismissed) is to be determined by reference to how, in the circumstances of the individual case, the interests of justice will best be served, (2) as it is a strong thing for a court to refuse to hear a party it is a step which is only to be justified by grave considerations of public policy and which a court will take only when the contempt itself impedes the course of justice, (3) there was no direct connection (a) between the findings of contempt against S and the issue of beneficial ownership of the London property, which arose in connection with the charging order proceedings, or (b) between S's contempts and the question whether his attempt to intervene in the charging order proceedings represents a collateral attack upon the earlier findings, (4) S asserted a claim to ownership of the London property but had had no proper opportunity to establish that claim by being a party to any relevant judicial process, (5) as the only question at issue was whether S should be permitted that opportunity, it would be disproportionate, or at any rate an inappropriate consequence of his unrelated contempt, that he should be denied the right to challenge on appeal the judge's decision denying him the opportunity. ***Hadkinson v Hadkinson*** [1952] P. 285, CA, ***JSC BTA Bank v Ablyazov*** [2012] EWCA Civ 639, May 16, 2012, CA, unrep., ***JSC BTA Bank v Ablyazov*** [2013] EWHC 1979 (Comm), July 5, 2013, unrep., ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras 23.0.16.1, 52.5.4 & 52.9.4.)

■ **JX MX v DARTFORD AND GRAVESHAM NHS TRUST** [2015] EWCA Civ 96, February 17, 2015, CA, unrep. (Moore-Bick, Black & Lewison L.JJ.)

Approval of compromise on behalf of child–anonymity order

CPR rr. 21.10 & 39.2, Human Rights Act 1998 Sch.1 Pt. I arts.8, 10 & 14. Child (C), by her mother as litigation friend, bringing proceedings against hospital trust (D) alleging negligence on the part of those who were responsible for her care. Before trial, D agreeing to settle her claim by paying a very significant sum in damages, including both a large lump sum and substantial periodical payments. On application to the court under r.21.10 for approval of the settlement, C seeking orders designed to ensure that her identity was withheld from the public indefinitely. Judge declining to make an order preventing publication of C's name, but directing that her address should not be disclosed. On C's appeal against the judge's dismissal of her application for an anonymity order (made with the

judge's permission), **held**, allowing the appeal, (1) at an approval hearing the court is concerned, not so much with the direct administration of justice, as with ensuring that through the offices of those who act on his or her behalf the claimant receives proper compensation for his or her injuries, (2) the public undoubtedly has an interest in knowing how that function is performed and the principle of open justice has an important part to play in ensuring that it is performed properly, but its nature is such that the public interest may usually be served without the need for disclosure of the claimant's identity, (3) when dealing with an approval application of the kind made in the instant case a court should recognise that it is dealing with what is essentially private business, albeit in open court, and should normally make an anonymity order in favour of the claimant without the need for any formal application, unless for some reason it is satisfied that it is unnecessary or inappropriate to do so. Court stating the principles to be applied and the procedure to be followed (paras 34 & 35). Relevant authorities on scope of principle of open justice examined. ***Scott v Scott*** [1913] A.C. 417, HL, ***In re BBC*** [2014] UKSC 25, [2014] 2 W.L.R. 1243, SC, ***Independent News and Media Ltd v A*** [2010] EWCA Civ 343, [2010] 1 W.L.R. 2262, CA, ***H v News Group Newspapers Ltd (Practice Note)*** [2011] EWCA Civ 42, [2011] 1 W.L.R. 1645, CA, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras 21.10.2 & 39.2.11.)

■ **R. (JAMES) v GOVERNOR OF BIRMINGHAM PRISON** [2015] EWCA 58, February 9, 2015, CA, unrep. (Arden, Beatson & Gloster L.JJ.)

Term of imprisonment for civil contempt–credit for time spent on remand

CPR rr.40.7 & 81.31, Contempt of Court Act 1981 s.14, Criminal Justice Act 2003 ss.240ZA & 305, Police and Crime Act 2009 s.43(5), Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.108, Human Rights Act 1998 Sch.1 Pt I arts.5 & 14. On County Court application by local authority, court making order granting injunction under 2009 Act, with power of arrest for breach attached, prohibiting individual (C) from entering a prescribed area. On November 29, 2012, found in the prohibited area, arrested, brought before the court, and remanded in custody pursuant to s. 43(5). At hearing on December 5, judge finding C in breach of the injunction and committing him to imprisonment. Committal order stating that C "be committed to HMP Birmingham for a period of three months" that is, until January 18, 2013, or "until lawfully discharged if sooner". Judge's wish, expressed when sentencing C, that time spent by C on remand should be credited as time served (with the result that his discharge date would be January 11) not reflected in the order when made. Prison notifying C that the remand period would not be credited and that his date of discharge would be January 18. C's application for permission to continue a claim for judicial review of that decision refused by a High Court judge. Permission subsequently granted by a single lord justice, who ordered that the application be retained in the Court of Appeal. **Held**, refusing the application, (1) a committal for contempt must be for "a fixed term" (s.14), (2) in determining such term in a case of civil contempt it is open to a judge to reflect a period spent on remand by the contemnor, (3) where a contemnor had spent seven days on remand, a committal to prison for (say) "three months less seven days" would satisfy the requirement that a committal must be for "a fixed term", (4) a committal order takes effect from the day on which it is given (r.40.7) and any subsequent correction to it altering the term of imprisonment cannot have retrospective effect, (5) the relevant legislation excludes committals from provisions requiring credit to be given for time on remand where a person is sentenced for a criminal offence, (6) amendments made to sentencing legislation by the 2012 Act (coming into effect on December 3, 2012) had not altered the law in that respect. Court rejecting submissions that the sentence procedure for committals (a) was in breach of art.5, on ground that it was "arbitrary" and therefore not "in accordance with a procedure required by law", or (b) was in breach of art.14, on ground that it was discriminatory. ***Delaney v Delaney*** [1996] Q.B. 387, CA, ***McKnight v Northern*** [2001] EWCA Civ 2028, December 17, 2001, CA, unrep., ***R. (Sevketoglu) v Sevketoglu*** [2003] EWCA Civ 1570, *The Times*, November 27, 2003, ***K. v. P.***, [2008] EWCA Civ 600, [2008] 2 F.L.R. 2137, CA, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras 40.7.1, 81.31.4 & 81.31.5, and Vol. 2 paras 3A-1207, 3A-1782 & 3C-87.)

■ **SIMPSON v MGN LTD** [2015] EWHC 126 (QB), January 27, 2015, unrep. (Warby J.)

Costs management order – good reason for departing from–contingency cost

CPR rr.3.13, 3.15, 3.18 & 44.2, Practice Direction 3E paras 7.3 & 7.6, Practice Direction 44 paras 9.5 & 9.6. In defamation claim, before CMC claimant (C) proposing to defendants (D) trial of preliminary issue on meaning and intimating prospect of an application to strike out D's plea of justification. In addition, parties filing and exchanging costs budgets (r.3.13). D's budget, which was agreed by C, including costs of C's preliminary issue application as a contingency (Contingency Cost A). C's budget, which was contested by D, including costs of C's preliminary issue application as a contingency (Contingency Cost C, with a figure of £20,575). At CMC on October 30, 2014, Master declining "at this stage" to direct preliminary issue, and making costs management order in accordance with r.3.15(2) and para.7.3 in which D's Contingency Cost A was agreed but not approved, and C's Contingency Cost C was neither agreed nor approved. On November 26, 2014, C making application for order (1) for trial of preliminary issue on

meaning, and (2) striking out D's plea of justification. On January 19, 2015, judge (1) trying issue of meaning, (2) striking out D's plea of justification, and (3) dismissing D's cross-application for permission to amend that plea. C applying for order for costs in sum of £24,000 as set out in statement of costs filed with court (but not served on D as required by PD44 para.9.6) before the hearing. D opposing that application on ground that C's approved costs budget did not include any sum in respect of the applications determined by the judge and there was no good reason for departing from that budget (r.3.18). In particular, D submitting that C had without good reason failed to submit for approval by the court a revised budget (as required by PD3E para.7.6) in respect of the preliminary issue application. **Held**, rejecting D's principal submissions and making order for costs in C's favour in sum of £10,500, (1) at the CMC, the Master did not approve or disapprove C's Contingency Cost C figure, (2) instead the Master simply and quite properly put that issue to one side on the footing that it was then not applicable because of his decision that, at that stage, there should be no order for the trial of a preliminary issue, (3) C's failure to comply with para.7.6 had only a modest impact on the efficient dispatch of the litigation, (4) assessing C's recoverable costs for success on the application at nil would be unjustly disproportionate, (5) in the circumstances C should recover 90% of the costs which would have been approved as reasonable had C submitted budget for approval in advance of the hearing, less a deduction to reflect the fact that C's failures caused D to incur additional costs, beyond those it would have incurred if C had sought and obtained such approval, and taking into account C's failure in relation to PD44 para.9.6. Judge observing that the application of the wording of r.3.18(b) is not straightforward in the circumstances which arose in this case and suggesting that it was not aimed at such circumstances. (See ***Civil Procedure 2014*** Vol. 1 paras 3.15.1, 3.15.3, 3.18.1 & 44PD.9, and ***Supplement 4*** para.3EPD.3.)

■ **STEVENS v EQUITY SYNDICATE MANAGEMENT LTD** [2015] EWCA Civ 93, February 26, 2015, CA, unrep. (Jackson, Kitchin & Floyd L.J.)

Assessment of damages to vehicle–determination of basic hire rate for replacement

Following collision between two vehicles, one driver (D) admitting liability for damage to the other's (C) vehicle and costs of repairs agreed. After collision, for purpose of hiring replacement vehicle whilst his own vehicle was being repaired, C (who did not suffer disadvantage of being impecunious) entering into credit hire agreement with company (X) under which total daily hire rate agreed was £165.50 (excluding VAT) of which £140 constituted the basic daily hire date (BHR). Under that agreement, X also arranging for, and funding costs of, repairs to C's vehicle pending the recovery of those costs from D's insurers (Y). C and Y falling into disagreement as to the amount of the recoverable BHR and C bringing proceedings in the County Court, allocated to the fast track. Recorder deciding that BHR was £63.02 (excluding VAT). On appeal to High Court judge, judge upholding that decision ([2014] EWHC 689 (QB)). Single lord justice granting C permission for second appeal to the Court of Appeal. **Held**, dismissing appeal, (1) determining the BHR involves an objective investigation of the BHRs that notionally C would have been quoted on non-credit terms by suppliers of hire vehicles operating in the same broad geographical area, being mainstream or local reputable suppliers, and which a reasonable person would have been willing to pay, (2) where such investigation yields a range of high and lower BHRs a reasonable estimate of the BHR may be obtained by identifying the lowest reasonable rate so quoted. ***Dimond v Lovell*** [2002] 1 A.C. 384, HL, ***Burdis v Livsey*** [2002] EWCA Civ 510, [2003] Q.B. 36, CA, ***Pattni v First Leicester Buses Ltd*** [2011] EWCA Civ 1384, [2012] Lloyd's Rep. 577, CA, ref'd to. (See further "In Detail" section of this issue of CP News.)

■ **TCHENGUIZ v GRANT THORNTON UK LLP** [2015] EWHC 405 (Comm), February 20, 2015, unrep. (Leggatt J.)

Particulars of claim–non-compliance with provisions as to length etc –adverse order for costs

CPR rr.16.4 & 58.5, Admiralty and Commercial Courts Guide Section C and Appendix 4. In claim brought by several claimants (C) against several defendants (D), C pleading in particulars of claim that D conspired to induce the SFO to investigate them on a false basis by the unlawful mean of making statements to the SFO which did not believe to be true. Those particulars signed by several counsel and running to 94 pages in length, thereby exceeding substantially the 25 page limit imposed by para.C1.1(b), and not complying with the principles stated in Appendix 4. Two months after service, C making application for retrospective permission to serve particulars of claim of length greater than 25 pages. On this application made on paper coming before judge, judge inviting C's legal representatives to explain why proper practice had not been followed and to make written submissions on question whether the particular should be re-pleaded and the costs of drafting the served version disallowed. **Held**, dismissing C's application, (1) the particulars of claim should be struck and the costs of drafting them disallowed, (2) fresh particulars of claim not exceeding 45 pages and otherwise complying with Appendix 4 should be served within 21 days. ***Standard Bank Plc v Via Mat International Ltd***, [2013] EWCA Civ 490, [2013] 2 All E.R. (Comm) 1222, CA, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 para.16.4.1, and Vol. 2 paras 2A-10.1, 2A-56 & 2A-161.)

■ **YEO v TIMES NEWSPAPERS LTD** [2015] EWHC 209 (QB), February 4, 2015, unrep. (Warby J.)

Costs management order–revisions of budgets by court–contingencies

CPR rr.3.13 to 3.18, 26.3 & 44.3, Practice Direction 3E para.7 & Precedent H. Member of Parliament (C) bringing defamation claim against newspaper (D). Before first CMC, parties filing and exchanging costs budgets. At CMC judge (1) dismissing an application by D, (2) giving ruling on preliminary issue and granting C permission to amend particulars of claim, and (3) giving parties permission to restore for further directions and costs budgeting ([2014] EWHC 2853 (QB)). After re-pleading by both parties and service of reply by C, further issues arising for decision at combined second CMC and first costs management conference, for which parties produced revised budgets, neither of which was agreed, and both of which included estimates for costs of contingencies (six in all but not one common to both parties). Costs in parties' budgets, when added to their incurred costs, totalling, for C £559,915, and for D £415,972. Judge making revisions to the budgets for costs to be incurred on future phases of the litigation having effect (principally as a consequence of not approving the parties' contingent costs estimates) of reducing total costs of C to £370,000 and of D to £346,553. Judge making costs management order accordingly, recording the court's approval thereof (r.3.15(2)). In reserved judgment, judge highlighting particular issues that may arise in costs budgeting, and offering some guidance for the future, with particular reference to publication cases. In so going judge stating (amongst other things), (1) when reviewing budgets the court will not undertake a prospective detailed assessment, but will consider whether the estimated costs are reasonable and proportionate, (2) in cases where the estimated costs run to six or even seven figures in total it would be appropriate for the court to have regard, not only to the factors listed in r.44.3(5), but also (as would be done on a summary assessment) to hours and rates, (3) contingencies must involve work that does not fall within the main categories in Precedent H, and in order for work to qualify as a contingency it must be possible to identify to the opposite party and to the court what that work would be, (4) if work identified as a contingency is included in a budget but not considered probable by the court no budget for it should be approved because work should be included as a contingency only if it is foreseen as more likely than not to be required. Judge also stating that, as libel and other publication cases are rarely undefended, and will all but inevitably be assigned to the multi-track, they represent a class of case in which early intervention by the court for the purpose of initiating the costs budgeting process may be merited. (See ***Civil Procedure 2014*** Vol. 1 paras 3.13.1, 3.15.1 & 3.15.3, and **Supplement 4** paras 3EPD.2 & 3EPD.4.)

Statutory Instruments

■ **CIVIL JURISDICTION AND JUDGMENTS (AMENDMENT) REGULATIONS 2014** (SI 2014/2947)

Amend Civil Jurisdiction and Judgments Act 1982 ss.1, 16 & 48, Civil Jurisdiction and Judgments Order 2001 art.2 and Sch.1, and Civil Jurisdiction and Judgments (Authentic Instruments and Court Settlements) Order 2001 arts. 1, 2 & 3; insert art. 6G in High Court and County Courts Jurisdiction Order 1991; and make consequential amendments to other enactments to facilitate the application in the UK of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("the recast Judgments Regulation"). In force January 10, 2015. (See ***Civil Procedure 2014*** Vol. 2 paras 5-9, 5-194, 5-196, 5-197, 5-202, 5-210+ & 9B-935.)

■ **CIVIL PROCEDURE (AMENDMENT) RULES 2015** (SI 2015/406)

CPR Pt 88, Counter-Terrorism and Security Act 2015. Provide rules of court for purpose of implementing statutory arrangements for imposing temporary exclusion order (TEO) on an individual as made by Ch 2 of Part 1 of the 2015 Act, in particular where the jurisdiction of the High Court at first instance and the Court of Appeal on appeal is invoked under those arrangements. Impose on court duty ensure that information is not disclosed contrary to the public interest and provide that the overriding objective, and so far as relevant any other rules, must be read and given effect in a way which is compatible with that duty. Modify application of Part 8 and Part 52. Make provision for special advocates. In structure and detail modelled on Part 76 and Part 80. Not supplemented by a practice direction. Made by Lord Chancellor under powers granted by the 2015 Act. In force February 27, 2015. (See ***Civil Procedure 2014*** Vol. 1 paras 1.2, 5.4C.9 & 52.1.1.)

■ **CIVIL PROCEEDINGS AND FAMILY PROCEEDINGS FEES (AMENDMENT) ORDER 2015** (SI 2015/576)

Civil Proceedings Fees Order 2008. In Sch.1 (fees to be taken) substitutes from "1. Starting proceedings (High Court and County Court)" to the end of the entry headed "Fees 1.1, 1.2 and 1.3". Alters the basis on which fee for starting proceedings to recover money where the sum claimed exceeds £10,000 to provide that where the claim exceeds £10,000 but does not exceed £200,000 the fee is 5% of the value of the claim, and is £10,000 where the claim exceeds £200,000 or is not limited. Merges fee 1.3 with 1.2 for starting proceedings in CCBC and Money Claims Online, and alters basis for calculating fee where claim exceeds £10,000 but does not exceed £100,000 by providing that the fee is 4.5% of the vale of he claim. Also in Sch.1 prescribe afresh without altering the amounts of fees 2.1(a) and 2.1(b). Makes consequential amendment to art. 5 (remissions and part remissions). In force March 9, 2015. (See ***Civil Procedure 2014*** Vol. 2 para.10-5, and **Supplement 4** para.10-07.)

In Detail

DETERMINING BASIC HIRE RATE FOR REPLACEMENT VEHICLE

In *Stevens v Equity Syndicate Management Ltd* [2015] EWCA Civ 93, February 26, 2015, CA, unrep., Kitchin L.J., in giving the lead judgment of the Court of Appeal (with which Jackson & Floyd L.JJ. agreed), explained that, the principles to be applied in determining the basis upon which a claimant can recover damages in respect of his vehicle hire costs when he is the innocent victim of a road traffic accident and has hired a replacement vehicle on credit hire terms have been considered in a number of decisions. (For summary of this case, see "In Brief" section of this issue of CP News.) His lordship reviewed the relevant authorities, including *Pattni v First Leicester Buses Ltd* [2011] EWCA Civ 1384, [2012] Lloyd's Rep IR 577, CA, in which the lead judgment was given by Aikens L.J.

In summarising those principles insofar as they were relevant to this appeal Kitchin L.J. stated (para.10) that is the duty of the innocent party to mitigate his loss, and if the loss of the use of the vehicle can be mitigated by the hire of a replacement vehicle, "the cost of that replacement vehicle will be the measure of damages recoverable for the loss he has sustained". His lordship added (para.11):

"Further, such an innocent party who hires a replacement vehicle on credit hire terms suffers a loss which is also recoverable as damages provided always that he has acted reasonably. Nevertheless, and even if he has acted reasonably, the innocent party may not be able to recover the full amount of the credit hire rate that he has agreed to pay to the credit hire company. It all depends upon his financial circumstances. If he could have afforded to hire a replacement vehicle in the normal way, that is to say without credit hire terms and by paying in advance, then the damages recoverable will be that sum which is attributable to the basic hire rate (or BHR) of the replacement vehicle. If, on the other hand, he is impecunious and could not have afforded to hire a replacement vehicle by paying in advance then, prima facie, he is entitled to recover the whole of the credit hire rate he has paid, provided it was a reasonable rate to pay in all the circumstances."

It is clear that it is for the defendant to demonstrate, by evidence, that there is a difference between the credit hire charge agreed between the claimant and the credit hire company and the BHR. That is all very well, but how is the BHR to be calculated? In the *Pattni* case, three possible methods of calculation were canvassed by Aikens L.J. The first was to break down the charge made by credit hire companies so as to enable the additional unrecoverable elements to be stripped out. The second was to apply what was described as a reasonable discount to the credit hire rate charges. The third, and the course preferred by the Court in that case, was to look at locally available BHR figures. Aikens L.J. explained (at para.41) that, in practice, a judge adopting that third course may have two sorts of evidence available to him.

"First, he may have direct evidence, in the form of published rates, from the actual credit hire company that hired the replacement car which demonstrates either that the credit hire rate and the BHR for that type of car is the same or it is different and what the difference is. Secondly, the judge may have evidence of the BHR charged by other car hire companies in the area for the type of car actually hired. From that he will be able to ascertain, on a balance of probabilities, what the BHR for the actual type of car hired was and so arrive at the measure of damages recoverable, subject to the issue of the reasonable time for hiring the car."

In the instant case the trial judge adopted the third approach, but (perhaps not surprisingly) the evidence available to the judge as to hire rates charged by local suppliers of vehicles produced a wide range of figures. Kitchin L.J. said (paras. 35 & 36) that a judge should try to identify the rate or rates for the hire, in the claimant's geographical area, of the type of car actually hired by the claimant on credit hire terms. If that exercise yields a single rate then that rate "is likely to be a reasonable approximation for the BHR", because it is likely to be a fair market rate for the basic hire of a vehicle of that kind without any of the additional services provided to the claimant under the terms of the credit hire agreement. If, on the other hand, it yields a range of rates then a reasonable estimate of the BHR may be obtained "by identifying the lowest reasonable rate quoted by a mainstream supplier or, if there is no mainstream supplier, by a local reputable supplier."

Kitchin L.J. stressed that exercise to be undertaken by the judge is an objective one. The evidence of the claimant about what he would have done had he gone into the market to hire a vehicle on standard hire terms is likely to be of little assistance to the judge seeking to carry it out. The search must rather be for the lowest reasonable rate quoted by a mainstream supplier for the basic hire of a vehicle of the kind in issue "to a reasonable person in the position of the claimant" (para.39). In this latter respect his lordship found that the High Court judge had fallen into error in the way in which he approached the exercise of determining the BHR, but not in the answer to which he came.

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Published by Sweet & Maxwell Ltd, 160 Blackfriars Road, Southwark, London SE1 8EZ
ISSN 0958-9821

Typeset by Matthew Marley
Printed by St Austell Printing Company, St Austell, Cornwall