CIVIL PROCEDURE NEWS

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CONTENTS

In Brief

Cases

ABDELMAMOUD v THE EGYPTIAN SOCIETY IN GREAT BRITAIN LIMITED [2015] EWHC 1013 (Ch), April 17, 2015, unrep. (Edward Murray)

Default judgment–application to set aside by non-party–whether "directly affected"

CPR rr.3.1(7), 12.3, 13.3, 40.9 & 52.11. Dispute arising among members of a charity (D), organised as a company limited by guarantee, as to elections to D's governing committee. On December 14, 2012, individual (C) member of D lending D money to enable proceedings to be brought to prevent another individual (R) from holding himself out as chair. On May 16, 2013, C bringing claim against D for repayment of the loan. On June 26, 2013, C granted judgment in default of acknowledgment of service under r.12.3. Subsequently, C obtaining third-party debt order against D's bank in relation to funds **held** to the account of D. On October 14, 2013, several individual members of D (X), including R and three other individuals (two of whom claimed to be properly elected members of the committee), applying to stay the third party debt order and to have the judgment in default and the third-party debt order set aside. On July 30, 2014, Deputy Master proceeding on basis that, as their status as members of the committee was in dispute, X were not parties to C's claim against D, (1) finding (a) that X had standing to make the application, and (b) that the requirements of r. 13.3 for setting aside a default judgment were satisfied, and (2) granting X's application. On C's appeal to a judge (by way of review and not re-hearing), at which C represented, X appearing in person, and D not appearing or represented, held by Deputy Judge, allowing the appeal, (1) r. 40.9 permits a person who is not a party to proceedings, but who is "directly affected" by a judgment or order made in those proceedings, to have it set aside or varied, (2) whether a non-party has been "directly affected" by a judgment or order needs to be carefully scrutinised in the light of the general policy that a judgment or order should not easily be set aside, (3) it is necessary that some interest capable of recognition by the law is materially affected by the judgment or order or by its enforcement, (4) it is sufficient that the judgment or order would prima facie be capable of materially or adversely affecting a legal interest, (5) in the instant case X, although all members of D, did not have any interest capable of recognition by the law that was "directly affected", within the meaning of r.40.9 as properly understood, by the judgment obtained by C, (6) accordingly, the Deputy Master erred in law in holding that the applicants had *locus standi* under r.40.9. ***Hepworht Group Ltd v Stockley*** [2006] EWHC 3636 (Ch), [2007] 2 All E.R. (Comm) 82, ***Latif v Imaan Inc*** [2007[EWHC 3179 (Ch), December 17, 2007, unrep., ***IPCom GmbH & Co KG v HTC Europe Co Ltd*** [2013] EWHC 2880 (Ch), September 26, 2013, unrep., ref'd to. (See ***Civil Procedure 2015*** Vol. 1 paras 3.1.9.4, 13.3.4, 40.9.1, 40.9.1, 40.9.2 & 40.9.5.)

BOURKE v FAVRE [2015] EWHC 277 (Ch), February 2, 2015, unrep. (Nugee J.)

Application to amend claimant's statement of case–risk of loss of trial date–prejudice to defendant

CPR rr.17.1, 29.2 & 29.5. In November 2013, man (C1) and his son (C2) bringing Chancery action against his sister (D1), the owner (as a result of 1966 gift by the mother (X) of C1 and D1) of a landed estate consisting of various properties, and against the wife (D2) of his deceased brother (Y). Action as originally pleaded consisting of claims (1) for adverse possession of a particular property within the estate, and (2) rights over other properties based on terms of a supposed oral agreement made in 1966 by C1, D1 and Y with X. Defence (served in January 2014), D1 pleading inter alia that the land was given to her absolutely with no terms attached and that she made no legally-binding promise in 1966 as a condition of receiving the estate from X. Reply served on April 4, 2014, by which time the trial window had been fixed for March 2015. After standard disclosure (in April 2014) and exchange of witness statements (in November 2014), on December 9, 2015, claimants applying to amend claim to add (1) an alternative claim based on proprietary estoppel (previously broadly intimated in correspondence), and (2) three new adverse possession claims, two of which involved the joinder of C2's wife as a co-claimant. D1 resisting this application. **Held**, refusing the application, (1) in any case where an amendment poses a risk of the loss of a trial date that risk is a significant factor to be take into account in determining whether it should be allowed, (2) in the instant case the application could properly be characterised as "late" and the explanation for delaying it (i.e. that a decision to apply should await a sight of D1's evidence) was not an adequate one, (3) as to the proprietary estoppel claim, (a) the amendment was not a refinement or modification of the existing claim, but was a wholly new case based on representations alleged to have been made by D1, (b) it was not obvious that permitting that amendment would require an adjournment, but there was a real and not fanciful risk that it would, (c) even if an adjournment were not required, allowing the amendment would cause prejudice to the defendants, (d) the defendants had not acted unreasonably in waiting to see if the application were granted before starting work on the wholly new case, (4) as to the three new adverse

possession claims, (a) the amendment introduced entirely new causes of action and rather different from the existing adverse possession claim, (b) it would be open to the claimants to bring those claims in a second action, (c) in the circumstances, they should not added by amendment in the existing action against the wishes of the defendants. ***Worldwide Corporation v GPT Ltd*** [1998] EWCA Civ 1894, December 2, 1998, CA, unrep., ***Swain-Mason v Mills & Reeve LLP (Practice Note***) [2011] EWCA Civ 14, [2011] 1 W.L.R. 2735, CA, ***Brown v InnovatorOne Plc*** [2011] EWHC 3221 (Comm), November 28, 2011, unrep., ***Hague Plant Ltd v Hague*** [2014] EWCA Civ 1609, [2015] C.P. Rep. 14, CA, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2015*** Vol. 1 paras 17.3.5 & 17.3.7, and Vol. 2 para.11-11.)

■ **EXCALIBUR VENTURES LLC v TEXAS KEYSTONE INC** [2015] EWHC 566 (Comm), February 3, 2015, unrep. (Christopher Clarke L.J.)

Non-party costs order–payment on account–date from which interest should run

CPR rr.40.8, 44.2, 44.3 & 46.2, Senior Courts Act 1981 s.51, Judgments Act 1838 s.17. Company (C) bringing substantial commercial claim against several defendants (D). Claim financed by a number of different persons (X) who at different times and in different amounts produced the monies necessary to start and, later, to continue the action. On December 13, 2013, judge giving judgment for D and ordering C to pay D's costs on the indemnity basis and to make an interim payment of costs on account ([2013] EWHC 4278 (Comm)). Subsequently, on October 23, 2014, upon C's failure to provide additional security for D's costs, judge granting D's application for costs orders against X making them jointly and severally liable for the costs of the action on the indemnity basis ([2014] EWHC 3436 (Comm)). At hearing to determine the order for costs against X, **held**, (1) it was common ground that interest on the costs payable by X should be at the rate of 1.5% from the date of the relevant invoices until the date of judgment, whereafter interest would run at the Judgments Act rate of 8%, unless the court ordered otherwise, (2) for X the default position was that the rate of interest on the costs for which they were liable ran at 8%, not from December 13, 2013, but from October 23, 2014, (3) in the circumstances it would be unjust to depart from that position and to order (as D submitted) that the commencement date for the 8% rate should be backdated to a date before October 23, 2014, (4) it did not follow that, because C became liable for interest at 8% from December 13, 2013, X (their funders) should pay interest at that rate from then, (5) there should be an order for an interim payment on account of costs and interest thereon, (6) in the circumstances, "a reasonable sum" on account of costs (r.44.2(g)) was 80% of the sum claimed by D. Matters to be considered when determining whether to order any payment on account of costs and its amount explained. Relevant first instance authorities on date from which interest should run and on fixing of "reasonable sum" noted. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2015*** Vol. 1 paras 7.0.16, 40.8.11, 44.2.15, 44x.3.22 & 46.2.1, and Vol. 2 para.7C-93.)

■ **KAZAKHSTAN KAGAZY PLC v ZHUNUS** [2015] EWHC 996 (Comm), April 16, 2015, unrep. (Walker J.)

Application for security for costs order–conditions to be satisfied

CPR r.25.13, Human Rights Act 1998 Sch.1 Pt I arts.6 & 14. Isle of Man company (C) and other companies, of which it was the ultimate owner, bringing claim in Commercial Court against businessman (D) and two other individuals. Claimant companies alleging that they had been the victims of very substantial frauds by which the defendants had stolen US$ 135 million from them. Freezing injunction granted against D (former director and chairman of board of C and of one of the other claimant companies) but subsequently replaced by an undertaking on terms offered by him. D and other defendants denying the frauds altogether. By notice D applying for order under r.25.12 requiring C to provide security for the costs of the action. **Held**, granting the application and making an order for security in the sum of £1m, (1) an applicant for an order under r.23.12 must satisfy both "the justice test" and "the pre-conditions test" as provided, respectively, by paras (a) and (b) of r.25.13(1), (2) in relation to the latter it is sufficient for an applicant to establish only one of the several pre-conditions relevant to that test stated in r.25.13(2), (3) in the instant case D sought to establish two of them, viz. "the residence pre-condition" and "the inability to pay pre-condition" (r. 25.13(2)(a) & (c)), (4) it was common ground that, as it has a potential to be discriminatory, the grant of security on the residence pre-condition should not be either automatic or inflexible, (5) the residence pre-condition was satisfied as the vast majority of C's assets were outside the European legal market, (6) C's location in the Isle of Man did not, in those circumstances, enable it to say that reliance upon that pre-condition would be discriminatory, (7) on the evidence filed the court was satisfied that there was reason to believe that the claimants would be unable to pay D's costs if ordered to do so, and (8) looking at the matter in the round, and having regard to all the circumstances, the court was satisfied that it was just to make an order for security. Authorities on r.25.12 and r.25.13 examined and explained, in particular those relevant to the residence pre-condition. Observations on need for commercial litigation practitioners to bring a sense of proportion to interlocutory applications. ***Sir Lindsay Parkinson & Co v Triplan*** [1973] Q.B. 609, CA, ***Jirehouse Capital v Beller*** [2008] EWCA Civ 908, [2009] 1 W.L.R. 751, CA, ***Chemistree Homecare Limited v Teva Pharmaceuticals Ltd*** [2011] EWHC 2979 (Ch), November 3, 2011, unrep., ***Nasser v United Bank***

of Kuwait [2001] EWCA Civ 556, [2002] 1 W.L.R. 1868, CA, ***AIMS Asset Management v Kazakhstan Investment Fund Lt***d May 22, 2002, unrep., ***Texuna International Ltd v Cairn Energy Plc*** [2004] EWHC 1102 (Comm), [2005] 1 B.C.L.C. 579, ref'd to. (See further "In Detail" section of this issue of CP News.) (***Civil Procedure 2015*** Vol. 1 paras 25.13.6 & 25.13.13.)

■ **PATEL v MUSSA** [2015] EWCA Civ 434, April 29, 2015, CA, unrep. (Moore-Bick, Lewison & King L.JJ.)

Directions for application for permission to appeal–imposition of procedural sanction for failure to comply–appeal against

CPR rr.52.3 & 52.10, Human Rights Act 1998 Sch. 1 Pt. I art.6. Adverse parties to county court claim compromising claim. Claim stayed and terms of agreement scheduled to a Tomlin order. One party (C) applying to court for order enforcing the agreement. District judge dismissing application and refusing permission to appeal. On C's application for permission to appeal to a circuit judge, on February 18, 2014, judge on own initiative giving directions and listing matter for hearing on Monday, May 12, 2014. C failing to comply with directions to file skeleton argument by April 4, and bundle of documents three clear days before the hearing (i.e. by April 6 (r.2.8(3) & (4)). Instead, C e-mailing skeleton argument to court on morning of hearing, and e-mailing and faxing bundle on April 9. At the hearing, on ground that C's failure to comply with the directions was not trivial and no reasonable excuse for it had been put forward, circuit judge dismissing C's application for permission to appeal. Single lord justice granting C permission to appeal. On C's appeal to Court of Appeal, **held**, dismissing appeal, (1) the circuit judge did not purport to deal with C's application for permission to appeal on its merits, but simply disposed of it peremptorily by way of a sanction, (2) the circuit judge's order was, in effect, a case management order, independent of the application for permission, and as such was amenable to appeal (subject to permission) in the same way as any other case management order, (3) it is well established that courts are entitled to give directions for the proper and efficient conduct of proceedings before them and to impose sanctions on parties who fail to comply with their orders, including, in an appropriate case, the sanction of striking out of proceedings, (4) provided such powers are exercised fairly, they do not constitute a breach of art. 6, (5) the circuit judge was entitled to regard C's failure to comply with his directions as serious and unjustified and to impose a sanction of some kind, (6) the dismissing of C's application was a course which was open to the circuit judge in the exercise of his discretion and he could not be criticised for taking that course. Observations on Court of Appeal's "residual jurisdiction" to entertain an appeal against a judge's refusal of permission to appeal where the process by which the judge reached his decision was unfair and contravened art.6, and explanation of why it was not arguable (contrary to the single lord justice's provisional view) that that jurisdiction could be invoked by the appellant in the instant case. ***Mitchell v News Group Newspapers Ltd (Practice Note)*** [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, CA, ***Denton v T H White Ltd. (Practice Note)*** [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296, CA, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2015*** Vol. 1 para.52.3.9, and Vol. 2 paras 3D-76 & 9A-842.1.)

■ **PATEL v NATIONAL WESTMINSTER BANK PLC** [2015] EWCA Civ 332, April 1, 2015, CA, unrep. (Moore-Bick, McFarlane & Vos L.JJ.)

Application made at trial to amend statement of case–prospect of amended claim succeeding

CPR rr.17.3 & 24.2. Kenyan company (X) drawing cheque for equivalent to £137,000 on its Kenyan bank (Y) in favour of businessman (C). On August 1, 2006, C paying cheque into his account with London bank (D). Cheque lost in banking system and never presented to Y. Subsequently becoming apparent to C that X's account with Y had been overdrawn during the period July to December 2006, and was closed in 2008. On July 22, 2012, C bringing proceedings against D for breach of its duty to him as its customer seeking to recover the face value of the cheque. In particular, C's statement of case (as amended in July 2013) alleging that the cheque would have been dishonoured on presentation for payment and that its loss had prevented C from taking proceedings against X to recover the face value. On first day of trial (April 7, 2014), C applying for permission to re-amend the particulars of claim to raise an alternative case, inconsistent with that currently pleaded, based on the proposition that the cheque would have been honoured on presentation. D opposing amendment on the grounds that it amounted to putting forward a completely new case which it could not be expected to deal with at that stage of the proceedings. Judge dismissing application, finding (1) that there was no evidence to support the contention that, had the cheque been presented, Y (by advancing X's overdraft facilities) would have made the necessary funds available to meet it, and (2) that C had no real prospect of showing that X would have made funds available for the purpose. Judge making it clear that, even if he had been persuaded that the re-amendments gave rise to an arguable case, he would, in the exercise of his discretion, have refused permission to re-amend. Judgment then entered for D upon C conceding that his case as pleaded could not succeed. **Held**, dismissing C's appeal, (1) under CPR Pt 24 the court may give summary judgment against a claimant if it is satisfied that the claim has no real prospect of success, (2) it follows that when an application is made to amend the particulars of claim to introduce a fresh claim or a new basis of claim the court is entitled to consider whether the

case which the claimant seeks to introduce has any real prospect of success, (3) in the instant case (a) there was no evidence before the court capable of supporting the case that Y would have advanced the funds needed to honour the cheque and this element of the proposed amendment had no real prospect of success, and, (b) (Vos L.J. dissenting) such evidence as was before the court as to whether X would have honoured the cheque had it been presented to Y on time had little evidential weight and could not establish that C had any real prospect of succeeding on that issue. Dissenting judge holding (a) that the judge was wrong, in effect, to undertake a mini-trial of the case and, having done so, erred in concluding that there was no prospect of C establishing at trial that the cheque would have been honoured by X providing funds to Y to allow that to happen, but (b) that the judge would have been right to hold in accordance with the principles applicable to late amendments that neither of the amendments should be allowed. ***Swain-Mason v Mills & Reeve LLP (Practice Note)*** [2011] EWCA Civ 14, [2011] 1 W.L.R. 2735, CA, ref'd to. (See ***Civil Procedure 2015*** Vol. 1 paras 17.3.6 & 17.3.7.)

■ **SOCIETY OF LLOYD'S v NOEL** [2015] EWHC 734 (QB), March 20, 2015, unrep. (Lewis J.)

Application for extended civil restraint order–whether respondent "persistently" issued claims or applications

CPR rr.2.3, 3.11 & 23.12, Practice Direction 3C para.3.1. Over long period individual (D) in dispute with Lloyd's (C) and engaged in legal proceedings concerning losses incurred by her and other underwriting members of C. After settlement of the main proceedings, on ground that five applications subsequently made by D had been certified as totally without merit (TWM), on November 16, 2007, High Court judge making extended civil restraint order (ECRO) lasting two years against D ([2007] EWHC 2979 (QB)). On January 16, 2010, High Court judge refusing C's application for an extension of that order ([2010] EWHC 360 (QB)). On December 6, 2014, D making application to High Court judge for order against C, including an order setting aside an injunction granted to C on October 28, 2009, and restraining D from disseminating information alleging fraud or dishonesty by C. Judge dismissing application and, under r.23.12, certifying that it was made TWM ([2014] EWHC 4536 (QB)). Judge noting that this was the second application made by D, since the expiry of the ECRO made on November 16, 2007, which had been certified by a judge as being TWM. Judge giving directions for application by C for civil restraint order (either limited or extended) against D. At hearing of application D assisted by a McKenzie friend. **Held**, granting C's application and making an ECRO for the maximum term of two years, (1) it is a pre-condition for the making of an ECRO that the court is satisfied, that the individual has "persistently issued claims or made applications which are totally without merit", (2) in the instant case the position was that D made five applications which were certified as being TWM prior to the making of the first ECRO and since the expiry of that order D had made two further applications which had been certified as being TWM, (3) a court is entitled to have regard to all the claims or applications made which were TWM in deciding whether it has power to make an ECRO in accordance with para.3.1, (4) the court is not limited to considering solely the claims and applications made since the expiry of the latest ECRO. Authorities on meaning of "persistently" in this context examined. ***Attorney General v Barker*** [2000] 1 F.L.R. 759, DC, ***Connah v Plymouth Hospitals NHS Trust*** [2006] EWCA Civ 1616, November 2, 20076, CA, unrep., ***Noel v The Society of Lloyd's*** [2010] EWHC 360 (QB), January 26, 2010, unrep., ref'd to. (See ***Civil Procedure 2015*** Vol. 1 paras 2.3.4 & 3.11.1, and Vol. 2 para.9A-152.3.)

■ **SU-LING v GOLDMAN SACHS INTERNATIONAL** [2015] EWHC 759 (Comm), March 26, 2015, unrep. (Carr J.)

Late application to amend statement of case–trial date vacated–whether application should be granted

CPR r.17.1(2). Investment management firm (D), with whom an individual investor (C) had a private wealth management account, selling shares by which C had secured loans made to her by D and which loans had not been repaid by C following D's demand. Proceeds of sales insufficient to meet C's debt to D. On November 5, 2013, C commencing claim against D, alleging that D's actions had contributed to the collapse in price of the shares causing her losses. D serving defence and bringing counterclaim. Proceedings transferred to Commercial Court and at CMC on March 6, 2014, judge giving full directions for a trial, fixed shortly afterwards to begin on February 24, 2015, including directions (with which D but not C complied) for exchange of experts' reports. At PTR on January 16, 2015, judge refusing C's application for an adjournment of the trial until "a date after October 2015", but ordering that start of trial should be delayed until March 4. On February 10, C making application for permission to amend particulars of claim, abandoning large parts of the claim as pleaded and substantially re-pleading the claim (adding, amongst other things, new allegations of breach of contract by C). D resisting application, principally on ground that C's new case was not sufficiently strong to justify permission for a very late amendment. On February 27, D making counter-application for claim to be dismissed or struck out pursuant (r.3.4(2)), and for summary judgment on their counterclaim (r.24.2). Trial date then vacated because (1) were the amendment to be allowed, vacation was inevitable, and (2) were the amendment disallowed, the claim would not proceed because, as C conceded, it

was unsustainable. **Held**, dismissing C's application and granting D's, (1) in effect C sought wholly to abandon her existing case and to run a new one based on facts and matters of which she either was and/or should have been aware many months, if not a year or so, earlier, (2) C's new case was at best a difficult one on the merits, it was speculative and inherently implausible, (3) C's submission that, were her application granted, D would suffer no prejudice that could not be compensated for by way of costs, was unsustainable, (4) in the circumstances it would not be a just and proportionate outcome, nor consistent with the overriding objective, to permit the amendment. Principles for determination of applications to amend, in particular very late applications to amend, summarised. ***Swain-Mason v Mills & Reeve LLP (Practice Note)*** [2011] EWCA Civ 14, [2011] 1 W.L.R. 2735, CA, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2015*** Vol. 1 paras 17.3.5 & 17.3.7.)

■ **VIDAL-HALL v GOOGLE INC** [2015] EWCA Civ 311, March 27, 2015, CA, unrep. (Lord Dyson M.R., McFarlane & Sharp L.JJ.)

Service out of jurisdiction–claim for misuse of private information–contravention of statutory data protection requirements

CPR rr.6.36 & 11, Practice Direction 6B para.3.1(9), Data Protection Act 1998 s.13, Directive 95/46/EC art.23, Human Rights Act 1998 Sch 1 Pt I art.8, Charter of Fundamental Rights of the European Union 2000 art.47. Three individuals (C) domiciled in England, issuing claim form bringing claim against company (D) registered in Delaware and with principal place of business in California. C pleading (1) misuse of private information and/or breach of confidence, for which damages for anxiety and stress claimed, and (2) breach of the DPA 1998, for which compensation claimed. C making no claim in either case for pecuniary loss. In essence C alleging that, during a particular period, D collected private information about their internet usage without their knowledge and consent. Master granting C permission to serve the claim form on D out of the jurisdiction. D applying under r.11 for an order declaring that the court did not have jurisdiction to try the claims, alternatively that it should not exercise jurisdiction it did have; and for an order setting aside the order for service of the claim form out of the jurisdiction. Judge declaring (1) that the court had jurisdiction (a) in respect of the claims for misuse of private information and (b) under the DPA, and that both these claims fell within para.3.1(9) (the "tort" gateway), but (2) that the court did not have jurisdiction in respect of the claims for breach of confidence, and (3) that the meaning of "damage" in s. 13 and, in particular, the question whether (as C contended but D opposed) there can be a DPA claim for compensation where there is no pecuniary loss, were serious issues to be tried ([2014] EWHC 13 (QB), [2014] 1 W.L.R. 4155). On D's appeal to the Court of Appeal, **held** dismissing the appeal, (1) misuse of private information should now be recognised as a tort for the purposes of service out the jurisdiction (and not classified for such purposes as a claim for breach of confidence), (2) such recognition does not create a new cause of action but simply gives the correct legal label to one that already exists, (3) the natural and wide meaning of "damage" in art. 23 included "moral", non-pecuniary damage, such as distress, (4) s.13(2) could not be interpreted compatibly with art.23, (5) as the availability of such damages had not been effectively transposed into domestic law by the DPA 1998, s.13(2) was to be disapplied so that any damage suffered as a result of a contravention by a data controller of any of the requirements of the DPA could be claimed under s.13(1). ***Johnson v Medical Defence Union Ltd*** [2007] EWCA Civ 262, [2008] Bus. L.R. 503, CA, ***Campbell v Mirror Group Newspapers Ltd*** [2004] UKHL 22, [2004] 2 A.C. 457, HL, ***OBG Ltd v Allan*** [2007] UKHL 21, [2008] 1 A.C. 1, HL, ***Douglas v Hello! Ltd (No.3)*** [2005] EWCA Civ 595, [2006] Q.B. 125, CA, ***Kitechnology BV v Unicor GmbH Plastmaschinen*** [1995] F.S.R. 765, CA, ***Leitner v TUI Deutschland GmbH & Co KG (C168/00)*** [2002] E.C.R. I-2631, ***Benkharbouche v Embassy of Sudan*** [2015] EWCA Civ 33, [2015] I.R.L.R. 301, CA, ref'd to. (See ***Civil Procedure 2015*** Vol. 1 paras 6.37.15 & 6.37.43.)

Practice Note

■ **PRACTICE NOTE–FIXED-END TRIALS** April 28, 2015, unrep. (Sir Terence Etherton C.)

Chancery Guide paras 3.18, 3.25, 5.13, 5.15, 5.48, 5.50, 6.13 & 7.3 to 7.6. Provides that in future all trials in the Chancery Division in London (including trials before Masters and Registrars) are, save in exceptional circumstances, required to be completed within the period allocated to them (i.e. are to be conducted "on a fixed-end basis"). Contains guidance on the making and revising of estimates for trials and role of court therein. States that at a PTR the judge will be concerned to check that the time estimate is realistic and that the parties have taken appropriate steps to agree a timetable for the trial. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2015*** Vol. 1 paras 1A-17, 1A-32, 1A-46, 1A-55 & 1A-65.)

In Detail

LATE APPLICATION TO AMEND STATEMENT OF CASE

CPR r.29.2 states that, when it allocates a case to the multi-track the court will give directions and will set a timetable for the steps to be taken between the giving of the directions and the trial (r.29.2(1)). Further, the court will fix a trial date or the period in which the trial is to take place as soon as practicable (r.29.2(2)). Rule 29.5 states that a party who wishes to vary the case management timetable by varying the date which the court has fixed for the trial or the trial period must apply to the court. In theory, an application to vary a trial date may be made to bring the date forward or to put it back, but as a practical matter is most likely to be the latter. One obvious circumstance in which a party should make an application under r.29.5 to put a trial date back would be where an original statement of case (upon which the case management timetable was set) is to be amended imposing on the parties new and unforeseen preparatory work. But where the amendment cannot be made without the permission of the court, the application to vary the trial date (by vacating the date and fixing a new date), will be rolled up with the application to amend.

Strictly speaking, an order vacating a trial date in the procedural context here under discussion is not an order for the "adjournment" of a trial, as the application to vary the trial date is made before the trial has begun, but that terminological distinction is not always maintained in judgments. (In some other contexts such order is described as an order for "the postponement of a trial"; see Practice Direction 29 (The Multi-Track) para.7.4 (Failure to comply with case management directions).)

In modern times the courts have shown an increased reluctance to allow amendments where do so would require, or threaten to require, the vacating of the trial date. The authorities on applications for "late" amendments were considered by Hamblen J. sitting in the Commercial Court in *Brown v InnovatorOne Plc* [2011] EWHC 3221 (Comm), November 28, 2011, unrep., and that case was relied on by Nugee J. sitting in the Chancery Division in *Bourke v Favre* [2015] EWHC 277 (Ch), February 2, 2015, unrep. (For summary of this case, see "In Brief" section of this issue of CP News.)

In the *Bourke* case in April 2014 a trial period in March 2015 was fixed. On December 9, 2014, the claimants made an application to amend their statement of case and it was heard on February 2, 2015. In his unreserved judgment, Nugee J. explained that in the *Brown* case Hamblen J. identified four factors as being those which are likely to be regarded as relevant in any application to amend which posed a risk of the loss of a trial date. Those factors are: (1) the history as regards the amendment and the explanation as to why it is being made late; (2) the prejudice which will be caused to the applicant if the amendment is refused; (3) the prejudice which will be caused to the resisting party if the amendment is allowed; (4) whether the text of the amendment is satisfactory in terms of clarity and particularity.

In the *Bourke* case the claimants put off revealing to the defendants the details of their amended claim, and drafting and making a formal application to amend, until after they had seen the defendants' witness statements. Nugee J. found that that was not an adequate reason for the delay. His lordship said (para.12):

"Once the necessity to amend has become apparent, a party really ought to tell the other side not only of their intention to amend but, at least in outline, of what the amendment consists, so that the opposing party has sufficient advance notice in order to enable him or her to give consideration whether to oppose or consent to such an amendment. The desire to see the other side's witness statements before amending is not, I think, a good reason for holding back on a proposed amendment. The purpose of pleading is to identify the issues so that disclosure and witness statements can be focused appropriately. It is putting the cart before the horse to wait until you have seen what the other side says before deciding whether or not to pursue an amendment."

The bulk of the judgment of Nugee J. was concerned with the third of the relevant factors, that is, the prejudice which allowing the claimants' amendment would cause to the defendants. His lordship found that if the postponement of the trial were necessary it would inevitably cause significant prejudice to the defendants, and even it were not, there would be some prejudice. His lordship was concerned that the applicants, by delaying their application to amend, made for the purpose of adding to a contractual claim a proprietary estoppel claim, had created "an unlevel playing field". His lordship explained (para.21):

"The modern approach in litigation is to require parties to be open, above board and cooperative. For the claimants to prepare their own evidence knowing that they might very well seek to amend to plead a proprietary estoppel claim but not telling the defendants that that was what they were going to do until after they had seen the evidence that the defendants had already prepared, strikes me as contrary to these principles."

Provisions in the Admiralty and Commercial Courts Guide seek to ensure that applications to amend (and other interlocutory applications) are made as soon as practicable and in a timely fashion so that they may be considered by the court without the prospect of the trial date having to be abandoned being a material factor. Thus paras D12.1 to D12.5 of this Guide deal with "Progress monitoring" (White Book 2015 Vol. 2 para.2A-72). Paragraph D12.1 states that a "progress monitoring date" will be fixed at the CMC and will normally be after the date in the pre-trial timetable for exchange of witness statements and expert reports. Paragraph D12.2 states that at least three clear days before the progress monitoring date the parties must each send to the Case Management Unit (with a copy to all other parties) a progress monitoring information sheet to inform the court: (i) whether they have complied with the pre-trial timetable, and if they have not, the respects in which they have not; and (ii) whether they will be ready for a trial commencing on the fixed date specified in the pre-trial timetable, and if they will not be ready, why they will not be ready. A standard form of progress monitoring information sheet is set out in Appendix 12 to the Guide. In the recent case of *Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), March 26, 2015, unrep., Carr J. drew attention to this guidance (para.39) as an example of ways in which the judges of the Commercial Court "pro-actively" manage cases brought before it for the benefit of all users, in particular for the purpose of avoiding last minute problems, such as applications to amend, which delay the start of trials or cause adjournments.

In the *Su-Ling* case (where, it has to be said, the provisions of para.D12.2 etc do not appear to have had the desired effect) the trial of the claim was fixed to start on March 4, 2015. On February 10, 2015, the claimant (C) made an application for permission to amend her particulars of claim, abandoning large parts of the claim as pleaded and substantially re-pleading the claim. The trial date had to be vacated because it was clear that, were the amendment to allowed, that was inevitable, and further, were the amendment disallowed, the claim would not proceed because, as C conceded, her original case was unsustainable. (For summary of this case, see "In Brief" section of this issue of CP News.)

Carr J. heard C's application on March 12 and 13, and dismissed it. In a reserved judgment her ladyship explained (para.36) that an application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is "better than merely arguable", and the court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation. Carr J. referred to a number of recent Court of Appeal and first instance cases in which the principles to be applied by the court in dealing with very late applications to amend have been examined (para.37). Her ladyship explained (para.38) that the relevant principles to be derived from these authorities are well-known and can be stated simply as follows:

"(a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

(b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

(c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

(d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

(e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

(f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

(g) much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds

but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

CONDUCT OF INTERLOCUTORY APPLICATIONS IN SUBSTANTIAL COMMERCIAL CLAIMS

In *Kazakhstan Kagazy Plc v Zhunus*, [2015] EWHC 996 (Comm), April 16, 2015, unrep., Walker J. stated that the manner in which this case had progressed provided further evidence of "an urgent need" for commercial practitioners "to bring a sense of proportion" to the conduct of interlocutory applications in claims for substantial sums proceeding in the Commercial Court. (For summary of this case, see the "In Brief" section of this issue of CP News.) In his lordship's opinion, there are in this respect "universal guiding principles" which practitioners should always have in mind, and made some suggestions as to what they may include, whilst stressing that they are not rules and are not intended to define or to limit. His lordship said (para. A1.3):

"My suggested universal guiding principles would include:

(1) The court expects solicitors and counsel to take appropriate steps to conduct the debate, whether in advocacy or in correspondence, in a way which will lower the temperature rather than raise it.

(2) This remains the case even where–indeed particularly where–any concession is perceived as anathema by one or other or both sides. It is perfectly possible to be vigorous without being insulting.

(3) Imputations on others, whoever they may be, should only be made if they are both necessary and justified. If they are not strictly necessary, or they are not objectively justified, they should be rigorously excluded. Sometimes they are necessary, for example when seeking a freezing order, or when an allegation of bad faith is necessary. They must be confined to what is necessary. As to what is objectively justifiable, regard should be had to the degree of proof that is needed. What is needed in order to support an application for a freezing order may differ from what may be required if an imputation is to be made and sustained in a different context.

(4) Rather than focus on criticisms of the other side, the focus should be on working out a timetable which will enable opposing parties to consider what facts and issues can be agreed, and what information and revised estimates for reading and hearing time can be given to the court prior to the hearing so as to ensure that the court's time is used efficiently and productively.

(5) If it is likely that a point which might be taken by a party, or it becomes likely that a point previously taken by a party, will not significantly advance that party's case, or will require a disproportionate amount of time or resources if it is to be resolved, then notification should be given that the point will not be relied upon for present purposes. The notification can be accompanied by an appropriate reservation as to the position in future."

PAYMENT ON ACCOUNT OF COSTS

As is explained in para.44.2.15 of Volume 1 of White Book 2015, the rule stated in para.(8) of r.44.2 came into being as a consequence of the recommendations made in the Access to Justice–Final Report (July 1996) Ch.7 para.40, and was revised, with effect from April 1, 2013, following recommendations made in the Review of Civil Litigation Costs–Final Report (December 2009) Ch.45 para.5.10. The rule provides that where the court orders a party to pay costs subject to detailed assessment, "it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so".

Necessarily, the determination of "a reasonable sum" involves the court in arriving at some estimation of the costs that the receiving party is likely to be awarded by the costs judge in the detailed assessment proceedings or as a result of a compromise of those proceedings. In a case of any complexity, the evidence and submissions arguably relevant to that exercise may be extensive. The court has to guard against the risk that it may be drawn into costly and time-consuming "satellite" litigation.

As is noted in the commentary in para.44.2.15, the procedure contained in Section II of CPR Part 3 for the filing, exchange and approval of costs budgets of parties (introduced as part of the costs reforms taking effect from April 1, 2013) significantly affects the approach of the court to orders for payments on account of costs.

The authorities on r.44.2(8) consist mostly of first instance decisions, some applying the rule as it stood before April 1, 2013, and some after; and not all in accord. They were reviewed by Christopher Clarke L.J. in *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), February 3, 2015, unrep., a case in which the proceedings were commenced in 2010. His lordship (who had served as trial judge in the case) noted that, before the rule change, first instance authority emerged for the proposition that the amount ordered to be paid on account should be the

"irreducible minimum" of what may be awarded on detailed assessment and that that criterion had been applied in some cases subsequently but disapproved in others. After reviewing those particular authorities (paras 15 to 21) his lordship concluded that there was no rule to that effect. In his lordship's opinion what is "a reasonable sum on account of costs" will have to be an estimate dependent on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. His lordship explained (para.23):

"A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad."

His lordship added (para.24):

"In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment."

RESIDUAL JURISDICTION OF COURT OF APPEAL

Section 69 of the Arbitration Act 1996 s.69 imposes on the right of appeal to the High Court against an arbitration award stringent restrictions (see White Book 2015 Vol. 2 para.2E-264). Those restrictions are reinforced by sub-section (8) of s.69 which provides that leave to appeal against an order of the High Court refusing leave to appeal against an arbitration award can be granted only by the High Court itself. On the face of it, therefore, the Court of Appeal has no jurisdiction to give permission to appeal against an order of the High Court refusing leave to appeal so as to enable the merits of that refusal. However, as Moore-Bick L.J. explained in giving the lead judgment of the Court of Appeal in *Patel v Mussa* [2015] EWCA Civ 434, April 29, 2015, CA, unrep., in *North Range Shipping Ltd v Seatrans Shipping Corp* [2002] EWCA Civ 405, [2002] 1 W.L.R. 2397, CA, the Court of Appeal was persuaded that, since a party's right to complain of an unlawful judicial act is limited by section 9(1) of the Human Rights Act 1998 to the exercise of a right of appeal, the Court was required to afford the applicant a right of appeal to enable it to complain that the process by which the judge had reached his decision was unfair and contravened article 6 of the Convention.

The concept of the Court of Appeal having such "residual jurisdiction" was elaborated in later cases (see White Book 2015 Vol. 2 paras 2E-266 & 2E-268). Moore-Bick L.J. stated (para.15) that the cases make it clear "that the Court is vested with a residual jurisdiction to review a decision that is so flawed by unfairness of one kind or another that it cannot be regarded as a proper decision at all". As such, the residual jurisdiction "fills the gap that would otherwise be created by statutory provisions which purport to exclude altogether the power of this court to intervene and thus provides a means of protecting the integrity of the decision-making process".

Section 54 of the Access to Justice Act 1999 is the statutory basis for the rule that generally in civil proceedings permission to appeal is required. In that section, sub-section (4) states that no appeal may be made against a decision of a court under this section to give or refuse permission. (It is expressly provided that this sub-section does not affect any right under rules of court "to make a further application for permission to the same or another court".) As is explained in the White Book, section 54(4) gives statutory expression to the rule in *Lane v Esdaile* (see Vol. 2 para.9A-842.1). In the *Patel v Mussa* case (for summary, see the "In Brief" section of this issue of CP News), Moore-Bick L.J. concluded that section 54(4) creates in relation to the High Court a position analogous to that which arises under section 69(8) of the 1996 Act. However, in that case, which was an appeal, not from the High Court but from the County Court, it was not open to the appellant to invoke the Court's residual jurisdiction as the decision of the circuit judge which the appellant sought to appeal was not a decision on the merits refusing permission to appeal. His lordship added that, if he were wrong about that, and the Court's residual jurisdiction was engaged, this was not a case in which it could be invoked. His lordship's principal reason for reaching this conclusion was that the decision of a County Court judge refusing permission to appeal was susceptible to challenge by claim for judicial review. Such proceedings would provide an adequate means for any breach of article 6 in the making of a decision to refuse permission to appeal as so ensure compliance with section 9(1) of the 1998 Act.

COMMERCIAL COURT APPLICATIONS–SKELETON ARGUMENTS

In White Book 2015, Section F (Applications) of the Admiralty and Commercial Courts Guide is published in Volume 2 at para.2A-85 et seq (p 505).

The judge in charge of the Commercial Court (Flaux J.) has announced amendments to two paragraphs in Section F. They are designed to limit the length of skeleton arguments for applications and take effect immediately.

The amendments are as follows:

F5 Ordinary applications (White Book 2015 Vol. 2 para.2A-89 (p 507))

At end add:

"Skeletons should not without good reason be more than 15 pages in length."

F6 Heavy applications (White Book 2015 Vol. 2 para.2A-90 (p 508))

"Skeletons should not be more than 25 pages in length. The court will give permission for a longer skeleton where a party shows good reason for doing so. Any application to serve a longer skeleton should be made on paper to the court briefly stating the reasons for exceeding the 25 page limit. Such application should be made sufficiently in advance of the deadline for service to enable the court to rule upon it before then."

PRACTICE NOTE–FIXED-END TRIALS

Practice Note–Fixed-end Trials was issued by Sir Terence Etherton, Chancellor of the High Court, on April 28, 2015. It states as follows:

"Following the success of last year's pilot scheme, all trials in the Chancery Division in London (including trials before Masters and Registrars) are in future to be conducted on a fixed-end basis. That means that each trial will, save in exceptional circumstances, be required to be completed within the period allocated to it.

The adoption of fixed-end trials makes it all the more important that parties should ensure that time estimates are accurate and, where appropriate, revise them. The parties need to consider carefully how long each element of the case is likely to take. Every time estimate should also take account of the length of time that the judge is likely to require for pre-reading. Where it is thought that it will be appropriate to have an interval between the close of evidence and final submissions, the time estimate should factor this in as well (taking into account both the preparation of the submissions and, where written submissions are to be supplied, the time that the judge will need to digest them). In practice, it is vital for the parties to agree a trial timetable at as early a stage as possible and to review it if circumstances change. In future, timetables (agreed, if possible) should always be filed at the same time as the skeleton arguments for the trial.

It is to be stressed that, as mentioned above (and also in the Chancery Guide), every time estimate must make a realistic allowance for pre-reading by the judge. The time within which a case must be concluded will thus run from the beginning of the judge's pre-reading. Should the period allowed for pre-reading prove inadequate, the time available in Court will be shortened correspondingly. The same principle will apply if too little time is allowed for the judge to read any written closing submissions.

A time estimate for the trial will typically have been provided at an early stage of the proceedings. Where, as will usually be appropriate, a case management conference has been held, this is likely to have fixed a time estimate. If an existing estimate now seems erroneous, it should be revised as soon as practicable, and in any event by the date of any pre-trial review. The Court will, if possible, seek to accommodate an increase (especially a modest one) if appropriate without changing the trial window.

Where one or more parties to a case propose that the time estimate for a trial should be changed but one or more other parties disagree, the matter must be referred to a Master, Registrar or Judge, as appropriate. Listing cannot change the time estimate given for a trial without either the parties' consent or a direction from a Master, Registrar or Judge.

A pre-trial review should be held about four weeks before the trial in any case estimated to last five days or more. Among other things, the judge hearing the pre trial review will be concerned to check that the time estimate is realistic and that the parties have taken appropriate steps to agree a timetable for the trial. A trial will, however, be conducted on a fixed-end basis even where there has been no pre-trial review (as will typically be the case with trials lasting less than five days)."

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