CIVIL PROCEDURE NEWS

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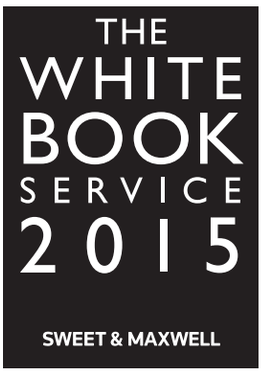

In Brief

Cases

MARCHMENT V FREDERICK WISE LTD [2015] EWHC 1770 (QB), 20 May 2015, unrep. (His Honour Judge Moloney QC, sitting as a judge of the High Court.)

Late Service–Engineer's Report–Grant of relief engendering adjournment of trial–importance of obtaining confirmation of effect of relief on court and public resources

CPR r.3.9. The Claimant (C) issued proceedings seeking damages for asbestos alleged to have been caused by exposure to asbestos fibres during the course of his employment. The claim's trial date was listed for one and a half days, commencing on 16 June 2015. A number of applications came before the court on 20 May 2015, one of which was the C's application for relief from sanctions arising from late service of his engineer's report. The C's engineer's report ought to have been served by 13 February 2015. It was not served until 13 March 2015, the date on which both parties' engineering experts were scheduled to meet. The failure to serve had a number of further adverse consequences for the case management timetable, as it meant that no medical report and no joint engineer's reports could be prepared or served. It was accepted that the breach was serious and that there was no good reason for the default. The real issue was an assessment of the third stage of the *Denton* test. While noting the need to place particular weight on r.3.9(1)(a) & (b) relief was granted. **Held**, (1) there were factors that both pointed towards and against the grant of relief, the most important of which was that, in favour of relief, absent the engineer's report he would not be able to secure a judgment on the merits on the crucial issue of causation, and against the grant of relief, that the trial date could not be met if relief was granted which in the majority of cases would be determinative, but (2) in the present case, (i) the trial was a short one; (ii) more importantly, vacating the trial date would not have a negative effect on the court or the use of public resources. The Queen's Bench Listing Office had confirmed that other matters could be listed in place of the trial; (iii) the trial could be relisted within a reasonable period of time; and (iv) an adjournment would enable a further report on a different issue to be obtained. ***Denton v T H White Ltd (Practice Note)*** [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296, CA, ref'd to. *(See **Civil Procedure 2015** Vol.1 paras 3.9.4.3, 3.9.6.4)*

ART AND ANTIQUES LTD V MAGWELL SOLICITORS [2015] EWHC 2143 (Ch), 4 June 2015, unrep. (Mr J Klein, a deputy judge of the High Court, Chancery Division.)

Late Service–Expert Report–Grant of relief despite no good reason for serious default

CPR r.3.9. Claimant (C) failed to serve expert's report in time. C applied for relief from sanctions. C accepted that the default was serious and that there was no good reason for it. The court was thus required to consider all the circumstances of the case in reaching its decision whether to grant relief. In considering the circumstances, the deputy judge had regard to the view of both the majority and minority in ***Denton v T H White Ltd (Practice Note)*** [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296, CA. The judge thus, contrary to the view of Lord Dyson M.R and Vos L.J. in that decision, took account of Jackson L.J.'s minority view that r.3.9(1)(a) & (b) should not be given greater weight in assessing all the circumstances. **Held**, (1) in assessing all the circumstances, prejudice to the Defendant (D) had to be considered; (2) the failure to serve the expert's report did not give rise to such prejudice even though the date at which a Pt 36 offer could be made had passed such that its automatic cost consequences would not apply as (i) if a Pt 36 offer were made in the light of service of the expert's report the court could make an appropriate cost award reflective of the fact of the C's failure to serve the expert's report on time, and (ii) the D had already received a copy of the expert's draft report and it could properly be assumed that the final report would not differ markedly from it; (3) relief would be granted on very strict terms in order to not adversely effect trial preparations, preserve the trial date and mark the court's disapproval of the C's conduct. ***Denton v T H White Ltd (Practice Note)*** [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296, CA, ref'd to. (See ***Civil Procedure 2015*** Vol.1 *paras 3.9.4.3, 3.9.6.9)*

SAFIN (FURSECROFT) LTD V THE ESTATE OF DR SAID AHMED SAID BADRIG (Deceased) [2015] EWCA Civ 739, 10 July 2015, unrep. (Etherton C., Bean and King L.JJ.)

Consent Order–Discretion to extend time to comply

CPR rr.1.1, 1.2, 1.4, 3.2(a). Proceedings issued by the company (C) in February 2012 seeking forfeiture of a lease and possession of a property for non-payment of rent and service charges. Order for possession made in June 2012. Application for relief from forfeiture made in July 2012. Trial of the application listed for January 2014. Prior to trial the parties attended a settlement conference at which they agreed a Consent Order (CO). In March 2014, the defendant

individual (D) applied to (i) set aside the CO, or (ii), in the alternative, extend time to comply. On 23 July 2014, Circuit Judge heard the application and granted an extension of time to comply with the CO's terms. The application to set aside was abandoned at the hearing. C appealed. Appeal transferred to Court of Appeal, which considered the CO to have disposed of the substantive dispute between the parties. **Held**, (1) the jurisdiction and approach to varying time to comply with the terms of a CO under the CPR differed from that taken under the RSC; (2) the basis of the CPR's jurisdiction to do so was r.1.1, which can as Neuberger J. explained in ***Ropac Ltd v Inntrepeneur Pub Co. Ltd*** [2001] L.T.R. 10, ChD, provide a basis for the court, in certain circumstances, to override in the wider public interest an agreement entered into by parties to litigation, and r.3.2(a); (3) the proper approach under the CPR to exercising the discretion to vary time to comply with a CO, including (a) one that disposed of a, or the, substantive dispute, and (b) one where time was specified as being of the essence, was that set out by Tomlinson and Lloyd L.JJ. in ***Pannone v Aardvark Digital Ltd*** [2011] EWCA Civ 803; [2011] 1 W.L.R. 2275, CA; (4) exercise of discretion is not limited to situations where there are unusual circumstances; (5) a decision to vary time for compliance would require the court to take account of all the circumstances; (6) in assessing the circumstances, that the parties' agreement disposed of a substantive dispute and not merely a case management issue, would always be a highly relevant, often decisive, factor; (7) the power to vary such time limits was, however, one that should be exercised sparingly. ***Seibe Gorman & Co Ltd v Pneupac Ltd*** [1982] 1 W.L.R 185, CA, ***S v S (Ancillary Relief: Consent Order)*** [2002] EWHC 223 (Fam); [2003] Fam. 1, Fam., ***Di Placito v Slater*** [2003] EWCA Civ 1863; [2004] 1 W.L.R. 1605, CA, ***Ropac Ltd v Inntrepeneur Pub Co. Ltd*** [2001] L.T.R. 10, ChD, ***Pannone v Aardvark Digital Ltd*** [2011] EWCA Civ 803; [2011] 1 W.L.R. 2275, CA ref'd to. (See ***Civil Procedure 2015 Vol.1*** *paras 3.1.2, 40.6.3.)*

YEO V TIMES NEWSPAPERS LTD [2015] EWHC 2132 (QB), 22 July 2015, unrep. (Warby J.)

Cost budget–approval of revised budget–previously incurred costs

CPR r.3.18(b), CPR PD3E paras 7.4, 7.6, & 7.9, Bill of Rights 1689, art.9, Defamation Act 1996, s.13, Deregulation Act 2015, sch.23, pt 8. A former Member of Parliament (C) commenced defamation proceedings against a newspaper's publishers (D). The basis of the claim was the content of articles printed in the newspaper in June 2013. A pre-trial review was held on 16 July 2015 ahead of the trial, which was to commence on 12 October 2015. Four issues arose at the pre-trial review, two of which were the effect of the repeal of Defamation Act 1996, s.13 and, related to it, an application to revise an approved cost budget. The parties' costs budgets were approved in February 2015. On 13 July 2015, the C applied to revise his cost budget to, amongst other things, incorporate an item relating to work arising from the issue of parliamentary proceedings. It was submitted that this issue arose, as a consequence of the repeal of s.13, as a significant development in the litigation per CPR PD3E 7.6, and thereby warranted revision of the C's costs budget, and its approval. Of the total costs related to this new item, a substantial amount had been incurred prior to time the revised budget was completed. **Held**, (1) the change in law effected by the repeal of s.13 was not a significant development in the litigation, (2) the reasons that gave rise to consideration of parliamentary privilege arose from matters distinct from s.13's repeal. This may justify a future revision to the costs budget, (3) reliance could not, in any event, be placed on PD3E para.7.6. This provision relates to costs to be incurred in the future i.e., after any revised budget has been approved, and not to costs incurred before any such approval, (4) where costs are incurred outside the scope of PD3E para.7.6, and hence before a revised budget can be approved under that provision, two alternatives lie open: (i) that such costs will fall within the ambit of an interim application to which PD3E para.7.9 would apply, or (ii) would fall for consideration under r.3.18(b). (See ***Civil Procedure 2015 Vol.1*** *paras 3.15.3, 3.18.1.)*

CHAPLAIR LTD V KUMARI [2015] EWCA Civ 798, 27 July 2015, unrep. (Arden, Patten, Christopher Clarke L.JJ.)

Small Claims Track–Power to award costs other than fixed costs

CPR rr.27.1, 27.14 & 44.5. Proceedings brought by landlord (C) against tenant (D) for recovery of unpaid rent and service charges. Claim allocated by consent to the small claims track (SCT). Claim succeeded. Contractual right to costs of proceedings in the lease. Costs awarded in C's favour, however District Judge held that no power to award costs other than r.27.14 fixed costs. C appealed costs decision to Circuit Judge (CJ). CJ allowed costs appeal. D appealed. On D's appeal to Court of Appeal, **held**, permission to appeal should not be granted on this issue (permission was granted on a separate issue). Permission to appeal not granted as the law on the point was well-established: (1) where there is a contractual right to costs the court should, normally, exercise its costs discretion to reflect those rights; (2) r.27.14 should be read as subject to r.44.5, which gives effect to the general principle set out at (1) and which is not excluded from r.27 by r.27.2, and (3) the rule-making power cannot, in any event, set aside or overrule a contractual entitlement which would be necessary for r.27.14 to have an exclusionary effect. ***Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)*** [1993] Ch. 171, CA, ***Church Commissioners v Ibrahim*** [1997] E.G.L.R. 13, CA, ref'd to. ***(See Civil Procedure 2015 Vol.1*** *para.44.5.1.)*

■ **BEGG V HM TREASURY** [2015] EWHC 1851 (Admin), 29 June 2015, unrep. (Cranston J.)

Closed Material Proceedings–Protective Costs Order–Conditions for grant of Order

CPR rr.1.1(1), 1.2(a) & (d), & 3.1(2)(m), Senior Courts Act 1981, s.51, Terrorism Act 2000, Terrorism Act 2006, Terrorist Asset-Freezing etc. Act 2010. In February 2014, man (C) arrested and charged with offences under TA 2000 and TA 2006 and subsequently C designated under TAFA 2010, s.2. C thereby subject to asset freezing under TAFA 2010 ss.11 to 15. Criminal proceedings not pursued. In October 2014 designation under TAFA 2010 revoked. C appealed decision to revoke under TAFA 2010, s.26. Basis of the appeal was that the designation decision should be quashed ad initio. C sought protective costs order in respect of the appeal. Held (1) a protective costs order can be made, in furtherance of the overriding objective, in cases where individuals cannot assess the merits of their case because they have been accused of terrorism and closed evidence, to which by definition they do not have access, is to be relied on in the proceedings, (2) the grant of a protective costs order in such circumstances should however be subject to strict conditions viz., (i) the proceedings must be of 'real benefit' to the individual bringing it, (ii) it must appear on the basis of the open material that a reasonable person would pursue the claim, but that given the use of closed material it is not possible to assess the actual prospects of pursuing the claim, (iii) it is fair and just to make the order having assessed the individual's financial means and the likely costs of the proceedings, (iv) absent a protective costs order the individual, acting reasonably, is likely to abandon the claim, and (v) the individual should be deprived of the benefit of the order if their conduct is later determined, by the judge who hears the case and in light of an assessment of the open and closed material, to be unreasonable or abusive. ***R v Lord Chancellor ex p. Child Poverty Action Group*** [1999] 1 WLR 347, Admin, ***R (Corner House Research) v Secretary of State for Trade and Industry*** [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600, CA, ***R (Compton) v Wiltshire Primary Care Trust*** [2008] EWCA Civ 749; [2009] 1 W.L.R. 1436, CA, ***R (Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp*** [2008] EWCA Civ 1209, [2009] C.P. Rep. 8, CA ref'd to. (See ***Civil Procedure 2015*** Vol.1 para.48GP.76.)

Statutory Instruments

■ **CIVIL PROCEDURE (AMENDMENT NO.4) RULES 2015** (SI 2015/1569)

In force from 1 October 2015, except for the amendment to Pt 52 Table of Contents and insertion of r.52.15B, which come into force on the day on which section 91, Criminal Justice and Courts Act 2015 comes into force.

CPR rr.3.1(2)(m), 3.1A, 5.4D, 7.4(3), 47.6(1), Pt 52 Table of Contents, 52.15B, and 63A. Amend r.3.1(2)(m) to include a reference to early neutral evaluation as an order the court may make to help parties settle their dispute. Insert a new r.3.1A to make explicit the court's extant powers to modify procedure where at least one party is a litigant-in-person. Insert a signpost after r.5.4D to provisions that disapply or modify rr.5.4, 5.4B and 5.4C. Amend r.7.4(3) to clarify the requirement to file a particulars of claim. Insert r.47.6(1)(c) reference to costs management. Amend Pt 52 Table of Contents to include reference to Planning statutory review appeals and insert r.52.15B to provide for such appeals. Insert r.63A establishing the joint Chancery Division and Commercial Court Financial List. (See further "In Detail" section of this issue of CP News.)

■ **THE CIVIL LEGAL AID (MERITS CRITERIA) (AMENDMENT) REGULATIONS 2015** (SI 2015/1414)

In force from 31 July 2015 except in respect of regulation 2(2) (female genital mutilation protection) which is in force from 17 July 2015.

Amend Civil Legal Aid (Merits Criteria) Regulations 2013. Amends merits criteria to apply to applications for civil legal aid regarding female genital mutilation protection orders the criteria applicable to domestic violence and related family disputes. Applies merits criteria for civil legal aid for matters concerning victims of human trafficking to matters concerning slavery, servitude or compulsory labour.

■ **THE CIVIL AND CRIMINAL LEGAL AID (AMENDMENT) REGULATIONS 2015** (SI 2015/1416)

In force from 17 July 2015 except in respect of regulations 2(3)(b), 2(5)(b), 3(b) and (c) and 6(3) which are in force from 31 July 2015.

Amend Civil Legal Aid (Procedure) Regulations 2012, Civil Legal Aid (Remuneration) Regulations 2013 and Civil Legal Aid (Financial Resources and Payment for Services) Regulations. Makes various amendments concerning civil legal aid provision relating to claims concerning female genital mutilation, slavery servitude and compulsory labour, particularly in respect of legal representation and remuneration.

Practice Directions, Guidance and Notes

CPR PRACTICE DIRECTION–81st Update. In force from 1 October 2015 except in respect extension to PD51I, which is in force from 29 September 2015, and PD8A, 8C, 54E, which come into force according to the provisions in paragraphs 1 and 2 of the Update. The update revises PD 4 (Forms), 6B (Service out of the jurisdiction), 8A (alternative procedure for claims), 30 (Transfer), 47 (Procedure for Detailed Assessment of Costs), PD52C (Appeals to the Court of Appeal) and inserts a new PD 8C (Alternative Procedure for Statutory Review of Certain Planning Matters). It extends the application of PD51I (County Court at Central London Pilot Scheme) for a further 12 months. It also introduces the following: PD51L (New Bill of Costs Pilot Scheme); PD51M (Financial Markets Test Scheme (See further "In Detail" section of this issue of CP News.)); PD51N (Shorter and Flexible Trials Pilot Schemes); PD54E (Planning Court Claims (which replaces the previous PD54E); and PD63AA (Financial List (See further "In Detail" section of this issue of CP News.)).

PRACTICE GUIDANCE: COURT OF APPEAL (CIVIL DIVISION) HEAR-BY DATES (2015) 17 June 2015, reported as *Practice Guidance (Court of Appeal: Hear-by Dates)* [2015] 1 W.L.R. 3407, C.A (Lord Dyson M.R.)

Provides updated guidance on the hear-by dates applicable to appeals issued in the Court of Appeal (Civil Division) from July 31, 2015. Different hear-by dates apply to different types of appeal. The Guidance replaces the *Practice Note (Court of Appeal: Listing Windows) (No.2)* [2003] 1 W.L.R. 838 and *Practice Note (Court of Appeal: Listing Windows)* [2001] 1 W.L.R. 1517, as detailed at ***Civil Procedure 2015*** Vol.1 para.52.12.1.7. (See further "In Detail" section of this issue of CP News.)

CHANCERY DIVISION–EXTENDING TIME LIMITS AND SEALING TOMLIN ORDERS, 20 July 2015, unrep.

Provides guidance on a number of changes to Chancery standard form orders, which are to take effect under CPR r.2.11, to facilitate extensions of time to carry out procedural steps, to stay proceedings for the purpose of ADR, and to extend time to file documents pursuant to N149C paras 3 and 4, by agreement and without reference to the court. It further notes that Master's clerks may now seal Tomlin Orders in money claims where no other relief had been sought. (See further "In Detail" section of this edition of CP News.) (See ***Civil Procedure 2015*** Vol.1 para.2.11.1.)

In Detail

LITIGANTS-IN-PERSON

In *Mole v Hunter* [2014] EWHC 658 (QB), 27 March 2014, QB, unrep., Tugendhat J. considered the effect that litigants-in-person increasingly were having on the courts. In particular he explained how unrepresented litigants in defamation cases typically had difficulty in complying with procedural obligations. Such problems are not unique to such cases, but are typical of procedure generally, see for instance: *Tinkler v Elliott* [2012] EWCA Civ 1289, 10 October 2012, CA, unrep., where issues arose concerning whether a litigant-in-person acted promptly in seeking to set aside a judgment made in their absence and whether they adopted the proper approach in the attempt to do so; *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234, 27 March 2013, CA, unrep., in which Sir Alan Ward commented on the significant degree to which judges had to "micro-manage cases" to ensure that litigants-in-person focused on the real issues in dispute; and *Otuo v Brierley* [2015] EWHC 1938 (Ch), 6 July 2015, ChD, unrep., where Edward Murray, sitting as a deputy judge of the High Court, commented on the problematic nature of, and lack of proper focus within, a litigant-in-person's witness statement.

Tugendhat J. went on to explain that the court could, and was increasingly, using its general powers under CPR r.3.1(2)(m) to adapt the court process to enable it to manage cases effectively where one or more parties were litigants-in-person. In this way it could, to a certain extent, ameliorate the procedural problems that such litigants experienced. He further noted that such adaptation could effect a more inquisitorial form of process than ordinarily used in civil proceedings; a form of process that the Judicial Working Party on Litigants in Person had recommended be introduced through amendment to CPR r.3.1. Reform was thus unnecessary because the court already had sufficient power to achieve such ends.

Notwithstanding Tugendhat J.'s correct view concerning CPR r.3.1(2)(m)'s broad scope, and hence the absence of a need for reform, reform to r.3.1 has been effected to provide via the introduction of r.3.1A. The new rule imposes a positive obligation on the court to take certain steps when at least one party is unrepresented, including adopting a form of procedure appropriate to furthering the overriding objective and, where necessary, questioning witnesses. As a case management power, parties–and it must be assumed that this will apply more stringently to represented parties than unrepresented ones–will be required to assist the court in giving effect to this new rule under r.1.3.

The growth of unnecessary rules, practice directions and guidance is generally to be deprecated, not least given the problem procedural complexity and opacity causes for litigants-in-person. In this instance however, the new rule in making explicit the court's power to adapt its procedure to deal with a case justly and at proportionate cost for litigants-in-person provides useful clarity. Care will however need to be taken to ensure that the new rule is not interpreted as cutting down the wide ambit of r.3.1(2)(m). The text of r.3.1A is set out below:

"Case management – unrepresented parties

3.1A.—(1) This rule applies in any proceedings where at least one party is unrepresented.

(2) When the court is exercising any powers of case management, it must have regard to the fact that at least one party is unrepresented.

(3) Both the parties and the court must, when drafting case management directions in the multi-track and fast track, take as their starting point any relevant standard directions which can be found online at www.justice.gov.uk/courts/procedure-rules/civil and adapt them as appropriate to the circumstances of the case.

(4) The court must adopt such procedure at any hearing as it considers appropriate to further the overriding objective.

(5) At any hearing where the court is taking evidence this may include—

(a) ascertaining from an unrepresented party the matters about which the witness may be able to give evidence or on which the witness ought to be cross-examined; and

(b) putting, or causing to be put, to the witness such questions as may appear to the court to be proper."

FINANCIAL LIST AND FINANCIAL MARKETS TEST CASE SCHEME

Civil Procedure (Amendment No.4) Rules 2015 introduces from 1 October 2015 a new Part 63A. Its related Practice Directions 63A and 51M come into force at the same time. They introduce a novel procedural development.

Since the High Court was created in 1873 it has been divided into, what were at the time envisaged to be temporary, Divisions each with their own specific jurisdiction (See Senior Courts Act 1981, Sch.1; ***Civil Procedure 201***5 Vol.2 paras 9A-398-401). Part 63A creates the first cross-Divisional jurisdiction, a 'single specialist list' run jointly by the Chancellor of the High Court and the judge in charge of the Commercial Court; a list that enables claims within its scope to be issued in either the Chancery Division or the Commercial Court and heard by any judge authorised to hear such claims irrespective of whether they are judges of the Chancery Division or Commercial Court (rr.63A.2, 63A.4), hence a Commercial Court Financial List judge could hear such a claim if issued in the Chancery Division and vice versa.

The new list's scope of application is relatively broad. It covers any claim that falls within the ambit of either of three criteria.

First, it applies to claims of a value of more than £50 million, or the equivalent amount in another currency, which are primarily concerned with '*loans, project finance, banking transactions, derivatives and complex financial products, financial benchmark, capital or currency controls, bank guarantees, bonds, debt securities, private equity deals, hedge fund disputes, sovereign debt, or clearing and settlement*': r.63A.1(2)(a).

Secondly, it applies to claims the resolution of which requires specific expertise in the financial markets, which is defined as including: r.63A.1(2)(b).

Finally, it applies to claims that raise issues of general importance to the financial markets: r.63A.1(2)(c). For the purpose of Part 63A financial markets are defined as encompassing '*the fixed income markets (covering repos, bonds, credit derivatives, debt securities and commercial paper generally), the equity markets, the derivatives markets, the loan markets, the foreign currency markets, and the commodities markets*': r.63A1(3).

It is thus apparent that the financial limit on the value of claims only applies to the first of the three criteria, thus enabling individual claims of lower value to be brought as financial list claims where, for instance, they raise issues of general importance. An individual claim may have a relatively low value, but in terms of its effect on the market as a whole it may have a significant value and import.

Part 63A is sparse in detail as to how it is to operate. It simply provides that the CPR and its PD apply to claims in the new list except as otherwise provided in Part 63A or its Practice Direction, that r.30.5 concerning transfer applies to Financial List claims, and more specifically that the procedure set out in rr.58.5 to 58.13 and 58.15 apply as they would claims in the Commercial List. Financial List claims are thus to be managed as if they are claims proceeding in the Commercial List: rr.63A.3 & 4.

PD51M (Financial Markets Test Case Scheme) supplements Part 63A. It introduces a novel test case scheme, operative from 1 October 2015 until 30 September 2017, for Financial List claims commenced after 1 October 2015. It applies to a claim that raises points of general importance to the financial markets, i.e., claims within the scope of r.63A.1(2)(c). It enables parties, by agreement, to issue proceedings intended to clarify a point of law needing authoritative guidance. No active dispute between the parties need exist, although they need to demonstrate opposing interests as to how the legal issue be resolved (See *Rolls-Royce plc v Unite the Union* [2010] 1 W.L.R. 318, CA; ***Civil Procedure 2015*** Vol.1 para.40.20.2).

EARLY NEUTRAL EVALUATION

Early Neutral Evaluation (ENE), the provision by a neutral, independent, third party (whether a judge or other third party) of an informal assessment of potential outcome of a claim based on the parties' claims as developed at that time, has been in feature of common law civil procedure since it was pioneered in the United States District Court in the Northern District of California in the late 1980s.

It has, however, been relatively under-developed and under-utilised in England and Wales, outside of proceedings in the Technology and Construction Court and the Commercial Court. The former makes provision for it in paras 7.5.1-7.5.4 of the Technology and Construction Court Guide, which notes that it may be carried out by the court with the consent of the parties (***Civil Procedure 2015*** Vol.2 para.2C-42). The Admiralty and Commercial Court Guide, paras G2.1-G2.5, contains similar provisions (***Civil Procedure 2015*** Vol.2 para.2A-102). There are three plausible reasons for this lack of use. First, there is a general assumption that its use depends upon party consent. Secondly, lack of clarity regarding the basis on which a court could, either with or without party consent, direct an ENE hearing take place. Thirdly, an under-appreciation, outside the TCC and Commercial Court, by the judiciary and legal profession of its merits, and particular its utility as a means to promote settlement.

In terms of the first and second issue, neither the TCC Guide nor the Admiralty and Commercial Court Guide assist. Both support the view that party consent is necessary. Neither provide any jurisprudential basis for the court's power to carry it out. They are, as explained by the Court of Appeal in *Bovale v Secretary of State for Communities and Local Government* [2009] EWCA Civ 171, [2009] 1 W.L.R. 2774 (***Civil Procedure 2015*** Vol.2 para.12-44), simply

descriptive. They are neither rules nor practice directions. Previous editions of the, then, Commercial Court Guide could, however, arguably have provided a basis for the power to carry out ENE in commercial claims. Both the *Practice Direction (Commercial Court: Practice Guide)* [1994] 1 W.L.R. 1270 and *Practice Direction (Guide to Commercial Court Practice: Fourth Edition*) [1997] C.L.C. 1538 provided that the Guide's provisions were to be followed except where they were in conflict with Rules of the Supreme Court. (It is notable that neither Practice Direction has been revoked.) The Practice Directions could thus have been the source of the Commercial Court's jurisdiction to order ENE.

In *Seals v Williams* [2015] EWHC 1829 (Ch), 15 May 2015, ChD, unrep., Norris J considered the question of the court's power to order ENE. At paras 4 – 6 he, rightly, concluded that the wide jurisdiction provided by r.3.1(2)(m), which specifies that the court can make any order, in addition to those particularised in r.3.1, to manage cases and further the overriding objective, provided such power. He further stated that the question of the Civil Procedure Rules' vires in this area arose from the court's inherent jurisdiction. One consequence of this was, as an aspect of the court's inherent jurisdiction, the power to order ENE and for a judge to conduct it was part of the judicial function and did not depend upon party consent. The first two issues were thus put at rest.

In terms of the third issue, Briggs L.J., in the *Chancery Modernisation Review: Final Report* (2013), tackled it in respect of Chancery proceedings, see paras 5.23-5.30. The Review recommended the development of judge-led ENE as an option to be available in Chancery proceedings, see Review para.16.19. Wider consideration of its utility and applicable to other proceedings had however continued to be absent until the most recent CPR amendments.

The Civil Procedure (Amendment No.4) Rules 2015, from 1 October 2015, codifies Norris J.'s statement from *Seal*. It amends r.3.1(2)(m) to make explicit reference to the power to order an ENE. The power to do so is not constrained by the need to secure party consent. The text of the amended rule is as follows:

"**The court's general powers of management**

3.1(2) Except where these Rules provide otherwise, the court may –

(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case."

The amended rule is not, as might have been expected limited to Chancery proceedings. It is of general application. While it is likely to be used more readily in the immediate future in Chancery proceedings given the impetus to its use by the Briggs' Review and Norris J.'s judgment in the *Seal* case, its use in appropriate cases in the Queen's Bench Division and the County Court is likely to become increasingly common. Its further promotion, and the establishment of a clear and common approach to ENE, could however be facilitated through the development of a dedicated ENE Practice Direction. Until that occurs, guidance as to the proper approach to directing an ENE and carrying it out, save as to the requirement for party consent, should usefully be drawn from the TCC and Admiralty and Commercial Court Guides.

COURT OF APPEAL (CIVIL DIVISION)–HEAR-BY DATES

On 17 June 2015, the Master of the Rolls issued *Practice Guidance: Court of Appeal (Civil Division) Hear-By Dates* [2015] 1 W.L.R. 3407. It is the first set of updated guidance concerning hear-by dates applicable to the Court of Appeal (Civil Division) since 2003 and expressly replaces *Practice Note (Court of Appeal: Listing Windows) (No.2)* [2003] 1 W.L.R. 838. By necessary implication, it also replaces paragraph 2 of *Practice Note (Court of Appeal: Listing Windows)* [2001] 1 W.L.R. 1517, which had been preserved by the 2003 Practice Note and made provision for expedited hearings. Expedited appeals are now dealt with under paragraph 4 of the 2015 Guidance, and *Unilever plc v Chefaro Proprietaries Ltd (Practice Note)* [1995] 1 W.L.R. 243.

The 2015 Guidance differs in two substantive ways to the 2003 Practice Note: first, in its Annex 1, it provides updated guidelines for hear-by dates for an equally updated range of types of appeal; secondly, it no longer provides guidance for applications to fix hearings beyond the hear-by date, previously provided by paragraph 2 of the 2001 Practice Note. The updated guidelines now provide for three different hear-by dates depending on whether permission to appeal was granted by the trial (lower) court, the Court of Appeal on paper, or the Court of Appeal at an oral hearing. Where parties to an appeal seek to postpone a hearing beyond the hear-by dates specified in the Guidance, it is to be expected that they will in future need to consider seeking a formal stay of the appeal. Annex 1: Hear-by Dates

All times run from date of issue to date of appeal hearing.

PRACTICE GUIDANCE: COURT OF APPEAL (CIVIL DIVISION) HEAR-BY DATES (2015)

1. Hear-by dates for different classes of appeal were revised more than 12 years ago, see *Practice Note (Court of Appeal, Civil Division Listing Windows and Hear-by Dates)* [2003] 1 W.L.R. 838, dated 28th February 2003. Since that time, the number of permission applications filed in the Court of Appeal has increased by 67%. There has also been a small increase of 3% in appeals since 2003.

2. Over the same period, the number of Lord and Lady Justices of Appeal has increased by one, from 37 to 38, in 2008. Because of the increasing volume of work of the Court, the hear-by dates set in 2003 are no longer realistic. In order to provide litigants and practitioners with a reliable timescale within which different classes of appeal are likely to be heard, revised hear-by dates have been set, to apply to all cases filed after 31st July 2015. The new hear-by dates are set out in the Hear-by Date Table, set out in Annex 1 to this Practice Guidance. They vary depending upon whether permission to appeal was granted in the lower court or, if by the Court of Appeal, whether on paper or at an oral renewal hearing.

3. The hear-by dates are measured from the date an Appellant's Notice is issued in the Court of Appeal to the date the appeal is likely to be heard. In the exercise of its case management powers, the Court will strive to ensure that appeals are generally heard before the relevant hear-by date.

4. Applications for an expedited hearing will continue to be determined by a single Lord or Lady Justice or a Master or Deputy Master, in accordance with the principles set out in *Unilever plc v Chefaro Proprietaries Ltd (Practice Note)* [1995] 1 WLR 243.

5. This Practice Guidance replaces the Practice Note, dated 28th February 2003, for all cases filed after 31st July 2015.

Lord Dyson, Master of the Rolls and Head of Civil Justice

17th June 2015

Annex 1: Hear-by Dates

	All times run from date of issue to date of appeal hearing		
TYPE OF APPEAL	If PTA granted in lower court	If PTA granted in CA on paper	If PTA granted in CA at oral hearing
• Child cases • Planning appeals	2 months	4 months	5 months
• Interlocutory appeals (Administrative Court, High Court, County Court) • Preliminary issues (High Court, County Court) • Financial remedies (child) • Immigration/asylum statutory appeals and judicial review appeals • National security related appeals • Possession (High Court, County Court) • Bankruptcy (High Court)	6 months	9 months	12 months
• Final orders (Administrative Court, High Court, County Court) • Other Tribunals (e.g. UTLC, UTTCC, UTAAC, EAT, CAT) • Financial remedies (divorce)			

CHANCERY DIVISION-CHANGES TO STANDARD FORM ORDERS

On 20 July 2015, further reforms to Chancery procedure arising from the Chancery Modernisation programme were published. The reforms, which record changes being introduced to Chancery standard form orders and case management directions, amendments to the Notes to Form N149C, and to the process for filing Tomlin Orders, took effect on that date, although that they do is only apparent from a note on the website of the Judiciary of England and Wales. The note itself fails to specify any such date, as well as failing to identify by whose authority it was issued (see An Appeal for Orderly Publication in Issue 7/2015, July 14 2015 of CP News): for such guidance to be authoritative, and to be readily accessible to all court users, particularly litigants-in-person, such information ought not to be absent.

HM Courts & Tribunals Service

Chancery Division – Extending time limits and Sealing Tomlin Orders

Introduction

A number of measures are being introduced, under CPR rule 2.11, to enable the parties to extend certain time limits without the need for a court order. These should save both time and costs for litigants, by reducing the number of applications to the court.

Additionally, Tomlin Orders which deal only with money claims may now, under CPR rule 40.6 and 40PDB para 3.1, be sealed by a clerk without reference to a Master, provided no other relief has been sought.

All these measures take effect immediately.

1. Extending time limits for procedural steps by agreement, without reference to the court.

This is being implemented by adding a new paragraph to the standard form of order and draft case management directions, as follows:

> "The parties may, where CPR rule 2.11 applies, agree to extend any time period to which the proceedings may be subject for a period or periods of up to 28 days in total without reference to the court, provided that this does not affect the date given for any case or costs management conference or pre-trial review or the date of the trial. The parties shall notify the court in writing of the expiry date of any such extension."

This paragraph will be incorporated into the draft case management directions on the Justice website as soon as possible, but in the meantime it may be added it to any draft directions you are drafting for the court.

2. Extension of time for stays for ADR by agreement, without reference to the court.

This is implemented by adding a new paragraph to the standard form of order for a stay, as follows:

> () the parties may agree to extend the stay for periods not exceeding a total of three months from the date of this order without reference to the Court and shall notify the Court in writing of the expiry date of any such extension. Any request for a further extension after three months must be referred to the Court.

() Any party has permission to apply in relation to the extension.

A form of the complete Order for stay is attached to this note. It may be a little while before the amended form is available on the Justice website.

3. N149C paras 3 and 4 and accompanying Note

This requires the parties to file documents (Directions Questionnaire, draft directions (whether or not agreed), Disclosure Report, List of Issues and Costs Budgets) by a specified date.

As from now, the parties may agree to extend the time limit specified in Form N149C paras 3 and 4 for a period or periods of up to 28 days without reference to the court. They must notify the court in writing of the expiry date of any such extension.

The Note has been amended accordingly and the new version is attached.

4. Sealing of Tomlin Orders relating to money claims by Masters' clerks.

If Tomlin Orders are concerned only with claims for money (ie debt or damages, including any interest and costs) and no other relief has been sought, they may from now on be sealed by the clerk without reference to the Master. This will be subject to strict criteria to protect the parties and ensure that no incorrect forms of order are sealed.

To ensure that the claim is purely a money claim, the solicitors for the parties must include with the request for an order the following wording:

> "We certify that the only relief sought in this claim/counterclaim is the payment of money including any interest and costs, and that no ancillary relief has been sought at any stage".

This statement will be relied on by the clerk.

A correct form of Tomlin Order, which takes account of the fact that confidential schedules are no longer accepted by the court, is attached.

Proc 01 S

STAY FOR ALTERNATIVE DISPUTE RESOLUTION

Claim No.

IT IS ORDERED that

() this claim be stayed until for the parties to try to settle the dispute by alternative dispute resolution or other means. The parties shall notify the Court in writing at the end of that period whether settlement has been reached.

() the parties shall at the same time lodge *either*:
(a) (if a settlement has been reached) a draft consent Order signed by all parties; *or*
(b) (if no settlement has been reached)
(i) a statement of agreed directions signed by all parties or (in the absence of agreed directions) statements of the parties' respective proposed directions;
(ii) the parties' Disclosure Reports; and
(iii) the parties' Costs Budgets.

() the parties may agree to extend the stay for the purpose granted for periods of up to three months from the date of this order without reference to the Court and shall notify the Court in writing of the expiry date of any such extension. Any request for a further extension after three months must be referred to the Court.

() Any party has permission to apply in relation to the extension.

HM Courts &
Tribunals Service

Date

NOTE ACCOMPANYING FORM N149C
Address:

Ref

Re: Title:

A defence or defences have been filed in the above claim. Please see Form N149C which is attached to this letter.

UNDER THE FOLLOWING PROVISIONS, WHICH SUPPLEMENT FORM N149C FOR ALL PART 7 CASES IN THE CHANCERY DIVISION OF THE HIGH COURT:

1. **You must, *subject to 1(c) below*, by the date specified in paragraph 3 of Form N149C file**:
(a) Your Directions Questionnaire*, Draft Directions**, Disclosure Report*** and a List of Issues.
(b) Your Costs Budget in Form H (CPR 3.13) ***unless*** *(i) you are a litigant in person or (ii) the value of the claim is £10million or above (£2million for cases issued before 22nd April 2014) excluding interest and costs, or (iii) the claim was issued before the 1st April 2013 (in which case section H of the Directions Questionnaire does not apply).****PLEASE NOTE THESE EXCEPTIONS***
(c) the parties may agree to extend the time limit specified in Form N149C para 3 and 4 for a period or periods of up to 28 days without reference to the court, and must notify the court in writing of the expiry date of any such extension.

Important Notes:

- These documents must be filed at the same time and not separately.
- A failure to file all the documents the Court requires for case management by the date specified in paragraph 3 of Form N149C, or by the date of any agreed extension under 1(c), may lead to the claim, or the defence, being struck out or some other sanction imposed.
- You **must state whether the directions, and/or costs budgets, are agreed**.
- The court will not normally be able to make case management directions based upon an agreed order **unless all costs budgets are agreed** or the claim is outside the scope of costs management (see 1(b) above).
- Please note that **no fee** is payable upon allocation.

2. *The Directions Questionnaire (Form N181) may be found at http://hmctsformfinder.justice.gov.uk/courtfinder/forms/n181-eng.pdf

The Draft Directions should be based upon Draft Chancery Case Management Directions (Form Proc 01a) which can be found at http://hmctsformfinder.justice.gov.uk/courtfinder/forms/proc001a-eng.doc and **NOT on the standard directions referred to in guidance note (ii) in Form N149C. A hard copy of the draft Chancery directions may also be obtained from the Issue Section. **You should state if these are agreed.**
Further draft case management directions, that may be appropriate in some cases, may be found at Appendix 3 of the Chancery Guide at http://www.justice.gov.uk/downloads/courts/chancery-court/chancery-guide.pdf **You should state if these are agreed.**

***The Disclosure Report (Form N263) must be filed in every case (CPR31.5(3)) and can be found at http://hmctsformfinder.justice.gov.uk/courtfinder/forms/n263-eng.pdf

3. The current Chancery Division trial windows can be found at
http://www.justice.gov.uk/courts/rcj-rolls-building/chancery-division/chancery-judges-listing-office

4. In accordance with the Practice Note dated 8th September 2014 the Claimant must, within 5 working days after the deadline specified in Form 149C, lodge a paginated bundle containing the statements of case, directions questionnaires and associated documents listed in paragraph 1 above.

5. If all parties wish the claim to be stayed for longer than the period of 28 days under 1(c) above at this stage in order to attempt ADR, a consent order should be filed before the date specified in paragraph 3 on Form N149C. In that event, the Directions Questionnaire and other documents referred to need not be filed. The consent order may provide for a stay for a period not exceeding 3 months and should specify the calendar date when the stay will end. Unless a settlement is reached, the Directions Questionnaire, and all the other applicable documents, must be filed not later than the date the stay expires.

CHANCERY ISSUE SECTION

Tomlin Order

Claim No.

AND the parties having agreed to the terms set out in [the attached schedule][a [confidential] schedule/agreement dated……., copies of which are held by the parties' solicitors/the solicitors for the (*party*)] [and to there being no order for costs]

IT IS BY CONSENT ORDERED that

(1) all further proceedings in this claim be stayed except for the purpose of carrying the terms of the agreement into effect
AND for that purpose the parties have permission to apply [without the need to issue fresh proceedings].

(2) [any provision in respect of costs] *(unless in preamble)"*

REUTERS/Yannis Behrakis

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