CIVIL PROCEDURE NEWS

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In Brief

Cases

R v EDWARD BROWN (FORMERLY LATHAM) [2015] EWCA Crim 1328, 29 July 2015, unrep. (Fulford L.J., Holroyd and Singh JJ.)

Legal Profession Privilege–Iniquity exception–Additional common law exception

Common law right to consult lawyers in private, European Convention on Human Rights, art.6(3)(c). The appellant was convicted in July 2011 of the attempted murder of a Mr Walker whilst he, the appellant, was a hospital patient. At the time the attempted murder occurred the appellant was serving two life sentences, both also for attempted murder. During the trial an issue arose whether it was permissible for the appellant to be accompanied by two nurses during any case conferences with his legal team. The trial judge held that as there was a real risk that the appellant would either inflict serious injury on himself or kill himself during such a conference he could be accompanied by the nurses. The appellant appealed conviction on the ground that his right to communicate with his lawyers privately had been breached. The appeal was dismissed. **Held**, the court recognised that in addition to the iniquity exception a further, limited common law exception to legal professional privilege existed. This additional exception arises where there is a real possibility that the privilege will be misused either for a purpose or in a manner that: (i) involves impropriety; which (ii) amounts to an abuse of the privilege. The court went on to note that the rare circumstances of the present case exemplified the type of situation where the exception could arise. It further noted where there was a risk that abuse of the privilege in such circumstances gave rise to a threat to life, article 2 ECHR would be engaged and would thereby justify interference with the privilege. Guidance was also given to the effect that should the exception arise in future cases, it should be made clear to any individuals permitted to attend an otherwise privileged meeting that anything they heard was confidential and should not be disclosed to any third party unless exceptional circumstances justified such disclosure i.e., it was clear that the communication fell within the iniquity exception or amounted to another serious abuse of the privilege. The court also held that the exception did not breach article 6(3)(c) ECHR. ***R v Cox & Railton*** (1884) 14 Q.B.D 153, (QB), ***McE v Prison Service of Northern Ireland*** [2009] 1 A.C. 908, (HL), ***R v Derby Magistrates' Court, ex parte. B*** [1996] 1 A.C. 487, (HL), ***Three Rives District Council v Governor and Company of the Bank of England (No. 6)*** [2005] 1 A.C. 610, (HL), ref'd to. (See ***Civil Procedure 2015*** Vol.1 para.31.35.)

VIRIDOR WASTE MANAGEMENT v VEOLIA ENVIRONMENTAL SERVICES [2015] EWHC 2321 (Comm), 22 May 2015, unrep. (Popplewell J.)

Service–Retrospective extension of time–Relief from Sanctions–Opportunistic and unreasonable advantage

CPR rr.3.9(1), 3.10(a), 6.20(1)(c). Claimant (C) issued proceedings against defendant (D) for unjust enrichment shortly prior to limitation. C notified D of issue and nature of claim. D subsequently issued proceedings, which mirrored C's claim, against C. C served its claim form in November 2014. Shortly thereafter D served its claim form and particulars of claim. The parties agreed to an extension of time for the C to serve its particulars of claim. The C, inadvertently, served the particulars of claim by second-class post having intended to serve by first-class post. Service was effected late. D refused to consent to an extension of time to serve, resisted C's application for such an extension and applied to strike out C's claim. CPR r.3.9 applied. **Held**, the failure to effect service in time was, in the circumstances, neither serious nor significant. Service was effected a matter of a few working hours after the deadline; the ultimate purpose of the service rules was thus achieved as per Lord Clarke in ***Abela v Baadarani*** [2013] UKSC 44, [2013] 1 W.L.R. 2043. The C's default had no real impact either on the immediate litigation, on the court, or on other court users. The only disruption it had caused was the result of the immediate contested application. Furthermore, the breach did not produce any delay that could be said to be significant or serious. Given these findings it was unnecessary to consider the second and third stages of the test in ***Denton v T H White Ltd (Practice Note)*** [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296, however the court noted that the administrative failure to send the particulars of claim, one that could have occurred in any well-run office, was at the lower end of the scale of culpability and was one that on the facts did not arise as a result of a lax culture of compliance within the C's solicitors' firm. The court also noted that: (i) the default was immediately rectified; (ii) the application to cure the default was made promptly; (iii) the D had a live claim that mirrored the C's claim which would, at the least, in the circumstances of the nature and value of the claims, produce a particularly unjust result if relief was refused, and (iv) taken together with the findings on the nature of the breach it was just to grant an extension of time to serve. Finally, the court stressed that the D's conduct in

bringing the present application to strike out and having refused to agree to the C's application was such as to amount to the opportunistic and unreasonable conduct the majority in ***Denton*** at paras 39-41 had deprecated: its conduct had had an adverse impact on other court users, was unnecessary and inappropriate and was to be discouraged. Costs were thus awarded against the D on an indemnity basis. ***Mitchell MP v News Group Newspapers Ltd*** [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), ***Abela v Baadarani*** [2013] UKSC 44, [2013] 1 W.L.R. 2043, (UKSC), ref'd to. ***(See Civil Procedure 2015*** Vol.1 paras 3.9.3, 3.9.4.4, 6.15.1, 6.15.3.)

- **TRANSFORMERS AND RECTIFIERS LTD v NEEDS LTD** [2015] EWHC 1687 (TCC), [2015] Costs L.R. 611, 12 June 2015 (Coulson J.)

Costs–Summary Assessment–Judge's power to assess

CPR rr.1.1(1), 44.6(1) CPR PD44 para.9.7. During the interlocutory stage of proceedings two sets of costs orders were made. The costs were, however, not summarily assessed at the time the orders were made. At a subsequent interlocutory hearing the Claimant (C) sought the summary assessment of the costs of that hearing and of the two costs orders made previously. The question arose whether the judge at that hearing could summarily assess all three sets of costs orders, or whether only the judge who made the cost order could carry out the summary assessment. The Defendant submitted that only the judge who made a cost order had the jurisdiction to summarily assess the costs under it, per ***Mahmood v Penrose*** [2002] EWCA Civ 457, (CA). **Held**, in appropriate circumstances, a judge may summarily assess the costs of a hearing heard before or arising under an order made by a different judge. There was nothing within the CPR or its PDs to the contrary. The approach submitted by the D to be correct was not consistent with the overriding objective. That being said, in the majority of cases it will be more practical and appropriate for the same judge who conducted the hearing or made the costs order to carry out the summary assessment. ***Mahmood*** was distinguishable as: (i) it was decided under a previous and differently worded version of the overriding objective. The present wording, and its increased emphasis on proportionality, means that the absolute bar it upheld is now unjustifiable; (ii) it was decided under a previous and differently worded version of CPR PD44. The present wording provides greater flexibility in approach; (iii) it concerned the costs of a hearing, whereas different factors may need to be considered in other situations, such as the present where the costs orders arose in respect of matters determined on the papers; and (iv) it could not be said the Court of Appeal in that case intended to lay down a general rule, not least as Counsel did not appear for either party and it is not apparent that argument on the point was addressed to the court. ***Mahmood v Penrose*** [2002] EWCA Civ 457, (CA), distinguished and not followed. (See ***Civil Procedure 2015*** Vol.1 para.44.6.3.)

- **BRITISH AIRWAYS PLC v SPENCER & OTHERS** [2015] EWHC 2477 (ChD), 21 August 2015, unrep. (Warren J.)

Expert Witnesses–Overriding objective–Guidance on when necessary to admit expert evidence

CPR rr.1.1, 3.1(2)(k), 35.1. During a case management hearing arising in the context of complex, high value proceedings concerning pension provision, a Deputy Master refused to allow expert evidence to be called or relied on. The Claimant appealed from that refusal. **Held**, the appeal was allowed in part, the judge noting in doing so that case management decisions concerning expert evidence had to be consistent with the overriding objective. In ensuring that was the case it is necessary to ensure that too great a weight is not placed on saving cost and time. In assessing whether to admit expert evidence the court must adopt an issue-based approach and answer the following questions: (i) is the admission of expert evidence necessary, rather than merely helpful, in order to determine a particular issue in the proceedings. If yes, the evidence should be allowed; (ii) if expert evidence is not necessary i.e., the answer to the first question is no, then would its admission assist the court to determine the issue. If so, and as its admission is not necessary, the court is in a position to determine the issue without expert evidence; which leads to (iii) would, looking at the proceedings as a whole, admission of expert evidence which is not necessary for the determination of an issue, nevertheless reasonably assist the resolution of the proceedings. In considering this question the court should take account of issues which include but are not limited to: the value of the claim; the effect of judgment on the parties; who is to pay for the evidence, and hence by implication the cost, and any delay obtaining the evidence will necessitate, including delay that would require vacation of a trial date; the proportionality of its admission. In applying this filter test, the court should take account of the pleaded issues and should do so unless a particular issue has been excluded as a consequence of an order under CPR r.3.1(2)(k). ***Barings Plc v Coopers & Lybrand (No 2)*** [2001] EWHC 17 (ChD), [2001] PNLR 22, (ChD), ***JP Morgan Chase v Springwell*** [2006] EWHC 755 (Comm), [2007] 1 ALL E.R. (Comm) 549, ***Chartwell Estate Agents v Fergies Properties SA*** [2014] EWCA Civ 506, (CA), ref'd to. (See ***Civil Procedure 2015*** Vol.1 para.35.1.1.)

Practice Update

STATUTORY INSTRUMENTS

- **THE CIVIL JURISDICTION AND JUDGMENTS (HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 2005) REGULATIONS 2015** (SI 2015/1664) In force from 1 October 2015.

Amends Civil Jurisdiction and Judgments Act 1982, Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302), and CPR rr.6.31, 6.33, 12.10(b)(i), 12.11, 25.12(2)(a)(ii), 74.1(5), 74.3(1), 74.4, 74.10, 74.11 to make reference to the Hague Convention on Choice of Court Agreements 2005. (See ***Civil Procedure 2015, 4th Supplement*** Vol.1 for updated provisions of the CPR.)

Readers' attention is particularly drawn to ***Civil Procedure 2015***, Vol.2, paras 5-27 and 5-46, as the text set out there is the, now, unamended text of sections 25 and 49 of the 1982 Act. The provisions set out there are amended as follows: (i) regulation 13 of the 2015 Regulation adds reference to the 2005 Hague Convention to the power to grant interim relief in the absence of substantive proceedings, and (ii) regulation 19 of the 2015 Regulations adds reference to the 2005 Hague Convention to section 49 of the 1982 Act (savings for powers to stay, strike out or dismiss proceedings).

- **THE LATE PAYMENT OF COMMERCIAL DEBTS (AMENDMENT) REGULATIONS 2015** (SI 2015/1336) In force from 21 June 2015, albeit does not affect contracts entered into prior to that date.

Implements Directive 2011/7/EU on combating late payment in commercial transactions (the Late Payment Directive). Amends section 4 of the Late Payment of Commercial Debts (Interest) Act 1998 to clarify the provisions relating to the maximum periods for honouring payment terms. The text of the amended section 4 is as follows:

"Section 4. Period for which statutory interest runs.

(1) Statutory interest runs in relation to a qualifying debt in accordance with this section (unless section 5 applies).

(2) Statutory interest starts to run on the day after the relevant day for the debt, at the rate prevailing under section 6 at the end of the relevant day.

(2A) The relevant day for a debt is—

(a) where there is an agreed payment day, that day, unless a different day is given by subsection (2D), (2E) or (2G);

(b) where there is not an agreed payment day, the last day of the relevant 30-day period.

(2B) An "agreed payment day" is a date agreed between the supplier and the purchaser for payment of the debt (that is, the day on which the debt is to be created by the contract).

(2C) A date agreed for payment of a debt may be a fixed date or may depend on the happening of an event or the failure of an event to happen.

(2D) Where—

(a) the purchaser is a public authority, and

(b) the last day of the relevant 30-day period falls earlier than the agreed payment day, the relevant day is the last day of the relevant 30-day period, unless subsection (2G) applies.

(2E) Where—

(a) the purchaser is not a public authority, and

(b) the last day of the relevant 60-day period falls earlier than the agreed payment day, the relevant day is the last day of the relevant 60-day period, unless subsection (2G) applies.

(2F) But subsection (2E) does not apply (and so the relevant day is the agreed payment day, unless subsection (2G) applies) if the agreed payment day is not grossly unfair to the supplier (see subsection (7A)).

(2G) Where the debt relates to an obligation to make an advance payment, the relevant day is the day on which the debt is treated by section 11 as having been created (instead of the agreed payment day or the day given by subsection (2D) or (2E)).

(2H) "The relevant 30-day period" is the period of 30 days beginning with the later or latest of—

(a) the day on which the obligation of the supplier to which the debt relates is performed;

(b) the day on which the purchaser has notice of the amount of the debt or (where that amount is unascertained) the sum which the supplier claims is the amount of the debt;

(c) where subsection (5A) applies, the day determined under subsection (5B).

(2I) "The relevant 60-day period" is the period of 60 days beginning with the later or latest of—

(a) the day on which the obligation of the supplier to which the debt relates is performed;

(b) the day on which the purchaser has notice of the amount of the debt or (where that amount is unascertained) the sum which the supplier claims is the amount of the debt;

(c) where subsection (5A) applies, the day determined under subsection (5B).

(5A) This subsection applies where—

(a) there is a procedure of acceptance or verification (whether provided for by an enactment or by the contract), under which the conforming of goods or services with the contract is to be ascertained, and

(b) the purchaser has notice of the amount of the debt on or before the day on which the procedure is completed.

(5B) For the purposes of subsections (2H)(c) and (2I)(c), the day in question is the day after the day on which the procedure is completed.

(5C) Where, in a case where subsection (5A) applies, the procedure in question is completed after the end of the period of 30 days beginning with the day on which the obligation of the supplier to which the debt relates is performed, the procedure is to be treated for the purposes of subsection (5B) as being completed immediately after the end of that period.

(5D) Subsection (5C) does not apply if—

(a) the supplier and the purchaser expressly agree in the contract a period for completing the procedure in question that is longer than the period mentioned in that subsection, and

(b) that longer period is not grossly unfair to the supplier (see subsection (7A)).

(6) Where the debt is created by virtue of an obligation to pay a sum due in respect of a period of hire of goods, subsections (2H)(a) and (2I)(a) have effect as if they referred to the last day of that period.

(7) Statutory interest ceases to run when the interest would cease to run if it were carried under an express contract term.

(7A) In determining for the purposes of subsection (2F) or (5D) whether something is grossly unfair, all circumstances of the case shall be considered; and for that purpose, the circumstances of the case include in particular—

(a) anything that is a gross deviation from good commercial practice and contrary to good faith and fair dealing,

(b) the nature of the goods or services in question, and

(c) whether the purchaser has any objective reason to deviate from the result which is provided for by subsection (2E) or (5C).

(8) In this section—

"advance payment" has the same meaning as in section 11;

"enactment' includes an enactment contained in subordinate legislation (within the meaning of the Interpretation Act 1978)

"public authority" means a contracting authority (within the meaning of regulation 2(1) of the Public Contracts Regulations 2015"

(Also see ***Civil Procedure 2015, 4th Supplement,*** Vol.2, para.9B1337.)

PRACTICE GUIDANCE

CHANCERY MASTERS–URGENT APPLICATIONS–LISTING NOTICE, 7 September 2015, unrep.

On 7 September 2015 an, undated and unsigned, Information Notice concerning changes to listing arrangements for urgent applications to Chancery Masters was issued by HM Courts and Tribunals Service. The Notice, which does not apply to applications for extensions of time or "without notice" applications, provides, amongst other things: guidance on certification of urgent Application Notices; specifies that such applications should not be listed as urgent if they cannot be disposed of within two hours or less; provides guidance on notifying the Court Office where the matter settles; and notes the potential costs consequences of failure to adhere to the Notice's guidance. The Notice is replicated below.

"NOTICE

Listing Arrangements for Urgent Applications to the Chancery Masters

There is a fortnightly "urgent applications" list for urgent Masters' business. It is held from 11.00–1.00 and 2.15–4.30 on every other Wednesday. One Master (in rotation) including the Chief Master will take this list (whether or not he or she is the assigned Master for the case). The following requirements must be observed:

- Applicants must certify on the Application Notice when issued as follows "I hereby certify that this is urgent business, and cannot await a hearing before the assigned Master in its due turn, because [specify reasons]. [signed] [dated]." If appropriate, the reasons for urgency may be attached in a covering letter.
- Application notices must be issued and served in the usual way.
- An application should not be so listed unless the overall time required to deal with the application is 2 hours or less. The 2 hour maximum includes time in court, time for judgment and costs assessment.
- The existing directions set out in the Chancery Guide relating to delivery of bundles and skeleton arguments will apply.
- In the event of a settlement, the Court Office must be informed as soon as possible to allow the listing time to be available for the efficient disposal of other urgent business.
- Failure to comply with these arrangements may result in the Master refusing to hear the application and/or in an adverse costs order being made. If the Master is not satisfied that the matter was urgent the case may be put back by him/her into the assigned Master's ordinary list to come on for hearing in its due turn.
- This Notice is not to be understood as a substitution for the existing arrangements for listing applications for extensions of time or for "without notice" applications, in respect of which the existing arrangements will also continue to apply."

GUIDANCE–ELECTRONIC FILING IN THE BANKRUPTCY & COMPANIES COURT (ROLLS BUILDING), 17 September 2015, unrep. (Registrar Baister)

On 17 September 2015, Chief Bankruptcy Registrar Baister issued Guidance concerning the introduction, from 1 October 2015, of electronic issuing and filing in proceedings in Bankruptcy and Companies Court proceedings. For proceedings commenced from that date in the Royal Courts of Justice and the Rolls Building, electronic files will be maintained and utilised for all cases. At the present time, however, it is not possible to issue proceedings electronically. The Guidance anticipates, however, that this will become possible when relevant rule or Practice Direction changes have been made. Until that time documents will still need to be issued either at the public counter or by post. The Guidance is replicated below.

"Electronic issuing and filing

From 1 October 2015 an electronic file will be maintained of all proceedings commenced in the Bankruptcy & Companies Court in the Royal Courts of Justice at the Rolls Building. Proceedings commenced before that date and for which a paper file has been maintained will continue to be operated as a paper file.

Court users will not be able to issue proceedings electronically until either a change has been made to the Insolvency Rules 1986 or a Practice Direction has been issued (see rule 12A.14 Insolvency Rules 1986). Until then documents will be issued at the public counter and by post and scanned onto the electronic file. Staff will ask for longer documents such as witness statements and large exhibits to be emailed to the court.

A guide to issuing electronically is available on line at http://www.ce-file.uk/.

Fees
Fees will have to be paid using Payment by Account or a debit card. For further information see: http://libra.lcd.gsi.gov.uk/hmcts/documents/fee-account/fee-account-promotional-a4-leaflet.pdf.

NB: The official receiver's deposit must still be paid by cheque.

Case numbers
All proceedings commenced on or after 1 October 2015 will be given a new style of number: Companies Court case numbers will take the form CR-2015-0000000; bankruptcy case numbers BR-2015-000000.

Sub-applications
Where in existing insolvency proceedings (e.g. a bankruptcy or a winding up after the making of a winding up order by the court) an application is made by application notice (Form 7.1A) seeking new relief (what used to be called an originating application but is now an application in proceedings which are not already before the court) a unique identifying number will be allocated to the new application as well as the case number. That unique identifying number MUST be included (as well as the case number) in all documents filed in relation to that substantive application (including applications made in the substantive application) so that they can be linked to the substantive application to which they relate. Documents filed which do not comply with that requirement will be rejected.

Saving original documents
Where parties file material electronically the original (signed) documents (including the original exhibits to any witness statement filed) must be preserved and must be made available for inspection if required.

Bundles
In the majority of routine cases it is expected that the court will rely on the electronic file only, for example when dealing with multiply listed bankruptcy and winding up petitions and hearings for directions lasting no more than 30 minutes. Where the documentation the court is likely to be required to read is substantial (30 pages or more) or complex or an application is listed for more than 30 minutes a paper bundle (together with any skeleton argument relied on) should be lodged in accordance with the relevant provisions of the Chancery Guide or any order made. The court will operate a strict "no bundle, no hearing" rule: if no bundle is lodged when one is required the hearing will be vacated.

Multiple filing
Parties should avoid sending to the court documentation in more than one form (for example, a fax followed by an original letter). They should also not send to the court routine correspondence passing between the parties on which the court will not normally act.

Inspection
Any electronic file maintained by the court will continue to be a complete record of any insolvency proceedings with which the court is dealing or has dealt and will remain available for inspection in the same way as a paper file.

Comments
Any comments or suggestions arising out of the move to electronic filing will be gratefully received. Please send any to rcjcompanies.orders@hmcts.gsi.gov.uk marked "Electronic filing".

Stephen Baister
Chief Bankruptcy Registrar
17 September 2015"

In Detail

SHORTER AND FLEXIBLE TRIALS PILOT SCHEMES

On 1 October 2015 Practice Direction 51N (noted in "CPR Practice Direction Update", Civil Procedure News Issue 8/2015) entered into force, thereby introducing a two year pilot, which is to run in the following courts in the Rolls Building, London: the High Court, Chancery Division, the Patents Court, the Companies Court, London Mercantile Court and Technology and Construction Court. The pilot scheme only applies to claims issued after 1 October 2015. The Practice Direction's provisions where they conflict with provisions in other rules or practice directions take precedence.

The Practice Direction is supplemented by a "Shorter and Flexible Trial Procedures – Pilot Schemes" guide, issued on 1 October 2015, by Etherton C., Flaux J., Edwards-Stuart J. The Guide sets out the background to the pilot and provides an overview of its provisions and of how they are intended to operate. The Guide is replicated below. See ***Civil Procedure 2015, 4th Supplement*** Vol.1 para.51NPD et seq. for the text of the Practice Direction.

The pilot scheme introduces two discrete forms of procedure: a shorter trial procedure, and a flexible trial procedure. The aim of both is to facilitate greater procedural efficiency, economy and proportionality in commercial and business disputes.

Both pilot schemes only apply with express party consent, albeit the court may encourage entry into the schemes where appropriate. Parties may subsequently apply to opt-out of the schemes. Should parties opt-into either scheme any relevant Pre-Action Protocol will not apply. The schemes differ.

The Shorter Trial procedure is intended to ensure that claims reach trial, which will be listed for a maximum four-day hearing, within ten months of issue. Claimants are to inform defendants, within their letter of claim, of the intention to opt-into the procedure. Statements of case can be no more than twenty pages in length. Particulars of claim must be served with the claim form. Claims that opt-into this procedure are subject to docketing, limits will apply to extensions of time to comply with procedural obligations, disclosure, and oral evidence, including expert evidence, at trial. Trial management will also apply with limits applied to the total time a party may utilise during the trial itself. Costs budgeting will not apply, unless agreed to by the parties. Costs will be subject to summary assessment.

This procedure is not generally suitable for cases that: (i) involve allegations of fraud or dishonesty; (ii) are likely to require extensive disclosure, witness or expert witness evidence; (iii) involve multiple issues or parties, albeit this does not include cases that involve Part 20 counterclaims for revocation of IP rights; (iv) proceed in the IPEC; or (v) concern public procurement. When determining whether a claim is suitable consideration will also need to be given to the amount in dispute.

The Flexible Trial procedure enables parties to adapt the trial procedure to their individual needs. This will enable parties to agree to limit disclosure, expert and evidence and submissions. The Practice Direction sets out a standard form of flexible trial procedure applicable save to the extent it is varied by the parties or court.

"Shorter and Flexible Trial Procedures–Pilot Schemes

Shorter and Flexible Trial procedures

1. In October 2015, the Courts situated in the Rolls Building will start administering two pilot schemes: the Shorter Trial procedure and the Flexible Trial procedure. The schemes will be in operation in the Commercial Court, the Technology and Construction Court, the Chancery Division and Mercantile Court in the Rolls Building.

2. The aim of both pilot schemes is to achieve shorter and earlier trials for business related litigation, at a reasonable and proportionate cost. The procedures should also help to foster a change in litigation culture, which involves recognition that comprehensive disclosure and a full, oral trial on all issues is often not necessary for justice to be achieved. That recognition will in turn lead to significant savings in the time and costs of litigation.

3. The Shorter Trial procedure offers dispute resolution on a commercial timescale. Cases will be case managed by docketed Judges with the aim of reaching trial within approximately 10 months of the issue of proceedings, and judgment within six weeks thereafter. The procedure is intended for cases which can be fairly tried on the basis of limited disclosure and oral evidence. The maximum length of trial would be four days, including reading time.

4. The Flexible Trial procedure involves the adoption of more flexible case management procedures where the parties so agree, resulting in a more simplified and expedited procedure than the full trial procedure currently provided for under the CPR.

Formulation of the procedures

5. In the autumn of 2014 four judges from the Rolls Building courts (Hamblen J., Edwards- Stuart J., Birss J. and Jay J.) were asked by the Chancellor to investigate possible procedures which could be adopted in order to achieve shorter and earlier trials. This judicial committee was later expanded to include Sara Cockerill QC (Essex Court Chambers) and Ed Crosse (Simmons & Simmons LLP). The committee met a number of times and prepared a draft Practice Direction for pilot schemes relating to both of the proposed procedures.

6. The draft Practice Direction was the subject of public consultation in May 2015 with judges, court users as well as the Ministry of Justice and Her Majesty's Courts and Tribunal Service. Numerous positive responses were received and a number of detailed drafting points and suggestions as to how the Practice Direction could be improved have been taken into account in a revised draft.

Overview and guidance on the procedures

7. The key features of the proposed Practice Direction for the Shorter Trial pilot scheme include the following:

- **Scope:** The scheme is intended for commercial and business cases, which do not require extensive disclosure, witness or expert evidence. The amount at issue in the proceedings may be relevant to, but not determinative of, the question of suitability.
- **Docketed judges:** Cases will be managed and tried by docketed judges to provide greater continuity, efficiency and an increased judicial understanding of and control over the management of the case.
- **Opt in:** The scheme is not mandatory–a claimant must first elect to "opt in", although the court may encourage the parties to do so in appropriate cases. The parties may also adopt the scheme by agreement and the defendant may apply for an order that a claim be transferred in.
- **Transfer out:** The defendant has a right promptly to apply to transfer the case out of the scheme on the grounds of suitability. In this regard, the court is alive to the risk that a well-prepared claimant may attempt to use the scheme to "ambush" a defendant during the pre-CMC period. The court may sanction such behaviour in costs if a claimant has acted in an oppressive or unfairly prejudicial manner.
- **Pre-action protocols:** These will not apply but, save in cases of urgency, a letter of claim should be sent notifying the defendant of the intention to issue in the scheme. The defendant should respond in 14 days.
- **Pleadings:** Statements of case should be no more than 20 pages long and should attach core documents. The Claim Form and Particulars of Claim should be served promptly following the period for the defendant's response (subject to agreement). The Defence must be served 28 days thereafter.
- **Early CMC:** On issue of the Claim Form, the Claimant should take steps to fix a CMC for approximately 12 weeks after the date for acknowledgement of service.
- **Limited disclosure:** Standard Disclosure will not apply to the scheme. Instead, an arbitration style approach will be taken, with disclosure limited to documents relied upon and documents requested by the other party and either agreed or ordered. Document requests will be exchanged 14 days in advance of the CMC.
- **CMC:** At the CMC, the court will review and approve a list of issues, resolve any disputed document requests, consider ADR, give directions and fix dates (or windows) for the trial and PTR.
- **On paper applications:** To minimise costs and increase speed, applications other than those made at the CMC will be primarily on paper and/or conducted by telephone.
- **Early fixing of the Trial:** The trial will be fixed for a date not more than 8 months after the CMC and the length will be not more than 4 days, including reading time.
- **Evidence:** Unless otherwise ordered, factual and expert evidence will be in writing and limited in length. Oral evidence will be limited to identified issues, as directed at the CMC or subsequently.
- **Extensions of time:** Timetables should be strictly adhered to. However, the parties may agree to a single 14 day extension for the Defence and a single 7 day extension to any other date set by the rules or by directions. Otherwise, time can only be extended by the court and for good reason.
- **PTR:** At the PTR, the court will fix a timetable for the trial and give directions to ensure that it is strictly adhered to–for example a "chess clock" approach in respect of opening submissions and cross examination may be used.
- **Trial:** The trial will be before the same designated judge unless that is impractical.

- **Judgment:** The court will endeavour to hand down judgment within six weeks of the trial or (if later) final written submissions.
- **Costs:** Costs budgeting will not apply, unless the parties otherwise agree. Instead, the costs of the entire case will be assessed summarily by the trial judge, the parties having exchanged schedules of costs three weeks after the trial.

The Flexible Trial procedure

8. The Flexible Trial procedure enables parties by agreement to adapt trial procedure to suit their particular case. Trial procedure encompasses pre-trial disclosure, witness evidence, expert evidence and submissions at trial. It is designed to encourage parties to limit disclosure and to confine oral evidence at trial to the minimum necessary for the fair resolution of their disputes. Its aim is to reduce costs, reduce the time required for trial and to enable earlier trial dates to be obtained. The key is flexibility and choice.
9. A default Flexible Trial procedure is provided. This will apply where the parties adopt the procedure, save and to the extent that the parties agree or the court orders otherwise.
10. The procedure provides considerable flexibility to the parties to agree a procedure appropriate to their case and the court will seek to respect that agreement. However, the court retains ultimate control over the procedure to be adopted.

Next steps

11. Pilots of the two schemes will commence at the start of the new term in October 2015 and are scheduled to last for 2 years.
12. Parties and their advisers are strongly encouraged to consider using the scheme for suitable cases.
13. It is recognised that there may be aspects of the schemes which require refinement over time. The courts will work closely with users to clarify and resolve any such issues in an efficient way.
14. Similarly, and consistent with the overriding objective, parties participating in the scheme will be expected to communicate and cooperate with each other to a high degree, with a view to ensuring that cases can, indeed, be determined in a cost effective and timely manner.

Issued on the authority of The Chancellor, the Judge in Charge of the Commercial Court and the Judge in Charge of Technology and Construction Court."

Competition Appeal Tribunal–Collective Proceedings

On 1 October 2015 reforms effected by s.81 and sch.8 of the Consumer Rights Act 2015, concerning collective proceedings in the Competition Appeal Tribunal (CAT), enter into force and are supplemented by rr.73 to 98 of The Competition Rules 2015 (SI 2015/1648) (the 2015 Rules), which are themselves explained by s.6 of The Competition Appeal Tribunal-Guide to Proceedings 2015 (the 2015 Guide).

The 2015 Act introduces a number of substantial reforms to the pre-existing collective proceedings mechanism available in the CAT under s.47B of the Competition Act 1998. Prior to the 2015 reforms s.47B enabled collective proceedings to be brought by a pre-authorised representative party (authorised by the Lord Chancellor) where there had been a finding by a relevant competition authority of a breach of competition law: a follow-on collective action. The representative body could bring such proceedings on behalf of a class of individuals, said to have suffered loss as a consequence of the defendant's breach, who had to agree explicitly to be represented by it i.e., on an opt-in basis. Only one action was ever brought under the provisions: *Consumer Association v JJB Sports PLC*: case/n 1078/7/9/07 unrep.

The 2015 reforms were effected in order to remedy perceived weaknesses with the procedure, particularly the fact that collective proceedings could only be brought on an opt-in basis and by a limited number of pre-authorised representative bodies. They do so by substituting new sections 47A to 47E and new ss.49A to 49E for the pre-2015 ss.47A and 49A of the 1998 Act. These provisions enable damages claims, money claims and injunctions to be brought on a collective basis for infringements or alleged infringements of competition law. They enable such proceedings to be brought on either a follow-on basis, as previously, or a standalone basis i.e. where there is no extant decision by a competition authority.

In order to bring such proceedings it is necessary for a collective proceedings order (a CPO) to be obtained: see rules 75–81 of the 2015 Rules. This is important as, unlike the position in respect of the representative action under CPR r.19.6 or civil proceedings in general, collective proceedings before the CAT can only be continued if permission to do so is granted by the CAT. A number of points should be noted.

First, a CPO cannot be granted unless the CAT authorises the proposed representative party to act as such (Rule 78, 2015 Rules). This is an innovation, as previously the CAT had no power to authorise representatives. It is intended to enable a wider range of representatives to bring claims, including, in principle, law firms, third party funders, trade associations, consumer bodies, special purpose vehicles (para.6.30, 2015 Guide). The representative party need not have a cause of action against a defendant to the proceedings, but must be such as to render it reasonable and just for the CAT to authorise it to act as such. In assessing this question the CAT will, amongst other things, need to be satisfied that the proposed representative is able to fairly and adequately represent the represented class and that there are no conflicts of interest between it and the class.

Secondly, a CPO cannot be granted unless the CAT is satisfied that the proceedings are eligible proceedings i.e. that the proceedings are to be brought on behalf of a definable class, that the claims raise common issues (akin to the test for a Group Litigation Order under CPR r.19.10 rather than a representative action under CPR r.19.6), and it must be a suitable claim (Rule 79(1)(a)-(c), 2015 Rules). The question whether a claim is a suitable one is to be determined by consideration of `all matters (the CAT) thinks fit', including, for instance, whether a CPO will be the most appropriate means to determine the common issues fairly and expeditiously, the costs and benefits of collective proceedings, the size and nature of the class. Importantly, a factor that must be taken account of in determining suitability is the availability of alternative means of dispute resolution (Rule 79(2), 2015 Rules). There is no provision to appeal from a decision to grant or refuse to grant a CPO. Any such challenge must therefore fall to be determined by judicial review of the CAT's decision (para.6.92, 2015 Guide).

The most significant question the CAT will however need to determine in making a CPO is the basis on which it will proceed. A CPO can be brought on either on an opt-in basis, as previously, or on an opt-out basis (i.e., all individuals within the class said to have suffered damage etc., as a consequence of the defendant's breach or alleged breach of competition law are automatically represented and have to take explicit steps not to be so represented). In determining the question whether to authorise a CPO to proceed on an opt-in or opt-out basis the CAT must consider, in addition to the factors applicable to the question whether the claim is suitable for a CPO: (i) the strength of the claims; and (ii) taking account of all the circumstances, including the likely damages recoverable, whether it is practicable to bring the proceedings on an opt-in basis (Rule 79(3), 2015 Rules).

Any judgments bind all those within the represented class. Damages may be awarded on an aggregate basis i.e., it is not necessary to quantify the exact amount of damage each class member has suffered (Rule 73(2), 2015 Rules). Punitive or exemplary damages are not however capable of being awarded. Should any damages awarded remain unclaimed, it must be paid to a charity designated for such purpose by the Lord Chancellor. They cannot therefore be returned to the defendant. The only charity so designated at the present time is the Access to Justice Foundation (s.47C(5) of the 1998 Act).

Provision is also made for CAT approval of any collective settlement of claims, whether the settlement arises out of a CPO or not (Rules 94 -98, 2015 Rules). Where a collective settlement is reached and approved it remains possible for the parties to agree for any unclaimed sums available under the settlement to be returned to the defendant (para.6.88, 2015 Guide).

In terms of funding, damages-based agreements are prohibited where a CPO is made on an opt-out basis, which may suggest that previously perceived problems concerning the funding of such actions will remain unaddressed (s.47C(8) of the 1998 Act).

Use of the new procedure is limited to claims arising from 1 October 2015: see Rule 119, 2015 Rules.

REUTERS/Anindito Mukherjee

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