CIVIL PROCEDURE NEWS

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Duty to the court–Conduct of litigation–Costs

CPR r.1.3. Building contract dispute. Defendant sought to refer dispute to adjudication. Claimant resisted referral on basis that there was no provision in the building contract concerning adjudication and that as the property was residential it fell outside the statutory adjudication scheme. Claimant issued Part 8 claim seeking declaration that contract did not provide for dispute to be referred to adjudication. Application dealt with on paper. No declaration granted as: appeared no immediate prospect of defendant seeking to commence adjudication proceedings; defendant did not appear to intent to take part in proceedings; and, was a potential contentious issue of fact. Case management directions were however given. Case management hearing held thereafter. Both parties attended, and the Defendant indicated it would now oppose the Claimant's application. **Held**, It was clear that the Defendant has no immediate intention to pursue adjudication proceedings, the question in the Part 8 proceedings as to whether the contract incorporated a right to adjudicate was moot. Application stayed, and proceedings converted to Part 7 claim. Turning to the issue of costs, the Judge criticised the conduct of both parties. The Defendant was, for instance, criticised for raising and persisting with the issue of adjudication. It was characterised as a threat and a negotiating tactic. The Claimant was also criticised however, for the immediate issue of Part 8 proceedings. In criticising both parties' conduct the Judge emphasised that r.1.3 required both the parties and their legal representatives to assist the court in furthering the overriding objective, which since the implementation of the Jackson reforms included ensuring that cases are dealt with at proportionate cost. As such, litigation cannot be conducted either by way of the pursuit of issues that have 'no real impact' on the matters in dispute or by 'war of attrition by correspondence' (see para.45). It was no longer permissible to conduct litigation in ways that were unreasonable or evidenced intransigence. Where parties conducted litigation in such ways, ways that did no secure the most expeditious, economical and proportionate means of bringing real issues to trial, costs consequences will follow. Parties and the court should aim to secure a 'culture or cooperative conduct' to enable real issues to be determined fairly (para.49). In the circumstances the Claimant was to receive its costs of the proceedings on the standard basis, albeit no order as to preparation and issue costs of the application was made. This order would however be varied if the stay on the application was lifted. Furthermore, the Claimant's costs of the action until the case management hearing were to be paid on an indemnity basis. The Claimant was then to pay 50% of the Defendant's costs, on the standard basis, of attendance at the CMC. (See ***Civil Procedure 2015*** Vol. 2, *Section 11-15; and see* ***Davies v Forrett*** [2015] EWHC 1761 (QB), 23 June 2015, unrep., para.23; ***Denton v White*** [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296, CA, paras 40–44.)

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Statutory Interest–Simple Interest

Senior Courts Act 1981, s.35A. Claim for simple interest under SCA 1981. Common ground between parties that purpose of interest award was compensatory not punitive. Issue before the court was how to determine how much interest was due by way of compensation under the court's wide discretion. **Held**, the appropriate interest rate was 3% above base rate. In reaching that decision, it was noted that (i) an award of simple interest may not be able to properly compensate an individual who had to borrow money and was kept out of their money for a long period; (ii) in the light of ***Sycamore Bidco v Breslin*** [2012] EWHC 3443 (Ch) and the Commercial Court Guide para.J14.1 there was now no presumption in favour of awarding interest at 1% above base rate in commercial cases; (iii) a distinction needed to be drawn between the approach taken in commercial and non-commercial such as personal injury cases, and cases which fell within neither of the former two categories. Hildyard J's guidance in ***Challinor v Juliette Bellis & Co*** [2013] EWHC 347 (Ch), paras 30–35, was helpful guidance in determining the approach to take to determine the appropriate rate in such cases. It was not however to be treated as legislation: care should be taken in considering whether it was of assistance on the facts of any individual case. Furthermore, the use of restitutio in integrum, in that case, as a means to explain the objective underpinning the interest setting exercise was deprecated; (iv) in considering what was a fair interest rate it was permissible to look at the range of interest rates held to apply in recent cases; the court would not enquire into actual loss or speculate as to what the claimant would have done with the money, see ***Challiner*** at para.21, and ***Reinhard*** at paras 22–23. ***Tate & Lyle v GLC*** [1983] 2 A.C. 509, HL, ***Claymore Services Ltd v Nautilus Properties Ltd*** [2007] EWHC 805 (TCC), [2007] B.L.R. 452, TCC, ***Shearson Lehman Hutton Incy v MacClaine Watson & Co*** [1990] ALL E.R. 723, Comm, ***Attrill v Dresdner Kleinwort Ltd Commerzbank AG*** [2013] EWCA Civ 394, [2013] 3 All E.R. 607, CA, ***Challinor v Juliette Bellis & C***o [2013] EWHC 347 (Ch), unrep.,

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- **RSM Bentley Jennison (A Firm) & Ors v Ayton** [2015] EWCA Civ 1120, 3 November 2015, unrep. (Lord Dyson MR, Underhill L.J., Dame Janet Smith)

Tender before claim–common law–unliquidated damages

CPR rr.2.2, 36.16(3)(a), 37.2, 37.3, PD37 and CPR Glossary. A dispute arose concerning an investment in an oil transaction. In pre-action correspondence the claimant's solicitors indicated that the claimant sought £100,025 plus interest and legal costs from the defendant. In reply the defendants' solicitors, without admitted liability, sent a cheque for £103,576.56 in settlement of the claim. The claimant rejected the offer, returned the cheque and thereafter issued proceedings. The defendant denied liability, and in addition relied upon the defence of tender before claim noting that it remained willing to pay the sum that had been previously tendered by cheque. The defendant further noted in its defence that the sum of £103,576.56 had been paid into court pursuant to CPR r.37.2. The defendant subsequently issued an application seeking to strike out the claim or, in the alternative, summary judgment on the claim or part of it. The Master dismissed the applications, holding that the defence of tender before claim was not available in the present case as the claim was one for unliquidated damages: the defence remained governed by the common law, which restricted its application to claims for liquidated damages. The defendant appealed from the Master's decision. The Court of Appeal noted that the common law position was well established: tender before claim was only available where liquidated damages were claimed: see ***Davys v Richardson*** (1888) and ***John Laing Construction Ltd v Dastur*** (1987). **Held**, the CPR had not altered the common law position. The definition of tender before claim in the CPR's glossary could be read as an attempt by the CPR's drafters to expand the scope of the defence. The attempt was misconceived: the defence was a matter of substantive law and not procedure. Rules of court, which govern procedure and practice, cannot alter or amend substantive law, per Parker L.J. in ***John Laing Construction Ltd*** at 691 C-D. In any event, the CPR's Glossary is limited in its scope: see CPR r.2.2, which makes clear that the Glossary is no more than a guide to the meaning of the terms it deals with and does not purport to give them any meaning 'which they do not have in the law generally.' Accordingly the appeal was dismissed: the defence remained that set by the common law and was thus limited to liquidated claims. ***Dixon v Clarke*** (1848) 5 CB 365, 136 E.R. 919, CtQB, ***Davys v Richardson*** (1888) 21 Q.B.D. 202, QBD, ***John Laing Construction Ltd v Dastur*** [1987] 1 W.L.R. 686, CA, ***Smith v Springer*** [1987] 1 W.L.R. 1720, CA ref'd to. (See ***Civil Procedure 2015*** Vol. 1 para.16.0.1.)

- **Jones v Longley & Ors** [2015] EWHC 3362 (Ch), 20 November 2015, unrep. (Master Matthews)

Litigants-in-person–costs–application of the CPR

Senior Courts Act 1981, s.50, CPR rr.44.2, 46.3. Dispute arose between co-executors of a will. Probate granted. Subsequently order made under Administration of Justice Act 1985, s.50 removing the claimant as co-executor. First defendant acting in-person. Issue arose whether court should take a different approach to assessing costs in respect of first defendant on the basis that he was a litigant-in-person. **Held**, while the court had a wide discretion under Senior Courts Act 1981, s.50 and CPR r.44.2 the court could not adopt a differential approach to applying the rules as to costs depending on whether a litigant was legally represented or not. (See ***Civil Procedure 2015*** Vol. 1 para.3.1A.1.)

- **Property Alliance Group Ltd v The Royal Bank of Scotland Plc** [2015] EWHC 3341 (Ch), 20 November 2015, unrep. (Birss J.)

Litigation Privilege–Dominant Purpose–Deceit–Failure to seek permission to use inadvertently disclosed privileged material

CPR r.31.20. Claim arising from swap contract sales. Allegations of misrepresentation, breach of contract, LIBOR manipulation. Inspection of audio recordings and related transcripts sought. Privilege asserted. Permission to use an email said to be subject to privilege that was disclosed inadvertently: CPR r.31.20. The audio recordings and transcripts were of meetings between the Claimant's Managing Director and two former employees of the Defendant. The recordings were made unbeknownst to the Defendant's former employees. The issue relating to privilege was whether the audio recording and transcripts between the individuals was made 'for . . . dominant purpose of conducting' the litigation. **Held**, (i) the issue was whether the conversation was privileged not whether the recording and transcript was privileged. The court, not the parties, must assess question of dominant purpose objectively taking account of all the evidence, including the intentions of those involved; (ii) while the Claimant's MD had arranged the meeting in order to gather evidence for the litigation, the Defendant's former employees attended the meeting for unrelated reasons. The meeting's dominant purposes could not properly be said to be related to the conduct of litigation. It had two 'entirely divergent purposes.'; (iii) that the Claimant's MD had deceived the Defendant's former employees as to the purpose of the meeting was of fundamental importance in determining the dominant purpose question; (iv) as such the meeting, and a fortiori, the recording and transcript, were not subject to privilege;

(v) in respect of the inadvertently disclosed email, it was subject to privilege. A reasonable solicitor ought to have realised it was more likely than not to be privileged and that it had been disclosed in error. The Defendant had made substantial use of the email without seeking permission from the court as required by CPR r.31.20. That the email disclosed non-disclosure by the Claimant was no more than a mitigating factor in assessing the appropriate costs sanction that would be imposed on it. It was not exculpatory. ***Grant v Southwestern*** [1975] 1 Ch 185, ChD, ***Grant v Downs*** (1976) 135 C.L.R. 674, HC (Aus), ***Waugh v British Railways Board*** [1980] A.C. 521, HL, ***Plummers Ltd v Debenhams Ltd*** [1986] B.C.L.C. 447, ChD, ***Guinness Peat Properties v Fitzroy Robinson Partnership*** [1987] 1 W.L.R. 1027, CA, ***Parry v News Group*** (16 November 1990, CAT), [1990] 141 N.L.J. 1719, (CA), ***Telebooth v Telestra*** [1994] 1 V.R. 337, SCt Vic (Aus), ***Bourns v Raychem (No. 3)*** [1999] All ER 154, CA, ***Crisford v Hazard*** [2000] 2 N.Z.L.R. 729, NZ CA, ***Al-Fayed v Commissioner of Police for the Metropolis*** [2002] EWCA 780, unrep., CA, ***China National Petroleum Corporation v Fenwick Elliott*** [2002] EWHC 60 (Ch), [2002] T.C.L.R. 19, ChD, ***LFEPA v Halcrow Gilbert*** [2004] EWHC 2340 (QB), unrep., QBD, ***Three Rivers District Council v the Bank of England*** (No.6) [2004] UKHL 48, [2005] 1 A.C. 610, HL, ***Woori Bank v KDB Ireland*** [2005] IEHC 451, unrep., HC IE ref'd to. (See ***Civil Procedure 2015*** Vol. 1 paras 31.3.5 and 31.20.1.)

■ **Mulvenna and Smith v Secretary of State for Communities and Local Government & Anor** [2015] EWHC 3494 (Admin), 4 December 2015, unrep. (Cranston J.)

Judicial Review–Time Limits–EU Law–Principle of Effectiveness

Town and Country Planning Act 1980, ss.78, 79, CPR rr.3.1(2)(a), 54.5(5). Two judicial review proceedings brought in respect of decisions taken by the Secretary of State for Communities and Local Government to recover planning appeals and subsequent dismissal of the appeals. Various issues arose, however one question related to the fact that the judicial review proceedings were issued out of time. One judicial review claim was issued 20 months out of time, the other 15 months out of time. **Held**, (i) no extension of time would be granted under CPR r.3.1(2)(a). The time limits to bring judicial review proceedings are deliberately tight. They are intended to promote the proper administration of public law. The onus is on individuals who wish to challenge a decision by way of judicial review to do so timeously. They should not wait for others to do so; (ii) the imposition of the time limits applicable to judicial review claims did not infringe the principle of effectiveness arising under EU law. Commentary, based on conclusions drawn from EU procurement law, to the effect that the judicial review time limits were likely to be found to breach the principle of effectiveness, contained in Civil Procedure 2015 Vol.1, para.54.5.1 referred to disapprovingly and as having 'no basis in authority.' ***Johnston v Chief Constable of the Royal Ulster Constabulary (Case C-222/84)*** [1987] Q.B. 129, ECJ, ***Levez TH Jennings (Harlow Pools) Ltd (Case C-326/96***) [1999] 2 CMLR 363, ECJ, ***Alabaster v Barclays Bank plc*** [2005] EWCA Civ 508, [2005] 2 C.M.L.R. 19, CA, ***Uniplex (UK) Ltd v NHS Business Services Authority*** [2010] 2 C.M.L.R. 47, ECJ, ***SITA UK Ltd. v Greater Manchester Waste Disposal Authority*** [2011] EWCA Civ 156, [2011] L.G.R 419, CA, ***R (Unison) v Lord Chancellor*** [2014] EWHC 4198 (Admin), [2015] I.C.R. 390, Admin. (See ***Civil Procedure 2015*** Vol. 1 para.54.5.1.)

■ **Tanir v Tanir** [2015] EWHC 3363 (QB), 7 December 2015, unrep. (Garnham J.)

Failure to serve claim form–default judgment–set aside

CPR rr.1.1, 6.4, 6.18, 12.3, 13.2, 13.3, 39.5. Claimant obtained judgment against defendant before the Turkish courts in 2012. Claimant commenced enforcement proceedings in England in December 2014. Judgment in default of acknowledgement of service entered in January 2015. Defendant issued application to set aside default judgment. Application dismissed by the Master. Defendant appealed from that dismissal. Garnham J. allowed the appeal. **Held**, (i) the central issue was whether the default judgment was irregular due to it never having been served upon the defendant. Service was to have been effected by the court. Evidence from the court file did not demonstrate that it had ever attempted to serve the claim by post. Furthermore the Defendant's conduct was, as a matter of fact, inconsistent with his having been served; (ii) that a court may properly set aside a default judgment and an appellate court may allow an appeal from a refusal to set aside is clear from ***Patel v Smeaton*** (2000). It was clear from that decision that it cannot be presumed that because a court is supposed to take certain steps to effect service that it will in fact have done so absent a record to support the supposition that it has in fact done so; (iii) the approach taken in ***Nelson v Clearsprings (Management) Ltd*** (2007) para.42 was not followed. It was distinguishable from the present case, as it was not concerned with an application to set aside an irregular judgment, and in any event the wording of CPR r.13.2 was mandatory. Having found that the claim was never served, the judgment was irregular, hence wrongly entered. As such it could not but be set aside. ***Patel v Smeaton*** (24 October 2000, CA) unrep., CA, ***Nelson v Clearsprings (Management) Limited*** [2006] EWCA Civ 1252, [2007] 1 W.L.R. 962, CA. (See ***Civil Procedure 2015*** Vol. 1 paras 6.1.7.2, 13.2.1.)

- **Commissioner of Police of the Metropolis v Abdulle** [2015] EWCA Civ 1260, 8 December 2015, unrep. (Moore-Bick VP-CA (Civ), Lewison, Kitchin L.JJ.)

Appeals from strike out decisions–sparing approach–deprecation of satellite litigation

CPR rr.3.4, 3.7, 3.9. Claim for damages arising from alleged unlawful detention and use of unlawful force. Significant procedural delay, a large degree of which was engendered by the claimants and/or their solicitors. Additionally, procedural default by claimants. Defendant applied to have claim struck out on grounds of procedural non-compliance. Application refused by the Judge, who, permitted claim to continue as it was practically ready for trial, it was for a significant sum and concerned a serious issue in terms of the substantive claim. Permission was however granted on the terms that previous, unpaid, cost orders were paid by the claimants. The claim stayed until payment made. Non-compliance with the terms would result in the claim being subject to an automatic strike-out. Defendant appealed. Appeal dismissed by the Court of Appeal. In giving judgment Lewison L.J. noted that in assessing the application he would have given greater weight to the claimants' delay, the seeming lack of competence on the part of their solicitors, and the fact the fixed trial date was lost and would have allowed the application to strike out. Moore-Bick VP-CA (Civ) and Kitchen L.J. agreed. However, the Court **held**, (i) that the Judge's decision could not be characterised as perverse, such as to enable the Court of Appeal to interfere with the decision; (ii) the approach set out by Davis L.J in ***Chartwell Estate Agents Ltd*** at para.63 in respect of CPR r.3.9 applied equally to decisions taken under CPR r.3.4(2)(c): an appeal court 'will not lightly interfere' with the first instance judge's decision. Satellite litigation concerning case management decisions taken under this rule was as much to be deprecated as it was in respect of r.3.9. ***Mannion v Gint***y [2012] EWCA Civ 1667, unrep., CA, ***Mitchell v News Group Newspapers Ltd*** [[2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, CA, ***Chartwell Estate Agents Ltd v Fergies Properties SA & Anor*** [2014] EWCA Civ 506, [2014] 3 Costs L.R. 588, CA, ***Denton v White*** [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296, CA ref'd to. (See ***Civil Procedure 2015*** Vol. 1 paras 3.4.3.5, 3.4.4, 52.3.9.)

- **Cook v Virgin Media Limited & Anor** [2015] EWCA Civ 1287, 14 December 2015, unrep. (Lord Dyson MR, Floyd and Simon L.JJ.)

Forum non conveniens–Application to intra-UK disputes–court's jurisdiction to make orders of own initiative

Civil Jurisdiction and Judgments Act 1982, Brussels I Regulation 44/2001, Brussels Regulation 1215/2012, CPR rr.1(1)(2)(e), 3.1(2)(f) and (m), 3.3(1), 11. Two personal injury claims. Injuries alleged to have arisen in Scotland. Claims issued in England. Claimants domiciled in Scotland. Defendants' registered offices in England. Jurisdiction disputed. Claims allocated to Carlisle County Court. DJ, initially, stayed claims, having found Scotland to be the most convenient forum. Claimants failed to show cause why claims should proceed in England. Claims struck out as should have been issued in Scotland. Application to set aside refused. Appeal to Circuit Judge failed. Circuit Judge held court could exercise power to strike out on *forum non conveniens* grounds even though defendants had not raised objection under CPR r.11. Also held Civil Jurisdiction and Judgments Act 1982 did not preclude principle of *forum non conveniens*. Appeal to Court of Appeal noted that no prior authority on question whether English court can strike out or stay purely domestic claim on forum non conveniens grounds where Scotland is the most appropriate forum, and **held**, (i) Brussels Regulation regime only applies to claims that have an international element. It does not apply to claims that are purely internal to a Member State. Hence no application to intra-UK disputes; (ii) accordingly, intra-UK disputes are governed by the principle of forum non conveniens, which is further preserved in terms of its domestic application by Civil Jurisdiction and Judgments Act 1982, s.49; (iii) where defendants do not make an application under CPR r.11 to challenge the court's jurisdiction, an English court has the power to act on its own initiative, and may make suitable case management orders, such as staying or striking out the claim on forum non conveniens grounds, see CPR r.3.1.(2)(m) and r.3.3(1). The court's power to make such an order of its own initiative was not precluded by the Court of Appeal's decision in ***Hoddinott***, which simply provided that a defendant who had failed to make a CPR r.11 application would be taken to have accepted the court's jurisdiction. ***Hoddinott*** did not deal with the question of the court's own powers to determine its jurisdiction; (iv) such an order made under r.3(1)(2)(m) would, for instance, further the requirements of CPR r.1.1(2)(e); (v), finally, in such a case it may be sensible, where a finding is made that another part of the UK is the most convenient forum to try a claim, to stay rather than strike out the claim. ***Kleinwort Benson v City of Glasgow DC (Case C-346/93)*** [1995] ECR I-615, ECJ, ***Owusu v Jackson*** (Case C-281/02) [2005] Q.B. 801, ECJ, ***Hoddinott v Persimmon Homes (Wessex) Ltd*** [2007] EWCA 1203, [2008] 1 W.L.R. 806, CA, ***Rehder v Air Baltic Corporation (Case C-204/08***) [2009] I.L.Pr. 44, ECJ, ***Color Drack GmbH v Lexx International Vertriebs GmbH (Case C-386/05)*** [2010] 1 W.L.R. 1909, ECJ, ***Maletic v lastminute.com GmbH (Case C-478/12)*** [2014] Q.B. 424, ECJ, ref'd to. (See ***Civil Procedure 2015*** Vol. 1 paras 3.3.1, 3.1.11A, 11.1.1.)

Thevarajah v Riordan & Ors [2015] UKSC 78, 16 December 2015, unrep. (Lord Neuberger PSC, Lord Mance JSC, Lord Clarke JSC, Lord Sumption JSC, Lord Hodge JSC)

Relief from Sanctions–Debarring Order

CPR rr.3.1(7), 3.9. The parties entered an agreement whereby the Respondent (Thevarajah) was to purchase shares in a property development company. The Respondent paid the purchase price (£1.572 million), and thereafter issued proceedings for specific performance of the agreement, and other relief. The Respondent subsequently obtained a freezing order in March 2013, which required, amongst other things, the Appellants to disclose certain financial and related information by May 2013. The Appellants failed to disclose the information either by the required time or thereafter. Upon application by the Respondent an 'unless order' was granted, which required the Appellants to disclose the relevant information by 1 July 2013 failing which they were to be debarred from defending the claim. The Appellants failed to comply with the 'unless order'. On 9 August 2013 Hildyard J. granted an application by the Respondent that the Appellants be debarred from defending the claim in the light of their failure to comply with the 'unless order'. Hildyard J. further dismissed a cross-application by the Appellants seeking a determination that they had complied with the order or, in the alternative, that they be granted relief from sanction under CPR r.3.9 in the event that they were found to have failed to comply with the order. On 2 October 2013, one day prior to the trial of the action, the Appellants issued a further application for relief from sanction. The trial and the relief application were listed together before Mr Andrew Sutcliffe QC, sitting as a deputy judge of the High Court. Relief was granted, the debarring order discharged and the trial adjourned to a later date. The Respondent appealed from that decision to the Court of Appeal, which allowed the appeal and restored the debarring order. The Appellants appealed from that decision to the UK Supreme Court. **Held**, appeal dismissed. Lord Neuberger PSC gave the sole judgment, with which the other Justices agreed: (i) but for the appellants' interest in receiving an explanation from the UKSC in its own words why the appeal was to be dismissed, the appeal could have simply been dismissed by the court simply endorsing the judgment of Richards L.J. giving the Court of Appeal decision that was under appeal: see ***Thevarajah v Riordan & Ors*** [2014] EWCA Civ 14, [2014] CP Rep 19. The UKSC's judgment was 'not intended to differ from [the Court of Appeal's] essential reasoning'; (ii) the Court of Appeal in ***Mitchell*** and ***Denton*** had authoritatively stated the test for relief from sanctions under CPR r.3.9. Hildyard J's decision pre-dated those decisions; it was however consistent with the approach they would articulate. Neither party had suggested that the UKSC should, in this case, reconsider those decisions. They were right not to do so; (iii) CPR r.3.1(7) applied to the application for relief before the deputy judge. The Court of Appeal was correct in holding that the deputy judge took the wrong approach to the Appellants' application under r.3.1(7). As the Appellants could not show there was a material change of position the deputy judge should not have considered the application on its merits: see ***Mitchell*** para.44-45 and ***Collier*** para.40; (iv) even if CPR r.3.1(7) did not apply to the application before the deputy judge the Appellants would still have had to show a material change in circumstances in order to persuade the court to exercise its discretion to vary or rescind its order: see ***Chanel Ltd*** at 492-493, as supported by ***Mitchell*** at para.44; (v) the Appellants could not show that the Court of Appeal erred in holding that there was no material change in circumstance as compliance with an 'unless order' after a debarring order and a refusal to grant relief from sanctions has been made cannot amount to such a change in circumstances. Late compliance could in principle however provide the basis for a second, successful, application for relief from sanctions; (vi) there was no factual basis to support a finding concerning compliance with the 'unless order' by the deputy judge contrary to that made Hildyard J.; (vi) finally, the Appellants' delay of eight weeks from Hildyard J.'s order to making the application heard by the deputy judge was, as the Court of Appeal concluded, an issue that posed 'difficulties' in terms of persuading a court to exercise its discretion. ***Chanel Ltd v FW Woolworth & Co Ltd*** [1981] 1 W.L.R. 485, CA, ***Lloyds Investment (Scandinavia) Ltd v Christen Ager-Hanssen*** [2003] EWHC 1740 (Ch), unrep., ChD, ***Collier v Williams*** [2006] EWCA Civ 20, [2006] 1 W.L.R. 1945, CA, ***Tibbles v SIG plc*** [2012] EWCA Civ 518, [2012] 1 W.L.R. 2591, CA, ***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, ref'd to. (See ***Civil Procedure 2015*** Vol. 1 paras 3.1.9, 3.1.9.1 and 3.9.3 et seq.)

Practice Updates

STATUTORY INSTRUMENTS

- **THE CIVIL LEGAL AID (MERITS CRITERIA AND INFORMATION ABOUT FINANCIAL RESOURCES) (AMENDMENT) REGULATIONS 2015** (SI 2015/2005). In force from **10 December 2015.**

Amends the Civil Legal Aid (Merits Criteria) Regulations 2013 (SI 2013/104). Amends definition of private law children case in regulation 2 of the 2013 Regulations. Amends criteria in regulation 69 of the 2013 Regulations in respect of victims of domestic violence and family matters. Amends paragraph 23 of the schedule to Legal Aid (Information about Financial Resources) Regulations 2013 (SI 2013/628), concerning direct payments under Care Act 2014, ss.31-33, to include reference to Children Act 1989, s.17A, and Children and Families Act 2014, s.49(3).

- **THE INSOLVENCY PRACTITIONERS AND INSOLVENCY SERVICES ACCOUNT (FEES) (AMENDMENT) ORDER 2015** (SI 2015/1977). In force from **31 December 2015.**

Amends Insolvency Practitioners and Insolvency Services Account (Fees) Order 2003 (SI 2003/3363), articles 2(a) and 2(b). Increases fee for recognition as a recognised professional body from £4,500 to £12,000. Increases, as from 1 January 2016, from £300 to £360 the multiple used to calculate the annual fee payable by such bodies.

- **ALTERNATIVE DISPUTE RESOLUTION FOR CONSUMER DISPUTES (AMENDMENT) (NO 2) REGULATIONS 2015** (SI 2015/1972). In force from **9 January 2016.**

Amends Prescription and Limitation (Scotland) Act 1973, the Limitation Act 1980, the Foreign Limitation Periods Act 1984, the Equality Act 2010 and the Limitation (Northern Ireland) Order 1989 to remove now unnecessary reference to 'ADR Official'. Amends Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (SI 2015/542) through inserting a new article 8A and sub-para.(g) in para.2 of schedule 3 to the provision of website links ODR platforms by various bodies.

- **BLOOD TESTS (EVIDENCE OF PATERNITY) (AMENDMENT) REGULATIONS 2015** (SI 2015/1834). In force from **23 November 2015.**

Amends Blood Tests (Evidence of Paternity) Regulations 1971 (SI 1971/1861) to enable suitably trained CAFCASS and CAFCASS Cymru officers and individuals appointed by testers to take blood samples under the Regulations, and exempts samples taken by such officers from the fee regime provided for under the 1971 Regulations. Further amends the 1971 Regulations to make provision governing the procedure for obtaining blood samples and supervision of such activity. Further amendments modernise the Regulations to take account of the use of digital photography and electronic documentation. (See ***Civil Procedure 2015*** Vol. 1 CPR PD23B para.13; Vol. 2 paras 9B-1263 et seq.)

- **THE BLOOD TESTS (EVIDENCE OF PATERNITY) (AMENDMENT) (REVIEW) REGULATIONS 2015** (SI 2015/2048). In force from **11 January 2016.**

Amends Blood Tests (Evidence of Paternity) (Amendment) Regulations 2015 (SI 2015/1834) to provide, via a new regulation 3, for review by the Secretary of State of the amendments effected by SI 2015/2034 upon the Blood Tests (Evidence of Paternity) Regulations 1971 (SI 1971/1861).

MINISTERIAL STATEMENT

- **INSOLVENCY LITIGATION: WRITTEN STATEMENT–HCWS42/ HLWS410,** in force from **April 2016.**

On 17 December 2015, the Minister for Justice issued a Ministerial Statement noting that as from April 2016 the insolvency exception to the reforms to 'no-win no-fee' agreements introduced by Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2013 would cease to have effect.

PRACTICE GUIDANCE

- **PRACTICE STATEMENT: LISTING OF CASES FOR TRIAL IN THE PATENTS COURT, 7 December 2015, unrep.**

On 7 December 2015 Arnold J, with the concurrence of Etherton C, issued guidance by way of a Practice Statement concerning trial listing in the Patents Court. It replaces previous guidance issued on 28 January 2015, and incorporates guidance given in ***Merck Sharp & Dohme Ltd v Shionogi*** [2015] EWHC 3438 (Pat), 25 November 2015, unrep. The guidance is replicated below.

"Practice Statement: Listing of Cases for Trial in the Patents Court

The Patents Court endeavours [to] bring patent cases on for trial where possible within 12 months of the claim being issued. To this end, the following procedure will be adopted.

1. The parties will be expected (a) to start to consider potential trial dates as soon as is reasonable (sic) practicable after the service of the proceedings and (b) to discuss and attempt to agree trial dates with each other when seeking to agree directions for trial.
2. The starting point for listing trials is the current applicable Trial Window advertised by the Chancery List Office. Patent cases will be listed on the basis that the Trial Windows are divided as follows: estimated hearing time (excluding pre-reading and preparation of closing submissions) up to 5 days; estimated hearing time (excluding pre-reading and preparation of closing submissions) 6 to 10 days; and estimated hearing (excluding pre-reading and preparation of closing submissions) over 10 days.
3. Where it will enable a case to be tried within 12 months, or shortly thereafter, the Court may list a trial up to one month earlier than the applicable Trial Window without the need for any application for expedition.
4. The Court will use its case management powers in a more active manner than hitherto, with a view to dealing with cases justly and at proportionate cost in accordance with CPR rule 1.1. This may have the effect of setting limits on hearing times that enable cases to be listed promptly. For example, the Court may direct that a case estimated at 6 days will be heard in 5 days, and may allocate time between the parties in a manner which enables that to be achieved.
5. Where it makes a significant difference to the time which cases must wait to be listed for trial and it will not cause significant prejudice to any party, cases may be listed without reference to the availability of counsel instructed by the parties.

These steps do not exclude the possibility of cases being expedited where expedition is warranted. Nor do they exclude the possibility of the parties opting to use the streamlined procedure or the Shorter Trial pilot scheme or the Flexible Trial pilot scheme.

This Practice Statement is issued with the concurrence of the Chancellor of the High Court. It supersedes the Practice Statement issued on 28 January 2015.

Arnold J
Judge in Charge of the Patents Court
7 December 2015"

INTELLECTUAL PROPERTY ENTERPRISE COURT (MULTI TRACK) PRACTICE NOTE–ENFORCEMENT OF FINANCIAL ELEMENT OF AN ORDER, 17 December 2015, unrep.

On 17 December 2015 HHJ Hacon issued guidance concerning the documents that should be filed with an application to enforce the financial element of an order of the IPEC. The guidance is replicated below.

"Intellectual Property Enterprise Court (Multi Track) Practice Note

Enforcement of Financial Element of an Order

A party making an application for enforcement of a financial element of an Order (as opposed to an injunction) made in the Intellectual Property Enterprise Court (Multi Track) must lodge the documents set out below with the High Court. Thus must be done at The Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 7NL. The documents should be in hard copy and contained in a bundle which is clearly marked 'For the attention of the IPEC Small Claims Track'. The relevant documents are:

- the enforcement application;
- any evidence in support of the application;
- the sealed order of which enforcement is sought;
- any appeal notice or appeal order; and
- any order staying the proceedings.

HHJ Hacon
Head of the Intellectual Property Enterprise Court
17 December 2015"

PRE-ACTION PROTOCOLS

PRE-ACTION PROTOCOL FOR LOW VALUE PERSONAL INJURY CLAIMS IN ROAD TRAFFIC ACCIDENTS

Paragraph 1.1(A1)(a) and (b) of the Protocol amended to replace the reference to "1 January 2016" with a reference to "6 April 2016", such that the amended paragraphs read as follows:

"(A1) 'accredited medical expert' means a medical expert who—

(a) prepares a fixed cost medical report pursuant to paragraph 7.8A(1) before 6 April 2016 and, on the date that they are instructed, the expert is registered with MedCo as a provider of reports for soft tissue injury claims; or

(b) prepares a fixed cost medical report pursuant to paragraph 7.8A(1) on or after 6 April 2016 and, on the date that they are instructed, the expert is accredited by MedCo to provide reports for soft tissue injury claims;"

The date upon which the amendment took effect is unclear, however it appears to have taken effect from 23 December 2015, when notice of the amendment was placed on the Ministry of Justice's website.

In Detail

Developments in the Competition Appeals Tribunal–II

Collective Proceedings Update–Clarification

Substantial reform to collective proceedings in the Competitions Appeals Tribunal (CAT) was previously noted in CP News (See "In Detail" section, CP News 09/15). The new procedure introduced by those reforms applies to claims arising on or after 1 October 2015. Contrary to the impression that may have been given in CP News 09/15, for claims arising before 1 October 2015, the new procedure is governed by the limitation provisions which applied under Rule 31(1)-(3) of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372): see Rule 119, 2015 Rules, which, for ease of reference, is replicated below:

"**Savings–Rule 119.—**

(1) Proceedings commenced before the Tribunal before 1st October 2015 continue to be governed by the Competition Appeal Tribunal Rules 2003 (the '2003 Rules') as if they had not been revoked.

(2) Rule 31(1) to (3) of the 2003 Rules (time limit for making a claim) continues to apply in respect of a claim which falls within paragraph (3) for the purposes of determining the limitation or prescriptive period which would apply in respect of the claim if it were to be made on or after 1st October 2015 in—

(a) proceedings under section 47A of the 1998 Act, or

(b) collective proceedings.

(3) A claim falls within this paragraph if—

(a) it is a claim to which section 47A of the 1998 Act applies; and

(b) the claim arose before 1st October 2015.

(4) Section 47A(7) and (8) of the 1998 Act as they had effect before they were substituted by paragraph 4 of Schedule 8 to the Consumer Rights Act 2015(c) continue to apply to the extent necessary for the purposes of paragraph (2)."

Also see: The Competition Appeal Tribunal–Guide to Proceedings 2015, paras 5.12-5.13; and, ***Sainsbury's Supermarkets Ltd v Mastercard Incorporated*** [2015] EWHC 3472 (Ch), paras 24-30 for further consideration (detailed below).

CAT Transfer Jurisdiction–Recent Developments

Proceedings can be transferred from the County and High Courts to the CAT: see CPR PD30 paras 8.3-8.6 and 8.7-8.10 and The Section 16 Enterprise Act 2002 Regulations 2015 (SI 2015/1643).

In ***Sainsbury's Supermarkets Ltd v Mastercard Incorporated*** [2015] EWHC 3472 (Ch), 30 November 2015, unrep., Barling J. exercised the transfer jurisdiction for the first time. The claim, which was for damages in excess of £100 million, arose from alleged breaches by the defendant, Mastercard Incorporated, of the Treaty on the Functioning of the European Union and/or the Competition Act 1998. The claim was issued in the High Court, Chancery Division and was set down for a nine-week trial, to commence on 11 January 2016. The claim was, understandably, noted to be complex: over 20 separate issues arose to be determined, with, amongst other things, over 1000 pages of expert evidence to be considered. Barling J. was the nominated case management and trial judge.

During the course of a case management hearing in November 2015 Barling J. raised the question whether the claim should be transferred to the CAT for trial. In the course of so doing he noted the following:

- the CAT's jurisdiction to hear private actions had been broadened as a consequence of the Consumer Rights Act 2015 (CRA 2015). As such it could now hear both follow-on and standalone competition damages claims. The High Court is no longer the sole venue in which the latter could be heard; and
- one consequence of the enlargement of the CAT's jurisdiction was that standalone claims could now be transferred to it from the High Court: see Enterprise Act 2002, s.16, Competition Act 1998, s.42A (as substituted for the original s.42A by part 1 of sch.8 of the CRA 2015; the 2015 Regulations and CPR PD30 paras 8.3-8.6 and 8.10-813, both as in force from 1 October 2015 (paras 5-12).

Barling J. then outlined the advantages of transfer to the CAT, which are:

- its ability to draw upon judicial expertise in competition law from CAT Chairman and former Chairman and now, additionally, suitably qualified judges of the High Court and its equivalents in Scotland and Northern Ireland;
- the specialist nature of the CAT, in that its panels are constituted of a variety of expert economists, accountants etc, as well as judges. This broad, specialist, expertise is particularly suited to the adjudication of competition claims, which invariably require the assessment of complex, technical evidence; and
- that the CAT has the support of invaluable legal and administrative assistance, which given the length and complexity of competition claims was of "particular value" (paras 13-18).

These advantages enabled the CAT to draw on the High Court's expertise in managing complex, lengthy claims, while also securing judicial continuity between the two jurisdictions should a claim be transferred between them. The fact of judicial continuity was particularly highlighted in respect of claims that had reached an advanced stage (para.18). It being obvious, albeit unstated, that transfer of a claim at such a stage to a new judge may well give rise to otherwise unnecessary and potentially disproportionate additional cost and delay. Such potential problems were however obviated where the judge dealing with such a claim in the High Court could deal with the claim post-transfer to the CAT.

Subject to two points raised by the claimant, both parties agreed to the transfer of the present claim from the High Court to the CAT. Barling J. transferred the claim as from 1 December 2015 to the CAT. In doing so he gave the following guidance:

- Where proceedings have reached an advanced stage in the High Court, transfer to the CAT would be unlikely to be effected if such transfer but the trial window at risk. Enquiries should therefore be made of the CAT Registry to ascertain whether any proposed transfer could be effected without adversely affecting the existing trial timetable. In the present case the time window could be preserved following transfer;
- Whether the judge assigned to manage and try a claim in the High Court was available to hear the matter in the CAT if it was transferred there was a significant factor in assessing whether to effect such a transfer. In the present case the considerable familiarity Barling J. had with the claim thus pointed towards transfer as no loss of familiarity, with the attendant adverse consequences that would give rise to, would arise (paras 20-21).

Turning to the two points raised by the claimant:

Limitation

- The claimant queried the application of the transitional provisions set out in Rule 119, 2015 Rules to the present case. The particular concern at the heart of the query was *if* Rule 119 was held to apply to the transferred claim, then the CAT would only have jurisdiction to deal with those aspects of the claim that fell within the limitation period applicable under that rule. Its jurisdiction would be thus limited to dealing with such part of the overall

claim where the cause of action arose "less than two years prior to commencement of the claim": see Rule 31(1)-(3) Competition Appeal Tribunal Rules 2003 and Rule 119, 2015 Rules.

Barling J. did not rule on the precise scope of application of Rule 119, 2015 Rules i.e., on whether it applied to both follow-on and standalone claims or simply to follow-on claims. He did however express the view that Rule 119, 2015 Rules had no application to the proceedings "such as the present". It did not because such proceedings: were commenced in the High Court not the CAT and Rule 31, 2003 Rules and Rule 119, 2015 Rules only apply to proceedings that commence in the CAT; Rule 119, 2015 Rules only applies to claims made on or after 1 October 2015, the present claim was made before that date; the present claim was not commenced under s.47A, Competition Act 1998 but under the High Court's jurisdiction (paras 24-30).

Additional Costs

- The claimant raised concerns about the additional costs that would be incurred following any transfer to the CAT, such costs arising from the necessity of producing four additional trial bundles. The cost of each additional bundle was noted to be £6,400. In the context of the present litigation, and the level of damages sought, while this additional cost was not to be underestimated, it was not such as to amount to a significant factor in considering whether to effect a transfer to the CAT from the High Court, nor was it sufficient to justify an order requiring the additional bundle costs to be shared by both parties (paras 31-32).

Barling J. transferred the claim to the CAT. In doing so, and no doubt mindful of the limitation question, he did so expressly on the basis that the transfer did not 'in any way alter, limit or exclude in any respect any element of the claimant's claim as constituted in (the High Court)'.

The decision provides helpful guidance on the approach to the question whether to transfer proceedings from the High Court to the CAT. The guidance is strongly suggestive that the High Court's approach will be such as to effect such transfers, except where they would adversely effect the trial window or where judicial continuity could not be maintained post-transfer in cases where a single judge had had responsibility for the claim for any real length of time in the High Court. It can be anticipated that if a transfer application were made reasonably shortly after a claim had been commenced in the High Court the significance of both the trial timetable and judicial continuity questions would not loom large in the exercise of discretion.

Furthermore, while Barling J's judgment does not resolve the issue over the exact scope of application of Rule 119, 2015 Rules it does suggest a means to sidestep its potential application. Following the approach taken in this case it would seem that such claims as can be commenced in the High Court can, effectively, avoid any limitations applicable under Rule 119 by being issued there and then being transferred to the CAT. Such transfer would, if sought at a very early stage, such as immediately following issue in the High Court, appear on Barling J's approach to be one that would have good prospects of succeeding.

Looked at more broadly, that the inter-play between the jurisdiction of the High Court and that of the CAT can give rise to such differences might seem to raise the question whether Rule 119, 2015 Rules could usefully be revisited. The creation of otherwise avoidable incentives to issue claims in the High Court that might otherwise be issued in the CAT, which will then be transferred to the CAT, might appear to create a system that provides for the imposition of unnecessary cost and delay on the parties, as well as on the High Court. It is difficult to see how it is consistent with the policy underpinning the CPR's overriding objective, or with, as Barling J. noted, the broader policy objective of moving specialist claims to specialist tribunals.

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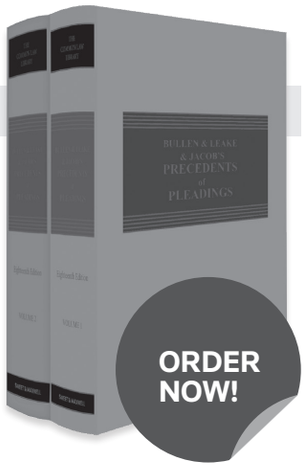

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