CIVIL PROCEDURE NEWS

Issue 2/2016 February 18, 2016

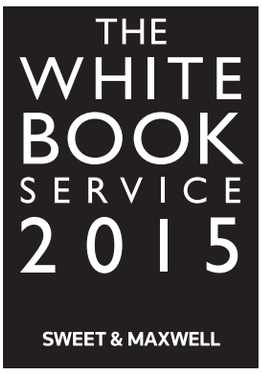
CONTENTS

Recent Cases

Queen's Bench Guide 2016

Court of Protection

Briggs Review



In Brief

Cases

The RBS Rights Issue Litigation [2015] EWHC 3433 (Ch), 26 November 2015, unrep. (Hildyard J, Chief Master Marsh.)

Expert Evidence–Test for admissibility

CPR r.35.1. Group litigation arising out of the purchase of shares from a rights issue. A question arose whether expert evidence was required in respect of investment information and/or equity analysis. **Held**, permission to call an expert on this issue refused. Expert evidence on the point could, however, be led by those experts already appointed. In reaching the decision the test articulated by Warren J. in ***British Airways Plc v Spencer*** [2015] EWHC 2477 (Ch) was followed: see Civil Procedure News Issue 9/2015. Furthermore, and particularly in large commercial claims, it was incumbent on litigants to adhere to r.35.1, both in spirit and to the letter. It was equally incumbent on the court to ensure that that was the case. ***Midland Bank Trust Company Ltd v Hetts Stubbs & Kemp*** [1979] 1 Ch. 384, ChD; ***Barings Plc v Coopers &Lybrand (No 2)*** [2001] EWHC 17 (ChD), [2001] P.N.L.R. 22, (ChD); ***JP Morgan Chase v Springwell*** [2006] EWHC 755 (Comm), [2007] 1 ALL E.R. (Comm) 549, Comm.; ***British Airways Plc v Spencer*** [2015] EWHC 2477 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2015*** Vol.1, para.35.1.1.)

Yentob v MGN Ltd [2015] EWCA Civ 1292, 17 December 2015, unrep. (Arden, Rafferty, Kitchen LJJ.)

Part 36 Offer–Normal cost consequences of non-acceptance–Whether unjust

CPR rr.36.17, 53. A number of Claimants brought proceedings against the Defendant seeking damages for misuse of private information. The Defendant made a Pt 36 offer to settle the Claimant's claim. The Claimant failed to beat the offer at trial. The trial judge held that while the Claimant had failed to beat the Pt 36 Offer, the judgment held that the Defendant's wrongdoing was greater than it admitted. As such it was unjust to impose the normal cost consequence. In reaching this decision, the trial judge held it was appropriate to compare the Pt 36 Offer's terms, the judgment, and the fact that there may be cases where a party is justified in proceeding to trial notwithstanding the terms of the offer. There were exceptional circumstances in the proceedings (the Defendant's limited admissions and denial of liability until shortly before trial; until trial the Claimant was unable to know the extent to which his phone had been hacked) that meant it would be unjust to make the normal Pt 36 costs order. No order as to costs was made. The Defendant appealed that order on two grounds: (i) the trial judge applied the wrong test in reaching that decision. A balance of justice test was applied, whereas the proper test is that it would be unjust to impose the normal order; and (ii) in reaching the decision took account of material that was irrelevant to the test. The Court of Appeal dismissed the appeal and **held**: (i) the trial judge had not applied a balance of justice test. There was no suggestion that the decision was based on an approach that understood the test to be one of whether the Claimant had simply concluded that it was reasonable to continue to trial to secure findings of fact. The test required something more: unjustness. The Judge applied that test; (ii) CPR r.36.17(5) is clear. It requires the court to take account of "all the circumstances" when assessing whether imposition of the normal cost consequences would be unjust. If the rule had been intended to require certain matters not to be considered within that assessment it would have said so explicitly. It did not; (iii) Pt 36 has two purposes. Its main purpose is to promote the making and acceptance of offers to settle. Its further, subsidiary, purpose is to prevent injustice that would, absent r.36.17(5), arise in cases where non-acceptance of an offer was properly justifiable; (iv) the fact that the Claimant could have sought a CPR r.53 open statement in court did not undermine the trial judge's decision. In the present cases, the trial judge properly found as a fact that such an open statement was unlikely to have been offered by the Defendant or made in court. ***Matthews v Metal Improvements Ltd*** [2007] EWCA Civ 215, [2007] CP Rep 27, CA, ref'd to. (See ***Civil Procedure 2015*** Vol.1, *para.36.17.3.)*

Infederation Ltd v Google Inc [2015] EWHC 3705 (Ch), 17 December 2015, unrep. (Roth J.)

Subsequent use of disclosed documents–Parallel Proceedings

Treaty on the Functioning of the European Union, Competition Act 1998, CPR r.31.22. Proceedings for breach of dominant position contrary to art.102 TfEU and chapter II prohibition in Competition Act 1998 brought by Claimant against Defendants. Parallel proceedings launched by European Commission investigating potential breach of art.102 TfEU against first Defendant. Claimant applied for permission under CPR r.31.22(1)(b) to provide European Commission with documents disclosed in the domestic proceedings. **Held**, application granted as: (i) CPR r.31.22 was a complete code governing collateral use of disclosed documents. Its rationale and application had recently been explained by Jackson L.J. in ***Tchenguiz v Director of the Serious Fraud Office*** [2014] EWCA

Civ 1409, unrep. It was clear that, amongst other things, the court's permission would only be granted in special circumstances; (ii) Pre-CPR authority had held that such special circumstances could arise where there were parallel proceedings before the domestic courts and the European Commission and in which the same evidential material should be available. It was "highly desirable" in such circumstances that the two tribunals should be able to evaluate the same evidence unless it was clear that on the facts that the material would not have any value in the collateral proceedings, per Ferris J in ***Apple Corps Ltd v Apple Computer Inc*** [1992] 1 C.M.L.R. 969; (iii) the decision in ***Apple Corps*** remained valid under the CPR, see for instance, ***Synstar Computer Services (UK) Ltd v ICL (Sorbus) Ltd*** [2002] I.C.R. 112; (iv) in the present case it was "highly desirable" to facilitate the European Commission's ability to evaluate the same issues using the same evidence as was available in the domestic proceedings. This would ensure that the two Tribunals reached their decisions following an evaluation of the same evidence and argument; (v) the argument that permission should not be granted because in this case the material sought to be released from the prohibition on subsequent was commentary on documents rather than documents was rejected. Disclosure of such material was a lesser invasion of the Defendants' right to privacy and confidentiality than disclosure of documents. Further, refusing to grant permission would not promote compliance with the disclosure obligation: see ***Tchenguiz Apple Corps Ltd v Apple Computer Inc*** [1992] F.S.R. 389, [1992] 1 C.M.L.R. 969, ChD; ***SmithKline Beecham PLC v Generics (UK) Ltd*** [2003] EWCA Civ 1109, [2004] 1 W.L.R. 1479, CA; ***Tchenguiz v Director of the Serious Fraud Office*** [2014] EWCA Civ 1409, unrep., CA; ***Synstar Computer Services (UK) Ltd v ICL (Sorbus) Ltd*** [2002] I.C.R. 112, ChD, ref'd to. (See ***Civil Procedure 2015*** Vol.1, para.31.22.1.)

- **Watts v Watts** [2015] EWCA Civ 1297, 21 December 2015, unrep. (Sales LJ, Cobb J, Sir Stanley Burnton.)

Appearance of bias–Recusal–deputy High Court Judge

CPR r.1. Probate action between siblings. The deputy High Court judge, a practising barrister, was leading counsel in separate, long-running litigation in which counsel for one of the siblings (S) was junior counsel. An issue arose whether this gave rise to an appearance of bias on the part of the deputy High Court judge, such that there would be a valid concern that she would favour S at trial. The deputy High Court judge dismissed an application to recuse herself brought on this basis by the other sibling (B). B appealed. The Court of Appeal dismissed the appeal and **held**: (i) a judge disclosing information to parties to enable them to object to their dealing with proceedings and to demonstrate that they have "nothing to hide" is only required to disclose material facts. There is no requirement to provide detail concerning the nature and subject matter of the litigation in which they, and as in this case counsel for one of the immediate parties, are instructed. Furthermore, the level of detail concerning such litigation a deputy High Court judge could provide would be limited, unless there was a strong public interest to the contrary, by their professional obligations and duty of confidentiality to their client. There was nothing, however, to stop a party asking a judge for further information in order to enable them to make an informed recusal application; (ii) the fact that the deputy High Court judge did not give reasons for her refusal of the recusal application at the time of the hearing was consistent with CPR r.1, and particularly the need to manage proceedings economically and efficiently. It did not reinforce an objective perception of bias towards the party making the recusal application; (iii) a notional fair-minded, informed observer would not consider that the deputy High Court judge would in the present circumstances be biased in the light of her leading counsel for S in unconnected proceedings. Such an observer would be aware of the high ethical standards and professional obligations imposed on both the deputy High Court judge and counsel for S. They would be aware of the potential for professional opprobrium and disciplinary proceedings were she to fail to adhere to those ethical standards. Furthermore, counsel for S could have no expectation of favour given this background of high standards and professional obligation. It was apparent from authority that closer professional relationships than that which arose in this case did not give rise to an appearance of bias; they did not because the relationships had to be understood against and in the light of the background of well-known professional standards applicable to the legal profession. ***Davidson v Scottish Ministers*** [2004] S.C.L.R. 991, HL; ***Porter v Magill*** [2001] UKHL 67; [2002] 2 A.C. 357, HL; ***Lawal v Northern Spirit Ltd*** [2003] UKHL 35; [2004] 1 All E.R. 187, HL; ***Resolution Chemicals Ltd v H. Lundbeck A/S*** [2013] EWCA Civ 1515; [2014] 1 W.L.R. 1943, CA; ***Jones v DAS Legal Expenses Insurance Co***. [2003] EWCA Civ 1071, CA; ***Locabail (UK) Ltd v Bayfield Properties Ltd*** [2000] Q.B. 451, CA; ***Taylor v Lawrence*** [2001] EWCA Civ 119, CA; ***Taylor v Lawrence*** [2002] EWCA Civ 90, [2003] Q.B. 528, CA; ***The Gypsy Council v United Kingdom*** (2002) 35 EHRR CD 96, ECtHR; ***Laker Airways Inc v FLS Aerospace Ltd*** [2000] 1 W.L.R. 113, Comm.; ***Smith v Kvaerner Cementation Foundations Ltd*** [2006] EWCA Civ 242, [2007] 1 W.L.R. 370, CA ref'd to. (See ***Civil Procedure 2015*** Vol.2, Section 9A-48.)

■ **Tubelike Ltd & Ors v Visitjourneys.com Ltd** [2016] EWHC 43 (Ch), 11 January 2016, unrep. (Chief Master Marsh)

Summary Judgment–Set Aside–Correct Approach

CPR rr.1, 3.6, 13.3, 23.11, 24.2, PD24 para.8, 39.3. Claim for money due under a side letter to the grant of three leases and for insurance rent under the leases. Summary judgment granted. Application by Defendant to set aside the judgment. Application dismissed. **Held**, (i) the CPR fails to provide sufficient guidance as to the approach to applications to set aside. PD24 para.8.1 does not specify relevant criteria, in contrast to similar provision in CPR rr.3.6, 13.3 and 39.3. Its cross-reference to CPR r.23.11 is gnomic and unhelpful. Furthermore, it would appear more appropriate for the power to set aside to be in the rule itself rather than its Practice Direction; (ii) summary judgment finally determines a claim, unlike other applications. As such it is appropriate to apply by way of analogy the criteria set out in CPR r.39.3(5) to applications to set aside summary judgment, consistently with the overriding objective: ***Riverpath Properties v Barbara Brammall*** (2000 WL 46) unrep., distinguished, and ***Republic of Iraq v Al-Kobayci & Ors*** [2006] EWHC 1967 (Ch) considered; (iii) As the power to set aside is an unfettered one, the provisions in r.39.3(5) should therefore not to be followed slavishly. ***Riverpath Properties v Barbara Brammall*** (2000 WL 46) unrep., ChD; ***Republic of Iraq v Al-Kobayci & Ors*** [2006] EWHC 1967 (Ch), unrep., ChD; ***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, *para.24.6.8.)*

■ **BNM v Mirror Group Newspapers Ltd** [2016] EWHC B1 (Costs), 11 January 2016, unrep. (Master Gordon-Saker.)

Costs–Conditional Fee Agreements–Liability to pay success fee–European Convention on Human Rights

European Convention on Human Rights, arts 6, 10, Human Rights Act 1998, ss.2, 6, Courts and Legal Services Act 1990, s.58A(6), Access to Justice Act 1999, s.29, Legal Aid, Sentencing and Punishment of Offenders Act 2012, ss.44(4), 46(1), 46(2), CPR rr.43, 44 (pre-1 April 2013), and 48.1 (post-1 April 2013), Costs Practice Direction, ss.9, 10, 11, 14, 19, 20 (pre-1 April 2013). Claimant issued proceedings against Defendant seeking injunctive relief, damages and delivery up of confidential information. Prior to issue Claimant entered conditional fee agreement (CFA) with her solicitors. The agreement included a 100% success fee. Further CFAs, with the same level of success fee, were thereafter entered into by the solicitors with two counsel. Both CFAs provided for discounted success fee uplifts in the event of settlement. Claimant also took out an ATE insurance policy. The claim settled. Claimant sought costs of £241,817, which was inclusive of both solicitors and counsels' success fees, the ATE premium and related insurance premium tax. Recoverability of the success fees and ATE premium was challenged by the Defendant on the basis that it was unlawful as it breached arts 10 and 6 ECHR. **Held**, (i) subject to the art.10 ECHR point, recovery of both success fees and ATE premiums were recoverable under the relevant statutory provisions applicable at the time: Courts and Legal Services Act 1990, s.58A(6), Access to Justice Act 1999, s.29; (ii) recoverability of succeed fees did not breach either arts 6 or 10 ECHR. Recoverability of ATE premiums were an aspect of the success fee recoverability regime hence their recover did not breach the ECHR rights either, see ***Campbell v MGN (No 2)*** [2005] 1 W.L.R. 3394 and ***Coventry v Lawrence*** [2015] 1 W.L.R. 3485; (iii) notwithstanding the fact that the European Court of Human Rights in ***MGN v United Kingdom*** (2011) 53 E.H.H.R. 5 held that in proceedings such as the present the requirement to pay a success fee did breach the art.10 ECHR right, the court was bound to follow the decisions of the House of Lords and United Kingdom Supreme Court. It could only take account of the decision of the European Court of Human Rights, see Human Rights Act 1998, s.2; (iv) in the circumstances, both success fees, albeit assessed at a lower level than claimed, and ATE premium were recoverable. ***A-G v Dean and Canons of Windsor*** (1860) 8 HL Cas 369, HL, ***Campbell v MGN (No 2)*** [2005] 1 W.L.R. 3394, HL; ***Kay v London Borough of Lambeth*** [2006] UKHL 10, [2006] 2 A.C. 465, HL; ***MGN v United Kingdom*** (2011) 53 E.H.H.R. 5, EcTHR; ***Animal Defenders International v United Kingdom*** (2013) 57 E.H.R.R. 607, ECtHR; ***Coventry v Lawrence*** [2015] UKSC 50, [2015] 1 W.L.R. 3485, UKSC, ref'd to. (See ***Civil Procedure 2015*** Vol.2, Section 7A1.56.)

■ **Crooks v Hendricks Lovell Ltd** [2016] EWCA Civ 8, 15 January 2016, unrep. (Moore-Bick V-P, Arden and Lindblom LJJ.)

Offer to settle–Date of Judgment–Meaning of "net of CRU"

Social Security (Recovery of Benefits) Act 1997 ss.6, 8, 10, 11, 14, Social Security (Recovery of Benefits) Regulations 1997, reg.11, CPR rr.36.14, 36.15, as applicable at the time. Personal injury claim. Judgment given for the Claimant at trial. Costs assessment adjourned pending the outcome of a CRU assessment regarding recoverable benefits. Following issue of a revised CRU certificate and credit for interim payments made by the Defendant it was held that the Claimant had failed to beat a Pt 36 Offer. The offer was said to be for £18,500 net of CRU and inclusive of interim payments of £18,500. It was made without regard to any liability for recoverable benefits. Claimant appealed. The

Court of Appeal dismissed the appeal, **holding**: (i) the offer was a valid Pt 36 Offer (CPR r.36.15(3)(a)). The fact that it was stated to be "net of CRU" and made without regard to recoverable benefits did not take it outside the scope of the rules, nor was it required for that reason to set out the amount of gross compensation (CPR r.36.15(6)(a)). In assessing whether the offer was within the rules it was necessary to consider its purpose in the context of the litigation. In this case that was to provide the Claimant with certainty as to the amount on offer irrespective of what that would amount to for the Defendant; (ii) the term "net of CRU" should be given its natural meaning; (iii) where offers are made under CPR r.36.15(3)(a) in these terms the court must compare the offer made to the amount of damages awarded post-reduction for benefits. The court must compare "like with like". This is in contrast to CPR r.36.15(3)(b) offers, where deductibles specifically fall within the amount to be compared with the judgment award; (iv) the consequences of a Pt 36 offer have to be considered "upon judgment being entered" (CPR r.36.14(1)). This does not refer to the date on which judgment is given. On the contrary, it means "once judgment has been given and not before then." This is to enable judges to adjourn the assessment of costs in appropriate circumstances e.g., where a pre-trial offer must be compared with judgment damages, or where decisions that have an impact upon the comparators had not, as here in respect of the CRU assessment, been made at the time judgment was given; (iv) in assessing whether the Pt 36 Offer had been beaten the approach taken in ***Fox v Foundation Piling Ltd*** [2011] EWCA Civ 790 was to be followed. Properly assessed, the Claimant had beaten the Pt 36 Offer. The Offer ought to have been compared with the judgment award net of CRU. ***Davies v Inman*** [1999] P.I.Q.R. Q26, CA; ***Williams v Devon County Council*** [2003] EWCA Civ 365, unrep., CA; ***Fox v Foundation Piling Ltd*** [2011] EWCA Civ 790, unrep., CA, ref'd to. (Now see ***Civil Procedure 2015*** Vol.1, para.36.22.1.)

- **Solicitors Regulation Authority v Spector** [2016] EWHC 37 (Admin), 15 January 2016, unrep. (Burnett LJ, Nicol J.)

Solicitors Disciplinary Tribunal–Open Justice

European Convention on Human Rights, art.10, Solicitors Act 1974, s.49, Legal Services Act 2007, s.28(3)(a), CPR r.52.11(3)(a). Disciplinary proceedings before the Solicitors Disciplinary Tribunal (SDT) against three solicitors. SDT granted application by one of the solicitors that the proceedings in respect of him should be anonymised and that the Solicitors Regulation Authority (the SRA) should not disclose his involvement in the proceedings except in limited circumstances and where the enquirer already knew of his involvement. Such disclosure should then be limited to confirmation that allegations, except for one relating to a technical breach, were not proved and that no sanction was imposed for the technical breach. The SRA challenged the decision. **Held**, (i) the anonymity decision was wrong in principle and, furthermore, not made out on the facts; (ii) open justice is a fundamental common law right. It can be abrogated or limited by statute. No such legislative provision applied to the SDT, albeit rule 12 of its Disciplinary Proceedings Rules did provide for restrictions to be imposed on public access to hearings, such as to allow it to sit in private; (iii) in addition to the common-law right, the public have a right under art.10 ECHR, except where art.10(2) applies, to receive information, such as that relating to the present proceedings; (iv) where a court or tribunal can sit in private it is implicit that it can provide for witnesses or parties to be anonymised; (v) when considering taking such a step the court or tribunal must start from the general principle of open justice and ask itself if an exception to that principle is justified; (vi) in this case the SDT failed to take as its starting point the general principle and the need to justify any restriction or derogation from it; (vii) the nature of the outcome of the proceedings was not a matter that touched upon that justification. It could not justify a derogation from the general principle: the public interest in being informed of acquittals was as important as that concerning convictions; (viii) the suggestion that the fact of proceedings being brought against the solicitor might taint his character could not justify a departure from the general principle, not least because he had been vindicated; (ix) the anonymity ordered interfered with the SRA's ability to carry out its regulatory functions; (x) the hearing had been heard in public, the SDT's hearing lists were still publically available. As such any member of the public could have discovered the solicitor's identity at the hearing and subsequently. As such it was irrational to seek to restrict what the SRA could say in respect to enquiries concerning the solicitor; (xi) no art.10(2) ECHR justifications arose to support a restriction on the public right to receive information concerning the proceedings. ***Scott v Scott*** [1913] A.C. 417, HL; ***Attorney-General v Leveller Magazine Ltd*** [1979] A.C. 440, HL; ***In Re Guardian News and Media Ltd*** [2010] 2 A.C. 697, UKSC; ***Yassin v GMC*** [2015] EWHC 2955 (Admin), unrep.; ***Re S (A Child) (Identification Restrictions on Publication)*** [2004] UKHL 47, [2005] 1 A.C. 593, HL; ***BBC v Roden*** [2015] I.C.R. 985, EAT; ***L v Law Society*** [2008] EWCA Civ 811, Master of the Rolls, unrep.; ***Andersons, Solicitors and others v SRA*** [2012] EWHC 3659 (Admin), unrep.; ***Aston Cantlow PCC v Wallbank*** [2004] 1 A.C. 546, HL; ***A v BBC*** [2014] UKSC 25, [2014] 2 W.L.R. 1243, UKSC, ref'd to. (See ***Civil Procedure 2015*** Vol.2, *Section 7C.)*

Commodities Research Unit International (Holdings) Ltd & Ors v King and Wood Mallesons LLP [2016] EWHC 63 (QB), 20 January 2016, unrep. (Nicol. J.)

Legal Advice Privilege–Waiver

CPR rr.1.2, 31.6, 31.12, 31.14, 31.22. Two applications for specific disclosure in a claim for professional negligence brought against the solicitor defendants. The negligence was alleged to have arisen in respect of advice given to the claimants concerning an employee's departure from his employment with them. The original claim settled. Standard disclosure ordered. Inspection had taken place. The defendants subsequently sought disclosure of further documents. First application for specific disclosure made. The Master directed the exchange of witness statements. Three witness statements served by the claimants, one of which was from claimants' chief financial officer (the CFO). It detailed contact between the claimants and their legal advisers in respect of the original claim. It stated expressly that privilege was not being waived. Consequent to the exchange of witness statements the defendants issued their second specific disclosure application. It sought disclosure of, amongst other things, the communications referred to in the CFO's witness statement. **Held**, (i) waiver is determined by the conduct of the parties. It was clear from the witness statements that, notwithstanding the express statements to the contrary, privilege had, to a certain extent, been waived. The claimants were right not to argue the contrary; (ii) given this it was for the court to determine the extent to which privilege had been waived. It was not for parties to "cherry pick" the extent to which privilege had or had not been waived; (iii) where documents contained separate or severable issues privilege could be waived in respect to some issues but not others; (iv) not all aspects of a lawyer's records were subject to legal advice or litigation privilege. Dates and times of meetings with lawyers were not privileged. Reference to such matters would not give rise to a waiver of privilege, whereas reference to the subject matter discussed at the meeting would give rise to it; (v) the dates and times of meetings, which had been referred to in the CFO's witness statement went beyond simply setting out the bare dates and times of meetings. It was provided in order to meet an issue upon which the claimants had been put to strict proof in the proceedings, and as such privilege had been waived. ***R v Manchester Crown Court, ex parte Rogers*** [1999] EWHC 94 (Admin), [1999] 1 W.L.R. 832 ref'd to. (See ***Civil Procedure 2015*** Vol.1, para.31.3.27.)

R (C) v Secretary of State for Justice [2016] UKSC 2, 27 January 2016, unrep. (Hale DPSC, Lords Clarke, Wilson, Carnwath, Hughes JJSC.)

Open Justice–No presumption in favour of anonymity in civil proceedings or types of civil proceeding

Mental Health Act 1983, Mental Capacity Act 2005, European Convention on Human Rights, art.6(1), CPR. 39.2. Appellant had a history of severe mental health problems. Following a conviction for murder he was sentenced to life imprisonment, with a tariff set at eleven years. In 2007 the tariff expired. From 2000 however he had been detained for treatment in a high security psychiatric hospital. In 2007 he was transferred to a private sector psychiatric hospital. In 2009 he commenced escorted community leave. In 2012 an application for unescorted leave to commence was refused by the Secretary of State. In 2013 the First-tier Tribunal held that the Appellant ought to have been entitled to a conditional discharge, but that if not discharged he should remain in hospital. The Secretary of State referred the matter of release into the community to the Parole Board. Subsequently a further application was made for consent to unescorted community leave. This was refused. Judicial Review proceedings of that refusal brought. The Appellant was granted anonymity in the proceedings. Upon review continued anonymity was refused. The Court of Appeal dismissed an appeal from that refusal. Appellant appealed to the United Kingdom Supreme Court. **Held**: (i) there is no presumption of anonymity in civil proceedings or specific types of civil proceedings in the High Court concerning patients subject to provisions in the Mental Health Act 1983; (ii) this is in contrast with other jurisdictions, such as the Court of Protection, the First-tier Tribunal (Health, Education and Social Care Chamber) (the successor for England albeit not Wales of the Mental Health Review Tribunal's jurisdiction) and the Upper Tribunal where it deals with appeals from the aforementioned First-tier Tribunal chamber, where privacy and anonymity is the default position, subject to a power to set it aside. The practice in those other jurisdictions reflects that acknowledged in ***Scott v Scott*** that proceedings concerning the "detention, care and treatment of people with mental disorders and disabilities" were unlike ordinary civil proceedings and were private and subject to anonymisation; (iii) the fundamental question is that set out in CPR r.39.2(4), whether anonymity is necessary in the interests of the patient. This requires striking a balance between, on the one hand, the public's right to know who is litigating and what is being said and done in the courts, and on the other hand, the need to maintain confidentiality in the pursuit of effective treatment for the patient as part of their detention in a secure hospital. Harm to the latter (to their health and well-being, in respect of a chilling effect arising from a risk of disclosure on patient, doctor and other carers willingness to seek legal remedies to challenge detention, and any arising from particular case-specific issues), in respect of both the individual litigant and such patients as a whole, must be balanced against harm to the former; (iv) anonymity, on the facts of the present case, should be granted. ***Scott v Scott*** [1913] A.C. 417, HL; ***B v United Kingdom*** (2002) 34 E.H.R.R 19, ECtHR, ***The City Mental Health NHS Trust*** [2003] UKHL 58, [2004] 2 A.C. 280, HL; ***In re S (A Child) (Identification: Restrictions***

on Publication) [2004] UKHL 47, [2005] 1 A.C. 593, HL; ***R (Mersey Care NHS Trust) v Mental Health Review Tribunal*** [2004] EWHC 1749 (Admin), [2005] 1 W.L.R. 2469, Admin; ***R (Von Brandenburg) v East London and The City Mental Health NHS Trust*** [2003] UKHL 58, [2004] 2 A.C. 280); ***In re British Broadcasting Corp*** [2009] UKHL 34, [2010] 1 A.C. 145, HL; ***AH v West London Mental Health Trust*** [2010] UKUT 264 (AAC) and [2011] UKUT 74 (AAC), unrep., UKUT; ***In re Guardian News and Media Ltd*** [2010] UKSC 1, [2010] 2 A.C. 697, UKSC; ***R (M) v Parole Board (Associated Newspaper Ltd intervening)*** [2013] EWHC 1360 (Admin); [2013] EMLR 23, Admin; ***A v British Broadcasting Corp (Secretary of State for the Home Department intervening)*** [2014] UKSC 25, [2015] A.C. 588, UKSC, ref'd to. (See ***Civil Procedure 2015*** Vol.1, para.39.2.11.)

Practice Updates

PRACTICE GUIDANCE

QUEEN'S BENCH GUIDE 2016. In force from 1 January 2016.

In December 2015, Senior Master Fontaine approved a revised, fourth, edition of the Queen's Bench Guide. The revised guide was issued on 13 January 2016. It is updated to take account of statutory and procedural changes that have been effected since publication of its third edition. It has, for instance, been updated to take account of the following:

- the replacement for the Masters' Support Unit with the Queen's Bench Issues and Enquiries Section, see Guide, paras 1.6.5, 1.7.5;
- the Queen's Bench Listing Section deals with the listing of hearings and trial before Masters that last for more than half an hour, see Guide para.1.6.5;
- the ability of Masters to hear trials and applications for injunctions other than search orders or freezing injunctions, see Guide, para.1.7.3;
- copies of documents to be filed must be lodged with the Central Office in hard copy as it is not a court or court office for the purposes of electronic filing as provided for under CPR r.5.5 and CPR PD 5B, see Guide para.2.7.2;
- draft orders must be provided to Masters in Word and not PDF format, see Guide para.2.7.2;
- a subtle relaxation of the provisions relating to page limits for documents provided by electronic means. It is now provided that ten pages is a limit "regarded as a norm" rather than a prescribed limit, see Guide para.2.7.4;
- changes to the Masters assigned to deal with clinical negligence and mesothelioma claims, see Guide para.6.2.3;
- changes to reflect the revisions to CPR r.36 that came into force in April 2015, see Guide, para.6.13.1 et seq.;
- reference to ***Denton v T H White Ltd (Practice Note)*** [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296 in respect of the test for relief from sanctions, see Guide para.7.15.2; and
- reference to the Recast Brussels Regulation (EU Regulation 1215/2012), see Guide para.12.16.14.

PRACTICE DIRECTION

COURT OF PROTECTION PRACTICE DIRECTION-TRANSPARENCY PILOT.

In force from **29 January 2016.**

On 28 January 2016, Sir James Munby, President of the Court of Protection, issued a Practice Direction under power provided by rule 9A, Court of Protection Rules 2007.

The Practice Direction provides for a pilot scheme, to run from 29 January 2016 until 31 July 2016, which will enable hearings in Court of Protection proceedings to be open to the public. Such proceedings will however maintain party anonymity and continue to be subject to reporting restrictions.

Under the Pilot scheme the default position will be for the Court to make an order allowing public access to the proceedings, with an attendant anonymity and reporting restrictions order (see para.2.1 of the Practice Direction). This is subject to two restrictions.

First, the Practice Direction does not apply to proceedings concerning serious medical treatment or committal applications. Secondly, the Court retains a discretion to deviate from the general approach where it concludes that there is good reason to do so (see paras 2.4 and 2.5 of the Practice Direction).

In Detail

HONORARY QC

It is with real pleasure that the publishers of Civil Procedure News congratulate its former editor and General Editor of the White Book, Professor I.R. Scott on his appointment as an Honorary QC for services to the civil procedure rules. Professor Scott's contribution to the development of the White Book Service and its authoritative commentary on the CPR and its predecessor the RSC has over the last twenty-five years been unprecedented, and his award is richly deserved.

BRIGGS REVIEW

In July 2015 Lord Justice Briggs was asked to carry out a review of the structure of the civil courts. The review takes place against a backdrop of significant reform across all the courts in England and Wales, not least arising from the HMCTS Reform programme. The Review, which published its Interim Report (the Civil Courts Structure Review: Interim Report, dated December 2015) on 12 January 2016, carries with it the prospect of significant reform to the practice and procedure of the civil courts should its final recommendations be implemented. The Review's remit covers examining: the creation of a new online court; the use of non-judicial case officers employed by HMCTS to carry out certain judicial functions; more effective deployment of the civil judiciary; the possibility of unification of the civil courts; regionalisation of civil work; potential reform to the Divisional structure of the High Court; reforms to the enforcement process; and potential reform to the relationship between the civil courts and the Employment and Employment Appeals Tribunals.

The Review's Interim Report makes a number of provisional recommendations, and canvasses a number of consultation questions. They are outlined as follows in the Interim Report's published summary, reprinted here with some formatting changes for greater clarity:

"Urgent Priorities

- Prepare the civil judiciary to play their part in the management of the HMCTS reforms from April 2016, including Judicial College training and staff to support the leadership judges.
- As soon as possible design the structure and software which will be needed for the re-organised courts, particularly the Online Court.
- Ease the burden on the Court of Appeal. Proposals are already due to be made in April 2016 but the report seeks further suggestions.

Online Court: (see Chapter 6)

Provisional View:

- There is a clear and pressing need to create an Online Court for claims up to £25,000 designed for the first time to give litigants effective access to justice without having to incur the disproportionate cost of using lawyers. There will be three stages:

  Stage 1 – a largely automated, interactive online process for the identification of the issues and the provision of documentary evidence;

  Stage 2 – conciliation and case management, by case officers;

  Stage 3 – resolution by judges. The court will use documents on screen, telephone, video or face to face meetings to meet the needs of each case.

Questions

- Should the Online Court be separate court with its own bespoke rules, or a branch of the County Court, mainly governed by the Civil Procedure Rules? The report favours the first option.
- Which types of claim which should be included, or excluded, if £25,000 is the ceiling?
- How much and what types of assistance with IT will needed for court users?
- How much if at all should one side's costs be paid by the other side?

- Should any appeal be to a Circuit Judge?
- Case Officers (see Chapter 7)

Provisional View

- Transfer some of judges' more routine and non-contentious work to Case Officers supervised by judges. Parties should have the right to have a Case Officer's decision reconsidered by a judge.

Questions

- Should conciliation offered by Case Officers be based on simple telephone mediation, or written early neutral evaluation, or a mixture of the two?
- How to draw a practicable but flexible line between routine case management, suitable for Case Officers, and the more discretionary type calling for judicial expertise and authority?
- What should be the specialisation, qualification, training and experience of Case Officers?
- What should be the nature of the right to have a Case Officer's decision reconsidered by a judge?
- Number of Courts and Deployment of Judges (See Chapter 8)

Provisional View

- There should not be a move to unified civil court ahead of the implementation of the Reform Programme.
- There should be a stronger concentration of civil expertise among the Circuit Judges and District Judges.
- All civil work with a regional connection should be tried in the regions, regardless of value, subject to very limited specialist exceptions such as Patents.
- A way must be found to prevent the permanent loss of civil hours to meet the needs of urgent family cases.

Questions

- How can more of the High Court's workload be directed towards the County Court by changing the current value limits and thresholds?
- What structural means would reinforce the principle that no case is too big to be resolved in the regions?
- How can the growth of regional centres of civil specialist excellence be fostered, to avoid the current tendency of regional cases to be issued in, or transferred to, London.
- How can the current systems for the transfer out of London of cases more appropriately managed and tried in the regions be improved?
- How can greater civil expertise be concentrated among the Circuit Judges and District Judges?
- Should the number of District Registries be reduced further or the concept be replaced altogether?
- Will the current number and geographical distribution of the Designated Civil Judges best serve the civil court structure as it emerges from the Reform Programme?
- Should the fault line between the Chancery and Queens Bench Divisions within the Rolls Building be addressed, and if so how?
- Would a different structure allow the civil courts to respond more quickly and flexibly to sudden changes in the make up of the civil workload?

Rights and Routes of Appeal (see Chapter 9)

Questions

- When permission to appeal has been refused on the documents, there is a right to the renew it orally. How valuable is this?
- Would a substantial increase in the use of deputies in the Court of Appeal, or the use of two judge courts in place of the current three, reduce the actual or perceived quality of the decision making?
- Should the thresholds for obtaining permission to appeal be raised, and if so by reference to what criteria?
- Should the focus of the Court of Appeal be directed mainly to second appeals?

- How should space be made in the workloads of High Court judges to let them provide more assistance to the Court of Appeal, both as deputies and by giving more appellate jurisdiction to the High Court?

Enforcement (Chapter 10)

Questions

- Should the enforcement of judgments become a unified service for all the civil courts?
- Which features of the current County Court and High Court enforcement procedures should be replicated or developed in a unified service?
- Will digitisation and automation enable better enforcement?
- Should all methods of enforcement be centralised as far as possible?
- Should there be a default assumption that judgments for payment of money (if not complied with) should no longer leave the creditor to have to take the initiative for the purposes of obtaining information about the debtor's assets and resources?
- Boundaries (see chapter 11)

Question

- Might the Employment Tribunal and Employment Appeal Tribunal be integrated into the structure of the civil courts."

Comment–The Review's Central Assumption

The fundamental assumption underpinning the Review, and as it notes the HMCTS Reform Programme, is that the court system ought now to be able to move to being one free from paper. The courts, their processes, the manner in which they communicate to litigants and lawyers and by which litigants and lawyers communicate with them, ought to be "digital by design". Given recent reforms to the criminal justice system, and the introduction there of the Crown Court Digital Case System, and reform recommendations by Justice and the Civil Justice Council, the inevitability of such an assumption underpinning reform appears difficult to resist.

Care will however need to be taken in ensuring that reform moves from principle to implementation. As reforms to introduce an "E-Bench" digital filing system in New Zealand demonstrated recently digitisation carries with it a real risk of failure; a particular instance of failed IT reform that is almost all too well known in terms of public sector reform. The New Zealand reforms were abandoned with a loss of NZ$6.8 million. The financial risk in England and Wales, to the court's budget, must be, inevitably, greater. New Zealand's attempt to digitise its criminal process foundered on a reported failure to ensure that it could fully replace paper-process due to differential processes being used in the various courts and tribunals to which it was meant to operate. It is to be hoped that the HMCTS Reform programme, which seeks to digitise the present civil court process (see Briggs Interim Report at 4.10) ensures that it learns from New Zealand. At the present time both HMCTS and the Briggs Review have given some attention to successful digital reform programmes carried out in The Netherlands and British Columbia, Canada (Briggs Interim Report at 4.11). Lessons can and should perhaps be learnt from programmes that have failed, just as much as from those that have succeeded: it is always possible to replicate the attributes that made the latter a success, while not eliminating those that caused the former to fail.

An Online Court with Digital Rules

The Briggs Review's Interim Report suggests that it may seek to side-step the problem that adversely affected implementation in New Zealand. While it canvasses a number of options for reform, its provisionally preferred reform option is to see the creation of a new Online Court–perhaps to be known as the Digital Civil Court. There is little doubt from the Interim Report that such a reform option will ultimately be pursued: its creation is stated to be "a clear and pressing need" (Briggs Interim Report at 12.6). This Court, it is proposed, separate from the County Court, would have its own rules and processes rather than be a novel Division of the County Court and thus subject to the CPR. It would become an additional court below that of the High Court.

The prospect that the new online court will be a standalone civil court, akin in one sense to the Family Court, ought to render it possible to start its design, and its rule design from first principles, rather than fit its digital design to a pre-existing structure and set of processes. It would thus be possible to avoid the problem that appears to have bedevilled New Zealand's digitisation process as it would not need to accommodate or be required to be compatible with a

range of pre-existing and inconsistent processes across differing courts and tribunals.

It remains at this stage an open question whether a newly created rule committee ought to take responsibility for this process, or whether the CPRC should do so. Given that the wider aim of the HMCTS Reform programme is to digitise the existing courts and tribunals, it might appear sensible to establish a new cross-jurisdictional rule committee that could prepare common, digital processes for a common IT platform through which litigants and their lawyers could access the whole panoply of jurisdictions, rather than embed from the beginning of the digitisation process the historic differences and divisions that exist between them. Whether a holistic or a dual (online court/previously established courts and tribunals) approach is taken, digitisation presents the prospect that there will inevitably be fundamental change to the procedure and practice governing, issue, service, case and costs management, irrespective of how that change is reflected in the CPR and separate online court rules.

The absence of lawyers

Historically procedural reform, court design and procedural rules have been predicated on the provision of lawyers as the default. That can no longer be taken for granted. A second assumption underpinning the Briggs Review's considerations is that any new online court will therefore be one where the absence of legal assistance and representation for litigants will be the default position (Briggs Interim Report at 5.24, 5.27 et seq.).

To flesh out this assumption, any online processes will need to be capable of being utilised by a wide range of individuals; with assistance provided by the court system to those who either cannot navigate its forms and processes due a lack of Internet access or an inability to utilise such access unaided. They will have to be straightforward, and in all likelihood have to involve little if any discretion. The system will have to lead litigants to the desired procedural result e.g., a complete claim form, a complete particulars of claim (in whatever simplified form that might ultimately be). This focuses on procedure.

The question arises however to what extent, if any, those online processes can provide assistance in terms of the substantive law, or whether the court process should properly be providing such assistance. If no such assistance is given, the risk arises that large numbers of claims will be issued that disclose no cause of action. While this is possible at the present time, given that the online court seeks to encourage claiming by greater numbers of individuals–those that are presently locked out of the justice system due to the cost of litigation–the prospect would seem to arise that the risk of unmeritorious claims being issued in the future will increase. This in turn might suggest that there may be an equal rise in applications for permission to appeal from decisions dismissing such claims.

Conversely, what protection to litigants might properly be expected in the absence of legal assistance to advise them on the merits of their claim. Absent such legal advice, how is a litigant to properly assess the advise a proposed Case Officer is giving them via the online court's proposed conciliation stage? Absent such advice, how is a litigant to properly assess whether they have proper grounds of appeal? The online court proposals provide a template for increased access, but the key question for the stage up to the Final Report must be how and to what extent they are capable of securing meaningful access and effective participation such that litigants can properly understand the nature of their claims and their strengths and weaknesses.

The reform process will thus need to focus on more than procedure. It will need, as has been suggested in the United States for instance, for consideration to be given to facilitating an understanding of the substantive legal issues by, for instance: providing court-based lawyers, who would have no involvement with a specific claim otherwise, to advise litigants on the substantive law in order to assist the formulation of a claim; the creation of online model case analyses to assist litigants understand their dispute and formulate their claim; template claims for common types of claim (breach of contract, consumer disputes, road traffic accident claims) (as per R. Zorza, *The Self-Help Friendly Court: Designed from the Ground-Up to Work for People Without Lawyers* at 50).

The reform process will also have to consider how litigants, without legal assistance, can be put in a position whereby they are capable of properly scrutinising and, where appropriate, challenging judicial decisions made regarding their claims. In a court process where the absence of lawyers is the norm and where the default position will be that the the court will take an investigative approach, with the judge "their own lawyer" (Briggs Interim Report at 6.15) this becomes an acute concern. Removing the scrutiny on claims and on judicial decisions given by parties' lawyers from the system, places an increased weight on public and appellate scrutiny of decision-making, designing the new system will need to ensure that that weight can be borne.

EDITOR: **Dr J. Sorabji**, UCL Judicial Institute; Principal Legal Adviser to the Lord Chief Justice and the Master of the Rolls
Published by Sweet & Maxwell Ltd, 160 Blackfriars Road, Southwark, London SE1 8EZ
ISSN 0958-9821

Typeset by Matthew Marley
Printed by Hobbs The Printers Ltd, Totton, Hampshire.

675330