CIVIL PROCEDURE NEWS

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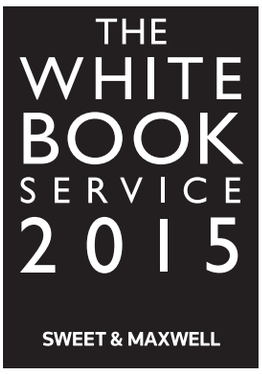

In Brief

Cases

Personal Management Solutions Ltd & Anor v GEE 7 Group Ltd & Anor [2015] EWHC 3859 (Ch), 10 December 2015, unrep. (Morgan J.)

Pre-Action Disclosure–no post-issue jurisdiction

Senior Courts Act 1981, s.33, CPR rr.1, 31.5, 31.6, 31.12, 31.16. Application for pre-action disclosure sought by claimants under Senior Courts Act 1981, s.33 and CPR r.31.16. Claim form issued prior to hearing of pre-action disclosure application, albeit claim form not served. Respondent unaware until just prior to that hearing commencing before the deputy Master that claim form issued. Evidence in support of the application made it clear that pre-action disclosure was being sought. Respondent submitted that as claim form issued the court no longer had jurisdiction to grant the application. Deputy Master accepted that had no jurisdiction, and that had no jurisdiction to transform the application into one for specific disclosure under CPR r.31.12. Deputy Master granted permission to appeal. On appeal **held**, no jurisdiction to grant an order for pre-action disclosure once a claim has been issued. The statutory power was introduced to enable orders requiring pre-action disclosure to be made. Just as the general disclosure rules in CPR r.31 only applied post-issue, the pre-action regime only applied pre-issue. This was a matter of jurisdiction, and not discretion. Further *obiter* guidance was given, (i) in those circumstances where a pre-action disclosure application was made before issue of the claim form, but the application hearing takes place after issue, the court does not have jurisdiction. At the hearing however the court retains jurisdiction to both deal with the costs of the application and jurisdiction under the general disclosure provisions in CPR r.31; (ii) assuming that a pre-action disclosure application cannot be heard under the circumstances outlined in (i), it remains possible for the applicant to discontinue the claim, and seek pre-action disclosure for a 'second set of proceedings', although that is on the further assumption that a second set of proceedings would not amount to an abuse of process; (iii) assuming that a pre-action disclosure application cannot be heard under the circumstances outlined in (i) it remains open to the applicant to seek pre-action disclosure in respect of issues that would be raised in a second set of proceedings, but only in respect of those issues, should they not be an abuse of process and in circumstances where the original set of proceedings are not discontinued. ***Arsenal Football Club Plc v Elite Sports Distribution Ltd*** [2002] distinguished, the commentary at ***Civil Procedure 2015*** Vol.2 para.9A-113 noted as resting on a misreading of that decision. ***Arsenal Football Club Plc v Elite Sports Distribution Ltd*** [2002] and ***Alstom Transport v Eurostar International Ltd*** [2010] explained as being concerned with CPR r.31.12 not r.31.16, per Coulson J. in ***Roche Diagnostics Limited v The Mid Yorkshire Hospitals NHS Trust*** [2013]; (iv) while the deputy Master could have dealt with the application as one made under CPR r.31.12, that he did not was a case management decision that was not wrong in principle. It was moreover noted given the different nature of the tests applicable to rr.31.12 and 31.16, that the respondents had not been given the opportunity to properly prepare for an application under the former rule, and that there was a strong, on the face of it, argument that disclosure should take place in the ordinary course of case management. For the deputy Master to take any other course than that which he took would have been 'very surprising'. ***Black v Sumitomo Corp*** [2002] 1 W.L.R 156, CA; ***Arsenal Football Club Plc & v Elite Sports Distribution Ltd*** [2002] EWHC 3057 (Ch), [2003] F.S.R. 26, ChD; ***Alstom Transport v Eurostar International Ltd*** [2010] EWHC B32 (Ch), unrep., ChD; ***Roche Diagnostics Limited v The Mid Yorkshire Hospitals NHS Trust*** [2013] EWHC 933 (TCC), [2013] P.T.S.R. D35, TCC; ***Dellal v Dellal & Ors*** [2015] EWHC 907 (Fam), [2015] Fam. Law 1042, Fam, ref'd to. (See ***Civil Procedure 2015*** Vol.2, Section 9A, para.113.)

Anglia Research Services Ltd v Finders Genealogists Ltd [2016] EWHC 297 (QB), 17 February 2016, unrep. (H.H.J. Moloney QC sitting as a judge of the High Court.)

Pre-Action Disclosure–post-issue application–second claim–whether an abuse of process

Senior Courts Act 1981, s.33, CPR rr.1, 31.4, 31.16. Application for pre-action disclosure in respect of an action for defamation and harassment. Application issued in November 2015 and listed for hearing in December 2015. The claim form was issued prior to the application hearing, although not served. Claim issued the day before the end of the defamation limitation period. Copies of the claim form and of a draft claim form relating to a proposed second action provided to the court and defendant in support of the application. **Held**, (i) following Morgan J. in ***Personal Management Solutions Ltd & Anor v GEE 7 Group Ltd & Anor*** [2015] there was no jurisdiction to entertain the application as the claim form had been issued, (ii) it was not an abuse of process to seek to bring the second, proposed, action, while the initial claim remained live as amongst other things, the second claim was for a separate

publication and hence was a separate cause of action in defamation and the initial claim was issued as a protective claim; (iii) in considering whether the application for pre-action disclosure could properly be related to the second, proposed, action following and developing Morgan J's *obiter* guidance in ***Personal Management Solutions Ltd***, the court should exercise, as appropriate, the jurisdiction to order pre-action disclosure in respect of those matters set out in the application that related to the proposed second claim. It should not however apply it in respect of those matters in the application that related to the first, issued, claim. This approach was consistent with the overriding objective; (iv) in the circumstances of this case the pre-action application was justified and the court should exercise its discretion to grant it. ***Black v Sumitomo Corp*** [2002] 1 W.L.R 156, CA; ***Arsenal Football Club Plc & v Elite Sports Distribution Ltd*** [2002] EWHC 3057 (Ch), [2003] F.S.R. 26, ChD; ***Majrowski v Guys & St Thomas's NHS Trust*** [2006] UKHL 34, [2007] 1 A.C. 224, HL; ***Personal Management Solutions Ltd & Anor v GEE 7 Group Ltd & Anor*** [2015] EWHC 3859 (Ch), ref'd to. (See ***Civil Procedure 2015*** Vol.2, Section 9A, para.113.)

- **Tchenguiz & Ors v Grant Thornton UK LLP & Ors,** [2015] EWHC 3926 (Comm), 21 December 2015, unrep. (Knowles J.)

Summary Judgment–proportionality–impact of adjournment on parties and other litigants

CPR rr.1.1(2)(e), 24. Long running proceedings arising out of the 2007-08 financial crisis. The hearing of an application by the fifth defendant for summary judgment was listed for January 2016. Application to adjourn that hearing. **Held**, application refused, to decide otherwise would be contrary to the interests of justice, to the overriding objective. On a summary judgment application, the court is aware of what evidence is available to it, and what is not. Parties can make appropriate submissions on the application in respect of what is not available to it, particularly where there is a significant amount of evidence that is unavailable at the hearing. Furthermore, to adjourn a longstanding listing would have an adverse impact on both the parties and on other litigants. In assessing whether to grant an adjournment of a fixed hearing, this was an important consideration. (See ***Civil Procedure 2015*** Vol.2, Section 11 para.12)

- **Suh & Anor v Mace (UK) Ltd** [2016] EWCA Civ 4, 15 January 2016, unrep. (Beatson & Vos L.JJ.)

Litigant-in-Person–admissions during negotiations–admissibility–without prejudice privilege

Action for wrongful forfeiture of a business lease. Claimants acting in person. Discussions between claimant and solicitor for defendant. Second claimant made admissions during the discussions concerning rent arrears at the time of landlord's re-entry into the premises. Defendant sought to rely on the admissions at trial. Judge queried at trial admissibility. Claimants asserted that admissions were protected by without prejudice privilege, which had not been waived. Judge held were not covered by the privilege, as discussions did not form part of genuine attempt to compromise the dispute. Judgment ultimately entered for defendants. Claimants appealed. Appeal allowed. Retrial ordered. **Held**, (i) the law concerning without prejudice privilege was well-established; (ii) whether communications fall under the ambit of privilege is a question to be assessed objectively; (iii) discussions with litigants-in-person can fall under the privilege. Carrying out the objective assessment whether the discussions with such litigants fall within the privilege's ambit may however be difficult. In carrying out that assessment there was 'no justification for salami slicing (the discussion) into parts that were open and parts that were without prejudice'; (iv) there was no evidence to support the contention that the second claimant sought to abuse the privilege nor was the privilege waived. Assessing whether there was a waiver in the present case required an objective assessment of the claimants' conduct; the assessment called for an evaluation of whether it was unjust, given their conduct, for the claimants to contend that the admissions were privileged. In carrying out this assessment whether or not the claimants were aware of the existence of without prejudice privilege was beside the point; it was a question of justice and of protecting the privilege, see, ***Unilever plc v The Procter & Gamble Co*** [2000] 1 W.L.R. 2436. ***Lord Ashburton v Pape*** [1913] 2 Ch. 469, CA; ***Finch v Wilson*** (8 May 1987) unrep., CA; ***Hawick Jersey International v Caplan*** T.L.R. (11 March 1988), QBD; ***Rush & Tomkins v GLC*** [1989] 1 A.C. 1280, HL; ***Derby v Weldon (No.10)*** [1991] 1 W.L.R. 660, ChD; ***Forster v Friedland*** (10 November 1992, CAT 1052), unrep., CA; ***Fazil-Alizadeh v Nikbin*** (1993, CAT 205), unrep., CA; ***Family Housing Association (Manchester) v Michael Hyde & Partners*** [1993] 1 W.L.R. 354, CA; ***Unilever plc v The Procter & Gamble Co*** [2000] 1 W.L.R. 2436, CA; ***Somatra v Sinclair Roche and Temperley*** [2000] 1 W.L.R. 2453, CA; ***Brunel University v Vaseghi*** [2007] EWCA Civ 482, unrep., CA; ***Ofulue v Bossert*** [2009] 1 A.C. 990, HL, ***BE v DE*** [2014] EWHC 2318 (Fam), [2014] Fam. Law 1387, Fam. Ct., ref'd to. (See ***Civil Procedure 2015*** Vol.1, para.31.3.40.)

- **Jockey Club Racecourse Limited v Willmott Dixon Construction Limited** [2016] EWHC 167 (TCC), 4 February 2016, unrep. (Edwards-Stuart J.)

Part 36 Offer–whether genuine offer

CPR r.36. Claim for cost of repair and consequential losses arising from design and construction of a grandstand at racecourse. Claimant made a Pt 36 Offer, which provided for a 5% discount on the damages claimed i.e., it was made on the basis that the defendant accept liability for 95% of the damages, with the damages to be assessed. Offer

not accepted. Issue of liability settled by consent in claimant's favour. Two issues arose, first, whether the Pt 36 Offer was a genuine one; and second, if it was genuine was it a derisory offer such that it created no real incentive to settle. **Held**, (i) this was a claim where there was no question of apportionment of liability. Either the claim would succeed or it would fail. That the court in such circumstances could not have made an award in the terms the Pt 36 Offer was made did not entail that the offer was not a valid one. In such circumstances, a discount to reflect litigation risk and/or the risk that damages will not be assessed as claimed, is a valid basis upon which to make a Pt 36 Offer, Tuckey and Schiemann L.JJ in ***Huck v Robson*** [2003] applied, and see Norris J. in ***Wharton v Bancroft*** [2012]; (ii) the offer made, notwithstanding the fact that it could not be described as generous, was not such as to amount to total capitulation by the defendant if accepted, see ***AB v CD*** [2011] and ***Wharton v Bancroft*** [2012]; (iii) in the context of a £400,000 claim the offer of a discount of £20,000 was not derisory. ***Huck v Robson*** [2003] 1 W.L.R. 1340, CA; ***AB v CD*** [2011] EWHC 602 (Ch), unrep., ChD; ***Wharton v Bancroft*** [2012] EWHC 91 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2015*** Vol.1, para.36.2.1 et seq.)

- **Ewing v Crown Court Sitting at Cardiff & Newport & Ors** [2016] EWHC 183 (Admin), 8 February 2016, unrep. (Burnett L.J., Sweeney J.)

Open justice–public hearing–taking note of proceedings in public gallery

Criminal Justice Act 1925, s.41, Contempt of Court Act 1981, s.9, Senior Courts Act 1981, s.42, Criminal Practice Direction 2015 Amendment No 3 [2015] EWCA Crim 430, paras 6A.2, 6C.7, 6C.8, 6C.9, 6C.11, 6C.12, 6C.13, 6C.14. Claimant subject to an order under s.42, Senior Courts Act 1981 granted permission to bring judicial review proceedings concerning a direction in Crown Court proceedings that members of the public, and specifically the claimant, were not to take notes of the proceedings absent permission of the court. **Held**, the judicial review succeeded: (i) note taking in court is an aspect of the common law principle of open justice. The general rule is thus that individuals who attend court proceedings may take notes and may do so without having obtained the prior permission of the court; (ii) limits on the principle of open justice may be derived from statute or rules of court; (iii) there are no legislative provisions relating to note taking in open court nor is it dealt with in rules of court; (iv) the right to take notes of proceedings may be limited or prohibited if it is likely to interfere with the proper administration of justice; (v) examples given in Criminal Practice Direction 6C, on live text-based communications, concerning the withdrawal of permission to use such devices, provide helpful guidance on the circumstances when note taking may interfere with the proper administration of justice. Further examples can be found in HMCTS Guidance to criminal court staff concerning "note taking in public gallery of criminal courts"; (vi) the practice that had established itself in Cardiff which required individuals to seek permission prior to taking notes in open court was thus impermissible; (vii) the note taking in the present case could not be said to have posed a threat to the proper administration of justice. ***Scott v Scott*** [1913] A.C. 417, HL, ref'd to. (See ***Civil Procedure 2015*** Vol.1, para.39.0.5.)

- **Dubai Financial Group LLC v National Private Air Transport** [2016] EWCA Civ 71, 9 February 2016, unrep. (Longmore, Treacy, McCombe L.JJ.)

Setting aside default judgment–no date for filing acknowledgment of service

CPR r.6.15(4), 12.3(1), 13.2, 13.3. A claim for substantial damages arising from a contract for the sale of an interest in a Gulfstream aircraft. Permission to serve the claim form out of the jurisdiction granted in December 2011. Problems arose concerning service, extensions of time to serve were granted and the claim form was purportedly served in Saudi Arabia in December 2012. The defendant did not acknowledge service. Judgment in default was entered in July 2013. The claimant informed the defendant of the default judgment in July 2014. In October 2014, following the arrest and seizure of the Gulfstream aircraft at Luton Airport, the defendant applied to set aside the default judgment. The application was refused on the grounds that there had been valid service, and that there was no arguable defence to the claim. The defendant appealed. Appeal allowed. **Held**, (i) the defendant had an arguable defence. The judge erred in concluding that because the defence rested on a late new issue it was unarguable. The right approach to such points is that which would be taken in a summary judgment applicable i.e., permission to defend should be granted on the condition that the amount in issue in the claim be paid into court or paid into an account held in the name of both parties' solicitors pending conclusion of the claim; (ii) per Treacy & McCombe L.JJ, the conditions necessary to give rise to a judgment in default of acknowledgement of service had not arisen as the defendant had not failed to comply with a rule or order requiring such acknowledgement to be filed by a specified time. The relevant court order that provided that such steps that had been taken by the claimant to effect service were good service via an alternative method did not, as required by CPR r.6.15(4), require the acknowledgment, any admissions or any defence to be filed by specified times. Such an order must specify such times. Absent such specification no time limit can run against a defendant for the purposes of default judgment. A default judgment entered in such circumstances must be set aside as of right, as the time for for filing an acknowledgment of service had not expired. It had not expired as there was no such time provided for, no obligation to comply placed on the defendant, and thus there

was no time limit to expire and no possibility of default arising. This was a question of certainty and due process that was embedded into our system of law, per McCombe LJ at para. 42; (iii) on its own the failure to serve a response pack with the claim form did not amount to a good reason to set aside a default judgment. ***Kaki v National Private Air Transport*** [2015] distinguished. ***Elmes v Hygrade Food Products Plc*** [2001] EWCA Civ 121, [2001] C.P. Rep. 71, CA, ***Gulf International Bank BSC v Ekttitab Holding Company KSCC*** (Case No: 2010, Folio 696, 15 November 2010), [2010] EWHC B30 (Comm), unrep., Comm., ***Rajval Construction Ltd v Bestville Properties Ltd*** [2010] EWCA Civ 1621, unrep., CA, ***Henrikson v Pires*** [2011] EWCA Civ 1720, unrep., CA, ***Abela v Baadarani*** [2013] UKSC 44. [2013] 1 W.L.R. 2034, UKSC, ***Kaki v National Private Air Transport*** [2015] EWCA Civ 731, unrep., CA, ref'd to. ***(See Civil Procedure 2015*** Vol. 1, para.13.2.1.1.)

- **Wasif v The Secretary of State for the Home Department** [2016] EWCA Civ 82, 9 February 2016, unrep. (Lord Dyson M.R., Underhill and Floyd L.JJ.)

Permission to apply for Judicial Review–totally without merit–proper approach

CPR rr.52.3(4), 52.15, 52.15A, 54.12, Upper Tribunal Rules 2008 r.30.1. Applications to seek permission to apply for judicial review of a refusal to grant leave to remain in the United Kingdom. Permission refused on the papers by Upper Tribunal and applications certified as being totally without merit. **Held**, appeals dismissed by the Court of Appeal, with the following guidance given on the correct approach to the question whether to certify an application as totally without merit (TWM): (i) the Court of Appeal in ***R (Grace) v Secretary of State for the Home Department*** (2014) had explained that certification of an application as totally without merit was not confined to those cases where repetitive applications were made by an abusive or vexatious litigant. Certification served a wider purpose: to protect public authorities and the court from the adverse consequences of hopeless applications. It further acknowledged that TWM certification was subject to two safeguards viz., a judge would only certify an application in this way if they were 'confident' it was 'bound to fail', that being the correct way to interpret, TWM's meaning, and that such a decision was subject to the possibility of appellate review; (ii) there is a distinction between the TWM test of 'bound to fail' and the test for the grant of permission to appeal, the latter test being that permission should be granted where the application is 'arguable' or has a 'realistic prospect of success', see ***Sharma v Brown-Antoine*** (2006); (iii) the difference between the two tests can best be explained by acknowledging that there are some applications that demonstrate no rational basis on which they could succeed and applications that a judge identifies as demonstrating a rational argument albeit one that is not arguable. The former is an application bound to fail, and should be certified TWM. The latter is an application that does not have a realistic prospect of success, even though it has a rational, arguable, basis, and should be refused but not certified TWM; (iv) the Court of Appeal went on to set out observations by way of general guidance: (1) where an application is refused, TWM certification ought not to be applied automatically; (2) TWM certification should only be made when a judge is certain after careful consideration that the application is bound to fail; (3) TWM certification should only be made where a judge concludes that an oral renewal would not provide a genuine opportunity for an applicant to address weaknesses the judge had perceived in their application; (4) in assessing the former question the judge should consider whether a judge at the oral renewal, having heard oral argument, would refuse permission. Applicants should be given the benefit of 'any real doubt'; (5) where an application is brought by a litigant-in-person it should not be certified TWM unless it is apparent that if the applicant had had the benefit of legal representation it would not have disclosed an arguable claim. In circumstances where a litigant-in-person's application was confused or otherwise inadequately presented or evidenced, a refusal of permission should not be certified TWM and should identify the defects in the application. Alternatively, such applications may be adjourned to an oral hearing on notice to the respondent; (5) an application should not be certified TWM where it is refused on grounds of defence raised in a respondent's acknowledgment of service; (7) reasons should be given, even if in summary form, for a refusal of permission. Where, however, an application is certified TWM, care must be taken to provide proper reasons, and ones which deal with the points raised in the application. Such reasons may however, depending on the circumstances, be concise. The reasons for refusing permission and certifying TWM should be set out separately, even if in some cases this requires the judge to set out their reasons for refusal and then a statement to the effect that the application has been certified TWM for the reasons set out in respect of the refusal. ***Flannery v Halifax Estate Agents Ltd*** [2000] 1 W.L.R. 377, CA; ***Sengupta v Holmes*** [2002] EWCA Civ 1104, (2002) 99(39) L.S.G. 39, CA; ***R (N) v Mental Health Review Tribunal (Northern Region)*** [2005] EWCA Civ 1605, [2006] Q.B. 468, CA; ***Sharma v Brown-Antoine*** [2006] UKPC 57, [2007] 1 W.L.R. 780, PC; ***GR (Albania) v Secretary of State for the Home Department*** [2013] EWCA Civ 1286, unrep., CA; ***R (Grace) v Secretary of State for the Home Department*** [2014] EWCA Civ 1191, [2014] 1 W.L.R. 3432, CA, ref'd to. (See ***Civil Procedure 2015*** Vol.1, paras 52.3.8.1, 54.12.1.)

■ **Pyrrho Investments Ltd v MWB Property Ltd & Ors** [2016] EWHC 256 (Ch), 16 February 2016, unrep. (Master Matthews.)

E-Disclosure–use of predictive coding

CPR rr.1.2, 31, PD31A, PD31B. Various claims arising from alleged breach of fiduciary duty; company dividend and transaction entered into by second claimant by various defendants who had a secret interest in the transactions. Total value of the various claims in excess of £40 million. 3.1 million unique electronic documents under control of second claimant. Extent of disclosure in issue. PD31B paras 25–27 provide for electronic document searches to be conducted via a 'Keyword search or other automated methods of searching.' The CPR does not however give any guidance as to whether such searches may be carried out by computer programme, or whether they must be carried out by people. Such automated searches are variously known as 'predictive coding', 'technology assisted review', or simply 'assisted review'. The Master noted that there was no English authority on the use of predictive coding as a search method. It had however been approved in the United States in 2012 and, more recently, by the Irish High Court's Commercial Court absent agreement of the parties. **Held**, the use of predictive coding was permissible under the CPR. Its use furthered the CPRs' overriding objective (CPR r.1.1). Ten specific factors were identified as supporting the decision to approve predictive coding's use: (i) its utility in appropriate cases had been demonstrated in other jurisdictions, even if experience from those jurisdictions was to a certain extent limited; (ii) evidence shows it to be at least, if not more, accurate than human document review; (iii) it provided a more consistent search method than that which would otherwise be adopted through the use of a large number of junior fee-earners; (iv) the CPR does not prohibit its use; (v) the need to search through over 3 million documents; (vi, vii, viii) the cost of a manual search would be unreasonable as per CPR PD31B para.25, whereas the cost of predictive coding, albeit still significant, would be substantially less and would, given the claim's value, be proportionate; (ix) there was sufficient time between the instant hearing and the trial date to permit consideration of alternative disclosure methods should predictive coding prove inadequate; (x) the parties had agreed to its use. The Master went on to note that approval of predictive coding's use in other cases would depend on the circumstances of such cases. ***Digicel (St Lucia) Ltd & Ors v Cable & Wireless Plc & Ors*** [2008] EWHC 2522 (Ch), [2009] 2 All E.R. 1094, ChD; ***Goodale v Ministry of Justice*** [2009] EWHC B41 (QB), unrep., QB; ***Moore v Publicis Groupe*** 11 Civ 1279 (ALC)(AJP), (S.D.N.Y. Feb. 24, 2012), unrep., U.S. District Court of New York; ***Irish Bank Resolution Corporation Ltd v Quinn*** [2015] IEHC 175, [2015] 3 J.I.C. 0306, Irish High Court (Comm.) ref'd to. (See ***Civil Procedure 2015*** Vol.1, paras 31.6.5, 31.7.4, 31BPD.1 et seq.)

■ **Family Mosaic Home Ownership Ltd v Peer Real Estate Ltd** [2016] EWHC 257 (Ch), 16 February 2016, unrep. (Birss J.)

Case management–transfer of proceedings to Shorter Trials Scheme

CPR rr.1, 3.1(2)(m), 30, PD51N. Claimant seeking specific performance of contract for sale of commercial property. Application to transfer claim to the Shorter Trials Scheme (STS). Birss J. noted that, ordinarily, such applications would not result in the giving of a formal reasoned judgment. In future cases, assuming they were simple cases, reasoned transfer judgments would not generally be necessary. The present application was however the first such application following the STS's introduction through CPR PD51N. **Held**, (i) while PD51N paras 2.10–2.15, which deal with transfer, do not expressly provide for the transfer of existing claims into the STS, the court had jurisdiction to effect such a transfer; the STS is not limited in application to claims issued following its introduction. The jurisdiction to transfer such claims arises under CPR r.1.1(1) and r.3.1(2)(m). Transferring an extant claim to the STS ought to further the overriding objective, as the STS is intended to reduce litigation costs and enable the court's resources to be utilised by other parties: see, for instance, r.1.1(2)(b) and (e). Furthermore, r.3.1(2)(m) provides the express power to effect the transfer in order to further the overriding objective. It was noted, by parity of reasoning, that the same considerations underpinned the power to transfer claims out of the STS. Additionally, it was clear that the intention behind PD51N was that such transfers-in (or out) of the STS were to be possible. The transfer power could thus be seen to be implicit to PD51N. The absence of any transfer power in CPR r.30 was not a relevant consideration, given the effect of PD51N para.1.3; (ii) on the facts this was a claim which fell within the scope of the STS and could thus be transferred into the scheme; and (iii) as this would only be the second such case operative within the STS its transfer-into the scheme would not have any significant adverse effect on the court's administration or on the needs of other court users. The transfer was effected. (See ***Civil Procedure News***, Issue 9/2015.)

■ **Broadhurst v Tan** [2016] EWCA Civ 94, 23 February 2016, unrep. (Lord Dyson M.R., McCombe & David Richards L.JJ.)

Part 36 Offers–relationship with fixed costs–low value personal injury claims

CPR rr.36, 45. Two appeals that arose from unrelated low value personal injury claims. Both claims commenced under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. Part 36 claimants offers

were made in both cases. As the claims commenced prior to 6 April 2015 they were thus subject to the provisions of Pt 36 applicable prior to the 2015 revision to that rule coming into force. Both claimants obtained more advantageous judgments at trial than their offers, the latter of which had both been rejected by the defendants prior to trial. In both cases the trial judge held that CPR r.36.14(3) applied in a CPR r.45, Section IIIA case where a claimant had made a successful Pt 36 Offer i.e., one where the judgment obtained is at least as advantageous to the claimant as the offer. In one case the trial judge went on to equate profit costs assessed on an indemnity basis with the fixed costs provided for in CPR r.45.29C, Table 6 (subject to the application of r.45.29J). **Held**, (i) notwithstanding the revisions to Pt 36 implemented in April 2015 the judgment is applicable to the post-2015 rules as it is to the pre-2015 rules; (ii) where a claimant makes a successful Pt 36 Offer CPR rr.36.14 and 36.14A require an award of costs assessed on the indemnity basis. CPR r.36.14(3) is not modified by r.36.14A. CPR Pt 36 forms a self-contained code, and is only modified to the extent that it makes provision for such modification. CPR r.36.14 is not subject to r.45.29B; (iii) thus in a claim to which CPR r.45 Section IIIA applies, r.36.14(3) applies where the claimant made a successful Pt 36 Offer i.e., the claimant is entitled to costs assessed on an indemnity basis; (iv) fixed costs and assessed costs are conceptually distinct. The former are awarded, for instance, irrespective of the work done. The latter are awarded by way of assessment of work actually done. See ***Solomon v Cromwell Group*** [2012]; (iv) in circumstances where a claimant makes a successful Pt 36 Offer to which CPR r.45 Section IIIA applies then (a) the fixed cost regime will apply to the final staging point as per r.45.29C, Table 6B, and (b) costs from the point in time when the Pt 36 Offer became effective will be awarded and assessed on an indemnity basis; (v) it was further noted that if there were any doubts as to the interpretation of the rules it would have been permissible to refer to the Explanatory Memorandum to the specific rules as an aid to construction. ***Pepper v Hart*** [1993] A.C. 593, HL; ***R v Secretary of State for the Environment, ex parte Spath Homes Ltd*** [2001] 2 A.C. 349, HL; ***Solomon v Cromwell Group*** [2012] 1 W.L.R. 1048, CA, ref'd to. (See ***Civil Procedure 2015*** Vol.1, para.36.21.1.)

CIVIL PROCEDURE SURVEY PRIZE WINNERS

Thank you to everyone who completed the Civil Procedure 2016 Survey and many congratulations to Anna Watterson of 1MCB Chambers, London, and Oliver Wooding of St John's Chambers, Bristol, who have won the gratis subscriptions to the 2016 White Book.

Practice Updates

PRIMARY LEGISLATION & STATUTORY INSTRUMENTS

FINANCE (NO.2) 2015 (2015 c.33), in force from **18 November 2015; THE ENFORCEMENT BY DIRECT DEDUCTION FROM ACCOUNTS (PRESCRIBED INFORMATION) REGULATIONS 2015** (SI 2015/1986), in force from **25 January 2016.**

Section 51 and Schedule 8 of the Finance (No.2) Act 2015 provide for a scheme through which Her Majesty's Revenue & Customs (HMRC) may issue a 'hold notice' in respect of monies held in a bank or building society account by a taxpayer. The taxpayer may object to the 'hold notice'. Where HMRC dismisses that objection, a right of appeal from that dismissal lies to the County Court under Sch.8, Pt 1, para.12 of that Act. The Enforcement by Direct Deduction from Accounts (Prescribed Information) Regulations 2015 provides a scheme for the provision of information by the taxpayer to give effect to provisions in Sch.8 of the Act. (See CPR PD52D, ***Civil Procedure 2015*** Vol.1, paras 52.3.3, 52DPD.1 et seq.)

CIVIL PROCEDURE (AMENDMENT) RULES 2016 (SI 2016/234), in force from **6 April 2016**, subject to transitional provisions relating to amendments to the following: Pt 3, r.45.8 Table 5; Pts 66, 70, 73 and 75; the new Pt 89; RSC Ord.115 r.4(4); and the deletion of CCR Ord.27. The transitional provisions provide that the amendments to which they relate only apply to proceedings that commence on or after 6 April 2016. (See further "In Detail" section of this issue of CP News.)

PRACTICE DIRECTIONS

PRACTICE DIRECTION–83rd Update, in force from **6 April 2016** except as noted below.

The update revises PD3E (Costs Management), PD4 and Schedule 1 (Forms), PD7C (Production Centre), PD7E (Money Claim Online), PD8A (Alternative Procedure for Claims) (in force from date on which The Recall of MPs Act 2015 (Recall Petition) Regulations 2016 comes into force), PD12 (Default Judgment) (in force from 23 February 2016), PD36A (Offers to Settle), PD37 (Misc. Provisions about Payments into Court), PD47 (Procedure for Assessment of Costs and Default Provisions), PD51L (New Bill of Costs Pilot Scheme) (in force from 1 April 2016), PD51P and Schedule 2 (Pilot for Insolvency Express Trials) (in force from 1 April 2016), PD52C (Appeals to the Court of Appeal), PD52D (Statutory Appeals and Appeals subject to Special Provision) (amendments relating to The Recall of MPs Act 2015 (Recall Petition) Regulations 2016 enter into force on the date that Regulation enters into force, otherwise the amendments enter into force on 6 April 2016), PD70 (Enforcement of Judgments and Orders), PD73 (Charging Orders, Stop Orders and Stop Notices), PD74A (Enforcement of Judgments in Different Jurisdictions (in force from 23 February 2016). (See further "In Detail" section of this issue of CP News.)

PRACTICE GUIDANCE

CHANCERY GUIDE 2016, in force from **18 February 2016.**

On 18 February 2016, Etherton C. approved the issue of a revised Chancery Guide, which was originally published and dated March 2016. A revised version with the correct February date was issued on 23 February 2016. Readers should ensure that they refer to the February 2016 version. The Guide has been revised both structurally and substantively. It is also intended that it will be revised electronically in future, with any revisions noted at the outset of the Guide. The most significant revisions, which reflect updating in the light of the Jackson Costs Review and Briggs Chancery Modernisation Review as well as innovations such as the Financial List and Shorter and Flexible Trials Pilot (See ***Civil Procedure News***, Issue 8/2015 and 9/2015), include the following:

- a new structure, which sets out the content so that it is in chronological order, following the life of a claim;
- the provision of court contact details at the outset of the Guide, within Chapter 3, rather than in its Appendix as was previously the case;
- full details of the various court user committees with relevant contact details, see Guide paras 3.1-3.11;
- detailed guidance concerning litigants-in-person, see Guide Chapter 4;
- guidance on the use of CE-file, the Electronic Working Pilot Scheme, and the introduction from March 2016 of the electronic online search and office copy scheme, see Guide Chapter 6;
- changes to the jurisdiction that Chancery Masters may exercise, see Guide paras 14.1-14.3, 14.7;
- changes to track allocation and docketing, as introduced in January 2015, see Guide paras 14.9 et seq.;
- changes to case and costs management, including the introduction of triage as part of the case management process, see Guide Chapter 17;
- detailed guidance on the approach of case management to settlement, including Early Neutral Evaluation and Chancery Financial Dispute Resolution, particularly noting that best practice in respect of the former will be to order it to take place with party consent, see Guide Chapter 18, and particularly para.18.8;
- detailed guidance on the proper completion of witness statements, see Guide Chapter 19;
- detailed guidance on the procedure of the specialist courts and jurisdictions within the Chancery Division, see Guide Chapters 25, 26, 29;
- specific guidance on the transfer of competition law claims to and from the CAT, see Guide paras 29.109–29.118;
- detailed guidance on the Financial List and Shorter and Flexible Trials pilots, see Guide, Chapters 27 and 28.

Guidance on the approach to chancery business outside London is to be included in Chapter 30 of the Guide.

In Detail

CIVIL PROCEDURE (AMENDMENT) RULES 2016

The Civil Procedure (Amendment) Rules 2016 effect a number of changes to the CPR. The most notable of these are as follows:

- **Amendment to CPR Pt 3.** It is amended to, amongst other things, replace CPR r.3.12(1)(c) with a new sub-rules (c) to (e), which reads as follows,

  '(c) *where in proceedings commenced on or after 6th April 2016 a claim is made by or on behalf of a person under the age of 18 (a child) (and on a child reaching majority this exception will continue to apply unless the court otherwise orders); or*

  (d) *where the proceeding are the subject of fixed costs or scale costs; or*

  (e) *the court otherwise orders.'*

It is also amended to replace CPR r.3.13 with a new r.3.13, which reads as follows,

'3.13.—(1) Unless the court otherwise orders, all parties except litigants in person must file and exchange budgets—

(a) where the stated value of the claim on the claim form is less than £50,000, with their directions questionnaires; or

(b) in any other case, not later than 21 days before the first case management conference.

(2) *In the event that a party files and exchanges a budget under paragraph (1), all other parties, not being litigants in person, must file an agreed budget discussion report no later than 7 days before the first case management conference.';*

- **Amendment to CPR Pt 73 (Charging Orders).** CPR rr.73.1 to 73.10 are replaced with new rr.73.1 to 73.10C. Such applications are to be made to the County Court Money Claims Centre (CPR r.73.3(2)). Applications for Interim Charging Orders must be made in the form and set out the content specified in PD73 (CPR r.73.3(5)(a)). Applications will, ordinarily, be dealt with on the papers and may be dealt with by a court officer (CPR rr.73.4(2), 73.4(3) & (4)). On application court officers' decisions are subject to reconsideration by a district judge, albeit one carried out on the papers without a hearing (CPR r.73.5); and
- **CCR Order 27 is replaced by a new CPR Pt 89 (Attachment of Earnings).** The revisions finally move the rules concerning attachment of earnings applications from the County Court Rules into the CPR. The new provisions require applications for such Orders to be made to the County Court Money Claims Centre (CPR r.89.3), provide for the generality of the process to be carried out by a court officer including the issue of a notice requiring a debtor to show good cause why they should not be imprisoned for failing to reply to notice of an application for an attachment of earnings order or to make payment to a creditor (CPR rr.89.5(3), 89.8(3), (4)).

CPR PRACTICE DIRECTION–83rd UPDATE

The 83rd PD Update effects a number of changes, the most significant of which concern the following:

- **PD3E (Costs Management).** Amendments are made in respect of: Budget discussion reports; the disapplication of costs management where a claimant has 'limited or severely impaired life expectation'; use of Precedent H and particularly its restricted application (only the first page should be used) where either a party's budgeted costs are no more than £25,000 or the claim is stated to be for no more than £50,000. Further guidance is also given in respect of cost managements orders, under CPR r.3.15, particularly that the court is not to fix or approve hourly rates at cost management hearings;
- **PD36A (Offers to Settle).** This is renamed as PD36 (Offers to Settle);
- **PD47 (Procedure for Detailed Assessment of Costs and Default Provisions).** Amendments are made to insert new subss.(7) to (9) in para.5.8. They provide as follows:

  '(7) Where the case commenced on or after 1 April 2013, the bill covers costs for work done both before and after that date and the costs are to be assessed on the standard basis, the bill must be divided into parts

so as to distinguish between costs shown as incurred for work done before 1 April 2013 and costs shown as incurred for work done on or after 1 April 2013.

(8) Where a costs management order has been made, the costs are to be assessed on the standard basis and the receiving party's budget has been agreed by the paying party or approved by the court, the bill must be divided into separate parts so as to distinguish between the costs claimed for each phase of the last approved or agreed budget, and within each such part the bill must distinguish between the costs shown as incurred in the last agreed or approved budget and the costs shown as estimated.

(9) Where a costs management order has been made and the receiving party's budget has been agreed by the paying party or approved by the court, (a) the costs of initially completing Precedent H and (b) the other costs of the budgeting and costs management process must be set out in separate parts.';

- **PD51L (New Bill of Costs).** Amendments are made to extend the application of the pilot scheme from 1 April 2016 until 1 September 2016;

- **PD51P (Insolvency Express Trials (IET) Pilot).** This introduces a new pilot scheme, to run for two years from 1 April 2016. The pilot scheme applies to proceedings in the Bankruptcy and Companies Courts in respect of proceedings before Bankruptcy Registrars. It is intended to provide a simple, expeditious process for matters which: (i) can be dealt with in a maximum of two days; (ii) require limited directions and disclosure; and (iii) where each parties' costs, inclusive of any CFA uplift but not VAT or court fees, will be £75,000 or less. The pilot scheme is specified as working

  'within and [as] subject to . . .

  (a) Insolvency Act 1986;

  (b) Insolvency Rules 1986;

  (c) Practice Direction – Insolvency Proceedings (Chancery Division, 29 July 2014, [2014] B.C.C. 502; [2014] B.P.I.R. 1286);

  (d) Cross-Border Insolvency Regulations 2006 (SI 2006/1030);

  (e) Administration of Insolvent Estates of Deceased Persons Order 1986 (SI 1986/1999);

  (f) Limited Liability Partnerships Regulations 2001, EC Regulation on Insolvency Proceedings no 1346/2000 of 29 May 2000.'

  Proceedings intended to be within the scheme are to be commenced by application marked 'IET', with an explanation as to why the proceedings are suitable for the IET list. Applicants must also include in their application a statement informing the respondent that they may object to use of the IET procedure. The process is subject to strict time limits to ensure that the proceedings will reach a final hearing between three to six months of the directions hearing, which itself must be held no later than 45 days from issue of the application. Judgment will either be given at trial or within four weeks of trial;

- **PD 52C (Appeals to the Court of Appeal).** Amendments to make provision for various documents to be made available, for reporting purposes only, to properly accredited court reporters (whether from the law reports or the media) at Court of Appeal hearings viz., where a party is legally represented, the party's legal representative is required to make available two copies of the party's skeleton, including any supplementary skeleton, argument. Such skeleton arguments, in family proceedings involving a child, should be anonymised and ensure that they cannot enable the child to be identified. The documents are to be provided to court staff at the start of any relevant hearing. Provision is made, and criteria set out, for any party to challenge the provision of such documents to accredited court reporters and for the non-application of the requirement to make such provision;

- **PD 52D (Statutory Appeals and those subject to special provision).** Amendments made consequent to the Recall of MPs Act 2015 (Recall Petition) Regulations 2016. No amendments however made in respect of The Enforcement by Direct Deduction from Accounts (Prescribed Information) Regulations 2015 (as noted above). Specific provision also made in respect of Welsh statutory appeals; and

- **PD12 (Default Judgments) and PD74A (Enforcement of Judgments in Different Jurisdictions).** Amendments are made to these PDs so that they include reference to the 2005 Hague Convention in order to complement prior amendments made to the CPR by way of The Hague Convention on Choice of Court Agreements and Civil Jurisdiction and Judge (Hague Convention on Choice of Court Agreements 2005) Regulations 2015 (see Civil Procedure News Issue 9/2015).

CIVIL PROCEDURE FORMS

The 83rd PD Update replaces PD4 (Forms) in its entirety. The new PD4 (Forms), set out in Schedule 1 to the Update, contains a number of significant changes:

- **Presentational changes:** the forms are listed alphabetically according to their subject matter and with cross-references to relevant rules of court. Additionally, an alphabetical index supplements the subject matter listing;
- **Substantive changes**, which include:
  - A set of new Chancery Forms, numbered chronologically from CH1 to CH39, are introduced, the majority of which replace previous Chancery Forms;
  - Amendments the following N forms: N86, N87, N149C, N217, N218, N224, N224A, N293A, N379, N380;
  - Amendments to all the Practice Forms (PFs), with the deletion of the following: PF12, PF13, PF15, PF21A, PF98, PF99, PF100, PF101, PF158, PF155, PF159, PF161, PF164;
  - Amendments to the following Number Forms (No.): No.32, No.33, No.34, No.35, No.37, No.41, No.44, No.44A, No. 44B, No.44C, No.44D, No.45, No.46, No.47, No.48, No.49, No.52, No.52A, No.67. The following are deleted: No.90, No.104, No.105, No.106; and
  - Three new forms, which replace No. 110, No. 111 and No. 112. The new forms, which should not be confused with the existing forms N110 and N112, are as follows:
    - **Form 110**-Certificate for enforcement in a foreign country under [section 10 of the Administration of Justice Act 1920] [section 10 of the Foreign Judgments (Reciprocal Enforcement) Act 1933] [section 12 of the Civil Jurisdiction and Judgments Act 1982] (CPR r.74.12 and Practice Direction 74A paragraph 7);
    - **Form 111**-Certificate of the enforcement in Scotland or Northern Ireland of a money judgment of the High Court or of the County Court (Section 18 of and Schedule 6 to the Civil Jurisdiction and Judgments Act 1982) (CPR 74.17 and Practice Direction 74A paragraph 8.2); and
    - **Form 112**-Certificate annexed to a sealed copy of judgment of the High Court or of the County Court for enforcement of non-money provisions in Scotland or Northern Ireland (section 18 of and Schedule 7 to the Civil Jurisdiction and Judgments Act 1982) (CPR 74.18 and Practice Direction 74A paragraph 8.3).

It is noteworthy that there are now two distinct forms relating to Group Litigation Orders under CPR r.19.11: Chancery Form CH6 Group *Litigation Order* and *Practice Form PF19 (Group Litigation Order (rule 19.11))*. Care should be taken in form choice. PF19 appears to have been designed to be utilised in group proceedings in the Queen's Bench and Chancery Divisions of the High Court and in the County Court. CH6 is designed for group proceedings in the Chancery Division of the High Court. It is perhaps regrettable that two forms covering the same set of proceedings in the Chancery Division have been issued. Where such proceedings are contemplated within the Chancery Division use of Chancery Form CH6 appears advisable rather than the more generic Practice Form PF19.

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