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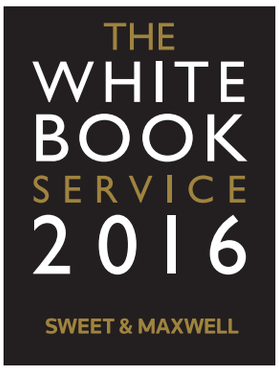

In Brief

Cases

Property Alliance Group Ltd v Royal Bank of Scotland Plc [2016] EWHC 207 (Ch), 27 January 2016, unrep. (Sir Terence Etherton, Chancellor of the High Court)

Transfer to Financial List – Opposed application – Guidance

CPR rr.1, 30.5, 63A, PD63AA, Guide to the Financial List. Claims arising from alleged rate swaps mis-selling, transfer of the management of the claimant's banking affairs to the defendant's Global Restructuring Group and its conduct of the claimant's business, and the defendant's conduct in respect of LIBOR rate fixing. Claims pursued by a property investment and development business against the Royal Bank of Scotland. Proceedings issued in September 2013 and had been subject to significant case management by Birss J since that time. Pre-trial review scheduled for 7-8 April 2016. Trial date fixed for 23 May 2016. The defendant applied for the proceedings to be transferred to the Financial List. The claimant opposed the application. The total value of the claims was around £29 million. The total value of the claims was thus lower than the £50 million specified in CPR r.63A1(2)(a). It was however conceded that the claims came within the scope of the Financial List as they raised issues of general importance to the financial markets per CPR r.36A1(2)(c). **Held**, the application was granted. Etherton C. noted that it would be 'rare' for an application to transfer a claim to the Financial List to be resisted if it fell within the definition of a Financial List claim as set out in CPR r.63A1(a), (b) or (c). This was however 'an unusual case' due to the significant involvement of Birss J in its case management and the fact that any transfer to the Financial List would, at the late stage which the proceedings had reached, require its transfer to another judge, one from the Financial List: Birss J not being a judge of the Financial List. Ten, non-exhaustive, factors were identified as being of particular significance to determining a contested application to transfer proceedings to the Financial List:

'*(1) the extent to which the case concerns matters of market significance, as distinct from factual and other matters relevant only to the case and the parties in question;*

(2) the relative importance of the issues of market significance;

(3) whether the case has already been assigned to a judge;

(4) whether, if transferred into the Financial List, the proceedings would require a change of judge;

(5) the length of time in which the proceedings have already been on foot;

(6) the extent to which an assigned judge has already conducted hearings and delivered judgments in the pending proceedings, and his or her general familiarity with the case;

(7) the extent to which the familiarity of the existing assigned judge with the case would enable judicial trial pre-reading, and the trial itself, to be conducted in a more efficient and timely way than if a new Financial List judge were to be appointed;

(8) whether or not the trial date has been fixed, and, if so, the proximity to the trial date;

(9) whether the trial timetable would be disrupted by the transfer into the Financial List; and

(10) whether, and if so, assigning a new Financial List judge would be disruptive to one or more other cases in the other lists, because the new judge would no longer be able to conduct those other proceedings, or for any other reason.'

The present proceedings were of market significance as they were in essence a test case, and there was thus a particular need to ensure that any judgment produced following trial would be properly authoritative in the financial market. A transfer would not have an adverse impact on the dates of either the pre-trial review or trial date: a Chancery judge nominated to the Financial List was available. It was however noted that the fact that a Chancery judge was available was incidental: the issue was whether a judge of the Financial List, whether from the Chancery Division or the Commercial Court, was available. It was stressed that applications for transfer should be made as early as possible, not least to ensure that any claim transferred to the Financial List can be assigned to a single judge who can conduct both the pre-trial review and the trial. Where such assignment is not possible due to a delay in making a transfer application, it may give rise to adverse consequences i.e., a reduction in familiarity on the part of the assigned judge with the proceedings and an attendant reduction in the judge's ability to manage the claim robustly and effectively. (See ***Civil Procedure 2016*** Vol.2, paras 2FA-9, 2FA-20.)

■ **Summers v Bundy** [2016] EWCA Civ 126, 11 February 2016, unrep. (Davis LJ and Sir Timothy Lloyd)

Award of damages – 10% uplift – Non-discretionary

Legal Aid, Sentencing and Punishment of Offenders Act 2012, section 44(6). Action for damages arising from clinical negligence. Claimant funded via legal aid. Judgment in default. Damages assessed in July 2015. Defendant not present at hearing. General damages for pain, suffering and loss of amenity assessed at £27,500. The judge went on to consider the question whether the damages award should be increased by 10% as per the recommendation in the Jackson Civil Costs Review. The claimant's position was that the 10% uplift on damages was not a matter of discretion, but ought to be applied as of right. The judge held that in the circumstances of the case, i.e., that the claimant was legally aided and was not represented via a conditional fee agreement (CFA), the discretion to increase the damages award should not be exercised in the claimant's favour. The claimant appealed. Permission to appeal granted by Jackson LJ, who noted that the appeal was 'bound to succeed.' Furthermore, Jackson LJ directed that there was no need for the appellant or the appellant's counsel to attend the hearing of the appeal. Noting that notwithstanding Jackson LJ's comment and direction it had to consider the matter judicially at the appeal hearing, the Court of Appeal **held** that the judge erred in treating the 10% uplift to be a matter of discretion. Its addition to damages for pain, suffering and loss was an entitlement, a matter of right. It was clear from the two Court of Appeal decisions in ***Simmons v Castle*** (2012) that the 10% uplift to general damages was to apply across the board, apart from those claims that fell within the ambit of s.44(6) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. As such it applied to claims that were funded via legal aid as of right. ***Simmons v Castle*** [2012] EWCA Civ 1039, [2012] C.P. Rep. 43, CA, ***Simmons v Castle (No.2)*** [2012] EWCA Civ 1288, [2013] 1 W.L.R. 1239, CA, ref'd to. (See ***Civil Procedure 2016*** Vol. 2, para.1B–13.)

■ **SARPD Oil International Ltd v Addax Energy SA** [2016] EWCA Civ 120, 3 March 2016, unrep. (Longmore and Sales LLJ and Baker J)

Security for Costs – Commercial Court practice – Assessment of ability to pay Costs of Pt 20 proceedings – Costs budget

CPR rr.1.1(2), 1.2, 1.3, 3.12-3.18, 25.12, 25.13, PD3E paras 6, 7.3, 7.4. Contractual dispute between a company incorporated in the British Virgin Islands and a company incorporated in Switzerland. The defendant applied for an order for security for costs. It did so on the basis that there was reason to believe the claimant would not be able to pay its costs if ordered to do so: CPR r.25.13(2)(c). Limited evidence available to support the application as little evidence available publicly e.g., no filed public accounts, and the claimant, notwithstanding requests to provide such information, had not provided the defendant with evidence of its financial position, nor had it provided any security. Application refused on basis that was no reason to believe the claimant would be unable to pay the costs. Furthermore, the judge declined to follow a Commercial Court practice that security of costs would be ordered where: (i) no filed, public accounts; (ii) the claimant company had no evident assets; and (iii) the claimant company declined to provide details of its financial position. The defendant appealed. **Held**, (i) the Commercial Court's practice was a sound one and was approved. Court of Appeal practice was consistent with that approach: see ***Mbasago v Logo Ltd*** (2006). A deliberate failure to provide evidence of ability to pay costs in the face of requests to provide such evidence provided 'every reason to believe that, if and when it is required to pay a defendant's costs, it will be unable to do so. The court should, however, evaluate that evidence as part of the totality of all the evidence before reaching a conclusion concerning ability to pay; (ii) Orders for security of costs look forward to the costs at the end of a trial. As such the costs of a Pt 20 claim which are likely to become the costs of the defendant at the conclusion of trial fall within the scope of any order for security for costs and ought, in an appropriate case, to come within the terms of such an order; the approach in ***Noterise Ltd v Haseltine Lake & Co*** (1992) was as applicable to the Commercial Court as it was to the Chancery Division, and furthermore it was consistent with CPR r.1.2 and the need to do justice in the individual case; (iii) the proper starting point to assess the amount of costs for which security was to be given was the approved costs budget. This was the case because any issues concerning the appropriate level of costs ought to have been raised and dealt with at the first case management conference, and secondly, because to allow the parties to re-open the issue, absent a change in circumstances since the first case management conference, and go behind the costs budget would be contrary to CPR r.1.1(2)(b), (d) and (e); (iv) more broadly, concerning costs budgets: where a court records its comments concerning incurred costs, and particularly whether they are reasonable and proportionate, those comments will 'carry significant weight' when the CPR Pt 44 discretion as to costs is exercised following any trial. Good reason will ordinarily be required to be shown to justify the court departing from an assessment that incurred costs were reasonable and proportionate when carrying out a cost assessment on the standard basis following trial; and, where a court approves estimated costs in a costs budget and comments in respect of incurred costs to the effect that the totality of costs (estimated and incurred) were reasonable and proportionate, its 'likely' effect is that, absent good reason to the contrary, the incurred costs would be included in a standard

assessment. This is because in such a circumstance there is 'little if any difference between the practical effect of the court's order in relation to incurred costs and its order in relation to estimated costs.' ***Edginton v Clark*** [1964] 1 Q.B. 367, CA, ***Johnson v Ribbins*** [1977] 1 W.L.R. 1458, CA, ***Taly v Terra Nova Insurance Co*** [1985] 1 W.L.R. 1359, CA, ***Noterise Ltd v Haseltine Lake & Co*** [1992] B.C.C. 497, ChD, ***Unisoft Group Ltd (No.2), Re*** [1993] B.C.L.C. 532, ChD, ***Phillips v Eversheds*** [2002] EWCA Civ 486, unrep., CA, ***Marine Blast Ltd v Targe Towing Ltd*** [2003] EWCA Civ 1940, unrep., CA, ***Assicurazioni Generali SpA v Arab Insurance Group*** [2002] EWCA Civ 1642, [2003] 1 W.L.R. 577, CA, ***Mbasogo v Logo Ltd*** [2006] EWCA Civ 608, unrep., CA, ***Datec Electronics Holdings Ltd v UPS Ltd*** [2007] UKHL 23, [2007] 1 W.L.R. 1325, HL, ***Jirehouse Capital v Beller*** [2008] EWCA Civ 908, [2009] 1 W.L.R. 751, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1, para.25.13.13.)

■ **Samara v MBI & Partners UK Ltd (t/a M.B.I. International & Partners Co)** [2016] EWHC 441 (QB), 4 March 2016, unrep. (Cox J)

Second application to set aside judgment in default – No jurisdiction

CPR rr.3.1(7), 13.3, 52.17. Default judgment entered in February 2012 in respect of a claim for damages in respect of an alleged breach of an employment contract. An application to set aside the judgment was made in May 2013 and subsequently refused in July 2013. In August 2013 an application for permission to appeal from the refusal to set aside was made. Permission was granted. The appeal was dismissed in February 2014. No application to appeal from that decision was made. Related proceedings concerning allegations of fraud against the claimant by the defendant were also being pursued. Those proceedings ended in their dismissal. Permission to appeal the dismissal of those proceedings was refused in October 2015. In December 2015 a second application to set aside the default judgment of February 2012 was issued by the defendant. The primary issue for the court was whether it had jurisdiction to entertain a second application to set aside a judgment in default under CPR r.13.3. **Held**, (i) there is no jurisdiction to entertain a second application to set aside a judgment in default; (ii) the proper route to challenge an order refusing to set aside a judgment in default is to appeal from that decision. An order made on any such appeal is a final order. The only proper means to challenge such an order is to appeal from that order i.e., to seek permission to bring a second appeal, or to reopen the final order on appeal under CPR r.52.17; (iii) if it were open to a party to make a second application under CPR r.13.3 it would enable parties to side-step CPR Pt 52, the protection its provisions afforded litigants and the stringent tests for permission to bring second appeals and, in the present case those concerning the grant of an extension of time within which to seek permission. It would also erode the protection that the provisions in Pt 52 gave to securing the principle of finality; (iv) furthermore, it was not permissible to rely on the decisions in ***Tibbles v SIG Plc*** (2012) and ***Thevarajah v Riordan*** (2015): that CPR r.3.1(7) cannot be relied upon to provide the jurisdiction to bring a second application to set aside a judgment in default. ***Carleton (Earl of Malmesbury) v Strutt & Parker*** [2007] EWHC 2199 (QB), [2007] 42 E.G. 294 (C.S.), QBD, ***Roult v North West Strategic Health Authority*** [2009] EWCA Civ 444, [2010] 1 W.L.R. 487, CA, ***Tibbles v SIG Plc*** [2012] EWCA Civ 518, [2012] 1 W.L.R. 2591, CA, ***S v Beach*** [2014] EWHC 4189 (QB), [2015] 1 W.L.R. 2701, QBD, ***Thevarajah v Riordan*** [2015] UKSC 78, [2016] 1 W.L.R. 76, UKSC, ref'd to. (See ***Civil Procedure 2016*** Vol.1, para.13.3.1.)

■ **Gentry v Miller** [2016] EWCA Civ 141, 9 March 2016, unrep. (Lewison, Beatson and Vos LJJ)

Relief from Sanction – Delay in applying to set aside judgment in default – Claim alleging fraud

CPR rr.3.9, 13.3, 39.3, 40.9. Road traffic accident. Claim for personal injury, credit hire charges and other damages. Liability admitted. No offer to settle. Numerous letters from claimant's solicitors to defendant insurer, which had not instructed solicitors, with no response. Judgment in default of acknowledgement of service entered in August 2013. Subsequently the defendant made a voluntary interim payment and CPR Pt 36 Offer. Further interim payment ordered and paid. Damages of £75,089 ordered at a disposal hearing in October 2013. Defendant insurer not notified of the disposal hearing, although the defendant had been. Neither attended. Upon receipt of notification of damages awarded by the claimant's solicitors on 25 October 2013 the defendant insurer instructed solicitors. Application to set aside the judgment in default issued on 25 November 2013. On 14 February 2014 the defendant's solicitors issued an application to, amongst other things, come off the record as acting for the defendant (remaining on the record for the defendant's insurers) on the basis that, amongst other things, the claim was fraudulent. Application to come off the record granted. On 14 March 2014 judgment in default and damages judgment set aside by District Judge. Appeal from that decision dismissed. Appeal to Court of Appeal. **Held**, (i) the three stage test in ***Denton*** applies to applications under CPR r.13.3 (see ***Regione Piemonte v Dexia Crediop Spa*** (2014)) and applications under CPR r.39.3; (ii) the correct approach in both cases is to first consider the express requirements of those rules and then consider whether relief from sanction is justified by applying the three stage ***Denton*** test; (iii) in respect of CPR r.13.3 the relevant breach for the first stage of the ***Denton*** test is the default in failing to serve an acknowledgment of service; (iv) in respect of CPR r.39.3 the relevant breach for the first stage of the ***Denton*** test is the order granted upon failure to attend trial; (v) a default judgment cannot be set aside 'as a matter of course' where an arguable fraud is alleged. Rules of court must be obeyed. ***Mitchell*** and ***Denton***

underscored that requirement, and that rule compliance underscored the promotion of the efficient conduct of litigation at proportionate cost. Professional litigants are well qualified 'to respect this change and must do so'. Whether an allegation of fraud justifies setting aside a default judgment depends on the circumstances of the case, and may excuse a party from not taking necessary steps to protect its position. In some cases, however, depending on those circumstances and the application of the rules and ***Denton*** test, it will be necessary for the court to leave a party against whom a default judgment is entered to pursue a fresh claim based on the fraud, see ***RBS v Highland Financial Partners*** (2013). In the present case, the defendant insurer's applications rather than being made promptly were 'inexcusably delayed' with no attempt made to justify the delay. It failed to take any opportunity to protect its position, including admitting liability without having ascertained whether it was properly satisfied that the claim was genuine. ***Hussain v Sarkar*** [2010] EWCA Civ 301, unrep., CA, ***Owens v Noble*** [2010] EWCA Civ 224, [2010] 1 W.L.R. 1489, CA, ***Mitchell MP v News Group Newspapers Ltd*** [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, CA, ***Durrant v Chief Constable of Avon and Somerset Constabulary*** [2013] EWCA Civ 1624, [2014] 1 W.L.R. 4313, CA, ***RBS v Highland Financial Partners*** [2013] EWCA Civ 328, [2013] 1 C.L.C. 596, CA, ***Regione Piemonte v Dexia Crediop Spa*** [2014] EWCA Civ 1298, unrep., CA, ***Denton v T H White Ltd (Practice Note)*** [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296, CA, ***Blakemores LDP v Scott*** [2015] EWCA Civ 999, unrep., CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1, paras 3.9.5, 13.3.5, 39.3.7.)

- **Littlestone v Macleish** [2016] EWCA Civ 127, 10 March 2016, unrep. (Black, Gloster and Briggs LJJ)

Part 36 Offer – Admission – Payment on account – Relationship to the offer

CPR rr.36.3(5), 36.10, 36.14(1)(a), 36.11(6), 36.14(2), 36.14(4) (pre-6 April 2015), 44.3(1), 44.5(1). Action for damages for breach of defendants' obligation to repair under a lease of office premises. Damages of £74,820.93, plus interest, were claimed. In February 2013 the defendants made a Part 36 Offer to settle for £35,000. In its defence, served on 1 March 2013, the defendants admitted liability in the amount of £17,504. The defendants offered to make payment of the amount admitted. The claimant accepted payment on the basis that it was doing so as a payment on account. Payment was made prior to the period for accepting the Part 36 Offer expiring. In October 2013 the claimant made a Part 36 Offer to settle for £54,000 (inclusive of interest and VAT), albeit minus the sum paid on account by the defendants. The defendants suggested the claimant's offer differed from theirs by £1,496 i.e., by implication their offer of £35,000 was available for acceptance without account being taken of the money paid on account. The claim succeeded. Total damages, including interest, of £55,463.11 were awarded. The judge rejected the defendant's contention that the payment on account was intended to be added to their Part 36 Offer, and rejected their argument that the claimant had failed to obtain a judgment more advantageous than their offer. Costs in the claimant's favour were awarded on the standard basis. Both parties appealed from the costs order. The defendant appealed on the ground that the claimant failed to beat their Part 36 Offer, and accordingly they ought to have been awarded their costs from March 2013 (the Part 36 Appeal). The claimant cross-appealed on the ground that the costs award should have been made on an indemnity basis as that was consistent with the terms of the lease agreement. The cross-appeal was dismissed: the proper approach to costs assessment where there was a contractual entitlement is set out in ***Gomba Holdings (UK) Ltd v Minories Finance Ltd (No.2)*** (1993); the costs order failed to apply that approach and no good reason was advanced to uphold the judge's decision. In respect of the Part 36 Appeal, Briggs LJ, with whom Black and Gloster LJJ agreed, **held**: (i) the Part 36 Offer was one to settle the claim in toto for £35,000; (ii) a payment on account following on from an admission was no more than that. It did not alter the nature of the claim or the amount claimed; (iii) the payment on account following the admission was a payment on advance of the amount that would have become due and payable if the defendant's Part 36 Offer had later been accepted i.e., a part payment of £35,000. This analysis did not offend CPR r.36.11(6). A payment on account following an admission where there is a Part 36 Offer for a higher amount than the offer is as much a payment on account of that offer as it is of the claim, unless the parties agree otherwise; (iv) the trial judge was correct in her approach to calculating the total damages to be awarded i.e., by not reducing the total amount by reference to the part payment. Given this the claimant clearly obtained a judgment more advantageous to that of the Part 36 Offer; (v) a payment following the admission is not an interim payment on account per CPR rr.25.1(k), 25.6, 25.8 and 25.9. It was not as it was made after an admission; (vi) Moore-Bick LJ's *obiter dicta* analysis in ***L.G. Blower Specialist Bricklayer Ltd v Reeves*** (2010) was not an authority for an alternative approach to the relationship between Part 36 and payments following admissions. ***Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)*** [1993] Ch. 171, ChD, ***Gibbon v Manchester City Council; L.G. Blower Specialist Bricklayer Ltd v Reeves*** [2010] EWCA Civ 726, [2010] 1 W.L.R. 2081, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1, para.36.17.2.)

- **Oak Cash & Carry Ltd v British Gas Trading Ltd** [2016] EWCA Civ 153, 15 March 2016, unrep. (Jackson, King and Lindblom LJJ)

Relief from sanction – Assessment of seriousness or significance of breach of an unless order

CPR r.3.9. Claim for recovery of debt of £200,000. Order made on 1 November 2013 requiring the filing of a pre-trial checklist by 3 February 2014. Defendant failed to file a pre-trial checklist. Unless order made on 10 February

2014 specifying that if the defendant failed to file a Listing Questionnaire by 19 February 2014 the defence would be struck out. Defendant failed to file a Listing Questionnaire by the due date, accordingly the defence was struck out. On 21 February 2014 the defendant filed a Listing Questionnaire. Following an application by the claimant, judgment in default of defence was granted on 18 March 2014. On 24 March 2014 the defendant applied for relief from the sanction contained within the unless order. Relief from sanction granted, and despite no application to set aside the default judgment having been made that judgment was set aside. The claimant appealed. Appeal allowed, and the default judgment was restored. Second appeal to the Court of Appeal dismissed. **Held**, key issue arose in respect of Stage 1 of the ***Denton*** test: in assessing the seriousness or significance of a breach was the breach of an unless order to be considered in isolation or looked at against the wider context of time to comply with the original order. In the present case the defendant breached the unless order by two days. It had however had in total three months to comply with the original order, and in filing the Listing Questionnaire did so 18 days late from the last date to file provided buy the original order. ***Denton*** para.27 explained: (i) as a general rule, at Stage 1 the court's role is to focus on the immediate breach in respect of which relief is sought. The court must not consider other, historic breaches; (ii) however, where relief is sought in respect of breach of an unless order that cannot be viewed in isolation from previous breaches. To assess the seriousness and significance of a breach of an unless order, the court must take account of the underlying breach i.e., the breach of the original order, as well as the immediate breach of the unless order. Where an unless order is concerned, the 'very breach' referred to in para.27 of ***Denton*** refers to the failure to comply with the obligation imposed by the original order, rule etc., and the extension of time to comply provided by the unless order. Not every breach of an unless order will, however, be serious or significant, albeit failure to comply with such an order points towards such a finding. This is the case because a party is in breach of two successive requirements to carry out the same obligation and the court has stressed the importance of compliance by imposing an unless order with an automatic sanction for non-compliance attached to it. ***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 2016*** Vol.1, para.3.9.4.1.)

- **Swindon Borough Council v Webb (t/a Protective Coatings)** [2016] EWCA Civ 152, 16 March 2016, unrep. (Tomlinson and Lewison LJJ)

Contempt of court – Guidance on proper approach to release of contemnor

CPR rr.3.3(1), 3.3(3), 3.3(4), 81.31, Enterprise Act 2002, section 213. Enforcement proceedings were brought by the claimant in June 2006 against the defendant, a 'rogue trader', seeking to enjoin him from carrying out various acts that were injurious to the interests of house holders. Restraining Orders, the breach of which was a contempt of court, obtained and served on the defendant in August 2006. In 2014 proceedings for committal for contempt initiated by the claimant. The defendant was found to have been in breach of the 2006 Order on four occasions. He was committed to prison for contempt for four months for each of the breaches; the periods to run concurrently. On 30 April 2014 the defendant was sent to prison. On 6 May 2014 a member of the County Court staff issued a Production Order requiring the defendant's attendance at court to purge his contempt. The basis on which that Order was issued was not clear, and no copy of the Order was available to the Court of Appeal. The judge who apparently authorised the Order to be issued appeared not to know the basis on which the defendant was being brought to court to purge his contempt; she appeared to believe he was being brought to court for other reasons and directed the court staff to make enquiries as to why he was being brought to court. By the time a member of the court staff (the member of staff who had prepared the Production Order being absent from work) had queried the reason why the defendant was being brought to court, he had been released from custody after purging his contempt before a Recorder who, apparently without the appropriate background materials, and without the claimant having been notified or being present, treated the hearing as a formality. The claimant appealed from the Recorder's Order, albeit not to seek the defendant's imprisonment as, due to other matters, the defendant was in prison. The claimant pursued the appeal to vindicate its position in pursuing rogue traders, and to demonstrate that sanctions for breach of restraining orders have consequences that will apply unless set aside following a proper, rather than irregular procedure, and following a genuine rather than merely formal apology to the court. **Held**, the appeal was dismissed by the Court of Appeal on the basis that setting aside the Recorder's Order would now serve no purpose: the defendant could not be returned to prison to serve the remainder of his sentences. Notwithstanding this the Court of Appeal emphasised the following by way of guidance to the proper approach to take to early discharge of a contemnor: (i) the proper approach to early discharge from committal for contempt is set out in CPR r.81.31. This approach ought to be followed, not least as it ensures that defendants are informed and able to attend court to make such submissions on the issue; (ii) applications for discharge ought, as a general rule, to be listed before the judge who imposed the committal order; (iii) where the court acts on its own initiative under CPR r.3.3(1) to direct a hearing to consider early discharge it should ordinarily give sufficient notice of its intention to do so to a party or third party who has an interest in the committal order, i.e., the party who applied for the committal for contempt, and to provide them an opportunity to be heard on the

question: see CPR r.3.3(3) and (4); (iv) at any hearing to consider early discharge the court must give real consideration to the question whether it is either appropriate or just to grant an early discharge. The hearing must not be treated as a mere formality, nor should the contemnor simply be required to accede to or agree with statements that would, if agreed with, secure the contemnor's release; (iv) authoritative guidance on the proper approach to assessing whether it is appropriate or just to grant an early discharge is set out in Wilson LJ's judgment in ***CJ v Flintshire Borough Council*** (2010), paras 6 and 20-22; specifically, the following eight questions should be considered,

'*(i) Can the court conclude, in all the circumstances as they now are, that the contemnor has suffered punishment proportionate to his contempt?*

(ii) Would the interest of the State in upholding the rule of law be significantly prejudiced by early discharge?

(iii) How genuine is the contemnor's expression of contrition?

(iv) Has he done all that he reasonably can to demonstrate a resolve and an ability not to commit a further breach if discharged early?

(v) In particular has he done all that he reasonably can (bearing in mind the difficulties of his so doing while in prison) in order to construct for himself proposed living and other practical arrangements in the event of early discharge in such a way as to minimise the risk of his committing a further breach?

(vi) Does he make any specific proposal to augment the protection against any further breach of those whom the order which he breached was designed to protect?

(vii) What is the length of time which he has served in prison, including its relation to (a) the full term imposed upon him and (b) the term which he will otherwise be required to serve prior to release pursuant to s.258(2) of the Criminal Justice Act 2003?

(viii) Are there any special factors which impinge upon the exercise of the discretion in one way or the other?'

Albeit, as noted by Sedley LJ in that decision, the eight questions should not be taken to be an exhaustive check-list. ***Enfield London Borough Council v Mahoney*** [1983] 2 All E.R. 901, CA, ***Wood v Collins*** [2006] EWCA Civ 743, unrep., CA, ***Poole Borough Council v Hambridge*** [2007] EWCA Civ 990, [2008] C.P. Rep. 1, CA, ***CJ v Flintshire Borough Council*** [2010] EWCA Civ 393, [2010] C.P. Rep. 36, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1, para.81.31.1.)

Group Seven Ltd v Nasir [2016] EWHC 620 (Ch), 21 March 2016, unrep. (Morgan J)

Costs management – Proportionality – Relevance of alleged fraud to assessment of costs budget – Relevance of potential future appeal to costs management order

CPR rr.3.15, 3.17, 3.18, 44.3, 44.4, CPR Practice Direction 3E paras 7.1-7.9. Claims arising from allegations of substantial fraud. Costs budgets submitted by the various parties in sum of £13,325,721. Budgets not agreed. Morgan J **held** not satisfied that litigation capable of being conducted fairly and proportionately absent a costs management order: CPR r.3.15. In making such an order the court was managing the costs of the first instance proceedings, it was not managing the costs of any future, potential, appeal. In assessing the various factors relevant to such an order in respect of the assessment of the proportionality of the budgeted costs it was noted that proportionality was 'a central concept of the CPR' and, in respect of costs, guidance was given to its assessment in CPR rr.44.3(5) and 44.4(3). It was further noted that, in terms of the relationship between costs and the sums in issue in a claim, the rules rightly did not provide for a 'mathematical relationship' between the two. In assessing proportionality, where there were allegations of fraud or other dishonesty, those allegations were not to be considered as a freestanding issue. Such allegations fall for consideration within the context of the factors identified in rr.44.3(5) and 44.4(3) i.e., they are subject to the proportionality assessment in the same way any other allegations would be and are at the costs management/budgeting stage of proceedings. This is however without prejudice to any costs assessment following trial if fraud is found at the trial and the judge awards costs on an indemnity basis. ***Bilta (UK) Ltd v Nazir (No.2)*** [2015] UKSC 23, [2015] 2 W.L.R. 1168, UKSC, ***Yeo v Times Newspapers Ltd (No.2) Practice Note*** [2015] EWHC 209 (QB), [2015] 1 W.L.R. 3031, QB, ***CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd*** [2015] EWHC 481 (TCC), [2015] 2 Costs L.R. 363, TCC, ***GSK Project Management Ltd v QPR Holdings Ltd*** [2015] EWHC 209 (QB), [2015] Costs L.R. 729, QB, ref'd to. (See ***Civil Procedure 2016*** Vol.1, para.3.15.1.)

OOO Abbott v Econowall UK Ltd [2016] EWHC 660 (IPEC), 23 March 2016, unrep. (HHJ Hacon)

Extension of time to serve claim form – requirement to co-operate

CPR rr.1.3, 3.1(2)(a), 3.4(2)(c), 3.9, 6.15(1), 6.15(2), 7.5(1), 7.6(3). Proceedings for patent infringement brought by the claimants in the present claim concluded in judgment in their favour in 2013. The present proceedings issued in July 2015 variously concern the manufacture and sale of items subject to the patent by the defendants. The claim form

was not issued within the period permitted by CPR r.7.5(1). Various applications made, including, amongst other things, that service by the claimant of a photocopy of an unsigned claim form shortly after the claim was issued stand as good service, that relief from sanction for the failure to serve in time be granted under CPR r.3.9, and a retrospective extension of time to serve the particulars of claim under CPR r.3.1(2)(a) be granted. **Held**, service of the unsigned claim form was deemed good service and retrospective permission to serve the particulars of claim granted. Parties are not required to inform their opponents of mistakes they have made in the conduct of litigation. This is however subject to the overriding objective, which places an obligation on parties to take such reasonable steps as can reasonably ensure that there is a clear common understanding between them as to the real issues in dispute, and as to the proper procedural arrangements for the effective progress of the claim. A failure to do so can lead, contrary to the overriding objective, to unnecessary cost and delay being incurred by the parties and to the court having to allocate resources to the claim that ought properly to be deployed to other claims. To assist the court furthering the overriding objective where a party becomes aware of a genuine misunderstanding between it and other parties in the litigation on a significant matter, that party should take reasonable steps to dispel the misunderstanding. The application to authorise service by an alternative method under CPR r.6.15(1) and (2) was to be approached according to the four principles identified in paras 33-38 of Lord Clarke of Stone-cum-Ebony JSC's judgment in ***Abela v Baadarani*** (2013). The requirements specified in CPR r.7.6(3) were not to be imported into an assessment of whether to grant an application under CPR r.6.15(1), see ***Bethell Construction Ltd v Deloitte & Touche*** (2011) at its para.24. In respect of the application for relief under CPR r.3.9, the Court of Appeal's decision in ***Kaur v Ctp Coil Ltd*** (2001) was binding. Relief from sanctions in the present situation can only be granted if the requirements of CPR r.7.6(3) are met. ***Vinos v Marks & Spencer Plc*** [2001] C.P. Rep. 1, CA, ***Kaur v Ctp Coil Ltd*** [2001] C.P. Rep. 34, ***Kuenyehia v International Hospitals Group Ltd*** [2006] EWCA Civ 21, unrep., CA, ***Hoddinott v Persimmon Homes (Wessex) Ltd*** [2007] EWCA Civ 1203, [2008] 1 W.L.R. 806, CA, ***Bethell Construction Ltd v Deloitte & Touche*** [2011] EWCA Civ 1321, unrep., CA, ***Abela v Baadarani*** [2013] UKSC 44, [2013] 1 W.L.R. 2043, UKSC, ***Denton v T H White Ltd (Practice Note)*** [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296, CA, ***Heron Bros Ltd v Central Bedfordshire Council*** [2015] EWHC 604 (TCC), unrep., TCC, ***Cant v Hertz Corporation*** [2015] EWHC 2617 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2016*** Vol.1, paras 1.3.2, 6.15.3.)

- **Barton v Wright Hassall LLP** [2016] EWCA Civ 177, 23 March 2016, unrep. (Black and Floyd LJJ and Moylan J)

Litigant-in-person – Alternative service – Summary of test under Abela v Baadarani [2013] UKSC 44, [2013] 1 W.L.R. 2043

CPR rr.6.15(1), 6.15(2), 7.5, PD6A paras 4.1-4.3. The claimant, a litigant-in-person, issued proceedings for professional negligence against the defendant. The claim form was to be served by the claimant. Claim form sent to defendant's lawyers via email following email correspondence between them. The defendant's lawyers subsequently acknowledged they had received the claim form and particulars of claim and pointed out that email service was not permissible as they had not previously informed the claimant that they were willing to receive service in that form. The defendant's lawyers further stated that the time period to serve under CPR r.7.5 had expired and the claim was time barred. The claimant applied for an order directing that the provision of the claim form and particulars of claim via email was deemed good service. Application refused by the District Judge. Appeal on the issue of whether the provision of the documents via email was good service as service by an alternative means under CPR r.6.15. Appeal dismissed. Appeal to the Court of Appeal dismissed. **Held**, the key issue in this case was whether there was anything to justify the conclusion that there was good reason to validate the service via email as good service. There was nothing to support such a conclusion. The claimant had simply failed to avail himself of the service time period. There was no suggestion the rules on service were complex or ambiguous such as might justify a litigant-in-person being granted particular indulgence, particularly in this case where the claimant was aware that some solicitors did not accept service by email and he had failed to ascertain whether the defendant's lawyers accepted service in this way. Further, the Court of Appeal summarised the test to be derived from ***Abela v Baadarani*** (2013) and later authorities respecting CPR r.6.15 viz.,

'i) In deciding whether steps should be validated under the rule the court should simply ask itself whether there is "good reason" to do so: (Abela [35]).

ii) A critical factor in deciding whether to validate service under the rule is that the document has come to the attention of the party intended to be served: (Abela [36]). That is the whole purpose of service: (Abela [37], [38]).

iii) However it is not by itself sufficient that the document was brought to the attention of the opposite party: something more must be present before there is a "good reason": (Abela [36]).

iv) In deciding whether there is a "good reason", there will inevitably be a focus on the reason why the claim form cannot or could not be served within the period of its validity, although this is by no means the only area of inquiry: (Abela [48], Kaki [33]).

v) The conduct of the claimant and of the defendant is relevant: (Kaki [33]). It is not necessary, however, for the claimant to show that he has taken all the steps he could have reasonably taken to effect service by the proper method: (Power [39]).

vi) The mere fact that one party is a litigant in person cannot on its own amount to a good reason, although it may have some relevance at the margins: (Hysaj [44]-[45]; Nata Lee [53]).

vii) If one party or the other is playing technical games, this will count against him: (Abela [38]).

viii) An appellate court will only interfere with the judge's evaluation of the various factors in the assessment of whether there is a good reason if he has erred in principle or was wrong in reaching the conclusion which he did: (Abela [23]).'

Abela v Baadarani [2013] UKSC 44, [2013] 1 W.L.R. 2043, UKSC, ***Power v Meloy Whittle Robinson*** [2014] EWCA Civ 898, unrep., CA, ***Kaki v National Private Air Transport Co*** [2015] EWCA Civ 731, unrep., CA, ***R. (Hysaj) v Secretary of State for the Home Department*** [2014] EWCA Civ 1633, [2015] 1 W.L.R. 2472, CA, ***Nata Lee Ltd v Abid*** [2014] EWCA Civ 1652, unrep., CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1, para.6.15.3.)

Practice Updates

STATUTORY INSTRUMENTS

THE COURT OF APPEAL AND UPPER TRIBUNAL (LANDS CHAMBER) FEES (AMENDMENT) ORDER 2016 (SI 2016/434), in force from **18 April 2016**.

Amends the Civil Proceedings Fees Order 2008 (2008/1053). Amends Schedule 1, column 1and 2: para.13.1(a) of the Order to increase the fee payable for issuing an application for permission to appeal or for an extension of time to apply for permission to appeal to £528; para.13(1)b) of the Order to increase the fee payable for filing an appellant's notice or respondent's notice where a respondent is appealing where permission to appeal is either not required or has been granted by a lower court to £1,199; para.13.1(c) of the Order to increase the fee payable for filing an appeal questionnaire (except where para.13.1(b) applies) to £1,199; para.13.2 of the Order to increase the fee payable for filing a respondent's notice where the respondent seeks to have the lower court's order upheld for reasons different from or additional to those of the lower court to £528; and para.13.3 of the Order to increase the fee for filing an application notice to £528. Further amendments are made to the Upper Tribunal (Lands Chamber) Fees Order 2009 (SI 2009/1114). (See ***Civil Procedure 2016*** Vol.2 para.10-7.)

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012 (No.12) ORDER 2016 (SI 2016/345), in force from **6 April 2016,** subject to transitional provisions set out in sections 44(6) and 46(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Disapplies the exclusion of insolvency proceedings from the effect of ss.44 and 46 of the 2012 Act regarding recoverability of conditional fee agreement success fees and insurance premiums. (See ***Civil Procedure 2016*** Vol.1, paras 48.0.2.2, 48.0.2.3, 48.0.2.4, 48.0.3, Vol.2 paras 7A2-1, 7A2-11, 7A2-12, 7A2-13.)

THE CIVIL PROCEEDINGS, FAMILY PROCEEDINGS AND UPPER TRIBUNAL FEES (AMENDMENT) ORDER 2016 (SI 2016/402) in force from **21 March 2016.**

Amends the Civil Proceedings Fees Order 2008 (SI 2008/1053). Amends Schedule 1, column 1 and 2, paras 1.4(b) and (c) of the Order to increase the fees to commence land recovery proceedings in: (i) the County Court to £355; and (ii) via Possession Claims Online to £325. Amends Schedule 1, column 1 and 2, para.2.4 to substitute a new para.2.4(a) and 2.4(b). The former prescribes a fee of £255 for issuing an application on notice where no other fee is provided for except for such applications referred to in para 2.4(b). The latter prescribes a fee of £155 for applications on notice under s.3 of the Protection from Harassment Act 1997 or those made for a payment out of funds deposited in court and where no other fee is provided for. Amends Schedule 1, column 1 and 2, para.2.5 to substitute a new para.2.5(a) and 2.5(b). The former prescribes a fee of £100 for issuing an application by consent or without notice where no other fee is provided for except for such applications referred to in para.2.4(b). The latter prescribes a fee of £50 for applications by consent or without notice under s.3 of the Protection from Harassment Act 1997 or those made for a payment out of funds deposited in court and where no other fee is provided for. Further amendments are made to the Family Proceedings Fees Order 2008 (SI 2008/1054) and the Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) (England and Wales) Fees Order 2011 (SI 2011/2344). (See ***Civil Procedure 2016*** Vol.2 para.10-7.)

PRACTICE GUIDANCE

SENIOR MASTER'S PRACTICE NOTE, in force from 14 December 2015.

Guidance given on making orders for transfer for enforcement under s.41 of the County Courts Act 1984. (See further "In Detail" section of this issue of CP News.)

SENIOR MASTER'S PRACTICE NOTE, in force from 21 March 2016.

Further guidance given on orders for transfer for enforcement under ss.41 and 42 of the County Courts Act 1984. (See further "In Detail" section of this issue of CP News.)

ADMIRALTY & COMMERCIAL COURTS GUIDE 2016, in force from 21 March 2016.

On 18 March 2016, an updated version of the Admiralty and Commercial Court Guide was issued. The new version has been amended by way of incorporation of a number of specific Guidance documents issued since it was last updated in April 2014.

A summary of the amendments has been issued to assist users of the Guide, and which is reproduced below for ease of reference:

Admiralty and Commercial Court Guide 2016 – Summary of Changes

Guide para.	Issue/source
B4.1	Claim Information Form: Low compliance rate.
C3.3	Flaux Guidance 2014: extension of time for serving pleadings over 28 days.
C4.4	Flaux Guidance 2014: extension of time for serving pleadings.
D2.2	Costs budgeting guidance on issues to be considered.
E2.3	Disclosure schedules approach and timing. Clarification responding to user query.
E2.5(f)	E-disclosure – approach to issues for resolution at the CMC. Clarification responding to user query.
F2.7	Gloster J guidance: Time estimates and reading lists on without notice applications.
F5.5	Flaux J Guidance 2015. Length of skeleton arguments. Clarification re., font size.
F6.1	Clarification of borderline between ordinary application and heavy application. Clarification responding to user query.
F6.5	Flaux J Guidance 2015. Length of skeleton arguments. Clarification re., font size.
F6.6	Clarification of borderline between ordinary application and heavy application. Clarification responding to user query.
Para F10.6(b)	Flaux Guidance 2014 plus clarification of the borderline between ordinary application and heavy application.
F13	Citation of authorities.
CMIS	• Removal of the initial questions which were directed to statistics. • A reminder to comply with the CIF requirements • A new question designed to indicate the state of play on/encourage consideration of the Shorter and Flexible Trails procedures. • A new costs budgeting question – an indication whether the CMC is considered the right time for costs budgeting issues, so the court can know if this will be a live issue. • A new disclosure schedules question, reflecting the Guide requirement that the parties indicate whether these are considered unnecessary.

PRE-ACTION PROTOCOLS

PRE-ACTION PROTOCOL FOR LOW VALUE PERSONAL INJURY CLAIMS IN ROAD TRAFFIC ACCIDENTS, amendment in force from **24 March 2016.**

On 24 March 2016 the Ministry of Justice announced that para.1.1(A1)(a) and (b) of this Pre-Action Protocol was amended such that the accreditation date for medial experts providing reports in respect of soft tissue injury claims is now 1 June 2016. The revised provision reads as follows:

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

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

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

In Detail

ENFORCING ORDERS FOR POSSESSION

The Senior Master has, since December 2015, issued two Practice Notes concerning applications to transfer County Court Possession Orders to the High Court for the purposes of enforcement. Transfer of proceedings from the County Court to the High Court are governed by County Courts Act 1984 ss.41 and 42:

County Courts Act 1984 s.41 – Transfer to High Court by order of High Court.

(1) If at any stage in proceedings commenced in the county court or transferred to the county court under section 40, the High Court thinks it desirable that the proceedings, or any part of them, should be heard and determined in the High Court, it may order the transfer to the High Court of the proceedings or, as the case may be, of that part of them.

(2) The power conferred by subsection (1) is without prejudice to section 29 of the Senior Courts Act 1981 (power of High Court to issue prerogative orders).

(3) The power conferred by subsection (1) shall be exercised subject to any provision made—

(a) under section 1 of the Courts and Legal Services Act 1990; or

(b) by or under any other enactment.

County Courts Act 1984 s.42 – Transfer to High Court by order of the county court.

1. *Where [the county court] 2 is satisfied that any proceedings before it are required by any provision of a kind mentioned in subsection (7) to be in the High Court, it shall—*

   (a) order the transfer of the proceedings to the High Court; or

   (b) if the court is satisfied that the person bringing the proceedings knew, or ought to have known, of that requirement, order that they be struck out.

2. *Subject to any such provision, the county court may order the transfer of any proceedings before it to the High Court.*

3. *An order under this section may be made either on the motion of the court itself or on the application of any party to the proceedings.*

4. *The transfer of any proceedings under this section shall not affect any right of appeal from the order directing the transfer.*

5. *Where proceedings for the enforcement of any judgment or order of the county court are transferred under this section—*

(a) the judgment or order may be enforced as if it were a judgment or order of the High Court; and

(b) subject to subsection (6), it shall be treated as a judgment or order of that court for all purposes.

6. *Where proceedings for the enforcement of any judgment or order of [the county court] 2 are transferred under this section—*

(a) the powers of any court to set aside, correct, vary or quash a judgment or order of the county court, and the enactments relating to appeals from such a judgment or order, shall continue to apply; and

(b) the powers of any court to set aside, correct, vary or quash a judgment or order of the High Court, and the enactments relating to appeals from such a judgment or order, shall not apply.

7. *The provisions referred to in subsection (1) are any made—*

(a) under section 1 of the Courts and Legal Services Act 1990; or

(b) by or under any other enactment.

The Practice Notes, reproduced below for ease of reference, clarify the proper approach to such applications in the context of applications to enforce possession orders. As the most recent Practice Note, dated 21 March 2016, makes clear they have been issued in the light of the adoption of inappropriate practices, which were themselves highlighted in ***Nicholas v Secretary of State for Defence*** [2015] EWHC 4064 (Ch), 24 August 2015, unrep., (Rose J) and ***Birmingham City Council v Mondhlani*** [2015] EW Misc (CC), 6 November 2015, unrep., (D.J. Salmon). The inappropriate practices are: the failure to give proper notice as required by CPR r.83.18(3); and misuse of Form N293A. (See ***Civil Procedure 2016*** Vol.1 paras 40.14A.1, 83.19.2, Vol.2 para.1B-103).

Nicholas v Secretary of State for Defence [2015] EWHC 4064 (Ch) – Lack of Proper Notice

The Secretary of State for Defence sought an order for possession of military premises occupied by Miss Nicholas. Miss Nicholas had originally occupied the premises as the wife of an RAF officer. The marriage ended in divorce and Mr Nicholas moved out of the property. Miss Nicholas continued to occupy the property. The Secretary of State's position was that she was no longer entitled to possession and had obtained an order granting possession. That order had been subject to a failed challenge by way of appeal to the Court of Appeal. An application for permission to appeal from the Court of Appeal's order to the Supreme Court had not been issued, although as an extension of time within which to issue had been granted, the possession proceedings had not been finally determined. Notwithstanding the potential application for permission to appeal, and apparently unaware of the possibility, the Secretary of State applied for permission to issue a writ of possession. Permission was granted on the papers by the Deputy Master. The Order was executed by a Sheriff of the High Court, which rendered Miss Nicholas 'street homeless and living in her car'.

An application to set aside the Deputy Master's Order was heard by Rose J, who set it aside on two grounds: (i) the basis on which it was made did not include evidence as to the pending, potential appeal to the Supreme Court. It was not apparent that the Order would have been granted if that information was before the Deputy Master, see Lang J's decision in ***Ahmed v Mahmood*** [2013] EWHC 3176 (QB) at para.20, where granting possession orders prior to liability being finally determined was deprecated; and (ii) Miss Nicholas was not given notice of the application for permission as required by CPR r.83.13(8)(a), in respect of which Rose J explained that its effect was, as noted at ***Civil Procedure 2016*** Vol.1 para.83.13.9, that notice of an application for a writ of possession must be given to all occupants of the relevant property, and the court will not grant permission unless they have been afforded an opportunity to apply for relief: see ***Leicester City Council v Adlwinkle*** (*The Times*, April 5, 1991, CA). Further support for the requirement of prior notice was to be found at para.50 of ***Jephson Homes Housing Association v Moisejevs*** [2000] EWCA Civ 271, [2001] 33 H.L.R 54, CA. Without there having been notice to Miss Nicholas the order should not have been made and accordingly had to be set aside.

The error which the Secretary of State made was to rely upon CPR r.83.13(3), which provided that the court's permission is not necessary for the issue of a writ of possession under Pt 55 where, amongst other things, the occupant is a trespasser, to justify the absence of notice as provided for by CPR r.83.13(4). Reliance on these provisions was not permissible as: (i) it was not established that Miss Nicholas was a trespasser, that was an issue that was within the ambit of the pending, potential application for permission to appeal to the Supreme Court; and (ii) the Secretary of State had applied for permission to enforce: CPR r.83.13(3) and (4) applied where the application was made against trespassers more than three months after the date of issue of the possession order.

Birmingham City Council v Mondhlani [2015] EW Misc (CC) – Misuse of Form N293A

The defendants had been secure tenants of Birmingham City Council since 1997. From December 2009 a number of possession orders and warrants of possession had been granted to the City Council on grounds of rent arrears in County Court proceedings. By 2015 the City Council had initiated a pilot scheme whereby it would seek the transfer of residential possession orders from the County Court to the High Court for purposes of enforcement. In July 2015, the City Council applied to the County Court to transfer the present proceedings, consistently with its pilot scheme, to the High Court. The defendants subsequently issued an application to add a disrepair counterclaim. That application was granted and, as a consequence, the District Judge rejected the application to transfer the proceedings to the High Court. The District Judge went on however to set out guidance to both the City Council as it had become apparent that the approach to such applications which it had taken in other cases was flawed and to other District Judges in Birmingham, and by implication elsewhere in England and Wales. Having noted the power to transfer proceedings to the High Court under County Courts Act 1984 ss.41 and 42, the power to make an order in the absence of the parties (***The Governor & Company of the Bank of Ireland v Shah & Dubash*** [2015] EWCA Civ 1018, paras 34-38), and the transfer provisions in CPR r.30.3(2) (the most relevant on an application to transfer for the purpose of enforcement of a County Court possession order noted as being CPR r.30.3(2)(a), (b) and (c)), the District Judge outlined, at paras 61 and 62, the different procedural regimes governing enforcement in the County Court and in the High Court,

> *'The County Court*
>
> *[61] The procedure is governed by CPR83.26. In summary it requires an application to be made to the County Court hearing centre. It may be made without notice. The application must certify that the premises have not been vacated. Applications are made using prescribed form N325. The issue of the warrant of possession in the County Court is an administrative act by Court staff. They issue a warrant of possession to the Court bailiff N49. They issue Notice of Appointment to the Claimant in form EX96 and a Notice of Eviction to the Defendant using a prescribed form N54. The N54 form contains a date and time when the eviction is to take place. It also contains information as to what happens at the eviction and what a tenant can do including a detailed explanation as to how in some circumstances a Court can decide to suspend the warrant and postpone the date for eviction and the procedure for so doing including a reference to the Court fee and fee exemption or remission. It also explains what to do if you can pay off any arrears.*
>
> *The High Court*
>
> *[62] In the High Court the procedure is governed by CPR83.13. In contrast to the County Court, in the High Court permission is required to issue a writ of possession and before permission is granted every person in actual possession of the whole or any part of the land ('the occupant') must receive such notice of the proceedings as appears to the Court sufficient to enable the occupant to apply to the Court for any relief to which the occupant may be entitled (CPR 83.13(2) and 83.13(8)).'*

The District Judge went on to note that the effect of Rose J's decision in ***Nicholas*** was that where an application for a writ of possession is made under CPR r.83.13 notice to all occupiers must be given of the application. The District Judge then outlined the factors to be taken account of when the County Court considered an application to transfer viz., (i) the expectation that County Court orders would ordinarily be enforced in the County Court, which points to an applicant seeking transfer to demonstrate some significant advantage arising from the transfer e.g., that transfer facilitates the better carrying out of its function as a social landlord; (ii) that there is no procedural prejudice to the tenant; (iii) the impact of transfer on court resources and, consistently with CPR r.1.(2)(e), on other litigants; and (iv) the likelihood that the warrant or writ of possession will be suspended. The greater the likelihood the less advantage there is in effecting a transfer to the High Court. In this respect the level of arrears and the case history are relevant factors to consider.

The District Judge went on to note that, in other cases, the City Council having obtained a transfer order had – through its agents – obtained writs of possession in Huddersfield District Registry. It had done so in a manner that did not appear to the District Judge to be in compliance with CPR r.83.13(2). A similar error had apparently been made as occurred in ***Nicholas***: the applications had proceeded as if the defendants were trespassers and thus there was no requirement to give notice. This error had arisen as the City Council's agents had applied for the writ of possession using Form N293A and writ form 66; the former is applicable only where the occupant is a trespasser. A secure tenant after a possession order is not however a trespasser. In reliance on the use of Form N293A, court staff had apparently been issuing writs for possession absent authority to do so and where CPR r.83.13(2) required the permission of a judge following the giving of proper notice as required by CPR r.83.13(8).

The Senior Master's Practice Notes

The two judgments make clear that where enforcement of a possession order is sought it is imperative that parties follow the correct procedure laid down in CPR rr.83.13 and 83.26. In particular, they highlight the need to ensure that unless the occupant can properly be classified as a trespasser, and as in ***Nicholas*** this may require a definitive, final determination by the court, the process applicable to trespassers cannot and should not be used. As such unless the occupant is a trespasser effective notice under CPR r.83.13(8) must be given. They further highlight the need to use the correct court forms in applying for possession orders. In this regard the Senior Master's Practice Notes emphasise the proper use of Form N293A (only to be used where the occupant is a trespasser) and the proper approach to take to applications involving enforcement against trespassers and as against tenants where transfer of proceedings from the County Court to the High Court is sought. The guidance they set out is equally applicable to in High Court District Registries as it is in proceedings before Masters in the Queen's Bench Division.

Senior Master's Practice Note – Transfers for Enforcement to the High Court, dated 14 December 2015

Form N293A (Combined Certificate for judgment and request for writ of control or writ of possession) (http://hmctsformfinder.justice.gov.uk/courtfinder/forms/n293a-eng.pdf) is used when a judgment creditor with a County Court judgment of £600 or more, or in receipt of a possession order against trespassers, wishes to transfer the claim to the High Court for enforcement, so that they can instruct a High Court Enforcement Officer, ("HCEO") (rather than the County Court bailiffs) to enforce the judgment either by a writ of control or a writ of possession.

The procedure to be adopted, (unless the judgment creditor/party with the benefit of a possession order asks the County Court District judge for an order for transfer under S. 42 of the County Courts Act 1984 when judgment is given), is to use Form N293A. This is submitted to the County Court (and now that there is a single County Court in theory this can be done by any County Court Office), with Part 1 of the form completed by the Judgment Creditor's legal representative. Part 2 is then completed by a court officer. The HCEO then completes Part 3, and takes the completed and certified N293A to the Central Office or a District Registry of the High Court and obtains a Writ of Control and/or a Writ of Possession.

In the last 12 months, instead of the Claimant making an application under S.42 at the hearing, or submitting Form N293A, a number of HCEOs have been making applications on a regular basis to the Practice Master in QBD under S. 41 of the County Courts Act 1984 to transfer the County Court claim for enforcement to the High Court. The HCEOs have informed the Masters that that County Court officers are refusing to certify Form 293As, without explanation. We have also been told that when applications are made under S. 42, some County Courts can take some 6-8 weeks to deal with them, and in the case of possession orders this means a significant loss of rental income to the judgment creditors. Thus it is much more efficient for judgment creditors/ parties with the benefit of a possession order, to enforce through a HCEO rather than via County Court bailiffs, so the HCEOs have no alternative but to make applications under S.41, where they can get an immediate order and issue a Writ of Control/Possession straight away.

The QB Practice Masters have been dealing with such applications, and making S.41 orders. However, as the County Court file and log for the case is not available to the QB Masters, in a number of cases their orders have conflicted with orders made by judges in the County Court. This has caused considerable problems in some cases. Accordingly, after consultation with the Deputy Head of Civil Justice, the President of the Queen's Bench Division, and the appropriate policy officials of the Ministry of Justice and of HM Courts & Tribunal Services, I have determined that the QB Masters will not make orders for transfer for enforcement under S. 41 unless on notice, and therefore all applications for transfer of county court orders and judgments for enforcement should be made either by an application under S. 42 to the District judge making the order, or, if for a Writ of Control or of Possession in a claim against trespassers, by lodging a properly completed Form N293A at a County Court office.

Barbara Fontaine
The Senior Master
14 December 2015

Senior Master's Practice Note – Applications for Transfer for Enforcement of Possession Orders to the High Court, dated 21 March 2016

I have received complaints that some High Court Enforcement Officers ("HCEOs") have been using Form N293A to transfer County Court Possession Orders against tenants for enforcement to the High Court. This procedure is wrong because:

1. The Form is intended for enforcement of possession orders against trespassers only (as stated in the notes at the bottom of the form; and
2. CPR 83.13(2) requires the permission of the High Court before a High Court Writ of Possession can be issued; and
3. CPR 83.13(8) (a) requires sufficient notice to be given to all occupants of the premises to enable them to apply to the court for any relief to which they may be entitled.

There have also been recent decisions where the misuse of Form N293A has been identified, e.g. *Birmingham City Council v Mondhlani* [2015] EW Misc (CC) (6 Nov. 2015); and lack of notice required under CPR 83.13(8) e.g. *Nicholas v Secretary of State for Defence* [2015] EWHC 4064 (Ch) (24 August 2015) Rose J. (unrep.).

In order to ensure that this practice does not continue:

1. The Queen's Bench Division Enforcement Section will not accept Form N293A for transfer to the High Court for enforcement of a possession order of the County Court other than for possession orders against trespassers. By distributing a copy of this note to Designated Civil Judges in District Registries I shall request that the same instructions be given to court staff in District Registries.

2. The Queen's Bench Masters will not accept applications under Section 41 of the County Court Act 1984 for transfer of a County Court possession claim for enforcement and such applications must be made under Section 42 of the County Court Act 1984 to a judge of the hearing centre of the County Court where the possession order was made, so that judge can satisfy themselves that the appropriate notice has been given under CPR 83.13(8).

3. The Civil Procedure Rule Committee ("CPRC") subcommittee on court forms has:
   (i) re-drafted Form N293A with greater emphasis on the restriction of the use of the form to requests for writs of control and writs of possession against trespassers only; and
   (ii) drafted a new form of draft order (PF92) giving permission to enforce a judgment or order for giving possession of land in the County Court (other than a claim against trespassers under Part 55), which make it clear that applications for such permission must provide evidence to satisfy the judge determining such application that the requirements of Rule 83.13(8) are met.

It is anticipated that these will be available for use in April 2016.

Barbara Fontaine
The Senior Master
21 March 2016

WHITE BOOK 2016 PREFACE—ERRATUM

On p.xiii of the 2016 edition of the White Book, in the preliminary pages, the date of Lord Justice Jackson's preface is printed as `January 12, 2015'. This is incorrect and should state '11 December 2015'. The publishers apologise for the error.

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LEGAL TAXONOMY
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