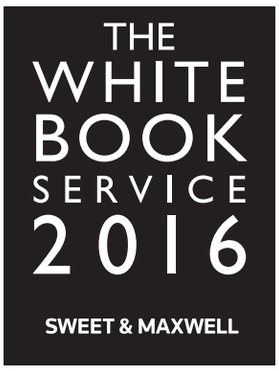
CIVIL PROCEDURE NEWS

Issue 5/2016 10 May 2016

CONTENTS



In Brief

Cases

- **Deutsche Bank AG v Unitech Global Ltd** [2016] EWCA Civ 119, 3 March 2016, unrep. (Longmore, Christopher Clarke and Sales LJJ)

Interim Payment – 'other sum' – liability to pay – restitution – payment into court – conditional leave to defend

Senior Courts Act 1981, s.32, CPR rr.1.1, 1.2, 3.1(3), 24.6, 25.1(1)(k), 25.6, 25.7, PD24 paras 4 and 5. Two actions brought by Deutsche Bank and others arising out of credit facility agreement and an interest rate swap agreement. The first action concerned the provision by the claimants of a $150 million to the defendants. The entire sum advanced was claimed in the first action. The Bank, in the second action, sought $11 million, under a guarantee under the swap agreement, from the 1st defendant. The claimants had secured summary judgment in respect of $177 million. That order had been set aside and the defendants had been given leave to defend the claim. It was common ground between the parties that if the defence succeeded at trial the defendant would be entitled to rescind the credit facility agreement. Rescission would be conditional on repayment by the defendant to the claimants of $120 million advanced under the facility. If the defence were not to succeed liability to the claimants would be $177 million. As such however the trial concluded repayment of $120 million would be required. Two questions of principle arose before the Court of Appeal: first, whether the court had power to either order an interim payment of $120 million; and secondly, whether the court had power to make leave to defend conditional upon payment into court of $120 million, and further, should have imposed such a condition upon the permission to defend granted upon the setting aside of summary judgment. The Court of Appeal allowed the appeal. The defendant was ordered to make an interim payment of $120 million and was required to pay that sum into court as condition to defend the claim. **Held**, (i) the power provided by the Senior Courts Act 1981, s.32(5), and particularly its reference to 'other sum', was wide enough to enable rules of court to be made to cover the situation where the sum to be paid by way of an interim payment arose by way of restitution of sums received by a defendant from a claimant where that payment arises as a condition precedent to rescission of a contract between the parties; (ii) CPR r.25.1(1)(k) is the relevant rule of court for the purposes of s.32(5) of the 1981 Act. It too is drafted widely enough to provide the power to make the order for an interim payment in the circumstances of the present case. Again, the reference to 'other sum' within the rule of court is wide enough to bring a restitutionary payment arising as a condition of the rescission of a contract within the ambit of the interim payment order-making power; (iii) the court's interpretation of CPR r.25.1(1)(k) did not require the court to rely on the interpretative power contained in CPR r.1.2. It was an interpretation that flowed from the wording of the provision itself. If, however, resort to CPR r.1.2 was necessary it would reinforce the court's conclusion as to the meaning and scope of the rule; (iv) there was nothing in the wording of CPR r.25.7(1)(c) to controvert the court's conclusion as to the ambit of r.25.1(1)(k); (v) CPR Pt 24 does not provide a power to make an order granting permission to defend conditional upon the defendant making a payment into court. Furthermore, Pt 24 does not itself provide a power to grant permission to defend. It sets out the court's power to give directions to file and serve a defence and, additionally, to give case management directions i.e., directions under the court's case management powers contained in CPR Pt 3; (vi) the power to make orders subject to the carrying out of specific conditions is a general case management power contained in CPR r.3.1(3). This is a wide-ranging power that enables the court to 'make any form of conditional order it thinks appropriate . . .'; (vii) the Court of Appeal's decision in ***Huscroft v P&O Ferries Ltd*** (2010) was distinguished. It explained that where a specific rule in the CPR made provision for particular applications, the court's general case management powers under CPR Pt 3 cannot be relied upon. That decision related to specific provisions in CPR r.25.12 and 13, where specific provision is made governing security for costs. CPR Pt 24 sets out no specific provisions concerning the making of conditional orders upon setting aside summary judgment. As such CPR Pt 3 is not disapplied and permission to defend can therefore be made subject to conditions; (vii) when exercising the discretion under CPR r.3.1(3) to make orders subject to the fulfilment of specific conditions the court must act consistently with the interpretative provisions of CPR Pt 1. ***Huscroft v P&O Ferries Ltd*** [2010] EWCA Civ 1481; [2011] 1 W.L.R. 939, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1 paras 3.1.4, 24.6.6.)

■ **Phillips v Willis** [2016] EWCA Civ 401, 22 March 2016, unrep. (Jackson, Floyd and Macur LJJ)

Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents – stage 3 – no power to transfer proceedings

CPR r.8, PD8B, Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. Road traffic accident. Claimant's car written off, and hired a replacement. Claimant suffered personal injury. In July 2013 the claimant submitted a claim notification form (CNF), under the RTA Protocol, seeking damages. Liability admitted and payment made regarding full value of claimant's car. Claim proceeded to Stage 2 of the RTA Protocol. A number of heads of damages were settlement at this stage, however a claim for recovery of car hire charges remained outstanding. The claim proceeded thereafter to the Stage 3 Procedure of the RTA Protocol process, as provided for under CPR PD 8B, as the claimant issued a CPR Pt 8 claim. The parties attended an oral, quantum, hearing. The District Judge did not proceed on that basis, but directed that the matter should continue as a CPR Pt 7 claim, allocated to the small claims track. An appeal from that decision was dismissed. A further appeal was brought by the claimant to the Court of Appeal. The issue at the appeal was whether the District Judge had power under CPR PD8B para.7.2 to direct that the proceedings continue as a CPR Pt 7 claim. **Held**, (i) the District Judge's order, made on his own initiative, was irrational. No further evidence was necessary to resolve the issue in dispute. Furthermore, the judge's order, and its elaborate directions, would have entailed the parties incurring 'grossly' disproportionate costs in respect of the damages at stake; (ii) in respect of the point of principle on the appeal, the claim did not exit the RTA Protocol process as a consequence of the personal injury claim settling. As such the claim did not fall under PD8B para.7.2, and the district judge had no power to direct that the claim proceed as a CPR Pt 7 claim, one allocated to the small claims track. Jackson LJ, went on to note, by way of obiter, that there may be some circumstances, where car hire charges are very high with complex issues of law or fact, that it would not be appropriate for proceedings to continue to a Stage 3 hearing. Jackson LJ further commented that the transfer of proceedings could not have been effected by reliance on CPR r.8.1(3). (See ***Civil Procedure 2016*** Vol.1 paras 8BPD.0. and 8BPD.5.1.)

■ **Patience v Tanner** [2016] EWCA Civ 158, 22 March 2016, unrep. (Sir Brian Leveson, President of the Queen's Bench Division, Black and Gross LJJ)

Open offer to settle – acceptance before trial – approach on appeal – whether need to show manifest injustice

CPR r.44.2(4). Dispute concerning sale of land by the claimant to the defendant. Proceedings issued, and thereafter Pt 20 proceedings issued by the defendant against the property developer to whom the defendant had sold the land. Open offer to settle to the claimant made by the Pt 20 defendant. Offer contained no details concerning the costs consequences of acceptance. Claim stayed by consent in order to pursue potential settlement. Various queries were made by the Offeree concerning the costs consequences of accepting the Offer, and went unanswered. Time to accept Offer passed. The Offeror thereafter asserted in correspondence that: (i) the Offer having lapsed was no longer capable of acceptance; (ii) if the Offeree had any queries concerning the Offer they should have been made in good time and prior to the deadline; and, (iii) the Offeree was at risk of cost sanctions for failing to accept the Offer. Stay lifted. Seven days before trial a new Offer in the same terms as the original Offer was made by the Pt 20 defendant to the claimant. Offer accepted five days before trial. Parties then attended court in order to argue the costs of the proceedings. The judge held that: the Offer provided the claimant with what he had sought in the proceedings, to which the defendant and Pt 20 defendant had both denied he was entitled; the Offer was not a Pt 36 Offer; the starting point for assessment of costs was that they follow the event, which in this case was in the claimant's favour; exercising the discretion under CPR r.44.2 however, the claimant was entitled to his costs up to the point at which the Offer originally lapsed and the defendant and Pt 20 defendant were entitled to their costs thereafter. The claimant appealed on the basis he ought to recover his costs or, in the alternative, all his costs up to the last date to accept the original Offer and a portion of his costs thereafter. Appeal allowed in part to vary the costs order so that there was no order as to costs for the period after the original Offer was capable of acceptance. **Held**, (i) costs decisions are 'pre-eminently matters of discretion and evaluation' for trial judges. Appeal courts should only interfere if such decisions are either wrong in principle, took account of a matter that ought not to have been considered, failed to consider a relevant matter, or are plainly unsustainable as per Davis LJ in ***F & C Alternative Investments Ltd v Barthelemy (No.3)*** (2012); (ii) it was not clear that the Court of Appeal decision in ***BCT Software Solutions v Brewer & Sons*** (2003) had established a further requirement, of establishing manifest injustice, to those set out in ***F & C Investments Ltd (No.3)*** (2012). The Court however approached this appeal on the basis, without deciding the point, that where the court determined costs following a settlement where there had been no trial that it was necessary to show that the costs order was manifestly unjust in order for an appeal court to interfere with the order. In the present case the judge failed to take account of a relevant matter in assessing costs: the defendant and Pt 20 defendant's conduct in the period after the original Offer lapsed. Assuming manifest injustice needed to be established, that issue was sufficient in that regard. ***BCT***

Software Solutions v Brewer & Sons [2003] EWCA Civ 939; [2004] I.P. & T. Rep. 267, CA, ***F & C Alternative Investments Ltd v Barthelemy (No.3)*** [2012] EWCA Civ 843; [2013] 1 W.L.R. 548, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.44.2.6.)

- **L (A Child), Re** [2016] EWCA Civ 173, 22 March 2016, unrep. (Sir James Munby, President of the Family Division, Vos LJ, Theis J)

Contempt of court – guidance on committal application

CPR Pt 81, FPR Pt 37. Appeal from a committal order made in family proceedings arising from the breach of a collection order. A number of issues arose relating to family proceedings. The Court of Appeal however stressed the importance of compliance with the proper procedure governing committal applications and gave guidance as to the proper approach that any court should take when dealing with such an application. The guidance was set out by Theis J at para.78 of her judgment, as endorsed by the President of the Family Division and Vos LJ (see paras 73-75 of his judgment). It is as follows:

"78. Before any court embarks on hearing a committal application, whether for a contempt in the face of the court or for breach of an order, it should ensure that the following matters are at the forefront of its mind:

1. *There is complete clarity at the start of the proceedings as to precisely what the foundation of the alleged contempt is: contempt in the face of the court, or breach of an order.*
2. *Prior to the hearing the alleged contempt should be set out clearly in a document or application that complies with FPR rule 37 [Editor's Note, see CPR Pt 81] and which the person accused of contempt has been served with.*
3. *If the alleged contempt is founded on breach of a previous court order, the person accused had been served with that order, and that it contained a penal notice in the required form and place in the order.*
4. *Whether the person accused of contempt has been given the opportunity to secure legal representation, as they are entitled to.*
5. *Whether the judge hearing the committal application should do so, or whether it should be heard by another judge.*
6. *Whether the person accused of contempt has been advised of the right to remain silent.*
7. *If the person accused of contempt chooses to give evidence, whether they have been warned about self-incrimination.*
8. *The need to ensure that in order to find the breach proved the evidence must meet the criminal standard of proof, of being sure that the breach is established.*
9. *Any committal order made needs to set out what the findings are that establish the contempt of court, which are the foundation of the court's decision regarding any committal order.*

79. Counsel and solicitors are reminded of their duty to assist the court. This is particularly important when considering procedural matters where a person's liberty is at stake."

(See ***Civil Procedure 2016 Vol.1*** para.81.28.3.)

- **Khaira v Shergill (No 2)** [2016] EWHC 628 (Ch); [2016] 4 W.L.R. 55, 23 March 2016, (Richard Spearman QC, a deputy judge of the High Court)

Assessment of costs – The United Kingdom Supreme Court – jurisdiction

CPR rr.2.1, 47.1, PD 47 paras 1.1-1.4, SCR rr.2(2), 2(3), 46, 48, 49, 53. The Supreme Court of the United Kingdom allowed an appeal in long running proceedings, which enabled several issues to proceed to trial. Consequent to its substantive order, the UKSC ordered the defendants to pay, on the standard basis if not agreed, the claimants' costs before it and the Court of Appeal. The costs order was in a standard form understood to be used in the Court of Appeal, and which it was 'strongly suspected' was a standard form used in the UKSC. Two significant issues, of general importance, arose out of the UKSC's costs order: (i) whether the order, by an appellate court, entitled the receiving party to an immediate assessment of the appeal costs; (ii) if there is no entitlement to an immediate assessment, can a court other than the appellate court direct such an assessment take place. It appeared that there was no prior authority on the points. It was noted however that the pre-CPR practice noted in ***Harrod (Buenos Aires) Ltd*** (10 March 1993) and applied in ***Morris v Bank of America National Trust*** (2000) (sic) might be adopted 'as a counsel of prudence' in order to avoid such issues arising i.e., where there was a doubt concerning an entitlement to costs

following the conclusion of a hearing concerning a discrete matter, the receiving party should seek the consent of the court to proceed to an assessment of costs immediately. **Held**, (i) the present costs order was made by the UKSC. The CPRs do not apply to such orders, as they do not apply to that court: see CPR r.2.1; (ii) the appeal before the UKSC was a separate proceeding for the purpose of costs from that in the courts below; (iii) SCR r.48(1) provides, unless ordered to the contrary, that 'the receiving party is not only entitled to proceed to assessment as soon as an order for costs is made but is also required to proceed to assessment within three months of such an order being made.' This is consistent with the SCR's overriding objective: see SCR rr.2(2) and 2(3). A receiving party does not, therefore, need to wait until the conclusion of a substantive claim which is to proceed to trial following any appeal to the UKSC before seeking an assessment of the costs of the appeal before the UKSC; (iv) costs of proceedings in lower courts, where costs orders are ultimately made in the UKSC, are not subject to assessment in the UKSC. However, where the UKSC had made an order in respect of both costs before it and of the proceedings in the Court of Appeal, that order was governed by SCR rr.46, 48 and 49; a separate cost regime to that provided for in the CPR. Both sets of costs were therefore payable under the UKSC regime. The judge then went on to state that: (i) trial and appeal proceedings in the same litigation are separate proceedings for the purposes of costs: see CPR r.47.1, PD47 and, applying, ***Hawksford Trustees Jersey Ltd v Stella Global UK Ltd*** (2012); ***Landau v The Big Bus Company*** (2014) distinguished; (ii) in so far as CPR r.47(1) applied, the relevant proceedings concluded with the UKSC's decision on the appeal. As such no order was needed to provide for the claimants to commence detailed assessment of the costs before the Court of Appeal and UKSC; (iii) in the event that there is no entitlement to an immediate detailed assessment as per the preceding points, there is, nevertheless, jurisdiction to order by way of an exercise of the court's discretion an order to that effect: applying ***GB Gas Holdings Ltd v Accenture (UK) Ltd*** (2010). ***Harrod (Buenos Aires) Ltd***, 10 March 1993, unrep., (Sir Mervyn Davies), ***Morris v Bank of America National Trust*** [2000] 1 All ER 954, CA, ***GB Gas Holdings Ltd v Accenture (UK) Ltd*** [2010] EWHC 2928 (Comm); [2011] 1 Costs L.O. 64, Comm, ***Hawksford Trustees Jersey Ltd v Stella Global UK Ltd*** [2012] EWCA Civ 987; [2012] 1 W.L.R. 3581, CA, ***Landau v The Big Bus Company***, 31 October 2014, unrep., (Master Haworth), ref'd to. (See ***Civil Procedure 2016*** Vol.2, para.4A-46.1 and following.)

- **R. (Sino) v Secretary of State for the Home Department** [2016] EWHC 803 (Admin), 12 April 2016, unrep. (Hayden J)

Costs – inter partes rates where publicly funded work – factor in assessment

CPR rr.44.2(2), 44.2(4), 44(2(5). Judicial review proceedings arising from the claimant's detention. Both public law and private law claims pursued. The public law claim failed in its entirety. The private law claim succeeded partially. Costs summarily assessed. **Held**, (i) the starting point for assessment in CPR r.44.2(2) set out a rebuttable presumption that costs follow the event. Determining who had succeeded for the purposes of this rule was not an exact science. It was a matter of common sense, not technicality: see ***Bank of Credit and Commerce International SA v Ali (No.3)*** (1999) and ***Straker v Tudor Rose (a firm)*** (2007); (ii) there was no rule of law requiring a deduction from a costs award where the successful party had lost in respect of certain issues in the claim: see ***Fox v Foundation Piling Limited*** (2011); (iii) where a party pursues an issue or claim that is, on the evidence, overly ambitious they do so at their own risk, and particularly to their damages. Parties are under an obligation to ensure that they pursue claims, and where appropriate refocus them, in the light of how the proceedings develop and of new evidence as it becomes available; (iv) in the circumstances of this case, the claimant was entitled to costs subject to a 40% reduction; (v) in carrying out the costs assessment under r.42.2, the court could properly take account of the fact that lawyers who take on publicly funded work may not be able to recover remuneration at inter partes rates where the claim was successful, and that this gave rise to a real risk that such practises would become unsustainable, which in turn posed a general threat to access to justice. ***Bank of Credit and Commerce International SA v Ali (No.3***) [1999] NLJ 1734 Vol. 149, ***Straker v Tudor Rose (a firm)*** [2007] EWCA Civ 368; [2007] C.P. Rep. 32, CA, ***Fox v Foundation Piling Ltd*** [2011] EWCA Civ 790; [2011] C.P. Rep. 41, CA, ***Community Care North East v Durham County Council*** [2010] EWHC 959 (QB); [2012] 1 W.L.R. 338, QB, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.44.2.5 and following.)

- **Webb v Liverpool Women's NHS Foundation Trust** [2016] EWCA Civ 365, 14 April 2016, unrep. (Gloster, Simon LJJ and Sir Stanley Burnton)

CPR Pt 36 – issue-based or proportionate costs orders–discretion

CPR rr.36.14(3), 36.14(4) (pre-April 2015, post-April 2015, CPR r.36.17), and CPR Pt 44. Clinical negligence claim arising from claimant's birth. Negligence established in respect of one of two issues. The claimant was thereby entitled to full recovery for the injury and loss caused. Prior to the trial, the claimant had made a Pt 36 Offer to settle on terms that she received 65% of the damages. The defendant had rejected the Offer. The judgment was plainly more advantageous than the Offer. The trial judge held that the court had discretion to make an issues-based or proportionate costs award, that CPR Pt 36 did not preclude such an approach. The judge went on to make such an award, disallowing recovery of costs relating to the issue in respect of which the claimant had not succeeded.

Appeal to the Court of Appeal, **held**: (i) in terms of the costs order as it related to costs incurred before the Pt 36 Offer's effective date, the entitlement to costs fell under CPR Pt 44. It was noted that in making such an assessment, it was not normally the case that the fact that a successful party had not succeeded on all their points would justify disallowing recovery of some of their costs, as per ***HLB Kidsons v Lloyds Underwriters*** (2007) at para.11 and ***Fox v Foundation Piling*** (2011) at para.48. There was nothing in the present case to justify a departure from the normal rule in respect of pre-effective date costs; (ii) there was no material difference between CPR r36.14 as formulated prior to April 2015 and its successor, CPR r.36.17; (iii) the term 'costs' in CPR r.36.14(3)(b) referred to all the successful party's costs; as such the successful party is entitled to all their costs on an indemnity basis unless such an order would be unjust. The previous approach to assessing which costs fell within the ambit of the indemnity costs rule in this context, as set out in ***Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd*** (2004) was no longer to be followed. The Court of Appeal's decision in that case concerned versions of both CPR Pt 36 and Pt 44 that are materially different from the pre-2015 and post-2015 versions of those Parts of the CPR. The proper interpretation of CPR r.36.14 (and of necessity the post-2015 CPR r.36.17) cannot therefore take account of the ***Kastor*** decision. The proper approach to CPR r.36.14 was that indicated by ***Shovelar v Lane*** (2011), as such, as Sir Stanley Burnton put it, '*In deciding what costs order to make under 36.14, the Court does not first exercise its discretion under Part 44. Its only discretion is that conferred by Part 36 itself.*'; (iv) given the foregoing point, and as CPR Pt 36 is a self-contained code (one which Sir Stanley critically noted continued to generate far too much satellite litigation given its 'highly prescriptive' nature such that it generates the very costs that it was intended to minimise), CPR r.36.14 applies to both the determination of what costs are to be assessed as well as the basis upon which they are to be assessed; (v) CPR Pt 36 does not preclude an issue-based or proportionate costs order; (vi) the court can deprive a party of some or all of their costs however only if it considers it unjust to award either all their costs or that part of their costs which are to be disallowed; (vii) in assessing the question whether it is unjust, the court must take account of 'all the circumstances of the case', and that the unsuccessful party by accepting the CPR Pt 36 Offer could have avoided the trial costs: see ***Smith v Trafford Housing Trust*** (2012) at para.13; (viii) in the immediate case the trial judge erred: the successful claimant was entitled to recover all her costs, and in respect of those incurred after the effective date, to do so on an indemnity basis. ***Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd*** [2004] EWCA Civ 277; [2004] 2 Lloyd's Rep. 119, CA, ***HLB Kidsons v Lloyds Underwriters*** [2007] EWHC 2699 (Comm); [2008] 3 Costs L.R. 427, Comm, ***Fox v Foundation Piling*** [2011] EWCA Civ 790; [2011] 6 Costs L.R. 961, CA, ***Shovelar v Lane*** [2011] EWCA Civ 802; [2012] 1 W.L.R. 637, CA, ***Smith v Trafford Housing Trust*** [2012] EWHC 3320 (Ch); (2012) 156(46) S.J.L.B. 31, ChD ref'd to. (See ***Civil Procedure 2016*** Vol.1 paras 36.17.4.2, 36.17.5.)

- **HK v Secretary of State for the Home Department** [2016] EWHC 857 (Admin), 18 April 2016, unrep. (Garnham J)

Judicial Review – admission of expert evidence – application of CPR Pt 35

CPR r.3.9, Pt 35. Judicial review proceedings concerning the lawfulness of the return to Bulgaria of a number of individuals who had sought asylum in the United Kingdom having earlier claimed asylum in Bulgaria. In the course of those proceedings an issue arose as to the proper approach to take to the admissibility of expert evidence, which was to be adduced by the fifth claimant. No application under CPR r.35.4. The report's admission was permitted, albeit with noted reluctance by the Judge, given the fact that the proceedings could be considered to be a form of test case. It was however noted, that in permitting the evidence to be adduced, given that: (i) it had been served late, with no prior discussion between the parties, (ii) a lack of adequate time for the Secretary of State to respond to the report; (iii) that it was the product of many, unnamed, individuals albeit one individual author or contributor was named; (iv) the refusal to be cross-examined by the named author; (v) it was a private rather than public report from Amnesty International, it would have such weight as those circumstances justified. On the question of the proper approach to adducing such evidence in judicial review proceedings, **held**, (i) CPR Pt 35 applied to judicial review proceedings. Its application is an essential aspect of the proper case management of proceedings and is a matter of securing justice as between the parties. Any failure to comply with its requirements will require an application for relief from sanctions, see CPR r.3.9; (ii) whatever the practice concerning the admission of expert evidence in Tribunals that practice did not apply to judicial proceedings in the Administrative Court; (iii) ***MN (Somalia) v Secretary of State for the Home Department*** (2014) distinguished, as it was not concerned with the approach to take to the admissibility of experts' reports; (iv) notwithstanding the approach taken in the present case, and the similar approach adopted in ***Pour v Secretary of State for the Home Department*** (2016) to permit such evidence to be adduced albeit with reservations as to the weight to be placed upon it, parties ought not to assume the court will be similarly lenient in respect of breaches of Pt 35 in the future. ***Elayathamby v Secretary of State for the Home Department*** [2011] EWHC 2182 (Admin); [2011] A.C.D. 117, QB, ***MN (Somalia) v Secretary of State for the Home Department*** [2014] UKSC 30; [2014] 1 W.L.R. 2064, UKSC, ***Pour v Secretary of State for the Home Department*** [2016] EWHC 401 (Admin), unrep., QB, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.54.16.1.)

■ **Howe v Motor Insurers' Bureau** [2016] EWHC 884 (QB), 20 April 2016, unrep. (Stewart J)

Qualified one-way costs shifting – Motor Insurance Bureau – personal injury

The Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Board) Regulations 2003, CPR r.44.13. Road traffic accident in France in 2007. The claimant's car collided with a wheel that had come off a lorry. The claimant was rendered paraplegic. Neither the lorry nor its driver were identified. The claim, which was brought against the Motor Insurers' Bureau (MIB), failed. The question before Stewart J was whether the claimant, who had been ordered to pay 85% of the MIB's costs, was within the ambit of the Qualified One-way Costs Shifting (QOCS) regime i.e., whether it was a claim seeking damages for personal injuries as required by CPR r.44.13(1)(a). **Held**, (i) the Court of Appeal decision in ***Wagenaar v Weekend Travel Ltd*** (2014) makes it clear that CPR r.44.13 applies to claims where the claimant is making a claim for damages for personal injuries; (ii) the claim was brought in respect of the MIB's liability to compensate under regulation 13 of the 2003 Regulations. Such a claim is not however a claim for damages for personal injury. It is a claim for a civil debt: see regulation 16 of the 2003 Regulations; (iii) as such the claim was not within the ambit of the QOCS regime. ***Marleasing v La Comercial Internacional de Alimentacion*** (C-106/89) [1990] ECR I–4135, ECJ, ***Jacobs v MIB*** [2010] EWCA Civ 1208; [2011] 1 All E.R. 844, CA, ***Bloomsbury International Ltd v Sea Fish Industry Authority*** [2011] UKSC 25; [2011] 1 W.L.R. 1564, UKSC, ***Nemeti v Sabre Insurance Co Ltd*** [2013] EWCA Civ 1555, unrep., CA, ***Wagenaar v Weekend Travel Ltd*** [2014] EWCA Civ 105; [2015] 1 W.L.R. 1968, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1 paras 44.13.1, 44.13.2.)

Practice Updates

STATUTORY INSTRUMENTS

■ **THE CIVIL LEGAL AID (PROCEDURE) (AMENDMENT) REGULATIONS 2016** (SI 2016/516), in force from **16 May 2016** except in respect of regulation 2(2) which comes into force on **25 April 2016.**

Amends the Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098), specifically its regulation 33. Substitutes a new regulation 33(2), which makes provision in respect of evidence necessary for civil legal services applications (see Legal Aid, Sentencing and Punishment of Offenders Act 2012 ss.9 and 10). Extends the definition of 'protective injunction' so as to encompass FGM protection orders, under the Female Genital Mutilation Act 2003 Sch.2 para.1, violent offender orders, under the Criminal Justice and Immigration Act 2008 s.98.

PRACTICE GUIDANCE

■ **SENIOR MASTER'S PRACTICE NOTE,** in force from **3 May 2016.**

Guidance issued on 15 April 2016, to come into effect on 3 May 2016, concerning the case management approach to be adopted in respect of civil recovery claims under the Proceeds of Crime Act 2002 Part 5 and the Practice Direction—Civil Recovery Proceedings. (See ***Civil Procedure 2016*** Vol.2, Section 3K.) (For the distinction between a Practice Note, as here, and a Practice Direction, see ***Bovale Ltd v Secretary of State for Communities & Local Government*** [2009] EWCA Civ 171; [2009] W.L.R. 2274, CA, ***Civil Procedure 2016*** Vol.2 para.12.44.) The Practice Note is reprinted below for ease of reference.

> ***"SENIOR MASTER'S PRACTICE NOTE, dated 15 April 2016, POCA CIVIL RECOVERY CLAIMS UNDER CPR PART 8, Civil Recovery Proceedings Practice Direction***
>
> ***Introduction***
>
> 1. *Civil Recovery claims commenced under Part 5 of the Proceeds of Crime Act 2002 ("POCA") must be brought under CPR 8 in accordance with paragraph 4.1 of the Civil Recovery Proceedings Practice Direction.*
> 2. *Part 8 is primarily designed for matters that are not factually contentious. There are normally no statements of case and claims are litigated purely by way of witness evidence.*
> 3. *Whilst this remains an appropriate procedure for civil recovery claims that are unlikely to be disputed, where facts may be contested the Part 8 procedure is not necessarily suitable. See for example the note in the White Book Vol 2 3K-4 (end of page 1996 to beginning page 1997) and the cases mentioned; particularly* ***Director of Assets Recovery Agency v Creaven*** *[2006] 1 WLR 633 at [11] per Stanley*

Burnton J. (as he then was); ***SOCA v Bosworth*** *[2010] EWHC 645 (QB) at [26] to [29] per HHJ Seymour;* ***SOCA v Pelekanos*** *[2009] EWHC 2307 per Hamblen J. at [3].*

4. *The court has power to order a case to proceed under Part 7 where appropriate under CPR 3.3 (see Hamblen J. in* ***SOCA v Pelekanos****). However, that would not assist in civil recovery cases, as many are suitable for the usual Part 8 procedure, and for those where facts are in issue the Part 7 procedure would be likely to unduly delay progress to trial.*

5. *To resolve these issues, a procedure has been put in place in the Queen's Bench Division under the court's case management powers in CPR 3.3 to take effect from 3 May 2016 for the case management of POCA civil recovery claims, as set out in the Schedule to this Practice Note.*

The Senior Master

SCHEDULE

1. *Before issuing the Part 8 Claim Form, the enforcement authority (as defined in s.316 (1) of POCA) will consider whether to ask the court to make directions ("Initial Directions") on the papers or at a hearing.*

2. *If the enforcement authority decides to seek Initial Directions without a hearing, it will*

(1) serve on the Defendant (unless evidence is provided to the court that there is good reason not to do so before Initial Directions are given) and

(2) lodge at court
the issued Part 8 Claim Form, accompanied by a short witness statement, with the following exhibits:

(i) Draft Points of Claim; and

(ii) Draft Initial Directions providing for:

a) The serving and filing of Points of Claim, Points of Defence and Points of Reply;

b) A directions hearing to be listed after service and filing of statements of case;

c) Permission to the Defendant(s) to apply to court to vary any of the Initial Directions.

3. *Where either:*

(i) the draft Initial Directions have been agreed with the Defendant(s) or their legal representatives; or

(ii) the court considers that a hearing is not required;
the court will make Initial Directions without a hearing ("the Initial Directions Order").

4. *If the court makes the Initial Directions Order, the enforcement authority will serve on the Defendant(s) within 7 days of receipt of the Initial Directions Order from the court:*

(i) Part 8 Claim Form and witness statement with exhibits (unless previously served);

(ii) Points of Claim;

(iii) the Initial Directions Order.

5. *If either:*

(i) the court considers it is not appropriate to make Initial Directions without a hearing; or

(ii) the enforcement authority considers that it is not appropriate to ask the court to deal with the matter without a hearing;

the court will list a directions hearing for 30 minutes (or longer if requested by either party) and will serve notice of the hearing on all parties."

In Detail

FURTHER GUIDANCE ON APPLICATIONS UNDER CPR r.39.3 – TBO INVESTMENTS LTD V MOHUN-SMITH [2016] EWCA CIV 403

The approach to applications to set aside a judgment given in the absence of one of the parties has been considered by the Court of Appeal on a number of occasions e.g., ***Regency Rolls Ltd v Carnall*** [2000] EWCA Civ 379, unrep., (noted in Civil Procedure News, 23 April 2001), ***Estate Acquisition and Development Ltd v Wiltshire*** [2006] EWCA Civ 533, unrep., ***Nelson v Clearsprings (Management) Ltd*** [2007] EWCA Civ 1252; [2007] 1 W.L.R. 962, and ***Bank of Scotland Plc v Pereira*** [2011] EWCA Civ 241; [2011] 1 W.L.R. 2391. (See ***Civil Procedure 2016*** Vol.1 para.39.3.1-39.3.9.)

In ***TBO Investments Ltd v Mohun-Smith [2016] EWCA Civ 403***, 26 April 2016, unrep. (Lord Dyson MR, Macur and Lindblom LJJ) gave further guidance on the proper approach to applications under CPR r.39.3, and in particular to the application of Lord Neuberger MR's dicta in paras 24-26 of ***Bank of Scotland Plc v Pereir***a (2011).

The Facts

The facts were as follows. In March 2013 the claimants issued a claim seeking damages arising from the alleged professional negligence of the defendant, TBO Investments Ltd. The claims value was approximately £2 million. The trial was listed for a 5-day floating trial window commencing on 23 June 2014. On 12 June 2014 the defendant's solicitors came off the record.

The trial commenced on 30 June 2014 in the absence of the defendant, which was acting through one of its two directors (its representative). On the day of the hearing the defendant's, then, former solicitors forwarded a request, dated 30 June 2014 for an adjournment which it had received from the defendant. The basis on which the adjournment was sought was that (i) the defendant's representative had been assessed as not fit for work by his GP given 'the stress and pressure of the pending proceedings' and could not therefore attend court; and (ii), the defendant was unable to send anyone else to act on its behalf.

The adjournment application was dismissed and the trial continued in the defendant's absence. The defence was struck out and judgment for £2,135,676 was entered for the claimants. Consequential costs orders were also made in the claimants' favour. On 18 July 2014, upon receipt of the order recording the decisions made on 30 June, the defendant issued an application to set aside the judgment entered in its absence. The basis of the application was the same as that given in support of the failed adjournment application i.e., the defendant's representative having been unfit to attend trial. The set aside application was however supported by fresh evidence from the defendant's representative and his GP. The application was dismissed, and the defendant appealed from that decision to the Court of Appeal. On the appeal to the Court of Appeal only the first two conditions set out in CPR r.39.3(5) were in issue. The appeal was allowed. Lord Dyson MR gave the lead judgment, with which Macur and Lindblom LJJ agreed.

CPR r.39.3(5)(a) – Acting promptly to set aside the order made in its absence

In dismissing the set aside application the judge held that the defendant had failed to act promptly in making the application. He did so on the basis that (i) the defendant was aware of the decisions made on 30 June by 3 July 2014 at the latest, and that its representative knew at some point between 3 and 8 July 2014; and (ii) knowing of the nature of the decision the defendant's representative rather than make an application chose to spend ten days visiting clients across the United Kingdom.

Lord Dyson MR noted that the test of promptness was set out by Simon Brown LJ in ***Regency Rolls Ltd v Carnall*** (2000): the applicant had to show that the application was made with 'reasonable celerity' (or as Arden LJ put it in her judgment with 'alacrity'), that they had not acted with 'needless delay' in making the application. That test was to be applied in the light of Lord Neuberger MR's guidance in ***Bank of Scotland Plc v Pereira*** (2011): that the assessment of promptness was 'very fact-sensitive' and in making the assessment of the applicant's conduct the court should, generally, not be too rigorous.

The judge's approach was held to be 'too draconian' in its assessment of the defendant and its representatives' conduct, and had failed to take proper account of the guidance in ***Bank of Scotland Plc v Pereira*** (2011). Assessing promptness does not simply require the court to assess the amount of time taken by an applicant to make the application to set aside. Hence in this case it was not enough to focus on the fact that it took the defendant between ten to fifteen days to issue its application. It was necessary to consider the time taken to issue the application in context. The context in the present case was that the claim was 'a complex and very substantial one'.

Given this, and not taking too rigorous an approach to assessing the defendant's conduct it could not be said that the application was not made properly promptly. As Lord Dyson MR put it at para.35 of his judgment,

> *"Even if the defendant did not act with alacrity by taking between 10 and 15 days to file the application, the judge failed to have regard to the statement in Pereira that the court should not, at least in many cases, be very rigorous when considering the applicant's conduct. He did not mention the Pereira guidance in paras 15 (sic) and 16 (sic) of his judgment. Having regard to that guidance and the fact that (i) this was a complex and very substantial claim and (ii) the period of time taken to file the application was only a matter of days, I do not consider that, if the judge had applied the Pereira guidance, he could reasonably have concluded that the defendant failed to act promptly."*

In the light of this it is readily apparent that in assessing whether an applicant has acted with reasonable celerity or alacrity in making an application to set aside is not simply a matter of looking at the length of time it took from notice, whether formal or informal, of the decision taken in the applicant's absence to issue. Delay is context dependent, as both Simon Brown LJ in ***Regency Rolls Ltd v Carnall*** (2000) and Lord Neuberger MR in ***Bank of Scotland Plc v Pereira*** (2011) had sought to emphasise.

CPR r.39.3(5)(b) – Good reason for not attending trial

The judge held that the defendant did not have a good reason for attending trial as it had not demonstrated that its second director could not represent it, nor had it made out the claim that its representative was too ill to attend.

In respect of the first issue Lord Dyson MR held that the question was whether the second director could have represented the defendant at trial. It was not a question of whether the second director could have attended the trial for the purpose of seeking an adjournment: CPR r.39.3(5)(b) is solely concerned with the question of attending trial in order to conduct the trial viz.,

> *"16 . . . "Failure to attend the trial". It makes provision for what may happen if a party does not attend for the purpose of conducting his case at the trial. The court may proceed in the absence of the party who does not attend or it may strike out the claim or defence of the party who does not attend. The rule is not concerned with applications for an adjournment of the trial."*

There was no evidence upon which the judge could properly have concluded, given the complexity of the claim, the fact it was document-heavy and listed for a seven-day trial, that the second director could have attended court in order to conduct the defence.

In respect of the second issue, in assessing the medical evidence put forward by the defendant's representative in support of the application to adjourn, the judge applied Norris J's guidance in ***Levy v Ellis-Carr*** [2012] EWHC (Ch), 23 January 2012, unrep., para.36 which had been approved by the Court of Appeal in ***Ketley v Brent*** [2012] EWCA 324, 21 February 2012, unrep., para.26. Lord Dyson MR held as follows:

(i) there is a material difference between an application for an adjournment of a trial and an application under CPR r.39.3;

(ii) in respect of applications to adjourn, as a general rule the rigorous approach set out in ***Levy v Ellis-Carr*** (2012) and endorsed by the Court of Appeal in ***Ketley v Brent*** (2012) should be followed. Jackson LJ's dicta regarding the 'general undesirability of adjourning trials' at para.89 of ***Denton v T H White Ltd (Practice Note)*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3296 was endorsed;

(iii) when exercising its discretion to grant or refuse an adjournment a trial on the merits will ordinarily follow. It remained possible that the party that sought an adjournment unsuccessfully would still succeed at trial. However, in some cases refusing an adjournment would 'almost inevitably' lead to the party who sought the adjournment losing at trial. That was a relevant factor in assessing whether to grant or refuse an adjournment;

(iv) in respect of an application to set aside under CPR r.39.3 the proper approach to assessing whether there was a good reason not to attend trial was that set out in ***Bank of Scotland Plc v Pereira*** (2011) not that set out in ***Levy v Ellis-Carr*** (2012). In so far as the two decisions differed, the former should have been followed. The judge had failed to do so. While the evidence before the judge could properly have satisfied him, applying ***Levy v Ellis-Carr*** (2012), that an adjournment should not have been granted, the application was to set aside not to adjourn and a different test applied;

(v) where an application for an adjournment is refused, as noted above, the claim will (assuming

the applicant is present at trial) go on to be adjudicated on its merits. Should an application to set aside under CPR r.39.3 fail, the applicant will have had no opportunity to have an adjudication on the merits. This distinction justifies a differential approach to the two types of application: the stricter approach in the former, and the less rigorous approach in the latter;

(vi) when assessing whether there is a good reason not to attend trial the court should not just ensure that it takes a not very rigorous approach to assessing the applicant's conduct, and the assessment of any medical evidence, as per ***Bank of Scotland Plc v Pereira*** (2011), it should also ensure that it properly considers the factors identified at para.25 of the Court of Appeal's decision in ***Estate Acquisition and Development Ltd v Wiltshire*** [2006] EWCA Civ 533, [2006] C.P. 32 viz., the need to

- give effect to the overriding objective; and
- comply with article 6 of the European Convention on Human Rights.

The need to ensure that these factors are considered properly is of particular importance where the applicant has a reasonable prospect of success at trial. In this regard, it was the prospect of success at trial i.e., that the applicant had satisfied the test set out in CPR r.39.3(5)(c), which supported the court taking a less than rigorous approach to the 'good reason' test in r.39.3(5)(b). It is also particularly important where, as here:

- the claim is a high value one; and
- given that the applicant was a small company, any refusal to grant the order sought would have serious consequences on it.

Macur LJ in her judgment, while concurring with that of Lord Dyson MR, noted, 'for the avoidance of doubt' and by reference to ***Brazil v Brazil*** [2002] EWCA Civ 1135; [2003] C.P. Rep. 7 at para.12, that the approach set out in ***Bank of Scotland Plc v Pereira*** (2011) and ***Estate Acquisition and Development Ltd v Wiltshire*** (2006) did not require the court to either suspend belief or adopt anything other than the civil standard of proof in assessing whether the reason given as to why the applicant had not attended the trial was a genuine or honest one.

Lord Dyson MR also noted that if the only evidence before the judge on the set aside application had been a sick note he could not have been criticised for dismissing the application even applying the guidance in ***Bank of Scotland Plc v Pereira*** (2011). That was not the only evidence before the court. Evidence of examination by the doctor and letters from the doctor confirming her diagnosis of stress were also before the court. While it may have been beneficial if further evidence was before the court e.g., that which was identified by the judge and noted at para.22 of Lord Dyson MR's judgment, there was sufficient evidence before the court in the present case to justify a finding that the applicant had good reason not to attend trial. The further evidence noted at para.22 as being beneficial was:

- whether the defendant's representative had a history of suffering from stress;
- whether he had been examined by a doctor in the week of the trial, and if so, what diagnosis was made at that time.

Finally, Lord Dyson MR stated that in future cases, simply producing a sick note would not necessarily justify a finding that an applicant had good reason not to attend trial. Such decisions were fact-sensitive, and would need to apply the tests outlined above. Should such an application succeed, the court would need to take account of the opposing party's position. In that regard he stated that it would often be '*appropriate to allows the application on condition that the applicant pays the other side's costs and pays a sum on account of those costs within a short period.*'

It might be noted, albeit Lord Dyson MR did not refer to it, that applying the overriding objective, as noted by ***Estate Acquisition and Development Ltd v Wiltshire*** (2006) requires the court to consider the effect of its decisions on other parties per CPR r.1.1(2)(e).

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

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

675333