CIVIL PROCEDURE NEWS

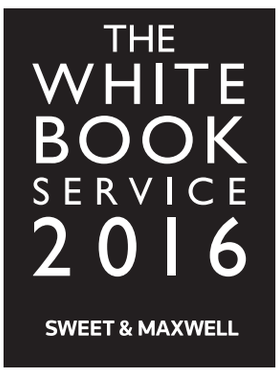
Issue 6/2016 10 June 2016

CONTENTS

Recent cases

The Civil Legal Aid (Procedure) (Amendment) (No.2) Regulations 2016

Guidance on Expert Evidence



In Brief

Cases

Bhatti v Asghar [2016] EWHC 1049 (QB), 7 April 2016, unrep. (Warby J)

Underpayment of court fee – approach to calculation of fee due – when proceedings are "brought"

Civil Proceedings Fees Order 2008 (SI 2008/1053), Civil Proceedings Fees (Amendment) Order 2014 (SI 2014/874), CPR rr.16.2, 16.3. Actions for restitution of monies paid and/or damages arising from intended, but not completed, real estate deals in Dubai. The claims were issued in October and December 2014. Application for specific disclosure issued by the claimants. Application for summary judgment or strike out, or alternatively specific disclosure and further information issued by the defendants. Both parties' applications issued shortly before the fixed trial date. The particular issue before the judge was the defendant's summary judgment/strike out application. The application was pursued on two alternative bases: first, that the claimants had deliberately underpaid the amount that was properly due by way of court fees on issue, and that this amounted to an abuse of process; secondly, the consequence of the court issue fee underpayment meant that the claims had not been brought properly for the purpose of limitation. As such the limitation period had continued to run and had expired. **Held**, it was correct to say that the limitation period had expired in respect of contractual claims and that in respect of both claims there had been an underpayment of court fees. The applications were however refused as, amongst other reasons, the defendants had not been given sufficient time to prepare for and respond to the issues raised, and the issues could be responded to properly at trial. Court fees should be calculated on the basis of the claim form and, if relevant the particulars of claims, as presented to the court office at the time the claim is issued. The claim value, in a money claim for a specified sum, must include any interest claimed. Any non-money claim, specified or unspecified, must be included in the fee as it comes under para.1.5 of Sch.1 to the 2014 Fees Order. CPR Pt 16 does not govern the approach to be taken to calculating the issue fee; the provisions in Pt 16 are concerned with calculating the value for the purposes of allocation to track, not issue. The 2014 Fees Order is the sole authority for calculating the correct fee on issue. Further, the court's approach to ascertaining whether a claim was considered: (i) the court's approach to assessing the question whether a claim has been brought is and ought to be a very strict one; (ii) a claim is 'brought' when the claimant's request to issue the claim, the claim form and court fee are delivered to the court office, which is to say that the claimant has done all it can to '*set the wheels of justice in motion*': see ***Aly v Aly*** (1984), ***Barnes v St Helens Metropolitan Borough Council*** (2006) and ***Page v Hewetts Solicitors*** (2012); (ii) in order for the claimant to do all it can to set the wheels of justice in motion it must provide the court with the correct issue fee and must do so at the same time as it delivers the claim form and, if appropriate, the particulars of claim to the court office. Compliance with these requirements ensures that the claim is brought for limitation purposes; (iii) in principle it is possible that where there is an error in calculating the correct issue fee the claim may still be brought for limitation purposes. The error would however have to lie with the court, such that the claimant could be said to have done all it properly could reasonably have done to set the wheels of justice in motion and had in no way contributed to the court's error. ***Aly v Aly*** (1 January 1984), unrep., CA, ***Barnes v St Helens Metropolitan Borough Council*** [2006] EWCA Civ 1372; [2007] 1 W.L.R. 879, CA, ***Page v Hewetts Solicitors*** [2012] EWHC 2845 (Ch), unrep., ChD, ***Page v Hewetts Solicitors*** [2012] EWCA Civ 805; [2012] C. P. Rep. 40, CA, ***Lewis and Ors v Ward Hadaway (a Firm)*** [2015] EWHC 3503 (Ch); [2016] 4 W.L.R. 6, ChD, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.16.3.2, Vol.2 section 10–7.)

The Prudential Assurance Company Ltd v HM Revenue and Customs [2016] EWCA Civ 376, 19 April 2016, unrep. (Lewison, Christopher Clarke and Sales LJJ)

Importance and extent of pleadings – costs – late amendment

CPR Pts 16, 19, PD19B para.14. Appeal in long running proceedings concerning taxation subject to a Group Litigation Order. Claim and defence both pleaded in very general terms and without factual allegations. Pleadings so vague it was noted by Lewison LJ that a reader would have '*very little idea about what was in issue*'. The approach was said to be justified by obiter dicta of Lord Woolf in the House of Lords' decision in ***Boake Allen Ltd v HMRC*** (2007). In that decision Lord Woolf identified, as an objective of the GLO procedure, the elimination of unnecessary litigation costs by '*reducing the number of steps litigants, who have a common interest, have to take individually to establish their rights . . .*'. Lewison LJ, delivering the judgment of the court, explained that this dictum could not justify parties ignoring basic steps in the litigation process. It was, he explained, simply meant to remind litigants that the costs benefit to be derived from GLOs is through enabling steps in the litigation to be taken once for all members of the group action. Lewison LJ went on to stress that Lord Woolf's dictum could not be taken as justifying an approach that

resulted in claims not being properly pleaded: relevant facts must be pleaded. In this respect the approach articulated by Mummery LJ in the Court of Appeal's decision in para.131 of ***Boake Allen Ltd v Revenue & Customs Rev 1*** (2006) was binding viz.,

> *"While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for a good reason—so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial. In my view, the fact that the nature of the grievance may be obvious to the respondent or that the respondent can ask for further information to be supplied by the claimant are not normally valid excuses for a claimant's failure to formulate and serve a properly pleaded case setting out the material facts in support of the cause of action. If the pleading has to be amended, it is reasonable that the party, who has not complied with well-known pleading requirements, should suffer the consequences with regard to such matters as limitation."*

Lewison LJ went on to reiterate the well-known rationale behind this, see para.20:

> *"Our procedural system is and remains an adversarial one. It is for the parties (subject to the control of the court) to define the issues on which the court is invited to adjudicate. This function is the purpose of statements of case. The setting out of a party's case in a statement of case enables the other party to know what points are in issue, what documents to disclose, what evidence to call and how to prepare for trial. It is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has had no fair warning."*

Should a party wish to amend their statements of case, that should be done by way of an application to amend. It was noted however that the modern approach to late amendments was to require a 'strong justification', and that this was necessary, consistently with the overriding objective, both in the interests of the opposing party and '*the interests of other litigants in other cases before the court and the court's duty to allocate a proportionate share of the court's resources to any particular case*.' The problem that arose from the parties '*unacceptably cavalier approach to pleadings*', which it was noted was not uncommon in litigation of the type before the court and which Lewison LJ emphasised must not continue, was that the parties did not agree on the scope of the trial, the issues before the trial judge, whether issues had been raised before him, and thus whether they formed the subject matter of the appeal. Such an approach and its consequences was unacceptable. It failed to approach the trial and appellate processes properly, was inimical to finality of litigation, gave rise to disproportionate costs and delay (particularly if a new trial had to be ordered or the Court of Appeal had to deal with a point that had not been raised at trial, which was in any event contrary to the Court of Appeal's role being to review or re-hear not hear *ab initio*), the '*disproportionate allocation*' of the Court of Appeal's resources, and if it required re-opening a trial it incurred the unfair and unnecessary costs to both parties and the court contrary to the proper administration of justice. Finally, it was noted that an equally stringent approach to that taken to permitting fresh evidence to be adduced before the Court of Appeal applies to the question of allowing pure points of law to be argued for the first time before the Court of Appeal. Such applications, and especially those that call for fresh findings of fact, supported by '*a cogent explanation*' as to why the point was not taken at trial would only rarely be allowed: see ***Crane v Sky-in-Home Ltd*** (2008) and ***Mullarkey v Broad*** (2009). ***Boake Allen Ltd v Revenue & Customs Rev 1*** [2006] EWCA Civ 25; [2006] S.T.C. 606, CA, ***Boake Allen Ltd v HMRC*** [2007] UKHL 25; [2007] 1 W.L.R. 1386, HL, ***Europcar UK Ltd v HMRC*** [2008] EWHC 1363 (Ch); [2008] S.T.C. 2751, ChD, ***Crane v Sky-in-Home Ltd*** [2008] EWCA Civ 978, unrep., CA, ***Mullarkey v Broad*** [2009] EWCA Civ 2, unrep., CA, ref'd to. (See ***Civil Procedure 2016*** Vol. 1 paras 16.4.1, 16.5.1, 16.5.2.)

- **Coral Reef Ltd v Silverbond Enterprises Ltd** [2016] EWHC 874 (Ch), 20 April 2016, unrep. (Master Matthews)

Doctrine of Precedent – Masters

CPR rr.25.12, 25.13, 25.14. Application for security for costs arising out of a claim for beneficial ownership of shares in a registered company. The claimant relied upon Andrew Smith J's decision in ***Sarpd Oil International v Addax Energy SA*** (2015) in respect of the stance it took to providing information about its financial position to the defendant prior to the hearing of the application. The day before the hearing the Court of Appeal's reversal of the High Court's decision was handed down, see ***Sarpd Oil International v Addax Energy*** (2016) (as noted in Civil Procedure News 04/2016). In rejecting the claimant's argument that it could have properly relied upon the first instance decision from the Commercial Court, the question arose whether a Master hearing the application, which was proceeding in the Chancery Division, was bound by the decision of a High Court judge i.e., the decision of Andrew Smith J. **Held**, the doctrine of precedent operates as between courts, not as between those who exercise the judicial authority of courts. Masters, just

as High Court judges, are bound by decisions of the Court of Appeal and United Kingdom Supreme Court. Masters are not bound by decisions of High Court judges. Judicial comity will however mean that just as between two High Court judges, as between a High Court judge and a Master, the latter will usually follow a decision of the former, except where the Master is convinced the decision is wrong. While there was no direct authority on the point, the Court of Appeal decision in ***Howard de Walden Estates Ltd v Aggio*** (2008) supported the proposition that the doctrine of precedent operated as between courts not as between judges of courts. In that case a decision of a deputy judge of the High Court had the same precedential value as that of a puisne judge of the High Court. Authority also made it clear that the same principle applied where a judge of a superior court sat in a lower court e.g., ***Bartlett v Barclays Bank (No 2)*** (1980) and ***Stockton v Mason*** (1978). A judge of the High Court would not now ignore a reasoned decision of a Master, but would consider the reasons as would happen if they were to consider a reasoned decision of a different judge of the High Court. Furthermore, no basis for drawing a distinction between judges of the High Court and Masters arose from the fact that the latter were officers of the court. It could be said that both judges of the High Court and Masters were judicial officers of the court. (Although this point can be queried as it conflates 'officer of the court' per s.88 of the Senior Courts Act 1981 with 'judicial office holder' and does not consider s.4 of the Senior Courts Act 1981 which makes clear that puisne and ex officio judges of the High Court are the High Court as the High Court consists of the judges.) Finally, previous practice concerning the reporting, or absence of widespread reporting, of Masters' decisions did not point towards a different answer to that given. Modern practice enabled Masters' decisions to be obtained more easily than in the past, and in any event, important decisions of Masters – particularly in respect of procedure and practice – were now being made available. ***Stockton v Mason*** [1978] 2 Lloyd's Rep. 430, CA, ***Bartlett v Barclays Bank (No 2)*** [1980] Ch. 515, ChD, ***O'Brien v Seagrave*** [2007] EWHC 788 (Ch), unrep. ChD, ***Howard de Walden Estates Ltd v Aggio*** [2007] EWCA Civ 499; [2008] Ch. 26, CA, ***Sarpd Oil International v Addax Energy SA*** [2015] EWHC 2426 (Comm), unrep., ***Sarpd Oil International v Addax Energy*** [2016] EWCA Civ 120, unrep., CA, ref'd to. (See ***Civil Procedure 2016*** Vol.2 section 9A-303+.)

- **Chachani Misti y Pichu Pichu SRL v Hostplanet Ltd** [2016] EWHC 983 (Ch), 29 April 2016, unrep. (Master Matthews)

European Enforcement Order – service

Regulation 805/2004 (EC), arts 12–19, CPR Pt 13. Application for a European Enforcement Order (EEO) arising out of claim for copyright infringement. Default judgment entered against the defendants for US$100,000. First defendant is a UK incorporated company. The second defendant's whereabouts were unknown. Service of the proceedings had been effected on the second defendant via email on 8 December 2015; such service, and service of further documents, having been authorised by Master Matthews by order, dated 5 January 2016. The second defendant had replied to the email via which the claim form was served, and had requested that further documents be sent to that email address. In considering whether to grant the EEO, the question arose whether in the circumstances of the case, the procedural requirements of arts 12 to 19 of Regulation 805/2004 (EC) were met. **Held**, the procedural requirements had been met and the EEO was made as (i) a judgment in default issued where a defendant's domicile, their physical address, cannot be determined 'with certainty', cannot form the basis of an EEO unless art.18(2) of the Regulation applies: see ***G v de Visser*** (2013) and art.14(1) of the Regulation. Where the EEO cannot be used enforcement must be sought under the Brussels Regulation (Regulation 44/2001 (EC); Regulation 1215/2012 (EU)). In this case all that was known was an email address, the origin of which was Luxembourg. That did not however provide any detail as to the defendant's physical address; (ii) Article 18 of the Regulation provides the means to cure failure to comply with the requirements of arts 13 and 14 of the Regulation. Article 18 applies where it can be established that the judgment debtor/defendant has received necessary documentation personally and with enough time to prepare a defence. The defendant in this case had received necessary documentation and had done so in the requisite timeframe; (iii) proof that article 18's requirements have been met must be drawn solely from '*the conduct of the debtor in the court proceedings*' per art.18(2). The second defendant's reply to the email via which the claim form was served was such conduct, and demonstrated that the defendant had sufficient time to prepare its defence; (iv) as the EEO can apply to default judgments, 'conduct in the proceedings' must be given a wider reading than one that restricted it to taking formal steps in the proceedings e.g., filing an acknowledgment of service or defence. As such the email response was relevant conduct in the proceedings for the purposes of art.18(2) of the Regulation. Furthermore, it was noted that art.19 of the Regulation, which set out a requirement for review, did not pose a difficulty for granting the application; a review process concerning default judgments was provided by CPR Pt 13. ***G v de Visser*** [2013] Q.B. 168, ECJ, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.13.2.1)

- **Mendes v Hochtief (UK) Construction Ltd** [2016] EWHC 976 (QB), 29 April 2016, unrep. (Coulson J)

Fixed trial advocacy fee – recoverable where claim settles before hearing commences

CPR Pt 45, Section IIIA. Claim for personal injuries arising from a road traffic accident. The claim was initially subject to the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. Upon the defendant

denying liability, the claim excited the RTA Protocol process and proceedings were issued in January 2015 and allocated to the fast track. The claim was subject to the CPR Pt 45, Section Part IIIA fixed costs regime. At the start of the trial the parties' counsel sought time, which was granted, to attempt to settle the claim. The claim settled by way of consent order. The Recorder assessed costs, but refused to award the fixed advocacy trial costs provided for in Pt 45, Table 6B. The claimant appealed that refusal, which had been made by the Recorder on the basis that the fixed trial advocacy fee was not recoverable as the claim had settled prior to the commencement of the final contested trial hearing. **Held**, on appeal to Coulson J, the fixed advocacy trial fee was recoverable where a claim settled on the day of trial but before the trial started: (i) while there was a typographical error in the final heading of Table 6B, section B, that did not justify reading or revising the various headings in the three columns of section B so that they were consistent with terms used in the Jackson Reports. Reversion from drafted and approved rules, to recommendations in reform reports was wholly illegitimate. The final column in section B should simply be read as if the obviously missing word were present, viz., 'on or after the date of listing but prior ***to*** the date of trial.'; (ii) the claim did not settle at any point prior to the date of trial, of the final contested hearing. It could and did not therefore fall within the ambit of section B; (iii) the date the trial, the final contested hearing, actually takes place or would have taken place is the relevant date for the purposes of determining whether section C applies. The date a trial is listed is not the relevant date; (iii) Table 6B was intended to provide a comprehensive scheme for costs recovery to claims to which it applied. If the rules had intended to provide for all costs incurred prior to the actual commencement of the final contested hearing to fall under Section B, with all costs incurred upon and after the commencement of that hearing falling under Section C, they would have said so. The rules do not do so. Nor is there a lacuna in the rules, whereby the costs in this case would fall outside both sections B and C, which would be the case if section B only applied to costs incurred prior to the date of the trial, and section C only applied to costs incurred on the date of the trial following the actual commencement of the contested final hearing. Costs incurred on the date of the trial are thus recoverable under section C. Any other reading, such as that which suggests there is a lacuna in the rules, would lead to uncertainty. Furthermore, if such costs as those incurred here were not recoverable it would tend to provide a disincentive to an advocate to seek to negotiate settlements 'at the door of the court'; (iv) in the present case, the costs incurred arose in a claim that was 'disposed of at trial'. That the disposal arose by way of settlement, following the grant of time by the Recorder to the parties to attempt to reach a compromise, and not judgment, did not alter that fact; (v) the fixed trial advocacy fee is recoverable for counsel's attendance at trial, it is not recoverable solely for exercising a right of audience at trial i.e., for the 'performance of advocacy'. If it were, it would suggest that if counsel is not called on by the court to address it no fee is recoverable. Nor does cost recovery in such a case as this provide the advocate with a windfall; the fee is intended to and does cover preparation costs and attendance costs; (vi) the preceding is consistent with the policy underpinning fixed recoverable cost regimes, see ***Nizami v Butt*** (2006), para.23; (vii) the authorities concerned with success fees under the pre-2013 rules were distinguished. ***Nizami v Butt*** [2006] EWHC 159 (QB); [2006] 1 W.L.R. 3307, QB, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.45.29A.1.)

■ **Shlosberg v Avonwick Holdings Ltd** [2016] EWHC 1001 (Ch), 05 May 2016, unrep. (Arnold J)

Legal professional privilege – bankruptcy – whether privilege passes to trustees-in-bankruptcy

European Convention on Human Rights, arts 6 and 8, Insolvency Act 1986, ss.283, 306(1), 308, 436(1). Application seeking an order directing that the second respondent, a solicitor's firm, stop acting for the first and third respondents. The application was brought by a bankrupt. The first and third respondents are the joint trustees-in-bankruptcy. The second respondent had in its possession a significant number of documents that were confidential and subject to legal professional privilege (LPP). The issue of principle was whether the first and third respondents had the benefit of the LLP as trustees-in-bankruptcy for the applicant. The applicant's position was that the benefit of the LLP in the documents did not devolve from him to the first and third respondents upon his bankruptcy and their appointment as trustees. **Held**, (i) the right to claim and exercise LPP does not depend upon ownership of documents, or e-documents, upon which the privileged information is recorded or stored. LPP does not depend upon ownership, but rather on the right to 'control the dissemination and use of the information recorded' or stored; (ii) there was a 'strong analogy' between LPP and the right to privacy. They are both personal rights, and protected under both arts 6 and 8 of the European Convention on Human Rights; (iii) as such, LPP does not devolve upon a trustee-in-bankruptcy upon the trustee obtaining title (assuming that title is obtained, which was queried) to the documents that contain privileged information; (iv) LPP is not an interest that vests in a trustee-in-bankruptcy under s.436(1) of the Insolvency Act 1986 as

> *"Although privilege is enforceable in a court of law, its only effect is to enable the beneficiary of the privilege to resist compulsory disclosure of information in proceedings. It is not a marketable right, it has no commercial value and it cannot be realised or distributed to creditors. Moreover, it does not arise out of, nor is it incidental to, property in the documents containing the privileged information. It is a right in respect of the information which arises out of the confidential relationship between the client and the lawyer, and it has nothing to do with the status of the documents as chattels."*

(v) Section283(4) of the 1986 Act provides a trustee-in-bankruptcy with the same power over property in a bankrupt's estate as that which the bankrupt had over it. While LPP is a power over documents, it is not such a power over the documents qua chattels. It is a power over the information within the documents. Again, such power is not one that 'would assist the trustee to realise the value of the documents . . . or to distribute the proceeds.' It was thus not a power for the purposes of s.283(4) of the 1986 Act; (vi) the argument that the claim in respect of which the documents subject to LPP had concluded in a judgment, that such judgment was an 'obligation' under s.436(1) of the 1986 Act, that as an obligation it vested in the trustee-in-bankruptcy, and therefore the LPP also vested in the trustees by way of application of ***Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd*** (1972) was rejected; and (vii) by way of obiter, it was stated that LPP was outwith s.283(1) and (4) as it was property that was 'peculiarly personal' to the bankrupt and was so irrespective of the subject matter of the litigation, see ***Re Rae*** (1995) and ***Re Celtic Extraction Ltd*** (2001). ***Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd*** [1972] Ch. 553, ChD, ***Re Konigsberg*** [1989] 1 W.L.R. 1257, ChD, ***Bristol Airport plc v Powdrill*** [1990] Ch. 744, CA, ***Heath v Tang*** [1993] 1 W.L.R. 1421, CA, ***Re Rae*** [1995] B.C.C. 102, ChD, ***R v Derby Magistrates' Court ex p. B*** [1996] 1 A.C. 487, HL, ***Re Cook*** [1999] B.P.I.R. 881, ChD, ***Re Omar*** [2000] B.C.C. 434, ChD, ***Re Celtic Extraction Ltd*** [2001] Ch. 475, CA, ***Haig v Aitken*** [2001] Ch. 110, ChD, ***Foxley v United Kingdom*** (2001) 31 E.H.R.R. 25, ECtHR, ***Surface Technology plc v Young*** [2002] F.S.R. 25, ChD, ***Deloitte & Touche Inc v Bennett Jones Verchere*** (2002) 206 D.L.R. (4th) 280, CA of Alberta, Canada, ***R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*** [2002] UKHL 21; [2003] 1 A.C. 563, HL, ***B v Auckland District Law Society*** [2003] UKPC 38; [2003] 2 A.C. 736, HL; ***R v Dunwoody*** [2004] Q.C.A. 413, Supreme Court of Queensland, Australia, ***Three Rivers District Council v Bank of England (No.6)*** [2004] UKHL 48; [2005] 1 A.C. 610, HL, ***Garvin Trustees Ltd v The Pension Regulator*** [2015] Pens. L.R. 1, UT (T&C), ref'd to. (See ***Civil Procedure 2016*** Vol.1 paras 31.3.5 and following.)

- **CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd** [2015] EWHC 1345 (TCC); 160 Con. L.R. 73, 21 May 2015, (Coulson J)

Late Amendment – further guidance on court's approach

CPR rr.1, 17.3. A claim was issued concerning alleged defects in a commercial development. The claim was brought pursuant to a warranty agreement entered into by the owner of the development, the claimant, and contractor, the defendant, which was responsible for the design and build. Additional claims were pursued by the defendant against various other parties to the development. The claim was issued in October 2013, having been through a lengthy pre-action protocol process that had commenced in 2011. In October 2014, case management directions were given, which fixed the trial to commence on 18 January 2016. In April 2015 the claimant applied to make a significant number of amendments to its particulars of claim, having been working on them since at least October 2014. The application, which was a very late one brought after the pleading and disclosure process had been finalised, would have necessitated considerable revisions to the pre-trial timetable, and would have risked the trial date, was refused. In reaching that decision Coulson J reviewed the authorities on late amendment, noting that: (i) if, which was doubted, Peter Gibson LJ's dicta in ***Cobbold v Greenwich LBC*** (1999) had ever set out the correct approach to late amendments it no longer did so; (ii) the starting point to assess late amendments is the overriding objective; (iii) having reviewed the authorities, Coulson J summarised his understanding of the approach to be taken to late amendments:

> *"[19] (a) The lateness by which an amendment is produced is a relative concept (Hague Plant). An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment.*
>
> *(b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date (Swain-Mason), even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason (Brown).*
>
> *(c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise (Brown; Wani). In essence, there must be a good reason for the delay (Brown).*
>
> *(d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused (Swain Mason; Hague Plant; Wani).*
>
> *(e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' (Worldwide), to the disruption of and additional pressure on their lawyers in the run-up to trial (Bourke), and the duplication of cost and effort (Hague Plant) at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments (Swain Mason).*

(f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered (Swain-Mason). Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise (Archlane)."

(Although also see, and compare the guidance and summary of the principles to apply to applications for late amendment in ***Su-Ling v Goldman Sachs International*** [2015] EWHC 759 (Comm), 26 March 2015, unrep., Carr J, noted in Civil Procedure News 5/2015 and Lewison LJ's judgment in ***The Prudent Assurance Company Ltd v HM Revenue and Customs*** [2016] EWCA Civ 376, above, in particular in respect of the need to take account of the impact of late amendments on other litigants.) ***Worldwide Corporation Ltd v GPT Ltd*** (2 December 1999), unrep., CA, ***Cobbold v Greenwich LBC*** [1999] EWCA Civ 14; (9 August 1999), unrep., CA, ***Savings and Investment Bank Ltd (in liquidation) v Fincken*** [2003] EWCA Civ 1630; [2004] 1 W.L.R. 667, CA, ***Swain-Mason and Others v Mills and Reeve LLP*** [2011] EWCA Civ 14; [2011] 1 W.L.R. 2735, CA, ***Brown v Innovatorone PLC and Ors*** [2011] EWHC 3221 (Comm), unrep., ***Archlane Ltd v Johnson Controls Ltd*** [2012] EWHC B12 (TCC), unrep., ***Hague Plant Ltd v Hague and Ors*** [2014] EWCA Civ 1609, unrep., CA, ***Bourke v Favre*** [2015] EWHC 277 (Ch), unrep., ChD, ***Wani LLP v Royal Bank of Scotland PLC*** [2015] EWHC 1181 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2016*** Vol.1 paras 17.3.4 and following.)

- **Handley v Lake Jackson Solicitors (a firm)** [2016] EWCA Civ 465, 24 May 2016, unrep. (Moore-Bick VP, Christopher Clarke LJ)

Costs – destination of appeals from County Court

Access to Justice Act 1999, s.55(1), Access to Justice Act 1999 (Destination of Appeals Order) 2000, art.5, CPR r.52.13. Three appeals were dealt with in the County Court from which a number of issues of principle arose concerning the proper approach to take to appeals from costs orders made in respect of those appeals. **Held**, (i) the approach to this issue articulated by Stadlen J in ***Rubric Lois King (A Firm) v Lane*** (2012) disapproved; (ii) the proper approach, summarised at para.54, is as follows:

"(i) If the county court judge has heard the appeal and ruled on the issues determined by the district judge (including the validity or otherwise of the claims, the relief to be granted and the costs of the hearing before the district judge), any appeal will lie only to the Court of Appeal. Permission must be sought from the Court of Appeal and the second appeal test will apply.

(ii) In respect of the costs of the appeal to the county court, any appeal will lie to the Court of Appeal;

(iii) It would be open to the county court judge to grant permission to appeal to the Court of Appeal in respect of the costs of the appeal to the county court and the normal test for permission will apply. It would also be open to the Court of Appeal to grant permission applying the same test.

(iv) If there has not been what can properly be regarded as a hearing of the appeal [i.e., where permission to appeal was refused or where an appeal was dismissed upon the appellant applying to withdraw it], any appeal (which is almost certainly to be one on costs) is to the High Court judge and the normal test will apply."

Furthermore, the appeal route is not altered where an appeal is dealt with partially or wholly on the basis of written submissions, nor is it affected by the manner in which the judgment on costs was given i.e., at the end of the appeal hearing, at a date thereafter at an oral hearing, or in writing. ***Rubric Lois King (A Firm) v Lane*** (13 March 2012) unrep. (QBD, Birmingham District Registry) ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.52.1.4.)

Practice Updates

STATUTORY INSTRUMENTS

- **THE CIVIL LEGAL AID (PROCEDURE) (AMENDMENT) (NO.2) REGULATIONS 2016** (SI 2016/561), in force from **30 May 2016.**

Amends the Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098). Inserts a new reg.61A concerning Mediation Information and Assessment Meetings (MIAMs) in respect of family mediation, enabling the backdating of provision for civil legal services in specified circumstances. The new regulation is, however, prospective in effect and only applies to determinations concerning eligibility that are made after 30 May 2016.

In Detail

GUIDANCE ON EXPERT EVIDENCE – KENNEDY v CORDIA (SERVICES) LLP (SCOTLAND) [2016] UKSC 6; [2016] WLR 597, UKSC

In ***Kennedy v Cordia (Services) LLP (Scotland)*** [2016] UKSC 6; [2016] WLR 597 the United Kingdom Supreme Court (UKSC) has, unusually, given a considered decision on the proper approach to take to expert evidence. While the decision arises from a Scottish appeal and is not therefore binding in England and Wales (see Constitutional Reform Act 2005, s.41(2)), it provides useful and highly persuasive guidance on the proper approach to take to experts giving evidence of fact.

The Facts

The facts were as follows. Miss Kennedy was a home carer in Glasgow. She was employed by Cordia LLP. On 18 December 2010 Miss Kennedy, in the course of her employment, visited the house of a Mrs Craig. It was not the first house visit of the day. Having parked her car, Miss Kennedy used a public footpath to approach Mrs Craig's house. The footpath was on a slope. Due to the adverse weather conditions it was a slippery slope; one covered in fresh snow with ice below. Miss Kennedy slipped and fell. She injured her wrist. Proceedings were brought for personal injury, based on breaches of the Personal Protective Equipment at Work Regulations 1992, the Management of Health and Safety at Work Regulations 1999 and common law. The claim succeeded at first instance. That decision was reversed on appeal. A further appeal was brought to the UKSC. That appeal, which raised questions about the admissibility of expert evidence amongst other things, was allowed. Lords Reed and Hodge gave a joint judgment, with which Lady Hale and Lords Wilson and Toulson agreed.

Admissibility of opinion evidence and to evidence of fact

Four criteria were identified governing whether expert evidence (or *skilled evidence* as it is described in Scottish proceedings) should be admitted (para.44), viz.,

> *"(i) whether the proposed skilled evidence will assist the court in its task;*
>
> *(ii) whether the witness has the necessary knowledge and experience;*
>
> *(iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and*
>
> *(iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence."*

The criteria are well-known in English procedure. In dealing with the first criterion, Lords Reed and Hodge stated that the threshold test applicable to it where a proposed expert is to give opinion evidence was one of necessity, see ***R v Turner*** [1975] Q.B. 834 at 841. A difference was however noted to the approach to necessity depending on whether the expert was to give opinion evidence or evidence of fact. In respect of the former, the approach was one of strict necessity. The approach to the latter was not as strict; it was whether the evidence '*would be likely to assist the efficient determination of the case'*. As Lords Reed and Hodge explained,

> *"46. In our view, the test for the admissibility of the latter form of evidence cannot be strict necessity as, otherwise, the court could be deprived of the benefit of a skilled witness who collates and presents to the court in an efficient manner the knowledge of others in his or her field of expertise. There may be circumstances in which a court could determine a fact in issue without an expert collation of relevant facts if the parties called many factual witnesses at great expense and thus a strict necessity test would not be met. In Daubert v Merrell Dow Pharmaceuticals Inc (1993) 509 US 579, the United States Supreme Court referred to rule 702 of the Federal Rules of Evidence, which in our view is consistent with the approach of Scots law in relation to skilled evidence of fact. The rule, which Justice Blackmun quoted at p.588, states:*
>
> > *'If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.'*
>
> *47. The advantage of the formula in this rule is that it avoids an over-rigid interpretation of necessity, where a skilled witness is put forward to present relevant factual evidence in an efficient manner rather than to give an opinion explaining the factual evidence of others. If skilled evidence of fact would be likely to assist the efficient determination of the case, the judge should admit it."*

In respect of England and Wales it could properly be added that if the admission of expert evidence of fact furthered the overriding objective, which goes wider than procedural efficiency, it should be admitted.

Types of evidence of fact given by experts

In addition to considering the test of admissibility for expert evidence of fact, Lords Reed and Hodge (at paras 40–42) considered a number of examples of types of factual evidence an expert may give viz.,

> *"40. Experts can and often do give evidence of fact as well as opinion evidence. A skilled witness, like any non-expert witness, can give evidence of what he or she has observed if it is relevant to a fact in issue. An example of such evidence in this case is . . . evidence of the slope of the pavement on which Miss Kennedy lost her footing. There are no special rules governing the admissibility of such factual evidence from a skilled witness.*
>
> *41. Unlike other witnesses, a skilled witness may also give evidence based on his or her knowledge and experience of a subject matter, drawing on the work of others, such as the findings of published research or the pooled knowledge of a team of people with whom he or she works. Such evidence also gives rise to threshold questions of admissibility, and the special rules that govern the admissibility of expert opinion evidence also cover such expert evidence of fact. There are many examples of skilled witnesses giving evidence of fact of that nature. Thus Dickson on Evidence, Grierson's ed (1887) at section 397 referred to Gibson v Pollock (1848) 11 D 343, a case in which the court admitted evidence of practice in dog coursing to determine whether the owner or nominator of a dog was entitled to a prize on its success. Similarly, when an engineer describes how a machine is configured and works or how a motorway is built, he is giving skilled evidence of factual matters, in which he or she draws on knowledge that is not derived solely from personal observation or its equivalent. An expert in the social and political conditions in a foreign country who gives evidence to an immigration judge also gives skilled evidence of fact.*
>
> *42. It is common in Scottish criminal trials for the misuse of drugs for the Crown to adduce the evidence of a policeman who has the experience and knowledge to describe the quantities of drugs that people tend to keep for personal use rather than for supply to others. Recently, in Myers, Brangman and Cox v The Queen [2015] UKPC 40; [2015] 3 WLR 1145, the Judicial Committee of the Privy Council approved of the use of police officers, who had special training and considerable experience of the practices of criminal gangs, to give evidence on the culture of gangs, their places of association and the signs that gang members used to associate themselves with particular gangs. In giving such factual evidence a skilled witness can draw on the general body of knowledge and understanding in which he is skilled, including the work and literature of others. But Lord Hughes, in delivering the advice of the Board at para 58, warned that "care must be taken that simple, and not necessarily balanced, anecdotal evidence is not permitted to assume the robe of expertise." To avoid this, the skilled witness must set out his qualifications, by training and experience, to give expert evidence and also say from where he has obtained information, if it is not based on his own observations and experience."*

Given this it is now clear that where:

- an expert seeks to give evidence of what they had actually observed, there is there is no difference between an expert and lay witness in terms of the test for admissibility; and
- an expert seeks to give evidence of fact based on their knowledge and experience of the subject matter of their expertise, they must, as they would prior to giving expert opinion evidence, set out their qualifications, training and experience and must identify the source of their evidence if it is not their experience. In terms of admissibility, such evidence was subject to that applicable to expert evidence of fact and not to the admission of lay evidence of fact.

Approach to the expert's opinion on what they would have done

In addition to considering the approach to evidence of fact, the approach to an expert's opinion on the question of what they would have done in the circumstances of the case was considered. The established position, following ***Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp*** [1979] Ch 384, ChD, at 402, is that such evidence is of no real assistance and, as such, is inadmissible. As Oliver J put in that case,

> *"evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court; whilst evidence of the witnesses' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide."*

Lords Reed and Hodge (at para.67) provided a gloss on Oliver J's dicta. While they agreed that such evidence is likely to be of little weight and thus inadmissible, this was not an absolute rule. There were some cases where such evidence would be of assistance to the court and should, as in ***Kennedy***, be admissible and form part of the trial judge's consideration. As they put it, indicating that a more nuanced approach to such evidence's admissibility and weight is to be taken,

> *"we see no reason why the Lord Ordinary should not have found helpful the reasoned view of a person experienced in carrying out risk assessments on the rating of risks within a risk assessment. Cordia assessed the risk of injury such as sprains or fractures when travelling to and from work locations to be "tolerable", applying a British Standard with which a judge might not be familiar but which was relevant to a consideration of proper practice. Mr Greasly (Miss Kennedy's expert) opined that in wintry conditions the risk should have been assessed as "substantial". His evidence provided a basis for the Lord Ordinary to weigh up the opposing views when deciding whether Cordia had suitably and sufficiently evaluated the risks and identified the measures needed to protect health and safety. We have difficulty in seeing how Miss Kennedy's counsel could have presented her case on these matters by legal submissions alone."*

Approach to evidence on the ultimate issue

It is well-established that experts provide evidence and do not determine the ultimate issue that is before the court: see Stuart Smith LJ in ***Liddell v Middleton*** [1996] P.I.Q.R. P36 as approved in ***Armstrong v First York*** [2005] EWCA 227 at para.28, "*We do not have trial by expert in this country; we have trial by judge.*" This injunction arises as an instance of the prohibition on the delegation of the judicial function to determine proceedings before the court: see, ***Terra Woningen v Netherlands*** (1996) E.H.R.R. 456. Lords Reed and Hodge endorsed that position, and noted its recent approval by the Privy Council in ***Pora v The Queen*** [2015] UKPC 9; [2016] Cr. App. R. 3 at para.24. In doing so they drew proper attention to a distinction between the impermissible delegation of the judicial function on ultimate issues and the permissible provision by an expert of their view on how the ultimate issue should be determined. As they put it at para.49,

> *". . . on occasion in order to avoid elusive language the skilled (expert) witness may have to express his or her views in a way that addresses the ultimate issue before the court, expert assistance does not extend to supplanting the court as the decision-maker. The fact-finding judge cannot delegate the decision-making role to the expert."*

The court's and the parties' duty to control expert evidence

The nature of the expert's duty to the court is long-established in English and Welsh law both at common law per Cresswell J's statement of principles in ***The Ikarian Reefer*** [1993] 2 Lloyd's Rep. 68 at pp.81–82, and CPR r.35.3. The former was endorsed as applicable to civil claims in Scotland. In considering this issue Lords Reed and Hodge emphasised that questions of expert witness independence and impartiality go to admissibility of the expert's evidence. They are not simply questions of the weight to be given to such evidence. In respect of which also see the recent Supreme Court of Canada decision in ***White Burgess Langille Inman v Abbott and Haliburton Co*** (2015) SCC 23 at paras 35 and following, and ***R (Factortame Ltd) v Secretary of State for Transport*** [2002] EWCA Civ 932; [2003] Q.B. 381 at para.70 and ***Matchbet Ltd v Openbet Retail Ltd*** [2013] EWHC 3067 (ChD), unrep., at paras 312–17, where the test of admissibility is explained to be fact-specific: absence of independence or impartiality does not automatically disqualify an expert.

In considering the question of the admissibility and weight to be given to a proposed expert's independence and impartiality it is noteworthy that Lords Reed and Hodge relied on two decisions of the Court of Appeal viz., at para.51,

> *"If a party proffers an expert report which on its face does not comply with the recognised duties of a skilled witness to be independent and impartial, the court may exclude the evidence as inadmissible: Toth v Jarman [2006] EWCA Civ 1028; [2006] 4 All ER 1276, paras 100–102. In Field v Leeds City Council [2000] 1 E.G.L.R. 54, the Court of Appeal upheld the decision of a district judge, who, having ordered the Council to provide an independent surveyor's report, excluded at an interim hearing the evidence of a surveyor whom the Council proposed to lead in evidence on the ground that his impartiality had not been demonstrated. It is unlikely that the court could make such a prior ruling on admissibility in those Scottish procedures in which there is as yet no judicial case management. But the requirement of independence and impartiality is in our view one of admissibility rather than merely the weight of the evidence."*

Questions of admissibility are not however merely matters for the court to consider. Their Lordships' judgment drew useful attention (at para.57) to the requirement for parties' legal representatives to ensure that an expert is aware of and able to carry out their role properly. They drew particular attention to the fact that it is for the legal representatives to ascertain whether a putative expert is properly qualified to give admissible expert evidence, and to ensure that the putative expert is fully aware of their duties. Moreover, they emphasised the requirement that legal representatives should provide putative expert's with

"all of the relevant factual material which they intend should contribute to the expert's evidence in addition to his or her own pre-existing knowledge. That should include not only material which supports their client's case but also material, of which they are aware, that points in the other direction, viz the court's concerns about one-sided information in R v Gilfoyle ([2001] 2 Cr. App. R. 5) . . ."

Reliable body of evidence

Their Lordships also considered the position regarding what the courts should accept as the subject matter of expert evidence. In doing so they not only considered examples of what amounts to a 'reliable body of knowledge of experience' capable of forming the subject matter of such evidence, but they also approved the position taken by the Court of Appeal (Criminal Division) in excluding evidence that is not based upon an established body of knowledge, viz., paras 54-56,

"What amounts to a reliable body of knowledge or experience depends on the subject matter of the proposed skilled evidence. In Davie v Magistrates of Edinburgh the question for the court was whether blasting operations in the construction of a sewer had damaged the pursuer's building and the relevant expertise included civil engineering and mining engineering. In Myers, Brangman and Cox, as we have said, the subject matter was the activities of criminal gangs; a policeman's evidence, which was the product of training courses and long term personal experience as an officer serving with a body of officers who had built up a body of learning, was admitted as factual evidence of the practices of such gangs.

In many cases where the subject matter of the proposed expert evidence is within a recognised scientific discipline, it will be easy for the court to be satisfied about the reliability of the relevant body of knowledge. There is more difficulty where the science or body of knowledge is not widely recognised. Walker and Walker at para.16.3.5 refer to an obiter dictum in Lord Eassie's opinion in Mearns v Smedvig Ltd 1999 SC 243 in support of their proposition that:

'A party seeking to lead a witness with purported knowledge or experience outwith generally recognised fields would need to set up by investigation and evidence not only the qualifications and expertise of the individual skilled witness, but the methodology and validity of that field of knowledge or science.'

We agree with that proposition, which is supported in Scotland and in other jurisdictions by the court's refusal to accept the evidence of an expert whose methodology is not based on any established body of knowledge. Thus in Young v Her Majesty's Advocate 2014 SLT 21, the High Court refused to admit evidence of "case linkage analysis" because it was the subject of only relatively recent academic research and a methodology which was not yet sufficiently developed that it could be treated as reliable. See also, for example, R v Gilfoyle [2001] 2 Cr. App. R. 5, in which the English Court of Appeal (Criminal Division) refused to admit expert evidence on "psychological autopsy" for several reasons, including that the expert had not embarked on the exercise in question before and also that there were no criteria by reference to which the court could test the quality of his opinions and no substantial body of academic writing approving his methodology. The court also observed that the psychologist's views were based on one-sided information and doubted that the assessment of levels of happiness or unhappiness was a task for an expert rather than jurors."

Cost and Efficiency

The final point that their Lordships emphasised is one well-known in England and Wales: the need to promote the efficient and cost effective use of expert evidence (at paras 60–61). In this regard they emphasised: the proper use of case management; the need for parties to co-operate and the court to encourage them in doing so; for parties to to agree non-contentious evidence so that experts can focus on the real issues in dispute; the use of single joint-experts, and effective preparation of experts' reports. More significantly from the perspective of England and Wales, Lords Reed and Hodge also emphasised that courts utilise their powers concerning costs to promote the effective use of experts, to '*discourage the excessive use of expert evidence*.' While CPR Pt 35 provides a clearer basis for discouraging excessive use of experts, the reference to using cost sanctions – as a supplement to express powers to control expert evidence – may provide courts an additional fillip in this area. Equally, the emphasis on controlling costs may also provide an additional stimulus to the courts to make greater use of those aspects of the Jackson reforms that were particularly focused on the aim of reducing the cost of expert evidence i.e., greater use of the power to require the use of hot-tubbing or concurrent evidence (CPR PD35 paras 11.1–11.4).

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.

675334