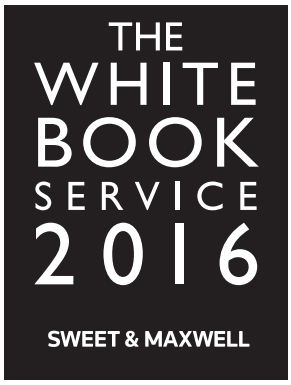
CIVIL PROCEDURE NEWS

Issue 7/2016 11 July 2016

CONTENTS

Recent cases

Guidance on Statements of Case, Counterclaims and Litigants-in-Person



In Brief

Cases

- **R (Tesfay) v Secretary of State for the Home Department** [2016] EWCA Civ 415, 04 May 2016, unrep. (Lloyd Jones, McCombe & Beatson LJJ)

Jurisdiction to award costs – permission to appeal application withdrawn

Senior Courts Act 1981, ss.15 and 51. Following the decision of the United Kingdom Supreme Court in ***EM (Eritrea) v Secretary of State for the Home Department*** [2014] UKSC 12; [2014] A.C. 1321 over 300 certifications in human rights claims were withdrawn and then reconsidered by the defendant. In proceedings before the Court of Appeal the question arose as to whether that court had jurisdiction to make costs orders in respect of proceedings before it and before courts from which appeals were sought where appeal proceedings were withdrawn before permission to appeal was granted. **Held**, (i) costs incurred in respect of an application for permission to appeal were costs that were "incidental" to proceedings before the Court of Appeal and were thus within the ambit of Senior Courts Act 1981, s.51(1)(a); and (ii) it is well established that the Court of Appeal, in hearing and determining an appeal, has all the jurisdiction of the court or tribunal from which the appeal arises: see Senior Courts Act 1981, s.15(3)(a). Costs incurred in proceedings in courts or tribunals from which appeal is sought to the Court of Appeal are costs that are incidental to the hearing and determination of an appeal. This is the case whether or not an application for permission to appeal is withdrawn prior to the grant of permission. As such the Court of Appeal had jurisdiction to deal with both sets of costs. (See ***Civil Procedure 2016*** Vol.2 sections 9A-52 and 9A-201.)

- **R (Bar Standards Board) v Disciplinary Tribunal of the Council of the Inns of Court** [2016] EWCA Civ 478, 24 May 2016, (McCombe and King LJJ)

Bar disciplinary proceedings – basis upon which costs are calculated

Senior Courts Act 1981, ss.31(5) and 31(5A), Disciplinary Tribunal Regulations 2009 (as amended) r.31, CPR r.48.6. Disciplinary proceedings were brought against a barrister by the Bar Standards Board (BSB). The proceedings were dismissed, with a cost assessor appointed by the Disciplinary Tribunal concluding, amongst other things, that the proceedings ought not to have been brought. Costs of £27,521.50 were awarded against the BSB. Judicial Review proceedings concerning the costs order succeeded before the Divisional Court, which quashed the determination that the hourly rate for recoverable costs was £120. The Divisional Court substituted its own determination that the rate was £60 per hour, and ordered the barrister to pay 60% of the BSB's costs of the judicial review. The barrister appealed from the substantive order, seeking the reinstatement of the original order, and from the costs order. **Held**, the appeal was dismissed save in respect of one point: the hourly rate was calculated improperly and its determination was remitted to the Disciplinary Tribunal. In reaching its decision the Court of Appeal set out the proper approach to calculating the hourly rate for such proceedings: (i) in order to determine the appropriate hourly rate under r.31 of the Disciplinary Rules where costs are awarded in favour of a defendant in disciplinary proceedings the approach taken under the CPR is of no assistance, the CPR are "not even persuasive" authority for the approach to take; Ryder J in ***Miller v Bar Standards Board*** (2012) disapproved. The costs were assessed by the costs assessor, under r.31, on the basis that ***Miller*** was binding. The cost assessor's conclusion on this point was wrong; (ii) if, contrary to the first point, the CPR was applicable to the determination of costs under r.31 of the Disciplinary Rules, contrary to Ryder J in ***Miller v Bar Standards Board*** (2012) the correct approach to the application of CPR r.48.6 as a persuasive authority was that the barrister ought to have been treated as a litigant-in-person and ought therefore to have only been entitled to recover costs at the litigant-in-person rate. Again the cost assessor's conclusion on this point, following ***Miller***, was wrong; (iii) in assessing costs under r.31 of the Disciplinary Rules, guidance should be taken from the common law as set out in ***London Scottish Benefit Society v Chorley*** (1884) and as applied in ***Khan v the Lord Chancellor*** (2003) at paras 52-53. As such a barrister who defended disciplinary proceedings successfully was not limited to recover at the litigant-in-person rate proscribed by the CPR but was rather entitled to recover costs based on the *"expenditure of professional skill"*; (iv) in the circumstances of the present case, as there was no basis upon which the Divisional Court could have properly concluded that if it had remitted the costs assessment to the Disciplinary Tribunal there was only one decision the Tribunal court could have made, as required by Senior Courts Act 1981, s.31(5A)(c), the determination of costs ought to have been remitted to the Tribunal and not dealt with by the Divisional Court at the conclusion of the judicial review proceedings. ***London Scottish Benefit Society v Chorley*** (1884) 13 Q.B.D. 872, CA, ***Miller v Bar Standards Board*** (January 2012), unrep., Ryder J, Visitor of the Inns of Court, ***Baxendale-Walker v Law Society*** [2007] EWCA Civ 233, unrep., Master of the Rolls as a statutory domestic appeal tribunal, ***City of Bradford***

MBC v Booth [2000] Crown Office Digest 338, unrep., QBD Div Ct, ***Malkinson v Trim*** [2002] EWCA Civ 1273; [2003] 1 W.L.R. 463, CA, ***Khan v the Lord Chancellor*** [2003] EWHC 12 (QB); [2003] 1 W.L.R. 2385, QBD, ***Jafri v Lincoln College*** [2014] EWCA Civ 449; [2015] QB 781, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.16.3.2, Vol.2 section 9A-101.)

■ **Parke v Butler** [2016] EWHC 1251 (QB), 26 May 2016, unrep. (Edis J)

Qualified one-way costs shifting – costs on appeal

CPR rr.44.13, 44.14, 52.9A. A personal injury claim arising from a road traffic accident was dismissed following allocation to the fast track. A subsequent appeal by the claimant was dismissed, albeit on grounds different from those found by the trial judge. Costs were assessed at £2,795.21 plus VAT. The costs order arising from the trial was not enforceable against the claimant as it was subject to the qualified one-way costs shifting (QOCS) regime: see CPR rr.44.13 and 44.14. The issue before Edis J was whether the costs order made on the appeal was also one that was not enforceable on the basis that it too was subject to CPR r.44.14. **Held**, the costs order on appeal was subject to the QOCS regime and was thus not enforceable as (i) there were no authorities on point and those that there were did not assist other than to determine what the term "proceedings" meant for the purposes of CPR r.44.13, see ***Wagenaar v Weekend Travel Ltd*** (2014) paras 38-40; (ii) following ***Wagenaar v Weekend Travel Ltd*** (2014) it was clear that not all steps in proceedings fell within the ambit of "proceedings" in CPR r.44.13. An appeal from a decision to dismiss at trial a personal injury claim was however a proceeding for the purpose of CPR r.44.13 as:

> *"[17] An appeal by a claimant against the dismissal of his claim for personal injuries is a means of pursuing that claim against the defendant or defendants who succeeded in defeating that claim at trial. There is no difference between the parties or the relief sought as there is between the original claim and the Part 20 claim. Most importantly, to my mind there is no difference between the nature of the claimant at trial and the appellant on appeal. He is the same person, and the QOCS regime exists for his benefit as the best way to protect his access to justice to pursue a personal injury claim. To construe the word "proceedings" as excluding an appeal which was necessary if he were to succeed in establishing the claim which had earlier attracted costs protection would do nothing to serve the purpose of the QOCS regime. The other construction, which holds that for the purposes of CPR Part 44.13 an appeal between the claimant and the defendant in a personal injury claim is part of the proceedings which include a claim for personal injuries is open to me, following Hawksford Trustees Jersey Limited, and should be preferred because it more justly achieves what is plainly the purpose of the regime as divined from the Rules.*
>
> *[18] ... In my judgment for the purposes of the QOCS regime any appeal which concerns the outcome of the claim for damages for personal injuries or the procedure by which it is to be determined is part of the proceedings as defined in CPR 44.13 ..."*

Finally, it was noted that this construction was not adversely affected by CPR r.52.9A, as that rule did not apply to matters where the same costs regime – as here – applied at both first instance and on appeal. ***Cooper v Floor Cleaning Machines Ltd*** [2003] EWCA Civ 1649, unrep., CA, ***Hawksford Trustees Jersey Ltd v Stella Global UK Ltd (No 2)*** [2012] EWCA Civ 987; [2012] 1 W.L.R. 3581, CA, ***Wagenaar v Weekend Travel Ltd*** [2014] EWCA Civ 1105; [2015] 1 W.L.R. 1968, CA, ***Akhtar v Boland*** [2014] EWCA Civ 943, unrep., CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.44.13.2.)

■ **BNM v MGN Ltd** [2016] EWHC B13 (Costs), 3 June 2016, (Master Gordon-Saker)

Costs – detailed assessment – proportionality

CPR rr.44.3, 48.1(1) (post-April 2013), Costs Practice Direction, section 11 (Pre-2013). The claimant had sought damages, an order for delivery up and an injunction against the defendant to enjoin its use of confidential material taken from her mobile phone. Both solicitors and Counsel for the claimant were engaged on the basis of conditional fee agreements. Following entry into the CFAs the claimant took out an ATE insurance policy. The claim settled in the claimant's favour by way of consent order prior to trial. The claimant claimed costs of £241,817, inclusive of success fees of 60% and 75% for her solicitors and counsel, respectively, and of £61,480 in respect of the ATE insurance policy premium, inclusive of IPT. The issue of costs was dealt with by way of detailed assessment, at which the claimant was awarded £83,964.80 in costs. In reaching that decision the Senior Costs Master considered three issues concerning the application of the proportionality test under CPR r.44.3 (post-April 2013), viz.:

> *"i) Does the new test of proportionality apply to additional liabilities? ii) If it does, should it be applied to additional liabilities separately, rather than by the global basis described above? iii) Are the costs allowed on the line by line assessment disproportionate?"*

The Senior Costs Master noted that the new test of proportionality was introduced in order to mark a sharp break with the pre-2013 test for proportionality under what was CPR r.44.5 (pre-April 2013) and held: (i) while the pre-April 2013 rules concerning recoverability of additional liabilities were preserved post-April 2013, the pre-April 2013 test of proportionality had not been preserved in respect of such additional liabilities. The pre-April 2013 test only remains applicable in respect of those circumstances defined in CPR r.44.3(7). Furthermore, it would be *"absurd and unworkable"* to apply the new test of proportionality to base costs and the old test to success fees. It would run contrary to the requirement that the court should ensure that only proportionate costs are allowed to adopt such a view; (ii) CPR r.44.5 (pre-April 2013) only remains applicable as *provided* for by CPR r.44.3(7) (post-April 2013), as such section 11 of the Costs Practice Direction (pre-April 2013) does not apply to an assessment of the proportionality of additional liabilities; as such, when *"applying the new test of proportionality, the court need not consider the amount of any additional liability separately from the base costs."*; (iii) turning to the third question, it was correct to say that there would be cases, particularly privacy-based claims, where costs though they exceeded the amount claimed bore a reasonable relationship to them. Per the Senior Costs Master,

> *"Had it been intended that costs should never exceed the sums in issue the rule could easily have stated that. There will be cases in which the costs bear a reasonable relationship to the sums in issue even though they exceed those sums."*

In respect of costs budgeting the court could not simply consider financial proportionality. The nature of any non-monetary relief, the factual and/or legal complexity of the claim, the nature and extent of any evidence, the importance of the claim to the claimant and any wider public importance, the seriousness of the allegations made, whether, and if so whether that was justified, the claim was issued without informing the defendant that issue was to take place, whether additional work was a consequence of defendant conduct, were all (non-exhaustive) relevant factors to consider in considering whether the costs bore a reasonable relationship to the claim's value where: (a) the costs exceeded the value; and (b) the claim settled at an early stage of the proceedings; (iv) CPR r.44.3(2)(a) (post-April 2013) specifies that reasonable and necessary costs may be disproportionate. The ATE premium in the present case was not unreasonable in amount and was necessary. It was however disproportionate. In circumstances where a court reduces the ATE premium on grounds of disproportionality it must specify the amount allowable. In the present case, where the claim was not complex, the damages sought were not substantial, the defendant's conduct had not engendered largescale additional work, there was no wider importance to the claim, and the claimant's prospects of success were initially significantly greater than 50% and increased in the light of "'*substantial admissions' by the defendant*", it could not be said that there was a reasonable relationship between the £20,000 settlement figure and an ATE premium of £58,000. As such only half the premium claimed was proportionate. ***GDK Project Management Ltd v QPR Holdings Ltd*** [2015] EWHC 2274 (TCC), unrep., TCC, ***Stocker v Stocker*** [2015] EWHC 1634 (QB), unrep., QBD, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.44.3.3.)

■ **Hanspaul v Ward** [2016] EWHC 1358 (Ch), 13 June 2016, unrep. (Chief Master Marsh)

Settlement before trial – proper approach to determining costs of claim

CPR rr.1, 44.2. The claim concerned a dispute arising from a family trust settlement. A preliminary issue was settled at trial. A CMC was scheduled for January 2016, albeit by the time it was held the only live issue in the proceedings was that of costs. The proper approach to resolve that issue was contested by the parties; the question being, should the court determine costs following a full trial, following a so-called *"trial lite"* i.e., a limited trial of no more than two days, capped costs, standard disclosure and one witness per party, or without a trial and without the court hearing witness evidence. **Held**, (i) the starting point for determining any issue as to costs is CPR r.1.1(1) (post-April 2013) and by reference to CPR r.44.2. The court should adopt an approach consistent with the overriding objective, taking particular account of the need to ensure that costs are proportional. Application of the overriding objective should ensure that the procedure adopted to determine costs while being fair enabled the issue to be resolved in such a way as to minimise the incidence of further costs. Determination of such a question is *"entirely fact specific"*; (ii) two lines of authority (see ***BCT Software Solutions Ltd v C Brewer & Sons Ltd*** (2004) and ***Brawley v Marczynski (No.1) and (No.2)*** (2003)) concerning the approach that could be taken by a court when the only remaining issue between the parties is that of costs had been identified. The better way to view these authorities was as providing *"examples of the way the court has exercised its discretion in the particular circumstances of each case"* i.e., they should not be viewed as mutually exclusive and differing approaches. Furthermore, care should be taken not to treat observations in cases or case examples concerning the approach taken to costs where a claim had settled on terms agreed between the parties as applicable to those claims where issues had simply fallen way; (iii) that there were contested issues of fact did not necessitate a trial be held. Before ordering a trial, even where there are such contested issues, a court should *"carefully consider the alternatives to a trial and decide whether only a trial will meet the justice of the case and be fair to the parties"*; (iv) in the circumstances of the present case, there was no need to direct a trial, the issue of costs

could be determined at a hearing following the submission of witness statements and documents. Such an approach was consistent with the overriding objective, with the Senior Costs Master noting specifically how it was consistent with the need to take "*into account the interests of all the parties and the needs of other court users in competition for scarce resources*". ***R v Holderness Borough Council ex parte James Robert Developments Ltd*** [1993] 66 P & CR 46, CA, ***R (Boxall) v Waltham Forest London Borough Council*** [2010] L.L.R. 1, Admin., ***Brawley v Marczynski (No.1) and (No.2)*** [2002] EWCA Civ 756 and [2002] EWCA Civ 1453; [2003] 1 W.L.R. 813, CA, ***BCT Software Solutions Ltd v C Brewer & Sons Ltd*** [2003] EWCA Civ 939; [2004] Fleet St. Reports 9, CA, ***Philip James Long v Farrer & Co*** [2004] EWHC 1774 (Ch); [2004] B.P.I.R. 1218, ChD, ***Pathway Resourcing Ltd v Kaul*** [2008] EWHC 3078 (Ch), unrep. ChD, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.44.2.1 and following.)

- **PM Project Services Ltd v Dairy Crest Ltd** [2016] EWHC 1235 (TCC), 13 June 2016, unrep. (Edwards-Stuart J)

Bundles – need to ensure proper pagination

CPR r.1.1. The claimant brought an application for summary judgment in respect of three separate claims against the defendant. Two of the three applications were supported by a witness statement to which 750 pages of exhibits were annexed. The third was not. The former two applications were adjourned due to the nature of the bundles with the applicant being ordered to pay the costs of producing properly prepared bundles and the costs thrown away by the adjourned hearing. In reaching his decision **Edwards-Stuart J criticised** the paucity of the pagination with numerous exhibits being placed at pages in the bundle that bore no resemblance to where they were stated to be in the witness statement. The failure to properly paginate the bundle ran a coach and horses through both the time-estimate for pre-reading and the hearing, the inevitable – albeit unstated – consequence of which was to contravene the overriding objective, not least the court's ability to properly manage its resources proportionately. (And see: ***Iliffe v Feltham Construction Ltd*** [2015] EWCA Civ 715 at paras 50-54; and ***Pawar v JSD Haulage Ltd*** [2016] EWCA Civ 551, where the respondent was held to be entitled to its costs of having to prepare the appeal bundles as those submitted by the appellant were "*chaotic*".)

- **Harb v HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz** [2016] EWCA Civ 556, 16 June 2016, unrep. (Lord Dyson MR, Moore-Bick VP, McFarlane LJ)

Test for apparent bias

Appeal in a long-running claim to enforce an agreement alleged to have been entered into between the parties. At trial a contract was held to have been made. The judgment was appealed on a number of grounds. The fifth ground of appeal centred on the contention that there was an appearance of bias on the part of the trial judge. Appeal allowed and re-trial ordered before a different judge. Due to the Court of Appeal's findings on the other grounds of appeal it was not necessary for it to determine the fifth ground. Notwithstanding that, the Court found that there was no apparent bias on the trial judge's part, albeit his conduct was criticised. In considering the issue of bias, Lord Dyson MR, giving the judgment of the court, emphasised the following points that ought to be considered when carrying out the objective test to determine whether a fair-minded informed observer would conclude there was a real possibility of bias: (i) the fair-minded informed observer is not to be confused with the litigant in the proceedings; the opinion of the latter is not the opinion of the former and vice versa. The test is objective. In carrying out the assessment of the fair-minded observer's opinion, they are to be understood as knowing that "*judges are expected to be true to their judicial oaths and not allow their feelings about an advocate to affect their determination of the case they are hearing*"; judicial irritation and hostility towards an advocate does not necessarily entail a real possibility of bias against a party; (ii) the fair-minded, informed, observer is taken to know all relevant circumstances, which per Stanley Burnton LJ in ***Virdi v Law Society*** (2010) is taken to include "*all relevant facts and not only those that are publicly available.*" ***Porter v Magill*** [2002] 2 A.C. 357, HL, ***Helow v Secretary of State for the Home Department*** [2008] UKHL 62; [2008] 1 W.L.R. 2416, HL, ***Competition Commission v BAA Ltd & Ryanair Ltd*** [2010] EWCA Civ 1097; [2011] U.K.C.L.R. 1, CA, ***Virdi v Law Society*** [2010] EWCA Civ 100; [2010] 1 W.L.R. 2840, CA, ref'd to.

- **May v Wavell Group Plc** [2016] EWHC B16 (Costs), 16 June 2016, unrep. (Master Rowley)

Costs – Proportionality Test

CPR rr.44.3(2), 44.3(5), 44.9. A County Court claim for private nuisance settled before the defendants served their defences when the claimants accepted their CPR Pt 36 offer. The claimants submitted a bill of costs totalling £208,236.54. The claim settled for £25,000. The claimants provided no evidence to suggest the claim had ever been valued at more than the settlement figure. The issue was the correct application of the two-stage test to assess recoverable costs and particularly the application of the post-April 2013 proportionality test, under CPR r.44.3(2) and (5) in respect of work done post-April 2013. **Held**, (i) reasonable costs (stage 1 of the test) were assessed on an item by item basis at £99,655.74; (ii) the reasonable costs allowed could not be said to be proportionate. Applying the five

criteria set out in CPR r.44.3(5), £35,000 plus VAT was recoverable. In reaching his decision Master Rowley set out the following guidance: (i) the general approach to proportionality in respect of costs is set out in Leggatt J's judgment in ***Kazakhstan Kagazy Plc v Zhunus*** (2015). That approach is not, however, appropriate for modest i.e., lower value claims: it is "*too generous to the receiving party*" under the post-Jackson approach to proportionate costs. In many, but note not all, modest value claims the amount recoverable from a paying party is no more than a contribution to the receiving party's costs viz.,

> *"It seems to me to be clear that where the sums in issue are modest, the Kazakhstan method is still too generous to the receiving party under the new approach. The amount that can be recovered from the paying party is not the minimum sum necessary to bring or defend the case successfully. It is a sum which it is appropriate for the paying party to pay by reference to the five factors in CPR 44.3(5). It is not the amount required to achieve justice in the eyes of the receiving party but only a contribution to that receiving party's costs in many modest cases."*

As intended post-Jackson this meant the approach set out in ***Jefferson v National Freight Carriers Plc*** (2001) and ***Lownds v Home Office*** (2002) was no longer applicable; (ii) as the approach in ***Kazakhstan Kagazy Plc v Zhunus*** (2015) did not apply to modest claims, no guidance could be drawn from decisions such as ***CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd*** (2015) in respect of costs assessment in such claims; (iii) it was clear that the assessment of proportionality was to be carrying out on a global basis. It would only be rarely appropriate, and then in unusual cases only, that assessing proportionality could properly be carried out on an individual item basis. The approach taken by Master O'Hare in ***Hobbs v Guy's and St Thomas's NHS Foundation Trust*** (2015), was thus exceptional; (v) when carrying out the proportionality test under CPR r.44.3(5) it was necessary to consider all the criteria there set out. It was not the case that CPR r.44.3(5)(a), the sum in issue, was first amongst equals. In carrying out the assessment it was appropriate to consider the stage at which the proceedings had reached; in so doing it was clear that the "*proportionate amount of costs must inevitably be smaller for a case which concludes early than one which reaches a final hearing*"; (vi) generally it would not be appropriate to consider the costs of drawing up the bill of costs separately from the remainder of the costs of the proceedings when carrying out the proportionality test. Such an approach was an unnecessary refinement to what was "*a blunt instrument rather than a precision tool*"; and, (vii) in modest value cases, parties' lawyers should inform their clients that should they succeed in their claim they will recover no more than a contribution to their incurred costs. ***Jefferson v National Freight Carriers Plc*** [2001] EWCA Civ 2082; [2001] 2 Costs L.R. 313, CA, ***Lownds v Home Office*** [2002] EWCA Civ 365; [2002] 1 W.L.R. 2450, CA, ***Hobbs v Guy's and St Thomas's NHS Foundation Trust*** (2 November 2015), unrep, SCCO, ***Kazakhstan Kagazy Plc v Zhunus*** [2015] EWHC 404 (Comm); 158 Con. L.R. 253, Comm, ***CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd*** [2015] EWHC 481 (TCC); [2015] B.L.R. 285, TCC, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.44.3.3.)

■ **ASDA Stores Ltd v Brierley** [2016] EWCA Civ 566, 22 June 2016, unrep. (Elias and Christopher Clarke LJJ)

Employment Tribunal – no jurisdiction to issue general stay of proceedings in order to effect transfer of claim to High Court

Employment Tribunal Rules (2013) r.29, Equality Act 2010, ss.127, 128. 7000 claimants brought equal pay claims against ASDA. The question arose whether the claims could be transferred to the High Court in the absence of an express power to do so via the use of a stay of the Employment Tribunal claims. **Held**, while Equality Act 2010, ss.127 and 128 establish the High Court's jurisdiction over equal pay claims, that it can effect a transfer of any such claims issued before it to the Employment Tribunal by striking out such claims, and stay such claims while referring equality issues to the Tribunal for determination, the Employment Tribunal has no equivalent statutory jurisdiction or power. Employment Tribunal Rules (2013) r.29 provides a power to impose an indefinite or permanent stay of proceedings. It does not however provide a basis for the Tribunal to do what primary legislation does not provide a power for it to do i.e., effect a transfer of proceedings to the High Court via the imposition of a general stay on proceedings before it. Furthermore, such a power would impose significant disbenefits on claimants, such as the need to issue fresh, High Court, proceedings, incur additional court fees and would place them at risk of costs where, in general, no such costs risk exists in Tribunal proceedings. This supported the conclusion that Parliament could not be taken to have left to secondary legislation what it did provide within primary legislation. Moreover, there is no doctrine of *forum non conveniens* as between domestic courts and tribunals. This is not to suggest that where there are existing parallel proceedings in the High Court and Employment Tribunal the latter could not stay the proceedings before it in order to enable the former to determine the proceedings before it. This might well be the proper course of action where the High Court proceedings were more advanced than those in the Employment Tribunal, not least to avoid parties and the courts and tribunals incurring unnecessary costs and to obviate the potential for the High Court and Employment Tribunal handing down parallel but contradictory judgments. ***Crofts v Cathay Pacific Airway*** [2005] EWCA Civ 599; [2005] I.C.R. 1436, CA, ***Abdulla v Birmingham City Council*** [2012] UKSC 47; [2012] I.C.R. 1419, UKSC, ref'd to.

Cyprus Popular Bank Public Co Ltd v Vgenopoulos [2016] EWHC 1442 (QB), 22 June 2016, unrep. (Picken J)

Worldwide freezing injunction – registration as a foreign judgment – whether immediately effective and enforceable – scope of measures of enforcement

Judgments Regulation (No.44 of 2001) (EC) arts 38 and 47.3. The claimant bank, registered in Cyprus, issued proceedings in Nicosia in November 2012 against the defendants in respect of a variety of causes of action e.g., breaches of fiduciary duty, breach of trust, negligence. In April 2013 the claimant applied for a worldwide freezing injunction on a without notice basis in the District Court of Nicosia. The application was granted on an interim basis up to a value of 3,790,000,000 Euros in respect of the first and second defendants, and 1,500,000,000 Euros in respect of the third defendant. Following further interlocutory applications, and an on notice hearing, the interim worldwide freezing order became a final order (the Cyprus Freezing Injunction) in May 2013. In February 2015 the claimant applied to register the Cyprus Freezing Injunction as a judgment further to art.38 of the Judgments Regulation in the High Court, Queen's Bench Division (a registration order). Such applications are ordinarily dealt with on the papers, without a hearing. Master Leslie however queried whether an application for protective measures, a freezing order, under art.31 of the Judgments Regulation was a more appropriate course of action, and the application was consequently dealt with at a hearing, at which the registration order was made: it being established that where a freezing order is made at an on notice hearing, it is within the scope of the Judgments Regulation: see arts 32 and 38 of the Judgment Regulation and ***Denilauler v SNC Couchet Frères*** (1980). Two novel issues of principle arose: first, whether a worldwide freezing injunction issued in a foreign jurisdiction becomes fully enforceable and effective in England and Wales immediately upon registration under the Judgments Regulation or whether it does so only upon the expiry of the two-month period available for an appeal from the registration; and secondly, the scope of *"measures of enforcement"* within art.47.3 of the Judgments Regulation. **Held**, a worldwide freezing injunction only becomes fully effective and enforceable under the Judgments Regulation when the two-month period available for an appeal from registration expires. The nature of the procedure set out in arts 39-46 read with art.47.3 provides claimants with a straightforward means to obtain registration on a without notice basis. It does so however on the basis that registration is not enforceable until the defendant has had the opportunity to challenge the registration via the appeal process. As a matter of principle the effect of registration must be neutral as between the parties until the appeal process has either concluded or the appeal time limit has expired, otherwise a claimant would have an advantage from the point of registration while the appeal time limit was live or prior to determination of an appeal. As Picken J put it at paras 28-29,

> *"It cannot be right, and it would be wholly at odds with the scheme of the Judgments Regulation, were a claimant to be able to achieve the immediate freezing of bank accounts in this jurisdiction by obtaining an order pursuant to Article 38 without, pending an appeal, having to persuade the Court (in this jurisdiction) that it ought itself to grant a freezing order on conventional grounds.*
>
> ...
>
> *Until such time as any appeal has been determined, the position is clear: under Articles 47.2 and 47.3, the only measures which can be taken by a claimant are protective measures which, in accordance with Article 31, will be whatever protective measures are available in this jurisdiction (as the Member State where the Cypriot Freezing Order is being sought to be enforced). It may be that a freezing order will be obtainable in this jurisdiction in the same way as it was in Cyprus; it may be, however, that a freezing order will not be obtainable. It will depend on the Claimant being able to satisfy the Court here that a freezing order is appropriately granted, including justifying the making of such an order notwithstanding what, at least on the face of it, appears to have been unjustifiable delay."*

In respect of "measures of enforcement" within art.47.3 of the Judgments Regulation, that term includes service of the worldwide freezing injunction and the registration order, and notification of the injunction's terms to third parties. By providing a copy of the worldwide freezing injunction by serving the order the claimant has enforced it: service of the order in this way is a means to carry into effect the underlying judgment or order. The various authorities cited to the court did not assist the determination of this question: none of them considered this question. The key point is that "*it is the service of a freezing order, or notification of its terms, which makes it effective as against third parties and which, in practical terms, carries the freezing order into effect and so represents, or entails, enforcement of it*": see Picken J at para.39. That was sufficient to determine the second question. ***Denilauler v SNC Couchet Frères 125/79*** [1980] E.C.R. 1553, CJEU, ***Capelloni v Pelkmans (Case 119/1984)*** [1985] E.C.R. 3147; [1986] 1 C.M.L.R. 388, CJEU, ***Deutsche Genossenschaftsbank v Brasserie du Pecheur S.A. (Case 148/84)*** [1986] 2 C.M.L.R. 496, CJEU, ***Calzaturificio Brennero S.A.S v Wendel GmbH Schuhproduktion International (Case 258/83)*** [1986] 2 C.M.L.R. 59, CJEU, ***Hoffman v Krieg (Case C-145/86)*** [1988] E.C.R. 645; [1990] I.L. Pr. 4, CJEU, ***Ryan v Williams*** (Court of Appeal,

13 January 2000) unrep., CA, ***Dadourian Group International Inc v Simms*** [2006] EWCA Civ 399; [2006] 1 W.L.R. 2499, CA, ***Banco Nacional de Comercio Exterior SNC v Empresa De Telecommunicaciones De Cuba SA*** [2007] EWCA Civ 662; [2008] 1 W.L.R. 1936, CA, ***Masri v Consolidated Contractors (Oil & Gas) Company SAL*** [2009] EWCA Civ 36; [2009] 1 C.L.C. 82, CA, ***McGuffick v Royal Bank of Scotland plc*** [2009] EWHC 2386 (Comm); [2010] Bus. L.R. 1108, Comm., ***West Tankers Inc v Allianz SpA*** [2012] EWCA Civ 27; [2012] Bus. L.R. 1701, CA, ***JSC BTA Bank v Ablyazov*** [2015] UKSC 64; [2015] 1 W.L.R. 4754, UKSC, ***Rudolfs Meroni v Recoletos Ltd (Case C-559/14)*** (25 May 2016), unrep., CJEU, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.25.1.25 and following, Vol.2 sections 15-81 and following.)

■ **Bolt Burdon Solicitors v Tariq** [2016] EWHC 1507 (QB), 22 June 2016, unrep. (Spencer J)

Part 36 – additional amount – application to contractual interest

CPR r.36.17(3) and (4). The solicitor claimant successfully brought a claim seeking payment of professional fees under a non-contentious business Contingency Fee Agreement. The defendants were ordered to pay the full amount claimed of £498,083.52 plus contractual interest. They were further required to pay, under CPR r.36.17(4)(d), an additional amount of 10% of the judgment. Three issues arose. The parties agreed that they could be determined on the basis of written submissions. The issues were: (i) whether an additional amount was payable in respect of the contractual interest award; (ii) the interest rate payable on costs incurred prior to judgment; and (iii) the amount to be paid on account of costs. In respect of the second issue, it was agreed as between the parties that the rate of interest payable on the claimant's costs prior to judgment, as per CPR r.36.17(3), was "*4% above base rate from the date on which the work was done or the liability for the disbursement was incurred, or 9th March 2015, whichever [was] the later.*" Regarding the third issue, a payment on account in the amount of 80% of the approved costs budget was ordered to be paid. In respect of the first issue, the issue of principle, **held**, the sum awarded by way of interest was a contractual entitlement. As such it was part of a "specific sum" awarded to the claimant and was thus a part of the sum in respect of which the "additional amount" under CPR r.36.17(4) was to be calculated. If the interest had been awarded as a matter of discretion under, for instance, Senior Courts Act 1981, s.35A the answer may have differed. If, the Civil Procedure Rule Committee had intended to exclude interest from the "additional amount" calculation, it could have said so explicitly. It did not. Furthermore, the absence of a reference to excluding interest in CPR r.36.17(4)(d) when it was expressly excluded from CPR r.36.17(4)(a) was strongly suggestive that a difference in approach between the two provisions was intended; one that in respect to r.36.17(4)(d) led to the conclusion that it was not to be excluded from the calculation. The decision in ***Watchorn v Jupiter Industries Ltd*** (2014) did not point to an alternative conclusion in respect of CPR r.36.17(4)(d) as it was concerned with interest awarded under r.36.17(4)(a) and whether that fell within the ambit of the "additional amount" under r.36.17(4)(d). Finally, reliance could not be made on CPR r.36.17(5) to argue that it would be unjust to award an additional amount in respect of the interest. As Spencer J put it, such a submission was misconceived as:

> *"The parties contracted for interest at 8% if the sum due was not paid on time. That entitlement became part of the overall award. There has been no claim for enhanced interest under sub-paragraph (4)(a) of the Rule, as there could have been. The 'additional amount' is clearly designed as a penal sanction to mark a defendant's failure to accept a Part 36 offer when he should have done, and to reward the claimant for a commendable attempt to settle the case. The make up of the overall sum to which the prescribed percentage is applied is immaterial."*

Watchorn v Jupiter Industries Ltd [2014] EWHC 3003 (Ch), unrep. ChD, ref'd to. (See ***Civil Procedure 2016*** Vol.1 paras 36.17.4.3 and 36.17.4.4.)

■ **Begg v HM Treasury** [2016] EWCA Civ 568, 23 June 2016, unrep. (Lord Dyson MR, Longmore and Lloyd Jones LJJ)

Closed material proceedings – protective costs order

CPR rr.1.1(1), 1.2(a) & (d), & 3.1(2)(m), Senior Courts Act 1981, s.51, Terrorism Act 2000, Terrorism Act 2006, Terrorist Asset-Freezing etc. Act 2010. Appeal by the claimant from decision of Cranston J noted in *Civil Procedure News* (08/2015). It was common ground on the appeal that Cranston J was right to hold that a protective costs order (PCO) could be made where an individual had been accused of terrorism and it was impossible for them to determine the merits of their claim due to reliance being placed on closed material. Lord Dyson MR **stated** that Cranston J was right to reject an argument that a PCO could only be granted in public interest litigation. In doing so he endorsed what Cranston J had said at ***Begg v HM Treasury*** (2015) paras 24-25. The appeal's focus was Cranston J was correct to refuse to make a PCO because it was premature to determine the second of the four conditions that had to be satisfied to justify the making of such an order. **Held**, Cranston J's decision on the second of the four conditions was upheld. He was right to conclude as he did because: (i) the appellant had sufficient open material upon which to properly conclude that his case had good prospects of success; (ii) the appellant knew, because the respondent had

informed him of the fact, the respondent was to rely on closed material; and (iii) hence the appellant's lawyers could not properly advise him on his prospects of success. However, having made such a finding Cranston J ought to have gone on to consider the first, third and fourth conditions he identified and which needed to be satisfied to make a PCO. He did not do so, and simply held that the grant of such an order should await service by the respondent of its evidence, including gisting of the closed material. This was the wrong approach. Having made a positive finding on the second condition, consideration should have been given to the other conditions. Cranston J erred in not doing so. The appeal was thus allowed, with the matter remitted back to the High Court and ideally to Cranston J. ***R (Corner House Research) v Secretary of State for Trade and Industry*** [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600, CA, ***Al Rawi v Security Service*** [2011] UKSC 34, [2012] 1 A.C. 531, UKSC, ***Begg v HM Treasury*** [2015] EWHC 1851 (Admin); [2015] 1 W.L.R. 4424, Admin, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.48GP.76.)

■ **Salekipour v Parmar** [2016] EWHC 1466 (QB), 23 June 2016, unrep. (Garnham J)

County Court – no power to rescind judgment

County Courts Act 1984, ss.23, 38. The claimants issued proceedings against their landlords seeking various relief, including repayment of money paid as a consequence of misrepresentation or under economic duress, repayment of overpaid rent, loss of a premium arising from a proposed lease assignment and damages under the Prevention of Harassment Act 1997. The second defendant pursued a counterclaim for non-payment of rent and unpaid insurance premiums. All the claims were dismissed. All the counterclaims succeeded. Judgment was entered for the defendants in May 2012 of £17,138.95 plus interest. Central to the judgment was the trial judge's assessment of the second defendant's credibility and that of what was described as an "independent" witness called by the defence. In September 2014 the claimants issued new proceedings in which they sought rescission of the May 2012 judgment and a new trial. The basis of the fresh claim was that the evidence of the "independent" witness was untrue and had been obtained by the second defendant by "*subornation of perjury*". The claim was struck out as an abuse of process. An application to set aside that order was dismissed on the basis that the County Court had no jurisdiction to rescind one of its own prior judgments; it was noted however that if the power existed, the application to set aside would have been granted and directions for a trial of the issue of subornation of perjury would have been made. The claimants appealed from that decision. **Held**, the question whether the County Court could rescind one of its own, prior, decisions on the basis of subornation of perjury was a novel one. While it was well-established that the High Court has such jurisdiction to deal with proceedings to rescind a prior decision on grounds of, for instance, fraud, albeit the usual means of challenging such a decision was through an appeal, it was clear that the County Court had no such jurisdiction, except for a jurisdiction to set aside a deed of release of a judgment debt that had been obtained by fraud, as: (i) the County Court has no inherent jurisdiction; (ii) while the Court of Appeal's decision in ***Stevenson v Garnett*** (1898) is suggestive, but no more than that as it did not relate to a claim to rescind a judgment on the basis of fraud, of the County Court having a statutory jurisdiction, that conclusion has been doubted by the Court of Appeal in ***Bishop v Chhokar*** (2015) and ***Rawding v Seaga UK Ltd*** (2015). Absent a clear and binding authority, the question as to statutory jurisdiction under County Courts Act 1984, ss.23 and 38 was thus live, however; (iii) County Courts Act 1984 s.38 provided no basis to found such a jurisdiction, as it simply set out remedies that can be obtained in the County Court; (iv) County Courts Act 1984, s.23 only provides the County Court with jurisdiction to hear original actions for relief from fraud within its financial limits and on the same basis as the High Court can hear such original actions; and (v) County Courts Act 1984, s.70 clearly sets out that absent statutory provision a County Court judgment is final and conclusive. For s.23 of the Act to provide a basis for applying to rescind such judgments it would have had to have provided such a power in clear language. ***Stevenson v Garnett*** [1898] 1 Q.B. 677, CA, ***Hip Foong Hong v Neotia & Co*** [1918] A.C. 888, PC, ***Jonesco v Beard*** [1930] A.C. 298, HL, ***Ladd v Marshall*** [1954] 1 W.L.R. 1489, CA, ***Kuwait Airways Corporation v Iraqi Airways Corporation*** [2003] EWHC 31 (Comm); [2003] 1 Lloyd's Rep. 448, Comm, ***Tower Hamlets LBC v Begum (Rahanara)*** [2005] EWCA Civ 116; [2006] H.L.R. 9, CA, ***Noble v Owens*** [2010] EWCA Civ 224; [2010] 1 W.L.R. 2491, CA, ***Bishop v Chhokar*** [2015] EWCA Civ 24; [2015] C.P. Rep. 26, CA, ***Rawding v Seaga UK Ltd*** [2015] EWCA Civ 113, unrep., CA, ref'd to. (See ***Civil Procedure 2016*** Vol.2 sections 9A-448 and 9A-468.)

In Detail

GUIDANCE ON STATEMENTS OF CASE, COUNTERCLAIMS AND LITIGANTS-IN-PERSON – JONES v LONGLEY [2016] EWHC 1309 (Ch)

In ***Jones v Longley*** [2016] EWHC 1309 (Ch), Master Matthews provided guidance on the proper completion of statements of case, counterclaims, litigants-in-person and the overriding objective (also see *Civil Procedure News* 01/2016 re. ***Jones v Longley*** [2015] EWHC 3362 (Ch)).

The Facts

The facts were as follows. Probate of a will was granted in May 2012, following which the co-executors' relationship was less than harmonious and eventually broke down entirely. In January 2014, the claimant, Jones, issued a Pt 8 claim seeking the first defendant, David Charles Longley's removal as co-executor (see Administration of Justice Act 1985, s.50). After a number of interlocutory hearings, on 30 July 2015 the claimant was removed as co-executor; Master Matthew's noting that the removal did not rest on any criticism of the claimant. Prior this however, the first defendant had been granted permission to file and serve a counterclaim. In April 2014 the first defendant, a litigant-in-person, had purported to do so by filing two documents, one of 17 pages, the other of 80 pages; the former of which was to be read in conjunction with a 2000 page array of other documents and annexes. The counterclaim and its supporting witness-statement was described as follows, "*pedantic and prolix, meandering and lacking in particularity in important places ... [with] no headings or paragraph numbers, and, although there are separate paragraphs, they are often very long*". While not only failing to comply with procedural requirements it was also not drafted so as to enable the claimant to ascertain with any precision what the actual substance of the claim against him was or prepare a defence to the counterclaim.

At the 30 July 2015 hearing, the first defendant was directed to file and serve *"a brief statement of case summarising his counterclaim, which shall comply with the requirements of part 16 of the Civil Procedure Rules 1998 and its Practice Direction, and with the requirements of Chapter 2 and Appendix 2 of the Chancery Guide"*. This was required to be done by 30 September 2015.

On 29 September the first defendant purported to comply with the 30 July 2015 order by filing and serving a revised counterclaim, which was of a similar character in terms of drafting as the original. On 9 November 2015 the claimant issued an application seeking an order striking out the 29 September 2015 counterclaim pursuant to CPR r.3.4(2)(a) and on the basis of non-compliance with the 30 July 2015 order. Master Matthews heard that application, and an application by the claimant to amend the application notice so as to include an application for summary judgment, on 20-21 January 2016.

The counterclaim was struck out under CPR r.3.4(2)(b) as an abuse of process rather than under r.3.4(2)(a), which was not considered appropriate in a case where it was simply impossible to plead in response to a statement of case, as there had been,

> *"a serious failure to comply with relevant rules and, given how the pleading was drafted it was impossible to secure a fair trial."*

Statements of Case and Strike out

The revised counterclaim was, in the words of Master Matthews, a "*nightmare pleading to deal with*". While it contained some detail that was clear enough to enable a defendant to respond to it, it remained largely impossible to decipher, with various claims mixed together, no clarity in the manner in which the particulars of claim were set out and no coherence in the way that causation, amongst other things, was pleaded. Given these manifold defects it was unsurprising that, as with the first version of the counterclaim, the revised version failed to comply with the requirements of CPR Pt 16 and the guidance set out in the Chancery Guide 2016.

Compliance with the various requirements of Pt 16 is not a matter of formalism for its own sake, of creating trip wires for litigants. It is a necessary requirement of justice. Compliance with Pt 16, as Master Matthews explained, is a requirement imposed to *"equally protect the person responding to a claim as much as [to] enable the claimant to put forward his or her claim."* Compliance here, as it is generally, is the means by which claims can be properly prosecuted and defended, by which parties and the court can ascertain what is truly in issue and in need of resolution at trial, and through which the court can secure effective and efficient case management: see, for instance, ***Towler v Wills*** [2010] EWHC 1209 at paras 17-18.

In assessing the failure to remedy the non-compliance with the pleading requirements, and particularly the question whether the counterclaim should be struck out as an abuse of process under CPR r.3.4(2)(b), the principles set out in ***Mitchell MP v News Group Newspapers Ltd*** [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795, and ***Denton v T H White Ltd (Practice Note)*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3296, were, subject to one qualification applicable. The qualification, per Richards LJ in ***Walsham Chalet Part Ltd v Tallington Lakes Ltd*** [2014] EWCA Civ 1607 at para.44 viz., was that in considering the question of striking out a claim in addition to the ***Mitchell-Denton*** tests the court had also to consider the proportionality of the sanction. In the circumstances of this case, not least the impossibility of pleading in response to the counterclaim and therefore of securing a fair trial or a fair process for the claimant, the time spent so far on the proceedings, the lack of good reason for the non-compliant pleading, the futility of imposing an unless order by way of an attempt to secure future compliance, Master Matthews held that striking out the claim was the appropriate order to make.

Counterclaims

Particular care needs to be taken in the preparation of counterclaims as they are not simply governed by CPR Pt 20, but also by Senior Courts Act 1981, s.49(2)(a), which refers back to the jurisdiction maintained by Supreme Court of Judicature (Consolidation) Act 1925, s.39(1)(b) and, through it, by Judicature Act 1873, s.24(3). Consequently, as Master Matthews noted,

> *"s.49(2)(a) of the 1981 Act gives the court jurisdiction to grant relief to a counterclaiming defendant against a person other than the original claimant only to the extent that it did 'hitherto', that is, under the earlier legislation. But that legislation made clear that, in the case of a counterclaim against a third party, the relief sought had to be 'relating to or connected with the original subject of' the claim. If it was not, the counterclaim would be struck out as against the third party: see eg. SF Edge Ltd v Weigel (1907) 97 LT 447, CA."*

That this remains the case is borne out by the terms of CPR r.20.9(2), and particularly r.20.9(2)(c) as (at para.41),

> *"The drafting of rule 20.9(2)(c), in restricting the question to be raised in the counterclaim to one 'connected with the subject matter of the proceedings' when the court is considering a counterclaim against a third party, shows that, where the question is not connected with the subject matter of the proceedings, the court does not need to take it into account, because in such a case the court cannot allow the counterclaim to be made anyway."*

Care is not only needed in ascertaining whether a prospective counterclaim comes within the ambit of the court's jurisdiction, but it must also be taken to ensure that permission to bring a counterclaim is obtained where necessary under CPR r.20.5. In this regard Master Matthews determined a novel point of application in respect of CPR r.20.9(2)(c): that permission under r.20.5 is needed to bring a counterclaim against an existing party if brought against that party in a different capacity to that which they are already party to the litigation. As Master Matthews put it (at para.47),

> *"However, rule 20.9(2)(c) ... similarly restricts the question to be raised in the counterclaim to one 'connected with the subject matter of the proceedings' when the court is considering a counterclaim against an existing party but in a different capacity ... the First Defendant needs permission to make a counterclaim against the Claimant in respect of the claims alleged against him arising out of conduct before the death of the deceased."*

Litigants-in-Person

The growth in numbers of litigants-in-person is now well-established. It is unlikely to be reversed in the near future. While the CPR has been revised, through the introduction of CPR r.3.1A, to make explicit the fact that powers exist to vary the management of proceedings where at least one party is a litigant-in-person, it is clear that such variation is limited by reference to an overarching principle: that the CPR is not to be applied in such a way as to create, *de facto*, two sets of rules, one applicable to represented parties, one applicable to litigants-in-person. Master Matthews' judgment provides a further instance of the courts applying this approach. While it was accepted that the majority of the pleading and rule-compliance problems flowed from the fact that the first defendant was not a lawyer and was inexperienced in litigating, that was not viewed as sufficient justification for a more lenient approach to be taken in any consideration of those problems. As Master Matthews stressed (at para.56),

> *"there are not in our system two sets of rules, one for those who employ lawyers, and one for those who do not. There is only one set of rules, which applies to everyone, legally represented or not. The courts cannot and do not modify the rules for those who are not represented: see eg. Elliott v Stobart Group [2015] EWCA Civ 449, [39]."*

While, as Green J noted (albeit it was not referred to by Master Matthews) in ***Yampolskaya v AB Bankas Snoras*** [2015] EWHC 2136 (QB), 2 July 2015, unrep. (at para.25) the court can and will take into account the particular characteristics of each litigant-in-person when considering the ***Mitchell & Denton*** test, that approach appears limited to an application of the rules and cannot per ***Elliot v Stobart Group*** (2015) go so far as to effect a change in the rules themselves. Although as Master Matthews went on to note (at para.57),

> *"It may be that, at the margins, and where the courts are properly exercising discretion, the courts will allow a little more leeway to litigants in person than to those who have professional lawyers: cf Tinkler v Elliott [2012] EWCA Civ 1289, [32]. And there are occasionally legal procedural rules where the elements needed for the application of a rule may be impacted by the absence of knowledge or experience of legal processes. But such cases are by their nature rare. The general proposition is that there are no special rules for litigants in person as compared with those litigants who are represented. So I judge the position in this application by reference to the ordinary procedural rules applicable to everyone."*

The present case could not be said to be one of those rare occasions when an absence of knowledge or experience might justify a more lenient approach; the first defendant knew what steps needed to be taken to rectify the problems concerning the original counterclaim. He knew because both the court and the claimant had pointed them out to him, and he had been afforded an opportunity to look to the relevant rules and produce rule compliant statements of case. In other cases, however, it is not readily apparent why it is to be assumed that litigants-in-person ought to be taken as generally understanding the CPR and its particular provisions. Given, for instance, the constant stream of proceedings that raise the proper application of, and compliance with, CPR Pt 36, could it properly be said that it is a rule that does not require "*knowledge or experience of legal processes*"? What may be rare from a judicial or lawyers' perspective may well be common place from that of non-lawyers. While it is readily understandable that the courts would not want a twin-track approach to the CPR to develop, it is perhaps past time for a proper consideration of revision of the rules into genuinely plain language, rather than the so-called plain language of a statutory instrument, to take place.

The overriding objective

In considering the proper approach to take to the applications before him Master Matthews properly referred himself to the overriding objective. In doing so he stressed the relevance of CPR r.1.1(2)(e), the need to allot "*an appropriate share of the court's resources, while taking into account the need to allot resources to other cases*". As he put it (at paras 81 and 82),

> *"In addition, there are the interests of other litigants with disputes waiting for resolution in the system. The resources which the courts have today are sadly limited. There must come a point where the litigants in a given case have had as much of the resources as is proportionate, in particular given the way in which they have been making use of them. The interests of the other users of the system must be taken account of. CPR rule 1.2(2)(e) specifically requires the Court to consider this.*
>
> *This litigation has already consumed enormous amounts of court time and resources. genuinely ..."*

The importance of this factor of the overriding objective has been patent since its introduction in 1999; see for instance, Ward LJ in ***Arrow Nominees Inc v Blackledge*** [2000] C.P. Rep. 59 at para.73. Its particular importance, following the introduction of the Jackson Reforms in 2013, was stressed in both the first instance and Court of Appeal decisions in ***Mitchell MP v News Group Newspapers Ltd*** viz., [2013] EWHC 2355 (QB) per Master McCloud, at para.59,

> *"Judicial time is thinly spread, and the emphasis must, if I understand the Jackson reforms correctly, be upon allocating a fair share of time to all as far as possible and requiring strict compliance with rules and orders even if that means that justice can be done in the majority of cases but not all.",*

and see [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795 per Lord Dyson MR, at para.39,

> *"The importance of the court having regard to the needs and interests of all court users when case managing in an individual case is well illustrated by what occurred in the present case."*

The need to take CPR r.1.1(2)(e) into account has moreover been stressed in a variety of contexts cf., ***Cook v Virgin Media Ltd*** [2015] EWCA Civ 1287, ***Tchenguiz v Grant Thornton UK LLP***, [2015] EWHC 3926 (Comm), ***Family Mosaic Home Ownership Ltd v Peer Real Estate Ltd*** [2016] EWHC 257 (Ch), 16 February 2016, unrep., ***Hanspaul v Ward*** [2016] EWHC 1358 (Ch). Master Matthews' judgment emphasises that its application is not confined to cases where parties are represented. It is an aspect of the overriding objective, which because it looks to the wider impact of the conduct of proceedings by litigants, cannot properly be minimised in terms of its relevance when considering the approach to case management, rule-compliance or relief from sanctions. Given the growth in litigants-in-person generally, and the need to expend more judicial resources in the proper management of claims in which they are involved *cf.* ***Mole v Hunter*** [2014] EWHC 658 (QB) at paras 112-114, its proper application would appear to be all the more important: effective management of particular claims to ensure they utilise no more than a proportionate share of the court's resources thereby facilitating the greater availability of those resources to claims involving litigants-in-person generally.

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.
675335