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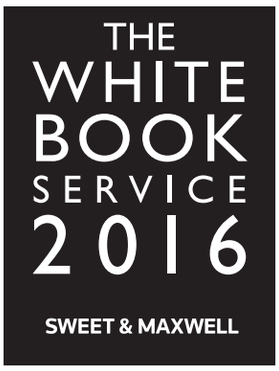

In Brief

Cases

Maman (t/a Fine Watches and Jewellery) v Certain Lloyd's Underwriters subscribing to Policy Number DCAL/08230 [2016] EWHC 1327 (QB), 27 May 2016, unrep. (Master Kay QC)

Amendment – correction of party name or description where misdescribed

CPR rr.1, 2.3, 16, 17.4, 19.1, 19.5, CPR PD16 para.2.6, CPR PD61 para.3.2. The claimant is a jeweller. He made two claims under an insurance policy in respect of the alleged theft of items in February and March 2009. The claims were refused. Proceedings were issued in February 2015 against the insurance brokers, as 1st defendant, the insurance broker's agent, as 2nd defendant, and "Lloyd Syndicate Members", as the 3rd defendant. The 1st and 2nd defendants ought not to have been named as defendants. On 5 June 2015 the claimant issued an application seeking permission to amend the title of the claim by removing the 1st and 2nd defendant from it and by amending the 3rd defendant's description to "Lloyd's Underwriters subscribing to the Policy Number DCAL/08230". On 8 June 2015 Master Leslie dealt with and granted the application on a without-notice basis. The 3rd defendant applied to set aside the order in so far as it related to it. It did so on the basis that the test set out in CPR r.17.4 was not satisfied. Three questions arose: first, had the relevant limitation period expired such that the court had jurisdiction to grant a change of name under CPR r.17.4 or the addition or substitution of a party under CPR r.19.5; secondly, if the answer to the first question was yes, were the requirements of the two rules met; and, if the answer to the second question was yes, should the court exercise its discretion and make the order sought. **Held**, the correct approach to determine whether the limitation period had expired in claims against insurers was well-established: see ***The Chandris*** (1963), ***Anthony Callaghan v Dominion Insurance Company Ltd*** (1997): such a cause of action arises "at the time when the loss against which the insured is to be indemnified actually occurs" (para.29). This general rule is only subject to an exception when the insurance policy includes a term to the contrary. There was no such term in the present insurance policy, hence the limitation periods applicable to the present claim expired in February and March 2015. It was apparent from Lord Phillips MR's decision in ***Adelson v Associated Newspapers*** (2007), which set out the correct approach to such applications, that the present type of case could be dealt with either under CPR r.17.4 or r.19.5. Moreover, it was apparent that when an application was made under one rule, it was appropriate to consider the possible effect of the other (para.42). In the present case the 3rd defendant was described rather than named in the claim. The application was to amend that description by replacing it with another description rather than one seeking to either amend a name or replace a description with a name. While there was little guidance in the CPR as to identifying parties by way of description it was apparent that a practice had developed whereby Lloyd's underwriters accept service of a claim against a syndicate in the following circumstances (para.45(c)):

> *"where the claim is named against a syndicate by naming the underwriting agent of the leading syndicate or by a claim which describes the syndicate to be sued by reference to its reference initials and numbers as identified from the insurance policy. That practice makes use of identifying the defendant to be sued by a description rather than by a name."*

Given this, and other examples relating to proceedings against "squatters", it was apparent that it was permissible to identify a party by description rather than by name. If, which was not decided, this was a procedural irregularity it was one that could be corrected under CPR r.17.1(1), (2) or (3). A failure to give an inadequate description did not render the claim form a nullity; the defect was capable of cure under the previously referred to rules. While CPR r.17.4 does not refer to the correction of a description of a party, but only to correcting a name it was not so limited. It was not because where the rules permit a claim to be commenced against a party by way of description as well as by name, then they should provide the same power to correct the former as they do the latter. If CPR r.17.4 were limited to the correction of party names only this would result in an unjust result, contrary to CPR r.1. The applicable test to permit correction under CPR r.17.4 was whether the name or description was set out due to a genuine mistake and one that did not cause reasonable doubt as to the party in question's identity (para.47(c), and para.55 in respect of the comparable application to CPR r.19.5). On the facts in the present case, the test under CPR r.17.4 were satisfied. Given that, the third question, as to discretion, arose. In that regard the approach set out in ***American Leisure Group Ltd v Olswang LLP*** [2015] was applied: all the circumstances of the case must be weighed up in considering whether to exercise the discretion including, but not limited to: the factors set out at ***American Leisure Group Ltd v Olswang LLP*** [2015] para.52; the necessity of balancing the prejudice to each party; whether any such prejudice can be cured by an award of costs; whether an exercise of discretion would redress an imbalance between the parties as a matter

of fairness; and whether it was consistent with CPR r.1.1 and 1.3. In the latter respect, of particular salience were the need to secure expedition, fairness as between the parties, and the encouragement of co-operation between the parties. ***Anthony Callaghan v Dominion Insurance Company Ltd*** [1997] 2 Lloyd's Rep. 541, QBD, ***The Chandris*** [1963] 2 Lloyd's Rep. 65, Comm, ***Firma C-Trades SA v Newcastle Protection and Indemnity Association, The Fanti*** [1991] 2 A.C. 1, HL, ***Mitchell v Harris Engineer Co*** [1967] 2 Q.B. 703, CA, ***The Sardinia Sulcis*** [1991] 1 Lloyd's Rep. 201, CA, ***Scottish Equitable Plc v Derby*** [2001] EWCA Civ 369; [2001] 3 All E.R. 818, CA, ***Adelson v Associated Newspapers*** [2007] EWCA Civ 701; [2008] 1 W.L.R. 585, CA, ***American Leisure Group Ltd v Olswang LLP*** [2015] EWHC 629 (Ch); [2015] P.N.L.R. 21 ChD, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.17.4.5.)

San Juan v Allen [2016] EWHC 1502 (Ch), 22 June 2016, unrep. (Master Clark)

Summary judgment – test for declaratory relief

CPR rr.11, 24. Claim issued in respect of a residential development. The claimants sought, amongst other things, a declaration that a common form transfer of plots of land that formed the development had been effected and that the defendants were bound by the 'building scheme' thereby created. The claimant sought summary judgment on this issue. The defendants applied, amongst other things, for an order under CPR r.11 that the court decline jurisdiction on the basis that the claim was premature, or should be stayed pending an application to the Upper Tribunal (Lands Chamber). **Held**, the defendants' applications were refused, it being noted that reference to CPR r.11 was misconceived and had not been relied on by Counsel before the Master. The claimants' application for summary judgment, the principles governing which was noted as being well-established and well-summarised in ***Easyair Ltd v Opal Telecom Ltd*** [2009] as approved by ***AC Ward & Sons v Catlin (Five) Ltd*** (2009) and ***Mellor v Partridge*** (2013), was granted. In dealing with the question whether to grant declaratory relief on a summary judgment application, the applicable test was that set out by Etherton C in ***CIP Property (AIPT) Ltd v Transport for London*** (2012) para.26, viz., the test for the grant of declaratory relief was "broadly similar" to that for the grant of a *quia timet* injunction. In determining whether to grant a declaration it was necessary to answer three questions: 1) was the claim premature; 2) would the declaration serve a useful purpose; and 3) are the issues in dispute sufficiently defined to be properly justifiable. Master Clark explained that this did not mean that the two tests were "effectively" the same as there may be instances were a *quia timet* injunction ought not to be granted due to the lack of imminence of the threat it seeks to meet, where the grant of a declaration would be justifiable. He further noted that in elaborating the test for a declaration, Etherton C had noted, without deciding the issue, that the 2nd and 3rd questions were tests for determining the 1st question i.e., prematurity. ***Easyair Ltd v Opal Telecom Ltd*** [2009] EWHC 339 (Ch), unrep., ChD, ***AC Ward & Sons v Catlin (Five) Ltd*** [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301, CA, ***CIP Property (AIPT) Ltd v Transport for London*** [2012] EWHC 259 (Ch); [2012] B.L.R. 202, ChD, ***Mellor v Partridge*** [2013] EWCA Civ 477, unrep., CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1 paras 24.2.3, 24.2.4, 40.20.3.)

Zumax Nigeria Ltd v First City Monument Bank Plc [2016] EWCA Civ 567, 23 June 2016, unrep. (Kitchin, Christopher Clarke LLJ and Cobb J)

Disputing the court's jurisdiction – non-compliance with time limits

CPR r.11. The claimant, a Nigerian registered company, sought the recovery of substantial sums alleged to have been obtained fraudulently and wrongfully retained in breach of trust by companies for which the defendant, a Nigerian registered bank, was the successor-in-title. Proceedings were served on the defendant in Nigeria in October 2013. Thereafter the defendant obtained an extension of time by agreement to challenge the jurisdiction. That extension expired in December 2013. The claimant refused to agree to a further extension following which the defendant issued an application seeking such an extension. A number of other procedural applications were then made. The various applications were refused. On appeal to the Court of Appeal, the defendant challenged the various refusals. In respect of the challenge to the refusal to grant an extension of time to challenge the jurisdiction, the Court of Appeal **held**, (i) applications to challenge jurisdiction under CPR r.11 must be made promptly albeit the court has power to grant retrospective extensions of time to do so where appropriate and does so notwithstanding r.11.5, as explained by ***Texan Management Ltd v Pacific Electric Wire and Cable Company Ltd*** (2009); (ii) while the Privy Council in ***Texan Management Ltd*** explained that such an application for an extension was not an application for relief from sanctions, it had been authoritatively determined by the Court of Appeal in ***Salford Estates (No.2) Ltd v Altomart Ltd*** (2015) that applications for extensions of time were to be determined by the application of the ***Mitchell-Denton*** test. As such its three stage test was applicable to applications for retrospective extensions of time to challenge the jurisdiction under CPR r.11. ***Texan Management Ltd v Pacific Electric Wire and Cable Company Ltd*** [2009] UKPC 46, PC, ***Mitchell v News Group Newspapers Ltd (Practice Note)*** [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795, CA, ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, CA, ***Salford Estates (No.2) Ltd v Altomart Ltd*** [2014] EWCA Civ 1408; [2015] 1 W.L.R. 1825, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.11.1.1; also see ***Le Guevel-Mouly v AIG Europe Ltd*** [2016] EWHC 1794 (QB), 19 July 2016, unrep.)

■ **Goldcrest Distribution Ltd v McCole** [2016] EWHC 1571 (Ch), 30 June 2016, unrep. (Master Matthews)

Power to make declaratory judgment in default

CPR rr.13.2, 13.3. Claim issued for possession of residential property against the first and second defendants in February 2015. The claim arose in respect of a legal charge over the property entered into by the 1st and 2nd defendant. The charge was dated 2 July 2014. Prior to that date, on 19 May 2014, a bankruptcy petition, of which the claimant became aware on 30 June 2014, was presented against the 1st defendant. The 1st defendant was adjudged to be bankrupt on 19 January 2015, following which in April 2015 the 1st defendant's trustee-in-bankruptcy was added as a 3rd defendant. The claim was defended on a number of grounds by way of defence and counterclaim. In particular the 2nd defendant sought declaratory relief seeking to set aside the charge on the basis that it was unenforceable. On 17 February 2016 an application by the 2nd defendant for judgment in default of filing a defence to the counterclaim and an application by the claimant to amend its particulars of claim was heard by a deputy Master. The 2nd defendant's application succeeded, the claimant's was dismissed. The claimant applied to vary that order to allow it to defend the counterclaim. **Held**, (i) the same approach was to be taken to the application under CPR r.13.3 where the default judgment was given on a counterclaim that mirrored a defence as would be taken to a default judgment on a claim (para.17); (ii) the claimant had real prospects of successfully defending the claim; (iii) applying the ***Mitchell-Denton*** criteria per ***Regione Piemonte v Dexia Crediop SpA*** (2014) and ***Gentry v Miller*** (2016) to the question of discretion under CPR r.13.3(2), the default judgment should not be set aside; (iv) applying the principle articulated by Lord Maugham LC in ***Brunswick Railway Company v British and French Trust Corporation Ltd*** (1939) that a default judgment is capable of creating an estoppel in so far as what "*necessarily and with complete precision have been thereby determined*" by that judgment, the default judgment gave rise to an issue estoppel concerning the entire legal effect of the charge in respect of the 2nd defendant. The claimant's claim was limited accordingly. By way of *obiter dictum* Master Matthews went on to consider the question whether the court should grant a declaratory judgment in default of defence. It was noted that in both ***Wallersteiner v Moir*** (1974) and ***Brunswick Railway Company v British and French Trust Corporation Ltd*** (1939) the practice of granting such judgments in default, by consent or upon admissions, had been deprecated, and that as far as possible declaratory judgments should be made only after argument and adjudication on the merits. The judgments in those cases did not however establish a clear principled approach, and in any event the proper approach now must be one that was: (i) applicable across all Divisions of the High Court and not, as in the historic authorities based on Chancery Division practice alone; and (ii) be consistent with CPR r.1.1. Given these two points: the principled approach to take was that such a declaration "should not be given without argument *inter partes*, save in the clearest cases" (para.43). Furthermore, as Master Matthews put it,

> *"[43] . . . So long as a declaration can be given without injustice to those affected by it, the court should not be hamstrung merely by the fact that it is being sought on an application for default judgment."*

This approach was consistent with the present need to ensure that the court's resources, in respect of trial time, were reserved for those cases that truly needed to be determined at trial. It was also consistent with changes to the rules of evidence that had occurred since the Court of Appeal's decision in ***Wallersteiner v Moir*** (1974). ***Williams v Powell*** [1894] W.N. 141, ChD, ***Brunswick Railway Company v British and French Trust Corporation Ltd*** [1939] A.C. 1, HL, ***Kok Hoong v Leong Cheon Kweng Mines Ltd*** [1964] A.C. 993, PC, ***Wallersteiner v Moir*** [1974] 1 W.L.R. 991, CA, ***Pugh v Cantor Fitzgerald Ltd*** [2001] EWCA Civ 307; [2001] C.P. Rep. 74, CA, ***Regione Piemonte v Dexia Crediop SpA*** [2014] EWCA Civ 1298, unrep., CA, ***Devon & Cornwall Autistic Community Trust (trading as Spectrum) v Cornwall Council*** [2015] EWHC 129 (QB), unrep, QBD, ***Gentry v Miller*** [2016] EWCA Civ 141; [2016] 1 W.L.R. 2696, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1 paras 12.0.1, 40.20.3.)

■ **Purrunsing v A'Court & Co (A Firm)** [2016] EWHC 1528 (Ch), 01 July 2016, unrep. (HHJ Pelling QC sitting as a judge of the High Court)

Part 36 – Determining whether award exceeds offer – relevance of interest to the calculation

CPR rr.36.5(4), 36.17. The claimant brought proceedings for breach of trust in respect of monies paid under a purported sale of property in Wimbledon by an individual falsely claiming to be its registered proprietor. The claim was brought against the registered conveyancer and solicitor's firm acting for the purported proprietor. The two defendants were held to be liable, with both to bear the loss equally as between themselves. Each defendant was held to be liable for the claimant's costs as between themselves and the claimant. In determining the question of costs the court was faced with a question previously determined by the Court of Appeal in ***Blackman v Entrepose UK*** [2004] EWCA Civ 1109; *The Times* 28 September 2004, CA in respect of what was then CPR r.36.20 (noted in ***Civil Procedure 2005*** Vol.1 para.36.20.2). In that case the Court of Appeal held that interest accrued following the time for acceptance of a payment in was to be ignored for the purpose of determined whether the amount awarded at trial beat the payment in. **Held**, while the ***Blackman v Entrepose UK*** (2004) decision was not cited in the judgment,

HHJ Pelling QC reached the same conclusion as the Court of Appeal in that decision. If the approach were adopted whereby interest that accrued after the date when the relevant could have been accepted, it would render the assessment of whether to accept a Pt 36 offer "entirely unpredictable": it would depend on when the claim was tried and when judgment was handed down. It could not have been the case – it was "in the highest degree unlikely" – that that could have been intended by the rules given the draconian nature of the provisions relating to enhanced costs under CPR r.36.17(4)(d). That could not be right. The correct approach, as set out at para.15 of the judgment, to determine whether a judgment award is more advantageous than a Pt 36 Offer is "*to ensure that the offer or the judgment sum is adjusted by eliminating from the comparison the effect of interest that accrues after the date when the relevant offer could have been accepted.*" (See ***Civil Procedure 2016*** Vol.1 para.36.17.2.)

Titmus v General Motors UK Ltd [2016] EWHC 2021 (QB), 7 July 2016, unrep. (Laing J)

Part 36 – no power to extent time for payment

CPR Pts 3, 36, 44. A claim was brought for damages arising from asbestos exposure. Judgment for the claimant, with damages to be assessed at trial, was entered on 23 July 2015. Two days prior to that the defendant made a Pt 36 Offer, which could be accepted up to 11 August 2015. The Pt 36 Offer was then accepted on 25 April 2016. CPR r.36.14 makes provision for other effects of acceptance of a Pt 36 Offer, one of which is that payment of the sum accepted must be made to a claimant within 14 days of the date of acceptance of the offer: see CPR r.36.14(6)(a). A question arose whether the court had power to extend time for payment of the sum due pursuant to the Pt 36 Offer. **Held**, (i) Pt 36 is a self-contained code. As such the power under CPR r.3.1(2)(a) could not be used to extend time for compliance with its provisions, including the time limit set out in r.36.14(6). To apply the power to extend time for compliance to Pt 36 would undermine its "clear rules" and the encouragement they provide to settlement. The 14-day time limit can only be disapplied as provided for by CPR r.36.14(6) i.e., where the parties have agreed in writing to vary the time limit; and see CPR r.36.14(7); (ii) furthermore, there was no power to order the sum due following acceptance of a Pt 36 Offer to be paid into court. CPR Pt 36 did not provide such a power, nor for the reason already stated could the court's general management powers under CPR Pt 3 make good that absence of express power in Pt 36. ***Cave v Bulley Davey (A Firm)*** [2013] EWHC 4246 (QB), unrep. QBD, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.36.14.1.)

Times Newspapers Ltd v Abdulaziz [2016] EWCA Crim 887, 08 July 2016, unrep. (Gross LJ, Wyn Williams J, HHJ Hilliard QC, the Recorder of London, sitting as a judge of the Court of Appeal (Criminal Division))

Open justice – restraint of publication of that which was done in open court

Contempt of Court Act 1981, ss.4.2, 11, Criminal Justice Act 1988, s.189, CrimPR rr.6.6, 40, CrimPR PD6B.4(i). An application was made in a rape trial that defence evidence be held in private. The application was initially held in open court, and then in private. The privacy order application was granted in respect of evidence concerning the defendant's character. The judge subsequently provided an explanation in open court, and later by email to the applicant, concerning the grounds upon which the order was made. The Crown subsequently applied, under Contempt of Court Act 1981, s.11, for an order prohibiting reporting of the judge's explanation. That application was granted. Appeal to the Court of Appeal (Criminal Division). The test for derogating from the principle of open justice was well-established. It was one of necessity. It was necessary in the present case to render the judge's explanation private. The real question in this case was whether there was jurisdiction to do so given that the judge's statements had been made in public. **Held**, (i) jurisdiction exists to correct mishaps such as occurred in the present case. It was clear, and the judge had acknowledged it to be the case, that his statements had been made in error: they ought not to have been made in public as they were covered by the privacy order. That something had been said in open court, and had entered the public domain, was thus not conclusive to the imposition of restraint on future publication or repetition in public, see ***In re Times Newspapers Ltd*** (2007); (ii) restraint could be founded in such circumstances on Contempt of Court Act 1981, s.11 if that was applicable; (iii) in the present case the judge had "*deliberately allowed a 'matter'*", as required by s.11 of the 1981 Act, to be withheld from the public. Their publication by the judge was in error. The content of that publication was, however, covered by the privacy order: the court had power to correct the error accidently caused to protect the administration of justice that would otherwise be caused by future publication. ***In re Times Newspapers Ltd*** [2007] EWCA Crim 1925; [2008] 1 W.L.R. 234, CA (Crim), ***In re Trinity Mirror Plc*** [2008] EWCA Crim 50; [2008] Q.B. 770, CA (Crim), ***In re Guardian News and Media Ltd*** [2014] EWCA Crim 1861; [2015] 1 Cr. App. R. 4, CA(Crim), ***In re Guardian News and Media Ltd*** [2016] EWCA Crim 11; [2016] 1 W.L.R. 1767, CA (Crim), ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.39.2.9; Vol.2 paras 3C-57 and following, and 3C-75.)

Da Costa v Sargaco [2016] EWCA Civ 764, 14 July 2016, urep. (Black, Floyd LJJ, Moylan J)

Power to exclude party from the court during trial

European Convention on Human Rights, article 6. Two claimants, owners of motorbikes, issued negligence claims alleging that the first defendant ran into and damaged their motorbikes whilst they were parked. The second

defendant-insurer defended the claim, alleging that that the claims were fraudulent. The trial judge dismissed the claims, finding the claims to be either "*manufactured or fraudulent*". The claimants appealed on several grounds, one of which related to the trial judge's decision at the outset of trial that neither claimant could be in court whilst the other gave evidence. The claimants argued that they had a right both at common law and under art.6 of the European Convention on Human Rights to be present at all times during the trial. The appeal succeeded to the extent that the finding of fraud was set aside. Hence the judgment stood. In respect of the appeal in respect of the claimants' exclusion from the trial whilst they each gave evidence, it was **held** as follows: (i) there is no absolute requirement for parties to litigation to be present personally at all times during a trial. Such a requirement was not supported by ***Al Rawi v The Security Service*** (2011); (ii) in assessing whether there were reasons justifying a party's exclusion from a trial it was necessary to take as the starting point that a party is entitled to be present throughout trial; (iii) while there may be reasons justifying a party's exclusion from trial in order to facilitate effective cross-examination, it was "*extremely difficult to contemplate there being any sufficient reason for taking (such a course of action) in a case such as the present one*". The order ought not to have been made; (iv) that the order was wrongly made did not, however, automatically render the proceedings unfair. A common approach seemed to be taken here both under art.6 of the ECHR and the common law, see ***The Attorney General of Zambia v Meer Care & Desai (A Firm)*** (2006) (paras 44 and following). Where a party is wrongly excluded from a hearing it is necessary to consider, and do so carefully, whether the proceedings as a whole are rendered unfair given the exclusion. In the present case the trial was not rendered unfair through the exclusion. ***Scott v Scott*** [1913] A.C. 417, HL, ***Muyldermans v Belgium*** (1991) 15 E.H.R.R. 204, ECtHR, ***Dombo Beheer BV v The Netherlands*** [1994] 18 E.H.R.R. 213, ECtHR, ***Goc v Turkey*** [2002] 35 E.H.R.R. 6, ECtHR, ***The Attorney General of Zambia v Meer Care & Desai (A Firm)*** [2006] EWCA Civ 390; [2006] 1 C.L.C. 436, CA, ***Stoichkov v Bulgaria*** [2007] 44 E.H.R.R. 14, ECtHR, ***Hermi v Italy*** [2008] 46 E.H.R.R. 46, ECtHR, ***Al Rawi v The Security Service*** [2011] UKSC 34; [2012] 1 A.C. 531, UKSC, ***R (Osborn) v Parole Board*** [2013] UKSC 61; [2014] A.C. 1115, UKSC, ref'd to. (See ***Civil Procedure 2016*** Vol.1 paras 32.1.4.3, 39.2.12, and see ***Civil Procedure News*** 05/214, In Detail.)

- **Blue Holdings (1) PTE Ltd v National Crime Agency** [2016] EWCA Civ 760, 19 July 2016, unrep. (Gross and Hamblen LLJ, Sir Colin Rimer)

Letters of request – inspection

Proceeds of Crime Act 2002, ss.444(1)(a), 447, Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, Pt 4A, CPR rr.1.1(2)(c), 31.14(1), 31.15. The United States Department of Justice made a request for assistance to the United Kingdom Central Authority in respect of civil forfeiture proceedings in the United States; a request for mutual legal assistance or MLA. The US proceedings concerned assets that were allegedly corruptly misappropriated by a former President of Nigeria. The appellants sought an order to inspect the MLA (CPR rr.31.14, 31.15). They did so on the basis that it had been referred to in a witness statement in proceedings brought by the National Crime Agency (NCA) to freeze assets by way of a prohibition order under the Proceeds of Crime Act 2002. The NCA proceedings were brought in support of the US proceedings. The application to inspect was refused. On an appeal from that refusal the Court of Appeal held that: (i) in determining the question whether the request was "mentioned" in the witness statement, as required by CPR r.31.14, the approach taken by Slade J in ***Dubai Bank Ltd v Galadari*** (1990) concerning r.31.14's predecessor, RSC O.24, r.10, remained the starting point. That test, which was "*formulated . . . in terms of whether the pleading or affidavit 'makes direct allusion to the document of class of documents'*" had been assumed by Rix LJ in ***Rubin v Expandable Ltd*** (2008) to remain the test under the CPR as "mentioned" in r.31.14 confirmed the "direct allusion" test from the previous authority and was "as general as could be". As such it was not intended to be a difficult test to satisfy. Applying that approach to the witness statement, it was clear there were direct allusions to the request; (ii) The general rule is that having established that the document is mentioned the right to inspect is established: see ***Rafidain Bank v Agom Sugar*** (1987). It is not however an automatic right. The court retains a discretion, consistent with the overriding objective of securing equality of arms (CPR r.1.1(2)(c)) to refuse inspection; (iii) the burden rests on the party seeking to resist the right to inspect to justify a departure from the general rule. Such justification could be resisted on grounds of proportionality: CPR r.1.1(2)(c) and r.31(3)(2). In carrying out the proportionality assessment, the court would "*very likely need to consider whether inspection was necessary for the fair disposal of the application or action*"; (iv) the assessment of necessity was not a freestanding question or pre-condition that had to be satisfied prior to permitting inspection as it had been under the RSC. Necessity under the CPR was relevant only in so far as it arose within the question of proportionality in considering whether to depart from the general rule; (v) confidentiality remained a relevant factor to take into account in assessing whether to refuse inspection. The pre-RSC position had not changed in this respect i.e., disclosure and inspection could not be refused on the ground of confidentiality alone. The approach to take in considering confidentiality was that set out in ***Science Research Council v Nasse*** [1980] A.C. 1028; (vi) both the decision in ***Church of Scientology v DHSS*** [1979] and ***Danisco v Novozymes A/S (No.2)*** [2012] would be better dealt with now under the proportionality-based approach

outlined above than in terms of necessity. The former decision was noted however as remaining good authority for the proposition that the court has an inherent jurisdiction to take such precautions as necessary to ensure that the disclosure and inspection process is not subject to abuse; (vii) in striking the balance between the right to inspect and the confidentiality of State-to-State communications, the starting point was that letters of request are confidential. In the present case however the request had gone beyond such a communication, as the request necessitates resort to the court for the grant of a prohibition order under the 2002 Act. As such it is subject to the CPR, which includes the provisions contained in Pt 31. Parties that resort to the courts are reasonably to be considered to have agreed to become subject to the court's procedural regime. Furthermore Parliament had not made provision in the 2002 Act to render requests made in furtherance of it non-disclosable or outwith the CPR. ***Church of Scientology v DHSS*** [1979] 1 W.L.R. 723, CA, ***Science Research Council v Nasse*** [1980] A.C. 1028, HL, ***Rafidain Bank v Agom Sugar*** [1987] 1 W.L.R. 1606, CA, ***Dubai Bank Ltd v Galadari*** [1990] 1 W.L.R. 731, CA, ***Rubin v Expandable Ltd*** [2008] EWCA Civ 59; [2008] 1 W.L.R. 1099, CA, ***Danisco v Novozymes A/S (No.2)*** [2012] EWHC 389 (Pat); [2012] F.S.R. 22. ChD, ref'd to. (See ***Civil Procedure 2016*** Vol.1 paras 31.3.6, 31.9.4, 31.14.5, 31.19.1.)

- **Willers v Joyce (Re:Gubay (deceased) No.2)** [2016] UKSC 44; [2016] 3 W.L.R. 534, 20 July 2014, (Lord Neuberger PSC, Lady Hale DPSC, Lords Mance, Kerr, Clarke, Wilson, Sumption, Reed, and Toulson JJSC)

Doctrine of Precedent – where Privy Council decision to be treated as decision of the United Kingdom Supreme Court

In a unanimous decision the United Kingdom Supreme Court clarified the status of decisions of the Judicial Committee of the Privy Council in terms of the doctrine of precedent. The issue arose in the context of an appeal concerning the substantive issue of whether the tort of malicious prosecution encompassed the prosecution of civil proceedings, see ***Willers v Joyce (Re:Gubay (deceased) No.1)*** [2016] UKSC 43; [2016] 3 W.L.R. 477. Lord Neuberger PSC, giving the reasoned judgment, restated the doctrine of precedent as it applied to the hierarchy of courts and to courts of co-ordinate jurisdiction. In this respect he noted that the same approach should be taken by Circuit judges to decisions of other Circuit judges as High Court judges take to decisions of other High Court judges. In terms of JCPC decisions, it was noted that while it was not a UK court: (i) the majority of its decisions concerned the application of the common law; and (ii) the JCPC was ordinarily constituted by Justices of the UKSC. Three things followed from these points: first, JCPC decisions cannot bind any judge in England and Wales or override any decision of an English and Welsh court or the UKSC; second, any JCPC decision must be treated as "being of great weight and persuasive value" by any judge in England and Wales and in the UKSC when it concerns a common law issue; and thirdly, that the JCPC is bound by decisions of the UKSC or House of Lords when applying the law of England and Wales. In respect of courts in England and Wales, they would be expected to follow JCPC decisions where there was no superior court decision to the contrary; they are not bound to do so nor should they follow such a decision where it is contrary to one of a superior court. The latter is to be understood, subject to one exception, to be an absolute rule. That exception applied where: (i) on an appeal to the JCPC the appellant was challenging an earlier decision of the Court of Appeal, the House of Lords or the Supreme Court on a question of English law; and (ii) the JCPC was constituted of Justices of the UKSC; and (iii) the JCPC expressly directs in its judgment that English and Welsh courts are to treat its judgment as representing the law of England and Wales. In such a case the JCPC decision is to have the same effect as a judgment of the UKSC or House of Lords. ***Young v Bristol Aeroplane Co Ltd*** [1944] K.B. 718, CA, ***Doughty v Turner Manufacturing Co Ltd*** [1964] 1 Q.B. 518, CA, ***Practice Statement (Judicial Precedent)*** [1966] 1 W.L.R. 1234, HL, ***Fitzleet Estates Ltd v Cherry*** [1977] 1 W.L.R. 1345, HL, ***Davis v Johnson*** [1979] A.C. 264, HL, ***Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*** [1986] A.C. 80, PC, ***Mercedes-Benz AG v Leiduck*** [1996] A.C. 284, PC, ***In re Spectrum Plus Ltd (In liquidation)*** [2005] 2 A.C. 680, HL, ***R v James & Karimi*** [2006] Q.B. 588, CA (Crim), ***Howard De Walden Estates Ltd v Aggio*** [2008] Ch. 26, ChD, ***Patel v Secretary of State for the Home Department*** [2013] 1 W.L.R. 63, CA, ***Knauer v Ministry of Justice*** [2016] UKSC 9; [2016] 2 W.L.R. 672, UKSC, ref'd to. (See ***Civil Procedure 2016*** Vol.2 paras 12.48 and following.)

- **Vilca v Xstrata Ltd** [2016] EWHC 1824 (QB), 21 July 2016, unrep. (Foskett J)

Independent review of disclosure

CPR r.31.6. A question arose concerning e-disclosure in complex proceedings concerning matters arising from acts of violence in Peru for which it was alleged the defendants were legally responsible: see ***Vilca v Xstrata Ltd*** [2016] EWHC 389 (QB). That question centred on the claimants' application for a direction that an independent lawyer carry out a re-review of the defendants' disclosure. Disclosure had taken place in a number of tranches. **Held**, (i) the court has jurisdiction to direct an independent review of disclosure, to be carried out by solicitors or counsel independent of the parties; see ***Nolan Family Partnership v Walsh*** (2011). It was noted that such an order would seem however to be unprecedented; (ii) due to the unusual nature and cost of such an order it would require strong grounds; to justify

making such an order; (iii) such strong grounds were not made out where there was, on the facts of the present case what was in reality, a single, even though significant, matter that demonstrated a failure to comply with the disclosure process. ***Nichia Corp v Argos Ltd*** [2007] EWCA Civ 741; [2007] Bus. L.R. 1753, CA, ***Cheshire Building v Dunlop*** [2007] EWHC 403 (QB), unrep., QBD, ***Shah v HSBC*** [2011] EWCA Civ 1154; [2012] Lloyd's Rep. F.C. 105, CA, ***Nolan Family Partnership v Walsh*** [2011] EWHC 535 (Comm), unrep., Comm, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.31.19.4.)

- **Novus Aviation Ltd v Alubaf Arab International Bank BSC(c)** [2016] EWHC 1937 (Comm), 27 July 2016, unrep. (Leggatt J)

Part 36 Offer – judgment in foreign currency – approach when Pt 36 Offer in pounds sterling

CPR r.36x.14. The claimant was held to be entitled to damages arising from the defendant's repudiatory breach of contract. In April 2014 the claimant made a Pt 36 Offer. The offer was made in pounds sterling: £3,775,272. The judgment sum was entered in US dollars, at $5,430,924, the equivalent of which was £4,117,114. The claimant contended that in the circumstances it had obtained a judgment more advantageous than its Pt 36 Offer. **Held**, (i) CPR r.36x.3(1)(c), now r.36.3(1)(g), provide that a money judgment sum and Pt 36 Offer are to be compared at the time the judgment order is made: see, ***Barnett v Creggy*** (2015). This applies even when the Pt 36 Offer is in pounds sterling and a money judgment is in a foreign currency; (ii) however, when assessing if it would be unjust to award indemnity costs and enhanced interest under CPR r.36x.14(5) (now CPR r.36.17(5)) a comparison between the amount awarded and the value of a Pt 36 Offer at the time it was made is a "highly material circumstance" that the court may take into account; (iii) in circumstances where there had been a sharp fall in the value of sterling against the dollar between the time the Pt 36 Offer was made and judgment being entered it was unjust to award indemnity costs and enhanced interest. The fall in value of sterling before judgment was the only reason the claimant beat its Pt 36 Offer. Such adventitious circumstances could not properly form the basis of indemnity costs and enhanced interest awards under Pt 36. ***Barnett v Creggy*** [2015] EWHC 1316 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.36.17.5.)

- **Bill Kenwright Ltd v Flash Entertainment FZ LLC** [2016] EWHC 1951 (QB), 28 July 2016, unrep. (Haddon-Cave J)

Service of proceedings out of jurisdiction – alternative method for service – deemed service

CPR rr.6.15, 6.35, 6.37, 6.47. The claimant, a company incorporated in England, issued proceedings for breach of contract against the defendant, a company incorporated in the United Arab Emirates. The claimant applied for permission to serve the claim form out of the jurisdiction in July 2015. The application was granted. In October 2015 the claimant was granted permission by the Senior Master to serve the claim out of the jurisdiction, by registered mail, which was service by an alternative method. The Senior Master further ordered that the claim would be deemed served two days on the second day after posting. In February 2016 the defendant applied for, amongst other things, an order setting aside service. It did so on the grounds that there was no good reason to grant the order for alternative service and that the court had no power to make the order deeming service. **Held**, there was good reason to make the order and the court had power to make the order deeming service: (i) in considering whether there is good reason to grant an order for alternative service the existence of a Service Treaty is a relevant consideration, as a matter of comity, in determining the exercise of the court's discretion. It was not however an immutable factor, but was context dependent. In the present case use of the service method provided under a Service Treaty would have engendered lengthy delay, which taken together with other factors, constituted good reason to make the order. In other cases, such as ***Knauf UK GmBH v British Gypsum Ltd*** (2002) where use of a relevant treaty method under the Brussel's Convention was being used to gain priority or ***Deutsche Bank v Sebastian Holdings*** (2014) where use of a relevant treaty method would not have engendered delay good reason may not be held to exist; (ii) the court has power under CPR r.6.37(5)(b)(i) to make an order for service by an alternative method under CPR r.6.15. As such CPR r.6.15(4)(b) applies to orders for service by alternative method, and hence such orders must include provision for a deemed service date. Absent such provision the order would be defective; (iii) CPR r.6.47 requires written evidence of service in accordance with the provisions of CPR Pt 6. Evidence provided to the court that the requirements of CPR r.6.15 have been satisfied meets that test. ***Societe Generale de Paris v Dreyfus Bros*** (1885) 29 Ch. D. 239, ChD, ***Canada Trust Co v Stolzenberg (No.2)*** [1998] 1 W.L.R. 547, CA, ***Knauf UK GmBH v British Gypsum Ltd*** [2001] EWCA Civ 1570; [2002] 1 W.L.R. 907, CA, ***Abela v Baadarani*** [2012] UKSC 44; [2013] 1 W.L.R. 2043, UKSC, ***Deutsche Bank v Sebastian Holdings*** [2014] EWHC 112 (Comm), unrep., ***Erdenet Mining Corp. v. Kazakhstan*** [2016] EWHC 299 (Comm), unrep., ***Brownlie v Four Seasons Holdings Inc*** [2016] 1 W.L.R. 1814, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1 paras 6.40.5, 6.47.1.)

Practice Updates

STATUTORY INSTRUMENTS

- **INSOLVENCY PROCEEDINGS (FEES) ORDER 2016** (SI 2016/692). In force from **21 July 2016** subject to transitional provisions.

Revokes the Insolvency Proceedings (Fees) Order 2004 (SI 2004/593) and the various Orders amending it viz: SI 2005/544; SI 2006/561; SI 2007/521; SI 2008/714; SI 2009/645; SI 2010/732; SI 2011/1167; SI 2014/583; SI 2015/1819; and SI 2016/184. The revocation is subject to transitional provisions that maintain the otherwise revoked Orders in force for: preparing and submitting reports under Insolvency Act 1986 s.274, bankruptcy and winding-up order made pursuant to applications for such that were made before 21 July 2016, and deposits paid in respect of such matters before that date (see article 7 of the Order). The Order introduces a new fee structure to register individual voluntary arrangement, for various Official Receiver's administration fees, adjudicator's administration fees, trustee-in-bankruptcy fees, income payments agreements and orders fees, and liquidator fees.

- **THE CIVIL PROCEEDINGS, FIRST-TIER TRIBUNAL, UPPER TRIBUNAL AND EMPLOYMENT TRIBUNALS FEES (AMENDMENT) ORDER 2016** (SI 2016/807). In force from **25 July 2016.**

Amends the Civil Proceedings Fees Order 2008 (SI 2008/1053). Effects increases to the following fees: the fee to start proceedings for another remedy in the High Court and the County Court; for the filing of proceedings against a party or parties not named in the proceedings; for applications for permission to issue proceedings; for an order for the assessment of solicitor-client costs under Solicitors Act 1974, Pt 3 or an order on starting costs-only proceedings; for various fees relating to judicial review proceedings; for fees relating to detailed assessments of costs; for various fees relating to writs of possession, control and delivery, to applications requiring judgment debtors to attend court, third party debt orders, charging orders, judgment summonses, registration and enforcement of judgments, orders and arbitral awards; applications related to enforcement proceedings in the County Court; applications to enforce money judgments; and filing documents under the Bill of Sales Act 1878 (referred to in error in the SI as "1978"); and the fee for affidavits. It also makes various amendments to the Magistrates' Courts Fees Order 2008 (SI 2008/1052), the Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) (England and Wales) Fees Order 2011(SI 2011/2344), the First-tier Tribunal (Property Chamber) Fees Order 2013 (SI 2013/1179), and the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893) (See ***Civil Procedure 2016*** Vol.2, s.10.)

- **CIVIL PROCEDURE (AMENDMENT NO.2) RULES 2016** (SI 2016/707). In force from **8 August 2016** subject to transitional provisions in respect of amendments to Pt 46.

Amends CPR r.3.19 by way of substituting new paras (1) and (3) and omitting para.(3). The amendments thereby create a separate costs capping regime for judicial review proceedings under Pt 4 (ss.88-90) of the Criminal Justice and Courts Act 2015. That separate regime, of "judicial review costs capping orders" made by either the High Court or Court of Appeal, is provided by way of amendments the Order effects to CPR Pt 46 through the insertion of new rr.46.16 to 46.19. The amendments are subject to transitional provisions that maintain the previous rules' effect for those judicial review proceedings where the judicial review claim form was filed with the court prior to 8 August 2016. (See ***Civil Procedure 2016 2nd Supplement*** paras 3.19.1, 46.16–46.19, 46PD.10).

- **CIVIL PROCEDURE (AMENDMENT NO.3) RULES 2016** (SI 2016/788). In force from **3 October 2016** subject to transitional provisions in respect of amendments to Pt 52.

Amends CPR Pt 52 by introducing a new Pt 52 in substitution for the previously in force Part (See In Detail below.) Makes a number of amendments consequential to that amendment to: rr.45.41; 47.14(7); 76.12(2); 80.8(2); and 88.15(2). A number of minor typographical errors are contained within the consequential amendments. See further In Detail, below. The substitution of a new Pt 52 is subject to the following transitional provision: where an appellant's notice was issued before 3 October 2016, the version of Pt 52 in force at that time applies, and where a request for reconsideration under r.52.16 is made before 3 October 2016 the same applies. The following further amendments were also made: r.2.4(a) inserts a reference to "Registrar in Bankruptcy" after the reference to "Master"; r.26.2A(3), (4) and (5) are made subject to a new para.5A. Paragraph 5A makes provision for the automatic transfer of specified multi-track cases to the County Court at Central London; r.40.2(4) to make provision for judgments or orders to provide an indication of which Division of the High Court is the appeal court, where that is the appeal court, in respect of the judgment or order; minor amendment to r.54.5(6) to correct a typographical reference which ought to have read "regulation 92(2)"; and r.63.19 to omit para.(1A) and delete reference to "specialist" in para.(3).

■ **THE ACCESS TO JUSTICE ACT 1999 (DESTINATION OF APPEALS) ORDER 2016** (SI 2016/XXX). In force from **3 October 2016.**

Replaces Access to Justice Act 1999 (Destination of Appeals) Order 2000 (SI 2000/1071). (See ***Civil Procedure 2016*** Vol.2 paras 9A-897 to 9A-905.7.) The 2016 Order simplifies routes of appeal in civil proceedings. Appeals from district judges, or equivalent, in the County Court will lie to a Circuit judge, and appeals from a Circuit judge, or equivalent, will lie to the High Court. The one exception to this relates to appeals from district judges in non-insolvency company law proceedings. Such appeals will lie to the High Court. To ascertain which judges are equivalent to a district judge or Circuit judge see art.5 of the Order. Appeals from High Court officers, deputies or temporary officers, and district judges of the High Court lie to High Court judges. Appeals from a district judge in the small claims track of the IPEC lie to an enterprise judge. The Order restates the position that second appeals only lie to the Court of Appeal.

PRACTICE DIRECTIONS

■ **CPR PRACTICE DIRECTION – 84th Update**, in force as noted below.

The update makes the following revisions:

- **PD2A (Court Offices)**, to omit para.2.2 concerning Practice Masters being present at the Central Office when the office is open. Although see para.6.1–6.2 of the Queen's Bench Division Guide 2016. In force from 3 October 2016;
- **PD8A (Alternative Procedure for Claims)**, revises paras 17.1, 17.2, and 17A.1 to provide, respectively, for: applications for detailed assessments of a returning officer's accounts to be made by the Electoral Commission; to read "returning officer" as referring to a counting officer or Regional County Officer on such applications made under the European Union Referendum Act 2015; and to make provision for proceedings under the European Union Referendum (Conduct) Regulations 2016 to come within the scope of proceedings to which para.17A.1 of the PD applies. In force from 17 June 2016;
- **PD32 (Evidence)**, substitutes reference to the "Foreign and Commonwealth Office (Legislation Office) sopenquiries@fco.gov.uk" for the reference to the "Foreign and Commonwealth Office (International Legal Matters Unit, Consular Division)" in para.4 of Annex 3 to the PD. In force from 17 June 2016;
- **PD51K (The County Court Legal Advisers Pilot Scheme)**, extends the pilot scheme's operation until 31 March 2017. Inserts new paras 2A and 9A concerning applications for extensions of time to serve particulars of claim in defined circumstances and to substitute a new litigation friend in place of an existing one. In force from 29 September 2016; and
- **PD51L (New Bill of Costs Pilot Scheme)**, extends the scheme's operation until 30 September 2017. In force from 29 September 2016.

■ **CPR PRACTICE DIRECTION – 85th Update**, in force from **8 August 2016**, subject to transitional provisions.

The update amends **PD46 (Costs Special Cases)** in the light of amendments to CPR Pt46 effected by the Civil Procedure (Amendment No.2) Rules 2016. It inserts a new para.10.1 and 10.2, which make provision for specified details concerning an applicant for a judicial review cost capping order to be provided to the court and for such applications to be contained in, or to accompany, the judicial review claim form. The amendments do not apply to judicial review proceedings where the claim form was filed before 8 August 2016.

PRACTICE GUIDANCE

THE ADMINISTRATIVE COURT JUDICIAL REVIEW GUIDE 2016

On 25 July 2016 HMCTS published a new guide to the Administrative Court. The guide comprehensively covers all aspects of the Administrative Court's work. It deals with pre-issue matters that potential applicants for judicial review proceedings should consider, outlines how the court has approached matters such as locus standi, the nature of judicial review time limits, and the proper use of the judicial review pre-action protocol. It then provides a clear roadmap through the various stages of the judicial review process from issue to appeal. Particular attention is drawn to the changes effected in August 2016 to cost capping in judicial review proceedings (noted above in Practice Updates). Guidance is given on both pre- and post-August 2016 regimes. Additionally, it provides: information for litigants-in-person; guidance on the use of McKenzie Friends; guidance on legal aid provision and court fees by reference to relevant judicial review forms; court office addresses; addresses for service for central government departments.

In Detail

CIVIL PROCEDURE (AMENDMENT NO.3) RULES 2016 (SI 2016/788) – NEW CPR PT 52

Background

Civil Procedure (Amendment No.3) Rules 2016 (SI 2016/788), r.10 and schedule, substitute a new Pt 52 for the previous Part. The substitution takes effect on 3 October 2016. The substitution is subject to transitional provisions, set out in art.16(1) of the SI, which provide that the pre-3 October 2016 Pt 52 continues to apply to proceedings where an appellant's notice was issued prior to that date (3 October 2016). In addition, the transitional provisions (art.16(2) of the SI) specify that where a request was made prior to 3 October 2016 for review of a decision of a court officer or reconsideration of a decision of a single judge or court officer that was made without a hearing, the provisions of the pre-3 October 2016 CPR r.52.16 apply. The new Pt 52 necessitates a number of consequential changes to the Practice Directions that supplement it. At the time of this edition of Civil Procedure News going to press no Practice Direction-making Update had been issued. It is assumed that one will however be issued prior to the statutory instrument coming into force.

Relevant background to the changes are set out in the *Civil Courts Structure Review: Interim Report*[1] and the Civil Procedure Rule Committee consultation, "*Appeals to the Court of Appeal: proposed amendments to Civil Procedure Rules and Practice Direction*"[2] (19 May 2016). The amendments' principal purpose is to streamline the appeal procedure, enabling permission to appeal applications to be considered with greater efficiency and economy for both the court and parties. They seek therefore to reduce the significant delays which, particularly, applications for permission to appeal and appeals to the Court of Appeal have been subject to as a consequence of sharp increases in appeals being made over the recent past.

In addition to making substantial amendments to the rules in order to achieve that purpose, Pt 52's structure has also been revised. Pt 52 was, historically, poorly and illogically laid out. The decision, for instance, not to consolidate the provisions related to the tests for permission to appeal in one place being a particularly egregious example of poor drafting. An illogical structure may have been acceptable in practice when most litigants were legally represented, notwithstanding a failure to meet the standard Dyson LJ, as he then was, noted in *Collier v Williams* [2006] EWCA Civ 20; [2006] 1 W.L.R. 1945 at [1]: that the CPR was intended to meet i.e., that the CPR were intended to be "*simple and straightforward*". With the number of litigants-in-person increasing, rules that fail to meet that standard become increasingly less tenable. That Dyson LJ also noted in *Collier v Williams* that the CPR was intended to be drafted so that the rules were, as far as possible, "*not susceptible to frequent satellite litigation*", and that that "*intention had not been fulfilled*", points today, as it did in 2006, to an urgent need to revisit the rules and their drafting. The present opaque and often overly complex manner adopted for the drafting of statutory instruments cannot be sustainable. Plain language drafting must replace it. In this regard the CPRC, as part of its current rule-simplification exercise, ought perhaps to look with some urgency at the continuing problem that is Pt 36.

Amendments to Pt 52

The reforms effect a structural change to Pt 52. The previous four section structure is replaced with by one of seven sections:

Section I: Scope and Interpretation

Section II: Permission to Appeal – General (which includes the tests for both first and second appeals)

Section III: Permission to Appeal – Judicial Review Appeals, Planning Statutory Review Appeals and Appeals from the Employment Appeal Tribunal

Section IV: Additional Rules (which includes, for instance, Appellants' and Respondents' Notices, time limits, transcripts)

Section V: Special Provisions relating to the Court of Appeal

Section VI: Special Provisions relating to Statutory Appeals

Section VII: Re-opening Final Appeals

1 https://www.judiciary.gov.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf [Accessed 16 August 2016]
2 https://www.judiciary.gov.uk/wp-content/uploads/2016/05/appeals-to-the-coa-proposed-amendments-to-cpr-cprc-outline.pdf [Accessed 18 August 2016]

For ease of reference the amendments are as follows.

Pt 52 as in force *from* 3 October 2016	**Pt 52 as in force *prior to* 3 October 2016**	**Content of Rule**
Section I		***Scope and Interpretation***
52.1	52.1	**Scope and interpretation of Pt 52** • No substantial changes. • Cross reference to rr.47.21 to 47.24 removed from new rule.
52.2	52.2	**Parties to comply with PD52A to 52E** • No change.
Section II		***Permission to Appeal – General***
52.3	52.3 (1)–(3)	**Permission to Appeal – General** • Substantially replicates old r.52.3(1)–(3). • Makes additional provision for the requirement to obtain permission to appeal from decisions of judges in the family court.
52.4	52.3 (4A)–(5)	**Determination of applications to appeal to the County Court and High Court** • Substantially replicates old r.52.3(4A)–(5). • New general rule (new r.52.4(1)–(2)) that applications for permission to appeal to County Court or High Court will be determined on paper without a hearing. Exceptions to this are provided for.
52.5	No prior provision	**Determination of applications to appeal to the Court of Appeal** **New general rule.** • Makes provision for applications for permission to appeal to the Court of Appeal to be determined on paper without a hearing. • Provides power to the judge determining the permission on application on the papers to direct it to be determined at an oral hearing.
52.6	52.3 (6)–(7)	**Permission to appeal test – first appeals** • Replicates old r.52.3(6)–(7). • Makes provision for first appeal test, which remains unchanged, and which applies unless new r.52.7 applies.
52.7	52.13	**Permission to appeal test – second appeals** • Makes provision for the second appeal test. • Extends the test to applications for permission to appeal from decisions that were made on appeal by the "Upper Tribunal which was made on appeal from a decision of the First-tier Tribunal on a point of law where the Upper Tribunal has refused permission to appeal to the Court of Appeal". • Alters the nature of the second appeal test to add an additional requirement that the application for permission to bring a second appeal also demonstrate a "real prospect of success" where the appeal is to be brought on the "important point of principle or practice" ground.

Pt 52 as in force *from* 3 October 2016	**Pt 52 as in force *prior to* 3 October 2016**	**Content of Rule**
Section III		***Permission to Appeal – Judicial review appeals, planning statutory review appeals and appeals from the Employment Appeal Tribunal***
52.8	52.15	**Judicial Review appeals from the High Court** • Replicates the old rule, save minor linguistic amendments and amendments to renumber the rule's sub-paragraphs. • Also amended to make reference to refusal of permission to apply for judicial review of decisions of the Upper Tribunal being refused on the papers.
52.9	52.15A	**Judicial Review appeals from the Upper Tribunal** • Replicates the old rule, save for setting out time limits for making applications for permission to appeal to the Court of Appeal under the new rule. • Applications must be made within seven days of either: (a) the decision of the Upper Tribunal refusing permission to appeal to the Court of Appeal, where that decision was made at a hearing; or (b) service of the Upper Tribunal's order refusing permission to appeal to the Court of Appeal where it was made on the papers
52.10	52.15B	**Planning statutory review appeals** • Replicates the old rule, save for changes to render the rule consistent with the changes to the permission to appeal process now contained in r.52.
52.11	No prior provision	• **Appeals from the Employment Appeal Tribunal** • This is a new provision which governs applications for permission to appeal to the Court of Appeal arising from certain specified appeals to the Employment Appeal Tribunal where orders have been made under Employment Appeal Tribunal Rules 1993 rr.3(7), 3(7ZA) or 3(10). • Provides a power for the Court of Appeal to remit the appeal to the Employment Appeal Tribunal instead of granting permission to appeal.
Section IV		***Additional Rules***
52.12	52.4	**Appellant's Notice** • Replicates the old rule, save to make the default provision in r.52.12(2)(b) of 21 days to file an appellant's notice expressly subject to any time limits provided for in rr.52.8–52.11 and PD52D.
52.13	52.5	**Respondent's Notice** • Replicates the old rule, save for a correction to r.52.13(2)(b) to replace "decision" with "order".
52.14	52.5A	**Transcripts at public expense** • Replicates the old rule.
52.15	52.6	**Variation of time** • Replicates the old rule, save for updating the reference to "Practice Direction 52" to "Practice Directions 52A to 52E" in r.52.15(2)(b).

Pt 52 as in force *from* 3 October 2016	**Pt 52 as in force *prior to* 3 October 2016**	**Content of Rule**
52.16	52.7	**Stay** • Replicates the old rule.
52.17	52.8	**Amendment of appeal notice** • Replicates the old rule.
52.18	52.9	**Striking our appeal notices and setting aside or imposing conditions on permission to appeal** • Replicates the old rule.
52.19	52.9A	**Orders to limit the recoverable costs of an appeal** • Replicates the old rule.
52.20	52.10	**Appeal court's powers** • Replicates the old rule.
52.21	52.11	**Hearing of appeals** • Replicates the old rule.
52.22	52.12	**Non-disclosure of Part 36 offers and payments** • Replicates the old rule. • The new rule has not been updated to bring it in line with CPR r.36.16 i.e., to remove redundant reference to payments-in.
Section V		***Special provisions relating to the Court of Appeal***
52.23	52.14	**Assignment of appeals to the Court of Appeal** • Replicates the old rule, save for a change to the cross reference to the power in s.57 of the Access to Justice Act 1999, which clarifies that that power is separate from the power contained within the rule.
52.24	52.16	**Who may exercise the powers of the Court of Appeal** • Makes provision for legally trained court officers, with the Master of the Rolls' consent, to exercise the Court of Appeal's powers. • Substantially replicates the old rule, subject to the following changes: • The new rule provides that decisions taken by such court officers will now be taken without an oral hearing unless the officer directs to the contrary. • Further provides that any review of a court officer's decision will be carried out by a single judge without an oral hearing unless the judge directs to the contrary. • Further provides that where a single judge takes a decision, other than one by way of review of a decision of a court officer, any review of the singe judge's decision will be made without an oral hearing unless the judge directs to the contrary.
Section VI		***Special provisions relating to statutory appeals***
52.25	52.12A	**Statutory appeals – court's power to hear any person** • Save for a grammatical correction, replicates the old rule.

Pt 52 as in force *from* 3 October 2016	**Pt 52 as in force *prior to* 3 October 2016**	**Content of Rule**
52.26	52.18	**Appeals under the Law of Property Act 1922** • Replicates the old rule.
52.27	52.19	**Appeals from certain tribunals** • Save for a grammatical correction, replicates the old rule.
52.28	52.20	**Appeals under certain planning legislation** • Replicates the old rule
52.29	52.21	**Appeals under certain legislation relating to pensions** • Replicates the old rule.
Section VII		***Reopening final appeals***
52.30	52.17	**Reopening of final appeals** • Replicates the old rule, save for a correction to the reference to Practice Direction 52A in new r.52.30(8).

CIVIL PROCEDURE (AMENDMENT NO.3) RULES 2016 – CORRECTION SLIP

The SI was issued with a number of typographical errors, which were as follows:

- article 13(2), the reference to "rule 76.16(2)(b) and (c)" ought properly to refer to "rule 76.16(2)(a) and (b)";
- article 14(2), the reference to "rule 80.12(2)(b) and (c)" ought properly to refer to "rule 80.12(2)(a) and (b)";
- article 15(2) the reference to "rule 88.15(2)(b) and (c)" ought properly to refer to "rule 88.15(2)(a) and (b)"; and
- in the Schedule substituting the new Pt 52, the second of the two sub-paragraphs numbered "r.52.24(3)(d)" ought properly to have read "r.52.24(3)(e)".

A correction was issued on 24 August 2016 to the Civil Procedure (Amendment No.3) Rules 2016. The correction related to two of the typographical errors, namely the error in respect of:

- article 15(2); and
- rule 52.24.3(e).

These two amendments have thus now been corrected. The Ministry of Justice has not yet however corrected the other two typographical errors, those in respect of arts 13(2) and 14(2), which are in identical terms that the error corrected in respect of art.15(2).

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