CIVIL PROCEDURE NEWS

Issue 9/2016 07 November 2016

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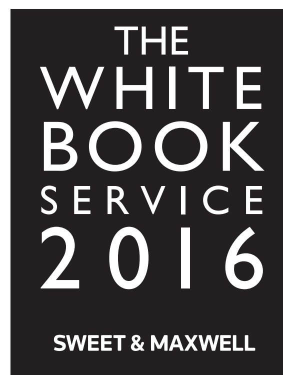

In Brief

Cases

- **Lowin v W Portsmouth & Co Ltd** [2016] EWHC 2301 (QB), 20 June 2016, unrep. (Laing J, and Master Leonard Sitting as a Costs Assessor)

Costs – provisional assessment – effect on Pt 36

CPR rr.36.17(4), 47.15(5). A claim for damages arising from the death of the appellant, Lowin's mother. The claim settled through the appellant's acceptance of a Pt 36 Offer. A further Pt 36 Offer, in respect of the claimant's costs, was made by the respondent. Subsequently, a District Judge ordered the respondent to pay the appellant's costs, such costs to be decided by provisional assessment if not agreed. The costs were thereafter subject to provisional assessment. That assessment was for a greater sum than that contained in the Pt 36 Offer. A later decision held that the appellant's costs of the provisional assessment were, notwithstanding that the assessment was carried out further to CPR r.36.17(4)(c), to be capped pursuant to CPR r.47.15(5). The appellant appealed. The issue on appeal was straightforward: if a costs assessment goes no further than provisional assessment, is a party who has secured a more advantageous position in terms of a Pt 36 Offer entitled to costs assessed on an indemnity basis or are such costs capped by CPR r.47.15(5). **Held**, CPR Pt 36 did apply and costs were not subject to CPR r.47.15(5). The present issue concerned the entitlement to assessed costs, whether assessed on the standard or indemnity basis, and whether such costs were subject to a cap rather than being subject to a fixed costs regime. For CPR r.47.15(5) to derogate from Pt 36 the rules would have to specifically provide for that. Absent such express modification of the rules Pt 36 cannot but apply to the present situation, and is not displaced by CPR r.47.15(5). While this conclusion might increase the costs of provisional assessments, by reducing incentives to keep such costs down, it was noted as providing a clear incentive to accept "sensible Part 36 costs offers" as failure to do so created the potential for further costs to be incurred arising from a failure to beat the offer. ***Nizami v Butt*** [2006] EWHC 159 (QB); [2006] 1 W.L.R. 3307, QBD, ***Broadhurst v Tan*** [2016] EWCA Civ 94; [2016] 1 W.L.R. 1928, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.36.17.4.)

- **Jamadar v Bradford Teaching Hospitals NHS Foundation Trust** [2016] EWCA Civ 1001, 21 July 2016, unrep. (Jackson and Lindblom LJJ)

Failure to file costs budget – relief from sanction

CPR rr.3.9, 3.13, 3.14. The claimant brought clinical negligence proceedings against the defendant Hospital Trust. The claim was initially defended, and notice was served on Form 149C specifying, amongst other things, that the claim was suitable for multi-track allocation. Shortly thereafter the defendant admitted liability. The court then made an order on the papers which revoked the N149C notice and entered judgment for an amount to be determined. The defendants subsequently filed and served various documents, including their costs budget with the court. The claimants however failed to file or serve their costs budget. The defendant's solicitors on three subsequent occasions sought from the claimant's solicitors a copy of their (the claimant's) costs budget. The matter came before a District Judge at a case management conference, at which the claimant's counsel produced, for the first time, an unsigned costs budget. The District Judge noted that the claimant had failed to serve a costs budget pursuant to CPR r.3.13 and consequently made an order under CPR r.3.14 that the claimant's costs were limited to recovery of court fees. The claimant applied to vary the order or alternatively to obtain relief from sanction. Those applications were dismissed. An appeal to the Circuit Judge was also dismissed. The claimant then appealed to the Court of Appeal on two bases: first, that CPR r.3.12 did not apply to the claim as it ceased to be a multi-track claim following entry of judgment following the court order which entered judgment on the admission and, crucially, revoked the N149C notice; and secondly, that relief from sanctions ought properly to have been granted. **Held**, appeal dismissed. The order revoking the N149C notice arose due to the claim no longer being defended in terms of liability. The claim as pleaded was for £3 million. It was "self-evidently" a multi-track claim, and all directions given were those appropriate for a multi-track claim and, conversely inappropriate for a fast track claim. In essence, allocation was a matter of substance and not of form, in substance the claim remained a multi-track claim irrespective of the notice's revocation which could not in and of itself affect allocation or effect an alteration in allocation. As such a costs budget ought to have been filed and as it was not, the automatic sanction applied. Relief from sanctions was properly considered by the Circuit Judge, who was noted by Jackson LJ to have *"very properly paid no heed to (Jackson LJ's) partially dissenting judgment which advocated for a somewhat softer approach"* to that of the majority in ***Denton v White*** (2014). ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795, CA, ***Denton v White*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.3.13.1.)

■ **Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd** [2016] EWHC 2361 (Comm), 15 September 2016, unrep. (HHJ Waksman QC sitting as a judge of the High Court)

Third party funding – recoverable costs – arbitration proceedings

Arbitration Act 1996, ss.59(1)(c), 68; International Chamber of Commerce Rules, r.31(1); CPR r.44. Arbitral proceedings under the International Chamber of Commerce (ICC) Rules. Application under Arbitration Act 1996, s.68 to set aside arbitral award concerning interests and costs following on from previous arbitral awards as between the parties. The arbitrator held that the defendant was entitled to the costs of third party litigation funding, such funding facilitating the defendant's ability to bring the arbitration. The defendant sought to recover by way of costs from the claimant approximately £1.94 million. That sum was the amount due to the third party funder under the funding agreement. The basis of the arbitrator's award was that the third party funding costs were "other costs" within the ambit of Arbitration Act 1996, s.59(1)(c). The claimant challenged the award of costs on the ground that it was a "serious irregularity" pursuant to Arbitration Act 1996, s.68(2)(b); the serious irregularity being that "other costs" under s.59(1)(c) did not encompass third party funding costs. **Held**, the award of costs of third party funding was not in excess of the arbitrator's powers to order the claimant to pay the defendant's costs. The award of costs could not properly be characterised as a "serious irregularity"; analysis of Lord Steyn in ***Lesotho v Impregilo*** (2006) applied. Third party litigation funding costs were in principle recoverable as "other costs" under s.59(1)(c) of the 1996 Act. While that was sufficient to dispose of the proceedings, HHJ Waksman QC went on to by way of **obiter dicta**: (i) the Arbitration Act 1996 was designed to be a complete code, subject to well-established exceptions. It is not to be construed by reference to the CPR, particularly the CPR's costs rules. The 1996 Act's provisions concerning costs are, in any event, clearly wider in scope than those under CPR r.44 as they explicitly provide for the recovery of costs other than legal costs; (ii) the costs recoverable under s.59(1)(c) of the 1996 Act are those costs, legal and otherwise, which relate to the arbitration and were incurred in respect of it. As HHJ Waksman QC noted in assessing whether costs incurred are costs for the purposes of the 1996 Act the question to ask is: "*Do the costs relate to the arbitration and are they for the purposes of it?*". As he went on to state, "*If the costs have not been incurred in order to bring or defend the claim in question, I would accept that they fall outside the definition of 'other costs' and they would not relate to the arbitration – but that is not the case here*"; (iii) that s.59(1)(c) of the 1996 Act did not refer to third party funding costs was irrelevant. It could not properly be expected that the 1996 Act would expressly refer to all forms and types of cost recoverable under it; (iv) discussion of costs, and third party funding, in the ICC Commission Report of 2015 paras 87–93 provided further persuasive support for the view that such funding costs were recoverable if they were incurred in order to prosecute or defend the claim. ***Lesotho v Impregilo*** [2006] 1 A.C. 221, HL, ref'd to. (See ***Civil Procedure 2016*** Vol.2 para.2E-230.)

■ **Kazakhstan Kagazy Plc v Zhunus** [2016] EWHC 2363 (Comm), 29 September 2016, unrep. (Leggatt J)

Discontinuance – when effective

CPR rr.38.2, 38.3. Proceedings brought against the defendants arising out of an alleged fraud under both English and Manx law. The claim against the first defendant settled. Claims against the second and third defendants are ongoing. In December 2015 the claimants informed the defendants that the Manx law claims would not be pursued. The claimants sought to amend the Particulars of Claim, filed and served notice of discontinuance in respect of the Manx law claims and provided the defendants with a draft order, which was to be agreed. The draft order was not agreed. Thereafter the claimants informed the defendants that they were reconsidering their decision not to pursue the matters dealt with in the notice of discontinuance. The claimants then informed the defendants that they intended to pursue those matters, and thus not discontinue them. Amongst a number of issues the question arose whether the Manx law claims had been discontinued. **Held**, the claims had been discontinued. In assessing the application of CPR r.38.2: (i) claim refers either to the entire action or all causes of action pursued by a particular claimant against a particular defendant. While the court did not have to decide between these two alternatives in the present case, it was clear that "claim" did not refer to "a part of a cause of action" i.e., it was not possible to discontinue a claim for certain losses alleged to have arisen from a breach of duty whilst maintaining a claim for other losses said to have arisen from the same breach of duty; (ii) in terms of CPR r.38.2(2)(a), which provides that the court's permission is required to discontinue if the court has granted an interim injunction, that applies only where that which is subject to the injunction "includes whatever claim or part of a claim . . . that the claimant wishes to discontinue". That this is the proper scope of this provision is clear from the fact that discontinuance may well, and perhaps more realistically would necessarily, require consideration by the court whether and if so to what extent the injunction would need to be varied or discharged upon discontinuance; (iii) in the present case the court's permission was, on the facts, not required as a freezing injunction previously granted did not come within the ambit of CPR r.38.2(2)(a), as it did not concern the Manx law claims but only related to other claims that were being pursued on a different legal basis. As such, having complied with the notice requirements provided in CPR r.38.3(1) the Manx law claims had been

discontinued: the notice was effective, as a matter of law, upon completion of those requirements and was effective irrespective of what the claimants may or may not have intended or believed in respect of its going into effect. Notice was effective automatically upon completion of the procedural formalities specified in the CPR. (See ***Civil Procedure 2016*** Vol.1 para.38.1.1.)

- **Shalabayev v JSC BTA Bank** [2016] EWCA Civ 987, 7 October 2016, unrep. (Jackson, Gloster and King LJJ)

Non-parties – abuse of process by way of collateral attack

Charging Orders Act 1979, ss.1(1), 1(2), CPR Pt 81. An application for a charging order was made by the defendant against property in long running proceedings (the main proceedings). The claimant sought to intervene in the application on the basis that he was the beneficial owner of the property. The application was refused as a collateral attack on previous findings in committal proceedings, concerning one of the parties in the main proceedings, that had arisen in the course of the main proceedings; the claimant having been a witness in the committal proceedings. The claimant appealed. **Held**, on the facts of the case the appeal was allowed. The application did not amount to a collateral attack on the findings in the contempt proceedings. The claimant had not been a party to the contempt proceedings, and had not had the opportunity to address the court on its conclusions in those proceedings. Furthermore, the issue in the contempt proceedings was the alleged contempt of one of the parties not the ownership of the property in question, and the judge's findings in those proceedings, regarding ownership, were necessarily superficial given the nature of the evidence before him. The claimant had, in the circumstances, not been provided with a proper opportunity to establish ownership of the property. In terms of principle, the Court of Appeal rejected the submission that the doctrine of abuse of process by way of collateral attack only applied to a litigant who was a party to the proceedings said to be subject to the collateral attack or a privy of the party. A non-party, such as a witness to the proceedings said to be subject to collateral attack, was within the ambit of the doctrine. This was clear from the fourth of Morritt VC's statements of principle in ***Secretary of State for Trade and Industry v Bairstow*** (2004). As he put it,

"If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

HHJ Mackie QC's analysis of Morritt VC's statement in ***Great Wealth Telecom Ltd v Simtel Communications Ltd*** (2007) was accordingly not correct. Guidance for assessing whether the principle articulated by Morritt VC was met could be derived from ***Re Norris*** (2001) viz., it would be less likely for later proceedings brought by a non-party to earlier proceedings to be an abuse of process where: (i) there is a substantive distinction between the first set of proceedings to which the individual concerned was a non-party and the later set of proceedings; (ii) the aim of the first set of proceedings differed in nature from the aim of the later proceedings i.e., in the present case the first proceedings were concerned with establishing whether there was a contempt of court, whereas the latter proceedings were concerned with establishing the non-party to the first proceedings' beneficial ownership of property; (iii) the first set of proceedings, due to their procedure, did not permit of resolution of the issue which arose in the latter proceedings, i.e., in the present case there was no power under CPR Pt 81 to determine the dispute concerning beneficial ownership of the property within the contempt proceedings; (iv) the initial proceedings were contempt proceedings as they are self-contained and do not provide a proper forum for the resolution of substantive disputes through which non-parties appearing as witnesses could properly put their case concerning any such substantive dispute; (v) the later set of proceedings were the proper forum to contest the substantive issue the non-party to the first set of proceedings wished to contest; (vi) the later proceedings are the proper proceedings, as here due to the nature of legal issue under the Charging Orders Act 1979, ss.1(1) and 1(2), for the issue in question to be determined; (vii) the non-party as a mere witness to the first proceedings had no right to representation, no control over and no right of appeal at those proceedings; (viii) the non-party's interest or interests in the first set of proceedings was or were not aligned with that of the party for whom they appeared as a witness; and (ix) finally, care should also be taken in assessing whether the non-party's claim in the second proceedings was properly founded i.e., it had a proper evidential base. In making that assessment the court should consider, objectively, whether the non-party was entitled to an opportunity to vindicate the right they sought to pursue in the latter proceedings. ***Re Norris*** [2001] 1 W.L.R. 1388, HL, ***Secretary of State for Trade and Industry v Bairstow*** [2004] Ch 1, CA, ***Great Wealth Telecom Ltd v Simtel Communications Ltd*** [2007] EWHC 95 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.81.28.1.)

- **Wall v The Royal Bank of Scotland Plc** [2016] EWHC 2460 (Comm), 7 October 2016, (Andrew Backer QC sitting as a judge of the High Court)

Third party funding – court's power to require disclosure of information concerning the funder

Senior Courts Act 1981, s.51, European Convention on Human Rights, article 8, CPR r.25.14. Claims were brought against the defendant in the sum of £700 million in respect of alleged interest rate swap mis-selling. The defendants intended to apply for an order for security for costs under CPR r.25.14, believing that the claim was being funded by third party litigation funders. In order to pursue that application, the defendants sought an order requiring the claimant to provide it with the name and address of any such third party litigation funder and confirm whether any such funder fell within the ambit of CPR r.25.14(2)(b). **Held**, application granted. It was inherent to the power to make an award for security for costs that the court could order disclosure of information identifying a third party funder. As the judge put it at para.23, "*Inherent in the power to grant the remedy is the power to make ancillary orders to make it effective. To order Mr Wall to identify to RBS the party or parties against whom any CPR 25.14 application will lie, if made, is to do no more than to make such an ancillary order.*" The position was summarised as follows (para.26):

> *"i) Where there is good reason to believe that a claimant has funding falling within CPR 25.14(2)(b), the court thereby has power to grant a remedy by way of security for costs against the funder(s) in question.*
> *ii) For an application to be made for the court to exercise that power, it is necessary to identify the funder(s) in question against whom any application will be made.*
> *iii) Where the defendant does not know that identity, but the claimant does, ordering the claimant to reveal it to the defendant is doing no more than making an order that is necessary to make effective the primary power (to grant a security for costs remedy under CPR 25.14).*
> *iv) The court therefore has the power to grant the present application."*

In terms of ECHR, article 8, assuming it was engaged, the defendant's procedural right to seek costs against a non-party were sufficient to engage the article 8(2) exception where such a party had provided funding for reward. In any event, it was difficult to see how article 8 ECHR could be engaged as there could be no expectation of privacy concerning the identity of the third party funder due to the operation of Senior Courts Act 1981, s.51. ***Bekhor (A J) & Co Ltd v Bilton*** [1981] Q.B. 923, CA, ***Abraham v Thompson*** [1997] 4 ALL E.R. 362, CA, ***Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd*** [2003] EWHC 1381 (Comm), unrep., Comm, ***Reeves v Sprecher*** [2007] EWHC 3226 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.25.14.6.)

- **Croke v Secretary of State for Communities and Local Government** [2016] EWHC 2484 (Admin), 11 October 2016, unrep. (HHJ Alice Robinson sitting as a deputy judge of the High Court)

Issue of claim – time limit where unable to enter court building – limitation

CPR r.7.2, Town and Country Planning Act 1990, ss.288, 289. An application under s.288 of the 1990 Act was issued on 29 March 2016. It was however apparent that limitation had expired on 23 March 2016. The claim was struck out on the papers. The claimant issued an application to renew. The question at the oral hearing was whether the court had jurisdiction to entertain the claim given the prior expiry of the limitation period. The claimant argued that an attempt to issue the claim on the last day of the limitation period was frustrated as a member of the court's security team had refused him entry into the court building at 4.25 pm. **Held**, the court had no jurisdiction to entertain the claim which was time-barred. While there were authorities that dealt with the issue where a statutory time-limit ran out on a date on which the court was closed, there were no authorities on the present point viz., where a claim could not be issued as the claimant was unable to enter an open court building as entry was refused. Addressing the question by reference to the need to secure legal certainty and consistency of approach per ***Pritam Kaur v S Russell & Sons Ltd*** (1973) the proper approach was that which required a litigant to ensure that they were in a position to attend the court office in good time to issue, so as not to be "*thwarted by unexpected problems*". This was particularly the case where a claim was subject to strict time limits. There was no discretion to extend time (absent statutory provision or provision in the CPR, of which there was none in this case to permit an extension). ***Pritam Kaur v S Russell & Sons Ltd*** [1973] Q.B. 336, CA, ***Aadan v Brent London Borough Council*** (2000) 32 H.L.R. 848, CA, ***Van Aken v Camden London Borough Council*** [2003] 1 W.L.R. 684, CA, ***Moulai v Deputy Public Prosecutor in Creteil, France*** [2009] 1 W.L.R. 276, HL, ***Kane v Spain*** [2012] 1 W.L.R. 375, Admin, ***Calverton Parish Council v Nottingham City Council*** [2015] EWHC 503 (Admin); [2015] P.T.S.R. 1130, Admin, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.7.2.1.)

Practice Updates

STATUTORY INSTRUMENTS

- **THE INSOLVENCY (AMENDMENT) (NO.2) RULES 2016** (SI 2016/903). In force from **3 October 2016**, subject to transitional provisions.

Amends the Insolvency Rules 1986, r.7.47 to provide for new routes of appeal for corporate insolvency proceedings. It provides for appeals: from district judges sitting in the County Court to lie to either a High Court judge sitting in a Chancery District Registry or to a Registrar in Bankruptcy (as determined by a new Sch.2D to the 1986 Rules, inserted by r.5 and the Schedule to these Rules), with the appropriate judge depending on the venue where the decision was made; from other judges sitting at first instance to High Court judges; and from High Court judges to lie to the Court of Appeal. Transitional provisions provide for the continuance of the pre-3 October 2016 routes of appeal to those proceedings where notice of appeal or an application for permission to appeal was filed with the court prior to that date.

- **THE CIVIL COURTS (AMENDMENT) ORDER 2016** (SI 2016/974). In force from **31 October 2016**.

Amends the Civil Courts Order 2014 (SI 2014/819) in order to remove references to County Court hearing centres that have been closed (Accrington; Conway and Colwyn; Buxton; Altrincham; Morpeth and Berwick; Tameside), to High Court District Registries that have now closed (Brecon; Bridgend; King's Lynn; Macclesfield; Rhyl; Warrington), to create two new District Registries (Port Talbot; Prestatyn); and correct a typographical error relating to the spelling of Bury St. Edmunds.

PRACTICE DIRECTIONS

- **CPR PRACTICE DIRECTION – 86th Update**, in force from **3 October 2016**, except for the amendments to Practice Direction 8A, which came into force on the date The Telecommunications Restriction Orders (Custodial Institutions) (England and Wales) Regulations 2016 came into force (**3 August 2016**), and to Practice Direction 51O, which came into force on **29 September 2016**. Transitional provisions apply to the amendments to Practice Direction 52C, such that the amending provisions only apply where an appellant's notice is issued or permission appeal is granted by the Court of Appeal on or after 3 October 2016; the unamended provisions continue to apply to those matters where the appellant's notice was issued or permission to appeal was granted by the Court of Appeal prior to 3 October 2016.

The update makes the following revisions:

- **PD2C (Starting proceedings in the County Court)**, variously amends para. 3.3(1) and the table to the Schedule in respect of where proceedings may be started or commenced;
- **PD3C (Civil Restraint Orders)**, consequential amendment following revision to Pt 52;
- **PD3E (Costs Management)**, substitution of revised Precedent H in its Annex A;
- **PD5B (Communication and filing of documents by email)**, amends para.1.2(a) to make reference to proceedings issued or transferred to various courts forming the Rolls Building jurisdictions in substitution of reference to "claims which use the CE-File electronic court file";
- **PD8A (Alternative Procedure for Claims)**, inserts a new para.23.2A concerning non-disclosure orders under regulation of the Telecommunications Restriction Orders (Custodial Institutions) (England and Wales) Regulations 2016 and amends reference to reg.10 of the 2016 Regulations in para.23.4 to reg.6 in para.23.5;
- **PD26 (Case management – preliminary stage, allocation and re-allocation)**, amended to omit reference to Hammersmith in para.9.3 and inserts a new para.10.4 which details the County Court hearings centres for the purposes of CPR r.26.2A(5A)(c);
- **PD45 (Fixed costs)**, omits reference to "West London" in para.2.6;
- **PD47 (Procedure for detailed assessment of costs and default provisions)**, omits reference to "West London" in para.4.2(1) and substitutes reference to 2000 with reference to 2016 in para.20.1;
- **PD51I (County Court at Central London multi-track pilot scheme)**, omits the PD;
- **PD51L (New bill of costs pilot scheme)**, amends the pilot scheme, with the intention of introducing a mandatory bill of costs applicable to work carried out after 1 October 2017, substitutes a new Annex AB precedent bill of costs;

- **PD51N (Shorter and flexible trials pilot schemes)**, extends the pilot for 12 months to 20 September 2018, makes various amendments to allow a Master to deal with matters in the Chancery Division of the High Court, inserts a new para.2.15A requiring consideration of amendment to any statements of case where a claim is transferred into the Shorter Trials Scheme;
- **PD51O (Electronic Working pilot scheme)**, extends the pilot for 12 months to 16 November 2017, makes various amendments concerning the operation of the scheme;
- **PD52A (Appeals: General provision)**, various amendments to substitute new provisions to reflect changes to the routes of appeal and to cross-references to the post-October 2016 Pt.52. Substitutes new para.3.1, amends para.3.4 to omit references to different types of Pt 7 and Pt 8 claimants and reference to final, interim, other and specialist to reflect abolition of differential approach to multi-track and non-multi-track and final and interim judgments on appeal, and makes other amendments to definitions, substitutes a new para.3.5 to include new destination of appeals tables, omits paras 3.6-3.8;
- **PD52B (Appeals in the County Court and High Court)**, amendments to reflect the new cross-references to the post-October 2016 Pt 52 in para.4.2(d) and para.7.1 and the omission of reference to a number of appeal centres from Table A;
- **PD52C (Appeals to the Court of Appeal)**, makes various amendments to reflect the new amendments to cross-references to the post-October 2016 Pt 52, substitutes new paras 14 to 16 concerning the documents for use on an application for permission to appeal, the determination of applications for permission to appeal, and permission hearings, substitutes a new Listing window notification timetable and a new Steps to be taken once hearing date fixed timetable in para.21, substitutes a new para.27 concerning appeal bundles, setting out provision for core bundles and supplementary bundles, service, respondent's notice, amongst other things, on permission to appeal applications and on appeals, substitutes a new para.31 concerning skeleton arguments.
- **PD52D (Statutory appeals and appeals subject to special provision)**, numerous amendments made to cross-references to the post-October 2016 CPR Pt 52.

(See ***Civil Procedure 2016 4th Supplement*** (Winter 2016).)

PRACTICE GUIDANCE

PRACTICE NOTE – POSSESSION CLAIMS AGAINST TRESPASSERS

On 30 September 2016 the Senior Master and Chief Master issued a joint Practice Note concerning the proper approach for practitioners to take to claims for possession against trespassers. The note stresses that such claims must, in the majority of cases, be brought in the County Court. It outlines the approach in cases of real urgency where there is "a substantial risk of public disturbance and/or serious risk of harm to persons"; such claims may be brought in the Queen's Bench or Chancery Division of the High Court in London. Guidance is given as to the proper approach to be taken where such claims are to be issued. The note is set out in full below.

PRACTICE NOTE – CHANCERY DIVISION AND QUEEN'S BENCH DIVISION OF THE HIGH COURT IN LONDON

POSSESSION CLAIMS AGAINST TRESPASSERS

1. *This note is intended to provide guidance for practitioners about the circumstances in which the High Court in London may be willing to deal with claims against trespassers. In the vast majority of cases the claim must be brought in the County Court but a small number of exceptional cases justify issue in the High Court.*
2. *CPR 55.3(2) provides that a possession claim may be issued in the High Court if the claimant files with the claim a certificate stating the reasons for bringing the claim in the High Court and PD55A refers to circumstances which may justify starting the claim in the High Court. The certificate must be signed with a statement of truth.*
3. *Claims for possession against trespassers may be issued either in the Queen's Bench or the Chancery Division of the High Court. PD55A para.1.6 has no relevance to claims against trespassers. (The land need not be subject to a charge to enable the claim to be issued in the Chancery Division.)*
4. *PD55A para.1.3(3) provides that one of the circumstances which may, in an appropriate case, justify starting the claim in the High Court is where "the claim is against trespassers and there is a substantial risk of public disturbance or of serious harm to persons or property which properly require immediate attention".*
5. *Unless there is real urgency (a need for immediate attention), the High Court will rarely be the suitable venue.*

6. *Claims involving a substantial risk of public disturbance and/or serious risk of harm to persons, particularly where the disturbance may be widespread, will often be suitable for the High Court. Such cases may also involve a serious risk of harm to property.*
7. *The class of cases involving a serious risk to property is likely to be wide with only a few such cases warranting issue in the High Court. A substantial risk of harm to property may be linked to a substantial risk to persons.*
8. *Harm to property need not be long-lasting or permanent. An example of such a case is where there has been substantial tipping of waste material on commercial property. Further tipping may be likely and urgent steps may be required to prevent further harm to the property. Waste material may contain substances which are dangerous and pose a hazard to anyone gaining access to the site.*
9. *In a case of real urgency, where there is a need to manage the risk of public disturbance or further substantial risk of harm to persons or land, the court will consider fixing a hearing of the claim very soon after issue (occasionally on the same day as issue) and giving permission for short service of the claim. A case may be made for the period under CPR 55.5(2)(b) to be shortened where there is a real risk of further harm to property of persons if the period specified in the rule remains.*
10. *In the Chancery Division, in cases of urgency, an applicant should in the first instance speak to the Chief Master, if available, or otherwise to any Master. The normal allocation of cases by rota will not apply. The application should be brought to the attention of a Master before it is issued.*
11. *In the Queen's Bench Division, the issued application should in the first instance be put before the Master dealing with the Urgent Applications List.*
12. *In both Divisions, the Master will consider the certificate and the witness statement and decide whether the claim should be (or have been) issued in the High Court and whether short service is appropriate. An order for short service will always be subject to a provision that the Defendants may apply to set it aside. If the Master agrees to the claim being listed urgently a date will be fixed there and then.*

Chief Master and Senior Master

30 September 2016

PRACTICE NOTE – PD51O PARA.3.4(2)

On 12 October 2016 Mr Justice Mann, as acting Chancellor of the High Court, Mr Justice Blair and Mr Justice Coulson, as judges in charge of the Commercial Court and Technology and Construction Court respectively, issued a Practice Note clarifying the operation of CPR PD51O, para.3.4(2). It does so in order to clarify which documents may no longer be submitted via email but, unless submitted to the court on paper, must be provided via the Electronic Working system. The note is set out in full below.

PRACTICE NOTE – PD51O PARA.3.4(2)

"*This Practice Note provides clarification as to the documents which will no longer be accepted as email attachments but which must be submitted via Electronic Working (unless submitted on paper). It operates while that Direction is in the form which came into force on 3 October 2016.*

The word "submissions" should be taken to mean all those documents which are required by the rules or any practice direction to be filed on the court file. It does not mean normal day to day communications with the court such as those sending in draft orders or dealing with case management issues.

Nor (for the avoidance of doubt) does it mean documents such as skeleton arguments and chronologies which are submitted to any court for the determination of any hearing or paper application unless the court has directed that those documents be filed. Where any such document has been directed to be filed the parties must do so but may also (by way of exception to the Practice Direction) submit them by email to the listing officer or the judge's clerk in question.

The court may direct that any document which is not required to be filed should in fact be filed, in which case it becomes a "submission" for the purposes of the Practice Direction.

The expression "trial judge" shall include any judge, Master or Registrar who is determining any matter at an oral hearing or on paper.

Practice Note approved by the Acting Chancellor, Mr Justice Mann, in concurrence with the Judge in Charge of the Commercial Court, Mr Justice Blair, and the Judge in Charge of the Technology and Construction Court, Mr Justice Coulson, on this day, 12 October 2016"

PRACTICE GUIDANCE – SEALING TOMLIN ORDERS

On 23 September 2016 new guidance was issued as part of the Chancery Modernisation process by Her Majesty's Courts and Tribunals Service concerning the process for sealing Tomlin Orders. The guidance was issued via the website of the Judiciary of England and Wales and took effect on **3 October 2016**. The Guidance is reproduced below.

HM Courts &
Tribunals Service

IMPORTANT NOTE

Sealing of Tomlin Orders

*From **3rd October 2016** a Court Associate of the RCJ, Rolls Building will approve and seal Tomlin Orders if:-*

- *The Order is headed "Tomlin Order"*
- *The Order concerns only a claim for money (i.e. debt or damages, including any interest and costs)*
- *No other relief (e.g. injunction) has been sought*
- *The request for sealing includes a signed solicitors' statement with the following wording:*

  "We certify that the only relief sought in this claim/counterclaim is the payment of money including any interest and costs, and that no ancillary relief has been sought at any stage".
- *The proceedings are stayed without any time limit (not discontinued or dismissed).*
- *None of the parties are acting in person, or are protected parties.*
- *The Order includes permission to apply.*
- *The Order refers to an attached schedule or to a dated schedule/agreement (which may be confidential) which is held in a specified place.*

  (Note: if the Order refers to an attached confidential schedule it will be returned; no confidential schedules will be accepted by the court)

If the Order does not meet these requirements it will be returned for correction and re-submission

This is the correct form of wording for the Tomlin Order

. . . "AND the parties having agreed to the terms set out in [the attached schedule][a [confidential] schedule/agreement dated........, copies of which are held by the parties' solicitors/the solicitors for the (party)] [and to there being no order for costs]

IT IS BY CONSENT ORDERED that

(1) all further proceedings in this claim be stayed except for the purpose of carrying the terms of the agreement into effect

AND for that purpose the parties have permission to apply [without the need to issue fresh proceedings].

(2) [any provision in respect of costs] (unless in preamble)"

A Court Associate may also approve & seal the following orders:-

1. *Order for an oral examination if the request is not for a Judge to conduct the examination*
2. *Order for dismissal by consent and if costs are not involved*
3. *Order for payment out of money by consent which has been paid into Court*
4. *Order for Solicitors ceasing to act if costs are not involved*

Note: *the Orders mentioned above will be marked:*

*"**Entered and sealed by a Court Officer under CPR rule 40.6(3)**"*

In Detail

GUIDANCE ON VALIDATION OF WARRANT OF POSSESSION WHERE A LANDLORD WHO SEEKS TO ENFORCE HIS RIGHT TO POSSESSION BECAUSE OF AN ALLEGED BREACH OF THE TERMS OF A SUSPENDED POSSESSION ORDER HAS NOT COMPLIED WITH CPR r.83.2 – *CARDIFF CITY COUNCIL v LEE (FLOWERS)* [2016] EWCA Civ 1034

Practice and procedure concerning possession proceedings has recently come under scrutiny from a number of different directions, see for instance ***Senior Master's Practice Note – Transfers for Enforcement to the High Court***, dated 14 December 2015 and ***Senior Master's Practice Note – Applications for Transfer for Enforcement of Possession Orders to the High Court***, dated 21 March 2016 (***Civil Procedure News 04/2016***) and the Briggs' *Civil Courts Structure Review* (Final, July 2016), Ch.10.

In ***Cardiff City Council v Lee (Flowers)*** [2016] EWCA Civ 1034, the Court of Appeal (Arden and Briggs LJJ) examined a further issue concerning enforcement of warrant of possession. In so doing the court provided guidance on the proper approach to be taken where a landlord seeking to enforce a right to possession where there has been an alleged breach of the terms of a suspended possession order has not complied with the procedural requirements set out in CPR r.83.2 (see ***Civil Procedure 2016*** Vol.1 para.83.2.1 and following). This provision, as noted by Arden LJ at para.3 of her judgment, with which Briggs LJ agreed, was to provide a degree of protection to tenants where a landlord seeks possession on the basis of a breach of a suspended warrant for possession. The provision requires judicial scrutiny of the landlord's application and its claim that the terms of the suspension have been breached.

The Facts

The facts were as follows. In January 2009 the appellant was granted a secure tenancy (Housing Act 1985, s.79). In March 2013 a claim for possession was made on the grounds of breach of tenancy, amongst other things. In September 2013, an order for possession was made, suspended for two years. The suspension was granted on terms that the appellant comply with the terms of the tenancy agreement. Following a dispute between the appellant and a neighbour during 2015, the landlord warned the former that it intended to seek a warrant for possession. In August 2015 the respondent filed a N325 form (request for a warrant of possession of land). The warrant was issued on 14 August 2015. On 25 August 2015 notice was served to the appellant of repossession, which was to take place on 9 September 2015. On 3 September the appellant applied for a stay of the warrant. That application was subsequently dismissed on the basis that there had been a breach of tenancy and the warrant had been issued pursuant to CPR r.83.26. An appeal from that order was dismissed in January 2016.

The Appeal to the Court of Appeal

On appeal to the Court of Appeal it was common ground that the application ought properly to have been made under CPR r.83.2 and not r.83.26. It was noted that in future such applications in Cardiff, to apply for enforcement of possession where there was a breach of a suspended possession order, would be issued under r.83.2. The same approach should be adopted generally. Arden LJ noted in **obiter** that the approach taken by the Circuit Judge on the first appeal as to why this type of application came under r.83.2 and not r.83.26 was correct. The Circuit Judge's reasoning was noted, at para.7, as follows:

> *"The judge considered that CPR 83.26 was directed, as far as landlord and tenant cases were concerned, to simple situations where the court had made an order for possession and the tenant had not complied with the order and had remained in possession after the date for possession and has refused to leave. CPR 83.2 applied to particular types of warrants of possession (see 83.2(1) and (2)). The particular types of warrant of possession to which it applies are described in CPR 83.2(3) and they include in paragraph (e) 'under the judgment or order, any person is entitled to a remedy subject to the fulfilment of any condition, and it is alleged that the condition has been fulfilled'.'*

Following the Court of Appeal in ***St Brice v Southwark LBC*** [2001] EWCA Civ 1138; [2002] 1 W.L.R. 1537, which established that the issue for a warrant of possession was an administrative, and not a judicial, act, it was clear that the determination of a tenant's rights took place at the hearing where a suspended possession order was made (Arden LJ at paras 3 and 10). As such the present application was thus one that fell within CPR r.83.2(3)(e), as the remedy, possession, was subject to fulfilment of a condition viz., non-compliance with the terms of the suspension and it was alleged that there had been non-compliance.

In this case it was argued that the respondent had failed to comply with the procedural requirements of CPR r.83.2(3) as it had failed to apply for permission to issue the warrant of possession, as it had used Form N325. This, it was argued, was a procedural error that the court could not cure under CPR r.3.10 or waive under its general case management power contained in CPR r.3.1(2)(m) (see ***Vinos v Marks and Spencer PLC*** [2000] 3 All E.R. 784, ***Steele v Mooney*** [2005] EWCA Civ 96; [2005] 1 W.L.R. 2819, and ***Hashtroodi v Hancock*** [2004] EWCA Civ 652; [2004] 1 W.L.R. 3206).

Decision and Discussion

The appeal was dismissed. CPR r.83.2 contained an important safeguard for all tenants. It was particularly important however where a landlord may be unscrupulous and may seek to use eviction as something other than a last resort, and may wish to seek possession without judicial scrutiny of any alleged breach of a suspended order. The rule was clear in its intent, despite its poor drafting (which was noted as being "*opaque*" by Arden LJ at para.23): it required landlords to establish satisfaction of the condition upon which their right to possession rested before any eviction process could take place.

However, the failure to comply with the requirement to obtain permission before applying for a warrant of possession was a procedural error. CPR r.3.10 provides that errors of procedure do not invalidate steps taken in error unless so ordered by the court. The warrant granted was valid, albeit voidable. Further, it provides that the court may cure the error. In this case it did so through hearing the appellant's application to discharge the warrant. While this was not an application to cure the error *per se* the court would look to the substance and not the form of the application in considering whether the error had been cured.

In considering whether CPR r.83.2 excluded reliance on the power under CPR r.3.10 Arden LJ noted that the proper approach to "error of procedure" was set out at paras 22–24 of ***Steele v Mooney*** (2005): (i) the term was not to be given a narrow meaning, but a broad common sense one; (ii) it gave a discretion that was to be exercised in accordance with the overriding objective (**NB**: this would now require it to be exercised in accordance with the post-April 2013 overriding objective); and (iii) ***Vinos v Marks and Spencer PLC*** (2000) established that it could not be used to achieve a result prohibited by another rule.

In the present case while the respondent used the wrong form of application by using Form N325, it was one that was "clearly connected" with the procedure under CPR r.83.2 albeit used in error for it. It was within the broad, common sense meaning of error of procedure. Secondly, the appellant's interpretation would simply lead to extra expense and delay if CPR r.3.10 could not be relied on. This was contrary to the overriding objective. Thirdly, the present situation was one where an application had been made by mistake. It was thus not one that fell within the ambit of ***Vinos*** per Dyson LJ at para.27 in ***Steele***. Furthermore, that CPR r.83.2 states that an application "must" be made did not disapply CPR r.3.10: imperative language does not exclude the possibility of error or the power to cure error.

CPR r.3.10 was not excluded by CPR r.83.2. The defect could thus be cured by r.3.10, where such an approach was justified on the facts of the case.

Comment

The decision makes clear the application of CPR r.3.10 to procedural error in respect of applications under CPR r.83.2. In this it took a different approach from that of the Court of Appeal to the mandatory requirements that were previously contained in CCR Ord.26 r.5, the breach of which had been held to be an abuse of process and a nullity rather than a procedural error capable of cure: see ***Hammersmith & Fulham London Borough Council v Hill*** [1994] E.G.L.R. 51 and ***Hackney London Borough Council v Hill*** (1996) 28 H.L.R. 219 (as noted in ***The Supreme Court Practice 1999*** Vol.1 at para.C26/5/1). It did so however because the issue before the court focused not on whether the error amounted to a procedural irregularity or a nullity; that it was an irregularity was assumed. The question was what was the nature of the irregularity i.e., was it one that could be cured under CPR r.3.10 or was it one, applying ***Vinos v Marks and Spencer PLC*** (2000), that could not be cured by that provision. It may well be the case therefore that the question whether the error was, as in the pre-CPR decisions a nullity or not, remains to be determined. The second point that can be made is that this issue may also return to the Court of Appeal in respect of the question that was explicitly assumed by the parties: that the proper procedure for this type of application was that set out in CPR r.83.2 and not that in r.83.26. It is perhaps to be doubted whether, given the reasoning of the Circuit Judge and Arden LJ's **obiter** comments on the point, such an appeal if made would succeed. At the present time however what is clear is that applications to enforce a right of possession on the basis of breach of terms of a suspended possession order must be made pursuant to the mandatory provisions of CPR r.83.2, and it might be expected to be made on an *ex parte* basis pursuant to CPR r.83.2(5), and that failure to do so is a procedural irregularity, one that – depending on the circumstances – renders any enforcement order made voidable, and is one capable of cure under CPR r.3.10.

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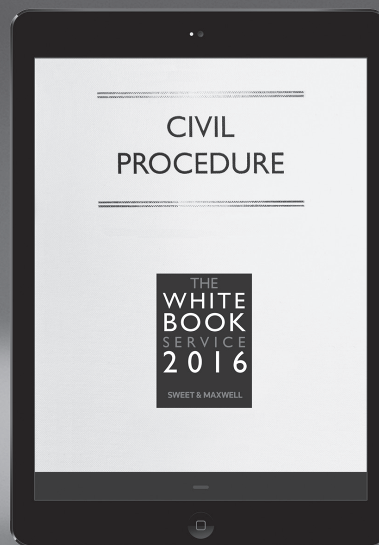

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Published by Sweet & Maxwell Ltd, 160 Blackfriars Road, Southwark, London SE1 8EZ
ISSN 0958-9821
© Thomson Reuters (Professional) UK Limited 2016
All rights reserved
Typeset by Matthew Marley
Printed by Hobbs The Printers Ltd, Totton, Hampshire.