CIVIL PROCEDURE NEWS

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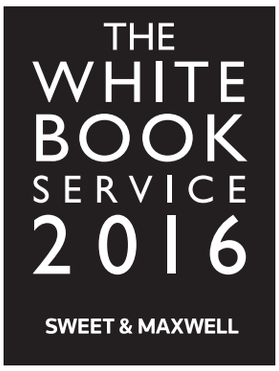

In Brief

Cases

Darby Properties Ltd v Lloyds Bank Plc [2016] EWHC 2494 (Ch), 22 September 2016, unrep. (Master Matthews)

Expert evidence – factual evidence given by expert – not subject to CPR Pt 35

CPR Pt 35. A claim was brought against a bank seeking damages for negligence and breach of contract. An issue arose as to the admissibility of expert evidence. In considering the question, Master Matthews noted, amongst other things, that: i) experts are not to make factual findings; and ii) that experts may not give their opinion of what they would have done in a hypothetical situation: ***JP Morgan v Springwell*** (2007) and ***Midland Bank Trust Company Ltd v Hetts Stubbs & Kemp*** (1979). He further noted, and applied the three stage test for determining the application of CPR r.35.1 set out in ***British Airways Plc v Spencer*** (2015) (as noted in ***Civil Procedure News*** Issue 9/2015). Master Matthews then went on to consider, and reject, a distinction drawn by the UKSC in respect of expert evidence given in Scotland in ***Kennedy v Cordia (Services) LLP*** (2016). In that case the UKSC distinguished between two types of evidence of fact that could be given by an expert: (i) evidence of fact that could be given by any witness, whether expert or not, about, for instance, what they observed, but which is given by an expert witness; (ii) evidence of fact that could only be given by an expert witness as a result of their expertise e.g., scientific observation evidence. The position in Scotland was that the first type of expert witness evidence was not subject to the rules governing admissibility of expert evidence, whereas the second type of evidence was. Master Matthews **concluded** that this distinction did not exist in English law, and that where an expert witness gave evidence of fact they did so on the same basis as a non-expert, lay, witness i.e., admissibility was not subject to the requirements of CPR r.35.1. This was the case because CPR Pt 35 only related to opinion evidence and not evidence of fact. That an expert gives evidence of fact does not transform that evidence into opinion evidence. ***British Airways Plc v Spencer*** [2015] EWHC 2477 (Ch); [2015] Pens. L.R. 519, ChD, ***JP Morgan v Springwell*** [2006] EWHC 2755 (Comm); [2007] 1 All E.R. (Comm) 549, Comm, ***Midland Bank Trust Company Ltd v Hetts Stubbs & Kemp*** [1979] Ch 384, ChD, ***Kennedy v Cordia (Services) LLP*** [2016] 1 W.L.R. 597, UKSC, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.35.4.1.)

Campbell v Campbell [2016] EWHC 2237 (Ch), 13 September 2016, unrep. (Chief Master Marsh)

Litigants-in-person – costs management

CPR rr.3.12-3.18, 46.5, PD3E, PD46. A dispute arose between two brothers who jointly owned interests in a jewellery business. The claimant was initially acting through solicitors, but in May 2016 commenced acting in person. He was represented by Counsel under the direct access scheme, and also received assistance from further Counsel who was not instructed under that scheme. He was also assisted by a solicitor qualified in Jersey practicing with a Jersey-based law firm. A question arose as to the application of the costs management rules to the claimant as a litigant-in-person (LiP). **Held**, a costs management order could be made where a party was a LiP. Furthermore, the costs budgeting provisions could be applied to a LiP. In this case it was appropriate to make such orders as the claim was for a significant sum (£10 million), was complex, and as the claimant was instructing Counsel through the direct access scheme it was necessary to secure control over the claimant's costs. In terms of the court's jurisdiction to make such orders Chief Master Marsh noted that CPR r.3.12(2), which sets out the purpose of costs management, does not suggest litigants-in-person (LiPs) are exempt from its provisions, nor does CPR r.3.15(2) or (3). Furthermore, the terms of CPR PD 3E, while in part drafted on the assumption that a solicitor will complete relevant costs budgeting documentation, did not suggest that there was any reason in principle why a LiP could not complete the documentation. CPR r.3.13 did however exempt LiPs from the obligation to file and serve a costs budget. This was because, in the majority of claims, a LiP's costs will not need to be managed i.e., because costs will be subject to the hourly rate: CPR r.46.5, PD46 para.3.4. There might however be claims where either a LiP may decide to file and serve a costs budget, or due to the nature of the claim e.g., where it was complex, there was representation via the direct access scheme and the costs were likely to be substantial, that the court might order a LiP to do so. This was such a case. Furthermore, in terms of recoverability of expenses incurred by a LiP from obtaining assistance, as here from Counsel not instructed under the direct access scheme and from a lawyer from another jurisdiction, they were recoverable under CPR r.46.5(3)(b), on the assumption that the provision of such legal assistance where the party acting as a LiP was lawful. ***Agassi v Robinson (Inspector of Taxes No.2)*** [2005] EWCA Civ 1507, unrep., CA, ***Campbell v Campbell*** [2016] EWHC 1828 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.3.13.4.)

■ **Ravenscroft v Canal & River Trust [2016] EWHC 2282 (Ch)**, 14 September 2016, unrep. (Chief Master Marsh)

McKenzie Friend – Reasonable Assistance – Right of Audience

Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 W.L.R. 1881. The claimant applied for a Mr Moore to act as his McKenzie Friend. Chief Master Marsh considered the application of the Practice Guidance in circumstances where the claimant was noted as being "largely illiterate", was emotionally involved with the claim to the extent that he could not deal with it "calmly", that he could not afford to instruct a lawyer, and that the proposed McKenzie Friend was willing to act gratis and was, furthermore experienced and knowledgeable. **Held**, while the Practice Guidance makes it clear that an individual has a right to be provided with reasonable assistance by a McKenzie Friend, it made it equally clear that a McKenzie Friend could only take conduct of litigation or exercise rights of audience with the permission of the court. While there was no reason to set aside the right to receive reasonable assistance, it would not be appropriate to grant the McKenzie Friend a right to conduct the litigation as there was a need to ensure that the claimant remained primarily responsible for communicating with the defendant. It was clear that reasonable assistance would benefit the claimant and the court, as would providing the McKenzie Friend with a grant of rights of audience to act as the claimant's advocate. The grant of the latter right, in addition to the provision of reasonable assistance, would lead to a more expeditious conclusion of the trial. (See ***Civil Procedure 2016*** Vol.2, s.13-22.)

■ **Pittville Ltd v Hunters & Frankau Ltd** [2016] EWHC 2683 (Ch), 27 October 2016, unrep. (Snowden J)

Relief from sanction – scope of need to secure compliance with court orders – need to consider the extent to which applicant for relief is able to comply with order

CPR rr.3.9 (1)(a) and (b), 25.13. A dispute arose between two cigar importers, MasterCigars and Hunters & Frankau Ltd. Proceedings were issued in 2004 by the former seeking a declaration that a consignment of cigars which they had imported were not counterfeit. The latter counterclaimed, asserting trademark infringement in respect of the cigars imported by MasterCigars. The claimant ultimately succeeded on both the claim and counterclaim. In 2010 MasterCigars issued further proceedings alleging that the defendant had, amongst other things, made false statements during the first set of proceedings, which had caused it damage. The defendant applied for security for costs. That application was granted; MasterCigars was ordered to provide security in the form of cash or a bank guarantee or, in the alternative, by way of providing a copy of an ATE insurance policy for the same sum. Following non-compliance with that order an unless order was obtained by the defendant; that order provided for security only by way of cash or bank guarantee. That order was not complied with and judgment was thereafter entered for the defendant in 2011. No appeals were made against any of these orders by MasterCigars. In 2014, Pittville Ltd, the assignee of MasterCigar's which had in the intervening period gone into liquidation, attempted to revive the second set of proceedings. It applied to be substituted as claimant and to vary the unless order to provide for a further three months to provide security. Relief from sanction was granted by the Deputy Master and the judgment that followed on from non-compliance with the unless order was set aside. In a subsequent judgment, the Deputy Master varied the unless order to once more provide for security to be given by way of ATE insurance policy. The defendant appealed from both orders. **Held**, appeal allowed and the order granting judgment was reinstated. The judge noted that case management decisions would not be interfered with lightly by an appeal court: ***Global Torch v Apex Global Management (No.2)*** (2014). In terms of the order to grant relief from sanction, the Deputy Master was right to view the failure to give security, and to still not have done so some four years after the original order was made, as a serious and significant default (***Denton*** stage one). He was plainly wrong however to hold that lack of funds was a good reason for non-compliance. (***Denton*** stage two) Assessing whether there was a good reason for non-compliance requires consideration of the reason(s) why the order was originally made. Here that meant consideration why security for costs was ordered, which was – self-evidently – that there was a reason to believe that the claimant would not be able to pay any costs orders. It was incoherent to see a lack of resources as both a reason to justify granting an order for security for costs and to then see lack of resources as a good reason for non-compliance with that very order. Furthermore, reasons that were taken account of in deciding whether to grant the order for security i.e., whether it would be unjust to dismiss a claim if security cannot be complied with due to lack of resources, cannot then be relied on as good reason for non-compliance. Finally, the Deputy Master also failed to apply the third stage of the ***Denton*** test. He did so by failing to consider CPR r.3.9(1)(a) and (b) properly. In terms of the former, it was plain that the failure to progress the litigation for more than three years could not be said to have met the criterion of ensuring it was conducted efficiently and at proportionate cost. In terms of the latter, consideration of compliance did not only refer to the need to move away from the previously lax approach to non-compliance generally. It also required the court to consider whether the applicant for relief was able to comply if relief was granted; this was a "weighty factor" in assessing this issue. In the present case there was nothing before the court to justify the conclusion that even now the security for costs order could be complied with. The only way in

which this factor could have been satisfied was if it was appropriate to vary the original order, as the Deputy Master later did, to permit security to be given by way of ATE policy. However, on the authorities there was no justification for adopting such an approach. Given that, there was no basis to conclude that the third stage of the ***Denton*** test was, or could be, satisfied properly. ***Lloyds Investment (Scandinavia) Ltd v Ager-Hanssen*** [2003] EWHC 1740 (Ch), unrep., ChD, ***Tibbles v SIG Plc*** [2012] 1 W.L.R. 2591, CA, ***Broughton v Kop Football (Cayman) Ltd*** [2012] EWCA Civ 1743, unrep., CA, ***Global Torch v Apex Global Management (No.2)*** [2014] 1 W.L.R. 4495, CA, ***Denton v TH White*** [2014] 1 W.L.R. 3296, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.3.9.1.)

- **R (on the application of) O'Connor v Crown Prosecution Service** [2016] EWHC 2792 (Admin), unrep. 4 November 2016, (Fulford LJ and Leggatt J)

Open justice – access to court building – power to exclude

Magistrates' Courts Act 1980, s.121(4), Courts Act 2003, ss.51(3), 55, European Convention on Human Rights, arts 6, 10; Criminal Procedure Rules (2014) Pt 6, CPR r.39.2. A number of individuals were barred from entering a court building in order to attend a hearing in a Magistrates' court to provide support, from the public gallery, for a defendant in proceedings before the court. They were barred from entering by the court security staff, a decision to bar them having been taken by a member of the court staff. The defendant applied for the individuals to be admitted. The Magistrates refused to grant the application. That decision was based on legal advice from the justice's clerk that whether to permit the individuals into the court building was a matter for the court manager not the court. The trial was however adjourned. That decision was subject to judicial review proceedings in which the court considered whether: it was lawful for Her Majesty's Court Service (HMCTS) staff to prohibit entry into the court building; whether it was lawful for the Magistrates to refuse to allow the individuals to attend the trial; and if it was unlawful to prohibit the individuals from attending the hearing that resulted in it not being a public hearing. **Held**, the decision to exclude by both HMCTS staff and the magistrates was unlawful. Such proceedings as took place at that time did not amount to valid proceedings. The principle of open justice is a fundamental principle of the common law; one aspect of which is that all courts are open to every member of the public, subject to the court's power to remove them from a hearing if their presence is injurious to the proper administration of justice (***Daubney v Cooper*** (1829)). It is also set out in Magistrates' Courts Act 1980, s.121(4). A member of the public's ability to enter a court building or attend a trial was "a necessary incident" of the right to open justice. HMCTS, contrary to its long-held policy, does not have the power of an occupier of premises to grant or withhold permission to enter a court building or make entry subject to conditions.

> "*Access to a court building for the purpose of attending a public hearing is a matter of legal right and does not require any express or implied permission from the occupier.*"

This is a longstanding, "ancient" common law right, albeit one qualified at common law and, in respect of criminal courts under Pt 6 of the CrimPR (and by analogy under CPR r.39.2) by the court's (not HMCTS's) power to restrict access in the interests of justice. A further power to exclude is provided under Courts Act 2003, ss.51(1) and 53. This power enables court security officers to exclude or remove individuals from court buildings. Such exclusion will be lawful where the conditions set out in the statutory provisions are met, and HMCTS may formulate policies to enable court security staff to exercise those powers when the statutory conditions are met. They can however be no parallel process by which HMCTS can require the exclusion etc. of members of the public lawfully. Exercise of the powers in the Courts Act 2003 do not require authorisation by the court, or reference to it. If an individual is seeking to attend a particular hearing and "there is a dispute or room for dispute about" their right to do so, then reference should be made to the court to determine the issue. This is an essential aspect of the court being able to control and maintain the integrity of its process. It ensures fairness, and ensures unnecessary cost and time are not wasted in the individual having to bring judicial review proceedings at a later time in order to challenge the exclusion. The present case as the "paradigm" example of when reference to the court ought to have been made before any decision was made. Furthermore, the right of the public to attend court hearings is an aspect of the principle of open justice i.e., of the right of parties to have their proceedings heard in public. It is a question of fact and degree whether a hearing is open to the public. Where members of the public are unlawfully excluded from a hearing the key issue is: "*whether the nature and extent of the exclusion are such as to deprive the hearing of its open and public character*". This question is not answered by simply "counting heads" i.e., looking at the number of individuals excluded. In the present case the exclusion of all the defendant's supporters meant that justice could not be seen to be done. ***Daubney v Cooper*** (1829) 10 B & C 237, Ct K.B., **Scott v Scott** [1913] A.C. 417, HL, ***McPherson v McPherson*** [1936] A.C. 177, PC (Canada), ***R v Denbigh Justices, ex p Williams*** [1974] Q.B. 759, QBD, ***R v Leicester City Justices*** [1991] 2 Q.B. 260, CA, ***Storer v British Gas plc*** [2000] 1 W.L.R. 1237, CA, ***R (Lumba) v Secretary of State for the Home Department*** [2011] UKSC 12; [2012] 1 A.C. 245, ***Al-Rawi v Security Service*** [2012] 1 A.C. 531, UKSC, ***R (Guardian News and Media Ltd) v Westminster Magistrates' Court*** [2013] Q.B. 618, CA, ***Laporte v Metropolitan Police Commissioner*** [2014] EWHC 3574 (QB); [2015] 3 All E.R. 438, QB, ***Richmond Newspapers Inc v Virginia*** 448 US 555 (1980), US Sup.Ct, ref'd to. (See ***Civil Procedure 2016*** Vol.1, para.39.2.1.)

Hopkinson v Hickton [2016] EWCA Civ 1057, 3 November 2016, unrep. (Patten and King LJJ)

Expert determination – test for apparent bias

The terms of a Tomlin Order provided for land to be subject to an independent valuation in order to ascertain the value of shares in a company. The valuation was to be carried out by a "suitably qualified independent valuer". A valuer was selected by the parties in accordance with an agreed procedure. The valuer thereafter valued the land. In his valuation report the valuer disclosed, for the first time, the fact that he was already familiar with the land in question because he had formally signed-off a previous valuation of it: he had not carried out that valuation, but simply conducted a "high level review" of it. He noted that there was nothing in his present report that conflicted with information disclosed in the process of carrying out the earlier valuation. A challenge arose to his appointment on the basis that he was not an independent valuer as required by the terms of the Tomlin Order. It was argued that his having been involved with the earlier valuation of the land meant that there was a perception that he would seek to reach a valuation that was in line with that earlier one. **Held**, the valuer was an independent valuer. The Court of Appeal gave the following guidance: the test for apparent bias as set out in ***Porter v Magill*** (2001) and ***Helow v Home Secretary*** (2008) was the appropriate test to apply in determining whether the valuer was an independent valuer at the time of appointment. The question to be asked therefore was whether a fair-minded and informed observer would conclude that there was a real possibility that the valuer was biased. As Patten LJ went on to say at para.28,

> *"Consistently with that, an expert valuer does not satisfy the requirement that he be independent if he has a connection with one of the parties, an interest in the outcome of the valuation or some other connection with the property which, objectively viewed, creates a real risk that he may act partially in carrying out the valuation. His independence is negated by the relevant factor regardless of whether in fact it would cause him to act partially. The stipulation that the expert be independent is intended to remove from the parties the risk of a lack of impartiality and professional objectivity."*

Evidence as to how the valuer actually conducted the valuation was not a relevant consideration in assessing the test per ***Locabail (UK) Ltd v Bayfield Properties Ltd*** (2000): how it was conducted could not be known by a reasonable observer at the time of appointment. Evidence as to what the valuer knew, in respect of the earlier valuation, at the time of appointment could be considered, however the weight to attach to it would be fact-dependent and care should be taken to consider the effect of unconscious bias arising as a consequence of what was known by the valuer. ***Locabail (UK) Ltd v Bayfield Properties Ltd*** [2000] Q.B. 451, CA, ***Re Medicaments and Related Classes of Goods (No.2)*** [2001] 1 W.L.R. 700, CA, ***Porter v Magill*** [2001] UKHL 67; [2002] 2 A.C. 357, HL, ***Helow v Home Secretary*** [2008] UKHL 62; [2008] 1 W.L.R. 2416, HL, ref'd to.

Bestfort Developments LLP v Ras Al Khaimah Investment Authority [2016] EWCA Civ 1099, 8 November 2016, unrep. (Black, Gloster, Briggs LJJ)

Security for costs – threshold test – objective justification where discrimination

European Convention on Human Rights, arts 6, 14, Civil Jurisdiction and Judgments Act 1982, ss.1(3), 25, CPR rr.25.12, 25.13. A second appeal from a refusal to grant security for costs against claimant companies that were incorporated and resident outside of England and Wales and outside the EU. The issue before the Court of Appeal was what was the "*correct evidential threshold for the grant of an order for security of costs under CPR r.23.13(2)(a) . . ." where the claimant is resident out of the jurisdiction but "not resident in a Brussels Contracting state, a State bound by the Lugano convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction Act 1982.*" **Held**, the approach to take to analysing the provisions concerning security for costs was that it should be simple and clear rather than technical and semantic. An applicant for an order for security for costs in respect of a claimant who was outside the jurisdiction and not resident in a Convention State had to show that there was a real risk that an order for costs could not be enforced against the claimant and that, in all the circumstances, such an order was just. Furthermore, such an application had to be supported by evidence sufficient to make out the existence of such a risk on objectively justified grounds. There was no need to demonstrate that there would be a substantial difficulty in enforcing the order. Orders for security for costs against claimants who are resident outside the jurisdiction and outside Convention States can give rise to discrimination contrary to article 14 of the European Convention on Human Rights, with the discrimination relating to access to the court as provided for by art.6 of the Convention: see ***Nasser v United Bank of Kuwait*** (2001). Such applications against such claimants are prima facie discriminatory and are discriminatory on grounds of residence: ***Nasser v United Bank of Kuwait*** (2001) not followed. The issue of discrimination does not however arise at the stage where the court is assessing whether the jurisdictional conditions for the making of an order for security for costs have been met (see CPR r.25.13(2)). The issue arises at the stage when the court is exercising its discretion concerning whether it is just to make such an order: CPR r.25.13(1)(a). For the discretion to be exercised in a just, and hence non-discriminatory manner, it must conclude that it is making the order is *"objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned"*.

Fitzgerald v Williams [1996] Q.B. 657, CA, ***Dumrul v Standard Chartered Bank*** [2010] EWHC 2625 (Comm), ***Nasser v United Bank of Kuwait*** [2001] EWCA Civ 556; [2002] 1 W.L.R. 1868, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1, para.25.13.6.)

- **Bird v Acorn Group Ltd [2016] EWCA Civ 1096**, 11 November 2016, unrep. (Arden, Underhill, Briggs LJJ and Master Gordon Saker, the Senior Costs Judge, sitting as an Assessor)

Disposal hearing – applicable fixed costs regime

CPR r.45.29E(4)(c), PD26 paras 12.2(1)(a), 12.4, Pre-Action Protocol for Low Value Personal Injury (Employer's Liability and Public Liability) Claims. A customer of a car garage was injured whilst on the premises in 2013. A claim was entered on the EL/PL portal thereafter. Absent a response from the defendant, the claim was withdrawn from the portal. Liability was then admitted. Following default judgment being entered due to the defendant failing to acknowledge service of the claim, the claim was listed for a disposal hearing (see CPR PD26 para.12.4). The claim settled. Costs were not agreed, and were provisionally assessed. The District Judge concluded that the applicable costs were those set out in Table 6D, part B of the PL Protocol as listing for a disposal hearing was a listing for trial as referred to in that Table. The Court of Appeal **held** that

> *"listing a case for a disposal hearing following judgment, pursuant to Part 26PD12, is listing for trial, for the purposes of triggering column 3 in Table 6D part B where a case which originated in the EL/PL Protocol settles after listing."*

The same reasoning applies where the claim originated in the RTA Protocol, in which case Table 6B and EL Protocol Table 6C. The court's reasoning was as follows: first, listing for disposal was the final stage of first instance proceedings. It made no difference that the disposal hearing might turn into a directions hearing. A full trial might also turn into a directions hearing, that fact did not mean that the hearing was not listed for trial; secondly, even if the disposal hearing was not contested, it was still a trial; thirdly, listing for a disposal provides the basis upon which a claimant or other party may serve evidence which can, and are often then, assessed by the judge at the disposal hearing. In other words, the first three points all show the hallmarks of a final merits-based determinative hearing or, more simply, a trial; fourthly, the court in ***Lamont v Burton*** (2007) assumed a disposal hearing was a trial per what was then CPR r.45.15. It could be assumed that when the Civil Procedure Rule Committee prepared the EL/PL Protocol it did so against that background and adopted that position; ***Forcelux Limited v Binnie*** (2009) distinguished. Further, while the three columns in Table 6D part B were intended to be sequential: i) this did not require claims to move through each column in sequence. It was perfectly permissible for a claim to move directly from col.1 to col.3 where there was a listing for disposal with no prior allocation to the fast track, hence missing out col.2 entirely; secondly, should that happen it was not possible for a claim to move back from col.3 to col.2 where a claim listed for a disposal hearing ultimately results in that disposal hearing turning into a directions hearing, with directions given including allocation. ***Lamont v Burton*** [2007] EWCA Civ 429; [2007] 1 W.L.R. 2814, CA, ***Forcelux Ltd v Binnie*** [2009] EWCA Civ 854; [2010] C.P. Rep. 7, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1, para.45.29A.1.)

Practice Updates

STATUTORY INSTRUMENTS

- **THE INSOLVENCY (ENGLAND AND WALES)** (SI 2016/1024). In force from **6 April 2017**.

Revokes the Insolvency Rules 1986 (SI 1986/1925) as from 6 April 2017, subject to transitional provisions contained within Sch.2 of the 2016 Rules. Give effect to various amendments to the Insolvency Act 1986 under: Enterprise and Regulatory Reform Act 2011; Deregulation Act 2015; and the Small Business, Enterprise and Employment Act 2015.

- **THE DISQUALIFIED DIRECTORS COMPENSATION ORDERS (FEES) (ENGLAND AND WALES) ORDER 2016** (SI 2016/1047). In force from **30 November 2016**.

Provides for the Secretary of State to be paid a fee for distributing to creditors amounts received in respect of: compensation orders made under Company Directors Disqualification Act 1986, s.15A(1)(c); and, compensation undertakings made under Company Directors Disqualification Act 1986, s.15A(2).

- **THE CIVIL COURTS (AMENDMENT No.2) ORDER 2016** (SI 2016/1068). In force from various dates.

Amends the Civil Courts Order 2014 (SI 2014/819) in order to remove references to district registries of the High Court, and their corresponding County Court hearing centres that close on dates specified in the Order: Halifax (28 November 2016); Tunbridge Wells (9 December 2016); Scunthorpe (13 January 2017); Hartlepool (30 January 2017).

Also removes reference from the 2014 order to Reigate County Court hearing centre as from 31 March 2017. The Amendment Order specifies two possible dates when the County Court hearing centres are to close. By art.1(b) of the Order it specifies that the omission of reference to County Court hearing centres occurs "on the date the Order comes into force for the purposes of each of the amendments in paragraphs (i) to (iv)" in art.1 i.e., the date on which the district registries are deleted from the 2014 Order. However, art.1(e) provides that the deletion of reference to the County Court hearing centres takes effect on 28 November 2016 i.e., prior to the deletion of all but the Halifax district registry: thus the Order deletes County Court hearing centres for Tunbridge Wells, Scunthorpe and Hartlepool prior to the deletion of their district registries. It may be presumed that the intention was to close both district registry and County Court hearing centre on the same date, however the drafting appears not to achieve that effect.

PRACTICE GUIDANCE

PRE-ACTION PROTOCOL FOR CONSTRUCTION AND ENGINEERING DISPUTES

On **14 November 2016**, the 2nd edition of the Pre-Action Protocol for Construction and Engineering Disputes came into force. This is not yet reflected by the Ministry of Justice Civil Procedure Rules website nor the Practice Direction Pre-Action Conduct, both of which continue to refer to the 1st edition (4 April 2014) of the Pre-Action Protocol. The 2nd edition, and reference to the date it came into force, can be found on the TECSA website (*http://www.tecsa.org.uk/pre-action-protocol-pap*). It is to be assumed that the Ministry of Justice website and Practice Direction will be updated in due course and that confirmation of approval, as provided for by para.1 of the Practice Direction on Pre-Action Conduct (PD-PAC), of the 2nd edition by the Master of the Rolls will be published in due course. The revised Protocol contains a number of significant departures from previously accepted practice concerning such Protocols:

- It permits parties, by mutual agreement, to disapply the Protocol (see para.2.2 of the 2nd edition of the Protocol);
- It deviates from the established position concerning the imposition of cost sanctions for breach of the Protocol. It replaces the established, and common position across the other Protocols and the PD-PAC, with the following guidance (para.4.1 of the 2nd edition of the Protocol):

  "It is likely to be only in exceptional circumstances, such as a flagrant or very significant disregard for the terms of this Protocol, that the Court will impose cost consequences on a party for non-compliance with this Protocol."

This revision puts the 2nd edition of the Protocol in apparent conflict with the position articulated in para.13 of the PD-PAC. While a conflict between guidance, as is the case for a Pre-action Protocol and a Practice Direction ordinarily would be resolved in favour of the latter given that a Practice Direction has the force of law, while a guidance simply sets out best practice, in this case it is to be assumed that no conflict arises and that the provisions of the 2nd edition of the Protocol will be effective. This would appear to be the case due to para.2 of the PD-PAC restricting the scope of the PD-PAC to those situations where no Pre-Action Protocol approved by the Master of the Rolls applies. Furthermore, paras 13 and 14 of the PD-PAC make clear that the court will expect compliance with either a Pre-Action Protocol or the PD-PAC; the former where an approved Protocol applies.

The 2nd edition of the Protocol also makes the following changes:

- To facilitate a more proportionate approach to the provision of information, parties are now only required to "*exchange sufficient information about the proposed proceedings broadly to allow the parties to understand each other's position and make informed decisions about settlement and how to proceed*" (para.3.1.1 of the 2nd edition of the Protocol);
- To secure greater consistency with the overriding objective, the Protocol's application has been extended to "modest value claims" and changes have been made to simplify and reduce the amount of information provided in letters of claim and responses (paras 5, 6 and 8 of the 2nd edition of the Protocol);
- A new Protocol Referee Procedure is introduced, which may be used if both parties agree (paras 7.1.5, 8.1, and 11 of the 2nd edition of the Protocol and the annexed Protocol Referee Procedure). The Protocol referee, if appointed, has jurisdiction to: make directions concerning future conduct of the Protocol process; and determine whether, and to what extent, there has been non-compliance with the Protocol.

CHANCERY GUIDE – AMENDMENTS

On **11 November 2016** the Chancery Guide was reissued in amended form (https://www.gov.uk/government/publications/chancery-guide). The following amendments were made:

- minor amendments to paras 1.9 and 1.11, which provide details concerning the application of the Financial List and the Guide itself;
- amendments to court contact details in Ch.2;
- amendments to Ch.6, in respect of the content of court files (para.6.2), to the guidance concerning communication with court and filing documents made in the light of changes effected by Practice Direction 510 (paras 6.20 – 6.31);
- amendments to specify that as from 1 April 2017 in respect of the Chancery Division of the High Court "*all claims will have to be issued on-line and all filing will have to be made using Electronic Filing.*" (para.6.30);
- guidance on how to issue a claim in the Financial List (para.8.8(ix));
- guidance on applying for a claim to be docketed generally (para.8.10), and in respect of issuing claims in the Shorter trials scheme (para.8.14);
- amendments to the guidance on issuing claims under CPR Pt 8 (paras 9.1 and 9.4);
- amendments concerning serving replies to statements of case (para.10.3) and in respect of service of claim forms on a defendant (para.11.2;
- amendments to the procedure governing applications to Masters (paras 15.30-15.33, including a new para.15.30.1.1, which provides that

  "Where an application has been listed for hearing and an additional application is made, the approval of the Master must be obtained if the additional application is to be heard at the same time as the first. This is a change in practice as it now applies to all applications, not just CMC or Directions hearings. In cases of urgency a party may seek approval for listing at an AWN, but generally approval will be sought from the Master internally by the Master's clerk."
- minor textual amendment to para.17.46 concerning expert evidence;
- a new para.22.5.1 concerning the need for penal notices to be served with orders where a party considers that enforcement by way of committal may be needed;
- amendments concerning the proper approach to Tomlin Orders (paras 22.11, 22.13. and 22.14);
- correction to the text of para.22.22 to add in missing text to the final sentence;
- inclusion of a new paras 22.23.1-3 concerning the change in routes of appeal, abolition of the distinction between interim and final orders for the purposes of appeal routes and detail of the route of appeal from Chancery Masters to puisne judges;
- amendments to Ch.24 to reflect the amendments to CPR Pt 52;
- amendments to para.28.5 concerning allocation of claims in the Shorter Trial scheme and amendments to the guidance, in para.28.7, concerning transfer of claims to the scheme;
- amendments to paras 29.22–29.23 concerning applications for orders under the Variation of Trusts Act 1958; and
- the introduction of a new para.29.65.1 requiring consent orders in respect of claims under the Inheritance (Provision for Family and Dependents) Act 1975 to be filed according to the procedure set out in Ch.22 of the Guide.

QUEEN'S BENCH GUIDE – AMENDMENT

On **3 October 2016**, an amendment to the guidance concerning Queen's Bench Masters' listing practice came into force. The amendment was made to ensure the Guide was consistent with the CPR following amendments to CPR PD2B, which came into force on the same date. The amendment to the Guide is in identical terms to the Senior Master's Practice Note, dated 18 July 2016. (See ***Civil Procedure 2016 4th Supplement*** (Winter 2016) Vol.1 para.2APN.1 and Vol.2 para.1B-0.) The text of the amendment to the Queen's Bench Guide and of the Practice Note are as follows:

1. *As a result of amendments to the relevant Practice Direction there will not be a Practice Master sitting in the Queen's Bench Division from 3 October 2016.*
2. *The Chambers List will be replaced by an Urgent Applications List which will be listed every day from 10.30am to 1.00pm and from 2.00pm to 4.30pm. The Room number and the name of the Master hearing each list will be on the Notice Board in the Queen's Bench Masters corridor.*

3. *The first 15 minutes of each list (morning and afternoon) will be the "Solicitors' Clerks' List" and reserved for clerks from solicitors' firms to see Masters.*
4. *Applications up to a maximum of 45 minutes' duration will be listed at 10.45am and 2.15pm to be heard so soon thereafter as time permits. No more than a total of 2hrs and 15 minutes of applications will be listed in any one morning or afternoon Urgent Applications List.*
5. *Any person who wishes an application to be heard in the Urgent Applications List who has not previously issued and listed an application (a 'very urgent application') may have the application heard in the Urgent Applications List on the day of attendance if time permits, as long as the application is first issued and listed by QB Masters' Listing. If there is insufficient time to hear the application on the day of issue the Master sitting will give any appropriate direction including for re-listing. Applicants seeking to be heard on a very urgent basis shall attend QB Masters' Listing in Room E102 before reporting to the Usher with their listed and issued application.*
6. *There will be an usher present outside the Master's room to take a note of parties' details and bring in the Court Record Forms to the Master. The Master and the applicants will also be assisted by a member of the Case Progression team.*
7. *All parties attending shall provide their full details to the Usher and shall produce their issued and listed application notice. Members of the Public wishing to observe the court (but not to address the court) should ask the usher to be admitted to the Masters' room and will be permitted to do so unless directed otherwise by the court.*

BANKRUPTCY PETITIONS – HEARINGS IN MULTIPLE LISTS IN THE ROLLS BUILDING

On **7 October 2016** Registrar Baister issued guidance, to take effect from 1 November 2016. The note replaces guidance previously issued on 17 September 2015. It provides guidance concerning the application of the procedure laid down in PD51O (The Electronic Working Scheme) to hearings in multiple lists in the Rolls Building. The guidance is set out in full below.

On 17 September 2015 I sent out a note entitled Electronic Filing in the Bankruptcy & Companies Court (Rolls Building) to provide some guidance to practitioners pending the coming into force of a Practice Direction. It has now been superseded by the Practice Direction 51O – The Electronic Working Pilot Scheme.

As frequent users will have experienced, the use of C-File in court for multiple bankruptcy petition lists is not satisfactory. Accordingly the registrars have decided that bankruptcy hearings in the multiple lists should be dealt with in line with Practice Direction 51O – The Electronic Working Pilot Scheme.

First hearings

Three working days before the first hearing of any bankruptcy petition the petitioning creditor should lodge a bundle containing:

(a) the statutory demand and evidence of service;

(b) the petition and evidence of service (including any order for substituted service and any extension order served).

An attendance sheet (incorporating the certificate of continuing debt) and list of supporting/opposing creditors should be handed to the registrar at the hearing along with any relevant documents received late.

The court will retain the bundle for any adjourned hearing until the petition is either dismissed or a bankruptcy order is made.

Subsequent hearings

If the papers were in order at the first hearing it will be unnecessary to file a further bundle. Any papers not filed for the first hearing should, however, be filed to complete the bundle. Otherwise, completion of the attendance sheet (including the certificate of continuing debt and of service of the adjournment notice) will generally suffice.

All hearings

Whilst the foregoing will suffice for the majority of hearings, practitioners should also file any other documents which the court needs to consider (e.g. any notice of or evidence in opposition from the debtor).

The procedure outlined above will take effect on 1 November 2016.

Stephen Baister

Chief Bankruptcy Registrar 7 October 2016

In Detail

FURTHER DEVELOPMENTS IN LATE AMENDMENT – HENDERSON v DORSET HEALTHCARE UNIVERSITY FOUNDATION NHS TRUST [2016] EWHC 3032 (QB)

The court's approach to amendment, and particularly late amendment, of statements of case is an area where, like the approach to relief from sanction, the CPR moved sharply away from its historical approach. As Neuberger J explained it in ***Charlesworth v Relay Roads Ltd*** [2000] 1 W.L.R. 231 at 238, shortly after the CPR came into force, six factors needed to be taken account of in dealing with such applications:

> *". . . (1) the court has jurisdiction to grant an application to amend the pleadings to raise new points and/or to call fresh evidence and/or to hear fresh argument; (2) the court must clearly exercise its discretion in relation to such an application in a way best designed to achieve justice; (3) the general rules relating to amendment apply so that: (a) while it is no doubt desirable in general that litigants should be permitted to take any reasonably arguable point, it should by no means be assumed that the court will accede to an application merely because the other party can, in financial terms, be compensated in costs; (b) as with any other application for leave to amend, consideration must be given to anxieties and legitimate expectations of the other party, the efficient conduct of litigation, and the inconvenience caused to other litigants; (4) quite apart from, and over and above, those principles, because it is inherently contrary to the public interest and unfair on the other side that an unsuccessful party should be able to raise new points or call fresh evidence after a full and final judgment has been given against him, it would generally require an exceptional case before the court was prepared to accede to an application where the applicant could not satisfy the three requirements in Ladd v. Marshall; (5) almost inevitably, each case will have particular features which the court will think it right to take into account when deciding how to dispose of the application before it; (6) the court should be astute to discourage applications which involve parties seeking to put in late evidence, but cases where new evidence is found after judgment is given and before the order is drawn up will be comparatively rare."*

In doing so he noted that the modern approach to late amendments was derivable from three pre-CPR decisions, including ***Worldwide Corporation Ltd v G.P.T. Ltd*** (2 December 1998, CA, unrep.). The criteria he set out followed that decision, particularly its rejection of the historical approach to late amendment, endorsed by Millett LJ in ***Gale v Superdrug Stores Plc*** [1996] 1 W.L.R. 1089, 1098-1099, that focused on the amending party being able to compensate the other party to the litigation in costs and its endorsement of the need to consider the public interest in the efficient conduct of litigation and the adverse effect on other litigants caused by the amendment.

As with the change in approach to relief from sanctions the adoption of the new approach to late amendment and ***Worldwide Corporation Ltd*** was not entirely consistent notwithstanding decisions such as ***Swain-Mason v Mills & Reeve LLP*** [2011] 1 W.L.R. 2735. See, for instance, the approach by Peter Smith J in ***The Nottinghamshire and City of Nottingham Fire Authority v Gladman Commercial Properties*** **[2011]** EWHC 1918 (Ch) at [42]-[55], unrep., in which it was stated that the view post-CPR was one that took a stricter approach to granting late amendments was wrong. Equally, the position was articulated that the central question was, as it was pre-CPR, whether the non-amending party could be compensated in costs. In reaching this decision Peter Smith J relied on the Court of Appeal decision in ***Cobbold v Greenwich LBC*** (1999) (9 August 1999, CA, unrep.) as setting out the post-CPR approach.

Following the Jackson reforms' introduction a number of decisions have emphasised how the post-CPR approach to late amendment is stricter than it was previously and requires consideration of more than the ability or not to compensate the non-amending party in costs. As with Neuberger J's approach in ***Charlesworth*** the importance of taking account of the impact late amendments have on other litigants has been underscored; see, for instance, Lewison LJ's dicta in ***The Prudential Assurance Company Ltd v HM Revenue and Customs*** [2016] EWCA Civ 376, unrep, (noted in ***Civil Procedure News*** **05/2016**), which stressed that late amendments were to be supported by a strong justification that, consistently with the overriding objective (particularly CPR r.1.1(2)(e)), required consideration of both the interests of the non-amending party and those of *"other litigants in other cases before the court and the court's duty to allocate a proportionate share of the court's resources to any particular case."* Moreover, reliance on ***Cobbold*** as setting out the modern approach to late amendments has been laid to rest; see Coulson J in ***CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd*** [2015] EWHC 1345 (TCC); 160 Con. L.R. 73 at [15] (noted in ***Civil Procedure News*** 06/2016 and which also set out a checklist of considerations to be taken account of in dealing with an application to amend), relying on the Court of Appeal decisions in ***Savings and Investment Bank Ltd (in liquidation) v Fincken*** [2003] EWCA Civ 1630;

[2004] 1 W.L.R. 667 and ***Swain-Mason v Mills and Reeve LLP*** [2011] EWCA Civ 14; [2011] 1 W.L.R. 2735.

The leading guidance on the proper approach to take is that set out in ***Su-Ling v Goldman Sachs International*** [2015] EWHC 759 (Comm), 26 March 2015, unrep., (noted in ***Civil Procedure News*** 05/2015), viz.,

> *"[36] An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation.*
>
> *[37] Beyond that, the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities: Swain-Mason v Mills & Reeve [2011] 1 WLR 2735 (at paras. 69 to 72, 85 and 106); Worldwide Corporation Ltd v GPT Ltd [CA Transcript No 1835] 2 December 1988; Hague Plant Limited v Hague [2014] EWCA Civ 1609 (at paras. 27 to 33); Dany Lions Ltd v Bristol Cars Ltd [2014] EWHC 928 (QB) (at paras. 4 to 7 and 29); Durley House Ltd v Firmdale Hotels plc [2014] EWHC 2608 (Ch) (at paras. 31 and 32); Mitchell v News Group Newspapers [2013] EWCA Civ 1537.*
>
> *[38] Drawing these authorities together, the relevant principles can be stated simply as follows:*
>
> > *a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;*
> >
> > *b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;*
> >
> > *c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;*
> >
> > *d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;*
> >
> > *e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;*
> >
> > *f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;*
> >
> > *g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.*
>
> *[39] The Commercial Court has a long tradition of pro-actively managing litigation brought before it for the benefit of all users (as recognised, for example, in Worldwide Corp Ltd (supra)). The timetables laid out in and the requirements of the Admiralty and Commercial Court Guide, such as the requirement in D12.2 for provision of a progress monitoring information sheet, are designed precisely to avoid last minute problems which delay the start of trials or cause adjournment."*

That guidance was applied by May J in ***Georgiev v Kings College Hospital NHS Foundation Trust Appeal*** [2016] EWHC 104 (QB), 26 January 2016, unrep. May J specifically stressed how the modern approach to applications to amend requires consideration of more than the immediate interests of the parties. As she put it at para.8,

> *"The task of a court faced with an application to amend has changed. Gone are the days when amendments were nodded through on the basis that there was no prejudice to the other side which could not be compensated in costs. Today prejudice to the administration of justice generally is a consideration equally to be taken into account. The exigencies of listing and the demands of other litigants are such that courts now carefully case-manage the cases before them and require litigants to keep to the timetables which are set. Where the parties seek adjustments to those timetables the overriding objective dictates whether, and if so what, adjustments may be permitted."*

In ***Henderson v Dorset Healthcare University Foundation NHS Trust*** [2016] EWHC 3032 (QB), 25 November 2016, unrep., Warby J considered a late application to amend particulars of claim in respect of a claim for personal injury for psychiatric harm arising from the claimant murdering her mother. The application was issued on 14 November and heard on 23 November 2016; the trial of the action was to take place on 5 December 2016. The proceedings had been issued in August 2013; liability for negligence was admitted and judgment on liability with damages to be assessed was entered in May 2014. In February 2016, a trial of preliminary issues, concerning the extent to which the claimant's damages claim was precluded due to her own illegality had been directed to take place in the December. The basis of the claim was her murder of her mother which was said to be attributable to the defendant's health worker's failure to act upon a deterioration of her (the claimant's) psychiatric condition (paranoid schizophrenia). The application to amend sought to add a new claim under the Human Rights Act 1998. The application to amend was refused on a number of bases, for instance, the proposed amendment was not properly pleaded; no adjournment should be granted to give further time to enable the claimant to plead the amendment properly as more than ample time had already been afforded. Warby J went on to consider, by way of *obiter dicta*, whether the amendment ought to have been allowed as a matter of discretion i.e., he considered the test for late amendment.

Warby J's consideration of the test for late amendment stresses once more that the pre-CPR approach, which provided that the "*court will grant amendments provided the opposite party can be compensated in costs"* no longer applies (***Henderson*** at para.60). The test derived from Bowen LJ's dicta in ***Cropper v Smith*** (1884) 26 ChD 700 at 710-711 is no longer applicable to such applications, in the same way that it is no longer applicable to applications for relief from sanctions (see the UKSC in ***Prince Abdulaziz v Apex Global Management Ltd (Rev 2)*** [2014] UKSC 64; [2014] W.L.R. 4495 per Lord Neuberger PSC at para.27). As Warby J explained, consistently with the prior approaches in ***Charlesworth***, ***The Prudential Assurance Company Ltd v HM Revenue and Customs*** (2016), ***Su-Ling v Goldman Sachs International*** (2015), and ***Georgiev v Kings College Hospital NHS Foundation Trust Appeal*** (2016) as well as that taken in ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795 **and** ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, the overriding objective requires other considerations to be taken account of in assessing whether to exercise the discretion.

And once again, the approach articulated in ***Worldwide Corporation*** as approved by the Court of Appeal in ***Swain Mason v Mills & Reeve LLP*** (2011) was noted as setting out the basis of the post-CPR, the modern, approach. In doing so Waller LJ's stress upon the need to consider the effect that the grant of an amendment, particularly where it necessitates an adjournment of a trial date, will have upon litigants in other proceedings must be considered (***Henderson*** at para.62). Warby J went on to note that, as established in ***Worldwide Corporation***, the onus was on the party seeking the amendment to justify why the discretion ought to be exercised and why that was fair to the parties in the proceedings, and litigants in other proceedings: "fair to all concerned". As the overriding objective makes clear "all concerned" encompasses those litigants referred to in CPR r.1.1(2)(e).

Warby J's decision is another important reiteration of the change in approach to amendment and late amendment that the CPR's introduction effected. While residual doubts may have continued to exist as to the nature of the change in approach, and the status of the Court of Appeal's pre-CPR decision in ***Worldwide Corporation*** there is now clear trend of authorities stemming from, at least, the Court of Appeal's decision in ***Swain-Mason*** through the High Court decisions in ***Su-Ling*** and ***Georgiev***, as well as ***CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd*** (2015) which have made it clear that the pre-CPR ***Cropper v Smith***-based approach is no longer applicable. The tenor of the CPR, whether it relates to relief from sanctions or amendment, is one that requires the court, and parties who have to assist the court in doing so and co-operate with each other to that end (as noted by Warby J in ***Henderson*** at para.63), to ensure that proceedings are prosecuted not only proportionately as between the parties but also so as to ensure that "justice is done to all litigants" (per Waller LJ in ***Worldwide Corporation***) as cited by Neuberger J in ***Charlesworth*** at 237.

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