
CIVIL PROCEDURE NEWS

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Consent judgment on admissions – applicability of rule in Ladd v Marshall to application to vary the judgment

CPR r.3.1(7). Claim for negligence brought against the defendant hospital. At an early stage in the proceedings judgment, on a number of issues, for the claimant was entered into by consent based on admissions relating to breach of duty and causation. The defendant thereafter sought to withdraw the admissions and vary the consent judgment. **Held**, if no consent judgment had been entered the application to withdraw the admissions would have been straightforward as the claim was still at an early stage with no evidence or expert evidence served. However, the real issue focused on the fact that the admissions had given rise to a final judgment, albeit one entered by consent. Applications to vary or revoke court orders, under CPR r.3.1(7), should not undermine the principle of finality. Final orders should ordinarily only be challenged by way of appeal: see **Roult v North West Strategic Health Authority** (2010) and **Kojima v HSBC Bank plc** (2011). In order to exercise the jurisdiction under CPR r.3.1(7) to revoke a final judgment, including a consent judgment, the three stage test in **Ladd v Marshall** (1954) applied. The basis on which the defendant wished to withdraw its admissions and vary the consent judgment was an expert's report, which had been obtained after the judgment had been entered. In the circumstances of the case the three limbs of the test were made out and the consent judgment was varied. **Ladd v Marshall** [1954] 1 W.L.R. 1489, CA, **Roult v North West Strategic Health Authority** [2010] 1 W.L.R. 487, CA, **Kojima v HSBC Bank plc** [2011] EWHC 611 (Ch), unrep., ChD, ref'd to. (See **Civil Procedure 2016** Vol.1 para.3.1.12.)

- **Qader v Esure Services Ltd** [2016] EWCA Civ 1109; [2016] 6 Costs L.O. 973, 16 November 2016, (Tomlinson, Gross and Briggs LJ)

RTA Protocol – allocation to multi-track – continued application of fixed costs regime

CPR Pt 45, Pre-Action Protocol for Low Value Personal Injury (Employer's Liability and Public Liability) Claims. Conjoined appeals arose from road traffic accident claims that had commenced via the Pre-Action Protocol for Low Value Personal Injury (Employer's Liability and Public Liability) Claims (the RTA Protocol). The claims had exited the Protocol and subsequently been allocated to the multi-track due to their being allegations of dishonesty on the part of the claimants. Allocation to the multi-track was contrary to the assumption behind the RTA Protocol, which was that claims that exited it would proceed on the fast track if Pt 7 proceedings were issued, or via a disposal procedure. The issue before the Court of Appeal was "whether the fixed costs regime continues to apply to a case which no longer continues under the RTA Protocol but is allocated to the multi-track after being issued under Part". **Held**, (i) CPR r.45.29 did not make express provision for the fixed costs regime to be limited to Protocol cases that proceeded on the fast track; (ii) however, CPR Pt 45 section IIIA should be read as if it provided for the disapplication of the fixed costs regime to claims that exit the RTA Protocol and are allocated to the multi-track; (iii) the conclusion on disapplication was justified by an examination of the intention behind and origin of CPR Pt 45 section IIIA. The failure to provide for the exclusion of multi-track cases from the fixed costs regime was a drafting error on the part of the Civil Procedure Rule Committee. The Court of Appeal could rely on the court's exceptional power to correct obvious drafting errors in legislation to correct the Rule Committee's error and give effect to its actual intention: **Inco Europe Limited v First Choice Distribution** (2000) applied. The Court of Appeal was able to do this through adding wording to CPR r.45.29B so that rather than stating,

"Subject to rules 45.29F, 45.29G, 45.29H and 45.29J, if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31st July 2013, the only costs allowed are—"

it was to read

"Subject to rules 45.29F, 45.29G, 45.29H and 45.29J and for so long as the claim is not allocated to the multi-track, if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31st July 2013, the only costs allowed are—"

Inco Europe Ltd v First Choice Distribution [2000] 1 W.L.R. 586, HL, ref'd to. (See **Civil Procedure 2016** Vol.1 para.45.29B.1.)

- **Amey LG Ltd v Cumbria County Council** [2016] EWHC 2946 (TCC), 18 November 2016, unrep. (HHJ Stephen Davies sitting as a judge of the High Court)

Costs assessment – proportionality not a factor under CPR r.44.2

CPR rr.44.2, 44.3, 44.4. A claim and counterclaim arose in respect of a contract for, amongst other things, the provision of highways maintenance. The claimant was the overall winner in respect of the claims and sought its costs of the claim and counterclaim. The defendant, however, submitted that there should be a reduction in the costs awarded to reflect the claimant's lack of success on a number of issues, its conduct and admissible offers to settle. The defendant further sought separate costs orders in its favour in respect of three issues. **Held**, the claimant should be awarded 85% of its total costs. In reaching his decision HHJ Stephen Davies noted the general principles relevant to the question were set out in CPR r.44.2 and the issues the court had to consider in assessing whether to depart from the general loser pays rule were those set out in CPR r.44.2(5). He further noted that the approach to take when considering the application of those principles was that set out by Jackson J in **Multiplex Constructions v Cleveland Bridge** (2008) at para.72. A particular question arose whether proportionality was a factor the court had to take account of in determining which order to make under CPR r.44.2, and specifically in considering whether to make a proportionate costs order under that rule. There was no express reference to proportionality in CPR r.44.2 in contrast to CPR rr.44.3 and 44.4. If the Civil Procedure Rule Committee had intended proportionality to be a factor under CPR r.44.2 it would have been expected to make specific, express provision for that within the rule itself. However, if a proportionate costs award was justified on the grounds set out within CPR r.44.2, then (i) as a general rule, proportionality should not be taken account of and a "clear dividing line" between it and CPR r.44.2 should be maintained and the proportionate costs award should be made solely based on considerations of the express factors in r.44.2; (ii) however, if a trial judge departed from the general rule and took account of proportionality, either implicitly or expressly, in determining what proportionate costs order to make, they should clearly state in either their order or judgment that they have done so and state the percentage or fractional reduction attributable to the proportionality assessment which they had made. It was essential that they did so to ensure that the receiving party was not at risk of double jeopardy in respect of proportionality when the costs came to be assessed by the costs judge: see **Ultraframe v Fielding** (2006). As HHJ Stephen Davies put it at paras 27-28,

"[27] . . . it appears to me that in most, if not all, cases, a clear dividing line can be drawn between the circumstances to be considered under Part 44.2 and proportionality. The trial judge should limit his task to addressing whether relevant circumstances such as conduct, success and admissible offers arise and, if so, their impact on the total time and cost of the trial, or the case as a whole, and how – if at all – they ought to be reflected in the costs order made. The trial judge should make a proportionate costs order based solely on such considerations, as opposed to the further consideration as to what proportion of the overall costs would have been incurred had the action been pursued in a manner which was proportionate. At this stage the trial judge will have details of the approved costs budgets of the parties, if the case is subject to costs management, and may well have been provided with some details of costs actually incurred for the purpose of making an interim payment on account of costs, but will not be in a position to know whether and if so to what extent costs have been unreasonably incurred, which is of course a matter for detailed assessment.

[28] If however a trial judge is minded to take into account proportionality when deciding what proportionate costs order to make, and to make a discount which expressly or implicitly takes into account his assessment of overall proportionality when arriving at a percentage or fractional reduction, that should be clearly stated and identified in the order and/or the judgment, so that the costs judge will know what the trial judge has taken into account and why when undertaking the detailed assessment at the later stage . . ."

Ultraframe v Fielding [2006] EWCA Civ 1660; [2007] 2 All E.R. 983, CA, **Multiplex Constructions v Cleveland Bridge** [2008] EWHC 2280 (TCC); [2009] 1 Costs L.R. 55, TCC, **Biffa Waste Services v Maschinenfabrik Ernst Hese** [2008] EWHC 2657 (TCC), unrep., TCC, **Walker Construction (UK) Ltd v Quayside Homes Ltd** [2014] EWCA Civ 93; [2014] 3 Costs L.O. 362, CA, ref'd to. (See **Civil Procedure 2016** Vol.1 para.44.2.6.)

- **Secretary of State for the Home Department v HM Senior Coroner for Surrey** [2016] EWHC 3001 (Admin), 23 November 2016, unrep. (Cranston J)

Public Interest Immunity – Closed Material – Inquest – High Court Jurisdiction

Senior Courts Act 1981, s.19, CPR rr.31.19, 40.20. In the course of an inquest under the Coroners and Justice Act 2009 into the death of Mr Perepilichnyy the Secretary of State for the Home Department applied for an order permitting the non-disclosure of documents. The order was sought on the ground that disclosure would damage the public interest. The application was made to the High Court because the Coroner did not have security clearance to view the material that was to be subject to the order and could not therefore determine the application within the

context of the inquest. **Held**, Cranston J granted the application. In so doing he held that the High Court, as a superior court of record, had inherent, general, jurisdiction to determine public interest immunity applications in respect of coronial inquests. The Coroners and Justice Act 2009 did not oust that jurisdiction. While the inherent jurisdiction should only be exercised, exceptionally, as a last resort and not such as to conflict with statute (which in this case it did not), it had to be exercised on a proper procedural basis. In the present context, where non-disclosure on public interest immunity grounds was in issue, either CPR r.31.19 or r.40.20 could form the basis of the application. That being said, Cranston J favoured use of CPR r.31.19 as the procedural base as it: (i) applies to claims, including those arising as the present one did, under CPR Pt 8; and (ii) it provides a process for free-standing non-disclosure applications. Finally, it was noted that while interested parties had a right to take part in coronial inquests, there was no comparable right in civil proceedings. However, the High Court should exercise its jurisdiction to enable such interested parties involved in coronial inquests to take part in applications such as the present to the extent they would do so if the application was before the inquest. **Baxter Student Housing Ltd v College Housing Co-operative Ltd** [1976] 2 SCR 475, Supreme Court, Canada, **Taylor v Lawrence** [2002] EWCA Civ 90; [2003] Q.B. 528, CA, **Bank Mellat v HM Treasury** [2013] UKSC 39; [2014] A.C. 700, UKSC, ref'd to. (See **Civil Procedure 2016** Vol.1 para.31.19.4, Vol.2 para.9A-68.)

- **Sony Communications International AB v SSH Communications Security Corporation** [2016] EWHC 2985 (Pat); [2016] 4 W.L.R. 186, 24 November 2016, (Roger Wyand QC sitting as a deputy High Court judge)

Departure from costs budgets – assessment – apportionment

CPR rr.3.15(3), 3.18, PD 3E paras 7.3 and 7.6. Claim for revocation of a patent and Pt 20 claim by the defendant for patent infringement. Costs budgets were approved in December 2015. Judgment entered on both claim and Pt 20 claim the consequence of which was that the claimant became entitled to costs. The costs were subject to summary assessment. The following approach to the assessment was adopted: Stage 1: required the assessment of the claimant's costs against its costs budget. This required the court to consider each phase of the budget per Precedent H by way of comparing the claimant's actual expenditure for each phase with its budgeted expenditure for the comparable phase. The claimant was then entitled to the lower of the two figures. The claimant sought, however, to increase the amount provided for in several phases of the costs budget as it had, in those phases, incurred significantly greater expenditure than provided for in the budget. **Held**, **Henry v News Group Newspapers Ltd** (2013) at paras 24-28 set out a number of principles concerning the court's power to depart from costs budgets, which Leggat J summarised as follows (at para.14),

- “(i) *The budget is not a cap but a guideline which the court has the power to depart from;*
- “(ii) *Each phase of the budget is to be considered separately and it is not legitimate to combine two phases where one is overspent and the other is underspent;*
- “(iii) *The court will only depart from the budget where it is satisfied that there is a good reason to do so;*
- “(iv) *The parties have a duty to revise their budgets if significant developments in the litigation warrant such revisions;*
- “(v) *The court can depart from the budget even if the parties have not revised their budgets as the litigation proceeds. The passage in the judgment of Moore-Bick LJ set out above could be read as suggesting that it would be more difficult to establish ‘good reasons’ for departing from the budget if the parties have been assiduous in updating their budgets, however, that would be encouraging parties to ignore their duty to update;*
- “(vi) *In considering whether there are good reasons for departing from the budget the court should take into account all the circumstances of the case;*
- “(vii) *A particular consideration is the function of the budget in ensuring that the costs incurred are proportionate and reasonable. If the budget is being considered before the result of the trial is known, both parties have an interest in trying to ensure that both their own and the other side's costs are reasonable and proportionate. Once the result is known, the two parties have conflicting interests in that the winning party will seek to recover as much of their costs as possible and the paying party will seek to reduce the costs it has to pay. This makes it much more difficult for the court to assess what costs are reasonable and proportionate;*
- “(viii) *A further function of the budget to be considered is the value to the opposing party to understand what is being done and what it is going to cost. Accordingly, a factor in the assessment is whether any requested increase in the budget, post-trial, will be whether the increase would take the paying party by surprise.”*

In the present case, while the claimant had failed to comply with its duty to seek a variation of its costs budget, per CPR PD3E para.7.6, the following approach was justified: (i) in terms of an overspend on expert evidence, there was a good reason to depart from the budget and it was fair to allow an increase in the claimant's budgeted amount to the level of the defendant's budgeted amount for such evidence. In considering whether the amount was reasonable and proportionate, the best indication was the defendant's budgeted costs for the equivalent budget phase; (ii) the claimant overspent on the trial preparation phase and underspent on the trial phase. It was not permissible, as submitted by the claimant, to add the two phases together and treat them as a single phase. There was no good reason to depart from the budget as approved for trial preparation; (iii) there was however a good reason to depart from the budget for the trial phase as the post-trial costs were higher than could have been foreseen by the parties. Finally, it was held that the court's role in approving costs budgets is confined to approving the total figures for each phase of the proceedings. While the court may take account of the manner in which that total is reached i.e., by considering its constituent elements, the court does not approve the apportionment between them. Court approval is not required where a party simply wishes to change an apportionment where that change does not affect the budget total for the relevant phase. The same approach applies both where budgets are agreed between the parties and where they are approved by the court. Where it is apparent that the allocated apportionment within a costs budget is wrong, the court may make its own assessment of the apportionment in assessing the costs of that phase. **Henry v News Group Newspapers Ltd** [2013] EWCA Civ 19; [2013] 2 All E.R. 840, CA, ref'd to. (See **Civil Procedure 2016** Vol.1 para.3.18.1.)

- **Agarwala v Agarwala** [2016] EWCA Civ 1252, 8 December 2016, unrep. (Longmore, King and David Richards LJ)

Litigants-in-person – case management – control of communications with the court

CPR r.3.1. Appeal from an order to pay equitable compensation by way of account for loss of profits arising from the running of a bed and breakfast business. Appeal allowed on limited grounds concerning the calculation of part of the quantum. King LJ went on however, in a postscript to the judgment, to note that the parties had been prohibited by the trial judge from making any applications in the proceedings without first obtaining the permission of the court. The prohibition had been made in the light of repeated applications and email communications to the court, which it was noted had the effect of "bombarding" the court and court administration such as to undermine the efficient and effective management of the proceedings. King LJ went on to note that

"Whilst every judge is sympathetic to the challenges faced by litigants in person, justice simply cannot be done through a torrent of informal, unfocussed emails, often sent directly to the judge and not to the other parties. Neither the judge nor the court staff can, or should, be expected to field communications of this type. In my view judges must be entitled, as part of their general case management powers, to put in place, where they feel it to be appropriate, strict directions regulating communications with the court and litigants should understand that failure to comply with such directions will mean that communications that they choose to send, notwithstanding those directions, will be neither responded to nor acted upon."

King LJ's comment echoes the prior decision of the Court of Appeal in **Binder v Binder** (9 March 2000, CA, unrep.) in which Thorpe LJ refusing an application for permission to appeal upheld an order made by Butler-Sloss P that the appellant be prohibited from communicating by "telephone, fax or email or in any other way . . . with any person in the Royal Courts, Family Division or any family court in London or the Principal Registry of the Family Division in respect of any (of the particular) proceedings . . ." save that the appellant could apply in writing and *ex parte* to the President of the Family Division or the applications judge with such applications determined on paper only. Thorpe LJ further extended the order to prohibit the appellant from communicating "in any way with any judge or employee of this court in respect of any (relevant proceedings), and further that he should be restrained from accosting any member of this court or any employee of the Court Office, either within the precincts, should he ever have legitimate leave to be within the precincts, or without the precincts of the court." While Thorpe LJ's order was made in addition to a *Grepe v Loam* order (now civil restraint order), it was not a necessary attendant of that order. Both King LJ's and Thorpe LJ's judgments demonstrate the breadth of the court's case management powers either under the court's inherent jurisdiction (in the latter case) and under CPR r.3.1(2)(m) to protect its processes and the proper administration of justice from both abusive and/or particularly disruptive conduct by litigants. (See **Civil Procedure 2016** Vol.1 para.3.1.19.)

- **Blue Tropic Ltd v Chkhartishvili** [2016] EWCA Civ 1259, 9 December 2016, unrep. (Arden and Henderson LJ)

Amendment introducing new cause of action

Limitation Act 1980, s.35, CPR r.17.4(1) and (2). A dispute arose between two Georgian businessmen concerning the transfer of assets from non-trading holding companies. The claim arose under the Georgian Civil Code, article 992, and concerned a claim that the transfer of assets had resulted in actionable harm to the companies. The claim was

amended shortly before the trial commenced. It was common ground between the parties that the amendment was made after the relevant Georgian limitation period had expired. The claim succeeded on its amended basis. It would however have otherwise failed. The issue before the Court of Appeal was whether the late amendment was properly granted given the restriction on permitting amendments brought after the expiry of the limitation period provided by Limitation Act 1980, s.35 and CPR r.17.4 i.e., the court lacks jurisdiction to allow such an amendment if it introduces a new cause of action unless that cause of action arises out of the same or substantially the same facts as already in issue. **Held**, the appeal was allowed as the amendment introduced a new cause of action and one that did not arise from the same or substantially the same facts as those already in issue. As such the trial judge had no jurisdiction to grant the late amendment and the claim was dismissed. In giving his judgment Henderson LJ noted the classic definitions of what constitutes a cause of action i.e., “every fact which is material to be proved to entitle the plaintiff to succeed – every fact which the defendant would have a right to traverse” per Brett J in **Cooke v Gill** (1873) at 116. Identification of the material facts was to be carried out “at the highest level of abstraction” per Millett LJ in **Paragon Finance Plc v D B Thakerar & Co** (1999) at 405. Guidance on how to assess, for the purposes of Limitation act 1980, s.35, whether a proposed amendment pleads a new cause of action was noted as having been given by the Court of Appeal in **Savings and Investment Bank Ltd v Fincken** (2001) at para.30 and **Smith v Henniker-Major & Co** (2002) at paras 95-96: the essential elements of the original statement of case must be compared with the essential i.e., bare minimum elements of the proposed amended statement of case, which requires non-essential facts to be set to one side. In considering the applicability of Limitation Act 1980 s.35(5)(a) it should be borne in mind that the comparison concerns an assessment of the evidence likely to be adduced at trial in respect of the original and proposed amended statements of case: see **Goode v Martin** (2002) at 1838. Proposed amendments must be clear in order to bring out the true nature of the amendment. A paradigm case where a proposed amendment will raise a new cause of action is one that seeks to plead, for the first time, intentional wrongdoing: see **Paragon Finance Plc v D B Thakerar & Co** (1999) at 406. It is not sufficient that the original claim and the proposed amendment both can be said to plead “unlawfulness”. That simply begs the question as to the nature of the unlawfulness originally pleaded and that detailed in the proposed amendment. **Cooke v Gill** (1873) 8 C.P. 107, Ct of Common Pleas, **Letang v Cooper** [1965] 1 Q.B. 232, CA, **Paragon Finance Plc v D B Thakerar & Co** [1999] 1 All E.R. 400, CA, **Savings and Investment Bank Ltd v Fincken** [2001] EWCA Civ 1639, unrep., CA, **Smith v Henniker-Major & Co** [2002] EWCA Civ 762; [2003] Ch. 182, CA, **Goode v Martin** [2002] 1 W.L.R. 1828, CA, ref’d to. (See **Civil Procedure 2016** Vol.1 paras 17.4.4.2-17.4.4.3.)

■ **Aviva Insurance Ltd v Randive** [2016] EWHC 3152 (QB), 9 December 2016, unrep. (Slade J)
Court’s approach on application for permission to bring contempt of court proceedings

CPR r.81.12(3). A claim was brought for damages arising out of a road traffic accident. Negligence was admitted. Causation in respect of personal injury (soft tissue injuries to neck and back) and consequential losses was contested. The claim was discontinued at trial. The district judge found the claimant to have been fundamentally dishonest for the purposes of CPR r.44.16. The defendant insurer thereafter issued proceedings for committal for contempt on the basis that the claimant/respondent had made false statements in documents verified by statements of truth. **Held**, permission was granted in part. Slade J in dealing with the application noted that the test for granting permission is that set out in **Kirk v Walton** (2008) at para.29 viz., (i) there must be a strong prima facie case but the court considering the permission application must not consider the merits of the case against the respondent; (ii) the public interest requires such proceedings to be brought; and (iii) such proceedings are proportionate and consistent with the overriding objective (the amount of money involved, the importance of the case, the need to allocate an appropriate share of the court’s resources to the case while ensuring that other cases are allotted an appropriate share of those resources). **Kirk v Walton** [2008] EWHC 1780 (QB); [2009] 1 All E.R. 257, QBD, **International Sports Tours Ltd v Shorey** [2015] EWHC 367 (QB), unrep., QBD, **Hydropool Hot Tubs Ltd v Roberjot** [2011] EWHC 121 (Ch), unrep., ChD, ref’d to. (See **Civil Procedure 2016** Vol.1 para.81.12.4.)

Practice Updates

STATUTORY INSTRUMENTS

■ **THE CIVIL PROCEEDINGS FEES (AMENDMENT) ORDER 2016** (SI 2016/1191). In force from **6 March 2017**.

The Order amends the Civil Proceedings Fees Order 2008 (SI 2008/1053). It comes into force on 6 March 2017, subject to a saving provision which disapplies the amendments to proceedings in which the court gave notice of the trial date or of the start of the trial period before that date. Article 2 of the 2016 Order effects two significant

changes. **First**, it increases the fee payable for fixing a trial date of trial period as follows: (i) multi-track (£1,090); (ii) fast track (£545); small claims track (£25 for claims not exceeding £300; £55 for claims exceeding £300 but not exceeding £500; £80 for claims exceeding £500 but not exceeding £1,000; £115 for claims exceeding £1,000 but not exceeding £1,500; £170 for claims exceeding £1,500 but not exceeding £3,000; and £335 for claims exceeding £3,000). **Secondly**, it deletes from the 2008 Order provision for the hearing fee to be refunded where the court is given notice that the claim has settled or has been discontinued. As such from 6 March 2017 such refunds will no longer be available.

PRACTICE DIRECTIONS

■ **CPR PRACTICE DIRECTION – 87th Update**, in force on the day the Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (the 2017 Regulations) come into force. The 2017 Regulations are intended to implement the Damages Directive (Directive 2014/104/EU). The Update inserts a new Practice Direction 31C (Disclosure and Inspection in relation to Competition Claims) into the CPR.

The PD applies to disclosure or inspection applications where the first proceedings relating to the specific claim were brought on or after the date on which the PD came into force. Its provisions specifically apply to such applications in respect of competition claims generally (para.1 of the PD) and in respect of evidence held on file by competition authorities (para.2 of the PD). Competition authorities for the purpose of the PD are, as defined by para.3.1 of Sch.8A of the Competition Act 1998 (as inserted into the 1998 Act by the 2017 Regulations): the Competition and Markets Authority (CMA); UK regulators that have concurrent jurisdiction to that of the CMA in competition matters; the European Commission; and EU member state competition authorities as designated under art.35 of the EC Competition Regulation (Council Regulation (EC) No.1 of 2003). The PD further provides that CPR Pt 31 applies to applications within the scope of the PD in so far as its provisions are consistent with the PD; see para.1.7 and para.2.2 of the PD. It specifically limits disclosure and inspection to that which is “proportionate” (para.1.5 of the PD). It requires the court to take account of, in addition to other factors, the matters detailed in art.5(3) of the Damages Directive when it considers the question of proportionality i.e.,

“Article 5(3) . . . (a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;

(b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure;

(c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.”

PRACTICE GUIDANCE

■ QUEEN’S BENCH GUIDE 2017

The Queen’s Bench Guide was reissued on 12 December 2016. The new, 2017, 5th edition, contains a number of amendments that have been made since the 2016, 4th edition, was issued in January 2016. It has specifically been updated to take account of substantive changes to the CPR that have been made during 2016 i.e., changes to CPR Pts 3, 36 and, most significantly, 52. It also reflects changes such as the introduction of the Urgent and Short Applications List (see paras 9.1 and 9.2 of the 2017 Guide) and the abolition Practice Master and the Chambers List (as previously detailed in para.6.1 of The Queen’s Bench Guide 2016).

■ CHANCERY DIVISION – INFORMAL COSTS MANAGEMENT NOTE

On the 1 November 2016, Chief Master Marsh issued an informal note on the approach taken to costs management in the High Court, Chancery Division, in London. The note was published on the Chancery Bar Association’s website (<http://www.chba.org.uk/for-members/library/practice-directions-court-notice/costs-management-note>). The note, which is neither practice guidance nor a practice note, is reprinted below as it provides a helpful explanation of the approach taken in the Division to such matters.

COSTS MANAGEMENT

1. *This is an informal note for publication by the ChBA to provide information about the way in the Chancery Division in London approaches the subject of costs management. It is not a Practice Note and does not attempt to summarise all the relevant provisions in the CPR.*

2. *The subject of costs management surfaces for the first time in a claim after a defence is filed with the court. That prompts the court to send out two documents. The first is Form N149C which provisionally allocates the claim to the multi-track and gives a date by which Directions Questionnaires and draft directions are to be filed. The second document, which is sent with Form N149C, is a Note which provides more general directions specifying the documents which must be filed to enable the court to undertake an initial case review on paper.*
3. *By sending the Note, claims are taken out of the default provision for filing and exchange of costs budgets under CPR 3.13(1) which specifies this must be done not less than 21 days before the first CMC. The Note specifies that, unless exempted because the claim has a value in excess of £10 million or the party is a litigant in person, costs budgets must be filed with the Directions Questionnaire, draft directions, Disclosure Report and list of issues.*
4. *Importantly, the Note states: "The parties should jointly consider whether they wish the court to exercise its costs management powers and should notify the court in their Directions Questionnaires of their views. Please note that even if you agree that you do not wish there to be costs management you must serve and file a costs budget."*
5. *The court's power to make a costs management order is separate from the requirement to file and serve costs budgets. Under CPR 3.15(2), the court may decide not to make a costs management order, and thus obviate the need for a costs management hearing to approve budgets, if "... it is satisfied that the litigation can be conducted justly at reasonable and proportionate cost in accordance with the overriding objective..."*
6. *The court is unable to consider making an order under CPR 3.15(2) without adequate information about the budgeted costs. Normally this will require budgets in Precedent H to be prepared. However, an alternative, which may be acceptable to the court where all the parties agree to seek an order that the case should be taken out the costs management regime, is for budgets to be prepared using only the first page of Appendix H, as if the claim had a value of less than £50,000 and the costs were less than £25,000.*
7. *The exercise of the court's discretion under CPR 3.15(2) will be based upon a number of factors, including the agreement of the parties. However, agreement by the parties to take the claim outside the costs management regime is not determinative. Each case will turn on its own facts and the court will consider the type and size of the claim, the amount of the budgeted costs on each side and the extent to which there is equality of arms.*
8. *It is extremely unlikely the court will take a case out of costs management if one of the parties is a litigant in person or a represented party objects to such an order.*

Matthew Marsh

Chief Master 1/11/16

■ CE-FILE UPDATE

Sir Geoffrey Vos CHC, Blair J and Coulson J announced, on 15 December 2016, that the CE-File system would become fully operational on 25 April 2017 (<http://www.ce-file.uk>). From that date, all claims and applications in the Rolls Building jurisdictions must be issued via CE-File. Paper processes will no longer be available.

■ CARDIFF CITY COUNCIL V LEE (FLOWERS) [2016] EWCA CIV 1034 – UPDATE

In *Cardiff City Council v Lee (Flowers)* [2016] EWCA Civ 1034, the Court of Appeal considered the correct approach to requests for warrants for possession of land (See *Civil Procedure News* Iss.09 of 2016). Following that decision Form N235 has been subject to consideration by the Civil Procedure Rule Committee. Pending the conclusion of the Rule Committee's work, Her Majesty's Courts and Tribunals Service has introduced the following:

- A new Form N325A (Request for warrant for possession of land following a suspended order for possession). This form is to be used where a warrant for possession is sought following the grant of suspended order for possession, which has been breached (see <https://formfinder.hmctsformfinder.justice.gov.uk/n325a-eng.pdf>); and
- where a reissue of a warrant of possession is sought, a revised Form N445 must be used (see <https://formfinder.hmctsformfinder.justice.gov.uk/n445-eng.pdf>).

In Detail

CASE MANAGEMENT, NULLITIES AND CROSS-EXAMINING TRANSLATORS - KIMATHI v THE FOREIGN & COMMONWEALTH OFFICE [2016] EWHC 3004 (QB), 24 NOVEMBER 2016; [2016] EWHC 3005 (QB), 24 NOVEMBER 2016

Proceedings were brought against the Foreign and Commonwealth Office in 2013 by 40,000 claimants seeking damages for, amongst other things, trespass to the person, assault, false imprisonment. The proceedings were made subject to a Group Litigation Order in November 2013. Thereafter a number of case management orders and interlocutory decisions have been made: see, for instance, *Kimathi v The Foreign & Commonwealth Office* [2015] EWHC 3116 (QB); [2015] EWHC 3432 (QB); [2016] EWHC 600 (QB).

On 24 November 2016, Stewart J, the judge assigned to manage the group litigation, handed down two judgments arising from the litigation. The first, *Kimathi v The Foreign & Commonwealth Office* [2016] EWHC 3004 (QB), concerned the question of the court's power to order translators to attend court to be cross-examined. The second, *Kimathi v The Foreign & Commonwealth Office* [2016] EWHC 3005 (QB), concerned the extent to which the court's general case management power under CPR r.3 could be relied upon to cure a procedural defect that went beyond irregularity and had rendered the proceedings a nullity. In respect of the former, Stewart J held that a party had no right to require the attendance of a translator for the purposes of cross-examination. The court could, however, require attendance for those purposes as a matter of discretion under its general case management powers. In respect of the latter, Stewart J held that the court's general case management powers exercised consistently with the overriding objective did not provide power to cure a procedural defect that rendered proceedings a nullity.

Kimathi v The Foreign & Commonwealth Office [2016] EWHC 3004 (QB)

Eleven translators had provided translations of witness statements provided by a number of the claimants: see CPR PD32 para.23.2. The defendant applied for an order requiring the translators attendance at court for cross-examination in order to ascertain the means by which the witness statement translations were produced. This it was said would enable the court to determine the accuracy and reliability of the translations. The basis of the application was a number of serious discrepancies in the translations e.g., material differences between two versions of translations of the same text which had been served at different times, text from the English translation not being found in the original and vice versa, lack of detail concerning translators' qualifications. In supporting its application the defendant relied upon a number of decisions which emphasised the importance of ensuring that translators are properly qualified and understand their role and the need to ensure that translations are accurate and reliable so as to ensure that the court can properly assess the evidence in translation: *NN v ZZ* [2013] EWHC 2261 (Fam); [2016] 4 W.L.R. 9 at paras 56-60; *Re ABC & F (Children)* [2015] EWHC 3663 (Fam), unrep., at para.14; *R v Foronda* [2014] NICA 17, Court of Appeal in Northern Ireland, unrep., at para.15.

Stewart J noted that there was no prior authority directly on the question of the court's power to require the attendance of translators for the purpose of cross-examination. The defendant argued that the right to require attendance was derived from CPR r.32.2(1), which provided the general rule that facts to be proved at trial by witness evidence are to be proved via oral evidence in public. It was argued that the following were facts that needed to be proved at trial: whether the translators were translators; the nature of the translator's experience and qualifications as contained in an affidavit per CPR PD 32 para.23.2(2); and the court's order providing for a witness statement in a foreign language is to be filed in the proceedings.

Stewart J first noted that while the general rule in respect of witness evidence was that it was to be given by oral evidence at trial and in public this was not an absolute rule. There was no absolute right to cross-examine a witness as the court could direct that particular witness's evidence could be given via witness statement and read out in court without the witness being called to give oral evidence: see CPR r.32.2(1)(a) and r.32.2(3)(b) and *Civil Procedure 2016* Vol.1 at para.32.2.3.1. Furthermore, he noted that CPR r.32.5 provides for a party that had served a witness statement to call the witness whose statement it was at trial if they wished to rely on their evidence unless they intended to rely on the statement as hearsay evidence or the court had ordered otherwise. He also noted that CPR r.32.7 enables parties to seek an order for permission to cross-examine a person who gave evidence, whether by, for instance, affidavit or witness statement, at a hearing other than a trial.

An analysis of the provisions established that they did not provide a right to call a translator to be cross-examined. This was apparent for four reasons, which Stewart J explained as follows:

“(i) The requirement in Rule 32.5 refers to the use at trial of witness statements which have been served and requires a party who has served a witness statement, and who wishes to rely at trial on the evidence of the witness, to call the witness to give oral evidence (subject to exceptions). The practice direction specifically requires a translator to file an affidavit verifying a witness statement. It does not require or permit a translator to file a witness statement.

(ii) Historically, written witness statements were not served and/or used as evidence in chief. This began in the mid 1980s and was incorporated into the Civil Procedure Rules. Prior to then, evidence in chief of a foreign language witness was oral and interpreted into English live in court by an interpreter. The new procedure permitted, as here, a witness statement translated by one translator and a different person being the court interpreter. It was not, in my judgment, ever intended by the CPR that every translator who had provided a proper form affidavit would attend court pursuant to Rule 32.2(1) so as to “re-prove” the written translation.

(iii) Nor do I find that in the wording of Rule 32.2. “Any fact which needs to be proved by the evidence of witnesses” is not to be interpreted at including such matters as are provided for in 32PD 23.2. In any event, the Defendant did not object to the translated evidence being given by the Test Claimants, and did not raise this particular issue till after all their evidence had been completed.

(iv) I reject the Defendant’s submission that Rule 32.7 which permits a party to apply to the Court for permission to cross-examine the person giving the evidence “at a hearing other than the trial” is of any assistance. There is no inference from Rule 32.7 that Rule 32.5 would extend to the makers of verifying affidavits under CPR 32 PD 23.2.”

That was not however the end of the matter. While there was no right to call a translator, the court did have, under its general case management power and particularly the power to make any order to manage cases and further the overriding objective contained within CPR r.3.1(2)(m), the discretion to order the attendance of a translator for the purpose of cross-examination. On the facts of the present case, the various issues concerning the translations raised by the defendants were not sufficient to make out a case that an order to attend for cross-examination would further the overriding objective. Equally, if there was a right to require a translator to attend for cross-examination, contrary to the primary decision, in the circumstances it was right to exercise the discretion to order otherwise as provided for by CPR r.32.2(2)(b) and/or CPR r.32.5(1).

More significantly however, Stewart J held that in so far as the various discrepancies between the translations and foreign language witness statements were concerned they could be dealt with by way of cross-examination of the witnesses themselves. The issue was to ascertain the witnesses’ evidence, and that could best be done by examining and cross-examining the witnesses rather than embarking on an examination or cross-examination of the translators and their reasons etc., for translating the witness statements in the way that they had. Furthermore, other issues that became apparent from witness cross-examination, such as the inclusion of wording in a translation that was detrimental to the defendant but which was not included in the original text, were submission points and not something that could usefully be explored by way of cross-examination of the translator. Given Stewart J’s final comments it appears clear that it is likely to be a rare case where the court will exercise its discretion to order to attendance for cross-examination of a translator i.e., to those situations where the translator’s honesty was in issue.

Kimathi v The Foreign & Commonwealth Office [2016] EWHC 3005 (QB)

The second of Stewart J’s decisions of 24 November 2016 concerned an application to strike out the claim of Test Claimant 11 either under CPR r.3.4(2)(a) and/or as a nullity, or that it be summarily determined.

The basis of the application was straightforward: the claimant had been entered on the Group Litigation Order Group Register approximately seven months after he had died. It was well-established law a claim cannot be brought in the name of a deceased individual: see, for instance, ***Watson v King*** (1815) 4 Camp. 272 and more recently, ***NP Engineering and Security Products Ltd, Official Receiver v Pafundo*** [1998] 1 BCLC 208 (CA). It was equally well-established that an administrator cannot issue proceedings absent grant of letters of administration (see Law Reform (Miscellaneous Provisions) Act 1934, s.1 and ***Millburn-Snell v Evans*** [2011] EWCA Civ 577; [2012] 1 W.L.R. 41), and that where, as in the present case, a grant of administration is made in another jurisdiction, before proceedings can be issued the grant must be re-sealed in the jurisdiction. As the claim was brought, by addition of the claimant’s name to the Group Register, after he had died, in his name and not in the name of his estate, and even if brought on behalf of his estate it was brought prior to the grant of, and of the re-sealing, of the grant of administration, it was a nullity.

In determining the application, Stewart J held that the question when the claimant became party of the proceedings was the date of entry on the Group Register. An argument had been made that the claimant became party to the proceedings upon the date the claim form was issued. If correct, the claimant would have become party to the proceedings whilst he was alive. It was, in Stewart J’s judgment, clear from the terms of the Group Litigation Order that that submission was unsustainable: the Order made it clear that claimants who joined the Group Register were deemed to have become party to the proceedings as of the date they are entered on the Register, and hence not from the date upon which

the claim was initially issued. As such, and in the light of, amongst other things, the claimants' acceptance that the claimant's name was added to the Group Register in a personal capacity and not in that of his personal representatives acting on his estate's behalf, it was clear that the proceedings were a nullity. The question became whether the court could, if it had jurisdiction to do so, cure the nullity under its general case management powers.

Stewart J first noted that Peter Smith J in *Meerza v Al Babo* [2015] EWHC 3154 (Ch), unrep., endorsed the view that the court's power under CPR r.3 could, as a matter of principle, cure any technical defect in process. It could do so irrespective of whether that defect arose as a matter of procedure or as a matter of law. The basis of this approach was that the ability to cure technical defects furthered the overriding objective. The approach taken by Peter Smith J in some respects echoes fears expressed when the CPR was introduced that the overriding objective would "*tempt judges and lawyers into concluding that . . . the court has a discretion where, in fact, none exists*" (*Civil Procedure 2016* Vol.2 para.11.7). While Stewart J distinguished the present case from that of *Meerza v Al Babo* (2015) on the basis that that case was not one where the claimant was deceased at the time proceedings commenced, he went on to consider, at paras 18 et seq., the substantive question of whether CPR r.3, consistently with the overriding objective, was "*a cure-all for every defect however fundamental, whether or not it (was) one of law, and whether or not the authorities have previously determined that there is a nullity.*" The existence of such a power might be thought to be surprising given the express power to cure procedural error in CPR r.3.10; power which does not go so far as to enable the court to cure defects that amount to nullities (*Civil Procedure 2016* Vol.1 paras 3.10.1 to 3.10.3). It would be difficult to conceive the basis for concluding that the court has implicit power via its case management powers construed consistently with the overriding objective to go beyond a power to cure procedural error that is expressly provided for and has been since 1965 (RSC Ord.2 r.1, *Supreme Court Practice 1999* Vol.1 para.2/0/2 et seq.) and is now contained in CPR r.3.10. The existence of such a power might, for instance, have taken the Court of Appeal in *Stoute v LTA Operations Ltd* [2014] EWCA Civ 657; [2015] 1 W.L.R. 79 by surprise. In that case, Underhill LJ at para.39 et seq considered whether an error as to service of a claim form was a procedural error or a nullity, and hence curable under CPR r.3.10 or not. If a wider, general power to cure all defects including nullities existed under CPR r.3.1 such a discussion would have been otiose as whether the error was an irregularity or a nullity it would have been capable of cure. Reference to CPR r.3.10 would have been redundant, as would the rule itself.

Stewart J in his judgment rejected the submission that CPR r.3 provides a cure-all for every procedural defect. The power to cure procedural error thus remains that provided for expressly within CPR r.3.10. He did so on the following basis (para.18) (additions in brackets replacing footnotes in the original):

"i. The rule against allowing amendments to a claim to plead a subsequently arising claim is one of practice not law and can be departed from when the justice of the case requires (See Lord Denning MR in Alfred C Toepfer v Peter Cremer [1975] 2LL.R 118, 125). The change in approval in such cases derived from developments in the law relating to "relocation back" and amendment to the RSC at O18 R9 which specifically permitted amendment to plead any matter, even if it arose after issue of writ. (See Vax Appliances Ltd v Hoover Plc [1990] RPC 656)

ii. In Hendry v Chartsearch Ltd ([1998] C.L.C. 1382) Evans LJ (with whom the other Lords Justices agreed) said that the rules had changed and, "In accordance with modern practice generally, the court has a general discretion which should not be restricted by hard-and-fast rules of practice, if not of law, such as that which is suggested here."

iii. Mance LJ in Maridive made it clear ([2002] EWCA Civ 369; [2002] 1 All E.R. (Comm) 653) that he did not "regard the present case as one where, as at the date when Moore-Bick J made his order allowing an amendment, the original claim could be said to be 'incurably bad'". See also Mance LJ at paragraphs 34 and 37 where he emphasised that what was amenable to being cured in that case was an irregularity and not a nullity. Chadwick LJ (at para.54) said 'There is no absolute rule of law or practice which precludes an amendment to rely on a cause of action which has arisen after the commencement of proceedings...'. Peter Smith J (at para.46 of Meerza) concluded that this statement by Chadwick LJ made it clear that any technical objection whether procedural or legal could be overcome provided it was just to do so. In my judgment it is not clear at all from those observations of Chadwick LJ; indeed the contrary is the case. The citation appears to me to be predicated upon the fact that if there were an absolute rule on law or practice precluding an amendment to rely on a cause of action arising out of the commencement of the proceedings, then the Court would not have a discretion. If I am wrong about that, the observations of Chadwick LJ are obiter, as the Maridive case was one not of nullity but irregularity.

iv. Although a judge must be cautious in making assumptions when a point has not been expressly argued before the Court of Appeal, I find it difficult to believe that the Court in Millburn-Snell ([2011] EWCA Civ 577; [2012] 1 W.L.R. 41, Lord Neuberger of Abbotsbury MR, Hooper and Rimer LJJ) would not have considered their wide discretion under CPR 3 to apply the overriding objective to enable cases to be dealt with justly, and so, in effect, decided the case per incuriam."

Stewart J went on to hold, in the alternative, that even if the discretion to cure the defect existed it could not properly be exercised. As such the claim was struck out as a nullity.



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