CIVIL PROCEDURE NEWS

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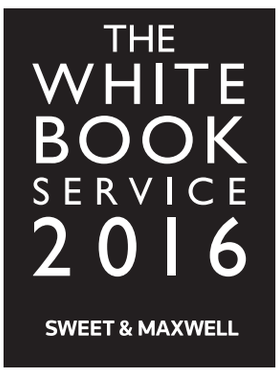


In Brief

Cases

- **Morris v Highland Group International GmbH** [2016] EWCA Civ 1361, 1 November 2016, (McCombe LJ)

Power to impose conditions on appeal – variation through appeal case management

CPR r.52.9(3) (pre-October 2013), now CPR r.52.18(3) (post-October 2013). Proceedings were brought by a contractor against a company based in Switzerland for breach of contract. The claimant obtained a default judgment. An application to set aside that judgment was rejected. Permission to appeal from the refusal to set aside was sought from the Court of Appeal. Permission to appeal was rejected on the papers, as was an application to stay pending oral renewal of the permission application. Permission to appeal was granted at the oral renewal hearing, although a stay was again refused. Following the grant of permission, the claimant (respondent) issued three applications: i) for security for costs; ii) that the appellant's notice be struck out or stayed pending payment into court of the amount owing under the default judgment; iii) a further payment into court of a significant sum as security for an unliquidated damages claim; and iv) an application for disclosure. The first two applications were considered by McCombe LJ. Security for costs, to be paid into court was ordered, with the appeal to be struck out in the event of non-compliance. In considering the applications McCombe LJ considered the application of CPR r.52.9(3), which had been considered by the Court of Appeal by, amongst others, Longmore LJ in ***Spar Shipping v Grand China Logistics Holding (Group) Ltd*** (2016). He noted that Longmore LJ's gloss on the rule had been interpreted by ***Civil Procedure 2016*** 4th Supplement, as follows:

> *"The position is that r.59.9(3), despite examples of cases in which it has not been applied literally, or has been unnoticed or ignored, or has been regarded as subject to the court's general case management powers stated in r.3.1, means what it says, and it applies both where the hearing at which permission was granted was one held in a lower court as well as one held in an appeal court. Rule 52.9(3) is there for a purpose. Its purpose is to control costs and delays in the progressing and determination of appeals by denying parties, once they have had an opportunity of doing so, the further opportunity to make submissions about the matters referred to in subparas 1(b) and 1(c) of r.52.9."*

McCombe LJ concluded that the effect of the rule was not as wide-ranging as suggested in that commentary. On the contrary he held, in the light of Waller LJ's dicta in ***Contract Facilities v Rees*** (2003), that CPR r.52.9.3 did not preclude the Court of Appeal from exercising case management powers during the course of the appellate process. It did not preclude therefore the imposition of conditions under those powers to, for instance, stay an appeal or stay an appeal subject to conditions. CPR r.52.9(3)(a) does not preclude the court from exercising a power to strike out an appeal during the course of appeal proceedings. It was implicit in the court having and retaining use of the strike out power that it could impose less draconian sanctions or conditions. As McCombe LJ put it at para.24,

> *"It seems to me that in imposing the restriction that it does in paragraph 52.9(3) of the Rules, the rule-making body has expressly excluded the power under (a), and it seems to me it has excluded it for very good reason. Of course, at the permission stage things are fresh in the Court of Appeal and the question of imposing conditions (paragraph (c)) may well arise. But as time goes on the court must retain, in my view, a power of control over proceedings before it and if an appropriate case is brought before it, as Mr Cohen recognises there sometimes is, there must be a power to strike out, and a strike-out power to my mind always includes, as Mr Rodger submits, a power to order a strike-out 'unless' something is done; the less draconian is obviously included in the more draconian."*

While it was not referred to in the judgment such an approach is clearly consistent with the overriding objective and the CPRs' intention to enable the court to ensure that sanctions are proportionate: ***Biguzzi v Rank Leisure*** (1999). ***Biguzzi v Rank Leisure*** [1999] 1 W.L.R. 1926, CA, ***Experience Hendrix LLC v PPX Enterprises Inc*** [2002] EWCA (Civ) 1960, unrep. CA, ***Contract Facilities v Rees*** [2003] EWCA (Civ) 1105; (2003) 147 S.J.L.B. 933, CA, ***Spar Shipping v Grand China Logistics Holding (Group) Ltd*** [2016] EWCA (Civ) 520, unrep., CA, ref'd to. (See ***Civil Procedure 2016*** 4th Supplement, para.52.9.5.)

- **Harlequin Property (SVG) Ltd v Wilkins Kennedy (a firm)** [2016] EWHC 3188 (TCC), 12 December 2016, unrep. (Coulson J)

Witness training

A claim for damages arising from multiple alleged breaches of contract and/or duty arising from a luxury resort development in the Caribbean was brought by property developers. Damages of approximately US$60 million was sought. The claim was one that primarily turned on factual issues. In reaching his judgment Coulson J was critical of two witnesses, one for the claimants and one for the defendant. In respect of the defendant's witness Coulson J commented that he was a "singularly evasive witness" who was particularly noted for deliberately failing to answer questions put to him. He further noted that the defendant had had "witness training" contrary to the discouragement of such practices given by the High Court in ***Republic of Djibouti v Boreh*** (2016). In that case Flaux J at para.67 noted it was to be discouraged as while it was not improper (unlike witness coaching) it tended to "*reflect badly on the witness who, perhaps through no fault of his or her own, may appear evasive because he or she has been 'trained' to give evidence in a particular way.*" In the present case, the defendant's witness "*natural tendency to avoid answering any difficult question"* was noted as having been exacerbated by the training he had received. Accordingly, Coulson J further reiterated Flaux J's discouragement of witness training. ***Republic of Djibouti v Boreh*** [2016] EWHC 405 (Comm), unrep., Comm, ref'd to.

- **Deutsche Bank AG v Sebastian Holdings Inc** [2016] EWHC 3222 (Comm), 16 December 2016, unrep. (Teare J)

Suspended committal order – jurisdiction to grant – no power to serve out of jurisdiction

CPR r.71.8, Pt 81, PD6B para.3.1(10). Proceedings arose out of foreign exchange and equity trading and resulted in judgment for the claimant for US$243 million. The former sole director and shareholder of the defendant was required to provide documents relating to the defendant's means to pay the judgment debt and required to attend at court for cross-examination. Following disclosure and his attendance at court, the claimant applied for permission to serve an application for a suspended committal order out of the jurisdiction on the defendant's former director/shareholder on the basis that he failed to disclose a number of documents that ought to have been disclosed under the court's previous order and had lied on oath whilst undergoing cross-examination. **Held**, (i) the court's power to commit an individual to prison for contempt of court is a common law power, which arises under the court's inherent jurisdiction. The note in ***Civil Procedure 2016*** Vol.2 para.3C-21 is inaccurate; (ii) the CPR sets out the procedure by which the common law power is to be exercised both in respect of enforcement of judgments and enforcement of procedural orders; (iii) as such CPR Pt 71 and Pt 81 provide the procedural means by which the common law jurisdiction is to be exercised; (iv) CPR Pt 71 or Pt 81 could be used to seek a committal order. The former would be preferable where the issue was simple i.e., committal for failure to attend court. Where however the issue was likely to be complex or difficult to prove the more detailed process under Pt 81 should be used; (v) in the present case as breach of an order pursuant to CPR r.71.2 was in issue, it was permissible for the party seeking an order for committal to proceed under Pt 81; (vi) while it was established that CPR Pt 81 had extra-territorial effect, authority did not yet establish that the same was the case for committal applications under CPR r.71.8. By way of *obiter*, Teare J stated that where an order had been properly made under CPR r.71.2 there was a strong public interest in the court having jurisdiction to uphold and enforce that order by way of committal proceedings under r.71.8 where the respondent to the committal application was either in the jurisdiction or out of the jurisdiction, hence r.71.8 had extra-territorial effect in the same way that CPR Pt 81 had such effect; (vii) the committal application could not however be served out of the jurisdiction via CPR PD6B. ***Griffin v Griffin*** [2000] C.P.L.R. 452, CA, ***Masri v Consolidated Contractors International Co SAL*** [2009] UKHL 43; [2010] 1 A.C. 90, HL, ***Dar Al Arkan Real Estate Development Co v Al-Refai*** [2014] EWCA Civ 715; [2015] 1 W.L.R. 135, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1 paras 71.8.1–71.8.2, Vol.2 para.3C-21.)

- **Christie v Birmingham City Council** [2016] EWCA Civ 1339, 14 December 2016, unrep. (Hallett and Underhill LJJ)

Contempt of court – period of suspension

Contempt of Court Act 1981, s.14(1), Policing and Crime Act 2009, ss.34, 36(2), 40, CPR r.81.29. Proceedings for a gang injunction were brought by the City Council. An interim order was granted and served on the appellant in February 2016. In March 2016 the City Council applied to commit the appellant to prison on the grounds that he had breached the terms of the interim gang injunction in two respects. The appellant was subsequently found to have breached the terms of the injunction and was sentenced to 28 days imprisonment for the first breach and 56 days imprisonment for the second. The orders were to run concurrently. Both were suspended "*until 'expiry of the current injunction or any further order and will not be put in force if during that time the contempt nor complies with the injunction order dated the 15th February 2016.'"* The appellant challenged the order on the basis that, amongst other

things, the period of suspension should have: i) not exceeded two years; and ii) should have been for a fixed period. **Held**, care should be taken not to confuse provisions relating to the period of imprisonment, and which require it to be for a fixed term not exceeding two years (see Contempt of Court Act 1981, s.14(1)) and provisions that enable a court to suspend a sentence of imprisonment for contempt: see CPR r.81.29, which affirms the court's inherent jurisdiction to suspend any such order of committal for any period or on such terms as the court specifies. This point had been considered by the Court of Appeal in ***Griffin v Griffin*** (2000), in which Hale LJ had specifically dealt with the issue and "*declared that there is a power to suspend a committal order for an indefinite period, albeit in many circumstances it may be considered inappropriate to do so*". The limits imposed by the Contempt of Court Act 1981, s.14(1) apply only to the term of imprisonment. They are not applicable to the question of or power to suspend a term of imprisonment. Orders suspending a term of imprisonment should nevertheless be drafted carefully so as to ensure that the contemnor has a degree of certainty over its effect and duration. The appeal was dismissed. ***Pidduck v Molloy*** [1992] 2 F.L.R. 202, CA, ***Phonographic Performance v Tierney*** [2003] EWHC 2416 (Ch), unrep., ChD, ***Griffin v Griffin*** [2000] 2 F.L.R. 44, ***R (James) v Governor of Birmingham Prison*** [2015] 1 W.L.R. 4210, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.81.29.1.)

- **GH v The Catholic Child Welfare Society (Diocese of Middlesbrough)** [2016] EWHC 3337 (QB), 21 December 2016, unrep. (HHJ Gosnell sitting as a judge of the High Court)

Assessing witness credibility

249 claims subject to a Group Litigation Order were brought against the defendants. The claims concerned allegations of physical or sexual abuse by teachers or school staff members for which the defendants were alleged to be vicariously liable. In the course of his judgment in respect of the trial of one of the lead claimants, HHJ Gosnell considered the approach to assessing witness credibility. First, he noted instructive guidance had been given by Bingham J writing extra-judicially in *The Judge as Juror: The Judicial Determination of Factual Issues* (Current Legal Problems 38) in which he outlined that the main tests for assessing whether a witness is lying are:

> *"(1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred;*
>
> *(2) the internal consistency of the witness's evidence;*
>
> *(3) consistency with what the witness has said or deposed on other occasions;*
>
> *(4) the credit of the witness in relation to matters not germane to the litigation;*
>
> *(5) the demeanour of the witness."*

The first three tests were noted by Bingham J to be of general utility. The fourth test was of arguable utility. And in so far as the fifth test was concerned, the modern approach was "to distrust" it as being indicative of honesty. He further noted Goff LJ's dicta from ***The Ocean Frost*** (1985) where, in fraud cases, the approach in respect of witness credibility was:

> *". . . to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, references to the witness' motives and to the overall probabilities can be of very great assistance to a Judge in ascertaining the truth."*

In HHJ Gosnell's view (at para.24) this approach was equally of merit in assessing witness credibility where "*it would not be difficult to find motives why either the Claimants' or the Defendants' witnesses might choose to lie.*" He further concluded that Leggatt J's guidance from ***Gestmin SGPS S.A. v Credit Suisse (UK) Ltd*** (2013) (at paras 15–23) concerning the fallibility of recollection, the unreliability of memory particularly in respect of the recollection of past beliefs, and most significantly the effect that the litigation process and especially the process of preparing for trial has on memory and recall, was of general application to cases where a witness was required to give evidence as to what they recalled of events that occurred a long time in their past. ***The Ocean Frost*** [1985] 1 Lloyd's Rep. 1, CA, ***Gestmin SGPS S.A. v Credit Suisse (UK) Limited*** [2013] EWHC 3560 (Comm), unrep., Comm, ref'd to.

- **Agents Mutual Ltd v Moginnie James Ltd [2016] EWHC 3384** (Ch), 30 December 2016, unrep. (Master Matthews)

Application notice – power to amend

CPR rr.2.3(1), 3.1(2)(m). An application for summary judgment was made in Chancery proceedings that had been transferred in part to the Competition Appeal Tribunal (CAT). The order effecting the transfer directed that the summary

judgment application must be made no later than 16 August 2016. The application was issued in time. At the hearing of the application the claimant applied to amend the application. It was submitted by the respondent that there was no power to amend an application notice. If this were correct it would not, ordinarily pose a difficulty, as an application to amend would in effect amount to a fresh free-standing application. In the present circumstances, due to the order effecting the transfer to the CAT, the claimant could not issue any fresh application. Master Matthews noted that there was no authority on the point and **held**, while it was correct to say that as provided by CPR r.2.3(1), an application notice was not a statement of case, and hence could not be amended as a statement of case, the court had power under CPR r.3.1(2)(m) to amend an application. Furthermore, he stated that, it would "*often further the overriding objective if the court allows all issues between the parties about summary judgment to be decided at the same time, rather than require the applicant to issue a fresh application*". (See ***Civil Procedure 2016*** Vol.1 paras 3.1.19, 23.0.5)

- **Willmott Dixon Construction Ltd v Robert West Consulting Ltd** [2016] EWHC 3291 (TCC), 21 December 2016, unrep. (Coulson J)

Late amendment – the modern approach

CPR r.17.1(2)(b), Pt 24. Contractors appointed an engineering company to carry out design work in respect of works being undertaken on properties in London. The design was alleged to be defective, the consequence of which was that the contractors suffered loss and damage. In December 2015, the defendant provided answers to a request for further information. In December 2016, the defendant applied to amend those answers in order to add a new allegation that the claimant was vicariously liable for negligence on the part of the contractor's independent sub-contractor. The application to amend was made under CPR r.17.1(2)(b). The contractor opposed the amendment on the ground that it could not succeed in law and/or it would require the production of further evidence, which could not be carried out properly given the proximity in time to the trial date. **Held**, the application failed: the proposed amendments had no realistic prospect of success and, even if they did, they were sought too late i.e., too close to the trial date given the need to adduce further evidence if allowed. In reaching his decision Coulson J noted that the modern approach to amendment was summarised in the Court of Appeal's decision in ***Swain-Mason v Mills and Reeve LLP*** (2011). He further noted that Carr J's decision in ***Su-Ling v Goldman Sachs International*** (2015) at para.38 set out the relevant principles. He applied that approach, finding that in the present case: the amendments were made late, within weeks of the trial date. There was no explanation offered as to why this was the case. Furthermore, due to the uncertainty that the amendments would introduce into the litigation, if allowed the application would inevitably require the trial to be adjourned. Applying the principle's set out by Carr J, which must now be accepted as the definitive approach to such applications (see ***Civil Procedure News*** No.12/2016), the amendments were sought too late and ought not to be allowed. ***Swain-Mason v Mills and Reeve LLP*** [2011] EWCA Civ 14; [2011] 1 W.L.R. 2735, CA, ***Su-Ling v Goldman Sachs International*** [2015] EWHC 759 (Comm), unrep., Comm, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.17.3.7)

- **Azumi Ltd v Zuma's Choice Pet Products Ltd, Vanderbilt v Wallace** [2017] EWHC 45 (IPEC), 16 January 2017, unrep. (Mr Recorder Douglas Campbell QC sitting as a judge of the IPEC)

Deputy judge – recusal – McKenzie Friend – right of audience

At the hearing of an application arising out of proceedings for an alleged infringement action, two procedural questions arose: first, whether the Recorder hearing the application ought to recuse himself in circumstances where counsel for the claimant was a member of the same Chambers as the Recorder; and secondly whether a McKenzie Friend, who was a solicitor albeit one who had been made subject to indefinite suspension from practice, ought to be granted a right of audience. **Held**, applying the test from ***Porter v Magill*** (2001), it could not be said that the notional, fair-minded observer – who was neither unduly sensitive nor suspicious (per ***Helow v Secretary of State for the Home Department*** (2008)) – would conclude that there was a real danger of bias on the part of a Recorder who simply shared Chambers with counsel appearing before him or her. In the absence of anything more than sharing Chambers, the notional, fair-minded observer being aware of professional standards at the bar would not see any reason for recusal in these circumstances: ***Watts v Watts*** (2015) applied. In respect of the question concerning the grant of a right of audience to the defendant's McKenzie Friend: (i) rights of audience are governed by the Legal Services Act 2007, sch.3, para.1(6); (ii) the approach to the grant of such a right by the court under its inherent jurisdiction, preserved by the 2007 Act, was set out in ***Clarkson v Gilbert*** (2000); (iii) where the person who seeks a right of audience "*has set himself up as an unqualified advocate and holds himself out as providing advocacy services, whether for reward or not, the court will make such an order only in exceptional circumstances*." In the present case, the individual for whom rights of audience was sought has been made subject to indefinite suspension from practice as a solicitor, which the individual had failed to mention at an earlier hearing. In such circumstances, the grant of a right of audience would be an exceptional course of action: the situation was akin to granting a right

of audience to an unqualified individual who held himself out as providing advocacy services. ***Clarkson v Gilbert*** [2000] 2 F.L.R. 839, CA, ***Porter v Magill*** [2001] UKHL 67; [2002] 2 A.C. 357, HL, ***Helow v Secretary of State for the Home Department*** [2008] UKHL 62; [2008] 1 W.L.R. 2416, ***Watts v Watts*** [2015] EWCA Civ 1297, unrep., CA, ref'd to. (See ***Civil Procedure 2016*** Vol. 2, s.13.)

- **Secretary of State for the Home Department v Akbar** [2017] EWCA Civ 16, 19 January 2017, unrep. (Arden and Macfarlane LJJ, Cranston J)

County court – second appeal – immigration appeal

Access to Justice (Destination of Appeals) Order 2016, art.6 Access to Justice Act 1999, s.55, CPR Pt 52. In January 2015 a civil penalty notice under s.15 of the Immigration, Asylum and Nationality Act 2006 (the 2006 Act) was issued by the Secretary of State's Immigration Enforcement Division against Mr Akbar. Mr Akbar subsequently sought to challenge the notice under s.16 of the Act. The objection was rejected. Mr Akbar then appealed to the County Court. The appeal was heard by a district judge in September 2015. At that appeal hearing issues were raised concerning, amongst other things, the absence of appeal bundles and the failure of a witness for the Secretary of State to appear for cross-examination. It was apparent that the proceedings had not been managed by the government legal department as well as they ought to have been. The district judge allowed the appeal, having noted the failures on the part of the government legal department to file a trial bundle and secure the attendance of the witness. The district judge went on to refuse permission to appeal, treating that application as effectively an application for relief from sanction. The Secretary of State appealed. The Court of Appeal allowed the appeal, remitted the matter to the County Court for rehearing and **held**, the judge, although it was apparent that he had been "*misled as to the nature and extent of [the] procedural failings*" ought to have approached the hearing by examining the procedural errors on the Secretary of State's part and considering what was the proportionate response to them, assuming – which they were not – that they were serious procedural irregularities. In dealing with a preliminary issue at the outset of the appeal hearing the Court of Appeal held that it had jurisdiction to hear the appeal. Cranston J, giving the reasoned judgment of the court, **held**, it had jurisdiction to hear appeals from County Court decisions that were appeals from civil penalty decisions made under s.17 of the 2006 Act. Such appeals were second appeals, and thus could not but lie to the Court of Appeal: see, by way of analogy, ***Azimi v Newham LBC*** (2001). Appeals under the 2006 Act are by way of rehearing and must take account of statutory requirements: see ss.17(3) and 19 of the 2006 Act. They are not therefore entirely comparable to ordinary civil appeals as governed by CPR Pt 52. CPR r.52.1(3)(c) provides however that an appeal from a person or body from whom an appeal may be brought is an appeal to a lower court for the purposes of Pt 52. Appeals from that lower court – here the County Court – must therefore lie to the Court of Appeal irrespective of which level of judge hears the appeal in the lower – the County – court: see Access to Justice (Destination of Appeals) Order 2016, art.6 and s.55 of the Access to Justice Act 1999. Care must therefore be taken in determining the level of judge to hear the appeal in the County Court given that the next stop is the Court of Appeal. ***Azimi v Newham LBC*** (2001) 33 H.L.R. 51, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1 paras 52.3 and 52.6.)

- **HRH Emere Godwin Bebe Okpabi v Royal Dutch Shell Plc** [2017] EWHC 89 (TCC), 26 January 2017, unrep. (Fraser J)

Approach to forum applications

CPR rr.1, 11(1). Two sets of groups actions with a total of approximately 45,500 individual claimants brought against Royal Dutch Shell Plc and a subsidiary company incorporated in Nigeria. The first set of claims sought damages, amongst other things, arising from pollution and environmental damage alleged to have been caused by oil spills from the defendants' oil pipelines in Nigeria. The second set of claims sought damages on a similar basis, with the claims said to arise under Nigerian statute and common law. Applications were issued challenging the court's jurisdiction under CPR r.11.1(a) and/or (b). The jurisdictional challenged succeeded. In the course of his judgment Fraser J commented critically on the parties' failure to ensure that they approached the hearings properly. In particular, he noted their failure to ensure that they did not approach the applications as if they required "*full expositions of the factual and legal issues*". The parties had failed to comply with observations made by Lord Neuberger PSC in ***VTB Capital Plc v Nutritek International Corp*** (2013), which as Fraser J stated "*must be observed.*" As Lord Neuberger PSC at para.82 put it,

> *". . . hearings concerning the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues, and long argument. It is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost."*

Non-compliance with these observations was the cause of excess litigation costs entirely contrary to CPR r.1. In future there had to be a "fundamental change in approach" by parties and their legal advisers to such applications to ensure compliance with Lord Neuberger PSC's observations. As Fraser J put it at para.10:

"I am however firmly of the view that the views of Lord Neuberger must be observed. The current approach of parties in litigation such as this is wholly self-defeating, and contrary to cost-efficient conduct of litigation. This case is an ideal example of one with 'masses of documents, long witness statements, detailed analysis of the issues, and long argument' being deployed on both sides. The costs burden upon the parties must be enormous, and this approach is, in my judgment, diametrically opposed to that required under the overriding objective in CPR Part 1. It would be regrettable if the only way that compliance could be ensured were to be by the court imposing a strict limit on the number of witness statements that could be lodged, and also restricting their length. Experienced legal advisers ought not to need such strictures in order to concentrate their minds. However, a fundamental change of approach is required by the parties in cases such as these for applications of this nature."

VTB Capital Plc v Nutritek International Corp [2013] UKSC 5; [2013] 2 A.C. 337, ***Lungowe v (1) Vedanta Resources plc (2) Konkola Copper Mines plc*** [2016] EWHC 975 (TCC); [2016] B.C.C. 77, TCC, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.11.1.1)

Practice Updates

PRACTICE GUIDANCE

PRACTICE NOTE – ADMIRALTY: ASSESSOR'S REMUNERATION

On 3 January 2017 Teare J, the Admiralty Judge, with the agreement of the Master of the Rolls and President of the Queen's Bench Division issued a new Practice Note concerning remuneration of Trinity Masters, nautical and other assessors. This matter had previously been governed by a Practice Direction, which was in force from 1994 until its revocation and replacement by unofficial guidance in 2007. That guidance was set out in ***Civil Procedure 2016*** Vol.2 para.2D-142. The new Note provides guidance in respect of fees for hearings or appeals which commence after 3 January 2017. It further provides that the fees contained within it shall be updated annually on 1 April each year by reference to the Retail Price Index. The note is reprinted below.

Practice Note (Admiralty: Assessors' Remuneration) of 3rd January 2017

1. *This guidance is issued by Mr Justice Teare with the agreement of Sir Terence Etherton, Master of the Rolls, and Sir Brian Leveson, President of the Queen's Bench Division. It is issued as a Practice Note and not as a Practice Direction. It replaces previous guidance issued following the revocation of Practice Direction (Admiralty: Assessors' Remuneration) [1994] 1 W.L.R. 599 by Practice Direction (Admiralty: Assessors' Remuneration) [2007] 1 W.L.R. 2508.*
2. *In the absence of special directions given in a particular case the level of remuneration which should normally be paid to Trinity Masters and nautical and other assessors summoned to assist the Court of Appeal, the Admiralty Court on the trial of an action, or a Divisional Court of the Queen's Bench Division is as follows:*
    1. *Full day's attendance at hearing: £750;*
    2. *Half day's attendance at hearing: £375;*
    3. *Attendance at court when case is not heard: £150 per hour;*
    4. *Consultation with the court on a day when there is no hearing: £375;*
    5. *Attendance to hear reserved judgment (including any consultation with the court on the same day): £188;*
    6. *If notice of attendance is countermanded less than two days before the hearing: £375; and*
        1. *Assessors should receive reasonable sums for their travelling expenses and subsistence;*
        2. *Where there is a cross appeal, or where appeals are heard together, or where actions are consolidated or tried together, the proceedings should be treated as one appeal or action as the case may be;*
        3. *In the absence of special directions given in a particular case, the remuneration and expenses should be paid by the appellant or the party setting down the action as the case may be without prejudice to any right to recover from any other party the amount so paid on assessment.*
3. *The figures specified in paragraph 2 above shall be subject to annual adjustment on 1 April each year, the first such adjustment to take effect on 1 April 2017. The adjustment will be index-linked to the Retail Price Index.*
4. *The guidance in this Practice Note takes effect on 3rd January 2017 and is to apply to all actions and appeals the hearing of which begins on or after that date.*

In Detail

MERRIX v HEART OF ENGLAND NHS FOUNDATION TRUST [2016] EWHC B28 (QB) – BUDGETED COSTS, CPR R.3.18 AND ASSESSMENTS

Since the introduction of costs management in 2013 the author has found it both unnecessary and unreasonable (and so has not had to resort to the "proportionality trumps both" test in CPR r.44.3(2)(a)) to linger for long on the link between budgeted costs and detailed assessment of recoverable costs on the standard basis. The reason was that the wording of CPR r.3.18 could be neither clearer nor more unambiguous. In plain words it stated that: on a standard basis assessment, in the absence of "good reason", the assessing court cannot depart from the last agreed or approved budget for a phase, whether upwards of downwards.

However, recently that clarity has come under concerted challenge, demanding more detailed consideration. Indeed, there has even been one reported decision, ***Merrix v Heart of England NHS Foundation Trust*** [2016] EWHC B28 (QB), in which the court found that the budget was no more than a draw down fund, that the budgeted costs could not be exceeded without good reason, but that they could be reduced without reference to good reason by an old fashioned "item by item" assessment. Whilst this was a first instance decision from the District Bench and is subject to appeal, it has received much comment, as the increasing incidence of budgeted claims reaching assessment has turned the spotlight on the relationship between those proceedings and the costs management order.

This article considers the arguments raised on both sides of the debate and concludes, plagiarising part of the parlance of the rule itself, that there is no good reason to depart from the precise and clear wording of CPR r.3.18 as both the starting and finishing point for the correlation between budgeted costs and assessment.

The arguments raised in support of the budget being no more than a cap or a draw down fund
In essence, the arguments, not all of which were raised in ***Merrix***, can be summarised as follows:

- CPR Pt 47 obliges the court to carry out a detailed assessment (and that applies to incurred and budgeted costs). At a detailed assessment the court will make an individual "line by line" assessment of the reasonable costs and then decide issues of proportionality. Nowhere in CPR Pt 44 or Pt 47, the rules governing that process, is there any provision that the paying party has to show a good reason to seek a departure from any approved or agreed budget. Indeed, the last approved or agreed budget is just one of a non-exclusive list of factors (of which it is the last) in CPR r.44.4(3). It is neither afforded primacy in the list, nor said to be determinative. In any event CPR r.44.4(1) requires the court to consider all the circumstances when assessing costs.
- The instruction to the court not to undertake a detailed assessment at the time of budgeting (in CPR PD3E para.7.3) and the express requirement that the court should not fix hourly rates at the time of budgeting (in CPR PD3E para.7.10), clearly evidence that these are matters for later and that the budgeting exercise is not intended as a substitute for detailed assessment.
- The budget is no more than a "cap" on costs or a fund against which a party may draw down (using either term to mean that it is a maximum sum that must not be exceeded). It is not a fixed sum. Accordingly, the requirement to show "good reason" under CPR r.3.18(b) only applies where the receiving party seeks to recover more than the budget for a phase. If, after assessment on an item by item assessment, the sum for a phase is within the sum budgeted then it is the lesser sum that is recovered. Support for the argument that a budget is no more than a cap and that "good reason" in CPR r.3.18 only applies to an upwards departure, can be found in the decision in ***Simpson v MGN Ltd*** [2015] EWHC 126 (QB), in particular from the comment that:

  > *"It is clear from CPR 3.18(b) that if a figure has been agreed or approved for a particular phase of proceedings the amount recoverable by the receiving party in respect of that phase will be capped at that figure, unless there is good reason to depart upwards. (If the receiving party has incurred costs less than budgeted there will be good reason to depart downwards.)" (para.19)*

- Unless the reasonable amount is determined first on an item by item assessment the court cannot fulfil its function under CPR r.44.3(2)(a) to step back and determine if the sum reasonably assessed is proportionate
- The decisions of Moore-Bick LJ in both ***Henry v News Group Newspapers Ltd*** [2013] EWCA Civ 19 and ***Troy Foods v Manaton*** [2013] EWCA Civ 615 clearly support the contention that approval of a budget does not demonstrate *"without further consideration, that the costs incurred by the receiving party are reasonable or proportionate simply because they fall within the scope of the approved budget."* (***Troy*** para.8)

The arguments raised in support of CPR r.3.18 being the beginning and end of the debate in the absence of a good reason to depart from the budgeted costs of each phase

The arguments, some in response to those above and some entirely freestanding, are as follows:

- CPR r.3.18 is absolutely transparent in its meaning and requires no insertion of any words to make sense. It sets out precisely what it was intended to mean. This view is reinforced if one reverts to the intention expressed equally unambiguously by Jackson LJ in his Final report at p.401 under the general description of "The essential elements of costs management" that "*at the end of the litigation the reasonable costs of the winning party are assessed in accordance with the approved budget"* (Final Report Ch.40 para.1.4)
- CPR r.44.4(2), is set out in the judgment in ***Merrix***, but appears not to have been the topic of submission. It is neither analysed in the judgment nor, consequently, does it inform the decision-making process. This is an important omission, as the rule is of direct relevance to the situation where a costs management order has been made. This is because CPR r.44.4(2)–under the general heading of CPR Pt 44 "*Factors to be taken into account when deciding the amount of costs*"–states that:

  "44.4(2) In particular, the court will give effect to any orders which have already been made."

A costs management order is an order that has already been made, with a procedurally prescribed consequence under CPR r.3.18 setting out the effect it has when the court decides the amount of recoverable costs. As such, the court must give effect to it (the costs management decision). Accordingly, the assertion that there is nothing in the costs provisions of the CPR that fetters the powers and discretion of an assessing judge where a costs management order has been made, appears to be fundamentally flawed: any decision to depart from budgeted costs in the absence of a good reason to do so is contrary to the express requirement at CPR r.44.4(2).

- Any attempt to revisit reasonableness and proportionality, other than under the guise of 'good reason', overlooks or ignores the fact that the budgeted costs have already been subject to a judicial determination of reasonableness and proportionality (see the wording of CPR PD3E para.7.3 and para.3 of the Guidance Notes on Precedent H – the latter expressly refers to CPR r.44.4(3) and r.44.3(5)). At assessment there has already been judicial determination of the reasonableness and proportionality of the budgeted costs. Accordingly, the assessing judge has no jurisdiction to exercise an appellate function (note that this is not the same thing as revisiting the budget under "good reason" as the rules specifically reserve and convey this jurisdiction to the assessing judge in the same way that CPR PD3E para.7.6 expressly reserves the jurisdiction for the court to vary budgeted costs provided it does so prospectively).
- The fact that CPR PD3E para.7.3 expressly warns the court against undertaking a detailed assessment in advance, is not a preservation of an unfettered right to a detailed assessment in respect of the same costs later. Instead, it merely prescribes that the court is not to approach the budgeting exercise as though it has been asked to undertake a traditional detailed assessment. In other words, it is simply an explanation of the process of budgeting and not any attempt to reserve a position for subsequent detailed assessment. That this is so, is surely supported by the fact that the court may elect, as is both permissible and proportionate, to undertake a summary assessment of costs in budgeted cases (see for example ***Sony Communications International AB v SSH Communications Security Corporation*** [2016] EWHC 2985 (Pat), in which it was accepted that the winning party would only recover less than the budget for a phase if it had actually spent less on the phase – amounting to nothing more than an articulation, and the application, of the indemnity principle [considered further below]). CPR PD3E para.7.3 is silent as to summary assessment. If the argument as to preservation of the right to revisit budgeted costs is founded on the words of CPR PD3E para.7.3, then strictly that argument results in the right only arising on a detailed but not summary assessment. To create such a distinction seems nonsensical and introduces a distinction that does not exist in CPR r.3.18.
- The fact that CPR r.44.4(3)(h) is one of eight factors to which the court must have regard in a non-exhaustive list does not mean it is not determinative. It is a reminder to the court and the parties that this is a relevant factor in respect of those costs within the bill that have been cost managed. The relevance to be attached to that factor is set by a combination of CPR r.3.18 and r.44.4(2) as described above.
- Jackson LJ rejected the notion that a costs budget is a costs cap in his final report when describing the Law Society submission that "budgeting is not costs capping" as, helpful (p.413). Indeed, if a budget is no more than a costs cap, one cannot help but wonder why the costs management rules are found in Section II (Costs Management) and not in Section III (Costs Capping) of CPR Pt 3. CPR PD3E para.7.3 clearly states that the budget for a phase is a specific figure. If one accepts that CPR r.3.18 and r.CPR 44.4(2) are determinative, it matters not how one seeks to define budgeted costs as there can be no departure from the sum specified on any phase in the absence of a good reason.

- There is no difficulty with undertaking the CPR r.44.3(2)(a) proportionality cross check. At the end of the assessment the court will have determined the "reasonably incurred" and "reasonable in amount" sum of the non-budgeted costs (i.e. those incurred before the costs management order) and these must then be added to the budgeted costs. The proportionality cross check is then applied, but on the basis that this cannot reduce the overall costs to less than the budgeted costs, for, as is set out above, those costs were subject to a determination of proportionality at the time the budget was set. Accordingly, if the total of the assessed costs is not proportionate, then the court must reduce the costs to a level that is proportionate, but that cannot be less than the budgeted costs.
- The judgment of Moore-Bick LJ in ***Henry*** was under a pilot scheme with a different stated objective than the current regime (CPR 51 PD1.3 as was), with a "broad" range at costs management and with a different proportionality approach (having no equivalent of CPR r.44.3(5) or r.44.3(2)(a)). The current regime does provide for the court to determine both reasonableness and proportionality of the budget at costs management with express reference to these specific costs provisions. It should also be remembered that in ***Henry*** the court was actually concerned with a party who had exceeded the budget and not complied with the provisions of the scheme itself and this was the focus of the decision. In respect of the reverse situation, what the court said in para.16 may, if one accepts that reasonableness and proportionality have already been determined, be seen as no more than an iteration of the indemnity principle, namely that "*if the costs incurred in respect of any stage fall short of the budget, to award no more than has been incurred does not involve a departure from the budget*". In fact it is suggested that it does represent a departure as the budget is for a specific sum, but plainly one for good reason – namely that a receiving party cannot recover more costs from a paying party than it is obliged to pay under its retainer with its solicitors.
- Not only is the decision in *Troy* not binding (it related to permission to appeal), as the court recognised in *Merrix*, but the pilot scheme under CPR PD51G, under which it was budgeted, was less prescriptive as to how a budget was to be set than CPR Pt 3 Section II. Whilst CPR PD51G para.1.3 contained a reference to "reasonable and proportionate" costs, that was in the context of incurred costs, which could not be budgeted. CPR PD51G para.4.2 stated the purpose of costs management to be "*to control the costs of litigation in accordance with the overriding objective*". It is important to remember that the then overriding objective did not include the words "*and at proportionate cost*". Accordingly, there was certainly scope under the pilot to argue at subsequent assessment that the costs budgeting process had not involved a prospective evaluation of the reasonable and proportionate costs. Therefore, the comment by Moore-Bick LJ, that there should be further consideration of these twin requirements, is unsurprising, but does not inform the debate under the post-31 March 2013 rules. It is also worth remembering that in ***Troy*** the court was concerned with a budget that Moore-Bick LJ described as having been set by the first instance judge "*on the basis that he would approve any figure for a particular element of the claim, provided it was not so unreasonable as to render it obviously excessive or, as he put it, 'grossly disproportionate'*". This does not bear analogy with a budget set by express reference under CPR PD3E para.7.3 to both reasonableness and proportionality.
- Similarly, the passage cited from ***Simpson*** does not carry the weight that it appears to on first reading. It is a selective extract. It is interesting to note that the paragraph from which it is taken begins by stating that "*It is clear that if costs management is to work conclusions reached upon reviewing costs budgets must be adhered to, and not second-guessed at a later stage.*" Viewed as a whole, it is arguable that the comment supports entirely the certainty of outcome intended by costs management and dismisses the notion that the budgeted costs are subject to some subsequent redetermination. This is a refrain to which Warby J returned in ***Barkhuysen v Hamilton*** [2016] EWHC 3371 (QB) when stating that, but for the indemnity costs he had made, the claimant would have been limited to the sums budgeted.

  Even if one analyses only the words in brackets at the conclusion of the passage referred to above from *Simpson*, namely "(If the receiving party has incurred costs less than budgeted there will be good reason to depart downwards)", it is striking that the court did not say "If the receiving party has incurred costs less than budgeted after an assessment there will be good reason to depart downwards". The court appears, in fact, to have been making no more than the obvious point that breach of the indemnity principle would be a "good reason" to depart from the budget. Accordingly, rather than "costs being less than budgeted costs" representing authority to embark upon an assessment of these costs, the court was simply making the trite observation that if, under the terms of the fee retainer, the amount for which the client is liable to his solicitor is less than the budgeted costs, then it would be a breach of the indemnity principle to recover costs beyond the extent of that liability and that would be "good reason" to depart downwards from the budget. On this construction "incurred costs less than budgeted" does not equate to "incurred costs less than budgeted after an assessment". Precedent bill AB enables easy identification of where the indemnity principle would be breached without a departure from the last approved/agreed budget, and the amount by which there should be departure for this "good reason" (see p.9 of Precedent AB).

Accordingly, rather than supporting an item by item assessment, ***Simpson*** endorses a simple construction of the words used in CPR r.3.18. That this is so is reinforced by the court expressly limiting its conclusions to the CPR PD3E para.7.6 consideration before it and adding that CPR r.3.18 is aimed "*at ensuring that once the court has reached a decision on what it is reasonable for a party to spend on a given phase that conclusion should be final in the absence of some good reason.*"

- Lord Dyson MR, in ***Denton v T H White*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3296 had no doubt as to the effect of a costs management order on a standard basis assessment when considering the benefit of an indemnity costs order. Making a clear link between the budget set and the effect of CPR r.3.18 on ultimate costs recovery, he said:

  "If the offending party ultimately loses, then its conduct may be a good reason to order it to pay indemnity costs. Such an order would free the winning party from the operation of CPR rule 3.18 in relation to its costs budget."

This is an unambiguous confirmation that if costs are ordered on the standard basis, then CPR r.3.18 applies.

- Case and costs management are inextricably linked. Dealing with a case in a way that is just and proportionate, means that, when considering the appropriate directions that determine the procedural path a claim takes, the decision is inseparably linked to the reasonable and proportionate budget for each phase (see ***Jamadar v Bradford Teaching Hospitals NHS Trust*** [2016] EWCA Civ 1001 para.38). To permit wholesale revision of the budget downwards in the absence of good reason retrospectively, having required the parties to adopt the procedural route ordered, recognising the reasonable and proportionate sum that this would cost, might be said to be illogical, unfair and, arguably, in breach of the overriding objective.

Conclusion

Having reviewed the competing arguments, it is suggested that a straightforward interpretation of the relevant rules linking the combination of the unambiguous wording of CPR r.3.18 (being a specific rule determining the link between costs management and assessment) and the unequivocal directive that is CPR r.44.4(2), points to a clear and obvious outcome: that on an assessment of costs (whether summary or detailed) on the standard basis the court cannot depart from the last agreed or approved budget unless there is good reason. In other words, CPR r.3.18 means no more nor no less than it says. This construct requires no artificial semantic agility; it requires no argument that must distinguish between a detailed and summary assessment for it to make sense; and it provides the outcome for which it was introduced. The budget set is by specific sum per phase. If the Civil Procedure Rule Committee had intended the permitted departure for good reason to be in respect only of costs exceeding that specific sum or wanted to create some distinction between summary and detailed assessments, then the rule would say precisely that. It does not. It is crystal clear. Accordingly, any attempt to define a budget as a cap or a fund, is both unnecessary and irrelevant, as whatever it is, CPR r.3.18 is clear as to its relevance at assessment.

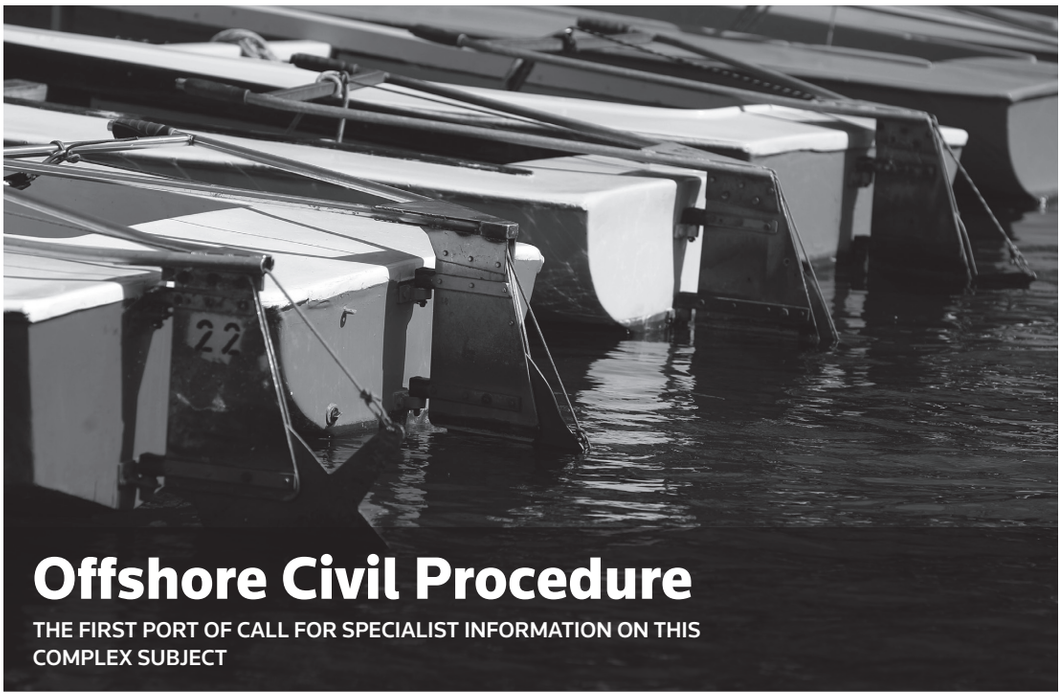
This conclusion is unsurprising when one considers that the architect of costs management, Jackson LJ, described one of the benefits of costs management in his book *The Reform of Civil Litigation* in these terms:

"Both sides know where they stand financially. They have clarity as to a) what they will recover if they win… and b) what they will pay if they lose (own actual costs + other parties' recoverable costs) … This information is of obvious benefit for those making decisions about the future conduct of litigation." (para.14-019.)

This clarity is removed entirely if the budgeted costs are subject to a retrospective item by item assessment revisiting reasonableness and proportionality, which has already been determined, as a matter of routine (rather than in the limited context of departure by dint of "good reason") and the ability to make informed decisions is lost, returning parties to the uncertainty of costs exposure that costs management was, in part, designed to address.

Finally, if CPR r.3.18 does not mean what it expressly says, then one is forced to consider what is the point of the investment of time and costs into budgeting? It would be a process that adds a tier of case management and increases costs with no discernible benefit. In so doing it would fall foul of that part of the overriding objective that requires the court to deal with cases at proportionate cost which it is designed to support.

Simon Middleton
Joint Editor of *Cook on Costs* and contributor to *Costs & Funding following the Civil Justice Reforms: Questions & Answers*.



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