CIVIL PROCEDURE NEWS

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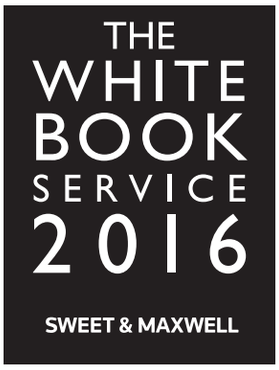

In Brief

Cases

Mack v Clarke [2017] EWHC 113 (QB), 27 January 2017, unrep. (Master Davison)

Admissions – amendment

CPR rr.3.1(3), 14.1(5). A claim was issued for damages arising from alleged negligent treatment: delay in referring the claimant to hospital, by the defendant GP. The defendant applied to amend the defence in order to strike out a paragraph from it which, on one view, could be said to have made partial admissions concerning causation. While the amendment was not opposed, the claimant sought disclosure of drafts of experts' reports upon which the partial admission was said to have been based. Master Davison noted that it was clear law that CPR Pt 35 did not abrogate litigation privilege in respect of experts' reports (***Jackson v Marley Davenport Ltd*** (2004)). The application for disclosure was however based on CPR r.14.1(5) and CPR r.3.1(3) i.e., that it was reasonable to permit the amendment on the condition that the reports were disclosed. **Held**, properly analysed the amendment did not seek to effect the withdrawal of an admission nor was it reasonable, as required by CPR r.3.1(3) to impose such a condition in the event that the amendment did seek to withdraw an admission as: (i) CPR Pt 14 is intended to encourage parties to concede claims or parts of their claims. Such concessions must be both clear and unequivocal: ***Technistudy v Kelland*** (1976). They are not however concerned with, for instance, admissions of trivial or uncontroversial matters such as the "*time, date and place of an accident*". On the contrary,

> *"CPR 14 taken as a whole is primarily directed towards admissions which would entitle a claimant to enter judgment against the defendant. Rule 14.1(1) is drawn somewhat more widely. It refers to 'any part' of another party's case. But, in my view, that must still comprise a distinct element or ingredient of that case, for example breach of duty, causation or a head of loss."*

The paragraph subject to the proposed amendment was neither clear or unequivocal, nor did it amount to an admission of an "element or ingredient" of the claimant's case; (ii) imposing such a disclosure obligation as a condition of permitting withdrawal of an admission would "trespass on a very well entrenched and important privilege" i.e., litigation privilege. Equally imposing such a condition would be counter-productive. It would, because it would discourage parties from making admissions either at all or not unless and until experts had produced their final and definitive reports. As such it would frustrate the overriding objective *per se* as well as, through having a disproportionate effect upon defendants contrary to equality of arms. ***Technistudy v Kelland*** [1976] 1 W.L.R. 1042, CA, ***Jackson v Marley Davenport Ltd*** [2004] EWCA Civ 1225; [2004] 1 W.L.R. 2926, CA, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.14.1.8.)

Sharp v Leeds City Council [2017] EWCA Civ 33, 1 February 2017, unrep. (Jackson, Briggs and Irwin LJJ)

Fixed costs – application to pre-action disclosure

County Courts Act 1984, s.52, CPR Pts 25, 45, Section IIIA, Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims, Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents, Pre-Action Protocol for Personal Injury Claims. A claim was brought seeking damages for personal injury arising from the defendant's alleged failure to properly maintain a footpath. The claim proceeded under the EL/PL Protocol following a claim notification form (CNF) being loaded onto the Portal. At some point after October 2014, the claim no longer continued under the EL/PL Protocol. It thereafter came under the PI Protocol. Following the defendant's failure to provide pre-action disclosure pursuant to the PI Protocol, the claimant sought pre-action disclosure (PAD) under County Courts Act 1984, s.52(2) and CPR r.25(1)(i). Such applications were noted by the Court of Appeal as being apparently commonplace where claims proceeded under the PI Protocol (which would hardly suggest the Protocol was being complied with properly). The question before the Court of Appeal was

> *". . . whether the regime for fixed costs provided by Section IIIA of Part 45 for claims which started, but no longer continue, under the EL/PL Protocol applies to the costs of an application under Section 52 of County Courts Act 1984 for pre-action disclosure in connection with such a claim."*

The Court of Appeal answered the question in the affirmative. As Briggs LJ put it at para.30,

> *". . . the fixed costs regime plainly applies to the costs of a PAD application made by a claimant who is pursuing a claim for damages for personal injuries which began with the issue of a CNF in the Portal pursuant to the EL/PL Protocol but which, at the time of the PAD application, is no longer continuing under that Protocol."*

The basis of this was that: (i) the obvious aim of the fixed costs regimes under the EL/PL and RTA Protocols was to limit the costs of bringing and defending a claim within the Protocols to the specified fixed recoverable costs, subject to express and limited exceptions. It was impermissible to accept that in addition to those express exceptions there were implied exceptions; to do so would undermine the fixed costs regimes' purpose and would be contrary to proportionality: see CPR rr.45.29A(1), 45.29D. The applicability of the fixed costs regime in this respect is supported by the general approach to Pt 45, and particularly the provisions in CPR rr.45.29C and 45.29E; (ii) the application for PAD is an application within the definition of interim applications per CPR r.45.29H; (iii) in appropriate i.e., exceptional circumstances under CPR r.45.29J the fixed costs applicable to such an application may be disapplied. In this way it may be possible to provide an effective disincentive to defendants to not comply with their disclosure obligations and thereby necessitate a pre-action disclosure application by a claimant. It was however noted that if this proved not to be an effective means of securing compliance with disclosure obligations under the Protocols, the Civil Procedure Rule Committee may need to consider introducing a further and higher fixed cost regime for recovery of the costs of such applications. (See ***Civil Procedure 2016*** Vol.1 para.45.29A.1.)

- **Al-Rawas v Hassan Khan & Co (a firm)** [2017] EWCA Civ 42, 1 February 2017, unrep. (Elias and Sharp LJJ, Green J)

Application of limitation period – counterclaim

Limitation Act 1980, s.35. Claims were brought by solicitors' firms against their former clients seeking payment of, amongst other things, unpaid legal fees. The claims were issued within the relevant limitation period. The defendants issued defences and counterclaims. The claimants in their defences to the counterclaims pleaded that they were statute-barred. It was common ground between the parties that: i) the counterclaims were counterclaims for the purposes of s.35(3) of the Act and that if they were deemed to have been commenced at the time the claimants' claims were issued they would be statute-barred. Applications for summary judgment on the limitation point were dismissed. An appeal from that dismissal was however allowed. On appeal to the Court of Appeal, a narrow point of construction of Limitation Act 1980, s.35 was identified:

> *"C brings a claim against D, which is in time. D (not having previously made any claim in the proceedings) wants to counterclaim against C, but a fresh action to advance that counterclaim would be out of time at the time when C's claim is brought. Does section 35 of the Limitation Act, in particular subsections (1) and (3) of section 35, nevertheless allow D to bring the counterclaim, as a matter of right?"*

In reaching its decision the Court of Appeal noted that this s.35 of the 1980 Act was well-known and understood to be poorly drafted and lacking in clarity, as previously noted by the UKSC in ***Roberts v Gill*** (2010). This was noted as being particularly problematic due to s.35 of the 1980 Act dealing with both matters of substantive and procedural law. The section however applied the 1980 Act, i.e., primary limitation periods applicable to claims, to new claims, which included claims for set-off, counterclaims as well as claims to add or substitute causes of action or parties. The section's aim was clear. It was to: "*enable a claimant to amend pleadings out of time so as to sue in another capacity; and to enable parties to be added out of time where joinder is necessary if the claimant's claim is to succeed. . .*" It was noted that Lord Collins in ***Roberts v Gill*** (2010), at para.38 of his judgment, summarised the effect of s.35 and the CPR in seven propositions. Lord Collins' third proposition however required modification:

> *"(1) A new claim means a claim involving either (a) the addition or substitution of a new cause of action; or (b) the addition or substitution of a new party: section 35(2).*
>
> *(2) Any new claim made in the course of an action is deemed to have been commenced on the same date as the original action: section 35(1).*
>
> *(3) No such new claim, **other than an original set-off or counterclaim**, may be made after the expiry of any applicable limitation period, except as provided by rules of court: section 35(3)."* (Modification by way of addition to the original proposition in bold.)
>
> *(4) Rules of court may provide for allowing a new claim, but only (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and (b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action (i.e. any claim made in the original action cannot be maintained by an existing party unless the new party is joined as claimant or defendant): section 35(4), (5), (6). The relevant rules of court are in CPR 17.4 and 19.5.*
>
> *(5) CPR 17.4(2) has the effect that a new claim may be added by amendment but only if the new claim arises out of the same facts or substantially the same facts as the original claim.*

(6) CPR 19.5(2), (3) have the effect (among others) that a new party may be added only if the limitation period was current when the proceedings were started, and the addition of that party is necessary in the sense that the claim cannot properly be carried on by the original party unless the new party is added.

(7) Rules of court may allow a party to claim relief in a new capacity: section 35(7). The relevant rule is CPR 17.4(4), by which the court may allow an amendment to alter the capacity in which a party claims if the new capacity is one which that party had when the proceedings started, or has since acquired."

Consequently: (i) when a new claim is made, including one by way of set-off or counterclaim, s.35(1) provides that it is deemed to have been commenced at the same date when the original claim was commenced. As such if that date, as in the present case, was beyond the applicable primary limitation period the new claim would be statute-barred, unless either s.33 of the 1980 Act or rules of court applied. ***Lloyds Bank plc v Wojcik***, (19 December 1997), unrep., CA, ***JFS (UK) Ltd v Dwr Cymru Cyf*** [1999] 1 W.L.R. 231, CA, ***Haward v Fawcetts (a firm)*** [2006] 1 W.L.R. 682, HL, ***Roberts v Gill*** [2010] UKSC 22; [2011] 1 A.C. 240, UKSC, ***R (Eastenders Cash & Carry plc) v Revenue & Customs Comrs*** [2012] EWCA Civ 689; [2012] 1 W.L.R. 2912, CA, ***Aspect Contracts (Asbestos) Ltd v Higgins Construction plc*** [2015] UKSC 38; [2015] 1 W.L.R. 2961, UKSC, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.17.4.2 et seq.)

■ **The Football Association Premier League Ltd v O'Donovan** [2017] EWHC 152 (Ch), 3 February 2017, unrep. (Chief Master Marsh)

Application to lift stay – amendment – new claim

CPR r.15.11. The claimant issued proceedings alleging infringement of copyright by a public house through televising live football matches. Neither an acknowledgment of service nor a defence was filed. The claimant applied to amend its claim. The defendant did not respond to a request, made on 19 December 2016, to consent to the proposed amendments. Due to the operation of CPR r.15.11 the claim became subject to an automatic stay on 27 December 2016: no acknowledgment of service or defence having been filed within a specified time limit and the claimant not having entered or applied for default or summary judgment. While the application to amend had been made prior to 26 December 2016, as Chief Master Marsh noted, the claimant properly applied under CPR r.15.11(2) to lift to stay. The Chief Master went on to explain the purpose of CPR r.15.11 in the following terms:

"The purpose served by CPR 15.11 is not immediately obvious other than, perhaps, it encourages claimants to make a decision about what steps to take to pursue a claim and renders inactive claims that might otherwise lie merely somnolent on the court file. It might also, perhaps more in theory than in reality, provide comfort to a defendant that no further action in the claim can be taken save with the court's permission However, it seems to me that the rule is not intended to place an especially heavy burden on the claimant to discharge before the court will agree to the stay being lifted. In the usual way, the court must weigh the competing interests of the parties in the balance."

In weighing the parties' competing interests, the Chief Master went on to find that the claimant had both a proper explanation for its delay, which was generally caused by changes to the subject matter of the copyright claims that had arisen following the claim being issued and its desire to amend its claim in the light of them, and real prospects of success in the claim (given his knowledge of previous similar claims). Furthermore, in the claimant's favour, was both the fact that the claim had reasonable grounds and that the defendant had singularly failed to communicate with the claimant. The defendant, on the other side of the equation, could not be said to suffer any apparent prejudice caused by the delay. As such the discretion to lift the stay would be exercised. In terms of the proposed amendments it was readily apparent that the amendments if allowed would add new causes of action. The question here was:

". . . whether it is inevitable that the claimant has to issue a second claim against the first defendant in order to pursue the two new claims?"

The approach to take to the question was not clear from the authorities, and it was noted that the commentary set out in ***Civil Procedure 2016*** Vol.1 at paras 17.3.4–17.3.5 did not perhaps provide a complete account of either the pre- or post-CPR authorities. The Chief Master noted that the Court of Appeal in ***Maridive & Oil Services SAE v CNA Insurance Co (Europe) Ltd*** (2002) adopted, what looked like the surprising view, that it was bound by pre-CPR authorities, when the CPR effecting significant changes to practice and procedure, and particularly significant changes to the approach to pleadings and amendment. The difference between the RSC and CPR was further emphasised by the introduction and nature of the overriding objective. The RSC and its authorities should be treated with caution. Given this, the proper and present state of the law regarding the addition of new causes of action was that set out in ***British Credit Trust Holdings v UK Insurance Ltd*** (2004). The Chief Master, at para.34, summarised that approach as follows, subject to the caveat that the summary was as to the nature of the present claim:

"i) There is nothing in the CPR or the general law that prevents a party adding a new cause of action to a claim subject to different considerations applying in cases of 'incurable nullity' and in cases where limitation is an issue (by virtue of the Limitation Act). In the case of the latter, s.35 of the Limitation Act 1980 and CPR 17.4 apply.

ii) The CPR encourages the parties to resolve all the issues between them in one claim and this accords with the approach set out in the overriding objective. This is not a requirement of the CPR but the court will lean in favour of adding claims rather than requiring an additional claim to be issued where possible.

Where the two exceptions referred to in paragraph i) and ii) do not apply;

iii) In cases where permission to amend is granted to add a cause of action that existed at the date the claim was issued, in non-limitation cases, it will normally be related back to the date the claim was issued and the claim will be treated as having included the additional claims as from the date of issue. There may be circumstances where this is not appropriate and the court may grant permission to amend on terms as to the date the added claims took effect. This might be relevant, for example, to interest and costs.

iv) The court's power to permit amendments where new claims are being added, as Morrison J observed in British Credit Trust Holdings, allows the court to impose conditions when granting permission to amend such as to make it clear, in appropriate cases, that the amendment takes effect upon the date of the order or such earlier date as the court specifies.

v) To my mind, and perhaps controversially, the doctrine or rule of relation back is no more than a rule of thumb, save where it finds statutory force in s.35 of the Limitation Act 1980. In the vast majority of cases it is convenient that a claim is treated as including all the amendments as if they were included as at the date of issue of the claim. It is, however, not an essential or necessary effect of an amendment and the court may grant permission to achieve a different outcome.

vi) I would only add that it is plainly preferable for a claimant to include all the claims it wishes to pursue in the claim when issued and there may be many cases where it is more appropriate for additional claims to be made by issuing a new claim. It does not follow that simply because the court has power to permit an amendment adding a new claim, it will necessarily exercise its discretion to do so. As will all such decisions, the provisions of the overriding objective are paramount."

The amendments were allowed. ***Sneade v Wotherton*** [1904] 1 K.B. 295, CA, ***Hendry v Chartsearch Ltd*** [1998] C.L.C. 1382, CA, ***Maridive & Oil Services SAE v CNA Insurance Co (Europe) Ltd*** [2002] EWCA Civ 369; [2002] 1 All E.R. (Comm) 653, CA, ***British Credit Trust Holdings v UK Insurance Ltd*** [2003] EWHC 2404 (Comm); [2004] 1 All E.R. (Comm) 444, Comm, ***Millburn-Snell v Evans*** [2011] EWCA Civ 577; [2012] 1 W.L.R. 41, CA, ***Hussain v Bank of Scotland*** [2012] EWCA Civ 264, CA, ***Haastrup v Haastrup*** [2016] EWHC 3311 (Ch), unrep. ChD, ref'd to. (See ***Civil Procedure 2016*** Vol.1 paras 17.3.4, 17.3.5.)

- **Michael Wilson & Partners Ltd v Sinclair** [2017] EWCA Civ 55, 7 February 2017, unrep. (McCombe and Briggs LJJ)

Money judgment – jurisdiction to grant stay of execution

CPR rr.3.1(1), 3.1(2)(f), 40.8A, 83.7. The parties had been engaged in litigation in the Bahamas. Within that litigation a number of costs orders had been made. Those costs orders were registered under the Administration of Justice Act 1920, in favour of the appellant by order, dated 19 October 2014. The respondent had sought a stay of execution of the order registering the costs orders. The stay was granted. An appeal of the order granting the stay was dismissed. The appellant was granted permission to bring a second appeal. On that appeal, the Court of Appeal **held**: (i) the discretion to grant a stay of execution arose under CPR r.83.7 and not, as the judge at the first appeal held, under CPR r.3.1(2)(f). CPR r.83.7 ousts the application of r.3.1(2)(f) where money judgments are concerned and does so from the point at which the money judgment or an order for the payment of money is issued; (ii) as CPR r.83.7 applied, it was therefore necessary to consider whether special circumstances applied which rendered it "inexpedient to enforce the judgment or order" (per CPR r.83.7(4)(a)). While the judge on the first appeal had made findings, in the alternative, on the basis of this provision ordinarily the Court of Appeal would only set aside that decision if the judge had erred in principle in exercising the discretion: see ***Civil Procedure 2016*** Vol.1 para.52.11.14. However, in the present case there had been a number of developments following on from the first appeal that undermined the basis on which that decision was made. As such the Court of Appeal was justified in exercising the discretion under CPR r.83.7. The appeal was allowed and the stay was lifted. (See ***Civil Procedure 2016*** Vol.1 para.83.7.1 et seq.)

■ **Dawson-Damer v Taylor Wessing LLP** [2017] EWCA Civ 74, 16 February 2017, unrep. (Arden, David Richards and Irwin LJJ)

Legal Professional Privilege – application to documents – subject access requests

Data Protection Act 1998, Directive 95/46 EC (the Data Protection Directive). The appellants were beneficiaries of Bahamian trusts. The respondent acted for a trustee of one such trust. In August 2014 the appellants made a subject access request under s.7(2) of the Data Protection Act 1998. They sought information about themselves held by the respondent as solicitors for the trusts. The respondents declined to comply with the request on the basis that it was exempt from disclosure under the 1998 Act as it was personal data protected by legal professional privilege: see Sch.7, para.10 of the 1998 Act, and see ***Schmidt v Rosewood*** (2003). Subsequently the appellants sought a declaration that the respondent had not complied with the request. They sought an order requiring the respondent to comply with the request per s.7(9) of the 1998 Act. The application was dismissed. The appellants appealed to the Court of Appeal. The appeal raised three issues, one of which was the application of legal professional privilege. **Held**, the legal professional privilege exception under Sch.7, para.10 of the 1998 Act was limited in application to documents that were subject to legal professional privilege for the purpose of English law. Parliament was not to be assumed to have intended to legislation for matters that occur outside the UK. Parliament had further sought to legislate in order to give effect to the "member state option" arising under art.13(1)(g) of the Data Protection Directive when it enacted the 1998 Act. As such, the right it sought to safeguard via Sch.7, para.10 of the 1998 Act was the fundamental right protected by legal professional privilege as it is recognised in respect of proceedings within any part of the UK. Data controllers are therefore only able to rely on the exemption if legal professional privilege in respect of the content of a subject access request if that privilege arises under the law of any part of the UK. It was further held that the legal professional privilege exception under Sch.7, para.10 of the 1998 Act did not apply to documents that would not be subject to legal professional privilege but would, as in this case, be subject to a right of non-disclosure arising on another basis i.e., trust law principles. The exception was limited to legal professional privilege as conventionally understood. ***Talbot v Marshfield*** (1865) 2 Dr & Sm 549, Ct of Chancery, ***Re Londonderry's Settlement*** [1965] Ch. 918, CA, ***Schmidt v Rosewood*** [2003] UKPC 26; [2003] 2 A.C. 709, PC, ***R (o/a Morgan Grenfell Ltd v Special Commissioners of Income Tax*** [2002] UKHL 21; [2003] 1 A.C. 563, HL, ***YS v Minister voor Immigratie, Integratie en Asiel*** [2015] 1 C.M.L.R. 18, ECJ, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.31.3.5.)

■ **Merrix v Heart of England NHS Foundation Trust** [2017] EWHC 346 (QB), 24 February 2017, unrep. (Carr J)

Costs budgeting – detailed assessment

CPR Pts 3, 47. A costs management order was made in clinical negligence proceedings. A costs budget was approved. The claim however settled prior to trial. A preliminary issue concerning costs was considered by the Costs Judge. That issue was:

> *"To what extent, if at all, does the costs budgeting regime under CPR Part 3 fetter the powers and discretion of the costs judge at a detailed assessment of costs under CPR Part 47?"*

The Costs Judge answer was that while a costs budget was not binding on a costs judge at a detailed assessment it would be a "strong guide". (For a discussion see ***Civil Procedure News*** 2/2017.) On appeal to the High Court, Carr J allowed the appeal and at para.92 **held**, that while it was likely that the issue would and should be considered by the Court of Appeal sooner rather than later,

> *". . . where a costs management order has been made, when assessing costs on the standard basis, the costs judge will not depart from the receiving party's last approved or agreed budget unless satisfied that there is good reason to do so. This applies as much where the receiving party claims a sum equal to or less than the sums budgeted as where the receiving party seeks to recover more than the sums budgeted."*

This was the case because CPR r.3.18 was expressed in clear and mandatory terms, which specify that the court will not depart from a costs budget, except for a good reason. Thus, in the absence of a good reason to depart from it, a Costs Judge is bound by an agreed or approved costs budget. This is the case irrespective of whether "*it is claimed that budgeted figures are or are not to be exceeded*". CPR r.3.18 means what it says. The aim here is to reduce the scope of and need for detailed assessment not least because costs budgeting requires the reasonableness and proportionality of costs to be determined at that stage and determined prospectively. Such an approach was consistent with ***SARPD Oil International Ltd v Addax Energy SA*** (2016), ***MacInnes v Gross*** (2015), ***Collins v Devenport Royal Dockyard Ltd*** [AGS/16029/54] and ***Harrison v Coventry NHS Trust*** (2016), nor was it inconsistent with CPR PD3E para.7.3 which simply provides that when a court reviews a costs budget it does not carry out a detailed assessment but rather considers whether the budgeted costs "*fall within the range of reasonable and proportionate costs*". While the question of what might be a good reason to depart from a costs budget did not arise, it was obvious that if the amount spent by

the receiving party was lower than agreed or approved in a costs budget would be such a reason. It would, in order to comply with the indemnity principle. Costs budgeting does not however replace detailed assessment or render it redundant. Detailed assessment will still need to be carried out for costs outside the budget e.g., where there is good reason to depart from the budget, or even where there is no such good reason where there are pre-incurred costs, costs of interim applications which were validly not included in the budget, or, costs assessed on an indemnity basis. It was also the case that there was nothing in CPR Pt 44 which overrode CPR r.3.18. Ensuring that the plain words of CPR r.3.18 are applied was noted as serving two purposes, "*reducing the costs of the detailed assessment process and of securing greater predictability on costs exposure/recovery for the parties*". Furthermore, it would ensure that both

> *". . . the receiving and paying party have the benefit of the legitimate expectation. This is a central pillar of access to justice in a world where costs will always be a primary consideration for those contemplating or participating in litigation, and consistent with the overriding objective. The expensive costs of the detailed assessment procedure are reduced and the case is dealt with justly, with both parties knowing from an early stage what their potential costs liability is, absent good reason to depart from the budget."*

Troy Foods v Manton [2013] EWCA Civ 615; [2013] 4 Costs L.R. 546, CA, ***Henry v News Group Newspapers Ltd*** [2013] EWCA Civ 19; [2013] 2 All ER 840, CA, ***Simpson v MGN Ltd*** [2015] EWHC 126 (QB); [2015] 1 Costs L.R. 139, QBD, ***May & May v Wavell Group plc*** [2016] EWHC B16 (Costs), SCCO, ***Harrison v Coventry NHS Trust*** (16 August 2016, unrep.), SCCO, ***Collins v Devonport Royal Dockyard Ltd*** [AGS/16029/54], unrep., ***SARPD Oil International Ltd v Addax Energy SA*** [2016] EWCA Civ 120; [2016] C.P. Rep. 24, CA, ***MacInnes v Gross*** [2017] EWHC 127 (QB), unrep., QBD, ref'd to. (See ***Civil Procedure 2016*** Vol.1 para.3.18.1.)

Practice Updates

STATUTORY INSTRUMENTS

THE DAMAGES (PERSONAL INJURY) ORDER 2017 (SI 2017/206). In force from **20 March 2017.**

On 27 February 2017, under power provided by s.1 of the Damages Act 1996, the Lord Chancellor announced the modification of the personal injury discount rate for compensation for future financial loss. The modification is set out in the Damages (Personal Injury) Order 2017. From 1 March 2017 the discount rate will be minus 0.75 per cent (-0.75%). The previous rate which had been in force since 2001 was 2.5 per cent (2.5%).

THE CIVIL PROCEDURE (AMENDMENT) RULES 2017 (SI 2017/97). In force from **6 April 2017**, except for revisions to Section VII of Pt 54, Pt 52, Pt 61, which are in force from **28 February 2017**, and for revisions to Pt 3 (except those to r.3.15), Pt 25, Pt 44, which are in force from **6 March 2017**. The amendments to Pts 3 (except those to r.3.15), 25 and 44 are subject to transitional provisions. The statutory instrument effects the following amendments to the CPR:

- introduces provisions into Pt 3, and makes consequent amendment to Pts 25 and 44, to provide for sanctions (automatic strike out) for non-payment of various court fees by claimants and defendants;
- amends CPR rr.3.15 and 3.18 to reverse the effect of the decision in *SARPD Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 120;
- amends CPR r.45.29B to 45.29E to reflect the Court of Appeal's decision in *Qadar v Esure Services Ltd* [2016] EWCA Civ 1109;
- introduces provisions governing costs protection in environmental claims in Pt 45, Section VII and Pt 52;
- amends Pt 61 to make provision for the use of electronic track data;
- makes minor amendments to CPR rr.63.16(2), 63.20(2) and Pt 68.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 88th Update, in force on various dates. It effects the following revisions:

- **PD2C (Starting proceedings in the County Court)**, in force from **31 March 2017**, amends the schedule of County Court hearing centres to: omit those now closed; reflect that Port Talbot is now a District Registry; and insert various references to Prestatyn;

- **PD2E (Jurisdiction of the County Court that may be exercised by a legal adviser)**, inserts a new PD which makes permanent provision for Legal Advisers to exercise certain of the County Court's jurisdiction. Effects the omission of **PD51K (The County Court legal advisers pilot scheme)**. Reference to "legal adviser" is also added to paras 2.1 and 2.2 by amendment to **PD17 (Amendments to statements of case)**. All amendments in force from **1 April 2017**;
- **PD3B (Sanctions for non-payment of fees)**, in force from **6 March 2017**, effects a minor amendment to require notice to be sent to the claimant and defendant in the event that a claim or counterclaim is struck out under CPR r.3.7A1 or r.3.7AA for non-payment of fees;
- **PD3E (Costs management)**, in force from **6 April 2017**, substitutes references to "budgets" and to "parts of budgets" with references to "budgeted costs" and "incurred costs";
- **PD4 (Forms)**, in force from **6 March 2017**, deletes reference to Form N173;
- **PD23A (Applications)**, in force from **1 April 2017**, amends para.10.3 to require consent orders made by a judge to specify the name and title of the relevant judge;
- **PD25A (Interim injunctions)**, in force from **28 February 2017**, substitutes paras 5.1 to 5.3 in their entirety and inserts new paras 5.4 and 5.5;
- **PD26 (Case management – preliminary stage)**, as from **1 April 2017** amends para.3.1 through substituting a new subpara.(2)(a), which makes reference to PD2E. As from **31 March 2017**, amends para.10.4 to delete reference to Bow County Court;
- **PD45 (Fixed costs)**, as from **28 February 2017** deletes paras 5.1 and 5.2, and as from **31 March 2017** deletes reference to Bow County Court from para.2.6;
- **PD47 (Procedure for detailed assessment of costs and default provisions)**, as from **31 March 2017** deletes reference to Bow County Court from para.4.2(1), and as from **6 March 2017**, substitutes a new para.13.3(b) to reflect the change effected by the reforms to PD3B (as noted above);
- **PD51O (The Electronic Working pilot scheme)**, in force from **1 April 2017**, inserts reference to para.3.4(2) into para.3.1 and substitutes para.3.4(2) requiring use of Electronic Working (or paper) as a means to file documents i.e., it prohibits filing of documents via e-mail. Further amends by way of substitution para.14.2 to make further reference to terminals provided by HMCTS for the purpose of obtaining electronic copies of documents;
- **PD52B (Appeals in the county court and the High Court)**, in force from **31 March 2017**, effects various changes to Table A and Table B to reflect the closure of a number of County Court hearing centres
- **PD52D (Statutory appeals and appeals subject to special provision)**, in force from **28 February 2017**, inserts into para.26.1 and new subpara.17 to make reference to Aarhus Convention claims;
- **PD54A (Judicial Review)** in force from **28 February 2017**, replaces para.5.9 with one that makes provision for a set of bundles to be provided to each judge hearing a claim in proceedings before the Divisional Court;
- **PD56 (Landlord and tenant claims and miscellaneous provisions about land)**, in force from **6 March 2017**, inserts various provision relating to Pubs Codes Tenants;
- **PD61 (Admiralty claims)**, in force from **28 February 2017**, inserts: a new para.4.6 which makes case management conferences mandatory in collision claims within a specified period following filing of the final collision statement of case; a new para.4.7, making provision for fast track procedures where electronic track data has been disclosed in any collision claim;
- **PD68 (References to the European Court)**, in force from **6 April 2017**, substitutes PD68 in its entirety;
- **PD74A (Enforcement of judgments in different jurisdictions)**, in force from **1 April 2017**, makes various changes to paras 4.2, 4.3 and 7.2 to take account of the introduction of PD2E (see above).

PRACTICE GUIDANCE

CHANCERY GUIDE – UPDATE

A number of minor amendments have been made to the Chancery Guide. The most significant is reference to the fact that as from **25 April 2017** e-filing becomes compulsory in the Rolls Building jurisdictions (See ***Civil Procedure News*** 01/2017). The current version of the Guide, amended as of February 2017, can be found at: *https://www.gov.*

uk/government/uploads/system/uploads/attachment_data/file/590859/Chancery_Guide_02.17.pdf. The version on the Judiciary of England and Wales' website is out of date.

ADMIRALTY AND COMMERCIAL COURT GUIDE – UPDATE

As from 28 February 2017 to take account of amendments to CPR Pt 61 and PD61 (as noted above), the Admiralty and Commercial Court Guide, Section N, was amended. In particular, a new Appendix 20 – Electronic Track Data in Collision Claims – is added to provide guidance on the proper approach to be taken in respect of collision claims where track data has been recorded electronically or digitally.

ALTERATION OF CPR HYPERTEXT LINKS

Some Ministry of Justice weblinks are moving, which will result in consequential amendments needing to be made to provisions in the CPR and Practice Directions. It is hoped that such amendments are made in a timely manner. Readers should be aware of one such change to CPR PD52C para.27(1). The present link is to be changed to *http://hmctsformfinder.justice.gov.uk/HMCTS/GetForms.do?court_forms_category=Court%20Of%20Appeal%20Civil%20Division*.

PRACTICE NOTE – VARIATION OF TRUSTS

Sir Geoffrey Vos, Chancellor, with the agreement of the Chancery Bar Association, authorised the issue of a Practice Note setting out the proper procedure to adopt for dealing with proceedings concerning the variation of trusts, and related confidentiality applications. In particular, it provides guidance to the approach in the light of the decision in ***V v T & A*** [2014] EWHC 3432 (Ch) and the extension of Masters' jurisdiction in April 2015. It further provides in an Appendix, a draft form interim order to be used on applications for interim confidentiality orders. The note is reprinted below. The Appendix is available at *https://www.judiciary.gov.uk/publications/practice-note-variation-of-trusts/*.

Practice Note: Variation of Trusts of 9 February 2017

Confidentiality Orders Pending the Hearing of the Application

This note sets out the practice concerning the way in which the initial stages of Variation of Trusts ("VoT") claims are handled in the light of:

i. The decision in V v T and A [2014] EWHC 3432 (Ch);

ii. The change to Masters' jurisdiction in April 2015;

iii. The guidance contained in paragraphs 29.22 to 29.27 of the Chancery Guide [as amended].

The procedure set out below has been approved by the Chancellor with the agreement of the Chancery Bar Association.

Paragraph 30 of Morgan J's judgment in V v T and A makes suggestions for the future listing of VoT applications where there is a wish to preserve confidentiality. However, the guidance pre-dates the extension to the Masters' jurisdiction in April 2015. As from that date the Masters have had jurisdiction to make VoT orders and all VoT claims should in the first instance come before a Master.

When the parties are ready to issue VoT proceedings, they should attend before a Master in advance of the claim being issued (a) to consider whether orders should be made on an interim basis to preserve confidentiality pending the full hearing of the application and (b) to discuss whether the application is best suited for hearing by a Master or a judge. Whether a particular application is more suitably dealt with by a judge is decided on a case by case basis taking account of the complexity and scope of the application, whether there are novel legal issues, the parties involved and the parties' wishes. The draft Part 8 claim and the evidence in support should be lodged before the application is issued. It may be reviewed on paper but it is often more convenient for the claim to be discussed at an application without notice ("AWN") hearing. If the Master is satisfied, based on the evidence, that there is real prospect of the court being willing to direct that the main hearing should be in private and/or there should be reporting restrictions and/or access to the court file shou ld be limited and/or the proceedings are anonymised then interim orders can be made to preserve confidentiality. An example of such an order is at Appendix A, available on the justice.gov website, numbered CH43.

Whether it is appropriate to make an interim order to restrict access to the claim form and evidence on the court file and to make the proceedings anonymous pending the disposal hearing will depend on the circumstances in each case. These orders are not automatic and the applicants will have to provide evidence which justifies the making of such an order. At the full hearing, in the light of more detailed consideration the court can decide whether these orders should be continued and whether the hearing should be in private.

In Detail

BRIGHTSIDE GROUP LTD v RSM UK AUDIT LLP [2017] EWHC 6 (COMM) – COMPLIANCE WITH CPR R.7.7 AND DEEMED DATE OF SERVICE

In ***Brightside Group Ltd v RSM UK Audit LLP*** [2017] EWHC 6 (Comm) Andrew Baker J examined the relationship between CPR r.6.14 and r.7.7.

The facts were straightforward. Proceedings were issued on 26 April 2016. The claim pursued two claims of negligence. The first claim arguably became statute-barred on 27 April 2016; the second, on 2 June 2016. The claim form was not served following issue. On 27 May 2016 the defendants' solicitor provided the claimant's solicitor notice under CPR r.7.7. The notice specified that if the claim form had not been served or discontinued by 10 June 2016, an application to dismiss would be made. The defendants' solicitors served the CPR r.7.7 notice by fax and email. CPR r.6.26 deemed it to be served on 27 May 2016. The claim form was not served until 10 June 2016. It was served by a trainee solicitor who delivered it by hand to the ground floor reception of the building in which the defendants' solicitors' firm had its offices. The claim form was handed to a messenger employed by a service company that worked for the defendant's solicitor. The messenger signed for the package.

The defendants thereafter applied for the claim's dismissal on the basis that the claimant had failed to comply with the terms of the CPR r.7.7 notice. The defendants' application also sought a declaration under CPR r.11 that the court had no jurisdiction to try the claim as the attempt to serve the claim form was invalid. It was said to be invalid because *per* CPR r.6.14 if the delivery of the claim form was valid then it was deemed to be served on 14 June 2016, and if the attempt to serve was not valid service then the claim form had not been served as required by the CPR r.7.7 notice.

Andrew Baker J dismissed the application. In doing so he noted that the issue at the heart of the application – the relationship between CPR r.7.7 and the deemed service provisions in CPR r.6.14 – was one on which there was *"no prior authority"*. He held that where a claimant had to comply with the terms of a CPR r.7.7 notice that required service of a claim form or discontinuance by a specified date, compliance was to be determined by reference to the CPR r.6.14 deemed dates for service. It was not to be determined by the date on which the claimant took a step to effect service per CPR r.7.5. As such, in the present case the fact that the claim form was left with the messenger on the 10 June 2016 was thus insufficient to comply with the CPR r.7.7 notice. Notwithstanding the failure to comply with the notice, the claim was not dismissed due to the absence of any prejudice to the defendants arising from the non-compliance.

The key question in the present case, as the claimant had served the claim form, was the date on which service took place. The answer was provided by CPR r.6.14. It was clear from the decisions in ***Godwin v Swindon Borough Council*** [2002] 1 W.L.R. 997 and ***Anderton v Clwyd County Council (No.2)*** [2002] 1 W.L.R. 3174 that the deemed date of service set out in what is now (but was, at the time of the two decisions, CPR r.6.7) CPR r.6.14 is a fixed date, an irrebuttable date. The authorities remain binding. Furthermore, as Andrew Baker J went on to hold at paras 20 and 23,

> *"CPR 6.14 fixes the date on which service of a claim form occurs, for all, not only for some, CPR purposes.*
>
> *. . . CPR 6.14 creates a fixed rule as to when, for the purpose of the CPR, service of a claim form occurs; a fixed rule that operates independently of any enquiry into when the claim form was in fact received by or otherwise brought to the attention of the defendant; and a fixed rule that applies to all claim forms served anywhere within the United Kingdom, not just to those served within the jurisdiction."*

In reaching this conclusion, Andrew Baker J rejected the submission that compliance with the requirements of a CPR r.7.7 notice should be determined by reference to CPR r.7.5(1) and thus by reference to the question whether the step required to be taken by r.7.5(1) had been complied with by the date specified in the r.7.7 notice. That submission rested on, amongst others, decisions of the High Court in ***Ageas (UK) Ltd v Kwik-Fit (GB) Ltd*** [2013] EWHC 3261 (QB) and ***T & L Sugars Ltd v Tate & Lyle Industries Ltd*** [2014] EWHC 1066 (Comm). Andrew Baker J held that neither of these decisions, both of which concerned compliance with contractual provisions related to service, were concerned with CPR r.7.7. He explained that there was a fundamental difference between the roles CPR r.6.4 and r.7.5(1): the former was concerned with providing for when a claim form is served, whereas the latter was concerned with what needed to be done to render service valid, see para.24,

> *"CPR 7.5(1) now defines the temporal validity of a claim form, for service within the jurisdiction, by the obligation imposed on the claimant to complete the 'step required' within four months from issue. It therefore defines what must be done within four months by a claimant who serves within the jurisdiction for the resulting service of his claim form to be valid. It does not provide or imply that service of a claim form served within the jurisdiction occurs upon completion of that step. CPR 6.14 still fixes when, for the purpose of the CPR, service occurs for a claim form served*

within the jurisdiction, as it does for a claim form served out of the jurisdiction but within the United Kingdom."

Furthermore, and contrary to the decision in ***T & L Sugars Ltd*** reference to when a claim form was "actually served" was unhelpful. It was source for confusion; a point that is apparent from the decision in ***Godwin*** and its emphasis on the importance of the irrebuttable nature of the deemed service provisions for fixing the date on which service is effected.

In the present case, service had been effected validly. The question was when it took effect. While both questions could be relevant to the question of compliance with a CPR r.7.7 notice, in the present case as service had been validly effected, CPR r.7.5 was not engaged. The question was when service was effected, and that could only be answered by reference to CPR r.6.4.

Andrew Baker J's decision is a welcome clarification of the law in this area, although given the difference in interpretation given between his judgment and those in ***Aegas (UK) Ltd*** and ***T & L Sugars Ltd*** the possibility remains that some certainty as to approach will remain. It is to be hoped though that as the decision in ***Brightside*** specifically focused on the issue of the relationship between CPR rr.6.4, 7.5(1) and 7.7 that it will be followed and that a definitive ruling by the Court of Appeal will not become necessary. This is particularly the case given that the approach in ***Brightside*** is one that quite properly and sensibly sets out a simple and straightforward approach to service rather than the bifurcated approach taken in, for instance, ***Aegas (UK) Ltd***. As Neuberger LJ put it in ***Kuenyehia v International Hospitals*** [2006] EWCA Civ 21 at para.15, this is an area *"where simplicity, clarity and certainty are particularly desirable."* Andrew Baker J's decision rightly places a halt on what might well have become a line of authority that would introduce unnecessary and unintended complexity into questions of service; a line of authority where different service rules and regimes applied for different purposes. The last thing that is needed is for the service rules to start to once more be a source of satellite litigation, a point emphasised by Dyson LJ in ***Collier v Williams***, the culmination of the service cases that Andrew Baker J relied upon in ***Brightside***. As Dyson LJ lamented in ***Collier v Williams*** [2006] 1 W.L.R. 1945 at para.1, the, then, service rules had

> *". . . generated an inordinate amount of jurisprudence. This is greatly to be regretted. The CPR were intended to be simple and straightforward and not susceptible to frequent satellite litigation. In this area, that intention has not been fulfilled. As a result, the explicit aims of the Woolf reforms to reduce cost, complexity and delays in litigation have been frustrated. . . ."*

Brightside properly reflects the intention of securing a simple and straightforward approach, one that provides necessary clarity and certainty. It ought then to reduce the scope for satellite litigation over service to start to develop once more.

Andrew Baker J's decision is also to be welcomed for its rejection of the idea that the deemed service rules promote one aim, that of setting "*a date from which to identify consequent steps in the litigation*". That is, of course, one aim of the provisions, and a very important one for both claimants, defendants and the court. It is an essential prerequisite of effective case management: see ***Godwin*** at para.20 and ***Zuckerman on Civil Procedure*** (2006) at para.4.7 viz,

> *"Since the entire litigation timetable refers back to the service of the claim form, the time of service must be capable of being established with certainty by the litigants and by the court, in order to enable them to carry out their litigation functions in an efficient and orderly manner."*

The wider aim of these provisions however is to further the overriding objective by providing the means by which litigation can be carried out efficiently, and through there being simple rules as to service, cost-effectively. Certainty in the date of service may be essential for determining when further procedural steps can be taken, but that is one part of a wider aim. Moreover, certainty as the date of service, as in the present case, is important for respect of limitation.

Finally, the decision is to be welcomed for the clarification it provides concerning the role of CPR r.7.7 and, particularly the reference to dismissal of the claim within it. At para.34 of his judgment Andrew Baker J explained that the rule did not contain any presumption in favour of dismissal for non-compliance. It was one possible sanction, and other lesser ones or none (depending on the circumstances of the claim) could properly be applied where there had been non-compliance with the terms of the r.7.7 notice. As he put it,

> *". . . The function of CPR 7.7, as it seems to me, is to enable defendants to flush out early whether a claim that has been issued against them is going to be pursued and to get early sight of it, if it is. That does not involve or require putting the temporal validity of the claim form, that is to say the length of time within which the claimants' invocation of the court's jurisdiction will be valid, into defendants' hands (through service of a CPR 7.7 notice). I do not read the express reference to dismissal of the claim in CPR 7.7(3) as indicating a presumption as to the result of non-compliance with a CPR 7.7 notice. In my judgment, it is there merely to make clear that non-compliance is to carry with it a power to dismiss in an appropriate case (and not only lesser, procedural, sanctions). An example would be where the defendant, on his application under CPR 7.7(3), persuades the court by evidence that the claimant has no real intention of pursuing the claim. The court could then, and would expect to, put the claim out of its misery by an order for dismissal even though ex hypothesi the claimant had not done so himself by discontinuing."*

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