CIVIL PROCEDURE NEWS

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In Brief

Cases

■ **Hall v Elia** [2016] EWHC 1023 (Ch), 10 March 2016, unrep. (Proudman J)

Test for repeated application for stay of enforcement

CPR rr.3.1(7), 52.7 (now 52.16). Various orders were made in long-running proceedings concerning ownership of substantial property in Knightsbridge, London. An application for a stay of execution of an order that, amongst other things, required the sale of the property was dismissed in December 2015. A further application for a stay was considered by Proudman J. The application was dismissed. Proudman J **noted** that the grant of a stay of execution of an order was exceptional: the general rule was that litigants could enforce judgments pending an appeal. The established test for the grant of a stay was that set out by Clarke LJ in ***Hammond Suddard v Agrichem*** (2001) at para.22. **Held**, when a party makes a repeated application for a stay the applicant must demonstrate either that there has been a material change in circumstances since the previous stay application was refused or that the original refusal was based on an obvious mistake: ***Thevarajah v Riordan*** (2015) was not limited in application to CPR r.3.1(7) and was applied. As Proudman J put it at paras 16-19,

> *"[16] . . . It seems to me that the Hammond Suddard case . . . has been overtaken in any event by Thevarajah. The decision is not limited to CPR 3.1(7) cases. Lord Neuberger quotes at [18] from the judgment of Buckley LJ in Chanel Ltd. v. FW Woolworth & Co. Ltd. [1981] 1 WLR 485 where he said at pages 492-493:*
>
> > *"Even in interlocutory matters [note the "even"] a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter."*
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> *[17] Lord Neuberger goes on to say at [18]:*
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> > *"Accordingly, even if CPR 3.1(7) did not apply to the second relief application, it appears clear that the appellants would have faced the same hurdle before the Deputy Judge."*
>
> *[18] In any event the jurisdictions mentioned are not to be used as backdoor routes for an appeal. The applicant must establish either a material change of circumstance or an obvious mistake: see Papanicola v. Humphreys [2005] All ER 418 at [35], which Mr. O'Mahony has helpfully analysed in his skeleton argument together with the judgment of the court in Mitchell v. News Group Newspapers Ltd. [2013] EWCA Civ 1537; [2014] 1 WLR 795, citing the judgment of Rix LJ in Tibbles v. SIG PLC (t/a Asphaltic Roofing Supplies) [2012] EWCA Civ 518; [2012] 1 WLR 2591.*
>
> *[19] I therefore find that the applicants cannot have innumerable bites at the same cherry without showing a change of circumstance."*

Hammond Suddard v Agrichem [2001] EWCA Civ 2065l; [2002] C.P. Rep. 21, CA, ***Papanicola v Humphreys*** [2005] EWHC 335 (Ch); [2005] All E.R. 418, ChD, ***Tibbles v SIG PLC (t/a Asphaltic Roofing Supplies)*** [2012] EWCA Civ 518; [2012] 1 W.L.R. 2591, CA, ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795, CA, ***Thevarajah v Riordan*** [2015] UKSC 78; [2016] 1 W.L.R. 76, UKSC, ref'd to. (See ***Civil Procedure 2017*** Vol.1, paras 3.1.10, 3.1.11, 52.16.3.)

■ **Thompson v Reeve** (Claim No. HQ14P03864), (QBD), 20 March 2017, unrep. (Master Yoxall)

Part 36 – power to rectify procedural error

CPR r.3.10, Pt 6, Pt 36. A CPR Pt 36 offer was made by the claimant in a personal injury action on 25 August 2016. The offer was for settlement of the whole claim in the sum of £340,000. On 27 February 2017 the Lord Chancellor announced a reduction in the discount rate to 0.75% effective from 20 March 2017. This had the effect of increasing the value of the claim to £602,500. In the light of this the claimant's solicitors, by email, informed the defendant's solicitors that the Pt 36 offer, and all previous offers, were withdrawn per CPR r.36.9(2). On 2 March 2017, the defendant sent by fax and DX its acceptance of the claimant's Pt 36 offer. At a telephone case management conference that day it informed the Master that the claim was now stayed. Service of notice of withdrawal of a Pt 36 offer is governed by CPR Pt 6. CPR r.6.20(1)(d) and CPR PD 6A, para.4.1(1) permit service by email where the receiving party has indicated in writing that it is willing to accept service. The defendant in this case had not apparently done so. Service of notice of the withdrawal, effected by email, was thus invalid. Hence the defendant's stance that it

could and had accepted the, still, valid, Pt 36 offer. The claimant accepted service of the notice of withdrawal did not comply with CPR r.6.20 and applied for rectification of the procedural defect under the general power in CPR r.3.10, which it submitted was to be read as having wide scope of application: see, ***Integral Petroleum SA v SCU-Finanz AG*** (2014). The defendant submitted that CPR Pt 36 was a self-contained code and thus CPR r.3.10 had no application. **Held**, while CPR Pt 36 was a self-contained code it was not wholly self-contained, a fact made clear by the application of the rules governing service to it. There was nothing in ***Sutton Jigsaw Transport Ltd v Croydon London Borough Council*** (2013) to the contrary: it concerned the question whether the court could dispense with service or permit retrospective service of notice of withdrawal and not the question of, or application of, CPR r.3.10. CPR r.3.10 was of wide effect and was capable of application to CPR Pt 36 to rectify procedural errors. In this case, the defendant received actual notice of withdrawal. The defect simply related to the method of service used to effect notice. It was a procedural defect that could be cured by CPR r.3.10. ***Vinos v Marks & Spencer plc*** [2001] 3 ALL E.R. 784, CA, ***Steele v Mooney*** [2005] EWCA Civ 96; [2005] 1 W.L.R. 2819, CA, ***Sutton Jigsaw Transport Ltd v Croydon London Borough Council*** [2013] EWHC 874 (QB), unrep., QBD, ***Integral Petroleum SA v SCU-Finanz AG*** [2014] EWHC 702 (Comm), unrep., Comm., ref'd to. (See ***Civil Procedure 2017*** Vol.1, para.3.10.3.)

■ **Chuku v Chuku** [2017] EWHC 541 (Ch), 17 March 2017, unrep. (Newey J)

Security for costs – guidance for determining whether a claimant is a nominal claimant

CPR r.25.13. A dispute arose between two brothers concerning a residential property in London which had been purchased by their father in 1976. Their father died in Nigeria in 2000. Under the terms of their father's will the property was to be held in common by all members of his family. The claimant was given power of attorney by his father's executors in order to reseal and register their grant of probate and to seek a grant of representation in respect of the London property. Letters of administration were granted and, subsequently, the claimant was registered, in his capacity as administrator of his father, as proprietor of the London property. He issued possession proceedings against the defendant, his brother. The defendant applied for an order for security for costs against the claimant. The application was granted by the Recorder who concluded that the claimant was resident out of the jurisdiction: CPR r.25.13(2)(a). The Recorder also concluded, although he did not decide the point, that the claimant was a nominal claimant: CPR r.25.13(2)(f). The claimant appealed. On appeal, the Newey J **held** that the claimant was not resident out of the jurisdiction. Given that finding, the question whether the claimant was a nominal claimant, which had not been determined by the Recorder, came to the fore, and Newey J **held** that the claimant could not properly be characterised as such. In reaching this conclusion he reviewed a number of pre- and post-CPR authorities which considered the meaning of "nominal claimant". Having done so, at para. 26 he stated that in the light of the authorities:

> *". . . it seems to me that:*
>
> *i) A person with a significant interest in the outcome of a claim will rarely, if ever, be considered a "nominal claimant" within CPR 25.13(2)(f);*
>
> *ii) A personal interest is not, however, essential. While a trustee, executor or personal representative will not be a "representative claimant under Part 19" merely because CPR 19.7A is in point, he still will not ordinarily be a "nominal claimant", regardless of whether he is also a beneficiary;*
>
> *iii) At least typically, there "must be some element of deliberate duplicity or window-dressing" for a person to be a "nominal claimant"."*

White v Butt [1909] 1 K.B. 50, CA, ***Envis v Thakkar*** [1997] B.P.I.R. 189, CA, ***Farmer v Moseley (Holdings) Ltd*** [2001] 2 B.C.L.C. 572, ChD, ***Compagnie Noga d'Importation et d'Exportation SA v Australia & New Zealand Banking Group Ltd*** [2004] EWHC 2601 (Comm), unrep., Comm., ***Allen v Bloomsbury Publishing plc*** [2011] EWCA Civ 943, unrep,, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1, para.25.13.17.)

■ **AM (Pakistan) v Secretary of State for the Home Department** [2017] EWCA Civ 180, 22 March 2017, unrep. (Elias, Lewison and Floyd LJJ)

Permission to appeal – extension of time to appeal from Upper Tribunal

CPR r.52.12, PD52D para.3.3. The applicants applied for indefinite leave to remain. The application was refused by the Secretary of State. An appeal to the First-tier Tribunal was dismissed. An appeal from that decision to the Upper Tribunal was allowed. Permission to appeal from that decision was granted to the Secretary of State by the Upper Tribunal. The appeal was ultimately allowed by the Court of Appeal and the First-tier Tribunal's decision was reinstated. Before the Court of Appeal dealt with the substantive issue, it considered a preliminary procedural point. Notwithstanding the grant of permission to appeal by the Upper Tribunal it was apparent that the Secretary of State had, unwittingly, lodged the appeal five days out of time. The basis for the error was reliance on out-of-date

commentary in ***Civil Procedure 2016***. The Secretary of State applied for an extension of time in order to regularise, and render valid, the grant of permission to appeal. **Held**, the test was that set out in ***Mitchell*** and ***Denton***, and ***R (Hysaj) v Secretary of State for the Home Department*** (2014); the latter making clear that the ***Mitchell-Denton*** test was not varied to provide particular leniency where public bodies were concerned. Applying the three limbs of the ***Mitchell-Denton*** test the extension of time would be granted. In respect of the second limb of the test: there was no excuse for failing to comply with the time limits; the Secretary of State quite properly did not seek to use reliance on outdated commentary to excuse the non-compliance. It was noted however that reliance on the commentary did show that the non-compliance did not arise from a "*cavalier disregard*" of the rules. ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537; [2014] 1 W.L.R. 795, CA, ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 2 W.L.R. 3926, CA, ***R (Hysaj) v Secretary of State for the Home Department*** [2014] EWCA Civ 1633; [2015] 1 W.L.R. 2472, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1, para.52.12.3.)

■ **Mole v Parkdean Holiday Parks Ltd** [2017] EWHC B10 (Costs), 29 March 2017, unrep. (Master Brown)

Conditional fee agreement – success fee – replacement of litigation friend post-April 2013

Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.44(4). The claimant, a protected party, brought a personal injury claim following an accident at a swimming pool in 2005. The claimant's mother originally acted as his litigation friend having entered into a CFA on his behalf. The CFA provided for a 100% success fee. In April 2013, the Official Solicitor replaced the claimant's mother as litigation friend. In July 2013, the Official Solicitor signed a deed, ratifying and affirming the CFA. In March 2015 damages and periodical payments were approved by the court, with the claimant's reasonable costs to be paid by the defendants. The defendants argued that the Official Solicitor could not, as either a matter of fact or of law, ratify or affirm the CFA. As such they argued, by the deed the Official Solicitor had entered into a new CFA, which as it was entered post-April 2013 could not provide for recovery of the success fee from the defendants. The claimant argued that the retainer was between him and his solicitors and not between his litigation friend and his solicitors. As such the CFA was between the claimant and his solicitors, having been entered into by his litigation friend on his behalf as his agent or on a comparable basis: see ***Blankley v Central Manchester & Manchester Children's University Hospitals NHS Trust*** (2015) which established that: the claimant's incapacity at the time at which the CFA was entered into in 2006 did not prevent him being a principal for the purpose of entry into it; that different agents acted for the principal at different times did not alter the fact that the underlying retainer between the principal and the solicitors continued. In the light of this it was not, the claimant submitted, necessary for the Official Solicitor to either affirm or ratify the original CFA: it continued, as a matter of law, at all times. **Held**, the CFA entered into in 2006 remained effective. The substitution of litigation friend had no effect upon its validity or continuance: ***Blankley v Central Manchester & Manchester Children's University Hospitals NHS Trust*** (2015) applied. ***Helps v Clayton*** (1864) 17 CB (NS) 553; 144 E.R. 222, Ct Comm. Pleas, ***Steeden v Walden*** [1919] 2 Ch. 393, ChD, ***B v B*** [2010] EWHC 543 (Fam), unrep., FD, ***Blankley v Central Manchester & Manchester Children's University Hospitals NHS Trust*** [2015] EWCA Civ 18; [2015] 1 W.L.R. 4307, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1, paras 48.0.1 and following.)

■ **Shaw v Grouby** [2017] EWCA Civ 233, 6 April 2017, unrep. (Sir Geoffrey Vos, CHC, Patten LJ)

Judicial interventions during trial – procedural unfairness

A property dispute arose over a private driveway. On appeal to the Court of Appeal it was alleged that the trial judge's conduct during the trial gave rise to procedural unfairness. It was alleged that the trial judge intervened in the course of the trial excessively, particularly during the course of examination of factual and expert evidence. The interventions were said to call into question the judge's objectivity and impartiality. **Held**, while the CPR provides trial judges with, as Jonathan Parker LJ put it in ***Southwark LBC v Kofi-Adu*** (2006) at para.142, "a wide degree of latitude in which the way in which [proceedings are conducted]", judicial interventions can, if excessive, undermine the integrity of the judicial process: the greater the number and frequency of interventions, the greater the risk that the judge's conduct will render the trial unfair. In assessing whether a judge's conduct had rendered a trial unfair the question to ask was, as Patten LJ put it at para.43

> *"whether [the judge] became so involved in the examination of the witnesses that he either made it impossible for [counsel] properly to conduct his clients' case or lost the ability to reach balanced and objective conclusions on the evidence which he heard."*

In the present case, while the judge's interventions were excessive they did not render the trial unfair. In reaching this conclusion Patten LJ noted that the judge could have properly asked questions of witnesses to the extent he had following the conclusion of counsel's cross-examination, except where they arose from a need to clarify answers given. In this way he would not have intervened in cross-examination too readily and too often interrupted counsel in their examination of witnesses. Sir Geoffrey Vos, CHC, also stressed the need for judges to exercise self-restraint in their conduct of the trial process, albeit that operates in an era of "*active trial management*" where "*a measure of*

judicial interventionism" are valid means to promote efficient and effective interim hearings and trials. That being said, Vos CHC stressed that judges should take care to ensure that they "*allow relevant evidence to be presented and cross-examined without inappropriate interruptions*". The Court of Appeal's judgment thus serves to provide a clear, albeit measured, warning to both judges and parties, concerning the level of intervention in party presentation of evidence. It equally provides a helpful restatement of the test for determining when a judge could be said to have rendered a trial unfair through an excess of zeal. ***Jones v National Coal Board*** [1957] 2 Q.B. 55, CA, ***Southwark LBC v Kofi-Adu*** [2006] EWCA Civ 281; [2006] H.L.R. 33, CA, ref'd to.

■ **Falmouth House Ltd v Abou-Hamdan** [2017] EWHC 779 (Ch), 10 April 2017, unrep. (Nugee J)

Party attendance at trial – District judges power to vary a case management order made by a Circuit judge

CPR rr.2.4, 3.1(7), 3.1(2)(c), 39.3. A dispute arose between a freehold owner of property and the lessee of a flat. The dispute centred on non-payment of service charges and contributions to a reserve fund. The lessee, the defendant, defended the claim and, initially, pursued a counterclaim. The initial trial date was vacated and relisted for hearing in August 2015. The order relisting the trial date specified that if the defendant did not attend in person his defence and counterclaim would be struck out and judgment would be entered for the claimant. The defendant did not attend the trial in person, but was represented by counsel. An application for relief from sanctions for non-compliance with the order requiring personal attendance was refused. The defence was struck out and judgment in default entered for the claimant. The counterclaim had previously been abandoned. An appeal from these decisions was allowed. In giving judgment Nugee J noted that the court had power to require a party to attend court in person and could do so even if they were represented by solicitors or counsel: CPR r.3.1(2)(c). Reasons to make such an order could include the facilitation of settlement. In the present case, it was apparent that the order requiring attendance was made in order to ensure that the trial date was not lost by the defendant's non-attendance as, at the time the order was made, the defendant was acting in person. Given this it was clear that non-compliance with the order to attend in person was neither significant nor serious (applying the ***Mitchell-Denton*** test). The trial would have been effective notwithstanding the non-compliance as the defendant was, at the trial, represented by counsel. See, for instance, Gross J in ***Rouse v Freeman*** (2002), where it was stated that where a party is represented at trial by solicitors or counsel even if they do not attend in person, CPR r.39.3 does not apply: it does not apply because the party has attended trial through their representative. In reaching his decision Nugee J noted that: (i) just as a party has a right to appear in person, they have a right to be represented by lawyers. This right may not be an express right in respect of civil cases under article 6 ECHR, it is nevertheless the position at common law; (ii) litigants are not, generally, required to attend court hearings in person, although see the power set out in CPR r.3.1(2)(c); (iii) as a general rule a party is entitled to decide whether or not to give evidence. They are not obliged to give evidence. If they choose not to do so they may still challenge their opponent's case and evidence. This position is unaffected by the court's case management powers. The court, of course, has separate powers to compel attendance for the purposes of cross-examination. As such, in the absence of a good reason to compel attendance i.e., facilitate settlement or to give evidence, a party could not be criticised for not attending court in person. Nugee J also noted that there was no reason in principle why a District Judge could not have varied the initial order, which had been made by a Circuit Judge, that required the defendant's attendance in person. As Nugee J put it at para.76,

> *". . . CPR 2.4 provides that where the CPR provide for the "the court" to do any act, then except where an enactment, rule or practice direction provides otherwise, the act may be performed in the County Court by any judge of the county court; and "judge of the county court" includes a District Judge: see CPR 2.3(1) and s.5(1)(b) County Courts Act 1984. It seems to me to follow that a District Judge has power to vary an Order that has been previously been made by the Court, whether the Order was made by another District Judge or by a Circuit Judge. This also seems to me to be what one would expect. Certainly in the case of case management directions, it is frequently the case that it is appropriate to revisit them during the course of proceedings, and it would be unfortunate if because a particular direction had been made by a Circuit Judge, it could not be varied thereafter by a District Judge, however appropriate the variation might be. Similarly in the High Court it is an everyday occurrence for directions to be given by a High Court Judge – for example setting a timetable for steps towards trial after dealing with an interlocutory application – and thereafter for the timetable to be varied by a Master, and it would be very inconvenient if that could not be done."*

Whether such a variation should be granted was however a matter of discretion under CPR r.3.1(7) as per the guidance in ***Tibbles v SIG plc*** (2012). In this case the fact that the defendant moved from being a litigant-in-person when the initial order requiring attendance at trial was made to being represented prior to trial, there was a clear change in circumstances that could found a variation of the initial order to remove the direction on attendance. ***Baron v Lovell*** [2000] P.I.Q.R. P20, CA, ***Rouse v Freeman***, The Times, 8 January 2002, QBD, ***Tarajan Overseas Ltd v Kaye*** [2001] EWCA Civ 1859, The Times, 22 January 2002, CA, ***Tibbles v SIG plc*** [2012] EWCA Civ 518; [2012]

1 W.L.R. 2591, CA, ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 2 W.L.R. 3926, CA ref'd to. (See ***Civil Procedure 2017*** Vol.1, paras 3.1.10, 3.1.11.)

■ **Times Newspapers Ltd v Flood** [2017] UKSC 33, 11 April 2017, unrep. (Lord Neuberger PSC, Lords Mance, Sumption, Hughes, Hodge JJSC)

Conditional fee agreement – compatibility with Convention rights

Access to Justice Act 1999, s.27, Human Rights Act 1999, s.4, European Convention on Human Rights, articles 6, 8 and 10. Three appeals arose from separate, substantive, proceedings for libel and obtaining private information unlawfully brought against newspaper publishers. The appeals challenged the costs orders made at the conclusion of the substantive proceedings. In each of the proceedings the claimant had entered into a conditional fee agreement which allowed for a 100% success fee uplift with an after-the-event insurance policy, both of which were recoverable from the losing party. The newspapers challenged the costs order, which arose under the provisions, as then in force, of the Access to Justice Act 1999 and CPR Pt 44, on the basis that it infringed their article 10 ECHR rights. The CFA regime in issue was largely replaced following the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, albeit its provisions removing recoverability of success fees and after-the-event insurance premiums had not been brought into force for defamation or privacy claims. **Held**, the appeals were dismissed. It would not be appropriate for the court to decide whether the CFA regime infringed the newspaper publisher's article 10 ECHR rights. It would also not be appropriate for it to issue a declaration of incompatibility under s.4 of the Human Rights Act 1998 in respect of the relevant statutory provisions. The court would, for the purposes of the present appeal, assume that it was a general rule of domestic law that the CFA regime in question infringed newspaper publishers' article 10 ECHR rights. Even on this assumption it would not be appropriate to apply it retrospectively to CFAs entered into under that regime. It would not be appropriate to do this because: (i) individual litigants had entered into financial agreements based on a legitimate expectation that the statutory regime that created it would not, retrospectively or retroactively, be repealed or otherwise rendered invalid; (ii) retrospective application of such a rule may have an adverse impact on claimants' article 6 and article 8 ECHR rights; (iii) assuming the CFA regime infringed of the newspapers' article 10 ECHR rights, such infringement was outweighed by (i) and (ii), not least because any adverse effect on the article 10 right would be an indirect one through a potential chilling effect on it, whereas any adverse effect on claimants' article 6 and article 8 ECHR rights would directly harm their ability to secure access to the courts. ***Callery v Gray (No's 1 and 2)*** [2002] 1 W.L.R. 2000, HL, ***Campbell v MGN Ltd (No.2)*** [2005] 1 W.L.R. 3394, HL, ***MGN v United Kingdom*** (2011) 53 EHRR 5, ECtHR, ***Lawrence v Fen Tigers Ltd (No.3)*** [2015] 1 W.L.R. 3485; UKSC, ref'd to. (See ***Civil Procedure 2017*** Vol.2, para.9A-823.)

Practice Updates

PRACTICE GUIDANCE

PRACTICE NOTE: RELATING TO THE INSOLVENCY PROCEEDINGS PRACTICE DIRECTION

On **6 April 2017**, the Insolvency (England and Wales) Rules 2016 (SI 2016/1024), as amended by a number of subsequent statutory instruments, came into force. They replaced the Insolvency Rules 1986 (SI 1986/1925). The 2016 rules require amendments to be made to *Practice Direction – Insolvency Proceedings* [2014] B.C.C. 502; [2014] B.P.I.R 1286 (the Insolvency Practice Direction) (see ***Civil Procedure 2017*** Vol.2 para.3E-0.1). The amendments have not, as yet, been made. Consequent changes to the CPR are also awaited.

On **6 April 2017**, Sir Geoffrey Vos, Chancellor of the High Court, issued a Practice Note which explained that pending issue of a revised Practice Direction, the Insolvency Practice Direction is not to be treated as being in effect where it contradicts the 2016 rules i.e., the Practice Note restates the established position that where rules of court and a practice direction are in conflict the former take precedence: see *Secretary of State for Communities & Local Government v Bovale Ltd* [2009] EWCA Civ 171; [2009] W.L.R. 2274 para.11. The Practice Note further makes clear that the terms of the Insolvency Practice Direction are, however, to be taken and followed as proper guidance in so far as they possibly can. The Practice Note is reprinted below.

Practice Note: relating to the insolvency proceedings practice direction

1. Following the making and coming into effect of
   - The Insolvency (England and Wales) Rules 2016
   - The Insolvency (Amendment) Rules 2016
   - The Insolvency (Amendment)(No.2) Rules 2016
   - The Insolvency (England and Wales) Amendment Rules 2017
   - The Insolvency (England and Wales) Rules 2016 (Consequential Amendments) (Savings) Rules 2017
   - (together, "the new rules")
   - significant amendments are required to the Insolvency Proceedings Practice Direction ("IPPD").
2. In the near future the IPPD will be revoked, and an interim Practice Direction will be made pending the making of a substantially revised IPPD in due course.
3. Pending the revocation of the IPPD
   - The new rules are to be given effect;
   - The IPPD is to be treated as not in effect where it contradicts the new rules, but the practices set out in the IPPD may continue to be followed as sound guidance to the extent possible.

Made with the authority of the Chancellor of the High Court

6 April 2017

CE-FILE UPDATE: REGARDING USE OF ELECTRONIC FILING IN PD50I PARA.2.2 AND THE SPECIFICATION ON THE CE-FILE WEBSITE

Electronic filing was to become compulsory in the Rolls Building courts from 25 April 2017. No Practice Direction has however been issued providing for this. As such Practice Direction 50I (The Electronic Working Pilot Scheme) remains in force. Users should take care in approaching filing documents due to the inconsistency between the permissive provision regarding use of electronic filing in PD para.2.2 and the specification on the CE-file website that use of electronic filing is mandatory as from 25 April 2017. It is hoped that this inconsistency will be resolved sooner rather than later.

In Detail

SOCIETE GENERALE v GOLDAS KUYUMCULUK SANAYI ITHALAT IHRACAT AS [2017] EWHC 667 (COMM) – ALTERNATIVE SERVICE, DISPENSING WITH SERVICE AND ENFORCING UNDERTAKINGS AS TO DAMAGES

Societe Generale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS [2017] EWHC 667 (Comm) concerned complex commercial litigation between the claimant bank and the defendants concerning gold bullion transfers. The defendants were variously incorporated in Turkey and Dubai. Worldwide freezing injunctions were issued pre-issue in March 2008. Attempts to serve the claims (the English proceedings) in Turkey in 2008 were defective, and attempts to serve in Dubai were, at best, of doubtful efficacy. The claimant subsequently, on advice, proceeded to commence separate proceedings in Turkey in early 2009 and took no further steps to progress the English proceedings until May 2016. At that time the claimant applied, variously, for orders to serve the proceedings by alternative means or for an order dispensing with service.

Popplewell J refused the applications. He did so on the basis that the claimant had deliberately determined to "warehouse" the claims in 2008 following the defective attempts to serve the defendants. This was an abuse of process given the fact that the claimant had obtained a number of worldwide freezing injunctions against the defendants. In reaching his decision Popplewell J provided helpful summaries of the principles governing permission to allow alternative service, permission to dispense with service, and the court's approach to enforcing undertakings to the court contained within the freezing injunction.

Guidance: alternative service and dispensing with service

In respect of service Popplewell J summarised the authorities as follows, see paras 48-49:

> *"[48] I was referred to a number of authorities and have had regard in particular to Battersby v Anglo-American Oil Co Ltd [1945] KB 23; Dagnell v J L Freedman & Co [1993] 1 WLR 388; Vinos v Marks & Spencer plc[2001] 3 All ER 784 Knauf UK GmbH v British Gypsum Ltd [2002] 1 WLR 907; Godwin v Swindon Borough Council [2002] 1 WLR 997; Anderton v Clwyd County Council (No 2) [2002] 1 WLR 3174; Shiblaq v Sadikoglu [2004] 2 All ER (Comm) 596; Hashtroodi v Hancock [2004] 1 WLR 3206; Kuenyehia v International Hospitals Group Ltd [2006] EWCA Civ 21; Aktas v Adepta [2011] QB 894; Cecil v Bayat [2011] 1 WLR 3086; Abela v Baadarani [2013] 1 WLR 2043; Bank St Petersburg OJSC v Arkhangelsky [2014] 1 WLR 4360; and Barton v Wright Hassall LLP [2016] EWCA Civ 177.*
>
> *[49] I would endeavour to summarise the relevant principles as follows:*
>
> *(1) As the wording of Rule 6.16 makes clear, the Court will only dispense with service in exceptional circumstances.*
>
> *(2) In deciding whether to authorise service by an alternative method under CPR Rule 6.15, whether prospectively or retrospectively, the Court should simply ask itself whether there is "a good reason": Abela at [35]. This is the same test as whether there is good reason (without the indefinite article): Barton at [19(i)]. The Court must consider all the relevant circumstances in determining whether there is a good reason for granting the relief; it is not enough to identify a single circumstance which taken in isolation would be a good reason for granting relief (e.g. allowing the claimant to pursue a meritorious claim) if it is outweighed by other circumstances which are reasons not to grant the relief. I do not read Aikens LJ as saying anything different in Kaki at [28] when emphasising the existence of the indefinite article "a good reason"; he did so in order to make the point that although all the relevant factors for and against granting relief inform the conclusion as to whether there is a good reason (see his paragraph [33]), no subsequent and separate discretion falls to be exercised if there is a good reason for granting relief.*
>
> *(3) A critical factor is whether the defendant has learned of the existence and content of the claim form: Abela at [36], Barton at [19(ii) and (iii)]. If one party or the other is playing technical games, this will count against him: Abela at [38]; Barton at [19(vii)]. This is because the most important function of service is to ensure that the content of the document served is brought to the attention of the defendant: Abela at [37]). The strength of this factor will depend upon the circumstances in which such knowledge is gained. It will be strongest where it has occurred through what the defendant knows to be an attempt at formal service. It may be weaker or even non-existent where the contents of the claim form become known through other means. It is well known that sometimes issued claim forms are sent to a defendant "for information only" because the claimant does not want*

for the time being to trigger the next steps. Sometimes a claim form may be sent in circumstances which although less explicit do not suggest that the sending is intended to amount to service. The defendant may happen to learn of the claim form and its contents from a third party, or a search, in circumstances which might not suggest an intention by the claimant to serve it or to pursue the proceedings, or might positively suggest the reverse.

(4) However the mere fact that a defendant learned of the existence and content of the claim form cannot of itself constitute a good reason; something more is required: Abela at [36], Barton at [19(ii)];

(5) There will be a focus on whether the claimant could have effected proper service within the period of its validity, and if so why he did not, although this is by no means the only area of inquiry: Abelaat [48], Kaki at [33], Barton at [19(iv)]; generally it is not necessary for the claimant to show that he has taken all the steps he could reasonably have taken to effect service by the proper method: Bartonat [19(v)]; however negligence or incompetence on the part of the claimant's legal advisers is not a good reason; on the contrary, it is a bad reason, a reason for declining relief: Hashtroodi at [20], Aktasat [71].

(6) Delay may be an important consideration. It is relevant whether the application for relief has been made promptly and, if not, the reasons for the delay and any prejudicial effect: Anderton at [59]. It is relevant if the delay is such as to preclude any application for extension of the validity of the claim form because the conditions laid down in 7.6(3)(b) and/or (c) cannot be fulfilled, i.e. if the claimant has not taken reasonable steps to serve within the period of validity of the claim form and/or has not made the application promptly: Godwin at [50], Aktas at [91]. The culpability of the claimant for any delay may be an important factor. Particular considerations arise where the delay is abusive (see (7) below) or may have given rise to a limitation defence (see (8) below).

(7) Abuse:

(a) It is relevant whether any conduct of the claimant has been an abuse of process of the proceedings.

(b) At one extreme, there will rarely if ever be "good reason" where the claimant has engaged in abusive delay or abusive conduct of the proceedings which would justify striking them out if effective service had been made when attempted under the principles established in Grovit v Doctor [1997] 1 WLR 640 and Habib Bank v Jaffer [2000] CPLR 438.

(c) However even where the abuse is not of that character, any abuse of process will weigh against the grant of relief.

(8) Limitation:

(a) Where relief under Rule 6.15 would, or might, deprive the defendant of an accrued limitation defence, the test remains whether there is a good reason to grant relief: Abela.

(b) However save in exceptional circumstances the good reason must impact on the expiry of the limitation period, for instance where the claimant can show that he is not culpable for the delay leading to it or was unaware of the claim until close to its expiry: Cecil at [108] and see Godwin at [50].

(c) It is not ordinarily a good reason if the claimant is simply desirous of holding up proceedings while litigation is pursued elsewhere or to await some future development; the convenience for a claimant of having collateral proceedings determined first is not a good reason for impinging on the right of a defendant to be served within the limitation period plus the period of validity of the writ: Battersby per Lord Goddard at p.32; Dagnell per Lord Browne-Wilkinson at p. 393C. Cecil at [99]-[106].

(d) Absent some good reason for the delay which has led to expiry of the limitation period, it is only in exceptional cases that relief should be granted under Rule 6.15 or 6.16; there is a distinction between cases in which there has been no attempt at service and those in which defective service has brought the claim form to the defendant's attention (Anderton at [56]-[58], Abela [36]), with relief being less readily granted in the former case, but even in the latter case exceptional circumstances are required: Kuenyehia at [26];

(e) Absent some good reason for the delay which has led to expiry of the limitation period, it is never a good reason that the claimant will be deprived of the opportunity to pursue its claim if relief is not granted; that is a barren factor which is outweighed by the deprivation of the defendant's accrued limitation defence if relief is granted; that is so however meritorious the claim: the stronger the claim, the greater the weight to be attached to not depriving the defendant of his limitation defence: Cecil at [55], Aktas at [91].

(9) Cases involving service abroad under the Hague Convention or a bilateral treaty:

(a) Where service abroad is the subject matter of the Hague Convention or a bilateral treaty, it will not normally be a good reason for relief under CPR 6.15 or 6.16 that complying with the formalities of service so required will take additional time and cost: Knauf at [47], Cecil at [66], [113].

(b) It remains relevant whether the method of service which the Court is being asked to sanction under CPR 6.15 is one which is not permitted by the terms of the Hague Convention or the bilateral treaty in question. For example, where the country in which service is to be effected has stated its objections under Article 10 of the Hague Convention to service otherwise than through its designated authority, as part of the reciprocal arrangements for mutual assistance on service with this country, comity requires the English Court to take account of and give weight to those objections: see Shiblaq at [57]. In such cases relief should only be granted under Rule 6.15 in exceptional circumstances. I would regard the statement of Stanley Burnton LJ in Cecil at [65] to that effect, with which Wilson and Rix LJJ agreed, as remaining good law; it accords with the earlier judgment of the Court in Knauf at [58]-[59]; Lord Clarke at paragraphs [33] and [45] of Abela was careful to except such cases from his analysis of when only a good reason was required, and to express no view on them (at [34]); and although Stanley Burnton LJ's reasoning that service abroad is an exercise of sovereignty cannot survive what was said by Lord Sumption (with unanimous support) at [53] of Abela, there is nothing in that analysis which undermines the rationale that as a matter of comity the English Court should not lightly treat service by a method to which the foreign country has objected under mutual assistance treaty arrangements as sufficient. That is not to say, however, that there can never be a good reason for ordering service by an alternative method in a Hague Convention case: Bank St Petersburg at [26].

(10) The mere fact that a party is a litigant in person cannot on its own amount to a good reason, although it may have some relevance at the margins: Barton at [19(vi)]."

Popplewell J's summary of the relevant principles to be drawn from the, now, significant number of authorities in this area not only demonstrates the detail which has grown up over the "good reason" test for granting permission to serve by alternative means, but it does so in a way that provides a clear checklist for practitioners and the court.

One point that could be said to be missing from the checklist is the reminder given by Lightman J in ***Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd*** [2007] EWHC 327 (Ch), unrep., that when considering whether to grant permission to serve by alternative means, the question whether there was a good reason to grant permission had to be considered in the light of the overriding objective. As such, questions of cost to the parties of the litigation, of expedition, the need to allot no more than a proportionate share of the court's resources to the claim, and given the April 2013 amendments to CPR Pt 1, rule compliance, also need to be taken account of in assessing the question. As Lightman J put it at para.37,

"[37] Accordingly the provisions of CPR Part 6.8 and the requirement of a good reason for authorising an alternative method of service must be interpreted and applied in a manner which gives effect to the overriding objective. In particular the court must have in mind the horrendous cost of litigation today, the hurdles thereby created in the way of obtaining justice on the part of those with limited means (and in particular those with limited means facing litigants with abundant means) and the need to ensure that cases proceed expeditiously. The question whether there is good reason is a matter to be determined by the judge at the date of the application on the particular facts of the case before him. It is not a precondition of the making of the order that service by a method permitted by the Rules is impracticable: it is only necessary that there is a good reason to make the order. In deciding what is a good reason the court will have in mind the overriding objective and whether the making of the order will enable the court to deal with the case justly. There is no good reason if the application is made to achieve a collateral object which the Rule is not designed to confer e.g. a step ahead in a race to commence proceedings in this jurisdiction before they are commenced elsewhere. The court will have in mind in circumscribing the ambit of what is a good reason that a finding of its existence is only the first stage in the process: the second stage must then be gone through of deciding whether the court's discretion should be exercised having regard to all the facts including the parties' conduct."

Guidance: enforcing undertakings to the court

In respect of enforcing undertakings to the court, Popplewell J summarised the authorities, at paras 74–77, as follows,

"[74] The cross undertaking in damages is given to the Court, not the opposing party, and the Court has an unfettered discretion whether to enforce the undertaking, to be exercised on ordinary equitable principles taking into account all the circumstances of the case: Cheltenham & Gloucester Building Society v Ricketts [1993] 1 WLR 1545.

[75] Where it is subsequently determined that the interim order ought not to have been granted or maintained, the Court will ordinarily enforce the undertaking save in special circumstances: Graham v Campbell (1877) 7 Ch. D. 490, 494, Cheltenham & Gloucester v Ricketts at 1556F-1557E; Dadourian Group International Inc v Simms [2009] EWCA Civ 169 at [184]. Thus prima facie a person who has suffered loss as a result of an interim order being wrongly made or maintained against him is entitled to be compensated for his loss (Fiona Trust v Privalov [2014] EWHC 3102 (Comm) at [12]). In Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd [2006] EWCA Civ 430 Neuberger LJ said at [42] that he can normally expect an inquiry as to damages 'virtually as of right'.

[76] The Court will however decline to enforce the cross undertaking where the conduct of the defendant in relation to the obtaining of the undertaking or enforcement of the undertaking makes it inequitable to enforce it: F. Hoffman-La Roche & Co AG v Secretary of State for Trade & Industry [1975] AC 295, 361). One example of such conduct which has been held to justify refusing an inquiry is delay on the part of the defendant. In this respect guidance as to the relevant principles is to be found in the judgment of Millet LJ in Barratt Manchester Ltd. v. Bolton Metropolitan Borough Council [1998] 1 WLR 1003 at p. 1009E-G:

> *'Since there is no cause of action there is no period of limitation either; but the cross-undertaking cannot be enforced without the leave of the court, which may be with held if not applied for promptly: see Smith v. Day (1882) 21 Ch. D. 421 and Ex parte Hall; In re Wood (1883) 23 Ch. D. 644. As those cases show, the court does not inquire whether the other party has been prejudiced by the delay. The only question is whether the applicant has behaved with reasonable despatch.'*

and at p.1012C-F:

> *'The enforcement of the cross-undertaking should be regarded as being conditional on the inquiry being applied for promptly and prosecuted with reasonable diligence……Where the delay has occasioned significant prejudice, it will almost always be right to dismiss the inquiry and discharge the cross-undertaking. But the greater the delay, the less the need to establish prejudice; and the court should not hesitate to discharge the cross-undertaking and dismiss the inquiry where there has been excessive and prolonged delay even though it cannot be shown to have occasioned any prejudice to the other party.'*

[77] In that case the absence of any prejudice to the claimant arising from the defendants delay in prosecuting the inquiry, although not determinative, was nevertheless treated as a 'highly material' factor (at p.1012E) in support of the Court's decision to uphold the continued enforcement of the cross undertaking."

In the present case, the freezing injunctions were wrongly maintained by the claimant from the point that it determined to warehouse the English claims. At that time, in 2008, the claimant ought to have applied to discharge the freezing injunctions or, at the least, seek an order varying the basis on which they were made. Popplewell J took the view that it was unlikely that a court, if an application to vary had been made in 2008, would have continued the freezing injunctions. Because such a course of action would have effectively resulted in the English claim being put into abeyance for an indefinite period and beyond the expiry of any limitation period, it would have likely be held at that time to have been an abuse of process. Furthermore, it was unlikely that the claimants would have been able to satisfy the court that the threshold test of exceptional circumstances was met in order to justify a grant of, or continuance, of a freezing injunction in support of foreign claims, per ***ICICI Bank Uk plc v Diminco NV*** [2014] EWHC 3124 (Comm); [2014] 2 C.L.C. 647 at paras 13-27. Given this, and notwithstanding the concomitant eight-year delay on the part of the defendants to seek to discharge the freezing injunctions and enforce the undertaking as to damages, Popplewell J held it was not inequitable to enforce the undertaking.

In reaching this decision Popplewell J identified five reasons which supported the conclusion that notwithstanding the delay enforcement was justified:

- the claimant's abusive conduct in maintaining the freezing injunctions, which gave rise to a prima facie claim for "very substantial loss" on the part of the defendant;
- the fact that the claimant was aware that there was a "serious possibility" of very substantial loss by the defendants when it obtained the freezing injunctions, and must equally have been aware of the potential adverse consequences to the defendant of its actions in maintaining the injunctions when it warehoused the English proceedings;
- the claimant could not rely on the defendants' delay as it was "itself delaying the progress of the proceedings, which it treated as being on hold";
- the defendant did not know that the claimant had acted abusively in its conduct of the English proceedings until the present applications relating to service were made;
- the claimant was unable to identify any prejudice arising from the delay in enforcement.

Popplewell J's judgment on these points provides useful guidance on the importance that the court will give to abusive behaviour by a party that has obtained, and not properly sought to discharge, a freezing injunction in assessing whether it is inequitable to enforce the undertaking as to damages. Abusive behaviour by the claimant here was the central reason why, notwithstanding delay on the defendant's part in seeking to either discharge the freezing injunction or enforce the undertaking, enforcement was not inequitable. The abuse-caused delay by the claimant equally neutralised the, otherwise adverse, effect of the defendant's delay. Abusive conduct is thus a significant factor that can properly be taken account of in assessing whether to grant enforcement of the undertaking.

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