CIVIL PROCEDURE NEWS

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CPR rr.6.3, 6.9, 6.20, 34.6. Defendants in complex proceedings issued a witness summons to secure the attendance of an individual at trial. The individual was the leaseholder of a flat in London, to which the summons was sent by first class post on 15 February 2017. The individual vacated the flat on 18 February 2017, having given notice to terminate the lease in January 2017. The individual was however not in the jurisdiction, having left London on 24 December 2016. Service of the summons was held to be valid on 28 February 2017. An application by the individual to set aside service of the summons was dismissed on 28 February 2017. **Held**, the individual was within the jurisdiction until 18 February 2017, when he vacated the leasehold flat; and he was validly within the jurisdiction on 15 February 2017 when the summons was issued and on 17 February 2017 when it was deemed to be served, notwithstanding the fact that he was not physically within the jurisdiction at those times. He was absent from the jurisdiction in an attempt to avoid personal service. He was however within the jurisdiction when deemed service was effected on 17 February as he did not quit the jurisdiction until he vacated the leasehold flat on 18 February: see Teare J at para.65 and ***SSL International plc v TTK LIG Ltd*** (2011) at para.57. Furthermore, CPR r.6.9 and r.6.20 apply to service of witness summons, hence service of a witness summons on an individual can be effected on their "usual or last known residence": see ***Clavis Liberty Fund 1 LP v Young*** (2015) at para.2, and per Teare J in the present case at para.58. ***Chellaram v Chellaram (No.2)*** [2002] 3 All E.R. 17, ChD, ***City & Country Properties Ltd v Kamali*** [2006] EWCA Civ 1879; [2007] 1 W.L.R. 1219, CA, ***SSL International plc v TTK LIG Ltd*** [2011] EWCA Civ 1170; [2012] 1 W.L.R. 1842, CA, ***Clavis Liberty Fund 1 LP v Young*** [2015] UKUT 72 (TCC); [2015] 1 W.L.R. 2949, UT ref'd to. (See ***Civil Procedure 2017*** Vol.1 at paras 6.9.7, 6.20.2, 34.6.1.)

■ **Simou v Salliss** [2017] EWCA Civ 312, 28 April 2017, unrep. (Sir Terence Etherton MR, Beatson and Henderson LJJ)

Case management—adjournment—litigants-in-person

CPR rr.1.1(1), 3.1(2)(b), 3.1A, 52.21(3)(b). A trial judge refused two applications to adjourn a trial of two actions arising from a boundary dispute made by two defendant litigants-in-person. The applications were based on the first defendant's serious ill-health and on-going hospital treatment. The first application was made by the second defendant. It was made a week before trial. The application appeared not to have been dealt with properly by the court office and passed to the trial judge. The second application was made in the second week of the trial. It was refused. The claims succeeded. The defendants appealed from the final orders. They did so on the basis that the two refusals to grant adjournments breached their right to fair trial, in that they were not able to take an effective part in the trial due to the first defendant's medical condition; the first defendant not being able to attend court throughout the trial due to his having to attend hospital for treatment. The Court of Appeal approached the appeal before it on the basis that at the start of the trial there was an outstanding adjournment application that the judge had not dealt with and which ought to have been dealt with before the trial commenced. It was apparent from the court transcript that the trial judge was not aware of the fact an adjournment application had been made, nor—understandably—did the second defendant litigant-in-person not renew the application or make a fresh one at the start of the trial. In effect therefore the trial commenced following the trial judge's implicit refusal of it. Henderson LJ, giving the substantive judgment of the Court, noted that the decision whether to adjourn a trial was a case management decision (per CPR r.3.1(2)(b) applied consistently with the overriding objective and, in this case having regard to the fact that the defendants were litigants-in-person per the longstanding practice of the courts now made explicit in CPR r.3.1A). As such it would only be reversed on appeal if it was "*plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree*": see ***Global Torch Ltd v Apex Global Management Ltd*** (No.2) (2014). He further noted that the appellants sought a re-trial. The Court of Appeal would only make such an order if the decision appealed was "unjust": CPR r.52.21(3)(b). Whether it was unjust depended on all the circumstances of the case as per Clarke LJ in ***Hayes v Transco Plc*** (2003) at para.14. It was also clearly established that the approach to adjournment applications which were supported by medical evidence was governed by the principles articulated in ***Levi v Ellis-Carr*** (2012): see ***Forresters Ketley v Brent*** [2012] at para.26. As Norris J put it in ***Levi v Ellis-Carr*** (2012) at para.36 where such evidence was relied on:

- it should identify the medical attendant, detailing how they are familiar with the applicant's medical condition. Details should be given of all recent medical consultations;
- the applicant's medical condition, including a recent prognosis, should be clearly set out and properly particularised;
- those aspects of the applicant's medical condition that, in the medic's opinion, would prevent attendance at court or prevent proper participation in the trial process should be specifically set out;
- the medic's evidence should be such as to enable the court to conclude that it was set out as an independent opinion, and one reached after a proper examination.

When such evidence is given the court can then properly assess the nature of the evidence, what weight to give it, and whether any arrangements can be made other than adjournment to meet the issues raised in the evidence. **Held**, applying the principles articulated in ***Levi v Ellis-Carr*** (2012), the appeal was dismissed. In reaching this decision, Henderson LJ concluded that the approach to the first adjournment application, and the court's failure to properly deal with it, amounted to a procedural irregularity. It ought to have been dealt with by the judge and the represented parties ought to have brought the judge's attention to the fact that it had been made and not ruled on. That being said, in the circumstances of the case and the manner in which the second defendant, had not clearly presented the application and had proceeded without raising the issue effectively on the first day of trial meant that no real blame could be attributed to the parties; a point which seems to under-emphasise the difficulties that litigants-in-person face in dealing with and understanding court procedure. In any event on the facts there was no basis on which a judge could properly have adjourned the trial. A judge properly directed would have postponed dealing with the application until satisfactory evidence i.e., evidence consistent with the principles set out in ***Levi v Ellis-Carr*** (2012), had been adduced. By the time this would have been obtained and submitted to the court it would have been apparent that the first defendant could attend and take an effective part in the remainder of the trial; thus, the application would have been refused in any event. As such no injustice was done by the judge's failure to deal with the first application prior to trial. ***Broughton v Kop Football (Cayman) Ltd*** [2012] EWCA Civ 1743, unrep., CA, ***Global Torch Ltd v Apex Global Management Ltd (No.2)*** [2014] UKSC 64, [2014] 1 W.L.R. 4495, UKSC, ***Hayes v Transco Plc*** [2003] EWCA Civ 1261, (2003) 147 S.J.L.B, CA, ***Levi v Ellis-Carr*** [2012] EWHC 63 (Ch), unrep., ChD, ***Forresters Ketley v Brent*** [2012] EWCA Civ 324, unrep., CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.3.1.3.)

■ **Spin Master Ltd v PMS International Group** [2017] EWHC 1477 (Pat), 9 May 2017, unrep. (Henry Carr J)

Case management—time allotted for trial

CPR r.1.1(2)(e). Infringement of a Community Registered Design proceedings were ongoing. An issue arose at a case management conference as to how the proceedings were to be managed so as to achieve a short, cost-effective hearing where one or both parties were preparing for a longer trial contrary to guidance provided for by the Court of Appeal in ***Procter & Gamble Co v Reckitt Benckiser (UK) Limited*** (2007) and ***Dyson Ltd v Vax Ltd*** (2011). In affirming the importance and applicability of that guidance Henry Carr J highlighted the fact that while parties may sometimes consider that the time allotted for trial is inadequate, it must be remembered that allotting trial time must be done by taking account of the interests of other court users as well as those of the parties. That point underpinned the Court of Appeal's guidance which focused on the limited nature of evidence appropriate for the trial of such actions. Henry Carr J went on to give further guidance on how shorter trials in registered design cases could be achieved in future: see para.27 where he set out that in future parties should consider the following steps:

> *"(i) The parties should, in appropriate cases, produce images at an early stage to show the differences or similarities upon which they rely, and in the case of the defendant, those features which are wholly functional or in which design freedom is said to be limited. Requests for further information are unlikely to be helpful.*
>
> *(ii) Claimants should not try to introduce or seek disclosure in relation to copying. The parties should carefully consider why, if at all, disclosure is necessary, rather than agreeing to standard or even issue based disclosure.*
>
> *(iii) Expert evidence as to whether the alleged infringement produces on the informed user the same or a different overall impression as the registered design should not be included in cases concerning consumer products.*
>
> *(iv) The parties should try to limit the length of expert evidence to an agreed number of pages.*
>
> *(v) If any evidence of fact is to be introduced, the court will need to be satisfied of its relevance.*
>
> *(vi) The parties should be prepared at the pre-trial review to identify issues on which cross-examination is necessary, and to explain why.*

(vii) Where multiple designs, or multiple infringements, are alleged, the parties should each select a limited number of samples on which the issues can be tested.

(viii) The parties should give careful thought to those issues which can be postponed to a damages enquiry, which will only need to be considered if liability is established."

Procter & Gamble Co v Reckitt Benckiser (UK) Limited [2007] EWCA Civ 936; [2008] Bus. L.R. 801, CA, ***Dyson Ltd v Vax Ltd*** [2011] EWCA Civ 1206; [2013] Bus. L.R. 328, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.1.3.3, Vol.2 at para.2F–14 et seq.)

■ **Gore v Naheed** [2017] EWCA Civ 369, 24 May 2017, unrep. (Patten, Lewison, Underhill LJJ)

Refusal to mediate—costs

Proceedings concerning a disputed right of way over a driveway concluded with judgment for the claimant. Costs were awarded on the standard basis. Both the judgment and the costs order were subject to appeal. The costs order was challenged, amongst other things, on the basis that the claimant had unreasonably refused to mediate. The basis of the refusal was the claimant's solicitor's conclusion that mediation had no realistic prospect of success and would do no more than add to cost. The trial judge held that the case raised complex questions of law, which therefore made it unsuitable for mediation. The appeal on costs failed. In rejecting the appeal the Court of Appeal noted that Briggs LJ in ***PGF II SA v OMFS Company 1 Ltd*** (2013) both emphasised the need for use of ADR to be encouraged by the court and that a failure to engage with an offer to mediate from the opposing party even if unreasonable did not automatically result in an adverse costs award. It was, as Patten LJ put it at para.49 "*simply a factor to be taken into account by the judge when exercising his costs discretion.*" It should be noted however that Briggs LJ's judgment states that the costs discretion, following a finding of unreasonable conduct in refusing to mediate (which is the prior and separate question to that of the costs discretion being exercised) was one that required some element of a successful party's costs to be disallowed. As Briggs LJ put it in ***PGF II SA v OMFS Company 1 Ltd*** (2013) at para.51:

"I agree . . . that a finding of unreasonable conduct constituted by a refusal to accept an invitation to participate in ADR or, which is more serious in my view, a refusal even to engage in discussion about ADR, produces no automatic results in terms of a costs penalty. It is simply an aspect of the parties' conduct which needs to be addressed in a wider balancing exercise. It is plain both from the Halsey case itself and from Arden LJ's reference to the wide discretion arising from such conduct in the Hewitt case, that the proper response in any particular case may range between the disallowing of the whole, or only a modest part of, the otherwise successful party's costs."

Given this Patten LJ's dicta ought to be treated with care in so far as it suggests, contrary to Briggs LJ's statement, that unreasonable conduct may not sound in costs. Briggs LJ was making the point that a finding of unreasonable conduct did not automatically or mechanistically produce the result that all of the successful party's costs should be disallowed. What was necessary was consideration of how much the reduction should be between the whole or a part of the whole. In the present case, the judge concluded the refusal to mediate was not unreasonable. Having made that finding the judge's decision not to reduce the claimant's costs award was not wrong in principle. The second question, concerning the amount of any reduction in costs did not therefore arise. Separately however, Patten LJ suggested at para.49 that he had:

"some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated."

That statement must be read in the light of ***PGF II SA v OMFS Company 1 Ltd*** (2013), Dyson LJ's guidelines from ***Halsey v Milton Keynes General NHS Trust*** [2004] EWCA Civ 576; [2004] W.L.R. 3002 (CA), particularly the latter's guidance relating to the merits of the case at para.18, and Rix LJ's statement in ***Rolf v De Guerin*** [2011] EWCA Civ 78; [2011] B.L.R. 221 (CA), at para.41. It is apparent from the various dicta that a party's desire to have their day in court is a factor that could be taken into account when assessing whether a party had unreasonably refused to mediate. Given this Patten LJ's dicta may properly be treated with caution. ***PGF II SA v OMFS Company 1 Ltd*** [2013] EWCA Civ 1288; [2014] 1 W.L.R. 1386, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.2, paras 14.1, 14.17.)

■ **Redbourn Group Ltd v Fairgate Development Ltd** [2017] EWHC 1223 (TCC), 26 May 2017, unrep. (Coulson J)

Relief from sanctions—application to set aside default judgment

CPR rr.3.9, 13.3. Default judgment was obtained in March 2017 in a dispute arising from the alleged wrongful repudiation of a contract. Five days after it was obtained the defendant applied to set it aside under CPR r.13.3. An issue arose whether the principles concerning relief from sanction per CPR r.3.9 set out in ***Denton v TH White Ltd*** (2014) were applicable. Coulson J, at para.17, took the view, absent authority, that they were relevant as:

"there is no greater sanction than judgment being entered in default of a defence, and no more important relief from sanction than being allowed to set aside that judgment, so as to be able to put forward a defence."

Coulson J then went on to note, at para.18, that the question whether they were relevant had been definitively established by the Court of Appeal in ***Gentry v Miller*** (2016). This was perhaps not as widely known or understood as it should be, it only being referred to in ***Civil Procedure 2017*** Vol.1, para.3.9.5 rather than, also, the commentary to para.13.3.5. Coulson J went on to apply the test from ***Denton*** and, on the facts of the case, refused to set the default judgment aside. ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, CA, ***Gentry v Miller*** [2016] EWCA Civ 141; [2016] 1 W.L.R. 2696, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1, paras 3.9.5, 13.3.5, 39.3.)

- **KM (Bangladesh) v Secretary of State for the Home Department** [2017] EWCA Civ 437, 21 June 2017, unrep. (Ryder SPT, Underhill LJ)

Extension of time for permission to appeal to Court of Appeal from Upper Tribunal

CPR rr.52.12(2), 52.15, PD52D para.3.3. On 29 April 2014, the Upper Tribunal dismissed an immigration appeal brought by the appellant from a decision of the First-tier Tribunal. The appellant applied for permission to appeal to the Upper Tribunal, but did so out of time on the 23 February 2015. On 25 March 2015, the Upper Tribunal refused to grant an extension of time, rejecting the appellant's explanation for the delay. The appellant thereafter sought permission to appeal from Court of Appeal. The application for permission from the Court of Appeal was brought in-time. Ryder SPT noted that where permission to appeal is refused by the Upper Tribunal the general time limit for seeking permission to appeal from the Court of Appeal is 28 days from the date the Upper Tribunal's decision is sent to the appellant: see CPR PD52D para.3.3. Both Ryder SPT and Underhill LJ went on to give guidance as to the proper approach to take where permission to appeal is sought from the Court of Appeal where the prior application for permission to the Upper Tribunal was brought out of time. Ryder SPT noted that the proper approach was that articulated by Brooke LJ in ***YD (Turkey) v SSHD*** (2006) at para.6. Underhill LJ, at para.44, summarised the position as follows:

". . . The result produced by applying an Ozdemir approach to the current rules/practice direction can be summarised as follows:

(1) The special time limit for appeals from the UT in para. 3.3 of the Practice Direction does not apply where the UT has refused permission on the basis of non-compliance with time-limits rather than on the merits.

(2) Instead the ordinary time limit in (now) CPR 52.12 (2) applies.

(3) Since ex hypothesi the application to the UT was out of time the application to the CA will be even more so, but the CA can grant an extension under CPR 52.15 if satisfied that the missing of the original deadline (and any subsequent delay) was justifiable. This will involve considering the same matters as the UT will have done, if it refused an extension; but it is not, as such, an appeal from the UT's decision."

Ozdemir v Secretary of State for the Home Department [2003] EWCA Civ 16, unrep., CA, ***Yacoubou v SSHD*** [2005] EWCA Civ 1051, unrep., CA, ***YD (Turkey) v SSHD*** [2006] EWCA Civ 52; [2006] 1 W.L.R. 1646, CA, ***A v SSHD*** [2006] EWCA 956, unrep., CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 para.52.15.)

- **Houghton v P.B. Donoghue (Haulage & Plant Hire Ltd)** [2017] EWHC 1738 (Ch), 13 June 2017, unrep. (Morgan J)

Part 36 offer—permission to accept offer during course of trial

CPR r.36.11(3)(d). A number of Pt 36 Offers were made during the course of proceedings. During the trial of the action the claimant sought permission to accept one such offer following a reassessment of his position in the light of the way in which the trial had progressed. Morgan J adopted the approach taken under previous versions of Pt 36 to the question. While permitting the claimant to accept the offer would save the court and parties time and expense, albeit given the late stage of proceedings this would inevitably be less of a saving than if the offer had been accepted during the pre-trial phase of proceedings. In a case such as this and where the defendant wished to "*take its chances with the trial continuing*" to grant permission would in effect see the court impose a settlement. In such circumstances, as Morgan J noted at para.10:

"I think that the philosophy exists that where a claimant decides to take his chances with the trial and then repents of his earlier decision to turn down the offer of settlement because the trial, he thinks, is going less well or more badly than predicted, that the court will often take the view that it is not right to give permission to impose a settlement on the reluctant defendant."

Capital Bank Plc v Stickland [2005] 1 W.L.R. 3914, CA, ***Sampla v Rushmoor Borough Council*** [2008] EWHC 2616 (TCC), unrep., TCC, ***Nulty v Milton Keynes BC*** [2012] EWHC 730 (QB), unrep., QBD, ref'd to. (See ***Civil Procedure 2017*** Vol.1 para.36.11.2)

■ **Halborg v EMW Law LLP** [2017] EWCA Civ 793, 23 June 2017, unrep. (Etherton MR, Beatson and Underhill LJJ)

Whether solicitor-LLP was a litigant-in-person—costs

Litigant in Person (Costs and Expenses) Act 1975, CPR r.46.5(2), PD46 para.3.4. The appellant was a solicitor in sole practice. He acted as the solicitor on the record in professional negligence proceedings. The respondent was the appellant's agent, acting on a conditional fee agreement, in the proceedings. The proceedings were compromised, with a payment made to the appellant's clients. While costs as between the appellant and the losing party in the compromised proceedings were resolved, an issue arose as to the respondent's payment. The respondent issued proceedings against the appellant. The present appeal concerned whether in assessing the costs of a summary judgment and strike out application, the respondent, an LLP which acts as its own legal representative in proceedings to which it is a party, was a litigant-in-person for costs purposes. **Held**, the appeal was dismissed: a solicitor LLP acting as its own legal representative in proceedings to which it was a party was not a litigant-in-person per CPR r.46.5(6)(a) or (b). A solicitor LLP was a corporation acting with a legal representative for the purposes of the former provision. In respect of the latter provision, which is as follows,

> *"(6) For the purposes of this rule, a litigant in person includes –*
>
> . . .
>
> *(b) any of the following who acts in person (except where any such person is represented by a firm in which that person is a partner). . ."*

the word "firm" includes a solicitor in sole practice and the word "partner" includes the situation where the firm has a sole principal. The *Chorley* principle, such that a solicitor acting for in-person may require their profit costs remained good law and applies to traditional solicitor partnerships as it does to LLPs (see paras 35 and 36): ***The London Scottish Benefit Society v Chorley, Crawford and Chester*** (1884), ***Malkinson v Trim*** (2002). ***The London Scottish Benefit Society v Chorley, Crawford and Chester*** (1884) 13 Q.B.D. 872, CA, ***Buckland v Watts*** [1970] 1 Q.B. 27, CA, ***Malkinson v Trim*** [2002] EWCA Civ 1273; [2003] 1 W.L.R. 463, CA, ***Qader v Esure Services Ltd*** [2016] EWCA Civ 1109; [2017] 1 W.L.R. 1924, CA ref'd to. (See ***Civil Procedure 2017*** Vol.1 para.46.5.6.)

■ **Blue v Ashley** [2017] EWHC 1553 (Comm), 26 June 2017, unrep, (Leggatt J)

Access by non-parties to witness statements in advance of trial

CPR rr.5.4C(2), 33.12. The claimant issued proceedings concerning an alleged oral agreement concerning shares in Sports Direction International Plc. Shortly before the trial, and for the purposes of a pre-trial hearing, documents, including witness statements of the parties, were filed with the court. While the witness statements were prepared for use at trial, they were referred to at the pre-trial hearing. The Times Newspapers Ltd (TNL) applied for access under either CPR r.5.4C(2) or the court's common law powers to: the filed witness statements of the parties, as well as the skeleton arguments used at the pre-trial hearing, further witness statements used at the pre-trial hearing, and an expert report on which one of the parties was to rely at trial. Leggatt J noted that this raised a question of general importance: "*whether a member of the public or the press should be given access in advance of a trial to witness statements which have been prepared for use at the trial in circumstances where the witness statements have already been referred to at a pre-trial hearing*." Leggatt J concluded in the absence of evidence explaining why it wanted access to the documents, it appeared that TNL's main reason for seeking access was to report some of the evidence that was to be given at the forthcoming trial. **Held**, the application was refused in respect of the parties' witness statements and the expert report. It was allowed in respect of the other witness statements, which had been prepared for and put in evidence at the pre-trial hearing. In reaching this decision Leggatt J stated that: (i) access to documents used in court proceedings is an aspect of, and must be guided by, the fundamental principle of open justice. The court thus has jurisdiction at common law, unless prohibited by statute, to grant access to documents where open justice requires it. This is in addition to any statutory power to grant access; (ii) CPR r.5.4C(2) applies to documents filed by a party. Where a document has been filed, but is no longer retained on the court file, the court has power to direct the party which filed the document to file a further copy of it in order to enable a non-party to obtain access to the document. Alternatively, the court could direct the party which filed the document to provide the non-party with a copy. The court could so order when open justice required it; (iii) the court has power at common law to direct that a non-party be provided with a copy of a document served during litigation but not filed at court; (iii) CPR r.32.13 does not prevent the court exercising its common law powers to direct that a non-party may inspect a witness statement at a time before the automatic right to inspect arises under that rule; but, (iv) the court should not generally order access to witness statements before a witness has given evidence as: conducting claims in public does not require access to evidence prepared for trial prior to it being given at trial. The principle of open justice only applies where a witness statement forms part of the evidence given at trial. There is no right to receive such material prior to it becoming

evidence. Trial preparation does not come under the principle of open justice; witness evidence is only subject to witness immunity when given as evidence, as such the safeguards which protect witnesses do not apply prior to the witness statement forming part of the evidence at trial. Furthermore, where a witness statement is referred to at a pre-trial hearing for the purpose of enabling the court to consider the nature of factual evidence to be given at trial, it is not to be treated as having been given in evidence. Witness statements are only put in evidence "*if and when the trial takes place and the witnesses are called to give oral evidence. . .*" per Leggatt J at para.18. Nor does ***R. (Guardian News & Media Ltd) v Westminster Magistrates' Court*** (2013) establish a strong default presumption that witness statements placed before a judge at a pre-trial hearing should be made available under the principle of open justice. While that decision established that documents placed before a judge at a public hearing should, other things being equal, be made available under the principle of open justice, a court is still required to "*assess the extent to which affording access to documents will serve the public interest in open justice and (weigh) this against any countervailing factors.*" This was not a formulaic test. It was one that required the court to consider "*the particular circumstances, including the nature of the documents in question, their role and relevance in the proceedings and, importantly, the purpose for which access to the documents is sought*." That access to a witness statement was not necessary to report the proceedings was not a good reason to refuse access, see ***NAB v Serco*** (2014). However, an interest in reporting the contents of a witness statement before evidence was given at trial was not a good reason to grant access prior to it being given at trial. It did not engage the principle of open justice. Nor did the fact that documents were referred to at a pre-trial hearing provide a good reason to grant access in the present circumstances. While the further question of access to an expert report was not considered in detail, Leggatt J concluded that where, as here, permission to adduce the evidence had been refused, a positive case would need to be set out to persuade the court that access to it fell within the principle of open justice. ***Roy v Prior*** [1971] A.C. 470, HL, ***R. (Guardian News & Media Ltd) v Westminster Magistrates' Court*** [2013] Q.B. 618, CA, ***NAB v Serco Ltd*** [2014] EWHC 1225 (QB), unrep., QBD, ref'd to. (See ***Civil Procedure 2017*** Vol.1 para.5.4C.7.)

■ **Glencore Energy UK Ltd v Revenue and Customs** [2017] EWHC 1587 (Admin), 29 June 2017, unrep. (Green J)

Judicial Review—venue for permission to appeal application

CPR rr.52.3, 52.8, 54.4, 54.12. Permission to apply for judicial review of a HMRC decision to impose a charge under the Finance Act 2015 was refused by Green J. The applicant sought permission to appeal from that decision from Green J. A question of principle arose: did the High Court have jurisdiction to grant permission to appeal from the refusal to grant permission to apply for judicial review where the refusal was made after a hearing in the High Court. Green J noted that there was no authority on the point. **Held**, the High Court did not have jurisdiction to grant permission to appeal from its decision, made after a hearing, to refuse permission to apply for judicial review. Only the Court of Appeal can grant permission to appeal in such circumstances as: (i) while CPR r.52.3(2) provides a general rule concerning permission to appeal, CPR rr.54.4, 54.12 and 52.8 provide a complete code governing proceedings for judicial review; (ii) and specifically, CPR r.52.8(1) implicitly provides that the High Court has no jurisdiction to grant permission to appeal as it specifies that permission may (which should be read as "may only" taking account of the implicit restriction) be sought from the Court of Appeal and not from either the lower court or appeal court as specified in CPR r.52.3. (See ***Civil Procedure 2017*** Vol.1 paras 52.3.6, 52.8.2.)

■ **BCS Corporate Acceptances v Terry** [2017] EWHC 1176 (QB), 30 June 2017, unrep. (Elisabeth Laing J)

Power to strike out claim following judgment

A dispute arose under an alleged consultancy agreement. Judgment in default of defence was obtained. An application to set aside was dismissed and an appeal from that decision was refused. A number of further applications were then made. One such application was an application to strike out the claimant's claim as an abuse of process based on ***Summers v Fairclough Homes Limited*** (2012). That application was refused. **Held**, (i) when considering the power to strike out a claim as an abuse of process the UK Supreme Court in ***Summers v Fairclough Homes Limited*** (2012) was not considering the question whether the court had power to strike out a claim post-judgment. It was concerned with the question of strike out prior to judgment being given; (ii) the court has no power to strike out a claim as an abuse of process after judgment as after judgment there is no claim to be struck out. Upon judgment, the cause of action merges with the judgment. A power to re-open a claim post-judgment in this way would, furthermore, offend against the principle of finality of litigation; (iii) where a party believes that they have obtained fresh evidence which could not have been deployed at the application to set aside a default judgment, the proper course of action was to apply for permission to appeal out of time from a refusal to set aside relying on the principle established in ***Ladd v Marshall*** (1954). ***Ladd v Marshall*** [1954] 1 W.L.R. 1489, CA, ***Summers v Fairclough Homes Limited*** [2012] UKSC 26; [2012] 1 W.L.R. 2004, UKSC ref'd to. (See ***Civil Procedure 2017*** Vol.1 para.3.4.1.)

■ **Howe v Motor Insurers' Bureau** [2017] EWCA Civ 932, 6 July 2017, unrep. (Munby PFD, McFarlane, Lewison LJJ)

Qualified one-way costs shifting—Motor Insurance Bureau—personal injury

The Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Board) Regulations 2003, CPR r.44.13. Road traffic accident in France in 2007. The claimant's car collided with a wheel that had come off a lorry. The claimant was rendered paraplegic. Neither the lorry nor its driver were identified. The claim, which was brought against the Motor Insurers' Bureau (MIB), failed. The question arose whether the claimant, who had been ordered to pay 85% of the MIB's costs, was within the ambit of the Qualified One-way Costs Shifting (QOCS) regime i.e., whether it was a claim seeking damages for personal injuries as required by CPR r.44.13(1)(a). Stewart J held it was a claim for civil debt and as such was not within the ambit of the QOCS regime (see ***Civil Procedure News*** No.5 of 2016). On appeal, the Court of Appeal **held**, that the claim was one for damages to which QOCS applied as: (i) the CPR as part of domestic law must be interpreted so as to give effect to EU law, including the principles of effectiveness and equivalence (see para.27). This is the case even in cases where an individual has no rights arising under EU law, for instance where interim relief is granted to suspend application of domestic legislation; given this (ii) the *Marleasing* principles were engaged in the present case. As Lewison LJ concluded at paras 36–37:

> *"[36] Can the reference in CPR Part 44.13 to "damages for personal injuries" be interpreted, conformably with the Marleasing principle, to include a claim for compensation under regulation 13? The rationale underlying QOCS is, in my judgment, a domestic version of the principle of effectiveness. Those who have (or may have) valid claims for damages for personal injury should not be deterred from pursuing them by the risk of having to pay the defendant's costs, except in the circumstances laid down by Section II of Part 44. If Mr Howe's claim under regulation 13 is covered by QOCS he will be in an equivalent position to an injured person who sues an insured driver.*
>
> *[37] The change required is to disapply the common law taxonomy of legal claims to a claim to compensation under regulation 13 and to treat the word "damages" in Part 44.13 as including compensation under that regulation. That is, no doubt, a departure from the "the strict and literal application of the words". However, I do not consider that it "goes against the grain" of the CPR. As Mr Williams QC, for Mr Howe, pointed out the glossary of terms in Appendix E to the CPR itself describes "damages" as a "sum of money awarded by the court as compensation to the claimant". Nor does this interpretation run counter to the underlying thrust of either the CPR or QOCS. As the judge himself said, Mr Howe is within the rationale which inspired QOCS. This interpretation is also supported by Lord Mance's statement in Moreno at [31] that the compensation to which the injured party is entitled is "the same compensation as that to which the victim is entitled as against the driver responsible.""*

Marleasing v La Comercial Internacional de Alimentacion Case C–106/89, [1990] ECR I–4135, ECJ, ***Vodafone 2 v HMRC*** [2009] EWCA Civ 446; [2010] Ch 77, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 paras 44.13.1, 44.13.2.)

■ **Birch v Birch** [2017] UKSC 53, 26 July 2017, unrep. (Lady Hale, DPSC, Lords Kerr, Wilson, Carnwath, Hughes)

No power to vary an undertaking

In July 2010 a husband and wife entered into a consent order compromising financial claims against each other relating to their divorce. In November 2011 the wife applied to vary an undertaking in the order. The application was dismissed by a District Judge in 2014 on the basis that the court had no jurisdiction to hear it. An appeal from that decision was dismissed by the Circuit Judge. The Court of Appeal allowed an appeal from that decision, holding that there was jurisdiction to vary the undertaking. On appeal to the United Kingdom Supreme Court, Lord Wilson stated that at no time in the courts below had the application to vary the undertaking been noted to—as it did—demonstrate a "conceptual confusion". Courts have no power to vary undertakings. They do not because undertakings are voluntary promises given to courts and, as such, a court *"has no power to impose any variation of the terms of a voluntary promise."* If an individual wishes to replace one undertaking for another then they must: i) apply to the court to release them from the undertaking or to discharge the undertaking; ii) accompany that application with an offer of a further undertaking. As Lord Wilson then noted at para.5:

> *". . . The court may decide to accept the further undertaking and, in the light of it, to grant the application for release. Equally the court may indicate that it will grant the application for release only on condition that she is willing to give a further undertaking or one in terms different from those of a further undertaking currently on offer. In either event the court's power is only to grant or refuse the application for release; and, although exercise of its power may result in something which looks like a variation of an undertaking, it is the product of a different process of reasoning. In Cutler v Wandsworth Stadium Ltd [1945] 1 All ER 103 Morton LJ said at 105D-E:*

> *"… the court does not vary an undertaking given by a litigant. If the litigant has given an undertaking and desires to be released from that undertaking, the application should be an application for release … Litigants are not ordered to give these undertakings; they choose to give them, and an application to have an undertaking already given varied is wholly wrong in form.""*

In the present case there had been a singular failure by the parties and the courts to distinguish between the court's jurisdiction to release an individual from an undertaking given to the court and the exercise of that jurisdiction. The focus had been on the existence of the jurisdiction, which had been confused by treating the issue as whether there was a power to vary. This confusion had been compounded by what appeared to be an approach which sought to restrict the nature of any supposed power to vary to such an extent that to all practical purposes it did not exist. It was however clear from the authorities (apart from that of ***Omielan v Omielan*** (1996) which was doubted, and the present one in the courts below) that there was a universal jurisdiction to release or discharge an undertaking. Moreover, the basis of granting a discharge was whether it was just to do so. In that regard, it was difficult to see that it would be just to do so unless there had been a "*significant change of circumstances since the undertaking was given*": see Lord Wilson at para.10. Furthermore, Lord Wilson stated at para.18, that

> *"In circumstances in which an undertaking could have been framed as an order, it would be illogical for answers to questions about the existence and exercise of the jurisdiction to grant release from it to be different from answers to questions about the existence and exercise of the jurisdiction to vary any such order."*

The appeal was allowed and the matter was remitted for determination whether or not the application for release from the undertaking should be granted. ***Cutler v Wandsworth Stadium Ltd*** [1945] 1 All E.R. 103, CA, ***Russell v Russell*** [1956] P. 283, CA, ***Omielan v Omielan*** [1996] 2 F.L.R. 306, CA, ***Kensington Housing Trust v Oliver*** (1997) 30 H.L.R. 608, CA, ***L v L*** [2006] EWHC 956 (Fam); [2008] 1 F.L.R. 26, FD, ***Mid Suffolk District Council v Clarke*** [2006] EWCA Civ 71; [2007] 1 W.L.R. 980, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.2 para.15–25 et seq.)

Practice Updates

STATUTORY INSTRUMENTS

■ **Civil Procedure (Amendment Rules No.2) 2017 (SI 2017/889)** in force from **1 October 2017.**

Introduces a new, clarifying, amendment to Pt 3 to make clear that the court has power to direct any proceedings to be heard by a Divisional Court of the High Court rather than a Divisional Court of a specific Division of the High Court. Makes further minor amendments to Pts 30, 52, 59, 61 and 62 consequent upon the renaming of the Mercantile Court as the Circuit Commercial Court. It also makes minor amendments to Pts 47, 52, 78 and 83.

PRACTICE GUIDANCE

■ **CPR PRACTICE DIRECTION—89th Update,** in force from **9 August 2017.**

The update introduces, as a temporary measure, Practice Direction 51Q (The County Court Legal Advisers Pilot Scheme). It is introduced to remedy a defect in the introduction of PD2E (Jurisdiction of the County Court that may be exercised by a legal adviser) on 1 April 2017; the defect being an inadvertent failure to provide an accompanying amendment to CPR Pt 2. It is to be anticipated that PD2E will be reintroduced in due course in tandem with an authorising amendment to CPR Pt 2. PD51Q is in the same terms as PD2E and reactivates the previous pilot scheme that had been set out in PD51K (The County Court Legal Advisers Pilot Scheme). The update further omits PD2E.

■ **CPR PRACTICE DIRECTION—90th Update,** in force from **9 August 2017,** except in respect of amendments to PD8A which come into force on the same date as the Drug Dealing Telecommunications Restriction Order 2017 enters into force.

The update introduces, as a pilot scheme running until 30 November 2019, an online claims process via a new PD51R. Use of the scheme is voluntary and by invitation only. The pilot runs until 30 November 2019. The update also makes minor amendments to CPR PD2C, 8A, 26, 45, 47, 52B and 75.

■ **CPR PRACTICE DIRECTION—91st Update,** in force from **12 September 2017.**

The update introduces a new County Court Online Pilot scheme via PD51S. The scheme will enable legal representatives to file claims online via the County Court Money Claims Centre. As with the Online Court pilot introduced by the 90th PD-Update, it is invitation only and voluntary. The pilot runs until 30 November 2019.

In Detail

CIVIL RESTRAINT ORDERS—CFC 26 LTD v BROWN SHIPLEY & CO LTD [2017] EWHC 1594 (Ch), 28 June 2017

Civil Restraint Orders (CROs) form, with civil proceedings orders under s.42 Senior Courts Act 1981 (the 1981 Act), a tailored and proportionate regime to control access to the court by individuals who engage in issuing claims and applications that are without merit. CROs originated in the court's inherent jurisdiction to protect its process from abuse: ***Cocker v Tempest*** (1841) 7 M & W 502 at 503–504; ***Grepe v Loam*** (1887) 37 ChD 168. The rationale underpinning the jurisdiction goes beyond protecting the court's process from abuse. It is equally important a means to ensure that individuals are not troubled by multiple claims and applications which are without merit. As Laws LJ noted in ***Attorney-General v Ebert*** (Div. Ct., unreported, 7 July 2000) such claims and applications are both harmful to the public interest as they waste the court's scarce resources, and hence contrary to CPR r.1.1(2)(e), and are equally apt to oppress those individuals who are subject to them.

Following substantial development by the Court of Appeal in ***Ebert v Venvil*** [2000] Ch. 484, ***Bhamjee v Forsdick (No.2)*** [2004] 1 W.L.R. 88, ***Mahajan v Department of Constitutional Affairs*** [2004] EWCA Civ 946, and ***Perotti v Collyer Bristow*** [2004] EWCA Civ 639, the jurisdiction was codified in 2004 in CPR r.3.11 and PD3C—Civil Restraint Orders. The former three judgments effectively created the three forms of civil restraint orders: limited civil restraint orders; extended civil restraint orders; and general civil restraint orders. During this period, in 2001 and 2003, the Divisional Court further confirmed that such orders could be made against McKenzie Friends as well as parties to proceedings: see ***Ex parte Purvis*** [2001] EWHC 827 (Admin) and ***Attorney-General v Purvis*** [2003] EWHC 3190 (QB). Notwithstanding codification within the CPR it remains the case that the court can, in the rare case where the regime provided for in the Practice Direction does not cover the situation, rely upon the inherent jurisdiction: ***R. (Kumar) v Secretary of State for Constitutional Affairs*** [2007] 1 W.L.R. 536. (See ***Civil Procedure 2017*** Vol.1, paras 3.11.1 and 3.11.2.)

The approach to granting civil restraint orders has recently been considered in a number of decisions. In ***Ashcroft v Webster*** [2017] EWHC 887 (Ch), HHJ Matthews sitting as a judge of the High Court considered the approach to granting extensions of extended civil restraint orders (noted in ***Civil Procedure News*** No.6 of 2017). In **CFC 26 Ltd v Brown Shipley & Co Ltd** [2017] EWHC 1594 (Ch), unrep., Newey J considered two further questions concerning the grant of extended civil restraint orders (ECROs). First, he considered whether an ECRO requires there to be at least three claims or applications brought that are totally without merit. Secondly, he considered whether it was necessary for such claims to be brought in the name of the person who, if the ECRO is made, is to be subject to the ECRO.

How many claims or applications that are totally without merit are necessary to found an ECRO?

Newey J noted that there was a consistent line of authorities that had held that at least three claims or applications that were wholly without merit needed to be brought to provide the basis for making an ECRO: ***Supperstone v Hurst*** [2009] EWHC 1271 (Ch); [2009] W.L.R. 2306; ***Courtman v Ludlam*** [2009] EWHC 2067 (Ch); ***Lilley v Euromoney Institutional Investor Plc*** [2014] EWHC 2364 (Ch); ***Miller v Gardiner*** [2015] EWHC 1712 (Ch); ***Richards v Investigatory Powers Tribunal*** [2017] EWHC 560 (QB). Moreover, there was nothing in ***Connah v Plymouth Hospitals NHS Trust*** [2006] EWCA Civ 1616 to suggest anything to the contrary. In particular, that decision did not suggest that no specific minimum number of claims or applications were necessary to justify the making of an ECRO. Nor did it suggest that what was necessary was that wholly without merit applications had been made in more than one set of proceedings. While Newey J did not refer to it, such a suggestion appears to be inconsistent with the Court of Appeal's statement in ***R. (Kumar) v Secretary of State for Constitutional Affairs*** (2007) at para.60 that applications made over a range of proceedings was suggestive of behaviour capable of meeting the requirement to impose a general civil restraint order. As the Court of Appeal in that case stated there needed to be evidence of an obsessive approach to a specific issue to give rise to an ECRO. Such evidence arose where three or more claims or applications were made in respect of the same matter. It did not arise, as Newey J noted at para.13, where an individual made less than three applications in two different sets of proceedings. As he put it:

> *"[13] It seems to me . . . right to take the view that an ECRO cannot be made unless there have, overall, been at least three totally without merit claims or applications. Had it been intended that an ECRO should be possible where there had been no more than two unmeritorious claims or applications, provided that they had been*

spread across more than one set of proceedings, the draftsman could have said so in terms. The Practice Direction is not so framed, but instead uses the word "persistently". Mr Boardman is in effect submitting that a person can be said to have issued claims or applications 'persistently' if he has made just one application in each of two sets of proceedings. In my view, however, such a person would not naturally be described as issuing claims or applications 'persistently', and the point is reinforced by the contrast with the '2 or more' found in paragraph 2.1 of the Practice Direction."

Can a CRO be based wholly or in part on claims or applications made in the name of someone other than the subject of the CRO?

Newey J considered the question without reference to previous decisions where civil restraint orders have been made or continued where an individual has issued proceedings in the name of others. In ***Sheikh v Beaumont*** [2015] EWHC 1923 (QB) Patterson J held that a general civil restraint order could continue where a litigant had pursued applications in the name of her mother (per Patterson J at para.51). In ***Moosun v HSBC Bank Plc (t/a First Direct)*** [2015] EWHC 3308 (Ch) Snowden J issued a general civil restraint order against a litigant who had issued proceedings in her own name, the names of her children, and in the name of her pets (per Snowden J at para.66).

Both those decisions answered the question Newey J considered in the affirmative. Neither however considered the question whether there was jurisdiction to do so. Newey J's analysis confirmed that, as a matter of principle, civil restraint orders can properly be issued where an individual issues claims or applications in the name of a third party, whether another individual or a company. The rationale underpinning this conclusion is that to limit the jurisdiction to a literal interpretation of the language of PD3C, which refers to parties who persistently issue claims (see, for instance, PD3C para.3.1) would undermine the utility of the civil restraint order regime.

A literal approach to the jurisdiction would enable individuals to sidestep the regime by issuing claims and applications in the name of third parties or companies: see, ***Mephistopheles Debt Collection Service v Lotay*** [1994] 1 W.L.R. 1064, where a similar question concerning civil proceedings orders under s.42 of the 1981 Act was resolved in favour of a purposive approach that would preclude vexatious individuals side-stepping the statutory regime by issuing proceedings in the name of ciphers. Further support for the view that the court could properly look beyond the formal position to the reality underpinning it for the purposes of PD3C was the approach taken to costs orders against non-parties. In such cases, the court would consider who was the "real" party to proceedings to determine the appropriate costs order: see ***Dymocks Franchise Systems (NSW) Pty Ltd v Todd*** [2004] UKPC 39, [2004] 1 W.L.R. 2807. Care needed to be taken to considering whether an individual was the real party to litigation where claims and applications were brought in the name of a company however. In such a case it would be necessary to demonstrate that the individual in question was genuinely in control of the company's decision-making process i.e., the company could properly be seen to be their cipher. As Newey J concluded at para.20:

". . . , it seems to me that, in a comparable way, references in Practice Direction 3C to a "party" who has issued claims or made applications, or to a "party" issuing claims or making applications, should be read as extending, not only to the named claimant or applicant but, where different, to the "real" claimant or applicant. Where the person against whom a CRO is sought has been the "real" party behind totally without merit claims or applications, it must, I think, be possible to take them into account. Likewise, if a claim or application is issued in the name of someone who is not subject to a CRO, but the "real" claimant or applicant has had such an order made against him, the CRO will, as it seems to me, bite on the claim or application. That is by no means, though, to say that a CRO will be in point wherever, say, the person subject to it has an interest, however small, in a company or trust that brings a claim or makes an application."

Newey J's judgment thus provides clear confirmation of the number of wholly unmeritorious applications which are required to have been made in order to provide the basis for an ECRO to be made. It equally provides important clarification that such orders may be made where an individual brings such applications in their own name or through applications brought in the name of third parties where the third party is no more than a cipher for the individual in question.

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