CIVIL PROCEDURE NEWS

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■ **Attorney General v Vaidya** [2017] EWHC 2152 (Admin), 20 July 2017, unrep. (Bean LJ, Goss J)

Civil Proceedings Order—Application to McKenzie Friend

Senior Courts Act 1981, s.42. The Attorney-General applied for a civil proceedings order, under s.42 of the Senior Courts Act 1981, against the respondent. In granting the application, the Divisional Court (Bean LJ giving the reasoned judgment, with which Goss J agreed), rejected a submission that it could consider whether previous decisions that had gone against the respondent, and which formed part of the Attorney-General's application, were properly certified as being totally without merit. It was no part of the Divisional Court's role on an application as the present to consider the "*rightness or otherwise of a decision already made against the respondent in other proceedings*". This was, however, noted to be subject to an exception where the law had changed since the decision in question had been made or where "*the law as previously understood [had] been revealed to be erroneously understood...*" The Divisional Court also made clear that it should be "standard practice" whenever a civil proceedings order under s.42 of the 1981 Act is made for it to "*include a paragraph prohibiting the vexatious litigant from acting as a representative or McKenzie Friend*." As Bean LJ explained, "*If a litigant is to be prevented without leave of the court from bringing cases himself, the case must surely be even stronger to prevent him from appearing as a representative*." ***Attorney General v Barker*** [2000] 1 F.L.R. 759, Div Ct, ***Attorney General v Covey***, *The Times*, 2 March 2001, Div Ct, ***Attorney General v Mensah*** [2004] EWHC 1441 (Admin), unrep., Div Ct, ***Ewing v Department of Constitutional Affairs*** [2006] EWHC 504 (Admin); [2006] 2 All E.R. 993, Admin Ct, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.3.11.1, Vol.2 at para.9A-152.5.)

■ **Caretech Community Services Ltd v Oakden** [2017] EWHC 1944 (QB), 31 July 2017, unrep. (Master McCloud)

Service—non-service—mis-service—alternative service

CPR r.6.15(2). Following a trial concerning the question whether service had been effected on the third defendant in which it was found that it had not been effected, an application was made seeking an order under CPR r.16.5(2) that steps already taken to bring the claim form to the defendant's attention would stand as alternative service. The basis of such an order, if made, was that service had been effected by delivering a copy of the claim form by post and email to the solicitors advising, albeit not on record as acting, for the defendant on 16 November 2015; the solicitors were not authorised to accept service. No response pack accompanied the copy of the claim form. Furthermore, the claim form was sent under cover of a letter which stated it was being provided "*for information*". **Held**, an order under CPR r.16.5(2) retrospectively validating service could not properly be made as: the copy of the claim form sent to the defendant was specifically and expressly sent "for information"; parties stating that they were providing copies of claim forms "for information" were to be taken at the word, and held to it. It was imperative that a party knew that when its solicitors were being provided with documents "which on their face are not being served", it can rely upon that. Furthermore, even if that were not the case, there was no good reason in such circumstances, particularly when the claimant's solicitor could have validly served the claim form in time, to make an order under CPR r.16.5(2). Master McCloud summarised the relevant principles to be drawn from the case law on service and CPR r.6.15 (see paras 67-71). In particular, she deprecated recent attempts, and the attempt in the present case, to draw a distinction between non-service and mis-service viz., (at para.67(2)(vii)),

> *"In my judgment approaching rule 6.15(2) by attempting to divide cases into those of "Mis-service" and "Non-service" is not of real assistance. The distinction was drawn and applied by the District Judge in United Utilities and was upheld by HHJ Woods on appeal but it is clear that the learned judge himself felt it did not sit comfortably in cases where the error was one of form. One might then foresee the notion that one could have cases of "Mis-service", "Non-service" and perhaps a third category of error such as "error of form", and so on. I do not think such an approach would be helpful and is likely to amount to an irresistible intellectual challenge to advocates in terms of generating case law as to the boundaries of such categories and their implications."*

The Master also rejected the submission that CPR r.6.15(2) could only be used to validate service at either the wrong location or in the wrong manner, viz., (at para.67(2)(viii)),

> *"I do not accept D3's argument that the wording of rule 6.15(2) leads to the conclusion that the court lacks the power to validate service which took place at the wrong location and in the wrong manner, if the other*

circumstances bring the case within the rule. As a matter of policy in my judgment it would sit ill with the Overriding Objective if a court was disempowered from validating service where (let us say) a minor error as to both location and manner took place, whilst being able in principle to waive more significant errors as long as they were 'either' as to method 'or' as to location. Moreover as a matter of drafting it seems probable that the word 'either' would have been included if the use of the word 'or' was intended to be 'exclusive or' (XOR in formal logic terms) rather than 'inclusive' of the case where both types of defect arise.[4] It would also be a conclusion which rather conflicts with the established practice of the court in suitable cases to allow alternative service under rule 6.15(1), where it is commonplace to direct service both by novel means and at otherwise unauthorised places if an application is made and the court is satisfied that such is appropriate."

The position was thus (at para.68),

> *"68. The approach I therefore take and which seems to me to come from the available case law is that:* ***Provided,***
> ***(a) critically, that the content of the existence of the claim form and its content has in fact come to the attention of the defendant; and***
> ***(b) if, judged objectively and not subjectively, the purpose of the steps taken was to bring it to his attention for service rather than solely for information,***
> ***Then***
> ***rule 6.15(2) is, subject to the requirement for "good reason" and the exercise of the court's discretion, available to validate the steps taken for that purpose even if the errors are both errors of method of delivery and errors of place of delivery."*** **(Bold in the original)**

Godwin v Swindon BC [2001] EWCA Civ 1478; [2002] 1 W.L.R. 997, CA, ***Training in Compliance Ltd v Dewse*** [2001] C.P. Rep. 46, CA, ***Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson*** [2002] EWCA Civ 879; [2002] C.P. Rep. 67, CA, ***Anderton v Clwyd CC*** [2002] EWCA Civ 933; [2002] 1 W.L.R. 3174, CA, ***Asia Pacific (HK) Ltd v Hanjin Shipping Co Ltd*** [2005] EWHC 2443 (Comm); [2005] 2 C.L.C. 747, Comm. Ct, ***Kuenyehia v International Hospitals Group Ltd*** [2006] EWCA Civ 21, unrep., CA, ***Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd*** [2007] EWHC 327 (Ch); [2007] 1 All E.R. (Comm) 813, ChD, ***Brown v Innovatorone plc*** [2009] EWHC 1376 (Comm); [2010] 2 All E.R. (Comm) 80, Comm. Ct, ***Bethell Construction Ltd v Deloitte and Touche*** [2011] EWCA Civ 1321, unrep., CA, ***Abela v Baadarani*** [2013] UKSC 44; [2013] 1 W.L.R. 2043, UKSC, ***Hills Contractors and Construction Ltd v Smith & Struth*** [2013] EWHC 1693 (TCC); [2014] 1 W.L.R. 1, TCC, ***Weston v Bates*** [2012] EWHC 590 (QB); [2013] 1 W.L.R. 189, QBD, ***MB Garden Buildings Ltd v Burton*** [2014] EWHC 431 (IPEC), unrep., IPEC, ***Kaki v National Provate Air Transport Co*** [2015] EWCA Civ 731; [2015] 1 C.L.C. 948, CA, ***United Utilities Group Plc v Hart*** (24 September 2015, HHJ Wood QC), unrep., CC at Liverpool, ***OOO Abbott v Econowall UK Ltd*** [2016] EWHC 660 (IPEC); [2017] F.S.R. 1, IPEC, ***Gee 7 Group Ltd v Personal Management Solutions Ltd*** [2016] EWHC 891 (Ch), unrep., ChD, ***Barton v Wright Hassall LLP*** [2016] EWCA Civ 177; [2016] C.P. Rep. 29, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at paras 6.15.2, 6.15.3, 6.15.5.)

■ **General Medical Council v Theodoropoulos (Rev 1)** [2017] EWHC 1984 (Admin), 31 July 2017, unrep. (Lewis J)

Court's power to hear and determine appeal in absence of a party

CPR rr.39.1, 39.3, Pt 52. The respondent's registration on the medical register was suspended for twelve months by order of the Medical Practitioners' Tribunal. The General Medical Council appealed from that decision to the Administrative Court. The respondent failed to attend, nor was he represented, at the appeal. The appeal was brought under s.40A of the Medical Act 1983. Lewis J had to consider, as a preliminary issue, whether the court could hear and determine the appeal in the respondent's absence. **Held**, the court could, under its inherent jurisdiction, hear and determine an appeal in the absence of a party. In reaching his decision Lewis J held that: i) the provisions of the 1983 Act provided no basis upon which the appeal court could proceed in the absence of a party, nor was there anything in CPR Pt 52 which provided a specific power for an appeal court to do so. There was thus a lacuna in CPR Pt 52; (ii) while Lewison LJ in ***Howard v Stanton*** (2011) had doubted if CPR r.39.3 provided a basis for an appeal court to proceed in the absence of a party, as that sub-rule applied to trials and an appeal was not a trial it was "*not apt to provide a power to hear . . . an appeal in the absence of one of the parties.*"; (iii) reliance could not be placed on the general case management power in CPR r.3.1(2)(m). As broad a power as that was it concerned case management, it was difficult to read taking a step or making an order for the purpose of case management as encompassing the hearing of an appeal. Its focus appears to be properly applicable to managing proceedings up to trial (and by implication, appeal) than the actual hearing of a trial or appeal. Without determining this point, this power was not relied upon to provide a basis to hear the appeal in this case; (iv) it was well-established that a court that has a specific jurisdiction has powers necessary "to enable it to act effectively within such jurisdiction":

Connelly v Director of Public Prosecutions (1964) at 1301. As the court had been given jurisdiction to hear appeals under s.40A of the 1983 Act, it must have such jurisdiction as necessary to enable it to hear such appeals and to do so even in the absence of one of the parties. As such the court could rely upon its inherent jurisdiction to proceed. Having decided the issue of principle, the second question was ought the court to proceed in the absence of the respondent in the present case. Lewis J **held** it could, and in doing so articulated the following guidance concerning the criteria to apply when considering such a question: (i) where the appellant or respondent has received notice of the hearing and there is no record of any attempt by them to inform the court of their non-attendance or to seek an adjournment, it may be appropriate to hear an appeal in that party's absence. In determining this question the court may take account of any evidence of contact between the parties or between the absent party and the court office in reaching its decision; (ii) where the party has contacted the court and indicated their non-attendance the following guidance was endorsed (at paras 28-29),

> "28. *In terms of considering whether to exercise the power, an appropriate starting point is the decision of the Court of Appeal in General Medical Council v Adeogba [2016] 1 W.L.R. 3867. The Court there was dealing with a respondent who failed to attend a Tribunal hearing. It is appropriate, as a starting point at least, to consider the approach adopted there although an appellate hearing may raise different or additional considerations, not least because the Tribunal, not the appellate court, will be the body that usually hears evidence and is the finder of facts. The Court approved the use of the criteria governing continuing with a criminal trial in the absence of a defendant set out in paragraph 22(5) of the judgment in R v Hayward [2001] QB 862 as qualified by the later decision in R v Jones (Anthony) [2003] 1 AC 1. Adapting the language of the judgment to reflect the context of an appeal hearing rather than criminal proceedings, the criteria are (1) the nature and circumstances leading to the respondent being absent, and in particular, whether the absence is deliberate and voluntary and such as to amount to a waiver of any right to attend (2) whether an adjournment might result in the respondent attending (3) the likely length of any adjournment (4) whether the respondent is or wishes to be legal represented or by his conduct has waived any right to be represented (5) whether the respondent would be able to give instructions to a legal representative before or during the hearing (6) the extent of the disadvantage to the respondent of not being able to attend (7) the general public interest (8) the effect of delay on the memories of witnesses. Other criteria (the risk that a jury would reach an improper view of the defendant's absence and the problem of separate trials where there is more than one defendant) are not apposite to an appeal hearing.*
>
> *29. In addition, however, the Court of Appeal in General Medical Council v Adeogba stressed the differences between a criminal trial and a disciplinary hearing in the context of the regulation of medical professions where the objective of the regulator is the protection, promotion and maintenance of the health and safety of the public. In that context, the Court emphasised that the 'fair, economical, expedition and efficient disposal of allegations made against medical practitioners is of very real importance'. . ."*

Connelly v Director of Public Prosecutions [1964] A.C. 1254, HL, ***R v Hayward*** [2001] Q.B. 862, CA (Crim Div), ***R v Jones (Anthony)*** [2002] UKHL 5; [2003] 1 A.C. 1, HL, ***Howard v Stanton*** [2011] EWCA Civ 1481, unrep., CA, ***Al-Daraji v General Medical Council*** [2012] EWHC 1835 (Admin), unrep., Admin, ***R (Veizi) v General Dental Council*** [2013] EWHC 832 (Admin), unrep., Admin, ***Malik v General Medical Council*** [2014] EWHC 2408 (Admin), unrep., Admin, ***General Medical Council v Adeogba*** [2016] EWCA Civ 162; [2016] 1 W.L.R. 3867, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.39.3.9.)

■ **Al Rabbat v Westminster Magistrates' Court** [2017] EWHC 1969 (Admin), 31 July 2017, unrep. (Lord Thomas CJ, Ouseley J)

Judicial Review—Divisional Court power to assess prospect that United Kingdom Supreme Court would depart from a previous decision

CPR Pt 54. A District Judge refused to issue a summons for a private prosecution in respect of an allegation that the crime of aggression had been committed by several interested parties in respect of the decision to invade Iraq in 2003. The applicant applied for permission to bring judicial review proceedings in respect of that decision. The Divisional Court held that it was bound by the decision of the House of Lords in ***R v Jones*** (2007), which established that there was no crime of aggression under the law of England and Wales. It was argued by the applicant that permission to bring judicial review proceedings should be granted so that the United Kingdom Supreme Court could review the decision in ***R v Jones*** (2007) and depart from it per the Practice Statement of 1966. **Held**, there was no prospect that the UKSC would depart from the decision in ***R v Jones*** (2007). Permission to bring judicial review proceedings was refused. It was however argued that the Divisional Court ought not to "*act as a gatekeeper*" for the UKSC through determining the prospects of it departing from previous authority. It was thus said that permission to bring judicial review proceedings should be granted in order to enable the UKSC to decide that question. In respect of this submission, the Divisional Court held as follows (at paras 26-28),

> *"[26] No one was able to refer us to any authority where this court has had to decide on the approach the Divisional Court of the Administrative Court should adopt in determining whether it should grant permission to bring judicial review proceedings in a case seeking to overturn a previous decision of the House of Lords or Supreme Court.*
>
> *[27] In contrast to proceedings before the civil courts where there is no restriction on the bringing of proceedings, permission is required to bring proceedings for judicial review and the court has a duty to determine the issue of permission. In our opinion, the requirement of permission obliges us to form a view on the prospects of success of any claim, even where, as in the present case, the legal question is one of substantial general public importance.*
>
> *[28] We are not simply required to leave the matter as an issue for decision by the Supreme Court. Having formed the view that there is no prospect of the Supreme Court overturning the decision in Jones, it is our duty to refuse permission to bring the proceedings for judicial review"*

Practice Statement of 26 July 1966 [1966] 1 W.L.R. 1234, HL, ***R v Jones*** [2007] 1 A.C. 136, HL, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.54.4.1.)

■ **Partridge v Gupta** [2017] EWHC 2110 (QB), 15 August 2017, unrep. (Foskett J)

Possession of Land—High Court Enforcement—notice of proceedings to persons in actual possession

CPR r.83.13(8)(a). An application was made to transfer the claim from the County Court to the High Court, under s.42(2) County Courts Act 1984, in order to pursue enforcement proceedings concerning possession of residential property via a writ of possession. A question arose concerning the nature of notice which had to be given under CPR r.83.13(8)(a) to those persons in "actual possession" of the property. The provision requires such persons to be given such notice of the proceedings "*as appears to the court sufficient to enable the occupant to apply to the court for any relief to which the occupant is entitled*"; also see CPR r.83.13(2). What constituted sufficient notice. **Held**, (i) notice did not require service of the formal notice of the application for permission to issue a writ of possession, nor did it require informal notice to be given by e.g., letter or other such means, of the date and time that such an application would be heard; (ii) where a sole occupant is subject to the possession order and is fully aware of the possession proceedings, sufficient notice is, generally, effected through a reminder of the terms of the court order and through making a request to them to give up possession under the terms of the order, as set out in ***Civil Procedure 2017*** Vol.1 at para.83.13.9. Any doubt about the sufficiency of such notice could be resolved by ensuring that the communication in question specified that permission to apply for a writ of possession would be made if possession was not delivered up, with eviction to follow thereafter; (iii) if a sole occupant had, however, played no part in the possession proceedings, sufficient notice would be given by ensuring a letter or similar form of communication containing all the information set out in (ii) was provided; and, (iv), where there were other occupants known to occupy the property in addition to the defendant-occupier, then a letter either addressed to the other occupants by name, if known, or otherwise to "the occupants" should be provided. It was suggested that such notice should be in similar terms to the following (see paras 15 and 67),

> *"We are writing to formally provide you with notice of the following:*
>
> *1. Our application to Watford County Court for leave to transfer the enforcement of the Order to the High Court under Section 42 of the County Court Act 1984. This allows a High Court Enforcement Officer to obtain possession of the property rather than a County Court Bailiff, and*
>
> *2. Our application in accordance with Civil Procedure Rules 83.13(8) to the Queen's Bench Division of the High Court for permission to issue a Writ of Possession following permission from the County Court under Section 42 of the County Court Act 1984 as stated above.*
>
> *We strongly recommended that you obtain independent legal advice but please do contact this office if you have any questions regarding the impending eviction."*

Furthermore, such a communication ought to make reference to the intention to apply for permission to issue a writ of possession if possession is not delivered up by the date prescribed in the order and that eviction will follow. In reaching this decision Foskett J noted that the leading case cited in ***Civil Procedure 2017*** Vol.1 at para.83.13.9 and its predecessors, ***Leicester City Council v Aldwinkle*** (1991) was cited by reference to the Times Law Reports and not the full report in the Housing Law Reports. Furthermore, he doubted whether that decision was authority for the proposition that a failure to give notice of an application for a writ of possession was *"of itself . . . a reason for setting aside a writ of possession or that all occupants must be given notice of the application for permission to issue a writ of possession if that is intended to mean service of the actual sealed application."* ***Leicester City Council v Aldwinkle*** (1991) *The Times*, 5 April, (1992) 24 H.L.R. 40, CA, ***Jephson Homes Housing Association Ltd v Moisejevs*** (2001) 33

H.L.R. 54, CA, ***Secretary of State for Defence v Nicholas*** [2015] EWHC 4064 (Ch), unrep., ChD ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.83.13.9.)

■ **Vilca v XSTRATA Ltd** [2017] EWHC 2096 (QB), 11 August 2017, unrep. (Stuart-Smith J)

Principles applicable to late amendment—lack of good reason not fatal

CPR rr.17.1, 17.3. Claims were brought under Peruvian law seeking damages for personal injury and consequential losses said to have arisen from the conduct of Peruvian National Police officers and others during a protest at or near a mine in Peru in 2012. The initial claim commenced in April 2013. A further claim was issued in May 2014. Particulars of claim were amended in April 2015. A re-amended defence was then served in response in May 2015. In November 2016, a further re-amended particulars of claim was served. A re-re-amended defence was then served in January 2017. In April 2017, the claimants informed the defendants they wished to further re-amend their particulars of claim. The defendants intimated than in principle they were willing to consent to such amendments. They did however specify that consent was conditional on their reserving their right to apply to strike out the amendments and without prejudice to their right to argue at trial that the amendments were made after the expiry of any relevant limitation period. The amendments were thereafter made by consent, and subsequently the defendants served a re-re-re-amended defence. In that defence, however, the defendants introduced for the first time a general plea of limitation, which if sustained would render the entire claim statute-barred. The question before the court was whether the defendants ought to be permitted to amend their defence in 2017 to enable them to raise a limitation defence to a claim originally issued in 2013. **Held**, the amendment, while late and unexplained raised an important issue (limitation) which the claimants conceded had a real prospect of success and could be dealt with at trial with no adverse consequences to the proper conduct of the litigation. As such it would have no adverse effect on other litigants and was hence consistent with the overriding objective. The amendment was allowed. In reaching this decision Stuart-Smith J reviewed the authorities on late amendment. In doing so he noted that the starting point for assessing the approach to take was ***Swain-Mason v Mills & Reeve LLP*** (2011), which itself referred back to ***Worldwide Corpn Ltd v GPT Ltd*** (1998). As he put it (at paras 25-26),

> *"25 The consistent strands to emerge from both Worldwide Corpn and Swain-Mason include that:*
>
> *i) Orders for costs may not adequately compensate the other party, particularly where that other party is "totally 'mucked around'";*
>
> *ii) The Court is now much more conscious that in assessing the justice of a particular case the disruption caused to other litigants by last minute adjournments and last minute applications have to be brought into the scales;*
>
> *iii) Accordingly, a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the Court;*
>
> *iv) The significance of the amendment to a party's position is capable of being brought into the scales, but is not of itself determinative; and*
>
> *v) It is always a question of striking a balance after weighing all relevant factors.*
>
> *26. . . the term "very late amendment" has subsequently become almost a term of art, meaning an application made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. I shall adopt that meaning. Elsewhere it has been said that "lateness" is a relative concept. I agree, and would add that the natural elasticity of language and its use in the authorities shows that an amendment may be regarded as "late" either because it could have been brought forward earlier or because it is brought forward at a time that is liable to disrupt the efficient conduct of the proceedings or both. The infinite variety of circumstances in which amendments may be brought forward means that there is a broad spectrum of potential impacts if an amendment is allowed, which is not dependent solely on chronological timing, and which may fall anywhere between the negligible and the devastating. In this broader post-CPR approach to amendments, the Court is not limited to considering the effect on the parties and whether any potential prejudice may be satisfactorily compensated in costs, though there is no reason why those may not be relevant considerations in appropriate cases. The Court will also have regard to the impact on the administration of justice in terms of potential disruption to the case in which the amendment is brought forward and in terms of the wider interests of the Court, other litigation and other litigants."*

He went on to note that both Carr J in ***Su-Ling v Goldman Sachs International*** (2015) and Coulson J in ***CIP Properties (AIPT) v Galliford Try Infrastructure Ltd*** (2015) had summarised the approach to take (See ***Civil Procedure News*** Issue 5 of 2015 and Issue 10 of 2016). While there were differences between their two summaries of the approach to take, they were not principled differences, but rather arose due to the different facts of the two cases. Apart from

on one point, both set out the same approach and were (once more) endorsed. The one point of dissent related to Coulson J's view, based on a reading of ***Brown v Innovatorone PLC*** (2011), that the absence of a good reason for the delay in seeking the amendment was fatal. ***Brown***, particularly as adopted and endorsed in ***Wani v RBS*** (2015), did not lay down an absolute rule that the failure to provide a good reason or explanation for the delay in seeking the amendment was fatal to the application. Absence of a good reason for delay was a factor to take account of in considering whether to grant the amendment; it was not "*an essential prerequisite to the allowing of an amendment.*" ***Worldwide Corpn Ltd v GPT Ltd*** [1998] EWCA Civ 1894, unrep., CA, ***Swain-Mason v Mills & Reeve LLP*** [2011] EWCA Civ 14; [2011] 1 W.L.R. 2735, CA, ***Brown v Innovatorone plc*** [2009] EWHC 1376 (Comm); [2010] 2 All E.R. (Comm) 80, Comm. Ct, ***Su-Ling v Goldman Sachs International*** [2015] EWHC 759 (Comm), unrep., Comm. Ct, ***CIP Properties (AIPT) v Galliford Try Infrastructure Ltd*** [2015] EWHC 1345 (TCC); 160 Con. L.R. 73, TCC, ***Wani v RBS*** [2015] EWHC 1181 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.17.3.7.)

- **Jones v Chichester Harbour Conservancy** [2017] EWHC 2270 (QB), 12 September 2017, unrep. (Master McCloud)

Service—deemed date for service—timing of relevant step to effect service

CPR rr.6.14, 7.5. The claimant brought a personal injury claim against the defendants alleging breach of duty in respect of the safety of a tree near Chichester Harbour. The claim was issued on 1 July 2016. An extension of time to serve was granted on 18 October 2016; the time for service being extended to 17 January 2017. The claim form was sent by email to the first defendant at 16.27 on 17 January 2017. A hard copy was posted by 1st class post the same day. It was received by the defendant on 18 January 2017; the defendant not having given a prior indication that it was willing to accept service by email. The claimant relied on service by post, the copy sent via email having been sent as a matter of courtesy and not in order to effect service. An issue arose concerning limitation. The defendants applied for an order to the effect that service of the claim was out-of-time and hence invalid. This was said to be the case because: (i) the extension of time to serve specified that "*the date for service . . . is extended to 17th January 2017*". The wording of the order, it was said, fixed the ultimate date of service, (ii) as such service had to be effected by that date at the latest; and, (iii) due to the operation of CPR r.7.5 this meant that the steps required to be taken to effect service, under CPR r.7.5, had to be taken on or before midnight on 13th January 2017. This was the case due to the operation of the provisions relating to the "deemed date of service" under CPR r.6.14. In support of this proposition the defendant relied on the judgment of Andrew Baker J in ***Brightside Group Ltd v RSM UK Audit LLP*** (2017) where (at para.13) he stated that,

> *". . . The answer given by CPR 6.14 to whether the question of when service took place is not the date on which the claimant took the step referred to in CPR 7.5(1) relevant to the method of service employed. The answer is the second day after completion of that step, because for the purpose of the CPR that is deemed by CPR 6.14 to be the date on which service took place."*

The claimant's stance was that all that was required to effect service was for the step required by CPR r.7.5 to be carried out prior to the midnight deadline on 17 January 2017, see the commentary in ***Civil Procedure 2017*** Vol.1 para.6.14.3. As the claim form was posted before midnight on 17 January, the relevant step to effect service was carried out before the deadline and hence service was valid. **Held**, the claim form was validly served. The date on which service was effected for the purpose of CPR r.7.5(1) was the date on which the claimant took the step specified in that rule. It was clear that, despite the wording of the order to extend time to serve, its intention was to extend time to comply with the requirements of CPR r.7.5. The correct approach (at para.38),

> *"38 . . .*
>
> *(1) . . . when determining whether, for the purpose of answering the question "was the claim form served during its period of validity?" is to ascertain whether the Claimant has carried out the step required by rule 7.5 within the time provided for doing so. That would apply equally to cases where time for service has been extended by order (as here) and to cases where the basic 4 or 6 month period of validity applies; and*
>
> *(2) as to the purpose of the 'deemed date' provisions in rule 6.14 those have to be given an interpretation which gives them a meaningful function and in my judgment the deeming provisions operate as a means to ensure that it is clear to the parties what date is to be used for the purpose of calculating such things as the date for service of acknowledgement of service or defence.*
>
> *39. Just as rule 7.5 is intended to assist the Claimant to avoid the trap of being deemed to be out of time, in my judgment rule 6.14 correspondingly assists the Defendant such that a reasonable assumption is made about how long, as a matter of fact, the claim form takes to arrive after posting and therefore represents a fair approach to the starting point for calculating time to respond. Otherwise the starting point would be that the*

time for service of a defence starts to run at the instant of posting of the claim form, which would be a strange approach since in the real world the Defendant cannot realistically be in receipt of the defence at that stage."

The decision in ***Brightside*** was *obiter*; it was not a decision concerning CPR r.7.5. However, in so far as it was authoritative, it was authority for the proposition that CPR r.7.5(1) was a special case, *"a rule which exists in its current form to provide a clear statement to a claimant as to 'what must be done within four months by a claimant who serves within the jurisdiction for the resulting service of his claim form to be valid.'. It [did] not alter the role of 'deemed date of service' for purposes outside that question."* Master McCloud, however, noted that if that were an incorrect interpretation of ***Brightside*** and it actually held "*that a claim form can cease to be validly served within the 4 month period even given proper compliance with rule 7.5, if the deemed service provisions 'bite'*", then it was an incorrect interpretation of the rule and not to be followed. On this also see, ***T&L Sugars v Tate and Lyle Industries Ltd*** (2014) which, while a decision on a contractual provision concerning service, supported the defendant's position and the interpretation of ***Brightside*** in the present case. ***Godwin v Swindon BC*** [2001] EWCA Civ 1478; [2002] 1 W.L.R. 997, CA, ***Anderton v Clwyd CC*** [2002] EWCA Civ 933; [2002] 1 W.L.R. 3174, CA, ***T&L Sugars v Tate and Lyle Industries Ltd*** [2014] EWHC 1066 (Comm), unrep., Comm. Ct, ***Brightside Group Ltd v RSM UK Audit LLP*** [2017] EWHC 6 (Comm); [2017] 1 W.L.R. 1943, Comm. Ct, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at paras 6.14.1-6.14.3.)

■ **Higgins v ERC Accountants & Business Advisers Ltd** [2017] EWHC 2190 (Ch), 18 September 2017, unrep. (HHJ Pelling QC sitting as a judge of the High Court)

Service—no duty on defendant to remind claimant of need to serve claim form

CPR rr.3.1, 3.9, 6.15, 6.16, 6.27, 7.6. In an action for damages or equitable compensation the claim form was issued on 19 May 2016. The claim form was provided to the defendants under cover of letter, dated 20 July 2016. The parties thereafter agreed a number of extensions of time to serve the claim form; correspondence showing that none of the parties believed the claim form had been served on 20 July 2016. The final extension of time to serve expired on 19 March 2017. The claim form had not been served by that date. The defendants thereafter issued applications challenging the court's jurisdiction. The claimants' position was that (notwithstanding the various agreements to extend service) valid service was effected when the claim form was sent to the defendants on 20 July 2016. The claimants further argued that if service had not been validly effected the court ought to, variously or cumulatively, exercise its powers under CPR rr.3.1, 3.9, 6.15, 6.16, 6.27, 7.6 to cure any error or omission. The second defendant's position was that the claim form had not been served and the only way in which that omission could be cured was through commencing a fresh claim, which in turn would enable it to take advantage of a limitation defence. The first defendant had issued an application in similar terms. **Held**, the claim form had not been served by letter on 20 July 2016. The court would not cure this error. It could not properly be said that provision of a copy of the claim form on 20 July 2016 amounted to valid service. It was clear the factual context could not justify a finding that the claimants were, on 20 July 2016, attempting to serve the claim form by sending a copy. If the claimant had intended to serve the claim form on that date, it was to be expected that the court sealed original copy would have been sent with a response pack: see, further, ***Hills Contractors & Construction Ltd v Struth*** (2014), which rightly held that a copy of the court sealed claim form and response pack was necessary to effect service. That was not done. The parties' subsequent conduct, concerning the various extensions of time, further made it clear that service was not attempted or effected on 20 July 2016. Furthermore, there had been no communication prior to that to the effect that the defendants' solicitors were authorised to accept service. In these circumstances, it could not be said that there had been any attempt to serve the claim form. In respect of the retrospective application of CPR r.16.5(2) (steps taken to bring a claim form to the defendant's attention as alternative method of service), the principles applicable were summarised by Floyd LJ in ***Barton v Wright Hassall LLP*** (2016). It was thereby necessary to demonstrate that there was a good reason to make such an order. It was clear that the simple fact that a defendant became aware of the existence and contents of a claim form did not amount to a good reason. Such a fact was a necessary but not sufficient condition for making an order under CPR r.16.5(2). In this case, the claimants could have served the claim form in time. That they did not was a matter of a "negligent or incompetent" error on the part of their solicitors (see para.39). Further, it was not apparent that the defendants were playing "technical" games in this case. The defendants' solicitors were under no obligation to "remind" the claimants' solicitors of the need to serve the claim form: ***OOO Abbott v Econowall UK Ltd*** (2016). There simply was no good reason to make an order under CPR r.16.5(2). Finally, there was no basis to grant an extension of time to serve under CPR r.7.6. To grant an extension it would have been necessary for the claimant to demonstrate that all reasonable steps had been taken to effect service in time. That was clearly not the case here. ***Asia Pacific (HK) Ltd v Hanjin Shipping Co Ltd*** [2005] EWHC 2443 (Comm); [2005] 2 C.L.C. 747, Comm. Ct, ***Brown v Innovatorone plc*** [2009] EWHC 1376 (Comm); [2010] 2 All E.R. (Comm) 80, Comm. Ct, ***Abela v Baadarani*** [2013] UKSC 44; [2013] 1 W.L.R. 2043, UKSC, ***Hills Contractors & Construction Ltd v Struth*** [2013] EWHC 1693 (TCC); [2014] 1 W.L.R. 1, TCC, ***OOO Abbott v Econowall UK Ltd*** [2016] EWHC 660 (IPEC); [2017] F.S.R. 1, IPEC, ***Gee 7 Group Ltd v Personal Management Solutions Ltd*** [2016] EWHC 891 (Ch), unrep., ChD,

Barton v Wright Hassall LLP [2016] EWCA Civ 177; [2016] C.P. Rep. 29, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at paras 6.15.2, 6.15.3, 6.15.5.)

■ **Brainbox Digital Ltd v Backboard Media GmbH** [2017] EWHC 2465 (QB), 6 October 2017, unrep. (Mr John Howell QC sitting as a deputy Judge of the High Court)

Discretion to order third party to give undertaking—nature of fortification of undertaking

CPR r.25.1(1)(f). Proprietary and freezing injunctions issued against the defendants on a without notice basis in proceedings seeking damages and/or restitution of sums paid to them. A question arose at the with-notice hearing whether the cross-undertaking in damages, which the claimant had given, should be fortified by an unlimited undertaking. That question was to be considered by reference to the principles articulated by Briggs J in ***Jirehouse Capital v Beller*** (2008), and endorsed by Tomlinson LJ in ***Energy Venture Partners Ltd v Malabu Oil and Gas Ltd*** (2014) at para.53. The specific issues in the present case were, however, whether fortification of an undertaking had to be limited in amount i.e., could the fortification be unlimited, and whether a third party could properly fortify a claimant's own undertaking. **Held**, the application to fortify the undertaking was refused. In reaching that decision the judge held that a cross-undertaking may be fortified by a third party either in a limited amount or for an unlimited amount. As explained (at paras 26-28),

> *"26. In my judgment the court may require, as a condition for granting or continuing an injunction, that the cross-undertaking given by the applicant is fortified by the provision by someone other than the applicant of an unlimited, or a limited, undertaking, or by the making of some other form of limited provision, to meet any loss that the injunction may cause: see Stephen Gee QC Commercial Injunctions 6th ed p347. Any fortification required is not necessarily limited in amount. The court has a wide discretion as to the conditions on which it may grant or continue an injunction. Discretions of that kind should not be fettered by rigid judge-made rules. Thus, for example, the default position is that an applicant for an interim injunction is required to give an unlimited cross-undertaking in damages, but there are circumstances in which no such undertaking may be required (for example in the case of a law enforcement agency enforcing the law in the public interest) and circumstances in which the extent of the cross-undertaking may be limited (for example in the case of a liquidator of an insolvent company). The question of the extent of the cross-undertaking remains a matter of discretion for the judge who grants the injunction: see eg JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2015] EWCA Civ 139, [2016] 1 W.L.R. 160, ("Pugachev") per Lewison LJ at [68]-[69], [73]. So equally in my judgment does any requirement for fortification of the applicant's cross-undertaking and the extent of any such fortification that the court may require.*
>
> *27. The principles that apply to applications for fortification nonetheless require an informed and realistic estimate to be made of the likely amount of the loss that the applicant for fortification may suffer given the unlimited cross-undertaking it already has. There would be no point in requiring such an estimate of the likely loss to be made if the extent of any fortification required was not normally to be related to it. The court could have adopted a different approach. The court could simply have required an applicant for fortification to show a good arguable case that there was a significant risk that it might suffer some, otherwise uncompensated, loss (without requiring any informed and realistic estimate of such loss to be made) and to have then required a further unlimited undertaking to be provided by a person other than the applicant for the injunction. Such an approach might well give the applicant for fortification some greater security that it will receive compensation for any loss which it suffers if it transpires that the injunction was wrongly granted. But it would do so only by requiring the provision of what may well be an unnecessary guarantee and one which the applicant for the injunction may find it harder to arrange (thus putting such remedy as it may finally obtain at greater risk of proving ineffective and denying it justice in practice). Such an approach would normally, therefore, be disproportionate. Identifying what level of fortification there is a good arguable case for enables no more, and no less, than what appears to be the necessary amount of security to be provided.*
>
> *28. The principles that apply to fortification are thus different from those that apply to the cross-undertaking normally required of an applicant for an injunction. The failure to establish a sufficient risk of loss is no reason for not extracting a cross-undertaking from it. This is not merely because the cross-undertaking may be required and given on a without notice hearing before the defendant has had the opportunity to give evidence about loss (or indeed anything else). As Lewison LJ stated in Pugachev supra at [77], "it is…fairness rather than the likelihood of loss that leads to the requirement of a cross-undertaking....In addition...the cross-undertaking is regarded as the price that must be paid for the interim interference with the defendant's freedom"."*

Furthermore, there had to be an evidential foundation to justify fortification of an undertaking: ***Bhimji v Chatwani (No.2)*** (1992) at 403 *and* ***JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*** (2015) at para.98. ***Bhimji v Chatwani (No.2)*** [1992] 1 W.L.R. 1158, ChD, ***Harley St Capital Ltd v Tchigirinski*** [2005] EWHC 2471, unrep., ChD, ***Jirehouse Capital v Beller*** [2008] EWHC 725 (Ch), unrep., ChD, ***Energy Venture Partners Ltd v Malabu Oil and Gas Ltd*** [2014] EWCA Civ 1295; [2015] 1 W.L.R. 2309, CA, ***JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*** [2015] EWCA Civ 139; [2016] 1 W.L.R. 160, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.25.1.25.10.)

Practice Updates

PRACTICE GUIDANCE

PRE-ACTION PROTOCOL FOR DEBT CLAIMS

The new Pre-Action Protocol for Debt claims, issued in March 2017, came into force on the **1 October 2017** (see ***Civil Procedure News*** Issue 4 of 2017).

The new Protocol applies to debt claims where a business, including sole traders and public bodies, claims payment of a debt from an individual. It does not apply where the debt falls within the scope of other Pre-Action Protocols. Explicit reference is made, in that respect, to the Pre-Action Protocols concerning Construction and Engineering Claims and Mortgage Arrears. It is noteworthy, however, that those two named Pre-Action Protocols are given, at para.1.4(a) of the Debt Protocol, as examples only. Should a debt claim also be made in proceedings to which other Pre-Action Protocols apply e.g., in a claim to which the Pre-Action Protocol for Possession Claims by Social Landlords applies, it ought to be expected that those Protocols ought properly to apply. The Debt Protocol is also explicitly disapplied from claims issued by HM Revenue & Customs and which fall under CPR PD7D. It must also be read in conjunction with any relevant debt recovery industry good practice and as subject (inevitably given its status as a Pre-Action Protocol) to any specific regulatory provisions.

COMMERCIAL, CIRCUIT COMMERCIAL COURT, AND CHANCERY GUIDES

The Commercial Court Guide and the Mercantile Court Guide were reissued on 12 September 2017; the latter being renamed, as a consequence of the renaming of the Mercantile Court via The Civil Procedure (Amendment No.2) Rules 2017 (SI 2017/889), the Circuit Commercial Court Guide. The Chancery Court Guide was reissued on 28 September 2017.

Each of the three Guides has undergone, amongst other things, revision in the light of the creation of the Business and Property Courts (BPC), which became operational on 2 October 2017, albeit the 92nd PD-Update dealing with their operation has not yet been published except in draft. It is hoped that that PD-Update will be issued shortly, not least as the statutory instrument that it supplements has been in force since 1 October 2017 and the operation of the BPC from 2 October 2017 was self-evidently predicated on the PD coming into force at the same time as the statutory instrument.

The BPC, itself, is constituted of the High Court's Chancery Division, the Commercial and Circuit Commercial Courts, the Admiralty Court, the TCC, and the specialist lists, such as the, Business List, Competition List, Insolvency and Bankruptcy List, and Financial List, which within the ambit of the Queen's Bench and Chancery Division and specifically, the Rolls Building jurisdictions. As such it is a new non-statutory umbrella within which the existing courts and court lists will now operate. Important revisions relating to the BPC in the Guides include:

- detail concerning the nature and operation of the BPC, including the transfer of cases into and out of London to and from the BPC's District Registries (Chancery Guide at 14.15 at p.45; care should be taken as the numbering of the sub-paragraphs in this part of the Guide appears to have gone astray); Commercial Court Guide at B.13-B.14; and Circuit Commercial Court Guide at 3.15-3.18);
- guidance on how to start a claim in the BPC using electronic filing (Chancery Guide at 8.6 to 8.11); the approach to electronic working and e-filing (Chancery Guide, Ch.6; Commercial Court Guide, B2; Circuit Commercial Court Guide at 3.3).

In Detail

WHEN CAN COSTS JUDGES DEPART FROM APPROVED COSTS BUDGETS?

CPR r.3.18 states as follows:

> *"In any case where a Costs Management Order has been made, when assessing costs on a standard basis, the court will:*
>
> *(a) have regard to the receiving parties' last approved or agreed budget for each phase of the proceedings;*
>
> *(b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so."*

Consider the following illustration: the claimant's budget claimed £30,000 for disclosure. In their budget discussion report the defendants challenged that as being far too much, both as to time spent by senior fee earners and as to the hourly rates for all fee earners. At the CCMC the Queen's Bench Master approved £25,000 without explaining how the reduction of £5,000 had been calculated.

At trial the claimant won and was awarded costs. The claimant's bill for detailed assessment claims £24,300 for disclosure, using of course the rates claimed in the budget. In respect of the incurred costs (i.e. the pre-budget costs) the costs judge fixed rates for all fee earners which are substantially lower than the rates claimed in the budget. Applying those lower rates to the disclosure costs claimed would bring the total down to £21,000.

The defendants' points of dispute complained also that too much time had been incurred by senior fee earners. The defendants proposed that half of senior fee earners' time should be allowed only at half rate. This adjustment would bring the total down by another £2,000 to just £19,000 even though an expenditure of £25,000 had been approved. The costs judge is persuaded that, had no budget been set, no more than £19,000 would have been allowed for disclosure.

The question to be discussed here is what sum should the costs judge allow?

Some practitioners would feel certain that the full £24,300 should be allowed. All of this and more had previously been approved by the Queen's Bench Master. The recent cases of ***Merrix v Heart of England Foundation NHS Trust*** [2017] 1 Costs L.R. 91 (Carr J) and ***Harrison v University Hospitals Coventry and Warwickshire Hospital NHS Trust*** (2017) 3 Costs L.R. 424 (CA) both confirm that a budget is more than just a cap on the maximum allowable. It is intended to provide real transparency to the costs likely to be awarded and thereby diminish the need for and expense of detailed assessment. This topic was also considered in ***Bains v Royal Wolverhampton NHS Trust*** (17 August 2017, unrep.) a detailed assessment conducted by District Judge Lumb (Regional Costs Judge), sitting in Birmingham. An informal report of the learned District Judge's decision has been published by Michael Fletcher (CILEx Litigator and Advocate) and noted in the *Civil Litigation Brief* website published by Gordon Exall (Barrister):

> *"Judge Lumb held that to reduce hourly charging rates for budgeted costs to the same levels as those allowed for the incurred costs, thereby causing a potential departure from the budgeted phase totals, would be to second guess the thought process of Costs Managing Judge and would impute a risk of double jeopardy into the detailed assessment. The Costs Managing Judge was not fixing hourly rates, but may have had regard to them when setting a reasonable and proportionate allowance for each phase of the budget. Absent cogent evidence to the contrary, the Costs Judge simply couldn't know. The clear philosophy and guidance from the Senior Courts in Merrix and Harrison was to simplify and reduce the scope of detailed assessments. The "good reason" bar was a high one."*

Other practitioners would feel equal confidence that the correct figure to allow is only £21,000, or possibly even less, £19,000. Although the assessing court must have regard to the approved budget figures, it can depart from them where good reason is shown. Here the good reason relates to the hourly rates claimed in both the budget and the bill. Paragraph 7.10 of Practice Direction 3E states:

> *"It is not the role of a court in the costs management hearing to fix or approve the hourly rates claimed in the budget."*

Indeed, hourly rates for fee-earners are not even stated if the budgeted costs (i.e. the total of the estimated costs) do not exceed £25,000 or if the value of the claim as stated on the claim form is less than £50,000. In these two circumstances, the parties must only use the first page of the precedent (r.1.13 and Practice Direction 3E, para.6). However, once a modest value claim proceeds to a detailed assessment, the bill of costs has to set out the costs claimed in minute detail.

In the illustration above, the hourly rates were disputed in respect of both the incurred costs and the budgeted costs. If the costs judge allows only £x per hour for incurred costs how could it possibly be right to allow £x+y per hour for the budgeted costs? Neither the figure £25,000 (approved at the CCMC), nor the figure £24,300 (as claimed in the bill for assessment) relates to the reasonable and proportionate costs which were actually incurred. Rule 3.18 authorises the court assessing costs to depart from decisions made by the budgeting court where there is good reason to do so. In ***Harrison*** the Court of Appeal declined to define the term "good reason", leaving this Instead to the good sense of the costs judges.

> *". . . Where there is a proposed departure from budget - be it upwards or downwards - the court on a detailed assessment is empowered to sanction such a departure if it is satisfied that there is good reason for doing so. That of course is a significant fetter on the court having an unrestricted discretion: it is deliberately designed to be so. Costs judges should therefore be expected not to adopt a lax or over-indulgent approach to the need to find "good reason": if only because to do so would tend to subvert one of the principal purposes of costs budgeting and thence the overriding objective. Moreover, while the context and the wording of CPR 3.18 (b) is different from that of CPR 3.9 relating to relief from sanctions, the robustness and relative rigour of approach to be expected in that context (see Denton v TH White Limited [2014] EWCA Civ 906, [2014] 1 W.L.R. 3926) can properly find at least some degree of reflection in the present context. Nevertheless, all that said, the existence of the "good reason" provision gives a valuable and important safeguard in order to prevent a real risk of injustice; and, as I see it, it goes a considerable way to meeting Mr Hutton's doom laden predictions of detailed assessments becoming mere rubber stamps of CMOs and of injustice for paying parties if the approach is to be that adopted in this present case. As to what will constitute "good reason" in any given case I think it much better not to seek to proffer any further, necessarily generalised, guidance or examples. The matter can safely be left to the individual appraisal and evaluation of costs judges by reference to the circumstances of each individual case." (Davis LJ)*

There is now a reported decision by a costs judge stating that there was good reason to depart from an approved budget where it had been drawn on the basis of hourly rates which he considered to be inappropriate: ***RNB v London Borough of Newham*** [2017] EWHC B15 (Costs) (Deputy Master Campbell); a case now being appealed to a High Court judge. Costs judges always give close attention to disputes as to hourly rates. A client on "no win, no fee" terms has only a reduced interest in negotiating the hourly rates with the solicitor. The courts should not encourage solicitors to routinely claim rates substantially above the normal rates, thereby enabling them to draw inflated budgets.

If the decision in ***RNB*** is accepted, is it appropriate to go further and allow only £19,000 in the example above? If the costs judge finds good reason for changing the hourly rates claimed in the budget, can a similarly good reason be found for disallowing some of the fees claimed by senior fee-earners doing junior work? The fact stated in the illustration above, that, had no budget been set, no more than £19,000 would have been allowed for disclosure, is of course not by itself a justification for departing from the approved budget. The budgeting rules do not allow the costs judge to make a departure whenever there is a reason to do so. There must be a "good" reason. The adjective "good" here is surely not being used in the sense of "not bad". It is therefore appropriate to take the expression "good reason" to mean "strong reason". Adopting the words of Davis LJ (see above) costs judges should be expected not to adopt a lax or over-indulgent approach to the need to find "good reason". They should not be too ready to depart from the budget totals, even on hourly rates, if the departure is fairly insignificant. It has never been the job of a costs judge to clip bills—i.e. to clip off one unit here and another one there even though, today, units (one tenth of an hourly rate) often exceed £50 each. In a six figure bill, a clip of £2,000 (from £21,000 to £19,000 in the illustration given above) may well be regarded as fairly insignificant, and therefore not made.

There is often an important difference between departures caused by hourly rate changes and departures caused by a decision as to what work should be delegated to junior fee earners. Hourly rate decisions are likely to affect every sub-total in an approved budget. Disputes as to the use of senior staff are less likely to have so widespread an effect.

Giving costs judges powers to put right things which later turn out to have gone seriously wrong, has been an accepted practice of costs assessment for decades. Courts awarding costs often express opinions on those costs which the cost judge must have regard to. No such opinions will be ignored. However, the costs judge will depart from them where he or she thinks that not to do so would lead to a substantial injustice.

John O'Hare (retired costs judge)

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