CIVIL PROCEDURE NEWS

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Pre-action Disclosure—service out of jurisdiction

Senior Courts Act 1981, ss.33, 37, CPR rr.6.2(c), 6.36 6.37, 7.2, 31.16(3)(d), CPR PD 6B para.3.1. An application to serve an application for pre-action disclosure out of the jurisdiction in New York was granted by the Master on an ex parte basis in February 2017. An application to set aside that order was made in March 2017. The primary basis of the set aside application was that the court had no jurisdiction to serve an application for pre-action disclosure outside the jurisdiction. In addition, it was argued that, if there was jurisdiction, permission ought not to be granted due to a material non-disclosure before the Master. **Held**, the court had jurisdiction, under s.33 of the Senior Courts Act 1981, to make such an order, and the Master was right to do so. An application for pre-action disclosure is a free-standing set of proceedings, and is so notwithstanding the fact it is commenced by way of application notice. As such there is jurisdiction, provided the conditions set out in the CPR are satisfied, to order service of such an application outside the jurisdiction. Furthermore, there is no authority to support the proposition that the court has no jurisdiction to do so. ***Towergate Underwriting Group Limited v Albaco Insurance Brokers Limited*** [2015] EWHC 2874 (Ch), unrep., ChD, ***AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC*** [2011] EWCA Civ 647; [2012] 1 W.L.R. 920, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.6.37.15.)

■ **Premier Motorauctions Ltd v Pricewaterhousecoopers LLP** [2017] EWCA Civ 1872, 23 November 2017, unrep. (Longmore, Kitchin and Floyd LJJ)

Security for costs—after-the-event insurance—assurance of non-avoidance

CPR r.25.13. Proceedings were brought by the joint liquidators of the claimant companies. After-the-event insurance policies were in place for the claimants and the joint liquidators. The defendants applied for security for costs in the sum of £7.2 million. The application was refused by Snowdon J. On an appeal from that decision, the Court of Appeal **held**, that in principle an ATE insurance policy can be sufficient to resist an application for security for costs on the basis that it would provide a defendant with sufficient costs protection. The question was whether the ATE insurance policy in question did, in fact, provide sufficient costs protection. In the present case, the ATE policy contained no anti-avoidance provisions. ATE insurers do seek to avoid such policies when they determine it is right to do so: ***Persimmon Homes Ltd v Great Lakes Reinsurance (UK) Plc*** (2010). There was no basis on the present case to properly conclude that the possibility that the insurers would seek to avoid the policy was illusory. In order to satisfy the court that an order for security for costs should not be made there must be some assurance that an insurance policy was not liable to be avoided on grounds of misrepresentation or non-disclosure. That was not the position here. As such an order for security of costs would be made. ***Nasser v United Bank of Kuwait*** [2002] 1 W.L.R. 1868, CA, ***Al-Koronky v Time-Life Entertainment Group Ltd*** [2006] EWCA Civ 1123; [2007] 1 Costs L.R. 57; CA, ***Persimmon Homes Ltd v Great Lakes Reinsurance (UK) Plc*** [2010] EWHC 1705 (Comm); [2011] Lloyd's Rep I.R. 101, Comm, ***Holyoake v Candy*** [2017] EWCA Civ 92; [2017] 3 W.L.R. 1131, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.25.13.1.)

■ **Mohammed v The Home Office** [2017] EWHC 3051 (QB), 24 November 2017, unrep. (Edward Pepperall QC sitting as a deputy judge of the High Court)

Part 36—approach to assessment of additional amount

CPR r.36.17(4). The claimant was found to have been unlawfully detained for three periods between September 2012 and March 2016. He was awarded damages of £78,500 plus interest. That award meant that he achieved a judgment that was more advantageous than a Pt 36 Offer to settle. It was not unjust to make orders under CPR r.36.17(4). Amongst other things, the question arose as to the proper approach to calculate the additional amount to which the claimant was entitled under CPR r.36.17(4)(d). There was conflicting High Court authority on the point. HHJ Purle QC in ***Watchorn v Jupiter Industries Ltd*** (2014) held that the additional amount was 10% of the net award of damages. In ***Bolt Burdon Solicitors v Tariq*** (2016) Spencer J took the approach that the additional amount was 10% of the damages plus interest. Additionally, it was noted there was a third approach: the additional amount was 10% of the damages plus interest, which would include any interest awarded under CPR r.36.17(4)(a). **Held**, the correct approach is that take in ***Bolt Burdon***. As Edward Pepperall QC put it (at para.27),

"[27] . . . In calculating the additional amount, the court should take into account the gross award that would have been made but for Part 36. That is the sum that the court was about to award when taken to the Part 36 offer. Such assessment therefore includes basic interest, whether awarded pursuant to contract (as in Bolt Burdon) or to the court's discretionary power, but excludes any enhanced interest awarded under r.36.17(4)(a)."

Watchorn v Jupiter Industries Ltd [2014] EWHC 3003 (Ch); [2015] 3 Costs L.O. 337, ChD, ***Bolt Burdon Solicitors v Tariq*** [2016] EWHC 1507 (QB); [2016] 4 W.L.R. 112, QBD, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.36.17.4.4.)

■ **Freeborn v Marcal (t/a Dan Marcal Architects)** [2017] EWHC 3046 (TCC), 28 November 2017, unrep. (Coulson J)

Party co-operation—rule non-compliance

CPR r.3.9. An issue arose concerning the service of the defendant's costs budget. The claimant asserted that it was served out of time. A formal application for relief from sanctions was made. The court held that it was not served out of time and therefore there was no need for an application for relief from sanctions. Assuming however, that relief was needed, it was clear that it should be granted: the breach was neither serious nor significant; there was very good reason for delay in serving the costs budget as the defendant relied on a letter from the court as to the date to serve; and in all the circumstances it was clear that at worst there was an inadvertent breach of the rules effected in reliance on an instruction by the court administration. The claimant was ordered to pay the costs of and occasioned by "the unnecessary application" the defendant had been put to. Coulson J went on to emphasise, as the Court of Appeal had in ***Denton v TH White Ltd*** (2014) at paras 39–43 that "*parties should work together to make sure that, in all but the most serious cases, satellite litigation is avoided even where a breach has occurred.*" As Coulson J put it (at para.16),

"[16] It is, of course, extremely important, post-Mitchell and post-Denton, for the parties to civil litigation to ensure that they comply with the CPR. Courts will be far less forgiving of non-compliance than they ever used to be. But that tougher approach must not be abused in the way that occurred here. Parties need to consider carefully whether the alleged breach of the rules is, on analysis, any such thing and, even if it is, whether it is proportionate and appropriate to require or oppose an application for relief from sanctions in all the circumstances of the case."

Mitchell MP v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] W.L.R. 795, CA, ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] W.L.R. 3926, CA, ref'd to (See ***Civil Procedure 2017*** Vol.1 at para.3.9.6.)

■ **Peterborough & Stamford Hospitals NHS Trust v McMenemy** [2017] EWCA Civ 1941, 28 November 2017, unrep. (Lewison and Beatson LJJ, Hildyard J)

After-the-event insurance premium—expert reports—recoverability—clinical negligence

The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013, CPR r.44.3. Claimants in clinical negligence claims entered into conditional fee agreements (CFA) and after-the-event insurance policies (ATE) upon instructing solicitors. The claims settled pre-issue. They also settled prior to expert reports having been obtained. The question arose whether it was reasonable for the claimants to have taken out ATE insurance relating to expert reports at the time they did. **Held**, it remained reasonable for claimants to take out such insurance when a CFA is entered into. There was no basis for departing, under the regime introduced following the Legal Aid, Sentencing and Punishment of Offenders Act 2012, from the position set out in ***Callery v Gray*** (2001) and ***Rogers v Merthyr Tydfil County BC*** (2006). Where such insurance had been taken out post-April 2013, the post-April 2013 proportionality test contained in CPR r.44.3 applied; ***BNM v MGN Ltd*** (2017). ***Callery v Gray*** [2001] EWCA Civ 1117; [2001] 1 W.L.R. 2112, CA, and [2002] UKHL 28; [2002] 1 W.L.R. 2000, HL, ***Rogers v Merthyr Tydfil County BC*** [2006] EWCA Civ 1134; [2007] 1 W.L.R. 80, CA, ***BNM v MGN Ltd*** [2017] EWCA Civ 1767; [2017] 6 Costs L.O. 829, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.44.3.3 and Vol.2 at paras 7A1-62, 7A2-25.1.)

■ **Budana v The Leeds Teaching Hospitals NHS Trust** [2017] EWCA Civ 1980, 5 December 2017, unrep. (Gloster VP, Davis and Beatson LJJ)

Transfer of pre-April 2013 conditional fee agreement—applicability of transitional provisions

Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.44. The claimant instructed a solicitors' firm to pursue a claim for damages for personal injury in December 2011. The claim was funded via a conditional fee agreement (CFA) with a 100% success fee. In March 2013, as a consequence of the implementation of the Jackson reforms through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), the solicitors were no longer able to continue acting for the claimant; the reforms had rendered the claim no longer economically viable for them. The claim was consequently transferred by the original solicitors to a second solicitors' firm. An issue arose as to whether and how a solicitor's retainer under a CFA may be transferred from one firm to another firm of solicitors. The claimant argued that the pre-LASPO CFA which she had entered into with her original solicitors was

assigned under the transfer to the second solicitors' firm. As such it fell under the transitional provisions contained in s.44(6) of LASPO, and as a consequence the success fee continued to be recoverable from the defendant. The defendant argued that the CFA was terminated in March 2013 by the letter notifying the claimant that the original solicitors were transferring the claim to a new firm. Alternatively, it was said that the transfer was a novation of the original contract and hence gave rise to a new, and importantly, post-April 2013 CFA which did not come under the transitional provisions of s.44(6) of LASPO. The issue was the subject of a leapfrog appeal to the Court of Appeal. **Held**, the contract was not terminated in March 2013. The transfer was likely, and technically, to have been by way of novation. However, the nature of the transfer should not obscure the fact that the transferred CFA was subject to the transitional provisions of s.44(6) of LASPO. This was both the parties' expectation in transferring the contract and was consistent with the legislative intent of the transitional provisions of LASPO (see paras 70–76, 106–112). ***Plevin v Paragon Personal Finance Ltd*** [2017] UKSC 23; [2017] 1 W.L.R. 1249, UKSC, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at paras 48.0.2.1, 48.0.2.3.)

■ **Liverpool Victoria Insurance Company Ltd v Yavuz & Ors** [2017] EWHC 3088 (QB), 6 December 2017, unrep. (Warby J)

Pre-Action Protocols – contempt of court – status

CPR PD Pre-Action Conduct, Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. Applications for orders to commit a number of individuals to prison for contempt of court. Warby J found that the applications were variously made out. At the conclusion of his judgment he queried whether falsehoods verified by statements of truth in a Claim Notification Form (CNF), under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents, were capable of founding proceedings for contempt of court. He noted that it was arguable that it could. He went no further than that, but suggested that it was a matter for consideration by those responsible for the Pre-Action Protocols (i.e., the Master of the Rolls who is responsible for approving them) or the Civil Procedure Rule Committee. Warby J did note, however, that irrespective of the answer to this question, falsehoods which were made prior to proceedings being issued, if they formed part of a course of conduct that continued following issue, could be treated as aggravating factors in contempt proceedings. That the Pre-Action Protocols do not form part of the CPR, the Civil Procedure Rule Committee only having jurisdiction to issue rules of court and Practice Directions supplementing the rules or in place of rules (Sch.1, para.6 of the Civil Procedure Act 1997) that govern pre-action conduct where specifically authorised by Parliament, e.g., under s.33 of the Senior Courts Act 1981, does seem to raise a serious question as to whether conduct carried out under or in respect of them can properly be construed as amounting to a contempt of court. (See ***Civil Procedure 2017*** Vol.1 at paras C1-001 et seq., C13-001 et seq.)

■ **Bailey v Glaxosmithkline UK Ltd v Managed Legal Solutions Limited** [2017] EWHC 3195 (QB), 8 December 2017, unrep. (Foskett J)

Third Party Funding—Arkin costs cap—security for costs

CPR r.25.14. A question arose, in long-running group litigation, concerning the application of the ***Arkin*** costs cap to an application for security for costs. The issue was whether it was permissible to order security for costs in excess of the funding provided by a third-party funder. **Held**, in considering an application for security for costs the court had a broad discretion, which was to be considered by reference to the guidance, which was noted to be non-exhaustive, given in ***The RBS Rights Issue Litigation (No 2)*** (2017) (see para.19). In addition, the availability of any after-the-event insurance policy was relevant to the exercise of that discretion, see ***Premier Motorauctions Ltd v Pricewaterhousecoopers LLP*** (2017). In the present case it was not possible to discount the possibility of avoidance, which therefore had to be taken into account in considering what order to make. In considering the question of quantum of any order for security of costs, where there was a third-party funder: (i) consideration needed to be given to the stability of the funding arrangements provided by the third-party funder; (ii) the court could, under its wide discretion, order security for costs in a sum above the ***Arkin*** cap (see paras 60–62). Additionally, it was noted that there was force in criticisms of the ***Arkin*** cap itself, which may itself not survive a concerted attack at the appellate level. ***The RBS Rights Issue Litigation (No 2)*** [2017] EWHC 1217 (Ch); [2017] 1 W.L.R. 4635, ChD, ***Arkin v Borchard Lines (Nos 2 and 3)*** [2005] 1 W.L.R. 3055, CA, ***Premier Motorauctions Ltd v Pricewaterhousecoopers LLP*** [2017] EWCA Civ 1872, unrep. CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.25.14.3.)

■ **Couper v Irwin Mitchell LLP** [2017] EWHC 3231 (Ch), 13 December 2017, unrep. (Arnold J)

Extended Civil Restraint Order—application to individuals other than the immediate parties to the original proceedings—waiver—relief from sanction

CPR PD 3C para.3.1. Following judgment in substantive proceedings in 2013 the claimant, and his wife, issued a number of applications which were dismissed as being totally without merit. In January 2017 a number of further

applications were also dismissed as being totally without merit and extended civil restraint orders were made against the claimant and his wife. In February 2017, the claimant issued proceedings against counsel who had represented him and the other claimants at the trial of the substantive proceedings in 2013. An application was then made by the claimant's now former counsel to strike out the proceedings on the basis that the claimant had issued the proceedings without seeking or obtaining permission to do so pursuant to CPR PD 3C para.3.3(1). The application was resisted on the basis that the terms of the extended civil restraint order did not apply to the claimant's former counsel. Furthermore, if it did, relief from sanction was sought, and alternatively again, if necessary permission to bring a fresh claim was sought. **Held**, the extended civil restraint order restrained the claimant from issuing claims or making applications "*concerning any matter involving or relating to or touching upon or leading to the proceedings in which*" if made without the prior permission of specified judges. This, and the provisions in CPR PD 3C relating to extended civil restraint orders, are primarily aimed at preventing claims and applications from being issued by those subject to such an order against parties to the proceedings from which the order originates. The purpose of extended civil restraint orders is however to prevent the harassment of such parties and the waste of the courts resources. As such, such orders are not limited to protect parties to proceedings. If they were so limited, individuals subject to such orders could bypass the restriction and protection it provides by, for instance, issuing claims or applications against witnesses to the original proceedings, or as in this case against counsel in those proceedings. Secondly, it was held that it was not possible for the claimant's former counsel to have waived the breach of the extended civil restraint order. Where there was a breach of such an order, its consequences i.e., strike out, took place automatically upon that breach irrespective of what the subject of the application i.e., in this case the claimant's former counsel, may or may not have done. Additionally, as the extended civil restraint order was an injunction to protect the parties to the original proceedings and the court, it was not capable (assuming contrary to the automatic strike-out point that there was anything to waive) of waiver by any conduct on the part of an individual who was within its ambit but for whose protection the order was not primarily made. Furthermore, in principle relief from sanction under CPR r.3.9 was available where there had been a breach of a civil restraint order. However, breach of the requirement to seek permission was a serious and significant breach per stage 1 of the ***Mitchell-Denton*** test. There was no explanation in the present case why that breach occurred. Assessing all the circumstances, and even accepting that there was good reason to grant permission to issue the claim if permission had been sought (as it was now in the alternative), there was no good reason to grant relief from sanction. However, in the circumstances permission to issue a fresh claim was granted. ***Mitchell MP v News Group Newspapers Ltd*** [2013] EWCA Civ 1537; [2014] W.L.R. 795, CA, ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] W.L.R. 3926, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.3.11.1.)

- **McGann v Bisping [2017] EWHC 2951 (Comm)**, 15 December 2017, unrep. (Richard Salter QC sitting as a deputy judge of the High Court)

Notice to challenge documents—mandatory procedure—duty of co-operation

CPR rr.1.3, 3.1(2)(m), 3.9, 3.10, 32.19. The claimant claimed payment of arrears of commission on the defendant's earnings. The primary basis of the claim was a management agreement said to have been entered into by the parties. The defendant alleged no such agreement had been entered into. In particular, the authenticity of the management agreement was disputed. It was clear that its authenticity, and that of other documents, was contested. However, contrary to CPR r.32.19, which was mandatory in its terms, no notice had been served specifying that the various documents were to be proved at trial. Due to the rule's terms it was not sufficient, as was the case under its predecessor (RSC Ord.27 r.4), for authenticity to be put in issue by putting a party to proof in a statement of case: ***Mumford v Revenue and Customs Commissioners*** (2017). As no notice under CPR r.32.19 had been served, the defendant was deemed to have admitted the authenticity of the various documents, and did so notwithstanding his statements of case and the shared assumption of both parties to the contrary. No application for an extension of time to serve the notice had been made. Nor had the defendant sought relief from sanctions under CPR r.3.9. However, the judge considered an application for relief from sanctions on his own motion. Relief would, in the circumstances, be granted. Additionally, it was noted that while there was no general duty on parties to point out procedural mistakes to their opponents, CPR r.1.3's "*duty of co-operation*" does require parties who intend to take procedural points to take them promptly. Were they not to do so, wasted court and party costs would be incurred. This was particularly true of commercial litigation, where a "*high level of realism and co-operation*" was required of parties, who were expected to make clear which points were to be taken well before the costs of dealing with them had been incurred. In the present case, it appeared more likely than not that neither party was aware of the consequences of CPR r.32.19. An order would on the court's own motion, in the circumstances, be made under the "*very wide powers*" contained in CPR r.3.1(2)(m) and those under CPR r.3.10, to dispense with service of the CPR r.32.19 notice challenging the authenticity of the documents. ***Mumford v Revenue and Customs Commissioners*** [2017] UKFTT 19 (TC), unrep., FtT TC, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.32.19.1.)

■ **Salekipour v Parmar** [2017] EWCA Civ 2141, 15 December 2017, unrep. (Sir Terence Etherton MR, Flaux and Moylan LJJ)

County Court—power to set aside judgment on grounds of fraud

County Courts Act 1984, ss.23, 38, 70, CPR r.3.1(7). Proceedings were commenced in September 2010 against the respondent to the present appeal, Parmar (P), by the appellant, Salekipour (S). S and her husband were tenants of a shop and garage in Greenford, Middlesex. P and her late husband were the landlords. S made a number of claims relating to the tenancy, as well as seeking damages under the Protection from Harassment Act 1997. Following a lengthy trial, which included five days of oral evidence, judgment was given in 2012 in P's favour both on the claims and in respect of counterclaims which P had brought. In September 2014, S commenced fresh proceedings seeking to rescind i.e., set aside the 2012 judgment and seeking an order for a new trial of the original proceedings. The basis of the 2014 claim was that judgment in the original proceedings was procured by, and rested upon, perjured evidence. The 2014 claim was struck out on the basis that the County Court had no jurisdiction to set aside a judgment obtained by fraud; it being held that that was an inherent jurisdiction of the High Court, which the County Court as a creature of statute did not also have. That decision was upheld on appeal. S appealed from that decision to the Court of Appeal. The central issue on the appeal was whether the County Court had jurisdiction under s.23 of the County Courts Act 1984 to set aside one of its own judgments and order a new trial on the basis that it was obtained by fraud. **Held**, the County Court had jurisdiction under s.23 of the 1984 Act. In reaching that decision, Etherton MR stated that prior to the introduction of the CPR in 1998, it was clear that the County Courts, as they were then, had jurisdiction to set aside County Court final orders on the grounds of fraud or perjury: see, for instance, s.89 County Courts Act 1846, s.93 County Courts Act 1888, s.95 County Courts Act 1934 and CCR (1936) Ord.37 r.1(1) as explained by ***R. v Sir Shirley Wothington-Evans ex p. Madan*** (1959), and finally, CCR (1981) Ord.37 r.1(1). That latter provision remained in force under the CPR until December 2002 when it was amongst a number of rules contained in Sch.2 to the CPR to be repealed by Civil Procedure (Amendment) Rules 2002 (SI 2002/2048). The revocation of the provision could not be said to have been intended to remove the County Court's jurisdiction, which it had had since its creation in 1846. There was nothing to indicate that the Civil Procedure Rule Committee had made a conscious decision to remove the jurisdiction. Nor was there any policy justification for it. Moreover, removing the jurisdiction would have introduced a distinction between the County Court and High Court, such that litigants in the latter would be without a remedy available in the High Court; a remedy which the County Courts Act 1846 and its successors had sought to maintain. Moreover, it was to be doubted that the potential availability in such cases of challenging a County Court judgment said to be based on fraud was by way of appeal was a satisfactory alternative remedy to setting aside. While much would depend on the facts of any individual case, it was to be doubted whether an appeal, as a general rule, was the best mechanism to test such challenges as appeals are not the "*most suitable*" means by which evidence can be heard and factual issues resolved. Crucially however, and irrespective of the provisions within the CPR – and in that respect it was not suggested that CPR r.3.1(7) (which was itself noted by Etherton MR to be, in terms of its scope and application, unclear in the light of numerous authorities) applied to the present situation as on the facts of this case it did not apply – the County Court's jurisdiction to set aside was maintained by ss.23 and 38 of the 1984 Act. It was maintained as the right to set aside a judgment on grounds of fraud was a principle of equity and was thus entirely within the scope of s.23 of the 1984 Act as "*proceedings for the relief against fraud*"; ***Flower v Lloyd*** (1877) and ***Noble v Owens*** (2010). It might be thought that in the light of this judgment the Civil Procedure Rule Committee may wish to consider re-introducing CCR Ord.37 r.1(1), as an addition to CPR Pt 3. Additionally, it may wish to consider revising CPR r.3.1(7) to provide greater clarity concerning its scope and application. ***Flower v Lloyd*** (1877) 6 Ch.D. 297, CA, ***Stephenson v Garnett*** [1898] 1 Q.B. 677, CA, ***Brown v Dean*** [1910] A.C. 373, ***R v Sir Shirley Wothington-Evans Ex p. Madan*** [1959] 2 QB 145, DivCt, ***Hertfordshire Investments Ltd v Bubb*** [2000] 1 W.L.R. 2318, CA, ***Bishop v Chhokar*** [2015] EWCA Civ 24; [2015] C.P. Rep 26, CA, ***Noble v Owens*** [2010] 1 W.L.R. 2491, CA, ***Rawding v Seaga UK Ltd*** [2015] EWCA Civ 113; [2015] Info. T.L.R. 161, CA, ***Sharland v Sharland*** [2015] UKSC 60; [2016] A.C. 871, UKSC, ref'd to. (See ***Civil Procedure 2017*** Vol.2 at para.9A-449.2.)

■ **Green v SGI Legal LLP** [2017] EWHC B27 (Costs), 18 December 2017, unrep. (Master Leonard)

Application for delivery up of documents held by solicitors

Solicitors Act 1974, s.68(1), CPR PD 46 para.4.6. Solicitors delivered to their clients in four separate cases documents which belonged to the clients. The clients, or rather former clients, thereafter requested copies of all documents held by the solicitors, which belonged to the solicitors and which related to the client's claim i.e., copies of all correspondence between client and solicitor and between solicitor and other parties, all telephone notes, files notes, attendance notes, internal memoranda relating to the claim in respect of which the solicitors had been instructed, costs correspondence, invoices, office and client account ledgers. The solicitors, the defendants to the present claims, refused to supply such copies. The clients applied in the present claims for an order for delivery of such copies in

return for payment of reasonable copying costs. In doing so, they limited their claim for delivery up to the following: copies of funding documents, of all correspondence sent to them, and, of all invoices created whilst they were clients of the solicitors. The Master noted that such applications were becoming increasingly common in the Senior Courts Costs Office. **Held**, the applications were refused. The question turned on proprietary rights. Contrary to a finding of the High Court of Northern Ireland, the question did not turn on questions of confidentiality. Where documents are the solicitor's property it is necessary for a former client to show that they are entitled, as of right, to receive copies of them. The claimants conceded, and did so properly, that in the light of the Court of Appeal's decision in ***Leicestershire County Council v Michael Faraday and Partners Ltd*** (1941) there was no right to require the supply of such copies. That the documents claimed were created for the claimants' benefit did not give rise to a right to be supplied with copies. The benefit was fulfilled when those documents had been, as they had apparently been, originally supplied to the claimants. ***Re Thomson*** (1855) 20 Beav. 545, 52 E.R. 714, (Ct of Ch), ***Re Wheatcroft*** (1877) 6 Ch.D. 97, ChD, ***Leicestershire County Council v Michael Faraday and Partners Ltd*** [1941] 2 K.B. 205, CA, ***Mortgage Business Plc and Bank of Scotland Plc v Thomas Taggart and Sons*** [2014] NICh 14, unrep., HC of NI, ***Ralph Hume Garry (a firm) v Gwillim*** [2002] EWCA Civ 1500; [2003] 1 W.L.R. 510, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.67PD.1.)

■ **W Portsmouth and Company Ltd v Lowin** [2017] EWCA Civ 2172, 19 December 2017, (Sir Geoffrey Vos, CHC, McCombe and Asplin LJJ)

Provisional assessment—Pt 36 indemnity costs—costs cap

CPR rr.36.17(4), 47.15(5), 47.20(4). A claim for damages arose from the death from mesothelioma of the respondent's mother. The claim settled. The claimant had made a CPR Pt 36 Offer concerning the litigation costs. That offer had not been accepted. On a provisional costs assessment the claimant achieved a more advantageous result than the terms of the Pt 36 Offer. A final costs order was made, with costs assessed on an indemnity basis per CPR r.36.17(4). However, the Master ordered that the costs should be capped, as they were subject to CPR r.47.15(5). In so doing the Master rejected a submission that ***Broadhurst v Tan*** (2016) should be followed. On appeal, the judge held that the costs ought not to be capped; that there was a tension between the two CPR provisions and that the scheme set out in ***Broadhurst v Tan*** (2016) while not directly applicable was helpful in determining the correct relationship between the two provisions. On a second appeal, the Court of Appeal **held**, there was no conflict between CPR r.36.17(4) and r.47.15(5). ***Broadhurst v Tan*** (2016) was not applicable: it was concerned with a conflict between fixed costs and assessed costs. CPR r.47.15(5) is not a fixed costs provision. Fixed costs are payable irrespective of whether they are incurred. If assessed costs were lower than the CPR r.47.15(5) cap, the assessed costs would be payable. The rule thus simply limits the amount of assessed costs that can be recovered. Furthermore, CPR r.47.20(4) makes express provision for CPR Pt 36 to apply to the costs of a detailed assessment. It does not refer to CPR r.47.15(5) as a basis for modifying its application. If it had been intended to disapply that rule in respect of CPR r.36.17(4) provision to that effect would have been in that rule or in r.47.20(4). There was no such provision. As such should a party be awarded costs on an indemnity basis on a provisional assessment, those costs were subject to the cap provided by CPR r.47.15(5). The Master's decision was thus restored. ***Webb v Liverpool Women's NHS Foundation Trust*** [2016] EWCA Civ 365; [2016] 1 W.L.R. 3899, CA, ***Broadhurst v Tan*** [2016] EWCA Civ 94; [2016] 1 W.L.R. 1928, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.36.17.4.)

■ ***Gilham v Ministry of Justice*** [2017] EWCA Civ 2220, 21 December 2017, unrep. (Gloster VP, Underhill and Singh LJJ)

Judge—office-holder —non-employee

Employment Rights Act 1996, Pt IVA. The appellant, a district judge, brought proceedings in the Employment Tribunal against the Ministry of Justice. The issue before the Court of Appeal in the proceedings was whether the appellant was, as a district judge, an employee and therefore within the ambit of the whistleblower protection provisions in that Act; see s.47B of the 1996 Act. As those provisions were a matter of domestic legislation and not derived from European Union law, they were not determined by the decision in the ***O'Brien*** litigation; *see* ***O'Brien v Ministry of Justice*** (2013). **Held**, for the purposes of domestic law, a judge is an office-holder and not an employee. To hold otherwise would be to hold that a judge was party to an employment contract with the Lord Chancellor. ***Preston v President of the Methodist Conference*** (2013) applied. While it was not necessarily incompatible with the doctrine of judicial independence for a judicial office-holder to hold office under a contract and under one with the Lord Chancellor or Ministry of Justice, it was however desirable to maintain as much distance as possible in this regard between the judiciary and the executive. Furthermore, the general view at the time of the appointment, such as there was one and even if it were wrong, was that judicial appointments were not based on a contractual relationship; as such that told against the idea that the "*parties*" were intended to or did in fact enter into a contractual relationship. Moreover, the basis of the appointment was predominantly (if not entirely) based on statute; it did not include the ordinary indicia of an employment contract; and, if it could be said that anybody was able to hold the appellant to the

performance of her office it was the Lord Chief Justice and not the Lord Chancellor. There was thus no proper basis to conclude that a contractual relationship could be said to arise between the appellant and the Lord Chancellor. A further ground of appeal based on article 10 of the European Convention on Human Rights was also dismissed. In passing it was also noted the claim was properly to be considered as being brought against the Lord Chancellor and not the Secretary of State for Justice; that the two offices were held by the same individual did not and does not entail that the two offices can be treated as interchangeable. They are, and remain distinct offices with distinct statutory functions. ***Terrell v Secretary of State for the Colonies*** [1953] 2 Q.B. 482, QBD, ***Knight v Attorney General*** [1979] I.C.R. 194, EAT, ***Perceval-Price v Department of Economic Development*** [2000] I.R.L.R. 380, CA of NI, ***Shaikh v Independent Tribunal Service*** UKEAT/0656/03 (16 March 2004, unrep.) EAT, ***Christie v Department of Constitutional Affairs*** [2007] I.C.R. 1553, EAT, ***O'Brien v Department for Constitutional Affairs*** [2008] EWCA Civ 1448; [2009] I.R.L.R. 294, CA, ***O'Brien v Ministry of Justice*** [2013] UKSC 6; [2013] 1 W.L.R. 522, UKSC***, Preston v President of the Methodist Conference*** [2013] UKSC 29; [2013] 2 A.C. 163, UKSC, ref'd to.

Practice Updates

STATUTORY INSTRUMENTS & PRACTICE DIRECTIONS

The Court of Protection Rules 2017 (SI 2017/1035) and **Court of Protection Practice Directions,** both in force from **1 December 2017.**

Since their introduction in 2007, the Court of Protection Rules 2007 (SI 2007/1744) have been subject to have multiple amendment. Those rules were replaced in their entirety by a complete revision of the rules by the Court of Protection Rules 2017, which in turn are supplemented by a revised and consolidated set of Practice Directions, the Court of Protection Practice Directions 2017. The Rules and Practice Directions were made under ss.51 and 52 of the Mental Capacity Act 2005. Two substantive changes are effected via the new Rules and Practice Directions: first, the format and arrangement of the Rules now follows the standard model adopted by the Civil Procedure Rules, Family Procedure Rules and Criminal Procedure Rules; secondly, further provision is made for case management (see CtPrR Pt 3), expert evidence (see CtPrR Pt 15), and contempt of court (see CtPrR Pt 21). The Civil Procedure Rules, and Family Procedure Rules, continue to apply in any case where the CtPrR or its Practice Directions do not expressly make provision, albeit with any necessary modifications and in so far as it is necessary to further the overriding objective (CtPrR r.2.5). Both CtPrR r.19.6 and r.24.2 in respect of costs and enforcement directly apply the Civil Procedure Rules directly, subject to necessary modifications and disapplications as provided within the CtPrR.

PRACTICE GUIDANCE

Aarhus Convention – Listing Arrangements

On 13 December 2017, the Judicial Office in an unattributed notice confirmed changes to listing arrangements for applications to vary costs capping orders: see CPR r.39.2 and CPR rr.45.43 and 45.44. Such applications to vary, as they concern hearings which involve confidential information, will in future be listed – in the first instance – as to be held in private. This change in listing arrangements follows on from the decision of Dove J in ***The Royal Society for the Protection of Birds Friends of the Earth Ltd & Anor v Secretary of State for Justice the Lord Chancellor*** [2017] EWHC 2309 (Admin) at para.52,

> *"[52] Firstly, it is clear that a hearing in relation to whether or not there should be a variation of a costs cap is a hearing at which confidential information including that relating to personal financial matters would arise such that the discretion under CPR 39.2(3) for the hearing to be in private is engaged. I can see no basis to distinguish in principle the kind of subject matter to be discussed in hearings covered by Practice Direction 39A paragraph 1.5(7) and (8) and the kind of issues which would be explored in a hearing in relation to variation of costs caps . . ."*

The new administrative arrangements were not introduced as a Practice Direction, or via a change to the CPR as further envisaged by Dove J. On the power, and formalities required to issue Practice Directions see: ***Bovale v Secretary of State for Communities and Local Government*** [2009] EWCA Civ 171; [2009] 1 W.L.R. 2774, CA. For the power to issue Practice Directions other than those issued by the Master of the Rolls under delegated authority see Civil Procedure Act 1997, s.5.2.

In Detail

PRINCIPLES APPLICABLE TO AN APPLICATION TO STRIKE OUT SECOND CLAIM FOR ABUSE OF PROCESS – DAVIES v CARILLION ENERGY SERVICES LTD [2017] EWHC 3206 (QB)

The courts have considered the approach to applications to strike out claims as an abuse of process on a number of occasions recently e.g., ***Clutterbuck v Cleghorn (As Judicial Factor to the Estate of Nichol)*** [2017] EWCA Civ 137, unrep., CA, ***Otkritie Capital International Ltd v Threadneedle Asset Management Ltd*** [2017] EWCA Civ 274; [2017] C.P. Rep. 27, CA. In ***Davies v Carillion Energy Services Ltd*** [2017] EWHC 3206 (QB), unrep., QBD, Morris J considered the approach to be taken where a defendant seeks to strike out as an abuse of process a second claim brought against it by a claimant.

The Claims

The claimant issued proceedings against Home Installation Services Northwest Ltd seeking damages arising from the breakdown of a central hearing system. The claim was issued in July 2010. It was struck out, following significant pre-trial proceedings, in July 2011 for failure to comply with an unless order of June 2011. The unless order required the claimant, who throughout this, the first claim, was acting in person, to file and serve a fully pleaded particulars of claim. It was not entirely clear why that unless order had been made; it appeared that it was made on the court's own initiative although it was not clear why.

In December 2015 the claimant issued a second set of proceedings seeking damages for breach of contract in respect of the central heating system and its breakdown. The second action was brought against both Carillion Energy Services Limited and Home Installation Services Northwest Ltd. The latter applied to have the second action struck out as an abuse of process. It did so on the basis that the first action had been struck out for the failure to comply with the June 2011 unless order. The application was refused. An appeal from that refusal was heard by Morris J. The appeal was dismissed.

The principles

In reaching his decision Morris J noted that two lines of authority had developed concerning the proper approach to take to applications to strike out second claims as an abuse of process. He summarised them and concluded as follows (paras 52–55),

> *"[52] First, the line of cases of Arbuthnot, Securum and Collins are authority for the following:*
>
> > *(1) Where a first action has been struck out as itself being an abuse of process, a second action covering the same subject matter will be struck out as an abuse of process, unless there is special reason: Securum §34, citing Arbuthnot, and Aktas §§ 48, 52.*
> >
> > *(2) In this context abuse of process in the first action comprises: intentional and contumelious conduct; or want of prosecution; or wholesale disregard of rules of court: Aktas §§72 and 90.*
> >
> > *(3) Where the first action has been struck out in circumstances which cannot be characterised as an abuse of process, the second action may be struck out as an abuse of process, absent special reason. However in such a case it is necessary to consider the particular circumstances in which the first action was struck out. At the very least, for the second action to constitute an abuse, the conduct in the first action must have been 'inexcusable'. Collins §§24-25 and Cranway §20.*
>
> *[53] Secondly, Johnson v Gore Wood, Aldi and Stuart v Goldberg are all cases of the Henderson v Henderson type of abuse, where the first action has been resolved by way of adjudication or settlement and where it is said that issues which should have been brought in the first action are being sought to be re-litigated. In such cases:*
>
> > *(1) Whether a second action raising matters which could have been, but were not, raised in the first action is an abuse of process is not a matter of discretion, but is a judgment to be made by the first instance judge, assessing and balancing all the relevant factors in the case.*
> >
> > *(2) On appeal from a first instance judge's decision, the appeal court will interfere only where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him or was wrong: Stuart §82.*
> >
> > *(3) Even if there is a finding of abuse of process, the court still has a remaining discretion not to strike out, but only in very unusual circumstances: Stuart §24 and Aktas §53.*

[54] Thirdly, there is a tension between these two lines of authority, which Rix LJ sought to address in Aktas at §53. Even if, as there suggested, the first category of case is to be regarded as an example of the general principles established in Johnson and Aldi, it is difficult to see how, in a 'procedural' case, the two approaches can be applied in tandem. If both approaches are to be applied, it is not clear at what point in the analysis the 'special reason' identified in Securum/Collins comes into consideration: in the first stage of the assessment of all relevant factors or at the second stage of residual discretion, if abuse is found; nor is it clear what factors come into play in the second stage, if all relevant factors have been considered in the first stage.

[55] Against this background, I conclude as follows:

> *(1) Where a first action has been struck out for procedural failure, the Court should apply the Securum/Collins approach I set out in paragraph 52 above. Even if Aldi and Stuart state general principles which are now applicable to all categories of abuse of process, I am not satisfied that there is any case authority which has specifically disapproved of the detailed analysis in Securum, Collins and Aktas of cases of procedural failure. Indeed Securum and Collins were not considered in either Johnson or Aldi. In Aktas, Rix LJ did not indicate disapproval of Securum.*
>
> *(2) However given the introduction, since those cases, of amendments to CPR 1.1 and given developments in Mitchell and Denton, the 'special reason' exception identified in Securum and Collins falls to be more narrowly circumscribed. Where the conduct of the first action has been found to have been an abuse of process or otherwise inexcusable, then the second action will be struck out as an abuse of process, save in 'very unusual circumstances'. (Other terminology might equally be used to indicate this strict approach). In addition, in a case where the first action was not itself an abuse of process, whether the conduct in that action was 'inexcusable' might fall to be assessed more rigorously and in the defendant's favour. However, even post-Jackson, ultimately, the importance of the efficient use of resources does not, in my judgment, trump the overriding need to do justice: see Aktas §92.*
>
> *(3) A single failure to comply with an unless order is not, of itself, sufficient to conclude that the second action is an abuse of process."*

Morris J's analysis provides a welcome clarification of the court's approach to the two situations where a second claim is issued and is alleged to be an abuse of process. That it goes beyond a mere summary and synthesis of the two approaches, but importantly considers the effect of the ***Mitchell-Denton*** line of authority provides clear and up-to-date guidance on the proper approach courts should take in the future.

The one possible area of doubt is the suggestion that the efficient use of resources does not trump the overriding need to do justice. Given the guidance at para.38 of ***Mitchell*** the continuance of support for the view that resource use and justice are properly distinct is doubtful. In that paragraph, the Court of Appeal endorsed Lord Dyson MR's explanation from the 18th Jackson Implementation Lecture that doing justice was not distinct from or superior to the CPR and its emphasis on economy, efficiency and proportionality viz.,

> *". . . The revisions to the overriding objective and to rule 3.9, and particularly the fact that rule 3.9 now expressly refers back to the revised overriding objective, are intended to make clear that the relationship between justice and procedure has changed. It has changed not by transforming rules and rule compliance into trip wires. Nor has it changed it by turning the rules and rule compliance into the mistress rather than the handmaid of justice. If that were the case then we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing justice in any case. It has changed because doing justice is not something distinct from, and superior to, the overriding objective. Doing justice in each set of proceedings is to ensure that proceedings are dealt with justly and at proportionate cost. Justice in the individual case is now only achievable through the proper application of the CPR consistently with the overriding objective."*

Doing justice is not distinct from the overriding objective, but is what is achieved through the application of the CPR consistently with the overriding objective, which necessarily includes ensuring litigation is carried out efficiently, economically, proportionality and so as to enable the court to take proper account of the need to allocate resources to proceedings other than the one it is immediately dealing with.

Application of the principles

Having set out the principles, Morris J applied them to the present application to strike out. The application was refused. It could not be said that there was a whole series of procedural failings on the claimant's part in the first action. There was, in fact, only one possible highly technical breach and a highly contestable breach of an unless order, the making of which in the first instance was dubious.

Relevance of the claimant being a litigant-in-person in the original claim
Morris J noted, in passing, that requiring the claimant, in the June 2011 unless order, to have pleaded a legal basis for his claim was something the CPR did not itself require (see para.64). CPR r.16.4 only requires parties to plead fact not law. In any event, Morris J went on to conclude the claimant, whose conduct was both understandable and not inexcusable, had in fact attempted to comply with the unless order. Furthermore, as the claimant was acting in person, some allowance was to be made for a lack of familiarity with the proper approach to take to pleading, what difference there was between pleading fact and law, what may or may not be a cause of action and what was meant by *"a legal basis of the claim"*: ***Elliott v Stobart Group Ltd*** (2015) and ***Hysaj v Secretary of State for the Home Department*** (2014) (erroneously cited in the judgment) considered.

Requiring a litigant to go beyond the requirements of the CPR in this respect must be questionable at best; requiring a litigant-in-person to do so is something which ought to be deprecated to a much greater degree. An alternative way of looking at the requirement in the unless order that the claimant set out the legal basis of his claim might be that the deputy District Judge wanted the claimant to provide a clear factual basis for each of the elements of his claim. To the extent that breach of contract was alleged, then sufficient detail would have been required to make out all the elements of a breach of contract claim. Such an approach to a poorly pleaded statement of case would be unobjectionable if the claimant were legally represented; a lawyer would be expected to know how to plead a breach of contract claim properly. The same cannot, and ought not, be assumed for litigants-in-person. An arguably better approach in such a situation would be for the judge, relying on powers under CPR r.3.1(1A) to assist the litigant-in-person to identify what factual matters needed to be set out in the pleading to provide a legal basis for the claim.

Relevance of application for relief from sanction
The claimant had not applied for relief from sanction in respect of the consequences of the unless order. Morris J noted that it was not clear whether this was a factor to consider in assessing whether the claimant's conduct in the first action was an abuse of process or otherwise inexcusable or whether it fell to be considered within the context of whether there were "*very unusual circumstances*". He concluded that it was a matter to be taken account of in respect of the latter.

Although it did not fall for determination, Morris J stated that generally in assessing whether the claimant's conduct was an abuse of process or otherwise inexcusable, then in most cases a failure to apply for relief from sanctions would amount to a strong factor in concluding conduct in the first action was inexcusable. However, it was doubtful whether such a failure to apply for relief where a claim had been struck out – as this one had been – for a single act of non-compliance would in and of itself bar the commencement of a second action. On the present facts, assuming the issue needed to be determined, as the claimant's conduct was not otherwise an abuse of process or inexcusable a failure to apply for relief from sanction did not itself render it so.

Authorities referred to
Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd [1998] 1 W.L.R. 1426, CA, ***Collins v CPS Fuels Ltd*** [2001] EWCA Civ 1597; [2002] C.P. Rep. 6, CA, ***Securum Finance Ltd v Ashton*** [2001] 1 Ch. 291, CA, ***Johnson v Gore Wood*** [2000] UKHL 65; [2002] 2 A.C. 1, ***Aldi Stores Ltd v WSP Group Plc*** [2007] EWCA Civ 1260; [2008] 1 W.L.R. 748, CA, ***Cranway Ltd v Playtech Ltd*** [2008] EWHC 550 (Pat), ***Stuart v Goldberg Linde*** [2008] EWCA Civ 2; [2008] 1 W.L.R. 823, CA, ***Aktas v Adepta*** [2010] EWCA Civ 1170; [2011] Q.B. 894, CA, ***Mitchell MP v News Group Newspapers Ltd*** [2013] EWCA Civ 1537; [2014] W.L.R. 795, CA, ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] W.L.R. 3926, CA, ***Elliott v Stobart Group Ltd*** [2015] EWCA Civ 449; [2015] C.P. Rep. 36, CA, ***Hysaj v Secretary of State for the Home Department*** [2014] EWCA Civ 1633; [2015] 1 W.L.R. 2472, CA.

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