CIVIL PROCEDURE NEWS

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- **CMOC v Persons Unknown** [2017] EWHC 3599 (Comm), 23 October 2017, unrep. (HHJ Waksman QC sitting as a judge of the High Court)

Freezing injunction—jurisdiction to permit service against persons unknown

CPR r.25.1(1)(f). An application for a worldwide freezing injunction was sought in a claim for alleged fraud said to be committed by persons unknown. A question arose whether the court had jurisdiction to permit service of the claim form absent a named defendant. **Held**, the court had jurisdiction to permit service of the claim form in a case where a freezing injunction was sought against persons unknown where they were clearly identified by description: ***Bloomsbury v News Group Newspaper*** (2003) applied. Furthermore, HHJ Waksman QC stated at para.4:

> *"[4] . . . If there are potential problems down the line concerning contempt, or there is a need to ensure that there has been proper notification of any relevant defendant of the injunction, that potential difficulty applies as much to the cases where other forms of injunctions against third parties have already been granted. So that is not a good reason not to extend the principle. Conversely, there is a strong reason for extending the principle which is that the freezing injunction can often be a springboard for the grant of ancillary relief in respect of third parties, which arguably could not get off the ground unless there has been a primary freezing injunction. That is very much the case in fraud litigation and is very much the case here where the first object is of course to notify the banks of the freezing injunction so that they can freeze the relevant bank accounts - irrespective of if and when it comes to the attention of the underlying defendants, And then, secondly, on the basis of that, to obtain vital information from the various banks which may assist in positively identifying some or all of the defendants. And I note that the latest edition of Gee on Injunctions takes the same view. See in particular para.17-019 at p.601 at the top of the page. So it seems to me there is at least a good arguable case that the court has jurisdiction to allow the claimants to bring a claim of this kind."*

Bloomsbury v News Group Newspaper [2003] EWHC 1205; [2003] 1 W.L.R. 1633, CA, ***Hampshire Waste Services v Intending Trespassers upon Chineham Incinerator Site*** [2003] EWHC 1738; [2004] Env. L.R. 9 ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para. 25.1.25.1.)

- **Arif v Berkeley Burke SIPP Administration Ltd** [2017] EWHC 3108 (Comm), 7 December 2017, unrep. (HHJ Russen QC sitting as a judge of the High Court)

Group litigation order—guidance on making an order and on transfer

CPR rr.19.10, 19.11, 30.2(4)(b). Applications were made to make a GLO in respect of claims arising from alleged self-invested pension plans misselling and to transfer the proceedings from the Bristol District Registry to London. **Held**, the GLO was to be made, subject to the consent of the President of the Queen's Bench Division. In considering whether individual issues predominated over common or related issues, the greater the preponderance of the latter over the former the greater the chance that a GLO will be the appropriate order, and vice versa. Even if there are large numbers of parties, which might initially suggest a GLO were appropriate, where individual issues specific to the parties predominate over common or related issues that conclusion may be set aside. The application to transfer the claim to the London Circuit Commercial Court was dismissed. In rejecting it, the judge noted that given the creation of the Business and Property Courts, the ethos underpinning its specialist jurisdictions across England and Wales in specified centres, in order to transfer a claim from a district registry to London the court must take care not to offend against that new ethos i.e., that no case is too big to be dealt with outside London. While there may be cases which, due to their size or complexity need warrant transfer to London in order to be dealt with by the Commercial Court or London Circuit Commercial Court, in order to justify such a transfer the criteria in CPR r.30.3(2) and the additional criteria in, what is now, the Practice Direction—Business and Property Courts, para.3 need to be satisfied. There was nothing in the present proceedings to warrant transfer to London. ***Tew & Tew v BOS (Shared Application Mortgages No. 1)*** [2010] EWHC 203 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.19.10.1.)

■ **Parvez v Mooney Everett Solicitors Ltd** [2018] EWHC 62 (QB), 19 January 2018, unrep. (Soole J)

Determining whether a document is a Bill of Costs

Solicitors Act 1974, s.70. The claimant instructed solicitors in respect of a road traffic accident claim. The solicitors were instructed on a conditional fee agreement (CFA). The claim settled. The solicitors by letter dated 28 June 2016 confirmed the settlement figure. Subsequently, the claimant instructed new solicitors, who sought the claimant's original solicitors' file. That file was provided to the new solicitors in August 2016. Within that file was a document dated 28 June 2016, which was headed 'Bill of Costs'. That document had not previously been given to the claimant. The question was whether the claimant could elect to treat the document as a bill of costs for the purposes of s.70 of the 1974 Act, which had been delivered via the provision of the file to the new solicitors. **Held**, for a document to be a bill of costs it must be sent by a solicitor to their client as a demand or claim: ***Kingstons Solicitors v Reiss Solicitors*** (2014). The client cannot determine whether a document is a demand or claim for payment, nor can a court. Only the solicitor can determine whether a document, and its contents, amount to a demand i.e., to a bill of costs. The court's power, contained in s.68 of the 1974 Act, to require a solicitor to deliver a bill of costs does not provide it with power to require delivery of a specific document as a bill of costs. If a client obtains a document via other means, which might be a bill of costs, but has not been specifically delivered by solicitors as a bill of costs possession by the client does not transform it into a bill of costs or provide the basis for the client to elect to treat it as a bill of costs. ***Brown v Tibbits*** (1862) 11 C.B. N.S. 855, Ct Comm. Pleas, ***Ex p d'Aragon*** 3 T.L.R. 815, CA, ***Bilkus v Stockler Brunton*** [2010] 1 W.L.R. 2526, CA, ***Kingstons Solicitors v Reiss Solicitors*** [2014] EWCA Civ 172, [2014] 6 Costs L.R. 998, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.2 at para.7C-120.)

■ **London Organising Committee of the Olympic and Paralympic Games (In Liquidation) v Sinfield** [2018] EWHC 51 (QB), 22 January 2018, unrep. (Julian Knowles J)

Test for fundamental dishonesty

Criminal Justice and Courts Act 2015, s.57. A claim for personal injury was brought against the London Organising Committee of the Olympic and Paralympic Games (LOCOG) by a Games volunteer. LOCOG alleged that certain aspects of the claimant's case were false, and that they had been verified by a statement of truth when they were known to be false. It alleged fundamental dishonesty pursuant to s.57 of the 2015 Act. If the allegation when to the claimant's primary claim or a related claim and was made out on the balance of probabilities the court would have to dismiss the claim, unless so doing would give rise to a substantial injustice to the claimant. At trial the judge found that the claimant was not fundamentally dishonest, but that in the event that was wrong, it would be substantially unjust to dismiss the entire claim as what dishonesty there was arose in respect of peripheral matters. LOCOG appealed. **Held**, the appeal was allowed. In determining the appeal, Julian Knowles J provided, at paras 62-65, the following guidance as to the correct approach to take to the application of s.57 of the 2015 Act,

> *"[62] In my judgment, a claimant should be found to be fundamentally dishonest within the meaning of s 57(1) (b) if the defendant proves on a balance of probabilities that the claimant has acted dishonestly in relation to the primary claim and/or a related claim (as defined in s 57(8)), and that he has thus substantially affected the presentation of his case, either in respects of liability or quantum, in a way which potentially adversely affected the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation. Dishonesty is to be judged according to the test set out by the Supreme Court in Ivey v Genting Casinos Limited (t/a Crockfords Club), supra.*
>
> *[63] By using the formulation 'substantially affects' I am intending to convey the same idea as the expressions 'going to the root' or 'going to the heart' of the claim. By potentially affecting the defendant's liability in a significant way 'in the context of the particular facts and circumstances of the litigation' I mean (for example) that a dishonest claim for special damages of £9000 in a claim worth £10 000 in its entirety should be judged to significantly affect the defendant's interests, notwithstanding that the defendant may be a multi-billion pound insurer to whom £9000 is a trivial sum.*
>
> *[64] Where an application is made by a defendant for the dismissal of a claim under s 57 the court should:*
>
> *a. Firstly, consider whether the claimant is entitled to damages in respect of the claim. If he concludes that the claimant is not so entitled, that is the end of the matter, although the judge may have to go on to consider whether to disapply QOCS pursuant to CPR r 44.16.*
>
> *b. If the judge concludes that the claimant is entitled to damages, the judge must determine whether the*

defendant has proved to the civil standard that the claimant has been fundamentally dishonest in relation to the primary claim and/or a related claim in the sense that I have explained;

c. If the judge is so satisfied then the judge must dismiss the claim including, by virtue of s 57(3), any element of the primary claim in respect of which the claimant has not been dishonest unless, in accordance with s 57(2), the judge is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.

[65] Given the infinite variety of circumstances which might arise, I prefer not to try and be prescriptive as to what sort of facts might satisfy the test of substantial injustice. However, it seems to me plain that substantial injustice must mean more than the mere fact that the claimant will lose his damages for those heads of claim that are not tainted with dishonesty. That must be so because of s 57(3). Parliament plainly intended that sub-section to be punitive and to operate as a deterrent. It was enacted so that claimants who are tempted to dishonestly exaggerate their claims know that if they do, and they are discovered, the default position is that they will lose their entire damages. It seems to me that it would effectively neuter the effect of s 57(3) if dishonest claimants were able to retain their 'honest' damages by pleading substantial injustice on the basis of the loss of those damages per se. What will generally be required is some substantial injustice arising as a consequence of the loss of those damages."

This approach has subsequently been applied in ***Razumas v Ministry of Justice*** [2018] EWHC 215 (QB), 12 February 2018, unrep. (Cockerill J) at paras 203-215. ***Suisse Atlantique Société D'Armement Maritime SA v nv Rotterdamsche Kolen Centrale*** [1967] 1 A.C. 361, HL, ***Howlett v Davies*** [2017] EWCA Civ 1696, [2018] 1 W.L.R. 948, CA, ***Ivey v Genting Casinos Limited (t/a Crockfords Club)*** [2017] 3 WLR 1212, UKSC, ref'd to. (See ***Civil Procedure 2017*** Vol.2 at para.3F-32.5.)

■ **Swain v JC & A Ltd** [2018] EWHC B3 (Costs), 31 January 2018, unrep. (Master Brown)

Application for delivery up of documents held by solicitors

Solicitors Act 1974, s.68(1), CPR PD 46 para.4.6. The claimant instructed the defendant solicitors' firm in respect of a personal injury claim. The claim was brought pursuant to a conditional fee agreement and ATE insurance policy. The claim settled in 2015. Out of the £2,807 which the claimant received under the settlement, deductions of approximately £890 were made. The claimant in the present action sought delivery up of the, now, former solicitors' documents relating to the claim. Delivery up was sought to enable the claimant to ascertain whether the deduction was, amongst other things, in accordance with the CFA and thus whether there was a basis for an assessment of the bill of costs. In other recent cases similar questions have been resolved on the basis of whether or not the former client of solicitors had a proprietary right in the documents: see for instance, the decision in ***Green v SGI Legal LLP*** [2017] EWHC B27 (Costs) (see ***Civil Procedure News*** No.1 of 2018), which was not referred to in the present case. As the Master noted in the present case this was an area where contrasting views were being taken by the courts. Authoritative guidance was needed. **Held**, the court had the power to order delivery up irrespective of whether the client had a proprietary right in the documents; see ***Mortgage Business plc and Bank of Scotland plc v Thomas Taggart and Sons*** (2014). In this case the court should exercise its discretion and order delivery up. This would also have been the case if the application concerned a statute bill. While such applications may be disproportionate, the fact that the making of copies or enabling a former client to inspect such documents was subject to payment of costs would help to '*deter frivolous requests*'. ***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, ***Fox v Bannister King & Rigbeys*** [1988] Q.B. 925, CA, ***Harrison v Tew*** [1990] 2 A.C. 523, HL, ***Pilbrow v Pearless de Rougmont & Co.*** [1999] 3 ALL E.R. 355, 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, ***Kanat Shaikhanovich Assaubayev v Michael Wilson & Partners*** [2014] EWCA Civ 1491, unrep. CA, ref'd to. (See ***Civil Procedure 2017*** Vol.2 at para. 67PD.1.)

■ **(R.) Fayad v The Secretary of State for the Home Department** [2018] EWCA Civ 54, 31 January 2018, unrep. (Hickinbottom and Singh LJJ)

Extension of time to review decision of Master of the Court of Appeal—applicable test

CPR rr.52.24(5), 52.24(7). At the conclusion of long-running judicial review proceedings, which culminated in an appeal before the Court of Appeal being withdrawn by consent, a Master of the Court of Appeal (Civil Division) determined the costs of the judicial review application. The appellant sought to challenge the Master's order. As there is no right to appeal from such an order, the application was by way of review of the decision under CPR r.52.24(5). Such applications must be filed within seven days of the party being served with notice of the Master's decision. The

application was filed on 18 October 2017, albeit in the wrong form. It was filed as an application for permission to appeal. It was treated by the Court as an application for review. As the Master's decision was however made on 16 August 2017, it was out of time. It was thus treated as an out of time application for review. The application sought an extension of time, and did so relying on the criteria for the grant of relief from sanctions contained in ***Sayers v Clarke Walker*** (2002). The respondent opposed the application for an extension of time on the basis that the correct approach was not that set out in ***Sayers v Clarke Walker*** (2002) but that set out in ***Denton v T H White Limited*** [2014]. **Held**, the application for an extension of time was to be determined by the approach set out in ***Denton***. The approach set out in ***Sayers*** was no longer good law. As Hickinbottom LJ put it at para.22:

> *"In Hysaj v Secretary of State for the Home Department [2014] EWCA Civ 1633; [2015] 1 WLR 2472, this court applied the same approach [as in Denton] to applications for extensions of time for permission to appeal. By analogy, the same principles are applicable to an application for an extension of time for review of a decision under CPR rule 52.24(7). With respect to Mr Dolan's reference to Sayers v Clarke Walker, pre-Denton authorities on the proper approach to applications for relief from sanctions and extensions of time have been overtaken by the recent authorities and are unhelpful; and reliance should not now be placed upon them. The approach to be adopted is that set out in Denton."*

Applying the test in ***Denton*** the application for extension of time was refused. Additionally, although it did not arise for decision, the Court noted that while the parties had agreed that the decision as to costs was to be determined by the parties on the papers, this did not also amount to an agreement that there could be no further recourse to the court. The agreement was not such as to amount to an agreement to oust the jurisdiction to seek a review of the Master's decision. The Court certified that the judgment was capable of being cited as per the ***PD (Citation of Authorities)*** [2001] 1 W.L.R. 1001, para.6.1. ***Sayers v Clarke Walker*** [2002] EWCA Civ 645; [2002] 1 W.L.R. 3095, CA, ***Denton v T H White Limited*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926, CA, ***Hysaj v Secretary of State for the Home Department*** [2014] EWCA Civ 1633; [2015] 1 W.L.R. 2472, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at paras.52.15.4 and 52.24.4.)

- **JMX (A child by his Mother and Litigation Friend, FMX) v Norfolk and Norwich Hospitals NHS Foundation Trust** [2018] EWHC 185 (QB) (07 February 2018, unrep. (Foskett J)

Pt 36—offer to accept 90% of value of claim—genuine offer to settle

CPR r.36.17(5)(e). The court found in favour of the claimant in a clinical negligence claim. Prior to the trial the claimant had made a Pt 36 Offer for 90 per cent of the agreed or assessed damages. That offer was not accepted and the claimant thereafter sought the benefit of the provisions in CPR r.36.17, having obtained a decision at least as advantageous as the Offer made. The question arose whether the Pt 36 Offer was a 'tactical offer' or a genuine offer to settle: see, for instance, ***Huck v Robson*** (2002). **Held**, it was a genuine offer to settle. In reaching that decision, Foskett J stated that the defendant's argument that the claimant's assessment of the litigation risk at 10 per cent was a 'significant under-evaluation' and as such the offer could not have been genuine was '*the kind of argument . . . which could hardly ever succeed*' (see paras 11-12). As he went on to state:

> *"[12] . . . How one side perceives the risks in a piece of litigation (whether in the clinical negligence sphere or any other sphere) will almost invariably be different from the way the other side perceives them. Quite often in my experience as a practitioner and, more particularly, as a mediator, a settlement of a case was achieved when there were widely differing views of the risks on both sides. Settlement did not require a meeting of minds on the nature of the litigation risks of each side. Quite how a judge can successfully embark on the kind of exercise I am being invited to embark upon is very difficult to see. Mr Nolan is right to say that it is almost akin to embarking on a mini-trial in the post-trial situation in order to determine how the case should have looked to the offeror before the offer was made. To my mind, this is an exercise which ordinarily should not be carried out and I am sure that most judges would not regard it is a welcome process, preferring the broad brush approach referred to in the note in the White Book [**editor's note see Civil Procedure 2017 Vol.1 para. 36.17.5.1**].*
>
> *[13] I see absolutely no reason to embark on this process in this case. Mr Westcott submits that clinical negligence cases are "notoriously hazardous" and they "can seldom be regarded as 'open and shut'." He says that "litigation risk" in clinical negligence cases "is often regarded as being in excess of the sometimes 'conventional' 10%." I am not sure, with respect, that I can fully accept that formulation both from my own experience as a former practitioner in the field and in other capacities. There are 'open and shut' cases and I have observed in another case (Surrey v Barnet and Chase Farm Hospitals NHS Trust [2016] EWHC 1598 (QB), [103]) that the NHSR (formerly the NHSLA) admits liability commendably early in cases where it is obviously right to do so and where there is plainly no defence. All cases do carry some risk, quite frequently associated with the way a*

witness, whether expert or otherwise, is likely to "perform". That may often be difficult to assess, but experienced practitioners can usually reach an informed view on such an issue.

[14] When an offer to accept 90% is made in a case such as this, I would regard it as a case where the Claimant's team regard the claim as very strong, but is prepared to offer a modest discount to secure absolute certainty of obtaining substantial compensation. That is what Mr Nolan says prompted the offer in this case and I have no reason to doubt that that was so. Whilst, of course, it is open to the offeror to explain this kind of thinking in the letter making the offer if it is thought helpful, I do wonder whether in most cases it would assist. I can see the letter prompting a reply (sometimes expressed in language that does not help the settlement process) and it may be thought better simply to leave it to the recipient of the offer to assess the offer as it stands."

Foskett J also issued a reminder that 'without prejudice' material was not intended to be put before the court as was done in the present case. As he put it at para.18:

"the content of privileged discussions should generally remain privileged: the purpose of the privilege is to enable all cards to be put on the table. A general 'open house' subsequently about what was said and by whom during those discussions could endanger the long-recognised utility of the "without prejudice" negotiating process. That can be in no-one's interests."

Huck v Robson [2002] EWCA Civ 398; [2003] 1 W.L.R. 1340, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para. 36.17.5.1.)

- **Barton v Wright Hassall LLP** [2018] UKSC 12, 21 February 2018, unrep. (Lady Hale PSC, Lords Wilson, Sumption, Carnwath, Briggs JJSC)

Service— litigants-in-person— application of the Civil Procedure Rules

CPR r.6.3(1)(d), CPR PD 6A. A professional negligence claim was pursued by a litigant-in-person (LiP) against a law firm (the defendant) that had previously acted for him. The LiP issued his claim on 25 February 2013. He elected to serve the claim form himself under CPR r.6.4(1)(b). The defendant was represented by Berrymans Lace Mawer (BLM). The LiP, on the last day on which service could be effected within the time limit provided by CPR r.7.5, sent the claim form to BLM via email. The LiP and BLM had previously communicated by email. BLM however had at no point confirmed that it would accept service by email. Absent that confirmation email service was not a valid mode of service. As a consequence of the failure to serve the claim validly it became time-barred. The LiP argued before the District Judge that service was valid on the basis that BLM had 'indicated' that it would accept service by email. In the alternative, he applied for a retrospective extension of time to serve the claim form: CPR r.7.6. In the further alternative, he sought an order that non-compliant service was in the present case good service: CPR r.6.15. The District Judge rejected the argument that BLM had indicated that it would accept service by email and dismissed the alternative applications. An appeal from the decision concerning validation of service was dismissed by the Circuit Judge, whose decision was then upheld by the Court of Appeal. The UK Supreme Court, by a majority of 3-2, upheld the Court of Appeal's decision. It doing so it confirmed that LiPs could not expect a lower standard or approach by the court to rule compliance than it expects of represented parties. While the court may be required to adapt case management directions to situations where one or more parties acting in person, that did not apply to rule compliance: ***R. (Hysaj) v Secretary of State for the Home Department*** (2015); ***Nata Lee Ltd v Abid*** (2015). LIPs were expected to familiarise themselves with the rules unless they were '*particularly inaccessible or obscure*': see para.15. Both the majority and the minority agreed that the present case and the issues raised by it concerning service, e-mail service and LiPs needed consideration by the Civil Procedure Rule Committee. ***R. (Hysaj) v Secretary of State for the Home Department*** [2015] 1 W.L.R. 2472, CA; ***Nata Lee Ltd v Abid*** [2014] EWCA Civ 1652, [2015] 2 P. & C.R. 3, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.6.3.5.)

- **Nesbit Law Group LLP v Acasta European Insurance Company Ltd** [2018] EWCA Civ 268, 21 February 2018, unrep. (Sir Geoffrey Vos C, Sharp and Hamblen LJJ)

Late Amendment

CPR r.17.3. A dispute arose as to the proper construction of an exclusion clause. A question also arose as to whether Acasta should be granted permission to amend to amend its Part 20 defence. The application to amend was understood to be brought very late. It was made four weeks before the appeal was to be heard. Acasta argued that, while there was no 'excuse' for the lateness of the application, its refusal would give rise to significant injustice to it and would cause no prejudice to Nesbit. The second, amendment point, only arose on the appeal before the Court of Appeal if the first, construction, issue was decided in Acasta's favour. The Court of Appeal held against Acasta on the construction issue. As such the amendment issue did not arise for decision. The court went on, however, to

consider the issue as it had been fully argued. In so doing Vos C noted that the principles concerning permission to amend were set out in paras 69-72, 85 and 106 of ***Swain-Mason v Mills & Reeve*** (2011). The recent authorities, as the parties had noted, were summarised in paras 36-38 of ***Su-Ling v Goldman Sachs International*** (2015). Vos C, in a short *obiter* judgment on the point, applied and thereby endorsed the '*new approach to late amendments epitomised in Swain-Mason*' (see para.44), which he summarised as follows (para.41):

> *"[41] . . . In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it. These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal."*

Swain-Mason v Mills & Reeve [2011] EWCA Civ 14, [2011] 1 W.L.R. 2735, CA, ***Quah Su-Ling v Goldman Sachs International*** [2015] EWHC 759 (Comm), unrep., Comm., ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.17.3.7.)

- **Property Alliance Group Ltd v The Royal Bank of Scotland Plc** [2018] EWCA Civ 355, 2 March 2018, unrep. (Sir Terence Etherton MR, Longmore and Newey LJJ)

Adducing partial witness statements—refusal

CPR r.32(5). The Court of Appeal heard, and dismissed, an appeal from the judgment of Asplin J in long-running litigation arising from interest rate swaps entered into by the claimant and defendant. In its judgment on the appeal the Court of Appeal considered a question concerning the approach that a court should take to reliance on parts of a witness statement which had been served but where the witness had not been called to give evidence at trial. In the present case, a witness for the defendant's witness statement was served. He was not called at trial to give evidence. The claimant sought to rely on parts of the witness statement as hearsay evidence. CPR r.32.5(5)(b) provides that if a witness statement has been served but the witness does not give evidence, and neither does the party who served the statement put it in as hearsay evidence then "*any other party may put the witness statement in as hearsay evidence.*" The Court of Appeal **held** that the power to adduce such a statement was confined to adducing the whole witness statement. A party could not pick and choose which parts of the statement were to be adduced. As the Court of Appeal explained it at para.173:

> *"In our view, CPR 32.5 is not applicable where a party wishes to put in only part of a witness statement. The rule itself refers to "the witness statement" being admitted, not merely some of it. Further, it makes sense that a party wanting to rely on something said in a statement should have to place all of the statement before the Court. A Court asked to attach significance to a passage from a statement should have before it the totality of what the witness said. There would otherwise, as the Judge noted in paragraph 296 of her judgment, be "real concern that cherry picking out of context would arise". It would, moreover, be odd if a party were free to contend for the reliability of what the witness said in a particular passage while withholding the balance of the statement because he disputed it. That, in fact, would seem to have been the position in the present case had the Judge acceded to PAG's application. PAG, we gather, was unwilling to put in Mr Sefton's witness statement in its entirety because most of what he said was adverse to its case. It follows that, in our view, the Judge was correct to refuse PAG's application."*

McPhilemy v Times Newspapers Ltd (No. 2) [2000] 1 W.L.R. 1732, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.32.5.3.)

Practice Updates

STATUTORY INSTRUMENTS

- **THE LATE PAYMENT OF COMMERCIAL DEBTS (AMENDMENT) REGULATIONS 2018** (SI 2018/117). In force from **26 February 2018.**

The 2018 Regulation amends The Late Payment of Commercial Debts Regulations 2002 (SI 2002/248). The amendments are: i) the substitution of a new regulation 3, concerning proceedings restraining grossly unfair terms or practices; and ii) the introduction of a new reg. 6 which requires the operation of the new regulation 3 to be subject to regular review. The amendments do not effect contracts made prior to 26 February 2018. The new reg.3 is intended to be

clarificatory. It provides that certain representative bodies, defined as organisations that are '*established to represent the collective interests of any enterprise, either in general or in a particular sector or area*', can challenge reliance upon contractual terms or practices that are grossly unfair.

■ **THE CIVIL PROCEDURE (AMENDMENT) RULES 2018** (SI 2018/239). In force from **6 April 2018.**

The 2018 Rules amendment effects three changes to CPR Pt 45. First, it substitutes a new CPR r.45.42(1)(b), which specifies the nature of financial information that a claimant needs to provide in respect of costs protection in Aarhus Convention claims. Secondly, it amends CPR r.45.44(2) so as to require a party to apply for a variation of a cost cap. Thirdly, it amends CPR r.45.44 to insert a new rr.45.44(5)-(7), which makes provision for the time when an application to vary a costs cap must be made and determined.

PRACTICE DIRECTIONS

■ **CPR PRACTICE DIRECTION—94th Update.** In force from **7 February 2018,** except for the amendment to CPR PD 75, which takes effect on **1 April 2018.** It effects the following revisions:

- amends PD 8A to include provision relating to the Proceedings under the Proceeds of Crime Act 2002 and the Anti-terrorism, Crime and Security Act 2001;
- amends PD 59 and 60 to require reference to be made to the Business and Property Courts, Circuit Commercial Court (QBD) or Business and Property Courts of England and Wales, London Circuit Commercial Court (QBD) as relevant;
- amends PD 66 as was apparently intended in CPR Practice Direction 93 (noted in ***Civil Procedure News*** No.10 of 2017), to substitute a new Annex 1 concerning disputes as to venue in civil proceedings by or against the Crown;
- amends PD 75 to refer to the Littering from Vehicles outside London (Keepers: Civil Penalties) Regulations 2018, amongst other (minor) changes;
- amends Practice Direction—Civil Recovery Proceedings to reflect the introduction of unexplained wealth orders and interim freezing orders consequent on the Criminal Finances Act 2017 coming into force on 31 January 2018 (see Criminal Finances Act 2017 (Commencement No. 4) Regulations 2018/78);
- amends Practice Direction—Business and Property Courts variously to effect a change to the abbreviation for the courts from BPCs to B&PCs, to reflect the addition of Liverpool and Newcastle as B&PCs District Registries, and, amongst other things, to clarify that hearings of applications to set aside statutory demands, unopposed creditors' winding-up petitions or unopposed bankruptcy petitions come within the scope of non-specialist work in the County Court.

PRACTICE GUIDANCE

■ **CHANCERY TRIAL DATE WINDOWS**

On 19 February 2018, Her Majesty's Courts and Tribunals Service updated its guidance on trial windows (*https://www.gov.uk/guidance/trial-date-windows-for-chancery-division*).

The updated time frame is:

Length of trial	Trial held within these dates	Final day for appointment to fix trial date
1 day or less	1 July 2018 to 30 November 2018	31 March 2018
Between 2 and 5 days	1 December 2018 to 28 February 2019	31 March 2018
Between 5 and 10 days	1 March to 31 May 2019	31 March 2018
Over 10 days	1 May 2019 to 31 July 2019	31 March 2018

In Detail

THE REBIRTH OF EQUITABLE INTERPLEADER—CELADOR RADIO LTD v RANCHO STEAK HOUSE LTD (EQUITABLE INTERPLEADER—ENFORCEMENT) [2018] EWHC 219 (QB)

It is unusual for written judgments to be handed down in respect of enforcement applications. Yet in ***Celador Radio Ltd v Rancho Steak House Ltd (Equitable Interpleader—Enforcement)*** [2018] EWHC 219 (QB), 16 February 2018, unrep., Master McCloud, noting that very point, handed down a detailed such judgment. The reason for this was straightforward: a number of High Court Enforcement Officers (HCEO) had drawn to the court's attention a lacuna in the procedure relating to enforcement. In order to remedy that gap in the rules, Master McCloud revived a form of interpleader: equitable interpleader.

The Background

Two sets of enforcement proceedings were transferred to the High Court. In the first, the Riaz case enforcement was sought in respect of a judgment debt of approximately £15,000. On 27 July a HCEO attended the judgment debtor's premises and took control of 460 articles of clothing, amongst other things. Later that day, a third party asserted that his company was the owner of the goods. Under CPR r.85.4(2) the HCEO informed the judgment creditor of the third-party claim. As ownership was disputed, the HCEO informed the third party that an application would have to be made under CPR r.85.5. No such application was made.

In the second, the Celador Radio case a HCEO took payment via a bank or credit card (the judgment does not specify which) pursuant to a writ of control by someone other than the judgment debtor. The basis on which the payment was made was later disputed; it was said payment was made in order to prevent a breach of the peace. Consequently, a third party claim to the money paid was made. Again, however, no application was made under CPR r.85.5.

Both cases highlight a flaw in the CPR; as Master McCloud put it at para.10, they show a deficiency in the rules. It is a gap that the Civil Procedure Rule Committee ought properly to consider and close.

The Gap in the Rules

Historically, where goods were held by a HCEO (or their predecessors) and there were rival claims to ownership, the dispute would be resolved via an interpleader summons (RSC Ord. 17). Interpleader proceedings were, however, replaced by the more prosaically, post-Woolf language entitled 'Procedure for making a claim to controlled goods' (CPR rr.85.4 and 85.5). As Master McCloud put it at para.3, this process

> *"places emphasis on the person who is asserting the rival claim to title of the seized ('controlled') goods. This is somewhat different from the conventional interpleader where the party playing 'piggy in the middle' – typically the enforcement officer – would apply to court to resolve the question of title".*

This procedure enables whoever asserts ownership over the controlled goods to apply to the court to determine their claim to them. The rules in Pt 85 are, however, silent as to what should happen when a third party gives notice that they believe the goods are theirs, but following the giving of a counter-notice by the creditor, the third party does not then make an application to the court. In such a situation the HCEO is aware that there are rival claims to the goods, but the necessary procedural step to enable those claims to be determined has not been taken by the third party: see CPR rr.85(4) and 85(5). As Master McCloud rightly noted this problem is compounded by the absence of any time limit within the CPR requiring the requisite application to be made. Consequently,

> *". . . there is no clear point at which the rule has been breached, and no provision within the rule for what should happen when no application is made.*
>
> *. . . The HCEO cannot release the goods or dispose of them but may well be storing them at cost. The purpose of swift enforcement is thereby frustrated, and costs and expense wasted. Court time can be taken because on an ad hoc basis the HCEOs attend court seeking local solutions from judges without there being a clear procedure which they can rely on as the proper one to adopt." (see paras 9 and 10).*

The consequence of failure of the rules to make adequate provision in this respect has been twofold. First, it has undermined effective and efficient enforcement. It has equally wasted court time and resources, when they ought properly to have been available for other cases. Secondly, it has led, contrary to the fundamental underpinnings of the

CPR, to a growth in local practices as—in the absence of a specified procedure—individual judges in various courts have devised '*local solutions*' to the problem. As Master McCloud explained the position at paras 11-12,

> *"The result is that, by this application I am informed that in the case of the particular solicitors representing the HCEOs in this case they have a practice of writing to the Third Party (claimant to the goods), giving them seven days to make their application under r. 85.5 and saying that if they do not, the HCEOs will make the application. If there is still no response then an application is made (notwithstanding that the rules in Part 85 do not cater for the situation) and I am told that these solicitors (who may or may not be typical of the general practice around the country) generally ask the judge to make an order allowing 21 days for the Third Party to issue their application and that thereafter the Third Party be debarred from making such an application or from bringing a claim against the HCEOs or any company with which the HCEO is associated if the HCEO (for example) sells the goods in execution.*
>
> *It is obviously not ideal that an 'ad hoc' approach depending on the best of intentions by local lawyers should have to be relied on and indeed there could be a challenge as to the vires for a court to make an order protecting the HCEO or associated companies against liability where such is not catered for under the rules."*

The Master queried the propriety of this approach. The idea that a court could, in present circumstances at least, prohibit a person from bringing an application in her judgment was '*dubious, jurisdictionally.*' (see para.24.)

The Decision— Reviving Equitable Interpleader

Rather than adopt the approach suggested by the parties, the Master identified a more appropriate approach, one which was based in an established procedure even if it was one that had not been used for quite some time. It was to revive the long dormant process of equitable interpleader.

In her judgment, the Master considered the origins and development of the interpleader jurisdiction (see paras 25-32). As with so many areas of English law and procedure, interpleader existed historically at both common law and in equity. Its more recent, in historical terms, development was however in equity within the Court of Chancery where it formed the basis of a claim for equitable relief via a Bill in Equity where there were rival claims to specific goods. The process was, at common law at least, codified via the Interpleader Act 1831. That however did not touch upon equitable interpleader. When that Act was repealed, interpleader was governed by the RSC, and what ultimately became RSC Ord. 17: ***Reading v the London School Board*** (1886) 16 QBD 686 at 690. The upshot of this was that (see paras 30-31),

> *"What we are left with, then, is the abolition of the statutory interpleader in the 19th century at the point when the court rules in the form of Order LVII came in to effect. In turn those rules were supplanted by CPR 85.4 and the demise of RSC Ord.17 (as Order LVII had by then become). I note also that The Tribunals Courts and Enforcement Act 2007 s. 65 abolishes «common law rules about the exercise of the powers which under it become powers to use the procedure in Schedule 12." It is I think doubtful that s.65 has effect in relation to any common law rights relating to interpleader brought by enforcement agents, since sch. 12 is silent as to such applications and arguably therefore not caught by s. 65. However the analysis in [The Law of Interpleader as Administered by the English, American, Canadian and Australian Courts by RJ MacLennan, (1901) (Carswell)] rather implies that interpleader at law had already been abolished by the advent of RSC Ord. 17 at the latest.*
>
> *I do however take heart from the analysis in MacLennan, helpfully dating as it does to a time more proximal to the nineteenth century yet late enough to be a time where Order LVII was in force, at page 17 where the learned author considers whether the supplanting of the interpleader at common law with the interpleader governed by statute (which I read here as including the RSC) had any impact on the existence, in principle, of the equitable form of interpleader relief. His conclusion is as follows:*
>
> *'Statute does not oust equitable remedy – Where courts of Chancery have existed separate and distinct from courts of law, the existence of an interpleader statute governing the proceeding in courts of law has been held not to oust or take away the concurrent jurisdiction of the court of Chancery. A court of equity if first resorted to would not refuse to entertain a bill of interpleader, although a court of law might have been resorted to on the facts stated. …* ***Where courts of law and equity are fused, and equitable principles are followed in the consolidated court, the rule is clear that interpleader statutes are not at all to limit or affect the equitable jurisdiction of the court to entertain an interpleader suit or action. Such statutes merely furnish another special, cumulative and concurrent remedy, summary in its operation, and they do not alter the settled doctrines concerning interpleader. The statutory remedy is a mere substitution for the equitable remedy, in the kinds of actions to which it applies.'"***

The conclusion reached at the end of the historical analysis was that equitable interpleader had not been abolished (see paras 33-34),

". . . the introduction of CPR 85 and revocation of RSC Ord. 17 does not in my judgment have the effect of abolishing the ability of a court of merged equitable and legal jurisdiction to render equitable relief where the black letter law offers none. A purist would interject that the equitable form of relief as it was known prior to the 19th century statutes may not have been aimed at resolving issues concerning sheriffs (enforcement officers) and that it was only in the 20th century that the notion of the sheriff's interpleader arose.

However, appreciating that as I do, where there is a need for sheriffs (enforcement officers) to access a court in an interpleader context, and the statutory and procedural law does not meet that need, yet where there has been historically a clear recognition of the existence of that need, Equity can still assist absent express statutory abolition of interpleader in Equity."

The process to use in the future

Equitable interpleader could be relied on as a gap-filling process i.e., only where the CPR did not provide an appropriate procedure (see para.38). The suggested approach taken when making such an application was explained as follows (see para.37):

"It may be of use for HCEOs to adopt the approach in future cases of making an application to the court supported by evidence of the basis for seizure, and evidence from the Creditor of the basis for the Creditor's belief that the ostensible title to the goods is that of the judgment debtor, and seeking an unless order in the form broadly as above leading to a declaration in the event of default, which then should offer the degree of protection reasonably required by the HCEO as 'middleman'."

The wording of the unless order referred to in the above is as follows (see para.35):

"(1) Unless by 4pm on a date 14 days from the date of service of this order the Third Party files and serves evidence setting out its basis for its asserted rival claim to title, it shall be debarred from relying on evidence of title to contradict that put forth by the HCEO.

(2) In the event that the Third Party is so debarred then without further hearing the HCEO shall be entitled to a declaration that the judgment debtor was at the material time the person with title to the seized goods and consequent upon that declaration the HCEO shall be entitled to dispose of them in execution and shall be entitled to his reasonable costs summarily assessed in the sum of [£959.30 in Riaz, £681.50 in Celador] being the sum claimed for this application.

(3) In the event that the Third Party serves and files evidence as above and is not debarred, the HCEO shall apply to this court for directions as to determination of the issue of title and as to management of the dispute and payment of the sums required by para 60(4)(a) of the Tribunals Courts and Enforcement Act 2007 Sch. 12, and for the application to proceed thereafter in accordance with CPR Part 85, and in that event costs shall be reserved.

(4) In the event that the Third Party serves and files evidence as above and is not debarred, any further evidence relied on by the judgment creditor in respect of the ownership of the [goods, in Riaz money in Celador] shall be provided by the Creditor, and the HCEO's witness evidence shall deal with enforcement steps taken insofar as not already detailed in the original application for this order."

Pending any revision to CPR Pt 85, the above process ought, it seems, to be adopted generally where the present factual situation arises.

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