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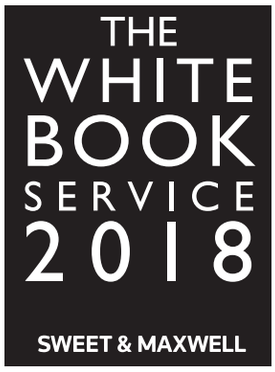

In Brief

Cases

BAE Systems Pension Funds Trustees Ltd v Bowmer and Kirkland Ltd [2018] EWHC 1222 (TCC), 23 February 2018, unrep. (Jefford J)

Power to order costs where one of two defendants discontinues

CPR r.38.6. The claimant issued proceedings in respect of a dispute concerning the design and construction of a warehouse. It proceeded against a number of defendants. It did so in order to protect its position concerning limitation. In principle, as Jefford J noted, this meant:

> *"[6] . . . that the claimant then takes the risk that the proceedings against one or more of those defendants may transpire to be ill-judged or inappropriate, and also . . . the claimant takes the risk that the defendants will not have all documentation and information at their fingertips in relation to a stale claim."*

Following issue, the parties engaged in what would otherwise have been pre-action communications and disclosure under the relevant pre-action protocol. Ultimately, the claimant discontinued its claim against the second defendant. In doing so it applied for an order that rather than it paying the second defendant's costs, which is the presumptive order under CPR r.38.6, the first defendant should be required to pay those costs. **Held**, the application was dismissed, the claimant would pay the second defendant's costs. In reaching that decision it was noted that there was no previous authority where "*on discontinuance, a costs order has been made against another defendant to the proceedings*" (see para.28). That being said, the court has a "*wide jurisdiction in respect of costs under Part 44*" and as such it is able to make such an order. Such an order could be made, for instance, in unusual circumstances, as:

> *"[30] . . . where a claimant had been positively misled by one defendant into suing another. . ."*

That there would have to be unusual circumstances to justify such an order was evidenced by the lack of authorities on the point. Some further guidance on when to exercise the discretion to make such an order could be taken from the cases on the making of Sanderson orders i.e., orders where an "*unsuccessful defendant is required to pay the costs of a successful defendant directly*". As Jefford J put it,

> *"[31] I . . . accept . . . that the cases in relation to Sanderson orders provide some (and I underline the word 'some') guidance as to how I should approach this matter. [See] in particular, . . . what was said in Irvine v Commissioner of Police for the Metropolis [2005] 3 Costs LR 380, at para.15, where the Court of Appeal cited with approval the decision of the judge below, where she had said this:*
>
> > *'It does seem to me that this is a case where, as in all cases, parties and their legal teams have to take a careful and close look at the basis on which they seek to bring in another party to proceedings and to make a judgment for themselves on the basis of the information available to them as to whether or not they are likely to succeed in claims against those parties. They cannot expect, simply because one party seeks to lay the blame at the door of another, that they can necessarily pursue that other party at the expense of the one who is pointing the finger. Parties must give careful thought to how they are going to pursue their claims'.*
>
> *[32] As I say, that gives me some guidance, but only some guidance, because, in this instance (that is, an application made under Part 38.6), the reasonableness or otherwise of commencing proceedings against a defendant is not the test by reference to which the default position applies or otherwise. The simple fact that it was reasonable or not to commence and pursue proceedings is not itself a factor that displaces the default presumption."*

Irvine v Commissioner of Police of the Metropolis (Costs) [2005] EWCA Civ 129; [2005] C.P. Rep. 19, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.38.6.1.)

Old Street Homes v Chelsea Bridge Apartments Limited [2018] EWHC 1162 (Ch), 12 March 2018, unrep. (HHJ Kramer sitting as a judge of the High Court)

Cost Judge—jurisdiction to determine incidence of costs of proceedings

Senior Courts Act, ss.19, 51, CPR r.2.4, Pts 44, 47. A Deputy Master dealt with a number of applications arising in proceedings. He made a number of costs orders concerning those matters. In respect of the costs of a freezing order hearing he did not determine who was to pay the costs. On the contrary, he directed that the issue as to who should pay those, and related, costs should be determined by a Costs Judge on detailed assessment. An appeal from that decision was brought on the basis that the Deputy Master ought to have determined those costs and that a Costs

Judge had no power to determine the question as to who was to pay costs. **Held**, appeal allowed, the Deputy Master erred in law in directing that a Costs Judge, who had no jurisdiction to do so, determine the question of which party was to pay costs. The reason why the Costs Judge had no jurisdiction was that the present proceedings and costs proceedings were two separate proceedings. A Costs Judge only has jurisdiction in respect of cost proceedings, and not the original proceedings from which costs proceedings may arise. As HHJ Kramer explained it,

> *"[31] . . . the key, however, as to why the deputy master could not ask the costs judge to decide the costs of these proceedings is that we are dealing here with two different proceedings. Yes, section 51 [of the 1981 Act] empowers the court to determine the costs of and incidental to the proceedings. The proceedings which were before the deputy master were the proceedings in this action, that is the proceedings for the freezing injunction and what other relief was being sought. The proceedings for the assessment of costs are separate proceedings. Indeed, if you look at Part 44, they are actually referred to as detailed assessment proceedings. The way you start those proceedings is completely different from the way you start those substantive proceedings. Now, a court can only decide the costs of the proceedings with which it is seized. I think an appropriate analogy may be a claim for pre-action disclosure and the following the action in the claim for pre-action disclosure. The costs have to be dealt with in that claim. They do not fall as part of a claim of an action which follows. In this case, as in all cases where you have a set of proceedings with a costs order followed by absence of agreement as to costs and costs proceedings follow, you have two separate proceedings. That is the reason why the judge who deals with the cost proceedings, and is not seized of these proceedings, does not have any power to deal with proceedings with which, to repeat myself, he has not been seized . . . The deputy master was dealing with these proceedings. In due course, when cost proceedings are issued, doubtless there will be a costs judge dealing with the cost proceedings. But since the costs judge is not seized of these proceedings, he has no power to determine the incidence of costs in these proceedings.*
>
> *[32] I agree . . . that a prerequisite of the costs judge becoming seized of this or anything to do with this case is that there are cost proceedings issued and that costs proceedings require as a prerequisite that there is an order for detailed assessment, which gives the authority to start those proceedings. I accept . . . that if you look at Part 47 it just would not work if you could get the matter to the costs judge without there actually be an order for costs. Because not only could you not produce your authority for the assessment, you could not produce a bill which was compliant with the directions, because that has to recite where your authority comes from; you would not know who the receiving party was, so you could not identify who actually was entitled to make the application; and nor could the court."*

(See ***Civil Procedure 2018*** Vol.1 at para.2.4.1.)

- **Pacific Biosciences of California, Inc v Oxford Nanopore Technologies Ltd** [2018] EWHC 806 (Ch), 20 March 2018, unrep. (Norris J)

Role of request for further information and of expert report

CPR Pt 18. In proceedings arising from an alleged patent infringement concerning DNA sequencing, the defendants made a request for further information. The defendants applied for an order requiring the claimant to answer the request. What lay behind the request, according to Norris J, was a need to identify what matters, what facts, expert evidence was to consider. In dealing with the application Norris J explained the role of a request for further information as falling within the court's case management responsibilities and being a means of ensuring that parties' statements of case properly defined the dispute. As he put it at paras 19-22,

> *"[19] . . . A request for further information, under CPR 18, arises really as part of the responsibility of the court to manage cases and the parties to co-operate in the just and efficient disposal of the issues between them. The function of a request is to identify the material facts that are going to be relied upon at trial, but not to plead evidence that will be led to prove those facts. The identification of the material facts, ideally, ought to be with the same degree of particularity as will be relied on at the trial itself. That way, everyone knows where they stand.*
>
> *[20] A major objective of case management is to ensure that statements of case do set out the parties' cases, and define the dispute between them. As part of its responsibility for managing cases, the court must ensure that parties plainly state the factual ingredients of their case, so that the true nature and scope of the dispute can be identified. I read from paragraph 18.0.1 of the White Book.*
>
> *[21] Defining issues has, I think, two aspects. First of all, identifying what will be debated and, secondly, eliminating what will not be debated. The second aspect is every bit as important as the first . . .*
>
> *[22] Defining issues for trial and issues to which the evidence must be directed, by means of statements of case, is not the only method of doing it. Sometimes, it is better to say that the parties must agree the terms of, for example, the instructions that are to be sent to experts . . ."*

Given this, whether to compel the claimant to answer the request was to be determined by an assessment of whether it was "*necessary for the just and efficient disposal of (the) case that there should be some further definition*" of their case (at para.23). Having set out the question to be asked, Norris J went on to discuss the relationship between requests for further information and expert reports. In respect of part of the request, the claimant had argued that it was unnecessary for the court to order it to answer it. It did so on the basis that it would be served at the same time as their expert report. That this was the case was, according to Norris J, not a determinative factor in answering the question whether the court should exercise its discretion in ordering the claimant to answer the request. A distinction had to be maintained between statements of case, including the means to ensure that they are properly particularised and expert reports. As he put it,

> *"[46] Whilst that is true, in my judgment, expert evidence and particularity in the statement of case serve two different functions. The function of the expert evidence is not to advance a claimant's case. The function of the expert evidence is to provide opinion evidence, agreeing or disagreeing with allegations which are contained in the claimant's case It is important that the distinction between the two is maintained."*

(See ***Civil Procedure 2018*** Vol.1 at para.18.0.1.)

- **R. (Watkins) v Newcastle Upon Tyne County Court** [2018] EWHC 1029 (Admin), 2 May 2018, unrep. (Turner J)

Judicial review of County Court—proceeding in the absence of the applicant

CPR rr.1.1, 39.3. A charity sought possession of one its properties from the applicant who lived there under the terms of a letter of appointment. Possession was sought on the basis that the tenant was in breach of the terms set out in the letter. As possession was not given up, the matter proceeded to trial. At the trial the applicant raised the argument for the first time that the letter of appointment granted a lease of the property. It had not previously been suggested that the letter provided anything more than a licence. Submissions at the hearing were limited to whether this issue should be considered. In a reserved judgment, the district judge held that the applicant occupied the flat as a licensee and not under a tenancy. An order for possession was made. In so doing he appeared to deal with whether the tenancy point could be taken and then went on to deal with the merits of the point. The charity's counsel at that stage queried whether the district judge had previously indicated that the question of the merits was not to be dealt with, that the reserved judgment was just to deal with the question whether the point could be taken. The judge did not clearly deal with that query. The applicant applied for permission to appeal the decision. This was refused on the basis that as the question whether the letter created a tenancy had not been pleaded in the first instance, it was not possible to appeal from a decision in respect of it. An application was then made to judicially review that refusal to grant permission to appeal. As Turner J noted, the procedural history of the proceedings was confused: the district judge ought to have been clearer in articulating what he was deciding; the circuit judge dealing with the permission to appeal application focused on the fact that the pleadings had not been amended to make the tenancy point a live issue; and the judge who dealt with the initial application for permission to bring judicial review proceedings, looking at the question whether the district judge applied the law correctly. Turner J noted the very restricted nature of the judicial review jurisdiction where decisions of the County Court is concerned: see, ***R. (Ogunbiyi) v Southend County Court*** (2015). In essence it needs to be demonstrated that the process was such as to amount to a wholly exceptional collapse of fair procedure, such as would occur where, as Laws LJ noted in ***R. (Cart) v Upper Tribunal*** (2009), there was actual bias on the part of the court. That was far from the case here and as such permission to bring judicial review proceedings was refused. The applicant did not attend the permission hearing before Turner J. She had previously informed the court she did not intend to come to the hearing, but did not ask for an adjournment. Turner J did not consider that a hearing of a renewed application for permission to bring judicial review came within the court's power contained in CPR r.39.3 to proceed with a trial absent a party. He **held** that he had jurisdiction to proceed in the appellant's absence as the court had inherent jurisdiction to "*act effectively within (its) jurisdiction*" (***Connelly v Director of Public Prosecutions*** (1964) at 1301), and doing so was required by the overriding objective. ***Connelly v Director of Public Prosecutions*** [1964] A.C. 1254, HL, ***R. (Mahon) v Taunton County Court*** [2001] EWHC (Admin) 1078; [2002] L.L.R. 364, Admin., ***R. (Sivasubramaniam) v Wandsworth County Court*** [2002] EWCA Civ 1738; [2003] 1 W.L.R. 475, CA, ***Gregory v Turner*** [2003] EWCA Civ 183; [2003] 1 W.L.R. 1149, CA, ***R. (Strickson) v Preston County Court*** [2007] EWCA Civ 1132, unrep., CA, ***R. (Cart) v Upper Tribunal*** [2009] EWHC 3052 (Admin); [2010] 2 W.L.R. 1012, Div. Ct, ***R. (Ogunbiyi) v Southend County Court*** [2015] EWHC 1111 (Admin); [2015] A.C.D. 83, Admin, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.54.4.1).

■ **Sagicor Bank Jamaica Limited v Taylor-Wright (Jamaica)** [2018] UKPC 12, 14 May 2018, unrep. (Lords Kerr, Hughes, Hodge JJSC, Lady Black JSC, Lord Briggs JSC)

Summary judgment—approach where party resisting relies on facts that if proved would entitle applicant to order

Supreme Court of Jamaica Civil Procedure Rules 2002 Pt 15, CPR Pt 24. The claimant sought amounts, totalling J$31million, said to be due from the defendant under a Demand Loan and credit card accounts. The latter claim was settled. The claimant applied for summary judgment on the Demand Loan claim. It did so under Supreme Court of Jamaica Civil Procedure Rules r.15.2. It is in terms identical to CPR r.24.2. The defendant resisted the application. She did so on the basis that the Demand Loan was itself based on a promissory note, which underpinned the claimant's claim, was a forgery. She went on to plead in her defence that she had borrowed J$21million from the bank. The judge granted summary judgment in the full amount claimed as: (i) whether the promissory note was a forgery was irrelevant given; (ii) the defendant's admission that she had borrowed J$21million and other evidence before the court. An appeal from that decision was allowed by the Court of Appeal of Jamaica. On appeal from that decision, the Privy Council **advised** The Queen to allow the appeal and reinstate the judge's decision. Even if the question of the promissory not being a forgery or not was a matter that could only be resolved at trial, given the nature of the defendant's response to the claim, which if true would entitle the claimant to the relief sought, to proceed to trial was contrary to the overriding objective: it would be no more than a "*serious waste of time and expense for the parties*"—and equally for the court. In reaching its decision, the Board noted that the appeal raised an important question concerning summary judgment i.e., that,

> *"[1] If a claimant comes to court seeking specific relief, by way of summary judgment, and the defendant, while denying the claimant's case on the facts, advances facts of her own which, if proved, would still entitle the claimant to the relief sought, should the court direct a trial so as to resolve those competing accounts of the facts, or grant summary judgment on the basis that a trial is not necessary to determine whether the claimant is entitled to the relief sought?"*

In reaching its decision the Privy Council dealt with this question in short order, starting that it

> *"[21] . . . considers it axiomatic that, if a pleaded claim is met with a defence (whether pleaded or deployed in evidence) on a summary judgment application which, if true, would still entitle the claimant to the relief sought, then generally there cannot be a need for a trial. If the pleaded claim justifies granting the relief sought then, if the claimant proves that claim, it will succeed. If the alleged defence also justifies the relief sought, then the claimant will succeed even though the defendant proves the facts alleged in her defence. In either case, the defendant will have no real prospect of successfully defending the claim, within the meaning of Part 15.2(b) [e.g., The defendant has no real prospect of successfully defending the claim or the issues.]."*

(See ***Civil Procedure 2018*** Vol.1 at para.24.2.3.)

■ **Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS** [2018] EWCA Civ 1093, 15 May 2018, unrep. (Longmore, Macur, Simon LJJ)

Service—retrospective deemed service by an alternative method—dispensing with service

CPR rr.6.15, 6.16, 6.40, 7.5. In 2008 the claimant issued proceedings against three Turkish and one Dubai company in a group of companies (the Goldas group). The proceedings concerned the delivery of 15.725 metric tonnes of gold bullion. The claim sought delivery up of the gold to the claimant, money due in respect of the purchase price, or damages. Freezing orders had been made shortly prior to the proceedings being issued. It was wrongly believed, based on incorrect advice from a Turkish law firm, that service had been effected in Turkey and Dubai. The Turkish defendants later informed the claimant that they would only be served according to the terms of the Hague Convention on the Service Abroad of Judicial and Extra-territorial Documents in Civil and Commercial matters (the Hague Convention). Further proceedings took place in Turkey, before—in February 2016—the defendant applied, amongst other things, to have the claims struck out or dismissed on the basis that they had not been served and the time for service under CPR r.7.5 had expired or, in the alternative, on the basis that the failure to progress the claims was an abuse of process. The claimant then applied for an order under CPR r.6.15 or r.6.16 to deem service by an alternative method with retrospective effect or dispense with service. The judge declined the claimant's application and dismissed the claims. The claimant appealed. The Court of Appeal dismissed the appeal. It **held** as follows: (i) in respect of CPR r.7.6 negligent or incompetent legal advice is always a bad reason for granting an extension of time. It is a reason for refusing an extension, see ***Hashtroodi v Hancock*** (2004) and ***Aktas v Adepta*** (2011). However, where CPR r.6.15 is concerned negligent or incompetent legal advice is not always a bad reason. Whether it is a good reason depends on the circumstances of the case, see ***Barton v Wright Hassall LLP*** (2018); (ii) where relief under CPR r.6.15 there was

no substantial difference to the approach taken under CPR r.7.6 to a consideration of the expiry of a limitation period before the application is made: see ***Abela v Baadarani*** (2013). And as ***Barton v Hassall*** (2018) made clear, such a circumstance was a "*highly important matter*" in assessing whether to exercise the discretion to extend; (iii) ***Cecil v Bayat*** (2011) established that service by an alternative method was only permissible in "*special circumstances*". There was no basis, absent a change in approach by the Supreme Court, to hold that if there was otherwise a good reason to permit alternative service it should only be refused if it would, and was designed to, subvert the Hague Convention. ***Godwin v Swindon Borough Council*** [2002] 1 W.L.R. 997, CA, ***Knauf GmbH v British Gypsum Ltd*** [2002] 1 W.L.R. 907, CA, ***Hashtroodi v Hancock*** [2004] 1 W.L.R. 3206, CA, ***Aktas v Adepta*** [2011] Q.B. 894, CA, ***Cecil v Bayat*** [2011] 1 W.L.R. 3086, CA, ***Abela v Baadarani*** [2013] UKSC 44; [2013] 1 W.L.R. 2043, UKSC, ***Barton v Wright Hassall LLP*** [2018] UKSC 12; [2018] 1 W.L.R. 1119, UKSC, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.6.15.5.)

■ **Travelers Insurance Co Ltd v XYZ** [2018] EWCA Civ 1099, 17 May 2018, unrep. (Patten and Lewison LJJ)

Non-party costs order against liability insurers

Senior Courts Act 1981, s.51. The question of liability for the costs of litigation under a Group Litigation Order (GLO) was considered by the Court of Appeal. The GLO concerned approximately 1,000 individual claims arising from implants for breast surgery. Costs under the GLO were common to all claimants equally, both insured and uninsured. The uninsured claimants applied for an order that the insurer of the insured claimants pay their costs. In determining the appeal, the principled approach to such applications under s.51 of the 1981 Act was to exercise the discretion so as to do justice: that was the only immutable principle governing the discretion: ***Deutsche Bank AG v Sebastian Holdings Inc*** (2016) was authoritative and was followed. As such, authorities which might be taken to lay down conditions to be satisfied before the discretion could be exercised were not to be taken as doing so. That being said, only one authority—that of ***Citibank NA v Excess Insurance Co Ltd*** (1999)—might be taken to lay down conditions. In so far as it purported to do so it was wrongly decided. Finally, it was stated that,

> *"[31] It has, of course, often been said that an order under section 51 is to be regarded as 'exceptional'. However, all that that means is that the case is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. Whether a case is exceptional is not to be judged according to what is or may be usual in the insurance industry, but whether a case is extraordinary in the context of the whole range of litigation that comes before the court . . ."*

Aiden Shipping Co Ltd v Interbulk Ltd [1986] A.C. 965, HL, ***TGA Chapman Ltd v Christopher*** [1998] 1 W.L.R. 12, CA, ***Citibank NA v Excess Insurance Co Ltd*** [1999] 1 Lloyd's Rep I.R. 122, QBD, ***Cormack v Excess Insurance Co Ltd*** [2002] Lloyd's Rep I.R. 398, CA, ***Dymocks Franchise Systems (NSW) Pty Ltd v Todd*** [2004] 1 W.L.R. 2807, PC, ***Palmer v Palmer*** [2008] EWCA Civ 46; [2008] Lloyd's Rep I.R. 535, CA, ***Legg v Sterte Garage Ltd*** [2016] EWCA Civ 97; [2016] Lloyd's Rep I.R. 390, CA, ***Deutsche Bank AG v Sebastian Holdings Inc*** [2016] EWCA Civ 23; [2016] 4 W.L.R. 17, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.2 at para.9A-202).

■ **HJ v Burton Hospitals NHS Foundation Trust** [2018] EWHC 1227 (QB), 21 May 2018, unrep. (Turner J)

Single joint expert—weight to be given to evidence of evidence of expert with overlapping expertise

CPR Pt 35. The claimant pursued a clinical negligence claim against the defendant. The claim settled on the basis that she would receive 65% of the claim. Quantum was not agreed, but was determined at trial. At the trial evidence was given by a jointly instructed orthopaedic expert. Further expert evidence was given by the claimant's occupational therapy expert. On a number of issues the claimant's expert and the joint expert gave overlapping evidence. The Recorder preferred the evidence of the claimant's expert. The defendant appealed from Recorder's judgment in respect of those issues. It did so on the basis that the Recorder could not properly prefer the evidence of the claimant's expert whether they were inconsistent with those of the single joint expert: ***Peet v Mid-Kent Healthcare Trust*** (2001) at para.17, where Lord Woolf stated that:

> *"If there is no reason which justifies more evidence than that from a single expert on any particular topic, then again in the normal way the report prepared by the single expert should be the evidence in the case on the issues covered by that expert's report."*

was relied on. **Held**, the appeal was dismissed. Lord Woolf's dictum in ***Peet*** was not definitive. The court is not bound to accept the evidence of a single joint expert. It must consider such evidence "*in the light of all the other evidence*", per Clarke LJ in ***Coopers Payen Limited v Southampton Container Terminal Limited*** [2004] at paras 38 and 42. Where, as here, the single joint expert was not the only expert on the particular issues that were the subject of the appeal, the judge must evaluate all the evidence and make appropriate conclusions based on that evidence. Care should be taken not to automatically assume that evidence given by different experts occupy non-overlapping fields of expertise. As Turner J put it at para.16,

> *". . . There will, of course, be areas in which an expert in one discipline will obviously speak with far greater, or even exclusive, authority when compared to an expert in another discipline. There will also be others in which experts of different disciplines may, although from different perspectives, be capable of speaking with some significant, or even equal, authority. The extent of the overlap will vary on the facts of any given case."*

Turner J at para.23 went on to stress that the fact that there may be overlap in some cases was not to be taken as an invitation to experts to "*stray freely outside the scope of their respective disciplines.*" It was however to note that in some areas of expertise rigid compartmentalisation was inappropriate. Turner J's judgment, at para.24, further supports parties ensuring that where, as here, a party expert takes a view inconsistent with that of a single joint expert, that evidence should be given to the single joint expert to comment upon. Following which,

> *". . . If either or both parties had been dissatisfied with his response then an application could have been made to call him to give oral evidence at trial."*

In the present case the single joint expert neither had the claimant's expert's opinion put to him to comment on, nor was an application for him to give evidence at trial made. Notwithstanding that Turner J stressed at para.25, it was clear from Clarke LJ's judgment in ***Coopers Payen Limited v Southampton Container Terminal Limited*** (2004):

> *". . . The opinion of a single joint expert who is not called to give evidence does not automatically trump the evidence of other witnesses either lay or expert."*

Peet v Mid-Kent Healthcare Trust [2001] EWCA Civ 1703; [2002] 1 W.L.R. 210, CA, ***Coopers Payen Limited v Southampton Container Terminal Limited*** [2004] 1 Lloyd's Rep. 331, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1 at para.35.0.5.)

- **Princess Folaremi Ajongbola Santos-Albert v Isiguzo Eugene Ochi** [2018] EWHC 1277 (Ch), 23 May 2018, unrep. (Snowden J)

Slip rule—variation of final charging order

CPR r.40.12. The claimant was a tenant of property (the property) owned by the defendant. She brought proceedings for disrepair in which she was awarded damages and costs. The defendant was ordered to pay a total sum of £15,000, by way of damages and an interim payment of costs, by 5 May 2015. Payment was not made. Following which an interim charging order over the property was made for the sum plus interest. In June 2016 a final charging order was made. Following receipt of the order the claimant's solicitors wrote to the court setting out that the order as drawn did not reflect the order as made, as it failed to include reference to the claimant's costs as provisionally assessed. They requested the order be redrawn under the slip rule: CPR r.40.12. The order was amended under that rule by the district judge who had originally made the order. Following further proceedings, and continuing non-payment by the defendant, the claimant issued proceedings seeking an order for sale of the property. Within those proceedings the district judge who made the charging order refused to vary or discharge it and held that the order as amended under the slip rule could only be varied by way of appeal. An appeal from that order was dismissed by Snowden J who **held** that: (i) the real purpose of CPR r.40.12 "*is to ensure that the order conforms with what the court intended, even if the error which has originally been made in drawing up the order is substantial.*" Use of the term "slip" in the rule is, as such, a misnomer; (ii) limitations on the power in the authorities (e.g., ***Bristol-Myers Squibb v Baker Norton Pharmaceuticals (No.2)*** (2001) at para.25) and as noted in ***Civil Procedure 2018*** Vol.1 para.40.12.1:

> *"[27] . . . is that there should genuinely have been an accidental error or omission: the slip rule should not be used to permit the court to have second or additional thoughts or to add a provision having substantive effect which was not in the contemplation of the parties or the court at the hearing."*

Bristol-Myers Squibb v Baker Norton Pharmaceuticals (No.2) [2001] EWCA Civ 414; [2001] R.P.C. 45, CA, ref'd to. (See ***Civil Procedure 2018*** Vol.1at para.40.12.1.)

- **Alpha Insurance A/S v Lorraine Roche, Brendan Roche** [2018] EWHC 1342 (QB), 25 May 2018, unrep. (Yip J)

Qualified one-way costs shifting—fundamental dishonesty—no exceptionality requirement

CPR rr.38.2(1), 44.16, PD44 para.12.4. Proceedings were issued following a road traffic accident. Negligence was admitted by the defendant's insurers. The first claimant was the driver of the car involved in the accident. The second claimant was said to be in the passenger's seat of the first claimant's car. The defendant alleged that of the two claimants, the second claimant was not in the first claimant's car at the time of the accident. The defendant alleged the second defendant's claim was fraudulent and, consequently, the first claimant's claim was tainted by that dishonesty. The claimants subsequently discontinued the claim. In such circumstances, the first claimant ought to have become liable for the defendant's costs: CPR r.38.2(1). However, the claim was one to which qualified one-way

costs shifting (QOCs) applied. The defendant sought an order disapplying the effect of QOCs on the basis that the claim was fundamentally dishonest (CPR r.44.16, PD44 para.12.4). The question before the judge was the application of CPR PD para.12.4(c), which provides that,

> *"where the claimant has served a notice of discontinuance, the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice has not been set aside pursuant to rule 38.4. . . "*

The judge noted there was no guidance on the application of this provision. He took account of a variety of matters. He then held as follows,

> *"In all the circumstances, it is my view that to set aside and identify a further trial date for the ventilation of that particular isolated issue in this particular case would be, on balance, a disproportionate use of limited and precious court resources, given the amount of time and court resources that have already been devoted to the pursuit of this case. When I say that, I expressly state for the record that I do not hold the defendant to be in any way to blame for the loss of the day's trial date. The defendant has, perfectly properly, sought to defend the case on the basis that is set out in the detailed pleading that was served on its behalf. There is [no] criticism levelled at the defendant here at all. In reality, there are many instances coming before these courts of cases where occupancy, or alleged phantom occupancy, turn out to be not sinister in the least, and certainly, there are reasons for parties discontinuing their litigation on multi-faceted and diverse (sic), and there is nothing, in my judgment, which suggests that there is any particular exceptional quality about this particular case that should cause me to give further directions and to set aside further court time to allow this particular isolated issue of dishonesty to be ventilated."*

The defendant appealed from the judge's decision. **Held**, appeal allowed. In determining the appeal Yip J provided the following guidance as to the correct approach to applications under CPR PD44 para.12.4(c): (i) there was no requirement for exceptionality under this provision before the court give directions under it. This was to be contrasted with CPR PD44 para.12.4(b), which explicitly provided for the need to show exceptionality; (ii) the correct approach to exercising the discretion under this provision required the court to weigh "*all relevant considerations in accordance with the overriding objective*". Furthermore, Yip J held that,

> *"[17] I do not agree with the suggestion put forward by the appellant that the test for determining whether to grant a defendant's application under CPR 44PD 12.4(c) should be analogous to the test for an application for summary judgment under CPR 24.2. The suggestion that a claimant would have to show that there was no real prospect of the allegation of fundamentally dishonesty succeeding and/or show compelling reasons why the allegation should not be pursued just does not fit with the wording of the Practice Direction. There is no presumption that the court should generally direct determination of the issues of fundamental dishonesty nor is there any presumption that the court should generally not make such a direction. In other words, giving such a direction should be seen to be neither routine nor exceptional.*
>
> *[18] The provision has been introduced expressly to allow issues of fundamental dishonesty to be determined after discontinuance. Inevitably, this involves the allocation of further court resources to a case in which the claim is no longer being pursued. It will not be uncommon for such cases to involve relatively modest costs. However, in considering proportionality, it does need to be recognised that there is a public interest in identifying false claims and in claimants who pursue such claims being required to meet the costs of the litigation.*
>
> *[19] Each case will depend on its own facts. This is an area in which judges sitting at first instance must be afforded a wide margin of appreciation. Provided that the judge has weighed the relevant considerations, an appeal court will not interfere merely because it might have arrived at the opposite conclusion. Appeals against discretionary decisions as to whether it is appropriate for issues relating to fundamental dishonesty to be determined are not to be encouraged."*

Having held that the judge erred in law, Yip J exercised the discretion afresh and directed that the matters concerning the allegation of fundamental dishonesty be determined. (See ***Civil Procedure 2018*** Vol.1 at para.44.16.2.)

Practice Updates

LEGISLATION

- **THE GENERAL DATA PROTECTION REGULATION (REGULATION (EU) 2016/679) and THE DATA PROTECTION ACT 2018.** In force, generally, from **25 May 2018.**

On 25 May 2018, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and the Data Protection Act 1998 were replaced by a new data protection regime. The new regime is contained within the General Data Protection Regulation 2016 (the GDPR) and the Data Protection Act 2018.

In the light of the obligations the GDPR imposes on data controllers, Her Majesty's Courts and Tribunals Service (HMCTS) and the Ministry of Justice (MOJ) have jointly issued a Privacy Notice, which provides information on how they process personal data consequent upon civil proceedings being issued. Changes to Civil Procedure Rules Forms have not yet been effected. A copy of the Privacy Notice can be found at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710749/Civil_privacy_notice_05218.pdf*

HMCTS and the MOJ's Privacy Notice is limited in scope to situations where it is the data controller. It does not apply where personal data is being processed by a judge or court acting judicially and, hence, where a judge is the data controller. In respect of processing carried out by the courts and judiciary reference should be made to a separate Privacy Notice issued, notwithstanding various exemptions from obligations otherwise arising under the GDPR, by the Lord Chief Justice and Senior President of Tribunals, which can be found at: *https://www.judiciary.gov.uk/about-the-judiciary/judiciary-and-data-protection-privacy-notice/*.

In Detail

TRANSFERS WITHIN THE HIGH COURT—STATUS OF SPECIALIST LISTS—MEZVINSKY v ASSOCIATED NEWSPAPERS LTD [2018] EWHC 1261 (CH)

The Issue

In ***Mezvinsky v Associated Newspapers Ltd*** [2018] EWHC 1261 (Ch), 25 May 2018, unrep., Chief Master Marsh considered the approach to be taken to transfers within the High Court. Specifically, he addressed the question of the approach to transfers between the Business and Property Courts and the Queen's Bench Division's Media and Communications List. In doing so he considered the application of Senior Courts Act 1981, ss.5(1), 5(5), 61, 64, 65, Sch.1, CPR Pt 30, and the Business and Property Courts Practice Direction. In terms of the latter, he explained the nature of the change effected by the Business and Property Courts creation as a "re-branding" and not a "restructuring".

The Claim

The basis of the claim was that unpixellated photographs of the claimants, who were one and three years old at the time, were published in articles on the defendant's website during 2017. The claimants are the children of Chelsea Clinton and Marc Mezvinsky. The claimants, through their litigation friends, brought proceedings against the defendant for misuse of private information and breach of the Data Protection Act 1998.

The Application to Transfer

On 16 May 2018 the defendant applied to have the claim transferred from the Business and Property Courts' (High Court, Chancery Division) Business List, to the Queen's Bench Division and allocated to the latter's Media and Communications List. The application was brought on two grounds: first, that if transferred it would be listed for trial earlier than it would be if it remained in the Chancery Division; and secondly, privacy claims were outside the scope of the Business List and that after the creation of the Media and Communications List it was "desirable" for all such claims to be allocated to it as it was created specifically for that purpose. Furthermore, it was submitted the judges of the latter list were all specialists in the field and thus a trial was likely to be dealt with in a shorter time than it would be if heard by a non-specialist. Saving time in this way would further the overriding objective.

The Decision
Chief Master Marsh dismissed the application. In doing so he noted that, in effect, the first ground was abandoned as it became common ground that a trial could be listed earlier in the Chancery Division than it could be if transferred to the Queen's Bench Division. The focus of the application was thus the second ground. It was based on a flawed approach to the nature of the Business and Property Courts and the Media and Communications List. It was not in the interests of justice to effect a transfer between the two. The claim was thus to be listed for trial in the Business List of the Business and Property Courts i.e., it was to remain within the High Court, Chancery Division.

The Guidance
In reaching his decision on the second ground Chief Master Marsh stated that it was:

> *"[6] . . . based upon a misconception about the effect of the creation of the Business and Property Courts and the status of the (Media and Communications List)."*

The misconception arose because of a lack of clarity concerning the nature of the High Court's jurisdiction and the nature of the Business and Property Courts and the Media and Communications List.

First, the Senior Courts Act 1981 makes clear that the High Court's jurisdiction is vested in the High Court and not to any specific Division. Each Division has the same jurisdiction, which is a product of its creation by way of consolidation of the superior common law and chancery courts in 1873. The 1981 Act does however provide for the distribution of specific business amongst the Divisions: see Sch.1 of the Act. It further provides for such distribution to be qualified and, thus altered, by rules of court. Additionally, where there is no specific provision allocating particular business to a specific Division, the Lord Chief Justice, with the Lord Chancellor's concurrence, may by order assign such business to a Division (or amend Sch.1 of the Act). As the Chief Master noted, actions for misuse of private information or breach of confidence actions had not been assigned to any specific Division. Consequently, it was, in the first instance, for the claimant to determine the Division in which to issue and proceed with their claim.

Secondly, the choice to issue the present proceedings in the Business and Property Courts' Business List, was subject to the court's power, under CPR Pt 30, to transfer the claim to another Division. The present claim was in reality issued in the Chancery Division. The application was in reality one seeking transfer to the Queen's Bench Division. CPR r.30(5)(1) was the relevant transfer rule. It, however, contains no criteria guiding the exercise of the court's discretion to transfer. It might however be thought that the transfer was subject to the provisions of CPR r.30(2) to (4), which deal with specialist lists. Those provisions were inapplicable to the present claim and application. They were because neither the Business List nor the Media and Communications List are specialist lists under the CPR. As the Chief Master explained, the Media and Communications List is not a specialist list under the CPR. It is simply

> *"[13] . . . a means by which work that is already within the Queen's Bench Division is allocated for its proper performance. (Its) creation . . . has no direct extra-divisional effect"*

It is thus a means by which business within the Queen's Bench Division can be managed more efficiently and effectively. This was also the case for Business and Property Courts' Business List. As he went on to explain:

> *"[14] . . . The fact that the Business List (ChD) is not a specialist list is less obvious than in the case of the M&CL because the Business List (ChD) was created by a Practice Direction. Paragraph 1.1 of the Practice Direction explains the work that is brought together under the umbrella title of the B&PCs and paragraph 1.3 explains how the B&PCs is divided into a number of courts and lists. However, nothing in the Practice Direction changes the status quo concerning the constituent elements of the B&PCs or specialist lists that are within it. Perhaps unhelpfully, the Advisory Note describing the B&PCs (which has no legal status) describes the work of the B&PCs as being divided '… into specialist courts and lists' using specialist in a non-technical sense. The short point for the purposes of this application, other than the fact that Rule 30.5(2) is not engaged, is that* ***the business of the Chancery Division is entirely unaffected by the creation of the B&PCs which has been described as a re-branding as opposed to a re-structuring. The Chancery Division lives; but its identity has had a makeover****." (emphasis added)*

A restructuring of the High Court would either have to be carried out through a re-allocation of business through a revision to Sch.1 of the Act or through the use of the power to alter Divisions through consolidation or creation of new Divisions contained in s.7 of the Act. That had not been done. More immediately, neither the Business List nor the Media and Communications List had been created as specialist lists for the purposes of the CPR. They were thus not comparable to the Technology and Construction Court or Financial List, which are specialist lists for the purposes of CPR r.30.5: see CPR rr.60.2(1), 63A.2(1). Given this, and the need for clarity, it would perhaps be advisable for the future to confine use of the terms "specialist lists" for those lists that are—in the formal sense—specialist lists.

Thirdly, given the nature of the Business List it was wrong to assert that privacy claims were outside its scope. It was a catch-all list for claims that do not fall within the scope of the other lists within the Business and Property Courts. In

other words, it was a general list for claims within those courts that did not fall within the ambit of its other lists. That it was a general list was perhaps obscured by the description in the Business and Property Courts lists, in the Advisory Note explaining their creation, as "specialist lists". As with the Media and Communications List, the Business List was in reality a means of managing claims within the Division to which it belonged more effectively and efficiently.

Given the second and third point, the real issue was whether the present claim should be transferred from the Chancery Division to the Queen's Bench Division. The approach to applications to transfers between Divisions was set out in ***Natl Amusements (UK) Ltd v White City Ltd Partnership*** (2010) and ***Appleby Global Group LLC v BBC*** (2018). In the latter, Rose J concluded that there was no significant difference between the Business List and the Media and Communications List in terms of judicial experience dealing with privacy claims. Moreover, where such claims are issued and proceed within the Chancery Division they will be allocated to the Chancery Division judge with the most appropriate expertise to hear them. There was a sufficient pool of judges in that Division with relevant expertise to deal with privacy claims. There was thus no justification in the present case for effecting a transfer to the Queen's Bench Division for allocation there to its Media and Communications List.

In reaching this decision the Chief Master noted that, in considering any such application to transfer, as here from the Chancery Division to the Queen's Bench Division, the court should however: (i) be wary of parochialism. The real issue was the interest of justice and the overriding objective; ii) not be doctrinaire in preferring one Division over another; and iii) not seek to sidestep the provisions of s.61 of the 1981 Act which require careful consultation and review before specific business is allocated to a specific Division.

Applying the authorities the Chief Master concluded as follows:

> *"[32] I approach the decision in the following way:*
>
> > *(1) It cannot be said that the choice to issue the claim in the B&PCs was obviously wrong. It is therefore incumbent of the defendant to satisfy the court that an order for transfer should be made.*
> >
> > *(2) The defendant has not provided any, or any convincing, evidence to show that there is greater, or a greater depth of, judicial expertise in one Division or the other. The evidence was focussed on other issues that have not proved to be helpful. The defendant glossed over, for example, the very large number of claims that are under management in three waves in the phone hacking litigation. As I have said, I am satisfied there is a pool of judicial expertise in both venues.*
> >
> > *(3) Even if it could be said that there is more expertise amongst the judges who sit regularly in the M&CL, as long as there is an adequate pool of expertise amongst judges who sit in the Business List (ChD) (which there is), it does not follow that the Queen's Bench Division is necessarily more appropriate than the Business List (ChD).*
> >
> > *(4) This is not a case in which the approach to dealing with the case would be different if the claim had been transferred. The directions would have been the same.*
> >
> > *(5) There are no other issues that make one venue or the other more appropriate. A difference of a few months concerning the trial date is marginal. In any event, although a minor consideration, it favours retention of the claim.*
> >
> > *(6) This application is unlike, for example, Natl where Akenhead J concluded that bulk of the factual issues in the claim related to building and engineering and the practices of parties involved in design, construction and development: [37]. The existence of those factors made the claim obviously suitable for transfer to the TCC. Here, it cannot be said that the issues in the claim are obviously more suitable for determination in the Queen's Bench Division given the conclusions I have reached about relative judicial expertise.*
> >
> > *(7) It is wrong in my view for the court to give weight to 'structural' issues of the type instanced by Ms Marzec [i.e., privacy issues are traditionally the domain of the Queen's Bench Division where the methodology for dealing with such claims had been developed by Eady and Jugendhat JJ]. Such issues are for the Civil Procedure Rules Committee and/or the Lord Chief Justice in conjunction with the Heads of Division. In any event, the creation of a pool of predictable decision making need not necessarily be premised upon all the judges making decisions in privacy cases sitting in the same Division.*
>
> *[33] There is no basis for concluding that the Queen's Bench Division M&CL is the appropriate, or the more appropriate, venue for this claim. Both the Business List (ChD) and the Queen's Bench M&CL are appropriate. There are no good reasons to transfer the claim and disturb the legitimate choice made by the claimants at the point the claim was issued."*

Case references

Natl Amusements (UK) Ltd v White City Ltd Partnership [2009] EWHC 2524 (TCC); [2010] 1 W.L.R. 1181, TCC
Appleby Global Group LLC v BBC [2018] EWHC 104 (Ch); [2018] E.M.L.R. 14, ChD.

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