CIVIL PROCEDURE NEWS

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Approach to re-listing an application for hearing where party failed to attend

CPR rr.23.11(2), 39.3(5). The first defendant (the defendant) was ordered to serve two witness statements, by an unless order dated 9 November 2018. The consequence of non-compliance was that the defendant was to be debarred from defending the claims and for judgment to be entered accordingly. Following non-compliance the claimant applied for judgment in their favour. The defendant, a litigant-in-person, did not attend the hearing, having previously advised the court that he was unable to do so as he had a full-time job, a family with young children and could not always make arrangements at short-notice. Judgment was given against the defendant at the application hearing in his absence. The defendant thereafter applied to set aside the judgment. He did so on the basis that he had been unable to attend the hearing. **Held**, the application was refused. In reaching that decision the judge noted that where a litigant fails to attend an application hearing they may apply to have the hearing re-listed. Equally, the court may re-list the application on its own initiative: see CPR r.23.11(2). This power is to be used sparingly, consistently with the need to conserve the court's resources and allot no more than an appropriate share of them to a claim (CPR r.1.1(2)(e)). In considering whether to re-list under r.23.11(2) it was appropriate to take account of the factors, set out in CPR r.39.3(5), applicable where a party seeks to set aside a judgment entered where they failed to attend trial. The two situations were analogous, albeit the r.39.3(5) factors were not to be applied inflexibly and the key issue on an application under r.23.11(2) was the prospect of showing that, should the judgment be set aside, there was a real prospect that the court at the re-listed application hearing would reach a different decision. Additionally, in this case as the defendant remained in default of the unless order, it was necessary to secure relief from sanction for the application to set aside to succeed. On the facts of this case there was no basis to grant relief from sanction. ***Brazil v Brazil*** [2002] EWCA Civ 1135; [2003] C.P. Rep. 7, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.23.11.3.)

■ **Bostani v Pieper** [2019] EWHC 547 (Comm), 4 March 2019, unrep. (Jacobs J)

Tomlin order – six-year time limit to enforce

Limitation Act 1980, s.35(3), CPR r.17(4). Proceedings were settled by way of a Tomlin Order in March 2011. Under the terms of the settlement, payments were to be made to the claimant in six instalments from June 2011 to December 2012. The first two instalments, totalling US$3 million, were paid. The terms of the settlement further provided that were the payments not to be made, the claimant was entitled to enter judgment against the defendant. The claimant, by application dated 4 December 2018, applied to enter judgment under the terms of the Tomlin Order. The defendant resisted the application on a number of grounds, including that the application to enter judgment was time-barred. It was noted that while Morritt VC in ***The Bargain Pages Ltd v Midland Independent Newspapers Ltd*** (2003) suggested that the enforcement of obligations contained in a settlement agreement which formed part of a Tomlin Order was subject to the Limitation Act 1980, there was no prior authority determining the question as to limitation. **Held**, a settlement, even if scheduled to a Tomlin Order, was a simple contract for the purposes of the Limitation Act 1980. As such enforcement was subject to the applicable six-year time limit. This was the case even though enforcement of such a settlement was to enforce the court's own order, see ***Starlight Shipping Company v Allianz Marine & Aviation*** (2011). In this case the application to enforce was brought in time, as the final payment did not fall due for payment until 7 December 2012. As an application to enforce obligations under the settlement is simply an application to the court to enforce its own order, neither CPR r.17(4) nor s.35(3) of the Limitation Act 1980 applied. ***The Bargain Pages Ltd v Midland Independent Newspapers Ltd*** [2003] EWHC 1887 (Ch); [2004] F.S.R. 6, ChD, ***Starlight Shipping Company v Allianz Marine & Aviation*** [2011] EWHC 3381; [2012] 2 All E.R. (Comm) 608, Comm., ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.40.6.2.)

■ **Cathay Pacific Airlines Ltd v Lufthansa Technik AG** [2019] EWHC 484 (Ch), 6 March 2019, unrep. (John Kimbell QC, a deputy Judge of the High Court)

Pt 8 proceedings – guidance on approach to order continuance as Pt 7 proceedings

CPR Pt 7, r.8.1(3), PD 57AB para.2.13. A claim and counterclaim were issued concerning aircraft engine maintenance. The claim was for approximately US$42.8 million. It was a contested claim. The counterclaim was for approximately

US$35.8 million. It was not contested. Two applications were before the court. The first was procedural, the second sought judgment to be entered on the claim, setting-off the sums claimed and counterclaimed. Judgment on the claim was refused. The procedural application sought an order under CPR r.8.1(3) that the claim, which had been issued as a Pt 8 claim, continue as a Pt 7 claim. **Held**, the claim was ordered to continue as a Pt 7 claim. It was further ordered to continue under the Shorter Trial Scheme, under CPR PD 57AB para.2.13. In reaching his decision the deputy judge set out a helpful summary of the ambit of the Pt 8 procedure (paras 31-37). It was apparent that the Pt 8 procedure was flexible, and while its main aim was to move quickly to a final hearing where it was unlikely that substantial disputes of fact would arise, it could be used where there were such substantial factual disputes. Moreover, there was a spectrum between Pt 7 and Pt 8, as noted by Marcus Smith J in ***Canary Wharf (BP4) T1 Ltd v European Medicines Agency*** (2019), where a flexible approach could be taken so as to adapt directions to the individual needs of the proceedings whether the claim remained a Pt 8 claim or was required to continue under Pt 7, see Coulson J in ***Vitpol Building Service v Samen*** (2008) at para.18. That being said, *"flexibility under Part 8 has its limits"* (para.35); see ***ING Bank NV v Ros Roca SA*** (2011) and ***Civil Procedure 2019*** Vol.1 at para.8.0.1, noting specific categories of claim not suitable for the Pt 8 procedure. In the present case there were two identifiable defects in the approach taken by the claimant: first, it failed to contain a statement that Pt 8 applied as required by CPR r.8.2(a). While it was noted that this might appear to be a technical point, it served an important purpose in that it ensured that proper consideration was given to whether Pt 8 was the proper means by which the claim should be prosecuted; and, secondly, there was a failure to comply with CPR r.8.2(b)(i), as the claim form did not identify the question, in this case of construction, which the court was being asked to decide. It was necessary to frame such questions, which were unlikely to raise issues of substantial dispute of fact with "*some degree of precision"* such that they are "*capable of a precise answer*". Care needed to be taken to ensure that the Pt 8 procedure was not used "*liberally and inappropriately*"; see Jefford J in ***Merit Holdings Ltd v Michael J Lonsdale Ltd*** (2017) at paras 21-22 and 31-32. The deputy judge, at para.42, gave further guidance on the proper approach for parties to take when considering whether to issue Pt 8 proceedings:

> *"[42]. . . Whenever a party is contemplating commencing proceedings under CPR Part 8 in respect of a claim which could be started under CPR Part 7, the following steps ought generally to be taken:*
>
> *(a) The proposed Defendant ought to be notified that the use of CPR Part 8 is being contemplated.*
>
> *(b) A brief explanation ought to be provided as why CPR Part 8 is considered to more appropriate than under CPR Part 7 in the particular circumstances of the case.*
>
> *(c) A draft of the precise issue or question which the Claimant is proposing to ask the Court to decide ought to be supplied to the Defendant for comment.*
>
> *(d) Any agreed facts relevant to the issue or question ought to be identified.*
>
> *The obligation to take these steps can be derived from the broader duties imposed on parties in CPR 1.3 ('Duty of Parties to help the court further the overriding objective') and Paragraph 3 (a), (b) and (e) of the Practice Direction on Pre-Action Conduct and Protocols. There will no doubt be exceptional cases (e.g. urgency or an uncontactable Defendant) where these steps will not be practical but if they are followed in the general run of cases, it ought to mean that the situation which arose before Jefford J. [in* ***Merit Holdings Limited v Michael J Lonsdale Limited*** *(2017)] and which has arisen again in this case can be avoided in future."*

Finally, the practice previously noted as being applicable to orders under RSC Ord.28 r.8(1), the predecessor to CPR r.8.1(3), and noted in the ***Supreme Court Practice 1999*** Vol.1 at para.28.8.1, was endorsed and applied in respect of directions concerning service of pleadings consequent upon a direction that a claim continue as a Pt 7 claim, see para.58. The passage from the ***Supreme Court Practice 1999*** endorsed read as follows:

> *"When this rule is invoked, the usual order will be for pleading to be served very quickly and then for the matter to be restored for final directions. It is better not to let affidavits stand as pleading because affidavits cannot be amended nor can particulars of them be ordered."*

Vitpol Building Service v Samen [2008] EWHC 2283 (TCC); (2009) 25 Const. L.J. 319, TCC, ***ING Bank NV v Ros Roca SA*** [2011] EWCA Civ 353; [2012] 1 W.L.R. 472, CA, ***Merit Holdings Ltd v Michael J Lonsdale Ltd*** [2017] EWHC 2450 (TCC); [2018] B.L.R. 14, TCC, ***Canary Wharf (BP4) T1 Ltd v European Medicines Agency*** [2019] EWHC 335 (Ch), unrep., ChD, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.8.0.1.)

■ **Schettini v Silvestri** [2019] EWCA Civ 349, 7 March 2019, unrep. (Lewison, Peter Jackson and Newey LJJ)

Appeal from undertaking – jurisdiction

Senior Courts Act 1981, s.16, CPR Pt 52. An interim injunction was granted on a without notice basis on the appellant's application. On the return date the defendant applied to have it discharged on the basis of, amongst other things, non-disclosure. The injunction was discharged. However, the judge re-granted an interim injunction on condition that the applicant fortify his cross-undertaking in damages. The applicant gave the undertaking. The applicant then sought to appeal the order on the basis that he should not have been required to give the fortified undertaking as a condition upon which the interim injunction be re-granted. **Held**, the appeal was dismissed. In determining the appeal the Court of Appeal had to decide the question whether it had jurisdiction to hear an appeal from the giving of an undertaking in damages. First, the court noted that an undertaking is a voluntary matter for the party. The court cannot compel the giving of an undertaking. All it can do is refuse to grant an injunction in the absence of an undertaking being given, see ***Tucker v New Brunswick Trading Co of London*** (1890). Where a litigant no longer wishes to be bound by an undertaking, they must apply to be released i.e., discharged, from it, see ***Birch v Birch*** (2017). A party cannot appeal from a decision, i.e., the giving of an undertaking, they have made in the conduct of proceedings, see ***Bell Davies Trading Ltd v Secretary of State for Trade and Industry*** (2004), ***Hart v Hart*** (2018). However, the Court of Appeal affirmed that where an undertaking is recorded in a court order, the Court does have jurisdiction to hear an appeal in respect of an undertaking, see s.16 of the Senior Courts Act 1981. There are, however, only two bases on which a party may, in extraordinary circumstances, appeal from the contents of an undertaking. As Lewison LJ put it at paras 20-21:

> *"[20] There are, in my judgment, two possible routes. The first is to decline to give the undertaking; accept that the judge will refuse the injunction in the absence of the undertaking; and appeal the refusal. Even if a judge refuses an injunction, he may still grant a limited injunction (with or without the undertaking) pending appeal: Novartis AG v Hospira UK Ltd [2013] EWCA Civ 583, [2014] 1 WLR 1264. The second is again to refuse to give the undertaking; but to invite the judge to make an order in equivalent terms or to make his grant of the injunction conditional on the provision of fortification. In that way, either the refusal or that part of the order containing the condition may be challenged on appeal.*
>
> *[21] Absent extraordinary circumstances, I would hold that a claimant who gives an undertaking (even where it is given reluctantly in order to obtain the order sought) ought not to be entitled to pursue an appeal against that undertaking. . . A litigant in that position is, of course, entitled to apply to be released from the undertaking (either unconditionally or on condition of offering a new undertaking). I consider that we should treat this appeal as amounting to an application to be released entirely from the undertaking. But as a general rule, such an application will not result in release unless there has been a change in circumstances since the undertaking was given."*

Tucker v New Brunswick Trading Co of London (1890) 44 Ch. D. 249, CA, ***Bell Davies Trading Ltd v Secretary of State for Trade and Industry*** [2004] EWCA (Civ) 1066; [2005] B.C.C. 564, CA, ***Novartis AG v Hospira UK Ltd*** [2013] EWCA Civ 583; [2014] 1 W.L.R. 1264, CA, ***Birch v Birch*** [2017] UKSC 53; [2017] 1 W.L.R. 2959, UKSC, ***Hart v Hart*** [2018] EWCA Civ 1053; [2018] 2 F.C.R. 671, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.2 at para.9A-57.)

■ **The Chartered Institute of Arbitrators v B** [2019] EWHC 460 (Comm), 7 March 2019, unrep. (Moulder J)

Access to documents – disciplinary proceedings

CPR rr.3.10, 5.4C(2). Applications were brought by the claimant for disclosure of various documents from the court records in order to enable their use in disciplinary proceedings brought by and before the Chartered Institute of Arbitrators. The documents sought were: statements of case; witness statements, including exhibits; and written submissions and skeleton arguments. The documents had previously been filed as part of an application under s.24 of the Arbitration Act 1996 to remove an arbitrator on the ground that there were serious doubts as to their impartiality. The application for disclosure was made under CPR r.5.4C(2) and/or the court's inherent jurisdiction. Additionally, permission was sought to rely on such documents, as ordered to be provided, in the disciplinary proceedings or to otherwise use them in the public interest. The judge approached the question of disclosure by applying the law on disclosure of documents that form part of the court record as stated by the Court of Appeal in ***Cape Intermediate Holdings Ltd v Dring*** (2018). The judge noted that that decision was, however, currently on appeal to the United Kingdom Supreme Court. **Held**, applying ***Dring***: (i) as a non-party to the s.24 Arbitration Act 1996 proceedings, the applicant was entitled to receive a copy of the Pt 8 arbitration claim form and statements of case; (ii) in so far as written evidence, i.e., witness statements and exhibits, filed in support

of the Pt 8 claim, and a transcript of previous proceedings, was concerned, CPR r.8.5 suggested that they were records of the court for which the applicant would need permission to obtain. If that analysis were wrong, then they fell to be considered under the court's inherent jurisdiction. As it was in the interests of justice to support disciplinary proceedings, permission would be granted; (iii) access to skeleton arguments fell under the court's inherent jurisdiction. In the present case, permission was not granted to provide access to such documents. Access was refused as the content of the skeleton arguments was not relevant to the disciplinary proceedings. In exercising the discretion to grant access to the various documents in considering the test set out at paras 127-129 of ***Dring***, it was necessary to consider the public interest in supporting the integrity of the arbitral process, which was a quasi-judicial form of alternative dispute resolution. It was in the public interest to support the maintenance of standards in arbitration that the public would expect. Consideration also had to be given to the expectation of confidentiality in the arbitral process, and whether it was in the interests of justice to set that aside: ***Glidepath BV v Thompson*** (2005) applied. A limited declaration was then made granting permission to rely on and/or refer in the disciplinary proceedings to the various documents for which access had been granted. While the applicant had sought access to the documents as a non-party, it was well-established that the circumstances in which declaratory relief could be granted was now wider than it had been historically, see ***Rolls-Royce plc v Unite the Union*** (2009). Furthermore, it was clear in the present case that there was a legal dispute between the applicant and the respondents as to the application, or not, of the legal obligation not to use documents prepared for and used in the arbitration for purposes other than the arbitration, except in the public interest. In so far as the declaration ought to have been brought as a Pt 8 claim, and not by Pt 23 application, that was a procedural error that could be cured by the application of CPR r.3.10 further to the overriding objective; see, ***The Styliani Z*** (2016). The application would thus be deemed to have been brought by way of a Pt 8 claim. ***Ali Shipping Corporation v Shipyard Trogir*** [1999] 1 W.L.R. 314, CA, ***Glidepath BV v Thompson*** [2005] EWHC 818 (Comm); [2005] 2 All E.R. (Comm) 833, Comm., ***Emmott v Michael Wilson & Partners Ltd*** [2008] EWCA Civ 184; [2008] 2 All E.R. (Comm) 193, CA, ***Rolls-Royce plc v Unite the Union*** [2009] EWCA Civ 387; [2010] 1 W.L.R. 318, CA, ***Cape Intermediate Holdings Ltd v Dring*** [2018] EWCA Civ 1795; [2019] 1 W.L.R. 479, CA, ***The Styliani Z*** [2015] EWHC 3060 (Admlty); [2016] 1 Lloyd's Law. Rep. 395, Admlty Ct, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.54C.1 and following.)

■ **Zeromska-Smith v United Lincolnshire Hospitals NHS Trust** [2019] EWHC 552 (QB), 8 March 2019, unrep. (Martin Spencer J)

Application for anonymity – notice to Press Association

CPR r.39.2. A claim for damages for psychiatric injury alleged to have arisen from the stillbirth of the claimant's child. An application for anonymity was made. The trial was listed for hearing on 22 February 2019. The application was made on 25 February 2019. The judge, however, set aside time for the Press Association to be given notice of the application in order to enable it, if it chose, to put in submissions. It did so in writing on 26 February 2019, at which point the judge permitted the application to continue. **Held**, the application was refused. The routine approach to granting anonymity orders in approval hearings relating to children and protected parties was peculiar to such hearings. It was not to be generalised to cases such as the present; ***In re Guardian News and Media Ltd (2010)*** at 723 applied. Having determined the substantive issue, the judge went on to give the following guidance on the proper approach to take to the provision of advance notice of such anonymity applications which ought to be followed in future cases, see para.21:

> *"[21] Finally, I wish to say something about the timing of any application for anonymity in cases which are not approval hearings for protected parties or children. Here, the application was made at the start of the trial, without any notice having been given to The Press Association in advance. This put the court reporter in an awkward position, and did not allow for full consideration of the issues or properly prepared submissions on behalf of the Press. . . in general, it seems to me that such an application should be made and heard in advance of the trial, and should be served on the Press Association. There are two reasons for this. First, and most obviously, it gives the Press Association a proper opportunity to make representations, whether orally at the application or in writing in advance. Secondly, the outcome of the application may inform any decision taken by a Claimant in relation to settlement. Thus, if a Claimant in a sensitive case such as the present knows that, if the matter goes to trial, her name will be published in the press, she may consider that to be an important factor in deciding whether or not to accept an offer of settlement – in some cases it could tip the balance. For these reasons, an application for anonymity should be made well in advance of the trial and Claimants (and their advisers) should not assume that the application will be entertained at the start of the trial (because of the disruption to the trial which may ensue, if the application needs to be adjourned to enable the Press Association time to prepare submissions), nor that it will be "nodded through" by the judge, where the Defendant takes a neutral stance and there is only a court reporter to represent the interests of the press."*

Scott v Scott [1913] A.C. 417, HL, ***In re Guardian News and Media Ltd*** [2010] UKSC 1; [2010] 2 A.C. 697, UKSC, ***JXMX v Dartford and Gravesham NHS Trust*** [2015] EWCA Civ 96; [2015] 1 W.L.R. 3647, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.39.2.14.)

■ ***Bank Mellat v HM Treasury*** [2019] EWCA Civ 449, 15 March 2019, unrep. (Gross, Peter Jackson and Coulson LJJ)

Disclosure where it would contravene provisions of foreign law

CPR rr.31.19(3), 31.19(5). The appellant, an Iranian Bank, appealed from an order made under CPR r.31.19(5) requiring it to disclose unredacted documents, albeit disclosure was to be subject to confidentiality. It was noted to be common ground that the production of such documents in unredacted form would be a breach of provisions of Iranian criminal law. In dismissing the appeal, Gross LJ with whom Peter Jackson and Coulson LJJ agreed, summarised the principles applicable to an application to resist disclosure on the basis that if such an order was made it would place the disclosing party in breach of foreign criminal law, see paras 54-62. Gross LJ summarised the approach at para.63 as follows:

> *"[63] Pulling the threads together for present purposes:*
>
> *(i) In respect of litigation in this jurisdiction, this Court (i.e., the English Court) has jurisdiction to order production and inspection of documents, regardless of the fact that compliance with the order would or might entail a breach of foreign criminal law in the "home" country of the party the subject of the order.*
>
> *(ii) Orders for production and inspection are matters of procedural law, governed by the lex fori, here English law. Local rules apply; foreign law cannot be permitted to override this Court's ability to conduct proceedings here in accordance with English procedures and law.*
>
> *(iii) Whether or not to make such an order is a matter for the discretion of this Court. An order will not lightly be made where compliance would entail a party to English litigation breaching its own (i.e., foreign) criminal law, not least with considerations of comity in mind (discussed in Dicey, Morris and Collins, [On The Conflict of Laws (15th ed.)] at paras. 1-008 and following). This Court is not, however, in any sense precluded from doing so.*
>
> *(iv) When exercising its discretion, this Court will take account of the real – in the sense of the actual – risk of prosecution in the foreign state. A balancing exercise must be conducted, on the one hand weighing the actual risk of prosecution in the foreign state and, on the other hand, the importance of the documents of which inspection is ordered to the fair disposal of the English proceedings. The existence of an actual risk of prosecution in the foreign state is not determinative of the balancing exercise but is a factor of which this Court would be very mindful.*
>
> *(v) Should inspection be ordered, this Court can fashion the order to reduce or minimise the concerns under the foreign law, for example, by imposing confidentiality restrictions in respect of the documents inspected.*
>
> *(vi) Where an order for inspection is made by this Court in such circumstances, considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order of this Court. Comity cuts both ways."*

Mackinnon v Donaldson, Lufkin and Jenrette [1986] Ch. 482, ChD, ***Brannigan v Davison*** [1997] A.C. 238, PC (NZ), ***Morris v Banque Arabe et Internationale d'Investissement SA*** [2001] I.L. Pr. 37, Comp. Ct, ***Secretary of State for Health v Servier Laboratories Ltd*** [2013] EWCA Civ 1234; [2014] 1 W.L.R. 4383, CA, ***National Crime Agency v Abacha*** [2016] EWCA Civ 760; [2016] 1 W.L.R. 4375, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.31.19.2.)

■ **Takhar v Gracefield Developments Ltd** [2019] UKSC 13, 20 March 2019, unrep. (Lords Kerr, Sumption, Hodge, Lloyd-Jones, Briggs, Lady Arden, and Lord Kitchin)

Setting aside a judgment for fraud – no reasonable diligence requirement

The claimant issued proceedings (the first proceedings) alleging that the transfer of several properties to the defendant company resulted from, amongst other things, undue influence. The claim failed. In December 2013 the claimant issued fresh proceedings alleging that the order in the first proceedings be set aside on the grounds that it was obtained by way of fraud. Those proceedings were based on fresh evidence. The defendants sought to have the claim struck out as an abuse of process. The application to strike out was refused. The defendants appealed. The central issue before the Court of Appeal was whether it was necessary to show that the fresh evidence could not

have been made available to the original trial through the use of reasonable diligence on the part of the claimant. The Court of Appeal held that it was necessary for a party seeking to set aside a judgment on the basis of fraud to demonstrate that the evidence upon which the allegation of fraud is based could not have been obtained with reasonable diligence and made available in the original trial. The claimant appealed. The United Kingdom Supreme Court allowed the appeal and **held** that there was no requirement to show that where no allegation of fraud had been raised at the original trial of a claim, that it was necessary for a party wishing to bring a second action to show that the evidence on which the allegation of fraud was based could not have been secured through the use of reasonable diligence before the original trial, see para.54. However, where: fraud was raised at the original trial; or, where a party took a deliberate decision before the original trial not to investigate the matter before the original trial, then it was suggested in *obiter* that it was likely to be the case that the court would have a discretion whether to allow an application to set aside the original judgment, see para.55. The principles governing applications to set aside judgments on the basis of fraud as set out by Aikens LJ in the Court of Appeal's decision in ***Royal Bank of Scotland plc v Highland Financial Partners LP*** (2013) at para.106 were approved, see para.56. ***Henderson v Henderson*** (1843) 3 Hare 100, [1843-60] All E.R. Rep. 378 Ct of Chancery, ***Owens Bank Ltd v Bracco*** [1992] 2 A.C. 443, HL, ***Owens Bank Ltd v Etoile Commerciale S.A.*** [1995] 1 W.L.R. 44, PC, ***Johnson v Gore Wood*** [2000] UKHL 65; [2002] 2 A.C. 1, HL, ***Arnold v National Westminster Bank plc*** [1991] 2 A.C. 93, HL, ***Royal Bank of Scotland plc v Highland Financial Partners LP*** [2013] EWCA Civ 328; [2013] 1 C.L.C. 596, CA, ref'd to.

■ **Matthew v Sedman** [2019] EWCA Civ 475, 20 March 2019, unrep. (Underhill VP, Irwin LJ)

Time at which cause of action accrues

A question arose on appeal as to the date on which a claim against trustees accrued in respect of a court-approved scheme of arrangement. Under the scheme of arrangement creditors had to submit claim forms on or prior to what was defined as the "Bar Date". The Bar Date was defined as the first business day falling three months after the "Effective Date", which was 2 March 2011. It was common ground that any application could be made up until midnight on the Bar Date, which was agreed before the Court of Appeal to be 2 June 2011. The question was, in calculating the limitation period, whether the Bar Date was the first day for calculating the six-year limitation period, or whether time began to run the day after the Bar Date. **Held**, where a deadline for completing an action is a particular day i.e., there is a midnight deadline, the cause of action accrues on the day of the deadline and not the following day, per ***Gelmini v Moriggia*** (1913) and ***Dodds v Walker*** (1981). Where, however, a cause of action accrued at a specific point in time during a specific day, it was well-established that that day was not counted for calculating the limitation period, per ***Pritam Kaur v S Russell & Sons Ltd (***1973). ***Gelmini v Moriggia*** [1913] 2 K.B. 549, KBD, ***Marren v Dawson Bentley & Co*** [1961] 2 Q.B. 135, Leeds Assizes, ***Pritam Kaur v S Russell & Sons Ltd*** [1973] Q.B. 336, CA, ***Dodds v Walker*** [1981] 1 W.L.R. 1027, HL, ref'd to.

■ **Cathay Pacific Airlines Ltd v Lufthansa Technik AG** [2019] EWHC 715 (Ch), 25 March 2019, unrep. (John Kimbell QC, a deputy Judge of the High Court)

Costs – payable in a foreign currency

Senior Courts Act 1981, s.51, CPR r.44.2, CPR PD16 para.9.1. Following on from an earlier judgment, noted above, which directed that CPR Pt 8 proceedings continue as CPR Pt 7 proceedings, the question of costs, amongst other things, arose. In particular, an application was made for a summary assessment of costs to be awarded in Euros. The deputy judge noted that while the High Court had, on three previous occasions considered the question whether an award of costs could be made in a foreign currency, it had not had to determine the question: see, ***Schlumberger Holdings Ltd v Electromagnetic Geoservices AS*** (2009); ***Actavis UK Ltd v Novartis AG*** (2009); ***Elkamet Kunststofftechnik GmbH v Saint-Gorbain France S.A.*** (2016). This was thus the first occasion on which the court would have to do so. **Held**, the court had jurisdiction to award costs in a foreign currency on a summary assessment and in the present case made the order in Euros. The judge reached this decision on the following basis: (i) the court has a wide discretion, subject to any applicable rules of court, under s.51 of the Senior Courts Act 1981 to make an award of costs; see, ***Miliangos v George Frank (Textiles) Ltd*** (1976); (ii) CPR r.44(2)(1) and r.44.2(6) do not expressly limit the discretion to award costs to sterling payments; (iii) there is no implied limit to the discretion in CPR r.44.2, such as to then limit the discretion under s.51 of the 1981 Act. On the contrary, CPR r.1.2, requires CPR r.44.2 to be read such as to permit costs to be awarded, in an appropriate case, in a foreign currency. This is the case as: it would place foreign parties on an equal footing with domestic parties (r.1.1(2)(a); it would save cost and time by avoiding currency conversion charges (r.1.1(2)(b) and (d); it would be fair as it avoided the risk of currency fluctuation (r.1.1(2)(d); (iv) no previous authorities determine the question in the negative; (v) an award of costs is a judgment and as such the ordinary rules applicable to judgments ought to apply; see ***Nyekredit Mortgage Bank plc v Edward Erdman Group Ltd (No.2)*** (1997); (vi) since 1976 it has been permissible to make judgment awards in a foreign currency; see, ***Miliangos v George Frank (Textiles) Ltd*** (1976). There was thus no basis to limit

an award of costs to sterling. The approach then to take was to consider how to approach determining the nature of an award in a foreign currency. As the basis of an award of costs is compensatory, the question must then be what is the most effective basis on which to provide the compensatory indemnity via an award of costs to a receiving party i.e., the court must approach the question by asking what "*currency most truly reflects the claimant's loss and therefore the currency in which it is most appropriate to compensate the receiving party for the costs which it has incurred*" (para.58); see, ***Harold v Smith*** (1860), ***The Folias*** (1979), ***The Dione*** (1980), and ***Brawley v Marczynski (No.2)*** (2002). Finally, while it was noted that the requirements of CPR PD 16 para.9.1 did not expressly apply to the situation where a party sought their costs in a foreign currency they ought to provide notice that they are seeking such an award, why payment should be made in the specified currency, and the sterling equivalent of the sum sought. This information could properly be given via a N260 form in combination with written submissions and a witness statement (see paras 55 and 58). ***Harold v Smith*** (1860) 5 H&N 381, Ct of Exch., ***Miliangos v George Frank (Textiles) Ltd*** [1976] A.C. 443, HL, ***The Folias*** [1979] A.C. 685, HL, ***The Dione*** [1980] 2 Lloyd's Rep. 577, Comm., ***Aiden Shipping Co. Ltd v Interbulk Ltd*** [1986] A.C. 965, HL, ***Nyekredit Mortgage Bank plc v Edward Erdman Group Ltd (No. 2***) [1997] 1 W.L.R. 1627, HL, ***Brawley v Marczynski (No.2)*** [2002] EWCA Civ 1453; [2003] 1 W.L.R. 813. CA, ***Schlumberger Holdings Ltd v Electromagnetic Geoservices AS*** [2009] EWHC 775 (Pat); (2009) 32(5) I.P.D. 32039, Pat., ***Actavis UK Ltd v Novartis AG*** [2009] EWHC 502 (Ch), unrep., ChD, ***Elkamet Kunststofftechnik GmbH v Saint-Gorbain France S.A.*** [2016] EWHC 3421 (Pat); [2017] F.S.R. 23, Pat., ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.44.2.1 and following.)

■ **Herbert v HH Law Ltd** [2019] EWCA Civ 527, 3 April 2019, unrep. (Sir Terence Etherton MR, Lindblom and Asplin LJJ)

Conditional Fee Agreement – assessment of risk – uplift – nature of ATE insurance premium

Solicitors Act 1974 s.70 and CPR r.46.9(3). The claimant pursued a claim for personal injuries arising from a road traffic accident. She instructed solicitors, the respondent to the appeal. She did so on the basis of a conditional fee agreement (CFA) with a 100 per cent uplift. The CFA was a post-LASPO CFA, and was supported by after-the-event (ATE) insurance. The claim settled. The claimant subsequently instructed new solicitors and challenged the respondent solicitors' bill of costs under s.70 of the 1974 Act. Two issues arose: first, a challenge to the level at which the CFA uplift had been set. It was argued that it was in need of justification, that it did not reflect a proper assessment of the litigation risk of the case, and that it was out of step with the previously applicable 12.5 per cent fixed success fee for road traffic accident claims that settled prior to trial; and second, whether the ATE premium was a disbursement or whether it was a cash payment by the solicitors paid on behalf of and as agent of the claimant. The Court of Appeal held as follows. First, the district judge and Soole J held that the uplift of 100 per cent could not be justified and that a reasonable uplift was 15 per cent. The Court of Appeal dismissed the appeal from these decisions and **held** at paras 51-54:

> *"[51] Mr Ralph's evidence in his witness statement was that HH's charging model was the same as that of many of its competitors. He said as follows:*
>
> > *"I can say that the model we have adopted, is that opted for by most of our competitors. It is routine that solicitors now make a solicitor client charge in the form of a success fee: I also know that many of our competitors charge success fees in the same way that we do. Our policy on success fees and the amount therefore reflects the "market rate" for a person who wishes to instruct a solicitor will pay. Equally of course, clients are free to "shop around" for a better rate, or lower success fee."*
>
> *[52] HH's point on the business model is that it is a perfectly fair and reasonable way of addressing the limited recovery of costs, generally fixed costs, in small personal injury claims, and the abolition in such claims of the right to recover from the losing party a success fee payable under a CFA, and so enables solicitors to handle those types of claim, bearing in mind that the client does not pay under the CFA if the claim is lost, the solicitor is effectively funding the litigation as it progresses and the effect of the 100% standard uplift is to spread the risk across the range of cases handled by the solicitor. HH says that consumer protection is provided in these types of claim by the statutory cap of 25% of relevant damages.*
>
> *[53] Leaving aside that there is a substantial dispute between the parties as to the practical implications of the 25% cap on different amounts of damages and profit costs, I do not consider that either HH's justification for its charging model or the 25% cap answer the point that in this country, in the context of a conditional fee agreement, the amount of a success fee is traditionally related to litigation risk, as reasonably perceived by the solicitor or counsel at the time the agreement was made. Across the broad range of litigation, it would be unusual for it not to be. It continues to be the case in those limited areas, such as publication and privacy proceedings and mesothelioma claims, where success fees are still recoverable from the losing party. Even taking the sub-set*

of low value personal injury claims, Mr Ralph's evidence goes no further than that "most" of HH's competitors have adopted the same business model and "many" of HH's competitors charge success fees in the same way. That is insufficient to avoid the need, for the purposes of informed consent of the client under CPR 46.9(3)(a) and (b), to have told the client that the success fee of 100% took no account of the risk in any individual case but was charged as standard in all cases.

[54] Nor was the 100% uplift in the present case any less unusual in nature and amount just because it was capped, as required by LASPO and the 2013 Order, at 25% of general damages for pain, suffering and loss of amenity and damages for pecuniary loss, other than future pecuniary loss. While the level of the contractual cap was not unusual, and its practical effect may have been to reduce the success fee to an amount that was not in all the circumstances exorbitant, it nevertheless remains the case that the starting point of a 100% uplift, irrespective of litigation risk, was and is unusual."

Secondly, both the district judge and then Soole J on appeal accepted that the ATE insurance premium was a solicitors' disbursement. The Court of Appeal allowed the appeal on this point and **held** that it was not a disbursement. It held that the applicable test was that set out in ***Re Remnant*** (1849). As Sir Terence Etherton MR put it at para.66:

"[66] It follows that a disbursement qualifies as a solicitors' disbursement if either (1) it is a payment which the solicitor is, as such, obliged to make whether or not put in funds by the client, such as court fees, counsel's fees, and witnesses' expenses, or (2) there is a custom of the profession that the particular disbursement is properly treated as included in the bill as a solicitors' disbursement."

This distinction was seen to be reflected in the distinction between "disbursement" and "professional disbursement" in the Solicitors Regulation Authority Handbook Glossary 2012 (see para.67). ATE insurance premiums did not fall within either of the two categories of disbursement, see paras 68-69:

"[68] The ATE insurance premium does not fall within either of those categories of solicitor's disbursements I have mentioned. It is a premium on a policy of insurance under which the client is the insured, pursuant to a contract of insurance made between the insurer and the client, in order to provide the client with funds to discharge costs which are not recovered from the opposing party and the client is liable to pay, whether those are costs of the other party or of the client's own solicitors. As the Court of Appeal observed in Hollins v Russell [2003] EWCA Civ 718, [2003] 1 WLR 2487 at [114], "the client's liability to pay the [ATE] insurance premium arises from the contract of insurance, not from her contract with the legal representative". In the present case, it was an insurance contract effected by HH as Ms Herbert's disclosed agent, and it specified Ms Herbert as "the Policyholder". An ATE insurance premium is not a payment which a solicitor is obliged, as such, to make irrespective of whether or not put in funds by the client, comparable to court fees and counsel's fees. It is not, technically speaking, a litigation expense at all: see BNM v MGN Limited [2017] EWCA Civ 1767 at [73]. Nor does the evidence establish that there is a custom of the solicitors' profession that an ATE insurance premium is to be treated as a solicitors' disbursement to be included in the bill submitted to the client. Ms Herbert relies on the practice of including the ATE insurance premium as a disbursement in the bill presented by the successful party to the losing party when success fees were recoverable before LASPO. I agree with Mr Bacon that this does not assist at all in establishing a custom that such a premium has customarily been treated as a solicitor's disbursement on solicitor and client assessments. There is no evidence at all before us as to such a custom. Nor did District Judge Bellamy refer to any such custom. He referred to Cook on Costs 2017 para. 2.12. We have not been shown that passage and it is not in our bundle of authorities. There is in the bundle an extract from para. 2.13 of Cook on Costs 2018, although we were not referred to it. I assume it is the same as the paragraph in the earlier edition of Cook, to which the District Judge referred. It describes the principle in Re Remnant and gives examples of what are and are not solicitor's disbursements consistent with that case. An ATE insurance premium is not one of them.

[69] Mr Kirby relied upon the terms of the particular retainer between HH and Ms Herbert and sought to argue that the Insurance Information Fact Sheet, which she signed, required her to take out ATE insurance cover unless she had "Before The Event Insurance" or some other means of funding any adverse order for costs and HH's disbursements. Even if that is the correct interpretation of the document, it misses the point as the test for what is a solicitor's disbursement to be included in the bill on assessment. The test is not what is agreed between an individual solicitor and the client but what every solicitor, as such, is obliged to pay irrespective of funding by the client or what is properly included in a bill of costs on assessment as a matter of general custom of the profession."

Re Remnant (1849) 11 Beav 603, Ct of Chancery, ***Hollins v Russell*** [2003] EWCA Civ 718; [2003] 1 W.L.R. 2487, CA, ***BNM v MGN Ltd*** [2017] EWCA Civ 1767; [2018] 1 W.L.R. 145, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.44.6.4.)

Practice Updates

STATUTORY INSTRUMENTS

- **THE EUROPEAN UNION (WITHDRAWAL) ACT 2018 (EXIT DAY) (AMENDMENT) REGULATIONS 2019** (SI 2019/718) in force from **12.40 pm on 28 March 2019.**

Consequent upon the agreement reached between the United Kingdom and the European Council to extend the two-year notice period for the withdrawal of the United Kingdom from the European Union, the 2019 Regulations amend the definition of "exit day" in s.20 of the European Union (Withdrawal) Act 2018. As amended "exit day" is either 11.00 pm on 22 May 2019 or 11.00 pm on 12 April 2019. It is the former date if the House of Commons approves the EU withdrawal agreement by 11.00 pm on the 29 March 2019, otherwise it is the latter date. See ***Civil Procedure News* Issue 3 of 2019** for details on the various statutory instruments and draft statutory instruments that are effected by the amendment to the definition of "exit day" in terms of when they are, in the event of a no-deal Brexit, intended to come into force.

PRACTICE DIRECTIONS

- **CPR PRACTICE DIRECTION – 107th Update.** In force on **EU "exit day"** i.e., the same day and same time as the Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 (SI 2019/521) enter into force. The Update effects amendments to Practice Directions consequent upon those to be made by the 2019 Regulations (see ***Civil Procedure News* Issue 3 of 2019**.
- **CPR PRACTICE DIRECTION – 106th Update.** In force from **11.00 am on 18 March 2019.** The Update amended CPR PD 51R – Online Money Claims Pilot and CPR PD 51S – The County Court Online Pilot. The amendments were:
  - to insert a new paragraph 10A in CPR PD 51R – Online Money Claims Pilot, making provision for claimants to inform the court if a claim settles; and, to make technical amendments concerning time limits to submit documents to the court in paragraphs 14.1(1), 14.1(2)(b), and 14.1(3); and
  - to make technical amendments concerning time limits to submit claim forms online in paragraphs 15, 17.2 and 18 of CPR PD 51S – The County Court Online Pilot.

MINISTRY OF JUSTICE CONSULTATION

- **EXTENDING FIXED RECOVERABLE COSTS IN CIVIL CASES: IMPLEMENTING SIR RUPERT JACKSON'S PROPOSALS – CONSULTATION**

On **28 March 2019**, the Ministry of Justice issued a consultation on extending fixed recoverable costs in civil claims. The consultation closes on **6 June 2019**. The consultation is available at: *https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/*. Its focus is the question of implementation of the recommendations made by Sir Rupert Jackson in the Fixed Recoverable Costs Supplementary Report to his Civil Litigation Costs Review, which was issued in 2017. The focus of the consultation paper is to consider the proposed extension of fixed recoverable costs to all cases allocated to the fast track; whether to extend the fast track to higher value cases, i.e., specified cases valued from £25,000 to £100,000, rather than, as had been recommended by Sir Rupert, create a new intermediate case track to which fixed recoverable costs would apply; and whether to apply costs budgeting to specified judicial review proceedings. Subscribers are encouraged to respond to the consultation to ensure that any conclusions drawn are as well-informed as possible.

In Detail

GUIDANCE ON SENTENCING AN EXPERT WITNESS FOR CONTEMPT OF COURT – LIVERPOOL VICTORIA INSURANCE COMPANY LTD v ZAFAR [2019] EWCA CIV 392

In ***Liverpool Victoria Insurance Company Ltd v Zafar*** [2019] EWCA Civ 392, 19 March 2019, unrep., the Court of Appeal (Sir Terence Etherton MR, Hamblen and Holroyde LJJ) provided general guidance on the approach to be taken to sentencing an expert witness whose practice of completing expert reports placed them in contempt of court or who lied when questioned about such reports.

The background

Proceedings seeking damages for personal injury said to have arisen as a consequence of a road traffic accident were brought by a taxi driver. A registered general medical practitioner (GP), was instructed to provide a medico-legal report in respect of the taxi driver's personal injuries. The respondent GP carried out his expert witness practice through a private company. The court noted that he produced some 5,000 expert reports annually, each report taking some 15 minutes to complete. The expert report in the present case contained the required declaration of compliance with the requirements of CPR Pt 35. It also contained a statement of truth and the assertion that the report was the expert's own independent opinion.

Following completion of the expert report, the taxi driver complained that it did not reflect the extent of his symptoms. His solicitor asked the expert, via email, to review his notes in the light of the information the taxi driver had provided and if necessary amend the report. The report was amended, albeit no further examination of the taxi driver was made and the expert had no significant notes pertaining to the original examination. The second report differed "*very significantly from the original report*". There was nothing in it to suggest it was a revised or amended report, or that there had been a prior report.

The original report was inadvertently included in the trial bundle. In the circumstances, the judge gave various directions, including those requiring witness statements to be given by the expert. In his witness statement the expert stated that the original report was the correct version of his report, and that the amended version had been made without his permission. He subsequently informed the appellant's solicitor that he ought not to have made that witness statement as he had amended the report. A further witness statement was made to that effect. Both witness statements were verified with a statement of truth.

The appellants subsequently issued proceedings seeking the appellant, and several others, committal for contempt of court. Sixteen grounds of contempt were alleged. Each alleged the respondent made or caused to be made a false statement in a document verified by a statement of truth. Following an extended hearing the judge held that ten of the grounds were made out to the criminal standard of proof, including that the expert had lied about altering the original report. He sentenced the respondent to be committed to prison for six months, suspended for six months. The appellant sought permission to appeal seeking to have the sentence increased as it was alleged to be unduly lenient. Permission was granted on the basis that there was no authority or other guidance on the appropriate sentence for an expert witness whose approach to expert reports was in contempt of court, or who told "*repeated lies when questioned about [those practices]*", see para.57.

The guidance

The Court of Appeal gave the following guidance to the approach to be taken to sentencing for contempt, see paras 57-71:

- contempt of court arising from a false statement verified by a statement of truth irrespective of whether it arose through dishonesty or recklessness as to whether the statement was true or false was always serious: it undermined the administration of justice. In assessing seriousness, the Sentencing Council's Guidelines on imposing community and custodial sentencing and on the reduction of sentence following a guilty plea were relevant. They were not, however, a precise analogy. Given this it was necessary for a court to: consider the contemnor's culpability, the harm caused, intended to be caused or likely to be caused by the contempt. Having determined the seriousness, the court must then consider if a fine would be a sufficient penalty. Where a fine was appropriate, then committal to prison could not be justified (para.58);
- A deliberate or recklessly made false statement verified by a statement of truth is, however, usually so inherently serious as to require committal to prison. This is the case irrespective of who makes the statement i.e., claimant, lay witness, or expert witness (para.59) This is the case even if the false statement comes to light early in the proceedings and does not therefore affect the outcome (paras 60, 64);

- "*In the case of an expert witness, the fact that he or she is acting corruptly and makes the relevant false statement for reward, will make the case even more serious; but it will be a serious contempt of court even if the expert witness acts from an indirect financial motive (such as a desire to obtain more work from a particular solicitor or claims manager), or without any financial motivation at all, and even if the expert witness stands to gain little financial reward by it. This is so because of the reliance placed on expert witnesses by the court, and because of the corresponding importance of the overriding duty which experts owe to the court*" (para.59);
- Culpability depends on the circumstances of the case. While not setting out an inflexible rule, an expert who is reckless as to making a false statement will usually be as culpable as one who does so intentionally (para.61);
- In assessing an expert witness's culpability, the extent to which they persist in the false statement or engages in other forms of misconduct to hide the making of the false statement is a relevant consideration (para.63);
- In determining the length of any prison sentence, the two-year range available to the court must be applied so as to cover a range of conduct. Where more than one contemnor is before the court, it must consider the comparative seriousness of an individual contemnor's misconduct in setting an appropriate sentence (para.64);
- In determining sentence, it will be necessary to take account of any relevant mitigation i.e., an early admission, particularly if made before proceedings commence or if it is made before any allegation of misconduct is made. The earlier the admission is made the greater the reduction in sentence may be appropriate. Co-operation with any investigation into misconduct committed by other individuals in the same or other fraudulent claims will also be relevant mitigation. Genuine remorse is equally valid mitigation. Serious ill-health, previous good character, a previously unblemished professional record can all be taken account of in determining sentence. However, it must be borne in mind that such factors as previous good character are what enable the expert to be in the position to make such false statements. Hence any such breach of trust must still be expected to result in a severe sanction (paras 65, 68);
- "*The fact that an expert witness has brought ruin upon himself or herself, and/or the fact that he or she faces proceedings by a professional disciplinary body, will therefore not in themselves be a reason not to impose a significant term of committal.*" (para.65);
- In assessing sentence, the court must also give proper weight to the impact of committal on other persons. This was particularly important where the contemnor was the sole or principal carer for children or vulnerable adults. Such factors in a borderline case may justify the court in making a non-custodial sentence or suspending a sentence (para.66);
- Where there is delay between a contemnor making an early admission of culpability and the court imposing a sanction, and that delay is outside the control of the contemnor, then this may be an important point of mitigation due to the anxiety caused to the contemnor by the delay (para.67);
- A maximum reduction of a third to the sentence for the totality of mitigation will only be appropriate where the misconduct is admitted as soon as proceedings commence. A sliding scale of reduction is to be applied, to 10 per cent where an admission of misconduct is made at trial (para.68);
- Having determined the appropriate length of the sentence, the court must then consider whether it can properly be suspended and ". . . *in the case of an expert witness, the appropriate term will usually have to be served immediately, and that one or more powerful factors justifying suspension will have to be shown if the term is to be suspended. We do not think that the court is necessarily precluded from taking into account, at this stage of the process, factors which have already been considered when deciding the appropriate length of the term of committal. Usually, however, the court in deciding the length of the term will already have given full weight to the mitigation, with the result that there is no powerful factor making it appropriate to suspend the term.*" That a false statement was made recklessly is not, however, a strong factor pointing towards suspension (paras 69, 70).

The decision

The Court of Appeal held that the judge's sentence was unduly lenient, and fell outside the range of sentences reasonably available. Nor had the judge identified "*any powerful factor or combination of factors in favour of suspension*", see para.74. As a consequence the court could retake the decision. It, however, concluded that in the circumstances it would not impose a more severe sentence. It reached that decision on the basis that it would be unfair to the respondent to do so given that its present judgment was setting out guidance for the future. Hence it would pass the same sentence as the judge, albeit for different reasons and having declared that the original sentence was unduly lenient.

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