CIVIL PROCEDURE NEWS

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THE WHITE BOOK SERVICE 2019

SWEET & MAXWELL

In Brief

Cases

■ **Yuzu Hair & Beauty Ltd (Dissolved) v Akilan Selvathiraviam** [2019] EWHC 772 (Ch), 13 February 2019, unrep. (Zacaroli J)

Freezing injunction – ordered where company had been struck off the register

CPR r.25.1(f), Senior Courts Act 1981 s.37, Companies Act 2006 s.1029. The claimant company had been struck off the register of companies. It had applied to be restored to the register. Pending that application i.e., whilst it remained dissolved, it applied for a freezing order against the defendant. The order was granted on a without notice basis. The question was raised at the with notice hearing whether a company that no longer existed because it had been struck off could apply for and obtain the grant of a freezing injunction. **Held**, the court had jurisdiction to grant a freezing injunction on the application of a company that had been dissolved. In reaching that decision Zacaroli J stated: (i) the application could not be granted on the basis that an application to restore the company had been made. While restoration would validate acts done prior to restoration, at the time the application is made no legal person exists to make it. Furthermore at the time the application is made the court cannot be certain it will be restored to the register; (ii) the application could, however, properly be made as part of the application, made by the director and shareholder of company, to restore it to the register. As the application to restore was part of legal proceedings, the aim of which was the pursuit of a claim to recover monies said to be owed to the company, s.37 of the 1981 Act could be relied upon. As Zacaroli J put it at para.4:

> *"[4] I consider that there is, however, another route to achieving the same end. That is to make a freezing order in the context of the application by the director and shareholder to restore the company to the register. Those are legal proceedings, the purpose of which is to enable the company to pursue a claim to recover money of which it had been defrauded by the defendant. The power under section 37 of the Senior Courts Act 1981 is wide enough, in my judgment, to justify an order being granted to an applicant in such proceedings in order to freeze the assets of someone against whom the company, when it is restored, would have a claim. An injunction would be justified in those circumstances as protecting the interests of the applicant (the director and shareholder) by preserving the assets of the company it is sought to have restored, thus ensuring that the restoration application achieves its objective."*

In reaching that decision, the judge relied on the decision of Briggs J in ***HM Revenue & Customs v Egleton*** (2006). He noted, however, that Briggs J held in that case, in the context of holding that a petitioning creditor of a company could obtain, under s.37 of the 1981 Act, a freezing injunction against a third-party debtor to the company, that such an order was one that should "*only rarely be given*". Briggs J reached that decision on the basis that there were alternative routes, in the context of that situation, that could be pursued to reach the objective of preserving assets. Distinguishing on this point, Zacaroli J held that in the present situation there was no alternative route to obtain relief, see paras 6–11. ***HM Revenue & Customs v Egleton*** [2006] EWHC 2313 (Ch); [2007] 1 All E.R. 606, ChD, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.25.1.25.1 and following; Vol.2 at para.15-55.)

■ **Vedanta Resources Plc v Lungowe** [2019] UKSC 20; [2019] 2 W.L.R. 1051, 10 April 2019 (Lady Hale PSC, Lords Wilson and Hodge, Lady Black, and Lord Briggs)

Jurisdiction – meaning of "proper place to pursue claim"

CPR r.6.37.3. The UK Supreme Court considered a number of issues concerning jurisdiction arising from claims concerning the alleged toxic emissions from copper mines in Zambia. One of those issues concerned the correct interpretation of the wording of CPR r.6.37.3. Specifically, the UKSC considered whether the language of CPR r.6.37.3, which specified that the court will not give permission to serve a claim out of the jurisdiction unless satisfied that England and Wales *"is the proper place in which to bring the claim"* differed in meaning from the analogous rule under RSC Ord.11 r.4(2). The rule under the RSC provided that permission would not be granted unless the court held *"that the case is a proper one for service out of the jurisdiction"*. The issue turned on whether the change in reference from "the case" under the RSC to "the claim" under the CPR made a material difference. At para.74 of his judgment, Lord Briggs, with whom the other Justices agreed, dealt with the issue in short order. **Held**:

> *"[74] I have not been persuaded that this change of language from 'the case' to 'the claim' was intended to effect any change in the previously clearly stated requirement for the court to consider the proper place for the case as a whole. In particular, the phrase 'the claim' is used in CPR Practice Direction 6B paragraph 3.1(3) in a way*

which suggests that the foreign defendant must be 'a necessary or proper party to that claim', which is the claim which has been or will be served on the anchor defendant."

Lord Briggs went on to overrule the approach taken by the Commercial Court in ***OJSC VTB Bank v Parline Ltd*** (2013): the question whether claimants would continue proceedings against an anchor defendant in England and Wales, thus giving rise to the risk of their being irreconcilable judgments, was not decisive in favour of finding that that was the proper place for the claim to be tried. The risk of irreconcilable judgments was a factor in deciding which was the proper place for the claim to be tried, and no more than that: it was not a decisive factor, see paras 68–87. ***OJSC VTB Bank v Parline Ltd*** [2013] EWHC 3538 (Comm), unrep., Comm., ref'd to. (See ***Civil Procedure 2019*** Vol.1 at paras 6.37.1 and following.)

■ **Illumina Inc v TDL Genetics Ltd** [2019] EWHC 1159 (Pat), 7 May 2019, unrep. (Henry Carr J)

Expert evidence – where adduced by hearsay notice

CPR 35.4. In proceedings alleging a patent infringement, the claimants wished to rely on expert evidence that had been relied upon in a previous claim in which they and the defendants were parties. They did so by way of service of a hearsay notice. The question before the court was whether it was necessary for the claimant to seek permission to adduce the expert evidence. **Held**, CPR Pt 35 did not apply to the expert evidence; ***Rogers v Hoyle*** (2014) applied and ***Mondial Assistance (UK) Ltd v Bridgewater Properties Ltd*** (2016) followed. It was established in ***Rogers v Hoyle*** at para.62 that CPR Pt 35 only applied to expert evidence where that evidence was obtained from an expert instructed by a party to the immediate proceedings i.e., the expert whose evidence was to be adduced was an expert within CPR r.35.2(1). The court, however, retained a discretion under CPR r.32.1(2) to exclude such evidence where it was to be adduced as hearsay. It should be slow to exclude such hearsay evidence; objections to it should be dealt with by consideration, at trial, of the weight to be given to it; see ***Mondial Assistance (UK) Ltd v Bridgewater Properties Ltd*** (2016) at para.22. That being said, such evidence could be excluded as hearsay where to allow it would be contrary to the overriding objective i.e., that it would, for instance, lead to disproportionate cost. Henry Carr J summarised the position as follows, at paras 24–25:

"[24] . . . The Court of Appeal concluded in Rogers v Hoyle that the purpose of CPR Part 35 is to regulate the evidence of experts instructed by the parties, to ensure that they act as experts and regulate the use and content of their reports. If the relevant expert is not instructed by one of the parties, or is not instructed by one of the parties in the proceedings in which the evidence is sought to be adduced, then Part 35 has no application.

[25] . . . CPR Part 35 is forward-looking. It seeks to regulate and control expert evidence which has not yet been adduced by a party to the proceedings. Furthermore, I do not accept that a party who seeks to adduce evidence in respect of which permission has already been obtained under Part 35 in previous proceedings and where the expert has already been cross-examined on his report (as in the present case) should be in a worse position than a party who seeks to adduce such evidence in respect of which permission has not previously been obtained (as in Rogers v Hoyle and Mondial)."

Rogers v Hoyle [2014] EWCA Civ 257; [2015] Q.B. 265, CA, ***Mondial Assistance (UK) Ltd v Bridgewater Properties Ltd*** [2016] EWHC 3494 (Ch), 8 November 2016, unrep., ChD, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.35.4.2.)

■ **ATB Sales Ltd v Rich Energy Ltd** [2019] EWHC 1207 (IPEC), 14 May 2019, unrep. (Melissa Clarke HHJ sitting as a judge of the High Court)

Finding of dishonesty – dishonesty not pleaded

CPR Pt 16, PD16 para.8.2. The claimants brought copyright infringement proceedings concerning its bicycle logo. Neither fraud nor dishonesty was pleaded in the Particulars of Claim. In the circumstances the defendants argued that the claimants had to be taken to have accepted that the defendants had an honest belief that: (i) they were unaware of the claimant or its logo; and (ii), they believed they had created their own logo independently of the claimant's logo. **Held**, the judge rejected the argument arising from the claimants' Particulars of Claim. It was not correct to suggest that in the absence of a pleading of dishonesty or fraud both the party whose pleading was silent on the issue and the court were bound to accept that a witnesses' evidence had been given honestly (see para.23). There were many circumstances where fraud or dishonesty were suspected, but there was no sufficient evidence for a party to plead it properly. Facts may arise during the course of a trial that, in the absence of a pleaded case of fraud or dishonesty, could form the basis of such a finding. As the judge explained at paras 26–27:

"[26] It is trite law that the assessment of the credibility and reliability of evidence is peculiarly a matter for the court. Of course I accept [the] submission that the Claimant is entitled to test the Defendants' evidence by cross-examination at trial. Until it is so tested, and considered in the light of other evidence before the court and the inherent probabilities, the court cannot know whether on the balance of probabilities it is true, mistaken, dishonest or concocted.

[27] As long as the facts upon which an inference of dishonesty may be based are pleaded, if evidence emerges at trial which the Claimant considers sufficient that the court might properly find dishonesty, even though it was not able to plead it before trial, it must be put to the relevant witness so that he may answer it. It is only then that a court may properly be invited to, and may make, an evidential finding that such a witness was indeed dishonest. This is part of the court's ordinary adjudicative function. In this case, the facts from which dishonesty may be inferred are clearly set out in the pleadings and arise from the cause of action. The Claimant pleads that the Defendants have copied C's Device, and the Defendants deny any familiarity with the Claimant or C's Device and deny copying it. It is for the court to sift and evaluate the evidence to determine the case. The court's hands will not be tied in the manner that the Defendants seek, by the fact that dishonesty has not been pleaded."

(See ***Civil Procedure 2019*** Vol.1 at para.16.0.1)

■ **Merinson v Yukos International UK BV** [2019] EWCA Civ 830, 15 May 2019, unrep. (Gross, Peter Jackson and Rose LJJ)

Jurisdiction – when dispute has arisen

Regulation (EU) No.1215/2012, art.23(1). The appellant was formerly employed by the respondent in the Netherlands. Proceedings between them brought there resulted in a court approved settlement, which contained a clause purporting to give the Dutch courts exclusive jurisdiction. The respondent subsequently issued proceedings seeking damages for alleged breaches of duty by the appellant said to have been carried out during the course of his employment. The claim was issued in England. The claim also sought a declaration that the settlement did not bar the claim for damages being brought and/or annulling the Dutch settlement. The claim was served by personal service on the appellant. Service was effected in England, where the appellant was then domiciled. The appellant sought a declaration that the English courts had no jurisdiction to trial the claims. The judge dismissed the application. The Court of Appeal dismissed an appeal from that decision. On the appeal it was common ground that the claim for damages was one relating to a contract of employment within the terms of art.20.1 of Reg.1215/2012. The question was whether the claim seeking to annul the settlement agreement was also one relating to a contract of employment. That question was to be determined by the application of the test set out in ***Aspen Underwriting Ltd v Credit Europe Bank NV*** (2018) i.e., *"whether in reality or substance there is a material nexus between the Annulment Claims and (the) contract of employment"* (see para.33). In the present case there was such a nexus, and as such the next question concerned service. Article 22(1) of Reg.1215/2012 provides that employers may only bring proceedings against employees in the courts of the Member State in which an employee is domiciled. That rule may, however, be set aside by agreement of the parties conferring exclusive jurisdiction *"to settle any disputes which have arisen or may arise in connection with a particular legal relationship"* on the courts of another Member State under art.23(1) of the Regulation. The question was whether the settlement agreement was one entered into by the parties after the dispute in the present claims had arisen. The Court of Appeal held that the test for determining when *"a dispute had arisen"* was that set out in the *Jenard Report* (see paras 44–48). As Gross LJ put it:

"[44] As it seems to me, there is no good reason why this test ('the Jenard test') should not be equally applicable to the provisions of Art. 23(1) of Brussels Recast, dealing with contracts of employment; the policy considerations as to matters relating to insurance and individual contracts of employment are materially similar in this regard. Accordingly and without reading it as a statute, the Jenard test for establishing when a dispute has arisen under Art. 23(1) contains two – cumulative – limbs:

i) Limb 1: The parties disagree on a specific point; and

ii) Limb 2: Legal proceedings are imminent or contemplated.

Thus, under this test, the parties are not free to enter into a jurisdiction agreement departing from the Section 5 jurisdiction regime unless and until both Limb 1 and Limb 2 are satisfied."

That test was not satisfied in this case. As such the exclusive jurisdiction agreement in the settlement agreement did not apply, and the English courts had jurisdiction as the courts of the Member State in which the appellant was domiciled at the relevant time. Furthermore, Gross LJ held that art.59 of the Regulation did not preclude the English courts exercising jurisdiction in respect of the claim seeking to annul the settlement (see paras 91–95). ***Aspen Underwriting Ltd v Credit Europe Bank NV*** [2018] EWCA Civ 2590; [2019] 1 Lloyd's Rep. 221, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.6JR.28.)

■ **Zurich Insurance Plc v Romaine** [2019] EWCA Civ 851, 17 May 2019, unrep. (Davis and Haddon-Cave LJJ)

Contempt of court – false statement of truth – proceedings discontinued

CPR rr.32.14, 81.18(3)(a), 81.17(1)(a). The claimant issued proceedings seeking damages for alleged breach of statutory duty and/or negligence said to have been caused by noise-induced hearing loss. The particulars of claim were supported by a statement of truth; CPR r.22.1. Evidence obtained by the defendant suggested that the nature of the claim advanced was untrue, and hence that the statement of truth was a false statement of truth. The defendant issued an application to strike out the claim, following which the claimant applied to discontinue the claim. The defendant subsequently commenced committal proceedings (CPR r.32.14, r.81.17(1)(a)). Permission to bring committal proceedings was, however, refused, on the basis that it was not in the public interest where, as here, the claim had been discontinued at a *"relatively early stage"*. The defendant appealed from the refusal. An oral reconsideration of the refusal was also refused. An appeal from that refusal was considered by the Court of Appeal, which granted the appeal and granted permission for contempt proceedings to be brought. In reaching its decision the Court of Appeal provided a summary of the applicable principles, which were intended to ensure that contempt proceedings were only brought when there was *"a strong prima facie case as to knowing falsity"*, see paras 26–29, ***A Barnes t/a Pool Motors v Seabrook*** (2010) at para.41, and ***KJM Superbikes Ltd v Hinton*** (2009) especially paras 16–18. Haddon-Cave LJ considered two specific issues. First, he noted that where a party considered that a party or witness may have committed contempt they should warn them of that at the earliest opportunity. A failure to do so is a factor for the court to take account of in assessing whether to grant permission to bring contempt proceedings. Where, as here, the alleged contemnor commenced proceedings, the absence of such a warning is *"unlikely to be of any relevance"* where they prepared the allegedly false statements. As he put it at para.47:

> *"[47] In practice, the absence of a warning is unlikely to be of any relevance where the alleged contemnor is himself the claimant in an underlying personal injury claim (such as the present case) and where the allegedly false statements are contained in claims documents prepared by himself or his solicitors and signed with a 'Statement of Truth'. Whilst the CPR do not provide (or allow) for a penal notice to be attached to a 'Statement of Truth', it is difficult to conceive of circumstances where a claimant can be heard to say that he was prejudiced by the absence of warning about the risks of contempt proceedings if he, himself, has been responsible for bringing a fraudulent claim."*

Secondly, it was right to say that early discontinuance was not a bar to a grant of permission to bring committal proceedings. While it was a factor to consider in assessing whether to grant permission, the court should be aware that discontinuance may be used tactically by unscrupulous parties engaged in wrongdoing. As Haddon-Cave LJ explained at paras 49–51:

> *"[49] The fact that a claimant or applicant discontinues proceedings or an application immediately or shortly after being confronted with evidence or an accusation of falsity is likely to be a relevant factor to be taken into account in most cases. This is because the claimant who discontinues immediately upon realising that 'the game is up' is naturally, and appropriately, to be contrasted with the claimant who contumaciously presses on nevertheless, wasting everyone's time and costs in the process. However, the analysis goes deeper than this. The stratagem of early discontinuance should not be seen to be used by unscrupulous claimants or lawyers as an inviolable means of protecting themselves from the consequences of their dishonest conduct. It is clear that the modus operandi of some of those involved in fraudulent insurance claims has been to issue tranches of deliberately low-value claims (sometimes on an industrial scale) for e.g. whiplash, slips and trips etc and when confronted with resistance or evidence of falsity, simply then to drop those particular claims, in anticipation that it would probably not be worth the candle for insurers to pursue the matter further, particularly since recovery of costs can itself be time-consuming and costly and nominal claimants may be impecunious. The problem has become even more acute in recent times because of one-way cost shifting ('QOCS') and the costs of proving 'fundamental dishonesty' under CPR 44.16 (and c.f. section 57 of Criminal Justice and Court Act 2015).*
>
> *[50] Thus, whilst the Judge was right to observe that early discontinuance was not a 'bar' to permission to bring committal proceedings, in my view, he erred because he should also have had regard to the very real mischief that the stratagem of early discontinuance represents in this arena as one of the tactics of unscrupulous claimants and lawyers who engage in the practice of low-value wide-scale insurance fraud, particularly in the field of e.g. NIHL claims.*
>
> *[51] It is axiomatic that the court should be astute to protect the court processes being used as an instrument of, or aid to, fraud in any way. Further, false statements in court documents are public wrongs which offend the proper administration of justice. They are not necessarily addressed by a private remedy, such as costs. They should, in appropriate cases, be marked by the public remedy of committal proceedings."*

A Barnes t/a Pool Motors v Seabrook [2010] EWHC 1849 (Admin); [2010] C.P. Rep. 42, Admin., ***KJM Superbikes Ltd v Hinton*** [2008] EWCA Civ 1280; [2009] 1 W.L.R. 2406, CA, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.81.17.1.)

■ **Koza Ltd v Akcil** [2019] EWCA Civ 891, 23 May 2019, unrep. (Patten, Floyd and Peter Jackson LJJ)

Undertaking to the court – meaning of "ordinary and proper course of its business"

In two appeals the Court of Appeal considered the approach to be taken to interpreting the term *"the ordinary and proper course of business"* in undertakings given to the court. The first appeal concerned an undertaking given to the court in respect of proposed funding by the appellant of an ICSID arbitration. It had been held at first instance that the provision of funds for fees, disbursements and adverse costs orders fell outside the scope of the *"ordinary and proper course of [the appellant's] business"*, as such under the undertaking given the appellant could not use its funds for such a purpose. The second appeal concerned the proposed funding of legal advice and representation for the second defendant in respect of proceedings brought by Turkey seeking his extradition. Again, it was held at first instance that the provision of funds for such a purpose was not within the scope of the *"ordinary and proper course of [the appellant's] business"*. In allowing the appeals, the Court of Appeal, at paras 22–27, provided a summary of the propositions applicable when determining whether funds fell within the *"ordinary and proper course of business"* in respect of an undertaking to the court. In doing so Floyd LJ noted that while previous authorities were of some assistance, they arose in different factual situations. Floyd LJ summarised the position at para.27 as follows:

> *"[27] I would draw from these authorities the following propositions of relevance to the present case:*
>
> *i) The question of whether a transaction is in the ordinary and proper course of a company's business is a mixed question of fact and law;*
>
> *ii) 'Ordinary' and 'proper' are separate, cumulative requirements;*
>
> *iii) The test is an objective one, making it necessary to consider the question against accepted commercial standards and practices for the running of a business;*
>
> *iv) The question is not whether the transaction is ordinary or proper, but whether it is carried out in the ordinary and proper course of the company's business;*
>
> *v) The questions are to be answered in the specific factual context in which they arise."*

In considering the propositions in respect of the first undertaking, it was not to be assumed that because an activity would be of benefit to the company that meant it would fall within the ordinary course of their business. In considering that question, it was

> *"necessary to examine the existing business of the company, and decide whether, in the light of all the circumstances prevailing at the time when the activity is embarked on, it can properly be described, objectively, as within the ordinary course",*

see para.42. The availability of alternative sources of funding could also be a relevant consideration in considering whether expenditure was within the ordinary and proper course of business. It may or may not be a relevant factor in any particular case, however. As such it needs to be considered on the facts, see paras 45–46. In considering the second, the extradition, undertaking the provision of funding to the second defendant, who was the appellant's director, were payments in the ordinary and proper course of its business; they were payments intended to protect the operation of its business, see paras 72–74. ***Countrywide Banking Corp Ltd v Dean (Liquidator of CB Sizzlers Ltd)*** [1998] A.C. 338, PC (NZ); [1998] 2 W.L.R. 441, ***Ashborder BV v Green Gas Power Ltd*** [2004] EWHC 1517 (Ch); [2005] B.C.C. 634, ChD, ***JSC BTA Bank v Ablyazov*** [2010] EWCA Civ 1141; [2011] Bus. L.R. D119, CA, ***Emmott v Michael Wilson & Partners Ltd*** [2015] EWCA Civ 1028, unrep., CA, ref'd to.

■ **R. (A Child)** [2019] EWCA Civ 895, 24 May 2019, unrep. (Peter Jackson and Baker LJJ)

Permission to appeal – confirmation of first appeal test

CPR r.52.6(1). In an appeal from a fact-finding judgment in family proceedings, Peter Jackson LJ with whom Baker LJ agreed, commented on the nature of the test for the grant of permission to bring a first appeal. He noted that in family proceedings two different views of the correct approach to the test of what was necessary to demonstrate that an appeal had a *"real prospect of success"* had developed. The first alternative was that set out in ***NLW v ARC*** (2012), in which Mostyn J had stated that to satisfy the test it was necessary to show that it was more likely than not that an appeal would succeed. The second alternative was one which restated the test as explained by Brooke LJ in ***Tanfern v Cameron-MacDonald (Practice Note)*** (2001) at para.21 i.e., that the prospect of success must be realistic rather than fanciful. Jackson LJ affirmed that the appropriate test was that set out in ***Tanfern***. The approach in ***NLW*** was disapproved. As he put it at para.31:

> *"[31] . . . This appeal represents an opportunity to resolve any remaining doubt. The test for the grant of permission to appeal on an application to the Court of Appeal or to the High Court or Family Court under the first limb of*

the relevant sub-rule is that the appeal would have a real prospect of success. As stated in Tanfern v Cameron-MacDonald (Practice Note) [2001] 1 WLR 1311 CA at [21], which itself follows Swain v Hillman [2001] 1 AER 91 CA, there must be a realistic, as opposed to fanciful, prospect of success. There is no requirement that success should be probable, or more likely than not."

Tanfern v Cameron-MacDonald (Practice Note) [2000] 1 W.L.R. 1311; [2000] 2 All E.R. 801, CA, ***NLW v ARC*** [2012] EWHC 55 (Fam); [2012] 2 F.L.R. 129, FD, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at para.52.6.2.)

■ **Jofa Ltd v Benherst Finance Ltd** [2019] EWCA Civ 899, 24 May 2019, unrep. (Sir Terence Etherton MR, Leggatt LJ)

Norwich Pharmacal – costs

CPR rr.31.17, 31.18, 44.2. On an appeal from an order for costs made by ***Norwich Pharmacal*** proceedings, the Court of Appeal noted that, following its previous decision in ***Totalise Plc v The Motley Fool Ltd*** (2001), as now approved by the UK Supreme Court in ***Cartier International AG v British Sky Broadcasting Ltd*** (2018) at para.12,

". . . the correct starting point on an application for Norwich Pharmacal relief is that the applicant should normally be ordered to pay the costs of the party ordered to give disclosure, including the costs of the application."

As Leggatt LJ, with whom the Master of the Rolls agreed, went on to state at para.31:

"[31] While accepting that there can be no absolute rule in the matter, I find it hard to envisage circumstances in which it would be just to award costs against a respondent to a Norwich Pharmacal application who, before agreeing to disclose documents, has done no more than require the applicant to satisfy the court that such an order is appropriate."

See further paras 31–47. Additionally, in considering the costs of the immediate appeal, the Court of Appeal went on to disallow costs incurred by the appellants' solicitors for work done on the appeal that ought properly have been carried out by counsel. As Leggatt LJ put it at paras 50–51:

"[50] Counsel's own fees for advice on the appeal and for the hearing amount to £6,662.50 in total, and in my view are reasonable and proportionate. The costs claimed by the appellants' solicitors, AMZ Law, however, include very large sums which appear, on their face, to be manifestly unreasonable as between themselves and their clients, let alone as costs claimed from the respondents. To give some glaring examples, costs are claimed for: (i) three solicitors each attending on [the second appellant] for 5 hours; (ii) 15 hours spent 'considering' the witness statement filed by the investors in support of their Norwich Pharmacal application, most of which was of little relevance to the issues on this appeal; (iii) 14 hours of 'legal research' by two solicitors; (iv) another 14 hours spent preparing a 5 page witness statement . . ., although no application was ever made (or could realistically have been made) to introduce this statement as evidence on the appeal; (v) 18 hours spent preparing a straightforward bundle of documents (of some 200 pages), with a further 14 hours then spent 'reviewing' the bundle; and (vi) 8 hours of attendance by each of two solicitors at a hearing for which the time estimate was one hour, with a further two hours each of travelling time.

[51] As indicated in the Guide to the Summary Assessment of Costs, para 65, where both counsel and solicitors have been instructed on a short appeal, the reasonable fees of counsel are likely to exceed the reasonable fees of the solicitor, the main element of the solicitor's work is to instruct counsel and prepare the appeal bundle, and there is usually no reason for the solicitor to spend many hours perusing papers or to work on legal submissions when the legal argument is being handled by counsel. In my view, a reasonable allowance for the costs incurred by the appellants' solicitors on this appeal is £4,500 (representing 20 hours of work at an hourly rate of £225). Taking into account court fees of £1,727 and some other minor expenses incurred, I would summarily assess the costs recoverable by the appellants in a sum of £13,000."

Norwich Pharmacal v Customs and Excise Commissioners [1974] A.C. 133; [1973] 3 W.L.R. 164, HL, ***Totalise Plc v The Motley Fool Ltd*** [2001] EWCA Civ 1897; [2002] 1 W.L.R. 1233, CA, at [29], ***Cartier International AG v British Sky Broadcasting Ltd*** [2018] UKSC 28; [2018] 1 W.L.R. 3259, UKSC, ref'd to. (See ***Civil Procedure 2019*** Vol.1 at paras 31.17.6, 31.18.11, 44.2.3.)

Practice Updates

STATUTORY INSTRUMENTS

- **The County Courts (Interest on Judgment Debts) (Amendment) Order 2019** (SI 2019/903) **in force** from 27 May 2019

In ***Simcoe v Jacuzzi UK Group Plc*** [2012] EWCA Civ 137; [2012] 1 W.L.R. 2393, the Court of Appeal held that CPR r.40.8(1) was ineffective in respect of proceedings in the County Court as it had not been made with the concurrence of HM Treasury as required by s.74 of the County Courts Act 1984. As a consequence orders concerning interest on County Court judgments remained governed by art.2 of the County Courts (Interest on Judgment Debts) (Amendment) Order 1991 (SI 1991/1184). It was anticipated that HM Treasury concurrence would be sought, at some point, to enable CPR r.40.8(1) to apply to County Court judgments. In the event, and seven years after ***Simcoe***, the present statutory instrument (the 2019 Order), amends art.2 of the 1991 Order to bring it into conformity with r.40.8(1). It amends the article so that the County Court has the power to order that judgment interest, rather than running from the date the judgment is given or the judgment amount is determined, may run from a date before or after it is given or determined. It does not, however, amend r.40.8(1). Such orders will thus be made under the 2019 Order rather than the CPR. Rather than creating two parallel regimes, it would have been simpler to have amended r.40.8 so that it was made with the concurrence of HM Treasury.

In Detail

CPR PT 36 – DEVELOPMENTS

Section 2(7) of the Civil Procedure Act 1997 requires the Civil Procedure Rule Committee to make rules that "*are both simple and simply expressed*". That requirement is one that is not always easy to implement. One particular area of civil procedure that has proved to be less than simple is CPR Pt 36. Since its introduction it has generated a not insignificant amount of case law and interpretation. There appears to be no sign of that trend abating. In May 2019 a further three significant judgments explaining a number of aspects of Pt 36 were handed down.

First, in ***Calonne Construction Ltd v Dawnus Southern Ltd*** [2019] EWCA Civ 754, 3 May 2019, unrep. (Hamblen, Flaux and Asplin LJJ) the Court of Appeal considered whether a defendant's Pt 36 Offer was valid where it was said to be made in respect of a counterclaim that had not been pleaded at the time it was made. It also considered the question whether the Offer was valid when it contained specific provision in respect of interest. Secondly, in ***Horne v Prescot (No.1) Ltd*** [2019] EWHC 1322 (QB), 24 May 2019, unrep. (Nicol J), the High Court considered the effect that excluding interest from a Pt 36 Offer in respect of costs in detailed assessment proceedings had on its validity. Finally, in ***White v Wincott Galliford Ltd*** [2019] EWHC B6 (Costs), 28 May 2019, unrep. (Deputy Master Friston), the Senior Courts Costs Office considered a Pt 36 Offer that was said to only apply to solicitor's hourly rates.

Taking each in turn:

Calonne Construction Ltd v Dawnus Southern Ltd (2019) concerned a claim for damages arising from a property development issued in December 2016. The claimants made an offer to settle in February 2017, which was said to be a Pt 36 Offer. It stated that it was to settle "*the claim and the 'anticipated counterclaim'*". The defendant thereafter made its own Pt 36 Offer, which was also said to be made in respect of both the claimants' claim and the "*counterclaim which [the defendant] would shortly be issuing . . .*" Shortly thereafter both the defence and counterclaim were served.

The claim proceeded to trial, albeit a significant number of issues had been agreed, with the judge finding in favour of the defendant. The claimant then challenged the validity of the defendant's Pt 36 Offer. It did so on the basis that (i) including the, as yet, unpleaded counterclaim rendered the Offer invalid; and, (ii) including in the Offer provision relating to the interest rate to be charged following the end of the "relevant period" also rendered it invalid. The trial judge rejected both arguments.

Dismissing the appeal the Court of Appeal **held**, in respect of the first issue, as follows: (i) a counterclaim is treated as if it is a claim for all purposes except where the CPR provides otherwise (CPR rr.20.2, 20.3); (ii) CPR r.36.2(3) makes it clear that CPR r.20.2(2) and (3) apply to CPR Pt 36; (iii) a Pt 36 Offer may be made in respect of the whole, or a part of, or any issue arising, in a claim, counterclaim or additional claim (CPR r.36.2(3)(a)). As a consequence Asplin LJ, with whom Hamblen and Flaux LJJ agreed, stated that:

"[32] . . . a defendant's proposed counterclaim must be treated as if it were a claim for the purposes of Part 36. In those circumstances, and in the light of the fact that a party is entitled to make a Part 36 offer at any time, including before commencement of proceedings (r 36.7), it seems to me that it cannot be correct that a Part 36 offer cannot be made in relation to a counterclaim before that claim has been pleaded. To conclude otherwise would derogate from both CPR r 20.3 and from CPR r 36.7. That must be the case even if proceedings in relation to another claim, the original claim, are already on foot. If it were otherwise, those rules to which express reference is made at the end of r 36.2 and r 36.7 would be undermined. It follows that I reject [the] argument that in such circumstances, the party who wishes to counterclaim remains entitled to make a Part 36 offer 'at any time' pursuant to r 36.7 and it is only the content of that offer which is constrained. Such an approach would have the effect of negating r 36.7 as far as any proposed claim by way of counterclaim was concerned.

[33] It seems to me, therefore, that the Judge was right to conclude that the Offer was not invalidated by reason of a reference to the proposed counterclaim which was not pleaded until some ten days later and that CPR r 36.5(2)(d) and, for that matter, (e), must be construed in a way which enables such an offer to be made despite the fact that the counterclaim, which is a separate claim for the purposes of the Rules, has yet to be commenced.

[34] . . . It cannot be correct that the defendant must go to the expense of pleading the counterclaim and if necessary, obtaining permission in relation to it, or alternatively, issuing separate proceedings in order to be able to make a Part 36 offer in relation to it or which takes the counterclaim into account. Such a consequence would be contrary to the policy behind both Part 20 and Part 36 itself."

In reaching its decision on this, the court distinguished the present issue from that which it had previously considered in ***Hertel v Saunders*** [2018] EWCA Civ 1831; [2018] 1 W.L.R. 5852, CA (see paras 41–42).

Turning to the second issue, concerning the provision relating to interest, the Court of Appeal **held** that its inclusion did not invalidate the Pt 36 Offer as: (i) there was nothing in Pt 36, and specifically nothing in CPR r.36.5 that precluded the inclusion of terms relating to interest after the relevant period had expired. CPR r.36.5(4) was not relevant; (ii) CPR rr.36.5(2) and 36.2(2) did not preclude its inclusion; (iii) it was correct to say that if a party could not include such provision it could not ensure that it would be compensated with interest arising from any delay between the end of the relevant period and the Offer's acceptance; (iv) it was not relevant that permitting the inclusion of such interest would, in principle, enable the Offer to make provision for interest to be paid at a significantly high rate (25% or 200%); (v) if the offeree found the interest provision unacceptable it could always make its own Pt 36 Offer (see paras 43–48).

Horne v Prescot (No.1) Ltd (2019) dealt with the question, which arose at a detailed costs assessment, whether an Offer to settle that was said to be "*exclusive of interest*" was a valid Pt 36 Offer. The Master held that it was a valid offer.

An appeal from that order was heard by Nicol J, notwithstanding that an appeal on the issue was to be heard by the Court of Appeal on an appeal from HHJ Dight in ***King v City of London Corp*** (CC at Central London Civil Justice Centre, 14 December 2018, unrep.) albeit not until November 2019.

Nicol J dismissed the appeal. In doing so it was noted that while it was established that the requirements of Pt 36 were prescriptive, there were no authorities that held that going beyond the requirements of Pt 36 would invalidate an Offer, where such additions were not inconsistent with them, see para.64. In detailed assessment proceedings interest did not need to be claimed; the entitlement to it was automatic. It would be paid by virtue of the Judgments Act 1838. An offer to settle the whole of the claim for the costs of the action, exclusive of interest, was thus an offer to settle the whole of the claim. It was prudent, however, to specify that such offers were exclusive of interest, otherwise the offer would be deemed to be inclusive of interest per PD47 para.19, see paras 65–66. Additionally, and as an obiter dictum, Nicol J suggested that the requirements of CPR r.36.5(4) were not mandatory. The language was that of a deeming provision, and could be properly contrasted with the use of "must" which signified the mandatory nature of the requirements of CPR r.36.5(1) and (3).

While Nicol J's decision will no doubt be revisited when this issue comes before the Court of Appeal in November, the approach taken has much to commend it in terms of its interpretation of the approach to interest, and importantly, the approach taken to offers that go beyond what is prescribed by Pt 36. A properly purposive approach to that Part, and one that deprecated technical challenges, would be one that limited scrutiny to ensure that its formal requirements were complied with and not to go beyond that to limit Offers to the extent of those requirements, unless and except where going beyond them conflicted with them.

Finally, ***White v Wincott Galliford Ltd*** (2019) which arose from a claim for damages arising from the death of the claimant arising from mesothelioma that was successful. As a consequence the claimants were entitled to their costs. As the receiving party they then made a novel Pt 36 Offer, which related only to hourly rates. This was an issue that was noted as being particularly contentious at the provisional assessment of costs.

Deputy Master Friston adopted an approach to interpretation of the provisions of Pt 36 which took a proper account of the overriding objective. He held that the offer made concerning the hourly rates was an offer in respect of a specific issue for the purposes of CPR r.36.5(1)(d), see paras 17–18, 35–37. In the present case the claimants had beaten their offer at the provisional assessment. The question then became whether it was unjust to permit them to receive the benefits arising under CPR r.36.17(4).

In deciding that issue the Deputy Master set out a useful summary of the approach to take and relevant authorities of the "injustice test", see paras 20–21:,

> "*[20] I summarise my understanding of the law relating to the injustice test in detailed assessment proceedings in the following way (and in doing so, I refer to authorities concerning Part 36 offers made in other types of proceedings):*
>
> *i) The burden is on the party seeking to rely on injustice: I note that both Andrew Baker J and Warby J have explained that the burden is on the party who seeks to persuade the court that an award would be unjust (see Tiuta Plc v Rawlinson & Hunter (a firm) [2016] EWHC 3480 (QB), at [14] and Optical Express v Associated Newspapers (Costs) [2017] EWHC 2707 (QB), at [11] respectively). For the reasons set out immediately below, that burden is a heavy one.*
>
> *ii) 'Formidable obstacle': Briggs J has said that 'the burden … to show injustice is a formidable obstacle' (see Smith v Trafford Housing Trust [2012] EWHC 3320, at [13(d)]. This was cited with approval by Gross LJ in Briggs v CEF Holdings Ltd [2017] EWCA Civ 2363, at [20]) and was also adopted by Eder J (see Ted Baker plc v AXA Insurance UK plc [2014] EWHC 4178 (Comm), at [16], [17] and [23]).*
>
> *iii) Specific factors to be taken into account: CPR, r 36.17(5) gives specific guidance as to the factors that the court ought to take into account. Those factors are:*
>
> *a) the terms of any Part 36 offer;*
>
> *b) the stage in the proceedings at which any Part 36 offer was made, including, in particular, how long before the assessment started the offer was made;*
>
> *c) the information available to the parties at the time when the Part 36 offer was made;*
>
> *d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and*
>
> *e) whether the offer was a genuine attempt to settle the proceedings.*
>
> *I pause here to note that that these factors relate either to the terms and content of the offer in question, or to the circumstances in which it was made and considered. They make no mention of the factors extraneous to the offer.*
>
> *iv) The requirement to look at the terms of the offer: In a similar vein, I note that in Cashman v Mid Essex Hospital Services NHS Trust [2015] EWHC 1312 (QB) at [24] Slade J has explained that when applying the injustice test, it is the terms of the offer that are relevant, not the level of the costs claimed or the amount disallowed on assessment.*
>
> *v) Harshness of results: Eady J has explained that while a judge may consider the effect of CPR Part 36 to be harsh, that fact would not be a reason for denying the offeror the benefits of having made the offer (Downing v Peterborough & Stamford Hospitals NHS Foundation Trust [2014] EWHC Civ 4216 (QB), at [61] et seq, per Eady J).*
>
> *vi) The need to take into account all the relevant factors: Black LJ has said that the 'factors specifically identified [in CPR, r 36.17(5)] as relevant cast quite a wide net on their own but they are not the only matters that fall for consideration and [that] anything else which is relevant must be considered as well' (see SG v Hewitt [2012] EWCA Civ 1053, at [29]). Indeed, Vos C has explained that the court is required to take into account all of the relevant circumstances: see OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195, at [25].*
>
> *vii) Disaggregation: I note that both Vos C and Slade J have explained that the factors that the court may take into account will not necessarily be the same for each of the benefits under CPR 36.17(4): see OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195, at [25] and Cashman at [19]. Indeed, Sir Colin Mackay has explained that the injustice test is to be (or at least may be) applied individually to each of those benefits rather than globally; this means that it is open to the court to allow the offeror the advantage of as many or as few of those benefits as would be appropriate on the*

facts of the case in hand: see RXDX v Northampton Borough Council [2015] EWHC 2938 (QB) at [8] and [9].

[21] In summary, when applying the injustice test in a detailed assessment in which a party has 'beaten' a Part 36 offer, the following principles will apply: the court must recognise that the offeree must shift a 'formidable obstacle' in order to satisfy the injustice test; the court should take into account all the relevant circumstances, but its principal focus should be on the terms and content of the offer (and the circumstances in it was made and considered) rather than the outcome of the assessment; and, where appropriate, when applying the injustice test to each of the benefits in CPR, r 36.17(4), the court may take into account factors specific to each of those benefits."

It was clear in this case that the defendant had satisfied the injustice test. It would, the Deputy Master held, have been "unreal" to permit the claimants to secure the benefit of an additional amount on all their costs from beating an offer on the single issue of hourly rates i.e., on a single aspect of the costs.

In addition such an offer would in no way benefit the court as it was unreal to consider that offers of such a type would promote settlement, nor would the offer have had any realistic effect on the conduct of the proceedings if it had been accepted. While this is not specified as an issue to be taken account of in Pt 36, it is an issue that is required to be considered by the overriding objective i.e., CPR r.1.1(2)(e) as it concerns the court's ability to allot resources to other litigants. While the Deputy Master did not make this clear in his judgment, by referring to the benefit to the court as a relevant consideration, he evidently and properly considered the rationale underpinning Pt 36, the promotion of settlement as a means to assist the court in marshalling its resources across all litigants as well as assisting the parties to resolve their disputes at proportionate cost and in proportionate time, and ultimately the basis of that in CPR Pt 1.

Having reached that decision the Deputy Master then went on to consider whether to allow the claimant to receive "*an additional amount*" under CPR r.36.17(4)(d). In declining to make such an award, the Deputy Master held that he was bound by Macur LJ's dicta in ***Thinc Group Ltd v Jeremy Kingdom*** [2013] EWCA Civ 1306; [2014] C.P. Rep. 8 at para.22. As he put it at paras 29–32:

"*[29] I note that in Thinc Group Ltd v Jeremy Kingdom [2013] EWCA Civ 1306, Macur LJ had this to say (at [22]):*

'There is no merit in [counsel's] argument that the judge should have regarded the terms of CPR 36.14 (2) and (3) [the then equivalents of CPR, rr 36.17(3) and (4)] to mean that he must consider that his discretion as to costs at this stage was fettered by a bi-polar evaluation of "unjust" to mean that the successful party receives their costs on an indemnity basis or not and thereby fell into error by apportioning costs in percentage terms and on an indemnity basis for the relevant period. The phrase "unless it considers it unjust to do so" in CPR 36.14 (2) and (3) bear the obvious interpretation of "unless and to the extent of".'

[30] I take the view that Macur LJ's comments are binding upon me in the sense that I must read the phrase 'unless it considers it unjust to do so' in CPR, r 36.17(4) as bearing the interpretation of 'unless and to the extent of'. I bear in mind that Macur LJ was dealing with a benefit that was not the modern-day 'additional amount'; indeed, the-then iteration of the Part 36 did not provide for any 'additional amount' at all. That may be so, but the CPR are delegated legislation, and Parliament is ordinarily presumed to legislate in the knowledge of, and having regard to, relevant judicial decisions (see, for example, Lachaux v Independent Print Ltd [2015] EWHC 2242 (QB)). Put otherwise, previous judicial authority forms part of the background context against which any new legislation is made (see Barras v Aberdeen Steam Trawling and Fishing Co Ltd [1933] AC 402 at 411).

[31] I am not able to discern anything in the present iteration of CPR Part 36 to suggest that Macur LJ's interpretation is any less obvious. In view of the above, I take the view that correct interpretation of the words 'unless it considers it unjust to do so' continues to be that it bears the interpretation of 'unless and to the extent of'.

[31] In view of the above, I conclude that the court does have the power to allow only a part of the 'additional amount', but that it may not do so simply because it regards the prescribed amount to be excessive. One only has to state that conclusion to realise that, in practice, the latter principle will tend to diminish (if not negate) the former. There may be circumstances, however, where the nature of the offer itself or the circumstances in which it was made would make it unjust to award the full amount; where this is so, it would (in theory at least) be open to the court to make a partial award."

Exercise of the power to make a partial award should thus be done to enhance and not detract from the efficacy of the award, see para.33 and ***Cashman v Mid Essex Hospital Services NHS Trust*** [2015] EWHC 1312 (QB); [2015] 3 Costs L.O. 411 at para.27.

There will undoubtedly be further decisions elaborating the application of Pt 36, which will continue to explain this highly technical and fundamentally important aspect of the CPR.

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