March 2007

Litigation & Dispute Resolution Legal Update

Welcome to Mayer, Brown, Rowe & Maw LLP's Litigation & Dispute Resolution Legal Update March 2007. In this publication you will find summaries of key cases, information about recent legislation, consultation papers and other relevant news. A full table of contents appears on the inside of the front cover.

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PRACTICE AND PROCEDURE

Costs

Determining the appropriate costs order

■ ***Stocking v Montila, ChD (Rimer J) 26.1.07***

The issue before the court was the appropriate order to make as to costs in this partnership litigation. An account was conducted before Rimer J in June 2005 following which he delivered reserved judgment. Amongst other provisions, he ordered that there be a further inquiry, which was then undertaken. The defendant submitted that he had materially beaten an offer made to the claimant in 2003 and because the claimant had not accepted the offer the court should have ordered him to pay the costs of the account, as well as those consequential on the earlier order, to be assessed on an indemnity basis. The claimant submitted that the offer had not been beaten and therefore the defendant should have been ordered to pay the claimant's costs of the account and consequential proceedings, on the standard basis.

The court held that the focus of its consideration of issues as to costs was generally on the guidelines set out in rule 44.3 (court's discretion and circumstances to be taken into account when exercising its discretion as to costs). Rimer J considered that the first question he had to ask was "who as a matter of substance and reality, had won"[1]. The answer was that the defendant had won overall, although not on all issues or by much, but that conclusion in and of itself did not entitle the defendant to the, or any, costs of the account. Rule 44.3 required the court to consider all the circumstances of the case. Further, there was authority (see *Hamer v Giles*[2]) for the proposition that in cases where the court's assistance was required for the winding up of a partnership's affairs, the costs were ordinarily borne by the partnership's assets before the final division of them between the partners. This remained valuable guidance, even post the introduction of the CPR.

In this case there were various considerations which might have pointed to the making of a complicated issue-based order (with orders both ways) of the type contemplated by rule 44.3(6)(f) ("(6) The orders which the court may make under this rule include an order that a party must pay - ...(f) costs relating only to a distinct part of the proceedings;...") but the likely result of making such an order was that it would have led to more expense and delay. Rimer J said that the all important matter was the offer made in 2003. He held that it was not an offer that clearly ought to have been accepted at the time it was made because there was no sensible basis on which the claimant could have assessed it[3]. The court concluded that the correct order was no order as to costs. **Judgment on Lawtel**

1 See *Locksley Brown v Mcasso Music Productions* [2005] EWCA Civ 1546, per Neuberger LJ

2 (1879) 11 Ch. D. 942

3 Reasons included that the method of calculation was unexplained, it was apparently fixed by reference to an unstated valuation as at an irrelevant date; the claimant had no means of knowing what the defendant had spent and the valuation basis of the calculation was one that the defendant had disclaimed by the time of the trial. There was therefore no sensible basis on which the claimant could assess the offer.

Evidence

Equality of expert evidence

- ***Kirkman v Euro Exide Corporation (CMP Batteries Ltd), CA (Buxton LJ, Smith LJ) 25.1.07***

This appeal concerned the distinction between evidence of fact and expert opinion in the context of a personal injury action. The district judge permitted a surgeon, who had treated the appellant, to re-draft his statement as evidence of fact as opposed to expert opinion. The trial judge refused permission to adduce the statement on the basis that it was expert opinion, not evidence of fact, and the order had been that each party could rely on only one expert medical witness. The respondent submitted that the appellant's attempt to rely on the statement was, in essence, a way of subverting that order.

Smith LJ commented that the problem that had arisen in this case stemmed from the rigid application of the "aspirational" objective within the CPR that the parties to litigation should operate under equality of arms. "This objective has been interpreted to mean that it is desirable for each party to have permission to deploy similar resources... However, the desirability for equality of arms was not intended to result in an absolute rule that, in every case, the parties must be limited to calling the same number of experts. There may be circumstances in which that general rule should give way for the sake of achieving the overriding objective of dealing with cases justly." In this case, it was clear that the evidence which had been challenged was evidence of fact and the appeal was allowed. **Judgment on Lawtel**

Pre-action disclosure

- ***Nikitin & Others v Richards Butler LLP & Others; Skarga v Richards Butler LLP & Others, QBD (Langley J) 9.2.07***

The applicants (N and S) applied for Norwich Pharmacal orders and pre-action disclosure against the respondents (R and H). R and H were private investigators and it was alleged that, in investigating the personal and financial affairs of N and S, they had obtained access to personal data in breach of the Data Protection Act 1998 and confidential information which had been misused. The aim of the application was to obtain documentation and information in order to ascertain the full extent of the investigations. N and S said they required the information to enable them to bring proceedings and take action against those responsible for the illegal activities; to enable them to ascertain what information had been obtained; to identify to whom the information had been disseminated; and to prevent further unlawful activity from taking place.

Before a Norwich Pharmacal order will be granted, three conditions must be satisfied: (1) a wrong must have been carried out or arguably carried out by an ultimate wrongdoer; (2) there must be a need for an order to enable action to be brought against the ultimate wrongdoer; (3) the person against whom the order is sought must be mixed up in the wrongdoing so as to have facilitated it and be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued[4].

Under rule 31.16, an order for pre-action disclosure may be made where "31.16(3)(a) the respondent is likely to be a party to subsequent proceedings; (b) the applicant is also likely to be a party to those proceedings; (c) if proceedings had started, the respondent's duty

4 Per Lightman J *in Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625

by way of standard disclosure...would extend to the documents or classes of documents of which the applicant seeks disclosure; and (d) disclosure before proceedings have started is desirable in order to (i) dispose fairly of anticipated proceedings; (ii) assist the dispute to be resolved without proceedings; or (iii) save costs."

Langley J had to decide whether the test of necessity was met to justify the making of a Norwich Pharmacal order and whether the requirements of 31.16 were met and, if so, whether an order for pre-action disclosure would have been appropriate as a matter of discretion. He dismissed the applications. He held that N and S had wholly failed to establish the relevant necessity to justify the relief sought. The purpose of the order was to enable a claim to be brought which could not have otherwise been effectively pursued. N and S's case could have been properly pleaded without obtaining further information. As regards 31.16, Langley J said that N and S had not demonstrated that pre-action disclosure was "desirable" for any of the reasons set out in rule 31.16(3)(d). The proceedings could be fairly brought and pursued without further disclosure and the prospect of further disclosure assisting resolution of the dispute without the need for proceedings was "fanciful". That conclusion was fatal to the application. **Judgment on Lawtel**

Abuse of process

Striking out claims which should have been raised in the course of earlier litigation

- ***Aldi Stores Ltd v (1) WSP Group PLC (2) WSP London Ltd (3) Aspinwall & Co Ltd, QBD (TCC) (Jackson J) 15.1.07***

This was an application to strike out proceedings as an abuse of process. The dispute arose out of a construction project. At the start of the proceedings, Aldi sued the main contractor (H). Another tenant at the site sued H separately. H then brought Part 20 claims in both actions and the Part 20 defendants brought further Part 20 claims between themselves. Aldi succeeded on liability against H in the first action. All of the issues in the other actions, save for Aldi's issues on quantum, were consolidated into one main action that settled after the parties had incurred substantial legal costs. Pursuant to the judgment in the first action, Aldi recovered from H's primary insurer sums representing just under half the value of its claim as an interim payment. Aldi was aware that it had the option of joining in the main action but it chose not to. It therefore ran the risk that it would not recover any further sums from H's insurers. Aldi commenced proceedings against the second insurer, which denied liability. The main action settled and the action against the second insurer also settled.

Aldi commenced the instant proceedings against the environmental consultants and consulting engineers, substantially repeating the allegations that had already been pleaded in the previous actions, and the defendants applied to strike it out as an abuse of process (on the basis that Aldi could have sued them as part of the main action). Aldi submitted that its decisions at each stage were sensible and proportionate; that they had never previously sued the defendants; and that the main action had settled, it had not been the subject of a judgment.

Jackson J cited the rule in *Henderson v Henderson* and the authorities which followed it[5] that the court will strike out as abusive claims which should have been, but were not raised, in the course of earlier litigation. He struck out the action as an abuse of

5 (1843) 3 Hare 100. The long line of authorities built on Henderson was reviewed by the H of L in J*ohnson v Gore Wood & Co* [2002] 2 AC 1.

process on the basis that: (1) Aldi was aware of the principle that if it wished to sue the applicants it should have done so in the context of the first action so that the allegations could have been dealt with on one occasion rather than in two separate trials; (2) Aldi was not prevented from suing in the first action by impecuniosity or any similar circumstance; (3) if the instant action had gone ahead the defendants would have faced the same allegations they had faced in the earlier trial; (4) further costs would have been incurred by the various parties litigating the same issues for a second time and the court's resources would have been devoted to trying precisely the same allegations that had already been made against the defendants. The balance therefore came down in favour of characterising the instant action as an abuse of process. Jackson J said "...if this action goes ahead, the applicants will be 'harassed' or 'vexed' for the second time by a very substantial, expensive and time consuming action. In my judgment that would be unjust. Also...that would be oppressive." Further, it was a misuse or an abuse of the process of the TCC to bring a substantial and complex action which litigated for a second time the same alleged breaches. "It is the policy...of this court to achieve, so far as possible, the efficient, just and cost effective disposal of all litigation which is brought. This policy serves the interests of the business community...who are the principal users of this court." **Judgment on Lawtel**

Summary judgment

Court's jurisdiction to grant summary judgment

- ***BBC Worldwide Ltd v Bee Load Ltd (T/A Archangel Ltd), QBD (Comm) (Toulson LJ) 8.2.07***

This case raised various issues regarding Part 24 and the jurisdiction to give declaratory judgments. Toulson LJ said that in considering whether to exercise its jurisdiction to grant a summary declaration, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there were any other special reasons for granting or refusing the declaration. In the instant case, the existence of proceedings in Maine, in which judicial indication had been given that the view of the Commercial Court on questions of English law regarding three agreements would have been welcomed, provided a cogent reason for exercising the jurisdiction, as long as the necessary requirements were met.

CPR rule 24.2 provides that the court may give summary judgment against a claimant or a defendant on the whole of a claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue or conversely that the defendant has no real prospect of successfully defending the claim or issue. Part of the argument that the defendant put forward in this case was that on all the issues of construction of the contracts, its arguments were tenable and accordingly the requirements of the rule were not satisfied. Toulson J said this raised the question of how the court should proceed where the issue raised is a pure point of construction which can be determined on a summary application as well as on a full trial (or trial of preliminary issues) because it would not be affected by evidence. He held that if at the end of the argument the court comes to a clear view as to the correct construction, it has jurisdiction to grant summary judgment under rule 24.2 on the basis that a trial would have no realistic prospect of causing it to reach a different judgment. "...if summary judgment is given on points of construction, it is because they appear to the judge to be clear as a matter of English law." **Judgment on Lawtel**

CPR 44th Update

■ The DCA has announced that two emergency practice direction amendments have been added to the 44th Update of the CPR. PD25 is amended to include reference to the fact that there is no longer a privilege against self-incrimination in relation to fraud cases. PD54 is amended to include a new section dealing with applications to judicially review a decision of the Immigration and Nationality Directorate to remove a person from the UK. The amendments came into force on 1 March 2007.

BREACH OF CONFIDENCE

An internal letter may be the subject of copyright and protected by the law of confidential information

■ ***Cembrit Blunn Ltd & Another v Apex Roofing Services & Another, ChD (Kitchin J) 5.2.07***

A dispute arose between the parties as to the quality of roofing slates supplied by the first claimant (C) to the defendant (A). C argued that the slates had lifted because of defective installation by A, but A obtained and circulated a letter from the second claimant (D) to C (a subsidiary of D) which discussed possible settlement of a threatened claim by A. C and D argued that the dealings with the letter amounted to infringement of copyright and misuse of confidential information; A submitted that the letter showed that C and D had not honestly believed that there was no defect in the slates and the disclosure of the letter had been justified to correct apparently false information disseminated by C and D, and to avoid unnecessary and unjustified litigation.

To succeed in an action for infringement of copyright it is necessary to show, amongst other things, that the work was the author's own intellectual creation. To succeed in an action for breach of confidence a claimant must establish that the information that he was seeking to protect was of a confidential nature, that it had been communicated in circumstances importing an obligation of confidence, and that the defendant had made or had been about to make an unauthorised or wrongful use or disclosure of the information. The court held that the letter was an original literary work written by an employee of D and that the copyright which subsisted in it belonged to D. It held that in this case the letter had been a private internal communication not intended for publication outside D's group of companies and it had been communicated in circumstances importing an obligation of confidence. Further, A's disclosure had not been justified either in the public interest or to avoid unnecessary and unjustified litigation, but had been used as a tactic to force C and D to accede to their demands. The letter had therefore been protected by the law of confidential information.

Note the reference in the above case to the decision of the CA in *Musical Fidelity Ltd v Vickers*[6] and the judge's comment that he did not understand the CA ultimately to have doubted the proposition that copyright can exist in solicitors' correspondence or in business correspondence generally. **Judgment on Lawtel [This summary was written by Christine Pearson.]**

6 [2002] EWCA Civ 1989

ARBITRATION

ECJ asked to rule: is the arbitration anti-suit injunction consistent with Brussels Regulation?

- ***West Tankers Inc v Ras Riunione Adriatica Sicurita SPA & Others, HL (Lord Nicholls, Lord Steyn, Lord Hoffmann, Lord Rodger, Lord Mance) 21.2.07***

The main question in this appeal, which the HL referred to the ECJ, is whether it is consistent with EC Regulation 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement.

West Tankers was involved in defending two sets of proceedings. The disputes arose after a vessel owned by them and chartered by Erg Petroli SpA collided with a jetty that was owned by Erg. Erg made a claim against its insurers (RAS) and commenced arbitration proceedings against West Tankers in London for uninsured losses, and RAS commenced proceedings against West Tankers in Italy to recover amounts paid to Era. West Tankers applied to the English court for an injunction restraining RAS from continuing the Italian proceedings on the grounds that the dispute arose out of the charterparty and therefore RAS (claiming by right of subrogation) was bound by the arbitration clause in that agreement.

In March 2005 Colman J held that the right of RAS to bring the claim against West Tankers by subrogation was subject to the arbitration clause in the charterparty. He made a declaration to that effect and granted the injunction.

The House of Lords referred the question to the ECJ for a final decision. It concluded that there were varying views on the issue and that it was of "very considerable and practical importance". Their Lordships said that arbitration fell outside the scope of Regulation 44/2001 and that, therefore, any restrictions regarding the granting of injunctions under the Regulation should not apply in the context of proceedings concerning arbitration. The judgment summarises the English court's jurisdiction to grant anti-suit injunctions in the context of arbitration proceedings and also summarises relevant decisions from both the English courts and ECJ. Lord Hoffmann (delivering the opinion) commented that the Regulation prevents courts of one Member State from interfering with the jurisdiction of courts of other Member States by issuing injunctions restraining a party from commencing or continuing litigation in that Member State. However, arbitration is altogether excluded from the scope of the Regulation by Article 1(2)(d) and this extends to court proceedings concerning arbitration. He emphasised the importance of the principle of autonomy of the parties in an arbitration and said that the jurisdiction to restrain foreign court proceedings is generally regarded "as an important and valuable weapon in the hands of a court exercising supervisory jurisdiction over an arbitration. It promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court." One commentator said that if the ECJ changes the rules parties would be likely to choose non-EU venues for their arbitrations.

Judgment on Lawtel

Construction of jurisdiction or arbitration clause in an international commercial contract

- ***Fiona Trust & Holding Corporation & Others v Privalov & Others, CA, (Tuckey LJ, Arden LJ, Longmore LJ) 24.1.07***

This case demonstrates a purposive approach to the construction of an arbitration clause in an international commercial contract.

A dispute arose in respect of eight charter parties. The claimants commenced proceedings in the High Court alleging, amongst other things, that the defendants had procured the charter parties by bribery and that the charter parties had been rescinded. The charter parties contained a "law and litigation" clause which provided that any dispute "arising under" the charter should be decided by the English courts to whose jurisdiction the parties agreed, but that notwithstanding the foregoing either party had the right to elect to have such dispute referred to arbitration in accordance with the rules of the London Maritime Arbitrators' Association. A party would lose its right to make such an election only if it received from the other party a written notice which, amongst other things, stated expressly that a dispute had "arisen out of this charter" and it failed to give notice of election to have the dispute referred to arbitration not later than 30 days from the date of receipt of the notice.

The defendant appointed an arbitrator and the claimants made an application under s72 Arbitration Act 1996 seeking to restrain the arbitration proceedings on the basis that they had rescinded the charter parties and thereby the arbitration agreements in them. The defendants then sought to stay the rescission claims under s9 of the Act. The judge at first instance declined to stay the claims for rescission and restrained the arbitration proceedings pending the trial of the action. The defendants appealed, arguing that "out of" was a wider phrase than "under" and that the parties therefore intended a wide meaning to be given to the arbitration clause.

On appeal the CA held that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed, and that the words "arising out of" should cover every dispute except a dispute as to whether there was ever a contract at all. There was a presumption in favour of a one-stop arbitration and no commercial man would create a system that required the court first to decide whether a contract should be rectified or rescinded before an arbitrator could go on to resolve the dispute. Consequently, the dispute as to whether the charters should be set aside or rescinded for alleged bribery did fall within the arbitration clause. Further, an allegation of invalidity of a contract did not prevent the invalidity question being determined by an arbitration tribunal pursuant to the separate arbitration agreement. Unless the arbitration agreement itself was directly impeached for some reason the tribunal would not be prevented from deciding the disputes relating to the main contract. Although s72 of the Act contemplated that a party that took no part in the arbitration proceedings should be entitled to question whether there was a valid arbitration agreement, the court should be very cautious about allowing its process to be so utilised. If the party who denies the existence of a valid arbitration agreement has instituted court proceedings, and the party who relies on the arbitration clause has applied for a stay of those proceedings, the application for a stay is the primary matter to be considered. It would only be if a stay were never applied for or were refused, but the party relying on the arbitration clause insisted on continuing with the arbitration, that any question of an injunction should arise. **Judgment on Lawtel [This summary was written by Christine Pearson.]**

CONTRACT

Test for common mistake - "essentially and radically" different from the subject matter which the parties believed to exist

- ***Kyle Bay Ltd (trading as Astons Nightclub) v Underwriters Subscribing Policy 019057/08/01, CA (Ward LJ, Neuberger LJ, Wilson LJ) 7.2.07***

The claimant appealed against a decision dismissing its claim to set aside or otherwise re-open, on the grounds of mistake and misrepresentation, a compromise of an insurance claim it had made against the defendants. The claimant contended that the policy it had taken out with the defendant was declaration-linked and not therefore subject to average, whereas the settlement of the business interruption component of its insurance claim following a fire was based on the common mistaken assumption and/or misrepresentation to the effect that the policy was on the gross profits basis and was accordingly subject to average, and that this resulted in its receiving £100,000 less than it should have received. The judge at first instance held that the settlement had been entered into on the basis of a common mistake but that the nature of the mistake was such that the claimant was not entitled to contend that the settlement agreement was thereby vitiated. He also held that the case on misrepresentation failed. The claimant appealed.

The leading case where the court considered the circumstances in which common mistake could vitiate a contract was *Great Peace Shipping Ltd v Ttsavliris Salvage (International) Ltd*[7]. The test set down there was whether the mistake rendered the contract in issue "impossible of performance". The claimant argued that this test was inappropriate in the instant case and that he preferred the test of "essentially and radically different" put forward by Steyn J *in Associated Japanese Bank (International) Ltd v Credit du Nord SA*[8]. Neuberger LJ noted that *Associated Japanese Bank* had been approved in *Great Peace* and said that the two approaches essentially amounted to the same thing. However, the test in *Great Peace* raised an issue of the definition of the relevant contract (the contract has to be defined to decide whether performance under it is impossible) whereas the test of "essentially and radically different" did not. Applying this test, the CA held that the mistake did not render what the parties believed to be the subject matter of the settlement agreement "essentially and radically" different from what it actually was. The parties correctly believed that they were settling a business interruption claim resulting from a fire at a certain premises; they made no mistake as to the period of interruption or the estimated level of gross profit or any other mistake about the claim or the nature of the cover, save the assumption that it was on a gross profits rather than declaration-linked basis. Although the difference between the actual and assumed subject matter of the settlement could be characterised as significant, there was no "essential and radical" difference. "In conceptual terms, once one appreciates what was correctly assumed or agreed...it is hard to say that if one corrects the one aspect which was wrongly assumed, it would radically and essentially alter the nature of the contract." Accordingly, the judge was correct to have dismissed the claim insofar as it was based on common mistake.

The claim for misrepresentation was also dismissed on the basis that the statements, viewed objectively, were contentions and not representations and that the statements were subjectively understood by the person to whom they were made as contentions and not representations. **Judgment on Lawtel**

7 [2002] EWCA Civ 1407, [2003] QB 679
8 [1989] 1 WLR 255

Champerty

- ***Mansell v Robinson, QBD (Underhill J) 30.1.07***

This was an appeal from a decision striking out the claim on the basis that it was champertous. Champerty is the maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action. The claimant in this case was a journalist who knew a man (W) who had in the 1990s been involved in unsuccessful litigation about the rights to the commercial exploitation of a comic strip. W continued to pursue his claim, supported by the defendant. The claimant contended that he agreed with W and the defendant to supply his services as an investigator in order to assist W in the furtherance of his claim and in return W and the defendant agreed to pay him a sum equal to 1% of the amount paid to settle or otherwise bring a conclusion to the claim, plus £250 per week. The claimant subsequently did a great deal of work but claimed that he did not receive full payment. He issued proceedings against the defendant for payment of the unpaid retainers. The claim was struck out on the basis that the agreement that the claimant should have been remunerated for his services, in part, by the payment of 1% of the proceeds was enough to render it contrary to public policy.

The appeal was allowed. The court held that "An absolute rule preventing a skilled researcher or inquiry agent whose services were sought by a person with a potential claim from making an enforceable contract under which he would be partly remunerated by reference to the sums recovered could in some meritorious cases be a real barrier to access to justice." The mere fact that litigation services had been provided in return for a promise of a share of the proceeds was not by itself sufficient to justify that promise being held unenforceable. The court emphasised that it was necessary in each case to decide whether the agreement in question had a real tendency to produce the "evils against which the law of maintenance and champerty is intended to guard." Underhill J distinguished a number of early authorities on the basis that whatever principle they established had no application to the case where a litigant took the initiative to engage a researcher or inquiry agent to look for information on his behalf. On that basis, the agreement on which the claimant sued was not objectionable on public policy grounds and was not champertous. **Judgment on Lawtel**

INSOLVENCY

Undervalue transactions and preferences: the "good faith" defence

- ***In the Matter of Sonatacust Ltd sub nom CI Ltd v Joint Liquidators of Sonatacus Ltd, CA (Smith LJ, Hooper LJ, Sir Martin Nourse) 25.1.07***

On occasion a third party may be the ultimate recipient of a preferential payment, or a payment resulting from an undervalue transaction. A subsequently appointed administrator or liquidator may wish to seek recovery of this payment pursuant to his powers to challenge vulnerable transactions. In this case the CA considered the scope of its powers to make an order for the return of such a payment from a third party and in so doing it also had to consider the application of the "good faith" defence that is available to a third party recipient in these circumstances. The court's decision serves as a reminder for liquidators and administrators of the possibility of pursuing third parties who have indirectly received the benefit of undervalue transactions or preferential payments.

However, such a claim may be successfully defended if the third party recipient can show that it received the payment in good faith and for value. Whether such a defence can be established will naturally depend on the circumstances, and in particular, the recipient's knowledge of the context in which a payment or benefit was received. **For a summary of this case see the MBR&M Financial Restructuring & Insolvency Legal Alert 12 February 2007.**

CONSULTATIONS

Pre-action protocol

■ The Civil Justice Council is proposing to recommend the introduction of a consolidated pre-action protocol that will reduce the present nine to one protocol by incorporating the core steps and guidance common to all of the protocols but with subject specific appendices. It is considered that a consolidated document will be easier for litigants to access, understand and apply and that it will make it easier to draft any future subject-specific material that may be appropriate to add to the appendices. The pre-action protocols currently in force are for personal injury, clinical negligence, construction and engineering disputes, defamation, professional negligence, judicial review, disease and illness, housing disrepair and rent arrears. There is also a Practice Direction on Protocols which includes a section on the pre-action behaviour expected in cases with no specific protocol. The PD makes clear that the court will take account of the compliance or non-compliance with the protocols in making decisions about case management and costs. The CJC is interested in responses to a number of questions including whether or not a consolidated protocol would be beneficial, what it should include and what other areas of civil litigation, if any, would benefit from subject-specific requirements appended to a consolidated protocol. The consultation period is for 12 weeks, terminating on 27 April 2007. The paper can be accessed on www.civiljusticecouncil.gov.uk

Proposed Regulation on the law applicable to contractual obligations (Rome I)

■ The proposed Regulation on the law applicable to contractual obligations aims to convert and modernise the 1980 Rome Convention into an EU Community Regulation. It makes provision for choice of law in specific cross border transactions including employment and consumer contracts. A new addition to the draft Regulation, to comprehensively cover insurance contracts, has recently been proposed. A consultation has been launched in conjunction with HM Treasury to examine the advantages/ disadvantages of this. The consultation ends on 30 March 2007.

Who should be allowed to enter the profession?

■ The Solicitors Regulation Authority wants practitioners' input on who should be allowed to enter the profession. The Solicitors Act 1974 and various regulations provide that, before admission, the SRA must ensure people are of the character and suitability to be a solicitor. However, character and suitability are not defined. Draft guidelines were issued in June 2006 but the SRA now wants solicitors' views on how the guidelines can be improved. The consultation closes on 27 April 2007. The guidelines are available on www.sra.org.uk.

A new framework for work based learning

■ The Solicitors Regulation Authority is seeking views on a new framework for assessing trainee solicitors' performance in practice. If implemented, the new framework would replace the current training contract with a flexible period of development based on assessment against clear standards and regular reviews; remove the requirement to obtain a formal, structured training contract; introduce a route to qualification for people not in a formal contract who are working in an appropriate level in a legal environment and can demonstrate the development of the required knowledge and skills; introduce a formal assessment of competence; and introduce an enhanced validation and monitoring process for organisations seeking accreditation as training organisations. The proposal is that the new framework will be piloted for a minimum of two years from September 2007. The deadline for submission of responses is 9 May 2007. For further information see http://www.sra.org.uk/consultations.page

Regulation of enforcement agents

■ The DCA has issued a consultation paper on the options for licensing enforcement agents such as bailiffs. Currently, the regulatory structure for enforcement agents in England and Wales is very fragmented and only applies to parts of the industry. The DCA believes that regulation of this area is needed to raise standards of professionalism. Its preferred solution is to regulate enforcement agents by the Security Industry Authority which was set up by the Home Office in April 2003. The DCA suggests that by broadening its scope the SIA could provide a cost effective means of regulating the enforcement industry. The consultation paper is available on http://www.dca.gov.uk/consult/enforce_agt/cp0207.htm. Comments should be submitted by 25 April 2007.

The DCA has also announced that it is intended that all enforcement agents, including bailiffs, who are not Crown employees will be subject to regulation by a new national framework that is to be established under the provisions of the Tribunals, Court and Enforcement Bill. Agents will be required to undergo criminal record checks, possess a certificate issued by a county court judge and they will be subject to a single complaints regime. Agents found in breach of the law could face the suspension or cancellation of their certificates and fines of up to £5,000. [Please note that we will continue to advise you on the progress of this Bill.]

LEGISLATION

Compensation Act 2006

■ The Compensation Act 2006 specifies certain factors that may be taken into account by a court determining a claim in negligence or breach of statutory duty; makes provision about damages for mesothelioma; and for the regulation of claims management services. The DCA will be the regulator. As regards claims management services, from 6 April 2007 it will be an offence to provide claims management services without authorisation or exemption. Businesses have been able to apply for authorisation since November 2006 and once they are authorised they will have to comply with a strict code of conduct which covers advertising and marketing; taking on business; representing a client; handling client money; and handling complaints. The legislation covers claims in respect of personal injury; criminal injuries compensation; employment matters; housing disrepair; financial products; and industrial injury disablement benefits. Although regulation does not begin until April, the industry is being encouraged to meet the requirements now.

Companies Act 2006

■ The DTI has announced the full implementation timetable for the Companies Act 2006. All of the Act will be in place by October 2008. The implementation is fairly evenly split between 1 October 2007, 6 April 2008 and 1 October 2008. The parts of the Act to be implemented in October 2008 are generally those that may involve companies making changes to their articles of association and the parts that will involve systems changes at Companies House. Note in particular that the part on directors' duties will come into force in October 2007, with the exception of the duty to avoid conflicts of interest (which may involve existing companies changing their articles of association). The share capital parts (including financial assistance) are due to be implemented in October 2008. The implementation timetable can be accessed on http://www.gnn.gov.uk/environment/fullDetail.asp?ReleaseID=267665&NewsAreaID=2&NavigatedFromDepartment=False. The DTI has also published guides to the Act for private companies which can be accessed on www.dti.gov.uk/files/file37956.pdf.

NEWS

Law Society and Bar Council strike fees deal

■ It was reported in *Legal Week* (1.2.07) that after almost a decade of negotiation the Law Society and Bar Council have struck a deal to make arrangements for paying barristers contractually binding by this coming October. The changes will enable barristers to sue solicitors for non-payment off the back of a legally binding invoice. Under the proposed system any fee dispute will go to a compulsory arbitration scheme before a joint panel. Once a decision has been reached, barristers will be able to sue for outstanding fees. The new contractual terms are to be drawn up by a working party; the question is what the terms of the contract will be. Watch this space.

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