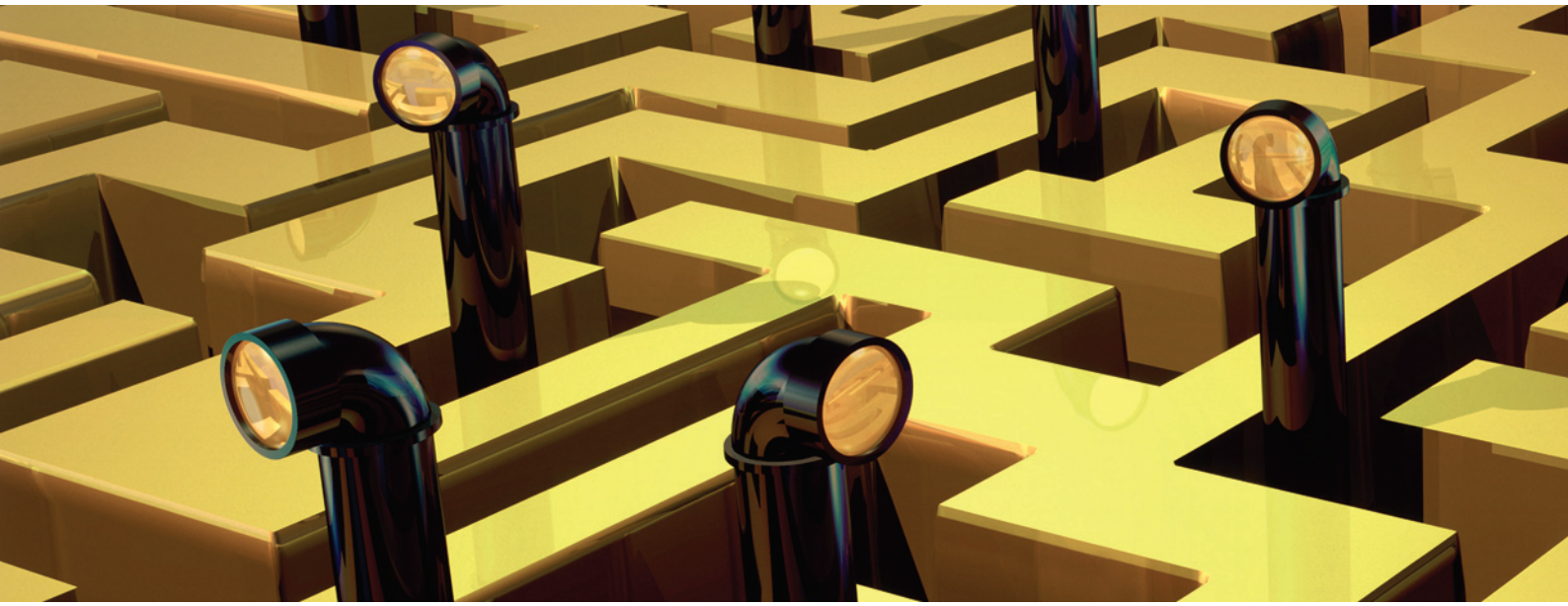
January 2008

Litigation & Dispute Resolution
Legal Update



Welcome to Mayer Brown's Litigation & Dispute Resolution Legal Update January 2008. 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

Commencement of a detailed assessment of costs

- ***Harris & Another v Moat Housing Group South Ltd, SCCO (Christopher Clarke J) 20.12.07***

This appeal from a decision of a costs judge on an issue in relation to assessment of costs raised a novel point on the interpretation of the CPR regarding a receiving party who seeks to recover costs of more than one firm of solicitors. The judge held that the solicitor should claim the costs of all solicitors in one bill of costs.

CPR rule 47.6 provides that "(1) Detailed assessment proceedings are commenced by the receiving party serving on the paying party – (a) notice of commencement in the relevant practice form; and (b) a copy of the bill of costs." The Costs Practice Direction at paragraph 4.2(2) provides that "Where the receiving party was represented by different solicitors during the course of the proceedings, the bill should be divided into different parts so as to distinguish between the costs payable in respect of each solicitor."

Christopher Clarke J said that the rules clearly provide that detailed assessment proceedings are commenced by the receiving party serving both a notice of commencement and the (not a) bill of costs. "If the receiving party is entitled to recover his costs of instructing more than one solicitor the practice direction requires him to include the costs of each solicitor separately in the bill. If he fails to include the costs of his previous solicitor, and the costs judge completes his assessment of the costs without regard to the previous solicitor's costs and proceeds to a final certificate, the receiving party cannot claim a further assessment. The detailed assessment proceedings have been completed and an amount ordered to be paid. The receiving party cannot start again." If there has been an agreement as to the costs payable, the critical question will be what has been agreed. For example, if the receiving party had made clear in the notice, in the bills or otherwise, that the amount claimed was only part of their claim to costs and that they would be claiming later in respect of e.g. another firm of solicitors, and they had agreed that the paying party would pay a sum in respect of those costs, the receiving party would not be prevented from making a claim in respect of those costs (despite there having been a failure to comply with the practice direction and subject to any sanction the court thought fit to impose). "If, on the other hand, what has been settled was the amount of the receiving party's costs pursuant to a particular order or orders the position would be different. If the receiving party has left out of his bill part of what he should have claimed and there has been a settlement of the bill, he cannot recover more than the amount agreed. The omission is his misfortune[1]."

1 *Hyman and Teff v Segalov* [1952] 2 All ER applied.

Profit costs or disbursements?

- ***Crane v Canons Leisure Centre, CA (May LJ, Maurice Kay LJ, Hallett LJ, Chief Master Hurst) 19.12.07***

In this case the claimant's solicitors had been appointed under a Collective Conditional Fee Agreement (CCFA) under which they were entitled to a success fee in respect of base costs (or profit costs) but not disbursements. The dispute itself had been settled without the start of proceedings. The defendant agreed to pay £1,500 plus costs on a standard basis to be assessed if not agreed. Costs were not agreed and the claimant's solicitors engaged costs consultants (CL) to conduct the detailed assessment of the claimant's costs. At the detailed assessment it was determined that the solicitors were entitled under the CCFA to a success fee and a proper amount for the costs of CL. On appeal, the costs judge disallowed the success fee part of the assessment and reduced the costs. The question was whether the satellite costs of conducting the detailed costs assessment were to be regarded as profit costs or disbursements. The significance of the distinction was that the solicitors would have been entitled to a percentage success fee on those costs if they were profit costs, as part of their base costs, but not if they were disbursements. The costs judge decided that those costs were disbursements which did not attract a success fee. The solicitors (nominally the claimant) appealed against the decision.

The appeal was allowed (Maurice Kay LJ dissenting). May LJ said that the distinction between base costs and disbursements in the CCFA was effectively a distinction between charges by the solicitors for work which they themselves did or were directly responsible for; and expenses which they incurred for the client, some of which were for other people's work which they were not directly responsible for and which they passed on to the client at cost. "If they properly choose to delegate their own work, they remain entitled to charge on their own account and the proper amount of the charge is not necessarily the same as the amount which they agree to pay their subcontractor. It could be more or it could be less." In this case, CL were doing work which the solicitors had themselves undertaken to do; it was solicitors' work for which they were entitled to make their own direct charge and in theory they remained liable for it. The costs were therefore base costs for the purposes of the CCFA and they were entitled to the success fee. May LJ also said that there were clear reasons of policy for the court not to require parties who enter into CFAs to address at the outset the risk of costs proceedings separately. There is a general sense that CFAs should not be over complicated, that costs should be agreed wherever possible and that if there are contested costs proceedings the means of financing the litigation should extend to the costs proceedings at the same rate as the proceedings themselves if that is what has been agreed with the client.

Non-party costs orders

- ***Nelson & Another v Greening & Sykes (Builders) Ltd, CA (Ward LJ, Wall LJ, Lawrence Collins LJ) 18.12.07***

One of the issues on appeal was whether the respondents (G&S) were entitled to a non-party costs order against one of the appellants (H) and whether the judge had been entitled to make an order that H pay already assessed costs without having given her an opportunity to re-open the assessments. That question turned, in part, on the construction of s51(3) Supreme Court Act 1981 which deals with costs in the civil division of the Court of Appeal, High Court and county courts. The section provides that "The court shall have full power to determine by whom and to what extent the costs are to be

paid." The argument put forward in this case was that under s51(3) there were only two types of costs orders that could be made – costs subject to detailed assessment or costs summarily assessed in a specific sum. In this case the judge did not purport summarily to assess costs. He had, in effect, ordered costs on an indemnity basis and H, therefore, had been denied natural justice. H had not been a party to earlier costs assessment proceedings and she had not had an opportunity to be heard on the propriety of any sums claimed as costs.

The appeal was dismissed. The CA held that the court has the power under s51(3) to order, in an appropriate case, that a non-party pay costs which have already been assessed. This was an appropriate case because the appellants were acting in tandem; Mr Nelson had been present for at least part of the hearing before the costs judge at the first costs assessment; he had been present at the second hearing and had then had the opportunity to challenge the summary assessment of costs. There was a more than sufficient degree of identification between the appellants in the conduct of the proceedings to have made it just for H to have been ordered to pay costs.

Pro bono costs recovery

■ It has been announced (the *Gazette* 6.12.07) that from next October pro bono supported litigants who win in court will be able to claim costs against the other side, with sums recovered being used to help fund future pro bono work. The Ministry of Justice said that it will introduce the necessary secondary legislation so as to implement s194 Legal Services Act. That section abrogates the indemnity principle (which restricts costs to no more than the amount the winning party owes its own lawyers). All types of civil cases will be included. Sums recovered will go to a prescribed charity and will be distributed to voluntary groups which provide legal support for both individuals and the community. The charity will be expected to consider any preferences voiced by the lawyers.

Evidence

Legal advice privilege

■ ***Financial Services Compensation Scheme Ltd v Abbey National Treasury Services plc, ChD (David Richards J) 4.12.07***

This was an application for disclosure of parts of documents which had been redacted on grounds of legal professional privilege and irrelevance. Formal disclosure had not taken place but as part of a process of voluntary disclosure, the claimant provided the defendant with documents in which it had redacted certain questions and answers which it claimed contained legal advice or a distillation of legal advice given by the claimant's general counsel and other qualified lawyers within the legal department to the claims teams. One document did not specifically identify the narrow question on which the legal department had advised (although it gave an indication of material considered by the legal department) but the claimant believed that, if unredacted, it would have enabled the nature and substance of the advice that had been given to have been inferred. The claimant submitted that if the substance of the advice could be inferred from the redacted passage, the passage "evidenced" the substance of the advice for the purposes of

the test set out in *Three Rivers District Council v Bank of England (No 5)*[2] ; a document from which the advice could be inferred constituted secondary evidence of the advice.

The court held that unless the inference is obvious and inevitable, in which case the document is in substance a statement of the advice or communication, privilege does not attach to such documents. The judge considered that "...it is the communication between the client and lawyer which is privileged either in its original form or in a summarised or paraphrased form. A document which does not contain the communication in any form contains nothings to which privilege attaches." Further, "...inference is usually a matter of subjective judgment...A claim to privilege should not...depend on a subjective assessment of this sort." In this case, taking the documents as a whole, the judge was of the view that it would have been artificial to have separated them and he allowed the claimant to assert privilege. By way of guidance, he said that he "...would encourage a plainer statement of the basis of the claim and an avoidance of more general assertions that a document 'evidences' or 'reveals' the substance of advice."

CCBE privilege appeal

■ It was reported in the *Gazette* (29.11.07) that the Council of Bars and Law Societies of Europe (CCBE) has voted narrowly to join the appeal against the recent European Court of First Instance ruling on legal professional privilege for in-house lawyers in the case of *Akzo Nobel Chemicals Ltd v Commission of the European Communities*[3]. The CFI rejected Akzo's arguments that legal professional privilege should be extended to cover communications with in-house counsel, resulting in a continuing disparity between EU and national laws. According to the *Gazette*, delegates were discouraged by counsel's opinion that any appeal would have less than a 50% likelihood of success.

Conduct of litigation

Duty of counsel

■ ***Khudados v Hayden & Others, CA (Ward LJ, Wilson LJ, Holman J) 13.12.07***

The claimant was suspended from her job and was then given notice to terminate her contract of employment. She brought proceedings one week before the notice expired, seeking various injunctions and claiming damages. Although the matter was listed for an expedited hearing, it was adjourned five times. The third adjournment was on the ground of the claimant's ill health. At least two medical reports were put before the court regarding her health and she was also examined by a third medical expert that had been appointed by the third defendant. It is not clear whether that report was placed before the court but, nonetheless, an adjournment was granted. The hearing was re-listed but was then adjourned twice more. A few days before the hearing was finally due to start, the claimant applied for a two month adjournment on the ground that she did not have legal representation. There was no reference to her ill-health in that application. The judge dismissed the application and permission to appeal was refused. The claimant renewed her application with counsel appearing on her behalf. She submitted that the defendant should have placed the third medical report before the judge and, had the judge seen the report he might have granted an adjournment. Ward LJ pointed out that

2 [2003] QB 1556

3 See the summary of this case in the Litigation & Dispute Resolution Legal Update October/November 2007.

the submission that the defendant should have placed the report before the judge begged the question: was there a duty on counsel to draw this evidence to the judge's attention. Counsel for the defendant submitted that CPR rule 1.3 (duty of the parties) required the parties to help the court to further the overriding objective to deal with cases justly and, on that basis, the medical report should have been before the judge. The question the CA had to address was "to what extent if at all a barrister who must promote and protect fearlessly and by all proper and lawful means his lay client's best interests is bound to disclose *evidence* favourable to the other side." The CA distinguished between *evidence* favourable to the other side and *law* in the form of all relevant decisions and legislative provisions of which he is aware whether the effect is favourable or unfavourable towards the contention for which he argued. Under the Bar Code of Conduct a barrister is under a duty to inform the court of the latter.

The CA held that a barrister was under no duty to draw the judge's attention to evidence that was favourable to the other side. "...a barrister would fail in his duty to his own client were he to supplement the deficiencies in his opponent's evidence". The fact that the other side was a litigant in person made no difference. Counsel could not, therefore, be criticised, for failing to disclose the further report. As regards rule 1.3 , the rule states that the parties are required to help the court to further the overriding objective of dealing with cases justly. The duty is to the court, not to the other side. "...fairness does not require counsel to place his own client at a substantial disadvantage by acting contrary to his interests. Whatever may be the requirement to help the court, it cannot...extend so far as to impose upon counsel a duty in conflict with his proper duty to his client." It followed that counsel had no obligation to disclose the report.

Summary judgment

Master erred by failing to make a final determination of the issues and granting summary judgment

- ***John D Wood & Co (Residential and Agricultural Ltd) v Edward Craze, QBD (Swift J) 30.11.07***

CPR rule 24.2 provides that the court may give summary judgment against a claimant or 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/successfully defending the claim or issue and there is no other compelling reason why it should be disposed of at trial. PD 24.1.3 provides that an application for summary judgment under rule 24.2 may be based on a point of law, the evidence which can reasonably be expected to be available at trial or the lack of it, or a combination of these. Real prospect of success means a real as opposed to a fanciful chance of winning[4]. Provided the test is satisfied, summary judgment may be entered even if the allegations are serious[5]. In *ICI Chemicals & Polymers Ltd v TTE Training Ltd*[6] the CA held that it was not uncommon for an application under Part 24 to give rise to a short point of law or construction and if the court was satisfied that it had before it all the evidence necessary for the proper determination of the question and the parties had adequate opportunity to address it in argument "it should grasp the nettle and decide it" (per Moore-Bick LJ).

4 *Swain v Hillman* [2001] 1 All ER 91

5 See *Hanco ATM Systems Ltd v Cashbox ATM Systems Ltd & Others* [2007] EWHC 1599 (Ch).

6 [2007] EWCA Civ 725. See the summary in the Litigation & Dispute Resolution Legal Update September 2007.

In this case the defendant tried to persuade the master to make a final determination of the points of law arising from the claimant's grounds of claim and submitted that this could be done on the information before him; there was no requirement for further evidence and as a matter of law and construction of the agreement between the parties, the claimant's grounds of claim should have been summarily dismissed or struck out. The master ruled that all grounds of claim (even the claim for *quantum meruit* which he found could not possibly succeed) should proceed to trial. The defendant, relying on *ICI Chemicals*, submitted that the master had erred by declining/failing to make a final determination of the issues and granting summary judgment and he criticised the master's decision to allow the *quantum meruit* claim to proceed despite having concluded that it could not possibly succeed.

Swift J held that the master should have "grasped the nettle" and decided the issues of law and construction that were canvassed before him in relation to all the grounds of the claim. He had the necessary material before him and argument from counsel; there was no suggestion that claimant's counsel was unprepared to argue the various points or that the court did not have time to accommodate them; and there was no suggestion that the court would have required further evidence in order to determine the issues. The master had, therefore, erred in failing to deal with the legal issues and the appeal was allowed.

Judge hears summary judgment application at a late stage and despite directions for trial having been given

- ***Bank of Scotland plc v King & Others, ChD (Morgan J) 23.11.07***

One of the three applications before the court was the claimant's application for summary judgment on the grounds that the defendants had no real prospect of successfully defending the claim and there was no other compelling reason why the claim should have been disposed of at trial. Morgan J had to consider whether this was a proper case for summary judgment or whether he should have adhered to the earlier directions that had been given by the master providing for there to be a trial in due course. He said that in some circumstances the fact that directions for trial had been given and that an application for summary judgment was made at a late stage might have led the court to refuse to consider the application. This case, however, was different. First, directions contemplated a trial in the period October to December 2007 but in the absence of summary judgment a trial would have been significantly delayed. Further, the claimant had before the court an application for judgment in default of defence on the basis that the defence had been struck out and the second and third defendants had applied for relief from the sanction of striking out. Had the judge declined to consider the application for summary judgment, he would have had to consider the other two applications in any event. And, the main issue to be considered, although not easy, would not have become any easier had it been dealt with at a trial. In those circumstances, Morgan J concluded that it was right to deal with the application and he found that the claimant was entitled to summary judgment.

Abuse of process

Application to strike out for abuse of process is a balancing exercise

- ***Aldi Stores Ltd v WSP Group plc & Others, CA (Longmore LJ, Thomas LJ, Wall LJ) 28.11.07***[7]

The Court of Appeal has allowed an appeal against the decision of Jackson J striking out a claim as an abuse of process on the basis that it could and should have been brought in previous litigation. It arose in the context of complex commercial litigation and raised the question as to whether Aldi, when pursuing a damages action against a contractor, should have at the same time pursued actions against professional consultants rather than bringing a second action. Jackson J held that the balance came down in favour of characterising the second action as an abuse of process and said that if it were to go ahead the applicants would have been harassed or vexed for the second time by a substantial, expensive and time consuming action and that would have been unjust.

The principles applicable to an application to strike out a claim on the basis that it is an abuse of process to bring a claim that could and should have been brought in previous proceedings are set out in the speech of Lord Bingham in *Johnson v Gore-Wood*[8] and were summarised by Clarke LJ in *Dexter v Vlieland-Boddy*[9] as follows: "(i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process. (ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C. (iii) The burden of establishing abuse of process is on B or C or as the case may be. (iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. (v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process. (vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C."

The CA held that the decision to be taken by the judge in an application for strike out for abuse of process is not the exercise of a discretion but rather a balancing exercise. "…an appellate court will…generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him." In this case Jackson J had reached a decision which was impermissible because he had taken into account factors which he should not have done and omitted factors which he should have taken into account. This led him to the impermissible conclusion that Aldi were abusing the process of the court. For those reasons the appeal was allowed.

Thomas LJ commented that should a similar problem arise in the future, the proper thing to do is to raise the issue with the court. "Parties are sometimes faced with the issue of wishing to pursue other proceedings whilst reserving a right in existing proceedings. Often, no problem arises; in this case…[the parties] in truth knew…that there was a potential problem, but it was never raised with the court…it should have been. The court would, at the very least, have been able to express its view as to the proper use of its

7 See the summary of the first instance decision in the Litigation & Dispute Resolution Legal Update March 2007

8 [2000] UKHL [2002] 2 AC 1

9 [2003] EWCA Civ 14

resources and on the efficient and economical conduct of the litigation…for the future, if a similar issue arises in complex commercial multi-party litigation, it must be referred to the court seized of the proceedings. It is plainly not only in the interest of the parties, but also in the public interest and in the interest of the efficient use of court resources that this is done. There can be no excuse for failure to do so in the future." This is consistent with the overriding objective and the duty on the parties to help the court further that objective.

Service of a claim form and disputing the court's jurisdiction

Requirement to comply with the provisions of CPR 11

- ***Hoddinott & Others v Persimmon Homes (Wessex) Ltd, CA (Sir Anthony Clarke MR, Dyson LJ, Jacob LJ) 21.11.07***

CPR rule 11(1) provides that "A defendant who wishes to – (a) dispute the court's jurisdiction to try the claim; or (b) argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have." A defendant who wishes to apply must first file an acknowledgement of service in accordance with Part 10 (11(2)). If he does so he does not lose any right that he may have to dispute the court's jurisdiction (11(3)). An application must be made within 14 days after filing an acknowledgement of service (11(4)). 11.5 provides that if the defendant (a) files an acknowledgement of service and (b) does not make such an application within 14 days, he is to be treated as having accepted that the court has jurisdiction to try the claim.

The claimants in this case appealed against an order setting aside an order extending time for service of a claim form. They issued a claim form in the High Court on 22 May 2006 which was not served immediately. Time for service expired on 22 September (rule 7.5(2)[10]). On 13 September, without notice to the defendant, the claimants' solicitor made an application pursuant to rule 7.6(2) to extend the time of service to 22 November. (Rule 7.6(4) provides that such an application may be made without notice.) The district judge granted the application and extended time for service to 22 November. The next day the claimants' solicitor sent the defendant's solicitor a copy of the order and enclosed a copy of the claim form "for information purposes only". On 2 October, prior to service of the claim form, the defendant's solicitor applied to set aside the order of 13 September on the grounds that the claimants did not have a good reason to obtain an extension of time. On 21 November the claim form and particulars of claim were served and on 28 November the defendant's solicitors acknowledged service. They ticked the box saying they intended to defend all of the claim but did not tick the box saying they intended to contest jurisdiction.

The district judge who heard the application to set aside the *ex parte* order did not accept the claimant's view that an additional two months would have led to a settlement. He held that rule 11 was relevant and that as the application effectively disputing service had been made even before the proceedings had been served it would have been ridiculous for the defendants to have been required to make an application under rule 11(1) after filing the acknowledgement of service. He also said that a claimant who makes a without

10 This rule provides that "The general rule is that a claim form must be served within 4 months after the date of issue."

notice application runs the risk that the order might subsequently be set aside but did not consider that there would be "an unfairness to the claimants simply arising from any reliance on the fact that an order was made". The issues on appeal were whether rule 11 was engaged at all; if so whether the district judge had been right to hold that the defendant's application to set aside the order for an extension of time rendered an application under 11(1) unnecessary.

The CA held that rule 11 was engaged. The word "jurisdiction" in 11(1) does not denote territorial jurisdiction but is a reference to the court's power or authority to try a claim. "Even…if the court has jurisdiction to try a claim where the claim form has not been served in time, it is undoubtedly open to a defendant to argue that the court should not exercise its jurisdiction to do so in such circumstances…It is no answer to say that service of a claim form out of time does not of itself deprive the court of its jurisdiction, and that it is no more than a breach of a rule of procedure, namely CPR 7.5(2). It is the breach of this rule which provides the basis for the argument by the defendant that the court should not exercise its jurisdiction to try the claim." As regards whether an application under 11(1) was necessary, the CA held that the language of rule 11 is clear and unqualified. If the conditions stated in 11.5(a) and (b) are satisfied the defendant is treated as having accepted that the court has jurisdiction to try the claim. In this case, both of the conditions were satisfied and the defendant was to be treated as having accepted that the court should exercise its jurisdiction to try the claim (this was reinforced by the fact that the defendant indicated on the acknowledgement of service that it did not intend to contest jurisdiction and did intend to defend the claim).

As regards the exercise of the judge's discretion under 7.6(1), the CA accepted the general principle that where there is no good reason for failing to serve the claim form within the four month period, the court still retains a discretion to grant an extension of time but is unlikely to do so. It agreed with the district judge that there was no good reason in this case. The "false sense of security" given by the without notice order is not a relevant factor to be taken into account under the rule. "…if a claimant…obtains an extension of time for service of the claim form without giving notice to the defendant, he does so at his peril. He should know that an order obtained in such circumstances may be set aside." When, however, such an application is made the court should consider it carefully and decide whether, as per the guidance given by the CA in *Hashtroodi v Hancock*[11], the claimant had made out a case for extending time.

Court dress

Practice Direction (Court Dress) (No 4)

■ Following consultation carried out by the DCA and consultation with the Heads of Division, the Lord Chief Justice has concluded that it is no longer appropriate for solicitors and other advocates authorised under the Courts and Legal Services Act 1990 to be precluded from wearing wigs when appearing in court. With effect from 2 January 2008 they now have the option to wear wigs in circumstances where they would be worn by members of the Bar. This change has come just as the Bar Council is preparing to undertake further consultation on whether the wig and gown should be retained in civil and family cases before it makes recommendations to Lord Phillips in March

11 [2004] EWCA Civ 652, [2004] 1 WLR 3206. The guidance was repeated in the cases reported with *Collier v Williams* [2006] EWCA Civ 20, [2006] 1 WLR 1945

2008. Lord Phillips will give directions as to court dress of advocates in light of the recommendations that he receives.

TORTS

Economic torts

- ***Meretz Investments NV & Another v ACP Ltd & Others, CA (Pill LJ, Arden LJ, Toulson LJ) 11.12.07***

This case was the first opportunity that the CA had to consider the judgment of the House of Lords in *OBG Ltd v Allan*[12] on economic torts, in particular, inducing a breach of contract and conspiracy to injure by unlawful means. In *OBG* the House of Lords held that conspiracy, inducing breach of contract and other economic torts are separate torts. The essential elements of the tort of inducing a breach of contract are knowledge of the contract, intention to induce a breach of the contract and actual breach of contract. The tort is committed when a party with the requisite knowledge and intention procures or persuades another party to breach his contract with a third party. The essential elements of the tort of causing loss by unlawful means are wrongful interference with the actions of a third party in which the claimant has an interest, and an intention thereby to cause loss to the claimant. Mere foresight that the claimant will suffer loss is not enough. The tort is actionable if the claimant proves loss as a result of an unlawful action which was taken pursuant to an agreement between the defendant and another party to injure him by unlawful means, whether or not that was the predominant purpose of the defendant. (The House did not consider the tort of conspiracy.) A crucial question on this appeal in relation to economic torts was whether the respondents had the necessary intention.

The CA dismissed the appeal in relation to economic torts (it was allowed in part in relation to issues concerning contractual liability). They found that the respondents did not have the intention to cause harm to the appellants for the purpose of the torts; it was sufficient to avoid liability that they believed they were entitled to act as they did. "The mere fact that [the respondents] intended the result to occur does not mean that they had the intention to cause harm for the purposes of the tort of inducing breach of contract. All they intended to do was to produce a result which they believed was a result of the contractual arrangements between [the parties] and that they were entitled to produce." As regards the tort of conspiracy to cause harm by unlawful means, the respondents did not do the act complained of with the intention of causing loss. The mere fact that by doing the act loss/damage would result did not mean they had the relevant intention to cause harm. In addition, there were no unlawful means. The second respondent had a contractual right to exercise its power of sale and the first respondent's breach of contract was an unavoidable consequence of that act.

12 [2007] UKHL 21. See the summary of this decision in the Litigation & Dispute Resolution Legal Update June 2007.

COMPANY

Directors' disqualification proceedings

- ***Secretary of State for Trade & Industry v Vohora & Another, ChD (Evans-Lombe J) 15.1.07***

This was an appeal against a decision that an application by the claimant was within the time limit imposed by s7(2) Company Directors Disqualification Act 1986 (CDDA). This section provides that "Except with the leave of the court, an application for the making under that section of a disqualification order against any person shall not be made after the end of the period of two years beginning with the day on which the company of which that person is or has been a director became insolvent."

CPR rule 7.2 provides that "(1) Proceedings are started when the court issues a claim form at the request of the claimant. (2) A claim form is issued on the date entered on the form by the court." The PD to Part 7 provides that "5.1...where the claim form as issued was received in the court office on a date earlier than the date on which it was issued by the court, the claim is 'brought' for the purposes of the Limitation Act 1980 and any other relevant statute on that earlier date...5.4 Parties proposing to start a claim which is approaching the expiry of the limitation period should recognise the potential importance of establishing the date the claim form was received by the court and should themselves make arrangements to record the date."

In this case, the defendants were directors of a company that became insolvent on 7 May 2002 and therefore any application to disqualify the directors had to be made by 7 May 2004 pursuant to the CDDA. The claim form was sent to the court with a letter dated 26 April 2004 and was stamped by the court as received on that date. The court did not immediately seal the claim form and an issue date of 17 May 2004, which was outside the limitation period, was eventually inserted. Following correspondence, the issue date was altered to 26 April. The defendants submitted that as the claim form was issued when the court sealed it and inserted an issue date, the court officials did not have authority to re-date it; therefore the proceedings were started outside the time limit. The claimant submitted that the claim form was issued on 26 April when it was received by the court and the letter accompanying it received the court stamp and a receipt for the court fee with that date. Alternatively, PD 7 required that the claim be treated as having been brought on an earlier date for the purposes of Part 7.

Evans-Lombe J applied the dicta of Tuckey LJ in *St Helens Metropolitan Borough Council v Barnes*[13] as to when a claim had been "brought" for the purposes of s11 Limitation Act 1980. In that case the CA held that there is a distinction between the date of issue and the date proceedings are "brought". They treated paragraph 5.1 of the Practice Direction as qualifying rule 7.2 and were able to construe s11 of the Act so as to treat the proceedings as having been "brought" when the draft claim form and the request for issue were handed to the court officials by the claimant. In the instant case, the judge considered that the words "an application for the making of an order" in s7(2) CDDA had the same meaning as "the bringing of proceedings". The claimant's case, therefore, was "brought" on the day when the request and draft claim form were received by the court office. S 7(2) comes within the words "any other relevant statute" in the Practice Direction. Accordingly, the appeal was dismissed. This decision emphasises

13 [2006] EWCA Civ 1372

the importance of following the guidance in the Practice Direction – make sure to record the date of receipt of the claim form by the court.

Final implementation date for the Companies Act

The Department for Business, Enterprise and Regulatory Reform has announced that the final implementation date for the Companies Act will now be 1 October 2009 and not 1 October 2008. This is being done in order to make sure that the necessary changes to the Companies House systems and processes will be in place before the final provisions of the Act come into force. The Department will be seeking the views of business to see whether some provisions of the Act can still come into force in October of this year. The measures that will now come into force in October 2009 include provisions on company formation and a company's internal constitution; directors' residential addresses; company and business names; and a company's share capital. The revised implementation timetable is available on ***http://www.berr.gov.uk/bbf/co-act-2006/index.html***.

ARBITRATION

CA refuses security for costs against holder of New York Convention Award

- ***Gater Assets Ltd v Nak Naftogaz Ukrainiy, CA (Buxton LJ, Rix LJ, Moses LJ) 17.10.07***

This appeal concerned a New York Convention[14] arbitration award which was assigned to the claimant (G). G applied without notice to the High Court for permission to enforce the award against the defendant (N) and permission was given. N applied for the order to be set aside on the grounds that the award had been made without jurisdiction, alternatively had been obtained by fraud, and that there had never been an effective subrogation to G. N also applied under CPR rule 25.12 for security for the costs of the application to set aside the enforcement order. The judge at first instance accepted N's argument that G had commenced proceedings to enforce the award and was therefore a claimant within the meaning of rule 25.13[15]. It was therefore appropriate for the court to exercise its discretion and grant the order for security for costs. G appealed and the CA, by a two to one majority, allowed the appeal though there was disagreement as to the basis of the decision.

Rix LJ held that there was no express application of the security for costs regime to the statutory enforcement of an arbitration award. He considered there was something counter-intuitive about an award debtor being able to obtain security for costs in order to challenge the formal or public policy of validity of an award. He was prepared to assume, but not decide, that there was technical justification to order security for costs against any award creditor who brings enforcement proceedings pursuant to statute, but thought that there was a distinction to be made. Where, at the initial stage, the judge is not prepared to order summary enforcement but directs service of the claim form (under

14 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958

15 25.13(2)(a) states that the court may award security if the claimant is resident out of the jurisdiction but not resident in a Brussels Contracting State, a Lugano Contracting State or a Regulation State as defined in s1(3) Civil Jurisdiction and Judgments Act 1982.

rule 62.18(2)[16]) the technical position is that the enforcement claim is assimilated to any claim (under rule 62.18(3)[17]) and is brought within the ordinary CPR regime. Where there is summary, albeit provisional enforcement, as in the present case, the enforcement proceedings remain outside the ordinary CPR regime.

Rix LJ thought, however, that as a matter of principle it would not be just for the security to be ordered. The award debtor of a New York Convention award who resists enforcement is in reality a claimant and not a defendant. Section 66 Arbitration Act 1996 governs enforcement of domestic arbitration awards and a court may give leave to enforce the award in the same ways as a judgment or order. Rix LJ did not think that an award debtor would be entitled to security for costs in the case of enforcement of a domestic award under s66, and to require a New York Convention award creditor to provide security for costs would be to impose substantially more onerous conditions than are imposed in the case of domestic awards. This would be in breach of Article III of the Convention. In his judgment it would not be just in all the circumstances for such an order for security for costs to be made.

Moses LJ also allowed the appeal but for different reasons. He thought that Rix LJ's arguments were relevant to discretion and not to jurisdiction, and concluded that a court did not have jurisdiction to make an order for security for costs. He attached significance to the express provision in rule 74.5, which provides for security for costs for enforcement of a judgment of a foreign court, but where no such provision had been made in respect of the enforcement of New York Convention awards.

Buxton LJ dissented from both views. Unfortunately, with a dissenting judgment and conflicting reasons for allowing the appeal, the basis for the decision remains unclear and may cause difficulties for practitioners.

EU

Accession of Bulgaria and Romania to the Convention on the Law Applicable to Contractual Obligations

■ The Council Decision of 8 November 2007 concerning the accession of the Republic of Bulgaria and of Romania to the Convention on the Law applicable to Contractual Obligations states that this agreement will enter into force between Bulgaria, Romania and the other Member States on 15 January 2008.

Improvements to Regulation 1206/2001 on taking evidence abroad

■ On 5 December 2007 the European Commission adopted its report on the application of Council Regulation (EC) 1206/2001 on cooperation between the courts of Member States in the taking of evidence in civil or commercial matters. The Report concludes that the application of the Regulation has generally improved, simplified and accelerated the cooperation between the courts on the taking of evidence in civil or commercial matters. It has achieved its two main objectives, namely simplifying the cooperation between

16 This rule states that the court may specify parties to the arbitration on whom the arbitration claim form must be served.

17 This rule states that the parties on whom the arbitration claim form is served must acknowledge service and the enforcement proceedings will continue as if they were an arbitration claim under Section I of this Part.

Member States and accelerating the performance of the taking of evidence to a relatively satisfactory extent. Simplification has been brought about mainly by the introduction of direct court-to-court transmission (although requests are still sent to central bodies) and by the introduction of standard forms. As regards acceleration, most requests for the taking of evidence are executed faster than before the entry into force of the Regulation and within 90 days as foreseen by the Regulation. Consequently, modifications of the Regulation are not required but its functioning should be improved. For further information see: ***http://ec.europa.eu/civiljustice/news/whatsnew_en.htm***

European Council reaches agreement on mediation directive

■ The European Council has reached agreement on the text of a proposed directive concerning certain aspects of mediation in civil and commercial matters. The initial proposal for a mediation directive was adopted by the European Parliament (subject to some amendments) on 29 March 2007 and following discussion a compromise text was submitted to the Council and agreement on the proposal was reached on 9 November 2007. If/when the text is adopted by the European Parliament, the next stage will be for it to be published in the Official Journal. The compromise text can be accessed on ***http://register.consilium.europa.eu/pdf/en/07/st14/st14316.en07.pdf***.

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January 2008