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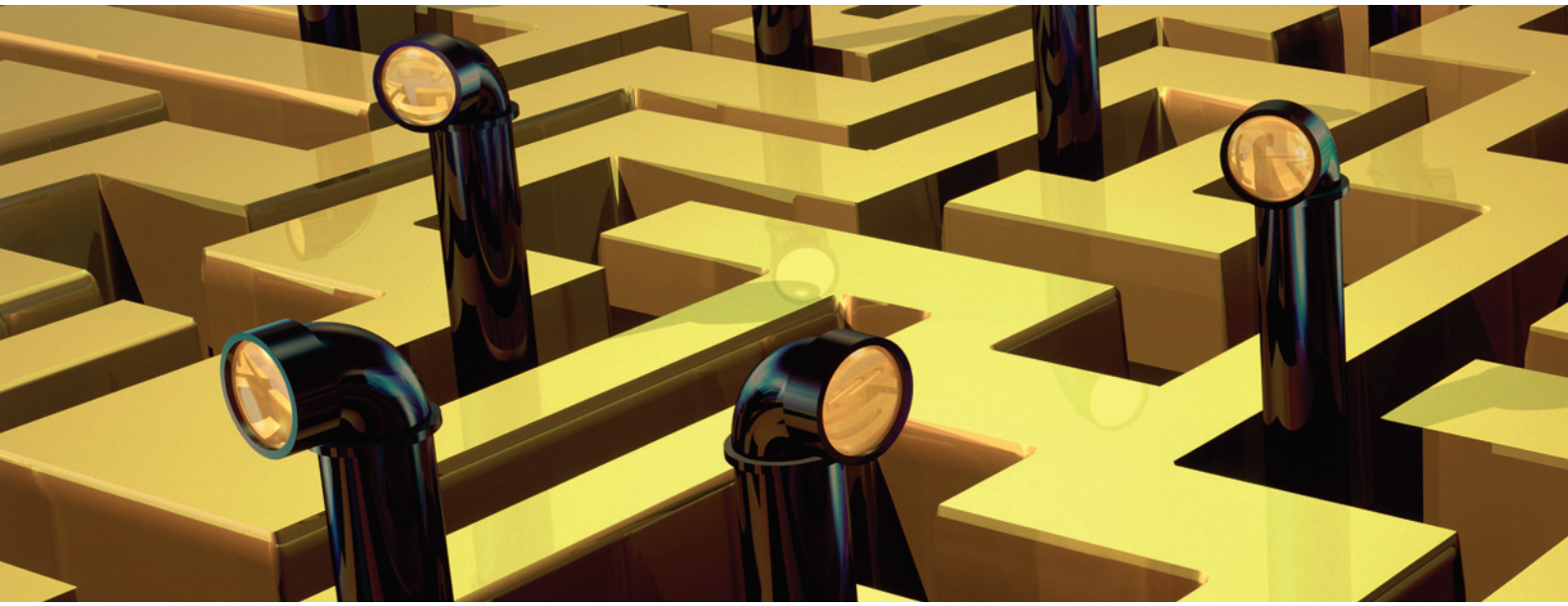
Litigation & Dispute Resolution
Legal Update



Welcome to Mayer Brown's Litigation & Dispute Resolution Legal Update March 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

CFA

- ***Gloucestershire County Council v Evans & Others, CA (Buxton LJ, Dyson LJ, Lloyd LJ) 31.1.08***

The question that the CA was concerned with was whether a collective conditional fee agreement (CCFA) complied with the requirements of s58 Courts and Legal Services Act 1990 as amended. It was the first time the court had to consider differential rate CFAs as opposed to agreements that were no win no fee and it held that the same rules apply for discount rates as they do for no win no fee. S58(2)(b) provides that "a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances." S58(4) says that: "The following further conditions are applicable to a conditional fee agreement which provides for a success fee – (a) it must relate to proceedings of a description specified by order made by the Lord Chancellor; (b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and (c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor." The maximum success fee permitted by s58(4)(c) and Article 4 of the 2000 Order is 100%.

In this case the CCFA provided for basic charges of £145 per hour and discounted charges of £95 per hour if the client lost. The success fee (the percentage of basic charges to be added to the basic charges if the client won) was set at 100%. The defendants submitted that the agreement provided that the solicitors were to receive an hourly rate of £95 whether the claimant won or lost but that in the event of a win, they would receive an additional £50 per hour. They contended that that meant the costs risk was no more than £50 per hour and the claimants should only have received the 100% success fee on the £50 difference between the full and discounted rates. In their opinion, the agreement, as it stood, provided for a success fee of 290%, and therefore did not satisfy s58(4)(c) of the Act and was unenforceable.

The appeal was dismissed. Dyson LJ (giving the leading judgment) said that s58(2)(b) was not "happily drafted" but that the concept of "costs at risk" formed no part of the definition of a CFA. The "lawfulness of the percentage increase is measured not by reference to the costs at risk, but by reference to the fees that would have been payable if the CFA were not a CFA." The CA also rejected the argument that a factual enquiry as to what bargain the parties would have struck if they had not entered into a CFA was necessary. "That would be a difficult, if not impossible task to perform."

Reduction in the award of costs

- ***Hall & Others v Stone, CA (Waller LJ (V-P), Smith LJ, Lloyd LJ) 18.12.07***

This was an appeal from a ruling on costs in a personal injury action. The claimants were awarded only 60% of their costs, however they maintained that they were the successful party and there was no reason why they should not have been awarded 100%.

CPR rule 44.3(2) provides that "If the court decides to make an order about costs – (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order." Rule 44.3(4) provides that "In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including - (a) the conduct of all the parties; (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply."

The CA held (Waller LJ dissenting) that the judge had erred in principle when making his decision and that, therefore, the decision had to be set aside. He erred in his approach to who was the successful party; he took conduct into account without specifying what conduct he had in mind or explaining what effect it had had on the proceedings; and he erred, in the circumstances, when taking into account early offers to settle. CPR 44.3(4) "is designed to allow the judge to take into account on costs the fact that the losing party actually won on one (or more than one) issue in the case. I do not think it means that the judge can cut down the costs of the successful party merely because he has not done quite as well as he had hoped" (per Smith LJ). Further, the mere fact that the defendant succeeded in keeping the damages down below the sum claimed by the claimant would not necessarily make him the victor or even a partial victor. What amounts to a party's success will be a matter of fact and degree and will be case-sensitive. "The focus should be on the partial success of the losing party on an issue with costs consequences." Accordingly, the appeal was allowed and there was a new order as to costs.

Evidence

Documents referred to in statements of case

- ***Expandable Ltd & Another v Rubin, CA (Rix LJ, Jacob LJ, Forbes J) 11.12.08***

The two questions that arose on this appeal were what is involved in a document being "mentioned" in a statement of case, witness statement or the like, and if a document is so mentioned, has privilege against its inspection been waived. CPR rule 31.14 provides that "(1) A party may inspect a document mentioned in – (a) a statement of case; (b) a witness statement; (c) a witness summary; or (d) an affidavit. (2) Subject to rule 35.10(4), a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed in the proceedings."[1]

1 Rule 35.10(4) makes provision in relation to instructions referred to in an expert's report.

The respondent (R) was the supervisor of a failed IVA of a debtor who was made bankrupt. There was a dispute as to whether R should have transferred to the debtor's trustees in bankruptcy the debtor's share of the proceeds of sale of a piece of land, which led to proceedings under the Insolvency Act 1986. The appellants (E) were two Gibraltar companies who claimed an interest in the proceeds of sale. In the course of R's enquiries into the matter, his solicitor (Z) interviewed the debtor. In his witness statement R said that there were several inconsistencies between what the debtor told R and what he told Z and that after Z had interviewed the debtor he wrote to R enclosing a copy of his note of the meeting and drawing his attention to the discrepancies. The notes of Z's interview with the debtor and the debtor's own note to R were disclosed to E. E requested disclosure of Z's covering letter to R on the basis that privilege had been lost because it had been mentioned in R's witness statement. Registrar Simmonds refused E's application for disclosure of the letter on the basis that "he wrote to me" did not amount to "mention" within the meaning of 31.14 and that even if it did, such mention would not have waived privilege. Patten J came to the same conclusions and rejected the appeal. Permission was given for a second appeal to the CA.

The CA said that the language "he wrote to me enclosing a copy of the meeting…" mentioned a document, namely Z's covering letter and that the test developed under RSC order 24 rule 10 of asking whether there had been a "direct allusion" to a document still remained the correct test[2]. The test of direct allusion was an elucidation of the present rule's language which speaks of "mentioned". Rix LJ noted that the expression "refer" or "reference" in RSC order 24 rule 10 was ambiguous as to whether it required a direct or an indirect reference, hence the use of "direct allusion" and "specifically mention" in the test. This was underlined by the use of the expression "mentioned" in 31.14. Subject to that, the expression "mentioned" was as general as could be and was not intended to be a difficult test. "The document in question does not have to be relied on, or referred to in any particular way or for any particular purpose, in order to be mentioned." In this case the expression the court had to consider began with "he wrote to me". Rix LJ held that "he wrote" was not a mere reference to a transaction otherwise to be inferred as effected by a document (as in "he conveyed" or "he guaranteed") but was a direct allusion to the act of making the document itself. The covering letter had, therefore, been mentioned in R's witness statement.

The CA then dealt with E's argument that mention of the letter was an automatic and absolute waiver of privilege. E submitted that the rule had changed in order to make a right of inspection under rule 31.14 supersede any ability to claim privilege and that mention of a document in one of the relevant categories operated as an automatic and absolute waiver of privilege. The CA held that there was no reason why the drafters of the CPR, in contra-distinction to the previous law, should have decided to require the automatic and absolute waiver of privilege for the mere mention of documents in statements of case and the like, there was nothing in Part 31 itself to explain such a change and such a fundamental change should not be regarded as having been effected by mere inference. Although the covering letter was mentioned in R's witness statement, privilege was not automatically and absolutely lost. Accordingly, the appeal was dismissed.

2 *Dubai Bank Ltd v Galadari (No 2)* [1990] 1 WLR 731 applied.

Use by one party of expert's report disclosed by another

- ***Shepherd & Neame & Others v EDF Energy Networks (SPN) plc & Others, QBD (TCC) (Akenhead J) 29.1.08***

This application raised issues under rule 35.11 which provides that "Where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial." The claimants applied, during the trial, to rely on the reports of two experts that had been retained by the second and third defendants. These defendants were no longer involved in the proceedings (the claims against them had been discontinued shortly after the trial began). The claimant submitted, based on the decision in *Gurney Consulting Engineers v Gleeds Health & Safety Ltd*[3], that the working of rule 35.11 entitled them by right to rely on the experts' reports even where the defendants had dropped out of the proceedings. The defendants relied on rule 35.1 which provides that "Expert evidence shall be restricted to that which is reasonably required to resolve proceedings." They submitted that it was unnecessary for the reports to be introduced because the claimants had other expert evidence which was adequate.

Akenhead J held that the claimants were entitled to rely on the experts' reports, pursuant to 35.11, for the following reasons: (1) the wording of 35.11 was unequivocal and unqualified and the rule gave them an unqualified right to do so; (b) it was logical that if parties complied with court orders regarding service of expert reports and the production of joint statements, they could rely on reports of experts whose clients were no longer active parties to the proceedings; (c) it was not disproportionate to permit the claimants to rely on the reports. There was no prejudice to the defendants who could either call the two experts or rely on the judgment in *Gurney* where it states that no great weight can be attached to the views of experts who do not give oral evidence at trial; (d) costs would not be materially increased.

Further information

Order to disclose information about the nature and extent of insurance cover

- ***Harcourt v Griffin & Others, QBD (Irwin J) 27.6.07***

CPR rule 18.1 provides that "(1) The court may at any time order a party to – (a) clarify any matter which is in dispute in the proceedings; or (b) give additional information in relation to any such matter, whether or not the matter is contained or referred to in a statement of case." This paragraph is subject to any rule of law to the contrary.

The claimant in this case suffered severe spinal injuries in an accident in the first defendant's gym. By consent, on 13 November 2006, Ramsey J gave judgment for the claimant for damages to be assessed at 75% of the full liability value of the claim. The defendants were ordered to pay the claimant's costs to date and to make an interim payment of £300,000 on account of costs, an interim payment of £1m and satisfy a liability to repay benefits, by 1 December 2006. The estimated value of the claim was between £8m - £10m on full liability, with a value after reduction of between £6m - £7.5m. The case had also generated enormous costs. The first

3 [2006] EWCH 43 (TCC). See the summary in the Litigation & Dispute Resolution Legal Update March 2006.

defendant was an unincorporated association and none of those individuals that would have been responsible for any liability on the first defendant's behalf were wealthy. The same applied to the second and third defendants. The claimant was, therefore, concerned as to how judgment in the sum likely to have been the final result and satisfaction of any costs order would have been met.

The claimant made a Part 18 request for further information directed to establishing the nature and extent of the insurance cover enjoyed by the defendants. The primary argument was that if the combination of the insurance limit and any assets available to satisfy an award was bound to be exceeded by any reasonable outcome, then it would have been wasteful and wrong to have engaged in a contested quantum phase. On the other hand, if there was ample insurance cover, then it would have been rational to expend further time and costs seeking to maximise the award. The defendants refused to supply the information. They submitted that it was elementary that an outsider to a contract, in this case any contract of insurance between defendants and insurers, had no right to know any of the terms of that contract; the statutory exceptions to that rule[4] proved the rule against disclosure – had Parliament intended other exceptions further legislation would have followed; had such a request been granted it would have handed an unfair advantage to a claimant in this type of litigation; were disclosure to have been granted, it would have become the standard practice in every case and that would result in satellite litigation; whilst the periodical payments regime and the various obligations of the parties and the court have an effect on what must be disclosed, the effect is actually limited in scope and did not extend to disclosure of the actual figure of the limit of cover and was not required.

Irwin J recognised that there "must be a very good reason before a court will enforce a disclosure of the terms of a contract between a party to litigation and a third party". There were, however, many circumstances where such disclosure may be compelled if it was relevant to an issue in the case. Examples included agency, cases where tortious liability was sought to be limited, or cases where interlocking contractual and commercial rights were in question. He agreed that there was no direct statutory authority under which the request was being made in this case. However, that did not mean that there was a necessary implication that Parliament did not intend such a request to be met. He also recognised that there might be cases where revelation of the limit of insurance cover would bring a tactical advantage to the other party in the litigation and there could be an issue of prejudice. No such argument was advanced in the instant case. Disclosure of this kind should only be ordered, therefore, where a claimant (or where the situation arises, any other party) can demonstrate that there is some real basis for concern that a realistic award in the case may not be satisfied. The exercise of any jurisdiction to order disclosure of such information must be approached with caution and there has to be a real basis for suggesting that it is necessary.

As regards Part 18, he said that "The purpose of the jurisdiction must be taken to be to ensure that the Parties have all the information they need to deal efficiently and justly with the matters which are in dispute between them. Moreover, the wording need not be taken to imply that there must be a live disagreement about the relevant issue, since on very many occasions parties are properly required to furnish information pursuant to CPR r 18 precisely to discover whether there is or is not a live disagreement between the parties on a given point. The whole thrust

4 There are statutory exceptions under the Third Party (Rights Against Insurers Act) 1930, the Contract (Rights of Third Parties) Act 1999 and the legislation relating to the Motor Insurers Bureau.

of the new approach to civil litigation enshrined in the Civil Procedure Rules is to avoid waste of time and cost to ensure swift and, as far as possible, proportionate and economical litigation." Accordingly, the wording of Part 18 was broad enough to cover information of this kind[5].

Court's jurisdiction

Power of the High Court to order transfer of proceedings to a county court

- ***National Westminster Bank plc v King, ChD (David Richards J) 20.2.08***

The question that was raised in this application was whether the High Court had the power under s40(2) County Courts Act 1984 to order the transfer of proceedings to a county court, notwithstanding that the proceedings would otherwise have fallen outside the jurisdiction of a county court. The court had to decide whether that provision was to be read as being subject to a qualification that it applied only to those proceedings which the county court would otherwise have had jurisdiction to hear and determine (s40, as originally enacted, made clear that it was not subject to such qualification). S40(2), as substituted by the Courts and Legal Services Act 1990, provides that subject to certain provisions "the High Court may order the transfer of any proceedings before it to a county court". S23 of the Act provides that "A county court shall have all the jurisdiction of the High Court to hear and determine – (c) the proceedings for foreclosure or redemption of any mortgage or for enforcing any charge or lien, where the amount owing in respect of the mortgage, charge or lien does not exceed the county court limit..." The county court limit is fixed at £30,000. Although the county courts have a broad, often exclusive jurisdiction to make charging orders, their original jurisdiction to enforce them is restricted to cases where the debt does not exceed £30,000, unless the parties agree otherwise under s24 of the Act.

The claim in the instant case was to enforce a charging order over the residential property of a judgment debtor by an order for sale. The charging order secured the sum of £39,256 then owing under the judgment together with any further interest becoming due and a sum for costs. The Chancery Master exercised his discretion to transfer the matter to the county court but the district judge decided that the county court did not have jurisdiction to make a determination. The bank sought clarity on that point.

The judge held that "As a matter of legislative policy, there is every reason to consider that the High Court should have an unlimited power of transfer. If, on consideration of the circumstances of an individual case, the High Court decides that it is suitable for determination by a county court, it is in keeping with the modern policy of assigning cases to the appropriate tier in the Court system that it should transfer it, irrespective of the county court limit. The legislative history...conclusively establishes that this is the correct approach." In this case, the Chancery Master had the power to make the order for transfer and as a result the county court had the jurisdiction to make a determination.

5 This conclusion was supported by the logic in the decision of the CA in *RE OT Computers* [2004] EWCA Civ 653 where the court ordered a defendant to give pre-issue disclosure of insurance details in a case governed by s2(1) Third Parties (Rights Against Insurances Act) 1930.

Case management

Should proceedings be stayed pending compliance with a pre-action protocol?

- ***Orange Personal Communications Services Ltd v Hoare Lea (a firm), QBD (TCC) (Akenhead J) 12.2.08***

The defendant (H) applied for a stay of proceedings pending the implementation of the process laid down by the Pre-Action Protocol for Construction Engineering Disputes. Although the claimant (O) had not followed that Protocol, the application raised interesting issues as to the extent to which it was appropriate for the court to adopt a pragmatic approach in such cases.

O owned a building in Bristol. It engaged Kier Regional Ltd to carry out works, including providing an air conditioning system, which Kier sub-contracted to Haden Young Ltd. Orange also retained H as consultants in relation to the design of the mechanical and electrical engineering works, including the air conditioning. In August 2001 there was a flood which caused damage to the building and to O's equipment. O issued proceedings in October 2006, claiming over £2m damages against Kier and Haden Young in relation to the flood. They both denied responsibility and pleaded that the loss and damage suffered was caused wholly or in part by the negligence of O or its design team H. The parties did not comply with various procedural directions and ADR was not undertaken. Following further directions a trial date was set. O did not accept that there had been any design deficiency but concluded that, had there been, it would have been H's fault. O issued Part 20 proceedings against H. H submitted that the claim should have been stayed to enable the pre-action protocol process to take place because it was "there to be complied with and should generally be complied with".

The judge dismissed the application for a stay[6]. He made some general observations: (1) the court should avoid the slavish application of individual rules, practice directions or protocols if they undermine the overriding objective; (2) anecdotal information about the pre-action protocol in the TCC is mixed. "It is recognised as being effective both in settling disputes before they even arrive in the Court and narrowing issues but also as being costly on occasion and enabling parties to delay matters without taking matters very much further forward"; (3) the norm must be that parties to litigation comply with the protocol requirements, but "the Court must ultimately look at non-compliances in a pragmatic and commercially realistic way. Non-compliances can always be compensated by way of costs orders." In this particular case, Akenhead J did not consider that at the stage the proceedings had reached the protocol process would have been sufficiently productive to have justified a stay or more productive than if no stay had been granted. As regards costs, he said that it had been reasonable for H to have made the application and accordingly imposed costs sanctions on O.

6 The judge considered the guidance set out in *Alfred McAlpine Capital Projects Ltd v SIAC Construction (UK) Ltd* [2006] BLR 139 where Jackson J refused a stay to enable the protocol process to be followed after a third defendant was joined.

Court documents

Supply of documents to a non-party

- ***R (on the application of) Corner House Research & Another v Director of the Serious Fraud Office (Defendant) & BAE Systems plc (Interested Party), QBD (Admin) (Collins J) 4.2.08***

In issue before the court was a claim for a declaration on behalf of three media concerns for access in judicial review proceedings to an acknowledgement of service and to any detailed grounds for contesting the judicial review claim pursuant to CPR rule 5.4C. The defendant submitted that if one looks at the language of the rules, and in particular the definition of statement of case in rule 2.3(1) (see below) it is apparent that the rules were intending to focus on private law claims. Although the claim form was within the ambit of documents that were publicly available, statement of case did not include the acknowledgement of service or the detailed grounds to contest because those were not defences within the meaning of the rule.

Rule 5.4C deals with the supply of documents to a non-party from the court records[7] and, together with rule 5.4D (supply of documents to a party from court records – general) came into force on 2 October 2006. 5.4C provides that the general rule is that a non-party to proceedings may obtain from the court records a copy of the statement of case, but not any documents filed with or attached to it or intended to be served with it and a judgment or order given or made in public (whether made at or without a hearing). These documents are available without permission if they were filed at court after 2 October 2006, all of the defendants have filed an acknowledgement of service or a defence or the claim has been listed for a hearing or judgment has been entered in the claim, and there is no order or undecided application on the court file restricting the release of the documents. A statement of case is defined in rule 2.3 (1) as a claim form, particulars of claim where these are not included in a claim form, defence, Part 20 claim, or reply to a defence and it includes any further information given in relation to them voluntarily or by court order under rule 18.1 (obtaining further information).

Collins J was satisfied that the correct meaning of 5.4C was that there was a right to have access not only to a claim form but also to an acknowledgement of service and detailed grounds in judicial review proceedings. He said that "the whole purpose behind the change in the rules to give access by third parties to the statements of claim and defences was in the interests of public justice to enable the media, and any member of the public, to be able to see how the courts were operating and to ensure that the public could look at and see why claims have been brought, why they have been rejected; why they were being allowed to proceed…it is, if anything, more important that there be public access to judicial review claims. They are more likely to be matters of genuine public concern than litigation between individuals, however much some of the public or some of the media may like to report such claims." Collins J agreed that a purposive approach should be adopted when construing the CPR and that it was not right, when faced with a contention relating to the construction of the rules, to adopt a technical and restrictive approach to the language. Further, it was correct for the court, if persuaded that a particular construction was appropriate, to

7 Rule 5.4C was inserted into the rules by the Civil Procedure (Amendment) Rules 2006, itself amended by the Civil Procedure (Amendment) (No 2) Rules 2006.

apply it[8]. The right for access did not extend to any documents that were annexed to either the acknowledgement of service or the detailed grounds – it merely included the grounds themselves as set out in either document. That was in conformity with what was allowed by the rule.

Collins J added two riders. The first was that it was open to a defendant and a claimant to include, either in the claim or any acknowledgement of service, a request that for whatever reason there should not be a disclosure of the whole or part; and the second was that his judgment would have retrospective effect to 2 October 2006 because it was a declaration that the law had always been as he said it was. The practical way of dealing with this to protect documents that were lodged in judicial review claims between 2 October 2006 and the date of the judgment was that if an application was made in respect of any acknowledgement of service or detailed grounds for contesting which were lodged before the judgment was publicised, the defendant should have the opportunity to raise any objections to disclosure. In those circumstances the court would notify the defendant and the claimant that whomever seeks access should, if possible, indicate that that access is going to be sought and the defendant would have seven days within which to raise objections. The matter could then be considered by the court. That would preserve the position in relation to such claims.

As a result of this judgment, the Ministry of Justice's guidance to court staff, which had been to refuse non-parties access to acknowledgments of service and detailed grounds to contest a judicial review claim, had to be changed. The judge gave the parties 14 days to arrange for this and for the matter to be publicised.

CONTRACT

Assignment

- ***Batey v Jewson Ltd & Another, CA (Mummery LJ, Jacob LJ, Mann J) 1.2.08***

The issue on this appeal was whether a particular document was a valid assignment of a right of action or an assignment of the fruits or proceeds of an action. The decision turned on the meaning conveyed by the document to a reasonable person having all the background knowledge reasonably available to the parties in their situation at the time[9]. The document had to be construed in the context of its commercial purpose and was not required by law to be in any particular form. All that was required was a "sufficient expression of an intention to assign"[10].

Batey (B) was a shareholder in a building company (S). S placed an order with the defendant (J) for roofing supplies and subsequently alleged that the supplies were defective. Approximately two years later, while the dispute was still dragging on, S was selling its assets with a view to a solvent winding up and it made an assignment to B of "any sums of money recoverable from the dispute with J". The assignment was not notified to J until two years later. B opened a credit account in

8 This followed the guidance in *YD v Secretary of State for the Home Department* [2006] 1 WLR 1646.

9 See *Investors Compensation Scheme Ltd v West Bromwich BS* [1998] 1 WLR 896

10 *Snell's Principles of Equity* (31st ed) at page 34, para 3-13

his own name with J and ordered building supplies. The dispute had still not been resolved when S was dissolved. J began proceedings against B for the balance of the purchase price plus interest for the goods sold and delivered to him. B served a defence and counterclaim pleading the assignment by S to him as the basis of a set off and a counterclaim for damages for the defective roofing supplies. J denied that B had any cause of action against it and put B to proof of the genuineness, validity and effectiveness of the alleged assignment. On a preliminary issue, the recorder concluded that the assignment was of the proceeds of S's claim against J and not of the right of action itself. It followed that B was not entitled to rely on the assignment for the purposes of set off and counterclaim. B submitted that the aim of the assignment was that he would have the right to pursue J for the unsatisfied claim made by S and to recover from J the sums due to S, and that the transaction between him and his own company necessarily involved him acquiring the right to sue J in case S was wound up before doing so.

Mummery LJ said that the picture that emerged from the assignment document when the background facts were examined was that the transaction between S and B obviously had a practical aim in a commercial setting. It was reasonably clear from the evidence that the purpose of the document was to ensure that B was to have the benefit of S's right of action against J. If S was to be wound up there was no point in its retaining the right of action and there was no sense in retaining the right of action while transferring to B the proceeds of a successful outcome to that action. The whole of the text of the assignment had to be read in context. "On that approach the language of the assignment is, at the very least, capable of applying to the dispute with Jewson…the assignment is not so worded as to exclude its application to Starlcroft's right of action, by which the sum of money in dispute is recoverable." The judge was, therefore, wrong to have construed the assignment so as to have confined it to the fruits of an action by S. "The Recorder reached the wrong decision because he construed the language of the assignment without sufficient regard to the evidence before him on the practical purpose for making it and on its relevant background." Accordingly, the appeal was allowed and the counterclaim restored and the matter was remitted to the county court for the trial of the counterclaim.

Breach of warranty – construing a clause

- ***Von Essen Hotels 5 Ltd v Vaughan & Another, CA (Mummery LJ, Hughes LJ, David Richards J) 17.12.07***

This was an appeal from a declaration made in favour of the respondents (the Vaughans) that the appellant (Von Essen) failed to give valid notice of a "Relevant Claim" for a breach of warranty within the time limit set in the Share Purchase and Asset Agreement. The agreement provided that notification of a claim for breach of warranty could be made by proof of actual service of a notice or by deemed service. Notification was to be sent by first class post to the Vaughans with a copy to their solicitors (named in the agreement). A notice was deemed to have been served if posted, on the second business day after it was put in the post.

The solicitors acting for the Vaughans in the making of the agreement were K&D. A potential conflict of interest subsequently arose and the Vaughans instructed another

firm of solicitors (PDT). Thereafter, Von Essen's solicitors (GD) corresponded with PDT, not with K&D, about the agreement. When the claims arose, GD sent a letter by first class post to the Vaughans at their home address, giving formal notice of the claims. Copies were sent to PDT but none were sent to K&D until approximately six weeks later and by then the contractual deadline had passed. The Vaughans had informed PDT that they were going on holiday. They never actually received the letter which meant there was no actual service of the notice on them. The issue was whether there had been deemed service before the contractual deadline. The Vaughans submitted that service of a copy of the notice on K&D was required for deemed service; as this was not done within the specified time period Von Essen had failed to comply with the requirements under the agreement and could not pursue its claim for breach of warranty. Von Essen submitted that it had served notice on the Vaughans by sending them the letter by first class post and that notice was deemed to have been served on the second business day after that; it was irrelevant to the deeming provision that the notice was not actually received and that no copy was sent to K&D before the deadline. They claimed that that requirement was permissive rather than mandatory. Further, PDT were within the definition of Vaughan's solicitors for the purposes of service and they had implied actual authority to receive the notice for the purpose of service.

The appeal was dismissed. The CA held that (1) Von Essen's construction involved detaching the later part of the clause which dealt with the deemed timing of service effected by different methods, from the earlier part of the clause, which provided for service of any notice on the vendors (i.e. the Vaughans) and that did not pay due respect to the drafting of the clause. When it was read as a whole, as it should have been, it was clear that the clause was drafted in a logical sequence and in a coherent fashion. It provided first for service by delivery or by post; secondly it identified with contact details the persons to be served; and thirdly it spelled out the deemed time of service according to the method of service employed. (2) The court could not "read out" of the agreement an express provision agreed by the parties for sending a copy of the notice to the vendors' solicitors. The requirement for the notice to be served on the solicitors was mandatory, not permissive. The clause said "to be served" not "may be served". (3) The expression "vendors' solicitors" was defined in the clause to mean K&D "where the context admits". Here the context positively pointed to K&D (it went so far as to name a solicitor at K&D). (4) There was no evidence to support the contention that PDT had implied authority to receive a copy of the notice under the agreement. Although the actual facts of a particular case may show that a solicitor has implied authority to accept a notice on behalf of a client, the evidence did not support it in this case. Once PDT received the letter purporting to give notice, its limited retainer created a duty to pass the letter onto the Vaughans. "But if that were enough to establish implied authority to accept service, every person acting for a limited purpose for a principal on any issue would have implied authority to accept service of any document on any topic…[it] is (or should be) well understood by business men and solicitors both, that is not the law." The lesson to take away is that where there is provision for deemed service, it is important to strictly comply with that provision to effect valid notification.

Construing the scope of a settlement agreement

- ***Satyam Computer Services Ltd v Upaid Systems Ltd, QBD (Comm) (Flaux J) 17.1.08***

This case was concerned with construing the scope of a settlement agreement. It centred on whether certain claims which the defendant had brought against the claimant in Texas were excluded by the terms of a settlement agreement between the parties. Flaux J reviewed the case law, including *BCCI (in liquidation) v Ali* and *MAN Neufahrzeuge AG v Ernst & Young*[11], and principles to be followed when construing the scope of an agreement. He examined phrases such as "used in connection with…", "shall be governed by…", "arising out of", "in respect of or relating in any way directly or indirectly to…". He cited the passage in Hoffmann LJ's judgment in *Arbuthnott v Fagan*[12] that "…such words ['connected…in any way'] indicate an intention that the concept of connection should be broadly construed. But they cannot be read literally…It is therefore still necessary to limit the connections to those which are relevant for the purpose in hand." He also said that one principle which emerged is that where the claims were based on fraud or involved allegations of dishonesty, "very clear and specific language in a settlement agreement will be required to settle such claims or exclude their subsequent pursuit, *a fortiori* if they are unknown at the time that the settlement agreement is entered into." In this case, the claims in Texas did not involve allegations of fraud and forgery against Satyam, and as such the wording of the clauses in question of the settlement agreement, even if they had been otherwise capable of applying to claims arising under an assignment agreement, was not sufficiently clear to exclude those claims.

COMPANY

Directors' powers and duties

- ***Hawkes v Cuddy & Others : Cuddy v Hawkes & Another, ChD (Lewison J) 13.12.07***

Mr Hawkes brought a petition against the first respondent alleging unfairly prejudicial conduct in relation to the third respondent company. Lewison J's judgment sets out and discusses the provisions in the Companies Act 2006 which deal with unfair prejudice. S994(1) provides that "A member of a company may apply to the court by petition for an order under this Part on the ground (a) that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or (b) that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial." S996(1) provides that "If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of…" S996(2) gives specific examples of the kinds of orders the court may make. These provisions re-enact those formerly found in ss459 and 461

11 [2002] 1 AC 251, [2005] EWHC 2347 (Comm)

12 [1996] LRLR 135

Companies Act 1985. Where unfair prejudice has been established, the remedy must be proportionate to the unfair prejudice found. Lewison J said that "The remedy afforded by section 994 is...essentially a remedy for the unfair management of the internal affairs of a company. It is not designed to deal with the situation where one company deals with another on an arms' length basis." The judgment has a detailed discussion of unfair prejudice and its various elements.

CONSULTATIONS

General Pre-Action Protocol and practice direction on pre-action protocols

■ The Civil Justice Council is undertaking a consultation following the outcome of its earlier consultation on a proposal to introduce a consolidated pre-action protocol. The CJC is now proposing to recommend the introduction of a General Pre-Action Protocol applicable in all disputes not subject to one of the other pre-action protocols. There is also a proposal to amend the Practice Direction on Protocols. It will be shorter than now and focus on the court's powers to impose sanctions for non-compliance, which is the main area of dissatisfaction with the protocols. The CJC also proposes that the Practice Direction, which is currently free-standing, should in future supplement Part 3 CPR so that it will be more clearly integrated in the corpus of the CPR and be more visible to users. The consultation period will last for 12 weeks, terminating on 19 May 2008. The paper can be accessed on *www.civiljusticecouncil.gov.uk*.

Tribunals, Courts and Enforcement Act: eligibility for judicial appointment

■ The Ministry of Justice is consulting on a draft Statutory Instrument made under s51 Tribunals, Courts and Enforcement Act 2007 relating to eligibility for judicial appointment. The Act revises the statutory eligibility requirements for judicial appointment. Amongst other eligibility changes, the Act contains order-making powers enabling the Lord Chancellor to specify "relevant qualifications" so that persons other than barristers and solicitors may become eligible to apply for judicial office. The draft Statutory Instrument sets out which categories of judicial office Fellows of the Legal Executives, registered patent agents or registered trade mark agents are to be eligible for. Responses are requested by 29 April 2008. *http://www.justice.gov.uk/publications/consultations.htm*

LEGISLATION

Judicial Committee (General Appellate Jurisdiction) Rules (Amendment) Order 2008

■ The appeal procedure relating to records was changed on 4 March 2008. Changes include omitting the requirement for the parties to examine the proofs of the Record (which means the aggregate of papers relating to an appeal including the pleadings, proceedings, evidence, judgments and order granting leave to appeal

proper to be laid before Her Majesty in Council on the hearing of the appeal) and the corresponding fee. There are changes to the existing procedure and consequential amendments and transitional provisions so that the amendments do not apply in relation to any appeal in which the appellant has already lodged the Record for reproduction before the amendments came into force.

REPORTS

Collective redress mechanisms

■ The Civil Justice Council has published a research paper entitled Reform of Collective Redress in England and Wales: a perspective of needs. The report concludes that there is overwhelming evidence of the need for a further collective redress mechanism which should be opt out rather than opt in, in order to supplement existing procedural devices available to claimants. An opt out class action procedure would enable class members, who were merely described at the outset, to opt out of the action if they chose to rather than having to opt in as identified parties when the litigation began. Reasons for this conclusion include that use of the existing GLO regime is an indication that collective redress is being pursued; class actions in England and Wales suffer from a variable rate of participation but it is typically low whereas data from other jurisdictions suggests that rates or participation under opt out regimes are high; and there are procedural problems under the opt in regime of the GLO, such as frontloading and limitation periods. For further information see *www.civiljusticecouncil.gov.uk*.

NEWS

New name for the Supreme Court

■ The Supreme Court Act 1981 is going to be renamed so that when the Supreme Court opens in October 2009 there will be no confusion. The new title will be The Senior Courts Act 1981. The new title comes from the Constitutional Reform Act 2005, Schedule 11 (Renaming of the Supreme Courts of England and Wales and Northern Ireland). When this comes into force in October 2009, all references in enactments to the Supreme Court Act 1981 will be substituted with the Senior Courts Act 1981. This will also affect how we refer to ourselves which, currently, is as Solicitors of the Supreme Court.

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