

# CPR Update

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Guildhall Chambers**

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# *Charnock v Rowan* [2012] EWCA Civ 2

## Agreed Bundles & Tactics

- What is the status of hearsay statements in documents in an “agreed trial bundle”?
- *Denton Hall Legal Services v Fifield* [2006] EWCA Civ 169.

# Charnock Contd

- Because “hearsay” you would ordinarily have to serve a Notice under Civil Evidence Act 1995 (CPR Part 33).
- Consider 32PD.27  
That burden is reversed for hearsay contained within an Agreed Bundle.

# Sting in the Tail ....

However, consider:

## Part 16.5

- Plead your case with “sufficient clarity” or you may be “debarred”.

# *Cecil Guntrip v Cheney Coaches Ltd* [2012] EWCA Civ 392

## Background

- CG left knee replacement.
- On return to work CG had to drive manual coach so left foot used on clutch.
- Increasing pain in knee, CG gave up work.
- Claim against CC for lack of risk assessment.

# *Cecil Guntrip v Cheney Coaches Ltd* [2012] EWCA Civ 392

## Background cont.

- Experts instructed on both sides.
- CG expert: knee problems poss. caused by job.
- Joint statement: knee problems consequence of knee replacement, not caused by job.
- Shortly before trial CG applied to rely on different expert.

# *Cecil Guntrip v Cheney Coaches Ltd* [2012] EWCA Civ 392

## Proceedings

DJ refused CG application:

- age of claim
- delay and costs
- risk to fairness
- original expert only gave a tentative view

CJ allowed CG appeal.

# *Cecil Guntrip v Cheney Coaches Ltd* [2012] EWCA Civ 392

## Proceedings cont.

CA allowed CC appeal:

- no flaw in DJ decision, had considered factors and both parties' positions;
- CJ had simply taken different view and recognised claim would fail if appeal not allowed; and
- expert shopping discouraged, good if expert modified opinion since saved time and costs.



# *Fred Perry (Holdings) Limited v Brands Plaza Trading Limited and Another* [2012] EWCA Civ 224

## Background

- F action against B for infringement of trade marks and passing off.
- B failed to comply with court orders.
- Unless order made for specific disclosure, B failed to comply.
- B Defence struck out, F applied for judgment.
- B sought relief from sanctions: unintentional failure to comply, interests of justice.

# *Fred Perry (Holdings) Limited v Brands Plaza Trading Limited and Another* [2012] EWCA Civ 224

## Proceedings

- B Defence struck out, F applied for judgment.
- B sought relief from sanctions: unintentional failure to comply, interests of justice.
- Judge dismissed B application: balance against relief.

# *Fred Perry (Holdings) Limited v Brands Plaza Trading Limited and Another* [2012] EWCA Civ 224

## Proceedings cont.

- CA upheld decision.
- Relief from sanctions discretionary so CA could only interfere if judge erred in principle or plainly wrong.
- Vital that CA should uphold robust but fair case-management decisions.
- (Per Jackson LJ) Following amendments to 3.9 in Apr. '13 litigants who disregarded court orders of CPR would receive much less indulgence.

# *Guntrip and Fred Perry*

## Comment

- Guntrip: CJ decision illustrates difficulties for defendants.
- Both cases: tendency towards robustness, less tolerance of breaches of orders and CPR.
- Amendments to 3.9: courts will consider need for litigation to be conducted efficiently and proportionately and need to enforce compliance with rules, practice directions and court orders.

# *Sandra Solomon v Cromwell Group Plc; Donna Oliver v Sandra Doughty* [2011] EWCA Civ 1584

## Background

- Low-value RTAs.
- C accepted Part 36 offer less than 10K pre-issue.
- D agreed to pay C costs.
- Dispute as to mode of assessment: standard basis under 36.10 and 44.12 or fixed costs under Pt 45 II and 44.12A.

# *Sandra Solomon v Cromwell Group Plc; Donna Oliver v Sandra Doughty* [2011] EWCA Civ 1584

## Background cont.

36.10(1) and (3): where Pt 36 offer accepted C entitled to costs of proceedings assessed on standard basis

44.12(1)(b): where a right to costs arises under 36.10(1) costs order deemed made on standard basis

# *Sandra Solomon v Cromwell Group Plc; Donna Oliver v Sandra Doughty* [2011] EWCA Civ 1584

## Background cont.

45.7: sets out costs to be allowed under 44.12A; where RTA and agreed damages less than 10K fixed costs apply

44.12A: where agreement reached save as to costs and no proceedings issued then parties may bring proceedings via Pt 8; where Pt 45 II applies costs should be assessed accordingly

# *Sandra Solomon v Cromwell Group Plc; Donna Oliver v Sandra Doughty* [2011] EWCA Civ 1584

## Proceedings

- CA held general provisions of 36.10 must give way to specific provisions of Pt 45 II.
- Cannot be the case that acceptance of Part 36 offer gives rise to costs on standard basis whereas acceptance of other offer gives rise to fixed costs under Pt 45 II.
- Nor can it be the case that claimants who proceed by Pt 8 (via 44.12A) should be subject to more restrictive regime than those who proceed by Pt 7.



# *Sandra Solomon v Cromwell Group Plc; Donna Oliver v Sandra Doughty* [2011] EWCA Civ 1584

## Proceedings cont.

If C argument correct, i.e., acceptance of Pt 36 offer always leads to costs on standard basis, then fixed costs regime undermined and less incentive for defendants to make Pt 36 offers.

# *Sandra Solomon v Cromwell Group Plc; Donna Oliver v Sandra Doughty* [2011] EWCA Civ 1584

## Comment

Low-value RTAs settled on terms of Pt 36 give rise to fixed costs under Pt 45 II.

# *Medway Primary Care Trust and Ashiq Hussain v Sebastian Marcus* [2011] EWCA Civ 750

## Background

- C claim for £525K for amputation of left leg following negligent treatment.
- D admitted breach of duty just before trial but not causation.
- C awarded £2K for PSLA due to breach of duty but causation failed.
- D appealed decision that they should pay 50% of C action.

# *Medway Primary Care Trust and Ashiq Hussain v Sebastian Marcus* [2011] EWCA Civ 750

## Proceedings

- CA held £2K not vindication for C since real claim was for amputation; costs incurred in advancing and defending allegations re. Amputation.
- So D successful parties so costs in their favour; but reduction because C succeeded to small extent and admission of breach of duty very late.
- D awarded 75% of costs.

# *Trevor Michael Fox v Foundation Piling Ltd* [2011] EWCA Civ 790

## Background

- C claim for £280K.
- D obtained surveillance evidence suggesting exaggeration.
- D offered £24K (Oct. '08), C settled for £32K (Nov. '09).
- Judge held D successful after Oct. '08 and awarded D costs from then, and if wrong as to D success then C conduct warranted departure from normal rule.
- At appeal parties agreed C successful party, issue was whether C conduct altered costs position.

# *Trevor Michael Fox v Foundation Piling Ltd* [2011] EWCA Civ 790

## Proceedings

- CA held no reason to depart from normal rule.
- Judge had declined to make any finding that C was guilty of misrepresentation or dishonesty so CA couldn't substitute a such finding.
- Fact that C had won on some issues but not others / had inflated quantum wasn't a reason to deprive him of part of costs.
- D had failed to make a realistic Pt 36 offer until Nov. '09 and so couldn't expect costs protection.

# *Medway and Fox*

## Comment

- Effect of *Fox* on *Medway*.
- Resolve minor and straightforward issues.
- Make sensible and early Pt 36 offers.
- Note *Carver* obsolete since Oct. '11 update to 36.14.
- But new fronts on costs battleground.

# *Germany v Flatman* [2011] EWHC 2945

- Also: *Barchester Healthcare Ltd v Weddall*
- Costs against Third Parties.
- Appeal to High Court.
- D had been successful but in each case Claimant without funds to pay D's costs.
- Same Sols: Godfrey Morgan represented Cs.



# Germany Contd

- Claimant was unemployed, so how were the expert reports funded?
- No evidence of commercial funder.

D sought orders:

1. Join Solicitors as Defendant.
2. Require disclosure of funding for court fees and expert reports.

# Germany Contd

- D's purpose was to invoke S.51 Senior Courts Act 1981.
- Third Party costs order.
- “Funder”?

If paid by solicitors:

1. To be reimbursed by C?
2. To be claimed from D if successful but otherwise not to be recovered from C?