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"Employment Law in the High Court"
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HIGH COURT PROCEDURE

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Introduction

1. This paper is intended to cover some of the main points of procedure arising out of High Court proceedings brought by employers to restrain breach of an express or implied term of the employment contract such as a breach of confidence or restrictive covenants.

Appropriate Forum[1]

2. In employment disputes with an international dimension, before issuing proceedings it will be necessary to determine which national court has jurisdiction over the claim. Very briefly, in the United Kingdom, the common law jurisdictional regime will apply unless displaced by a specific jurisdiction convention or Council Regulation on Jurisdiction and the Enforcement of Judgments in Civil Matters ((EC) No.44/2001 of 22nd December 2000) ("the Regulation"). In practice, where an employment dispute concerns a party who is resident or working in an EU Member State or EFTA State, it is very likely that jurisdiction over the claim will be determined by the Regulation rather than the common law.

3. In particular:

   3.1. Where the defendant is domiciled in a European Community state and where a matter falls within the scope of the Regulation, then the English common law jurisdiction regime is displaced by the Regulation. The Regulation itself supersedes the Brussels Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 ('the Brussels Convention') [2] (which was implemented into UK domestic law by the Civil Jurisdiction and Judgments Act 1982) and the Lugano Convention 1988 (except as set out below).

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1 In preparing this section of my paper, I am grateful to Robert Howe and Shaheed Fatima for their paper "High Court Procedure: Jurisdiction & Other Issues" delivered in May 2004.

2 Article 68 of the Regulation. Note that in respect of Denmark, the Brussels Convention still applies: s. 1(3) Civil Jurisdiction and Judgments Act 1982 (as amended by the Civil Jurisdiction and Judgments Order 2001 (SI. 2001/3929)).

3.2. Where the defendant is domiciled in Iceland, Norway, Switzerland (three EFTA countries) or Poland, then the Lugano Convention applies. This is very similar (but not identical) to the Regulation. The Lugano Convention was implemented into UK domestic law by the Civil Jurisdiction and Judgments Act 1991.

3.3. Where the defendant is domiciled in the United Kingdom or the proceedings fall within Article 22 of the Regulation and relate to the allocation of jurisdiction within the United Kingdom (to courts in England, Scotland or Northern Ireland) then the Regulation applies, as modified by Schedule 4 to the Civil Jurisdiction and Judgments Act 1982.

Jurisdiction Under The Regulation

4. The Regulation entered into force on 1 March 2002 and is directly applicable in domestic law (under section 2(1) of the European Communities Act 1972).

5. The Regulation applies where:

5.1. The dispute concerns a civil or commercial matter (almost all employment claims are likely to fall within this definition);

5.2. The dispute does not fall within the matters excluded by the Regulation in Article 1 (for example insolvency proceedings); and

5.3. The proceedings are started after the Regulation came into force.

6. Where the Regulation applies, permission is not needed to serve out of the jurisdiction (CPR 6.19(1A)). However, the Claim Form must include a statement of the grounds on which the claimant is entitled to serve it out of the jurisdiction (CPR 6.19(3)).

7. The fundamental rule for determining jurisdiction is that if the defendant is domiciled in a Regulation state then he must be sued in the courts of that state unless the Regulation specifically permits him to be sued in the courts of another Regulation state (Article 2(1)). The exceptions to that rule are interpreted restrictively.

8. Article 5 provides a relevant exception to the general rule. Under Article 5(1), a defendant may be sued in "in the courts for the place of the performance of the obligation in question". In the employment context, the obligation refers to the obligation to carry out the work.[3] The European Court of Justice has held that the place of performance of the employment contract is the place where, taking into account the whole term of the employment, the employee spends most of his working time engaged on the employer's business. [4]

9. Articles 18 to 21 of the Regulation set out the rules for determining jurisdiction in matters relating specifically to individual contracts of employment, and are therefore the first port of call in any claim concerning an individual contract of employment. The effect of Article 18 to 21 is that:

    9.1. the employee may sue the employer in the courts of the Regulation state in which the employer is domiciled (which is deemed to include the state where the employer has a branch, agency or other establishment) (Article 18);

    9.2. the employee may sue the employer in the courts of another Regulation state if that is the place where the employee habitually carries out his work[5] or in the courts for the last place where he did so, or in the courts for the place where the business which engaged the employee is or was situated (Article 19);

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[3] Case 133/81 *Ivenel v Schwab* [1982] ECR 1891

[4] *Weber v Universal Ogden Services Ltd* [2002] QB 1189

[5] The European Court of Justice has held that the place where an employee habitually carries out his work is the place where he has established the effective centre of his working activities: Case C-383/95 *Rutten v Cross Medical Ltd* [1997] ECR I-57.

9.3. the employer must sue the employee in the courts of the Regulation state in which the employee is domiciled (subject to the right to bring a counterclaim in the court in which the original claim is pending) (Article 20);

9.4. the parties can by consent depart from these rules by entering into a jurisdiction agreement, provided it was entered into after the dispute arose or which allows the employee to bring proceedings in courts other than those indicated by Articles 18 to 21 (Article 21).

10. Generally speaking, therefore, where the Regulation applies, an employer will have to sue an employee in his country of residence.

Common Law Jurisdictional Rules

11. The English Court has traditionally founded its jurisdiction on the ability to serve process on a party within or outside the jurisdiction. Although service does not create jurisdiction, it is a pre-condition to the exercise of jurisdiction by the English courts. If a person is served whilst within the jurisdiction, whatever their domicile, then the service is considered valid: see *The Maharanee of Baroda v Wildenstein* [1972] 2 QB 283 (CA). Likewise, where a defendant is outside the jurisdiction, he can only be made a party to proceedings in the English courts either by service or if service has been expressly dispensed with. This "exorbitant" jurisdiction - the power to give permission to serve proceedings on someone outside the jurisdiction – was formerly governed by RSC Order 11, and is now governed by CPR 6.20.

12. The Court's permission is required to serve a claim form out of the jurisdiction in any case falling outside CPR 6.19. The Court has no power to grant permission unless the case falls within one of the jurisdictional gateways in CPR 6.20. Those which are most likely to be of interest to an employment lawyer are:

12.1. Claim for an injunction against the defendant to do or refrain from doing an act within the jurisdiction (6.20(2)) – e.g. poaching your client's employees or soliciting his customers;

12.2. Claim is a Part 20 claim and the person to be served is a necessary or proper party to the claim against the Part 20 claimant (6.20(3A)) (e.g. claim against employee/ex-employee served here; new employer overseas);

12.3. Claim in relation to a contract made within the jurisdiction, or governed by English law, or containing an English jurisdiction clause (6.20(5));

12.4. Claim for breach of contract committed within the jurisdiction (6.20(6));

12.5. Claim in tort where damage was sustained within the jurisdiction or sustained as a result of an act committed within the jurisdiction (6.20(8)).

13. In addition, a party seeking permission to serve out must support the application with evidence showing that:

13.1. There is a good arguable case that the court has jurisdiction within one of the grounds in CPR 6.20;

13.2. There is a reasonable prospect of success on the merits; and

13.3. England and Wales is the proper place in which to bring the claim.

14. An application for permission to serve out is made without notice, and therefore attracts the obligation to make full and frank disclosure. Although in practice this principle is, for obvious reasons, applied less stringently than in the case of applications for more draconian orders, such as freezing or search orders, it is very important to check that the evidence in support is accurate and discloses any important matter relevant to the application. It is also important to check that you have met all the requirements set out in CPR 6.21. It is easy to

get an application to serve out wrong – care and careful checking of both CPR 6 and the accompanying Practice Direction is required.

15. The Court retains a discretion not to grant permission to serve out of the jurisdiction, or to stay proceedings started in the jurisdiction on the ground that England is not the appropriate forum (*forum non conveniens*). This is essentially a factual question, in which the Court will attempt to determine the 'natural forum' (the one with which the action has the most real and substantial connection) and will examine whether it is unjust not to serve permission or to stay proceedings. Factors examined will include the law applicable to the claim, the residence of the parties, the likely location of witnesses and documents, whether there are other proceedings already on foot in another jurisdiction, whether the claimant would be denied a fair or effective remedy overseas, whether the parties have an exclusive jurisdiction agreement, and so on: see *Spiliada Maritime Corp v Consulex Ltd* [1987] AC 460; *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islam Iran* [1994] 1 AC 438.

Appropriate Court

16. Both the High Court and the County Court have jurisdiction to grant interim injunctions: see section 37(1) of the Supreme Court Act 1981 and section 38 of the County Courts Act 1984.

17. In the County Court, injunctions may be granted by a circuit judge or recorder. Only a "duly authorised" judge of the County Court may grant search orders and freezing injunctions: see 25PD paragraph 1.1.

18. The High Court is usually the most appropriate forum in which to seek an injunction. The application should be made to a High Court judge. Masters and District Judges have power to grant injunctions only by consent, in connection with charging orders and appointments of receivers, and in aid of execution of judgments: see 25PD paragraph 1.2.

19. Injunction applications may be made in either the Queen's Bench Division or the Chancery Division. The decision whether to proceed in one or other division will depend on the subject matter of the case, the estimated length of the hearing sought, and the urgency of the application. The Chancery Division has exclusive jurisdiction over cases involving patents, trade marks, registered designs, copyright or design right: see Schedule 1 to the Supreme Court Act 1981.

20. The choice will also be determined by the time which the court has available. In the Chancery Division, the applications judge will hear cases of up to two hours in length – it is only if the hearing is estimated to be in excess of two hours that a special appointment is required. In the Queen's Bench Division, applications estimated to last more than an hour require a special appointment and are placed in the Interim Hearings List rather than being dealt with by the Interim Applications Judge. This will lead to a delay in the hearing of the application (although it is possible in some circumstances for a very urgent case to be heard at short notice by a Queen's Bench Applications Judge).

21. All hearings are now ordinarily held in public (CPR 39.2(1)), so there is no longer any distinction between the Chancery Division and the Queen's Bench Division in this regard. CPR 39.2(3) provides that a hearing may be in private if publicity would defeat the object of the hearing or it involves confidential information and publicity would damage that confidentiality.

The Application For Interim Relief

With Or Without Notice To The Respondent?

22. Applications for interim relief are governed by CPR Parts 23 and 25. Rule 23.4(1) provides that the general rule is that a copy of the application notice must be served on each respondent. An application may be made without notice if this is permitted by a rule, practice direction or court order (CPR 23.4(2)). Further guidance is found in Practice

Direction 23 paragraph 3 which provides that an application may be made without notice to the respondent only:

22.1. where there is exceptional urgency

22.2. where the overriding objective is best furthered by doing so;

22.3. by consent of all the parties;

22.4. where paragraph 2.10 applies [date has been fixed for the hearing but party does not have sufficient time to serve application notice];

22.5. where a court order, rule or practice direction permits.

23. Paragraph 4.1 of PD23 further provides that where notice is given, the application notice must be served as soon as practicable after it has been issued and at least 3 clear days before a hearing. Paragraph 4.2 provides that where an application notice should be served but there is not sufficient time to do so, informal notification of the application should be given unless the circumstances of the application require secrecy.

24. CPR 25.3(1) provides that the court may grant an interim remedy on an application made without notice if it appears to the court that there are "good reasons for not giving notice". If an applicant makes an application without notice, the evidence in support of the application must state the reasons why notice has not been given.

25. The effect of these rules is that there are three possibilities:

25.1. *no notice* (formerly 'ex parte'): this is appropriate only for cases requiring secrecy, notably freezing orders and search orders;

25.2. *informal notice* (formerly 'ex parte on notice'): this is appropriate where the case is too urgent to wait three clear days but secrecy cannot be justified. This gives the

respondent enough time to attend the hearing and make representations but usually not enough time to prepare reply evidence;

25.3. *three clear working days' notice in writing* (formerly 'inter partes'): this is appropriate for all other cases.

26. Normally, it will be inappropriate to make an application without notice if a respondent is represented by solicitors and/or there has been pre-application correspondence between the parties and/or there has been delay on the part of the party making the application.

27. There are three important considerations to bear in mind when making an application without notice. The first is the duty of both the applicant and the solicitor to make full and frank disclosure to the court of all relevant matters. According to Mummery LJ in *Memory Corporation plc v Sidhu (No 2)* [2000] 1 WLR 1443 (CA) at 1460, this amounts to:

> "a high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case. It is the particular duty of the advocate to see that the correct legal procedures and forms are used; that a written skeleton argument and a properly drafted order are prepared by him personally and lodged with the court before the oral hearing; and that at the hearing the court's attention is drawn by him to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed."

28. Further, PD25 paragraph 3.3 requires the evidence in support of an application to set out the facts on which the applicant relies, "including all material facts of which the court should be made aware".

29. The consequences of failing to comply with the duty of full and frank disclosure can be extremely serious, including discharge of the injunction, costs and damages: see for example *Alma Communications v Feedback Communications Ltd* [2004] All ER (D) 118.

30. Second, under CPR 239(2), where the court makes an order, whether granting or dismissing the application, the applicant must serve a copy of the application notice and any evidence

in support on any party against whom the order was sought or obtained. This means that an applicant needs to think carefully about disclosing confidential information in the application or evidence, and should not make an application without notice unless confident of success.

31. Third, it is also the duty of counsel and solicitors, on a without notice application, to make a full note during the course of the hearing, or if this is not possible, to prepare a full note as soon as possible afterwards, and to provide a copy of that note to all affected parties. This is essential so that the parties affected may know what occurred, the basis on which the order was made, and in order to make an informed application for discharge of any injunction: see *Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd*, 23 September 1999 (Lightman J); *Thane Investments Ltd v Tomlinson*, 6 December 2002 (Neuberger J).

Documents

32. In order to make an application for interim relief, the applicant will require the following documents:

    32.1. application notice in Form N244;
    32.2. a claim form or draft claim form;
    32.3. supporting evidence (a witness statement or affidavit);
    32.4. draft order.

33. The application notice must state the order being sought and explain why it is being sought: CPR 23.6. In cases of real urgency, the court may dispense with the need to file an application notice: CPR 23.3(2).

34. An application for interim relief may be made before the issue of the claim form: CPR 25.2(1)(a). In such cases, the applicant must undertake to the court to issue a claim form immediately or the court will give directions for the commencement of a claim. Where

possible, the claim form should be served with the order for the injunction: PD25 paragraphs 4.4 and 5.1(5). It has become common practice to serve the claim form without particulars of claim, and to serve the latter within 14 days of service of the claim form in accordance with CPR 7.4(1)(b). This practice is useful where solicitors have not been able to take full instructions on a client's case.

35. Applications for search orders and freezing injunctions must be supported by affidavit evidence: PD25 paragraph 3.1. Applications for other interim injunctions must be supported by evidence set out in a witness statement, statement of case, or the application notice itself (provided it is verified by a statement of truth): PD25 paragraph 3.2.

36. The evidence should cover the facts relied on in support of the particular cause of action in order to show a serious issue to be tried e.g. identification of the contract and the particular terms relied on, the facts constituting breach, evidence of loss or potential loss flowing from the breach. In restrictive covenant cases, the evidence will need to establish the interest which the covenant is seeking to protect and set out the facts relevant to its reasonableness. In breach of confidence cases, the evidence will need to set out the facts relied on as showing that the information has the necessary quality of confidence (without thereby giving away business secrets in the witness statement).

37. The evidence should also provide reasons why no notice was given (if the application is made without notice), all material facts of which the court should be aware including any evidence adverse to the applicant's case, and the ability of the applicant to pay damages to the respondent under the cross undertaking. Those drafting the witness statement should be aware that if the case proceeds to trial, the witness can be cross-examined about any discrepancies between the witness statement and his or her oral evidence at trial or any subsequent witness statement.

38. Draft orders should follow the form prescribed by Practice Direction (Interlocutory Injunctions: Forms) [1996] 1 WLR 1551. Where a freezing injunction or search order is sought, precedent forms are attached to Practice Direction 25. The draft order must set out clearly what the respondent must do or not do: PD25 paragraph 5.3; see also *Lawrence David*

Ltd v Ashton [1989] IRLR 22 at para 34 per Balcombe LJ. A court will be unwilling to grant an order for an interim injunction where it would be practically impossible for the respondent to understand whether he has complied with the requirements of the order: see for example *Berry Birch & Noble Financial Planning Limited v Berwick & Ors*, 23 May 2005, Cox J.

39. The draft order must contain the cross undertaking to pay damages sustained by the respondent. If an interim injunction is granted without notice, an order for an injunction must specify a return date for a further hearing at which the court will consider whether to continue the relief: see PD25 paragraph 5.1. The draft of the order sought should be filed with the application notice, both in hard copy and on disk in a format compatible with the court's word processing software: PD25 paragraph 2.4.

Obtaining The Evidence

40. Witness statements in support of an application for interim relief will normally be provided by a senior representative of the employer, and depending on the facts of the case, one or more current employees or possibly one or more customers.

41. Where an employer suspects that a (former) employee has removed or misused confidential information or set up in competition with the (former) employer in breach of express or implied terms of the employment contract, then it will be important to gather as much evidence of the breach as possible in support of the application for the interim injunction. Steps that may assist the employer may include:

    41.1. forensic examination of the employee's work computer (including checking the systems registry, external hard drives, USB drives, email system and document files to determine what documents he has opened, created, copied or deleted recently. If the employee has installed a secure deletion programme on his computer to prevent detection of deleted files, this may in itself be evidence of suspicious activity);

41.2. examination of the employee's holiday and absence records, including weekend security records (which may reveal an unusual pattern of absences, or conversely an unusual pattern of regular visits to the office at weekends);

41.3. restoration of email back-up to see what emails have been deleted;

41.4. examination of the employee's expense claims and company credit card records;

41.5. examination of the company's photocopier records where the photocopier can only be activated using keycodes or passcards specific to each employee (an unusually large amount of photocopying may suggest copying and removal of confidential documents from the employer's premises);

41.6. examination of the employee's customer files (are any files or documents missing?);

41.7. examination of the company's financial records to find out whether those parts of the business for which the employee was responsible have been losing income since their departure (have any of the company's clients reduced or stopped doing business with the company since the employee's departure?);

41.8. speaking with fellow employees to find out whether they are aware of any suspicious behaviour on the part of the employee. (Have they been approached to join the employee's new business? Did he ask his secretary to create unusual documents for him prior to his departure?);

41.9. speaking with clients to find out what contact or dealings they have had with the employee in question.

42. Employers should take legal advice before taking any of these steps to ensure that they are not in breach of data protection or privacy laws. In particular, regard should be had to the Regulation of Investigatory Powers Act 2000 (especially sections 1, 2 and 4), the

Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 (especially Regulation 3), and the Data Protection Act 1998 (especially section 35(2)). Human rights considerations may also arise, notably the right to privacy protected by Article 8.

43. Employers should also act with caution in approaching clients or customers. Customers who have dealt with the employee in question for a long time may feel loyalty towards the employee rather than the company, and may be defensive about answering questions about their contact and dealings with him. If they provide useful information about attempts to solicit custom, it may be possible to do without a witness statement from the client in question at the interim stage, but the employer will need to make the client aware that if the matter progresses to trial, the client is likely to be asked to give evidence and will be inconvenienced.

Pre-Action Disclosure

44. Pre-action disclosure is potentially one of the most useful weapons in the High Court employment litigation arsenal. Pre-action disclosure may be used by a prospective claimant to determine whether or not it has a cause of action at all, and whether or not to issue proceedings. In addition, it may be a much cheaper alternative to an application for a search order. It may therefore prove useful to a (former) employer who believes that a (former) employee has removed confidential information or has set up in competition with the (former) employer.

45. Pre-action disclosure is governed by CPR 31.16. Any application for pre-action disclosure must be made in accordance with CPR 23, and must be supported by evidence (usually a witness statement). CPR 31.16(3) provides:

> "The court may make an order under this rule only where-
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> (a) the respondent is likely to be a party to subsequent proceedings;

(b) the applicant is also likely to be a party to those proceedings;

(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to-

i. dispose fairly of the anticipated proceedings;

ii. assist the dispute to be resolved without proceedings; or

iii. save costs."

46. The principal authority dealing with this rule is the Court of Appeal decision of *Black v Sumitomo Corporation* [2002] 1 WLR 1562. Rix LJ explained in that case that an applicant has to do broadly two things: first, demonstrate that each of the four elements of 31.16(3) are satisfied; and second, persuade the court that it was appropriate in all the circumstances for the court to exercise its discretion in favour of granting pre-action disclosure.

47. As to the first two elements in 31.16(3), there is no longer any statutory requirement that a claim is likely to be made.[6] For the purposes of CPR 31.16(3)(a) and (b), the respondent/applicant is "likely to be a party to proceedings" where it is established that he *may well* be a party *if* subsequent proceedings are issued: see *Black v Sumitomo Corporation* [2002] 1 WLR 1562, at paras 71-72 per Rix LJ.

48. As to the standard disclosure requirement in 31.16(3)(c), Rix LJ found that the court must be clear what the issues in the litigation are likely to be i.e. what case the claimant is likely to be making and what defence is likely to be run, so as to ensure the documents being asked for are ones which will adversely affect the case of one side or the other, or support the case of one side or the other. In so finding, he approved Waller LJ's observations in *Bermuda International Securities v KPMG* [2001] Lloyd's Rep PN 392, 397 at para 26.

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[6] See section 33(2) of the Supreme Court Act 1981, originally enacted as section 31 of the Administration of Justice Act 1970, which used to read: "On the application … of a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court *in which a*

49. This means applicants for pre-action disclosure should be precise in setting out their intended case and should specify the documents or class of documents to be disclosed: the more diffuse the allegations and the wider the disclosure sought, the more sceptical the court is likely to be: see *Briggs & Forrester Electrical Limited v Governors of Southfield School for Girls & Anr* [2005] EWHC 1734 (TCC). However, in order to found an application for pre-action disclosure, it is not necessary for an applicant to do more than show that the substantive claim pursued in the proceedings is properly arguable and has a real prospect of success: see *Rose v Lynx Express Ltd & Bridgepoint Capital (Nominees) Ltd* [2004] EWCA Civ 447, at para 3 per Peter Gibson LJ.

50. As to the question of the desirability of ordering pre-action disclosure, Rix LJ (in paragraphs 79-81 of the judgment) held that paragraph (3)(d) involves a two-stage process: first, a jurisdictional threshold whereby the court is only permitted to consider the granting of pre-action disclosure where there is a real prospect in principle of such an order being fair to the parties if litigation is commenced, or of assisting the parties to avoid litigation, or of saving costs in any event. Second, if there is such a real prospect, then the court should go one to consider the question of discretion, which has to be considered on all the facts and not merely in principle but in detail. Important considerations will include the nature of the injury or loss complained of; the relevance of any pre-action protocol or inquiries; and the opportunity which the complainant has to make his case without pre-action disclosure.

51. Finally, applicants for pre-action disclosure should note that under CPR 48.1(2), the general rule is that the applicant will pay the costs of the application for pre-action disclosure, and the costs of complying with any order for disclosure.

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claim in respect of personal injuries to a person or in respect of a person's death *is likely to be made*, the High Court shall…"

Order For Speedy Trial

52. In many High Court employment cases, the grant of an interim injunction will effectively dispose of the action. This is particularly so in restrictive covenant cases where the period of the contractual restraint may have expired or run a large part of its course before the action is tried. Balcombe LJ in *Lawrence David Ltd v Ashton* offered the following advice in cases seeking to enforce restrictive covenants at para 54:

> "A defendant who has entered into a contractual restraint, which is sought to be enforced, should seriously consider, when the matter first comes before the court, offering an appropriate undertaking until the hearing of the action, provided that a speedy hearing of the action can then be fixed, and the plaintiff is likely to be able to pay any damages on his cross-undertaking. It is only if a speedy trial should not be possible that it would then be necessary to have a contest on the interlocutory application."

53. This is precisely what happened in the case of *TFS Derivatives Ltd v Morgan* [2005] IRLR 246 (HC). On the return date, both parties consented to an order that there be a speedy trial of the issues of liability, the Defendant giving undertakings in the terms of the covenants until trial.

54. Formerly, a specific power to order a speedy trial was found in RSC Order 29. Under the CPR, this power falls within the general case management powers of the Court. CPR 29.2(2) provides that the court will fix the trial date or the period in which the trial is to take place "as soon as practicable". This enables the court to order an early trial on a fixed date. Directions may include that witness statements or affidavits stand as pleadings.

Costs And Part 36

General cost orders

55. CPR 44 sets out the general rules on costs. Although the award of costs is always a matter for the court's discretion, in relation to interim applications, the discretion tends to be exercised as follows:

    55.1. where the hearing is without notice, costs will generally be reserved;

    55.2. at an interim hearing on notice, the main costs orders are:

- costs in the case (the costs of the application are awarded to the party who ultimately wins at trial)
- Claimant's costs in the case (the claimant will recover his costs of the interim application if he wins at trial; irrespective of the final outcome the defendant will have to pay his own costs of the interim application)
- Defendant's costs in the case (the reverse – the claimant pays his own interim costs whatever the final outcome and also the defendant's costs if the defendant wins at trial)

Part 36

56. Part 36 offers and payments[7] can be a useful tactical weapon in the litigation armoury, and it is useful to have some understanding of the costs consequences of making such offers or payments.

[7] An offer by a defendant to settle a money claim must be made by way of a payment into court, hence the reference to a Part 36 payment: see CPR 36.2(1) and 36.3(1). Thus, if a defendant wishes to settle the whole of a claim which includes a money claim (eg damages) and a non-money claim (eg an

57. Briefly, the purpose of Part 36 is to encourage parties to settle litigation by providing incentives to do so, and disincentives not to do so. Part 36 does not prevent parties making an offer to settle in any way they choose, but if the offer does not comply with the provisions of Part 36, then the costs consequences will not apply unless the court so orders: CPR 36.1(2). Part 36 offers or payments may be made at any stage after proceedings have begun, and in appeal proceedings. It is also possible to make offers prior to commencement of proceedings that are treated as Part 36 offers (and attract the relevant costs consequences), provided they comply with CPR 36.10: see *Huck v Robson* [2003] 1 WLR 1340 (CA).

58. Part 36 can apply to claims and counterclaims, and can relate to the whole claim, part of a claim, or an issue in the claim: CPR 36.5(2). As an injunction is not a separate cause of action, a Part 36 offer made in relation to the whole claim will, if accepted, put an end to any claim for damages and a claim for an injunction. Where a Part 36 offer or payment covers the whole of the claim, and there is a trial of a preliminary issue or the trial is split between liability and damages, then the appropriate course is, at the conclusion of the preliminary issue, to adjourn the question of costs pending the resolution of all the issues including damages: see *HSS Hire Services Group plc v BMB Builders Merchants Ltd* [2005] 1 WLR 3158 (CA).

59. A Part 36 offer must comply with the form and content requirements of CPR 36.5. For example, it must be in writing and must specify whether it relates to the whole of the claim, whether it takes into account any counterclaim, and whether it includes interest. It must set out certain requirements for acceptance depending on whether it was made more or less than 21 days before the start of trial. The court has the power to waive defects in the offer and to treat an offer as a Part 36 offer even where it does not comply strictly with the requirements: *Mitchell v James* [2004] 1 WLR 158 (CA).

60. There are five possible outcomes in respect of a Part 36 offer or payment:

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injunction to restrain breach of a restrictive covenant), the defendant must make a Part 36 payment in relation to the money claim and a Part 36 offer in relation to the non-money claim: CPR 36.4.

- The Part 36 offer or payment is accepted
- The claimant's Part 36 offer is not accepted and the claimant fails to beat the offer at trial
- The claimant's Part 36 offer is not accepted and the claimant beats the offer at trial
- The defendant's Part 36 offer or payment is not accepted and the claimant beats the payment or offer at trial
- The defendant's Part 36 offer or payment is not accepted and the claimant fails to beat the payment or offer at trial.

(i) Acceptance of Part 36 offer or payment

61. Where a defendant's Part 36 offer or payment is accepted by the claimant, or the claimant's Part 36 offer is accepted by the defendant without needing the permission of the court,[8] then the claimant will be entitled to its costs of the proceedings up to the date of serving notice of acceptance: CPR 36.13(1) and 36.14.

62. The effect of accepting a Part 36 offer or payment relating to the whole claim is to stay the claim upon the terms of the offer. Either party can apply to enforce those terms or claim a remedy for breach of contract without needing to start a new claim: CPR 36.15(1) and (2). The effect of accepting a Part 36 offer or payment relating to part of the claim is to stay that part of the claim, and liability for costs is decided by the court, unless agreed: COR 36.15(3).

(ii) Non-acceptance of the Claimant's Part 36 offer and the Claimant fails to beat the offer at trial

63. In this case, where the claimant loses its claim or fails to do better than the terms of its Part 36 offer, then the costs consequences in Part 36 do not apply. The ordinary costs consequences set out in Part 44 will apply instead.

[8] The permission of the court is required to accept a Part 36 offer or payment if the offer or payment is not accepted within 21 days of it being made, or the offer or payment is made within 21 days of the start of trial, and the parties fail to agree liability for costs: CPR 36.11 and 36.12.

(iii) Non-acceptance of Claimant's Part 36 offer and the Claimant beats the offer at trial

64. In this case, the costs consequences set out in CPR 36.21 apply. Where the claimant's Part 36 offer is not accepted and at trial the defendant is held liable for more or the judgment against the defendant is more advantageous to the claimant than the Part 36 offer, then the court will order:

- Interest on the whole or part of any sum of money (excluding interest) awarded to the claimant at a rate up to 10% above base rate for some or all of the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court; and
- The defendant to pay costs on an indemnity basis from the latest date on which the defendant could have accepted the offer without needing the permission of the court, and interest on those costs at a rate not exceeding 10% above base rate

unless it considers it unjust to do so.

65. In *Huck v Robson*, the Court of Appeal held that a claimant who beats his Part 36 offer at trial has a prima facie entitlement to indemnity costs and the crucial question for the court is whether it would be unjust to order indemnity costs, not whether it would be unjust not to do so. The same applies with interest: see *R & Ors v Bryn Alyn Community (Holdings) Ltd* [2003] EWCA Civ 383. In considering whether it would be unjust to make the orders above, the court will take into account all the circumstances of the case, including:

- The terms of any Part 36 offer;
- The stage in the proceedings when the Part 36 offer or payment was made;
- The information available to the parties at the time it was made; and
- The conduct of the parties with regard to the giving of information: see CPR 36.21(5).

66. Part 36.21 applies only where the claimant has bettered its Part 36 offer. Ordinarily, this should not be difficult to determine, but it requires clarity as to the meaning and scope of an offer. The Court of Appeal has held that terms as to costs or uplift interest (i.e. interest over the ordinary rate) are not within the scope of a Part 36 offer: *Mitchell v James* [2004] 1 WLR 158 (CA); *Ali Reza-Delta Transport Co Ltd v United Arab Shipping Co SAG (No 2)* [2004] 1 WLR

168 (CA). This means that those terms cannot be taken into account in determining whether a claimant has done better than it proposed in its offer. It does not prevent a claimant making an offer which includes a term as to costs or uplift interest, and the court would have regard to that in exercising its discretion in relation to costs at the end of the case.

(iv) Non-acceptance of Defendant's Part 36 offer or payment and Claimant beats the offer or payment at trial

67. Like scenario (ii), where the claimant beats the Part 36 payment or obtains a judgment which is more advantageous than the defendant's Part 36 offer, then the costs consequences in Part 36 do not apply. The ordinary costs consequences set out in Part 44 will apply instead.

(v) Non-acceptance of Defendant's Part 36 offer or payment and Claimant fails to beat the offer or payment at trial

68. In this case, the costs consequences set out in CPR 36.20 apply. Where a claimant does not accept a defendant's Part 36 offer or payment and at trial the claimant fails to better the Part 36 payment or fails to obtain a judgment which is more advantageous than a defendant's Part 36 offer, then unless it considers it unjust to do so, the court will order the claimant to pay the defendant's costs incurred after the latest date on which the payment or offer could have been accepted without needing the permission of the court.

69. In determining whether it is unjust to order costs, the court is likely to take into account all the circumstances of the case, including the factors set out at CPR 36.21(5).

70. Unlike CPR 36.21, Rule 36.20 makes no reference to indemnity costs. This means that in normal circumstances, costs should be awarded on the standard basis, unless the circumstances justify an order for indemnity costs: see *Excelsior Commercial Holdings v Salisbury Aspden & Johnson* [2002] EWCA Civ 879.

71. What, then, is the tactical advantage for a defendant in making a Part 36 offer if, unlike a claimant, it does not get indemnity costs when it beats its offer or payment at trial? The advantage is that the defendant can lose the case but still recover its costs incurred after the latest date on which the offer could have been accepted. In other words, it reverses the general rule in CPR 44 that the winning party will get their costs. This creates an incentive for defendants to make Part 36 offers or payments at an early stage of the proceedings.

72. In what circumstances will the court order the claimant to pay the defendant's costs on an indemnity basis? The mere fact that a defendant has bettered a Part 36 payment or offer is not enough: see *Excelsior Commercial Holdings v Salisbury*. However, the court may award indemnity costs where the circumstances take the proceedings out of the ordinary, for example, if the claim is hopeless or speculative, if the Part 36 offer is particularly generous, if the defendant made multiple attempts to settle the case, and if the claimant unreasonably rejects the offers.