

IN THIS ISSUE:



P1/ The Bigger Picture

Key developments worth noting



P2/ DATES FOR THE DIARY

Make sure you don't miss out



P3-5/ EDITORIAL

JANUARY 2018 NEWSLETTER

“
I heard a bird sing
In the dark of December
A magical thing
And sweet to remember.
'We are nearer to Spring
Than we were in September,'
I heard a bird sing
In the dark of December.”

Oliver Herford, I Heard a Bird Sing

THE BIGGER PICTURE



Beverley Barton, Senior Editor, Practical Law Dispute Resolution highlights a few of the "big picture" developments of interest to dispute resolution lawyers during January 2018.

Subscribers to Practical Law Dispute Resolution can access more detailed updates, including practical commentary, on the Practical Law Dispute Resolution website (www.practicallaw.com).

Lord Burnett's first annual press conference as Lord Chief Justice

On 5 December 2017, Lord Burnett gave his [first annual press conference](#) as Lord Chief Justice. Issues he covered included:

- The condition of the court estate.
- The move from a paper-based to a digital justice system.
- Litigants in person.
- Retention and diversity in the judiciary.
- Brexit.

Supreme Court

The Supreme Court wants more diversity and a "balance of expertise" as it looks to recruit a deputy president and two justices. See [The Law Society Gazette: Supreme Court aims for more diversity as it advertises for justices \(14 December 2017\)](#).

Business and Property Courts

Leeds Law Society, in collaboration with Thomson Reuters and the judges in the Leeds Business and Property Courts (Leeds B&PCs), has published a [Guide to the Business and Property Courts in Leeds](#).

Justice Committee Inquiry on proposals to raise the small claims limit for personal injury claims

The House of Commons Justice Committee has opened an inquiry on the government's proposals to raise the small claims limit for personal injury claims. See [Parliament.uk: Commons Select Committee: Government plans to raise small claims limit \(5 December 2017\)](#).

Aarhus Convention: Civil Procedure Rules amended so cost capping hearings in private

On 13 December 2017, a practice direction was introduced under the Civil Procedure Rules (CPR) to provide that hearings relating to the costs capping arrangements for an Aarhus Convention claim, under CPR Part 45.43, will be heard in private in the first instance.

Government response to the House of Commons Justice Committee report on implications of Brexit for civil justice

The government has published [The implications of Brexit for the justice system: Government Response \(Report\)](#) in response to the House of Commons Justice Committee's report [Implications of Brexit for the justice system](#) published on 22 March 2017. The Report sets out the government's position on criminal justice, civil law (including family law) and the legal services sector.

Government response to House of Lords European Select Committee Report on Brexit: justice for families, individuals and businesses?

The government has published [Government response to the House of Lords European Select Committee 17th Report of Session 2016-2017 "Brexit: justice for families, individuals and businesses?"](#), in response to the House of Lords European Select Committee 17th Report of Session 2016-2017, [Brexit: justice for families, individuals and businesses?](#), published on 20 March 2017.

The Courts (Abuse of Process) Bill 2017 - 19

The Courts (Abuse of Process) Bill 2017 - 19 received its first reading at the House of Commons on 12 December 2017. The aim of the Bill is to prevent abuse of process in civil and family courts. See [Parliament.uk: Courts \(Abuse of Process\) Bill 2017-19](#).

The Right to Justice

On 14 December 2017, members of the House of Lords debated the Bach Commission's report, [The Right to Justice](#). See [Parliament: Lords debates the right to justice report \(13 December 2017\)](#).

Judicial College Strategy 2018 - 2020

On 6 December 2017, the Judicial College published its Strategy for 2018 - 2020. It notes that further "case officer" administrative functions may be created and may fall within the College's responsibilities, and increased digitalisation via HMCTS reforms will require greater IT capability and enhanced judicial leadership skills in areas such as change management. The College expects to deliver more induction training to support increasing flexibility of judicial deployment across courts and tribunals. It also notes that exit from the European Union is likely to create legislative changes and "as yet unknown" training needs. See [Judiciary: Judicial College – Strategy of the Judicial College 2018 – 2020 \(6 December 2017\)](#).

Legal expenses insurance

The Financial Ombudsman Service (FOS) has updated its guidance in relation to legal expenses insurance and a client's freedom of choice to choose their own solicitor, both before and after the issue of proceedings. See [Law Society: Updated guidance on legal expenses insurance \(7 December 2017\)](#).

IN THE COURTS

Beverley Barton, Senior Editor, Practical Law Dispute Resolution distils just a few of the cases of particular practical importance for dispute resolution lawyers.

Subscribers to Practical Law Dispute Resolution can access detailed updates containing practical guidance on all of these decisions on the Practical Law Dispute Resolution website. (www.practicallaw.com).

Some decisions of particular practical interest handed down (or made publicly available for the first time) during December 2017 include:

CASE MANAGEMENT

In *Salekipour and another v Parmar* [2017] EWCA Civ 2141, the court considered whether the County Court has jurisdiction under section 23(g) of the County Courts Act 1984 (CCA 1984) to set aside a final order in previous County Court proceedings if it was obtained by fraud.

CONTEMPT

In *Simmonds v Pearce* [2017] EWHC 35 (QB) (1 December 2017), the High Court considered, for the first time, the procedure for trustees to apply for committal orders for contempt of court following the bankrupt's failure to comply with his statutory obligations under the Insolvency Act 1986 (IA 1986). Interestingly, the court stated that the CPR is unsatisfactory and unclear and that the whole procedure should be reviewed by the Civil Procedure Rule Committee.

COSTS AND FUNDING

Costs and funding continue to be hot topics. Decisions of interest include:

- *Budana v The Leeds Teaching Hospitals NHS Trust and another* [2017] EWCA Civ 1980, in which the court considered whether a success fee was recoverable under a conditional fee agreement (CFA) entered into before 1 April 2013 which had subsequently been transferred.
- *Lowin v Portsmouth* [2017] EWCA Civ 2172, in which the court considered the correct approach regarding indemnity costs under CPR 36.17(4)(b).
- *Whaleys (Bradford) Ltd v Bennett and another* [2017] EWCA Civ 2143 (15 December 2017), in which the Court of Appeal gave guidance on the correct test when considering whether indemnity costs should be awarded.
- *Percy v Anderson-Young* [2017] EWHC 2712 (QB) (1 November 2017), where a costs judge assessed a claimant's ATE premium in an RTA case that settled late.
- *Martin and another v Kogan and others* [2017] EWHC 3266 (IPEC), where HHJ Hacon, in the Intellectual Property Enterprise Court (IPEC), explained how that court should approach an award of indemnity costs under CPR 36.17(4)(b), where the claimant had made a Part 36 offer which the defendant failed to beat at trial.

NEGLIGENCE

In *Barker v Baxendale Walker Solicitors and another* [2017] EWCA Civ 2056, the court considered the scope of the duty of care of solicitors advising on a scheme designed to avoid tax.

OPEN JUSTICE

In *Dring v Cape Distribution Ltd and others* [2017] EWHC 3154 (QB), Master McCloud considered an application by an interested party for access, under CPR 5.4C(2), to a wide range of documents on the court record in a product liability case that settled after trial but before judgment. Her judgment provides extensive guidance on the operation of CPR 5.4C and rights of access to documents on the court record.

REMEDIES

In *ZCCM Investments Holdings plc v Konkola Copper Mines plc* [2017] EWHC 3288 (Comm) (14 December 2017), the court considered whether an acceleration clause in a settlement agreement was an unenforceable penalty.

SECURITY FOR COSTS

In *Bailey and others v Glaxosmithkline UK Ltd* [2017] EWHC 3195 (QB) (8 December 2017), Foskett J considered the relevance of the "Arkin cap" (restricting a professional funder's liability for the other side's costs to the amount of its funding (Arkin v Borchard Lines Ltd and others [2005] EWCA Civ 655)) when making an order for security for costs against a litigation funder under CPR 25.14.

DATES FOR THE DIARY



The Commercial Litigation Association Annual Conference will take place on Monday 5th February 2018 in central London.

As always, this will be a key event in the litigator's calendar, with excellent topics and speakers, including leading judges and public figures as keynotes:

- Using the powers of a receiver effectively in disputes
- Brexit: Impact upon Judgment Enforcement
- Breach of trust against banks and professionals arising out of fraud
- Competition Law update
- Drafting Arbitration Clauses Effectively
- Professional Negligence update
- Security for Costs
- Panel Session on Funding of Disputes

[CLICK HERE](http://www.comlit.co.uk) to visit www.comlit.co.uk for more info and booking details:

The disclosure pilot scheme - 28 February 2018

The pilot scheme, which was announced on 2 November 2017, is expected to launch this year in the form of a draft Practice Direction. The pilot is proposed to run in the Business and Property Courts, and has the backing of the Master of the Rolls.

The pilot scheme is open for feedback until 28 February 2018.

For **CLAN** Newsletter feedback, or if you would like to include anything in a future edition, please contact Alexandra Carr or Beverley Barton—**CLAN** Newsletter Editors:

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Security for Costs v ATE Insurance & Litigation Funding

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The purpose of an Order for Security for Costs is to allay the injustice caused by a defendant obtaining a costs order against a claimant which they are unable to enforce. However, having to give Security for Costs can be highly problematic for claimants. It requires them to have sufficient liquidity, such that they can afford to be without what is often a substantial sum of money until the proceedings are resolved – which could take several years.

After the Event Insurance - Premier v PWC & Lloyds (2017)

Partly to nullify potential Security for Costs applications, many claimants are obtaining After the Event ("ATE") insurance policies. These policies cover the legal costs incurred by a Defendant in the event that the Claimant is ordered to pay them.

However, in the recent Court of Appeal ruling in Premier Motor Auctions v PwC & Lloyds [2017] EWCA Civ 1872, which was handed down in November 2017, it was made clear that even where a claimant has a comprehensive ATE insurance policy in place, this will rarely offer a defendant with sufficient protection such as to render an Order for Security for Costs unnecessary.

In this case, the claimant had brought a claim for £54 million against the defendants, alleging that they had taken effective control of the company and forced it into administration, using unlawful means to do so. The defendants both made Security for Costs applications soon after the pleadings stage of proceedings closed, on the basis of the claimant's impecuniosity.

The claimant had an ATE insurance policy in place and had provided copies of the policy to the defendants. This notwithstanding, the defendants sought Security for Costs on the basis that there were circumstances in which the insurers could avoid paying out – particularly due to a material non-disclosure or misrepresentation by the claimant – and they might therefore be left without any costs protection.

At first instance, the defendants' arguments were rejected on the basis that the risk of avoidance by the insurer was merely theoretical and, having regard to all the circumstances of the case and the terms of the particular policy, there was no reason to believe that the ATE policy would not respond so as to enable the defendants' costs to be paid. The jurisdictional threshold for Security for Costs had therefore not been satisfied and so the defendants' applications were rejected.

The Court of Appeal overturned this decision, noting that whether this particular claim succeeded or not would depend on the witness evidence of a director of the claimant company. If that evidence was held not to be credible, the claim would most likely be lost and the claimant could be liable for the costs of the defendant. It further noted that the wording of the particular policy was such that there was a realistic possibility that this evidence would provide the insurers with grounds to avoid payment – for instance if the

witness was held to have misrepresented the facts of the case. This was not merely a theoretical risk.

The Court made clear that an ATE policy which does not contain anti-avoidance provisions is a contingent asset - whether or not it materialises is dependent upon future events. Given that there was therefore a realistic prospect of the insurer refusing to pay out and the claimant being ordered to pay the defendants' costs, the Court of Appeal granted the order for Security for Costs.

Given this ruling, and on the basis that it would surely be a rarity for any insurer to provide an assurance that it would not seek to avoid paying out under any circumstances, having ATE insurance alone is unlikely to be sufficient to resist a Security for Costs application in circumstances where the case itself turns on the credibility of oral evidence.

Third Party Funding - Sandra Bailey & Ors v Glaxosmithkline UK Ltd (2017)

Circumstances may arise in which there is reason to believe that the funder themselves will be unable to meet the defendant's costs. The defendant can in such a scenario make an application for Security for Costs against the third party funder. Pursuant to the decision in Arkin v Bochard Lines Ltd (Nos 2 and 3) [2005] 1 WLR 3055, a litigation funder can potentially be liable for the costs of the opposing party to the extent of the funding they have provided (this has come to be referred to as the "Arkin Cap").

This issue came up last month in the case of Sandra Bailey and Others v GlaxoSmithKline UK Limited [2017] 3195 (QB), in which the defendant estimated its costs at £6.8 million. The claimant had arranged an ATE insurance policy with a maximum payout of £750,000 and informed the defendant that its funder, Managed Legal Solutions Ltd, would be able to pay any surplus in its potential liability.

The defendant made a Security for Costs application on the basis that the funder was itself balance sheet insolvent. The funder resisted this, arguing that (i) the ATE policy was sufficient security for the defendant's recoverable costs, and (ii) the amount of security ordered should be limited to the amount of funding provided by the funder (per the Arkin Cap) – which in this case was £1.2 million.

However, given that the claimant was impecunious and the funder insolvent, the Court held that there was a "justifiable concern... about the intrinsic stability of the financial arrangements made for funding [the] litigation". It exercised its discretion to disapply the Arkin cap, ruling that in all the circumstances of the case it would be inappropriate, because there was a genuine and realistic prospect that the defendant would be unable to recover its costs when entitled to do so.

This case demonstrates that the Court may, if it deems it appropriate, undertake a detailed review of the financial standing of both the claimant and their third party funder, in exercising its discretion regarding Security for Costs.

ATE and Third Party Funding

It is also worth noting that the Premier decision could in fact result in a scenario whereby a claimant obtains a comprehensive ATE insurance policy and secures substantial third party funding for their claim, and yet still has a Security for Costs Order made against them, on the basis that both the insurance policy and funding arrangement would have avoidance provisions in place. If, for instance, there is a realistic possibility that a claimant could fail to disclose a material fact, Security for Costs would still be appropriate because the insurer and funder could both refuse to pay out and the defendant otherwise would be unprotected in respect of their costs.

If you have queries in relation to after-the-event legal expenses insurance or security for costs issues, or any questions about litigation funding generally, please contact Mark Beaumont at Annecto Legal Ltd:

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