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# CIVIL PROCEDURE NEWS

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■ FERROTEX INDUSTRIAL LTD. v. BANQUE FRANCAISE DE L'ORIENT, [2001] EWCA Civ. 1387, August 30, 2001, CA, unrep. (Peter Gibson & Tuckey L.JJ.)
CPR rr. 3.1(2)(a), 3.8, 3.9 & 25.15—foreign company (C) bringing claim against D—at trial judgment given for D—C given permission to appeal—on D's application, single Lord Justice making order by consent—order requiring C to provide security for costs by particular date, otherwise the appeal should stand dismissed—after that date, C applying for extension of time for complying with the order—held, dismissing the application, (1) the court's jurisdiction to extend time had not been expressly or impliedly ousted by the agreement between the parties evidenced by the consent order, however (2) in the circumstances of the case, relief from the sanction of dismissal should not be granted under r. 3.9 (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 3.1.2, 3.9.1 & 25.15.2)

■ MONTROSE INVESTMENTS LTD. v. ORION NOMINEES, July 19, 2001, unrep. (Sir Donald Rattee)
CPR rr. 3.1(2)(a), 11(4), 15.4 & 6.23—C serving claim form out of jurisdiction on D—by order made by consent, time for filing defence extended—subsequently, and before expiry of extended period, D making application under r. 11(1) disputing jurisdiction of court—Master dismissing C's application for declaration that D had submitted to the jurisdiction—held, allowing C's appeal, (1) on its proper construction r. 11(4) requires that an application under r. 11(1) must be made within the time specified in r. 15.4 (subject to r. 6.23) for filing a defence, and not within that time as extended, if at all, by agreement or by order of the court, (2) the time for applying may be extended by the court under r. 3.1(2)(a)—*Lawson v. Midland Travellers Ltd.* [1993] 1 W.L.R. 735, CA, ref'd to—observations on cross-references in CPR as aids to construction (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 3.1.2, 6.23.2, 11.1.1 & 15.4.1)

■ SARWAR v. ALAM, [2001] EWCA Civ. 1401; [2001] 4 All E.R. 541, CA (Lord Phillips MR, Brooke & Longmore L.JJ.)
CPR r. 1.1(2)(c), 44.12A & 44.5, Practice Direction (Costs) Section 11, Access to Justice Act 1999, ss. 29 & 30—C, a passenger in D's car, injured when car involved in accident—C's claim against D for damages settled without legal proceedings being commenced—C bringing costs-only proceedings to recover after-the-event (ATE) insurance premium—district judge holding that the premium was not recoverable because D's before-the-event (BTE) insurance policy contained a provision for legal expenses insurance which would have covered the claim made by C against D—judge dismissing C's appeal—held, allowing C's appeal, the representation available to C under D's BTE policy was not a reasonable alternative to representation by a lawyer of C's own choice, backed by an ATE policy—*Callery v. Gray* [2001] EWCA Civ. 1117, [2001] 3 All E.R. 833, CA, ref'd to (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 44.12A.1 & 44PD-005, and Vol. 2, para. 9A-862)

■ AUSTIN HALL BUILDING LTD. v. BUCKLAND SECURITIES LTD., April 11, 2001, unrep. (Judge Bowsher QC)
CPR r. 24.2, Housing Grants Construction and Regeneration Act 1996, s. 108, Human Rights Act 1998, ss. 6, 7 & 21 and Sched 1, art. 6—C submitting final account for building work carried out for D—upon D's delaying payment, C submitting dispute to adjudicator under s. 108—adjudicator making decision in C's favour—C bringing claim to enforce decision and applying for summary judgment—D contending (1) that the procedure which any adjudicator is required to adopt is inherently unfair and contrary to art. 6, and in particular (2) D was not given a public hearing and the decision was not pronounced publicly—held, granting C's application to enforce adjudicator's award by summary judgment, (1) assuming that the adjudicator is a public authority within s. 6(1), almost the whole of his conduct com-

plained of by D was the result of primary legislation under which he "could not have acted differently" (s. 6(2)(a)), however (2) D's complaint that he was not given a public hearing and the decision was not pronounced publicly could not be dismissed on this basis, (3) on examination an adjudicator under the 1996 Act is not a public authority and is not bound not to act in a way incompatible with the Convention (subject to the limitation provided by s. 6(2)), (4) proceedings before an adjudicator are not legal proceedings, but are a process designed to avoid the need for such proceedings (*Bryan v. United Kingdom* (1995) 21 EHRR 342, and *Elanay Contracts Ltd. v. The Vestry* [2001] BLR 33, ref'd to), (5) in any event, there was no infringement of art. 6 because by failing to ask for a public hearing D waived their rights (*Schuler-Zagren v. Switzerland* (1993) 16 ECHR 405, and *Hakanson & Sturesson v. Sweden* February 2, 1999, ref'd to), (6) the rules of natural justice apply to adjudications (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 24.2.3)

■ CACHIA v. FALUYL, [2001] EWCA Civ. 998; [2001] 1 W.L.R. 1966, CA (Lord Phillips MR, Henry & Brooke L.JJ.)
Human Rights Act 1998, ss. 3(1) & 6(1) and Sched. 1 (ECHR) art. 6, Fatal Accidents Act 1976, s. 2(3)—in 1997, dependent child (C) bringing claim against D for compensation for the death of his mother—previously, in 1991 writ against D by deceased's husband (H) and another dependent child (X), issued but never served—C's claim brought within primary limitation period—when C's claim brought, claim of H and X statute barred—D applying to strike out C's claim against him on ground that it infringed s. 2(3), which provides that "not more than one action" shall lie for and in respect of the same subject matter of complaint—judge granting D's application—on appeal, C given permission to amend notice of appeal to include Convention point—held, allowing C's appeal, (1) s. 2(3) had to be construed compatibly with the Convention, (2) under art. 6(1) a restriction on a right of access to a court must have a legitimate aim, and the means used must be reasonably proportionate to the aim sought to be achieved, (3) the effect of s. 2(3) in these circumstances was a procedural quirk and not a legitimate aim, (4) in order to give effect to C's Convention rights, "action" in s. 2(3) should be interpreted as meaning "served process", (5) as the 1991 writ was not served C's 1997 claim was not barred by s. 2(3) (see *Civil Procedure*, Autumn 2001, Vol. 2, paras 3D-9.1, 3D-12.1 & 9B-424)

■ COBHAM v. FRETT, [2001] 1 W.L.R. 1775, PC
CPR r. 52.10, Supreme Court Act 1981, ss. 15 & 16, County Courts Act 1984, s. 81—judge of High Court of British Virgin Islands giving judgment twelve months after trial upholding P's claim to the ownership of land—Court of Appeal substituting own conclusions and allowing D's appeal—held, allowing P's appeal, an appellate court should not allow an appeal based on excessive delay before judgment unless the judgment contained errors probably, or possibly, attributable to the delay sufficient to satisfy the appellate court that the judgment was unsafe and to allow it to stand would be unfair—relevant authorities referred to—see also *Poundall v. Lincolnshire County Council* February 9, 1998, CA, unrep. (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 52.10, and Vol. 2, paras 9A-45, 9A-49 & 9A-662)

■ FRIEND v. CIVIL AVIATION AUTHORITY, [2001] EWCA Civ. 1204; [2001] 4 All E.R. 385, CA (Simon Brown, Chadwick & Tuckey L.JJ.)
CPR r. 3.4(2)(b), Employment Protection (Consolidation) Act 1978, s. 74—dismissed employee (C) bringing industrial tribunal proceedings for unfair dismissal against employers (D)—proceedings based solely on allegations of procedural unfairness—tribunal upholding complaint but concluding (1) that C's conduct contributed to the dismissal, and (2) that, in the circumstances, under s. 74 it would be just and equitable to reduce compensation otherwise payable to him, by 100%—subsequently, C bringing claim against D in High Court for damages for breach of contract etc alleging that D had coerced him into complying with unlawful and unreasonable instructions as to safety—on D's application, judge striking out action on ground that it was barred by issue estoppel and had no reasonable prospects of success—held, allowing C's appeal, (1) the court had to be satisfied that C's claim raised the same issue that had been decided in the tribunal proceedings, (2) the tribunal's holdings under s. 74 implied no judgment on the lawfulness or otherwise of the safety instructions C had received, (3) as C could not be criticised for failing to canvass the safety issue before the tribunal, his claim should not be stayed under the *Henderson v. Henderson* principle—*Henderson v. Henderson* (1843) 3 Hare 100, *Thoday v. Thoday* [1964] 2 W.L.R. 371, CA, *Johnson v. Gore Wood & Co.* [2001] 2 W.L.R. 72, HL, ref'd to (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 3.4.3, and Vol. 2, paras 9A-160 & 9A-168)

■ HUBBARD v. LAMBETH SOUTHWARK AND LEWISHAM HEALTH AUTHORITY, *The Times*, October 8, 2001, CA (Tuckey & Hale L.JJ.)
CPR rr. 1.1, 1.4 & 35.12, Human Rights Act 1998, Sched. 1, art. 6—in medical negligence case, under r. 35.12 Master directing that there should be a pre-trial meeting of experts—held, dismissing C's appeal, (1) the aim of the meeting was to identify and limit the medical issues to be decided at trial, (2) the Master's order did not raise any question of the applicability of the art. 6 guarantees of a fair trial (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 1.4.6 & 35.12.1)

■ KASTOR NAVIGATION CO. LTD. v. AGF M.A.T. (THE "KASTOR TOO"), May 23, 2001, unrep. (Judge Dean QC)
CPR rr. 16.5 & 24.2—following loss of ship, owners (C) bringing claim against insurers (D) under fire policy—in their defence, D denying C's allegation that fire caused the loss—however, defence not stating D's own version of events—C applying for summary judgment against D under r. 24.2(a)(ii)—C arguing that, by not stating own version, D had not complied with r. 16.5(2) and therefore had no real prospect of successfully defending the claim—held, dismissing application, (1) as a matter of substantive law, the burden of proving loss by fire rested on C even though a credible alternative explanation for the loss was neither advanced nor proved by D, (2) on the facts of this case, D's defence complied with r. 16.5(2) (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 16.5.2)

■ LOCAL SUNDAY NEWSPAPERS LTD. v. JOHNSTON PRESS LTD., June 19, 2001, unrep. (Neuberger J.)
CPR rr. 25.1, 44.7 & 44.8, Practice Direction (Costs), para. 8.5—C bringing passing-off action against D—both parties publishers and distributors of local newspapers—C applying for interim injunction restraining D from publishing and distributing in particular area a new free Sunday newspaper—judge explaining questions to be considered on such an application—judge refusing the application, principally on the ground that C did not have a good arguable case—on the question of costs, held, (1) D should have their costs in any event, (2) those costs should not be assessed and paid forthwith, but should await the outcome of the proceedings, however (3) as there was a real prospect that the proceedings would go no further, D should have liberty to apply to convert the order into an order that the costs be assessed (either by summary or detailed assessment) and paid forthwith (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 25.1.10, 44.7.4, 44.8.1 & 44PD-002)

■ SECRETARY OF STATE FOR TRADE AND INDUSTRY v. LEWIS, *The Times*, August 16, 2001 (Neuberger J.)
CPR r. 52.11(1), Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987 r. 7(5)(a), Practice Direction (Directors Disqualification Proceedings), paras 10.5 & 10.6—registrar adjourning C's application for disqualification order against D for further consideration—without giving reasons, registrar directing under r. 7(5)(a) and para. 10.6(1) that application be heard, not by a judge, but by a registrar—D appealing to judge—held, (1) where (as here) prima facie an appeal is limited to a review of the decision of a lower court (r. 52.11), the appellate court should not hold a re-hearing for reason only that no reasons were given for the decision unless (a) the lower court was asked to give reasons and refused or (b) there was some good reason for not asking the court to give reasons; further held, dismissing the appeal, (2) factors favouring hearing of a disqualification application by a judge were (a) that complex issues of fact or law were involved, (b) that the case attracted considerable public interest, and (c) that the hearing would be long, (3) the wishes of the defendant should not be ignored but cannot be decisive and the desire of the claimant is a factor of less weight, (4) the likelihood of an application being heard sooner rather than later (whether by a registrar or a judge) should also be taken into account (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 52.11.1 & B2-010)

■ SIMBA-TOLA v. ELIZABETH FRY HOSTEL, [2001] EWCA Civ. 1371; July 30, 2001, CA, unrep. (Mance & Keene L.JJ.)
CPR rr. 1.1 & 31.12, Practice Direction (Disclosure and Inspection), para. 5.4—former resident (C) bringing county court claim against hostel (D) under Race Relations Act 1976—D giving standard disclosure—judge refusing C's application for specific disclosure of documents, including confidential personal files on fellow residents—held, dismissing C's appeal, (1) the judge had properly concluded that no racist or violent incident relevant to the issues in the case would be recorded in the personal files which was not also recorded in the material already disclosed by D, (2) the specific documents contained no additional relevant information, consequently (3) this was not a case in which the judge had to undertake the balancing exercise stated in *Science Research Council v. Nassé* [1980] A.C. 1028, HL (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 31.3.15, 31.12.2 & 31PD-005)

■ SOLID CAPITAL MARKETS (U.K.) LTD. v. LITTLE ROCK MINING INC., January 19, 2001, unrep. (Judge Bowers QC)
CPR rr. 13.3, 52.3 & 52.7—foreign company (D) instructing stockbrokers (C) to acquire allocation of shares in X Co—D not paying for shares ordered—C bringing claim in High Court against D—C obtaining judgment in default of defence—in process of C's attempts to enforce judgment, director of D resident in UK (K) required to attend for oral examination and further examination fixed for February 6—on January 19, applications by K (as a person affected by the judgment) and D to set judgment aside dismissed by judge on ground that D had no real prospect of successfully defending the claim—judge refusing permission to appeal—K and D indicating intention to apply to Court of Appeal for permission to appeal—K applying for order that date fixed for his further oral examination should be vacated—held, on D and K undertaking to use all reasonable endeavours to progress their application for permission to appeal, the oral examination should be adjourned to the first available date after March 1 on terms that, if there is an outstanding application to the Court of Appeal when that oral hearing is due to be held, then the matter should be adjourned

again (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 52.7)

■ SPECIALIST GROUP INTERNATIONAL LTD. v. DEAKIN, [2001] EWCA Civ. 777; May 23, 2001, unrep. CA (Aldous & May L.JJ.)
CPR r. 3.4(2)(b), Pt. 24—D bringing "loans action" against X (the corporate embodiment of C) and "shareholder action" against C—first action settled and consent order made—before second action tried, X bringing "bonuses action" against D, alleging point of law that might have provided X with a complete defence to the "loans action"—before *Johnson v. Gore Wood & Co.* [2001] 2 W.L.R. 72, decided, judge dismissing D's applications under r. 3.4(2)(b) to strike out "bonuses action" and/or under Pt. 24 for summary judgment (May 22, 2000, unrep., Rimer J., see *CP News* 04/2001)—held, dismissing appeal, (1) the principles of cause of action finality and issue finality are reasonably straightforward and are capable of being simply expressed, (2) the principles should only be applied where the circumstances are such that their application is necessary to prevent misuse of the court's procedure amounting to an abuse of process, (3) where the cause of action in the later proceedings is identical to that in the earlier proceedings, the bar is absolute unless fraud or collusion is alleged, however (4) the same rigidity does not apply to issues that have been the subject of previous litigation—*Johnson v. Gore Wood & Co.* [2001] 2 W.L.R. 72, HL, and *Henderson v. Henderson* (1843) 3 Hare 100, ref'd to (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 3.4.3, and Vol. 2, paras 9A-160 & 9A-168)

■ VERSAILLES TRADE FINANCE LTD. v. CLOUGH, *The Times*, November 1, 2001, CA (Brooke & Waller L.JJ. and Longmore J.)
CPR r. 24.2—C bringing substantial claim against D for breach of fiduciary duty etc—in defence, D (who was under investigation by prosecuting authorities) pleading that he could not plead to C's allegations because to do so might incriminate him—judge granting C's application for summary judgment on part of their claim—held, dismissing D's appeal, (1) the privilege of self-incrimination does not give rise to a defence in civil proceedings, (2) on the basis of the evidence before the judge, D had no real prospect of successfully defending the claim, (3) there was no basis on which the proceedings should have been stayed, adjourned or postponed—observations on effect of privilege (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 24.2.3, and Vol. 2, para. 9A-161)

## Statutory Instruments

■ COURT OF PROTECTION (AMENDMENT) RULES 2001 (S.I. 2001 No. 2977)
amend Court of Protection Rule 2001 (S.I. 2001 No. 824)—amend r. 8(1)(a) so that the court may make a short order or direction if it appears that the property of the patient does not exceed £16,000 in value, rather than £10,000 (r. 3)—amend r. 24 so that, unless the court directs otherwise, notice must be given to the patient where an application for any order, direction or certificate is made unless an application has already been made in respect of the same patient, but so that, in any case, notice must be given of a first application to appoint a receiver (r. 5)—where such notice is given, a certificate must be filed with the court to that effect (unless the court directs otherwise), which must include a certificate as to whether or not the patient understood the notice (r. 6)—make other minor amendments—in force October 1, 2001 (see *Civil Procedure*, Autumn 2001, Vol. 2, paras 6B-234 & 6B-250)

# IN DETAIL

## Insurance premiums as costs

In *Callery v. Gray* [2001] EWCA Civ. 1117; [2001] 3 All E.R. 833, CA, the Court of Appeal dealt with conjoined appeals raising certain issues concerning costs payable in personal injury cases by defendants to claimants where claimants (1) had entered into a conditional fee agreement (CFA) with their legal representatives providing for a "success fee", and (2) had taken out "after-the-event" (ATE) insurance to protect themselves from liability for costs.

The general position is that, if the claimant is successful in his claim, the success fee to which his legal representatives are entitled and any ATE premium paid by the claimant would be recoverable by the claimant as costs against the unsuccessful defendants. The Court of Appeal held that there was jurisdiction under section 29 of the Access to Justice Act 1999 to include in an award of costs made under CPR r. 44.12A (Costs-only proceedings) an ATE insurance premium paid in respect of contemplated proceedings notwithstanding that the claim was subsequently settled before those proceedings were initiated.

The Court also held that, in principle, in cases exhibiting certain characteristics it is reasonable for a claimant, at an early stage of the proceedings and before it is known whether the defendant is contesting the claim, (1) to enter into a conditional fee agreement with legal representatives providing for the payment of a success fee and (2) to take out ATE insurance cover. In these circumstances, it was reasonable that a success fee based on an uplift of 20%, and an ATE insurance premium of £350, should be recoverable as costs by the successful claimant against the unsuccessful defendant. The case characteristics are that the claim should be a "modest" claim for personal injuries caused by a "minor" traffic accident, and the amount of costs incurred by the parties should be "small". (One wonders how long it will be before these restricting conditions are quietly forgotten.)

In subsequent proceedings in this case, further issues were raised (see *Callery v. Gray* (No. 2) [2001] EWCA Civ. 1246; [2001] 4 All E.R. 1, CA), in particular the issue whether the successful claimant can recover by way of costs against the unsuccessful defendant an insurance premium which provided for cover which was not merely cover against his potential liability for costs to the defendant should his claim be unsuccessful, but which provided cover for liability other than or additional to that. For example, a premium for insurance to cover the claimant's liability to his legal representatives to compensate them in the event of his claim being unsuccessful for the disbursements incurred by them in acting for him (so-called "own costs" cover).

Section 29 of the 1999 Act states that, where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy "against the risk of incurring a liability in those proceedings", the costs payable to him may include costs in respect of the premium of the policy. The defendants argued that "own costs cover" was outside the scope of section 29 since it was cover, not against the "risk of incurring" the liabilities, but against the risk of being unable to recover an indemnity in respect of them consequent upon the failure of the claim.

The Court acknowledged that section 29 was "imprecise". After referring to related rules of court, in particular to CPR r. 44.5 and to Section 11.10 of Practice Direction (Costs) (see *Civil Procedure*, Spring 2001, Vol. 1, para. 44PD-005), the Court held that on the true construction of section 29 the words "insurance ... against the risk of incurring a liability" mean "insurance against the risk of incurring a costs liability that cannot be passed on to the opposing party". On such construction, by definition, this would include a claimant's liability for his own disbursements in the event of the failure of his claim. The Court added that the circumstances in which, and the terms of which, "own costs" insurance would be reasonable, so that the whole premium could be recovered as costs against an unsuccessful defendant, would have to be determined by the courts when dealing with individual cases.

In *Sarwar v. Alam* [2001] EWCA Civ. 1401; [2001] 4 All E.R. 541, CA, a passenger (C) brought a personal injuries claim against the driver of a car (D) in which he was a passenger. Up to a point the facts were rather similar to those which obtained in the Callery case. However, in the course of costs-only proceedings, D's insurers revealed that his motor insurance policy contained a provision for legal expenses insurance (LEI) which might have covered a claim made by C against D. Both the district judge and the judge on appeal held that this before-the-event (BTE) insurance was available to C and on this ground they disallowed the costs of his ATE premium as costs against D.

The Court of Appeal allowed C's appeal, principally on the grounds that the policy did not provide C with appropriate cover in the circumstances of this case. In a summary of the Court's judgment (provided by the Court but not forming part of the judgment) it is said that representation arranged by the insurer of the opposing party, to which the claimant had never been a party, and of which he had no knowledge at the time it was entered into, and where the opposing insurer through its chosen representative reserved to itself full conduct and control of the claim, was not a reasonable alternative to representation by a lawyer of the

claimant's own choice, backed by an ATE policy. However, if a claimant making a relatively small claim in a road traffic case (i.e. a claim under about £5,000) had access to BTE cover which appeared to be satisfactory for a claim of that size, then in the ordinary course of things he should be referred to the relevant BTE insurer. The Court gave guidance as to the nature of the inquiries a solicitor engaged by a claimant should make into the availability of BTE cover.

## Time for disputing jurisdiction

CPR r. 11(1) states that a defendant who wishes to dispute the court's jurisdiction to try the claim may apply to the court for an order declaring that it has no such jurisdiction. As is well known, the general rule is that the English courts have jurisdiction over defendants served with originating process within the court's territorial jurisdiction. However, in certain circumstances, service of process on defendants out of the jurisdiction may be effected in accordance with the rules now found in Sect. III of CPR Pt. 6 (former RSC Ord. 11, etc.). To an extent, these rules supplement primary legislation (notably the Civil Jurisdiction and Judgments Act 1982). (The question whether the court has jurisdiction is, of course, different from the question whether it will exercise it.)

Once upon a time, a claimant wishing to serve a defendant out of the jurisdiction was in all circumstances required to obtain an order from the court granting him permission to do so. But that has long-since ceased to be the case. It was recognised that, as in certain identifiable circumstances the permission would be routinely granted, claimants should not always be required to apply for an order. Thus, in Sect. III of CPR Pt. 6 one finds two related provisions, r. 6.19 and 6.20, stipulating, respectively, (a) the circumstances where permission of the court is not required and (b) the circumstances where the permission of the court is required. Rules 6.19 and 6.20 are not mutually exclusive. In circumstances falling within r. 6.19 (or arguably so) a claimant may apply for an order for permission to serve out. However, the provisions in Sect. III of Pt. 6 are structured as if they are mutually exclusive. Thus, r. 6.21, which spells out the procedure to be followed where an application for permission to serve out of the jurisdiction is made, expressly assumes that the application is being made in the circumstances provided for in r. 6.20.

A defendant who wishes to dispute the court's jurisdiction to try the claim under r. 11(1) must do two things. First, r. 11(2) tells him that he must file an acknowledgment of service in accordance with CPR Pt. 10. (By doing so he does not consent to the jurisdiction, expressly or impliedly, see r. 11(3).) Secondly, r. 11(4) tells him that he must make his application "within the period for filing a defence". In the text of the CPR, r. 11(4) is followed by a formal cross-reference which says "(Rule 15.4 sets out the period for filing a defence)". If a defendant files an acknowledgment of service and does not make an application within the period for filing a defence "he is to be treated as having accepted that the court has jurisdiction to try the claim" (r. 11(5)).

In *Montrose Investments Ltd. v. Orion Nominees* July 19, 2001,unrep., after filing an acknowledgment of service, the defendant (D), who had been served out of the jurisdiction, made an application under r. 11(1) disputing the jurisdiction of the court. The claimant (C) applied to a master for a declaration that D should be treated as having accepted that the court had jurisdiction to try the claim. The master dismissed the application. A judge (Sir Donald Rattee) allowed C's appeal.

D had filed an acknowledgment of service and, therefore, had complied with the first of the two conditions stated above. The case turned on the question whether D had complied with the second condition, that is to say, whether (as required by r. 11(4)) he had made the application under r. 11(1) "within the period for filing a defence".

Rule 15.4(1) states that the general rule is that the period for filing a defence is 14 days after service of the particulars of claim, or, if the defendant files an acknowledgment of service under Pt. 10, then the period is 28 days after service of the particulars of claim. Rule 15.4(2) states that this general rule is subject to (amongst other things) r. 6.23. If one goes to r. 6.23 one finds that it says that, if a claim form has been served out of the jurisdiction under r. 6.19, that is to say, if it has been served out of the jurisdiction in circumstances where the permission of the court was not required, then the period for filing the defence is to be calculated in accordance with the provisions of paras (2) to (4) of the rule (i.e. of r. 6.23). For obvious reasons, the time limits imposed by these paragraphs are rather more generous to defendants than those imposed by the general rule. (It may be noted that neither r. 15.4 nor r. 6.23 expressly deals with the calculation of periods for filing a defence in cases where service out of the jurisdiction is made with the permission of the court under r. 6.20.)

For convenience, the period for filing a defence fixed in accordance with the rules referred to above may be called the "primary" period, because the position is that it may be extended. Under r. 15.5 it may be extended by agreement of the parties for a period of up to 28 days. Further, it may be extended by the court in exercise of its general power under r. 3.1(2)(a) to extend time for compliance with any rule.

In the *Montrose Investments* case, the facts were that the primary period for filing a defence for one defendant expired on January 19, 2001, and for another defendant

it expired on February 2, 2001. By order of the court, made with the consent of both parties, these periods were extended to, respectively, February 19 and March 5. On February 19, that is to say, after the expiry of the primary periods for filing a defence but before the expiry of (what could be called) the extended periods, the defendants made an application under r. 11(1) disputing the court's jurisdiction. The question for the master, and then for the judge, was: had the defendants made their r. 11(1) application "within the period for filing a defence" as required by r. 11(4)? The master held "yes", the judge held "no". The master concluded that the period for filing a defence included any extended period; therefore the defendants' application was in time. The judge concluded that the period was confined to the primary period; therefore the defendants' application was out of time.

There was one main issue which separated the master and the judge, and it is a question which goes a long way towards explaining why it was that they reached different conclusions. That issue was whether the time for making an application under r. 11(1), which is fixed (as explained above) by reference to the time for filing a defence, may be extended by the court in exercise of its power under r. 3.1(2)(a). It is clear that the court may use that power to grant a defendant's application for an extension of time for filing a defence. But may the court use that power where a defendant wants an extension of time for making an application disputing the court's jurisdiction? The master was worried that the court had no such power and this concern encouraged him in his conclusion that the period for making an application included any extended period for filing a defence. (Perhaps the master was influenced by the reasoning of the Court of Appeal in *Vinos v. Marks and Spencer plc*. [2001] 3 All E.R. 784, CA, and related cases.) Before the judge it was conceded that the master was wrong in this respect and the judge agreed that the concession was rightly made.

Before the CPR came into effect, provisions relating to applications disputing the jurisdiction of the court were found in RSC Ord. 12, r. 8. The equivalent to CPR r. 11(4) was RSC Ord. 12, r. 8(1). Rule 8(1) said application had to be made "within the time limited for service of a defence" and in *Lawson v. Midland Travellers Ltd.* [1993] 1 W.L.R. 735, CA, it was held, but with some reservations expressed by Sir Thomas Bingham M.R., that this period was the time for service of a defence as extended, if at all, by agreement or by order of the court. Not surprisingly, in the Montrose Investments case this Court of Appeal decision was strongly relied on by the defendants.

In distinguishing this authority, the judge noted the Master of the Rolls' reservations and he also noted that it has been said on numerous occasions that the court should be slow to seek guidance on the proper construction of provisions in the CPR from cases (even in the Court of Appeal) which were decided on differently worded provisions of the old rules. The judge said that the bracketed cross-reference immediately following para. (4) of r. 11, in which reference is made to r. 15.4 (which sets out the period for filing a defence), makes it clear that what the rule makers had in mind was that the period for making an application disputing jurisdiction "was the period for filing a defence ascertainable from r. 15.4 itself" (i.e. the primary period), which of course in its own terms makes no reference to any possibility of extension. The judge said that the surrounding of words in the CPR by brackets does not deprive them of any effect that they would otherwise have. He accepted that some of the bracketed cross-references in the text of the CPR "do not have any force, as opposed to being mere guidance to the reader as to where to find matters elsewhere in the rules" but added that it is not the existence of brackets that is significant, but rather the nature of the words contained within them.

## Extending time for providing costs security

In *Ferrotex Industrial Ltd. v. Banque Francaise de l'Orient* [2001] EWCA Civ. 1387; August 30, 2001, CA, unrep., the claimants (C), a foreign company, were unsuccessful at trial but were given permission to appeal to the Court of Appeal. The defendants (D) issued an application notice for security for the costs of the appeal. At the hearing of the application on July 3, 2001, the court made an order in terms agreed by the parties. The order stated that the security should be provided by means of a bank guarantee within seven days, that is to say by July 10, and that the appeal should stand dismissed without further order if the security was not provided. The appeal was fixed for the week beginning July 23. The arranging of the guarantee took some time and involved several parties. In the event, largely because of delays in communications between the banks providing the guarantee and counter-guarantees, the necessary arrangements were not in place by July 10, with the result that the appeal stood dismissed.

On July 12, C applied to extend the time for providing the security. The power of the court to extend time for compliance with any court order is among the powers of the court listed in CPR r. 3.1 (see para. (2)(a) of that rule). The parties and the Court accepted that the dismissal of the appeal was a "sanction" imposed for failure to comply with a court order (in this case the consent order for security) within the meaning of CPR r. 3.8. Consequently, C was in the position of applying for relief from that sanction in the form of an extension of time for complying with the order. Rule 3.9 states that in dealing with such application the court will consider all the circumstances, including the particular circumstances listed in

that rule. So, C's application was not simply an application for extension of time under r. 3.1(2)(a).

In opposing the application, at the outset D raised a jurisdictional argument based on the decision of the Court of Appeal in *Siebe Gorman & Co. Ltd. v. Pneupac Ltd.* [1982] 1 W.L.R. 185, CA (see S.C.P. 1999, Vol. 1, para. 3/5/2 and Vol. 2, para. 17A-24). In that case it was explained that the jurisdiction of the court to grant a party an extension of time to do a specified act may be ousted by a binding contract between the parties. In the instant case D argued that the agreement between the parties was a real contract, which was evidenced by the "by consent" order for security, and that C could only be released from that agreement on conventional contractual grounds.

In the *Siebe Gorman* case the Court of Appeal said that where a real contract is evidenced by a "by consent" order the court's jurisdiction to extend time remained unless the agreement expressly or impliedly accepted or contemplated that an order would be made which restricted or ousted the court's jurisdiction in this respect. In the instant case D argued that the parties had impliedly agreed that the court's jurisdiction should be ousted because time was of the essence of the agreement, having regard to the imminence of the date for the hearing of the appeal.

In dealing with this objection, Tuckey L.J. said there was no escape from the conclusion that the parties did make a real contract, albeit one which was conditional upon the court making the order in the agreed terms. However, his lordship did not accept that the agreement impliedly accepted that the court's jurisdiction should be ousted. He said that, where a party was unable through no fault of his own to comply with an order the court's jurisdiction would not be ousted unless the parties had clearly spelt out their intention that it should be.

Tuckey L.J. then turned to the question whether, in all the circumstances of the case, and in particular the circumstances listed in r. 3.9, C should be granted relief, in the form of an extension of time for providing security for costs, from the procedural sanction of dismissal of the appeal. His lordship said that the security for costs order was designed "to produce finality" and "to make time of the essence given the imminence of the hearing date". Peter Gibson L.J. said the parties must have expected that there would be certainty as to the appeal within seven days of the order; either the appeal would go ahead, or it would not. That certainty would be defeated by an extension of time. Their lordships found the matter finely balanced but for these and other reasons held that C's application should be dismissed.

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FEATURE

## Relief from procedural sanctions

In Access to Justice Interim Report (June 1995), it was noted that it had often been said that the existing rules of court and practice directions contained solutions to the key problems of cost, delay and complexity if only litigation was conducted in accordance with them (Ch.3, para. 6). However, it was commented that rules and directions were flouted on a vast scale. The timetables they contained were generally ignored and their other requirements were complied with "when convenient to the interests of one of the parties and not otherwise". Further, cost sanctions were largely ineffective. One of the greatest grievances of litigants in person was that the apparent impunity with which practitioners (acting for parties to whom they were opposed) breached procedural orders.

In Access to Justice Final Report (July 1996), a whole chapter (Ch. 6) was devoted to procedural sanctions. It was said that, as part of a case-managed system, sanctions should be designed to prevent, rather than to punish, non-compliance with rules and timetables. The main recommendations were, apart from those specifically concerned with costs, that (1) the rules of court themselves should specify what will happen where there has been a breach; (2) all directions orders should include an automatic sanction for non-compliance; and (3) the onus should be on the party in default to seek relief from a sanction, not on the other party to apply to enforce the sanction.

It was also said that sanctions must be relevant and proportionate. They should be tailored to fit the seriousness of the breach to the other party. They should also where possible relate to the particular breach (e.g. the sanction for failure to produce a document timeously should be that the party is not entitled to rely on it). In relation to the Draconian sanction of striking out an entire claim or defence it was said that such a sanction "must remain as a weapon in the court's armoury, but ... it should not be imposed too readily" (Ch. 6, para. 10).

The second of the specific recommendations outlined above is carried into effect by CPR r. 3.8(1) which provides that, where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule etc, has effect "unless the party in default applies for and obtains relief from the sanction". This rule marks a departure from the previous law insofar as it relieves the innocent party of the need, in the event of his opponent's non-compliance, to make an application to the court to bring the sanction into effect. (Such an application was not always necessary under the old law.)

Rule 3.8(3) anticipates that, in many instances, a rule, practice direction or court order will require a party "to do something within a specified time" and will specify "the consequence of failure to comply" (obviously, this would include any "sanction for failure to comply" within r. 3.8(1)) and provides that, in these circumstances, the time for doing the act in question may not be extended by agreement between the parties. This particular provision is consistent with the overall "court control" philosophy behind the CPR case management scheme.

In Access to Justice Final Report (July 1996), it was recognised that there must be open to the defaulting party "some limited right to apply for relief from a sanction" and it was said that it is important "that the conditions for relief should be set out clearly in the rules". (It may be noted in passing that it was also said that the application for relief should be made "before the date of expiry of the specific requirement".) In Ch. 6, para. 14 of the Final Report it was recommended that the conditions should broadly follow the test stated in *Rastin v. British Steel* [1994] 1 W.L.R. 732, CA. This recommendation is carried into effect by CPR r. 3.9(1), a provision which follows closely what was said in para. 14.

Rule 3.9 does not say that the court may grant relief from procedural sanctions. It assumes that the court does have such a power. What it does say is that, on an application for relief from any sanction, the court "will consider all the circumstances" including certain listed circumstances. Those particular circumstances are the following: (a) the interests of the administration of justice; (b) whether the application for relief has been made promptly; (c) whether the failure to comply was intentional; (d) whether there is a good explanation for the failure; (e) the extent to which the party in default has complied with other rules, practice directions and court orders and any relevant pre-action protocol; (f) whether the failure to comply was caused by the party or his legal representative; (g) whether the trial date or the likely trial date can still be met if relief is granted; (h) the effect which the failure to comply had on each party; and (i) the effect which the granting of relief would have on each party. In exercising its power to grant relief from a procedural sanction (wherever that power is derived from) and in interpreting the circumstances listed in r. 3.9(1), the court must seek to give effect to the overriding objective (see rr. 1.1 & 1.2).

Obviously, in a given application for relief, not all of these circumstances will be relevant. However, not infrequently a number of them will be and the court will be faced with a difficult balancing exercise. In many instances, the specific relief that a party against whom a procedural sanction has been imposed will seek, is an extension of time for complying with a rule,

practice direction or court order. It is important that judges should not treat these applications merely as an application for extension of time for compliance under CPR r. 3.1(2)(a), but should take care to work through and to take into account insofar as they are relevant the circumstances listed in r. 3.9(1).

Circumstances may arise in which it may not be obvious that a party's application is, within the meaning of r. 3.9(1), an application "for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order". If it is not, then a judge could not be faulted for failing to consider and to deal with all of the circumstances listed in r. 3.9(1) insofar as they may be relevant to the application. However, the Court of Appeal seems to be rather keen on the listed circumstances, and has drawn into the ambit of r. 3.8 and r. 3.9 sanctions that appeared to have their own settled rules for the granting of relief; for example, relief from the consequence imposed by rule 32.10 for failure to serve a witness statement in time (see *Bansal v. Cheema* March 2, 2000, CA, unrep.).

It would seem that rules 3.8 and 3.9 were intended to have effect during the pre-trial stages of civil proceedings. In *Hertfordshire Investments Ltd. v. Bubb* [2000] 1 W.L.R. 2318, CA, the Court of Appeal allowed the defendant's appeal against a judge's order granting the complainant's application made out of time for the rehearing of a possession action. The Court observed that different considerations would arise where an application was made to extend time before trial (where r. 3.9 might apply) and after trial (where it would not). However, as is shown by the case of *Ferrotex Industrial Ltd. v. Banque Francaise de l'Orient* [2001] EWCA Civ. 1387, August 30, 2001, CA, unrep. (referred to elsewhere in this edition of *CP News*), r. 3.9 may come into play where the procedural sanction imposed by a court order is the dismissal of an appeal.

There is at least one situation in which rules 3.8 and 3.9 do not apply when it might reasonably be thought that they should, and that is where a claimant fails to serve a claim form within the time limit fixed by r. 7.5 and applies for the specific relief of an order extending time for service. The argument might run that, in this situation the sanction is that the claimant is not able to effect valid service of the claim form (a serious sanction if the limitation period has run). As is made clear by the case of *Kaur v. CTP Coil Ltd.* July 10, 2000, CA, unrep., in these circumstances, time may be extended "only if" the conditions stated in r. 7.6(3) apply and the court cannot permit, by application of the conditions listed in r. 3.9, what r. 7.6(3) expressly forbids (see also *Vinos v. Marks & Spencer plc.* [2001] 3 All E.R. 784, CA, and *Infantino v. Maclean* [2001] 3 All E.R. 802).

A shorter, and perhaps more elegant, route to the conclusion reached in the *Kaur* case might be to say that r. 3.8 and r. 3.9 are concerned with, what could be called, "direct" (rather than "indirect") procedural sanctions. That is to say, they are concerned with rules, practice directions and court orders that in terms impose a sanction for non-compliance (some support for this may be found in the passages in Access to Justice Final Report (July 1996) cited above). Rule 7.5 states that, after a claim form has been issued, it must be served on the defendant within a particular time. The rule is silent on what the consequences for failure to serve in time might be. It may be noted that in *Totty v. Snowden* [2001] EWCA Civ. 1415; [2001] 4 All E.R. 577, CA, where the claimant, having failed to serve particulars of claim complying with Pt. 16 within the time limit fixed by r. 7.4, applied for an extension of time, the Court of Appeal held that the application should be considered under the general discretionary power to extend time referred to in r. 3.1(2)(a). Rule 7.4 imposes no direct sanction for non-compliance and, in this case, it was not suggested that the question whether the application should be granted turned on a consideration of the circumstances listed in r. 3.9(1).

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