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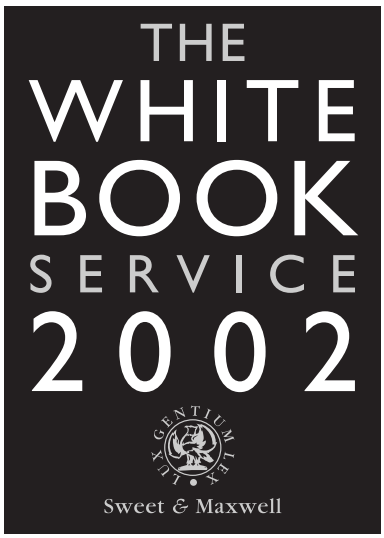

N BRIEF

Cases

■ BRAWLEY v. MARCZYNSKI [2002] EWCA Civ 756, May 8, 2002, CA, unrep. (Aldous, Mance & Longmore L.JJ)
CPR, r.44.3—C bringing intellectual property claim against D—claim settled without trial—trial judge making order (1) that D pay C profits as assessed by an inquiry, and (2) that parties be at liberty to apply for an order as to the costs of the action—after profits of £300,000 agreed, judge ordering D to pay C's costs—held, dismissing D's appeal, there is no "tradition" that, when a dispute is not judicially resolved, the correct order is "no order as to costs" (see *Civil Procedure*, Spring 2002, Vol. 1, para. 44.3.5.1, and Vol. 2, para. 9A-68)

■ R.(BARRON) v. SURREY COUNTY COUNCIL [2002] EWCA Civ 713, May 7, 2002, CA, unrep. (Mummery & Dyson L.JJ, and Sir Swinton Thomas)
CPR, r.54.20—C, one of several property owners affected by decision of local authority (D), granted permission to apply for judicial review of decision—C adding private law claim (based on estoppel) to public law claim—proceedings transferred from Administrative Court to Chancery Division—D conceding private law claim—judge staying C's proceedings generally—held, allowing C's appeal, in the circumstances it was appropriate to allow the public law proceedings to continue, even though C no longer required a remedy to vindicate her own rights, (2) the public law claim raised an important issue as to the legality D's policy which affected the interests of a large number of other owners (see *Civil Procedure*, Spring 2002, Vol. 1, paras 54.3.3 & 54.20.1, and Vol. 2, para. 9A-68)

■ BENNETT v. COMPASS GROUP U.K. AND IRELAND LTD. [2002] EWCA Civ 642, April 18, 2002, CA, unrep. (Pill, Chadwick & Clarke L.JJ.)
CPR, rr.3.1(2)(m), 31.6, 31.12 & 31.14(2)—employee (C) bringing claim against employers (D) for personal injuries—D arranging for C to be examined by their medical expert (X)—for this purpose, D wishing X to have access to GP and hospital records relating to C and referred to in C's medical report—district judge giving directions for standard disclosure—subsequently, after C failing to provide the medical records voluntarily, district judge making order for C to sign an authority permitting D to have access to them—judge dismissing C's appeal, holding that the district judge had jurisdiction to make the order, but granting permission for C to make a second appeal—held, dismissing the appeal, (1) jurisdiction to make the order could be derived from r.31.6 (standard disclosure), r.31.12 (specific disclosure) and r.31.14 (documents referred to in statements of case, etc.) (see also r.3.1(2)(m)), (2) the district judge had not erred in principle in the manner in which he had exercised his discretion, (3) orders of this type should be made in carefully defined circumstances and should be clearly drafted so that none of the claimant's rights are infringed (Ed.: with effect from March 25, 2002, r.31.14 was amended for the purpose of providing that a party may not of right inspect a document referred to in an opponent's expert report) (see *Civil Procedure*, Spring 2002, Vol. 1, para. 31.14.1)

■ DOUCE v. STAFFORDSHIRE COUNTY COUNCIL [2002] EWCA Civ 506, *The Times*, May 2, 2002, CA, unrep. (Potter L.J. & Sir Denis Henry)
CPR, r.24.2—owners and managers (C) of residential care homes regulated by local authority (D) bringing claim against D for economic loss—C alleging that D were negligent in construing Registered Homes Act 1984 so as to require them to maintain staffing levels according to capacity, rather than as to occupancy, resulting in the overpayment of wages by C—D relying on protection afforded by their role as statutory regulator and applying for summary judgment on ground that C had no real prospect of succeeding—judge refusing application—held, dismissing D's appeal (1) C's claim raised issues of mixed fact and law that would benefit from oral evidence in an area of developing jurisprudence, (2) the case was not suitable for summary judgment (see *Civil Procedure*, Spring 2002, Vol. 1, paras 24.2.3 & 24.3.2)

■ GOOD; IN RE, CARAPETO v. GOOD *The Times*, May 22, 2002 (Rimer J.)
CPR, rr.44.3(2), 44.3(4)(a) & 44.3(5)(b)—C bringing proceedings to prove X's will—claim opposed by D alleging undue influence—D failing in opposition—on question of costs, held, (1) the general rule is that the unsuccessful party (D) should pay the costs of the successful party (C), however (2) applying the principles stated in *Spiers v. English* [1907] P. 122, as there were reasonable grounds for suspecting undue influence, in the circumstances D should be required to pay half only of C's costs (see *Civil Procedure*, Spring 2002, Vol. 1, para. 44.3.6; see also *Supreme Court Practice 1999* Vol. 1, para. 62/B/99)

■ HAMILTON v. AL FAYED [2002] EWCA Civ 665, May 17, 2002, CA, unrep. (Simon Brown, Chadwick & Hale L.JJ)
CPR, r.48.2, Supreme Court Act 1981, s.51—X contributing to costs incurred by C in bringing libel action against D—C's action unsuccessful and trial judge making order requiring C to pay D's costs—costs order not satisfied—C losing appeal and made bankrupt—judge dismissing D's application made under s.51(1) to recover unpaid costs from X—held, dismissing D's appeal, (1) a distinction should be drawn between a third party who (a) made a finite contribution to a litigant's "fighting fund" (or who contributed his time and skill pro bono or under a no/win no/fee agreement), and (b) who accepted an unlimited liability to contribute to an order for costs made against the litigant he assisted, (2) as a general proposition, it was better that it should be assumed that "pure funders" should not be expected to fund opposition party's costs than that they should, but (3) in exceptional cases it may be unjust not to make an order (*e.g.* where the litigation was oppressive or malicious or pursued for some other ulterior motive), (4) D's ability to recover their costs had to yield to C's right of access to the courts to litigate his dispute in the first place (made real by X's financial assistance)—*Aiden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] A.C. 965, H.L.; *Symphony Group Plc. v. Hodgson* [1994] Q.B. 179, CA, ref'd to (see *Civil Procedure*, Spring 2002, Vol. 1, paras. 44.3.5, 48.2.1 & 48.2.2, and Vol. 2, para. 9A-265)

■ HENDERSON v. JAOUEN [2002] EWCA Civ 75, [2002] 2 All E.R.705, CA (Peter Gibson & Mantell L.JJ. and Wall J.)
Civil Jurisdiction and Judgments Act 1982, Sched. 1 (Brussels Convention) arts. 2 & 5(3)—following road accident in France, P bringing legal proceedings against D—in 1981, French tribunal and awarding P damages and giving P right to seek further award in event of subsequent deterioration in his condition—in 1995, bringing fresh proceedings in France seeking such further award—in these proceedings, provisional payment made but proceedings not further pursued by P—in 2000, P issuing claim against D in English court, claiming damages for the deterioration in his condition—Master refusing D's application to strike out the claim—held, allowing D's appeal, (1) D had to be sued in France and the English court had no jurisdiction (art. 2), (2) the deterioration of P's condition was not a fresh "harmful event" within art. 5(3) (see *Civil Procedure*, Vol. 2, para. 5-54)

■ MURRAY v. CASSIDY [2002] EWCA Civ 411, March 6, 2002, CA, unrep. (Schiemann & Sedley L.JJ. and Charles J.)
CPR, rr.3.4(2) & 20.2—in September 1996, mother (C), with child (X) as passenger, involved in road accident with other driver (D)—in October 1998, X commencing proceedings against D for personal injuries—D putting in a defence, effectively blaming C for the accident and, shortly before trial, issuing application to make Pt. 20 (contribution) claim against C—on day of trial (June 10, 1999), X's claim compromised on terms that D should pay £1,500 (with costs) and that D's application to issue Pt. 20 claim should be dismissed—in August 1999, C commencing proceedings against D for personal injuries—by way of defence, D denying negligence and making two Pt. 20 claims, one for the damage to his vehicle, and the other for the cost to him for settling X's claim—C pleading that D was estopped by the settlement of X's claim from making the Pt. 20 claims—C's claim against D settled—C applying for dismissal of D's Pt, 20 claims on abuse of process grounds—deputy district judge granting this application—deputy district judge not told that parties had reached agreement as to figure at which D's Pt. 20 claims should be settled if they were not dismissed for abuse—circuit judge dismissing D's appeal—single lord justice granting D permission to make second appeal—held, allowing appeal, (1) the crucial question is whether, in all the circumstances, D was misusing or abusing the process of the court by seeking to raise in the second action issues that he had raised twice in the first action and then resiled from, (2) various factors led to the conclusion that the continuance of the Pt. 20 claims was not an abuse, for example (a) the amounts of the claim and cross-claim in the first action were small, (b) D's conduct of that action resulted in no increase in C's costs, (c) C could have avoided double vexation by issuing her proceedings earlier, and (d) D was not proposing to put C to the trouble of defending his Pt. 20 claims but had agreed terms for settling them (*Johnson v. Gore Wood & Co.* [2001] 2 W.L.R.72, H.L., ref'd to) (see *Civil Procedure*, Spring 2002, Vol. 1, para. 3.4.3, and Vol. 2, paras 9A-160 & 9A-161)

■ PARTCO GROUP LTD. v. WRAGG [2002] EWCA Civ 594, *The Times*, May 10, 2002, CA (Dame Elizabeth Butler-Sloss P., Potter & Kay L.JJ.)
CPR, r.3.4—company (C) negotiating to takeover another company (X)—subsequently, C and another party bringing proceedings against directors of X (D) alleging that they had failed to disclose deterioration in X's finances—D applying under r.3.4(2) and the inherent jurisdiction to strike out C's statement of case insofar as it alleged

breach of an actionable duty of care owed personally—judge refusing application—held, dismissing Ds' appeal, (1) although the test and principles for striking out under r.3.4(2)(a) are well-established, it may not be appropriate to strike out a claim in an area of developing jurisprudence, (2) the nature and extent of the duties of care owed by personally by directors of a target company to a bidder company is such an area, (3) C's claim raised a serious issue of fact which could properly be determined only by hearing oral evidence, (4) in the circumstances, it was important to preserve a degree of latitude in approaching the terms of the pleadings as it was reasonable to suppose that facts might emerge to assist C to establish their cause of action (*Civil Procedure*, Spring 2002, Vol. 1, para. 3.4.2 cited by Court)

■ R.(WULFSOHN) v. LEGAL SERVICES COMMISSION [2002] EWCA Civ 250, February 8, 2002, CA, unrep. (Schiemann & Rix L.JJ)
CPR, rr.1.1(2) & 48.6, Practice Direction (Costs) Sect. 52—LSC refusing C legal aid to pursue housing claim—as litigant in person, C applying for judicial review of this decision—at trial, judge finding in favour of C and awarding him costs of £120—single lord justice granting C permission to appeal against the costs order—LSC choosing not to be represented at the appeal hearing—Court taking evidence from C as to the costs he had incurred—held, allowing appeal, (1) a litigant in person is entitled to compensation for his time, presently at the rate of £9.25 an hour, (2) C was clearly entitled to more than the amount awarded by the judge, (3) in the circumstances it was better for the Court to assess the costs, rather than referring the matter to the costs judge, (4) the matter was of importance and complexity, and there were a considerable number of hearings, (5) if C had been represented by lawyers throughout his costs would have been in the vicinity of £15,000, (6) bearing in mind the overriding objective, and the cap imposed by r.48.6(2), C should be awarded costs of £10,460 (see *Civil Procedure*, Spring 2002, Vol. 1, paras 48.6.3 & 48PD.3)

■ R.C. RESIDUALS LTD. v. LINTON FUEL OILS LTD. *The Times*, May 22, 2002, CA (Brooke & Kay L.JJ, and Sir Swinton Thomas)
CPR, rr.3.8 & 3.9, Practice Direction (Service) para. 3—in exercise of case management powers, judge giving directions permitting claimants (C) and defendants (D) to rely on expert evidence on quantum (which was heavily disputed) and requiring experts' reports to be served by particular date—failure of both parties to comply resulting in trial date being vacated—subsequently, May 7, 2002, fixed as new trial date and judge making "unless" order requiring reports to be served by 4.00 pm on April 26, 2001—C serving copies of the reports of their two experts at, respectively, 4.10 pm and 4.20 pm on that day—by operation of r.3.8, C barred from relying on the expert evidence—judge refusing relief from this sanction—held, allowing C's appeal, (1) under r.3.9(1), the judge was required to consider all the circumstances of the case and the particular circumstances listed in paras (a) to (i) of that rule, (2) as the judge had failed systematically to consider the particular circumstances, the exercise of his discretion was flawed, (3) insofar as the object of the unless order was to ensure that the trial date was met, that object was not imperilled by C's unintentional default, (4) in exercising the discretion afresh, and balancing the consequences of the order against all other matters, in the circumstances of the case the balance fell in favour of permitting the expert evidence to be given—Brooke L.J. commenting that where, in an emergency, solicitors refused service of evidence by e-mail (as they are entitled to do, see para. 3) they might have difficulty in resisting an application for relief from sanctions from a defaulting party—*Bansal v. Cheema*, March 2, 2000, CA, unrep.; *Woodhouse v. Consignia Plc*. [2002] EWCA Civ 275; [2002] 2 All E.R.737, CA, ref'd to (see *Civil Procedure*, Spring 2002, Vol. 1, para. 3.9.1 & 6PD.6)

■ SAYERS v. CLARKE WALKER [2002] EWCA Civ 645, May 14, 2002, CA, unrep. (Brooke & Kay L.JJ and Sir Christopher Staughton)
CPR, rr.1.1, 3.1(2)(a), 3.9, 52.4(2) & 52.6(1), Practice Direction (Appeals) paras 5.2 & 5.6—client (C) bringing professional negligence action against former professional advisers (D)—on October 17, 2001, trial judge giving judgment for C on part of his claim and making order for costs against D—orders accordingly drawn up and sealed on November 16, 2001—on December 20, 2001, after time fixed by r.52.4(2) had expired, D filing notice of appeal and applying for extension of time for appealing—held, granting application, (1) under r.52.4(2)(b), notice of appeal must be filed within 14 days after "the date of the decision of the lower court", (2) that date is the date when the lower court gave its decision as recited in the perfected order, and not the date when the order was perfected, (3) applications for extensions of time for appealing are governed by r.3.1(2)(a), r.52.6 and para. 5.2, (4) it must not be assumed that para. 5.2 sets out all the information a court may be likely to require in every case when deciding whether it is just to extend time for appealing in the face of non-compliance with the mandatory requirements of r.52.4(2), (5) where a court is considering an application for extension of time in a case of any complexity, the court should be guided by r.3.9(1) (even though, strictly speaking, no "sanction" has been "imposed" on the appellant)

and, therefore, should consider all the circumstances of the case and the circumstances listed in that rule—general guidance on matters of appellate practice given and citation restrictions imposed by para. 6.1 of Practice Direction (Citation of Authorities) [2001] 1 W.L.R.1001, disapplied (see *Civil Procedure*, Spring 2002, Vol. 1, paras 3.1.2, 3.9.1, 52.4.1, 52.4.3, 52.6.1, 52PD.13 & B4-001)

■ SCRUTON v. BONE November 20, 2001, unrep. (Sir Andrew Morritt V.-C.)
CPR, r.16.4(1), Practice Direction (Statements of Case) para. 8(2)—firm of stockbrokers (A) handling sale of shares of client (X)—after X's death, letters of administration granted to creditor of his estate (C)—in September 1996, in his capacity as administrator, C bringing Chancery action against ten directors of A—C claiming proceeds of the sale of the shares—C alleging against the directors (D) individually that they gave dishonest assistance in a breach of trust by A—after CPR, in effect, Master refusing to set aside order made before striking out C's statement of claim—held, dismissing C's appeal, (1) allegations of dishonesty must be pleaded clearly and with particularity, and are not to be left to inference alone, (2) an allegation of dishonesty may not inferred from the association of one individual with others, even where together they constitute the entire board of a company, (3) allegations of guilt by association should not be allowed any more under the CPR, than they were under the RSC, (4) where an allegation of dishonesty is made against a primary accounting party (*i.e.* a person bound to account without the necessity for the claimant to specify precisely that for which he was bound to account), it may be permissible to allow some deficiency in pleading in the initial stages provided that it can be made good by subsequent discovery and the giving of further particulars, (4) but that is not permissible where (as here) the establishment of the relevant dishonesty is crucial to having a claim against each of several defendants at all, without which there can be no obligation on them to account or to provide any information to the claimant (see *Civil Procedure*, Spring 2002, Vol. 1, paras 16.4.1 & 16PD.8)

■ WARRINER v. WARRINER [2002] EWCA Civ 81, *The Times*, March 28, 2002, CA (Mummery, Latham & Dyson L.JJ.)
CPR, rr.16.4 & 35.1, Damages Act 1996, s.1, Damages (Personal Injury) Order 2001 (S.I. 2001 No. 2301)—C bringing claim against D for personal injury—at case management conference for trial of quantum, judge directing that C should be permitted to adduce expert evidence on issue of correct discount rate for quantification of future pecuniary loss—held, allowing D's appeal, (1) the prescribed rate fixed by the 2001 Order made under s.1 is 2.5%, (2) the Lord Chancellor's detailed reasons for selecting that figure were published in July 22, 2001, (3) under s.1(2) the court may adopt a different rate in any particular case where there are exceptional reasons which justify it in doing so, (4) when considering whether a different rate should be adopted, the court should have regard to the Lord Chancellor's reasons for fixing the rate as he did, (5) if the case falls into a category that the Lord Chancellor did not take into account and/or there are special features of the case which (a) are material to the choice of rate of return, and (b) are shown from an examination of the Lord Chancellor's reasons not to have been taken into account, then a different rate may be "more appropriate" within s.1(2), (6) there was nothing in the particular facts of this case to make it more appropriate to apply a lower rate than 2.5% (see *Civil Procedure*, Spring 2002, Vol. 1, paras 7.0.20, 16.4.2 & 35.1.1)

Practice Directions

■ PRACTICE NOTE (GUIDANCE FOR PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE) [2002] All E.R.(E.C.) 460, CFI
supplements arts. 43(6), 44(1) & (2), 46(1), 76a & 116(2) of the Rules of Procedure of the Court of First Instance of the European Communities—gives directions as to (1) use of technical means of communication, (2) lodging of pleadings, (3) form and content of application and defence, (4) annexes to pleadings, (5) length of pleadings, (6) applications for expedited procedure, (7) applications for suspension of operation or enforcement and other interim measures, (8) applications for confidential treatment

IN DETAIL

Stay of judicial review claim where private law claim settled

In many important respects, English civil procedure lacks intellectual rigour. For example, it might reasonably be expected that the question: when do legal proceedings end? would admit of a fairly simple and coherent answer. But such is not the case (despite much rhetoric about the importance of "finality"). As a practical matter, generally it may safely be said that proceedings are at an end when judgment or final order is given or made by the court and the time for making any appeal has expired. In a sense, the claims and issues raised in the proceedings have merged in the judgment or order.

But the truth is that the circumstances in which, on the one hand, the jurisdiction of the court is exhausted (*e.g.* where the court is functus), or where the issues are not justiciable (*e.g.* because they are or have become "hypothetical") and (in colloquial terms) the proceedings are "dead" and not capable of being "revived", and, on the other hand, where the court's jurisdiction is not exhausted (*e.g.* where a stay has been imposed, either by the court or by operation of rule) and, despite appearances, proceedings may be continued, but perhaps only for limited purposes (*e.g.* determination of costs or enforcement), are many and various. Sometimes it is difficult to decide whether the relevant procedural law is unnecessarily complicated, or necessarily sophisticated.

Some additional complexity might be expected and justified where, in one and the same proceedings, a party may invoke very different aspects of the court's jurisdiction. For example, where a party commences High Court proceedings making a judicial review claim (invoking the Court's supervisory jurisdiction) together with a private law claim (invoking the Court's general jurisdiction to grant remedies). The recent case of *R. (Barron) v. Surrey County Council* [2002] EWCA Civ 713; May 7, 2002, CA, unrep., demonstrates this point.

In this case, the facts were that, in 1998, a local authority (D) wrote to several owners of property abutting on to common land, of whom the claimant (C) was one, confirming that their properties had rights of way over the common. Subsequently it became apparent that that confirmation was given on the basis of an error of law. Consequently, in 1998 D decided to introduce a scheme under which the owners were charged for grants of easements over the common land. Predictably, this annoyed the property owners.

In October 1999, C applied for permission to apply for judicial review of this decision. C's claim included (1) a public law challenge to D's decision made on the basis of legitimate expectation, and (2) a private law claim to the effect that, by the confirmation given in 1998, D were estopped from denying her right to a right of way over the common. In May 2000, Sullivan J., sitting in the Administrative Court, granted the application. Later on his lordship ordered that the claim should be transferred to the Chancery Division and (exercising powers at that time given by CPR, Sched. 1, RSC Ord. 53, r.9(5)) should continue as an ordinary civil claim.

Before the application for permission was dealt with, C was approached by representatives of an action group set up by other property owners affected by D's decision. As a result, C agreed that she would be an applicant on behalf of the other owners. However, although the claim form made it clear that C was a member of a group, her proceedings were not representative proceedings in the formal sense referred to in CPR, r.19.6. But it was always clear that the other property owners were interested in the success of the proceedings and would benefit from that success if the public law aspect of C's claim continued and succeeded. It was also clear that the decision of D to which the proceedings related was not made in relation to C specifically. The public law claim concerned a decision affecting a class of persons in which C was one. While the public law claim was of interest to others, clearly C's private law claim of estoppel could not be brought by her on behalf of the others.

By letter dated July 7, 2000, D conceded C's private law claim. D asserted that it followed from this that C's proceedings were no longer necessary and need not continue. C's solicitors replied saying that, although the public law issue was now only of academic interest to C, it remained important to the other property owners. In December 2000, after receiving instructions from a number of the other property owners (X), the solicitors applied for C's proceedings to be transferred back to the Administrative Court. The solicitors believed that transfer was necessary in order to enable an application to be made to join X as co-claimants with C, thereby enabling the public law claim to be continued.

D resisted the application for transfer and the deputy master refused it (apparently taking the view that the proceedings were "dead"). On October 12, 2001, Stanley Burnton J. dismissed C's appeal and, acting on his own motion, ordered that her proceedings should be stayed. His lordship said that the real issue was whether, in the exercise of discretion, the joinder of X should be permitted. He ruled that it

should not, principally because of the delay between July 2000 (when D conceded C's private law claim) and December 2000 (when the application refused by the deputy master was made). Public law proceedings must be commenced promptly and pursued diligently. His lordship found that the explanation for the five-month delay was inadequate. He conceded that, had the application been sought in July 2000, he should have made an order for joinder, notwithstanding the circumstances in which the proceedings were commenced.

When dealing with C's appeal, Stanley Burnton J. also had before him an application by one of the other property owners (B) for an extension of time for applying for permission to apply for judicial review of D's decision. His lordship refused this application, apparently on the ground of delay.

C appealed against the judge's decision. The Court of Appeal (Mummery & Dyson L.JJ, and Sir Swinton Thomas) allowed the appeal. The Court ordered (1) that the stay on C's proceedings should be removed, (2) that B should be joined with C as a co-claimant, and (3) that the action should remain in the Chancery Division, to be heard by a nominated Administrative Court judge who is a judge of the Chancery Division.

In giving the main judgment of the Court, Dyson L.J. said that, in substance, this was a test case. It was perfectly proper for the property owners affected by D's decision not to have commenced a series of judicial review claims, or a single composite claim with multiple claimants (see *R. v. Hertfordshire County Council Ex p. Cheung, The Times*, April 4, 1986, CA, per Lord Donaldson M.R.). His lordship noted that, in modern times, the general rule that the courts do not have jurisdiction to determine points of law that are, or have become, "hypothetical" or "academic" as between the parties, has been relaxed in cases where the point is a point of public law and it is in the general public interest that it should be resolved (see *e.g. R. v. B.B.C. Ex p. Quintavelle* [1998] 10 Admin. L.R.425, at pp. 426E-427C, *per* Lord Woolf M.R., and note cases cited at *Civil Procedure*, Spring 2002, Vol. 2, para. 9A-68). His lordship said that the principle that has emerged is that "it may be appropriate to allow public law proceedings to continue even if the claimant no longer requires a remedy to vindicate his or her own rights". The principal considerations that will determine whether it is appropriate to allow proceedings to continue in such circumstances are "whether there is some remedy which would be of value in providing guidance as to the lawfulness of the public authority's conduct; and whether the proceedings remain a suitable vehicle for providing it".

In applying the principle to the facts of this case, Dyson L.J. said C's public law claim raised an important issue as to the legality of the council's change of policy which affected the property interests potentially of a large number of people. If C wished to continue with the proceedings in order to obtain a determination by the court of that issue, then, provided that she prosecuted the claim properly she was, in his lordship's judgment, entitled to do so. The compromise of the private law claim did not make her public law claim "academic" since it affected other people. Dyson L.J. added that the judge erred in treating the question whether, in the exercise of the court's discretion, other persons may be added as co-claimants in C's proceedings as the principal issue in the case.

Dyson L.J. said that it was important to bear in mind that the sole issue before the deputy master was whether, in view of the fact that the private law claim had been settled, the proceedings should be transferred to the Administrative Court. There was no application by D to strike out or stay the proceedings for want of prosecution or as an abuse of process. In his lordship's judgment, the application to transfer was unnecessary. The public law claim could have been dealt with in the Chancery Division. Instead of answering the simple question, transfer or no, the deputy master wrongly concluded that the application was no more than an attempt to breathe life into a defunct claim, save for the purpose of dealing with costs. In his lordship's view, on the appeal to the judge, the judge should have appreciated that the application before him was quite unnecessary for the successful prosecution of the public law claim. Certainly, the judge should not have used the application as a vehicle, in effect, for entertaining an application to stay the whole proceedings for delay. There was no such application before him and it was doubtful whether he had the material that was necessary to enable him satisfactorily to perform the balancing exercise that would have to be performed before taking the step of staying the proceedings.

Dyson L.J. added that, in the circumstances of this case, imposing a stay on C's proceedings was a "Draconian step", because the effect of it was to ensure that the lawfulness of the policy could never be challenged on public law grounds, a consequence with potentially serious implications for the other interested persons. His lordship said that, on the material before Court of Appeal, he would hold that the decision to stay was disproportionate to the delay in this case. The short point would seem to be (though this is not drawn out) is that it was C who wanted to continue the public law claim and it could not be said that she was guilty of any delay in applying for permission to apply for judicial review or in any other respect. The stay imposed by the judge on C's public law claim was imposed because the

judge believed that her proceedings generally had come to an end. The Court of Appeal held that that was not so, applying the emerging principle that, in certain circumstances, claims may be continued for the purposes of determining a point of public law, even though the point is moot as between the parties to the claim.

Finally, it may be noted that the conclusion reached by the Court of Appeal in this case had the advantage of saving costs and court time. It would seem that at least some of the other property owners interested in the outcome of C's public law claim were in the same position as she was, in that they could commence legal proceedings against D to protect their rights of way on the basis that (as in the case of C) D were estopped from denying as against them that such rights existed. Such private law proceedings would traverse much of the same ground as that which would have to be covered if C's public law claim was continued. By continuing C's public law claim (or, possibly, finding that it had not come to an end), the Court avoided a multiplicity of proceedings (albeit not between the same parties), an important case management goal in itself (see *Civil Procedure*, Spring 2002, Vol. 1, para. 1.4.15, and Vol. 2, para. 9A-160).

Costs where proceedings settled without trial

In *Brawley v. Marczynski* [2002] EWCA Civ 756; May 8, 2002, CA, unrep., the facts were that, in September 1997, the claimant (C), having been granted legal aid, brought proceedings against a businessman and his company (D). It was C's case that he had entered into an agreement with D under which he (C) would pay half the costs incurred by D in obtaining a patent relating to a device invented by C, and that D would exploit the patent and the device and pay 50% of any profits over to C. C claimed (1) an account for all dealings with and profits and receipts made from the invention, (2) a declaration that the intellectual property rights were held by D on C's behalf, and (3) an inquiry as to damages. In March 1999, the judge ordered that the questions whether the parties had a partnership and, if so, what the assets of the partnership were and the basis on which they should be distributed if the partnership had come to an end should be tried as a preliminary issue.

On the morning of the trial (June 22, 1999) the parties asked for time in which they could negotiate. The judge (Pumfrey J.) afforded them such reasonable time as they might require. After four hours of such negotiations they were able to produce for the judge an agreed order. The order (which was dated July 12, 1999) compromised questions of liability to the effect (1) that the patent be assigned to C and the defendants as co-owners, (2) that the second defendant pay half the profits of the business relating to the device from February 15, 1990, to June 22, 1999, and (3) that an inquiry be taken to determine what such profits were. The order gave the parties liberty to apply for an order as to the costs of the action. There was at that stage no agreement as to how costs should be determined.

On May 25, 2000, Pumfrey J. stayed the inquiry as to the profits so as to enable the parties to engage in mediation. That did not assist as such, but by August 2001 the defendants had agreed to pay C £300,000, of which £50,000 was to be held in a client designated account to await the outcome of any agreement or decision as to the costs of the action. Those costs remained the only matter in dispute and the parties exercised the liberty to apply in relation to the costs granted by the order of Pumfrey J. The application came before Laddie J. on September 17, 2001, when (more than two years after liberty had been granted to argue the point) he ordered that D should pay C's costs. D appealed.

On the appeal, counsel for D made three principal criticisms of the manner in which Laddie J. had exercised his discretion as to costs. It was contended, first, that the judge took insufficient account of the fact that, when C served his witness statements for the purposes of the trial of the preliminary issue, it emerged that there had been prior publication of the patent and that it was therefore invalid; secondly, that the judge overemphasised D's agreement to pay C £300,000 and failed to recognise that that figure did not reflect D's actual liability, but was the result of a commercial decision made by a defendant confronted with a legally aided claimant; and thirdly, that the judge failed to follow what counsel called "the tradition" that when a dispute is not judicially resolved the correct order is "no order as to costs".

The Court of Appeal (Aldous, Mance & Longmore L.JJ.) rejected these criticisms. The point raised by the third of them merits further explanation. As is explained in *Civil Procedure*, Spring 2002, Vol. 1, para. 44.3.5.1 (p. 880) and Vol. 2, para. 9A-68 (p. 1542), it is not the function of the courts to make decisions on academic issues of law where there is no dispute to resolve. Where, as in the instant case, the proceedings are compromised by agreement, the issues (of fact, of law and of mixed fact and law) become academic (or "hypothetical"). However, the determination of such issues may be critical for the proper determination of any order for costs in proceedings that have otherwise come to an end. Competing policy objectives come into play, all of which are reflected in CPR, r.1.1. On the one hand there is the objective of doing justice between the

parties in individual cases; and on the other hand there are the objectives of ensuring that costs are not incurred unnecessarily and that court resources are not wasted.

In the instant case, Longmore L.J. referred to *R. v. Holderness Borough Council Ex p James Robert Developments Ltd.* (1992) 66 P.& C.R.46, CA, and *Boxall v. London Borough of Waltham Forest* December 21, 2000, unrep. (Scott Baker J.) (the latter case is explained in para. 44.3.5.1.1 of the White Book). In these cases, judicial review proceedings came to an end without a judicial hearing, leaving the question of costs to be determined. Longmore L.J. explained that these authorities show that the court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs. That is the first point, and it was not contested in this case.

But how should the court proceed? In the Holderness Borough Council case Simon Brown L.J., whilst recognising that costs applications have to be entertained and resolved, was anxious to avoid suggesting that this should involve "litigating the case for all the world as if the substantive issues need to be resolved for their own sake" and said "an altogether broader approach should be adopted". In the instant case, Longmore L.J. noted, as Scott Baker J. had noted in the Boxall case, that in some cases it will be obvious that the claimant would have won had the substantive issues been fought to a conclusion and in other cases it will be obvious that the defendant would have won. Laddie J. came to the conclusion that the instant case fell into the first of these two categories and made a costs order in accordance with the general rule (stated in CPR, r.44.3(2)) that the unsuccessful party (D) should pay the costs of the successful party (C). Laddie J. took the view that C, having been kept out of the money to which he was entitled for many years, until the settlement of July 1999, and indeed until the further settlement of the amount due in August 2001, was clearly the overall victor. In his lordship's opinion, Laddie J. had exercised his discretion in a manner that could not be faulted, and that was sufficient to dispose of the appeal.

However, cases will arise where it will not be obvious which side would have won had the substantive issues been fought to a conclusion. The position will, in differing degrees, be less clear. In the *Boxall* case, Scott Baker J. said that, in these circumstances, how far the court will be prepared to look into the previously unresolved substantive issues "will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties". In the absence of a good reason to make any other order "the fall back is to make no order as to costs". In the instant case, the Court of Appeal did not have to tackle this problem. However, Longmore L.J. did say that he found the several principles stated by Scott Baker J. as "most helpful".

Restrictions on citation of authorities

In April 9, 2001, Practice Direction (Citation of Authorities) [2001] 1 W.L.R.1001, was issued by Lord Woolf C.J. This practice direction is printed in *Civil Procedure*, Spring 2002, Vol. 1, para. B4-001 (p. 1756). The context of the practice direction and its elements were explained in issue 05/01 of *CP News* (May 24, 2001). The object is to attack the problem of "over-citation" of authorities by lawyers handling court proceedings, especially over-citation in skeleton arguments. The English courts have always feared, and have sought to discourage, any trend towards American-style court briefs. The practice states a uniform practice to be followed with the object of limiting the citation of previous authority to cases that "are relevant and useful to the court".

The Practice Direction focuses initially on reports of judgments given on particular types of application. These types are: (1) applications attended by one party only; (2) applications for permission to appeal, and (3) decisions on applications that only decided that the application was arguable. Para. 6.1 stated that a judgment falling into one of the categories may not in future be cited before any court unless it clearly indicated that it purported to establish a new principle or to extend the present law. What is meant by "clearly indicated" here? The Practice Direction says that, in respect of judgments delivered after April 9, 2001, the indication has to take the form of an express statement to that effect.

It would seem that it has taken some time for the significance of this aspect of the Practice Direction to be appreciated by judges and practitioners. Illustrations of express statements in judgments given on applications for permission to appeal to the effect that the judgment is not subject to the citation restrictions are provided by two recent decisions of the Court of Appeal.

In *Sayers v. Clarke Walker* [2002] EWCA Civ 645, May 14, 2002, CA, unrep., a renewed application was made to the Court of Appeal for an extension of time for appealing and for permission to appeal. (The case is referred to in the "In Brief" section of this edition of *CP News*.) At the end of his judgment, Brooke L.J. said: "For the avoidance of doubt, this is a judgment which sets out general guidance on matters of practice, and the restrictions on citation that are contained in para. 6.1 ... do not apply to it".

In *Napp Pharmaceutical Holdings Ltd.* [2002] EWCA

Civ 796; May 8, 2002, CA, unrep., an application was made to the Court for permission to appeal from a ruling given by the Competition Commission Appeal Tribunal. The Court dismissed the application. In the principal judgment of the Court, Buxton L.J. drew attention to the importance of the practice set out in paras 5.10 and 5.11 of Practice Direction (Appeals) relating to skeleton arguments on appeals (see *Civil Procedure*, Spring 2002, Vol. 1, paras 52.4.5 & 52PD.17, p. 1103). In addition, his lordship criicised the applicants for their consistent failure to take proper note of the restrictions on the citation of authorities imposed by the Practice Direction on applications for permission to appeal (despite having their attention drawn to them by the respondents). In his short judgment, Brooke L.J. said that, as the judgment of Buxton L.J. set out important guidance on practice in these respects, "it is not subject to the limitation of citation contained in para. 6.1".

Stationery Office CPR Update

The Civil Procedure (Amendment No. 5) Rules 2001 (S.I. 2001 No. 4015) made various amendments to the CPR. Among them were the additions (by r.26 and Sched. 1) to Pt. 45 (Fixed Costs) of r.45.6 (Fixed enforcement costs) and a table following it (Table 4) (see *Civil Procedure*, Spring 2002, Vol. 1, para. 45.6, p.931). A related amendment was the deletion of paras 3 and 4 in Pt. III of App.3 (Fixed Costs) of Sched. 1 RSC Ord. 62 (Costs) (see *Civil Procedure*, Spring 2002, Vol. 1, para. sc62.A3.4, p.1388).

These amendments came into effect on March 25, 2002. Unfortunately, they were inadvertently left out of the Stationery Office CPR Update 27, February 2002. Replacement pages for the Stationery Office version of the CPR have been issued to subscribers of that publication (under cover of letter dated April 18) to rectify these omissions.

They are omissions that anyone could have made, and are quite forgivable. What is perhaps not forgivable is that, for the purpose of making the second of these corrections, the Stationery Office have re-issued, not just the one page (p.33) of the CPR Sched. 1 whereon RSC Ord. 62, App.3, Pt. III paras 3 and 4 were found (an amendment requiring the shortening of that page because of the need to delete those paragraphs), but they have re-issued, not only that page, but the following 94 pages as well. That is to say, the whole of CPR Sched. 1 from the end of Ord. 62 to the end of the Schedule (*i.e.* the end of RSC Ord. 116) have been re-issued, even though no amendments whatsoever have been made to those rules, and this has been done simply because one page (p.33) was thrown out of kilter by the omission of paras 3 and 4. Doubtless, assistant librarians and clerks charged with the duty of updating the Stationery Office version of the CPR will be cheered by this news as they set about inserting the 94 pages and transferring across any hand-written annotations and post-it reminders relating to them and previously inserted by users of the work.

The recent Stationery Office circulation also included the video conferencing protocol which forms annex 3 to Practice Direction (Written Evidence) and which was, as explained in *CP News* Issue 04/02, also inadvertently omitted from Stationery Office Update 27.

FEATURE

Criterion for permission to appeal in statutory appeals

In the July 2001 edition of the *CP News*, reference was made to the decision of the Court of Appeal in the case of *Cooke v. Secretary of State for Social Security* [2001] EWCA Civ 734, April 25, 2001, CA, unrep. That case was referred to in the recent decision of the Court in *Napp Pharmaceutical Holdings Ltd. v. Director General of Fair Trading* [2002] EWCA Civ 796, May 8, 2002, CA, unrep., where the principal judgment was given by Buxton L.J. (His lordship's judgment contains important guidance on appellate practice; see "In Detail" page of this issue of *CP News*.) In a short judgment (agreeing with Buxton L.J.), Brooke L.J. expressed the hope that the White Book should draw the attention of practitioners to the judgment of Hale L.J. in the case of *Cooke v. Secretary of State for Social Security*, referred to by Buxton L.J. in his judgment. In what follows, the *Cooke* case, and its relevance to the *Napp* case, are briefly explained.

In the *Cooke* case, the claimant (C) appealed to a Disability Appeal Tribunal from the decision of an adjudication officer reducing benefit on ground of change of circumstances. The Tribunal upheld the officer's decision. The Social Security Commissioner dismissed C's appeal from the Tribunal. The Commissioner refused C permission to appeal to the Court of Appeal. C then applied to the Court of Appeal for permission to appeal. The case raised squarely the question of the nature of the criterion to be applied in granting permission to appeal in such cases. In the event, the Court (Clarke & Hale L.JJ. and Butterfield J.) granted C's application but dismissed the appeal.

In giving the principal judgment of the Court, Hale L.J. noted that section 55(1) of the Access to Justice Act 1999 (which is reflected in CPR, r.52.13) provides that, where an appeal is made to a county court or the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that (a) the appeal would raise an important point of principle or practice, or (b) there is some other compelling reason for the Court of Appeal to hear it (see *Civil Procedure*, Vol. 2, para. 9A-865). Her ladyship then explained that the criterion stated in section 55(1) for "second appeals" is clearly intended to be a somewhat different test from the usual criterion for the grant of permission to appeal stated in CPR, r.52.3(6). That rule provides that permission to appeal will only be given where (a) the court considers that the appeal would have a real prospect of success, or (b) there is some other compelling reason why the appeal should be heard.

In the Cooke case, section 55(1) did not in terms apply, because C's appeal was not being made from a decision of a county court or the High Court made on an appeal. However, Hale L.J. said that many of the policy considerations underlying section 55(1) applied with equal, if not stronger, force in the circumstances of that case. Her ladyship explained as follows:

"Firstly, this is a highly specialized area of law which many lawyers—indeed, I would suspect most lawyers—rarely encounter in practice. Secondly, there is an independent two-tier appellate structure. (Indeed, under the system as it was when this case was decided the adjudication officer himself had a degree of independence from the Secretary of State.) After the initial decision there is a fresh hearing before a specialist tribunal which is chaired by a lawyer and has an appropriate balance of experience and expertise amongst its members. After that there is an appeal on a point of law to a highly expert and specialized legally qualified body, the Social Security Commissioners. Thirdly, it is essential that that tribunal structure is sufficiently expert to be able to take an independent and robust view, particularly in cases where the government agency has gone wrong. It must be in a position to see through what the relevant sponsoring department is saying when it is arguing the case."

Hale L.J. accepted that it is important that such appeal structures should have a link to the ordinary court system, for the purpose of maintaining both their independence of government and of the sponsoring government department and their fidelity to the relevant general principles of law. But the ordinary courts "should approach such cases with an appropriate degree of caution" as it is quite probable that, on a technical issue of understanding and applying the complex legislation, the Social Security Commissioner will have got it right. This is because the Commissioners (1) will know how that particular issue fits into the broader picture of social security principles as a whole, (2) will be less likely to introduce distortion into those principles, (3) may be better placed, where it is appropriate, to apply those principles in a purposive construction of the legislation in question, and (4) will also know "the realities of tribunal life". All of this should be taken into account by an appellate court when considering whether an appeal will have a real prospect of success.

In summary, in the Cooke case the Court of Appeal held that, although section 55(1) of the 1999 Act does not apply to appeals of this type, "a robust attitude" to the prospect of success criterion (as stated in r.52.3(6)) should be adopted by the courts when considering whether permission to appeal should be given. The Court confined its decision to appeals from Disability Appeal Tribunals. However, Hale L.J. said that the point is relevant for other similar appeal structures, such

as those of the Employment Tribunals and Employment Appeal Tribunal, those of the Adjudicators and Immigration Appeal Tribunals, those of the Leasehold Valuation Tribunals and the Lands Tribunal. Her ladyship acknowledged that there are significant differences between the social security appeal structure and the others. Some of the other structures relate to private law tribunal systems, rather than government and citizen or applicant systems, and there may be other relevant differences. Nevertheless, her ladyship expected that the considerations that led to the Court's decision in the instant case could readily be raised in other appeal contexts.

That brings us to the recent case of *Napp Pharmaceutical Holdings Ltd. v. Director General of Fair Trading*. In this case the facts were that the Director General had concluded that Napp had, in the terms of section 18 of the Competition Act 1998, abused its dominant position. Under his statutory powers, the Director ordered various regulatory measures and imposed a penalty of £3.21m. The Competition Commission Appeal Tribunal largely upheld that decision but reduced the penalty to £2.2m. The company applied to the Court of Appeal for permission to appeal against both the findings of the Tribunal as to abuse, and the fact and amount of the penalty. Appeals to the Court from this Tribunal, apart from appeals as to the amount of penalty, are on points of law only.

The Court (Brooke and Buxton L.JJ.) refused permission. In doing so, Buxton L.J. said that certain of the findings criticised by the applicants did not, and could not involve points of law. They could not, therefore, be reviewed by the Court. His lordship added, even if those findings could be reviewed, the Court would be very slow to interfere with them. The findings were the conclusions of an expert and specialist tribunal, specifically constituted by Parliament to make judgements in an area in which judges have no expertise. They fell exactly into the category identified by Hale L.J. in the Cooke case. Brooke L.J. expressly agreed with this observation.

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