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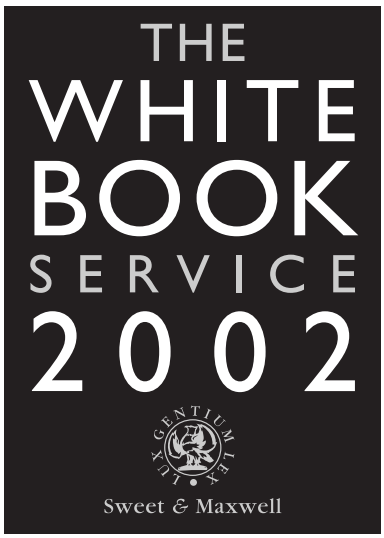
CIVIL PROCEDURE NEWS

- Insolvency Act administration orders
- Re-opening High Court appeal
- Deemed day of claim form service
- Service out of jurisdiction
- Dispensing with service
- Time for appealing
- Recent cases



N BRIEF

Cases

■ ANDERTON v. CLWYD COUNTY COUNCIL [2002] EWCA Civ 933, 152 New L.J. 1125 (2002), CA (Lord Phillips MR, Mummery & Hale L.JJ.)
CPR rr.2.8(4), 6.7(1), 6.9, 6.20, 7.5 & 7.6, Human Rights Act 1998, Sched 1, Pt.I, art.6 - in conjoined appeals, held, (1) where the method of service of a claim form is by first class post, service is effected on the "deemed day of service" as calculated in accordance with r.6.7(1); (2) in making that calculation, r.2.8(4) does not apply; (3) in the interests of certainty, the deemed day is not rebuttable by evidence of actual receipt of the claim form by the defendant on a day before or after the deemed day, and this does not contravene a party's art.6 rights, (4) under r.6.9, the court may order prospectively that service of a claim should be dispensed with, and (5) in exceptional circumstances, this power may be exercised retrospectively, but not for the purpose of circumventing the restrictions on granting extensions of time laid down in r.7.6(3), (6) where, after the four month period fixed by r.7.5(2), but before the six month period fixed by r.7.5(3) has expired, a claimant applies under r.6.20 for permission to serve out of the jurisdiction a claim form initially stamped "not for service out of the jurisdiction", the exercise of the court's discretion to grant an extension of time for service is not governed by r.7.6(3), but is to be exercised in accordance with the provisions of Sect. III of Pt.6 (see *Civil Procedure*, Spring 2002, Vol. 1, paras 2.8.3, 6.7.2 & 6.21.16, and Vol. 2, para. 3D-34)

■ OWUSU v. JACKSON [2002] EWCA Civ 877; June 19, 2002, CA, unrep. (Brooke & Latham L.JJ. and Hart J.)
CPR rr.11(1)(b) & 52.4(2), Practice Note (Reserved Judgments : Handing Down) [2002] 1 All E.R. 160 - claimant (C) bringing personal injury claim against foreign (D1) and English (D2) defendants - D1 challenging court's jurisdiction under r.11(1)(b) and D2 applying for stay of proceedings - in referring D1's jurisdictional issue to ECJ for preliminary ruling, Court giving guidance on practice for handing down reserved judgments in absence of parties (especially by part-time judges) in order to ensure that the "date of decision" within r.52.4(2), from which the time for appealing is calculated, is clear (see *Civil Procedure*, Spring 2002, Vol. 1, paras 40.2.5 & 52.4.1, and Vol. 2, para. B7-001)

■ SERAY-WURIE v. HACKNEY LONDON BOROUGH COUNCIL [2002] EWCA Civ 909; [2002] 3 All E.R. 448, CA (Simon Brown, Brooke & Dyson L.JJ.)
CPR rr.1.1, 2.8(4), 6.7(1), 47.6, 47.12, 52.3(6) & 51.14, Practice Direction (Costs) paras 38.1 to 38.4, Practice Direction (Appeals) para. 4.8, Access to Justice Act 1999 s.54(4)—H applying under r.47.12 to set default costs certificate aside - H contending that their points in dispute were sent by post and arrived on last day for service—S contending that, under deemed date of service rules, points in dispute served late—costs judge granting H's application—on ground that it had no realistic prospect of success, judge refusing S's application for permission to appeal—by operation of s.54(4) and para. 4.8, S unable to appeal against this refusal—nevertheless, S applying to judge to re-open his appeal—on this application, S contending (1) that judge had failed to follow Court of Appeal authority as to deemed service rules, and (2) that High Court has same power to re-open an appeal as that enjoyed by Court of Appeal—held, (1) in exceptional cases the High Court when sitting as an appeal court possesses power under its inherent jurisdiction to re-open its decisions in order to avoid real injustice, (2) the power is exercisable where it is clearly established that a significant injustice has probably occurred and there is no alternative remedy, (3) in the circumstances of this case, there was no ground for re-opening the court's decision refusing S permission to appeal [Ed.: this case decided before dicta in *Godwin* case disapproved in *Anderton v. Clwyd County Council* [2002] EWCA Civ 933; July 3, 2002, CA, unrep.] (see *Civil Procedure*, Spring 2002, Vol. 1, paras 47.6.1, 47.9.1, 47.12.1, 47PD.11, 52.3.10, 52.3.19, 52PD.6, and Vol. 2, para. 9A-864)

■ AL FAYED v. COMMISSIONER OF POLICE OF THE METROPOLIS [2002] EWCA Civ 780; *The Times* June 17, 2002, CA, Lord Phillips MR, Robert Walker & Clarke L.JJ.)
CPR rr.31.3 & 31.20—claimants (C) bringing proceedings against police (D) for wrongful arrest etc.—CPS making available to D opinion of counsel (P) obtained by CPS in relation to criminal proceedings against C—in compliance with r.31.3, D sending copies of disclosed documents to C's solicitors for inspection—these documents including certain documents for which legal professional privilege waived, but also inadvertently including P's opinion—solicitors not becoming aware of mistake until three months later—judge granting D's

application for injunction restraining use of P's opinion, ordering its return to D, and refusing C permission under r.31.20 to use it—held, allowing C's appeal, (1) the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires, (2) in the absence of fraud, all will depend upon the circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake, (3) in the circumstances of this case, the mistake was not obvious—principles of law and tests to be applied explained (see *Civil Procedure*, Spring 2002, Vol. 1, paras 1.3.2, 31.3.13, 31.3.27 & 31.3.30)

■ ANSARI v. PUFFIN INVESTMENT CO. LTD. *The Times* July 17, 2002 (Burton J.)
CPR r.52.11(1), Practice Direction (Appeals) para. 2A.1—claimant (C) bringing claim for damages for deceit against several defendants, including D—master dismissing D's application to strike out claim against him and to grant summary judgment—on sole ground that master had failed to give reasons for his decision, D appealing to judge—in dismissing appeal, held, on an appeal in these circumstances, the appeal court may deal with the matter as a re-hearing, rather than as a review of the decision below—*cf. Secretary of State for Trade and Industry*, *The Times* August 16, 2001 (see *CP News* 9/2001) (see *Civil Procedure*, Spring 2002, Vol. 1, para. 52.11.1)

■ BERRY TRADE LTD. v. MOUSSAVI, [2002] EWCA Civ 477; [2002] 1 W.L.R. 1910, CA (Potter, Mummery & Arden L.JJ.)
CPR rr.1.1(2)(e) & 3.1(2)(b), Human Rights Act 1998, Sched. 1, Pt.I, art.6(1)(3)(c)—claimant (C) applying for committal to prison for contempt of defendant (D) for breach of worldwide search and seizure order—after becoming bankrupt, D renewing application to LSC for public funding—before application determined, but after several adjournments, C's application coming on for hearing—D applying for further adjournment—C offering to pay for D's legal representation for the application—D rejecting offer—judge refusing D adjournment but granting permission to appeal—held, allowing D's appeal, (1) C's application constituted criminal proceedings for the purposes of the Convention, (2) depriving D, without sufficient and relevant justification, of his right to apply for public funding for legal representation would contravene his rights under arts.6(1) and 6(3)(c), (3) affording D a proper opportunity to exercise that right should outweigh other considerations, such as the convenience of other parties and the use of court resources—observations on the right to legal representation under art.6(3)(c) (see *Civil Procedure*, Spring 2002, Vol. 1, paras 1.3.7 & 3.1.3, and Vol. 2, para. 3D-34)

■ BRACKEN PARTNERS LTD. v. GUTTERIDGE December 17, 2001, unrep. (Stanley Burnton J.)
CPR rr.25.1(1)(f), 25.3(2) & 32.2(1), Chancery Guide App. 4, para. 1, Queen's Bench Guide para. 7.10.4—claimant (C) granted freezing injunction—C applying for continuation of injunction until trial or further order and defendant (D) applying for discharge—evidence of C and D in form of affidavits sworn by their solicitors, setting out facts on the basis of information provided by others—in granting C's application, judge explaining that (1) where affidavit evidence is necessary and the facts are contentious and evidence is to be given on matters that are within the personal knowledge of a party, the correct practice is for the affidavit to be sworn by the party personally, and not by his solicitor, (2) the court may take into account the unexplained reluctance of a party to swear an affidavit, (3) where affidavit evidence is required urgently a departure from this practice may be necessary for practical reasons (see *Civil Procedure*, Spring 2002, Vol. 1, paras 25.1.23, 25.3.3 & 32.4.5, and Vol. 2, paras 1-182 & 1A-51)

■ CALLERY v. GRAY (NOS. 1 & 2) [2002] UKHL 28, [2002] 1 W.L.R. 2000, HL
CPR rr.44.5 & 44.12A, Practice Direction (Costs) Sect.11.10, Access to Justice Act 1999 s.29—C instructing solicitors (X) to bring modest claim for personal injuries arising out of traffic accident against D—at the outset, C entering into conditional fee agreement (CFA) with X with success fee uplift and paying premium for after-the-event (ATE) insurance covering any liability for D's costs—claim settled without need to issue proceedings—Court of Appeal holding (1) 20% is the maximum uplift that could reasonably be agreed, (2) in principle, an ATE premium is recoverable, and the premium in the instant case was not manifestly disproportionate to the risk (see [2001] EWCA Civ 1117; [2001] 1 W.L.R. 2112, CA and [2001] EWCA Civ 1246; [2001] 1 W.L.R. 2142, CA)—held, dismissing D's appeal, the responsibility for monitoring and controlling the modern practice as to litigation funding lay with the Court of Appeal (see *Civil Procedure*, Spring 2002, Vol. 1, para. 44PD.5, and Vol. 2, paras 7A-33.1 & 9A-862)

■ CANTOR INDEX LTD. v. LISTER, November 22, 2001, unrep. (Neuberger J.)
CPR r.25.1(1)(f) & (g)—betting business (C) issuing claim for recovery of money against account holder (D)—C granted freezing injunction "until further order of the court"—D providing statement of assets, indicating money held in account with X—

Master making order by consent giving C final judgment in sum of £170,600—C applying for garnishee order in respect of money held in account with X—Master refusing to make garnishee order absolute, but ordering monies held by X paid into court—D applying for order that money paid in by X be paid out to his solicitors so as to allow him to meet his ordinary living expenses and reasonable legal costs—held, (1) under a freezing injunction in the normal terms, a defendant is entitled to borrow money for living and legal expenses even though the amounts so borrowed exceeds the amounts stipulated in the order for such expenses, because, in so doing, the defendant, though increasing his overall indebtedness, does not "dispose of, deal with or diminish the value of any of his assets", (2) the freezing order did not lapse, either when C got judgment, or when payment into court was ordered, (3) D was not entitled to claim retrospectively in respect of his living costs, but (4) D was entitled to claim for his legal costs (a) in respect of work already done, and (b) in respect of the work carried out in other cases, (5) the money in court was D's property, but was subject to flexible control by the court (see *Civil Procedure*, Spring 2002, Vol. 1, paras 25.1.23 & 25PD.14)

■ CHASE v. NEWS GROUP NEWSPAPERS LTD. [2002] EWHC 1101 (QB); May 29, 2002, unrep. (Eady J.)
CPR rr.31.22 & 32.12—newspaper (D) publishing story suggesting nurse had caused deaths of children at hospital run by NHS trust (H)—story subsequently taken up in TV programme—H applying for interim injunction for the protection of the confidentiality of the families of the children concerned and also to protect a nurse (C) employed at the hospital—evidence in support of application consisting of affidavit sworn by a member (S) of firm of solicitors (E) acting for H—affidavit containing considerable amount of information about the background of an investigation into the deaths, the involvement of the police, and why H thought it appropriate to apply for an injunction—judge granting injunction—copy of S's affidavit coming into C's hands through third party (who had undertaken not to use it for any purpose without permission of E)—subsequently, C commencing libel proceedings against D—defence including pleas of justification and qualified privilege—D disclosing to C case notes (referred to in TV programme) of meeting at hospital and doctor's letter relating to a child patient and his mother—C proposing to amend her reply by referring to certain information in S's affidavit arguably relevant to question whether any grounds existed for suspecting C of causing deaths and to knowledge of D's journalists—H not opposed to this use of affidavit—C applying for permission to use documents disclosed to her by D for purposes extraneous to the libel claim proceedings, specifically for vindicating her reputation by methods other than by the bringing of the instant proceedings—held, (1) the affidavit contained information that was relevant to the issues, (2) there was no reason why it should not be available for C to make such use of it as she wished for the purpose of vindicating her reputation, (3) despite the confidential nature of the documents disclosed to her by C, to a limited extent and for the purpose of rebutting the very grave charges against her, C should be released from the undertaking not to use them for extraneous purposes (see *Civil Procedure*, Spring 2002, Vol. 1, paras 31.22.1 & 32.12.1)

■ EXCELSIOR COMMERCIAL AND INDUSTRIAL HOLDINGS LTD v. SALISBURY HAMMER ASPDEN AND JOHNSON [2002] EWCA Civ 879 (Lord Woolf CJ, Waller & Laws L.JJ.)
CPR rr.36.20, 36.21, 44.3 & 44.4—property purchased by company (C) destroyed by fire—after recovering sum from insurers, C bringing claim against (1) solicitors (D1), and (2) loss assessors (D2), alleging that through their negligence property under-insured—D1 and D2 making a Pt.26 payment (£100,000)—at trial, judge (1) finding D1 in breach of their retainer but awarded nominal damages only, and (2) dismissing claim against D2—judge accepting that (1) C would not have been affected by knowledge of under-insurance and would have purchased property in any event, (2) any additional sum recovered from insurers would have been a windfall—judge ordering C to pay costs of D1 and D2 on standard basis up to date of payment in and on indemnity basis thereafter—held, dismissing C's appeal, (1) in normal circumstances an order for costs under r.36.20(2) should be an order on the standard basis unless it was unjust to make such an order, (2) where a Pt.36 payment is not accepted by a claimant he should not automatically be liable for indemnity costs, (3) the question will always be: is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs? (4) where a judge makes an order for costs other than the normal order he should explain the basis for it, (5) the judge was entitled to come to the conclusion that, having regard to the background circumstances of the case, the Pt.36 payment should have been accepted by C, and the fact that it was not meant that it was appropriate to make an indemnity order (see *Civil Procedure*, Spring 2002, Vol. 1, paras 36.20.1, 44.3.5, 44.4.2)

■ KOLLER v. SECRETARY OF STATE FOR THE HOME DEPARTMENT [2002] EWCA Civ 1267; July 26, 2001, CA, unrep. (Brooke, Tuckey & Laws L.JJ.)
CPR rr.52.3 & 52.13, Supreme Court Act 1981, s.15, Access to Justice Act 1999, s.55(1)—Special

Adjudicator dismissing applicant's (K) appeal against Secretary of State's decision refusing him asylum—Immigration Appeal Tribunal granting K permission to appeal but dismissing appeal—K applying for permission to appeal to Court of Appeal—held, dismissing application, (1) the case did not raise any point fit for a further appeal, (2) appeals to an IAT often raise difficult questions in an area of law that is still developing, however, (3) the Court of Appeal will be reluctant to permit a second appeal if the IAT set out the relevant principles of law correctly and the facts clearly before applying the law to the facts, (4) an appeal from an IAT does not fall into the category of tribunal appeals, identified by the Court in *Cooke v. Secretary of State for Social Security* [2001] EWCA Civ 734; [2002] 3 All E.R. 279, CA (see Feature page in *CP News 07/2002*), to which a stricter approach should be applied to the granting of permission to make second appeals (see *Civil Procedure*, Spring 2001, Vol. 1, paras 52.3.9 & 52.3.19, and Vol. 2, paras 9A-47 & 9A-865)

■ MARONIER v. LARMER [2002] EWCA Civ 774; *The Times* June 13, 2002, CA (Lord Phillips MR, Walker & Clarke L.JJ.)
CPR Sched. 1, RSC Ord. 71, rr.27 & 33, Civil Jurisdiction and Judgments Act 1982, s.2 & Sched. 1, art.27(1), Human Rights Act 1998, Sched. 1, Pt.I, art.6—in 1984, Dutch citizen (C) commencing professional negligence claim against dentist (D) in court of Member State—after defence filed, proceedings stayed by C—in 1998, after D had moved to England, claim reactivated by C and obtaining judgment against D—time for appealing expiring—D unaware of reactivation of claim and of outcome until registration of judgment in England for enforcement—judge setting aside registration—held, dismissing C's appeal, (1) in contravention of art.6, D manifestly denied a fair trial, (2) it is contrary to public policy to enforce a foreign judgment obtained in a Member State in these circumstances, (3) by art.27(1), a foreign judgment should not be recognised by an English court if recognition were contrary to public policy (see *Civil Procedure*, Spring 2002, Vol. 1, para. sc71.28.3.4, and Vol. 2, paras 5-89)

■ MEDCALF v. MARDELL, [2002] UKHL 27; [2002] 3 W.L.R. 172, HL
CPR r.48.7, Supreme Court Act 1981, s.51(6), Code of Conduct of the Bar para. 606—appellant (D) applying to Court of Appeal to amend his Notice of Appeal to add allegations of fraud and other improprieties on part of respondent (C)—Court dismissing application and C applying for wasted costs order against D's counsel (X)—X unable to obtain any waiver of privilege or confidentiality from D in relation to material supporting the allegations sought to be added—Court granting C's application (*The Times* January 2, 2001, CA)—held, allowing X's appeal, (1) before drafting such allegations, counsel should have before him reasonably credible material establishing a *prima facie* case, (2) at a hearing, counsel could not properly persist in an allegation which was unsupported by evidence, but (3) at a stage preparatory to that, the requirement is merely that counsel should have before him material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it, (4) where the party whom counsel represents is unwilling to waive privilege, the court must be very slow to conclude that there was no sufficient material, and should not make an order without satisfying itself that it was fair in all the circumstances to do so (see *Civil Procedure*, Spring 2002, Vol. 1, paras 48.7.4 & 48.7.8, and Vol. 2, para. 9A-266)

■ MEDISYS PLC. v. ARTHUR ANDERSEN October 26, 2001, unrep. (Cooke J.)
CPR r.31.16, Supreme Court Act 1981, s.33(2), County Courts Act 1984, s.52(2)—before proceedings commenced, applicant (M) applying under s.33(2) and r.25.1(1)(i) for order requiring respondent (A) to disclose documents—Master refusing application, principally on ground that M had not shown that they and A were likely to be parties to proceedings as required by paras (a) and (b) of r.31.16(3)—held, dismissing M's appeal (1) the purpose of r.31.16 is to bring about efficient management of a prospective claim and not to permit a fishing expedition to ascertain whether or not a claim is to be made, (2) the court may make an order only where the criteria in paras (a) to (d) of r.31.16(3) are met, (3) paras (a) and (b) should be given their ordinary meaning, (4) if there is anything approaching a real issue between the parties, and the parties show by their attitude that they intend to fight it (and to do so perhaps even regardless of the merits), then the court is likely to find paras (a) and (b) satisfied, (5) it would not be desirable to order disclosure in relation to a claim which was demurrable or doomed to failure, not because the parties were not likely to be parties to proceedings, but because the criteria in para. (d) would not then be met, (6) in the circumstances of this case, the exact ambit of standard disclosure in any subsequent proceedings could not readily be determined, consequently the criterion of para. (c) was not satisfied (see *Civil Procedure*, Spring 2002, Vol. 1, paras 25.1.26 & 31.16.1, and Vol. 2, paras 9A-93 & 9A-582)

■ MITCHELL v. JAMES [2002] EWCA Civ 997; *The Times* July 20, 2002, CA (Peter Gibson & Potter L.JJ. and Sir Murray Stuart-Smith)
CPR rr.36.10, 36.21, 44.3(4), 44.4 & 44.5, Practice Direction (Costs) paras 7.2 & 7.5—claimants (C) bringing claim against defendants (D) for specific

performance of oral agreement as to shares—C succeeding at trial and awarded costs against D—before proceedings started, C making offer to settle claim—offer containing terms as to costs, including term that each side should pay its own costs—D not accepting offer—C's contention that, pursuant to r.36.21, costs awarded to them by judge should be assessed on indemnity basis rejected by judge—held, dismissing C's appeal, in determining whether, at trial, a claimant has done better than he proposed in his offer, terms as to costs should not be considered as part of the offer (see *Civil Procedure*, Spring 2002, Vol. 1, paras 36.10.1, 36PD.7, 44.3.6, 44.4.2)

■ MOTOROLA CREDIT CORPORATION v. UZAN [2002] EWCA Civ 989; *The Times* July 10, 2002, CA (Lord Woolf LCJ, Waller & Sedley L.JJ.)
CPR rr.3.1(2)(f) & 25.1(1)(f)—claimant (C) bringing action against defendants (D) in United States court—C applying to English court for worldwide freezing order against D—application granted, together with order requiring D to provide C with information of all their assets worldwide—application by D to set freezing order aside pending in Commercial Court—D accepting that freezing order should continue until the hearing of that application, but applying for stay of the disclosure order in meantime—judge refusing stay—held (by majority), dismissing D's appeal, normally a freezing order cannot be properly policed and rendered effective without the required disclosures being made [Ed.: see also *Federal Republic of Nigeria v. Union Bank of Nigeria*, October 18, 2001, unrep. (Laddie J.)] (see *Civil Procedure*, Spring 2002, Vol. 1, paras 3.1.7 & 25.1.23, and Vol. 2, paras 9A-161 & 9A-163)

■ NAPP PHARMACEUTICAL HOLDINGS LTD. v. DIRECTOR GENERAL OF FAIR TRADING, [2002] EWCA Civ 796; May 8, 2002, CA, unrep. (Brooke & Buxton L.J.)
CPR rr.52.3(6) & 52.13, Practice Direction (Citation of Authorities) [2001] 1 W.L.R. 1001, paras 6.1 & 6.2, Practice Direction (Appeals) paras 5.10 & 5.11, Practice Direction (Appeals) para. 21.10, Access to Justice Act 1999, s.55(1), Competition Act 1998—decision of Director General (D) affecting company (C) upheld by Competition Commission Appeal Tribunal—C applying to Court of Appeal for permission to make statutory appeal on point of law—held, dismissing application, (1) the appeal was from an expert and specialist Tribunal, specifically constituted by Parliament to make judgments in an area of law in which judges have no expertise, (2) although the appeal was not a second appeal within s.55(1), a robust attitude to the prospect of success criterion (as stated in r.52.3(6)) should be adopted by courts when considering whether permission to appeal should be given in appeals of this type—*Cooke v. Secretary of State for Social Security* [2001] EWCA Civ 734; April 25, 2001, CA, unrep., ref'd to—Court also (1) drawing attention to importance of the practice set out in paras 5.10 and 5.11 relating to contents of skeleton arguments on appeals, and (2) criticising C for failure to take sufficient notice of paras 6.1 & 6.2 and over-citing authority (see *Civil Procedure*, Spring 2002, Vol. 1, paras 52.4.5, 52PD.17, 52PD.90 & B4-001, and Vol. 2, para. 9A-864)

■ OVERSEAS AND COMMERCIAL DEVELOPMENTS LTD. v. COX [2002] EWCA Civ 635; April 25, 2002, CA, unrep. (Sedley & Dyson L.JJ.)
CPR rr.1.1,3.1(2)(m), 3.9(1) & 51.1, Practice Direction (Transitional Arrangements) para. 19, Limitation Act 1980, ss.15 & 17, Land Registration Act 1925, s.75—freeholder (F) agreeing to sell registered land to businessman (D1) and permitting him to enter in possession pending exchange of contracts—contracts never exchanged and balance of purchase price never paid—anticipating bankruptcy, D1 purporting to transfer his business to his company (D2)—F entering into contract to sell land to another company (C)—F and C bringing claim against D1 and D2 for possession and *mesne* profits—as a result of his procedural defaults, D1 barred from defending—D2 entering defence and making counterclaim for relief based on estoppel and for rectification of the register accordingly—subsequently, D2 wound up and right to continue counterclaim assigned to D1—after F's death, her interest in land transferred to C—upon various applications coming before him, district judge holding that (1) the proceedings had become automatically stayed by para. 19(1), and (2) applying the considerations listed in r.3.9(1), the stay should not be lifted under para. 19(2)—judge dismissing C's appeal—held, allowing C's appeal, (1) the combined effect of the relevant limitation provisions and the continuation of the stay was to "sterilise" the land, adversely affecting its saleability and value, because C's title would remain subject to (a) the unresolved challenge by D1 for rectification, and (b) D1's disputed right to remain in occupation, (2) unless C could start fresh proceedings, it was difficult to see how the question of title could be resolved, (3) there was a very real risk, if not a probability (not properly brought to the attention of the district judge), that if the stayed proceedings were discontinued by C or dismissed, a fresh claim by C for possession would be struck out as an abuse of process, (4) in the circumstances, in considering and applying the r.3.9(1) criteria it was necessary (a) to form a realistic appreciation of the extent of that risk, and (b) to take it into account in considering the effect which lifting the stay would have on each party (r.3.9(1)(i)), (5) the consequences of not lifting the stay probably would be to commit both parties to further proceedings involving

yet more delay and cost (see *Civil Procedure*, Spring 2002, Vol. 1, paras 1.4.15, 3.4.3 & 51.2.2, and Vol. 2, para. 9A-160)

■ OWENS CORNING FIBREGLASS (U.K.) PENSION PLAN LTD., *The Times* July 8, 2002 (Neuberger J.)
CPR r.8.2A, Sched. 1, RSC Ord. 85, r.2(3)(d)—claim under r.2(3)(d) brought by trustees under Pt.8 procedure for approval of compromise agreement regarding occupational pension scheme—permission granted under r.8.2A to issue claim without naming defendants—in allowing claim, judge stating that, but for certain factors (including the urgency of the claim) it would have been better for the beneficiaries to have been notified of the proposed compromise and the Pt.8 claim so that they could have had the opportunity to put their views to the court (see *Civil Procedure*, Spring 2002, Vol. 1, paras 8.2A.1 & sc85.2.6)

■ PHOENIX FINANCE LTD. v. FEDERATION INTERNATIONAL DE L'AUTOMOBILE [2002] EWHC 1028 (Ch); *The Times* June 27, 2002 (Sir Andrew Morritt V.-C)
CPR rr.1.1 & 44.4—claimant (C) commencing proceedings against defendants (D)—C not sending D letter before action or giving D any other warning of their intention to commence proceedings—no pre-action protocol directly applicable to the proceedings—judgment given for D—on question of costs, held, (1) C should pay D's costs on the indemnity basis, (2) a letter before action is at least as necessary under the CPR as under the former rules (see *Civil Procedure*, Spring 2002, Vol. 1, para. 44.4.2)

■ Q. v. Q. *The Times* July 16, 2002 (Wilson J.)
CPR r.44.7 [RSC Ord. 62, r.7(4)(b)], Practice Direction (Costs) paras 13.1 & 13.2—at end of long hearing concerning child, Family Court judge making summary award of costs of £150,000 in favour of mother—in doing so, judge holding (1) subject to immaterial exceptions, the CPR provisions as to costs govern family proceedings, (2) para. 13.2(2) implies no general rule that detailed assessments are required where a hearing has lasted more than one day, (3) the fact that r.7(4) (power of court to award gross sum in lieu of taxed costs) was not expressly re-enacted in the CPR did not destroy the authority of *Leary v. Leary* [1987] 1 W.L.R. 72, CA, (4) the opportunity for avoiding the expense, delay and aggravation of a detailed assessment (formerly provided for by r.7(4) must be considered in every case, included protracted cases (see *Civil Procedure*, Spring 2002, Vol. 1, paras 44.7.4 & 44PD.7)

■ TAWL v. HARRODS LIMITED [2001] EWCA Civ 1695; November 2, 2001, CA, unrep. (Schiemann & Rix L.JJ.)
CPR rr.1.4(2)(c) & 24.2—D demanding payment from C under licensing agreement—C bringing claim against D claiming damages for repudiatory breach of the agreement—C applying for summary judgment on liability with damages to be assessed—judge dismissing application—judge also holding (1) that D's defence on the construction of the agreement was unarguable and making declaration in favour of C on this issue, and (2) that D's other defences (which included rectification and estoppel) were arguable, and ought to go to trial—held, allowing D's appeal, (1) on the point of construction, there was much to be said on both sides, (2) in the circumstances it was unsatisfactory to split the issues, and the whole matter ought to be dealt with at one hearing (see *Civil Procedure*, Spring 2002, Vol. 1, paras 1.4.7, 24.2.3 & 24.6.3)

■ WATCHTOWER INVESTMENTS LTD. v. PAYNE, [2001] EWCA Civ 1261; July 20, 2001, CA, unrep. (Peter Gibson & Clarke L.JJ. and Maurice Kay J.)
CPR rr.1.1 & 40.7, Practice Statement (Supreme Court : Judgments) para. 2, [1998] 1 W.L.R. 825—pursuant to Practice Statement, lords justices supplying parties with draft judgments in appeal from a county court on a preliminary issue—judgment turning on issue intention of parties to mortgage—respondent applying to re-open this issue—held, refusing application, the practice of handing down judgments was not adopted to encourage or facilitate the reopening of issues that were argued (see *Civil Procedure*, Spring 2002, Vol. 1, paras 1.3.2 & 40.2.1)

Practice Directions

■ PRACTICE DIRECTION (PILOT SCHEME FOR SMALL CLAIMS), HMSO CPR Update 28, June 2002
CPR rr.26.3, 26.4, 26.5 & 51.2—modifies and disapplies certain CPR provisions for purposes of the Small Claims Pilot Scheme operating in Lincoln, Wandsworth and Wigan county courts from July 8 to October 7, 2002—provides for allocation of claims to small claims track without need for court to serve allocation questionnaires or to make orders dispensing with them—certain claims excluded from Scheme (see *Civil Procedure*, Spring 2002, Vol. 1, paras 26.3.1 & 51.2.1) [Ed.: the heading to this PD states that it supplements Pt.27; it would be more accurate to say Pt.26]

N DETAIL

Deemed day of claim form service

In *Anderton v. Clwyd County Council* [2002] EWCA Civ 933; 152 New L.J. 1125 (2002),CA, the Court of Appeal dealt with five conjoined appeals involving claims brought by five separate claimants (Anderton, Bryant, Chambers, Dorgan and Cummins). This provided the Court with an opportunity for dealing with several related procedural issues relating to the service of claim forms.

One of them was the question of the effect of the "deemed day of service" provisions in CPR r.6.7. That rule explains how the day on which a document (including a claim form) "which is served in accordance with these rules or any relevant practice direction" is to be calculated. Under the CPR, the method of service that may be adopted varies depending on the nature of the document to be served. (The other questions raised in these conjoined appeals are explained below.)

Rule 6.7(1) identifies five methods for service of documents; they are (1) first class post, (2) document exchange,(3) delivering the document to, or leaving it at a permitted address, (4) fax, and (5) other electronic method. The table attached to r.6.7(1) stipulates the manner in which a "deemed day of service" may be calculated for each of these methods of service. Thus, where the method of service adopted is first class post, the deemed day of service is "the second day after it was posted".

Under the CPR, a claim form is among the documents that may be served by first class post.A claim form is an important document. It founds the jurisdiction of the court. If a party fails to serve a claim form within the time limits from date of issue set by the CPR (*e.g.* r.7.5) the court has no jurisdiction, and any purported service of the form will be set aside. If the limitation period has run, the claimant has lost his claim.

So the deemed day of service provisions in r.6.7 are of some importance. Among the questions arising in the conjoined appeals was whether the decision of the Court of Appeal in *Godwin v. Swindon Borough Council* [2001] EWCA Civ 641; [2002] 1 W.L.R. 997, CA, was right.(The case was explained in *CP News Issue 10/2001*; see also *Civil Procedure,* Spring 2002, Vol. 1, para. 6.7.2.) In that case, the claimant (C) was required to serve his claim form on or before Friday, September 8. On the day before that date, C posted his claim form to D by first class post and D received it on the following day, that is to say, one day after it was posted. The district judge noted that, by operation of the deemed day of service provisions in r.6.7, the claim form was deemed to have been served, not on the first day after (which was the actual day of service), but on the second day after it was posted. Thus it was presumed to have arrived after the deadline for service. The Court of Appeal held that this decision was right. The crucial point in the case was that the Court held that it was not open to C to rebut the presumption by proving that the claim form was in fact received by D on Friday, September 8 (the last day for service). It was that point which was challenged in the conjoined appeals, specifically on the grounds that it infringed a claimant's rights under art.6 of Part I of Schedule 1 to the Human Rights Act 1998 (see *Civil Procedure,* Spring 2002, Vol. 2, para. 3D-34).

In dealing with this question, the Court (Lord Phillips MR, Mummery and Hale L.JJ.) noted that, subject to the provisions of the 1998 Act, which were not mentioned in any of the judgments in the *Godwin* case, the ratio of that case is binding on the Court (see s.3 of the 1998 Act). The Court considered the purpose and effect of deeming provisions generally, and the relevant Strasbourg jurisprudence, and held that the decision of the Court in the *Godwin* case is not incompatible with art.6 of the Convention. It remains the law that the deemed day of service of a claim form under r.6.7 is not rebuttable by evidence of actual receipt of the claim form by the defendant. The Court endorsed the reasoning given in the *Godwin* case for this conclusion.

Para. 36 of the Court's judgment is worth stating verbatim because what is said there may be relevant where art.6 arguments are raised in procedural contexts related to the short point decided in the *Godwin* case. The Court said:

"The aim of r.6.7 is to achieve procedural certainty in the interests of both the claimant and of the defendant. Certainty in the time of service of a claim form is an important requirement for the efficient performance of the case management functions of the court. It is legitimate to promote that aim by setting a deadline of 4 months from issue for the service of the claim form by one of the permitted methods and by using the legal technique of deemed service to bolster the certainty. The rules employ a carefully and clearly defined concept of the "service" of a document, which focuses on the stated consequences of the sending of the document by the claimant, rather than on evidence of the time of its actual receipt by the defendant. The objective is to minimise the unnecessary uncertainties, expense and delays in satellite litigation involving factual disputes and statutory discretions on purely procedural points. The requirement for service of the claim form

within 4 months of issue, the range of permissible methods of service available at the option of the claimant and the days of service or deemed service specified for the different methods of service do not impair the very essence of the claimant's right of access to the court to enforce his civil rights. Under the Limitation Act and the CPR the claimant has full access to the court for the enforcement of his civil rights for a period, in the case of personal injury claims, of 3 years and 4 months (plus any further extension granted by the court). If the claimants in these cases are debarred from access to the court, it is not in consequence of a system of disproportionately strict procedural rules, which violate the fundamental right of access to the courts: it is as a result of the claimant, or of the claimant's legal adviser, waiting until almost the end of the generous period allowed for issuing and for serving the claim form, and then choosing at that last moment to use a method of service, such as postal service, without regard to the provision of the rules as to when service will be deemed to be effected if this method is used. The arguments appealing to proportionality, to justice and to the CPR's overriding objective of enabling the court to deal with cases justly lend no support to the case against an irrebuttable deemed day of service. Procedural rules are necessary to achieve justice. Justice and proportionality require that there are firm procedural rules which should be observed, not that general rules should be construed to create exceptions and excuses whenever those, who could easily have complied with the rules, have slipped up and mistakenly failed to do so."

Rule 2.8(4) and deemed dates for service

CPR r.2.8 shows how any period of time "for doing any act" specified by the CPR is to calculated. The rule applies to periods of time specified by "these Rules", by "a practice direction", or by a judgment or order of the court (r.2.8(1)).

Rule 2.8(4) states that, where the specified period (a) is five days or less, and (b) includes (i) a Saturday or Sunday, or (ii) a Bank Holiday, Christmas Day or Good Friday, "that day does not count". In old legal parlance, those days "toll" (as in bell). (The image is of marking time, before stepping forward again.)

The doing of the act may require interaction between the person required to do an act and others; for example a party and his lawyer, his bank, or his business associates, and this may not be possible (or reasonably practical) on days falling on weekends etc. Where a period of time is expressed as a number of days, and the number does not exceed five, it is conceivable that such short period may, as a practical matter, be further reduced by the fact that it includes days falling on weekends etc. For example, if a party was required by a rule, practice direction or court order to do an act within (say) five days, it is conceivable that, by the coincidence of a Bank Holiday weekend, that period could be reduced to two days. Time limits are fixed advisedly. If five days (a short enough period in itself) is thought to be a proper period to specify, for "doing any act", it would be unfair if it were substantially reduced by such a coincidence.

As is explained in *Civil Procedure*, Spring 2002 (Vol. 1, para. 2.8.3), r.2.8(4) follows former RSC Ord. 3, r.1(5) (which applied to periods of seven days or less) and CCR Ord. 1, r.9(3) (which applied to periods of three days or less). The five day period stated in r.2.8(4) effects a compromise between the two former procedural regimes. Provisions in the CPR specifying periods of seven days are quite common, but provisions imposing limits of five days or less are rare and usually apply to service of documents; examples are r.23.7(1)(b) (service of copy of application notice) and r.24.5(2) (service of evidence for summary judgment hearing).

In *Anderton v. Clwyd County Council*, the facts were that on July 5, a few days before the expiration of the relevant limitation period, the claimant (C) issued a claim form. By operation of r.7.5(2), the claim form had to be served on the defendants "within 4 months after" the date of issue. Thus, C had to serve the claim form on or before Sunday, November 5. The mode of personal service chosen by C was first class post. The claim form was posted to D on Friday, November 3. Rule 6.7(1) states that a document served by this method is deemed to be served "the second day after it was posted". By operation of that provision, the deemed date for the service of the claim form was Sunday, November 5. So, on the face of it, C's claim form was served in time, just.

However, D pointed out that the existence and effect of r.2.8(4) is expressly referred to and summarily explained in r.6.7(1), albeit in brackets. This leads to the conclusion (so it was argued) that the legislative intention is that the "second day after it was posted" time period referred to in r.6.7(1) is a specified period of five days or less within r.2.8. Thus, in calculating which day was "the second day after" C's claim form was posted, r.2.8(4) required that the Saturday and the Sunday immediately following the day of posting, should be treated as days that "did not count", with the result that the deemed date for service was Tuesday November 7. McCombe J. accepted this argument and (on July 25, 2001) held that the service of the claim form was out of time. (The judge's holding was explained in *CP News Issue*

08/2001.) Subsequently, in October 2001, in the case of *Godwin v. Swindon Borough Council* [2001] EWCA Civ 641; [2002] 1 W.L.R. 997, CA, May L.J. said (at para. 47) that McCombe J. was "obviously correct to hold that r.2.8 applies to the periods in r.6.7 for the reasons he gave" (see also Pill L.J. at para. 73, and Rimer J. at para. 59), but the particular point did not arise for decision by the Court of Appeal in that case. (See also, to same effect, dicta in *Consignia v. Sealy* [2002] EWCA Civ 878, at para. 29., and in *Seray-Wurie v. Hackney London Borough Council* [2002] EWCA Civ 909, at para. 7; [2002] 3 All E.R. 448, CA)

In the *Anderton* case, C appealed and (despite the obiter in Godwin) was successful ([2002] EWCA Civ 933, July 3, 2002, CA, unrep.). The Court said that, on the natural and ordinary meaning of the language of r.6.7, Saturday and Sunday are not excluded from the calculation of the day of deemed service by first class post. The Court pointed out that r.2.8 generally is in restricted terms, and does not apply whenever there is a reference in the CPR to the calculation of a period of time. It only applies to the calculation of any period of time "for doing any act" which is specified by the CPR, by a practice direction or by a court order. Correspondingly, r.2.8(4) is restricted in its effect to the "doing of any act" so specified within a specified period of five days or less. Rule 6.7 does not specify a period of time for doing any act under the CPR. It sets out the methods of calculating the days on which the event of service is deemed to happen as a result of doing acts under other rules involving the use of the various available methods for service of a claim form. Service of a claim form is an act done under other CPR rules, in addition to and as well as, r.6.7.

The Court added that the fact that the express mention of r.2.8 is by way of a seemingly informal cross reference in brackets is beside the point. What matters is the language of r.2.8, whether in or out of brackets, and whether it is apt to apply to r.6.7. In the Court's judgment, the language of r.2.8 is not applicable to r.6.7, "even if it had been the wish of the draftsman that it should apply".

The Court conceded that their holding in this case as to the construction of r.6.7 appears to produce a surprising mismatch of the different times of deemed service of a claim form. Thus, if a claim form is sent by first class post at 5.15 p.m. on Friday, it is deemed to be served on Sunday; but, if it is faxed at 5.15 p.m. on Friday, it is deemed to be served on Monday; and if it is served personally at 5.15 p.m. on Friday, it is treated as being served on Monday. The Court suggested that it is a matter for consideration whether r.6.7 should be amended.

It may be commented that, in this case, the Court of Appeal was too charitable to say that the construction problem arising was a result of the combined effect of (1) the much-vaunted "new procedural code" being in too many respects a "scissors and paste job", with former RSC and CCR provisions being brought together without sufficient attention being given to their provenances, and (2) the casual and slack manner in which, in the texts of particular rules, bracketed cross-references to other provisions are interleaved (ironically for the purpose of making the CPR more user-friendly) (see *Civil Procedure,* Spring 2002, Vol. 1, para. 2.3.3.2 (Cross-references as aids to interpretation).

Power of court to dispense with service

Rule 6.9 of the CPR states that the court may "dispense with service of a document". A claim form is a document, albeit a rather special document, in that service of it founds the jurisdiction of the court over the defendant. Another of the procedural issues considered in the conjoined appeals dealt with by the Court of Appeal in *Anderton v. Clwyd County Council* [2002] EWCA Civ 933; 152 New L.J. 1125 (2002), unrep., was whether the court has power under r 6.9 to dispense with service of a claim form and, if so, in what circumstances; more particularly, may service be dispensed with in a case where a claimant has failed to serve his claim form in time, thus saving his claim?

The point had arisen at first instance in *Infantino v. MacLean* [2001] 3 All E.R. 802. In that case, the claimant (C) issued a claim form for clinical negligence against a doctor (D). C complied fully with the Clinical Negligence Pre-Action Protocol and served draft particulars. By operation of r.7.5(2), the last date for service of the claim form fell on January 30, 2000. On January 26 (a Friday), C's solicitors sent the claim form and particulars by DX to D's insurers. By mistake, the documents were sent to the wrong DX number. After the mistake was realised, the documents were re-sent to the correct DX number and were received by insurers on January 31. The insurers declined to accept service. The district judge, apparently acting under r.3.9 and r.3.10, granted C's application for a retrospective extension of time for service to January 31.

On appeal the judge (Douglas Brown J.) allowed D's appeal, ruling that, in the light of the decisions of the Court of Appeal holding that retrospective extensions of time for service were forbidden in these circumstances (see *Vinos v. Marks & Spencer plc*. [2001] 3 All E.R. 784, CA, and *Kaur v. CTP Coil Ltd*. July 10, 2000, CA, unrep.), the district judge's order could not be upheld because, as C did not come within r.7.6(3), rr.3.9 and 3.10 did not avail her. However, the judge granted C's application under r.6.9 and saved C's claim by holding that, in the unusual circumstances of this case, it was just and consistent with the overriding objective, that service of the claim form should be dispensed with under that rule.

At first instance in *Anderton v. Clwyd County Council*

McCombe J. referred to *Infantino v. MacLean* and, with some reluctance, found bound to follow it and to hold that he had a discretion under r.6.9 to dispense with service of the claim form, even where retrospective extension of time for service of the claim form was prohibited. However, in the circumstances of that case he declined to exercise his discretion in favour of C. C appealed. Before the appeal came on, in *Godwin v. Swindon Borough Council* [2001] EWCA Civ 641; [2002] 1 W.L.R. 997, CA, a majority of the lords justices expressed the view that the doubts of McCombe J. as to the existence of the discretion were well-founded. In the *Godwin* case, May L.J. explained (at para. 50) that a person who has mistakenly failed to serve the claim form within the period permitted by rule 7.5(2) in substance needs an extension of time to serve it. Rule 7.6(3) expressly restricts the power of the court to grant an extension. On the facts of *Godwin*, an extension of time was not available to the claimant. May L.J. said the power to dispense with service of a document under r.6.1(b) and r.6.9 did not enable the court to order what was in substance an extension of time for service of a claim form, which was forbidden by r.7.6(3). Pill L.J. agreed with May L.J. on this point.

And so the point came before the Court of Appeal in the conjoined appeals, in which the appeal by C in the Anderton case was one. The Court held that a court has power under r 6.9 to dispense with service of a claim form retrospectively as well as prospectively, but it was only exercisable retrospectively in exceptional circumstances. The Court followed the *Godwin* case to the extent of holding that r.6.9 should not be used to circumvent the restrictions on granting extensions of time laid down in r.7.6(3).

But the Court drew a distinction between (1) the case where the claimant did not even attempt to serve in time by one of the methods permitted by r.6.2, and (2) the case where the claimant made an ineffective attempt to serve in time. The Court said, in the latter case, where the defendant was aware of the claim form, the claimant was really seeking to be excused from the need to prove service under the rules rather than permission to serve out of time in accordance with the rules. In the Court's opinion, it is in this second category of case that exceptional circumstances sufficient to justify the court's retrospective exercise of its power under r.6.9 to dispense with service of a document in the form of a claim form are to be found.

The Court explained as follows (at para. 55):

"The vast majority of applications, in which it will be appropriate to make an order to dispense with service, will be for prospective orders sought and granted before the end of the period for service. As a general rule applications made for retrospective orders to dispense with service will be caught by the reasoning in *Godwin*. There may, however, be exceptional cases in which it is appropriate to dispense with service without undermining the principle in *Godwin* that rule 6.9 should not be used to circumvent the restrictions on granting extensions of time for service as laid down in rule 7.6(3) and thereby validate late service of the claim form."

The Court held that two of the cases coming before the Court in these conjoined appeals fell into the exceptional category. In one (Chambers) by operation of the deemed day of service provisions in r.6.7(1), service was deemed to have occurred one day late. The circumstances were that the defendant had already admitted liability, had made an offer of £400,000, and had actually received the claim form within the four month period stipulated by r.7.5. The judge struck out the claim and refused to dispense with service under r.6.9. The Court allowed the defendant's appeal.

In the other (Dorgan), the claim form was received by fax only three minutes after 4 p.m. on the last day for service and came to the attention of the defendant's solicitor shortly thereafter. By operation of the deemed day of service provisions in r.6.7(1), the claim form was deemed to have been served on the next business day and, therefore, was served out of time (had it been transmitted before 4 p.m. service would have been in time). The judge dispensed with the service of the claim form under r.6.9 (following *Infantino v. MacLean*). The Court dismissed the defendant's appeal.

It is submitted, that the distinctions drawn by the Court of Appeal in the *Anderton* case accord with fairness and justice. On the face of it, the Court's holding to the effect that, where a claimant is prohibited from applying for an extension for time for service of a claim form, he may nevertheless apply for an order dispensing with service, and that such an order may be granted in exceptional circumstances, is clear enough. However, it remains to be seen whether the necessary distinctions can be easily and quickly drawn by procedural judges. It is to be feared a disproportionate amount of time and effort may have to be expended by procedural judges dealing with applications based on this aspect of the *Anderton* case.

In conclusion, it may be noted that, although the Court said that, on such an application, the court is being asked not to extend time but to excuse the claimant from the need to prove service of his claim form in circumstances where the defendant is aware of the claim form, the point is more subtle than that. An application under r.6.9 to dispense with service of a document may be (1) an application to dispense with service altogether, or (2) an application to dispense with service in accordance with the rules. What was countenanced by the Court of Appeal in the Anderton case in relation to documents in the form of claim forms is a dispensation of the latter variety, under which in exceptional circumstances the court is prepared to take jurisdiction over the defendant on the basis of proof of service, albeit not

of service in accordance with the rules. By operation of this principle, the claimant is not excused from proving service; he is relieved from proving service in accordance with the rules, in particular those rules imposing time limits.

The policy underlying the rules as to service of originating process is that the court should be satisfied that the defendant has had formal notice of the claim against him before assuming jurisdiction over him. (Nowadays, under the pre-action protocols, defendants are given informal notice of the claim sooner rather than later.) The time limits woven into those rules implement a different policy, that of the avoidance of delay in pursuing claims. The decision of the Court of Appeal in the Anderton case reinforces the former policy in circumstances where the effective implementation of the latter policy in the individual case is not really threatened.

Service of claim form out of jurisdiction

Rule 7.5 stipulates that, after a claim form has been issued, it must be served on the defendant within particular time limits, depending upon whether the claim form is to be served out of the jurisdiction or not. It is assumed that, when the claimant issues his claim form he will know whether or not it is to be served within or without the jurisdiction. Of course, at the time of issue the claimant may be mistaken or unsure about this matter; or it may be clear to him that there are several defendants to be served, some within and some without the jurisdiction.

In *Cummins v. Shell International Manning Services*, the claimant (C) was a marine engineer. He was injured in an accident at work on a ship. A week before the expiration of the relevant limitation period, a claim form naming two defendants (D1 and D2) was issued on his behalf stamped "not for service out of the jurisdiction". No attempt was made to serve the claim form on either defendant within the period of four months for service of a claim form within the jurisdiction fixed by r.7.5(2). After that four month period had expired, but before the six month period fixed by r.7.5(3) for service of a claim form out of the jurisdiction had expired, C applied under r.6.20 for permission to serve the claim form out of the jurisdiction.

The Master granted the application, ruling that, under r.6.20(3)(b), D2 was a "necessary and proper party to the claim". He also gave permission to renew the claim form, and extended for 21 days the time for serving the claim form on both defendants. Service of the claim form on D1 was the premise in the rule under which the application for permission was made and granted. An extension of time was accordingly required under r.7.6(3) for service of the claim form on D1 within the jurisdiction. In the event, the claim form was served on D1 within the jurisdiction within the extended time granted by the Master, and service was effected on D2 outside the jurisdiction within six months of the date of issue.

In summary, the position as to D2 was that the claim form was served out of the jurisdiction within the period of six months from its issue, but pursuant to permission granted on an application made after the expiration of the period of four months from issue of the claim form. (The claim against D1 was abandoned by C and was struck out by consent.)

Subsequently, D2 applied to set aside the Master's order. The judge granted the application and struck out C's claim against D2. The judge reasoned as follows.(1) The CPR required the application for permission to serve out of the jurisdiction to be made within four months of the date of the issue of a claim form marked "Not for service out of the jurisdiction," even though D2's address on the claim form is outside the jurisdiction. (2) The court's discretion to extend the time for service should not be exercised, because (a) the claim form was not served on D1 within the four month period prescribed by r.7.5(2), (b) the application to extend the time for service was not made until after the expiration of that period, and (c) there was no explanation for the non-service of the claim form on either of the defendants within the period of four months.(3) There is a discretion to extend the time for service of the claim form, but it is a limited discretion. In effect, the judge applied by analogy to the circumstances before him the strict criteria governing extensions of time under r.7.6(3) to an application for permission to serve out a claim form out of the jurisdiction after the end of the period of four months.

C appealed. This was another of the conjoined appeals heard by the Court of Appeal in *Anderton v. Clwyd County Council* [2002] EWCA Civ 933; July 3, 2002, CA, unrep. The Court allowed C's appeal and reinstated his claim.

On the appeal, D2 no longer contended, as they had been before the judge, that the application for permission to serve the claim form out of the jurisdiction must be issued before the end of the period of four months from the issue of the claim form. The question for the Court of Appeal was whether or not the exercise of the court's discretion to grant an extension in the circumstances of this case is governed by r.7.6(3). That provision states (amongst other things) that, if the claimant applies for an order to extend the time for service of a claim form "after the end of the period specified by rule 7.5", the court may make such an order "only if" the claimant has taken all reasonable steps to serve the claim form but has been

unable to do so, and has acted promptly in making his application for an extension of time.

In allowing C's appeal, the Court (Lord Phillips MR, Mummery & Hale L.JJ) examined the historical context of r.7.5 and r.7.6 and of the special provisions about service out of the jurisdiction contained in Section III of Part 6 (Service of Documents) (*viz.*, rr.6.17 to 6.31) (noting that, in the main, they are modeled upon previous CCR, rather than RSC rules). The Court pointed out that neither r.7.5(3), nor the special provisions as to service out of the jurisdiction in Section III of Part 6, expressly states the time within which an application for permission to serve out of the jurisdiction must be made, nor do they identify particular criteria applicable to an application for permission to serve out of the jurisdiction made after the end of the period of four months from the issue of the claim form. The Court held that the discretion exercisable on an application made before the end of the six month period allowed for service of the claim form out of the jurisdiction is governed by the provisions in Section III and is not governed directly or indirectly by r.7.6(3), which does not form part of Section III, or by the criteria set out in that rule.

The Court's conclusion on the construction of the relevant provisions of the CPR was therefore that, on their natural and ordinary meaning, the discretion to grant permission to serve a claim form out of the jurisdiction under r.6.20 is not subject to any express or implied requirement or condition to the effect (1) that the application must be made before the end of the period of four months from the issue of a claim form marked "not for service out of the jurisdiction", or (2) that different discretionary criteria apply to an application for such permission made after the end of the period of four months from the issue of the claim form than apply to an application made within that period, or (3) that the criteria set out in r.7.6(3) apply directly or indirectly to the exercise of the discretion, whether the application is made before or after the end of the period of four months from the issue of such a claim form.

Re-opening High Court appeal decision

In *Issue 03/2002* of the *CP News*, the case of *Taylor v. Lawrence*[2002] EWCA Civ 90; [2002] 2 All E.R. 353, CA, was mentioned. The facts in that case were that the claimant (C) brought a boundary dispute claim against his neighbour (D) in a county court. At trial, the deputy judge revealed that he was a client of C's solicitors. In the event, the deputy judge gave judgment for C. D appealed to Court of Appeal on the ground of appearance of judicial bias. This appeal was dismissed (see [2001] EWCA Civ 119). After the judgment of the Court was perfected, D applied for permission to appeal again to the Court of Appeal and to introduce additional evidence as to bias. A Full Court of the Court of Appeal granted permission to appeal, but dismissed the appeal. It was held that (1) the Court has an implied jurisdiction to do that which is necessary to achieve its objectives as a court of justice, accordingly, (2) in exceptional circumstances, the Court has power to re-open an appeal to avoid real injustice where there is no alternative effective remedy, (3) one circumstance (in addition, possibly, to fraud) in which it may be appropriate to exercise this jurisdiction is where it is alleged that a decision was invalid because the court which made it was biased.

This, of course, was quite a striking decision, overturning much received wisdom about the finality of appellate decisions. New rules and practice directions supporting this exceptional jurisdiction are expected. (The case is explained at greater length in the Notes section of the July 2002 issue of the *Civil Justice Quarterly*.)

In the recent case of *Seray-Wurie v. Hackney London Borough Council* [2002] EWCA Civ 909; [2002] 3 All E.R. 448, CA, the question which arose was whether the High Court, when exercising its appellate jurisdiction, has a similar exceptional jurisdiction to re-open appeals as that found to be enjoyed by the Court of Appeal in *Taylor v. Lawrence*. In this case, the facts were that a local authority (H) brought county court proceedings for possession against a charitable organisation (S). S defended the claim and counterclaimed, alleging that money owed by H extinguished the rent arrears. Before the case came to trial, H repossessed the premises under a compulsory purchase order.

At the trial of the counterclaim, S succeeded and was awarded costs. The judge ordered that the costs should be dealt with at separate hearing. (S's bill of costs totaled £280,000.) At that hearing, the judge ordered that there should be a detailed assessment of the costs. Accordingly, S served on H a notice of commencement of those proceedings (r.47.6), together with a notice warning H that points in dispute had to be served by October 1, 2001 (r.47.9(2)). On October 2, 2001, having had no response from H, S obtained a default costs certificate under r.47.9 (see also r.47.11). On October 5, 2001, H applied under r.47.12 to set the default costs certificate aside. H contended that their points in dispute were sent by post on Friday, September 28, 2001. C contended that, under the deemed date of service rules in r.6.7(1), the points in dispute were not served until Tuesday October 2, 2002, and were therefore out of time. (In fact, the points in dispute were not actually received by S until October 6.)

The costs judge granted H's application and (under para. 38.4) gave directions for the management of the detailed assessment proceedings. On the ground that it had no realistic prospect of success, a High Court judge refused S's application for permission to appeal from the costs judge decision (r.52.3(6)). By operation of s.54(4) of the Access to Justice Act 1999 and para. 4.8 of Practice Direction (Appeals), S was unable to appeal against this refusal (see *Civil Procedure,* Spring 2002, para. 52.3.19, explained further below). Nevertheless, S applied to a High Court judge to re-open his appeal. On this application, S contended that the judge had failed to follow the decision of Court of Appeal in *Godwin v. Swindon Borough Council* [2001] EWCA Civ 1478; [2001] 4 All E.R. 641, CA, as to the construction of the deemed service rules in r.6.7(1), and made the application on the basis that the High Court has the same power to re-open an appeal as that enjoyed by the Court of Appeal in the light of decision of that Court in *Taylor v. Lawrence*. The judge ordered that S's application be transferred to the Court of Appeal to determine question whether High Court had jurisdiction to entertain the application.

The Court of Appeal (Simon Brown, Brooke & Dyson L.JJ.) held that (1) in exceptional cases the High Court, when sitting as an appeal court, possesses power under its inherent jurisdiction to re-open its decisions in order to avoid real injustice, (2) the power is exercisable where it is clearly established that a significant injustice has probably occurred and there is no alternative remedy, (3) in the circumstances of this case, there was no ground for re-opening the court's decision refusing S permission to appeal.

Two comments may be made on this case. As noted elsewhere in this issue of the *CP News*, on July 3, 2002, in the case of *Anderton v. Clwyd County Council* [2002] EWCA Civ 933, the Court of Appeal held that the construction of the deemed service rules in r.6.7(1), apparently approved by the Court in *Godwin v. Swindon Borough Council* and taken to be correct by the Court in the *Seray-Wurie* case itself (decided on June 25, 2002), was wrong. Thus, the substantive point that S was endeavouring to raise in his application to re-open the appeal against the refusal of permission to appeal must now be regarded as without merit.

The second comment is this. The question whether an appeal may be made from a decision of a court refusing permission to appeal is a procedural conundrum that has taxed the English courts from time to time, at least since the decision of the House of Lords in *Lane v. Esdaile* [1891] A.C. 210, HL In the case of In *re The Housing of the Working Classes Act, Ex p. Stevenson* [1892] 1 Q.B. 609, CA, Lord Esher M.R. said that, on the basis of the authorities, he was prepared to lay down the general proposition that wherever power is given to a legal authority (*e.g.* a court or a tribunal) by legislation to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive; no appeal may be made from a decision in exercise of such a power unless the legislation expressly states otherwise. This proposition, commonly known as the rule in *Lane v. Esdaile*, is based on the view that the purpose of leave requirements is to restrict needless and frivolous appeals. If it were the case (contrary to the rule) that appeals could be made from the grant or refusal of leave to appeal, the result would be that, in attempting to prevent needless and frivolous appeals, the legislative authority would have introduced a new series of appeals with regard to leave to appeal. As Lord Halsbury L.C. put it in *Ex parte Stevenson* (at p.212): "How could any Court of Review determine whether leave ought to be given or not without hearing and determining upon the hearing whether it was a case fit for an appeal?" The policy underlying the rule is best exemplified in those cases where the court or tribunal to which an appeal against a refusal of leave is attempted is also the legal authority to which appeal might be made were leave to be granted. That was the position in *Ex p. Stevenson. Lane v. Esdaile*, on the other hand, was a case in which the court asked to hear an appeal for leave was not the legal authority to which the party wished to appeal.

It is surprising how often issues as to the extent of the rule in *Lane v. Esdaile* have arisen for decision. As might be expected, the modern trend has been towards re-inforcing the rule. In para. 52.3.19 of Volume 1 of the *Civil Procedure,* Spring 2002, it is said, on the basis of the modern legislation and the decision of the Court of Appeal in *Riniker v. University College London* (Practice Note) [2001] 1 W.L.R. 13, CA, that refusal of permission to appeal is, effectively, "the end of the road". If both the lower court and the appeal court refuse permission to appeal, it is not possible to appeal to a higher court. That, of course, was the problem that the appellant in the *Seray-Wurie* case encountered. However, as the Court of Appeal decided in that case that, in exceptional circumstances, the High Court may re-open a decision made on appeal, including a decision refusing permission to appeal, the result is that to that limited extent an exception to the rule in *Lane v. Esdaile* has re-emerged. However, it should be noted that the Court was at pains to point out (at para. 19) that nothing in their judgment should be interpreted as having any effect in relation to the re-opening of appeals made by circuit judges sitting as an appeal court in the county courts, as different considerations and different procedural rules apply in the county courts.

Time for appealing

In a number of respects, the procedural time limits in the CPR are tighter than they were under the former rules of court. For example, former RSC Ord. 59, r.4(1) stated that a notice of appeal to the Court of Appeal had to be served not later than four weeks "after the date on which the judgment or order of the court below was sealed or otherwise perfected". The comparable rule in the CPR is r.52.4(2). It states that the appellant must file the notice of appeal within fourteen days "after the date of the decision of the lower court". As was stressed in *Sayers v. Clarke Walker* [2002] EWCA Civ 645, *The Times* June 3, 2002, CA, lawyers ought to be aware that the "date of the decision" is not the same as the "date on which the judgment or order of the court below was sealed or otherwise perfected".

In *Owusu v. Jackson* [2002] EWCA Civ 877, June 19, 2002, CA, unrep., the claimant brought a serious personal injury claim against several defendants, one domiciled in England and the others domiciled abroad. The foreign defendants challenged the jurisdiction of the court under CPR r.11(1)(b). The English defendant applied for a stay of the proceedings. A deputy judge heard the application at a provincial court centre. At the end of the hearing on October 11, 2001, the judge reserved judgment. He held that he had no jurisdiction to stay the proceedings. On October 16, 2001, he initialed and dated his judgment to that effect. He did not deliver the judgment in open court. Instead he passed it to the officers of the court so that they could draw up and seal his order, which was perfected on October 19. The judgment and order were then posted to the parties' solicitors, who received it on October 24. The English defendant appealed to the Court of Appeal, with the result that the Court referred certain points to the ECJ for a preliminary ruling.

In dealing with the appeal the Court (Brooke & Latham L.JJ. and Hart J.) noted that the procedure adopted by the judge caused difficulties in relation to the computation of time for appealing under r.52.4(2). In the circumstances, what was the "date of the decision" appealed? In the event, in this case the time for appealing was formally extended, so the Court were not obliged to make a ruling on the point. However, the Court gave guidance on the matter.

The Court said (para. 26) a judge sits in public, and it is his duty to give judgment and make his judgment available to the parties in public. Time for appealing will then run from the time he communicates his decision to the parties (other than in draft form, following the modern procedure discussed in *Prudential Assurance Co. Ltd. v. McBains Cooper (A Firm)* [2000] 1 W.L.R. 2000, CA). If a judge sends his written judgment to the parties in draft, and they are able to agree the consequential orders, he may be able to excuse their attendance when he delivers the judgment formally in court, thereby making it available to the public and the media (if interested), but he cannot dispense completely with the formality of handing down his judgment in open court. Time for appealing will then start to run.

The Court expressed the opinion (para. 27) that it would be helpful if a Practice Direction were made which formalises this procedure, particularly in relation to part-time judges. Until such a Practice Direction is prepared and issued, it will be sufficient for us to indicate that if a part-time judge has sent a reserved written judgment to the parties in draft, and they have agreed upon any necessary consequential orders and filed them at the relevant court office, so that he is satisfied that nobody need attend when the judgment is formally handed down in court, he may make arrangements with another judge of the same court to hand the judgment down if it is inconvenient for him to return to the court for that purpose. The Court added that a full-time judge may make similar arrangements if he is unavoidably absent from his court for any reason and he cannot hand down his judgment elsewhere.

FEATURE

Offences and Insolvency Act administration orders

Where a debtor (a) is unable to pay forthwith the amount of a judgment obtained against him, and (b) alleges that his whole indebtedness amounts to a sum not exceeding the county court limit (inclusive of the debt for which the judgment was obtained), a county court may make an order, known as an "administration order", providing for the administration of his estate. The primary legislation dealing with administration orders is found in Pt.VI of the County Courts Act 1984 (see *Civil Procedure,* Spring 2002 Vol. 2, para. 9A-725 *et seq.*).

Administration orders were designed as an efficient means for consolidating the debts of a debtor. An order may be made only against a person who has at least one High Court or county court judgment against him and whose total indebtedness does not exceed £5,000. The effect of an order is to release the debtor from the burden of the debts (and arrangements with creditors) on an individual basis. The debtor under an administration order makes regular payments to the court and the monies so gathered are then distributed among the scheduled creditors. So the court has an interest in getting the money in and paying it out.

Rules of court supporting the provisions of Pt.VI of the 1984 Act were found in CCR Order 39. That Order was carried forward into Sched. 2 of the CPR (see *Civil Procedure,* Spring 2002, Vol. 1, para. cc39.0.1, p. 1654). Rule 14 of the Order states that, on the review of an administration order the court may do various things depending upon the circumstances found. For example, r.14(1)(c) states that, if satisfied that the debtor has failed without reasonable cause to comply with any provision of the order or that it is otherwise just or expedient to do so, revoke the order, either forthwith or on failure to comply with any condition specified by the court.

In 1993, for the purpose of relieving county court judges of the task of having to deal with all cases of defaults by debtors subjected to Pt.VI administration orders, rule 13A was added to the Order giving the "proper officer" of the court certain powers.(Nowadays the proper officer is the "court officer", see CPR r.2.3(1).) On application or on his own motion, where it appears that the debtor is failing to make payments in accordance with the order, the court officer may by notice require the debtor to (1) make payments as required by the order, (2) explain his reasons for failing to make the payments, and (3) make (a) a proposal for payment of the amounts outstanding or (b) a request to vary the order. Rule 13A(2) provides that, if the debtor does not comply with these requirements, the court officer shall revoke the administration order.

Under the Insolvency Act 1986, the court may make orders of many different varieties, including orders known as "administration orders". These orders, though in many respects similar in their objectives and effects, should not be confused with administration orders made and implemented under Pt.VI of the 1984 Act and CPR Sched. 2, CCR Ord. 39. The powers that the court may exercise in relation to Insolvency Act administration orders where the debtor defaults are, as Mr Registrar Baister has recently pointed out, rather more serious for the debtor than those exercisable by the court in relation to Pt.VI administration orders.

Section 429 of the 1986 states that, where a person fails to make any payment which he is required to make by virtue of an administration order made under that Act, the court which is administering that persons's estate under the order may, if it thinks fit, (a) revoke the order, and (b) make an order that section 429 and section 12 of the Company Directors Disqualification Act 1986 shall apply to him for such period, not exceeding two years, as may be specified in the order. By virtue of rule 13.2 of the Insolvency Rules, this power would be exercised by a district judge.

Where, in these circumstances, the court makes an order that section 429 shall apply to a person subject to an administration order, the effect is that he commits an offence if he obtains credit (which is defined) of or exceeding a prescribed amount, or enters into any transaction in the course of or for the purposes of any business in which he is directly or indirectly engaged, and does so without disclosing to the person from whom he obtains credit, or (as the case may be) with whom the transaction is entered into, that section 429 has been applied to him. (Such an offence is punishable by fine or imprisonment.)

Whenever section 429 is applied to a person subject to an administration order, section 12 of the Company Directors Disqualification Act 1986 is also to be applied. The effect of this is to make it an offence if (without the leave of the court which made the order) the debtor acts as a director, or liquidator of, or directly or indirectly takes part in, or is concerned in, the promotion, formation or management of, a company. (Such an offence is punishable by fine or imprisonment.)

The significance and importance of the powers exercisable by the court in relation to administration orders made under the Insolvency Act 1986 and flowing from section 429 of that Act (when contrasted with the powers exercisable in relation to administration orders made under Pt.VI of the 1984 Act) are obvious. Sir Andrew Morritt V.-C., in his capacity as chairman of the Insolvency Court Users' Committee, is concerned that publicity should be given to them so that they are more widely known.

CUMULATIVE INDEX to CIVIL PROCEDURE NEWS
Issues January to June 2002[1 to 6]
[references are to [year] issue/page]

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