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CIVIL PROCEDURE NEWS

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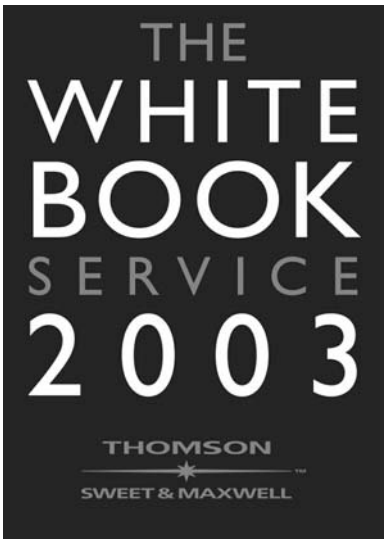

N BRIEF

Cases

■ AHMED v. UNIVERSITY OF OXFORD [2002] EWCA Civ 1907; December 20, 2002, CA, unrep. (Lord Phillips MR, Waller & Laws L.JJ.)
CPR r.35.15, and Sched.2, CCR O.49, r.17(3), Practice Direction (Experts and Assessors) para.7.1, Race Relations Act 1976, s.67(4)—student (C) bringing county court claim under 1976 Act against university (D) alleging discrimination and victimisation in the examination process—in reserved judgment dismissing claim, judge explaining role of assessors sitting with him—held, dismissing C's appeal, (1) C had not been racially discriminated against, however, (2) the judge's summary of the role of assessors appointed under s.67(4) was unsound, (3) such assessors form a distinct category of their own and do not come within r.35.15—role of assessors generally, and under s.67(4) particularly, explained (see *Civil Procedure*, Autumn 2002, Vol.1, paras 35.15.1 & 35PD.7, and Vol.2, paras 9A-330 & 9A-617)

■ WATSON v. BLUEMOOR PROPERTIES LTD. [2002] EWCA Civ 1875; December 10, 2002, CA, unrep. (Potter L.J. & Sullivan J.)
CPR rr.39.3 & 39.6, Practice Direction (Miscellaneous Provisions Relating to Hearings) para.5.2—in proceedings brought by homeowner (C) against development company (D), counterclaim by D coming on for trial—at trial, former director (X) of D attending—on ground that, within the meaning of r.39.3(1)(b), D had not attended, judge striking out counterclaim—judge dismissing D's application under r.39.3(3) for order setting aside striking out—held, granting D permission to appeal and allowing appeal, (1) the precise nature of the relationship between X and D, and therefore whether D could be represented at trial by X in accordance with r.39.6, was far from clear, (2) in the circumstances, D had good reason within the meaning of r.39.3(5)(b) for not attending, (3) in the exercise of discretion D's application under r.39.3(3) should be granted (see *Civil Procedure*, Autumn 2002, Vol.1, 39.3.4 to 39.3.7, 39.6.1 & 39PD.5)

■ ARSENAL FOOTBALL CLUB PLC. v. ELITE SPORTS DISTRIBUTION LTD. *The Times*, December 27, 2002 (Mr Geoffrey Vos QC)
CPR rr.3.4, 25.1(1)(i), 31.12 & 31.16, Supreme Court Act 1981 s.33(2)—claimants (C) bringing claim for damages and an injunction to prevent D from using photos of footballers—D applying under r.3.4 to strike out C's particulars of claim—held, dismissing application (1) C's allegations as to breach of contract did disclose a cause of action, (2) on the limited evidence presently available, it would not be correct to hold that C's allegations were wholly speculative and it would be premature to strike out C's claim, (3) C's claim fell within the court's jurisdiction to order pre-action disclosure, (4) in the circumstances it was appropriate to order that D (a) should give specific disclosure under r.31.12, and (b) should have liberty after disclosure to re-apply to strike out C's claim on ground that it had no reasonable prospects of success (see *Civil Procedure*, Autumn 2002, Vol.1, paras 3.4.2, 25.1.26, 31.12.2 & 31.16.3, and Vol.2, para.9A-96)

■ ARSENAL FOOTBALL CLUB PLC. v. REED [2002] EWHC 2695 (Ch), 152 New L.J. 1923 (2002) (Laddie J.)
CPR r.68.2, E.C. art.234—in claim by trade mark proprietor (C) for infringement, High Court (1) making findings of fact and concluding that there was no passing off by defendant (D) and (2) referring to Court of Justice (CJ) question as to effect of article in Council Directive—CJ making decision on law and holding that C was entitled to prevent use of the type made by D—C applying for injunction to restrain D—held, dismissing the application, (1) the CJ had made a finding of fact that was at odds with the finding of the High Court, (2) on applying the EC's guidance on the law to the facts as found by the High Court, it followed that D should succeed (see *Civil Procedure*, Autumn 2002, Vol.1, para.68.0.2)

■ CESKOSLOVENSKA OBCHODINI BANKA S.A. v. NOMURA INTERNATIONAL PLC. *The Times*, December 16, 2002 (Mr Jonathan Sumption QC)
CPR r.3.1(2)(f), Human Rights Act 1998, Sched.1, Pt I, art.6—complainant (C) bringing claim against defendants (D) in Commercial Court and D bringing proceedings against C in Czech Republic—D applying for stay on ground that England was not the appropriate forum—held, granting the application (1) in all the circumstances, the Czech Republic was the more appropriate forum for the trial of the dispute, (2) the facts that, when contrasted with the Czech court, the Commercial Court (a) would offer a more expeditious disposal of the dispute and (b) a tribunal with a fuller judicial understanding of the facts, were not defects that precluded substantial justice in the foreign

court (see *Civil Procedure*, Autumn 2002, Vol.1, para.1.3.4, 3.1.7 & 25.1.10.1, and Vol.2, para.9A-170)

■ DAR v. TAYLOR May 17, 2001, unrep. (Eady J.)
CPR rr.3.9, 51.1 & 52.11(1), Practice Direction (Transitional Arrangements) para.19, Human Rights Act 1998, Sched.1, Pt I, art.6—before CPR in effect, solicitor (C) commencing libel action over letter by defendants sent to insurance companies—proceedings automatically stayed on April 25, 2000, by operation of para.19(1)—on August 2, 2000, after expiry of limitation period, C applying under para.19(2) for stay to be lifted—district judge granting application—judge granting D permission to appeal—on appeal, D alleging that, on issue of reasons for substantial period of inactivity in progressing claim, important relevant information (including, in particular, investigation of C by FSA, as to which D offered fresh evidence) not revealed to district judge—held, varying the district judge's order, (1) in the circumstances, D's appeal should be dealt with as a re-hearing and not simply as a review of the district judge's decision, (2) the circumstances listed in r.3.9(1) were relevant to C's application, at least by way of analogy, (3) C has a prima facie case in libel, albeit subject to formidable defences of justification and qualified privilege, (4) the stay should be lifted on the condition that C's claim is confined to one for general damages and the claims for special damages are withdrawn—*Bank of Credit and Commerce International S.A. v. Bugshan*, March 14, 2001, unrep. (David Steel J.) ref'd to (see *Civil Procedure*, Autumn 2002, Vol.1, paras 3.9.1, 51.2.2, 51PD.19 & 52.11.1)

■ MAMIDOIL-JETOIL GREEK PETROLEUM COMPANY S.A. v. OKTA CRUDE OIL REFINERY A.D. *The Times*, December 27, 2002 (Aikens J.)
CPR r.36.21—claimants (C) bringing breach of contract claim against defendants (D)—D rejecting C's Pt 36 offer—at trial, C awarded damages against D—C's judgment more advantageous to C than Pt 36 offer—on question of costs, judge (1) declaring that D should pay 90% of C's costs, and (2) holding (a) an offeree (D) would be punished in costs or by higher interest on damages for rejecting an offeror's (C's) offer unless it was unjust to do so, (b) it would be unjust to do so where D had a good reason for rejecting the offer, (c) for example, where he (i) had a reasonable belief in his own prospects of success on the law as it stood at the time, or (ii) by reason of C's conduct (*e.g.* inadequate disclosure) was unable to assess the validity of the offer (see *Civil Procedure*, Autumn 2002, Vol.1, para.36.21.1)

■ MITCHELL v. UNITED KINGDOM (APPLICATION NO.44808/98) *The Times*, December 28, 2002, ECtHR
European Convention on Human Rights, art.6, CPR r.1.1—in 1988, company (C) commencing action for breach of contract against defendants (D)—D bringing counterclaim—proceedings subject to substantial delays, including delay of 30 months between setting down for trial (October 1991) and fixing of date for trial (March 1994) not attributable to parties—D succeeding at trial and bringing protracted enforcement proceedings before recovering amount considerably less than judgment debt—ECtHR finding that failure by UK to arrange its civil procedure legal system so as to prevent undue delay resulted in it being found in breach of the fair trial provisions of art.6 as C's proceedings against D had not been determined within a reasonable time (see *Civil Procedure*, Autumn 2002, Vol.1, paras 1.3.4 & 1.3.10)

■ POWELL v. HEREFORDSHIRE HEALTH AUTHORITY [2002] EWCA Civ 1786; *The Times*, December 27, 2002, CA (Lord Phillips M.R., Kay & Dyson L.JJ.)
CPR r.44.3(6)(g)—in June 1994, claimant (C) succeeding on liability in claim against local authority (D)—after damages assessed, final judgment entered in June 2001—in July 2002, Master ordering that interest on costs payable by D to C should run from June 1994, thereby ordering D to pay interest from that date on certain costs not incurred by C until a later date—on D's appeal, held, the Master was not required to make that order as the court has a discretion under r.44.3(6)(g) (which was not drawn to the Master's attention) to look at the date when costs were incurred and to reach a conclusion as to interest suiting the particular circumstances (see *Civil Procedure*, Autumn 2002, Vol.1, para.44.3.7)

■ PRUDENTIAL ASSURANCE CO. LTD. v. PRUDENTIAL INSURANCE CO. OF AMERICA [2002] EWHC 2809 (Ch); *The Times*, January 2, 2003 (Sir Andrew Morritt V.-C.)
CPR r.32.1, Human Rights Act 1998, s.12 and Sched. 1, Pt I, art.10—defendants (D) applying for order requiring claimants (C) to withdraw evidence which D contended was part of a communication between them and C privileged under the "without prejudice" rule—held, dismissing the application, (1) art.10 (freedom of expression) is subject to such restrictions as are prescribed by law as necessary in a democratic society for the protection of the rights of others, (2) the "without prejudice" rule is justified by the public interests which underlie it, (3) the rule is

to be applied with restraint, and only in cases to which those interests are plainly applicable (see *Civil Procedure*, Autumn 2002, Vol.1, paras 31.3.40 & 32.1.1, and Vol.2, paras 3D-16 & 3D-38)

■ SHARRATT v. LONDON CENTRAL BUS CO. 152 New L.J. 1859 (2002) SCTO (Chief Master Hurst)
CPR r.44.3, Courts and Legal Services Act 1990, ss.27, 28 & 58(2)(a), Access to Justice Act 1999, s.29, Conditional Fee Arrangements Regulations 2000 regs.1(2) & 4—CFA entered into between solicitor (S) and client (C) referred to solicitor by claims company (X) and task of giving C explanation required by reg.4 undertaken, not by S, but by representative of X—in proceedings before Chief Master, liability insurers (D) contending that, in these circumstances, CFA not valid and ATE insurance premium not recoverable—held (1) "a legal representative" within regs.1(2) & 4 may be an individual, a firm or a recognised body, (2) delegation (a) within the firm or body and (b) to a duly authorised agent is permissible, (3) the essential question is whether there had been sufficient explanation given by or on behalf of the legal representative (see *Civil Procedure*, Autumn 2002, Vol.1, para.44.3A.3, and Vol.2, paras 7A-23, 7A-33.1, 9A-862 & 9B-110)

■ THANE INVESTMENTS LTD. v. TOMLINSON *The Times*, December 6, 2002 (Neuberger J.)
CPR r.25.1(1)(f)—applicant (C), at a hearing of an application made without notice from which the respondent (D) was absent, obtaining an order freezing D's assets—D applying to set order aside—held, refusing application (1) C's legal representatives (X) were under a duty to provide D with a full note of the hearing, (2) the fact that D did not ask for a note did not relieve X of the duty to provide him with it (see *Civil Procedure*, Autumn 2002, Vol.1, paras 25.1.23 & 25.3.5)

Practice Directions

■ PRACTICE DIRECTION (PILOT SCHEME FOR SMALL CLAIMS), HMSO CPR Update 29, October 2002, Supplement 2CPR Pt 27—amends Practice Direction (Pilot Scheme for Small Claims)
as issued by HMSO CPR Update 28, June 2002—extends end of pilot scheme for original three county courts (Lincoln, Wandsworth and Wigan) from October 7 to December 31, 2002—adds four other county courts to the pilot scheme (Norwich, Portsmouth, Sheffield and Watford) for period November 11, 2002, to February 21, 2003 (see *Civil Procedure*, Autumn 2002, Vol.1, para.27BPD.1)

IN DETAIL

Role of assessors in trial of race discrimination claim

The Supreme Court Act 1981, s.19(2) states that any jurisdiction of the High Court shall be exercised only by a single judge of that court except insofar as it is (a) by or by virtue of rules of court or any other statutory provision required to be exercised by a divisional court, or (b) by rules of court made exercisable by a master, district judge or other officer of the court, or by any other person. (Note also s.68 (Exercise of High Court jurisdiction otherwise than by judges of that court)). In certain circumstances, an action tried by a judge of the High Court may or should be "tried with a jury" (s.69).

The County Courts Act 1984, s.5 states that there shall be a county court for each county court district, that circuit judges shall be assigned to each district, and "any function conferred by or under this Act" shall be exercised by those judges. Again, in certain circumstances, actions may or should be "tried with a jury".

The Supreme Court Act 1981, s.70 states that, in any cause or matter before the High Court the court may, if it thinks it expedient to do so, call in the aid of one or more assessors specially qualified, "and hear and dispose of the cause or matter wholly partially with their assistance". (Former RSC O.104, r.15, which provided for the appointment of scientific advisers in patent proceedings to which that Order applied was made under s.70.) Further, nautical assessors may be used in Admiralty proceedings (CPR r.61.13). The County Courts Act 1984 s.63 states that, in any proceedings the judge may, if he thinks fit, summon to his assistance, in such manner as may be prescribed, one or more persons of skill or experience in the matter to which the proceedings relate who may be willing "to sit with the judge and act as assessors".

CPR r.35.15 applies where the High Court appoints an assessor under s.70 of the 1981 Act, and where a county court appoints an assessor under s.63 of the 1984 Act. (The appointment of assessors under s.70 and r.35.15 was considered at first instance in two recent cases; *Sutton v. Tesco Stores Plc.*, July 30, 2002, unrep. (Mr Michael Yelton QC) (to assist court on psychiatric evidence), and In *re Independent Insurance Company Ltd.* [2002] EWHC 1577 (Ch), July 25, 2002, unrep. (Ferris J.) (to assist court on fixing of remuneration of provisional liquidators)). Rule 35.15(3) states that an assessor shall take such part in the proceedings as the court may direct and in particular the court may (a) direct the assessor to prepare a report for the court on any matter at issue in the proceedings, and (b) direct the assessor to attend the whole or any part of the trial to advise the court on any such matter. Rule 35.15(4) states that if the assessor prepares a report for the court before the trial has begun (a) the court will send a copy to each of the parties, and (b) the parties may use it at trial. Rule 35.15 is supplemented by Practice Direction (Experts and Assessors) paras 7.1 to 7.4. para.7.4 states that copies of any report prepared by an assessor will be sent to each of the parties, but the assessor will not give oral evidence or be open to cross-examination or questioning.

When exercising certain jurisdiction conferred on the court, not by the 1981 Act or the 1984 Act, but by other statutes, special provisions as to assessors may apply. One example is the Sex Discrimination Act 1975, s.66(1). It is expressly provided in CPR Sched.2, CCR O.49, r.17(3) that r.35.15 shall have effect in relation to an assessor who is to be appointed in proceedings under s.66(1). Another example is the Race Relations Act 1976, s.67(4). That sub-section states that, in any proceedings under this Act in a county court, the judge shall, "unless with the consent of the parties he sits without assessors, be assisted by two assessors". These assessors are to be appointed from a list of persons appearing to the Secretary of State to have "special knowledge and experience of problems connected with relations between persons of different racial groups". There is no reference in CPR Sched.2, CCR O.49, r.17, or anywhere else, to the effect that r.35.15 shall have effect in relation to an assessor who is to be appointed in proceedings under s.67(4) of the 1976 Act. (It is interesting to note that under s.67(4) the judge is required to sit with assessors, unless the parties agree that he should not).

In *Ahmed v. University of Oxford* [2002] EWCA Civ 1907, December 20, 2002, CA unrep. questions arose as to the role that assessors appointed under s.67(4) of the 1976 Act should play in the trial of claims for discrimination and victimisation on racial grounds under that Act. In this case a student (C) brought a claim against a university (D) alleging discrimination and victimisation in the examination process. The judge dismissed the claim.

In the course of giving his reserved judgment, the judge referred to the role of the assessors in the trial. The judge said that, on the basis of certain authority, counsel had agreed that the assessors "should not be involved in primary findings of fact nor in inferences to be drawn nor in the law to be applied". However, they may be concerned "with race relations practice, for example training, equal opportuni-

ties policies or monitoring, the possibility of discrimination emerging in subconscious ways which may lead to inferences being drawn by me and in the use of language or conduct which may lead to subconscious racism". In this context, the judge referred to The Aid [1881] P. 84, and to the judgment of Neill L.J. in *King v. Great Britain-China Centre* [1992] I.C.R.813, CA. In the judge's opinion, C's claim depended on what inferences it was proper to draw "from the primary facts found by the tribunal". The judge added:

"I make it clear, therefore, that I have in mind the views and assistance afforded by the assessors but the findings of primary facts, the inferences drawn from them and the conclusions that follow are mine."

A single Lord Justice granted C permission to appeal to the Court of Appeal. On the appeal, C argued (amongst other things) that the judge had erred in law in failing to inform the parties of the advice provided to him by the assessors and failing to provide the parties with an opportunity to make representations on the assessors' advice.

On the appeal, the Court (Lord Phillips M.R., Waller and Laws L.JJ.) held that the judge's summary of the role of assessors in race discrimination and victimisation cases was unsound. In giving the judgment of the Court, Waller L.J. reviewed the various provisions under which the High Court or a county may or should sit with assessors, and concluded that the reality is that it is impossible to lay down strict rules of general application as to the way in which assessors may be used. Where assessors are appointed under CPR r.35.15, the court has a broad discretion on how to use them and the type of assistance they give may vary widely, dependant upon the character of the litigation. They may have an evidential function (in which event disclosure to the parties will be the normal rule) and a function which is more inVolved in assisting the evaluation of evidence (in which event disclosure to the parties will not be the normal rule and only occur if fairness demands it).

His lordship added that, in the Court's judgment, assessors appointed under s.67(4) of the 1976 Act "form a distinct category of their own" and it was no accident, therefore, that a s.67(4) assessor was not put under the CPR r.35.15 umbrella by CPR Sched.2 CCR O.49, r.17(3). The terms of CPR r.35.15 are not appropriate for the role of s.67(4) assessors.

Waller L.J. explained (at para.32):

"The background to Parliament passing s.67(4) and the language of s.67(4) demonstrate that the court was not intended to have a wide discretion as to whether to use the assistance of assessors. Furthermore, the persons to be appointed as assessors are not scientists or seamen with special expertise in the true sense of that term, but ordinary lay people who have a particular experience in life, an experience which, if it is to be of any real assistance to a judge, involves being able to assess the likelihood of whether some conduct or another is racially motivated. Their expertise (if that is what it should be called) embraces assessing the implications of factual situations, and assisting in reaching a conclusion as to whether racism has played a part. That in our view points to it being the intention of Parliament that in race relations cases judges were to be assisted by assessors in the broadest sense of helping them evaluate the evidence in the area of race relations. The fact that an assessor may be involved in the fact finding role, whether it be of primary fact or by way of drawing inferences from the primary facts, does not mean that the assessor is actually deciding the facts. The ultimate decision has to be for the judge, but s.67(4) requires the judge to use the assistance of assessors unless (as the section provides) the parties otherwise agree."

Waller L.J. then dealt with the question as to what extent the judge should disclose during the case and before final submissions the advice that he is getting from the assessors. His lordship said (para.33) the principles to be gleaned from the authorities are these: (1) if a fact finding tribunal or assessors involved in the findings of fact are to be directed on the law, that direction should normally be given in open court and the direction should be accurate; (2) if the advice is in the nature of expert evidence to which the parties should be entitled to respond, disclosure will normally be required; (3) where a corporate judicial decision has to be made the detail of the discussion and the manner in which the conclusion was reached should normally remain confidential.

Waller L.J. then turned to the question as to what a judge should say in his judgment about the use made of the assessors. His lordship said (para.35) the detail and manner of a conclusion reached with the assistance of assessors is on the whole confidential. But it must be apparent from the judgment that the judge has complied with s.67(4) and availed himself of the assistance of his assessors in reaching his conclusions on issues relating to possible racism. The section is there because it is feared that the experience of the judge in a particular area may be lacking. The judge should thus make clear those areas where he has had recourse to the particular experience of the assessors. Where the judge accepts the evaluation of the assessors it will normally form part of the reasoning for the conclusion ultimately reached.

But what if the judge disagrees with his assessors? Waller L.J. said (para.38) where there is "serious disagreement" on such an issue, with the two assessors evaluating the matter one way and the judge dis-

agreeing, it would be necessary for the judge to spell out in the judgment the view formed by the assessors and his reasons for taking a different view. That will enable the parties to see how the judge has used the assistance of the assessors and enable the Court of Appeal to conduct a proper review. If the two assessors disagree on an important issue, there should be no difficulty in the judge recording the different advice he has received, and explaining his reason for preferring one view rather than the other.

Good reason for not attending trial

CPR r.39.3(1) states that the court may proceed with a trial in the absence of a party but (a) if no party attends the trial it may strike out the whole of the proceedings, (b) if the claimant does not attend it may strike out his claim and any defence to counterclaim, and (c) if a defendant does not attend it may strike out his defence or counterclaim (or both). Where the court strikes out proceedings, or any part of them under this rule, it may subsequently restore the proceedings or that part (r.39.3(2)). Where a party does not attend and the court gives judgment or makes an order against him the party who failed to attend may apply for the judgment or order to be set aside (r.39.3(3)). (A party may attend though his legal representative; see *Rouse v. Freeman*; *The Times*, January 8, 2002 (Gross J.)).

Where an application is made by a party who failed to attend the trial the court may grant the application only if certain conditions apply. That is to say, only if the applicant (a) acted promptly when he found out that the court had exercised its power to strikeout or to enter judgment or make an order against him, (b) had a good reason for not attending the trial, and (c) has a reasonable prospect of success at the trial (r.39.3(5)).

Rule 39.3 is supplemented by Practice Direction (paras 2.1 to 2.3, but this provisions do little more than repeat what is said in the rule itself).

In *Watson v. Bluemoor Properties Ltd* [2002] EWCA Civ 1875, December 10, 2002, CA, unrep., the facts were that the claimant (C) brought proceedings in the Chancery Division against a company (D) for an injunction and damages. The dispute arose because C had bought land from D and built a house on it on the understanding that, in accordance with a condition imposed by the planning authorities, D would demolish a bungalow on adjoining land. D made a counterclaim in which it was alleged that C's house had been erected in breach of covenants. After the proceedings had been commenced, the bungalow was demolished, and so C's claim for an injunction fell away, leaving as live issues C's claim for damages "in excess of £50,000", and D's counterclaim limited in value to £49,999.

At a case management conference, C abandoned her claim for damages. C then applied for an order striking out D's counterclaim under r.3.4 or r.24.2. on the grounds that there were no reasonable grounds for making the allegations contained in it (r.3.4(2)(a)) and that it had no real prospect of success (r.24.2(a)(i)). The master dismissed this application and directed that the issue of C's liability on the counterclaim should be tried and that C's claim for her costs on her abandoned claim should be reserved to the trial judge.

When the trial came on a man (X) who had until recently been a director of D, but who had been disqualified and had resigned as such, appeared to represent D (having done so at previous hearings). (It seemed that, to a large extent, the company was X's company). The judge ruled that D was not entitled to represent the company. The result was that, within the meaning of r.39.3(1)(c), D had not attended the trial. In these circumstances, the judge held that the counterclaim should be struck out for non-attendance and ordered that D should pay the costs of C's claim and of C's defence of the counterclaim. In addition, the judge ordered that D should make an interim payment of £10,000 on account of C's costs.

Six weeks later, D applied under r.39.3(3) to set aside the judge's judgment. At the hearing of this application, he judge pointed out that the three conditions laid down in r.39.3(5) are cumulative and found that D had not satisfied them. Accordingly, he dismissed the application. The judge expressed the view that had it just been a matter of determining whether D had a good reason for not attending the trial (r.39.3(3)(b)) he would have been inclined to have allowed D's appeal and to make an appropriate order compensating C in costs. However, the judge was clear that D had not acted promptly (r.39.3(3)(a)), and that the counterclaim had no reasonable prospect of success (r.39.3(3)(c)).

D applied for permission to appeal to the Court of Appeal. At the outset of the appeal hearing the Court (Potter L.J. and Sullivan J.) indicated that this was an appropriate case in which the grant permission and proceeded to consider the appeal. In the event, the Court allowed D's appeal. Put shortly, the Court agreed with the conclusion towards which the judge inclined on para.(b) of r.39.3(3), but reached conclusions opposite to the judge's on paras (a) and (c) of r.39.3(3).

The Court held that, in the circumstances, D had acted promptly. Sullivan J. pointed out that prejudice to the claimant does not form part of the test under

r.39.3(5) and it was not suggested in this case that any delay caused by D caused any particular prejudice to C. On the question whether D's counterclaim had a reasonable prospect of success, Sullivan J. disagreed with the judge's conclusion that it was vague and unparticularised. In addition, his lordship noted that the trial judge, in striking out the counterclaim under r.39.3(1), was not required to, and did not, enter into the merits of the counterclaim at all.

The real interest in this appeal lies in the way in which the Court dealt with the questions whether D (a company) did not, within the meaning of r.39.3(1)(c), attend the trial, and whether it had had, within r.39.3(5)(b), a good reason for not attending. Sullivan J. drew attention to the fact that the CPR introduced a greater measure of flexibility into the ability of a company to choose a person to represent it at a trial. It may be represented by a director, but it may also be represented by an employee, whether or not he or she is a director, provided always that the court is prepared to grant permission (see r.39.6 and Practice Direction (Miscellaneous Provisions Relating to Hearings) paras 5.2 and 5.3).

Sullivan J. noted that the trial judge did not consider these provisions, and the judge dealing with D's application to set aside the trial judge's orders said they were of no relevance because there was no evidence that X was an employee of D. His lordship said that the precise nature of the relationship between X and D was far from clear. The question whether, although X had ceased to be a director, he was able as an employee to represent D at the trial of the counterclaim was not investigated by the trial judge. His lordship said that, for the purposes of r.39.3(5)(b) he was satisfied that (1) to the extent to which D was really a front for X, it was unrealistic to say that D did not attend the trial but X did attend the trial, and (2) to the extent to which D was not a front for X, it seemed probable that D did have good reason for not attending the trial (that reason being that D believed, albeit mistakenly, that X would be able to act as its representative).

As the conditions in r.39.3(5) were met, the question for the Court of Appeal became whether, as a matter of discretion the orders made at the hearing of the counterclaim should be set aside. The Court held that they should, with the exception of the judge's order requiring D to make an interim payment of £10,000 on account of C's costs. As a condition of being permitted to reinstate the counterclaim, the Court ordered that D should provide security for the future costs of pursuing that claim in the sum of £10,000.

The "good reason" condition stated in r.39.3(5)(a) was examined by the Court of Appeal in the earlier case of *Brazil v. Brazil* [2002] EWCA Civ 1135, July 31, 2002, CA, where a defendant (D) failed to attend the trial before a master of a claim. Unbeknownst to C, D was illiterate and apparently did not understand that trial going ahead. On the ground that D had good reason for not attending, Hart J. granted D's application to set aside the master's order rectifying the register.The Court of Appeal dismissed C's appeal against this decision. In doing so, Mummery L.J. said:

"In my opinion the search for a definition or description of 'good reason' or for a set of criteria differentiating between good and bad reason is unnecessary. I agree with Hart J. that, although the court must be satisfied that the reason is an honest and genuine one, that by itself is not sufficient to make a reason for non-attendance a 'good reason'. The court has to examine all the evidence relevant to the defendant's non-attendance; ascertain form the evidence what, as a matter of fact, was the true 'reason' for non-attendance; and, looking at the matter in the round, ask whether that reason is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. An over analytical approach to the issue is not appropriate, bearing in mind the duty of the court, when interpreting the rules and exercising any power given to it by the rules, to give effect to the overriding objective of enabling it to deal with cases justly. The perfectly ordinary English phrase 'good reason' as used in r.39.3(5) is a sufficiently clear expression of the standard of acceptability to be applied to enable a court to determine whether or not there is a good reason for non-attendance."

FEATURE

Contempt of court appeals with permission and as of right

Under the Administration of Justice Act 1960, s.13, an appeal lies from "any order or decision" of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt) (s.13(1)) (see White Book, Vol.2, para.9B-25). An appeal lies (a) at the instance of a defendant, and (b) in the case of an application for committal or attachment, at the instance of an applicant (s.13(2)).

Whether the appeal is by the applicant or the respondent, the destination of an appeal is affected by the level of court at which the order or decision was made. If it was made by an inferior court, generally the appeal lies to the High Court (s.13(2)(a)). If it was made by a county court (which is an inferior court) or any other inferior court "from which appeals generally lie" to the Court of Appeal (Civil Division), then the appeal lies to that Court (s.13(2)(b)). (Pausing there, it should be noted that, nowadays, certain county court appeals that routinely went to the Court of Appeal when the 1960 Act into force, now go to the High Court). Similarly, if it was made by a single judge of the High Court, again the appeal lies the Court of Appeal (s.13(2)(b)). (As to further appeals to the House of Lords, see s.12(2)(c)).

In *Barnet London Borough Council v. Hurst* [2002] EWCA Civ 1009, [2002] 4 All E.R. 457, CA, the Court of Appeal took the opportunity to clarify the appropriate routes of appeal following an order made by a judge in a civil court on an application to the court for an order in the exercise of its jurisdiction to punish for contempt of court, especially where that jurisdiction was exercised by the making of an order committing the respondent to prison. In giving the principal judgment of the Court in this case, Brooke L.J. expressed the hope that the judgment would be given wide and effective publicity for the benefit of practitioners and judges alike. In what follows, an effort is made to explain the judgment in context.

The variety of circumstances in which the courts may make an "order or decision" of the type referred to in s.13(1) are, of course, quite wide, and this introduces certain procedural complications. Section 13(5) of the 1960 Act states that, in this context, "any order or decision" includes (amongst other things) an order or decision of the High Court or a county court under any enactment enabling that court "to deal with an offence as if it were a contempt of court" (s.13(5)(a)) and an order or decision under the County Courts Act 1984, ss.14 (Penalty for assaulting officers), 92 (Penalty for rescuing goods seized) or 118 (Power to commit for contempt) (s.13(5)(b)). For convenience, in what follows orders or decisions falling within s.13 may be described as "section 13 orders". It should be noted that such an order may or may not be, or include, an order committing a defendant to prison (a "committal order"). An application to a court, inviting it to exercise its jurisdiction to punish for contempt of court, may be determined by the court making a variety of orders other than or in addition to committal orders (including orders adjourning the proceedings and orders as to costs).

In county court proceedings, depending on the circumstances, a section 13 order may be made by a circuit judge or by a district judge. Until May 2000, CPR Sched.2, CCR O.37, r.6 provided that, in proceedings in a county court, any party affected by a judgment or final order of the district judge could, except where he had consented to the terms thereof, appeal to the judge. In *King v. Read and Slack* [1999] 1 F.L.R. 425, CA, the facts were that a district judge, in exercise of jurisdiction conferred by the County Courts Act 1984, s.14(1)(b), made an order committing a defendant (D) to prison for three months for assaulting an officer of the court. D wished to appeal. The question which arose was: what was the proper destination for the appeal? Was it, as O.37, r.6 suggested, the county court judge? Or was it, as s.13(2)(b) of the 1960 Act suggested, the Court of Appeal? The Court held that these alternatives were not mutually exclusive. The Court of Appeal's jurisdiction under s.13(2)(b) was not excluded by O.37, r.6, and the county court judge's jurisdiction under the rule was not limited by the statute. The true position was that D had a choice. He could appeal either to the county court judge or to the Court of Appeal (see further below). For convenience, this could be called the "parallel appeal principle". In this case Lord Woolf M.R. said that the appropriate course, in the ordinary way, would be for a person in the defendant's position to appeal to the local county court, rather than to the Court of Appeal.

With the coming into force in May 2000, of the Access to Justice 1999 (Destination of Appeals) Order 2000 (made under s.56 of the 1999 Act) (see White Book, Vol.2, para.9A-884) and the revision of CPR Pt 52 introducing the new arrangements for civil appeals, CCR O.37, r.6 disappeared. However, art.4(2) of the 2000 Order states that, subject to specified exceptions, where the decision to be appealed is made by a district judge of a county court, an appeal shall lie to a judge of a county court (see also Practice Direction (Appeals) para.2A.1; *ibid.* para.52PD.2A). Rule 52.1(4) states that the rules

in Pt 52 are subject to any rule, enactment or practice direction "which sets out special provisions with regard to any particular category of appeal". This provision would confirm, if confirmation were necessary, that the parallel appeal principle survives under the new civil appeals regime.

In *Barnet London Borough Council v. Hurst*, *op cit*, Brooke L.J. explained that an appeal from a committal order made by a district judge will ordinarily lie to a circuit judge in a county court. Alternatively, and exceptionally, it may lie to the Court of Appeal through the operation either (a) of the parallel appeal principle or (b) of the provisions of r.52.14 (which are new and are based on s.57 of the 1999 Act) under which an appeal to be heard in a county court may be transferred to the Court of Appeal in certain circumstances. His lordship added that, under the new civil appeals regime, the transfer mechanism in effect renders the parallel appeal principle unnecessary and is to be preferred as a route to the Court of Appeal.

CPR r.52.3 states the general rule that an appellant or respondent requires permission to appeal. So the general rule is that if an appeal is to be made from (what was described above as) a section 13(1) order (*i.e.* "any order or decision" of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt)) made by a district judge, permission to appeal is required, and this is so whether the appeal is to be made to a circuit judge in a county court or to the Court of Appeal. However, r.52.3 further provides that an appeal against "a committal order" is excepted from the general rule and may be made as of right (see r.52.3(1)(a)(i)). This is because the liberty of the subject is at stake (see *Tanfern Ltd. v. Cameron-MacDonald* [2000] 1 W.L.R. 1311, CA, at para.23). A committal order is an order which commits a party to prison (*Sierra Leone Government v. Davenport* [2002] EWCA Civ 230, [2002] CPLR 236, CA). Therefore, where a district judge in exercise of the contempt jurisdiction makes a committal order, a party does not require permission if he wishes to make an appeal, either to a circuit judge in a county court or to the Court of Appeal. (Further, where a committal order is made in county court proceedings on an application to a circuit judge, appeal may be made as of right to the Court of Appeal; see *Hampshire County Council v. Gillingham*, June 20, 2002, CA, unrep., referred to in the White Book at para.sc52.1.38).

Let us assume that a party appeals from a section 13(1) order made by a district judge to a circuit judge in a county court (either as of right, because it is a committal order, or with permission, because it is not), and the circuit judge makes an order or decision against which the party is minded to make a further, second appeal. Let us further imagine that the circuit judge's order on the appeal (a) does not include a committal order, or (b) does consist of or include a committal order. The first question is: what is the proper destination for the appeal? The second question is: is permission to appeal required? The answer to the first question is that the second appeal lies to the Court of Appeal (see art.5 of the 1999 Order and note s.13(2)(b) of the 1960 Act).

The answer to the second question is much more complicated. Part of the answer to the question is found in r.52.13. That rule states that permission is required from the Court of Appeal for any appeal to that Court from a decision of a county court which was itself made on appeal. Where, in an exercise of the contempt jurisdiction, a committal order was made by a district judge, and an appeal was made to a circuit judge, a further, second appeal to the Court of Appeal requires the permission of the Court of Appeal. The order appealed from, that is to say, the circuit judge's order, is not a committal order within r.52.3(1)(a)(i). It is conceivable that the following slightly different circumstances may arise. First, in the exercise of the contempt jurisdiction a district judge may make orders, but not including among them a committal order. Secondly, there may then be an appeal with permission to a circuit judge in a county court. Thirdly, in dealing with the appeal, the circuit judge may make a committal order. Fourthly, a party may wish to appeal from the circuit judge's order to the Court of Appeal. In these circumstances, is the permission of the Court of Appeal under r.52.13 required? The answer is that it is not because such an appeal is not a second appeal, but a first appeal; r.52.3 applies and the appeal is of right.

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