ISSUE 07/2003 JULY 18, 2003

CIVIL PROCEDURE NEWS

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Cases

■ ALI REZA-DELTA TRANSPORT CO. LTD. v. UNITED ARAB SHIPPING CO. S.A.G. (NO. 2) [2003] EWCA Civ 811; *The Times*, July 4, 2003, CA (Peter Gibson & Tuckey L.JJ. and Nelson J.)
CPR, rr.33.21 & 44.3—claimant (C) making Pt 36 offer to settle appeal—offer containing term waiving uplift interest on damages and costs—defendants (D) not accepting offer—on appeal, damages awarded matching exactly C's offer—C applying for their costs of the appeal on indemnity basis under r.36.21—held, dismissing application, an offer as to uplift interest is not part of the offer to be taken into account in determining the applicability of r.36.21 (see *Civil Procedure*, 2003, Vol. 1, paras 36.21.1 & 44.4.2)

■ GREGORY v. TURNER [2003] EWCA Civ 183; [2003] 1 W.L.R. 1149, CA; [2003] 2 All E.R. 1114, CA (Brooke, Sedley & Carnwath L.JJ.)
CPR, rr.52.3 & 54.3, Access to Justice Act 1999, s.54(4)—householder (C), acting in person, bringing county court claim against neighbours (D) for injunctive relief and damages for trespass (including aggravated damages) limited to £5,000—county court dealing with case as small claim—at trial, district judge awarding C £100 damages for trespass against D—circuit judge refusing C permission to appeal—held, though s.54(4) precluded any attempt by C to reopen the permission to appeal issue in the Court of Appeal, it does not oust the jurisdiction of the High Court, by judicial review, over decisions made by circuit judges in county courts to grant or refuse permission to appeal to themselves—*R.(Sivasubramaniam) v. Wandsworth County Court* [2002] EWCA Civ 1738; [2003] 1 W.L.R. 475, CA, ref'd to (see *Civil Procedure*, 2003, Vol. 1, para. 52.3.6, and Vol. 2, para. 9A-864)

■ PRICE v. PRICE [2003] EWCA Civ 888; June 26, 2003, CA, unrep. (Brooke, Sedley & Hale L.JJ.)
CPR, rr.1.1, 1.3, 1.4, 3.1, 3.4, 3.9 & 7.4, Human Rights Act 1998, Sched.1, Pt I, art. 6—in April 2001, legally aided claimant (C) issuing claim form in multi-track case for damages for personal injuries suffered in May 1998—in July, 2002, C applying for extension of time for serving particulars of claim—evidence in support of application revealing for first time claim for £550,000 including special damages—circuit judge refusing application—Court of Appeal allowing C's appeal on condition that no claim was made for special or general damages other than what might be substantiated by any pre-April 2001 medical report—*Walsh v. Misseldine* February 29, 2000, CA, unrep., ref'd to (see *Civil Procedure*, 2003, Vol. 1, paras 3.1.2, 3.9.1 & 7.6.3)

■ AMERICAN INTERNATIONAL SPECIALITY LINES INSURANCE CO. v. ABBOTT LABORATORIES [2003] EWHC 2714 (Comm); [2003] 1 Lloyd's Rep. 267 (Cresswell J.)
CPR, r.25.1(1)(a)—American insurer (C) obtaining anti-suit injunction in relation to a dispute arising out of insurance policies in which D was the insured—D filing claim against C arising under the policies in the courts of Illinois—C contending that these proceedings were in breach of a London arbitration clause in the policies—held, granting D's application to set aside the injunction, (1) the court will only restrain a party from pursuing proceedings in a foreign court if such pursuit would be vexatious or oppressive, (2) it had not been shown to a high degree of probability that the London arbitration clause had been incorporated into the policies—review of principles and authorities relating to the grant of anti-suit injunctions—*Donohue v. Armco Inc.* [2001] UKHL 64; [2002] 1 All E.R. 749, H.L., ref'd to (see *Civil Procedure*, 2003, Vol. 1, para. 25.1.12)

■ BATES v. MICROSTAR LTD. [2003] EWHC 661 (Ch); *The Times*, April 15, 2003 (Mr.Bernard Livesey Q.C.)
CPR, rr.1.1(2) & 25.1(1)(f)—C obtaining judgment against D in breach of contract claim—subsequently post-judgment freezing order made against D on condition that C undertake not to commence foreign proceedings against D without permission—C applying for permission to issue such proceedings—held, granting application, (1) strict compliance with certain conditions of a freezing order is necessary to prevent the order being used as a weapon of oppression against the defendant, (2) "oppression" includes the institution (a) of multiple proceedings in different jurisdictions, and (b) of other proceedings based on the improper use of information obtained by compulsion under the very order obtained and in breach of the implied undertakings against such use, (3) the central question is whether, in the context of the litigation as a whole, the release of the claimant from one or other of his undertakings is appropriate in the interests of justice, (4) any consideration of the basis on which leave should be granted has to include the considerations set out in r.1.1(2) (see *Civil Procedure*, 2003, Vol. 1, paras 1.3.2 & 25.1.27)

■ CHAN U SEEK v. ALVIS VEHICLES LTD. [2003] EWHC 1238 (Ch); *The Times*, May 16, 2003 (Neuberger J.)
CPR, rr.3.4—Master striking out claimant's (C's) claim—held, allowing C's appeal, (1) if the court considers that a claim, although weak, stands some chance of success, it is not consonant with basic principles of English justice or with human rights law for a party seeking to pursue such a claim to be barred from proceeding with it, (2) however much it might seek to apply the rules of proportionality, it was not the court's function to stifle a claim merely because it looks unlikely to succeed, (3) furthermore, it is important to bear in mind the well-established principle that the court should not carry out mini-trial at the interlocutory stage (see *Civil Procedure*, 2003, Vol. 1, paras 1.3.5 & 3.4.1)

■ JONES v. CONGREGATIONAL AND GENERAL INSURANCE PLC. *The Times*, July 7, 2003 (Judge Chambers Q.C.)
CPR, rr.44.4, 44.5 & 44.17, Access to Justice Act 1999, s.11(1)—claimant (C), who was legally aided, bringing claim against insurers (D)—C's claim dismissed and C ordered to pay D's costs on indemnity basis—C's case, and his obtaining of legal aid, founded upon fraudulent claims—held, dismissing C's application (1) s.11(1) provides that costs ordered against an assisted party should not exceed reasonable amount, (2) the protection of the sub-section does not apply to those whose conduct amounted to serious crime (see *Civil Procedure*, 2003, Vol. 1, paras 44.17.1, 48.13.0.3 & 48.13.0.8)

■ MILLER BREWING CO. v. RUHI ENTERPRISES LTD. *The Times*, June 6, 2003 (Neuberger J.)
CPR, r.25.1(1)(a), Practice Direction (Injunctions) para. 5.1—claimant (C) bringing trade mark claim against company (D1) and individual (D2)—C obtaining interim injunction against D2 preventing him from dealing in product—D1 applying for order requiring C to pay costs and charges which they claimed they had incurred as a result of that injunction—held, dismissing application, (1) where a claimant seeks an interim injunction other than a freezing order, the court will not, as a matter if course, make the grant of an order conditional on the claimant undertaking to pay the reasonable costs of any third party incurred as a result of the order, but (2) in appropriate circumstances the court may consider imposing a wider undertaking in damages than that normally extracted from an applicant for an interlocutory injunction—*Galaxia Maritime S.A. v. Mineralimportexport* [1982] 1 W.L.R. 539, CA, ref'd to (see *Civil Procedure*, 2003 Vol. 1, paras 25.1.9, 25.1.15, 25.1.16.1 & 25PD.5)

■ MORESFIELD LTD. v. BANNERS [2003] EWHC 1602 (Ch); July 3, 2003, unrep. (Lawrence Collins J.)
CPR, rr.20.6, 31.16 & 31.17—company (C) bringing professional negligence claim against solicitors (D)—C alleging D negligence in drafting share sale agreement—accountants (K) carrying out work for C in relation to sale of the shares—before C's claim commenced, (1) D considering bringing Pt 20 claim against K, and (2) K offering to disclose documents to D on terms—after C's claim commenced, (1) D apparently not intending, unless C successful against them, to bring claim against K, and (2) K withdrawing disclosure offer—during pre-trial stages of C's claim against them, D applying for pre-action disclosure (r.31.16) and for non-party disclosure (r.31.17) by K of certain documents—held, granting the application, (1) in Pt 20 proceedings by D against K the documents would be subject to standard disclosure, (2) D had made out a case for disclosure (a) under r.31.16, and alternatively (b) under r.31.17—judge observing that the general principles governing r.31.16 and r.31.17 are to be found in *Black v. Sumitomo Corporation* [2001] EWCA Civ 1819; [2002] 1 W.L.R. 1562, CA, applying *Bermuda International Securities Ltd. v. K.P.M.G.* [2001] EWCA Civ 269; *The Times*, March 14, 2001, CA, ref'd to (see *Civil Procedure*, 2003, Vol. 1, paras 31.16.3 & 31.17.3)

■ MOTOROLA CREDIT CORPORATION v. UZAN (NO. 2) [2003] EWCA Civ 752; *The Times*, June 19, 2003, CA (Thorpe, Potter & Tuckey L.JJ.)
CPR, rr.6.20 & 25.1(1)(f), Supreme Court Act 1981, s.37, Civil Jurisdiction and Judgments Act 1982, s.25—American company (C) bringing proceedings in American court against four defendants (D1, D2, D3 and D4)—D4 resident in England—C alleging that each defendant had fraudulently induced C to enter into financing agreements with a company owned by companies in the ownership or control of the defendants—further alleged that each of the defendants was personally liable for the whole amount outstanding—High Court granting C's application for worldwide freezing injunction in aid of the American proceedings—defendants, though not disputing that a good arguable case of fraud was established, applying to have injunction discharged—held, allowing appeals of D2 and D3, (1) neither s.37, r.6.20 nor r.25.1(1)(f) fetter the High Court's power in any way, (2) however, under s.25(2) the Court may refuse an application for interim relief in aid of a foreign court (perhaps in the form of a freezing injunction), "if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject-matter of the proceedings in question makes it inexpedient for the court to grant it", (3) no criterion or guideline is provided by s.25(2) as to the test to be applied by the court in considering whether it is

expedient to grant an order, but (4) the authorities show that there are certain particular considerations which the court should bear in mind—these considerations explained—*Refco Inc. v. Eastern Trading Co.* [1999] 1 Lloyd's Rep. 159, CA, ref'd to (see *Civil Procedure*, 2003, Vol. 1, paras 6.21.27, 25.1.27, and Vol. 2, paras 5-26 & 9A-112)

■ SNOWSTAR SHIPPING CO. LTD. v. GRAIG SHIPPING PLC. [2003] EWHC 1367 (Comm); June 13, 2003, unrep. (Morison J.)
CPR, r.31.16—C and D negotiating for sale of container ships—D proposing to fund purchase through Inland Revenue approved UK tax lease scheme—sale of one ship falling through, apparently because, though this was disputed by C, D unable to complete tax lease documentation within stipulated time—C considering bringing against D claims (1) for breach of contract, and (2) for misrepresentation and/or negligent misstatement in relation to the funding of the purchase and completion of the tax lease documentation—under r.31.16, C applying (1) for disclosure by D of all documents that passed between them and the tax authorities concerning the proposed tax lease scheme, and (2) for confirmation of date when those documents were provided (if not expressly shown)—held, dismissing the application, (1) on applications under r.31.16, the court must exercise its discretion if satisfied that (a) the potential claim overcomes a minimum threshold of credibility, and (b) the qualifying conditions have been fulfilled, (2) if the qualifying conditions are satisfied, the court may exercise its discretion, otherwise the application must be dismissed, (3) in the circumstances of this case, the potential claim (a) in contract satisfied the "credibility" test but faced clear difficulties, and (b) for misrepresentation was speculative and its credibility was not aided by the allegation of fraud, (4) C's application (a) fished for disclosure of documents that would be commercially sensitive or covered by privilege, and (b) was too widely drawn, (5) the court did not have the power under r.31.16 to order the date confirmations sought—*Black v. Sumitomo Corporation* [2001] EWCA Civ 1819; [2002] 1 W.L.R. 1562, CA, ref'd to (*Civil Procedure*, 2003, Vol. 1, para. 31.16.3)

■ TASYURDU v. SECRETARY OF STATE FOR THE HOME DEPARTMENT [2003] EWCA Civ 447; *The Times*, April 16, 2003, CA (Lord Phillips MR & Sedley L.J.)
CPR, rr.1.1, 1.3 & 52.3—adjudicator dismissing asylum seeker's (C) claim—C making renewed application for permission to appeal to Court of Appeal—half an hour before hearing on a Monday morning, Court informed that application withdrawn—Master of the Rolls stating (1) under r.1.3 the parties and their legal advisers have a duty to help the court to achieve the overriding objective (r.1.1), (2) that objective includes the appropriate use of court resources, (3) in order to ensure that judges' time is not wasted, the parties and their legal advisers have a duty promptly to advise the Court that a case listed for hearing is not proceeding (see *Civil Procedure*, 2003, Vol. 1, paras 1.3.7 & 1.3.8)

■ VOICE AND SCRIPT INTERNATIONAL LTD. v. ALGHAFAR [2003] EWCA Civ 736; May 8, 2003, CA, unrep. (Judge & Dyson L.JJ.)
CPR, rr.1.1(2)(c) & 27.14(3), Practice Direction (Case Management-Preliminary Stage : Allocation and Re-allocation para. 12.5—claimant (C) bringing county court claim against defendant (D) for £9,140, exclusive of interest—parts of claim unsustainable and some sums pleaded mistakenly overstated—at disposal hearing, district judge entering default judgment against D for £4,700 (including interest) and assessing costs at £6,000—claim not allocated to case management track, either at disposal hearing or previously—on appeal, circuit judge reducing judgment sum to £2,970 and reducing costs to £5,000 (being two-thirds of C's costs to date when pleading errors recognised)—D appealing on ground that costs awarded against him should have been assessed as if C's claim had proceeded as a small claim—Court directing that appeal raised point of principle of sufficient importance to justify second appeal (r.52.13)—held, allowing appeal, (1) this was not a claim in excess of £5,000 which failed on the evidence to produce an award in excess of that amount, (2) it was a claim that was advanced in an amount in excess of £5,000 as a result of mistake, oversight or carelessness, (3) the fact that the claim was not allocated to the small claims track (or to any track) did not preclude the court from considering whether it would be reasonable to make a costs assessment consistent with the small claims costs regime (see r.27.14(3))—Court emphasising overriding requirement of proportionality in civil litigation—*Lownds v. Secretary of State for the Home Department* [2002] EWCA Civ 363; [2002] 1 W.L.R. 2450, CA, ref'd to (see *Civil Procedure*, 2003, Vol. 1, paras 1.3.5, 26PD.12, 27.14.1 & 52.3.8)

Practice Directions

■ PRACTICE DIRECTION (PILOT SCHEME FOR TELEPHONE HEARINGS) TSO CPR Update 32, May 30, 2003
CPR, r.51.2—supplements Pt 23—provides for a Telephone Hearings Pilot Scheme to operate at Newcastle Combined Court Centre from September 1, 2003, to February 24, 2004—for duration suspends or modifies effects of Practice Direction (Applications) paras 6.1 to 6.5 (see *Civil Procedure*, 2003, Vol. 1, paras 23PD.6 & 51.1.2)

IN DETAIL

Extending time on condition limiting claim

In *Price v. Price* [2003] EWCA Civ 888; June 26, 2003, CA, the facts were that, in April 2001, a claimant (C) issued a claim form in a personal injuries action arising out of an accident occurring in May 1998. The particulars of claim were not served with the claim form, and were not served within the time limit fixed by r.7.4(1) (*i.e.* by April 28, 2001).

The particulars had still not been served by July 2002, when C applied for an extension of time for serving them. The evidence in support of C's application included an expert report and revealed for the first time a claim for £550,000 including special damages. Previously, D had laboured under the impression that the claim would be somewhere in excess of £50,000. C's application was allowed by a deputy district judge, but a circuit judge allowed D's appeal.

When the CPR case management system was brought into effect in April 1999, assurances were given that, with "court control", cases such as this would become things of the past. Certainly, courts are no longer plagued with striking out for want of prosecution applications and with the difficulties involved in applying the *Birkett v. James* test (as elaborately and unhelpfully embroidered over the years by a series of Court of Appeal and House of Lords decisions).

But it remains the position that district judges and circuit judges are required to deal with far too many applications for extensions of time. Their position has been made more difficult than it should by a series of Court of Appeal decisions applying r.3.9 (Relief from sanctions) generously in favour of badly disorganised parties on the basis that a fair trial of the issues was still possible. This has made judges reluctant to refuse applications for time extensions (often made with some misconceived art. 6 arguments thrown in) and has created a climate in which it is possible for parties "to muck one another about" and to inconvenience the court at late stages in pre-trial timetables, particularly in personal injury cases. Case "management" has been replaced by case "coddling". In far too many instances the scrambling about that has to go on to deal with amended pleadings and new evidence when trial is imminent is just plain silly, and gives the lie to any suggestion that England now has a robust case management system in place.

In *Price v. Price* [2003] EWCA Civ 888; June 26, 2003, CA, unrep., the Court of Appeal (Brooke, Sedley & Hale L.JJ.), though allowing C's appeal, struck a blow for common sense by reminding judges and practitioners that, when a court exercises its power under r.3.1(2)(a) to extend time, the order made may be subject to conditions (see r.3.1(3)(a)).

The Court drew attention to *Walsh v. Misseldine* February 29, 2000, CA, unrep. (decided after *Biguzzi v. Rank Leisure Plc.* [1999] 1 W.L.R. 1926, CA, and referred to in CP News Issue 4/2000). That was a case in which the claimant (C) commenced county court proceedings in July 1989 for personal injuries arising from an accident in 1986. The defendant (D) admitted liability, made interim payments and, in January 1994, paid money into court. At that time, the sole issue remaining in dispute between the parties was the likely prognosis for one of C's injuries. During a long period of inaction, for much of which both parties were to blame, the action was automatically struck out under CCR O.17, r.11(9). In April 1999 (when the CPR came into effect), following a further period of procedural wrangling, the action was reinstated and then, in June 1999, it was struck out by a district judge for want of prosecution. On appeal, a judge held that, under the CPR, the action should not have been reinstated. C prepared a new schedule of special damages including for the first time substantial items for loss of earnings.

The Court of Appeal (Stuart-Smith & Brooke L.JJ.) allowed C's appeal. The Court held: (1) by focusing on the issue of reinstatement, in the circumstances the judge had adopted the wrong approach, (2) it was possible to conduct a fair trial of the issues as they stood in March 1995 when the case should have been tried, but not on the loss of earnings issues added subsequently, accordingly (3) the action, confined to those issues, should be permitted to proceed subject to conditions, including a condition that C be not entitled to interest on damages between March 1995 and the date of his appeal to the Court of Appeal. The Court emphasised the significance of the fact that the issue of liability was not in dispute.

In the earlier case of *Stockman v. Payne* February 17, 2000, unrep., a case decided before the full significance of r.3.9 was understood, Buckley J. at first instance held that it would be an "overeaction" and not in furtherance of the overriding objective to grant the defendant's application to strike out the claimant's statement of case entirely, but ruled that the trial of the claim should be restricted to the existing schedule of loss and the evidence in support thereof.

In *Price v. Price*, the Court of Appeal recognised its responsibilities by saying: "It is very important that this Court should not relax the disciplinary framework created by the Civil Procedure Rules in a case like this". The Court said that this case was a case in which it was appropriate for the Court to adopt a sim-

ilar approach to that adopted in *Walsh v. Misseldine*.

In allowing C's appeal the Court held: (1) the deputy district judge erred in not addressing his mind to a number of the most important considerations set out in the checklist in r.3.9, (2) the circuit judge erred in not clearly weighing in the balance the prejudice to C caused by a refusal to extend time, (3) in exercising its discretion afresh, the Court held (a) it was not now possible to deal with the case in a manner that was fair to both parties if time was extended unconditionally, (b) barring C from pursuing his claim as it stood in April 2001, when the particulars of claim should have been served, would be a disproportionate response and would give D's insurers an unjustified windfall, accordingly, (4) C's appeal should be allowed by extending the time for service of the particulars of claim on condition that no claim was made for special or general damages other than what might be substantiated by any pre-April 2001 medical report.

Interest waiver in Part 36 offer

CPR, r.36.21 applies where at trial (a) a defendant is held liable for more, or (b) the judgment against a defendant is more advantageous to the claimant, than the proposals contained in a claimant's Part 36 offer.

Where r.36.21 applies, the court may order interest on the whole or part of any sum of money (excluding interest) awarded to the claimant at a rate not exceeding 10% above base rate for some or all of the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court (r.36.21(2). The court will make such an order "unless it considers it unjust to do so" (r.36.21(4)).

The court may also order that the claimant is entitled to (a) his costs on the indemnity basis from the latest date when the defendant could have accepted the offer without needing the permission of the court, and (b) interest on those costs at a rate not exceeding 10% above base rate (r.36.21(3)). Again, the court will make such an order "unless it considers it unjust to do so" (r.36.21(4)).

Rule 36.21(6) states that, in considering whether it would be unjust to make orders under r.36.21(2) or r.36.21(3), the court will take into account all the circumstances of the case including certain particular matters (e.g. the terms of any Part 36 offer).

In *Mitchell v. James* [2002] EWCA Civ 997; [2003] 2 All E.R. 1064, CA, the claimants (C) brought a claim against defendants (D) for specific performance of an oral agreement as to shares. C succeeded at trial and was awarded costs against D. Before proceedings had started, C had made an offer to settle the claim. That offer contained terms as to costs, including a term that each side should pay its own costs. D did not accept the offer. After trial, C contended that, pursuant to r.36.21(3), the costs awarded to them by the judge should be assessed on an indemnity basis. This was rejected by the judge. The Court of Appeal (Peter Gibson & Potter L.JJ. and Sir Murray Stuart-Smith) dismissed C's appeal. The Court held that, 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.

In *Ali Reza-Delta Transport Co. Ltd. v. United Arab Shipping Co. S.A.G. (No. 2)* [2003] EWCA Civ 811; *The Times*, July 4, 2003, CA, the facts were that, at trial, the claimants (C) succeeded and were awarded damages of US$115,800. However, they were dissatisfied with the award and appealed. In the Court of Appeal, C succeeded in that the Court held that the award should be increased to US$227,400. No question arose as to C's entitlement to their costs of the trial. C had made offers before trial and had, in the event, done better than those offers. Therefore r.36.21 applied to the trial costs and C were entitled to those costs on the indemnity basis.

However, the position as to the costs of the appeal was not so clear-cut. It transpired that C had made, but the defendants (D) had not accepted, an offer by C to settle the appeal for US$227,400. On the face of it, it seemed that r.36.21 did not apply. However, C's offer included a term in which C waived an entitlement to enhanced (or "uplift") interest on the US$227,400 (r.36.21(2)) or on costs (r.36.21(3)). The short question which arose was: was the term containing the waiver to be considered part of the offer? If it was, C could argue that the Court of Appeal's judgment was more advantageous to them than their offer, and that, therefore, r.36.21 applied and the Court should award them their costs in accordance with that rule.

The Court (Peter Gibson & Tuckey L.JJ. and Nelson J.) held that the waiver term should not be considered part of the offer. As to C's offer to waive interest on the damages, the Court accepted that such interest, unlike costs, relates directly to the substantive liability claimed. However, the Court pointed out that this aspect of C's offer related solely to uplift interest, that is to say, to interest that a court may award under r.36.21(2) over the ordinary rate, assuming r.36.21 applies. The Court added (para. 9):

"The court can award uplift interest only if the conditions of r.36.21(1) are satisfied. Thus while the provisions of Part 36 expressly contemplate that a Part 36 offer may include an offer as to interest (see r.36.22), and while the court is directed by r.36.21(4) to make an order as to interest in accordance with r.36.21(2) unless it considers it unjust to do so, the draftsman of the rule cannot have contemplated that uplift interest should be any part of the offer to be taken into account in determining the applicability of the rule."

The Court held that D should pay C's costs of the appeal on the standard basis. The Court rejected C's submission that they were entitled to their costs on an indemnity basis under r.44.3 and r.44.4. The Court said that D did not act unreasonably in resisting the appeal, and their conduct of the appeal was in no way improper. This was not one of those rare cases in which indemnity costs were appropriate.

Judicial review of refusal of permission to appeal

Section 54(1) of the Access to Justice Act 1999 states that rules of court may provide that any right of appeal may be exercised only with permission. CPR, r.52.3 was made in exercise of this power and sets out circumstances in which permission to appeal is required (note also Practice Direction (Appeals) para. 4.8).

Section 54(4) of the 1999 Act states: "No appeal may be made against a decision of a court under this section to give or refuse permission (but this subsection does not affect any right under rules of court to make a further application for permission to the same or another court."

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, including *Lane v. Esdaile* [1891] A.C. 210, H.L., he was prepared to lay down the general proposition that wherever power is given to a legal authority (e.g. a court or 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.

As was explained in a note in the Civil Justice Quarterly following *Kemper Reinsurance Co. v. Minister of Finance (Bermuda)* [2000] 1 A.C. 1, P.C., 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 news series of appeals with regard to leave to appeal (17 C.J.Q. 359 (1998)).

Section 54(4) may be seen as a statutory expression of the rule in *Lane v. Esdaile*. The significance of the subsection was explained by the Court of Appeal in *Riniker v. University College London (Practice Note)* [2001] 1 W.L.R. 13, CA, where the Court (Brooke & Robert Walker L.JJ.) rejected the submission that, despite s.54(4), it retains an inherent non-statutory jurisdiction to correct errors in the court below.

In the recent case of *Gregory v. Turner* [2003] EWCA Civ 183 (now fully reported at [2003] 1 W.L.R. 1149, CA; [2003] 2 All E.R. 1114, CA) the Court of Appeal (Brooke, Sedley & Carnwath L.JJ.) noted that, in recent months, a new practice has developed. Litigants in person "were now seeking orders from the Administrative Court for permission to apply for judicial review to quash a decision of a circuit judge, sitting as an appeal court, to refuse permission to appeal to him" (para. 29).

The Court explained the viability of this new route of challenge was authoritatively considered by the Court of Appeal in *R.(Sivasubramaniam) v. Wandsworth County Court* [2002] EWCA Civ 1738; [2003] 1 W.L.R. 475, CA, where the Court rejected the submission that it was clearly implicit in s.54(4) that the decision of an appeal court refusing leave to appeal was not susceptible to challenge by judicial review. The decision that the judicial review jurisdiction is not ousted by s.54(4), and that a county court judge's decision refusing permission to appeal may be challenged by an application for judicial review, draws attention to the circumstances in which the jurisdiction might be exercised. It is apparent from what was said in the Sivasubramaniam case and in *Gregory v. Turner* that the Court is anxious to ensure that such applications should not be made as a matter of routine where permission to appeal is refused.

In the Sivasubramaniam case, Lord Phillips M.R. made clear (at para. 54) that the new statutory scheme provided a litigant with fair, adequate and proportionate protection against the risk that a district judge may have acted without jurisdiction or fallen into error. In those circumstances judges of the Administrative Court should ordinarily exercise their discretion to dismiss such applications for judicial review in a summary manner. The Master of the Rolls added (para. 56) that, however, the possibility remains that there may be very rare cases "where a litigant challenges the jurisdiction of a circuit judge giving or refusing permission to appeal on the ground of jurisdictional error in the narrow, pre-Anisminic sense, or procedural irregularity of such a kind as to constitute a denial of the applicant's right to a fair hearing". If such grounds are made out "we consider that a proper case for judicial review will have been established".

In *Gregory v. Turner*, the Court explained (para. 40) that, unfortunately, the cases before *Anisminic Ltd. v. The Foreign Compensation Commission* [1969] 2 A.C. 147, H.L., do not provide clear guidance. The Court suggested that what is required, at least, is "some fundamental departure from the correct procedures"; a "mere irregularity in procedure" is not enough.

CPR UPDATE

AMENDMENTS TO PRACTICE DIRECTIONS

By TSO CPR Update 32 (May 2003), a number of amendments were made to existing Practice Directions supplementing particular CPR Parts. These changes are explained below. They come into effect on July 31, 2003, except where otherwise indicated. (Other changes made by this Update, and coming into effect on earlier dates, were explained in Issue 6, June 13, 2003, of *CP News*.)

Paragraph and page references are to the 2003 edition of Civil Procedure.

PRACTICE DIRECTION (COURT OFFICES)

para. 2PD.2, p.59

For sub-para (2) of para. 2.1, substitute the following

"(2) The hours during which the offices of the Supreme Court at the Royal Courts of Justice and at the Principal Probate Registry at First Avenue House, 42-49 High Holborn, London WC1V 6HA shall be open to the public shall be as follows:

(a) from 10 am to 4.30 pm;
(b) such other hours as the Lord Chancellor, with the concurrence of the Heads of Division, may from time to time direct."

PRACTICE DIRECTION (SERVICE)

para. 6PD.3, p.202

Paras 3.1 to 3.4 are substituted as follows:

"Service by Facsimile

3.1 Subject to the provisions of paragraph 3.3 below, where a document is to be served by electronic means—

(1) the party who is to be served or his legal representative must previously have expressly indicated in writing to the party serving—

(a) that he is willing to accept service by electronic means; and
(b) the fax number, e-mail address or electronic identification to which it should be sent; and

(2) the following shall be taken as sufficient written identification for the purposes of paragraph 3.1(1)—

(a) the fax number set out on the writing paper of the legal representative of the party who is to be served; or
(b) a fax number, e-mail address or electronic identification set out on a statement of case or a response to a claim filed with the court.

3.2 Where a party seeks to serve a document by electronic means he should first seek to clarify with the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means including the format in which documents are to be sent and the maximum size of attachments that may be received.

3.3 An address for service given by a party must be within the jurisdiction and any fax number must be at the address for service. Where an e-mail address or electronic identification is given in conjunction with an address for service, the e-mail address or electronic identification will be deemed to be at the address for service.

3.4 Where a document is served by electronic means, the party serving the document need not in addition send a hard copy by post or document exchange."

PRACTICE DIRECTION (PILOT SCHEME FOR TELEPHONE HEARINGS)

para. 23PD.14, p.488

After Practice Direction (Applications) add Practice Direction (Pilot Scheme for Telephone Hearings), made under r.51.2

PRACTICE DIRECTION (ACCOUNTS, INQUIRIES ETC.)

para. 40PD.15, p.948

In para. 15, for "at such rate" to "the testator's death" substitute

"at the basic rate payable for the time being for funds in court or at such other rate as the court shall direct, beginning one year after the testator's death."

PRACTICE DIRECTION (LANDLORD AND TENANT CLAIMS AND MISCELLANEOUS PROVISIONS ABOUT LAND)

As a result of an amendment made to the CPR by the Civil Procedure (Amendment No. 2) Rules 2002,

in Pt 56 (Landlord and Tenant Claims, etc) a "landlord and tenant claim" includes a claim under the Commonhold and Leasehold Reform Act 2002.

Provisions in the 2002 Act affecting the practice direction supplementing Pt 56 come into force, in relation to proceedings in England, on July 31, 2003, and will come into force, in relation to proceedings in Wales, at a later date. New para. 15.1 is added to this practice direction, but is restricted in its application to proceedings in England, and amendments are made to certain paragraphs for the purpose of making it clear that their application is restricted to proceedings in Wales.

para. 56PD.14, p.1410

In heading to para. 6.1 for "leasehold tribunal" substitute "leasehold valuation tribunal"

In para. 6.1(2)(b), delete "by"

At end of para. 6.1, add

(Paragraph 6.1 no longer applies to proceedings in England but continues to apply to proceedings in Wales)

para. 56PD.26, p.1412

Add at end of para. 9.6

(Paragraphs 9.1—9.6 no longer apply to proceedings in England but continue to apply to proceedings in Wales)

para. 56PD.30, p.1414

Add at end of para. 13.3

(Paragraph 13.3 no longer applies to proceedings in England but continues to apply to proceedings in Wales)

para. 56PD.31, p.1415

Add at end of para. 14.6

(Paragraph 14.6 no longer applies to proceedings in England but continues to apply to proceedings in Wales)

After para. 14.7 add the following new paragraph 15.1:

"Transfer to leasehold valuation tribunal under the Commonhold and Leasehold Reform Act 2002

15.1 If a question is ordered to be transferred to a leasehold valuation tribunal for determination under paragraph 3 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 the court will -

(1) send notice of the transfer to all parties to the claim; and
(2) send to the leasehold valuation tribunal—
(a) the order of transfer; and
(b) all documents filed in the claim relating to the question.

(Paragraph 15.1 applies to proceedings in England

PRACTICE DIRECTION (PROBATE)

para. 57PD.2, p.1425

For sub-para. (3) of para. 2.2, substitute

"(3) if the claim is suitable to be heard in the county court—

(a) a county court in a place where there is also a Chancery district registry; or
(b) the Central London County Court."

CUMULATIVE INDEX to CIVIL PROCEDURE NEWS
issues January to June 2003 [1 to 6]

[*references are to [year]* ***issue****/page*]

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Published by Sweet & Maxwell Ltd, 100 Avenue Road, London NW3 3PF.
ISSN 1470-2525

Typeset by Matthew Marley, desk top publishing and design
email: matthew.marley@btinternet.com
Printed by St Austell Printing Company, St Austell, Cornwall