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CIVIL PROCEDURE NEWS

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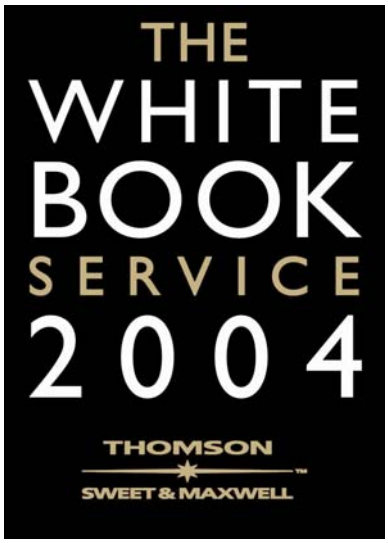

N BRIEF

Cases

■ CIBC MELLON TRUST COMPANY v. STOLZENBERG [2004] EWCA Civ 827; June 30, 2004, CA, unrep. (Ward, Arden & Aldous L.JJ.)
CPR, rr.1.1, 3.9 & 13.3, Human Rights Act 1998 Sched.1, Pt I, art. 6—following collapse of international finance companies, claimants (C) bringing claim to trace assets and for conspiracy to defraud against several defendants, including two companies (D)—C obtaining worldwide freezing order—C obtaining judgments against D—judge dismissing D's applications (1) for relief from sanctions imposed for their failure to comply with "unless" orders, and (2) to set aside judgments—Court of Appeal reviewing authorities on r.3.9 and dismissing D's appeals (*Civil Procedure* 2004, Vol.1, para. 3.9.1)

■ SCRIBES WEST LTD v. RELSA ANSTALT [2004] EWCA Civ 835; June 26, 2004, CA, unrep. (Brooke, Mance & Dyson L.JJ.)
CPR Pt 52—Court of Appeal explaining changes to Practice Direction (Appeals) relating (1) to appeals generally (grounds of appeal, permission to appeal, skeleton arguments, appeal bundles), and (2) to appeals to Court of Appeal especially (core bundles, bundles of authorities and papers)—in effect June 30, 2004 (see *Civil Procedure* 2004, Vol.1, para. 52PD.1 et seq.)

■ BOOTH v. PHILLIPS [2004] EWHC 1437 (Comm); 154 New L.J. 1050 (2004) (Mr Nigel Teare Q.C.)
CPR, r.6.20(8)—ship's engineer (B) killed whilst trying to repair vessel in Egyptian port—B's wife and executrix (C), who lived within the jurisdiction, bringing claim for damages against shipowners (D1) in tort and against others (D2) in tort and contract—D1 resident in jurisdiction but D2 not—C obtaining permission to serve D2 out of the jurisdiction—D2 applying to set order aside—held, dismissing the application, (1) under r.6.20(8), a claim form for a claim in tort may be served out of the jurisdiction with the permission of the court where damage was sustained within the jurisdiction (para. (a)), or the damage sustained resulted from an act committed within the jurisdiction (para. (b)); (2) the words of r.6.20(8) should be given their ordinary and natural meaning; (2) it is sufficient for the purpose of para. (a) that some of the damage (not all of the damage), whether physical or economic, was sustained within the jurisdiction; (3) C's claim fell within para. (a) as both her fatal accident claim for loss of financial dependency upon B, and her claim as executrix for funeral expenses incurred, were for damage sustained in England; (4) England was the forum in which the case could most suitably be tried for the interest of all the parties and the ends of justice—*Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.* [1990] 1 Q.B. 391, CA, ref'd to (see *Civil Procedure* 2004, Vol. 1, para. 6.21.15)

■ BOYD & HUTCHINSON v. FOENANDER [2003] EWCA Civ 1516; October 23, 2003, CA, unrep. (Auld & Chadwick L.JJ.)
CPR, rr.1.1(2) & 3.1(2)(b)—solicitors (C) bringing proceedings to enforce order for costs against defendant (D)—single lord justice giving D permission to make second appeal, but limited to one issue (*i.e.* whether D's liability to pay taxed costs had been discharged by a compromise agreement)—shortly after permission granted, D adjudged bankrupt and application to annul refused—when appeal came on, D applying for an adjournment (as appeal against refusal to annul bankruptcy order still pending)—held (1) in determining whether to grant an adjournment the Court must have regard to the overriding objective, (2) therefore the Court should deal with D's case in a manner which saves expense, is proportionate to the amount of money involved and allocates to it an appropriate share of the Court's resources, (3) the parties had come to court to argue a simple point of construction, and the members of the Court had read the papers, (4) in the circumstances, the appropriate course was for the Court (a) to hear argument on the merits, and (b) to refuse an adjournment if it concluded that the appeal has no prospect of success (rather than simply putting the point off to a future occasion), (5) as D's appeal had no prospect of success, an adjournment should be refused, (6) the appeal should be dismissed because D, having become bankrupt, had no standing to pursue the appeal—*Heath v. Tang* [1993] 1 W.L.R. 1421, CA, ref'd to (see *Civil Procedure* 2004, Vol.1, paras 1.3.5, 1.3.7 & 3.1.3)

■ FLEMING v. CHIEF CONSTABLE OF SUSSEX [2004] EWCA Civ 643; May 4, 2004, CA, unrep. (Potter, Mance & Jacob L.JJ.)
CPR, rr.1.1 & 44.3—at county court trial, civil jury awarding legally aided claimant (C) £5,000 damages in respect of major part of his claim for wrongful arrest, etc. against police (D)—on the basis of lengthy written submissions from the parties, judge ordering (1) that on issue of misfeasance, which formed part of C's original claim, but

was struck out by consent before trial, there should be no order or costs, but (2) otherwise D was to pay C's costs —held, dismissing D's appeal, (1) in seeking to overturn the judge's exercise of discretion it was incumbent on D to show that the judge erred in principle, (2) none of the considerations enumerated in r.44.3 justifies taking into account the size of a defendant's award of damages as a reason for the court's declining to make an issue-based order which otherwise ought to be made, simply on the ground that to do so would reduce the claimant's recovery in the claim, (3) by taking into account the impact that an adverse order for costs would have had on C's ability to receive in full the damages awarded to him, the judge took into account a matter which should have been left out of account, and in so doing erred in principle, however (4) the judge's order should stand as there was no discrete issue determined against C which added sufficiently to the length of the trial to necessitate displacing the general rule that costs should follow the event—observations on rationale of "issues" approach to costs under CPR (see *Civil Procedure* 2004, Vol.1, para. 44.3.1)

■ GHADAMI v. HARLOW DISTRICT COUNCIL, June 21, 2004, CA, unrep. (Ward L.J. & Sir Martin Nourse)
CPR, r.29.8, Practice Direction (The Multi-Track) para. 7.4, Practice Direction (Judicial Review) para. 15, Queen's Bench Guide para. 8.8—claimant (C) granted permission to apply for judicial review—case management directions including direction requiring C to prepare core bundle at early stage to facilitate parties' compliance with para. 15 (service of skeleton arguments)—after contacting C and respondent (D), court listing trial for June 23, 2004—on various grounds (including non-availability of his chosen counsel and his inability to prepare his case in time) C applying to vacate trial date—judge refusing application—held, allowing C's appeal, it was not appropriate in this case for the court to fix a trial date without having regard to the working out of the case management directions given when permission to apply for judicial review was granted (see *Civil Procedure* 2004, Vol. 1, paras 29.8.1, 29PD.7 & 54PD.15, and Vol.2, para. 1A-62)

■ HABIB BANK LTD v. AHMED [2004] EWCA Civ 805; 154 New L.J. 1051 (2004) (Auld, Sedley & Keene L.JJ.)
CPR, r.44.4(2), Insolvency Act 1986, s.423—bank (C) registering foreign judgment against borrower (D)—C granted charging order nisi on properties within jurisdiction—in making order absolute, judge (1) rejecting claims of interveners on grounds that they arose out of transactions entered into for purpose of putting assets beyond reach of C, and (2) making further orders under s.423, restoring the position to what it would have been in the transactions had not been entered into—on D's application, Court of Appeal finding there was no arguable case and refusing permission to appeal—C awarded their costs of opposing the application—C putting in bill for £54,487.50 for a half-day hearing—on summary assessment by Court (on the basis of written submissions), held, (1) the total claimed by C was disproportionate and would surprise most members of the public, (2) the question was whether it was just to require D to pay the large sums claimed as the price of losing, (3) it is not the Court's concern whether a bill of this magnitude is to be presented to C by their solicitors, (4) in the circumstances, the costs of C payable by D should be limited to £16,195, (5) in particular, Court reducing (a) the amount claimed for perusal and preparation of documents from £12,000 to £1,400, (b) the amount claimed for attendance of solicitors at court from £1,710 to £752.50, (c) the fees of leading and junior counsel from £37,365 to £12,750—*Lownds v. Secretary of State for the Home Department (Practice Note)* [2002] EWCA Civ 365; [2002] 1 W.L.R. 2450, CA, ref'd to (see *Civil Procedure* 2004, Vol.1, paras 44.4.3 & 44.5.4)

■ NATIONAL WESTMINSTER BANK PLC v. AARONSON [2004] EWHC 618 (QB); March 9, 2004, unrep. (Royce J.)
CPR, rr.3.1(2)(b) & 39.3—bank (C) bringing claim in a county court against husband and wife (both solicitors) (D)—D making counterclaim—D indicating to court that their preference would be to avoid a trial date falling during a three month period covering August 2003—in January 2003, court sending parties trial notice fixing August 11, 2003, as date for trial expected to last five days—on February 19, 2003, D orally advised by court that case would not be tried on August 11, but was likely to be listed in September—however, on February 27, 2003, following direction given by judge, court sending letter to D stating that trial date could be altered only on application on notice to the judge—in June, C chasing D about arrangements for meeting of experts—on August 1, D receiving letter and bundle of documents from solicitors for C indicating that they were preparing for a trial on August 11—on that date, counsel for D appearing to apply for adjournment—judge refusing application and (1) proceeding to try case in absence of D, and (2) giving judgment for C—D going abroad on holiday on August 13 (for which arrangements made in 2002)—on October 9, 2003, judge refusing D's application under r.39.3(3) to set judgment aside—on D's appeals to High Court judge, held, dismissing the appeals (1)

as to the adjournment application (a) it was not possible to say that the judge's approach to D's application for an adjournment was flawed, (b) he fairly assumed that D may not have received the court's letter of February 27, (c) he was perfectly entitled in the exercise of his discretion to refuse the application, and (2) as to the application to set aside, the judge was entitled to conclude that D did not have a good reason for not attending the trial within r.39.3(5)(b), (3) neither of the judge's decisions exceeded the generous ambit within which a reasonable disagreement is possible—*Brazil v. Brazil* [2002] EWCA Civ 1135; *The Times*, October 18, 2002, CA; *Tanfern Ltd v. Cameron-MacDonald (Practice Note)* [2000] 1 W.L.R. 1311, CA, ref'd to (see *Civil Procedure* 2004, Vol.1, paras 3.1.3 & 39.3.7)

■ PARSONS v. GEORGE [2004] EWCA Civ 912; July 13, 2004, CA, unrep. (Sir Andrew Morritt V.-C., Clarke & Dyson L.JJ.)
CPR, rr.3.10, 19.2, 19.5, 52.14 & 56.3, Practice Direction (Landlord and Tenant Claims etc.) para. 3.4, Landlord and Tenant Act 1954, ss.24, 25, 29(3) & 44(1)—landlord (S) granting tenant (C) lease subject to Pt II of 1954 Act—on March 26, 2003, after S's death, her executors (D) serving notice on C under s.25 terminating tenancy—D rejecting C's offer to purchase freehold and notifying C that, on April 23, freehold had been transferred to beneficiary (P)—on June 25, C issuing claim form naming D as defendants applying for new tenancy under s.29—D filing acknowledgment of service, stating that they were not the competent landlord (within meaning of s.44(1))—on September 15, C applying to court for order substituting P for D as defendant—district judge dismissing application but granting C permission to appeal—appeal transferred to Court of Appeal under r.52.14—held, allowing C's appeal, (1) by operation of s.29(3), C's claim for a new tenancy could not be entertained by the court if made after July 25, 2004, (2) C's claim was brought within that time limit, but was brought against the wrong defendant (D), (3) C's application to substitute P for D as defendant was brought after the expiry of the time limit, (4) s.29(3) imposed "a period of limitation" within the meaning of r.19.5(1), as r.19.5(1)(c) should be interpreted as referring to any enactment that allowed, or did not prohibit, a change of parties after the end of a relevant limitation period, (5) therefore r.19.5 applied to C's application, (6) as it was clear that C intended to make a claim against his competent landlord, but by mistake named the wrong person, his application to substitute as defendant the person who in fact answered the description of competent landlord came within r.19.5(3)(a), (6) in the circumstances, the discretionary power to substitute P as defendant should be exercised—Court explaining pre-CPR law and amendments to r.19.5 and stating that CPR did not deny court jurisdiction previously enjoyed—*Evans v. Charrington & Co. Ltd* [1983] 1 Q.B. 810, CA; *Signet Group Plc v. Hammerson Properties Plc*, *The Times*, December 15, 1997, CA; *Horne-Roberts v. SmithKline Beecham Plc* [2001] EWCA Civ 2006; [2002] 1 W.L.R. 1662, CA, ref'd to (see *Civil Procedure* 2004, Vol.1, paras 19.5.1, 19.5.2, 52.14.1, 56.3.1, 56.3.4, 56PD.5)

■ R. (ON THE APPLICATION OF MAHAJAN) v. CENTRAL LONDON COUNTY COURT, *The Times*, July 13, 2004, CA (Brooke & Dyson L.JJ.)
litigant in person (D) involved in numerous civil claims in various courts—D making several applications to Court of Appeal—Department of Constitutional Affairs (C) applying for general civil restraint order against D—held, granting C's application, the Court of Appeal has power, when making a general civil restraint order, to restrain the person against whom the order is made from bringing proceedings, not only in the Court of Appeal and in the High Court, but also in a county court—*Ebert v. Venvil* [2000] Ch. 484, CA, ref'd to (see *Civil Procedure* 2004, Vol. 1, paras 3.1.12, 3.1.15 & 25.1.5)

■ REED EXECUTIVE PLC v. REED BUSINESS INFORMATION LTD [2004] EWCA Civ 887; *The Times*, July 16, 2004, CA (Auld, Rix & Jacob L.JJ.)
CPR, rr.1.4, 26.4 & 44.3—employment agency (C) bringing claim against business publishers (D) for passing off and infringement of registered trade mark—trial judge giving judgment for C—D succeeding on partial appeals to Court of Appeal ([2004] EWCA Civ 159; March 3, 2004, CA, unrep.)—parties unable to agree consequential order as to costs—on preliminary issues as to costs, held (1) in appropriate circumstances, the court may impose a costs sanction against a successful party on the grounds that he has refused to take part in an ADR process proposed by his opponent, (2) the rule is that, on the question of costs, details of "without prejudice" negotiations cannot be disclosed unless both sides agree, (3) the application of this rule can be avoided by the simple expedient of using the Calderbank formula of negotiation "without prejudice as to costs", (4) the rule applies even though, in the absence of disclosure, the court might be unable to decide, when ruling on costs, whether a party had been unreasonable in refusing an ADR process—*Walker v. Walker* (1889) 23 Q.B.D. 335; *Unilever Plc v. Procter & Gamble Co.* [2000] 1 W.L.R. 2436, CA; *Halsey v. Milton Keynes General N.H.S. Trust* [2004] EWCA Civ 576; 154 New L.J. 769 (2004), CA, ref'd to (see *Civil Procedure* 2004, Vol. 1, paras 1.4.11, 31.3.40, 44.3.11)

■ SCRIVEN, IN THE MATTER OF [2004] EWCA Civ 683; June 2, 2004, CA, unrep. (Clarke & Sedley L.JJ.)
CPR Sched.2, CCR O.29, r.1(5), Administration of Justice Act 1960, s.13—bankrupt (S) failing to attend county court for public examination—examination adjourned generally and warrant issued for arrest of S—following his arrest, S released and ordered to attend adjourned hearing—S attending adjourned hearing but declining to submit to examination—recorder adjourning hearing—official receiver applying to commit S to prison for contempt—at hearing of this application, which S did not attend, county court judge finding S in contempt and imposing a sentence of six months' imprisonment—committal order (N79) and committal warrant (N80) issued—S arrested and imprisoned on March 17, 2004—committal order not served on S—held, dismissing S's appeal (made out of time), (1) a court to which an appeal is brought under s.13 has a complete discretion, fettered only by the need to do justice; (2) in all contempt cases, justice requires the court to take account of the interests of the contemner; (3) those interests include ensuring that he has been informed in sufficiently clear terms of what has been found against him; (4) as the committal order had not been served on S, the terms of r.1(5) had not been complied with; (5) the principle behind the service requirement in r.1(5) is not merely a formal right, as it is only on seeing the committal order that the contemner can decide whether he should appeal against the making of the order, seek to set it aside, or comply with it and seek to purge his contempt; (6) in the circumstances of this case, the non-compliance with the rule did not infringe the principle and did not give rise to such injustice or unfairness as would warrant the exercise of the court's appellate powers under s.13; (7) S was in no means in the dark about what had transpired and his attitude throughout was one of contumacious defiance of the court's process in bankruptcy; (8) r.1(5) does not require a committal warrant to be signed by the judge as a condition of its validity (see *Civil Procedure* 2004, Vol.1, paras 52.1.1, 52.3.2, sc52.1.42 & cc29.1.5)

■ SPADE LANE COOL STORES LTD v. KILGOUR, June 25, 2004, TCC, unrep. (Judge Toulmin Q.C.)
CPR, rr.6.5(6), 7.5 & 7.6—following fire in building, assignees of owner and tenant (C) bringing claim against architect (D)—in years since building completed, D changing name and address of firm—after expiry of limitation period, and shortly before expiry of four month time limit in r.7.5, C sending claim form and draft particulars to D's former address—D subsequently receiving legal correspondence from C at his correct address and claim form sent to him there—D maintaining throughout that C's claim form had not been properly served—questions (1) whether C had validly served claim form at D's "last known place of business" within meaning of r.6.5(6), and (2) whether time for serving the claim form should be extended under r.7.6, ordered to be tried as preliminary issues—held, determining the questions in favour of D, (1) the phrase "last known place of business" means place last known to C, (2) to obtain the requisite knowledge, C had to take reasonable steps to ascertain D's current, or last known, place of business, (3) on the evidence, C had not taken such steps, (4) time for service should not be extended as C had not taken all reasonable steps to effect proper service and had waited until the very end of the limitation period before attempting service—*Cranfield v. Bridgegrove Ltd* [2003] EWCA Civ 656; [2003] 1 W.L.R. 2441, CA; *Arundel Corporation v. Khokher* [2003] EWCA Civ 1784; December 9, 2003, CA, unrep.; *Hashtroodi v. Hancock* [2004] EWCA Civ 652; *The Times*, June 4, 2004, CA, ref'd to (see *Civil Procedure* 2004, Vol.1, paras 6.5.3 & 7.6.1)

■ STANELCO FIBRE OPTICS LTD v. BIOPROGRESS TECHNOLOGY LTD [2004] EWHC 731 (Ch); March 18, 2004, unrep. (Mann J.)
CPR, rr.29.2, 29.8 & 63.7, Practice Direction (The Multi-Track) para. 7.4, Chancery Guide paras 6.2 & 6.10—in December 2003, court setting out timetable for patents claim proceeding on multi-track—on February 27, 2004, judge making order for speedy trial—at listing appointment on March 9, claimants (C) seeking trial date in May, defendants (D) preferring July—Vice-Chancellor arranging for dedicated patents judge to try case and clerk fixing July 8 as date for trial—on March 18, principally on ground that their business was suffering because of the uncertainty brought about by the dispute, C applying to judge for order that trial should commence on May 8—held, refusing the application, (1) there had been considerable slippage in the timetable, (2) disclosure was incomplete, (3) the parties were not ready to prepare their witness statements, (4) the delay was basically attributable to C and not D, (5) there was a risk that the case would not properly be ready for trial on May 10, (6) D's witnesses would be inconvenienced by an earlier trial date, (6) the evidence as to the financial disadvantage likely to accrue to C by having the trial at the later date was too general and unsubstantiated to enable the court to conclude that it was sufficiently substantial to justify accelerating the trial (see *Civil Procedure* 2004, Vol.1, paras 29.8.1 & 29PD.7, and Vol. 2, paras 1-45 & 1-48)

IN DETAIL

RELIEF FROM SANCTIONS

CPR, rr.3.8 and 3.9 go together. Rule 3.8(1) states that where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect "unless the party in default applies for and obtains relief from the sanction". Rule 3.9(1) states that, on an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including the circumstances listed in paras (a) to (i) of that sub-rule.

The application of r.3.9 has fallen for consideration by the Court of Appeal, most recently in ***CIBC Mellon Trust Company v. Stolzenberg*** [2004] EWCA Civ 827; June 30, 2004, CA, unrep. In this case, Arden L.J. analysed carefully the various circumstances listed in r.3.9(1) and reviewed the authorities, particularly those dealing with non-compliance with "unless" orders. A significant feature of the case is that it involved an application under r.3.9 to set aside a judgment (not merely a procedural order) entered in default of compliance with an order of the court.

The facts of the case were that the claimants (C) invested in a group of international finance companies (X). In May 1996, following the collapse of X, C brought a claim against several defendants (some of whom were joined subsequently) including two individuals (D1) and (D2), and two companies including (D3 & D4) in which D2 had an interest, and also against several other individuals and corporations.

Initially the claim was a tracing claim, but it became a claim for conspiracy to defraud. C alleged that D1 had made fraudulent misrepresentations to them of which D2, D3 and D4 were aware. The pleadings did not progress beyond C's statement of case. A judge granted C a worldwide freezing order and subsequently made several orders against D3 (including "unless" orders) to secure their compliance with the disclosure terms of the freezing order.

On February 4, 1999, pursuant to an order made on October 13, 1998, on C's tracing claim a Master entered judgments against D3 for Can$357,000 and US$386,000. On October 4, 1999, a judge ordered that, unless D3 and D4 complied without outstanding orders, they should be debarred from defending the proceedings. D3 and D4 took no steps to comply with that order. Accordingly, on October 21, 1999, on the conspiracy claim a judge ordered that D3 and D4 should pay C damages to be assessed. On December 7, 1999, a Master awarded C damages of Can$245m and US$134m against D3 and Can$246m and US$134m against D4.

D3 applied to set aside the order of February 4, 1999 (entering judgment against them). In addition, D3 and D4 applied (1) for relief from the "unless" orders of October 13, 1998, and October 4, 1999, and (2) to set aside the orders of October 21, 1999, and December 7, 1999 (awarding damages against them). In dismissing these applications, the judge found (1) that C had a real prospect of succeeding on their conspiracy claim, (2) that there was a possibility that there would be fair trial if the judgments were set aside, and (3) that D3 and D4 had made conscious decisions not to comply with the unless order, preferring instead to mount jurisdictional challenges to C's claims (all of which in the event failed (see ***Canada Trust Co. v. Stolzenberg*** [2002] A.C. 1, HL). In addition, the judge ruled that to set aside the orders in the face of the appellants' deliberate non-compliance would not be in the interests of justice ([2003] EWHC 13 (Ch), February 3, 2003, unrep. (Etherton J.)).

On appeals by D3 and D4, the Court of Appeal (Ward, Arden & Aldous L.JJ.) refused them permission to appeal against the judge's holding that C's claim had a real prospect of success, and dismissed their appeals against the judge's exercise of discretion under CPR, r.3.9.

The Court reasoned as follows: (1) the judge was correct in holding that, in order to set aside the orders as sought by D3 and D4, he had to be satisfied (a) by analogy with r.13.3(1), that they had a real prospect of successfully defending the claims, and (b) the requirements of r.3.9 had to be considered and the power to grant relief from procedural sanctions under that rule had to be exercised in accordance with the overriding objective; (2) the judge did not (a) attach too great weight to the appellants' conscious decisions not to comply with the orders, or (b) misdirect himself as regards the prospects for a fair trial; (3) the fact that a fair trial is possible does not mean that relief from sanctions should follow; (4) the fact that the appellants were pursuing jurisdictional challenges to C's claim was relevant to para. (d) of r.3.9(1) (good explanation for failure to comply), but not to para. (b) (prompt application for relief), as those challenges did not prevent them from seeking relief from sanctions promptly; (5) the delay in applying for relief ran from the date when the sanctions were imposed, and not from the date when their jurisdictional challenges were exhausted; (6) it could not be said that the judge was plainly wrong in his assessment of the weight to be given to the various factors referred to in r.3.9(1).

CPR UPDATE

AMENDMENTS TO PRACTICE DIRECTION (APPEALS)

Amendments (coming into effect on June 30, 2004) have been made to Section I of Practice Direction (Appeals) (hereinafter "PD52"). They were noted in Issue 06/04 of ***CP News***, and the case of ***Scribes West Ltd v. Relsa Anstalt*** [2004] EWCA Civ 835; June 29, 2004, CA, unrep., provided the Court of Appeal with an opportunity to explain what has happened.

Some of the very substantial changes made to the directions concerning the preparation and filing of bundles of documents have effect in respect of the practice of all appeal courts, but there are others which apply only to practice in the Court of Appeal. These changes are explained by Brooke L.J. in paras 7 to 19 (the appeal bundle), para. 20 (the core bundle in the Court of Appeal) and para. 31 (papers for the Court of Appeal) of his judgment. Attention is drawn to the sanctions that may be imposed for non-compliance with these new directions. His lordship also explains (para. 32) that the provisions of Practice Note (Court of Appeal: Listing) [2001] 1 W.L.R. 479, CA, dealing with the short warned list and the special fixtures list, have been brought into PD52 by the amendment of para. 15.9 and the insertion of para. 15.9A.

Other changes to PD52 are explained below. In some instances the explanations given by his Brooke L.J. are summarised, and in others they are elaborated.

Grounds of appeal

Paras (a) and (b) of CPR, r.52.11(3) state that an appeal court will allow an appeal where the decision of the lower court was (a) wrong, or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court. Para. 3.2 of PD52, which states that the grounds of appeal should set out clearly the reasons why para. (a) or para. (b) is said to apply, now states that the grounds of appeal, in addition, should "specify, in respect of each ground, whether the ground raises an appeal on a point of law or is an appeal against a finding of fact" (a distinction that is important when the jurisdiction of the relevant appeal court is limited to an appeal on a point of law).

Permission to appeal

CPR, r.52.3 sets out the circumstances when permission to appeal is required. Directions as to permission hearings are found in PD52 para. 4.14A *et seq.* It is now provided (in para. 4.14A) that, where an appellant, who is represented, makes a request for a decision to be reconsidered at an oral hearing, his advocate must, at least four days before the hearing, inform the court and the respondent in a brief written statement of the points which he proposes to raise at the hearing. In addition, he must set out his reasons why permission should be granted notwithstanding the reasons given for the refusal of permission, and confirm, where applicable, that the requirements of para. 4.17 of PD52 (which relates to appellants funded by the Legal Services Commission) have been complied with.

Heretofore, para. 4.15 has provided that notice of a permission hearing need not be given to the respondent unless the court so directs. For the purpose of achieving consistency of practice, that paragraph now states that notice of a permission hearing will be given to the respondent but he is not required to attend unless the court requests him to do so. There is a consequential revision to para. 4.16, which now provides that an appellant will only be bound to bear the initial costs of providing a copy of the appeal bundle in those cases in which the court requests the respondent's attendance at the permission hearing. No change has been made to paras 4.22 to 4.24 (which contain the regime for deciding whether a respondent is to be allowed any costs in connection with his involvement in such an application).

Skeleton arguments

Provisions as to skeleton arguments are found in paras 5.9 to 5.11 of PD52. Such provisions are also found in ***Practice Direction (Court of Appeal: Citation of Authorities)*** [2001] 1 W.L.R. 1001, CA (hereinafter "the 2001 PD") (see ***Civil Procedure***, Vol.1, para. B4-001). The 2001 PD pre-dates the coming into effect of the CPR, it applies to all civil courts and is not confined in its application to skeleton arguments.

Para. 8.1 of the 2001 PD provides that, in any skeleton argument, and in any appellant's or respondent's notice (see para. 8.2), advocates ***are required to state***, in respect of each authority that they wish to cite, the proposition of law that the authority demonstrates, and the parts of the judgment that support that proposition. If it is sought to cite more than one authority in support of a given proposition, advocates ***must state*** the reason for taking that course. Para. 8.4 says that the two statements required to be made by advocates by para. 8.1 (emphasised above) should not materially add to the length of submissions or of skeleton arguments, but should be sufficient to demonstrate, in the context of the advocate's arguments, the relevance of the authority or authorities to that arguments and that the citation is necessary for a proper presentation of that argument.

Paras. 8.1 and 8.4 of the 2001 PD, insofar as they apply to skeleton arguments, are now brought into para. 5.10 of PD52 "in the hope that they will now be scrupulously observed" (as Brooke L.J. put it). Para.

8.1 is now replicated in sub-paras (3) and (4) of para. 5.10, and para. 8.4 in para. 5.10(5). However, it may be noted that, para. 5.10(5) does not faithfully replicate the effect of para. 8.4. This raises the question whether any change is intended. The point is that, whereas para. 8.4 provides that the two statements required of advocates by para 8.1 should be sufficient to demonstrate, in the context of the advocate's arguments, the relevance of the authority or authorities to that arguments and that the citation is necessary for a proper presentation of that argument, para. 5.10(5) confines that instruction of sufficiency to the second of the two required statements.

Para. 5.10 of PD52 (as now amended) applies to respondents' as well as to appellants' skeleton arguments (see para. 7.8). Practitioners who do not take seriously the provisions of para. 5.10 risk costs. Para 5.10(6) (which is entirely new) provides that the cost of preparing a skeleton argument which (a) does not comply with the requirements set out in para. 5.10, or (b) was not filed within the time limits provided by PD52 (or any further time granted by the court), will not be allowed on assessment except to the extent that the court otherwise directs.

Para. 5.9 of PD52 (to which no change is made) makes provision for the service and lodging of appellants' skeleton arguments. Paras. 7.6 to 7.7B make references to the serving and lodging of respondents' skeleton arguments. Here a small change is made in those cases in which the respondent does not want the appeal court to vary the order the lower court in any way or to uphold the order of the lower court for different or additional reasons. Para. 7.7(2) now provides that if a respondent does not file a respondent's notice for one of these reasons, but simply wants the appeal court to uphold the order of the lower court for the reasons given by the lower court, he may now postpone serving his skeleton argument provided that it is served at least seven days (previously 21 days) before the appeal hearing. (Practitioners should note that in the Court of Appeal appeals may be drawn from the short warned list at very short notice, giving respondents very little time in which to comply with para. 7.7(2).)

In appeals to the Court of Appeal, para. 15.6 of PD52 now requires a respondent to inform the Civil Appeals Office and the appellant in writing within a specified period (depending on whether permission to appeal has been granted) whether he proposes to file a respondent's notice or proposes to rely on the reasons given by the lower court for its decision.

Para 15.11A, also a new provision, prescribes the timetable for supplementary skeleton arguments in the Court of Appeal. The appellant must file any such skeleton at least 14 days before the hearing (para 15.11A(1)), and the respondent must file any such skeleton at least 7 days before the hearing. Para 15.11A(4) imposes a sanction for non-compliance. It states: "At the hearing the court may refuse to hear argument from a party not contained in a skeleton argument filed within the relevant time limit set out in this paragraph."

Bundles of authorities

Para. 15.11 of PD52 (which applies to civil appeals generally) states that, once the parties have been notified of the date fixed for the appeal hearing, the appellant's advocate must, after consultation with his opponent, file a bundle containing photocopies of the authorities upon which each side will reply at the hearing.

Para. 15.11 is now re-cast and given a new heading ("Bundles of authorities"). One substantial change is made. It is now provided in para. 15.11(3) (confirming the concession made in ***Harvey Shopfitters Ltd v. A.D.I. Ltd*** [2003] EWCA Civ 1757; [2004] 2 All E.R. 982, CA) that the bundle of authorities must be filed (a) at least 7 days (formerly 28 days) before the hearing, or (b) where the period of notice of the hearing is less than 7 days, immediately. In the ***Scribes West Ltd*** case Brooke L.J. stated (para. 30) that, if an appeal is listed for hearing at very short notice from the short warned list, the parties must do their best to provide an agreed bundle of authorities as rapidly as possible.

Otherwise, with one exception, the new version of para. 15.11 repeats the former version, with minor variations. The exception is sub-para. (5). It states: "A bundle of authorities must bear a certification by the advocates responsible for arguing the case that the requirements of sub-paragraphs (3) to (5) of paragraph 5.10 have been complied with in respect of each authority included". It was explained above that para. 5.10 relates to the content of appellants' and (by operation of para. 7.8) respondents' skeleton arguments, and that that provision has been revised to incorporate certain parts of the 2001 PD on the citation of authorities. The effect of para. 15.11(5) is to incorporate into PD52 para. 8.3 of the 2001 PD.

Handed down judgments in Court of Appeal

Practice Note (Court of Appeal: Handed Down Judgments) [2002] 1 W.L.R. 344, CA (see ***White Book***, Vol.1, para. B7-001, p.2149) gives directions as to the arrangements that may be made for the handing down of reserved judgments in the Court of Appeal.

The provisions of this Note are now brought into PD52. Para. 1 is replicated in para. 15.12 of PD52, para. 2 in para. 15.13, para. 3 in para. 15.14, and para. 4 in paras 15.15 to 15.18. Para. 5, which states that applications for permission to appeal to the House of Lords may be made on the basis of written submissions, is brought in as para. 15.19, but in amended form so as to provide that the Court may use this procedure whether or not all parties agree.

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