CIVIL PROCEDURE NEWS

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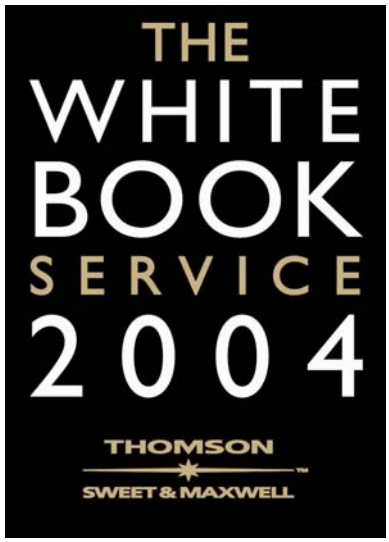

IN BRIEF

Cases

MORGAN EST (SCOTLAND) LTD v. HANSON CONCRETE PRODUCTS [2004] EWHC 1788 (TCC), July 22, 2004, unrep. (Judge Richard Havery Q.C.)

CPR rr. 17.4 & 19.5, Limitation Act 1980 s. 35—company (X) bringing claim for breach of contract—after expiry of relevant limitation period, X applying under r. 19.5(3)(b) to join original contracting party (Y) as co-claimant—D also applying under r. 19.5(3)(a) to substitute as claimant ultimate assignees (Z) of Y's rights—held, granting applications, (1) Y was a proper party, and (2) the naming of X rather than Z in the claim form was a genuine mistake (see ***Civil Procedure 2004*** Vol. 1 paras 17.4.5 & 19.5.1, and Vol. 2 para. 8-86 & 8-87)

AARON v. SHELTON [2004] EWHC 1162 (QB), [2004] 3 All E.R. 561 (Jack J. & assessors)

CPR rr. 1.1, 44.3 & 44.5—in course of trial, claimant (C) consenting to the dismissal of his action—judge ordering C to pay defendant's (D's) costs on an indemnity basis—at detailed assessment, C seeking to raise issue that amounts claimed by D were unreasonable because of certain alleged conduct on D's part—that conduct relevant to issues arising in the trial—costs judge ruling that it would be disproportionate and contrary to the overriding objective to permit C to raise this issue—held, dismissing C's appeal, (1) where a party wishes to raise in relation to costs a matter concerning the conduct of his opposing party (either before the litigation or during it), it is his duty to raise it before the judge making the costs order where appropriate to do so, (2) it is an abuse of the court's process to raise an issue before the costs judge which was not but should have been raised before the judge making the order for payment of costs (see ***Civil Procedure 2004*** Vol. 1 paras 1.4.15, 44.3.10, 44.5.1)

ADAN v. SECURICOR CUSTODIAL SERVICES LTD [2004] EWHC 394 (QB), February 23, 2004, unrep. (Eady J.)

CPR rr.3.1 & 41.2, Supreme Court Act 1981 s.32A—in 1996, claimant (C) bringing personal injuries action following accident whilst being transported in defendant's (D) van—after accident, C developing psychotic symptoms and detained under mental health legislation - order made for damages to be assessed—question whether psychosis could be attributed to the accident to be determined at assessment hearing—before assessment hearing, C applying for order that hearing "be treated as a provisional damages hearing"—held, dismissing application (1) in the interests of bringing finality in litigation, it is the court's function to make a single award for damages, making the best assessment possible of future loss, (2) the court has a wide discretionary power to order any question or issue, whether raised by the pleadings or otherwise, to be tried after the trial (r.3.1(2)), (3) in a personal injury case, it may well be in the interests of justice that a final award of damages should not be made until sufficient time had elapsed for a reliable prognosis to be made of the claimant's medical condition, (4) it is possible to envisage a case where the nature of the damage and the likelihood that it will be incurred is clear, but yet quantification cannot yet be meaningfully assessed, (5) in such a case, it may well serve the interests of all concerned to postpone the quantification until all the necessary evidence becomes available, (6) here, the prospect of any significant improvement in C's mental health, sufficient to effect the assessment of his future loss was largely speculative, (7) the regime for provisional damages is restricted to carefully defined circumstances that did not apply in this case (see ***Civil Procedure 2004***, Vol. 1 paras 3.1.1 & 41.2.1, and Vol. 2 para. 9A-90)

BLACKHAM v. ENTREPOSE UK [2004] EWCA Civ 1109, *The Times* September 28, 2004, CA (Brooke, Buxton & Carnwath L.JJ.)

CPR r.36.20—in personal injury action, claimant (C) not accepting payment in of £40,000 made by defendant (D)—in event, C awarded damages with interest totalling £40,854—but for the accumulation of interest from end of period (December 3, 2001) for acceptance of payment in, the award would not have exceeded £40,000—held, allowing D's appeal from the decision of the costs judge, (1) the damages award had not beaten the payment in within r.36.20(1)(b), (2) C should pay D's costs after December 1, 2001 (see ***Civil Procedure 2004*** Vol. 1 para. 36.20.1)

FIRSTDALE LTD. v. QUINTON [2004] EWHC 1926 (Comm), 154 New L.J. 1256 (2004) (Colman J.)

CPR rr.6.4 & 6.5—self-employed stockbroker (D) working under contract for company (X), a subsidiary of another company (C)—contract terminated and X proposing to bring claim against D—before proceedings commenced, X going into compulsory liquidation—in correspondence with solicitor for liquidator (L), D's solicitors confirming that they had instructions to accept service—subsequently, X assigning to C debt allegedly owed by D under the contract with X—C commencing proceedings against D to recover this

debt—claim form served on D personally by first class post—D applying to set service aside, held, dismissing application, (1) for the purposes of r.6.4, the document to be served was C's claim form, (2) D's solicitors notification to L's solicitors that they were authorised to accept service of a claim form issued by them was not notification to C that they were similarly authorised, consequently (3) in the circumstances the exception to personal service created by r.6.4(2) did not apply (see ***Civil Procedure 2004*** Vol. 1 para. 6.4.1)

■ **FLYNN v. SCOUGALL** [2004] EWCA Civ 873, [2004] 3 All E.R. 609, CA (Brooke, Potter & May L.JJ.)

CPR rr.36.2, 36.6, 36.12 & 52.13—in personal injury claim brought by firefighter (C), defendants (D) admitting liability—D making a Pt 36 payment of £24,500—subsequently, D receiving their expert's medical report—in light of this, D applying under r.36.6(5) for £14,500 to be paid out to them leaving £10,000 in court—application made before 21 day time for acceptance without the court's permission imposed by r.36.11(1)—before the hearing of D's application, and also within the 21 day limit, C giving notice of his acceptance of D's Pt. 36 payment—county court judge, on appeal from district judge, granting D's application and extending time for C to accept (if he chose) the £10,000 remaining in court—single lord justice granting C permission to make second appeal—held, allowing C's appeal (1) D's application did not operate as an automatic stay of the time for acceptance, (2) the court had jurisdiction to grant an application by D made within the 21 day period to withdraw or reduce their Pt 36 payment after C had exercised his unfettered right to accept it, (3) it was for the court then to decide whether D's application should be granted, (4) in exercising his discretion in this respect, the judge gave too little weight to the fact that C had given notice of acceptance, (5) D chose to make the Pt 36 payment before the expert's report had been received, (6) there had been no sufficient change of circumstances to justify granting D's application (see ***Civil Procedure 2004*** Vol. 1 paras 36.6.2 & 52.3.9)

■ **HUMBER BOAT WORKS LTD v. OWNERS OF M.V. "SELBY PARADIGM"** [2004] EWHC 1804 (Admlty), 154 New L.J. 1362 (2004)

CPR rr.1.1, 13.3, 19.2 & 61.9—salvagers (C) bringing claim against vessel owners (D)—C obtaining judgment in default under r.61.9—D's underwriters (X) avoiding policy for non-disclosure—however, in case the policy was subsequently held to be effective, X applying (1) under r.19.2 to be joined as second defendants, and (2) under r.13.3(1) or r.61.9(5) to set aside default judgment against D—held, granting the applications (1) the default judgment was not a bar to the joinder of X, (2) the question was whether D or X had a defence that had a real prospect of success, (3) X had clearly demonstrated that they had such a defence, (4) X were correct to pray in aid the overriding objective, (5) X's decision not to participate in the proceedings that led to the default judgment did not preclude the exercise of the court's discretion to add them as a party under r.19.2, (6) the burden needed to discharge a default judgment obtained when an application to do so is made under r.61.9(5) is not heavier than that required when such application is made under r.13.3 and is not akin to that imposed on an appellant (see ***Civil Procedure 2004*** Vol. 1 paras. 1.3.2, 13.3.1 & 19.2.2, and Vol. 2 paras 2D-57 & 2D-60)

■ **LARRIER v. CHIEF CONSTABLE OF MERSEYSIDE POLICE** [2004] EWCA Civ 246, February 25, 2004, CA, unrep. (Butler-Sloss P., Potter & Mummery L.JJ.)

County Courts Act 1984 s.66—motorist (C) stopped by police (D) for alleged speeding offence—at subsequent proceedings in a magistrates' court, case against C dismissed—C, on ground that his stopping and detention were unlawful, bringing county court claim for unlawful imprisonment and malicious prosecution against D—in course of trial by judge and jury, judge ruling that issues (1) whether C was in fact speeding and (2) whether D had reasonable cause to stop C, should be determined by him—judge (1) finding in favour of D on first issue, (2) deciding that there was no issue of fact to be left to the jury, and, after hearing submissions (3) giving a reasoned judgment dismissing C's claim—held, allowing C's appeal and ordering a new trial (1) in cases of this kind, it is for the judge (a) to decide whether there is sufficient evidence to go to the jury on any particular issue and (b) to adjudicate upon the reasonableness of the actions of the police, however (2) where there is a conflict of evidence between the parties as to a relevant issue of fact, it is for the jury to decide that issue, (3) the only basis for D's plea of justification was that C was speeding, (4) that was a relevant issue of fact which was disputed (see ***Civil Procedure 2004*** Vol. 2, para. 9A-626)

■ **LONGSTAFF INTERNATIONAL LTD v. BAKER & MCKENZIE** [2004] EWHC 1852 (Ch), June 16, 2004, unrep. (Park J.)

CPR rr.25.12 & 25.13(2), Companies Act 1985 s.726(1)—company (C) incorporated in British Virgin Island and managed in Jersey bringing claim against solicitors (D)–C claiming repayment of £750,000 in professional fees, alleging they had been paid by mistake—D's major asset a subsidiary British company (B) owning development land in London valued at £12m—D applying for security for costs—held, granting D's application, (1) a necessary condition for an order for security for costs in these circumstances is whether there is reason to believe that C will be unable to pay D's costs if ordered to do so (r.25.13(2)(c)), (2) the question is not whether C would be able to meet a

costs order eventually, but whether it could do so when an order was made and required to be met, (3) that question involves a consideration, not only of C's net asset balance, but also of the nature and liquidity of those assets, (4) both C and B were substantially illiquid, (5) even if B had large liquid assets, an undertaking by it to the court to meet any liability for D's costs which C fails to meet would not take the case out of r.25.13(2)(c) (see ***Civil Procedure 2004*** Vol. 1, paras 25.13.11 to 25.13.14)

LUMBERMENS MUTUAL CASUALTY COMPANY v. BOVIS LEND LEASE LTD [2004] EWHC 1614 (Comm), 154 New L.J. 1107 (2004) (Colman J.)

CPR rr.1.1 & 30.5, Practice Direction (Commercial Court) para. 4.3, Admiralty and Commercial Courts Guide para. B12, Technology and Construction Court Guide para. 4.4—in building contract dispute, claimant (C) issuing claim in Commercial Court—claim raising (1) an important issue of general application as to circumstances in which a cause of action arises under a liability policy, and (2) several contractual issues of fact and law which, if they stood alone, would make trial in the Commercial Court inappropriate—defendant (D) applying to transfer claim to Technology and Construction Court—held, dismissing application (1) having regard (a) to the overriding objective, (b) case management considerations, and (c) to the nature of the policy issue, it was not inappropriate that the proceedings should remain in the Commercial Court, (2) the policy issue should be tried before the other issues, (3) after the policy issue had been determined it would be open to either C or D to apply for the remaining issues to be transferred to the TCC (see ***Civil Procedure 2004*** Vol. 1, paras. 1.3.2 & 30.5.1, and Vol. 2, paras. 2A-25, 2A-55 & 2C-32)

REED EXECUTIVE PLC. v. REED BUSINESS INFORMATION LTD [2004] EWCA Civ 887, July 14, 2004, CA, unrep. (Auld, Rix & Jacob L.JJ.)

CPR r.1.1, 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 not willing to take part in mediation proposed by C—Court of Appeal allowing D's appeal ([2004] EWCA Civ 159, March 3, 2004, CA, unrep.) with result that C achieving only very limited success overall—parties unable to agree costs—on applications to the Court of Appeal, held (1) in deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including the conduct of the parties (r.44.3(4)), (2) the conduct of the parties may include a party's unreasonable refusal to go to ADR, (3) in theory, all the circumstances might include "without prejudice" negotiations, including such negotiations throwing light on the attitude of a party to ADR, (4) but the rule is that "without prejudice" negotiations (whether partly about ADR or not) cannot be taken into consideration in determining whether there is good cause for depriving a successful litigant of costs, (5) in some cases this may mean that the court will be unable to decide whether one side or the other was unreasonable in refusing mediation, (6) in this case, D's refusal to engage in mediation was not unreasonable—***Walker v. Wilsher*** (1889) 23 Q.B.D. 335, 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. 1.3.8, 1.4.11, 31.3.40, & 44.3.11)

SOMERSET-LEEKE v. KAY [2003] EWHC 1243 (Ch), [2004] 3 All E.R. 406 (Jacob J.)

CPR r.25.13—claimant (C) resident out of jurisdiction, but not in a Brussels or Lugano state—Master refusing defendant's (D) application for order for security for costs—held, dismissing D's appeal, (1) there is no general principle that, unless a claimant in C's position discloses where his assets are located, security for costs will be ordered, (2) there was no evidence that C, by moving countries, had made it more difficult to recover costs against him (see ***Civil Procedure 2004*** Vol. 1 paras 25.13.1, 25.13.3 & 25.13.6)

SPEED INVESTMENTS LTD. v. FORMULA ONE HOLDINGS LTD [2004] EWHC 1772 (Ch), *The Times* September 10, 2004 (Lewison J.)

CPR rr.11, 24.2 & 24.4—claimant (C) bringing claim against several defendants—some (foreign) defendants (D) making application under r.11 disputing court's jurisdiction—C applying for summary judgment—on preliminary issue, held, (1) in general, it is not open to a claimant to seek to obtain summary judgment in the face of a challenge to jurisdiction, (2) consequently, C's application should not be heard at the same time as D's (see ***Civil Procedure 2004*** Vol. 1 paras 1.4.14, 11.1.1, 23.0.9 & 24.4.2)

VODAPHONE LTD. v. G.N.T. HOLDINGS (UK) LTD [2004] EWCA Civ 1242, September 24, 2004, CA, unrep. (Potter L.J.)

CPR rr.3.1(3), 25.15 & 52.9—in June 2003, company (C) serving winding-up petition on another company (D) following D's failure to meet C's demands on a guarantee—in same month, principal assets of D, consisting of shares in German company (a subsidiary of D) (G), transferred by D1 to Swiss company (S)—ultimate holding company an Italian corporation (I)—in March 2004, trial judge giving C judgment for £500,000 in their claim on the guarantee against D and a director—D granted permission to appeal—C applying to single lord justice (1) for security for costs of the appeal, and (2) for payment into court by D of the judgment sum—witness statements filed by D (including one by managing director of I) stating that D and G

now insolvent—in ruling that D should provide security for costs in the sum of £16,400 and should pay half the judgment sum into court, held (1) this was a clear case in which security for costs should be ordered, (2) generally, the remedies of execution and/or bankruptcy or winding-up should be deployed for judgment enforcement purposes, (3) in the absence of very exceptional circumstances, a failure of an unsuccessful defendant to pay a judgment sum following a refusal of a stay of execution is not likely to constitute a "compelling reason" within r.52.9(2), (4) such circumstances existed in this case, as it appeared on the balance of probabilities that steps had been taken to render D judgment proof, (5) there was a real risk that, if the appeal were dismissed, C would be denied the fruits of its judgment (see ***Civil Procedure 2004*** Vol. 1 para. 3.1.5, 25.15.2 & 52.9.4)

Practice Directions

PRACTICE DIRECTION (CIVIL RESTRAINT ORDERS) TSO CPR Update 36, August 2004

supplements CPR r.3.11—sets out (1) circumstances in which court has power to make a civil restraint order (CRO), (2) the requirements and procedures in relation to CROs, (3) the consequences of making a CRO—forms annexed: N19 (Limited civil restraint order), N19A (Extended civil restraint order), N19B (General civil restraint order)—in force October 1, 2004 (see ***Civil Procedure 2004*** Vol. 1 para. 3.10.2)

PRACTICE DIRECTION (PILOT SCHEME FOR DETAILED ASSESSMENT BY THE SUPREME COURT COSTS OFFICE OF COSTS OF CIVIL PROCEEDINGS IN LONDON COUNTY COURTS) TSO CPR Update 36, August 2004

CPR r.47.4 (Venue for detailed assessment proceedings) - applies instead of Practice Direction (Costs) para. 31.1—replaces former practice direction—applies to requests for detailed assessments filed between July 6, 2004, and July 5, 2005—now applies to Croydon as well as to county courts listed in previous practice direction—in force July 6, 2004 (see ***Civil Procedure 2004*** Vol. 1 paras 47.4.1, 47PD.4 & 47BPD.1)

Statutory Instruments

CIVIL PROCEDURE (AMENDMENT NO. 2) RULES 2004 (S.I. 2004 No. 2072)

Civil Procedure Act 1998 s.2—amends rr.2.3, 3.3, 3.4, 3.11, 6.20, 45.10, 52.10, 65.3, and Sched. 2 CCR Ord. 49, r.17—substitutes r.5.4, adds r.23.12 and adds Sect IV to Pt 45—amendments deal with civil restraint orders, supply of documents from court records, fixed percentage increase of success fees in employers liability claims—also makes minor amendments—made in force September 1, and October 1, 2004 (see ***Civil Procedure 2004*** Vol. 1 seriatim)

SUPREME COURT FEES (AMENDMENT) ORDER 2004 (S.I. 2004 No. 2100)

Supreme Court Fees Order 1999 (S.I. 1999 No. 687) art. 5 (Exemptions, reductions and remissions)—amends description of qualifying benefits in art. 5(2)(b) by providing that the child tax credit need not be received by the party seeking exemption from court fees, as long as it is being paid in respect of a claim for child tax credit made jointly by the party and his spouse or partner—also increases the income threshold from £14,213 to £14,600—in force August 31, 2004 [Ed.: similar amendments are made to County Court Fees Order 1999 art. 5 by the County Court Fees (Amendment) Order 2004 (S.I. 2004 No. 2098)] (see ***Civil Procedure 2004*** Vol. 2, paras 10-6 & 10-18)

IN DETAIL

150th Edition

Before the Civil Procedure Rules came into being, the White Book was known as the Supreme Court Practice. Beginning in January 1990, the White Book service included the Supreme Court Practice News. Since 1999, the White Book has been known as Civil Procedure. And with that change the Supreme Court Practice News became the Civil Procedure News. The last issue of SCP News appeared in February, 1999, and the first issue of CP News appeared in the following month.

Every year 10 issues of the SCP News and CP News have appeared, with the exception of 1999 which (for obvious reasons) was a bumper year when 12 issues were published. The result is that this issue of CP News is the 150th. Throughout, the Editor has remained the same. Since 1990 he has become much older and perhaps a little wiser. He would not wish this milestone to be passed without expressing his thanks to the many subscribers to the White Book who over the years have been kind enough to pass on legal intelligence to him and who have given him useful comments on the material appearing in this publication.

Applications totally without merit

In the CPR Update section of this issue of CP News it is explained that, with effect from October 1, 2004, r.3.11 (Power of the court to make civil restraint orders) was added to the CPR. That rule states that a practice direction may set out (a) the circumstances in which the court has the power to make a civil restraint order (CRO) against a party to proceedings, (b) the procedure where a party applies for a CRO against another party, and (c) the consequences of the court making a CRO. Practice Direction (Civil Restraint Orders), issued in TSO CPR Update 36 (August, 2004) is the practice direction supplementing r.3.11. The following forms are annexed to this practice direction: Limited civil restraint order (N19), Extended civil restraint order (N19A), General civil restraint order (N19B).

It is also explained in the Update section that several other related amendments have been made to the CPR by the recent statutory instrument. In particular, new r.23.12 (Dismissal of totally without merit applications) states that, if the court dismisses an application and it considers that the application is totally without merit, (a) the court's order must record that fact, and (b) the court must at the same time consider whether it is appropriate to make a CRO.

Other of the related amendments stipulate certain particular circumstances in which the court should act in a similar way to that required where r.23.12 applies. These circumstances are: (1) where the court strikes out a claimant's statement of case and it considers that the claim is totally without merit (para. (6) added to r.3.4 (Power to strike out a statement of case)), and (2) where an appeal court (a) refuses an application for permission to appeal, (b) strikes out an appellant's notice, or (c) dismisses an appeal, and it considers that the application, the appellant's notice or the appeal is totally without merit (paras (5) and (6) inserted in r.52.10 (appeal court powers)).

In ***Mahajan v. Department of Constitutional Affairs***, [2004] EWCA Civ 96, June 30, 2004, C.A., unrep., Lord Justice Brooke said (para. 46) it is important that there should be an effective way of ensuring that orders made by courts, either to the effect that an application or action has been dismissed as being totally devoid of merit, or that a CRO has been made, are made widely known to other judges and courts who may be concerned with the same litigant.

Mistake as to party

Rules of court in Section I of Pt 15 of the CPR deal with the addition and substitution of parties. The law as to parties has always been difficult and rules of court have never, and never will, come close to providing a complete code. Rule 19.5 contains special provisions about adding or substituting parties after the end of a relevant limitation period. This has always been a particularly difficult subject. Any rules on this matter are bound to be dominated by the law of limitation of actions. And that is a matter controlled by primary legislation, in particular the Limitation Act 1980, and a vast body of case law.

Paragraph (2) of r.19.5 states that the court may add or substitute a party only if (a) the relevant limitation period (was current when the proceedings were started; and (b) the addition or substitution is necessary.

Paragraph (3) states that the addition or substitution of a party is necessary only if the court is satisfied that (a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party, (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant, or (c) the original party has died or had a bankruptcy order made against him and his interest or liability has passed to the new party.

These paragraphs reflect s.35 of the Limitation Act 1980 and the power to make rules of court stated therein.

Limitation problems may arise, not only where it is desired to add or substitute a new party, but also where, in a pending action, it is desired to amend a claim form and statement of case by adding a new claim against an existing party. Again, s.35 and the rule making power therein is relevant. Part 17 of the CPR deals with amendments to claim forms and statements of case and r.17.4 deals specifically with such amendments made after the end of a relevant limitation period.

Paragraph (2) of r.17 states that the court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.

Paragraph (3) of this rule states that the court may allow an amendment to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question.

Paragraph (4) states that the court may allow an amendment to alter the capacity in which a party claims if the new capacity is one which that party had when the proceedings started or has since acquired.

It is obvious that, where it is desired in a pending action to add or substitute a new party in circumstances where it is arguable that a relevant limitation has run, it is necessary to bear in mind, not only r.19.5 and s.35 of the 1985 Act and the case law appended to those provisions, but also r.17.4. The case law stretches back to well before the CPR came into effect, and indeed to before the passing of the Limitation Act 1980.

The relationship between r.17.4 and r.19.5 is not a particularly happy one. It shows up most clearly in those (not uncommon) cases where proceedings have been brought by or against the wrong party and it is not immediately clear whether putting the proceedings on a proper basis is a matter of correcting the mis-description of a party, or adding or substituting a new party.

Difficulties in the relationship between provisions now found in r.17.4 and r.19.5 are long-standing and they are not ones that could have been dealt with when the CPR were drafted for the purpose of implementing Lord Woolf's reforms. So it is a mistake to blame the exercise of drafting the new uniform rules for the problems.

However, since the coming into effect of the CPR, the attitude of the courts to the interpretation of rules of court has become more purposive. Further, the requirement stated in r.1.2 that the court must seek to give effect to the overriding objective when it (a) exercises any power given to it by the rules, or (b) interprets any rule, has been influential. That influence has been felt when the courts have had to apply r.17.4 and r.19.5, even though that exercise is not really one of applying rules of court, but rather one of applying primary legislation.

Both before and after the coming into effect of the CPR, the courts have shown a desire to be less restrictive when a party applies to add or substitute a new party in circumstances where it is arguable that a relevant limitation period has run. One example is the recent decision of the Court of Appeal in ***Parsons v. George***, [2004] EWCA Civ 912, [2004] 3 All E.R. 633, C.A. That case was decided on July 13, 2004, and was outlined in the "In Brief" section of the July 2004 issue of the CP News.

Parsons v. George was applied by Judge Richard Havery Q.C., in his decision in ***Morgan Est (Scotland) Ltd. v. Hanson Concrete Products Ltd***, [2004] EWHC 1778 (TCC), July 22, 2004, unrep. In this case the facts were that a claim for breach of contract was brought be a company known as X Co against another company (D Co). The particulars of claim stated that X Co were a contracting party. However, in fact the original parties to the contract were not X Co and D Co, but Y Co and D Co.

After the relevant limitation period had run, X Co applied under r.19.5 to add Y Co as additional claimants on the basis that their claim "could not be properly carried on" unless Y Co was added (r.19.5(3)(b)). There was no serious opposition by the defendants to this application.

X Co also applied under r.19.5 to join yet another company (Z Co) as co-claimants on the basis that this new party "is to be substituted for a party who was named in the claim form in mistake for the new party" (r.19.5(3)(a)). It was contended that X Co. had made a mistake in not understanding that, as a result of a transfer of assets, Z Co. and not they were the ultimate assignees of the rights under the contract originally enjoyed by Y Co. The defendants (D Co) objected to this application.

After a careful account of the facts and an instructive review of the relevant law, Judge Havery Q.C. granted the application. The judge explained that r.19.5 must be interpreted in the light of s.35(6) of the 1980 Act, and held that the mistake made by X Co was one of a kind contemplated by r.19.5(3)(a).

CPR UPDATE

AMENDMENTS TO RULES

A number of changes to rules in the CPR have been brought about by the Civil Procedure (Amendment No. 2) Rules 2004 (S.I. 2004 No. 2072).
These amendments took effect on October 1, 2004, with the exception of the amendments to r. 65.3, which took effect on September 1, 2004.

References are to paragraphs and pages in ***Civil Procedure 2004***.

para. 2.3, p.39

In para. (1) of r.2.3, after the definition of "child" insert:
"'civil restraint order" means an order restraining a party—
(a) from making any further applications in current proceedings (a limited civil restraint order);
(b) from issuing any further applications or making certain applications in specified courts (an extended civil restraint order); or
(c) from issuing any claim or making any application in specified courts (a general civil restraint order)."

para. 3.3, p.85

After para. (6) of r.3.3, insert:
"(7) If the court of its own initiative strikes out a statement of case or dismisses an application, and it considers that the claim or application is totally without merit—
(a) the court's order must record that facts; and
(b) the court must at the same time consider whether it is appropriate to make a civil restraint order."

para. 3.4, p.86

After para. (5) of r.3.4, insert:
"(6) If the court strikes out a claimant's statement of case and it considers that the claim is totally without merit—
(a) the court's order must record that fact, and
(b) the court must at the same time consider whether it is appropriate to make a civil restraint order."

para. 3.10.2, p.99

After this commentary paragraph, insert the following new rule in Pt 3:

"Power of the court to make civil restraint orders
3.11. A practice direction may set out—
(a) the circumstances in which the court has the power to make a civil restraint order against a party to proceedings;
(b) the procedure where a party applies for a civil restraint order against another party; and
(c) the consequences of the court making a civil restraint order."

para. 5.4, p.144

Rule 5.4 is substituted entirely and now reads as follows:

"Supply of documents from court records—general
5.4-(1) A court or court office may keep a publicly accessible register of claims which have been issued out of that court or court office.
(2) Any person who pays the prescribed fee may, during office hours, search any available register of claims.
(The practice direction contains details of available registers.)
(3) A party to proceedings may, unless the court orders otherwise, obtain from the records of the court a copy of—
(a) a statement of case;
(b) a judgment or order given or made in public (whether made at a hearing or without a hearing);
(c) an application notice, other than in relation to—
(i) an application by a solicitor for an order declaring that he has ceased to be the solicitor acting for a party; or
(ii) an application for an order that the identity of a party or witness should not be disclosed;
(d) any written evidence filed in relation to an application, other than a type of application mentioned in sub-paragraph (c)(i) or (ii);
(e) a notice of payment into court;
(f) an appellant's notice or respondent's notice.
(4) A party to proceedings may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party or communication between the court and a party or another person.
(5) Any other person may—
(a) unless the court orders otherwise, obtain from the records of the court a copy of—
(i) a claim form, subject to paragraph (6) and to any order of the court under paragraph (7);
(ii) a judgment or order given or made in public (whether made at a hearing or without a hearing), subject to paragraph (6); and
(b) if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.
(6) A person may obtain a copy of a claim form or a judgment or order under paragraph (5)(a) only if—
(a) where there is one defendant, the defendant has filed an acknowledgment of service or a defence;
(b) where there is more than one defendant, either—
(i) all the defendants have filed an acknowledgment of service or a defence;
(ii) at least one defendant has filed an acknowl-

edgment of service or a defence, and the court gives permission;

(c) the claim has been listed for a hearing; or

(d) judgment has been entered in the claim.

(7) The court may, on the application of a party or of any person identified in the claim form -

(a) restrict the persons or classes of persons who may obtain a copy of the claim form;

(b) order that persons or classes of persons may only obtain a copy of the claim form if it is edited in accordance with the directions of the court; or

(c) make such other order as it thinks fit.

(8) A person wishing to obtain a copy of a document under paragraph (3), (4) or (5) must pay any prescribed fee and—

(a) if the court's permission is required, file an application notice in accordance with Part 23; or

(b) if permission is not required, file a written request for the document.

(9) An application for permission to obtain a copy of a document, or for an order under paragraph (7), may be made without notice, but the court may direct notice to be given to any person who would be affected by its decision.

(10) Paragraphs (3) to (9) of this rule do not apply in relation to any proceedings in respect of which a rule or practice direction makes different provision."

para. 6.20, p.195

In para. (3) of r. 6.20, after "will be served" insert "(otherwise than in reliance on this paragraph".

para. 23.3.11, p.515

After this commentary paragraph, insert the following new rule in Pt 23:

"Dismissal of totally without merit applications

23.12 If the court dismisses an application and it considers that the application is totally without merit—

(a) the court's order must record that fact; and

(b) the court must at the same time consider whether it is appropriate to make a civil restraint order."

para. 45.0.1, p.1130

At to the end of the table of contents for Pt 45 the following:

"IV Fixed Percentage Increase in Employers Liability Claims

45.20 Scope and interpretation para. 45.20

45.21 Percentage increase of solicitors' and counsels' fees para.45.21

45.22 Alternative percentage increase para.45.22"

para. 45.10, p.1141

In para. (2)(b) of r. 45.10, for "body of a prescribed description within the meaning of section 30(1) of the Access to Justice Act 1999" substitute "membership organisation"

After para. (2)(b) of r. 45.10, add the following cross-reference:

"("membership organisation" is defined in rule 43.2(1)(n))"

para. 45.14, p.1143

After r.45,14, insert the following new section in Pt 45:

"IV—FIXED PERCENTAGE INCREASE IN EMPLOYERS LIABILITY CLAIMS

Scope and interpretation

45.20—(1) Subject to paragraph (2), this Section applies where

(a) the dispute is between an employee and his employer arising from a bodily injury sustained by the employee in the course of his employment; and

(b) the claimant has entered into a funding arrangement of a type specified in rule 43.2(1)(k)(i).

(2) This Section does not apply—

(a) where the dispute—

(i) relates to a disease;

(ii) relates to an injury sustained before 1st October 2004; or

(iii) arises from a road traffic accident (as defined in rule 45.7(4)(a)); or

(b) to a claim—

(i) which has been allocated to the small claims track; or

(ii) not allocated to a track, but for which the small claims track is the normal track.

(3) For the purposes of this Section—

(a) "employee" has the meaning given to it by section 2(1) of the Employers' Liability (Compulsory Insurance) Act 1969, and

(b) a reference to "fees" is a reference to fees for work done under a conditional fee agreement or collective conditional fee agreement.

Percentage increase of solicitors' and counsel's fees

45.21 In the cases to which this Section applies, subject to rule 45.22 the percentage increase which is to be allowed in relation to solicitors' and counsel's fees is to be determined in accordance with rules 45.16 and 45.17, subject to the modifications that—

(a) the percentage increase which is to be allowed in relation to solicitors' fees under rule 45.16(b) is—

(i) 27.5% if a membership organisation has undertaken to meet the claimant's liabilities for legal costs in accordance with section 30 of the Access to Justice Act 1999; and

(ii) 25% in any other case; and

(b) the percentage increase which is to be allowed in relation to counsel's fees under rule 45.17(1)(b)(ii), (1)(c)(ii) or (1)(d) is 25%.

("membership organisation" is defined in rule 43.2(1)(n))

Alternative percentage increase

45.22—(1) In the cases to which this Section applies, rule 45.18(2)–(4) applies where—

(a) the percentage increase of solicitors' fees to be allowed in accordance with rule 45.21 is 25% or 27.5%; or

(b) the percentage increase of counsel's fees to be allowed is 25%.

(2) Where the percentage increase of fees is assessed by the court under rule 45.18(4) as applied by paragraph (1) above—

(a) if the percentage increase is assessed as greater than 40% or less than 15%, the percentage increase to be allowed shall be that assessed by the court; and

(b) if the percentage increase is assessed as no greater than 40% and no less than 15%—

(i) the percentage increase to be allowed shall be 25% or 27.5% (as case may be); and

(ii) the costs of the application and assessment shall be paid by the applicant."

para. 52.10, p.1446

After para. (4) of r.52.10, and before the cross-reference at the end of that rule, insert new paras (5) and (6) as follows:

"(5) If the appeal court—

(a) refuses an application for permission to appeal;

(b) strikes out an appellant's notice; or

(c) dismisses an appeal,

and it considers that the application, the appellant's notice or the appeal is totally without merit, the provisions of paragraph (6) must be complied with.

(6) Where paragraph (5) applies—

(a) the court's order must record the fact that it considers the application, the appellant's notice or the appeal to be totally without merit; and

(b) the court must at the same time consider whether it is appropriate to make a civil restraint order."

para. 65.3, First Supplement p.87

CPR Pt 65 (Proceedings Relating to Anti-social Behaviour and Harassment) was added by the Civil Procedure (Amendment) Rules 2004 (S.I. 2004 No. 1306) and is printed in the First Supplement of Civil Procedure 2004. The following amendments have been made to r.65.3 (Applications for an injunction) and took effect on September 1, 2004:

(a) in para. (1), for "section 153A, 153B or 153D", substitute "Chapter III of Part V";

(b) in para. (2)(c), for "affidavit evidence", substitute "a witness statement";

(c) in paras (4)(a), (5) and (6), for "affidavit", substitute "witness statement".

para. cc49.17, pp.2072 to 2073

Paras (1), (4), (6) and (8) of CCR Ord. 49, r.17 were amended by the Civil Procedure (Amendment No. 3) Rules 2000 (S.I. 2000 No. 1317). By the Civil Procedure (Amendment No. 5) Rules 2003 (S.I. 2003 No. 3361) the title of the rule was changed and paras (2), (5) and (7) were amended, and paras (1), (4) and (8) were further amended. Unfortunately, not all of these amendments are accurately reflected in the rule as published in the White Book (the publishers apologise for this error). Paragraphs (4), (6) and (8) are again amended by the recent statutory instrument. Rule 17, with the necessary correction made and the recent amendments inserted, now reads in its entirety as follows:

"Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act 1995 and Disability Rights Commission Act 1999

17.—(1) in this rule—

(a) "the Act of 1975", "the Act of 1976", "the Act of 1995" and "the Act of 1999" mean respectively the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995 and the Disability Rights Commission Act 1999;

(aa) "the Religion or Belief Regulations" means the Employment Equality (Religion or Belief) Regulations 2003 and "the Sexual Orientation Regulations" means the Employment Equality (Sexual Orientation) Regulations 2003;

(b) in relation to proceedings under any of those Acts or Regulations, expressions which are used in the Act or Regulations concerned have the same meanings in this rule as they have in that Act or those Regulations;

(c) in relation to proceedings under the Act of 1976 "court" means a designated county court and "district" means the district assigned to such a court for the purposes of that Act.

(2) A claimant who brings a claim under section 66 of the Act of 1975, section 57 of the Act of 1976 or section 25 of the Act of 1995 shall forthwith give notice to the Commission of the commencement of the proceedings and file a copy of the notice.

(3) CPR Rule 35.15 shall have effect in relation to an assessor who is to be appointed in proceedings under section 66(1) of the Act of 1975.

(4) Proceedings under section 66, 71 or 72 of the Act of 1975, section 57, 62 or 63 of the Act of 1976, regulation 31 of the Religion or Belief Regulations or regulation 31 of the Sexual Orientation Regulations, section 17B or 25 of the Act of 1995 or section 6 of the Act of 1999 may be commenced—

(a) in the court for the district in which the defendant resides or carries on business; or

(b) in the court for the district in which the act or any of the acts in respect of which the proceedings are brought took place.

(5) An appeal under section 68 of the Act of 1975, section 59 of the Act of 1976 or paragraph 10 of Schedule 3 to the Act of 1999 against a requirement of a non-discrimination notice shall be brought in the court for the district in which the acts to which the requirement relates were done.

(6) Where the claimant in any claim alleging discrimination has questioned the defendant under section 74 of the Act of 1975, section 65 of the Act of 1987, regulation 33 of the Religion or Belief Regulations or regulation 33 of the Sexual Orientation Regulations—

(a) either party may make an application to the court in accordance with CPR Part 23 to determine whether the question or any reply is admissible under that section; and

(b) CPR r. 3.4 shall apply to the question and any answer as it applies to any statement of case.

(7) Where in any claim the Commission claims damages for expenses incurred by them in providing the claimant with assistance under section 75 of the Act of 1975, section 66 of the Act of 1976 or section 7 of the Act of 1999—

(a) the Commission shall, within 14 days after the determination of the claim, give notice of the claim to the court and the claimant and thereafter no money paid into court for the benefit of the claimant, so far as it relates to any costs or expenses, shall be paid out except in pursuance of an order of the court; and

(b) the court may order the expenses incurred by the Commission to be assessed whether by summary or detailed procedure as if they were costs payable by the claimant to his own solicitor for work done in connection with the proceedings.

(8) Where an application is made for the removal or modification of any term of a contract to which section 77(2) of the Act of 1975, section 72(2) of the Act of 1976, section 26 of or Schedule 3A to the Act of 1995, paragraph 1(1) or (2) of Schedule 4 to the Religion or Belief Regulations or paragraph 1(1) or (2) of Schedule 4 to the Sexual Orientation Regulations applies, unless in any particular case the court otherwise directs, and the proceedings may be commenced—

(a) in the court for the district in which the respondent or any of the respondents resides or carries on business; or

(b) in the court for the district in which the contract was made."

AMENDMENTS TO PRACTICE DIRECTIONS

In August, 2004, a number of changes to provisions in certain CPR practice directions were published in TSO CPR Update 36. (This Update also included Practice Direction (Civil Restraint Order) supplementing r.3.11; see further "In Detail" section of this issue of CP News.)

With certain exceptions (which are separately indicated below where necessary) these changes come into effect on October 1, 2004.

Paragraph and page reference are to ***Civil Procedure 2004***.

Practice Direction (Striking Out a Statement of Case)

para. 3PD.7, p.102

In sub-para. (3) of para. 7, delete "where the remedy sought, or the grounds advanced, substantially repeat those submitted in support of a previous application which has been refused,"

In sub-para. (4) of para. 7, delete "in any case where (3) does not apply,"

Practice Direction (Forms)

para. 4PD.3, p.109

After reference to form N17 insert:

N19	Limited civil restraint order
N19A	Extended civil restraint order
N19B	General civil restraint order

Practice Direction (Court Documents)

para. 5PD.4, pp.148 to 149

Paragraphs 4.1 to 4.5 of this practice direction are replaced with new paras 4.1 to 4.4 as follows (the heading to the paragraph remains the same):

"4.1 Registers of claims which have been issued are available for inspection at the following offices of the High Court at the Royal Courts of Justice:

(1) the Central Office of the Queen's Bench Division;

(2) Chancery Chambers.

4.2 No registers of claims are at present available for inspection in county courts or in District Registries or other offices of the High Court.

4.3 An application under rule 5.4(4), 5.4(5)(b) or 5.4(6)(b)(ii) for permission to obtain a copy of a document, even if made without notice, must be made under CPR Part 23 and the application notice must identify the document or class of document in respect of which permission is sought and the grounds relied on.

4.4 An application under rule 5.4(7) by a party or a person identified in a claim form must be made—

(i) under CPR Part 23; and

(ii) to a Master or district judge, unless the court directs otherwise."

Practice Direction (Consumer Credit Act Claim)

para. 7BPD.3, p.278

In sub-para. (5) of para. 3.1, for "section 139(a)" substitute "section 139(1)(a)"

Practice Direction (Statements of Truth)

para. 22PD.5, p.498

In para 5, for "paragraph 27" substitute "paragraph 28"

Practice Direction (Written Statements)

para. 32PD.28, p.799

In para. 28.3, for "paragraph 27.2(1)" substitute "paragraph 27.2(1)"

Practice Direction (Miscellaneous Provisions About Payments Into Court)

para. 37PD.7, p.953

In para. 7.1, for "an application notice" substitute "a witness statement or an affidavit"
In sub-para. (6) of para. 7.1, for "an application notice" substitute "a witness statement or an affidavit"
In para. 7.2, after "witness statement" insert "or affidavit"

para. 37PD.9, p.954

In para. 9.1, for "an application notice" substitute "a witness statement or an affidavit"
In para. 9.2, for "application notice" substitute "witness statement or affidavit"

para. 37PD.11, p.955

In para. 11.2, for "an application notice" substitute "a witness statement or an affidavit"
In para. 11.3, for "application notice" substitute "witness statement or affidavit"
In para. 11.4, for "application notice" substitute "witness statement or affidavit"

Practice Direction (Pilot Scheme for Detailed Assessment by the Supreme Court Costs Office of Costs of Civil Proceedings in London County Courts)

para. 47BPD.1, p.1197

In para. 1, for "between 6th January 2004 and 5th July 2004" substitute "between 6th July 2004 and 5th July 2005" and after "Clerkenwell" insert "Croydon,". These changes came into effect on July 6, 2004.

Practice Direction (Appeals)

para. 52PD.99, First Supplement p.60

For sub-para. (1) of para. 21.5, substitute the following:
"(1) This paragraph applies to appeals under section 25 of the Child Support Act 1991, section 15 of the Social Security Act 1998 and paragraph 9 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 (appeals from the decision of a Commissioner on a question of law)."

para. 52PD.105, First Supplement p.63

At the end of sub-para. (14) of para. 21.10A add:
"Judgments may be sent to the Commission electronically to comp-amicus@cec.eu.int or by post to the European Commission—DG Competition, B-1049, Brussels."

Practice Direction (Anti-Social Behaviour and Harassment)

para. 65PD.1, First Supplement p.95

In para. 1.1, for "under section 153A, 153B or 153D of the 1996 Act" substitute "under section [sic] Chapter III of Part V of the 1996 Act". This amendment came into effect of September 1, 2004.

para. 65PD.13, First Supplement p. 97

After para. 13.1, insert the following paragraphs:

"Application to join a person to the principal proceedings

13.2 Except as provided in paragraph 13.3, an application by a relevant authority under section 1B(3B) of the 1998 Act to join a person to the principal proceedings may only be made against a person aged 18 or over.

Pilot scheme: application to join a child to the principal proceedings

13.3 (1) A pilot scheme shall operate from 1st October 2004 to 31st March 2006 in the county courts specified below, under which a relevant authority may—

(a) apply under section 1B(3B) of the 1998 Act to join a child to the principal proceedings; and

(b) if that child is so joined, apply for an order under section 1B(4) of the 1998 Act against him.

(2) In this paragraph, "child" means a person aged under 18.

(3) The county courts in which the pilot scheme shall operate are Bristol, Central London, Clerkenwell, Dewsbury, Huddersfield, Leicester, Manchester, Oxford, Tameside, Wigan and Wrexham.

(4) Attention is drawn to the provisions of Part 21 and its practice direction: in particular as to the requirement for a child to have a litigation friend unless the court makes an order under rule 21.2(3), and as to the procedure for appointment of a litigation friend. The Official Solicitor may be invited to act as litigation friend where there is no other willing and suitable person.

(5) Rule 21.3(2)(b) shall not apply to an application under the pilot scheme, and sub-paragraph (6) shall apply instead.

(6) A relevant authority may not, without the permission of the court, take any step in an application to join a child to the principal proceedings, except—

(a) filing and serving its application notice; and

(b) applying for the appointment of a litigation friend under rule 21.6,

unless the child has a litigation friend."

Practice Direction (Competition Law etc.)

para.B10-006, p.130

At the end of para. 6 add:
"Judgments may be sent to the Commission electronically to comp-amicus@cec.eu.int or by post to the European Commission—DG Competition, B-1049, Brussels."

EDITOR: **Professor I. R. Scott**, University of Birmingham.
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