CIVIL PROCEDURE NEWS

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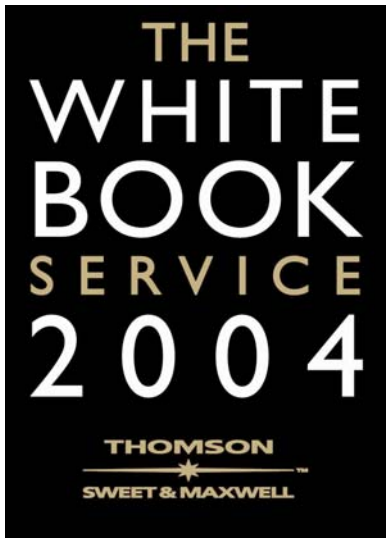
- Late application to adduce expert evidence
- Charging order in foreign currency
- Recent cases



IN BRIEF

Cases

■ **CARNEGIE v. GIESSEN** [2005] EWCA Civ 191, March 1, 2005, C.A., unrep. (Ward, Dyson & Carnwath L.JJ.)

CPR Pts 40 & 73, Charging Orders Act 1979 ss.1(1) & 3(4), Practice Direction (Judgments : Foreign Currency) [1976] 1 W.L.R. 83, paras 1, 11(a) & 13—Master granting claimant's (C) application, made on April 18, 2002, for order charging defendant's (D) property with US$1.4m liability—at hearing on January 14, 2004, of C's application for an order for sale, Master refusing C's application to amend charging order to state liability in its sterling equivalent as at April 18, 2002—judge dismissing C's appeal—held, dismissing C's further appeal, (1) the practice stated in paras 11(a) and 13 remains in effect, subject to the court's discretion to proceed otherwise (para. 1), (2) in departing from the normal practice the Master had exercised his discretion correctly in the circumstances of this case—***Miliangos v. George Frank (Textiles) Ltd*** [1976] A.C. 443, ***H.L., Ezekiel v. Orakpo*** [1997] 1 W.L.R. 340, C.A., ref'd to (see Supreme Court Practice 1999 Vol. 2 paras 2A-37, and ***Civil Procedure 2004*** Vol. 1 paras. 40.2.2 & 40BPD.10)

■ **MOY v. PETTMAN SMITH** [2005] UKHL 7, [2005] 1 W.L.R. 581, H.L.

CPR rr.29.9, 32.10 & 35.13—in clinical negligence claim against hospital (H), procedural judge dismissing claimant's (C) late application to adduce further expert evidence—as a consequence, at trial C accepting H's revised offer and settling claim on unfavourable terms—subsequently, C succeeding in professional negligence claim against his solicitors (D1) but failing in claim against his counsel (D2)—Court of Appeal allowing D1's appeal against trial judge's dismissal of their Pt 20 claim for contribution against D2—held, allowing D2's appeal, in not fully spelling out the considerations which led her to advise C not to accept the first offer to settle made by H at trial, D2 was not in breach of her duty to C—observations by both Court of Appeal and House of Lords (to an extent contradictory) on procedural judge's dismissal of C's late application in his clinical negligence claim—***Lownes v. Babcock Power Ltd*** [1998] P.I.Q.R. P253, C.A., ref'd to (see ***Civil Procedure 2004*** Vol. 1 paras 29.9.1, 32.10.2 & 35.13.1)

■ **BAMBER v. EATON** [2004] EWHC 2437 (Ch), [2005] 1 All E.R. 820 (Pumfrey J.)

CPR rr.3.10 & 17.3, Companies Act 1985 s.459(1)—minority shareholder (C) acting in person bringing claim against majority shareholders (D) alleging (amongst other things) unfair prejudice under s.459(1)—claim brought, not by petition, but by claim form—D applying under r.3.4 to strike out claim on grounds that it (1) had no merits, and (2) was irretrievably procedurally flawed—held, granting application on both grounds, (1) C's allegations would not support a properly constituted petition under s.459(1), (2) the requirement in s.459(1) that proceedings should be brought by petition is mandatory and not directory, (3) "error of procedure" in r.3.10 means error in a procedure established by the CPR themselves and does not give the court power to dispense with the requirements of s.459(1), (4) the power to amend a statement of case granted by r.17.3 is not sufficiently wide to permit one form of procedure to be transformed into another (see ***Civil Procedure 2004*** Vol. 1 paras 3.10.2 & 17.3.5)

■ **COMPAGNIE NOGA D'IMPORTATION ET D'EXPORTATION S.A. v. ABACHA** [2004] EWHC 2601 (Comm), November 18, 2004, unrep. (Langley J.)

CPR rr.3.1, 19.2 & 25.13, Companies Act 1985 s.726—Soviet entity (X) contracting to build steel project for Nigerian authority (D1)—payment in part by bills of exchange drawn by X and accepted by D, payable to order of Russian bank—contract providing that rights under it not assignable and bills not negotiable save with consent—Swiss company (C1) purchasing bills—on default, principally on ground that they had acquired an equitable proprietary interest in the bills, C commencing proceedings against D1 and others, including Australian bank (D2) and Russian government, and obtaining freezing order—D2 obtaining order for security for costs against C1 as condition of freezing order—Swiss court approving composition by C1 with its creditors—on the basis that they had assigned their claims to him, shareholder in C1 (C2) applying to be joined as claimant in the claim—D2 opposing application and applying for order for security for costs against C1 and, if he is joined, against C2—held, granting the application without the condition sought by D2, (1) in a case such as this, the claim should only proceed with the equitable assignee as a claimant in it, (2) the submissions by D2 as to the validity and effectiveness of the deed of assignment were not such as to justify refusing C2's application to be joined as a claimant, (3) it was "desirable" within the meaning of r.19.2(2) that C2 should be joined as claimant, (4) a condition that C2 should provide security for costs could not be imposed on C2's joinder because, although such an order may be made against an impecunious company, it cannot be made against a personal claimant under the disguise of a condition imposed on joinder, (5) it was not possible to conclude

that C2's conduct fell under r.25.13(2)(g) so as to enable an order for security to be made under that provision, (6) the circumstances in which it is appropriate to order security under r.3.1(2) are limited and did not apply in this case, (6) where a company and an individual are to be co-claimants, an order for security may remain and be made effective against the company even if no such order may be made against the individual, (7) no further order for security should be made against C2 because it was unlikely that there would be any realistic sanction for its breach—***Keary Developments Ltd v. Tarmac Construction Ltd*** [1995] 3 All E.R. 534, C.A., ***Eurocross Sales Ltd v. Cornhill Insurance Plc*** [1995] 1 W.L.R. 1517, C.A., ***Three Rivers District Council v. Bank of England*** [1996] Q.B. 292, C.A., ***Norglen Ltd v. Reeds Rains Prudential Ltd*** [1999] 2 A.C. 1, H.L., ***Ali v. Hudson*** [2003] EWCA Civ 1793, December 11, 2003, C.A., unrep., ref'd to (see ***Civil Procedure 2004*** Vol. 1 paras 3.1.4, 3.1.5, 19.2.2, 25.13.1 & 25.13.13)

- **GRAY v. GOING PLACES LEISURE TRAVEL LTD [2005] EWCA Civ 189, February 7, 2005, C.A. unrep. (Brooke, Latham & Neuberger L.JJ.)**

CPR r.44.14(1)(b), Supreme Court Act 1951 s.51, Practice Direction (Allocation of Cases to Levels of Judiciary) para. 11.1(d), Practice Direction (Appeals) para. 2A.4, Access to Justice (Destination of Appeals) Order 2000 arts 3(2) & 4—claimant's (C) claim proceeding on multi-track in a county court—after C's public funding certificate discharged and solicitors (S) had ceased to act for her, procedural judge confirming February 4, 2003, as trial date and directing that claim should be struck out unless C lodged bundle of documents by particular date as previously ordered—C not complying with order—C not appearing at trial and circuit judge dismissing claim with costs—defendants (D) making application against S for wasted costs order—application specifically returnable before a district judge—district judge granting application and assessing wasted costs summarily—circuit judge allowing S's appeal—held, dismissing D's appeal, (1) generally, the appropriate court to deal with a wasted costs order is the court that had dealt with the proceedings to which the costs related, (2) in the absence of a specific provision such as r.44.14(1)(b), the district judge would have had no jurisdiction to make a wasted costs order as it was part of the final order disposing of the case, (3) that CPR provision did not apply in this case, but it could apply in circumstances where it would not be appropriate for an application to be made to the judge who heard the trial, (4) the appropriate tribunal for the hearing of S's appeal was the circuit judge and not the Court of Appeal, because (6) the district judge was purporting to be making, not a final order in multi-track proceedings (in which event para. 2A.4 & art. 4 would apply), but an order for costs in the exercise of what he believed to be a free-standing power (and so art. 3(2) applied)—***Aaron v. Shelton*** [2004] EWHC 1162 (QB); [2004] 3 All E.R. 561, ref'd to (see Civil Procedure 2004 Vol. 1 paras 2BPD.11 & 44.14.1, and Vol. 2 paras 9A-266 & 9A-885.1)

- **MLAUZI v. SECRETARY OF STATE FOR THE HOME DEPARTMENT [2005] EWCA Civ 128, *The Times* February 15, 2005, C.A. [T] (Brooke, Latham & Neuberger L.JJ.)**

CPR rr.1.1, 1.3, & 52.5, Practice Direction (Appeals) paras 15.6, 15.1 & 15.11B—asylum seeker (C) appealing to Court of Appeal against decision of Immigration Appeal Tribunal—Monday February 7, 2005, fixed as date for hearing—respondent (D) failing give Civil Appeals Office notice of matters referred to in para. 15.6 until well after time limit fixed by that provision—also, respondent (D) failing to file skeleton argument at least seven days before the hearing as required by para. 15.11B—further, as a consequence of D's lack of cooperation, C failing to file bundle of authorities required by para. 15.11 within time limit set by para. 15.11B—D's failures in these respects in part explained by their wishing to take account of judgment of Court in another case, relevant to the appeal but not handed down until February 1—Court allowing C's appeal on the merits—Brooke L.J. stating (1) r.1.3 obliges the parties to help the court further the overriding objective, which includes the objective of allotting a case an appropriate share of the court's resources, (2) the provisions of the practice direction as to filing of documents must be complied with, (3) they have been drafted in such a way that late documents could in a real emergency be received, (4) in those circumstances, the other side and the Court must be told why there was to be default—***Scribes West Ltd v. Relsa Anstalt (Practice Note)*** [2004] EWCA Civ 835, [2004] 4 All E.R 653, C.A., ***Jeyapragash v. Secretary of State for the Home Department*** [2004] EWCA Civ 1260, [2005] 1 All E.R. 412, C.A., ref'd to (see ***Civil Procedure 2004*** Vol. 1 paras 1.3.7 & 1.3.8, and Supp. 1 paras 52PD.58, 52PD.63 & 52PD.65)

- **MORGAN EST (SCOTLAND) LTD v. HANSON CONCRETE PRODUCTS [2005] EWCA Civ 134, *The Times*, February 28, 2005, C.A. (Jacob & Hooper L.JJ.)**

CPR rr.1.1, 17.4 & 19.5, Limitation Act 1980 s.35—company (B) bringing claim for breach of contract—C one of three companies (A, B & C) in evolving corporate group—after expiry of relevant limitation period, B applying to join original contracting party (A), as co-claimant—B also applying to substitute as co-claimant ultimate assignees (C) of B's rights—judge granting applications ([2004] EWHC 1788 (TCC), July 22, 2004, unrep.)—held, dismissing defendant's (D) appeal, (1) it was clear that B was named in the claim form "in mistake" for A within the meaning of r.19.5(3)(a), (2) the intention was that the claimant should be the person holding the right to sue under the contract, (3) by the substitution of A, D was not prejudiced but merely deprived of an unmeritorious defence arising solely

from their opponent's mistake, (4) as beneficial owners of the legal title to sue vested in A, C could and should be joined as co-claimants, (5) the substitution of A for B could be justified on the basis of the "right description but wrong name" test approved by the Court in post-CPR cases, but (6) the better view is that that test does not set the limits of r.19.5, which should be interpreted in accordance with the overriding objective and without recourse to the former cases on RSC O.20, r.5, which was not intended to implement s.35—***The Sardinia Sulcis*** [1991] 1 Lloyd's Rep. 201, C.A., ***Gregson v. Channel Four Television Corporation***, ***The Times***, August 11, 2000, C.A., ***Horne-Roberts v. SmithKline Beecham*** [2001] EWCA Civ 2006, [2002] 1 W.L.R. 1662, C.A., ***Parsons v. George*** [2004] EWCA Civ 912, [2004] 3 All E.R. 633, C.A., ***Kesslar v. Moore & Tibbits*** [2004] EWCA Civ 1551, November 3, 2004, C.A., unrep., ref'd to [Ed.: see further "In Detail" section of ***CP News*** Issue 01/2005] (see ***Civil Procedure 2004*** Vol. 1 paras 17.4.5 & 19.5.1, and Vol. 2 paras 8-86 & 8-87)

■ **PAINTING v. UNIVERSITY OF OXFORD** [2005] EWCA Civ 161, *The Times*, February 15, 2005, C.A. (Longmore & Maurice Kay L.JJ.)

CPR rr.36.6 & 44.3—claimant (C) bringing claim against employers (D) for personal injuries—judgment on liability entered against D with an agreed deduction of 20 per cent for C's contributory negligence—principal issue arising at assessment hearing was whether C was exaggerating her loss—county court judge assessing damages at £25,300, as against £400,000 sought by C—on matter of costs, judge informed that D had made Pt 36 payment of £10,000, reduced with the permission of the court on February 24, 2004, from £184,000 after D in receipt of video surveillance evidence (with effect that trial date had to be vacated)—judge ordering D to pay all C's costs of the action—held, allowing D's appeal against costs order, (1) in the circumstances, the judge's decision fell outside the generous ambit within which reasonable disagreement is possible, (2) although C beat the payment in, D were the real winners in the litigation as they had won on the central issue that dominated the trial, (3) but for C's exaggeration, the claim would have been settled at an early stage and with modest costs, (4) the fact that C had contested and lost on the issue of exaggeration, and did so without showing any willingness to negotiate or to put forward a counter offer to D's Pt 36 payment, was a matter of some significance, (5) D should pay C's costs down to February 25, 2004, and that C should pay D's costs thereafter—***Islam v. Ali*** [2003] EWCA Civ 612, March 26, 2003, C.A., unrep., ***Molloy v. Shell U.K. Ltd*** [2001] EWCA Civ 1272, July 6, 2001, C.A., unrep., ***Tanfern Ltd v. Cameron-MacDonald (Practice Note)*** [2000] 1 W.L.R. 1311, C.A., ref'd to (see ***Civil Procedure 2004*** Vol. 1 paras 36.6.2 & 44.3.11)

■ **POLANSKI v. CONDE NAST PUBLICATIONS LTD** [2005] UKHL 10, [2005] 1 W.L.R. 637, H.L.

CPR rr.32.1, 32.3, 32.7, 33.2 & 33.4, Practice Direction (Written Evidence) para. 29.1 & Annex 3 Civil Evidence Act 1965 ss.1 & 3—claimant (C), resident in France, bringing claim for libel against publishing company (D)—D pleading justification and matters in mitigation of damages—claim to be tried by judge and jury—C a fugitive from American justice—if found present in England, C at risk of being arrested and extradited—judge granting C's application for VCF order, allowing him to give his evidence at trial through a video link from France—Court of Appeal allowing D's appeal ([2003] EWCA Civ 1573, [2004] 1 W.L.R. 387, C.A.)—held, allowing C's appeal, (1) the administration of justice is not brought into disrepute where a fugitive from justice (a) brings a claim in England, and (b) is allowed the procedural facility of a VCF order, (2) as a general rule, the unwillingness of a such a claimant to come to England is a valid, and could be a sufficient, reason for making a VCF order, (3) the judge was entitled and right to exercise his discretion as he did and his order should be restored—observations on whether, assuming a VCF order was not made, C's written statement could be put before the court as hearsay evidence (see ***Civil Procedure 2004*** Vol. 1, paras 32.3.1, 33.7.1, 33.4.1 & 32PD.33)

■ **STEELE v. MOONEY** [2005] EWCA Civ 96, *The Times*, February 15, 2005, C.A. (May, Tuckey & Dyson L.JJ.)

CPR rr.1.1, 3.10, 7.5(2), 7.6—claimant (C) issuing claim form for clinical negligence claim against several defendants (D)—time for service of claim form fixed by r.7.5(2) expiring on September 6, 2003—on August 13, after expiry of relevant limitation period, C issuing notice for application for extension of time under r.7.6—in terms, this application not seeking extension of period for service of claim form, but for service of "the particulars of claim and supporting documentation"—on August 15, 2003, deputy district judge making order in terms sought—on March 15, 2004, deputy district judge granting C's application to amend order to include extension of period for service of claim form—on ground that C's error was not an "error of procedure" within r.3.10, circuit judge allowing D's appeal—held, allowing C's appeal, (1) r.3.10 does not contain an exhaustive definition of procedural error, (2) a failure to serve a claim form within the period specified by r.7.5(2) is a procedural error, unless the claimant obtains an extension of time under r.7.6, (3) neither r.7.6(2) nor r.7.6(3) precludes relief under r.3.10, (4) the power to grant relief under r.3.10 is discretionary and is to be exercised in accordance with the overriding objective—***Elmes v. Hygrade Food Products plc*** [2001] EWCA Civ 121, January 24, 2001, C.A., unrep., ***Vinos v. Marks and Spencer plc*** [2001] 3 All E.R. 784, C.A., ***Totty v. Snowden*** [2001] EWCA Civ

1415, [2002] 1 W.L.R. 1384, C.A., ***Hashtroodi v. Hancock*** [2004] EWCA Civ 652, [2004] 1 W.L.R. 3206, C.A., ref'd to (see ***Civil Procedure 2004*** Vol. 1 paras 1.3.3, 3.10.1 & 7.6.1)

- **STEVENS v. LEEDER** [2004] EWCA Civ 50, *The Times*, January 14, 2005, C.A. (Jacob & Gage L.JJ.)

CPR rr.2.4 & 29.2, Practice Direction (Allocation of Cases to Level of Judiciary) para. 11.1—man (C) and woman (D) entering into transaction under which C and D became tenants in common of property formerly held solely by D—in county court claim brought by C, proceeding on multi-track, issue arising as to whether transaction should be set aside for undue influence—under para. 11.1(d), with consent of parties designated civil judge conferring jurisdiction on district judge to try claim—district judge giving judgment for C—held, allowing D's appeal, (1) the transaction should be set aside for undue influence, (2) it was inappropriate for this claim to be allocated to a district judge, (3) when requested to exercise his powers under para. 11.1, a designated civil judge (a) should consider carefully the nature of the case and the skills and experience of the district judge, and (b) should not be influenced by the consideration that there may be compensation to be paid to the parties if a fixed trial date cannot otherwise be complied with [Ed.: this claim was tried before the phrase "the consent of the parties" was removed from para. 11.1(d) with effect from June 30, 2004] (see ***Civil Procedure 2004*** Vol. 1 paras 2.4.1 & 2BPD.11)

- **UPHILL v. B.R.B. (RESIDUARY) LTD** [2005] EWCA Civ 60, *The Times*, February 8, 2005, C.A. (Tuckey & Dyson L.JJ.)

CPR rr.1.2, 6.9, 7.5(2), 7.6 & 52.13(2), Practice Direction (Citation of Authorities) [2001] 1 W.L.R. 1001, para. 6.1—widow and administratrix (C) bringing fatal accident claim for husband's death from mesothelioma—claim form issued on August 8 and limitation period expiring on August 14, 2002—claim form not served within 4 month period prescribed by r.7.5(2)—on November 25, 2002, without notice district judge granting C extension of time to April 1, 2003, for service under r.7.6—on March 11, claim form sent by first class post to loss adjusters (L) acting for defendants (D)—L forwarding claim form to D and D filing acknowledgment of service—on October 7, on D's application to set service aside, district judge holding (1) that the order extending time for service should not be set aside, (2) that service on L was not good service, but ruling (3) that service should be dispensed with retrospectively under r.6.9—on first appeal, circuit judge upholding district judge, and in addition holding that D, by their conduct after receiving the claim form, had waived their right to challenge the validity of service—held, refusing D permission to make second appeal to Court of Appeal (1) such permission may be granted under r.52.13(2)(a) where it would raise "an important point of principle or practice", and that means a point that has not yet been determined by the higher court, (2) the question whether an established point has been properly applied in an individual case does not of itself raise an important point within the meaning of that provision, (3) on this appeal, the relevant points were those applicable (a) to the grant of extension of time for service under r.7.6, and (b) to the making of an order dispensing with service under r.6.9, (4) those points had been established by the Court in recent decisions, (5) permission to make a second appeal may be granted under r.52.13(2)(b) where there is "some other compelling reason" for the Court to hear it, (6) the authoritative decision of the Court on r.7.6 (***Hashtroodi v. Hancock***, [2004] EWCA Civ 652, [2004] 1 W.L.R. 3206, C.A.) was not drawn to the attention of the court below by D, even after the circuit judge had circulated his draft judgment, (7) in the light of that decision, D's appeal against the circuit judge's refusal to set aside the order extending time for service had very strong prospects of success, but (8) in the circumstances, there was no compelling reason to give D permission to appeal under r.53.13(2)(b), further (9) the issue of D's waiver of the their right to challenge the validity of service was clearly resolved against D by r.11, and therefore raised no point of principle or practice and provided no compelling reason for granting permission to appeal—Court giving guidance (approved by Master of Rolls and Vice-President) on meaning of "no compelling reason" in this context—Court directing that this judgment should be released for citation under para. 6.1—***Tanfern Ltd v. Cameron-MacDonald*** [2000] 1 W.L.R. 1311, C.A., ***Brown & Brown v. Fenwick*** [2001] EWCA Civ 1481, Iftakar ***Ahmed v. Stanley A. Coleman and Hill*** [2002] EWCA Civ 935, June 18, 2002, C.A., unrep., ref'd to (see Civil Procedure Vol. 1 paras 2.3.7, 11.1.1, 52.3.8 & 52.13.1)

Statutory Instruments

- **HIGH COURT (DISTRIBUTION OF BUSINESS) ORDER 2004 (S.I. 2004 No. 3418)**

Supreme Court Act s.61(3)(a)(c) & Sched.1 para. 3—by addition to para. 3 of sub-para. (i) the following business, being business not previously assigned to any High Court Division, is assigned to the Family Division: all proceedings under the Gender Recognition Act 2004 ss.6 & 8—coming into force January 21, 2005 (see ***Civil Procedure 2004*** Vol. 2, paras 9A-298 & 9A-471)

IN DETAIL

Charging Order in foreign currency

In ***Carnegie v. Giessen*** [2005] EWCA Civ 191, March 1, 2005, C.A., unrep., the facts were that, on April 18, 2002, for the purpose of enforcing a judgment for US$1.4m, the claimant (C) applied for a charging order over property owned by the defendants (D). On June 19, 2002, the Master made final an interim charging order, charging the security with a liability expressed in dollars (following the judgment in this respect).

C's application for an order for sale of the charged property was heard on January 14, 2004. On this application, C submitted (for the first time) that the judgment debt in the charging order should be restated in its sterling equivalent as at April 18, 2002 (yielding, because of currency fluctuations between then and the hearing of the application, a much higher sterling amount). The Master made an order for sale but refused to amend the charging order. The Master's decision was upheld by the judge ([2004] EWHC 1782 (Ch), July 9, 2004, unrep.), and the Court of Appeal (Ward, Dyson & Carnwath L.JJ.) dismissed C's appeal.

The Court of Appeal said (1) the principle derived from the authorities is that currency conversion should be made as close as practicable to the date of payment, having regard to the realities of enforcement procedures, and (2) there is nothing in s.1(1) or s.3(4) of the Charging Orders Act 1979 which assists the argument that a charging order may not be expressed in a foreign currency. The Court explained that, before the CPR came into effect, it was clear that the practice was that, where a judgment creditor applied for a charging order to enforce a judgment expressed in a foreign currency, the affidavit in support of the application should include a certificate stating the sterling equivalent of the judgment, and that, if granting the application, the court would make an order for the sterling equivalent of the judgment as so verified by the applicant.

The Court said that authority for that practice is found in provisions in Practice Direction (Judgment : Foreign Currency) [1976] 1 W.L.R. 83 (as amended) (hereinafter "the 1976 Practice Direction"), which are unaffected by the CPR. But the Court further explained that that practice, as the 1976 Practice Direction itself indicates, is subject to any order or direction which the court may give or make in a particular case. Therefore, the Master clearly had jurisdiction to make the charging order in the form he did, expressing the charge in a dollar amount. And, assuming that he had jurisdiction to revise his order retrospectively, in the circumstances of this case he was fully entitled in the exercise of his discretion to refuse to do so.

In ***Miliangos v. George Frank (Textiles) Ltd*** [1976] A.C. 443, H.L., on November 5, 1975, the House of Lords held (much to the relief of the Commercial Bar) that the English court has power to give judgment for a sum of money expressed in a foreign currency, upholding the decision of the Court of Appeal in that case (reversing the trial judge). One consequence of this was that provisions in the Rules of the Supreme Court 1965 which required claims and judgments, and writs and orders for their enforcement, to be expressed in sterling were revoked by the Rules of the Supreme Court (Amendment) 1976 (S.I. 1976 No. 337). The revoked provisions (viz., RSC O.1, r.4(3), O.18, r.6(3A), O.42. r.1(4), and O.45, r.1(5)) were not of long standing as they had been added to the RSC, with effect from October 1, 1970, by the Rules of the Supreme Court (Amendment No. 3) 1970 (S.I. 1970 No. 1208) upon the coming into force of the Decimal Currency Act 1969.

Another consequence of the decision of the House of Lords in the ***Miliangos*** case was that, on December 18, 1975, the Senior Master of the Supreme Court, Master Jacob, issued the 1976 Practice Direction, the practice direction referred to by the Court of Appeal in ***Carnegie v. Giessen***. The practice direction stated the practice to be followed "in relation to the making of claims and the enforcement of judgments expressed in a foreign currency", subject to any order or directions which the court may make or give in a particular case, and in terms it applied to the Chancery Division and to the Family Division, as well as to the Queen's Bench Division. It was, as Senior Master's practice directions often were, officially reported as Practice Direction (Judgment : Foreign Currency) [1976] 1 W.L.R. 83, [1976] 1 All E.R. 669.

Shortly after it was made, para. 3 of the 1976 Practice Direction (Pleading claims for debts or liquidated demands in foreign currency) was disapproved by the Court of Appeal in ***Federal Commerce and Navigation Co. Ltd v. Tradax Export S.A.*** [1977] Q.B. 324, C.A., with the result that on December 21, 1976, Master Jacob issued a further practice direction, reported as Practice Direction (Judgment : Foreign Currency) (No. 2) [1977] 1 W.L.R. 197, substituting para. 3 (Pleading claims in a foreign currency) for the purpose of making it clear that what that paragraph said about pleading claims in a foreign currency was not confined to claims made for the payment of a debt or a liquidated demand.

When the relationship between the High Court and the county courts was substantially changed by the Courts and Legal Services Act 1990, para. 6 of the 1976 Practice Direction (Transfer to the county court) was revoked, not by a further practice direction issued by the Senior Master, but by a practice direction issued by the Lord Chief Justice (see Practice Direction (County Court : Transfer of Actions) [1991] 1 W.L.R. 643, [1991] 3 All E.R. 349).

As was explained in successive editions of the ***White Book*** down to the 1999 edition, practice directions issued by the Masters have no statutory authority, and cannot be treated as directions of the court or as rules of court made under statutory authority. For the purpose of bringing some order to the many directions that came into effect over the years, the Masters marshalled the extant directions together (including the 1976 Practice Direction) in a logical order with an index and they were presented as such in editions of the old ***White Book***. (In 1992, the Masters published their practice directions as a separate publication, referred to in Vol. 1, para. 50/9A/17 of the 1999 ***White Book***, but this exercise was not repeated.) In the 1999 edition, the 1976 Practice Direction, as amended in 1977 and 1991, is found in Vol. 2, para. 2A-37 et seq.

When the CPR came into effect, the status of those Masters' Practice Directions, insofar as they had not been expressly reproduced in CPR rules or in supplementing practice directions, was a matter for doubt. The effect of para. 9 of the 1976 Practice Direction was retained by para. 10 of Practice Direction (Judgments and Orders), supplementing CPR Pt 40 (see ***White Book*** para. 40BPD.10). And in the Queen's Bench Guide, as updated upon the coming into effect of the CPR, parts of paras 12 and 13 of the 1976 Practice Direction are found in paras 1.5.4 and 11.6.2 (see ***White Book 2004*** paras 1A-75 and 1A-76). Such partial replication of pre-CPR Masters' Practice Directions casts doubt on the remaining effect of those directions not restated in CPR rules or practice directions or in court guides, insofar as those directions deal with procedural matters that are also covered by the CPR. (There are, of course, many matters of civil procedure and practice that are not expressly dealt with in the CPR.)

Various paragraphs in the 1976 Practice Direction referred to particular provisions in the former RSC and to forms found in Appendix A to the RSC. When the Civil Procedure Rules 1998 came into effect, some of these particular provisions and forms survived in Sched.1 and Pt 4. For example, RSC O.49, r.1, and O.50, r.1, survived there until revoked, when in effect replaced by Pts 72 and 73 inserted in the CPR by the Civil Procedure (Amendment (S.I. 2001 No. 2792). Other particular provisions were replaced by new CPR provisions, but with much the same effect (e.g. RSC O.14, r.3 was subsumed in CPR r.24.2).

The particular paragraphs of the 1976 Practice Direction which were relevant in ***Carnegie v. Giessen*** appeared as paras 11(a) and 13 as published in 1976. As printed in Vol. 2 of the 1999 ***White Book***, those paragraphs appear as paras 11(a) and 14 (see, respectively, Vol. 2, para. 2A-47 and para. 2A-50). (It should be noted that in what is now para. 14 there is an error; "paragraph 12(a) above" should read "paragraph 11(a) above".) The explanation for the re-numbering of para. 13 as para. 14 is that, when the Masters' Practice Directions were re-issued in the ***White Book*** in 1993, a new para. 13 (Garnishee proceedings where the judgment debt is in sterling and the debt to be garnished in foreign currency) was inserted for the purpose of drawing attention to the practice stated by the Court of Appeal in ***Choice Investments Ltd v. Jeromnimon*** [1981] Q.B. 149, C.A. At the same time, para. 16 was added at the end (see para. 2A-52). That paragraph repeats the rule stated in ***In re Lines Brothers*** [1982] 2 W.L.R. 1010, C.A., where the Court held (disagreeing with a dictum of Lord Wilberforce in the Miliangos case) that a company liquidator is required to convert claims in a foreign currency to sterling as at the date of the commencement of the winding-up and not at the date when payment is made.

In ***Carnegie v. Giessen***, Carnwath L.J. said (see paras 21 and 33) it seemed unfortunate that there is no mention of the 1976 Practice Direction in the CPR practice directions. His lordship added that neither that omission, nor the omission of the practice direction from the current edition of the ***White Book***, can by itself be taken as implying revocation. He urged that those responsible for the CPR should review the matter generally in the light of modern conditions and give consideration to the inclusion of the substance of the 1976 Practice Direction (or an updated version) "in the relevant part of the current CPR Practice Directions". He also urged that an appropriate reference to the practice direction should be made in future editions of the ***White Book***.

Late application to adduce expert evidence

In ***Moy v. Pettman Smith*** [2005] UKHL 7, [2005] 1 W.L.R. 581, H.L., solicitors (D1) who had acted for a claimant (C) in a clinical negligence claim against a hospital (H), and counsel (D2) instructed by D1, were sued by C for professional negligence.

The clinical negligence action was commenced in a county court in 1994 and H admitted liability. In July 1996, at about the time when C had returned to full-time work, on C's behalf D1 secured from a surgeon (S) who had carried out remedial surgery on C an expert report that gave a hopeful prognosis. Unfortunately, C's condition deteriorated. Towards the end of 1997, April 6, 1998, was fixed as the date for trial. At the last of a series of pre-trial

reviews, held on November 27, 1997, the court ordered that medical evidence (limited to one expert) was to be exchanged by January 9, 1998 (a date suggested by H), and that in default "no evidence not so disclosed shall be admissible save with the leave of the court".

Unfortunately, by this date D1 had not obtained on C's behalf an up-to-date report from S dealing with the deterioration of his condition. By way of compliance with the order, the report received in July 1996 was served on H. An up-to-date report was eventually received by D1 from S on February 20, 1998. That report contained a worrying prognosis and led D1 and the counsel they had instructed (D2) to the conclusion that C's claim for damages would have to be changed fundamentally to take account of the fact that C may not be able to work full-time.

At a hearing on February 26, of an application made by D1 on C's behalf on January 9, at which D2 appeared, a deputy district judge refused to give C leave to adduce further expert evidence, and refused also to vacate the trial date. On March 6, a circuit judge dismissed C's appeal. C made no further appeal. D2 was of the opinion that, despite the decisions of the deputy district judge and the circuit judge, her prospects of persuading the trial judge to allow the additional medical evidence to be adduced "were better than 50:50".

At the start of the trial (on April 6), H offered to settle the claim for £150,000. D2 advised C on the advantages and disadvantages of accepting that offer. C decided not to accept the offer and the trial commenced with D2 applying to the judge for permission to adduce further medical evidence (in particular the further evidence of S), recognising that if this application was granted the trial would almost certainly have to be adjourned. The application was opposed by H. It became apparent after some little time that D2 was unlikely to succeed in her application. When the judge rose for a time to read the papers, further discussions took place between the parties with the result that D2 advised C to accept H's revised offer of £120,000. C took that advice and the case against H was settled.

C then instructed new solicitors and commenced proceedings in the High Court for professional negligence against D1 and D2. D1 made a Pt 20 claim for contribution against D2. The parties agreed damages in the sum of £210,000 for the under-settlement of C's clinical negligence claim. In relation to C's claim against D1, the trial judge (Judge Geddes) said that D1 ought to have obtained the further reports by the Autumn of 1997 at the latest. The judge also said that, at the pre-trial review held on November 27, 1997, D1 ought to have appreciated that it was by then too late to expect that the further medical report could be obtained by January 9, 1998, and should have made, either at that hearing or shortly thereafter, an application for further time. The judge concluded that, in failing to obtain the evidence in time, D1 had fallen below the standard expected of a reasonably competent firm of solicitors holding themselves out as capable of conducting a claim of this kind. However the judge also held that the advice that D2 had given C on the offer made by H at the start of the trial was not negligent. Accordingly, the judge dismissed C's claim against D2, and also dismissed D1's Pt 20 claim against D2.

D1 did not appeal against the judge's decision as to their liability in negligence. However, they did appeal against his decision dismissing their Pt 20 claim against D2. The Court of Appeal allowed D1's appeal, holding that the advice given by D2 to C was negligent ([2002] EWCA Civ 875, June 15, 2002, C.A., unrep.). But the House of Lords allowed D2's further appeal, and restored the judge's order.

This case will be remembered as an high authority on the liability of barristers in negligence for advice given as to the whether or not offers to settle civil claims made on the steps of the court should be accepted. But the several judgments given in the Court of Appeal, and the principal speech given in the House of Lords by Lord Carswell, are worth noting for the different things that they say about the way in which the courts should approach applications made shortly before trial for permission to adduce further expert evidence. In the Court of Appeal, Latham L.J. said that, given that the deputy district judge and the circuit judge had dismissed C's late application to adduce the further expert evidence, D2's "better than 50:50 assessment" of her prospects of persuading the trial judge to admit the evidence "could be charitably described as sanguine"; and Brooke L.J. was prevented from holding that that assessment in itself was negligent only by the "very unusual circumstances" of the case. On the other hand, Lord Carswell was critical of the decisions of the deputy district judge and the circuit judge. In his Lordship's opinion, there was a strong case to be made to the trial judge in the clinical negligence claim "that it would be artificial and unjust, despite all the errors of omission, to deprive [C] of the opportunity to adduce evidence which would make such a profound difference to the value of his claim" (paras 61 & 62; see also Baroness Hale at para. 27).

Lord Carswell's speech leaves one with the impression that the solicitors (D1) were unlucky to find themselves being held liable in negligence, as they might well have escaped the consequences of their failures had they made an appeal to the Court of Appeal from the circuit judge's dismissal of their application to the deputy district judge (what would now be called a "second" appeal). However, it should be remembered that the decisions criticised by Lord Carswell were made in February and March 1998, and before the CPR came into effect. A lot has happened since then. It may be that the difference between the Court of Appeal and the House of Lords is that the Court confined its attention to the law as it stood in early 1968, whereas the House gave itself the benefit of foresight.

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