CIVIL PROCEDURE NEWS

Issue 04/2005
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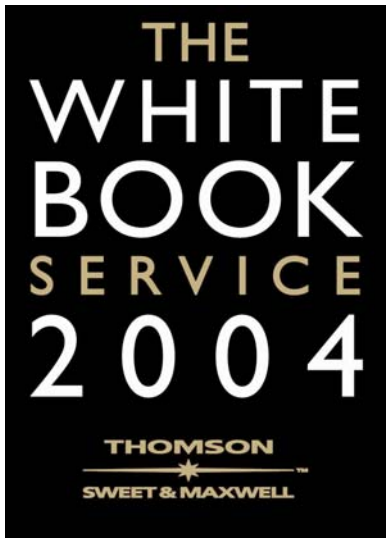

IN BRIEF

Cases

- **CHANTREY VELLACOTT v. THE CONVERGENCE GROUP PLC.** [2005] EWCA Civ 290, March 16, 2005, CA, unrep. (Clarke & Jonathan Parker L.JJ.)

CPR rr.17.4, 52.3(6) & 52.13(2), Limitation Act 1980 s.35—after expiry of limitation period, D applying to re-amend defence and counterclaim adding further allegations of negligence occurring before those already pleaded—Master and judge (on appeal) refusing application—held, allowing appeal, the amendments constituted a new claim arising out of substantially the same facts as a claim already pleaded (see ***Civil Procedure 2004*** Vol. 1 paras 17.4.4, 52.3.6 & 52.3.9, and Vol. 2 para. 8-79)

- **TRIODOS BANK N.V. v. DOBBS** [2005] EWHC 108 (Ch), February 8, 2005, unrep. (Lightman J.)

CPR r.25.1—bank calling in loan to company and (1) appointing receivers (D), and (2) bringing claim against director and majority shareholder (C) on personal guarantee—C counterclaiming and bringing separate claim against D—D giving undertaking not to dispose of shares in company's foreign subsidiary and C giving cross-undertaking in damages—before trial together of both claims, court releasing D from undertaking, but order not promptly perfected—delay aggravated by C's conduct—trial judge dismissing all C's claims and giving D permission to proceed to an inquiry for damages under C's cross-undertaking—at inquiry, held (1) D were entitled to damages for lost opportunity of sale of shares to third party, (2) in the circumstances, D's conduct insofar as it contributed to the delay in perfecting the order (freeing them to sell the shares) and put the sale at risk, did not amount to a failure to mitigate their loss (see ***Civil Procedure 2004*** Vol. 1 para. 26.1.16.1)

- **B v. B** [2005] EWCA Civ 237, March 10, 2005, CA, unrep. (Brooke, Arden & Longmore L.JJ.)

CPR rr.1.1, 1.3, 3.4(2)(b), 3.9 & 51.1, Practice Direction (Transitional Arrangements) para. 19—in July 1997, adult daughter (C) bringing claim against father (D) for non-molestation injunction and (as the law then required on such claim) for damages for abuse when child—C obtaining interim injunction and D giving undertakings—on April 25, 2000, those proceedings (if extant) automatically stayed by operation of para. 19(1)—on May 23, 2003 (one week before expiry of limitation period) C commencing second claim against D for damages for sexual abuse—district judge finding that first claim was extant (having not been withdrawn) and granting D's application to strike out second claim on ground that, in the circumstances, it was an abuse of process—district judge also refusing C's application under para. 19(2) to lift the stay on first claim—circuit judge dismissing C's appeal—C granted permission to make second appeal —Court giving C permission to adduce secondary evidence on question whether damages element of first claim withdrawn by operation of court order in 1998 (the relevant court file having been lost)—held, allowing C's appeal (1) the overriding concern is that C's undetermined claims should be justly tried, (2) the second claim was a claim for damages and was not an abuse because (a) although there was a claim for damages in the first claim, that was a formality and the first claim was effectively disposed of by the undertakings, and (b) C's solicitors were acting reasonably when they concluded that the damages claim in the first claim would be treated as having been withdrawn, (3) in any event, assuming that the second claim was an abuse, applying the r. 3.9 criteria, the automatic stay on the first claim should be lifted—observations on whether, in the circumstances, the duty imposed on solicitors by r.1.3 required that C's solicitors should have revealed to D sooner rather than later their position on the withdrawal of claim issue—***Woodhouse v. Consignia plc***, [2002] EWCA Civ 275, [2002] 1 W.L.R. 2558, CA, ***Buckland v. Palmer***, [1984] 1 W.L.R. 1109, CA, ***Overseas and Commercial Developments Ltd. v. Cox***, [2002] EWCA Civ 635, April 25, 2002, CA, unrep., ref'd to (see ***Civil Procedure 2004*** Vol. 1 paras 1.3.8, 3.4.3, 36.15.1, 51.1.4 & 51PD.19)

- **BEAZER HOMES LTD v. STROUDE** [2005] EWCA Civ 265, March 17, 2005, CA, unrep. (Mummery L.J. & Munby J.)

CPR r.32.1—local, planning and highway authorities, together with developers (C) and land owners (D) entering into agreement pursuant to statute—agreement relating to proposed development—C entering into further agreement with D to purchase their land, but failing to reach agreement on matters of collaboration and contribution—C bringing claim against D in which principal issue was the construction of the statutory agreement—D applying for summary judgment on ground that C's claim had no real prospect of success—judge granting D's application for direction that evidence of proposals and negotiations on the matters on which the parties failed to reach agreement should not be admissible on the construction issue—single lord justice giving C permission to appeal—held, dismissing the appeal, (1) the policy underlying the rule that evidence of negotiations leading to the making of a contract is not admissible for the purpose of construing the contract applied in the circumstances of this case, (2) under r.32.1 the court has power to "control the

evidence by giving directions", however (3) in general, disputes about the admissibility of evidence are best left to be resolved by the judge at the substantive hearing of the application (in this case, the hearing of D's summary judgment application) or at the trial of the action, (4) by pressing the judge for a direction as to the evidence, the parties saved neither time nor money (see ***Civil Procedure 2004*** Vol. 1 para. 32.1.1)

- **BEGUM v. KLARIT** [2005] EWCA Civ 210, *The Times*, March 18, 2005, CA (Brooke, Latham & Neuberger L.JJ.)

CPR rr. 44.3A & 44.5, Practice Direction (Costs) para. 11.8—in property dispute, claimant (C) entering into conditional fee agreement with legal representatives—judge granting C's application for rectification of a declaration of trust—Court of Appeal dismissing defendant's (D) appeal—as to costs, C seeking success fee of 100% for counsel and 70% for solicitors—on summary assessment of costs, held, (1) success on the facts was a near certainty, (2) in the circumstances, the recoverable success fees for counsel and solicitors should be 15% each—Court stating that exaggerated success fees discredited and devalued the arrangements for conditional fee agreements—***Atack v. Lee***, [2004] EWCA Civ 1712, The Times December 28, 2004, CA, ref'd to (see ***Civil Procedure 2004*** Vol. 1 paras 44.3A.2, 44.7.5 & 44PD.5, and Vol. 2 para. 7A-33.1)

- **HAJIGEORGIOU v. VASILIOU** [2005] EWCA Civ 236, *The Times* March 22, 2005, CA (Brooke, Dyson & Gage L.JJ.)

CPR rr.35.4 & 40.12(1), Practice Direction (The Multi-Track) para. 5.3(4)—leaseholder (C) bringing claim for breach of covenant of lease of premises to be used as restaurant—county court judge giving C judgment on issues of liability and ordering damages to be assessed—at case management conference, defendant (D) contending that expert evidence of a kind that could be provided by a particular expert (X) known to him was required—judge directing that both parties should have permission to instruct one expert each in the specialisation of restaurant valuation and profitability—particular experts to be instructed not named in directions—defendant (D) instructing X who inspected premises and reported to D—subsequently, D instructing another expert (Y)—at further case management conference, judge ruling (1) that D needed permission of court to rely on evidence of Y, and (2) that such permission should be granted only on the condition that D disclosed to C the report of X—judge giving D permission to appeal—held, allowing D's appeal, (1) D did not require the court's permission either (a) to instruct Y, or (b) to call Y or to put his report in evidence, because (a) r.35.4 gives the court power to restrict, not the instruction of experts, but their giving of evidence, (b) in this case the directions plainly and unequivocally identified the experts only by their field of expertise, and (c) there was no accidental error or slip in the directions in this respect capable of being corrected under r.40.12(1), (2) where (as was not the case here) permission is given under r.35.4 for a party to rely on the evidence of a named expert, the court's power to give him permission to rely on a second (replacement) expert may be subject to the condition that the report of the first expert is disclosed, (3) such a condition does not abrogate or emasculate legal professional privilege and, for the purpose of discouraging "expert shopping" (which is undesirable), normally should be imposed —***Lane v. Willis***, [1974] 1 W.L.R. 326, CA, ***Beck v. Ministry of Defence***, [2003] EWCA Civ 1043, The Times July 21, 2003, CA, ***Jackson v. Marley Davenport Ltd***, [2004] EWCA Civ 1225, [2004] 1 W.L.R. 2926, CA, ref'd to [Ed: the Court regarded itself as bound by the Beck case where, although the expert was not named in the directions, it was assumed without argument that permission to change experts was required.] (see ***Civil Procedure 2004*** Vol. 1 paras 29.3.2, 35.4.1, 35.10.5 & 40.12.1)

- **LOFTUS (DEC'D), IN RE** [2005] EWHC 406 (Ch), The Times March 28, 2005 (Lawrence Collins J.)

Limitation Act 1980 s.22(a)—claimant (C) bringing claim against administrator (D) of deceased's (X) estate—X dying intestate on August 11, 1990—C's claim commenced on January 20, 2003 (7 months before 12th anniversary of expiry of executor's year, but 12 years after X's death)—D contending that C's claim was statute barred—held, rejecting this contention, (1) the 12-year limitation period fixed by s.22(a) in respect of any claim to the personal estate of a deceased person applied to C's claim, (2) that time limit runs, not from the date of the death, but from the date of the end of the executor's year—***In re Johnson, Sly v. Blake***, (1885) 29 Ch.D. 964, ***In re Diplock's Estate***, [1948] Ch. 465, CA, ref'd to (see ***Civil Procedure 2004*** Vol. 2, para. 8-48)

- **OWUSU v. JACKSON** Case C-281/02, *The Times* March 9, 2005, E.C.J.

CPR rr.11(1)(b) & 68.2, Civil Jurisdiction and Judgments Act 1982 Sched. 1 (Brussels Convention) Art. 2—claimant (C) bringing claim against foreign (D1) and English (D2) defendants—D1 domiciled in non-contracting state (Jamaica)—claim having no connection with a contracting state apart from UK—C claiming damages for personal injuries suffered in Jamaica—on grounds of *forum conveniens*, D1 challenging court's jurisdiction under r.11(1)(b)—Court of Appeal referring jurisdictional issue to ECJ for preliminary ruling and staying proceedings ([2002] EWCA Civ 877, June 19, 2002, CA, unrep.)—ECJ ruling (1) the English court had jurisdiction under art. 2, (2) art. 2 is mandatory and there can be no derogation from it, except in cases expressly provided for by the Convention, consequently (3) the English court could not decline jurisdiction on the ground that Jamaica would be the more appropriate forum for the trial of the action (see ***Civil Procedure 2004*** Vol. 1 para. 6.19.9. and Vol. 2 paras. 5-49 & 9A-170)

- **R. (CORNER HOUSE RESEARCH) v. SECRETARY OF STATE FOR TRADE AND INDUSTRY** [2005] EWCA Civ 192, *The Times* March 7, 2005, CA (Lord Phillips M.R., Brooke & Tuckey L.JJ.)

CPR rr.1.1, 1.2, 3.1(2)(m), 44.3, 44.4(a), 44.5 & 54.4, Supreme Court Act 1981 s.51—public interest group (C) campaigning against corruption in international business, applying for permission to bring claim for judicial review against government department (D)—C seeking review of decision of D relating to consultation process for reform of export guarantee procedures—judge refusing C's application for protective costs order (PCO), principally on ground that he was not satisfied that claim would be discontinued if no order were made—held, allowing C's appeal, (1) in the exercise of its discretion as to costs, the court has jurisdiction in exceptional cases to make a PCO, protecting a claimant in public law proceedings from the risk of an adverse order as to costs, (2) no PCO should be granted unless the court considers that the application for judicial review has a "real prospect of success" and that it is in the public interest to make the order, (3) a PCO may be made provided the court is satisfied (a) the issues raised are of public importance, (b) the public interest requires that those issues should be resolved, (c) the applicant has no private interest in the outcome of the case, (d) having regard to the financial resources of the applicant and respondent, and to the amount of costs that are likely to be involved, it is fair and just to make the order, (e) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing, (4) a PCO may take a number of different forms, depending on what is appropriate and fair in each of the rare cases in which the question may arise, (5) in this case it was appropriate to direct (a) that D be not permitted to recover their costs from C, and (b) that costs recoverable by C from D be capped at a level to be fixed by the senior costs judge—procedure for applying for, and resisting, a PCO explained—Court explaining (1) liberalisation of standing in public law cases, and (2) development of "costs follow event" rule and exceptions thereto—***R. v. Lord Chancellor, Ex p. Child Poverty Action Group***, [1999] 1 W.L.R. 347, ***King v. Telegraph Group Ltd***, [2004] EWCA Civ 613, 154 New L.J. 823 (2004), CA, ref'd to (see ***Civil Procedure 2004*** Vol. 1 paras 3.1.8, 43.2.2, 44.3.13 & 54.16.7, and Vol. 2 para. 9A-265)

- **U. (A CHILD), IN RE** [2005] EWCA Civ 52, February 24, 2005, CA, unrep. (Butler-Sloss P., Thorpe & Laws L.JJ.)

CPR rr.52.6, 52.11(2) & 52.17, Practice Direction (Appeals) Sect. IV, Children Act 1989 s.31—local authority applying for care order in respect of a woman's (D) child—in November 2002, High Court judge making determination under s.31 concerning D's responsibility for acts likely to injure child—following decision of Court of Appeal in ***R. v. Cannings***, [2004] EWCA Crim 1, [2004] 3 W.L.R. 2607, giving guidance as to expert evidence, D applying for permission (1) to appeal out of time (r.52.6), and (2) to adduce evidence not before the judge (r.52.11(2))—Court of Appeal refusing permission ([2004] EWCA Civ 90, [2004] 3 W.L.R. 753, CA)—D then applying under r.52.17 for permission to re-open the Court's determination of that application—held, refusing application (1) the residual jurisdiction to re-open a final determination of an appeal can only properly be invoked where it is demonstrated that the integrity of the proceedings (whether at trial or at the first appeal) had been critically undermined, (2) the jurisdiction may be exercised where a decision was arrived at by a corrupted process, (3) it is conceivable that an application to invoke the jurisdiction might be justified on the basis of fresh evidence and in the absence of some other factor which had corrupted the process, but (4) in those circumstances the injustice that would be perpetrated if the appeal were not re-opened had to be so grave as to overbear the pressing claims of finality—***Taylor v. Lawrence***, [2002] EWCA Civ 90. [2003] Q.B. 528, CA, ***Ladd v. Marshall***, [1954] 1 W.L.R. 1489, CA, ref'd to (see ***Civil Procedure 2004*** Vol. 1 paras 52.11.2, 52.17.1 & 52PD.113)

Practice Direction & Protocol

- **PRACTICE DIRECTION (PROCEEDINGS RELATING TO SOLICITORS) (TSO CPR Update 38 (February 2005))**

supplements CPR Pt 67 (Proceedings Relating to Solicitors), inserted in CPR by the Civil Procedure (Amendment No. 4) Rules 2004 (replacing RSC O.106)—applies to proceedings under r.67.2 and to certain claims under r.67.3 and the Solicitors Act 1974, Pt III—deals with (1) proceedings in the SCCO, (2) jurisdiction and allocation of claims between judiciary, (3) evidence for orders for detailed assessment, (4) drawing up and service of orders—in effect on April 1, 2005

- **PRACTICE DIRECTION (APPLICATIONS FOR STATUTORY REVIEW UNDER SECTION 103A OF THE NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002) (TSO CPR Update 39 (March 2005))**

supplements CPR Pt 54 (Judicial Review and Statutory Review) Sect. III, inserted in CPR by Civil Procedure (Amendment) Rules 2005—deals with (1) addresses for filing applications, (2) access to court orders, and (3) referral to Court of Appeal—in effect on April 4, 2005

- **PRE-ACTION PROTOCOL FOR PERSONAL INJURY CLAIMS (TSO CPR Update 38 (February 2005))**

Practice Direction (Protocols) para. 5.1—revised edition of Pre-Action Protocol for Personal Injury Claims,

first issued in January 1999—follows structure of first edition as amended, but varies in detail in some respects—adds section on rehabilitation and adds the Rehabilitation Code as an annexure—in force April 1, 2005 (see ***Civil Procedure 2004*** Vol. 1 paras C1-005 & C2-001)

Statutory Instruments

CIVIL PROCEDURE (AMENDMENT) RULES 2005 (S.I. 2005 No. 352)

in exercise of powers under various statutes, amend CPR Pt 54 (Judicial Review and Statutory Review)—add to Pt 54 new Sect. III (Applications for Statutory Review Under Section 103A of the Nationality, Immigration and Asylum Act 2002) (rr.54.28 to 54.35) to take account of replacement of immigration adjudicators and the Immigration Appeal Tribunal with a new Asylum and Immigration Tribunal (AIT)—provide rules for appeals from AIT and other applications—make consequential amendments to rr.54.24, 54.25 & 54.26—important transitional provisions contained in r.9—in addition (on a quite separate matter), amend Sched.2 CCR O.49, r.12(3)(b), enabling a patient to be made a respondent to an application under the Mental Health Act 1983 s.29 for an order that the functions of his nearest relative shall be exercisable by some other person—in force April 4, 2005 (see ***Civil Procedure 2004*** Vol. 1 paras 54.24, 54.25, 54.26 & cc49.12)

CIVIL PROCEDURE (AMENDMENT NO. 2) RULES 2005 (S.I. 2005 No. 656)

Civil Procedure Act 1997 s.2, Prevention of Terrorism Act 2005 Sched., paras 3 to 5—amends Civil Procedure Rules 1998—inserts Pt 76 (Proceedings under the Prevention of Terrorism Act 2005 (rr.76.1 to 76.18)—provides procedure where applications made to High Court for control orders under 2005 Act, imposing obligations on individual suspect of terrorist-related activity—expressly or by implication, applies, modifies or disapplies provisions in certain other CPR Parts (e.g. Pts 5, 23, 31, 39 & 52)—disapplies certain paragraphs in Practice Direction (Appeals)—amends r.1.2 (Application by the court of the overriding objective)—in force March 11, 2005 (see ***Civil Procedure 2004*** Vol. 1 paras 1.2 & 2.3.3)

CIVIL PROCEEDINGS FEES (AMENDMENT) ORDER 2005 (S.I. 2005 No. 473)

Courts Act 2003 ss.92 & 108(6), Insolvency Act 1986 ss.414 & 415—amends Civil Proceedings Fees Order 2005 art. 4(2)(b)—also corrects mis-numbering of fees to be taken listed in Sched. 1—in force March 6, 2005 (see ***Civil Procedure 2004*** Vol. 2 paras 10-1 & 10-13)

COURTS ACT 2003 (TRANSITIONAL PROVISIONS, SAVINGS AND CONSEQUENTIAL PROVISIONS) ORDER 2005 (S.I. 2005 No. 911)

CPR Pt 41, Sect. II, Damages Act 1996 s.2—damages for future pecuniary loss in respect of personal injury—jurisdiction to order such damages and, with the consent of the parties, other damages for personal injury, in form of periodical payments—this Order provides that these powers shall be exercisable in proceedings whenever begun—in force April 1, 2005

DAMAGES (GOVERNMENT AND HEALTH SERVICE BODIES) ORDER 2005 (S.I. 2005 No. 474)

CPR r.41.9, Practice Direction (Periodical Payments under the Damages Act 1996) para. 3, Damages Act 1996 ss.2 & 2A—damages for future pecuniary loss in respect of personal injury—periodical payments for such damages awarded where continuity of payment reasonably secure (s.2(3), r.41.9 & para. 3)—payment reasonably secure where to be made by designated government or health service body (ss.2(4)(c) & 2A(2))—this statutory instrument designates such bodies—in force April 1, 2005

DAMAGES (VARIATION OF PERIODICAL PAYMENTS) ORDER 2005 (S.I. 2005 No. 841)

CPR Pt 41, Sect. II, Practice Direction (Periodical Payments under the Damages Act 1996) para. 5, Damages Act 1996 s.2B—damages for future pecuniary loss in respect of personal injury—order or agreement for payment by periodical payments—circumstances specified by Order made by Lord Chancellor under s.2B in which variable orders or agreements may be varied—circumstances specified similar to those which apply to awards of provisional damages—procedure for applying to court for permission to apply for variation—application of CPR to applications under this Order—in force April 1, 2005

HIGH COURT AND COUNTY COURTS JURISDICTION (AMENDMENT) ORDER 2005 (S.I. 2005 No. 587)

CPR Pt 63, Courts and Legal Services Act 1990 s.1—amends High Court and County Courts Jurisdiction Order 1991, Trade Marks Act 1994 ss.75 & 76, Patents County Court (Designation and Jurisdiction) Order 1994 art. 3—extends jurisdiction of a patents county court to hear trade mark matters under the 1994 Act—confers similar jurisdiction on the county courts at Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester, and Newcastle upon Tyne—in force April 1, 2005 (see ***Civil Procedure 2004*** Vol. 2 paras 2F-8 & 9B-140)

IN DETAIL

Periodical payments

In Issue 01/2005 of the CP News the amendments to the CPR made by the Civil Procedure (Amendment No. 3) Rules 2004 were noted. By that statutory instrument, Sect. II was inserted in CPR Pt 41 to make provision about the exercise of the court's jurisdiction under the Damages Act 1996 s.2 (as amended the Courts Act 2003) to order periodical payments where an award of damages for pecuniary loss is made in a personal injury action. In addition, Pt 36 was amended to ensure that the scheme for offers to settle and payments into court can work in cases in which periodical payments may be awarded.

It was explained in Issue 01/2005 there that those amendments were to come into effect on the day of entry into force of the Courts Act 2003 s.100. That section was brought into force on April 1, 2005, by the Courts Act 2003 (Commencement No. 9, Savings, Consequential and Transitional Provisions) Order 2005. And by the Courts Act 2003 (Transitional Provisions, Savings and Consequential Provisions) Order 2005 it is provided that the powers conferred on the court by subsections (1) and (2) of the 1996 Act (see below) "shall be exercisable in proceedings whenever begun".

By s.100, three new sections are substituted for the Damages Act 1996 s.2; they are s.2 (Periodical payments), s.2A (Periodical payments: supplementary), and s. 2B (Variation of orders and settlements). In addition, by s.101 of the 2003 Act s.4 and s.5 of the 1996 Act are substituted by a new s.4 (Enhanced protection for periodical payments).

Section 2(1) of the 1996 Act states that a court awarding damages for future pecuniary loss in respect of personal injury (a) may order that the damages are wholly or partly to take the form of periodical payments, and (b) shall consider whether to make that order. Section 2(2) of the 1996 Act states that a court in awarding other damages in respect of personal injury may, if the parties consent, order that the damages are wholly or partly to take the form of periodical payments. Section 2(3) states that a court may not make an order for periodical payments unless satisfied that the continuity of payment under the order is reasonably secure (s.2(3)).

Continuity of payment is to be regarded as reasonably secure in certain circumstances, including where the source of payment is a government or health service body designated by the Lord Chancellor (s.2(4)(c) & s.2A(2); see also CPR r.41.9 and Practice Direction (Periodical Payments under the Damages Act 1996) para. 3). The Order designating certain government and health service bodies accordingly was made last month and comes into force on April 1, 2005; see Damages (Government and Health Service Bodies) Order 2005.

The legislation provides that the court may make a variable periodical payments order for damages for future loss and care, anticipating that, in the future, events may justify the order being varied. And the legislation also anticipates that an agreement settling a claim providing for periodical payments for such losses may expressly permit a party to apply to the court for a variation of the agreement. But the circumstances in which the court may make a variable order, and the circumstances in which a variable order or agreement may be varied by the court, are not at large.

Section 2B of the Act provides that the circumstances in which variation may be permitted are to be determined in accordance with an Order made by the Lord Chancellor. That Order is the Damages (Variation of Periodical Payments) Order 2005. Art. 2 of that Order states that, if there is proved or admitted to be a chance that at some definite or indefinite time in the future the claimant will (a) as a result of the act of omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration, or (b) enjoy some significant improvement in his physical or mental condition, where that condition had been adversely affected as a result of that act or omission, the court may, on the application of a party, with the agreement of all the parties, or of its own initiative, provide in an order for periodical payments that it may be varied.

Mitigating undertaking loss

In ***Triodos Bank N.V. v. Dobbs***, [2005] EWHC 108 (Ch), February 8, 2005, unrep., a company entered into an agreement with a contractor to develop a site as a "televillage". The venture was financed by a bank and the company's director and major shareholder gave a personal guarantee. The project ran into difficulties. The bank called in its loan and appointed receivers.

As a result of the appointment of the receivers, two actions were brought. The first was brought by the bank against the director on the personal guarantee. He defended and brought a counterclaim. The bank obtained summary judgment on the claim but the counterclaim proceeded to trial.

The second proceedings were brought by the director (C) and the company (as co-claimants) against the receivers (D) and the bank. In these proceedings C sought to set aside the receivership and also sought other remedies. At a case management conference on July 30, 2002, D gave an undertaking not to dispose of shares in a subsidiary of the

company, incorporated in the USA, and C gave a cross-undertaking in damages. On December 19, 2002, at a hearing of D's application to strike out parts of C's case, the judge directed that D should be released from their undertaking, partly for the reason that by then it was clear that D (a large firm of accountants) would be able to pay any damages likely to be awarded against them should they dispose of the shares at an undervalue. Unfortunately, because of delays for which both D and C and, in addition, the court, were responsible, the order releasing D from their undertaking, though drafted by D by January 15, 2003, was not perfected by the court until May 23, 2003.

C's claim against D, and his counterclaim against the bank in the first action, came on for trial together in March 2004. The judge dismissed all of C's claims (with one minor exception) and gave D permission to proceed to an inquiry for damages under the cross-undertaking given by C. At the inquiry, D contended that by the time the order discharging their undertaking was perfected (May 23, 2003) (freeing them to sell) the shares had become valueless and that, because of the delay in perfecting the order, an opportunity to sell them to a third party for £33,500, which was the only real opportunity to sell them, was lost. The third party was a shareholder in, and a creditor of, the American subsidiary. For a period he had particular reasons for being willing to purchase the shares at a premium, but by the time D were free to sell them he was no longer interested.

At the inquiry D claimed the £35,500 as their losses resulting from their undertaking, and that was what the judge awarded them as damages against C. But it was not plain sailing. Lightman J. explained that the court has a discretion whether to enforce a cross-undertaking in damages and order an inquiry, but can refuse to do so if the party seeking enforcement has behaved inequitably (***F. Hoffman-La Roche & Co. A.G.***, [1975] A.C. 295, H.L.). The issue in this case was whether D could show that they had suffered loss as a result of giving the undertaking and, if so, what that loss was. The legal principles to be applied as to causation, remoteness and quantum are essentially contractual. That being the case, contractual principles regarding mitigation of damages must also apply.

His lordship found that the issues of causation, remoteness and quantum should be resolved in favour of D. The sale to the shares to the third party would have proceeded but for the undertaking. That left the issue of mitigation. D had lost the chance of a sale to the third party shortly after the date on which the judge ordered that they should be discharged from their undertaking. The question which arose was whether D had failed properly to mitigate their loss by taking insufficient steps to secure the most expeditious drawing up of the order for the release of the undertaking (freeing them to sell the shares).

Lightman J. found that, by delaying until January 15, 2003, their production of a draft of the order, D had acted unreasonably. The delay after that was a result, partly of C's lack of cooperation in agreeing the draft order, and partly of "the protracted delay of the court" in perfecting the order. But D's failure in that respect did not amount to a failure to mitigate because, even if they had prepared the draft immediately after the December 19, 2002, hearing, the effect of C's lack of cooperation (and assuming no failure on the part of the court to act promptly) would have been to postpone the perfection of the order to a date after the third party had decided not to purchase the shares. In the circumstances, it could not be said that D had failed to mitigate the losses suffered by their undertaking.

New claim arising out of same facts

In ***Chantrey Vellacott v. The Convergence Group Plc.***, [2005] EWCA Civ 290, March 16, 2005, CA, unrep. accountants (C) brought a claim against a former client company (D) for unpaid fees. In their defence, D alleged that C's work was negligent and worthless, and counterclaimed for substantial damages, including damages for loss of market opportunity. After expiry of the limitation period, D applied to re-amend their defence and counterclaim, adding further allegations of negligence occurring before those already pleaded. At a case management conference, a Master dealt with some of these amendments but did not allow them. On D's appeal, the judge (1) dismissed D's appeal against the Master's order and refused D permission to make second appeal, and (2) refused most, but allowed some, of the pleading amendments applied for by D but not dealt with by Master and refused permission to appeal.

On D's application to the Court of Appeal for permission to appeal the Court (Clarke & Jonathan Parker L.JJ.) held that in the unusual circumstances of this case, although the appeal was in part a second appeal, the test for whether D should be granted permission to appeal was that stated in r.52.3(6) (first appeal would have "real prospect of success"), but, in any event, D could be granted permission to appeal under r.52.13(2)(b) ("some other compelling reason for hearing" a second appeal).

The Court gave D permission to appeal and allowed D's appeal on the merits. The Court held (1) the proposed amendments introduced a "new claim" within the meaning of s.35(2) and r.17.4(2), (2) the question whether or not, within the meaning of s.35(5)(a) and r.17.4(2), a new claim arises out of substantially the same facts as a claim already pleaded is substantially a matter of impression, derived from a reasoned assessment of the relevant factors, (3) although it is not a mere exercise of discretion, an appeal court will be slow to interfere with a decision of a judge on such question, (4) in this case, it was not clear that the Master and the judge had taken all relevant factors into account, (5) when those factors were taken into account it was clear that the new claim arose out of substantially the same facts as the old.

CPR UPDATE

AMENDMENTS TO RULES

Civil Procedure (Amendment No. 2) Rules 2005

Part 76 (Proceedings under the Prevention of Terrorism Act 2005) was inserted in the CPR by the Civil Procedure (Amendment No. 2) Rules 2005 (S.I. 2005 No. 656), and came into effect on March 14, 2005, together with the Prevention of Terrorism Act 2005. The 2005 Act provides for the making of "control orders" imposing obligations on individuals suspected of involvement in terrorist-related activity. The making of a control order may involve an application by the Secretary of State to the High Court and the rules in Pt 76 (rr.76.1 to 76.34) provide the necessary rules of court. A control order may be made in circumstances involving the derogation of Convention rights. Thus, such orders may be "derogating" or "non-derogating". Generally, the provisions in Sect. 2 of Pt 76 are concerned with derogating control orders, and the provisions in Sect. 3 with non-derogating control orders.

In effect, Pt 76 contains a self-contained procedural code for this highly exceptional aspect of the jurisdiction of the High Court. However, the procedure affects other provisions in the CPR, either by adopting them, modifying them, or disapplying them. CPR provisions concerning hearings in public, disclosure, evidence, appeals, and the supply of court documents are among the rules affected in these ways. Rule 76.2 modifies the overriding objective. The rule states:

"(1)When this Part applies, the overriding objective in Part 1, and so far as relevant any other rule, must be read and given effect in a way which is compatible with the duty set out in paragraph (2).

(2)The court must ensure that information is not disclosed contrary to the public interest.

(3)Subject to paragraph (2), the court must satisfy itself that the material available to it enables it properly to determine proceedings."

In the light of r.76.2, r.3 of this statutory instrument amends CPR r.1.2 (Application by court of overriding objective) by an addition at the end. As amended, that rule reads as follows:

"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, subject to rule 76.2."

Civil Procedure (Amendment) Rules 2005

A number of changes to rules in the CPR have been brought about by the Civil Procedure (Amendment) Rules 2005 (S.I. 2005 No. 352), principally for the purpose of adjusting the provisions in CPR Pt 54 (Judicial Review and Statutory Review) to take account of the introduction of a new structure for asylum and immigration appeals, replacing immigration adjudicators and the Immigration Appeal Tribunal (IAT) with a new Asylum and Immigration Tribunal. The statutory basis for the new structure is found in the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and in amendments made by that Act to the Nationality, Immigration and Asylum Act 2002.

These changes came into effect on April 4, 2005, and are achieved by the addition of a further Section to Pt 54, Sect. III (Applications for Statutory Review under Section 103A of the Nationality, Immigration and Asylum Act 2002) (rr.54.28 to 54.35). Section II of Pt 54 (Statutory Review under the Nationality, Immigration and Asylum Act 2002) (rr.54.21 to 54.27) is retained for the time being, but subject to some amendments. The explanation for this apparent duplication is that the provisions in Sect. II (as amended) will continue to apply on and after April 4, 2005, to any pending or new applications under s.101(2) of the 2002 Act for the review of decisions made by the IAT before it ceased to exist. The provisions of the new Sect. III are supplemented by a practice direction (see "New Practice Directions" below).

Arrangements for the transition from the old scheme to the new are found in the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (Commencement No. 5 and Transitional Provisions) Order 2005 (S.I. 2005 No. 565), made under the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 s.48(3)(a). The effect of that Order on the new rules is stated in the Civil Procedure (Amendment) Rules 2005 r.9 (Transitional provision). For the purposes of r.9, definitions for "the 2002 Act", "the 2004 Act" and "adjudicator" are supplied by paras (c) to (e) of r.2. As enacted, the word "Section" appears to have been inadvertently omitted from the beginning of para. (2) of r.9. With that omission rectified, the rule reads as follows:

"9.-(1) This rule applies where by virtue of transitional provisions contained in an order made under section 48(3)(a) of the 2004 Act—

(a) an application to the Immigration Appeal Tribunal for permission to appeal against an adjudicator's decision on an appeal, which was pending immediately before 4th April 2005, continues on and after 4th April 2005 as an application under section 103A of the 2002 Act; or
(b) an application is made under section 103A of

the 2002 Act on or after 4th April 2005 for an order requiring the Asylum and Immigration Tribunal to reconsider an adjudicator's decision.

(2)Section III of Part 54 shall apply to the application, subject to the modifications set out in paragraphs (3) and (4).

(3) In rules 54.28(2()c), 54.29(2) to (4) and 54.33(3) and (5)(a), references to the tribunal shall be construed as references to the adjudicator who decided the appeal.

(4)In rules 54.28(2)(g) and 54.33(4)(b) and (5), the references to the Tribunal's decision on the appeal shall be construed as references to the adjudicator's decision."

The amendments made by the Civil Procedure (Amendment) Rules 2005 (S.I. 2005 No. 352), excluding the addition of Sect. III to Pt 54 (explained above) and the consequential changes the table of contents at the beginning of that Part, are set out below. As indicated above, these amendments came into effect on April 4, 2005.

It may be noted that minor amendments to the CPR, which are not set out below, have also been made by the Courts Act 2003 (Consequential Provisions) (No. 2) Order 2005 (S.I. 2005 No. 617) which came into effect on April 1, 2005.

Paragraph and page numbers refer to ***Civil Procedure 2004***, Vol. 1.

para. 54.24, p.1547

In para. (1) of r.54.24, for "Tribunal" substitute "Asylum and Immigration Tribunal"

para. 54.25, pp.1547 to 1548

For paragraphs (3) to (7) of r.54.25, substitute the following:

"(3) The court may—

(a) affirm the Tribunal's decision to refuse permission to appeal;
(b) reverse the Tribunal's decision to grant permission to appeal; or
(c) order the Asylum and Immigration Tribunal to reconsider the adjudicator's decision on the appeal.

(4) Where the Tribunal refused permission to appeal, the court will order the Asylum and Immigration Tribunal to reconsider the adjudicator's decision on the appeal only if it is satisfied that—

(a) the Tribunal may have made an error of law; and
(b) there is a real possibility that Asylum and Immigration Tribunal would make a different decision from the adjudicator on reconsidering the appeal (which may include making a different direction under section 87 of the 2002 Act.

(5)Where the Tribunal granted permission to appeal, the court will reverse the Tribunal's decision only if it is satisfied that there is no real possibility that the Asylum and Immigration Tribunal, on reconsidering the adjudicator's decision on the appeal, would make a different decision from the adjudicator.

(6)The court's decision shall be final and there shall be no appeal from the decision or renewal of the application."

paras 54.26 & 54.27, p.1548

In para. (1)(c) of r. 54.26, and in r. 54.27, for "Tribunal" substitute "Asylum and Immigration Tribunal"

para. cc49.12, p.2071

In para. (3)(b) of r.12, delete ", not being the patient,"; this amendment enables a patient to be made a respondent to an application under the Mental Health Act 1983 s.29 for an order that the functions of his nearest relative shall be exercisable by some other person.

AMENDMENTS TO PRACTICE DIRECTIONS

By TSO CPR Update 38 (February 2005) a number of changes are made to CPR practice directions. In addition, para. 21.7 of Practice Direction (Appeals) was substituted by TSO CPR Update 39 (March 2005).

These changes are set out below. Paragraph and page numbers refer to ***Civil Procedure 2004***, Vols 1 and 2, and Supp. 2, as indicated. Except in the one instance where it is indicated otherwise, these changes came into effect on April 1, 2005.

para. 8BPD.5, p.307

In Table 1, omit reference to RSC O.106, r.3(2). This is a consequence of the insertion in the CPR of Pt 67 (Proceedings Relating to Solicitors) and the revoking of RSC O.106 (see Civil Procedure (Amendment No. 4) Rules 2004, referred to in Issue 02/2005 of ***CP News***).

para. 23PD.7, p.519

After para. 7 of Practice Directions (Applications) insert cross-reference:

(Paragraph 29 and Annex 3 of Practice Direction 32 provide guidance on the use of video conferencing in the civil courts)

para. 23BPD.4, p.523

With effect from February 27, 2005, in the Annex to Practice Direction (Pilot Scheme for Telephone Hearings), "31st October" is substituted for "27th February" wherever it appears

para. 35PD.6, p.915

After para. 6 of Practice Direction (Experts and Assessors), insert new paragraph as follows:

"Orders

6A. Where an order requires an act to be done by an expert, or otherwise affects an expert, the party instructing him must serve a copy of the order on the expert instructed by him. In the case of a jointly instructed expert, the claimant must serve the order."

para. 45PD.1, p.1144

After para. 24.2 of Practice Direction (Costs) insert new para. 24A as follows:

"Section 24A Claims to which Part 45 does not apply

24A. In a claim to which Part 45 does not apply, no amount shall be entered on the claim form for the charges of the claimant's solicitor, but the words "to be assessed" shall be inserted."

para. 48PD.7, p.1229

In Practice Direction (Costs) para. 56.2 (Procedure on Assessment of Solicitor and Client Costs: Rule 48.10), for the first two sentences substitute the following:

"The procedure for obtaining an order under Part III of the Solicitors Act 1974 is by the alternative procedure for claims under Part 8, as modified by rule 67.3 and the Practice Direction supplementing Part 67."

Second Supplement para. 52PD.99, p.93

In Practice Direction (Appeals) para. 21.5 (Appeals from Social Security or Child Support Commissioners) is replaced. It now reads as follows:

"21.5 (1) This paragraph applies to appeals under the following provisions (appeals from the decision of a Social Security Commissioner or a Child Support Commissioner on a question of law)—

(a) section 6C of the Pensions Appeal Tribunals Act 1943;
(d) section 25 of the Child Support Act 1991;
(c) section 15 of the Social Security Act 1998;
(d) paragraph 9 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000.

(2)The appellant must file the appellant's notice within 6 weeks after the date on which the Commissioner's decision on permission to appeal to the Court of Appeal was given in writing to the appellant.

(3)In an appeal brought under paragraph 9 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 by a party other than the Secretary of State, the appellant must serve the appellant's notice on the Secretary of State in addition to the persons to be served under rule 52.4(3) and in accordance with that rule.

(4)Where, after a Commissioner has given a decision, responsibility for the subject matter of the appeal has been transferred from a government department or the Commissioners of the Inland Revenue or a local authority ("the first body") to another such body ("the second body") and an appeal is brought by a party other than the second body

(a) the second body shall be a respondent in place of the first body and the second body shall notify the court accordingly;
(b) if the appellant serves the appellant's notice or any other document on the first body, or if the court sends to the first body any communication in relation to the appeal, the first body shall forthwith send the notice, document or communication to the second body and the date on which the appellant's notice or other document was served on the first body shall be treated as the date on which it was served on the second body.

(5)This sub-paragraph applies where the appellant is the Secretary of State, the Commissioners of the Inland Revenue or a local authority. The appellant must serve the appellant's notice on any person appointed by the appellant to proceed with a claim, or an appeal arising out of a claim, in addition to the persons to be served under rule 52.4(3) and in accordance with that rule.

(Sub-paragraph (5) applies where the Secretary of State, the Commissioners of the Inland Revenue or a local authority is the appellant and that appellant appoints a person to proceed, in effect, on behalf of a respondent who is not himself able to proceed. An example is regulation 33 of the Social Security (Claims and Payments) Regulations 1987 which authorises the Secretary of State to appoint a person to proceed with the claim of another person who is unable for the time being to act.)"

Second Supplement para. 52PD.101, p.94

In Practice Direction (Appeals) para. 21.7 (Appeals from Immigration Appeals Tribunal) is substituted by paras 21.7 and 21.7A as follows:

"Asylum and Immigration Appeals

21.7 (1) This paragraph applies to appeals—

(a) from the Immigration Appeal Tribunal under section 103 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'); and
(b) from the Asylum and Immigration Tribunal under the following provisions of the 2002 Act—
(i) section 103B (appeal from the Tribunal following reconsideration); and
(ii) section 103E (appeal from the Tribunal sitting as a panel).

(2) The appellant is not required to file an appeal bundle in accordance with paragraph 5.6A of this practice direction, but must file the documents specified in paragraphs 5.6(2)(a) to (f) together with a copy of the Tribunal's determination.

(3) The appellant's notice must be filed at the Court of Appeal within 14 days after the appellant is served with written notice of the decision of the Tribunal to grant or refuse permission to appeal.

(4) The appellant must serve the appellant's notice in accordance with rule 52.4(3) on—

(a) the persons to be served under that rule; and
(b) the Asylum and Immigration Tribunal.

(5) On being served with the appellant's notice, the Asylum and Immigration Tribunal must send to the Court of Appeal copies of the documents which were before the relevant Tribunal when it considered the appeal.

21.7A (1) This paragraph applies to appeals from the Asylum and Immigration Tribunal referred to the Court of Appeal under section 103C of the Nationality, Immigration and Asylum Act 2002.

(2) On making an order referring an appeal to the Court of Appeal, the High Court shall send to the Court of Appeal copies of—

(a) that order and any other order made in relation to the application for reconsideration; and
(b) the application notice, written submissions and other documents filed under rule 54.29

(3) Unless the court directs otherwise, the application notice filed under rule 54.29 shall be treated as the appellant's notice.

(4) The respondent may file a respondent's notice within 14 days after the date on which the respondent is served with the order of the High Court referring the appeal to the Court of Appeal.

(5) The Court of Appeal may give such additional directions as are appropriate."

Second Supplement para. 52PD.113, p.101

After para. 22.6A of Practice Direction (Appeals) insert new para. 22.6B as follows:

"Appeals under section 49 of the Solicitors Act 1974

22.6B (1) This paragraph applies to appeals from the Solicitors Disciplinary Tribunal ('the Tribunal') to the High Court under section 49(1)(b) of the Solicitors Act 1974 ('the Act'). The procedure for appeals to the Master of the Rolls under section 49(1)(a) of the Act is set out in the Master of the Rolls (Appeals and Applications) Regulations 2001.

(2) Appeals to the High Court under section 49(1)(b) of the Act must be brought in the Administrative Court of the Queen's Bench Division.

(3) The appellant's notice—

(a) must state in the heading that the appeal relates to a solicitor, or a solicitor's clerk, and is made under section 49 of the Act;
(b) must be filed within 14 days after the date on which the Tribunal's statement of its findings was filed with the Law Society in accordance with section 48(1) of the Act; and
(c) must be accompanied by copies of the order appealed against and the statement of the Tribunal's findings required by section 48(1) of the Act; and
(d) unless the court orders otherwise, must be served by the appellant on—
(i) every party to the proceedings before the Tribunal; and
(ii) the Law Society.

(4) The court—

(a) may order an appellant to give security for the costs of an appeal only if he was the applicant in the proceedings before the tribunal; and
(b) may not order any other party to give security for costs.

(5) The court may direct the Tribunal to provide it with a written statement of their opinion on the case, or on any question arising in it. If the court gives such a direction, the clerk to the Tribunal must as soon as possible—

(a) file the statement; and
(b) serve a copy on each party to the appeal.

(6) The court may give permission for any person to intervene to be heard in opposition to the appeal.

(7) An appellant may at any time discontinue his appeal by—

serving notice of discontinuance on the clerk to the Tribunal and every other party to the appeal; and

filing a copy of the notice.

(8) Unless the court orders otherwise, an appellant who discontinues is liable for the costs of every other party to the appeal."

para. 57PD.18, p.1616

After para. 18.2 of Practice Direction (Probate) insert

new para. 18.3 as follows:

"Every final order embodying terms of compromise made in proceedings under the Act, whenever made with or without a hearing, must contain a direction that a memorandum of the order shall be endorsed on or permanently annexed to the probate or letters of administration and a copy of the order shall be sent to the Principal Registry of the Family Division with the relevant grant of probate or letters of administration for endorsement."

Vol. 2, para. 2F-100, p.539

In Practice Direction (Patents and Other Intellectual Property Claims) para. 18.1 (Allocation), at end of sub-para. (13) delete "and" and after sub-para. 14 insert:

"(15) registered trade marks; and
(16) Community registered trade marks."

Practice Direction (Patents and Other Intellectual Property Claims) para. 18.3 (which provided that registered trade mark, and Community registered trade mark claims had to be brought in the Chancery Division) omitted.

Vol. 2, para. 2F-102, p.539

In Practice Direction (Patents and Other Intellectual Property Claims) para. 20.1 (Claims under the 1994 Act), for "High Court" where it appears substitute "court"

Vol. 2, para. 2F-106, p.540

Practice Direction (Patents and Other Intellectual Property Claims) para. 24.1 (European Community trade marks) is amended and now reads in its entirety as follows:

"24.1 The Chancery Division of the High Court, a Patents County Court or a county court where there is also a district registry are designated Community trade mark courts under Article 91(1) of Council Regulation (EC) 40/94."

Vol. 2, para. 2F-110, p.541

In sub-paras (1) and (2) of Practice Direction (Patents and Other Intellectual Property Claims) para. 28.1 (Appeals and references from the Comptroller), for "the court" substitute "the Chancery Division of the High Court"

NEW PRACTICE DIRECTIONS

Part 67 (Proceedings Relating to Solicitors) was inserted in the CPR by the Civil Procedure (Amendment No. 4) Rules 2004, and came into effect on April 1, 2005 (see Issue 02/2005 of CP News). Practice Direction (Proceedings Relating to Solicitors), published in TSO CPR Update 38 (February 2005), supplements this Part.

As was explained above, by the Civil Procedure (Amendment) Rules 2005 (S.I. 2005 No. 353), with effect from April 4, 2005, a further Section, Sect. III (Applications for Statutory Review under Section 103A of the Nationality, Immigration and Asylum Act 2002) (rr.54.28 to 54.35), is added to CPR Pt 54 (Judicial Review and Statutory Review). Practice Direction (Applications for Statutory Review under Section 103A of the Nationality, Immigration and Asylum Act 2002), published in TSO CPR Update 39 (March 2005), supplements Sect. III.

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