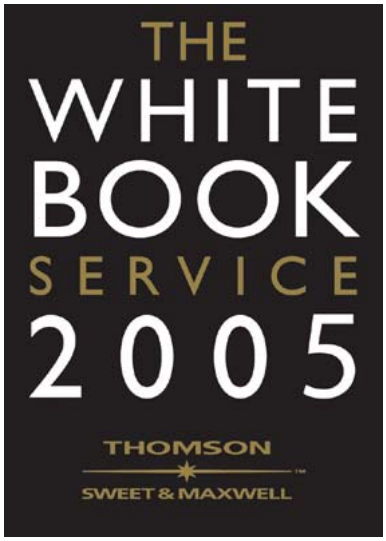
CIVIL PROCEDURE NEWS

Issue 05/2005
May 17, 2005

- Striking out appeal notice
- Hearing dates for applications
- Recent cases



IN BRIEF

Cases

■ **NAVITAIRE INC. v. EASY JET AIRLINE COMPANY LTD** [2004] EWHC 2271 (Ch), October 11, 2004, unrep. (Pumfrey J.)

CPR r.40.7, Chancery Guide Ch.6—judge handing down judgment in heavy copyright and breach of contract claim—before judgment entered, claimants applying to re-open trial—judge directing that hearing of application be fixed for date on which leading counsel was free to appear (see ***Civil Procedure 2005*** Vol. 1 paras 40.2.1 & 40.7.1, and Vol. 2 para. 1-44)

■ **TAIGA v. TAIGA** [2004] EWCA Civ 1399, September 23, 2004, C.A., unrep. (Thorpe & Potter L.JJ.)

C.P.R. rr.1.1(2)(a), 52.3 & 52.9—in divorce proceedings, judge ordering respondent husband (H) to pay maintenance pending suit for petitioner wife (W) and children—before trial of preliminary issues as to jurisdiction, H granted permission to appeal interim maintenance—permission subject to H's paying W's assessed costs of earlier hearings and making provision for W's costs of forthcoming trial—on basis that H had failed to comply with interim maintenance orders, W applying under r.52.9(1)(a) to strike out H's appeal notice—held, granting application, H's persistent breaches of the court's orders constituted "a compelling reason" within r.52.9(2) (see ***Civil Procedure 2005*** Vol. 1 paras 1.3.6, 52.3.12, 52.9.3 & 52.9.4)

■ **BURCHELL v. BULLARD** [2005] EWCA Civ 358, 155 New L.J. 593 (2005), CA (Ward & Rix L.JJ.)

CPR r.44.3—builder (C) bringing county court claim against property owner (D) for payment of £18,000—D making counterclaim for £100,800 for defective work etc—C defending counterclaim and making Pt 20 claim against sub-contractor (X) for contribution—before proceedings commenced, D refusing C's offer of mediation on ground of technical complexity of the dispute - X making offer to settle—following trial in May 2004, judge (1) giving C judgment in full on his claim against D, but awarding him only, 80 on the Pt 20 claim, and (2) giving D judgment for £14,000 on their counterclaim —as to costs, judge declining to make issues-based order and ordering that (1) D should pay C's costs of his claim, and (2) C should pay (a) Ds' costs of their counterclaim, and (b) X's costs of the Pt 20 claim—held, allowing C's appeal, (1) the general rule is that the unsuccessful party should be ordered to pay the costs of the successful party (r.44.3(1)(a)), but (2) in deciding what order to make the court must have regard to all the circumstances, including the conduct of the parties and the extent of their success (r.44.3(4) & (5)), (3) in making his order as to costs, the judge had erred in principle because he had fettered his discretion by not considering the alternatives to an order following the general rule (apart from the issues-based alternative which he properly rejected on complexity grounds), (4) the effect of the judgments on the claim and counterclaim was that D owed C £5,000 and, therefore, D were the unsuccessful party, (5) the costs incurred by the parties totalled £185,000, (6) the starting point was that C was entitled to his costs of the proceedings, that it so say, the costs of the claim and counterclaim taken together, (7) in the circumstances of the case, D should pay C 60% of those costs, and 60% of C's costs liability to X—Court stating that D had acted unreasonably in refusing C's offer of mediation, but the court would not mark its disapproval of D's conduct in this respect by imposing some costs sanction, because at the material time the law on this point had not been clarified—"The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value" (para. 43 per Ward L.J.)—***Medway Oil Storage Co. v. Continental Contractors***, [1929] A.C. 88, HL, ***Halsey v. Milton Keynes N.H.S. Trust***, [2004] EWCA Civ 576, [2004] 1 W.L.R. 3002,CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 1.4.11, 44.3.5, 44.3.13 & 48.15.2)

■ **COMPAGNIE NOGA D'IMPORTATION ET D'EXPORTATION S.A. v. AUSTRALIA & NEW ZEALAND BANKING GROUP** [2005] EWHC 225 (Comm), March 10, 2005, unrep. (Langley J.)

CPR r.17.4(2), Limitation Act 1980 s.35—trading company (C) bringing claim against several defendants including bank (D) to recover bonds and proceeds from their negotiation—C's claim against D including claim for recovery of assets held by it on behalf of other defendants, whom C alleged were fraudulent and had acted in breach of trust—in their defence, D stating that they had acted innocently—after expiry of limitation period, C applying (1) to amend their points of reply to D's defence, putting in issue fact of D's innocence, and (2) to amend claim to add further claim against D alleging that D had knowingly assisted in the dishonest scheme and to recover (amongst other things) fees earned by D from the transactions—held, granting the first application but dismissing the second (1) the proposed amendments to C's

points of reply to D's defence caused no prejudice to D, (2) C's proposed amended claim advanced a wholly new personal claim against D based on dishonesty, and was distinct in principle and amount from any claims advanced in the original claim, (3) as the new claim did not arise out of substantially the same facts as the original claim within the meaning of r.17.4(2) and s.35(5)(a) it should not be permitted, (4) the permitted amendments to C's points of reply introduced new facts into the original claim, in particular the fact of D's innocence, (5) as a result of that permitted amendment, it became arguable that facts in the proposed new claim were substantially the same as facts in issue in the original claim, however (7) as time had run, it would not be a proper exercise of discretion under r.17.4(2) for the court to allow C to advance the proposed new claim on this basis—***Goode v. Martin***, [2001] EWCA Civ 1899, [2002] 1 W.L.R. 1828, CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 para. 17.4.4, and Vol. 2 paras 8-81 & 8-85)

■ **D. (A CHILD), IN RE** [2005] EWCA Civ 347, March 15, 2005, unrep. (Thorpe & Hooper L.JJ.)

Courts and Legal Services Act 1990 ss.27 & 28—on appeal to Court of Appeal, both parties (A and R) appearing in person—A applying for permission for her McKenzie friend (X) to have right of audience, on basis that X could put her case better than she could—X a solicitor, presently struck from the Roll by the Solicitors Disciplinary Tribunal—R opposing application—held, refusing application, (1) ss.27 and 28 provide the court with a discretionary power to grant individuals rights of audience, but subject to very stringent restriction, (2) it is important to maintain fairness and parity, particularly where both parties appear in person, (3) the circumstances in which X found himself professionally militated strongly against the application—***In re Pelling (Rights of Audience)***, [1997] 2 F.L.R. 458, ref'd to (see ***Civil Procedure 2005*** Vol. 2 paras 9A-612 & 9B-436)

■ **HERTSMERE PRIMARY CARE TRUST v. RABINDRA-ANANDH** [2005] EWHC 320 (Ch), *The Times* April 25, 2005 (Lightman J.)

CPR rr.1.3, 1.4, 36.1(2), 36.5, 36.21 & 44.5—in July 2002, health authorities (C) bringing claim against estate of deceased medical practitioner (D)—on July 22, 2003, C making offer by letter to settle their claim (including the claim for interest) for £450,000—D not accepting offer—D telling C that their offer did not comply with the provisions of Pt 36, but then and subsequently deliberately refraining from explaining to C, when requested to do so, in what particular respects—C obtaining summary judgment for an account of overpayments made to D—in taking account, Master giving judgment for C for an amount which (including interest at 8%) exceeded C's offer—in addition, Master exercising his discretion under r.36.21 and ordering that D should pay interest on the judgment at 10% above base rate from August 14, 2003—as to costs, Master ordering that D should pay C's costs assessed on the standard basis up to August 13, 2003, and (again exercising discretion under r.36.21) on the indemnity basis thereafter—High Court judge giving D permission to appeal against Master's orders as to enhanced interest and indemnity costs—held, dismissing appeal (1) where an offer is made which does not comply with r.36.5, it will only have the consequences specified in r.36.21 if the court so orders (r.36.1(2)), (2) C's offer did not comply with r.36.5(6) (duration of offer), but this error was a pure technicality that should not preclude the entitlement of C to the full benefit of r.36.21, (3) the court must further the overriding objective by encouraging the parties to cooperate with each other (r.1.4(2)(a)) and the parties are required to help the court in this endeavour (r.1.4), (4) by deliberately refraining from explaining to C the exact nature of their technical error, D were in breach of their duty in this respect, and should not be entitled to reap any benefit from an argument to the effect that, because of the error, r.36.21 should not apply, (5) such behaviour by a party was conduct that could and should be taken into account in exercise of the court's discretion under r.44.5 whether to assess costs on an indemnity basis, (6) the Master's decision to order that the interest and costs consequences of r.36.21 should apply, and his application of his powers under that rule, were plainly correct—***Mitchell v. James***, [2002] EWCA Civ 997, [2004] 1 W.L.R. 158, CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 1.3.8, 1.4.4, 36.1.1, 36.5.2 & 44.4.2)

■ **KUWAIT AIRWAYS CORPORATION v. IRAQI AIRWAYS COMPANY** [2005] EWCA Civ 286, 155 New L.J. 468 (2005), CA (Ward & Longmore L.JJ.)

CPR rr.31.3 & 31.12—defendants (D) making disclosure by serving list of documents—D claiming right to withhold inspection by claimants (C) of certain of those documents on ground of litigation privilege—judge granting C's application for inspection of the documents on basis that they were generated as part of a fraud on the court in earlier proceedings between the parties ([2005] EWHC 367 (QB))—held, dismissing D's appeal, (1) the "fraud exception" applies, not only to legal advice privilege, but also to litigation privilege, but (2) where (as here) the issue of fraud is one of the issues in the action, the exception can only be invoked to require a party to permit inspection where (as here) there is a very strong prima case of fraud (otherwise a prima facie case of fraud might suffice)—(see ***Civil Procedure 2005*** Vol. 1 paras 31.3.5, 31.3.12,31.3.22 & 31.12.2)

■ **O'BRIEN v. CHIEF CONSTABLE OF SOUTH WALES POLICE** [2003] EWCA Civ 1085, *The Times* April 29, 2005, HL

CPR rr.1.1(2), 1.2, 1.4, & 32.1, Criminal Justice Act 2003 ss.101 to 106—conviction of claimant (C) for murder quashed after he had served seven years of life

sentence—C bringing claim for damages for malicious prosecution etc against police (D)—C alleging that certain officers had acted oppressively and dishonestly in investigating the crime for which he had been wrongly convicted—at case management conference, judge ruling that C might rely at trial on evidence of same or similar conduct by these officers in two other criminal cases—Court of Appeal dismissing D's appeal ([2003] EWCA Civ 1085, ***The Times*** August 22, 2003, CA)—held, dismissing D's appeal, (1) in civil proceedings the test for admissibility of similar fact evidence is whether the evidence is relevant, as being potentially probative of an issue in the case, (2) in civil proceedings there is no need to insist on the additional requirements for admissibility of such evidence that apply in criminal cases, however (3) a judge managing a civil case should keep well in mind (a) the policy considerations found in ss.101 to 106, and (b) the need to deal with the case in a way which was proportionate to what was involved, in a manner which was expeditious and fair—(see ***Civil Procedure 2005*** Vol. 1, paras 1.3.5, 1.4.3 & 32.1.4)

- **R. (LONDON ORATORY SCHOOL) v. THE SCHOOLS ADJUDICATOR** [2004] EWHC 3014 (Admin), December 17, 2004, unrep. (Jackson J.)

CPR rr.44.3(8) & 44.7, Practice Direction (Costs) paras 8.6 & 13.2—school (C) and others succeeding in claim for judicial review to quash decision of the Schools Adjudicator (D)—judge ordering that D should pay C's costs and ordering detailed assessment—C (a charitable institution) applying for order for payment on account of costs—D resisting this on ground that such orders not made in Administrative Court—held, granting application, (1) such orders are commonly made in general litigation in the QBD, (2) it was right in principle that an amount to be paid before costs are assessed should be made in this case, accordingly (3) within 28 days, D should pay C £25,000 on account of costs [Ed.: unless the court specifies a later date, payments on account should be made within 14 days] (see ***Civil Procedure 2005*** Vol. 1 paras 44.3.15, 44PD.2 & 44PD.7)

- **R. (TELEOS PLC.) v. COMMISSIONERS OF CUSTOMS AND EXCISE** [2005] EWCA Civ 200, *The Times* March 9, 2005, CA (Ward & Dyson L.JJ. and Bennett J.)

CPR rr.25.1(1), 25.1(3), 25.6, 25.7 & 68.2, Supreme Court Act 1981 s.32—commissioners (D) deciding that products of company (C) did not meet criteria for zero-rated VAT—C bringing claim for judicial review—judge referring issue of proper scope of the conditions for zero rating to ECJ for ruling and staying claim—C also (1) challenging D's decision not to exercise discretion to make interim payments to C of disputed input VAT credits pending outcome of proceedings, and (2) applying for interim payment under r.25.7—as to (1) judge holding that public law challenge could not succeed—as to (2) judge refusing C's application—with permission of judge, C appealing against (2), but not against (1)—held, dismissing C's appeal, (1) it is a general principle that a defendant has a right not to be held liable to pay until liability has been established by a final judgment, (2) the jurisdiction to order an interim payment under s.32 and r.25.6 is an exception to that principle and is subject to the strict restrictions stated in r.25.7, (3) C were not entitled to such an order because, in the circumstances of this case, none of the conditions in r.25.7 was satisfied, (4) D had a discretion to make interim payments to C of the disputed input VAT credits, (5) D's decision not to exercise this discretion in favour of C was susceptible to judicial review, (6) the judge expressed the view that a judicial review challenge by C would not succeed, and this part of his judgment was not the subject of appeal, (7) because of the existence of this discretion in the hands of D, and the manner of its exercise in this case, it was not necessary for the court to hold that it has a power (derived from the inherent jurisdiction or as a consequence of EC law) to grant an interim remedy in the form of an order requiring one party to pay an amount to the other in circumstances where the court refers a question to the ECJ, even if the conditions in r.25.7 are not satisfied—***R. v. Secretary of State for Transport, ex p. Factortame (No. 2)***, [1991] 1 A.C. 603, HL, ***Garage Molenheide BVBA v. Belgium (Case No. C-47/96)***, [1998] All E.R. (E.C.) 61, [1998] S.T.C. 126, [1997] ECR I-7281, ***Capital One Developments Ltd v. Commissioners of Customs and Excise***, [2002] EWHC 197 (Ch), [2002] S.T.C. 479, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 25.1.5, 25.1.10 & 25.7.1, and Vol. 2 paras 9A-86 & 9A-573)

- **SCAMMELL v. DICKER** [2005] EWCA Civ 405, 155 New L.J. 620 (2005), CA (Ward & Rix L.JJ.)

CPR rr.1.1(2)(e), 3.1(2)(f) & 40.6—in 1989, property owner (D) commencing proceedings against neighbour (C) to determine boundary dispute—in 1994, parties agreeing to settle proceedings and court making consent order with plan attached declaring boundary—subsequently, parties' surveyors encountering difficulty in attempting, on basis of the order, to stake out boundary on ground—surveyors' solution to difficulty disputed by parties—on August 23, 2002, in county court proceedings commenced by C, judge setting aside consent order on ground that it was void for uncertainty—High Court judge dismissing D's appeal ([2003] EWHC 1601 (QB), July 2, 2003, unrep.)—held, granting D permission to make second appeal and allowing appeal, (1) in theory it might be possible to declare a consent order void on the ground of uncertainty, (2) but disagreement as to the meaning and effect of a such an order did not make it uncertain, (3) the courts below erred in concluding that it was impossible to implement the parties' agreement, (4) the

agreement was reasonably certain and was capable of being made definite without further agreement—Court rejecting (but without having to decide the point) D's contention that proceedings brought by S should be stayed (r.3.1(2)(f)) on basis that allowing them to proceed would in the circumstances amount to an excessive allocation of court resources (r.1.1(2)(e))—***Scammell v. Ousten***, [1941] A.C. 251, HL, ***Mamidoil-Jetoil Greek Petroleum Co. S.A. v. Okta Crude Refinery A.D.***, [2001] EWCA Civ 406, [2001] 2 Lloyd's Rep. 76, CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 1.3.7 & 40.6.3)

- **VENTURA FINANCE PLC. v. MEAD** [2005] EWCA Civ 325, March 22, 2005, CA, unrep. (Auld, Chadwick & Arden L.JJ.)

CPR rr.44.3 & 48.3, Practice Direction (Costs) para. 50.3(2)—finance company (C) entering into debt purchase agreement with company (X)—agreement executed on behalf of X by directors and shareholders (D1 & D2)—D1 and D2 also executing deed of guarantee under which they agreed to pay C on an indemnity basis all costs of recovering monies due under it—X going into administration—D1 and D2 entering defence to C's claim against them under the deed—at hearing of C's application for summary judgment, all substantive issues disposed of by agreement and C obtaining judgment by consent for less than one-third of the amounts claimed—on matter of costs (as to which parties were not agreed), judge ruling that the liability of each defendant for costs was several and each should be responsible for only 50% of C's costs of the proceedings—subsequently, D1 adjudged bankrupt—held, allowing C's appeal, (1) when exercising its discretion under r.44.3, the court must have regard to all the circumstances, including the fact (if, as here, it be the case) that there is a contractual obligation to pay costs, (2) the overwhelming proportion of the costs incurred by C were incurred in relation to issues which were common to both defendants, (3) the judged erred in concluding that the only order which gave effect to the parties' contractual rights was that each defendant should be liable for only 50% of the whole costs of the proceedings, (4) D1 and D2 were severally liable for 100% of C's costs (but C could not recover more than 100% from them in aggregate) and there was no basis upon which either or both could be made liable for some lesser percentage—Court explaining that (a) the court has jurisdiction to make an order for costs in proceedings in which all substantive issues have been disposed of by agreement, but is not obliged to do so, and (b) unless the court has a proper basis of agreed or determined facts, upon which to exercise its discretion under r.44.3, it must accept that it is not in a position to make an order about costs at all—***Brawley v. Marczynski (No. 1)***, [2003] EWCA Civ 756, [2003] 1 W.L.R. 813, CA, ***BCT Software Solutions Ltd. v. C. Brewer & Sons Ltd***, [2003] EWCA Civ 939, [2004] F.S.R. 9, CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 44.3.8 & 48PD.1)

IN DETAIL

Striking out appeal notice

In ***Taiga v. Taiga***, [2004] EWCA Civ 1399, September 23, 2004, C.A., unrep., a wife (W) brought divorce proceedings against her husband (H). H challenged the jurisdiction of the court on various grounds (including the grounds that the marriage was invalid and that Nigeria was the appropriate forum) and November 15, 2004, was fixed for the trial of those issues in the Family Division as preliminary issues. Beforehand, a judge made a number of orders, including orders requiring H to pay costs orders made in favour of W at various hearings. H was also ordered to pay W maintenance on a monthly basis pending suit. H did not fully comply with these orders.

On June 14, 2004, at a hearing at which both parties were represented by counsel and which W attended (a fortuitous circumstance that was to prove of some importance), the Court of Appeal granted H permission to appeal against the judge's orders quantifying his maintenance obligations to W pending suit. In doing so, the Court took advantage of r.52.3(7)(b) and made the permission subject to conditions. In particular, the conditions were that H (1) should pay W her assessed costs of previous hearings, and (2) should pay into a joint solicitors' account a sum to cover W's costs in the forthcoming trial in the Family Division (that sum to remain in the account pending the outcome of that trial).

The Court also made it clear to H, though it did not make this an express condition of the permission, that it expected that he would pay promptly each month a proportion of the maintenance pending suit ordered by the judge, partly for the purpose of maintaining W and her children (the aliment element) and partly for the purpose of enable W to put her solicitors in funds (the legal expenses element).

H did not fully comply with the conditions, and did not comply with the Court's expectation. Accordingly, in September, W applied to the Court of Appeal for an order under r.52.9(1)(a) striking out H's appeal notice relating to the appeal for which he had been granted permission.

CPR r.52.9(1) states that the appeal court may (a) strike out the whole or part of an appeal notice; (b) set aside permission to appeal in whole or in part; (c) impose or vary conditions upon which an appeal may be brought.

However, r.52.9(2) states that the court will only exercise its powers under r.52.9(1) where there is "a compelling reason for doing so". And r.52.9(3) imposes a further restriction on the Court's powers. That provision states that a party who "was present at the hearing at which permission was given" may not subsequently apply to the Court for an order that the court exercise its powers under paras (b) or (c) of r.52.9(1); that is to say, such a party may not apply for an order setting aside permission to appeal in whole or in part (para. (b)), or imposing or varying conditions upon which an appeal may be brought (para. (c)).

It is interesting to note that W's application was for an order under para. (a) of r.52.9(1) (striking out appeal notice), and not for an order under para. (b) (setting aside permission) or under para. (c) (varying appeal conditions) of that provision. On the face of it, it would have been more natural, and would better have fitted the circumstances of the case, had W applied for an order setting aside the permission to appeal granted to H, or (better still) varying the conditions upon which that permission had been granted (making the Court's expectation as to the payment of maintenance an express condition). However, it seems to have been assumed by counsel and the Court that it was not open to W to apply for an order under either para. (b) or para. (c) of r.52.9(1) for the reason that W, personally, had been "present at the hearing [on June 15, 2004] at which permission was given" and therefore (as explained above) was prevented by r.52.9(3) from applying for an order either of those paragraphs.

It is perhaps interesting that counsel and the Court should have approached the matter on the basis that it was W's (quite fortuitous) personal presence at the hearing on June 15, 2005, that triggered the operation of r.52.9(3). It could be argued that the phrase "present at the hearing" includes present by counsel and that therefore in this case that provision would have been triggered in any event. (Attendance by counsel is certainly recognised in other contexts, e.g. ***Rouse v. Freeman***, ***The Times*** January 8, 2002 (Gross J.).) It would seem that r.52.9(3) is designed to ensure that the appeal court is not troubled by applications to set aside permission to appeal where it has already been granted, or to impose or vary conditions imposed on an appeal, where a party aggrieved by what has already been done in these respects has previously had a chance to raise and argue (through counsel or personally) any objections.

Be that as it may, the question that the Court of Appeal (Thorpe & Potter L.JJ.) had to deal with in this case came down to whether the Court should make an "unless" order to the effect that H's appeal notice should be struck out under r.52.9(1)(a) unless (in particular) H paid both the legal expenses element and the aliment element of the maintenance arrears. The key issue was whether W satisfied the Court that there was "compelling reason" within r.52.9(2) for striking out the appeal notice.

As Potter L.J. explained, in cases such as ***Hammond Suddard Solicitors v. Agrichem International Holdings Ltd***, [2001] EWCA Civ 2065, December 18, 2001, C.A., unrep., ***Carr v. Bower Cotton*** [2002] EWCA Civ 789, May 9, 2002, C.A., unrep., and ***Bell Electric Limited v. Aweco Appliance Systems GmbH & Co. KG***, [2002] EWCA Civ 1501, [2003] 1 All E.R. 344, C.A., the Court was concerned "with the question whether non-compliance with the orders of the judge below relating to the very judgment sum appealed from, or in relation to the costs of those proceedings below", was in particular circumstances a sufficient compelling reason to make an order under r.52.9(1)(c) with a consequent order under r.52.9(1)(a) if the conditions imposed in relation to the appeal were not carried out. The circumstances of this case were different.

At the hearing of this application, counsel for W produced evidence indicating that she was in a precarious financial position. She was unable to pay her solicitors, with the result that there was a serious risk that she would not be properly prepared by November 15, 2004, for the trial of the issues set to be tried in the Family Division on that date. Counsel said that H had demonstrated a willingness to use every imaginable tactical device, both in this jurisdiction and in Nigeria, to ensure that W and her children received no financial support from him.

Thorpe L.J. said he had no difficulty in concluding that H's conduct throughout, and particularly his conduct since June 14, 2004, satisfied the "compelling reason" requirement in r.52.9(2). His lordship added: "Unless this Court acts to censure the husband's conduct since 14 June, there will effectively be no determination on anything like equality of arms on 15 November". Potter L.J. concluded that H was concerned to see that W was deprived of the means to defend the appeal. Those means could only be provided if the orders as to maintenance made by the judge, and varied by the Court (but not linked to the granting of permission to appeal), were complied with. Accordingly, the Court ordered that H's notice of appeal should be struck out unless within 14 days he paid to W the arrears of the maintenance pending suit. The Court further ordered that the notice should be struck out if H defaulted on the monthly maintenance payments due to fall between the hearing of this application and the trial fixed for November 15, 2004, in the Family Division.

Hearing dates for applications

In Navitaire Inc. v. Easy Jet Airline Company Ltd, [2004] EWHC 2271 (Ch), October 11, 2004, unrep., Pumfrey J. handed down judgment in a complicated action for infringement of copyright and breach of contract.

The claimant (C) was successful to a limited extent only. On October 5, 2004, before any final order had been passed or entered, C applied to the judge to re-open the trial so that further evidence might be give and further submissions made on issues that had been decided contrary to their contentions. C said that they now believed, largely on the basis of the fruits of discovery applications in corresponding proceedings in the United States obtained on August 20, 2004, that those issues had been decided on materials which were incomplete and upon evidence that was false.

C's application came on initially before Pumfrey J. on October 11, 2004, and the judge considered the directions he should give for a timetable for a full hearing of the application. At this hearing, leading counsel for C made, what his lordship described as, "an exceptionally unusual application" seeking directions which were "equally unusual and contrary to the normal practice of the court". The gist of counsel's application was that as he (albeit with the assistance of junior counsel) had conducted the trial, the judge should direct that the application to re-open the trial should not be heard until he was free to appear on C's behalf. Counsel conceded that regard should also be had for the convenience of leading counsel for the defendants (D).

Pumfrey J. said that where there is a dispute as to timings for potentially urgent applications which turns upon the availability of counsel, it is the normal practice of the court to have no regard to the convenience of counsel when making a direction fixing the hearings. Without elaborating, his lordship said the reason for such practice is obvious. Put shortly, the reason is that it is for the court to manage urgent applications so that they are dealt with promptly, and though it may not be entirely accurate to say that in this endeavour the court has no regard for the convenience of counsel in fixing dates, it is clear that such convenience is not determinative. In any event, as his lordship said, stepping outside the practice requires special circumstances.

Counsel for C contended that there were special circumstances in this case. Pumfrey J. found that the circumstances were indeed very usual and granted this application. His lordship said that, if the full hearing of the application to re-open the trial was to be conducted by anybody else instructed by C, a disproportionate further expenditure of time and money would be involved. In the circumstances, the application was likely to be heard in January, 2005. D would suffer no specific prejudice if counsel were accommodated. The judgment already handed down was generally contrary to C's claim and adequately preserved D's interests. The difficulties that C faced in persuading the court to re-open the trial were substantial.

CIVIL PROCEDURE CD AND CIVIL PROCEDURE FORMS CD

Welcome to **Civil Procedure** 2005. We have recently upgraded **Civil Procedure** and **Civil Procedure Forms** to include our new electronic forms service, **Rapidforms**. Powered by Rapidocs software, this new service has been developed to allow PDF court forms to be edited quickly and easily and allows you to store or send the document electronically. **Rapidforms** offers step-by-step guidance throughout in the form of question and answer prompts which are used to populate the fields in the PDF form automatically. Over 60 forms are available as Rapidforms on **Civil Procedure/Civil Procedure Forms**. Please refer to the CD Quick Reference Card or the Help button on the CD toolbar for more information.

Please remember that you will need to uninstall any previous versions of Civil Procedure/Civil Procedure Forms before installing the new version.

Due to technical difficulties, users may experience problems accessing the following two forms:

- N9 – Response Pack
- ADM9 – Warrant of Arrest

Revised versions of these forms can be downloaded from the Sweet and Maxwell website at *http://www.sweetandmaxwell.co.uk/whitebook* by accessing the White Book Updating Service.

Accessing the White Book Updating Service

Click on White Book Rules and Forms Updating Service

You will need to enter your password [WB2005] to enter the site.

On the White Book section of the site, click on Civil Procedure Forms and Rapidform Updates

Downloading the files

Click on the relevant Zip folder icon

Save or drag file into Sweet & Maxwell Civil Procedure or Civil Procedure Forms templates folder

Typically, this will be "C:\Program Files\Sweet & Maxwell\Civil Procedure (or Civil Procedure Forms) \Templates

Select Save

The new files will overwrite the existing files and the Rapidocs links within Civil Procedure/Forms will then work for the affected forms.

Click on required form.

Please refer to **Helpdesk** for assistance with the following two forms:

- **N208(CC)** – Claim Form (CPR Part 8)
- **N294** – Claimant's Application for a Variation Order. Windows 98 users may experience difficulties in accessing this form.

Assistance

If you require any assistance, please contact Helpdesk on 020 7393 7266 or email sweetandmaxwell.techsupport@thomson.com

The next release will be published in July with new and revised Rapidforms. In the meantime, forms will continue to be added to the **White Book Updating Service**.

Yours faithfully

Sweet and Maxwell White Book Team

EDITOR: **Professor I. R. Scott**, University of Birmingham.
Published by Sweet & Maxwell Ltd, 100 Avenue Road, London NW3 3PF.
ISSN 0958-9821

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