CIVIL PROCEDURE NEWS

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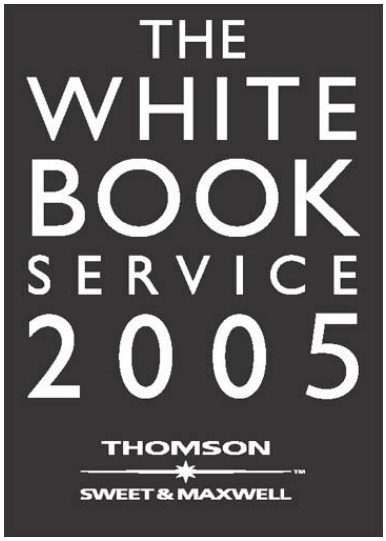

IN BRIEF

Cases

■ **MAGGS v. MARSHALL** [2005] EWHC 200 (QB), January 21, 2005, unrep. (Gray J.)

CPR rr.6.4, 6.5, 6.8, 6.9 & 7.6—claimant (C) purporting to effect personal service on individual defendant (D) by posting claim form to residential address—at same time, C posting claim form to solicitors (S) then acting for D—D giving no address for service and S not instructed to accept service—Master ruling that good service had been effected because either (1) the residential service was service at D's last known residence (r.6.5(6)), or (2) the service on S was service by a permitted alternative method (r.6.8)—held, allowing D's appeal, (1) on the evidence, D had never resided at the residential address, (2) as S were acting for D at the time of purported service, the method of service required by r.6.5(6) was not available to C, (3) an order for service by an alternative method may not be made retrospectively under r.6.8 (see ***Civil Procedure 2005*** Vol. 1 paras 6.4.1, 6.5.3 & 6.8.1)

■ **MARKEM CORPORATION v. ZIPHER LIMITED** [2005] EWCA Civ 267, March 22, 2005, CA, unrep. (Kennedy, Mummery & Jacob L.JJ.)

Chancery Guide para. 8.15, Human Rights Act 1998, Sched. 1 art. 6—company (C) bringing (1) several claims against company (D) claiming entitlement to patents, and (2) a breach of confidence claim against D and certain individuals—at trial of patent claims, judge finding in favour of C on some claims and of D on others—subsequently, judge refusing to strike out breach of confidence claim—held, allowing D's appeals, (1) the judge erred in making particular adverse findings of fact, and gave inadequate reasons for disbelieving parts of the evidence of certain witnesses, (2) procedural fairness requires that, if the evidence of a witness is to be disbelieved, he must be given a fair opportunity to deal with the allegation, (3) the breach of confidence claim should be struck out as an abuse of process—***Browne v. Dunn*** (1893) 6 R. 67, HL., ref'd to (see ***Civil Procedure 2005*** Vol. 1 para. 52.11.4, and Vol. 2 para. 1-76)

■ **ALLISON v. BRIGHTON & HOVE CITY COUNCIL** [2005] EWCA Civ 548, April 22, 2005, unrep. (Pill, Longmore & Gage L.JJ.)

CPR rr.25.6, 36.20 & 44.3(2)—property owner (C) bringing claim against neighbour (D) in nuisance and negligence for damages arising out of water penetration—D not admitting liability, but making voluntary interim payment on account of damages of £2,000—C not accepting D's Pt 36 payment of £7,200, open for acceptance until June 25, 2004—at trial, D admitting liability and, in submission to judge on issue of damages, C maintaining claim of £47,000 (largely made up of claim for diminution of value)—county court judge critical of C's expert witness (giving evidence as to valuation) and assessing damages at £4,340—judge ordering (1) as to costs from June 25, C to pay D's costs, and, (2) before that date, D to pay C only (a) 6.25% of costs attributable to C's expert, and (b) only 25% of C's other costs—on appeal against costs order, C submitting (1) that C had to prepare for trial as if all aspects of liability were in issue, (2) that any conduct of C justifying a departure from the general rule as to costs (r. 44.3(2)(a)) occurred after June 25, and (3) the judge failed to give reasons for departing from that rule—held, dismissing C's appeal, (1) it was impossible to say that the judge had exceeded the generous ambit within which reasonable disagreement is possible, (2) there was an inevitable overlap between what C had to prove to establish damages, and what he would have had to prove to establish liability, (3) although in making his costs order the judge did not give reasons for departing from the general rule, his judgment had to be seen in the context of the argument placed before him, (4) it was clear from the transcript of submissions made by counsel, and exchanges between judge and counsel, that the judge had all relevant factors in mind—***Islam v. Ali***, [2003] EWCA Civ 612, March 26, 2003, CA, unrep., ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 36.20.2 & 44.3.8)

■ **BURNS-ANDERSON INDEPENDENT NETWORK PLC. v. WHEELER** [2005] EWHC 575 (QB), [2005] 1 Lloyd's Rep. 580 (Judge Havelock-Allan Q.C.)

CPR rr.6.5, 6.9, 6.19(3), 7.5, 7.6 & 11, Practice Direction (Service Out of the Jurisdiction) para. 1.1—financial services company (C) making payments to compensate purchasers of pensions from individual (D)—on December 30, 2003, C issuing claim form for indemnification claim against D (believed to be resident in France)—C alleging that D was negligent and failed to comply with regulatory rules—claim form endorsed for service out of the jurisdiction and, on April 28, 2004, sent by registered post to D's last known residence in France—by that date, unbeknownst to C, D had ceased living in France and had returned to England—post returned to C unopened—on April 30, 2004, period for service of claim form within the jurisdiction stipulated by r.7.5(2) expiring—on May 14, 2004, on basis that they had been instructed to accept service, C serving claim form on D's English solicitors—on May 25, 2004, D's solicitors filing an acknowledgment of service—on September 10, 2004, D applying under r.3.4 to strike out claim on ground that claim form had not been either (1) validly served out of the jurisdiction, or (2) served in time within the jurisdiction (r.7.5(2))—C applying (1) for

extension of time for service (r.7.6), or (2) for service to be dispensed with (r.6.9)—held, dismissing D's application, (1) it could not be argued by C that, by posting the claim form to D in France on April 28, the effect was that the form was, by operation of r.6.7(1), deemed to have been served on D on the second day of that posting, (2) this was because r.6.7(1) has the effect of deeming service on a particular date only where service has (a) in fact been effected, and (b) been effected by a method referred to in the rule, (3) in this case, neither of those conditions was satisfied as (a) the post had not been received by D in France, and (b) the method of service used by C was registered post, a method not recognised in r.6.7(1), however (4) where a defendant, having filed an acknowledgment of service (as in this case), wishes to object to service of a claim form on him, whether within or without the jurisdiction, the appropriate application is an application, not under r.3.4, but under r.11, (5) such application should be made within 14 days after filing an acknowledgment of service (r.11(4)), (6) as D had made no such application within time he had to be treated as having accepted the jurisdiction of the court (r.11(5)), and (7) in any event, by his conduct D had waived any objections to jurisdiction based on irregularities as to service—also held, dismissing C's counter-applications, (8) time for service should not be extended because C had not satisfied paras (b) and (c) of r.7.6(3), and (9) service should not be dispensed with as the case did not fall within the exceptional circumstances in which the court may exercise its powers under r.6.9—***Godwin v. Swindon Borough Council***, [2001] EWCA Civ 641, [2002] 1 W.L.R. 997, CA, ***Anderton v. Clwyd County Council***, [2002] EWCA Civ 933, [2002] 1 W.L.R. 3174, CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 6.5.3, 6.7.2, 6.9.1, 6.19.2, 6BPD.1, 6.21.13, 7.6.1 & 11.1.1)

- **BURTON v. KINGSLEY** [2005] EWHC 1034 (QB), May 25, 2005, unrep. (Richards J.)

CPR r.44.3A—passenger (C) of driver (D1) seriously injured in collision - shortly after accident, C entering into CFA agreement with solicitors for purpose of pursuing claim against D1 and driver of other vehicle (D2)—CFA providing for 100% uplift in the event of success—on day of trial of liability, parties agreeing terms of settlement—on matter of costs, D1 contending that 100% uplift was unreasonable—matter falling to be determined in accordance with rules applicable to accidents occurring on or before October 5, 2003—held (1) the reasonableness of uplift (a) falls to be determined by reference to circumstances that were known, or should reasonably have been known, when the CFA was entered into, and (b) is dependent on the particular circumstances of each case, (2) when the CFA was agreed (a) it was correct to assess C's case as strong, but (b) uncertainties and difficulties did exist and created a very significant element of risk, and (c) the seriousness of C's injuries introduced potential complexity, nevertheless (3) the chances of success against either or both defendants were much higher than evens, and the degree of risk was such that a maximum of 50% should be the allowable uplift—***Atack v. Lee***, [2004] EWCA Civ 1712, *The Times*, December 28, 2004, CA, ***KU v. Liverpool City Council***, [2005] EWCA Civ 475, *The Times*, May 16, 2005, CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 para. 44.3A.3, and Vol. 2 para. 7A-36)

- **CRESSEY v. E. TIMM & SON LTD** [2005] EWCA Civ 763, June 24, 2005, CA unrep. (May, Rix & Jonathan Parker L.JJ.)

CPR rr.17.4(3) & 19.5, Limitation Act 1980 ss.11 & 14(1)(c)—on December 2, 2000, workman (C) employed by company (D2) injured at work—for a period, C believing (on the basis of information on his pay slips) that his employers were, not D2, but another company (D1)—C negotiating with insurers, to whom D1 directed C's letter of claim, and who, on April 30, 2001, identified their insured as D2 "and subsidiary companies"—insurers admitting liability, subject to contributory negligence - on March 30, 2004, after primary limitation period had run, C issuing claim form naming D1 and D2 as defendants—district judge dismissing D2's application to strike out claim on ground that it was statute barred—circuit judge dismissing D2's appeal—held, dismissing D2's further appeal, (1) the three year limitation period ran from C's date of knowledge of certain facts, in particular the identity of D2 as the proper defendant (ss.11(4)(b) & 14(1)(c)), (2) the difference between D1 and D2 was more than a difference between mere names and amounted to a difference between identities, (3) C's claim was not statute barred if it was shown that his date of knowledge of the identity of D2 as his employer was within three years of March 30, 2004, (4) where the identity of the defendant is uncertain because, for example, where (as here) the claimant is deprived of the knowledge he needs by being misinformed, knowledge of that fact may be postponed, (5) the length of such postponement will depend on the facts of the case, (6) on the evidence, C had no reason to think that any company other than D1 could be his employer until April 30, 2001, at the earliest, (7) provisions such as r.17.4(3) and r. 19.5, permitting correction of mistakes as to naming of parties after time had run, do not narrow the scope of s.14(1)(c)—***Simpson v. Norwest Holst Southern Ltd***, [1980] 1 W.L.R. 968, CA, ***Henderson v. Temple Pier Co. Ltd***, [1998] 1 W.L.R. 1540, CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 17.4.5 & 19.5.7, and Vol. 2 para. 8-31)

- **HOWELLS v. DOMINION INSURANCE CO. LTD** [2005] EWHC 552 (QB), April 7, 2005, unrep. (Cox J.)

CPR rr.19.6 [RSC O. 15, r.12] & 48.2, Supreme Court Act 1981 s.51—in 1993, chairman and secretary of sports club (C) (an unincorporated association) as representative parties bringing claim on fire policy against insurers (D) of C's property—D defending and counterclaiming (alleging material non-disclosure) for return of money paid under the policy—at trial (in

1999), judgment given for D on the claim and their counterclaim—D obtaining final costs certificate—D failing in efforts to enforce judgment and costs order against the representative parties and club assets—D applying for order under r.19.6(4) for permission to enforce the judgments against 32 named individuals (X) known to be members of C, both when the proceedings were commenced and when judgment on the claim was given - Master dismissing application—held, allowing D's appeal in part, (1) the representative parties had authority to bring the claim by virtue of r.19.6(1) (RSC O.15, r.12(1)), and the question whether or not they had the authority of the members of C to do so was irrelevant, (2) the judgment on the claim could be enforced against X, subject to any one of them being able to show there was a special reason why he should not be liable, (3) however, X, not being full parties to the claim, X were not individually liable for costs as the pre-CPR case law to this effect remains good law, (4) the matter should be remitted to the Master for him to consider whether permission to enforce the main judgment against X should be granted, having regard to whatever special circumstances may be shown to exist, if any, in relation to each of them - judge noting that D had not sought an order for costs against X as non-parties under r.48.2 and s.51—***Moon v. Atherton***, [1972] 2 Q.B. 435, CA, ***Independiente Ltd v. Music Trading On-Line (HK) Ltd***, [2003] EWHC 470 (Ch), March 13, 2003, unrep., ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 19.7.2 & 19.7.3)

- **KING v. COMMISSIONER OF METROPOLITAN POLICE** [2005] EWCA Civ 706, March 2, 2005, CA, unrep. (Ward & Longmore L.JJ.)

CPR rr.2.8, 3.9., 15.4, 15.11, 23.5 & 52.13—defendant (D) not filing defence within period stipulated by r.15.4—on basis that subsequent period stipulated by r.15.11(1) had expired, and claimant (C) had not applied for judgment, court on own motion staying claim under that rule on December 7, 2003—C's application to enter judgment stamped by court as received on December 12—C applying under r.15.11(2) for stay to be lifted—district judge treating application as an application for relief from a sanction under r.3.9—district judge dismissing application and circuit judge dismissing C's appeal—C applying under r.52.13 for permission to make second appeal—on this application, for first time C contending (1) that, on proper calculations, the period stipulated by r.15.11(1) did not expire until December 11, and therefore the stay was imposed without jurisdiction, and (2) that, in fact, C's application for judgment was received by court on December 8—held, dismissing application, (1) the construction of the stipulated period in r.15.11(1) admitted of little difficulty and did not raise an important point of principle or practice within the meaning of r.52.13, (2) if it were assumed that, in this case, that period expired on December 11, the date of C's application for judgment (whether December 8 or 12) became the critical question, (3) that was a question of fact which had not been raised in the court below (see ***Civil Procedure 2005*** Vol. 1 paras 15.4.2, 15.11.1 & 52.3.9)

- **MITSUI AND CO. LTD v. NEXEN PETROLEUM UK LTD** [2005] EWHC 625 (Ch), *The Times*, May 18, 2005 (Lightman J.)

CPR rr.31.16 & 31.18—English company (D) having oil field as primary asset—D's former holding company (X) selling whole of D's share capital to Channel Islands company (Y)—Japanese company (C), contending that X's parent company (Z) (a Canadian company registered in England as an overseas company) had by prior agreement with C agreed not to solicit offers by third parties for the oil field—C strongly suspecting that, in breach of that agreement, Z solicited from Y's parent company an offer to purchase D—in claim against D, C applying for disclosure of documents and provision of an affidavit by the former managing director of D and of X, and believed by C to be an innocent third party and a mere witness to wrongdoing—held, dismissing the application, (1) before *Norwich Pharmacal* relief may be granted, the applicant must show that there is a need for an order to enable an action to be brought against the ultimate wrongdoer, (2) relief should not be granted where the information required by the applicant can be obtained elsewhere, (3) in this case, C could seek the information by other means, in particular by an application under r.31.16 for pre-action disclosure by Z, (4) it is entirely in accord with r.31.18 that if r.31.16 provides an alternative means of obtaining information required by an applicant, the Norwich Pharmacal jurisdiction should not be exercisable—development of Norwich Pharmacal jurisdiction explained—***Norwich Pharmacal Co. v. Commissioners of Customs and Excise***, [1974] A.C. 133, H.L., ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras. 25.2.2, 31.0.6, 31.18.2, and Vol. 2 para. 2F-48)

- **RIDGEWAY MOTORS (ISLEWORTH) LTD v. ALTS LTD** [2005] EWCA Civ 92, [2005] 2 All E.R. 304, CA (Brooke, Mummery & Scott Baker L.JJ.)

CPR r.3.4, Limitation Act 1980 ss.24 & 38—in proceedings brought by party (X) against company (D), X succeeding and obtaining order for costs—on January 14, 1998, certificate issued stating that costs had been taxed at £58,000—subsequently, X assigning this costs judgment to claimants (C)—costs judgment remaining unpaid and, on February 3, 2004, C (as judgment creditors) presenting winding up petition against D—D applying to strike out petition on ground that, because it had been brought outside the six year limitation period imposed by s.24(1), it was statute barred—judge dismissing D's application ([2004] EWHC 1535 (Ch), [2004] All ER (D) 320 (May))—held, dismissing D's appeal, (1) for the purposes of s.24(1), "action" is defined in s. 38(1) as "any proceeding in a court of law", (2) although (in a general sense) a winding up petition

falls within this definition, such petition is *sui generis*, (3) the expression "an action...upon any judgment" in s.24(1) has a special meaning and means a "fresh action" brought upon a judgment in order to obtain a second judgment which could be executed, (4) C's winding up petition was neither (a) an action within this special meaning nor (b) a process of execution of the costs judgment on which it was based—***W.T. Lamb and Sons v. Rider*** [1948] 2 K.B. 331, CA, ***Lowsley v. Forbes*** [1999] 1 A.C. 329, H.L., ***In re A Debtor*** [1997] Ch. 310, ref'd to (see ***Civil Procedure 2005*** Vol. 2 paras 8-51 & 8-93)

■ **SECRETARY OF STATE FOR TRADE AND INDUSTRY v. PAULIN** [2005] EWHC 888 (Ch), *The Times*, May 26, 2005 (Sir Andrew Morritt V-C)

CPR rr.2.1(2), 52.2 & 52.3(1), Access to Justice Act 1999 (Distribution of Appeals) Order 2000 art. 2, Practice Direction (Insolvency Proceedings) paras 1.1(5), 17.2(1) & 17.6, Company Directors Disqualification Act 1986 ss.6 & 21(2), Insolvency Rules 1986 rr.7.47 & 7.49, Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987 r.2—registrar granting Secretary of State's (C) application for order disqualifying director (D) of insolvent company under s.6 (1)—held, (1) appeals from disqualification orders under s.6 are regulated by rr.7.47 and 7.49 and lie to a single judge of the High Court (first appeal) and thence to the Court of Appeal, (2) because they are so regulated, such appeals are properly characterised as "insolvency proceedings" within para. 1.1(5), (3) therefore a first appeal falls within para. 17.2(1) and, by operation of para. 17.6, may be made without the permission of any court—***In re Tasbian Ltd (No. 2)***, [1990] B.C.C. 322, ***In re Probe Data Systems Ltd (No. 3)***, [1992] B.C.C. 110, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 2.1.4 & 52.3.1, and Vol. 2 paras 3E-1, 3E-17 & 9A-882)

■ **RIO PROPERTIES INC. v. GIBSON DUNN & CRUTCHER** [2005] EWCA Civ 534, April 22, 2005, CA, unrep. (Jonathan Parker & Arden L.JJ.)

CPR rr.36.21 & 44.4—upon individual (A) being made bankrupt on petition of American company (C), trustee (B) in bankruptcy appointed—A entitled to a share of his deceased father's (X) estate—B granted orders for disclosure of information relating to A's affairs from solicitors (D) acting in the administration of X's estate—in one such order, C undertaking to pay reasonable costs incurred by anyone making disclosures—in negotiations between C and D for costs to paid by C to D in accordance with this undertaking, on August 7, 2003 (when receivership came to an end), C making offer—offer not accepted by D—on December 16, 2004, judge ordering C to pay D's costs, to be assessed in accordance with the terms of the undertaking—in doing so, judge taking no account of C's offer—held, allowing C's appeal in part, (1) the undertaking related to only some of the disclosure orders and the judge erred in ordering C to pay D's costs incurred in complying with all of them, (2) as C's offer was not made in accordance with the requirements of Pt 36, the question whether D should have been granted costs on the indemnity basis and with enhanced interest was a matter for discretion, (3) the judge's conclusion that the offer was difficult to evaluate, and that D could not be criticised for not having accepted it, was not outside the range of the reasonable exercise of discretion—***McPhilemy v. Times Newspapers Ltd (No. 2)***, [2001] EWCA Civ 933, [2002] 1 W.L.R. 934, CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 36.21.1 & 44.4.2)

■ **RUGBY JOINERY U.K. LTD. v. WHITFIELD** [2005] EWCA Civ 56, *The Times*, May 31, 2005, CA (Auld, Judge & Neuberger L.JJ.)

CPR rr.35.10 & 52.11—employee (C) bringing claim against employer (D) for damages for vibration white finger (VWF)—following judgment in her favour on liability by Court of Appeal (see [2004] EWCA Civ 147), at trial of quantum, county court judge assessing C's damages at £13,000—single lord justice giving D permission to appeal on ground that reasoning of judge defective and award too high—particular issue arising as to whether C's condition would have deteriorated after identification of early symptoms putting D on notice, even if C had then ceased working with vibratory tools—this issue not subject of any specific expert evidence—held, dismissing appeal, (1) although it is possible that the judge overlooked this issue when making a reduction, he is inherently unlikely to have done so, (2) when a judgment can fairly be construed as being right in law, the appeal court should not strain to interpret it in some other way, (3) those advising parties in VWF cases should alert their medical experts to the particular issue that arose in this case, so as to give them the opportunity to consider the probabilities—***Allen v. British Rail Engineering***, [2001] EWCA Civ 242, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 35.10.2 & 52.11.3)

Practice Statements

■ **STATEMENT (TECHNOLOGY AND CONSTRUCTION COURT : ARRANGEMENTS)** *The Times*, **June 14, 2005, T.C.C. (Lord Woolf L.C.J., May L.J. & Jackson J.)**

CPR r.60.1, Practice Direction (Technology and Construction Court) para. 2.1, Technology and Construction Court Guide para. 4, Supreme Court Act 1981 s.68—role of High Court judge in charge of TCC—new interim arrangements for allocation of claims to judges—classification of claims as "High Court judge" and "senior circuit judge" cases (see ***Civil Procedure 2005*** Vol. 2 paras 2C-3, 2C-10, 2C-28, 2C-32 & 9A-324)

IN DETAIL

Service of claim form where solicitor acting

CPR r.6.5 (Address for service) contains provisions relating to determining the address at which documents may be served effectively on a party. Paragraphs (5) and (6) of the rule may be juxtaposed.

Paragraph (5) states that, where (a) a solicitor is acting for the party to be served, and (b) the document to be served is not the claim form, the party's address for service is the business address of his solicitor.

Paragraph (6) states that, where (a) no solicitor is acting for the party to be served, and (b) the party has not given an address for service, the document must be sent or transmitted to, or left at, the place shown in the table at the foot of r.6.5. In the case of service on an individual, the place of service is his or her "usual or last known residence".

In ***Maggs v. Marshall***, [2005] EWHC 200 (QB), January 21, 2005, unrep., one of the issues arising was, what is meant by "solicitor is acting" in this context?

Gray J. said that, in construing these provisions it is necessary to have in mind paras (1) and (2) of r.6.4 (Personal service) and paras. (2) and (3) of r.6.5. These related provisions state that, where a solicitor is authorised to accept service on behalf of a party, and has notified the party serving the document in writing that he is so authorised, then the document may not be served personally on the party but must be served on the solicitor, unless it is expressly provided otherwise by an enactment, rule, practice direction or court order that personal service is required. A party must give an address for service within the jurisdiction. If a party does not give the business address of his solicitor as his address for service, and he resides or carries on business within the jurisdiction, then he must give his residence or place of business as his address for service.

Gray J. said that, if all of these rules are read together, the position is as follows.

Once the claim form has been served documents which need to be served are to be served on the opposite party's solicitor if he or she has one. If there is no solicitor acting then, provided only that the opposite party has not given an address for service, service may be effected by sending the document in question to the appropriate place for service as indicated in the table at the foot of r.6.5.

However, where the document to be served is a claim form, the position is different. The combined effect of paras (2) and (5)(b) of r.6.5 is to require personal service of a claim form on the defendant, even if that defendant has a solicitor acting for him, unless that solicitor has notified the claimant that he is authorised to accept and has notified the party to be served of that fact.

In this case, the claimants (C) purported to serve the claim form and the particulars of claim on the defendant (D) by posting them to him on May 24, 2004, at what C believed to be D's last known residence. At the same time, C posted the claim form and particulars to solicitors (S) then acting for D. D had not instructed S to accept service of the claim form.

After S had advised C that D had not resided at the address for some months, on C's application, on May 28, 2004, a Master ruled that the service of the claim form on S should be deemed to be good service. It would seem that what the Master did was to say that the service on S should be treated as a permitted service by an alternative method under r. 6.8.

Subsequently, D instructed new solicitors and they applied to set aside the Master's order and to strike out the claim form. It was D's case that he had been abroad and did not see the claim form or particulars until his return on June 1, 2004. C made counter applications. On September 30, 2004, the Master dismissed D's application. Further, the Master concluded that the service by posting the claim form to what C believed to be D's last known residence was good service.

On D's appeal, Gray J. held that the Master's ruling that the service on S was good service was wrong. His lordship held that an order permitting service by an alternative method under r.6.8 cannot be made retrospectively. The normal situation in which it would be appropriate to have resort to r.6.8 is where, through no fault of the claimant, difficulty is experienced in serving the defendant and the claimant applies to the court for permission to serve by an alternative method. A method of service already utilised (in this case the service on S) cannot be ratified retrospectively (as it were) as a permitted alternative method of service under r.6.8.

There remained the question whether C's service of the claim form on, what he believed to be, D's last known residence, was good service. The question was critical because the relevant limitation period had run. Gray J. held that it was not good service. His lordship concluded on the evidence before him that, as a matter of fact, the address to which the claim form had been posted was neither the current address of D at the date of purported service, nor was it his last known address. He accepted that D had never resided at the address.

Gray J. added that, even if the address had been D's last known address, service at that address would not have constituted valid service. The explanation for this conclusion lay in paras (5) and (6) of r.6.5 outlined above. Under para. (6), service of a document must be made on an individual party at his last known residence where two conditions are satisfied. One is that the party has not given an address for service. That condition was satisfied in this case. The other condition is that no solicitor is acting for the party to be served. That condition was not satisfied in this case because, as the Master found, S were acting for D at the time of the purported service at the address believed by C to be D's last known residence. The judge rejected the submission made by C that, in this context, "no solicitor is acting" is to be construed to mean "no solicitor is instructed to accept service". The table following r.6.5(6) could not be brought into play by such construction.

In conclusion it may be noted that, in this case, the Master also made rulings in the alternative to those explained above to the effect that C were entitled (1) to an extension of time under r.7.6 for serving the claim form, and/or (2) to an order dispensing with service under r.6.9. On the appeal, Gray J. accepted D's submissions and held that neither ruling was justified. In doing so his lordship reviewed recent authorities on r.7.6 and r.6.9.

Cross-examination of witnesses

When it became possible for solicitors to obtain rights of audience in the higher courts under the scheme introduced by the Courts and Legal Services Act 1990, arrangements were made by the Law Society for suitable training programmes and tests to be provided in accordance with qualification regulations approved by the Lord Chancellor's Advisory Committee on Legal Education and Conduct.

During that process, specimen tests were prepared. In one of them candidates were asked to explain and illustrate "the rule" in the case of ***Browne v. Dunn*** (1894) 6 R. 67, a decision of the House of Lords. An eminent Queen's Counsel serving on the sub-committee of the Advisory Committee vetting the tests asked for an explanation of the point of this question. When it was explained to him the Queen's Counsel agreed that it was an important rule for advocates; he regarded it as axiomatic and was surprised to learn that there was case law authority for it.

In the recent case of ***Markem Corporation v. Zipher Limited***, [2005] EWCA Civ 267, March 22, 2005, C.A., unrep., a case in which entitlement to patents or parts of patents for printing machines was contested, the rule in ***Browne v. Dunn*** was "discovered" by the Court of Appeal. On the appeal, certain of the trial judge's adverse findings of fact were challenged by the appellants. One argument (based on ***English v. Emery Reimbold and Strick Ltd***, [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409, C.A.) was that the judge had not given adequate reasons for these findings. Related to this point was the criticism that the judge had apparently disbelieved witnesses on certain matters on which they were not challenged at trial.

Prior to the hearing of the appeal, the Court drew the attention of the parties to the rule in ***Browne v. Dunn***. Apparently this was done because one member of the Court knew that practitioners before Australian courts were very much alive to the rule. In the judgment the Court (Kennedy, Mummery & Jacob L.JJ.) noted that in Halsbury's Laws of England (4th edn Reissue) para. 1024, the case is cited for the following proposition:

"Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence or at all, may be treated as an acceptance of the truth of that part of the whole of his evidence."

And the Court quoted at length from the decision of Hunt J. in the Australian case of ***Allied Pastoral Holdings v. Federal Commissioner of Taxation***, [1983] 1 N.S.W.L.R. 1, and commended the account of the rule, and the comments on it, given there.

Part of the judgment of Hunt J. in the Allied Pastoral Holdings case quoted by the Court of Appeal is as follows:

"It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matter, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party to opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in ***Browne v. Dunn***."

In the Markem Corporation case, the Court of Appeal said that procedural fairness, not only to parties, but also to their witnesses, requires that if their evidence is to be disbelieved, they must be given a fair opportunity to deal with the allegation. The Court held that the rule in ***Browne v. Dunn*** applied in this case. But it was not necessary to explore the limits of the rule because the case fell squarely within it.

It may be commented that, although nowadays the rule is based on procedural fairness grounds, it is at bottom a practical consequence of the adversary system for the examination of witnesses. The rule is necessary for the purpose of ensuring that trial courts are not confronted with interminable applications to recall witnesses.

In conclusion, it may be noted that the rule in ***Browne v. Dunn*** is referred to by implication in para. 8.1 of the Chancery Guide (see ***White Book*** Vol. 2 para. 1-76). It may also be noted that an excellent account of the rule and its implications may be found in the judgment of Gleeson C.J. in ***R. v. Birks*** (1990) 19 N.S.W.L.R. 677, at pp. 686 to 692.

Allocation of TCC Cases

In certain circumstances, the jurisdiction of the High Court may be exercised otherwise than by judges of that Court. Section 68 of the Supreme Court Act 1981 states that provision may be made by rules of court as to cases in which jurisdiction of the High Court may be exercised by such circuit judge, deputy circuit judges or recorders as may from time to time be nominated "to deal with official referees' business".

Under the CPR, rules of court made in exercise of this rule making power are found in Part 60 and in that Part such business is described as "Technology and Construction Court claims". This is rather odd because, strictly speaking, there is no such court as "the Technology and Construction Court". However, quite unabashed by this reality, r.60.1(2)(b) states that "Technology and Construction Court" means "any court in which TCC claims are dealt with" in accordance with Pt 60 or the practice direction supplementing that Part. If it is asked what does "any court" mean in this context? there is no obvious answer. The truth is that, whether the cases identified for special treatment be called "OR's business" or "TCC claims" they are dealt with not in "any court" but in the High Court. The circularity of the language in r.60.1 is a nonsense. (Further confusion is caused by the fact that, elsewhere in the CPR, reference is made to "the TCC specialist list".) But, never mind, the intentions are good. The objectives are to cheer up those non-High Court judges who labour on TCC business (both in and out of London), and to assure practitioners handling such business that they are not in a county court.

Rule 60.1(3) states that a claim may be brought as a TCC claim if it involves issues or questions which are technically complex, or where trial by a judge nominated to deal with TCC claims is desirable. Paragraph 2.1 of Practice Direction (Technology and Construction Court Claims) gives examples of the types of claim which it may be appropriate to bring as TCC claims. For some time past, the allocation of TCC claims (1) as between (a) High Court judges, and (b) nominated circuit judges, and (2) as among nominated judges (particularly out of London), has occasioned some difficulty. On June 7, 2005, Lord Woolf C.J., sitting with May L.J. and Jackson J. in the Technology and Construction Court, issued a statement announcing new arrangements for the allocation of TCC claims to appropriate judges. The Lord Chief Justice explained that the longer term future of the TCC is currently under consideration but it had been decided that, in the meantime, new interim arrangements for allocation of claims should be put in place and should take effect forthwith.

In the Statement, the Lord Chief Justice said:

1. The High Court judge in charge of the TCC (currently Jackson J.) will no longer be required to spend half of each term away from the TCC. Instead he will be principally based at the TCC and will only sit in other courts when there is no TCC work requiring the immediate involvement of a High Court judge.
2. The judge in charge of the TCC will (with the assistance of the registry manager) consider every new case which is started in or transferred into the London TCC. He will classify each new case as "HCJ" (High Court judge) or "SCJ" (senior circuit judge). The most complex and heavy cases will be classified "HCJ". These will be managed and tried either by the judge in charge of the TCC or by another suitable High Court judge. The majority of cases, however, will be classified as "SCJ". These cases may be allocated to a named senior circuit judge by the judge in charge of the TCC; alternatively, they will be so allocated by operation of the rota.
3. It is neither practicable nor necessary for the judge in charge of the TCC to consider TCC cases which are commenced in, or transferred to, court centres outside London. Nevertheless, if any TCC case started outside London appears to require management and trial by a High Court judge, then the full time or principal TCC judge at that court centre should refer the case to the judge in charge of the TCC for a decision as to its future management and trial.
4. When proceedings are commenced in, or transferred to, the London TCC, any party to those proceedings may make brief representations by letter as to the appropriate classification.

In the statement the Lord Chief Justice also said that, when published, the new edition of the TCC Guide will set out criteria which the judge in charge of the TCC will apply, when allocating cases to the appropriate level of judge. It will also provide that the judge in charge may change the classification of cases from "HCJ" to "SCJ", or vice versa, as appropriate.

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