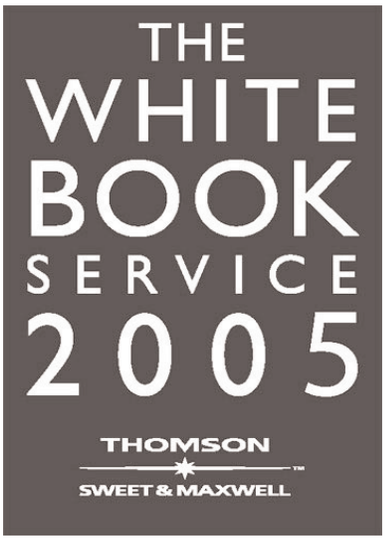
CIVIL PROCEDURE NEWS

Issue 2/2006
February 14, 2006

- Amendments to CPR
- Amendments to Practice Directions
- Extending time for service
- Restricting successive applications
- Dispensing with service of claim form
- Recent cases



IN BRIEF

Cases

■ **KUENYEHIA v. INTERNATIONAL HOSPITALS GROUP LIMITED** [2006] EWCA Civ 21, January 25, 2006, CA, unrep. (Waller, Dyson & Neuberger L.JJ.)

Dispensing with service—exceptional cases only

CPR rr.6.2(1)(e), 6.5, 6.9, 7.5 & 52.13, Practice Direction (Service) para. 3.1(1)—on last day for service, claimant's (C) solicitors (X) sending copy of claim form by courier to defendant's (D) solicitors (Y) and faxing copy of claim form to D's offices—judge holding that, in the circumstances, it would be proper to dispense with service under r.6.9—held, allowing D's appeal, (1) it requires an exceptional case before the court will exercise its powers to dispense with service under r.6.9, (2) the power is unlikely to be exercised save where the claimant has either made an ineffective attempt to serve by one of the methods permitted by r.6.2, or has served in time in a manner which involved a minor departure from one of those permitted methods of service—***Cranfield v. Bridegrove*** [2003] EWCA Civ 656; [2003] 1 W.L.R. 2441, CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 6.2.7, 6.9.1, 6PD.3 & 7.6.1)

■ **LEESON v. MARSDEN AND UNITED BRISTOL HEALTH NHS TRUST** [2006] EWCA Civ 20, *The Times*, February 3, 2006, CA (Waller, Dyson & Neuberger L.JJ.)

Successive applications to extend time for service—abuse of process

CPR rr.3.1(7), 3.3(5), 7.6 & 23.8, Practice Direction (Applications) para. 11.2—without a hearing, district judge dismissing claimant's (C) application made without notice for order extending time for service of claim form—subsequently, at two successive requests of C, district judge reconsidering order (on each occasion without a hearing) and extending time for service – district judge dismissing defendant's (D) application to set aside last of these orders, and circuit judge dismissing D's appeal—held, allowing D's further appeal, (1) C's last two applications should have been dealt with by the district judge, not on paper, but at a hearing, and (2) as those applications repeated the first, and were based on the same material, the second of them should have been struck out as an abuse of process, (3) further, there was no basis upon which the first order could be varied by exercise of the court's powers under r.3.1(7) (see ***Civil Procedure 2005*** Vol. 1 paras 3.1.9, 3.3.1, 23.0.14, 23.8.1 & 23PD.12)

■ **COLLIER v. WILLIAMS** [2006] EWCA Civ 20, *The Times*, February 3, 2006, CA (Waller, Dyson & Neuberger L.JJ.)

Address for service given—personal service not possible

CPR rr.6.4(2) & 6.5—on April 1, claimant (C) issuing claim form for personal injuries—primary limitation period expiring on April 9—on July 23, 2004, C's solicitors posting claim form to solicitors (X) nominated by defendant's (D) insurers to accept service—on August 1, validity of claim form for service expiring—on August 6, D applying to strike out claim—at hearing of application, D contending that service was ineffective because, although X were authorised to accept service (r.6.4(2)(a)), they had not notified C in writing that they were so authorised (r.6.4(2)(b))—by order dated January 11, 2005, district judge dismissing application—designated civil judge transferring D's appeal to Court of Appeal—held, dismissing appeal, (1) D had given X's address as his address for service (r.6.5(2)), consequently (2) in accordance with r.6.5(4), C was obliged to serve the claim form at that address, (3) in the circumstances, it was not open to C to serve the claim form personally on D, (4) r.6.4 is not of general application but is concerned with personal service only and r.6.4(2) is only concerned with preventing personal service, accordingly (5) r.6.4(2) was of no relevance in this case—***Nanglegan v. Royal Free Hampstead NHS Trust*** [2001] EWCA Civ 127; [2002] 1 W.L.R. 1043, CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 6.4.1 & 6.5.3)

■ **GLASS v. SURRENDRAN** [2006] EWCA Civ 20, *The Times*, February 3, 2006, CA (Waller, Dyson & Neuberger L.JJ.)

Time for service—no basis for extending

CPR rr.7.5(2) & 7.6(2)—claimant (C) bringing claim for personal injuries suffered in a road accident—time for service of claim form expiring on January 3, 2005—on December 21, 2004, principally on ground that his solicitors were awaiting an accountant's report, C applying for extension of time for service—on January 4, district judge refusing C's application, but on January 13, district judge setting aside that order and extending time to February 2—C effecting service within that time—on D's appeal, circuit judge considering matter afresh and concluding that under r.7.6(2) time ought to be extended—D given permission to make second appeal—held, allowing appeal, (1) the judge had not exercised his discretion correctly, (2) C was unable to identify anything which could fairly be characterised as a reason for extending time for service, (3) there was no basis upon which a competent litigation solicitor, had he thought about the matter properly, could have justified delaying service beyond the time fixed by r.7.5(2)—***Hashtroodi v. Hancock*** [2004] EWCA 652; [2004] 1 W.L.R. 3206, CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 7.6.1 & 7.6.2)

INVESTMENT INVOICE FINANCING LTD. v. LIMEHOUSE BOARD MILLS LTD. [2006] EWCA Civ 9, *The Times*, January 23, 2006, CA (Tuckey & MooreBick L.JJ.)

Stay of proceedings—costs of previous proceedings not paid

CPR rr.2.1(2) & 3.4(4), Supreme Court Act 1981 s.49(3)—trade creditor (C1) presenting petition to have company (D) wound up—judge dismissing petition and ordering C1 to pay D's costs, summarily assessed at £18,000—although payable within 14 days (r.44.8), these costs remaining unpaid—subsequently, C1 bringing proceedings against D for 42 unpaid invoices—C1 executing deed of assignment transferring 40 of the invoices to finance company (C2)—C2 substituted as co-claimants—on D's application, judge making unless order requiring C1 to provide security (1) in the sum of £5,000 for the costs of the proceedings, and (2) in the sum of £18,000 for the unpaid costs of the winding-up petition—C1's claims struck out when they failed to comply with this order—on D's further application, judge then making unless order requiring C2 to pay £23,000 into court as security for the unsatisfied costs orders made against C1—on C2's appeal against this order, held, dismissing the appeal, (1) the judge had jurisdiction to make the order, (2) there is a clear distinction between (a) imposing on a new party to the litigation as a condition of joinder a requirement to provide security for costs to which he could not otherwise be made subject, and (b) staying the proceedings until a previous order for costs has been satisfied, (3) the whole purpose of presenting the petition and commencing the action was the same, namely to recover on the unpaid invoices, and the parties were substantially the same, as C2 were the assignees of C1, (4) to start fresh proceedings to recover the same debt without paying the costs of the winding-up petition (which was dismissed as an abuse) was an abuse and the court had power to stay the proceedings until those costs were paid, (5) it was an abuse for C2, as successor in title to C1, to continue the proceedings while the existing orders for costs against C1 remained unsatisfied—Court stating that the court's power referred to in r.3.4(4) to stay subsequent proceedings pending payment of costs, ordered when a statement of case (which, as defined, does not include a winding-up petition) was struck out in previous proceedings, does not have the effect of limiting the court's general jurisdiction to stay proceedings or its inherent jurisdiction to stay proceedings to prevent abuse of its process—***Eurocross Sales Ltd. v. Cornhill Insurance Plc.*** [1995] 1 W.L.R. 1517, CA, ***Norglen Ltd. v. Reeds Rains Prudential Ltd.*** [1992] 2 A.C. 1, HL, ***Compagnie Noga d'Importation et Exportation S.A. v. Australian and New Zealand Banking Group Ltd.*** [2004] EWHC 2601 (Comm), November 18, 2004, unrep., ***Sinclair v. British Telecommunications Plc.*** [2001] 1 W.L.R. 38, CA, ***Martin v. Earl Beauchamp*** (1889) 25 Ch.D. 12, CA, ***M'Cabe v. The Governor and Company of the Bank of Ireland*** (1889) 14 App.Cas. 413, HL, ***Hines v. Birbeck College (No. 2)*** [1992] Ch. 33, CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 2.1.4, 3.4.8 & 25.14.1, and Vol. 2 paras 9A–59, 9A–161 & 9A–163)

MARSHALL v. MAGGS [2006] EWCA Civ 20, *The Times*, February 3, 2006, CA (Waller, Dyson & Neuberger L.JJ.)

Service of claim form—extending time—"last known residence"

CPR rr.6.5 & 7.6—stockbrokers (C) bringing claim against former client (D) for debt—C issuing claim form on January 28, 2004—after communications with solicitors (X) acting for D, on May 21 C posting claim form and particulars to D at a London address, believed by C to be D's last known residence (r.6.5(6)), and sending copies to X—on May 27, after X had failed to confirm that D had been properly served, C making application without notice for order (1) that the claim form had been effectively served, or (2) that time for service be extended under r. 7.6(2)—on May 27, Master ordering that the receipt of claim form and particulars by X "be deemed good service"—on June 17, D applying to set aside this order—on June 29, C making application substantially in the same terms as in their May 27 application—on October 12, in dealing with these application, Master deciding (1) that good service had been effected under r.6.5(6) by the posting to the London address on May 21, and (2) in any event, C were entitled to an order under r.7.6(3) extending time for service (but Master not dealing separately with C's application under r.7.6(2))—judge allowing D's appeal, holding (amongst other things) that C were not entitled to an extension of time under r.7.6(2)—on C's appeal, held, dismissing appeal (1) in r.6.5(6) "no solicitor acting" is to be interpreted as meaning "no solicitor acting so that he can be served", (2) as X were not so acting for D, and as D had not given an address for service, the conditions in r.6.5(6) were satisfied and the methods of service stated therein were open to C, (3) consequently, it was open to C to serve the claim form on D by posting it to his "last known residence", (4) however, the London address was not of such a residence because (as C now conceded) the fact was that D had never lived there, (5) an individual's "last known residence" means a residence which the serving party actually knows to be the individual's last residence or which he could (constructively) know so to be by exercising reasonable diligence (an honest belief is not sufficient), (6) in dealing with the question whether an extension should be granted the judge was wrong to treat the r.7.6(2) issue as if it would be determined by his decision on the r.7.6(3) issue, (7) however, exercising discretion afresh, and determining and evaluating C's reason for not serving the claim form within the specified period, this was not a case in which it would be right to extend time—***Smith v.***

Hughes [2003] EWCA Civ 656; [2003] 1 W.L.R. 2441, CA, *Mersey Docks Property Holdings v. Kilgour* [2004] EWHC 1638 (TCC), *Hashtroodi v. Hancock* [2004] EWCA 652; [2004] 1 W.L.R. 3206, CA, ref'd to (see *Civil Procedure 2005* Vol. 1 paras 6.5.3, 7.6.1 & 7.6.2)

R. (INTERNATIONAL MASTERS PUBLISHERS LTD.) v. REVENUE AND CUSTOMS COMMISSIONERS *The Times*, January 30, 2006 (Collins J.)

Judicial review—reasons for delay in bringing claim

CPR rr.3.1 & 54.5—in April 2004, Revenue (D) refusing to apply particular extra statutory concession to certain transactions of publisher (C)—accordingly, D issuing decision letter stating that VAT should be payable at standard rate—instead of applying for permission to bring judicial review claim challenging that decision, C appealing to VAT tribunal against D's decision on their zero rating claim—tribunal dismissing that appeal—C applying under r.3.1(2)(a) for extension of time for applying for judicial review of (1) the decision letter (alleging that it was irrational and unfair), and (2) the VAT tribunal's conclusion—held, dismissing the application, (1) for a number of reasons, including the saving of costs, C (acting on advice) had decided to stand the claim over pending any adverse decision by the tribunal, (2) C's not wishing to incur expense, possibly unnecessarily, was not sufficient to explain or justify the delay judge stating that C should have notified D of the possibility of a judicial review claim and sought their assurances or their agreement as to time limits (see *Civil Procedure 2005* Vol. 1 paras 3.1.2 & 54.5.1)

SMITH INTERNATIONAL INC. v. SPECIALISED PETROLEUM SERVICES GROUP LIMITED [2005] EWCA Civ 1357, November 17, 2005, CA, unrep. (Mummery, Jacob & Neuberger L.JJ.)

Appeal from tribunal—second appeal

CPR r.52.13, Access to Justice Act 1999 s.55, Patents Act 1977 s.97(3), Supreme Court Act 1981 s.18—hearing officer, acting on behalf of Patent Office Comptroller, finding that company's (C) proposed patent claim was invalid for lack of novelty—High Court judge allowing respondent company's (D) appeal—C applying to Court of Appeal for permission to appeal to that Court—held, granting permission to appeal, (1) the "second appeal" provisions in s.55 and r.52.13 do not apply to appeals under s.97(3) of the 1977 Act, (2) although s.55 is in wide terms, it has not impliedly repealed or amended the earlier s.97(3) or otherwise limited its scope, (3) C's proposed appeal had a real prospect of success—authorities of second appeals from tribunals etc. explained—*Tanfern v. Cameron MacDonald* [2000] 1 W.L.R. 1311, CA, ref'd to (see *Civil Procedure 2005* Vol. 1 para. 52.3.9 and Vol. 2 paras 9A-55 & 9A-873)

Statutory Instruments

ACCESS TO JUSTICE ACT 1999 (DESTINATION OF APPEALS) FAMILY PROCEEDINGS) ORDER 2005 (S.I. 2005 No. 3276)

CPR Pt 52, Practice Direction (Appeals) para. 2A Table 3, Access to Justice Act 1999 s.56, Supreme Court Act 1981 s.16(1), County Courts Act 1984 s.77(1)—provides different routes for appeals against decisions made in proceedings in relation to adoption, including the exercise of the inherent jurisdiction of the High Court with respect to minors, and in proceedings for the purpose of enforcing an order made in such proceedings—in particular provides (1) that appeals from decision made by a district judge of a county court will lie to a judge of that court (art.3), and (2) appeals from decisions made by the following judicial officers or their appointed deputies will lie to a judge of the High Court (*viz.*, from a district judge of High Court or of principal registry of Family Division, a costs judge) (art.2)—applies to any appeal in which appeal notice lodged after December 30, 2005—in force December 30, 2005 (see *Civil Procedure 2005* Vol. 1 para. 52.0.11 and Vol. 2 paras 9A–49, 9A–655 & 9A–875)

CIVIL PROCEDURE (AMENDMENT NO. 4) RULES 2005 (S.I. 2005 No. 3515)

Make amendments, substitutions and additions to CPR—amend (1) r.16.2 to require accrued interest to be stated in claim form where claim for specified sum of money, (2) r.25.1(1) to add order under art.9 of Council Directive (EC) 2004/48 on the enforcement of intellectual property rights to interim remedies, (3) r.40.2 to require explanation of routes of appeal in judgments and orders, and (4) r.63.1 to allocate to the multi track all claims brought under Pt 63 (Patents and Other Intellectual Property Claims)—also amend various rules (1) to permit, as an alternative to service by first class post, service by an alternative service providing for delivery on next working day (rr.6.2, 6.5, 6.7, 55.13 & 75.3), (2) to clarify rules for transfer of cases to and from specialist lists (rr.30.5, 58.4, 59.3, 61.2 & 62.3)—substitute (1) revised Pt 20 (Counterclaims and Other Additional Claims), and (2) r. 44.16 to take into account revocation of Conditional Fee Agreement Regulations—add (1) Adoption and Children Act 2002 to table of enactments detailing types of proceedings to which the CPR do not apply (r.2.1), and (2) provisions to Pt 54 (Judicial and Statutory Review) dealing with applications for review of decisions of the Asylum and Immigration Tribunal (AIT)—make minor amendments to rr.25.2(3), 52.1, 52.3 & 52.4—in force April 6, 2006

IN DETAIL

Restricting successive applications to extend time for serving claim form

In ***Collier v. Williams*** [2006] EWCA Civ 20, January 25, 2006, CA, unrep., the Court of Appeal gave judgment in four of six conjoined appeals raising issues relating to the service of claim forms (CPR rr.6.4 & 6.5), to the extension of time for such service (CPR r.7.6), and to the proper application of the guidance given by the Court in ***Hashtroodi v. Hancock*** [2004] EWCA Civ 652; [2004] 1 W.L.R. 3206, CA, as to the exercise of discretion in this context (see ***White Book*** Vol. 1 para. 7.6.2). All four of the conjoined appeals are mentioned in the ***In Brief*** section of this issue of ***CP News***.

The proper application of the ***Hashtroodi*** guidance was relevant to three of the four appeals. In two of these appeals, ***Marshall v. Maggs*** and ***Glass v. Surrendran***, the lower courts had extended time for service under CPR r.7.6 but the Court of Appeal found that they had incorrectly applied the guidance given in the Hashtroodi case and held that time should not have been extended. In the third, ***Leeson v. Marsden and United Bristol Health NHS Trust***, the lower court refused to extend time and the Court of Appeal found that the judge had correctly applied the guidance and upheld his decision. The judgment of the Court insofar as it deals with the ***Hashtroodi*** guidance in the context of these three appeals provides a clear warning that solicitors who delay issuing claim forms until the limitation period is about to expire run considerable risks. Indeed, the judgment may mark a turning point, leading to the lower courts paying greater attention to the ***Hashtroodi*** guidance and being less willing than heretofore to grant applications by claimants to extend time for serving claim forms. The judgment may also provoke a wave of appeals by defendants on whom service has been effected after time was extended in cases where it is arguable that, in extending time, the court did not undertake (what the Court of Appeal described as) the critical inquiry; that is to say, without determining and evaluating the reason why the claimant did not serve the claim form within the specified period.

In what follows attention is confined to the additional issues raised by one of the conjoined appeals, that is to say, in ***Leeson v. Marsden and United Bristol Health NHS Trust***, and nothing further is said about the Court's holdings (important as they are) on the issues common to the several appeals, that is to say, on the questions whether service was properly effected or the discretion to extend time properly exercised.

In disposing of the appeal in the ***Leeson*** case, the Court of Appeal had to deal with issues arising in relation to CPR r.3.1(7), r.3.3(5) and r.23.8. These provisions refer to the court's powers to vary or revoke its own orders, whether made on an application determined with, or without, a hearing. The Court expressed concern at the practices that appear to have developed in the courts for using those provisions in the handling of successive applications made by claimants for the extension of time for service. Under the CPR, the period of validity for service of originating process was reduced and the scope for extending the period restricted. Before the CPR came into effect, the period of validity was one year and extensions were routinely granted. It was intended that that relaxed regime should be abandoned. Certainly, it was not intended that claimants should be indulged by the court's readily granting of applications for extensions of time for service of claim forms, or that the courts should be burdened by successive applications by claimants for such relief, extending time first to one date and then to another. (The latter consideration has become increasingly important as the need to husband court and judicial resources has grown.)

The facts in the Leeson case

In the ***Leeson*** case, on November 24, 2003, very shortly before the expiry of the primary limitation period, the claimant (C) issued a claim form claiming damages for medical negligence against a doctor and a NHS trust. C alleged that the defendants had negligently failed to diagnose a developing neurological condition until December 13, 2000. According to r.7.5(2), the claim form had to be served on the defendants by March 24, 2004. On March 9, 2004, C applied to the court without notice to the defendants for an order under r.7.6 extending the time for service until September 30, 2004. The application notice requested the court to deal with the matter without a hearing. On March 22, 2004, upon contacting the court, C's solicitor discovered that the application had not been dealt with (the court had managed to lose the application). The solicitor immediately sent the application notice again to the court and specifically drew the court's attention to the fact that the time for service would expire on March 24.

On March 23, a district judge dealt with the application without a hearing (r.23.8). The district judge, (a) refused to grant an extension of time for service of the claim form, but (b) extended time for service of the particulars of

claim by four months (r.7.4). On April 1, C wrote to the court requesting the court to reconsider the order and to extend the time for serving the claim form for seven days beyond March 24. On April 6, without holding a hearing another district judge purported to grant a retrospective extension of time to March 31. The next day (April 7), the solicitor again wrote to the court requesting yet a further extension. On April 8, a third district judge, again without a hearing, extended the time to April 15. So by now, in response to three applications made by C without notice (on March 9, April 1 and 7) the court had made three orders (March 23, April 6 and 8), on each occasion made without a hearing, with the second and third of the orders (but not the first) extending time for service, first from March 24 to March 31 and then to April 15.

On April 15, the defendants applied to set aside the third of the court's orders (April 8). This application was heard by the third district judge at hearings held on July 13 and November 26. The district judge treated the matter as a rehearing of the earlier without notice applications made by C. He set aside the orders of March 23, April 6 and April 8, and ordered that the time for service of the claim form be extended to particular dates enabling C to effect good service.

The defendants appealed, arguing that the district judge had no jurisdiction to rehear C's earlier applications and that C's only remedy was to appeal against the order of March 23. The circuit judge held that the district judge did have jurisdiction and, on the defendants' appeal to the Court of Appeal (Waller, Dyson & Neuberger L.JJ.) held that the judge was right to so hold. However, the Court also held, and in doing so in effect allowed the defendants' appeal, (1) that C's applications of April 1 and 7 were merely repeats of the application of March 9, (2) that those two repeat applications should have been dealt with by the district judge, not on paper, but at a hearing, and (3) that the district judge, instead of granting the second of them, should have struck it out as an abuse of process. Accordingly, the Court concluded that the circuit judge should have allowed the defendants' appeal at least on the grounds that C's application of April 7 to vary the order of March 23 should have been struck out on that basis. As is explained below, the Court's decision was founded on the proper applications (1) of (in combination) CPR r.3.3(5) and r.23.8, and (2) of CPR r.3.1(7). In what follows, these two aspects (the first being much more complicated than the second) are dealt with in turn. (It is interesting to note that, in reaching its conclusions on these matters and in indicating practice to be followed in the future, at no point did the Court have recourse to the overriding objective.)

Extending time without a hearing (CPR r.3.3(5) and r.23.8)

Rule 7.5(2) states the general rule that a claim form must be served within four months of the date of issue. The claimant may apply for an order extending the period within which the claim form may be served (r.7.6(1)). Such an application may be made without notice to the defendant (r.7.6(4)(b)).

Rule 23.8 states that, in circumstances provided for in paras (a) to (c) of the rule, the court may deal with an application without a hearing. Those circumstances are if (a) the parties agree as to the terms of the order sought, (b) the parties agree that the court should dispose of the application without a hearing, or (c) the court does not consider that a hearing would be appropriate. Paragraph 11.2 of Practice Direction (Applications), supplementing Pt 23 (see ***White Book*** Vol. 1, para. 23PD.12) states that, where para. (c) of r.23.8 applies, the court will treat the application "as if it were proposing to make an order on its own initiative". That is a reference to the power of the court to make orders of its own initiative under r.3.3. Recourse to that rule reveals that r.3.3(5) states that, where the court does indeed make an order of its own initiative without hearing the parties or giving them an opportunity to make representations, a "party affected by the order" may apply to have it set aside varied or stayed. The order must contain a statement of the right to make such an application. In effect, the court's jurisdiction under r.3.3(5) is indirectly engaged in the circumstances provided for by r.23.8(c).

Rule 23.8 applies to applications generally, and therefore applies to an application made by a claimant without notice to extend time for serving his claim form under r.7.6. Where the court makes an order on such an application, it would seem that the claimant, a well as the defendant is a party affected by the order, and either or both them has the right to apply to have the order set aside, varied or stayed. (In any event, as the order has been made without notice to him, the defendant can apply to have the order set aside or varied under r.23.10.) Certainly, in relation to applications generally, in practice courts have taken the view that, if the order made by the court refuses the application, or does not give the applicant all the relief sought, it is open to the applicant to ask the court to reconsider the matter and seek a different order, rather than appeal. So it would seem to follow that where a claimant made a without notice application for an order extending time under r.7.6, and the court dealt with that application without a hearing and in the event refused the applicant the extension sought, the applicant (as a party affected) would have the right to have the court reconsider the matter and make a different order.

However, as indicated above, on the appeals in the ***Leeson*** case (both to the circuit judge and to the Court of Appeal), the defendants submitted that, in these circumstances, (1) the court had no jurisdiction to reconsider the matter, and (2) the only route of challenge open to the claimant was an appeal.

The submission was based on the argument that the circumstances did not come within r.23.8(c), and therefore no right under r.3.3(5) to have the matter reconsidered accrued to a party affected. The Court of Appeal rejected this submission. Put shortly, the Court held that, if the court accedes to an applicant's request to dispose of his without notice application on paper (i.e. without a hearing), the court does so, not under para. (b) of r.23.8 (as the defendants contended), but under para. (c) of that rule (and therefore r.3.3(5) is engaged). The Court recognised that this interpretation of the rules created a potential for abuse, as there is nothing in the rules to stop a party affected from making application after application to have the court reconsider orders made by the court without a hearing in relation to the same matter (see ***White Book*** Vol. 1 paras. 23.0.14 & 23.0.15). There has to be a solution to this abuse. The Court said that the solution lies in the court breaking the cycle (1) by being alert to ensure that a repeat application raising an important matter is not dealt with on paper but at a hearing, and (2) by the proper exercise of the discretion conferred by r. 3.3(5).

The Court said (para. 37):

"We suggest that it is good practice to require any application under r.3.3(5) to be made at a hearing rather than on paper. If a judge dismisses an application under r.3.3(5), whether on paper or at a hearing, any further application under r.3.3(5) should usually be struck out as an abuse of process, unless it is based on substantially different material from the earlier application (in which case different considerations will arise)."

The Court added (para. 38):

"On receipt of a without notice application with a request for the matter to be disposed of on paper, the court should consider whether it is appropriate to dispose of the matter without a hearing. In our view, there is a danger in dealing with important applications on paper. An application for an extension of time for service of the claim form is potentially of critical importance, especially where the application is made shortly before the end of the four months period for service and where the cause of action has become time-barred since the date on which the claim form was issued. If the application is allowed and an extension of time is given, the defendant can always apply under r.23.10 for the order to be set aside, in which case the applicant may be worse off than if it had been refused in the first place. It is highly desirable that on the without notice application, full consideration (with proper testing of the argument) is given to the issue of whether the relief sought should be granted. Equally, if an application is made late in the day and refused on paper when proper argument would have made it proper to grant, a great deal of heart-ache can be saved. We think that applications of this kind, where time limits are running out, should normally be dealt with by an urgent hearing. We accept, however, that owing to time constraints, pressure of business and the like, it will sometimes not be possible to deal with such an application other than on paper. Even in such cases, however, consideration should be given to dealing with the application by telephone."

The general power to vary or revoke an order (CPR r.3.1(7))

It was explained above that the Court's decision in the ***Leeson*** appeal was founded not merely on the proper application of (in combination) CPR r.3.3(5) and r.23.8, but also on the proper application of CPR r.3.1(7). Rule 3.1(7) states that a power of the court under the CPR to make an order includes a power to vary or revoke the order. Where the court makes an order on a claimant's application to extend time for service under r.7.6, and the claimant is not content with the order made, he may (instead of appealing the order) apply to the court under r.3.1(7) for appropriate relief. This avenue of review lies open to the claimant in a case where the order was made either on paper without a hearing or with a hearing. Consequently, in the ***Leeson*** case the Court of Appeal had to consider whether C's repeat application should have been entertained by the court under this rule.

The Court referred to the judgment of Patten J. in ***Lloyds Investment (Scandinavia). v. Ager-Hanssen*** [2003] EWHC 1740 (Ch), July 15, 2003, unrep. (see ***White Book*** Vol. 1 para. 23.0.14) and endorsed the approach adopted by the judge in that case. The Court said (para. 40) the power given by r.3.1(7) cannot be used simply as an equivalent to an appeal against an order with which the applicant is dissatisfied. The circumstances outlined by Patten J. are the only ones in which the power to revoke or vary an order already made should be exercised under r. 3.1(7). The Court summarised the position as follows (para. 120):

"In short, therefore, the jurisdiction to vary or revoke an order under r.3.1(7) should not normally be exercised unless the applicant is able to place new material before the court, whether in the form of evidence or argument, which was not placed before the court on the earlier occasion."

In applying this approach to the facts of the ***Leeson*** case the Court held that if the district judge, on C's application

of April 7 to vary the order of March 23, purported to vary the order in the manner requested by C by exercising the court's powers under r.3.1(7) he was wrong to do so (para. 123). He was wrong because, in substance, the circumstances that obtained at the time of C's later applications were no different from those that obtained at the date of the application of March 9. The Court expressly rejected the submission that the mere fact that an application is refused without a hearing is a sufficient reason for requiring r.3.1(7) to be construed as enabling a court to vary or revoke an order even where no new material is deployed by the applicant.

Dispensing with service of claim form

In ***Kuenyehia v. International Hospitals Group Limited*** [2006] EWCA Civ 21, January 25, 2006, CA, unrep., the facts were that, following negotiations with the defendants (D) and with their solicitors (Y), on December 19, 2003, the claimants (C) issued a claim form making a contractual claim. C's solicitors (X) did not serve the claim form on D promptly. On April 19, 2004, the last day for service as fixed by the time limit in r.7.5, X sent a copy of the claim form by courier to Y and faxed a copy of claim form to D's offices.

After the limitation period for some components of C's claim had run, on May 7, 2004, C applied for an order (1) that service had been validly effected (r.6.5), or (2) that time for service be extended (r.7.6), or (3) that service be dispensed with (r.6.9). A Master held that, although there had been no service of the claim form in accordance with Pt 6, service should be dispensed with pursuant to r.6.9. A judge dismissed D's appeal, holding that (1) although the service on D by fax was not valid, by that service in fact D had received the claim form within the four month period stipulated by r.7.5(2), and (2) in that circumstance it would be proper to dispense with service under r.6.9. A single lord justice granting D permission to make a second appeal (r.52.13).

The Court of Appeal (Waller, Dyson & Neuberger L.JJ.) allowed D's appeal. The Court referred to the well-known authorities culminating in ***Cranfield v. Bridegrove*** [2003] EWCA Civ 656; [2003] 1 W.L.R. 2441, CA. That is to say, in addition to that case, to ***Vinos v. Marks & Spencer plc***. [2001] 3 All E.R. 284, CA, ***Godwin v. Swindon Borough Council*** [2001] EWCA Civ 1478; [2002] 1 W.L.R. 997, CA, ***Anderton v. Clwyd County County Council*** [2002] EWCA Civ 933; [2002] 1 W.L.R. 3174, CA, ***Wilkey v. British Broadcasting Corporation*** [2002] EWCA Civ 1561; [2003] 1 W.L.R. 1, CA. (see ***White Book*** paras. 6.9.1 & 7.6.1.)

The Court explained that in the cases in that line of authority, the facts were that the service of the claim form would have been effective but for the fact that, by operation of a deeming provision in r.6.7, the service was carried out of time. In the instant case, the facts were that the services on D and Y were in time but neither accorded with the methods of service stipulated in Pt 6, as Y had no instructions to accept service and D had not indicated a willingness to accept service by fax, as required by Practice Direction (Service) para. 3.1(1), supplementing r.6.2(1)(e) (see ***White Book*** Vol. 1 para. 6.2.7 & 6PD.3). The Court was of the opinion that, despite this difference, the principles derived from those five authorities should be applied to the present case. The Court then identified those principles. Put briefly, they are (1) it requires an exceptional case before the court will exercise its powers to dispense with service under r.6.9, where the time limit for service of the claim form in r.7.5(2) has expired before service was effected in accordance with Pt 6, (2) the power is unlikely to be exercised save where the claimant has either made an ineffective attempt to serve by one of the methods permitted by r.6.2, or has served in time in a manner which involved a minor departure from one of those permitted methods of service, (3) it is not possible to give an exhaustive guide to the circumstances in which it would be right to dispense with service of a claim form.

The Court concluded that, (a) that this was not an exceptional case, and (b) that the failure to comply with para. 3.1(1) could not fairly be characterised as "a minor departure" from r.6.2(e), and allowed D's appeal.

CPR UPDATE—Rules

AMENDMENTS TO RULES

The Civil Procedure (Amendment No. 3) Rules 2005 (S.I. 2005 No. 2292) and the Civil Procedure (Amendment No. 4) Rules 2005 (S.I. 2005 No. 3515) make amendments, coming into effect on April 6, 2006, to provisions in eighteen Parts of the CPR. Other amendments made by the first of these statutory instruments, and coming into effect at earlier dates, were explained in issue 08/05 of ***CP News***. Volume, supplement, paragraph and page references are to Civil Procedure 2005.

Vol. 1, para. 2.1, p.38

In the table following r.2.1, after "Adoption Act 1976, s.66" insert "or Adoption and Children Act 2002, s.141"

Vol. 1, para. 6.2, p. 151

In sub-para. (b) of r.6.2(1), after "first class post" insert "(or an alternative service which provides for delivery on the next working day)"

Vol. 1, para. 6.5, pp.156 & 157

In para. (2) of r.6.5 (Address for service), add at the end the following sentence and signpost:

"Such address must include a full postcode, unless the court orders otherwise.

(Paragraph 2.4 of the Practice Direction to Part 16 contains provision about the content of an address for service)"

In para. (4) of r.6.5, after "first class post" insert "(or an alternative service which provides for delivery on the next working day)"

Vol. 1, para. 6.7, p.160

In the table following para. (1) of r.6.7(Deemed service), after "first class post" insert "(or an alternative service which provides for delivery on the next working day)"

Vol. 1, para. 6.13, p.164

After r. 6.13 (Service of claim form by court etc), insert the following signpost:

"(Paragraph 2.4 of the Practice Direction to Part 16 contains provision about the content of an address for service)"

Vol. 1 para. 9.2, p.304

After r.9.2 (Defence, admission or acknowledgment of service), insert the following signpost:

"(Paragraph 10.6 of the Practice Direction to Part 16 contains provision about the content the admission, defence or acknowledgment of service)"

Vol. 1, para. 12.4, p.317

In para. (2) of r.12.4 (Procedure for obtaining default judgment) an addition is made at the end so that the paragraph now reads in its entirety as follows:

"(2) The claimant must make an application in accordance with Part 23 if he wishes to obtain a default judgment—

(a) on a claim which consists of or includes a claim for any other remedy; or

(b) where rule 12.9 or rule 12.10 so provides,

and where the defendant is an individual, the claimant must provide the defendant's date of birth (if known) in Part C of the application notice."

Vol. 1, para. 16.2, p.362

After para. (1)(c) of r.16.2 (Contents of claim form), omit "and" and substitute:

"(cc) where the claimant's only claim is for a specified sum, contain a statement of the interest accrued on that sum; and"

Vol. 1, paras 20.1 to 20.13, pp.448 to 455

Part 20 (rr.20.1 to 20.13) has been substituted. See further ***In Detail*** section of the next issue of ***CP News***.

Vol. 1, para. 25.1, p.545

At end of para. (1)(n) of r.25.1 (Orders for interim remedies), omit "and" and after para. (1)(o) insert:

"; and

(p) an order under Article 9 of Council Directive (EC) 2004/48 on the enforcement of intellectual property rights (order in intellectual property proceedings making the continuation of an alleged infringement subject to lodging of guarantees)."

Vol. 1, para. 25.2, p.566

For para. (3) of r.25.2 (Time when an order for an interim remedy may be made) substitute:

"(3) Where it grants an interim remedy before a claim has been commenced, the court should give directions requiring a claim to be commenced."

Vol. 1, para. 30.5, p.727

For para. (2) of r.30.5 (Transfer between Divisions and to and from a specialist list) substitute:

"(2) A judge dealing with claims in a specialist list may order proceedings to be transferred to or from that list."

Vol. 1, para. 40.2, p.1013

In r.40.2 (Standard requirements), after para. (2) insert:

"(3) Paragraph (4) applies where a party applies for permission to appeal against a judgment or order at the hearing at which the judgment or order was made.

(4) Where this paragraph applies, the judgment or order shall state—

(a) whether or not the judgment or order is a final;
(b) whether an appeal lies from the judgment or order and, if so, to which appeal court;
(c) whether the court gives permission to appeal; and

if not, the appropriate appeal court to which any further application for permission may be made.

(Paragraph 4.3B of the Practice Direction supplementing Part 52 deals with the court's power to adjourn a hearing where a judgment or order is handed down and no application for permission to appeal is made at that hearing)"

Vol. 1, para. 44.16, pp.1133 & 1134

For r.44.16 (Adjournment where legal representative seeks to challenge disallowance of any amount of percentage increase), substitute:

"**44.16**—(1) This rule applies where the Conditional Fee Agreements Regulations 2000 or the Collective Conditional Fee Agreements Regulations 2000 continues to apply to an agreement which provides for a success fee.

(2) Where—

(a) the court disallows any amount of a legal representative's percentage increase in summary or detailed assessment proceedings; and
(b) the legal representative applies for an order that the disallowed amount should continue to be payable by his client,

the court may adjourn the hearing to allow the client to be—

(i) notified of the order sought; and
(ii separately represented.

(Regulation 3(2)(b) of the Conditional Fee Agreements Regulations 2000, which applies to Conditional Fee Agreements entered into before November 1, 2005, provides that a conditional fee agreement which provides for a success fee must state that any amount of a percentage increase disallowed on assessment ceases to be payable unless the court is satisfied that it should continue to be so payable. Regulation 5(2)(b) of the Collective Conditional Fee Agreements Regulations 2000, which applies to Collective Conditional Fee Agreements entered into before November 1, 2005, makes similar provision in relation to collective conditional fee agreements.)"

Vol. 1, para. 52.1, p.1454

In the cross-reference following para. (2) of r.52.1 (Scope and interpretation), for "Rules 47.21 to 47.26" substitute "Rules 47.20 to 47.23"

Vol. 1, para. 52.3, p.1457

In para. (6) of r.52.3 (Permission), for "will only be given where" substitute "may be given only where"

Vol. 1, para. 52.4, p.1465

As a result of changes to paras (2) and (3), r. 52.4 (Appellant's notice) now reads in its entirety as follows:

"(1) Where the appellant seeks permission from the appeal court it must be requested in the appellant's notice.

(2) The appellant must file the appellant's notice at the appeal court within—

(a) such period as may be directed by the lower court (which may be longer or shorter than the period referred to in sub-paragraph (b)); or
(b) where the court makes no such direction, 21 days after the date of the decision of the lower court that the appellant wishes to appeal.

(3) Unless the appeal court orders otherwise, an appellant's notice must be served on each respondent—

(a) as soon as practicable; and
(b) in any event not later than 7 days,

after it is filed."

Supplement 2, para. 54.28, p.118

After sub-para. (e) in r.54.28(2) insert the following:

"(ea) "fast track case" means any case in relation to which an order made under section 26(8) of the 2004 Act provides that the time period for making an application under section 103A(1) of the 2002 Act or giving notification under paragraph 30(5) of Schedule 2 to the 2004 Act is less than 5 days;"

Supplement 2, para. 54.28, p.119

After r.54.28 (Scope and interpretation), insert new rules 54.28A and 54.28B as follows:

"**Representation of applicant's while filter provision has effect**

54.28A—(1) This rule applies during any period in which the filter provision has effect.

(2) An applicant may, for the purpose of taking any step under rule 54.29 or 54.30, be represented by any person permitted to provide him with immigration advice or immigration services under section 84 of the Immigration and Asylum Act 1999.

(3) A representative acting for an applicant under paragraph (2) shall be regarded as the applicant's legal representative for the purpose of rule 22.1 (Documents to be verified by a statement of truth) regardless of whether he would otherwise be so regarded.

Service of documents on appellants within jurisdiction

54.28B—(1) In proceedings under this Section, rules 6.4(2) and 6.5(5) do not apply to the service of documents on an appellant within the jurisdiction.

(2) Where a representative is acting for an appellant who is within the jurisdiction, a document must be served on the appellant by—

(a) serving it on his representative; or
(b) serving it on the appellant personally or sending it to his address by first class post,

but it the document is served on the appellant under sub-paragraph (b), a copy must also at the same time be sent to his representative."

Supplement 2, para. 54.29, p.119

In para. (1) of r.54.29 (Application for review), for "paragraph (4)" substitute "paragraph (5)"

In para. (2) of r.54.29, for "The applicant" substitute "During any period in which the filter provision does not have effect, the applicant"

After para. (2) of r.54.29, insert:

"(2A) During any period in which the filter provision has effect, the applicant must file with the application notice a list of the documents referred to in paragraph (2)(a) to (e)."

Supplement 2, para. 54.32, p.121

In para. (2) of r.54.32 (Provision in fast track cases where filter provision does not have effect), for "Where a fast track order applies to an application under section 103A—" substitute:

"Where a party applies for an order for reconsideration in a fast track case—"

In r.54.32, omit para. (3).

Supplement 2, para. 54.34, p.122

In para. (2) of r.54.34 (Service of order), for "Where the application relates" substitute "Where the appellant is within the jurisdiction and the application relates"

After para. (2) of r.54.34 insert new paragraph as follows:

"(2A) Paragraph (2) does not apply in a fast track case."

For para. (3)(b) of r.54.34, substitute:

"(b) immediately after serving the order, notify—

(i) the court; and
(ii) where the order requires the Tribunal to reconsider its decision on the appeal, the Tribunal,

on what date and by what method the order was served."

In para. (5) of r.54.34, for "paragraph (3)(b)" substitute "paragraph (3)(b)(i)"

After para. (5) of r.54.34, insert:

"(5A) Where the court serves an order for reconsideration under paragraph (5), it will notify the Tribunal of the date on which the order was served.

Vol. 1, para. 55.13, p.1608

In para. (3) of r.55.13 (Claim form), after "first class post" insert "(or an alternative service which provides for delivery on the next working day)"

Vol. 2, para. 2A–9, p.170

In para. (2) of r.58.4 (Proceedings in the commercial list), for "Rule 30.5(3)" applies substitute "Rule 30.5 applies"

Vol. 2, para. 2B–4, p.276

In r.59.3 (Transfer of proceedings), for "Rule 30.5(3)" applies substitute "Rule 30.5 applies"

Vol. 2, para. 2D–14, p.335

In para. (3) of r.61.2 (Admiralty claims), for "Rule 30.5(3) applies" substitute "Rule 30.5 applies"

Vol. 2, para. 2E–7, p.411

In para. (4) of r.62.3 (Starting the claim), for "Rule 30.5(3) applies" substitute "Rule 30.5 applies"

Vol. 2, para. 2F–3, p.527

In r.63.1 (Scope of this Part and interpretation), after para. (2) insert new paragraph as follows:

"(3) Claims to which this Part applies are allocated to the multi-track."

Vol. 2, para. 2F–30, p.532

In r. 63.7 (Case management), omit para. (1) (see now r. 63.1(3) above).

Vol. 1, para. 75.3, p.1821

In para. (6) of r.75.3 (Request), after "first class post" insert "(or an alternative service which provides for delivery on the next working day)"

CPR UPDATE—Practice Directions

AMENDMENTS TO PRACTICE DIRECTIONS

By TSO CPR Update 40, changes due to come into effect on April 6, 2006, were made to certain CPR supplementing directions. They are noted immediately below. (Changes made by Update 40 and coming into effect at an earlier date were explained in issue 08/05 of *CP News*.) Yet further changes, also due to come into effect on April 6, 2006, will be made by TSO CPR Update 41. These will be noted in the next issue of *CP News*.

Practice Direction (How to Start Proceedings—The Claim Form) (PD7)

Vol.1, para. 7PD.4, p.265

At end of para. 4.1 add the following cross-reference (referring to changes to another practice direction not coming into force until April 6, 2006):

"(Paragraph 2.6 of the Practice Direction to Part 16 sets out what is meant by a full name in respect of each type of claimant.)"

Practice Direction (Default Judgment) (PD12)

Vol. 1, para. 12PD.3, p.327

As a result of amendments to CPR r.12.4 (Procedure for obtaining default judgment) not coming into force until April 6, 2006, as from that date para. 3 will be amended as follows.

The existing para. 3 shall stand as para. 3.1 and be followed by new para. 3.2 (see also new para. 10.7 in Practice Direction (Statements of Case)):

"**3.2** The forms require the claimant to provide the date of birth (if known) of the defendant where the defendant is an individual."

Practice Direction (Statements of Case) (PD16)

Vol. 1, para. 16PD.2, p.374

With effect from April 6, 2006, after para. 2.3 insert new paras 2.4 to 2.6:

"**2.4** Any address which is provided for the purpose of these provisions must include a postcode, unless the court orders otherwise. Postcode information may be obtained from www.royalmail.com or the Royal Mail Address Management Guide.

2.5 If the claim form does not show a full address, including postcode, at which the claimant(s) and defendant(s) reside or carry on business, the claim form will be issued but will be retained by the court and will not be served until the claimant has supplied a full address, including postcode, or the court has dispensed with the requirement to do so. The court will notify the claimant.

2.6 The claim form must be headed with the title of the proceedings, including the full name of each party. The full name means, in each case where it is known:

(a) in the case of an individual, his full unabbreviated name and title by which he is known;
(b) in the case of an individual carrying on business in a name other than his own name, the full unabbreviated name of the individual, together with the title by which he is known, and the full trading name (for example, John Smith 'trading as' or 'T/as' 'JS Autos');
(c) in the case of a partnership (other than a limited liability partnership (LLP))—
  (i) where partners are being sued in the name of the partnership, the full name by which the partnership is known, together with the words "(A Firm)"; or
  (ii) where partners are being sued as individuals, the full unabbreviated name of each partner and the title by which he is known;
(d) in the case of a company or limited liability partnership registered in England and Wales, the full registered name, including suffix (plc, limited, LLP, etc), if any;
(e) in the case of any other company or corporation, the full name by which it is known, including suffix where appropriate.

(RSC O81 contains rules about claims made by or against partners in their firm name)."

Vol. 1, para. 16PD.10, p.378

With effect from April 6, 2006, after para. 10.5, insert new paras 10.6 and 10.7 (as to the latter, see also new para. 3.2 in Practice Direction (Default Judgment)):

"**10.6** Any address which is provided for the purpose of these provisions must include a postcode, unless the court orders otherwise. Postcode information may be obtained from www.royalmail.com or the Royal Mail Address Management Guide.

10.7 Where a defendant to a claim or counterclaim is an individual, he must provide his date of birth (if known) in the acknowledgment of service, admission, defence, defence and counterclaim, reply or other response."

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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