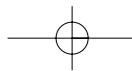
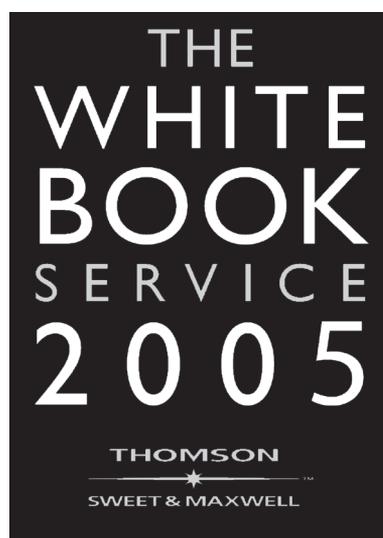


CIVIL PROCEDURE NEWS

Issue 3/2006
March 14, 2006

- Substituting defendant after limitation period has run
- Counterclaims and other additional claims
- Amendments to Practice Directions
- Pleading fabrication of symptoms
- Submission of no case to answer
- Information about parties
- Recent cases



IN BRIEF

Cases

■ **GRAHAM v. CHORLEY BOROUGH COUNCIL** [2006] EWCA Civ 92, February 21, 2006, CA (Brooke, Rix & Maurice Kay L.JJ.)

Submission of no case to answer—test where defendant does not elect—final decision

CPR r.52.11(3)(b), Access to Justice Act 1999 (Destination of Appeals) Order 2000 paras 1 & 4, Practice Direction (Appeals) para. 2A—claimant (C) bringing tripping claim against local authority (D)—claim brought in a county court and allocated to multi-track—at trial, after presentation of C's case (in which conflicting versions of the circumstances of C's accident emerged), judge deciding (1) that there was no case to answer, and (2) that judgment be entered in favour of D—held, granting C permission to appeal, allowing appeal and ordering re-trial, (1) only in exceptional cases should a judge rule on a submission of no case without putting the defendant to his election not to call evidence, (2) where the claimant has advanced a prima facie case to support the inference for which he contends, sufficient to call for an explanation from the defendants, a submission of no case should be dismissed (3) the judge's decision to accept D's submission of no case to answer was not a "final decision" within para. 1(2)(c), but his decision to enter judgment in favour of D was, consequently (4) the Court of Appeal had jurisdiction under para. 4(a) to entertain C's appeal against the latter decision—*Alexander v. Rayson* [1936] 1 K.B. 169, CA, *Benham Ltd. v. Kythira Investments Ltd.* [2003] EWCA Civ 1794, December 15, 2003, CA, unrep., ref'd to (see *Civil Procedure 2005* Vol. 1 paras 32.1.6 & 52PD.2A, and Vol. 2 para. 9A-879)

■ **KEARSLEY v. KLARFELD** [2005] EWCA Civ 1510, December 6, 2005, CA, unrep. (Brooke, Dyson & Carnwath L.JJ.)

Case allocation—sufficiency of pleadings—fabrication of symptoms

CPR rr.1.1(2)(a), 16.5, 26.8, 26.10, 35.5(2) & 52.13, Practice Direction (Statements of Case) paras 8.2 & 10.1, Practice Direction (Case Management—Preliminary Stage: Allocation and Re-Allocation) para. 9.(1), Queen's Bench Guide para. 5.6.3—driver (C) bringing low value claim against another driver (D) for personal injuries—in defence, D pleading that C was fabricating his symptoms—claim allocated to fast track—both parties obtaining reports from experts on issue of probability of a person suffering moderate whiplash injury in low-velocity rear-end collision—C's application for re-allocation of claim to multi-track and

extended directions for further expert evidence refused by district judge—circuit judge allowing C's appeal—held, dismissing D's appeal, (1) by the very nature of the related issues raised by D's defence, expert witnesses had to be called to give oral evidence if justice was to be done, (2) although this was a low value claim, in the circumstances, it was not disproportionate to re-allocate it to the multi-track, (3) the issue of C's fabrication of symptoms was sufficiently pleaded by D—*Armstrong v. First York Ltd.* [2005] EWCA Civ 277; [2005] R.T.R. 19, CA, *Cooper v. P & O Stena Line Ltd.* [1999] 1 Lloyd's Rep. 734, ref'd to (see *Civil Procedure 2005* Vol. 1 paras 1.3.6, 26.10.1, 16PD.8, 16PD.9, 26PD.9, 35.5.2 & 52.3.9, and Vol. 2 para. 1A-29)

■ **O'BYRNE v. SANOFI PASTEUR MSD LTD.** (Case C-127/04), February 9, 2006, ECJ

Claim brought against wrong defendant—substitution of defendant—limitation

CPR r.19.5, Limitation Act 1980 ss.11A & 35, Consumer Protection Act 1987 s.4, Council Directive 85/374/EEC Arts 7 & 11—vaccine manufactured by French company (X Co.) and distributed in England by another company (Y Co.), a wholly-owned subsidiary of X Co.—on ground that he had been damaged by defective vaccine, infant (C) bringing product liability claim against Y Co.—subsequently, upon realising that X Co. were the producers of the vaccine, C (1) commencing fresh proceedings against X Co., and (2) applying under r.19.5 to substitute X Co. as defendants in the original proceedings—X Co. raising limitation defence—High Court judge staying proceedings and referring questions to ECJ for preliminary ruling—held (1) it is for national courts to establish whether the links between a producer (X Co.) and another entity (Y Co.) are so close that the concept of producer within the meaning of Arts 7 and 11 also includes that latter entity so that they would be proper defendants, (2) when an action is brought against a company mistakenly considered to be the producer of the product, whereas, in reality, it was manufactured by another company, as a rule it is for national procedural law to determine the conditions in accordance with which one party may be substituted for another (see *Civil Procedure 2005* Vol. 1 para. 19.5.7, and Vol. 2 para. 8-87)

■ **A.B. v. DEPARTMENT OF TRADE & INDUSTRY** [2006] EWCA Civ 1737, December 21, 2005, CA, unrep. (Sir Anthony Clarke M.R., Brooke & Neuberger L.JJ.)

Assessment of costs—adjournment

CPR rr.3.1(2)(b) & 18.1—miners (C) bringing industrial disease claims against employers (D)—after trial of lead cases handled under a GLO, parties entering into agreement for disposal of outstanding claims—agreement sub-

sequently revised to provide for expeditious disposal of some claims through a system of "fast track offers" (FTOs)—parties unable to agree the assessment of costs to be paid by D to the claimants and their solicitors where offers made by D under the FTO system accepted in cases (1) where the claimants were still alive, and (2) where the claimants were deceased—on November 18, 2004, judge assessing costs in cases in the live claims at £1,478 plus VAT plus disbursements—shortly before hearing as to costs payable in the deceased claims, scheduled for January 28, 2005, D requesting (under Pt 18) further information from claimants' solicitors concerning time and effort involved in their handling of claims—D applying for adjournment of the hearing to enable that information to be gathered and collated, thereby enabling the court to be as fully apprised of the facts as possible—judge refusing adjournment and assessing costs payable in the deceased claims at £1,675 plus VAT plus disbursements—held, allowing D's appeal and remitting the matter to the judge, (1) in refusing the adjournment, the judge had misdirected himself, (2) the further information was (as the judge found) potentially relevant, (3) the judge was entirely right to criticise D for their delay in seeking the further information, but (4) that failure caused no prejudice to the claimants or to their solicitors that could not be met by an appropriate order for costs (see *Civil Procedure 2005* Vol. 1 para. 3.1.3)

■ **AER LINGUS v. GILDACROFT LTD.** [2006] EWCA Civ 4; [2006] All E.R. (D) 71 (Jan) (Sir Anthony Clarke M.R., Rix & Moore-Bick L.JJ.)

Limitation period—contribution claim

Limitation Act 1980 s.10, Civil Liability (Contribution) Act 1978 s.1—on January 27, 1998, employee (C) injured by malfunctioning machine—C bringing personal injury claim against employers (D1) and contractors (D2) responsible for installation of machine—after obtaining, on May 9, 2001, judgment by consent against D with damages to be assessed, C discontinuing claim against D2—by an agreement embodied in a further consent order, on October 3, 2003, C obtaining judgment for damages against D1—on February 4, 2004, D1 commencing proceedings for indemnity and contribution against D2—judge holding that D1's claim had not been brought within the two year period fixed by s.10 and was statute-barred ([2005] EWHC 1556 (QB))—held, allowing D1's appeal, (1) the limitation period in s.10 started to run, not from (as the judge had held) the earlier date on which liability was established (May 9, 2001), but from the later date of the award on quantum (October 3, 2003), (2) consequently, as D1's claim against D2 was brought within two years of the later date, it was not statute-barred—*George Wimpey and Co. Ltd. v. British Overseas Airways Corporation* [1955] A.C. 169, HL, *Knight v. Rochdale Healthcare N.H.S. Trust* [2004] EWHC 1831 (QB); [2004] 1 W.L.R. 371, ref'd to (see *Civil Procedure 2005* Vol. 2 paras 8-15 & 9B-290)

■ **ARMSTRONG v. TIMES NEWSPAPERS LTD.** [2005] EWHC 2816 (QB), December 7, 2005, unrep. (Eady J.)

Libel claim—preliminary ruling on meaning—jury trial

CPR rr.1.1 & 3.1(2)(m), Supreme Court Act 1981 s.69(4), Practice Direction (Defamation Claims) para. 4—sportsman (C) bringing libel claim against newspaper (D)—trial expected to require prolonged examination of documents and scientific investigation—parties agreeing that action should be tried by judge alone—application made for preliminary ruling on meaning of the words complained of—question then arising as to whether this preliminary issue should be tried (1) by judge alone (as C contended), or (2) with a jury (as D contended) —held, (1) it is necessary to be wary of any tension between case management powers under the CPR (e.g. r.3.1(2)(m)) and statutory issues of jurisdiction arising under statute (e.g. s.69), (2) if there is no jurisdiction by virtue of s.69 such a gap cannot readily be filled by case management powers, (3) although the point has not arisen directly, recent Court of Appeal authority proceeds on the assumption that the court has jurisdiction to order that the preliminary issue should be tried with a jury, even though the claim was to be tried by judge alone, however (4) in the circumstances of this case, in the exercise of discretion no order to that effect should be made because (a) there was no significant countervailing advantage in favour of jury trial so as to justify the unusual step of having two different modes of trial, and (b) it would not further the overriding objective—judge commenting that, since coming into effect of CPR, meaning of "in accordance with rules of court" in s.69(4) is not clear—*Phillips v. Commissioner of Police of the Metropolis* [2003] EWCA Civ 382, ref'd to (see *Civil Procedure 2005* Vol. 1 paras 1.3.2 & 53PD.13.1, and Vol. 2 para. 9A-326)

■ **AWG GROUP LIMITED v. SIR ALEXANDER MORRISON** [2006] EWCA Civ 6, January 20, 2006, CA, unrep. (Mummery, Latham & Carnwath L.JJ.)

Recusal of judge—witness known to judge—apparent bias

Claimant company (C) bringing substantial and complex claim in which serious allegations were made against individual defendants (D)—December 5 fixed as starting date for trial likely to last 6 months—a week before trial, during his pre-reading, assigned trial judge discovering that a person (X) well-known to him for a long period was a director of C and was to be called as a witness at trial—judge drawing this to the attention of the parties—D making application for judge to recuse himself on ground of apparent bias and to adjourn the trial—C offering not to call X and to prove facts to which he could depose by other witnesses—judge dismissing application but granting permission to appeal—held, allowing D's appeal, (1) the test for apparent bias is that, having ascertained all the circum-

stances bearing on the suggestion that the judge was (or would be) biased, the court must ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased, (2) most of the leading authorities are appeals arising from hearings that had already taken place or were under way and the objection was based (unlike the position here) on facts discovered during the course of, or only after the end of, the hearing, (3) where (as here) the appeal is made before trial the same principles apply and prudence naturally leans on the side of being safe rather than sorry, especially where it is impossible to predict how the trial might develop, (4) the disqualification of a judge for apparent bias is not a discretionary matter; either there is a real possibility of bias or there is not, (5) a real danger of bias might well be thought to arise where (as here) the judge was closely acquainted with a member of the public involved in the case, whether or not that person was to give evidence, (6) judicial impartiality is the fundamental principle of justice (both at common law and under Art.6 of the Convention), (7) consequently, the judge's concerns about the prejudicial effect that his withdrawal would have on the parties and on the administration of justice (delays, costs, listing problems) were not relevant, as efficiency and convenience are not the determinative legal values in this context—*Taylor v. Lawrence* [2002] EWCA Civ 90; [2003] Q.B. 528, CA, *R. v. Gough* [1993] A.C. 646, HL, *In re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 W.L.R. 700, CA, *Porter v. Magill* [2001] UKHL 67; [2002] 2 A.C. 357, HL, *Lawal v. Northern Spirit Limited* [2003] UKHL 35; [2004] 1 All E.R. 187, HL, *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* [2000] Q.B. 451, CA, ref'd to (see *Civil Procedure 2005* Vol. 2 para. 9A-44.1)

■ **FAIRMAYS v. PALMER** [2006] EWHC 96 (Ch), January 31, 2006, unrep. (Evans-Lombe J.)

Service of claim form—usual residence—defendant out of jurisdiction

CPR rr:6.5, 6.7, 10.3 & 12.3—partnership (C) bringing claim against former partner (D)—claim form issued by C not marked for service out of the jurisdiction—C purporting to effect service on D within the jurisdiction (r:6.5(1)) by posting claim form to C's usual or last known residence (r:6.5(6)), being a property owned by D—by operation of r:6.7 claim form deemed to have been served on July 29, 2003—C obtaining judgment against D in default of acknowledgment of service (r:12.3(1))—D applying to set judgment aside on ground that the claim form had not be properly served in accordance with the rules—Master dismissing application but giving permission to appeal—held, allowing D's appeal, (1) it has always been, and remains (since the coming into effect of the CPR), a fundamental rule of English procedure and jurisdiction that a defendant may be served with originating process within the jurisdiction only if he is present in the jurisdiction at the

time of service or deemed service, (2) it was common ground that (a) at the date of deemed service D was outside the jurisdiction (living in Ethiopia) and (b) the proceedings were never brought to his attention at any material time when D was present within the jurisdiction, in particular (i) during August 1 to 10, 2003, when D was holidaying at the residence but (ii) post was being redirected to him in Ethiopia, (3) in these circumstances, service of the claim form on D had not been effected in accordance with the fundamental rule and the judgment entered should be set aside—*Barclays Bank of Swaziland Ltd. v. Hahn* [1989] 1 W.L.R. 506, HL, *Rolph v. Zolan* [1993] 1 W.L.R. 1305, CA, *Cadogan Properties Ltd. v. Mount Eden Land Ltd.* [2000] I.L.Pr. 722, CA, *Chellaram v. Chellaram (No. 2)* [2002] EWHC 632 (Ch), [2002] 3 All E.R. 17, ref'd to (see *Civil Procedure 2005* Vol. 1 paras 2.3.1, 6.5.3 & 7.5.1)

■ **HAWLEY v. LUMINAR LEISURE PLC.** [2006] EWCA Civ 30, *The Times*, February 14, 2006, CA (Brooke & Maurice Kay L.JJ.)

Costs—whether offer withdrawn

CPR rr:36.2(4)(b), 36.5(7) & 36.12—claimant (C) bringing claim for personal injuries against owners of nightclub premises (D1), a company (now insolvent) providing security services to D1 (D2), and D2's insurers (D3)—D1 claiming contribution from D2—High Court judge giving judgment on liability as preliminary issue—shortly before appeal by D1 and cross-appeal by D3 against this judgment heard by Court of Appeal, D3 making Pt 36 offer to D1 (offer A) and D1 making counter-offer (offer B)—during hearing of appeal, D1 making new offer to D3 (offer C)—D3 rejecting offer C—after Court of Appeal had reserved judgment, D1 accepting offer A, but D3 contending that that offer (which had never been rejected by D1) was no longer open for acceptance—on D1's application under r:36.15(6) for a declaration, held, (1) the terms of D3's rejection of offer B effectively withdrew offer A, (2) in any event, offer A must be taken to have included an implied term to the effect that it was not open for acceptance after the hearing had ended and the Court had reserved judgment—*Mitchell v. James* [2002] EWCA Civ 997; [2004] 1 W.L.R. 158, CA, ref'd to—Court explaining that consultation paper had been issued recently proposing certain changes to Pt 36 scheme and expressing hope that issues raised by this appeal should be considered by the rules committee (see *Civil Procedure 2005* Vol. 1 paras 36.2.2 & 36.5.2)

■ **HICKMAN v. BLAKE LAPHORN** [2006] EWHC 12 (QB), January 17, 2006, unrep. (Jack J.)

Costs—conduct of party—refusal to negotiate or mediate

CPR r:44.3(5)—road accident victim (C) bringing professional negligence claim against solicitors (D1) and counsel (D2) who had represented him in bringing accident claim—D1 claiming contribution from D2—judge (1) holding that C's accident claim had been settled at an under value, (2) awarding C £130,000 dam-

ages and costs, and (3) apportioning liability at one-third D1 and two-thirds D2 ([2005] EWHC 2714 (QB), December 16, 2005, unrep.)—before trial, D1 and D2 disagreeing as to whether C's Pt 36 offers (first of £250,000, but later reduced to £150,000) should be accepted—also, although D1 were willing, D2 was not, to enter into mediation with C—on question as to proportion of C's costs for which D1 and D2 should respectively be liable, D1 contending that D2 should be liable for 100% of C's costs from a particular date because his refusal to negotiate or enter into mediation was unreasonable—held (1) although this was not a case in which the court was being asked to deprive a successful party of his costs because of his conduct in relation to settlement and mediation, the same principles applied, (2) consequently, it was for D1 to show that D2 had acted unreasonably, (3) the strong probability was that, if D2 had been prepared to negotiate or enter in mediation, and had been prepared to make an appropriate contribution, the defendants could have achieved a settlement with C at close to the sum actually awarded, but with considerable savings as to costs, (4) the differences between D1 and D2 arose because, whereas D1's insurers were prepared to take a commercial view of C's claim, D2's insurers were not, (5) D2's estimation of the strength of C's case was not unreasonable and, in the light of that estimation, D2's conduct was not unreasonable, (6) the defendants' liability for C's costs should be apportioned on the same basis as liability—*Halsey v. Milton Keynes NHS Trust* [2004] EWCA Civ 576, *Cowl v. Plymouth City Council* [2001] EWCA Civ 1935, *Dunnett v. Railtrack* [2002] EWCA Civ 303; [2002] 1 W.L.R. 2434, CA, ref'd to (see *Civil Procedure 2005* Vol. 1 paras 1.4.11 & 44.3.13)

■ **JACKSON v. MINISTRY OF DEFENCE** [2006] EWCA Civ 46, January 12, 2006, unrep. (Tuckey, Keene & Wilson L.JJ.)

Costs—successful party—exaggeration of claim

CPR r.44.3(4)—young soldier (C) bringing personal injury claim—shortly before trial, defendants (D) admitting liability and C entering judgment for damages to be assessed—C serving schedule of damages claiming more than £1m—trial of quantum fixed for April 2005—after C's schedule of loss had been reduced by negotiations between the parties to £240,000, on February 24, 2005, D making Pt 36 offer of £50,000—in accordance with local directions, parties ordered to attend pre-trial joint settlement meeting (JSM), to be conducted on a confidential basis—at JSM held on March 10, 2005, parties not reaching agreement—at trial of quantum, judge (1) finding that C in his evidence had exaggerated his disability, (2) awarding him damages of £55,000, and (3) ordering D to pay 75% of C's costs (to be subject to detailed assessment)—D appealing against costs order on grounds that (1) in effect they were the successful party, and (2) that a greater reduction than 25% ought to be made—held,

(1) although D were successful in the sense that they had resisted the claim insofar as it was exaggerated, C was successful in the sense that he established a claim for substantial damages and beat the payment into court, albeit by a small margin, (2) in the circumstances, the judge made a proper assessment as to who was the successful party, (3) at the JSM, no admissible offer was made by D, (4) the JSM scheme contemplated that if offers are made and rejected at a meeting they will be followed by an offer or payment conforming with Pt 36, (5) no inferences could be drawn from the parties' participation in the JSM, (6) in particular it could not be inferred that on that occasion D were prepared to improve their offer by at least £5,000, had there been reason to believe that C would have accepted it, (7) the judge must be taken to have been aware of the fact that, in resisting C's exaggerated claim, D had incurred costs, (8) in making the reduction of 25% from the costs to which C would otherwise have been entitled the judge had not exercised his discretion in manner that was plainly wrong, (9) it remained open for D at the detailed assessment to challenge any costs incurred by C insofar as they were unreasonably incurred in pursuing the claim to the extent to which it was exaggerated—*Painting v. University of Oxford* [2005] EWCA Civ 161, ref'd to (see *Civil Procedure 2005* Vol. 1 paras 44.3.10 & 44.3.11)

■ **J.P. MORGAN CHASE BANK v. SPRINGWELL NAVIGATION CORPORATION** [2005] EWCA Civ 1602, December 20, 2005, CA (Brooke, Buxton & Sedley L.JJ.)

Similar fact evidence—test for admissibility

CPR r.32.1—bank (C) administering funds bringing proceedings in Commercial Court against family company (D) for declaration that they owed no liability either in contract or tort or otherwise in respect of losses incurred by D—D entering defence and making counterclaim—judge (1) striking out certain paragraphs in D's amended defence and counterclaim, and (2) refusing to permit D to rely on similar fact evidence relating to dealings had by other family companies with C—judge excluding the similar fact evidence on the grounds (1) that it was not logically probative of any of the issues in the case, or (2) such "extremely slight" probative value as the evidence might possess should not be permitted to outweigh the serious practical consequences and disruption which would follow if it were admitted—held, dismissing the appeal, (1) similar fact evidence is legally admissible where the proposed evidence is potentially probative of one or more issues in the current litigation, but evidence passing this test may nevertheless be excluded by the court in the exercise of its case management powers, (2) by appearing to require that the similar fact evidence should be of itself, standing alone, probative of the nature of the relationship between C and D, the judge put the test for legal admissibility far too high, (3) the evidence of D's dealings with other family

companies was, depending on its content, potentially relevant to the contested issues in relation to the dealings between D and C, (4) there was already a superabundance of primary evidence going to the issues to which the similar fact evidence was relevant, (5) the court would only be assisted by the similar fact evidence if that primary evidence left it in doubt and if clear conclusions could be drawn from the similar fact evidence, (6) in the exercise of discretion, the similar fact evidence should be excluded, because if it were admitted the trial would be overburdened and steps that conceivably might be taken to relieve the burden would deprive C of effective scrutiny of the case against them—*O'Brien v. Chief Constable of South Wales* [2005] UKHL 26; [2005] 1 W.L.R. 1038, HL, ref'd to (see *Civil Procedure 2005* Vol 1 para. 32.1.7)

■ **MESSER GRIESHEIM GMBH v. GOYAL MG GASES PVT LTD** [2006] EWHC 79 (Comm), *The Times*, February 14, 2006 (Langley J.)

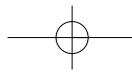
Default judgment obtained by claimant—claimant applying to set aside

CPR rr.12.3, 13.3 & 24.2—German company (C) entering into joint venture with company (D) carrying on business in India—C acquiring significant shareholding in D and in pursuit of venture D entering into loan agreement with bank (X) guaranteed by C—X recovering loan repayment from C under the guarantee—C bringing proceedings against D to recover this payment—D not filing acknowledgment of service and C entering default judgment—subsequently, C applying (1) to set aside the default judgment, and (2) for summary judgment on the same claim and for the same amount—these applications (which were resisted by D) made because C had learned that, whereas a default judgment (not being a judgment on the merits) would not be enforceable against D in India (where D had assets), a summary judgment would be—held, (1) a judgment creditor, as well as a judgment debtor, may apply under r.13.3 to have a default judgment set aside, (2) it is a consequence of the common law principle of merger (*i.e.* that a cause of action is merged in a judgment upon it) that, unless a judgment is set aside, the cause of action that gave rise to it cannot be pursued, (3) in these circumstances, that principle does not have the effect of depriving C of a claim upon which they could apply for summary judgment, (4) in the exercise of the court's discretion, the default judgment should be set aside as (a) C's claim on the merits would effectively be lost unless it was set aside, and (b) there was no injustice to D in doing so (enabling D to put forward such defences as it might have on the merits), (5) as the defences raised by D had no real prospect of success of succeeding, C's application for summary judgment should be granted—*C. Inc. Plc. v. L.* [2001] 2 Lloyd's Rep. 459, ref'd to (see *Civil Procedure 2005* Vol. 1 para. 13.3.1)

■ **SEB TRYGG LIV HOLDING AKTIENBOLAG v. MANCHES** [2005] EWCA Civ 1237; [2006] 1 All E.R. 437, CA (Buxton, Tuckey & Maurice Kay L.JJ.)

Arbitration—substitution of new claimant for former non-existent claimant—misnomer

CPR Pt 62—in April 1993, company (C) purchasing from four companies, including X, total shareholding in insurance company—dispute arising as a result of sale and C refusing to pay balance of purchase price—in November 1998, vendor companies commencing arbitration proceedings in Stockholm against C—before arbitration completed, C discovering that, in June 1997, the rights of X (against whom C were counterclaiming in the arbitration) had passed in full to another company (D) under a transformation agreement and X had ceased to exist—C commencing arbitration claim in Commercial Court against D and solicitors (S) for vendor companies—on the trial of preliminary issues arising in this claim, judge (1) ruling that S were in breach of a limited warranty to C to the effect that a client for whom they acted bore the name in which they pursued the arbitral proceedings, and (2) holding that the arbitral proceedings were not a nullity by reason of their having been commenced in the name of a company that no longer existed and declaring that D were parties to those proceedings and bound by any award ([2005] EWHC 35 (Comm); [2005] All E.R. (D) 307 (Feb) (Gloster J.))—held, allowing S's appeal, but dismissing D's appeal, (1) solicitors conducting proceedings should not be held to warrant that they have correctly named their client, (2) where proceedings (whether arbitral or litigation) are commenced by a party who does not exist they are a nullity, but where it is clear who the party was, but there is simply an error in naming him (a misnomer), the proceedings are not a nullity and the error can, in appropriate circumstances, be corrected within them, (3) in the instant case, it was clear from the points of claim that the arbitral proceedings were being brought by the vendor companies, (4) in those circumstances, the fact that the title to the proceedings did not record that one of those companies had transferred all of its rights to Y under the transformation agreement was a mere misnomer—observations on differences between misnomer in arbitration and in civil proceedings—*The Sardinia Sulcis* [1991] 1 Lloyd's Rep. 201, CA, *Morgan Est (Scotland) Ltd. v. Hanson Concrete Products Ltd.* [2005] EWCA Civ 134; [2005] 1 W.L.R. 2557, CA, *Lay v. Ackerman* [2004] EWCA Civ 184; [2004] H.L.R. 684, CA, ref'd to (see *Civil Procedure 2005* Vol. 1 paras 19.5.5 & 19.5.7)



IN DETAIL

Submission of no case to answer

As is explained in the *White Book* (Vol. 1 para. 32.1.6), at the end of the presentation of the claimant's case at trial the defendant may submit that there is no case to answer. If the judge is willing to entertain the submission and it succeeds, judgment may be given for the defendant without him being required to present his case.

Before the CPR came into effect, the relevant law on this matter in cases where trial was by judge alone was stated in a few lines in the old *White Book* (see *Supreme Court Practice 1999* Vol. 1 para. 35/7/3). There were really two propositions. The first was that a judge should generally refuse to rule on such a submission. The second was a judge might agree to rule on a submission where the defendant makes it clear that he does not intend to call evidence, whatever the outcome of his submission. So there was an established exception to the rule that the judge should not entertain a submission and it was understood that there may be others that did not involve requiring the defendant to elect not to call evidence. Thus there grew up a distinction between a judge entertaining a submission (a) where the defendant had been required to elect to call no evidence, and (b) where the defendant had not been required to elect to call no evidence. These propositions were derived from the cases of *Alexander v. Rayson* [1936] 1 K.B. 169, CA, and *Laurie v. Raglan Building Co.* [1942] 1 K.B. 152, CA.

Shortly after the CPR came into effect, judges sitting at first instance took the view that these propositions did not survive the new procedural regime, or at least did not survive intact. In particular it was held that, in the light of the new case management powers given to the courts and the overriding objective, the court's jurisdiction to entertain and rule on a defendant's submission of no case to answer without requiring him to elect not to call evidence was much wider than heretofore.

The Court of Appeal has struggled to discourage this trend. There have now been six important decisions of the Court on this matter, starting with *Boyce v. Wyatt Engineering* [2001] EWCA Civ 692; *The Times*, June 14, 2001, CA, and ending with the recent case of *Graham v. Chorley Borough Council* [2006] EWCA Civ 92, February 21, 2006, CA, unrep. In the *Graham* case, Brooke L.J. said he was sorry that there is still any lingering uncertainty as to the practice to be followed if a defendant's advocate wishes to persuade a judge to enter judgment in his client's favour at the conclusion of the claimant's evidence and drew particular attention to the decision of the Court in *Benham Ltd. v. Kythira Investments Ltd.* [2003] EWCA Civ 1794, December 15, 2003, CA, unrep. In that case and in the other recent Court of Appeal decisions the Court has been at pains to stress the practical difficulties that can arise where a judge entertains a submission of no case without putting the defendant to his election.

In the *Benham Ltd.* case all of the relevant pre- and post-CPR authorities are reviewed by Simon Brown L.J. (see *White Book* Vol. 1 para. 32.1.6). In this case his lordship (with whom Keene L.J. and Scott Baker L.J. agreed) said two important things.

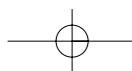
First he said that a trial judge should not entertain a submission of no case to answer without putting the defendant to his election except in the most exceptional circumstances. Unfortunately, but perhaps understandably, in his judgment Simon Brown L.J. gave no guidance as to what circumstances may be regarded as exceptional. At certain points in his judgment his lordship came close to saying that there were no circumstances in which this would be appropriate. At other points he seems to allow that such circumstances may obtain where the judge is of the opinion that there is nothing in the defendant's evidence that could affect the view taken of the claimant's evidence or case.

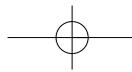
Secondly, Simon Brown L.J. said that if, quite exceptionally, a judge does entertain a submission of no case to answer without putting the defendant to his election, then the test to be applied by the judge in ruling on the submission is not a balance of probabilities test but "whether or not on the evidence adduced by the claimant the claimant has 'a real prospect of success'." However, it must be immediately pointed out that his lordship did not have in mind a test of the same level as that indicated by the expression "a real prospect of success" elsewhere in modern procedural law (e.g. in applications for summary judgment under CPR r.24.2). What his lordship had in mind was, from the claimant's point of view, a rather less onerous test. His lordship explained (para. 39) that the judge should ask himself:

"Have the claimants advanced a prima facie case, a case to answer, a scintilla of evidence, to support the inference for which they contend, sufficient to call for an explanation from the defendants?"

After framing the test in this way, Simon Brown L.J. added (*ibid.*):

"That it may be a weak case and unlikely to succeed unless assisted, rather than contradicted, by the defendant's evidence, or by adverse inferences from the defendant's not calling any evidence, would not allow it to be dismissed on a no case submission."





Now the *Benham Ltd.* case is a difficult case. With respect, it is submitted that the reasoning adopted by Simon Brown L.J. is not entirely satisfactory. His lordship's conclusions as to the appropriate test are based on the modern law concerning the circumstances in which a court may draw adverse inferences from a defendant's evidence and adverse inferences from the defendant's failure to adduce evidence. All this assumes that the defendant has material evidence to give. But yet the test only comes into play where the judge has decided that it is appropriate to rule on the defendant's submission without putting him to his election, and it would seem that the only situation in which it is clear that he may do that (though there may be others) is where he is of the opinion that there is nothing in the defendant's evidence that could affect the view taken of the claimant's evidence or case. There is an odd circularity here. The judge may entertain a submission without requiring election where he is of the opinion that there is nothing in the defendant's evidence that directly or by inference (adverse or otherwise) that bears on the claimant's case, but in ruling on the submission he must apply a test that is based on the assumption that it is possible that inferences favourable to the claimant may be drawn, including inferences in the form of inferences adverse to the defendant where he fails to call certain evidence.

Before turning to the recent *Graham* case, one further point about the *Benham Ltd.* case may be noted. Simon Brown L.J. said that where a trial judge puts the defendant to his election and the defendant elects to call no evidence and the judge proceeds to deal with the submission of no case to answer on that basis, it is necessary to be clear about exactly what is going on. His lordship explained (drawing on what Mance L.J. had said in *Miller v. Cawley* [2002] EWCA Civ 1100, July 30, 2002, CA, unrep.) that where the defendant has elected to call no evidence the issue for the trial judge is not whether the claimant's case had real prospects of success, but is the straightforward issue (arising in any trial after all the evidence has been called) of whether or not the claimant has made out his case on the balance of probabilities. It must be recognised that, in making out his case on the balance of probabilities in these circumstances, the claimant may rely, not only on his prima facie case (which may have its weaknesses), but also on such adverse inferences that may be drawn from the defendant's election not to call evidence. In a given case, such adverse inferences may be sufficient to tip the balance of probability in the claimant's favour (paras 23 & 30). Obviously, the possibility of drawing adverse inferences only arises where the defendant has material evidence to give on the issues in question (para. 29). These considerations led Simon Brown L.J. to the conclusion that, where a submission is entertained on the basis that the defendant has elected to call no evidence, it is better not to describe what is going on as a submission of no case to answer. Indeed, his lordship put the point more forcefully than this when he said (at para. 23) that it is "meaningless to refer to a submission of no case to answer except on the basis that the defendant has not been put to his election". It is submitted that this approach has much to commend it.

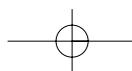
The facts in the recent *Graham* case were that the claimant (C) brought a claim against her landlords, a local authority (D). C alleged that she had tripped over a broken flagstone on a path at the rear of her property and suffered an injury to her knee. C further alleged that, before the accident, she had drawn D's attention to the fact that the flagstone was broken, but they had failed to repair it. The claim was brought in a county court and allocated to the multi-track. The accident occurred in August 1999. The claim form was issued just before the three-year limitation period expired and the case came on for trial in March 2005 (six years after the accident).

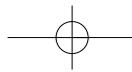
At the outset of the trial it was understood that D proposed to call as witnesses a doctor, who was to speak to a note he had made when C was brought to hospital after the accident, and a council official, who was to give evidence about D's arrangements for dealing with tenants' complaints. In presenting her case, C and her partner gave evidence. Documents before the court, including a report prepared by a consultant orthopaedic surgeon, described C's injuries. In addition, the documents gave brief accounts of the circumstances in which the accident had occurred. Obviously, these accounts (which were not wholly consistent) were simply attempts by the authors of the documents to record very briefly what C had said to them about how she had hurt herself.

At the end of the presentation of C's case at trial, counsel for D addressed the judge and submitted that there was no case to answer. After hearing counsel for C in reply, but without requiring D to elect not to call their witnesses (whatever his ruling on D's submission might be), the judge decided (1) that there was no case to answer, and (2) that judgment be entered in favour of D. The judge said that the crucial question in the case was the circumstances of C's accident. In the presentation of C's case conflicting accounts of the accident had emerged.

C applied for permission to appeal. The Court of Appeal (Brooke, Rix and Maurice Kay L.JJ.) (1) granted C permission to appeal, (2) allowed the appeal, (3) set judgment aside, and (4) directed a retrial before a different judge.

The Court held that the judge was wrong to conclude that there was nothing in the evidence that D's witnesses might give which could affect C's evidence or case and that, therefore, it was appropriate to consider D's submission without putting them to their election. The Court said cross-examination of the witnesses scheduled to be called by D (the doctor and the council official) might have produced evidence that assisted the C's case and if, in the event, D chose not to call these witnesses, C could have invited the judge to draw certain adverse inferences





that would have assisted her case. All in all, by dealing with the submission of no case to answer without putting D to their election, C had been deprived of “an opportunity that should have been open to her to strengthen her case in one way or another” (para. 41). (It has to be said that in the *Graham* case it was rather less obvious than in the *Benham Ltd.* case that the claimant might be assisted by the defendants’ evidence.)

Further, having decided to proceed without putting D to their election, the judge dealt with the submission by applying a “balance of probabilities” test instead of the lower “scintilla of evidence” test stated by Simon Brown LJ in the *Benham Ltd.* case. This was a serious procedural error within the meaning of CPR r.52.11(3)(b).

Substituting defendant after limitation period has run

In *O’Byrne v. Sanofi Pasteur S.A. (Case C-127/04)*, February 6, 2006, ECJ, by his litigation friend an infant (C) alleged that he had suffered serious brain damage as a result of having been inoculated with a vaccine that was defective. The vaccine had been produced by a French company (X Co). On September 18, 1992, that company had sent units of the vaccine to an English company (Y Co), a wholly-owned subsidiary of X Co, for distribution in England. The units were received by Y Co on September 22, 1992, and at later, undetermined, dates part of the consignment were sold and delivered to the Department of Health who supplied it to a hospital who in turn supplied it to the surgery at which C was vaccinated on November 3, 1992.

On November 2, 2000, C brought proceedings in the High Court against Y Co under the Consumer Protection Act 1987, alleging that they, as the producers of a defective product, were liable for the damage he had suffered. That legislation implemented Council Directive 85/374/EEC of July 25 on the approximation of the laws, regulations and administrative provisions of the Member States for defective products. These proceedings were commenced well within the relevant ten year limitation period imposed by the Limitation Act 1980 s.11A(3). That subsection implements Art.11 of the Directive which states that time begins to run “from the date on which the producer put into circulation the actual product which caused the damage” (see further s.4 of the 1987 Act).

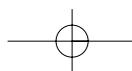
Sometime during the summer of 2002, C realised that he had not brought his claim against the correct defendants. X Co and not Y Co were the producers of the vaccine. Consequently, on October 7, 2002, C commenced proceedings against X Co (hereinafter “the second proceedings”). X Co contended that this claim against them was statute barred. The argument ran (1) that the product was put into circulation when the consignment was sent by them on September 18, 1992, to Y Co, (2) that C’s claim could not be brought after the expiry of the period of ten years from that date (i.e. after September 18, 2002), (3) as it was brought on October 7, 2002, it was out of time (by 19 days).

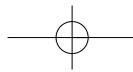
Faced with this predicament, C re-focused his attention on the proceedings he had commenced against Y Co on November 2, 2000 (hereinafter “the first proceeding”) and which clearly had been brought in time, albeit apparently against the wrong defendant. In those proceedings, on March 10, 2003, C applied for an order under CPR r.19.5 substituting X Co for Y Co as defendants. That rule contains special provisions (which must be read with the Limitation Act 1980 s.35) about adding or substituting parties where that is a consequence of the commencement of a new claim in relation to which the relevant limitation period had run. The rule states that the court may add or substitute a party only if the relevant limitation period was current when the original proceedings were started and the addition or substitution is necessary. The addition or substitution is necessary only if one of certain conditions is satisfied. The condition relevant here is that the new party (X Co.) is to be substituted for a party (Y Co.) who was named in the claim form in mistake for the new party (r.19.5(3)(a)). What may or may not amount to a mistake in this context is a matter of some difficulty (see *White Book* Vol. 1 para. 19.5.7), not only because of decisions made recently (see further below).

In relation to the second proceedings, the particular problem that C faced was that of showing that the ten year limitation period did not run, as X Co contended, from September 18, 1992, but from a date no later than October 7, 1992. In relation to the first proceedings, the particular problem faced by C was in convincing the court his mistake in bringing proceedings against the wrong company was of a nature that brought into play the provisions in r.19.5 and the primary legislation on which that rule is based allowing the commencement of a new claim involving a new party after time has run.

It was in these circumstances that, on November 18, 2002, the High Court stayed the proceedings and referred three questions to the European Court of Justice for a preliminary ruling. The ECJ gave its judgment on February 9, 2006.

The first question referred to the ECJ was relevant to the second proceedings. It asked whether the defective product was “put into circulation” (and therefore whether time began to run) (1) when on September 18, 1992, the alleged defective product left X Co? or (2) when on September 22, 1992, it reached Y Co (X Co’s wholly-





owned English subsidiary)? or (3) when, at some later and as yet undetermined date it left Y Co? or (4) when, again at some later undetermined date, it reached “the entity receiving the product from the English company”? If the ECJ said the answer was (3) or (4) C would have some hope of persuading the English court that the second proceedings against X Co were not statute barred. In the event, the answer that the ECJ gave to this question was that Art.11 of the Directive is to be interpreted as meaning that a product is put into circulation when it is taken out of the manufacturing process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed. The ECJ added (para. 30):

“It is for the national courts to establish, having regard to the circumstances of each case and the factual situation of the matter before them, whether the links between the producer [here X Co] and another entity [here Y Co] are so close that the concept of producer within the meaning of Articles 7 and 11 of the Directive also includes that latter entity and that the transfer of the product from one to the other of those entities does not amount to putting it into circulation within the meaning of those provisions.”

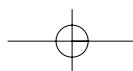
It would seem, therefore, that, in this case, the product was put into circulation by X Co not later than September 2, 1992, and that therefore C’s second proceedings, having been commenced on October 7, 2002, would be statute barred.

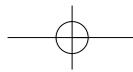
The second and third questions referred to the ECJ by the High Court were relevant to the first proceedings where, as was explained above, C had applied to rectify their mistake by substituting X Co as defendants instead of Y Co. As the ECJ explained (para. 33), when examined together these questions asked essentially whether, when an action is brought against a company mistakenly considered to be the producer of the product, whereas, in reality, it was manufactured by another company, it is open to the national courts to view such an action as being brought against that production company and to substitute the latter, as defendant to the action, for the company initially proceeded against. The answer that the ECJ gave to these questions was that, subject to a qualification, it is “for national procedural law to determine the conditions in accordance with which one party may be substituted for another in the context of such an action” (para. 34). The qualification (which is rather obvious) is that the national court must keep in mind that the class of persons against whom an injured party is entitled to bring an action under the system of liability laid down by the Directive is restricted to those defined as “producers” by Arts 1 and 3(1) of the Directive. Any party substituted for another must fall within that restricted class. (It is clear that X Co fell within the class.)

This answer to the second and third question has the effect of requiring the High Court to determine whether in the first proceedings the nature of the mistake made by C as to the proper defendants is such as to permit X Co to be substituted for Y Co in those proceedings in accordance with CPR r.19.5(3)(a) and the primary legislation on which that rule is based. As noted above, the law here is uncertain. The detour to the ECJ in this case has not had the effect of clarifying the position by imposing on this area of procedural law any helpful gloss derived from the Directive. However, at least it can be said that the answer given by the ECJ to the second and third questions referred to the Court has not made matters more complicated. Further, since the English proceedings were stayed and the questions referred to the ECJ by the High Court on November 18, 2003, the Court of Appeal has considered r.19.5 in three cases and there are signs that the Court might be moving towards an interpretation of r.19.5(3)(a) and the underlying primary legislation that is more favourable to parties that mistakenly sue the wrong defendant (see *Parsons v. George* [2004] EWCA Civ 912; [2004] 1 W.L.R. 3264, CA, *Kessler v. Moore & Tibbits* [2004] EWCA Civ 1551, November 3, 2004, CA, unrep., *Morgan Est (Scotland) Ltd. v. Hanson Concrete Products Ltd.* [2005] EWCA Civ 134; [2005] 1 W.L.R. 2557, CA and note also *SEB Trygg Liv Holding Aktiebolag v. Manches* [2005] EWCA Civ 1237; [2006] 1 All E.R. 437, CA). So the local landscape has changed. It will be interesting to see what happens when the instant case returns to the High Court.

Counterclaims and other additional claims

Under the CPR, additional claim provisions similar to those found scattered in the former RSC and CCR were brought together in Pt 20. As originally enacted, the rules in this Part endeavoured to improve upon the former rules in some respects, most notably by modernising terminology. The rules introduced the omnibus term “Part 20 claim” covering a variety of additional claims. Early on in the life of the CPR, the Civil Procedure Rules Committee became aware of the fact that the terminology in Pt 20 was causing confusion. In particular, the term “Part 20 claim” is unclear to lawyers as it does not convey any indication of the types of claims which it includes and the descriptions to be given to parties in the title of proceedings are confusing in cases where one or more Pt 20 claims have been brought. For example, where a defendant brings a counterclaim against the claimant, the parties acquire two separate labels. The claimant becomes “Claimant / Part 20 Defendant” and the defendant becomes “Defendant / Part 20 claimant”. And labelling becomes still more complex in cases where two defendants bring separate Pt 20 claims, or where a Pt 20 claim is made against someone who was not a party to the original claim, and that person then brings a further Pt 20 claim against another person.





In October 2003, these weaknesses in Pt 20 were identified, and proposals for remedying them were suggested, in DCA Consultation Paper CPL 11/03 ("Additional Civil Claims—Changes to Part 20 of the Civil Procedure Rules"). As a result, a new Pt 20 was substituted in the CPR by the Civil Procedure (Amendment No.4) Rules 2005 (S.I. 2005 No. 3515) and will come into effect on April 6, 2006. As substituted, Pt 20 is supplemented by Practice Direction (Counterclaim and Other Additional Claims). This practice direction has been amended and re-issued by TSO CPR Update 41 to supplement the new rules as substituted.

Under the new rules, the expression "Part 20 claim is not used". This has involved some redrafting of r.20.2. Paragraph (2)(a) of r.20.2 (Scope and interpretation) draws a distinction between a claim "by the claimant against the defendant" and other claims. Any other such "other" claim is an "additional claim". Rule 20.1 (Purpose of this Part) states that the purpose of Pt 20 "is to enable counterclaims and other additional claims to be managed in the most convenient and effective manner". So, in terms, a counterclaim is but one variety of additional claim. There are others. What might they be? Rule 20.2(1) explains that there are two other varieties, the second derivative of the first. The first is a claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy. The second is a claim made by a person who is not already a party as a result of a claim of the first variety being made against him, that is to say, a claim made by him against another person (whether or not already a party). There is nothing new here. These distinctions are drawn in the existing r.20.2(1). As previously, those having recourse to Pt 20 have to be alert to the fact that, in some contexts, the expression "additional claim" includes a counterclaim, and in others it is confined to an additional claim other than a counterclaim.

Rule 20.3 (Application of these Rules to additional claims) is given a more apt title than it had. It is in similar terms to the rule replaced, but para. (4) has been recast (so as to avoid piling an exception on an exception). Rule 20.4 (Defendant's counterclaim against the claimant) remains the same as before. Rule 20.5 (Counterclaim against a person other than the claimant) also remains the same as before except that, at the end of para. (1), "as an additional party" is substituted for "as defendant to the counterclaim". This gives us a first sight of the expression "additional party" as a term of art.

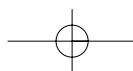
In para. (1) of r.20.6 (Defendant's additional claim for contribution or indemnity from another party) "against a person who is already a party to the proceedings" is substituted for "against another defendant", and "that party" is substituted for "the other defendant" and the rule is re-titled to reflect this, but otherwise the rule remains the same.

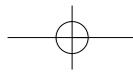
In the remaining rules in Pt 20, that is to say, in rr.20.7 to 20.13, there are no changes of substance. Rule 20.7 is now titled "Procedure for making any other additional claim", and r.20.8 is now titled "Service of claim form". In para. (2) of r.20.7 "appropriate claim form" is substituted for "Part 20 claim form". And in para. (3) of r.20.8 "as to its service" is substituted for "as to the service of the Part 20 claim". Otherwise the terms of these rules are not changed, except to the extent that the expression "additional claim" is substituted for "Part 20 claim" throughout. No changes are made to rr.20.9, 20.10, 20.11, 20.12 or 20.13 except for the purpose of substituting throughout (including in the titles to these rules) "an additional claim" for "a Part 20 claim", "the additional claim" for "the Part 20 claim", and "the additional claimant" for "the Part 20 claimant". At the end of r.20.13 there is a cross-reference to CPR Sched. 2 CCR O.42. This is a mistake as that order was revoked when Part 66 was inserted in the CPR by the Civil Procedure (Amendment No. 3) Rules 2005 (S.I. 2005 No. 2292). The cross-reference was inserted for the purpose of drawing attention to the fact that the rules made provision for an additional claim against the Crown where the Crown was not a party. Neither that provision, nor its equivalent in RSC O.77, r. 10, is now found in Pt 66.

As mentioned above, Pt 20 is supplemented by Practice Direction (Counterclaim and Other Additional Claims). That practice direction is being re-issued. It is noted therein that what are now to be called "additional claims" are described as "Part 20 claims" on a number of court forms and that, for the present, some of those forms will continue to use the old nomenclature. These references should be construed as being to additional claims under Pt 20 as amended.

The Pt 20 practice direction is being re-issued primarily for the purpose of substituting a completely revised para. 7, now titled "Titles of proceedings where there are additional claims". In this paragraph, paras 7.1 to 7.11 replace paras 7.1 to 7.6. As substituted, these directions provide a new scheme indicating how parties should be described in titles to proceedings where one or more additional claims are brought. Under the scheme, for this purpose each party has a single identification which is to be retained throughout, even if they subsequently acquire an additional procedural status.

In conclusion it may be noted that references to "a Part 20 claim" and "a Part 20 claimant" etc. are found elsewhere in CPR Parts, for example, in rr.3.7B, 8.7, 16.6 and 66.4, and in supplementing practice directions, for example, in Practice Direction (Case Management etc) (PD26) paras 2.2 and 7.7. Presumably, in due course these will be weeded out and replaced to bring them into line with the new terminology now found in Pt 20.





Pleading fabrication of symptoms

In *Kearsley v. Klarfeld* [2005] EWCA Civ 1510, December 6, 2005, CA, unrep., the facts were that a driver (C) brought a low value claim against another driver (D) for personal injuries arising out of a car accident. In his defence, D pleaded that C was fabricating his symptoms. On July 22, 2004, (a) in accordance with request from both sides, a district judge allocated the claim to the fast track, (b) permitted (i) C to rely on evidence of non-treating GP and (ii) D on a medical consultant and a collision engineer, and (c) set a trial window for February 2005. On August 2, 2004, D sought re-allocation of the claim to the multi-track and permission for the experts to give oral evidence, but the court took no action on this request. Subsequently, both parties obtained reports from experts on the issue of the probability of a person suffering moderate whiplash injury in a low-velocity, rear-end collision.

On December 21, 2004, C's application for the re-allocation of the claim to the multi-track and for extended directions for further expert evidence was refused by a district judge. On March 10, 2005, after the trial window had been moved forward to April 2005, a circuit judge allowed C's appeal, principally on the ground that the fast track procedures were not suitable because D's allegation of C's fabrication of symptoms required detailed investigation. The Court of Appeal granted D permission to make second appeal on the ground that it raised a point of practice of general importance.

The Court (Brooke, Dyson & Carnwath LJJ) dismissed the appeal. The Court said that, by the very nature of the related issues raised by D's defence, expert witnesses had to be called to give oral evidence if justice was to be done. They were issues on which current expert opinion was divided. The circuit judge was entitled to give directions as to evidence which would ensure that the parties were on a level playing field. The Court added that, although this was a low value claim, in the circumstances, it was not disproportionate to re-allocate it to the multi-track.

On the issue of C's fabrication of symptoms the Court said the issue was sufficiently pleaded by D as, in a case such as this, a defendant does not have to put forward a substantive case of fraud in order to succeed. It was sufficient for D to set out fully the facts from which they would be inviting the judge to draw the inference that C had not suffered the injuries he asserted.

The Court expressed concern that, because of the unsettled state of expert opinion, such low value claims as this may remain unsuited for the fast track, and suggested that consideration should be given to having a group of similar claims dealt with by a High Court judge so that authoritative guidance could be given on the appropriate approach to some of the generic issues that feature in them.

Information about parties

Recent amendments to rules in the CPR, and to paragraphs in supplementing practice directions, require parties to proceedings to provide specific information about themselves (or the other party) upon taking a particular step in the proceedings. These changes come into effect on April 6, 2006. (All of the changes to rules indicated below were set out in the *CPR Update* section of *CP News* Issue 2/06.)

Paragraph (2) of CPR r.6.5 (Address for service) states that a party must give an address for service within the jurisdiction. With effect from April 6, 2006, as a result of an addition made to this provision by the Civil Procedure (Amendment No. 3) Rules 2005 (S.I. 2005 No. 2292), such address must include a full postcode, unless the court orders otherwise.

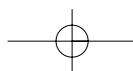
Paragraph 2 of Practice Direction (Statements of Case) (supplementing Pt 16) is concerned with the contents of claim forms and includes provisions about addresses of the claimant and the defendant. By TSO CPR Update 40, para. 2 has been expanded by the addition of paras 2.4 to 2.6. Paragraph 2.4 repeats r.6.5 as recently amended and indicates that postcode information may be obtained from various sources.

Rule 6.13(1) states that, where a claim form is to be served by the court, the claim form must include the defendant's address for service. There is no express mention there of the requirement of a postcode. However, after r.6.13 a signpost has been added directing attention to para. 2.4 of the practice direction.

Paragraph 10 of the practice direction is concerned with the contents of the defence and includes provisions about addresses of the defendant. Paragraph 10 has been expanded by the addition of paras 10.6 and 10.7. Paragraph 10.6 is in the same terms as para. 2.4. A signpost has been added to CPR r.9.2 (Defence, admission or acknowledgment of service) directing attention to para. 10.6 of the practice direction.

Paragraph 10.7 is not concerned with addresses for service. It states that, 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.

CPR r.12.4 deals with the procedure for the obtaining of a default judgment by a claimant. Paragraph (2) of that rule states that in certain circumstances the claimant must make an application in accordance with Pt 23. The recent statutory instrument amends that provision to provide that, where the defendant is an individual, the claimant must provide the defendant's date of birth (if known) in the application notice.



CPR UPDATE

AMENDMENTS TO PRACTICE DIRECTIONS

By TSO CPR Update 41, changes due to come into effect on April 6, 2006, are made to certain CPR supplementing directions. Some of those changes are noted below. The larger changes are not noted but will be included in the 2006 edition of *Civil Procedure*.

The larger changes include amendments to the following practice directions:

Practice Direction (Counterclaims and Other Additional Claims)

For an explanation of the changes made to this practice direction (supplementing CPR Pt 20), see the *In Detail* section of this issue of *CP News*.

Practice Direction (Costs)

Numerous changes are made to this practice direction (which supplements CPR Pts 44 to 48), principally for the purpose of taking account of the revoking of the Conditional Fee Agreements Regulations 2000 by the Conditional Fee Agreements (Revocation) Regulations 2005, and of the Access to Justice (Membership Organisation) Regulations 2000 by the Access to Justice (Membership Organisation) Regulations 2005, and of the fact that the revoked provisions continue to have effect in relation to arrangements entered into before November 1, 2005. Among the other changes is a new Section 49A (para. 49A.1 to 49A.9), inserted before Section 50. The new Section contains provisions dealing with costs payable by the trustee for civil recovery under a recovery order.

Practice Direction (Appeals)

This practice direction supplements Pt 52. Paragraphs 2A.1 to 2A.5 deal with routes of appeal. These paragraphs are now replaced in a much extended form. The intention is to state much more clearly than heretofore the various ways in which appeals may go. Other changes to this practice direction are set out below.

Practice Direction (Crown Proceedings)

This practice direction supplements CPR Pt 66, added to the CPR by the Civil Procedure (Amendment No. 3) Rules 2005 and brought into force on October 1, 2005, together with the supplementing practice direction. As was explained in *CP News* Issue 09/2005, it was explained that it is now provided that, where the court is exercising its power to transfer from one court to another proceedings in which the Crown is a party, the court should take into account (in addition to the criteria in CPR r.30.3(2)) any "note" by the Attorney General. Such a note is now published as a supplement to this practice direction. In addition, a

revised version of the list of authorised government departments published by the Cabinet Office (formerly annexed to Practice Direction (Addition and Substitution of Parties, but now annexed to this practice direction) has been published. It is dated August 31, 2005, and supersedes the list published on January 6, 2004 (see the *White Book* Supp. 2, para. 66.8, p.138).

Practice Direction (Proceeds of Crime Act 2002 Parts 5 and 8: Civil Recovery)

This practice direction does not supplement any particular CPR Part but stands alone. It is printed in the *White Book* in Vol. 1 at para. B11-001, p.2219 *et seq.* It is now re-named as Practice Direction (Civil Recovery Proceedings) and amendments are made to take account of the coming into effect of new legislation, in particular, the Proceeds of Crime 2002 (External Requests and Orders) Order 2005. Section II of this practice direction is substituted entirely.

Practice Direction (Court Documents) (PD5)

Vol. 1, para. 5PD.3, p.138, and Supp. 2 p.10

In para. 3.3, after "Subject to paragraph 3.3A" insert "and paragraph 15.1A of the Practice Direction which supplements Part 52"

For para. 3.3A substitute:

"3.3A A party may file by email an application notice in the Preston Combined Court where he is permitted to do so by PERMA (Preston E-mail Application Service) User Guide and Protocols."

After para. 3.3A, insert the following cross-reference:

"(Paragraph 15.1A of the Practice Direction which supplements CPR Part 52 provides for filing by email an appeal notice or application notice in proceedings in the Court of Appeal, Civil Division.)"

Practice Direction (Counterclaims and Other Additional Claims) (PD20)

Vol. 1, para. 20PD.1, p.456

This Practice Direction is replaced entirely. For explanation, see *In Detail* section of this issue of *CP News*.

Practice Direction (Statements of Truth) (PD22)

Vol. 1, paras 22PD.3 & 22PD.5, pp.494 & 495

After para. 3, insert:

"Inability of persons to read and sign documents to be verified by a statement of truth"

3A.1 Where a document containing a statement of truth is to be signed by a person who is unable to read or sign the document, it must contain a certificate made by an authorised person.

3A.2 An authorised person is a person able to administer oaths and take affidavits but need not be independent of the parties or their representatives.

3A.3 The authorised person must certify:

- (1) that the document has been read to the person signing it;
- (2) that that person appeared to understand it and approved its content as accurate;
- (3) that the declaration of truth has been read to that person;
- (4) that that person appeared to understand the declaration and the consequences of making a false declaration; and
- (5) that the person signed or made his mark in the presence of the authorised person.

3A.4 The form of the certificate is set out in Annex I to this Practice Direction.”

After para. 5, insert the following Annex I.

“Annex I

Certificate to be used where a person is unable to read or sign a document to be verified by a statement of truth

I certify the I [*name and address of authorised person*] have read over the contents of this document and the declaration of truth to the person signing the document [*if there are exhibits, add “and explained the nature and effect of the exhibits referred to in it”*] who appeared to understand (a) the document and approved its content as accurate and (b) the declaration of truth and the consequences of making a false declaration, and made his mark in my presence.”

Practice Direction (Pilot Scheme for Telephone Hearings) (BPD22)

Vol. 1, para. 23BPD.4, p.521

In the Appendix, the dates for the end dates for the schemes at each of the courts listed are extended to October 1, 2006, and at the end of the list “Any county court specified on Her Majesty’s Courts Service website at www.hmcourts-service.gov.uk as on in which telephone hearings are available” is added with commencement and end dates as “1st April 2006 – 1st October 2006”

Practice Direction (Case Management—Preliminary Stage: Allocation and Re-Allocation) (PD26)

Vol. 1, para. 26PD.2, p.646

In para. 2.1(1), for “The allocation questionnaire referred to in Part 26 will be in Form N150” substitute

“The allocation questionnaire referred to in Part 26 will be in Form N149 or Form N150”

Practice Direction (Evidence) (PD32)

Vol. 1, paras 32PD.20 & 32PD.21, p.815

After para. 20.3, insert the following cross-reference:

“(Paragraph 3A of the practice direction to Part 22 sets out the procedure to be followed where the person who should sign a document which is verified by a statement of truth is unable to read or sign the document.)”

Omit para. 21.1.

Vol. 1, para. 32PD.32, p.819

Omit Annex 2.

Practice Direction (Appeals) (PD52)

Vol. 1, para. 52PD.4, p.1489

After para. 4.3, insert (see CPR r.40.2):

“**4.3A** (1) This paragraph applies where a party applies for permission to appeal against a decision at the hearing at which the decision was made.

(2) Where this paragraph applies, the judge making the decision shall state—

- (a) whether or not the judgment or order is 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
- (d) if not, the appropriate appeal court to which any further application for permission may be made.

(Rules 40.2(4) contains requirements as to the contents of the judgment or order in these circumstances.)

4.3B Where no application for permission to appeal has been made in accordance with rule 52.3(2)(a) but a party requests further time to make such an application, the court may adjourn the hearing to give that party the opportunity to do so.”

Vol. 1, paras 52PD.15 & 52PD.17, p.1493

For para. 5.2, substitute:

“**5.2** Where the time for filing an appellant’s notice has expired, the appellant must—

- (a) file an appellant’s notice; and
- (b) include in that appellant’s notice an application for an extension of time.

The appellant’s notice should state the reason for the delay and the steps taken prior to the application being made.”

After para. 5.6(2)(f), insert:

“(g) a copy of the order allocating a case to a track (if any).”

Vol. 1, para. 52PD.29, p.1497

Para. 5.17 is amended so as to read:

“5.17 Where the lower court or the appeal court is satisfied that:—

- (1) an unrepresented appellant; or
- (2) an appellant whose legal representation is provided free of charge to the appellant and not funded by the Community legal service;

is in such poor financial circumstances that the cost of a transcript would be an excessive burden the court may certify that the cost of obtaining one official transcript should be borne at public expense.”

Vol. 1, para. 52PD.54, p.1506

After para. 15.1, insert new paragraph:

“15.1A (1) A party may file by email—

- (a) an appellant's notice;
- (b) a respondent's notice;
- (c) an application notice;

in the Court of Appeal, Civil Division, using the email account specified in the “Guidelines for filing by Email” which appear on the Court of Appeal, Civil Division website at www.civilappeals.gov.uk

(2) A party may only file a notice in accordance with paragraph (1) where he is permitted to do so by the “Guidelines for filing by Email”.

Practice Direction (Patents and Other Intellectual Property Claims) (PD63)

Vol. 2, para. 2F-83, p.548

In para. 1.1, at end add:

“• Section IV – Provisions about final orders”

Vol. 2, para. 2F-110, p.557

After para. 28.1, insert:

“IV. PROVISIONS ABOUT FINAL ORDERS

29.1 Where the court make an order for delivery up or destruction of infringing goods, or articles designed or adapted to make such goods, the defendant will pay the costs of complying with that order unless the court orders otherwise.

29.2 Where the court finds that an intellectual property right has been infringed, the court may, at the request of the applicant, order appropriate measures for the dissemination and publication of the judgment

to be taken at the defendant's expense.”

Practice Direction (Anti-Social Behaviour and Harassment) (PD65)

Vol. 1, para. 65PD.13, p.1699

In para. 13.3(1), for “31st March 2006” substitute “30th September 2006”

Practice Direction (Protocols)

Vol. 1, para. C1-003, p.2243

For para. 4.7, substitute the following:

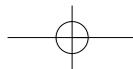
“4.7 The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and the Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.

It is not practicable in this protocol to address in detail how parties might decide which method to adopt to resolve their particular dispute. However, summarised below are some of the options for resolving disputes without litigation:

- Discussion and negotiation.
- Early neutral evaluation by an independent third party (for example, a lawyer experienced in that field or an individual experienced in the subject matter of the claim).
- Mediation—a form of facilitated negotiation assisted by an independent neutral party.

The Legal Services Commission has published a booklet on “Alternatives to Court”, CLS Direct Information Leaflet 23 (www.clsdirect.org.uk/legalhelp/leaflet23.jsp), which lists a number of organisations that provide alternative dispute resolution services.

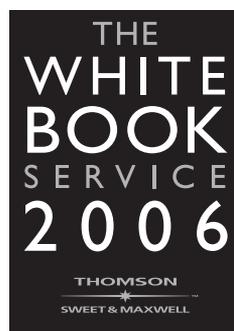
It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR.”



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