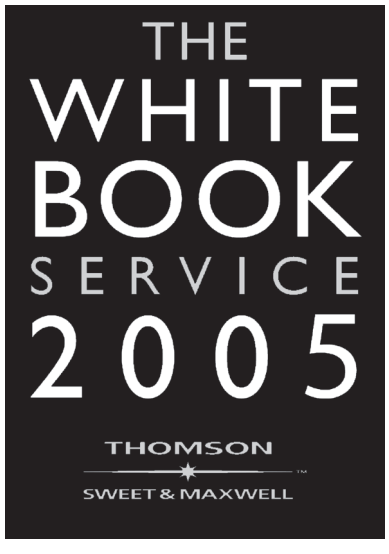
CIVIL PROCEDURE NEWS

Issue 4/2006
April 25, 2006

- Appointment of litigation friend
- Setting aside default judgment
- Statutory appeals
- Recent cases



IN BRIEF

Cases

■ **FOLKS v. FAIZEY** [2006] EWCA Civ 381, April 6, 2006, CA, unrep. (Pill, Keene & Wilson L.JJ.)

Litigation friend—appointment

CPR rr.1.1, 21.6(4), 23.1 & 23.4(1), Practice Direction (Children and Patients) para. 3—following compromise on liability in personal injury claim, claimant (C) accepted as patient by Court of Protection and receiver appointed—application then made under r.21.6 to appoint litigation friend to conduct proceedings on C's behalf—experts agreeing that C lacked capacity to manage his affairs, but disagreeing as to his capacity to litigate—application opposed by defendant (D)—judge adjourning application and directing that question whether appointment justified be determined as preliminary issue—held, allowing C's appeal against the adjournment, (1) a full inquiry into the distinction between C's capacity to manage his affairs and to litigate was not necessary and was contrary to the overriding objective, (2) the application was a bona fide one supported by evidence sufficient to enable the judge to reach a decision—observations on service of notice of application for order under r.21.6 (see ***Civil Procedure 2006*** Vol. 1 paras 1.3.4, 1.3.7, 21.3.2, 21.6.2 & 21PD.3)

■ **ZISSIS v. LUKOMSKI** [2006] EWCA Civ 341, April 5, 2006, CA, unrep. (Brooke & Wilson L.JJ. and Sir Peter Gibson)

Statutory appeal—application of Pt 52

CPR rr.3.10, 8.1 & 52.11, Practice Direction (Appeals) paras 9.1, 17.1 to 17.6, Party Wall etc. Act 1996 s.10—one (Y) of several surveyors appointed under s.10 to resolve party wall dispute between property owner (C) and neighbour (D) making Addendum Award against C for his costs—by Pt 8 claim form C bringing claim based on s.10(17) against D (who had appointed Y) for rescission or modification of Award—district judge joining Y as defendant and holding that Award was invalid but, on grounds that C's remedy lay in an appeal under Pt 52 and not by way of new claim, dismissing C's claim—held, granting C's appeal, (1) the district judge was right in holding that an appeal to a county court under s.10(17) is a statutory appeal to which the provisions in Pt 52 apply, however (2) having held that the Award was invalid, he was wrong to have dismissed C's Pt 8 proceedings and should have rectified C's procedural error either (a) by granting a declaration that the Award was a nullity, or (b) by allowing the proceedings to proceed as an appeal brought under Pt 52 (see ***Civil Procedure 2006*** Vol. 1 paras 3.10.2, 8.1.1, 52.11.1, 52PD.47 & 52PD.76)

■ **RICHMOND v. BURCH** April 7, 2006, unrep. (Mr. George Bompas Q.C.)

Setting aside default judgment—continuing injunction

C.P.R. rr.2.4, 13.3 & 25.1(1)(a), Supreme Court Act 1981 s.37(1), Practice Direction (Allocation of Cases to Levels of Judiciary) paras 2.2 to 2.4—in High Court proceedings, judge granting claimant judgment on liability in default of acknowledgment of service and making interim injunction final—Master setting default judgment aside—on D's appeal, held, setting the judgment aside and continuing the injunction, (1) para. 2.2 provides that an order "relating to" an injunction must be made by a judge, (2) the Master's order setting aside the default judgment had the effect of varying the injunction (making interim what was final) and was an order within para. 2.2, (3) to that extent, the Master's order was made without jurisdiction (see ***Civil Procedure 2006*** Vol. 1 paras 2.4.1, 2BPD.2, 13.3.1 & 25.1.9)

■ **ADAM v. ALI** [2006] EWCA Civ 91, *The Times*, March 6, 2006, CA (Ward, Arden & Dyson L.JJ.)

Limitation—previous proceedings struck out

CPR rr.3.3 & 3.4, Limitation Act 1980 ss.11 & 33—on July 12, 2002, a week after expiry of three-year primary limitation period fixed by s.11, claimant (C) issuing claim form for action in respect of personal injuries—C failing to serve claim form within four-month period fixed by r.7.5, or at all—on August 15, 2003, claim form struck out by district judge on own motion—on August 20, 2003, C issuing fresh claim form for same cause of action and applying under s.33 for direction that s.11 should be disapplied—Master ordering that question whether court had discretion to disapply s.11 in these circumstances be tried as a preliminary issue—judge holding that court had no such discretion and striking out claim—held, allowing C's appeal, (1) in the light of House of Lords' authority, which must be followed unless indistinguishable, the court would have no discretion had C's first proceedings been commenced within the primary limitation period, (2) as, in this case, C had not commenced her first proceedings within that period, that authority was distinguishable, (3) in the circumstances, it was just and equitable to allow C's claim to proceed (see ***Civil Procedure 2006*** Vol. 2 paras 8-71 & 8-72)

■ **BAILEY v. WARREN** [2006] EWCA Civ 51, *The Times*, February 20, 2006, CA (Ward, Arden & Hallett L.JJ.)

Litigation friend—pre-action compromise

CPR rr.21.1, 21.3 & 21.10—pedestrian (C) suffering severe head injuries when knocked down by driver (D)—after negotiations, in November 2000 C and D

agreeing liability on 50/50 basis—on April 27, 2001, C commencing proceedings against D and on December 4, 2001, C entering judgment for 50% of the full value of his damages to be determined—after expert had given opinion that C lacked mental capacity, on October 13, 2003, litigation friend appointed to conduct the proceedings on C's behalf—C (now advised by new legal representatives) applying to set aside the liability judgment entered on December 4, 2001—judge (1) holding that, as at that date, C was a "patient" within the meaning r.21.1(2), but was not so when he agreed apportionment of liability in November 2000, and (2) ordering pursuant to r.21.3(4) that the liability agreement be approved and that the liability judgment should stand—judge also ruling that if (contrary to his holding) C was a patient in November 2000, he would have approved the settlement under r.21.10(1)—held, dismissing C's appeal, (1) in determining that in November 2000 C was not incapable of managing and administering his property and affairs (r.21.1(2)(b)) the judge approached the matter too narrowly, but the appeal was not to be allowed on that ground alone, (2) the question whether a party was a "patient" within the meaning of r.21.1(2) and must have a litigation friend arose once proceedings had been commenced and not earlier, (3) if, as the judge held, C was a patient on December 4, 2001, the step of entering judgment on that date was of no effect unless the court ordered otherwise (r.21.3(3)), (4) the court would not order otherwise if the compromise was valid, that is to say, if it was approved by the court under r.21.10, (5) in the circumstances of this case, in the exercise of discretion (and as the judge would have exercised his discretion), the compromise should be approved under r.21.10 and the judgment of December 4, 2001, should be allowed to stand—Arden L.J. suggesting that r.40.6 should be amended to provide that a request for an order by consent must expressly state that none of the parties is a child or patient (para. 135)—Ward & Arden L.JJ. explaining that, on the question whether r.21.10 applies to settlements or compromises made before proceedings were commenced, that rule, though not in the same terms as former RSC O. 80, r.11, should be construed in the same manner (paras 132 & 159) (see ***Civil Procedure 2006*** Vol. 1 paras 21.2.1, 21.3.2 & 21.10.1)

■ **D. v. SECRETARY OF STATE FOR THE HOME DEPARTMENT** [2006] EWCA Civ 52, *The Times*, February 28, 2006, CA (Brooke, Moore-Bick & Wilson L.JJ.)

Asylum appeal—suspension of removal directions

CPR rr.3.9, 3.11, 52.4, 52.7 & 54.10(2), Nationality, Asylum and Immigration Act 2002 ss.78, 82, 103B & 104, Practice Direction (Citation of Authorities) [2001] 1 W.L.R. 1001, CA, para. 6.1—on February 1, 2005, determination of Immigration Appeal Tribunal allowing Secretary of State's (D) appeal and refusing asylum-seeker (C) permission to remain in UK served on C—on November 18, 2005, C filing Notice of Appeal in Court of Appeal—single lord justice ordering that removal directions imposed on C by D be suspended pending hearing of C's applications for an extension of time for appealing under s.103B and for permission to appeal—held, dismissing C's applications, (1) it is now settled that where, as in this case, an application for permission to appeal to the Court of Appeal is not filed with the IAT during the prescribed period, the Court will nevertheless have jurisdiction to entertain an "out of time" application so long as the appellant has first applied to the IAT and been turned away on the grounds that it no longer had any jurisdiction to grant relief, (2) in these circumstances, the 14-day period for filing the appellant's notice at the Civil Appeals Office ran from February 1, 2005, (3) accordingly, on February 15, 2005, C's appeal under s.82 was "finally determined" within the meaning of s.105 and there was no statutory bar to C's removal, (4) the Court had jurisdiction to suspend the operation of the removal directions for the period between November 18, 2005, when C's "out of time" Notice of Appeal was filed and the time when the application for permission to appeal is determined, (5) this jurisdiction is exercisable by an order of the Court made under the Court's inherent jurisdiction and directed to D for the purpose of maintaining the status quo—Court directing that this judgment should be released for citation (para. 6.1) (see ***Civil Procedure 2006*** Vol. 1 paras 2.3.7, 3.1.2, 52.4.1, 52.7.1 & B4-001, and Vol. 2 para. 9A-47 & 9A-59)

■ **EDO TECHNOLOGY LTD v. HILLS** [2006] EWHC 589 (QB), [2006] All ER (D) 338 (Mar) Walker J.)

Discharge of interim injunction—permission to amend statement of case

CPR rr.17.3 & 25.1(1)(a), Protection from Harassment Act 1997 ss.1, 3 & 7—on March 22, 2005, company and managing director (for and on behalf of company employees) (C) bringing proceedings under the 1997 Act for injunction against activist protestors (D) opposed to C's line of business—on April 29, 2005, judge granting C interim injunction—granted on basis that, as issues of freedom of expression were involved, there would be a speedy trial—November 21, 2005, fixed as date for start of estimated ten-day trial—following determination of certain preliminary issues and identification of issues to be tried, on November 4 and 9 respectively, (1) D applying to discharge interim injunction, and (2) C applying to amend particulars of claim—judge vacating trial date and adjourning hearing of applications—held, (1) granting D's application, (a) C secured the interim injunction on the footing that they would proceed to an early trial, (b) there was woeful neglect on their part to focus on the need to prepare for a speedy trial, and their seeking to introduce side-issues showed a wilful disregard of the importance of maintaining an early trial date, (c) C's

failure to work diligently towards achieving a speedy trial showed that they did not adhere to their obligations, (d) in the circumstances it was just and proportionate that the interim injunction should be discharged, and (2) granting C's application, (a) in general, the court will give permission to amend a statement of case so as to ensure that the real issues are resolved at trial, unless the grant of permission would cause prejudice to another party that cannot be compensated by an order for costs, (b) the mere fact that an issue can be said to arise from witness statements or documents served by one party does not lead to any general presumption in favour of permission to amend, (c) in general, parties should rigorously evaluate their case on any proposed new issues which would be likely to delay trial, (d) if the decision is taken that such an issue is so important that it ought to be advanced, then the application to amend should include an application for directions to enable a manageable trial date to be re-arranged (see ***Civil Procedure 2006*** Vol. 1 paras 17.3.5, 17.3.7, 25.1.3, 25.1.9 & 32.5.4)

■ **FULHAM LEISURE HOLDINGS LTD v. NICHOLSON GRAHAM & JONES** [2006] EWHC 158 (Ch), *The Times*, February 23, 2006, unrep. (Mann J.)

Disclosure of documents—waiver of privilege

CPR r.31.12—before purchasing interest in football club, on at least two occasions company (C) taking legal advice from solicitors (X) and counsel (Y) on the particular question of the position of minority shareholders—other solicitors (D) acting for C in completing purchase—subsequently, C bringing claim against D for professional negligence—claim including (1) allegation that purchase was completed on basis that minority shareholders had greater rights than they should have had, and (2) issue as to amount of fees spent in attempting to reach agreement on the position of those shareholders—instructions given to Y voluntarily disclosed by C and Y's advice referred to in particulars of claim and witness statements—C also disclosing to D invoices from X and fee notes from Y relating to their advice—becoming apparent from these disclosures that the involvement of X and Y in advising C on the minority shareholder issue greater than the two occasions referred to—in course of trial, on ground that C had waived privilege, D applying for specific disclosure of instructions, invoices and fee notes relating to that additional work and advice—held, allowing application in part, (1) where in relation to one transaction a party waives privilege and discloses certain documents, that party may be required to make further disclosures, (2) it is necessary first to identify the transaction in respect of which disclosure has been made, (3) if it is apparent from that material, or from other available material, that the transaction is wider than that which is immediately apparent, further disclosure of documents may be ordered if that is necessary in order to avoid unfairness or misunderstanding of what has been disclosed, (4) in the circumstances of this case, C should disclose such later advice as was given by X or Y which was in alteration, amplification or extension of the advice already disclosed (see ***Civil Procedure 2006*** Vol. 1 paras 31.3.6 & 31.3.27)

■ **GURNEY CONSULTING ENGINEERS v. GLEEDS HEALTH & SAFETY LTD** [2006] EWHC 43 (TCC), January 1, 2006, unrep. (Judge Peter Coulson Q.C.)

Use of experts' reports—served by parties no longer in action

CPR rr.1.1, 35.4, 35.11 & 35.12—owners of properties (C) engaging structural engineers (D1) for refurbishment work—C bringing claim against D1 and D1 bringing contribution proceedings against several other companies involved in the work, including planning supervisors (D2) and project managers (D3)—broad measure of agreement emerging between the experts instructed by the several parties (and whom the court had permitted to give evidence under r.35.4) with the exception of an expert engineer (X) instructed by D2 and D3—experts preparing joint statement in accordance with r.35.12—D1 settling (1) C's claim against them and (2) their contribution claims against all but D2 and D3—at trial of D1's contribution claim against D2 and D3, D1 raising question whether D2 and D3 may rely on expert reports served on behalf of those parties who are no longer in the action, being experts who would not now be giving oral evidence—held, (1) r.35.11 provides that, where a party has disclosed an expert's report, any party may use that expert's report as evidence at the trial, (2) in r.35.11, "a party who has disclosed a report" (a) means a party whom the court acting under r.35.4 has permitted to put an expert's report in evidence, and (b) refers to any party who has disclosed a report in accordance with r.35.4, whether he remains a party to the proceedings or not, (3) consequently, in this case it was not necessary for D2 and D3 to apply all over again for permission to rely on the reports of the other experts disclosed by C or the other defendants, (4) however, it was important that D1 should be advised by D2 and D3 as to which parts of the reports of the other experts they wish to use and why they wish to use them (see ***Civil Procedure 2006*** Vol. 1 para. 35.11.1)

■ **JAMES E. MCCABE LTD v. SCOTTISH COURAGE LIMITED** [2006] EWHC 538 (Comm), March 28, 2006, unrep. (Cooke J.)

Application for summary judgment—time for making

CPR r.24.2—distributors (C) bringing commercial claim against producers (D) for breach of agreement—amongst other things, C pleading (1) that it was implied that prices charged by D should have enabled C to sell enough of the product at a profit to

meet its minimum purchase requirement under the agreement (issue 1), and (2) that D made direct sales to other distributors without giving C sufficient notice (issue 2)—D defending and, in counterclaim, alleging that C had acted in breach of non-competition clause—in defence to counterclaim, C contending that (1) the clause was in restraint of trade and unenforceable, but (2) was not sufficiently fundamental as to render the whole agreement invalid (issue 3)—trial originally fixed on an expedited basis for June 2005, but subsequently re-scheduled for June 2006—in December 2005, D making applications for summary judgment on three particular issues—held, rejecting C's contention that the applications should not be entertained because they had been made late and raised issues that were wholly unsuitable for summary trial, (1) where an application for summary judgment is made long after such applications are usually made, with the consequential case management problems that might be created should there be any appeal, the court should bear in mind the need for especial vigilance in applying the "no real prospects of success" test, (2) issue 1 was purely a matter of construction and C had no realistic prospect of succeeding on it, as there was no room for such an implied term in the agreement, (3) issue 2 was not just a matter of construction but raised issues of fact inappropriate for summary judgment, (4) issue 3 was purely a matter of construction on which C had no realistic prospect of success in contending that the non-competition clause (on the assumption that it offended restraint of trade principles) could be severed, and (5) C should be put to their election whether or not they wished to maintain their plea that that clause was unenforceable (see ***Civil Procedure 2006*** Vol. 1 paras 24.2.4 & 24.4.2)

- **JENKINS v. YOUNG BROTHERS TRANSPORT LTD** [2006] EWHC 151 (QB), [2006] All ER (D) 270 (Feb), 156 New L.J. 421 (2006) (Rafferty J., Master Wright & assessor)

Conditional fee agreement—assignment where solicitor changes firms

CPR r.44.3A—Courts and Legal Services Act 1990 s.58, Conditional Fee Agreements Regulations 2000 regs. 2 to 4—on August 7, 2000, claimant (C) entering into CFA with solicitors (X) for purpose of pursuing personal injury claim against defendants (D) and taking out ATE insurance—subsequently, particular solicitor (S) acting for C, moving to another firm of solicitors (Y) and CFA assigned by X to Y accordingly—C issuing claim form and obtaining judgment on liability with damages to be assessed—subsequently, S moving to another firm of solicitors (Z) and CFA assigned by Y to Z accordingly—quantum claim settled on basis that D pay C £445,000 damages and costs, to be assessed if not agreed—at detailed assessment, D submitting that they were not liable for costs of Y and Z (including success fee) under a CFA because, although the CFA between C and X was valid, there was no valid CFA to which Y or Z were party—costs judge rejecting that submission—held, dismissing D's appeal, (1) the benefit of a personal contract can be assigned but, subject to at least one exception (the "conditional benefits" exception), the general rule is that the burden cannot, (2) in this case, the "conditional benefits" exception applied, as the benefit (the solicitors' right to be paid in certain circumstances) was conditional upon and inextricably linked to the burden (the obligations on the solicitors to prepare the case on behalf of C), (3) therefore (a) the assignments of the CFA from X to Y to Z were valid, (b) Y and Z were entitled to be paid by C, and (c) subject to detailed assessment, C was entitled to recover their charges from D (see ***Civil Procedure 2006*** Vol. 1 para. 43.2.1A & 44.3A.3)

- **MEADOW v. GENERAL MEDICAL COUNCIL** [2006] EWHC 146 (Admin), 156 New L.J. 328 (2006), *The Times*, February 22, 2006 (Collins J.)

Principle of witness immunity—application to disciplinary proceedings

CPR Pt 35—Doctor (D) giving expert opinion evidence for prosecution at trial of mother for murder of her children—mother convicted, but at second appeal, conviction quashed by Court of Appeal (Criminal Division)—mother's father making complaint against D to General Medical Council (C) on ground that D's evidence was badly flawed, particularly in the misuse of statistics—following hearing, Fitness to Practise Committee of GMC finding (1) that D had acted in good faith and not intended to mislead the court, and (2) that there was no evidence of any calculated or wilful failure to use his best endeavours to provide evidence—nevertheless, FPC finding D guilty of serious professional misconduct and erasing him from the medical register—on D's appeal to High Court, held, allowing appeal, (1) the principle that a witness enjoys immunity from suit in respect of evidence he gives in a court of law applies to expert and lay witnesses, and it applies to the dishonest as well as the honest witness, (2) to produce a report or to give information which is sufficiently flawed as properly to be regarded as serious professional misconduct will not attract immunity, even though it is used as the basis for evidence given subsequently, (3) although it has not hitherto explicitly been recognised by the authorities, the principle of immunity extends to protecting an expert witness, not only from civil proceedings, but also from disciplinary proceedings by his professional body, (4) accordingly, the FPC should not have heard the complaint—observations on whether expert witness body should have been permitted to intervene (para. 7) (see ***Civil Procedure 2006*** Vol. 1 para. 35.12.3)

IN DETAIL

Statutory appeals

In ***Zissis v. Lukomski*** [2006] EWCA Civ 341, April 5, 2006, CA, unrep., a building owner (C) who wished to carry out works which came within the provisions of the Party Wall etc. Act 1996 served on the adjoining property owner (D) a notice under section 6(1) of the Act. A dispute as to the works arose. Pursuant to section 10(1)(b), C and D appointed surveyors (respectively, X and Y) and they selected a third (Z). X and Y could not agree. Z alone made an award authorising the works subject to various conditions. However, in the face of continuing disagreement between X and Y, Z subsequently declared himself "incapable of acting" within section 10(9)(c) of the Act, but no steps were taken to appoint another surveyor to take his place. Y (the surveyor appointed by D) was anxious about the costs he had incurred. Acting on his own he purported to make an Addendum Award under section 10(7). That provision states that, where the surveyor for one party (here X) "neglects to act effectively", the surveyor for the other party (here Y) may proceed to act ex parte and anything so done by him "shall be as effectual as if he had been an agreed surveyor". In the Addendum Award, Y awarded himself £15,825 plus VAT, which he required C to pay within fourteen days. In response to this, C issued a claim form in a county court in which D was named as defendant. The relief sought by C was that the Addendum Award should be rescinded or modified. The claim was based on section 10(17) of the Act. That provision states that either party may "appeal to the county court against the award". However, these proceedings were not commenced by a Notice of Appeal under Part 52, but by a claim form using the alternative Part 8 procedure. (As the tables in the practice direction supplementing Part 8 indicate, that is the correct procedure to adopt for certain appeals, but appeals under the 1996 Act are not among them.)

At the hearing of C's claim against D the district judge held that the Addendum Award made by Y was invalid. For the purpose of ensuring that Y was bound by his decision, the district judge ordered that he should be joined as a defendant to C's claim. However, the district judge did not determine the proceedings in C's favour but went on to dismiss them on the basis that they had not been properly brought under Part 8, as in truth they were a statutory appeal which should have been brought under Part 52. Both C and Y appealed. It is the appeal by C with which we are here concerned.

At the hearing of C's appeal, counsel explained to the Court (Brooke & Wilson L.JJ. and Sir Peter Gibson) that there was much uncertainty amongst practitioners as to whether or not an appeal to a county court under section 10(17) against an award under the 1996 Act is a statutory appeal to which the provisions in Part 52 and, in particular, the provisions of Section II of Practice Direction (Appeals) apply. Counsel for C contended (partly but not wholly on the basis of the law as it stood before Part 52 came into effect) that such an appeal was in reality a new action and not a true appeal, and that it could be brought by way of a Part 8 claim.

If the provisions of Part 52 do apply to an appeal under section 10(17), then the further question whether the appeal is by way of rehearing or is simply a review of the surveyors' decision arises. One of the principal arguments in favour of the view that Part 52 did not apply was that appeal procedures, by restricting the circumstances in which evidence may be received and by providing, with limited exceptions, that the appeal be by way of review (see r.52.11), do not provide a satisfactory mechanism for reviewing awards made under the 1996 Act.

In dealing with this aspect of the appeal, the Court drew attention to, and relied on, the judgment of May L.J. in ***E.I. Du Pont de Nemours & Co. v. S.T. Dupont*** [2003] EWCA Civ 1368, October 10, 2003, CA, unrep. (see ***White Book*** para. 52.11.1) and said that this now the leading authority on the difference between an appeal by way of review and an appeal by way of rehearing under Part 52 (see Sir Peter Gibson at para. 37 et seq, and Brooke L.J. at para. 62). The Court held that the district judge was right in holding that C's proceedings should have been brought under Part 52. Sir Peter Gibson noted that, because section 10(17) provides for an appeal under an enactment to a county court from a person other than "a Minister of State, government department, tribunal or other person", the appeal comes within the language of para. 17.1 of Practice Direction (Appeals) as a "statutory appeal". Therefore, the provisions of Section II of Practice Direction (Appeals), in particular para. 17.1 to para. 17.6, apply. The fact that the 1996 Act is not listed in the Table in Section III of the Practice Direction (which contains provisions about specific statutory appeals) is of no consequence as that list is not exhaustive.

His lordship noted that, whereas section 10(17) states that an appeal to a county court by a party under that provision must be brought "within the period of fourteen days beginning with the day on which an award under this section is served on him", para. 17.3 states that an appellant's notice must be served within 28 days. His lordship explained that, as the provisions of Part 52 are subject to any enactment which sets out special provisions with regard to any particular category of appeal (r. 52.1(4)), the provisions of section 10(17) prevail in this respect.

On the specific question whether the procedures for appeals to which the provisions of Part 52 apply provide an adequate mechanism for reviewing awards made under the 1996 Act, Sir Peter Gibson began by noting that para. 9.1 of the Practice Direction (Appeals) specifically recognises that the decision from which an appeal is brought can be one reached (as is the case of an award made under s.10) without a hearing and that the appeal from it will nevertheless be governed by Part 52. In terms, that paragraph states that, if the appeal is "from the decision of a minister, person or other body" made without the holding of a hearing, the hearing of the appeal will be a rehearing (as opposed to a review of the decision). His lordship then added (para. 41):

> "There are ample powers under rule 52.11 to enable the court to receive evidence, and in the exercise of any power or discretion the court will be alive to the overriding objective of dealing with the case before it justly. Given that an award under the Act is non-speaking and made without a hearing, I would envisage that the appeal by way of rehearing will ordinarily require the county court to receive evidence in order to reach its own conclusion on whether the award was wrong. The flexibility contained in the provisions of Part 52 seems to me to defeat the thrust of [counsel's] argument that it would not be right for Part 52 to apply to an appeal under section 10(17). On the contrary, I think it plain that Part 52 was intended to cover a form of statutory appeal like that under section 10(17) and that the provisions of Part 52 are amply sufficient to allow justice to be done on such an appeal."

Having held that the district judge was right in holding that C's proceedings should have been brought under Part 52, the Court of Appeal then turned to the question whether the district judge was right to dismiss C's proceedings, even though he had held that the Addendum Award made by Y was invalid. In her claim form, C had pleaded that the Addendum Award ought to be rescinded and in the Particulars of Claim supporting that pleading she had pleaded that the Award was invalid (as D had contended all along). In the alternative, she pleaded that the Award should be modified. The Court held that the district judge had erred in this respect. Sir Peter Gibson said (para. 47):

> "He should either have allowed the amendment of the Particulars of Claim so that the relief sought was a declaration that the award was a nullity or, more consistently with the alternative claim for a modification of the award, he should have allowed the proceedings to proceed under Part 52. I can see no reason why an appellant appealing against an award should not be able to claim in proceedings brought under Part 52 that the award is a nullity and that in the alternative the award should be varied."

The district judge was deserving of sympathy. As his lordship explained (para. 46), C's Particulars of Claim proceeded on the footing that the proceedings were by way of an appeal under section 10(17), even in relation to the averment that the Addendum Award was invalid. Further, it did not seem to have been pointed out to the district judge how he might remedy the situation nor, it appeared, was he asked to do so. (Counsel for C had argued that r.3.10 provided the district judge with the power to remedy C's procedural error, but the Court did not specifically rely on that provision.)

In conclusion, it should be noted that, in disposing of C's appeal, the Court did not have deal with the question whether the district judge was right in holding that Y's Addendum Award was invalid. That issue would arise in Y's appeal, made to a circuit judge but transferred to the Court of Appeal (and yet to be heard) against the district judge's holding to that effect.

Appointment of litigation friend

In ***Folks v. Faizey*** [2006] EWCA Civ 381, April 6, 2006, CA, unrep., the liability issue in the claimant's (C) personal injury claim was compromised with damages to be assessed. Before the issue of quantum was dealt with, C was accepted as a patient by the Court of Protection and a receiver was appointed. An application was then made under r.21.6 for an order appointing C's sister as C's litigation friend. The application was supported by evidence, including a report by a neuropsychiatrist (X). On September 16, 2005, a district judge ordered a joint report of neuropsychiatrists, one appointed by C and the other by D. Accordingly, in December 2005, a joint report was produced by X and by another neuropsychiatrist (Y) appointed by D. On D's instructions, Y had examined C previously and had produced a report. The joint report referred to the fact that C was inclined to impulsive spending. The experts agreed that C was incapable of managing and administering his own affairs by reason of mental disorder and should be regarded as a patient within the meaning of the Mental Health Act 1983. But there was some disagreement between them to the extent that, in Y's opinion, nevertheless C "probably has the capacity to litigate", a matter that Y had elaborated on in his earlier report.

On January 10, 2006, C's application for the appointment of a litigation friend, which was opposed by D, came on before a High Court judge. The judge adjourned the application and directed the trial of a preliminary issue as to whether the facts justified the appointment of a litigation friend. C appealed against the judge's decision and the Court of Appeal (Pill, Keene & Wilson L.JJ.) allowed the appeal.

Pill L.J. said (paras 18) the application to appoint a litigation friend had been made in good faith by a solicitor mindful of his responsibilities. It was supported by a close member of the appellant's family, by the appellant himself, and by responsible medical evidence, which was sufficient guidance. The application was made to protect the position of C and those advising him. His lordship added that the rules as to capacity are not designed to create additional "satellite" litigation. The attempt by D's advisors to resolve an issue of minimal importance to the outcome of the litigation by the trial of a preliminary issue likely to last two days was fundamentally at odds with the overriding objective. His lordship conceded that there may be cases in which issues arising from the distinction between a party's capacity to manage his affairs and is capacity to litigate would have to be resolved, but this case was not one of them.

Keene L.J. said (paras 25 & 26) there has to be evidence to support any application for an order appointing a litigation friend (see r.21.6(4)) as that is necessary if the court is to be "more than merely a rubber stamp". But it does not follow from that that the other party to the litigation is then entitled to put in evidence disputing the basis for such an order. There was no basis on which it could properly be contended that D was at risk of suffering any prejudice from the appointment of a litigation friend. His lordship concluded (para. 27) that where there is adequate evidence to support an application under r.21.6, and there is no evidence suggesting that it is anything but bona fide, the court should make the order sought.

Wilson L.J. noted that, on this appeal, the Court was being asked to interfere with a judge's exercise of discretion in making a case management decision, but in the circumstances was persuaded that the judge was plainly wrong. It was open to the judge to act on the opinion of X, notwithstanding the contrary opinion of Y. His lordship added (para. 31) that where (as in this case) in the course of proceedings a party aspires to relinquish his conduct of them to a litigation friend, thought has to be given to the question the other party needs to be served with notice of the application made under r.21.6. The provisions of Part 23 apply to such applications. The general rule set out in r.23.4(1) states that notice "must be served on each respondent", and in r.23.1 "respondent" is defined to mean "(a) the person against whom the order is sought; and (b) such other person as the court may direct". Where an application is made for the appointment of a litigation friend to conduct proceedings on a party's behalf, the other party is not a "person against whom the order is sought", so the court will have to consider, in the light of the facts of each case, whether there is any need to direct service upon the other party.

Setting aside default judgment

In the case of ***Richmond v. Burch***, April 7, 2006, unrep., the claimants (C) were successful in obtaining an interim injunction restraining the defendants (D) from interfering with the running of their business in various respects. At a contested hearing a High Court judge ruled that C was entitled to judgment in default of acknowledgment of service with damages to be assessed. The judge's order also contained an order that the interim injunctive relief be made final. Subsequently, a Master granted D's application under CPR r.13.3 to set the default judgment aside. The Master's order contained no provision dealing in terms with the injunctive relief of which C had the benefit. However, as to this the Master expressed the view that the effect of setting aside the judge's order was that "the injunction will continue in place, but only as an interim injunction until trial". On an appeal to a judge, D contended, amongst other things, that the Master did not have jurisdiction to set aside the judge's order. Put shortly, the argument was that the Master had exceeded his jurisdiction because the effect of his order was to vary or discharge an injunction. A deputy judge (Mr. George Bompas Q.C.) agreed with this submission. The judge referred to CPR r.2.4, which states the general rule that, where the CPR provide for court to perform an act in relation to High Court proceedings, that act may be performed by a Master, and the exception to that general rule stated in para. 2.2 of Practice Direction (Allocation of Cases to Levels of Judiciary) which states that "injunctions and orders relating to injunctions ... must be made by a judge". The judge noted that none of the exceptions to this qualification of the general rule applied in this case (see ibid paras 2.3 and 2.4).

The deputy judge concluded that the Master's order had discharged the injunction ordered by the judge, and it was not clear that there remained in place any injunction at all. But even if that were wrong, the Master's order must be taken to have varied, or at least to have changed, a final injunction by making temporary that which was previously permanent. Either way, the Masters order was one, within the meaning of para. 2.2, "relating to" an injunction and therefore one which had to be made (if at all) by a judge.

Having reached this conclusion the deputy judge went on to deal with the question whether the default judgment should be set aside under r.13.3. He held that the judgment should be set aside and that the injunction should be continued.

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

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