CIVIL PROCEDURE NEWS

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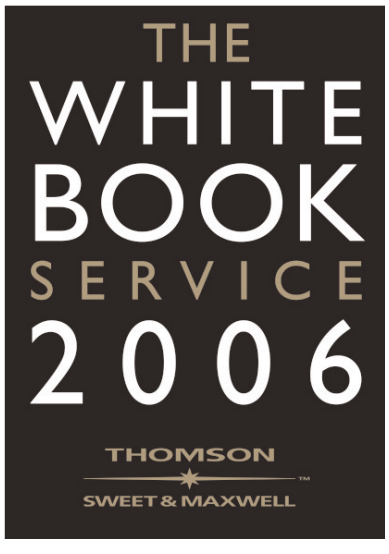

IN BRIEF

Cases

BRISTOL CITY COUNCIL v. HASSAN [2006] EWCA Civ 656, May 23, 2006, unrep. (Brooke, Dyson & Jacob L.JJ.)

Secure tenancy—form of conditional possession order

CPR rr.40.2, 55.2, Sched.2 CCR O.26, r.17(2), Practice Direction (Forms), Form N28, Housing Act 1985, ss.82 & 85—local authority landlord (C) bringing possession proceedings against statutory secure tenant (D) under s.82—district judge giving judgment for C granting suspended possession order in Form N28 terms thereby reducing D to status of "tolerated trespasser"—held, allowing D's appeal, (1) the general rule is that a landlord who obtains a possession order against a tenant (as distinct from a land owner obtaining possession against a trespasser) is not entitled to enforce it immediately and the court has a power (but not a duty) to fix a date for possession, thereby postponing the effect of the order, (2) there is nothing in ss.82 and 85 that obliges the court to depart from that general rule and (following the letter of Form N28) to set out an absolute date for possession on the face of its order, (3) the possession and money judgment against D should stand, but the claim should be remitted to a county court to determine what, of any, terms of postponement are appropriate—Court setting out specimen order appropriate for conditional possession orders in s.85 claims—***Harlow District Council v. Hall*** [2006] EWCA Civ 156, February 28, 2006, CA, unrep., ref'd to (see ***Civil Procedure 2006*** Vol. 1 paras 1.3.4, 4PD.3.1, 40BPD.8 & cc26.17.2, and Vol. 2 paras 3A–345 & 3A–378)

GOVER v. PROPERTYCARE LTD [2006] EWCA Civ 286, *The Times*, May 1, 2006, CA (Buxton, Lloyd & Richards L.JJ.)

Statutory appeal—issue not raised in tribunal below—permission

CPR r.52.3, Supreme Court Act 1981, s.15, Employment Tribunals Act 1996, s.37(1)—Employment Tribunal (ET) finding that employees (C) had been unfairly dismissed by employers (D), but restricting compensation—Employment Appeal Tribunal (EAT) upholding restriction—C granted permission to appeal to Court of Appeal on ground that, in applying doctrine based on authority as to reduction of compensation, ET had gone beyond the limits indicated therein—held, dismissing appeal, (1) the contention that, as a matter of law, the doctrine did not apply, had not been raised by C before the ET (or the EAT), (2) it was not subsumed in the ground for which permission to appeal had been granted, and permission to amend the grounds would not be permitted, (3) a departure from the case as put in the court below must be clearly identified and permission to appeal sought for it—observations on jurisdiction of Court of Appeal in appeals from EAT (see ***Civil Procedure 2006*** Vol. 1 paras 52.3.1 & 52.3.18, and Vol. 2 para. 9A–47)

BOURNEMOUTH & BOSCOMBE ATHLETIC COMMUNITY FOOTBALL CLUB LTD, IN THE MATTER OF May 11, 2006, unrep. (David Richards J.)

Private hearing—publication of proceedings— contempt

CPR r.39.2, Sched.1 RSC O.52, r.4, Administration of Justice Act 1960, s.12—company (C) presenting petition for winding up of another company (D)—on D's application, court ordering under r.39.2(3) that hearing of petition should be in private—judge giving judgment in private—petition later dismissed in open court—on ground that C had disclosed information relating to the hearing and judgment to a journalist, D alleging that D were in contempt—held, (1) where the court makes an order under r.39.2(3) the public and press are excluded from the hearing, (2) the publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in one of the cases listed in s.12(1), including the case where the court has expressly prohibited such publication (para. (e)), (3) in this case, D's allegations did not amount to contempt as no express order had been made under s.12(1)(e) expressly prohibiting publication, (4) an order that a hearing should be in private does not carry with it an order prohibiting publication of information relating to that hearing (see ***Civil Procedure 2006*** Vol. 1 para. 39.2.1, and Vol. 2 para. 9B–24)

GURNEY CONSULTING ENGINEERS v. GLEEDS HEALTH AND SAFETY LIMITED (NO. 2) [2006] EWHC 536 (TCC), *The Times*, April 24, 2006 (Judge Peter Coulson Q.C.)

Action compromised before judgment—publication of reserved judgment

CPR r.1.1(2)(e), Practice Direction (Reserved Judgments)—on February 6, 2006, following nine day trial, judge reserving judgment—on February 20, counsel informed that judgment would be made available to them on a confidential basis on March 9—judgment running to 298 paragraphs and 130 pages—on March 8, without prior warning judge's clerk informed that action had been settled and draft consent order dismissing the claimant's claim on terms submitted—parties not wishing to have judgment published—in ruling that the final draft judgment should not be published, judge stating (1) where a draft judgment has been sent to parties, and the action is compromised thereafter,

the judge has a discretion whether or not to publish the draft, (2) generally, if a draft judgment has not been sent to parties by the time they compromise, the court (particularly a trial court) will not publish that judgment, (3) it is a well-known rule of practice that, if following the conclusion of a hearing at which judgment has been reserved, there are meaningful settlement discussions between the parties, the court should be informed immediately of the fact of such discussion, (4) that rule is designed to prevent, as far as possible, the waste of judicial resources and to avoid detriment to other court users, (5) in this case, the parties failed to comply with this rule, as it was apparent that detailed negotiations had been going on since final submissions (see ***Civil Procedure 2006*** Vol. 1 paras. 1.3.7, 40.2.5 & 40EPD.1)

■ **LA CHEMISE LACOSTE S.A. v. SKETCHERS USA LTD** May 24, 2006, unrep. (Mann J.)

Amendment of pleadings—costs of application

CPR rr.17.1, 17.3 & 44.3(4)—in particulars of claim, claimant company (C) alleging that certain products sold by defendant company (D) infringed their design rights—subsequently, C proposing to amend particulars to allege similar infringements in relation to other of D's products—on basis that D's consent was not forthcoming, C applying to court for permission to make amendment—shortly before hearing of application, D consenting to amendment—held, granting application, (1) D ought to have consented to the amendment at an earlier stage, (2) D's responses to C's requests for consent were equivocal, (3) C had made the application because they had to make it, (4) in the circumstances, D should pay C's costs of the application (see ***Civil Procedure 2006*** Vol. 1 paras 17.1.3 & 44.3.10)

■ **LAW SOCIETY v. SEPHTON & CO** [2006] UKHL 22, [2006] 2 W.L.R. 1091, CA

Limitation—date of cause of action—contingent liability

Limitation Act 1980, ss.2 & 32—in accordance with relevant rules, solicitors' firm (S) filing with Law Society (C) annual report of examination of their books and accounts—between 1988 and 1995 such reports prepared by same accountants (D)—on May 20, 1996, C intervening in S and partner subsequently convicted of theft of funds of clients over a period—beginning in October 1996, C making series of payments out of compensation fund totalling £1.2m to meet claims made by former clients of S—on May 16, 2002, C issuing claim form against D to recover these payments—at preliminary hearing, judge accepting D's defence that claim was statute barred and striking out claim—Court of Appeal allowing C's appeal ([2004] EWCA 1627; [2005] Q.B. 1013, CA)—held, dismissing D's appeal (for different reasons), (1) C could bring the proceedings if the cause of action founded in tort accrued after May 16, 1996 (*i.e.* within 6 years), (2) C had no cause of action until it suffered damage in consequence of D's negligence, (3) C suffered damage only when a compensation claim was made by a client, (4) the contingent possibility of having to pay money in the future (arising as the misappropriation of client funds occurred) standing alone (as in the instant case) did not give rise to a cause of action triggering the limitation period (see ***Civil Procedure 2006*** Vol. 2 para. 8.4.1)

■ **ISLINGTON LONDON BOROUGH COUNCIL v. UCKAC** [2006] EWCA Civ 340, March 30, 2006, CA, unrep. (Mummery & Dyson L.JJ. and Sir Charles Mantell)

Amendment of particulars—appeal court's discretion to allow

CPR rr.1.1, 3.1(2)(i), 17.1 & 52.10, Housing Act 1985, ss.82 & 84 and Sched.2—local authority landlords (C) bringing claim against husband (D2) and wife (D1) (1) for rescission of secure tenancy granted to D2 and assigned by him to D1 on grounds of fraudulent misrepresentation and (2) an order for possession consequent upon rescission—in alternative, C claiming an order for possession under ground 5 of Sched.2—in her defence, D1 denying that C was induced into granting the tenancy by her false statement—judge (1) dealing with two questions as preliminary issues, (2) holding against C on both, and (3) dismissing C's claim—judge granting C permission to appeal—held, (1) dismissing C's appeal, the judge was correct in holding (a) that ground 5 is only available where the defendant from whom possession is sought is the person to whom the tenancy was granted, and (b) that rescission is not available where a landlord has been induced to grant a secure tenancy by a fraudulent misrepresentation made by or on behalf of the tenant, but (2) granting C's application for permission to re-amend their Particulars of Claim to plead in the alternative that the grant of the tenancy to D1 was null and void, (3) although the application to re-amend had not been made in the court below it was an appropriate exercise of the appeal court's discretion to allow the amendment, (4) it would not further the overriding objective to require C to commence fresh proceedings in order to raise the new point, even though D1 was prepared to undertake not to raise a defence of abuse of process in that event—Court observing that, had the appeal come before them from the judge's decision to strike out C's claim or to give D1 summary judgment, it would have been an appropriate exercise of the Court's discretion to allow the amendment, although no application had been made in the court below (see ***Civil Procedure 2006*** Vol. 1 paras 1.3.4 & 17.3.7, and Vol. 2 para. 3A–368)

■ **PHILLIPS v. NUSSBERGER** [2006] EWCA Civ 654, May 19, 2006, CA, unrep. (Pill, Neuberger & Wilson L.JJ.)

Priority of jurisdiction—dispensing with service of claim form

CPR rr.3.10, 6.9, 6.19 & 6.26, Civil Jurisdiction and Judgments Act 1981, Sched.3C (Lugano Convention),

Art.21, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention), Arts 2 & 3—in December 16, 2004, executors (C) issuing claim form against several defendants, including party (D) resident in Switzerland—in error, certified copy of claim form for service on D stamped "Not for service out of the jurisdiction" by court office—nevertheless, that copy claim form, together with other necessary documents (including translation of claim form and particulars of claim) sent by English competent judicial officer to Swiss counterpart for service on D—latter officer, upon noting stamp on claim form, extracting that document from the parcel of documents received, and on January 19, 2005, serving remainder on D—on February 4, 2005, D instituting proceedings in Swiss court against C concerning same cause of action—because, as at that date, the copy claim form had not been served on D, the Swiss court was "the court first seised" of the proceedings within Art.21, with the result that the English proceedings would have to be stayed—on C's application, on August 19, 2005, judge holding (1) that service of the claim form should be dispensed with (r.6.9), and (2) that the court's power to rectify errors of procedure (r.3.10) should be invoked to validate as sufficient service the documents served on D on January 19, 2005, thus giving the English court priority of jurisdiction under Art.21 as at that date—held, allowing D's appeal, (1) according to the principles of domestic service as derived from authorities, the power under r.6.9 to dispense with service is only exercisable retrospectively in exceptional circumstances, (2) in this case, reliance on r.6.9 would be (a) inappropriate because it was being invoked with a view to enable the English proceedings retrospectively to gain priority under Art.21 over the Swiss proceedings in circumstances where the latter proceedings had already achieved such priority, and (b) ineffective because seisin could not occur earlier than when the application for such relief was made, and probably not before it was granted (see ***Civil Procedure 2006*** Vol. 1 paras 6.9.1, 6.19.2, 6.19.26, 6.24.6, 6.24.8, and Vol. 2 para. 5–176)

■ **RHONE-POULENC RORER INTERNATIONAL HOLDINGS INC** [2006] EWHC 160 (Ch), February 16, 2006, unrep. (Lewison J.)

Patent claim—hearing officer allowing amendment - limitation

CPR r.17.4, Patents Act 1977, s.37(5), Limitation Act 1980, s.35, Patents Rules 1995, rr.54 & 100, Community Patents Convention Arts 23 & 24—company (D), claiming proprietary interest in patent recently granted to another company (C), referring question to Comptroller under s.37—reference advancing claim of joint ownership with C and made within two year time limit fixed by s.37(5)—subsequently, and after limit had passed, over objections of C hearing officer exercising his power under r.100 and allowing D to amend their r.54 written statement made in support of the reference to advance a claim of sole ownership—C appealing to High Court—held, allowing appeal, (1) in the absence of a statutory provision to the contrary (*e.g.* s.35(1) of the 1980 Act), an amendment which adds a new cause of action takes effect from the date on which it is made, and not from any earlier date, (2) s.37(5) and the other limitation periods in the 1977 Act are designed to give effect to Art.23, and do not permit new claims to be raised out of time, (3) where an amendment is made to a r.54 statement in order to raise a new claim of the kind contemplated by Art.23 it will not relate back to the date of the original reference, but will take effect from the time it was made, (4) where a party against whom such new claim is raised has a clear limitation defence under s.37(5), permission to amend should not be granted, and where such defence is arguable it should be tested in fresh proceedings, (5) the rule that permission to amend should normally be granted where the party against whom the amendment is made can be adequately compensated in costs does not apply in a case where a potential limitation defence arises judge expressing opinion that, as s.37(5) does not permit a new claims to be raised out of time, it is not "any other enactment which allows such an amendment" within the meaning of r.17.4 observations on applicability of CPR, in particular of r.17.4, to proceedings in the Patent Office (see ***Civil Procedure 2006*** Vol. 1 paras 2.1.1, 17.3.5 & 17.4.2, and Vol. 2 para. 2F–12.1 & 8–79)

■ **SEVEN v. GOSSAGE** [2006] EWCA Civ 631, May 2, 2006, CA, unrep. (Chadwick L.J. & Sir Peter Gibson)

Unless order striking out claim—whether failure to comply

CPR rr.1.1(2)(c), 3.4(2)(c) & 40.3—on May 12, 2005, in proceedings that had been stayed, judge directing that unless claimant (C) acting in person made application for directions by August 12, 2005, to enable various strike out applications to be heard, her claim against several defendants (D) should be struck out—on latter date, C attending at court office, apparently for purpose of filing application for a continuance of the stay—in event, application not then filed, but C appearing before a judge who, believing that he was faced with a without notice oral application for an extension of time for the filing of the application ordered on May 12, 2005, dismissing the application—when drawn up by court, order not reflecting judge's ruling and erroneously stating that judge had ordered that C's claim was dismissed—C applying to Court of Appeal for permission to appeal—held, granting permission and allowing appeal, (1) were it clear that C had not by August 12 done what she was required to do by the order of May 12, by virtue of that order her claim would stand struck out, (2) however, as that was not clear, it would be disproportionate to allow the later order of August 12 expressly dismissing the claim to stand, (3) C's claim should stand struck out for failure to comply with the

May 12 order, unless within 21 days C made an application on notice to show cause why it should not (see ***Civil Procedure 2006*** Vol. 1 paras 1.3.5, 3.1.9 & 3.4.4, 40.9.3 & 40.12.1)

■ **SINCLAIR INVESTMENT HOLDINGS S.A. v. CUSHNIE** [2006] EWHC 219 (Ch), January 27, 2006, unrep. (Mr. Thomas Ivory Q.C.)

Summary judgment—part of damages claimed only

CPR rr.24.2, 24.3 & 25.7—company (C) investing capital in another company (X) and receiving profit and interest as return—C bringing claim against officer and substantial shareholder (D) of X for damages for fraud—judge granting C's application for summary judgment on liability—on quantum, C applying for summary judgment for the amount of capital, less profit and interest received (which C claimed was undisputedly due), leaving the remainder of the disputed damages to be assessed at a trial—held, refusing the application, (1) where, in a claim for unliquidated damages, no application is made for an interim payment but summary judgment is given on liability and there is a triable issue as to quantum, the court as no power to give judgment for part of the damages unless the court is satisfied that such part of the damages can be clearly identified and quantified and that such ascertained part of the damages is undisputedly due, (2) in this case there was little doubt that a substantial sum was due to C, but (3) on the evidence before the court it was not clear precisely how much—***Associated Bulk Carriers Limited v. Koch Shipping Inc*** [1978] 2 All E.R. 254, CA, ref'd to (see ***Civil Procedure 2005*** Vol. 1 paras 24.3.2 & 25.7.27, ***Supreme Court Practice 1999*** Vol. 1 paras 14.1.3 & 29/10/3)

■ **SOUTHWARK LONDON BOROUGH COUNCIL v. KOFI-ADU** [2006] EWCA Civ 281, *The Times*, June 1, 2006, CA (Laws & Jonathan Parker L.JJ. and Sir Martin Nourse)

Fair trial—interventions by judge

CPR rr.1.1 & 52.10(2)(c)—local authority (C) bringing possession proceedings against tenant (D) for arrears of rent and nuisance—at outset of trial, because of doubts then arising as to D's entitlement to housing benefit, C applying for adjournment—this refused by judge—C then calling as witnesses council official and, on nuisance issue, neighbours of D—judge intervening substantially during course of examination in chief and cross-examination of these and other witnesses—judge (1) dismissing C's claim for possession, (2) adjourning C's claim for money judgment for determination by a district judge (presumably so that D's entitlement to housing benefit could be investigated), and (3) granting D's Pt 20 claim requiring C to make certain repairs—held, allowing appeal and ordering retrial before another judge, (1) within the bounds set by the CPR, a first instance judge is entitled to a wide degree of latitude in the way in which he conducts proceedings in his court, (2) however that latitude is not unlimited as ultimately the process must always be the servant of the judicial function of dealing with cases justly, (3) the manner in which the judge conducted the trial led to a failure on his part to discharge his judicial function, (2) a judge who intervenes in the course of the oral evidence of witnesses deprives himself of the advantage of calm, and dispassionate observation, (3) such intervention may so hamper the judge's ability properly to evaluate and weigh the evidence before him as to impair his judgment, and may for that reason render the trial unfair, (4) in the instant case, the judge's constant (and frequently contentious) interventions during the oral evidence served to cloud his vision and his judgment to the point where he was unable to subject the oral evidence to proper scrutiny and evaluation, (5) it was impossible to tell from his judgment what (if any) assistance he derived from the oral evidence which he heard as opposed to the documentary evidence and the witness statements (see ***Civil Procedure 2006*** Vol. 1 para. 1.3.3)

■ **STRETFORD v. THE FOOTBALL ASSOCIATION LIMITED** [2006] EWHC 479 (Ch), March 17, 2006, unrep. (Sir Andrew Morritt C.)

Fair trial—waiver of rights

Human Rights Act 1998, Sched.1, Pt 1, art.6—contract between Football Association (D) and players' agent (C) incorporating certain Rules of the Association including arbitration clause (Rule K)—C instituting disciplinary proceedings against D—C issuing Pt 8 claim for declaration that disciplinary proceedings did not comply with art.6—held, the contract between C and D constituted a waiver by C of his rights under art.6.1 in favour of the arbitral process for which Rule K provided (see ***Civil Procedure 2006*** Vol. 2 para. 3D–75)

■ **WOOD v. COLLINS** [2006] EWCA Civ 529, May 11, 2006, CA, unrep. (Thorpe & Gage L.JJ. and Hedley J.)

Committal sentence—appeal by applicant

CPR r.52.3(1), Sched.2 CCR O.29, r.1—woman (C) granted non-molestation and occupation orders against man (D)—C applying for order committing D for breach of orders—county court judge granting application and imposing 28 day suspended sentence—C appealing to Court of Appeal, contending that sentence was unduly lenient—held, (1) a sentence of three months imprisonment suspended should be substituted, (2) an applicant, as well as a respondent contemnor, has a right of appeal without permission against a committal order, (3) r.52.3(1)(a)(ii) should not be construed as restricting the applicant's right of appeal (see ***Civil Procedure 2006*** Vol. 1 paras sc52.1.39, sc52.1.42, sc52.7.1 & cc29.1.5, and Vol. 2 paras 7D–12, 7D–41 & 7D–51)

IN DETAIL

Conditional Possession Order

In ***Bristol City Council v. Hassan*** [2006] EWCA Civ 656, May 23, 2006, unrep., the Court of Appeal dealt with two conjoined appeals in cases with rather similar facts. In each case the facts were that a local authority landlord (C) brought proceedings under the Housing Act 1985, Pt IV against a statutory secure tenant (D) in receipt of housing benefit for possession of a dwelling house, in particular a suspended possession order on terms. A county court decided that C had established that statutory grounds for making the order existed and that it was reasonable to make such an order.

In cases such as these, normally the order for possession is made in accordance with Form N28 (Order for possession (rented residential premises) (suspended)), one of the forms listed in Table 1 in Practice Direction (Forms). Paragraph (1) of CPR r.4 states that the forms set out in Table 1 (and in the other tables in the Practice Direction) "shall be used in the cases to which they apply" and para. (2) states that a form may be varied by the court or a party "if the variation is required by the circumstances of a particular case". And, in introducing Table 1, para. 3.1 of the Practice Direction states that the table lists forms "that are referred to and required by Rules or Practice Directions supplementing particular Parts of the CPR", specifically Pts 1 to 75. The procedure set out in Sect. 1 of CPR Pt 55 (Proceedings for possession) must be used when a possession claim is brought by a landlord. Neither the provisions in that Part, nor the provisions in the supplementing practice direction, mentions Form N28. So the form is not "referred to" or "required by" any provision in Pt 55.

Form N28 has a long history. It was revised in 1993 and again in 2001, when Pt 55 was inserted in the CPR with effect from October 15, 2001, by the Civil Procedure (Amendment) Rules 2001 (S.I. 2001 No. 256), replacing provisions formerly found in the County Court Rules. The operative parts of the Form are structured so as to order (1) that the defendant give the claimant possession on or before a particular date, but (2) that the order is not to be enforced so long as the defendant complies with the conditions. The fixing of a particular date for giving possession complies with the rule that an order which requires an act to be done, other than a judgment or order for the payment of an amount of money, "must specify the time within which the act should be done" (formerly found in CCR O.22, r.3, but now stated in Practice Direction (Judgments and Orders) para. 8.1). In ***Harlow District Council v. Hall*** [2006] EWCA Civ 156, February 28, 2006, CA, unrep., the Court of Appeal held that in cases arising under Pt IV of the Housing Act 1988, so long as the defendant complies with the conditions, he enjoys the status of "tolerated trespasser", and not of a secure tenant, so long as he remains in possession of the premises after the date for giving possession has passed.

In each of the two cases under appeal, D contended that the possession order against him should not fix a date for the giving of possession. The purpose of the submission was to ensure that, subject to conditions, D remained as a secure tenant and did not become merely a "tolerated trespasser" (a reduction in status that can cause problems, not only for erstwhile secure tenants, but also for local authority landlords). It was submitted that the Form N28 order should be varied so as to declare that C was entitled to possession and to provide that a date for delivering possession should be fixed by the court on C's application, such application not to be made for so long as D complied with the conditions. In both cases the district judges rejected this submission and both defendants appealed.

In delivering the judgment of the Court, Brooke L.J. noted that, following the Court's decision in the ***Harlow District Council*** case, a working party was set up by the Department of Constitutional Affairs to advise on the form that a possession order should take in those cases in which the judge making a possession order against a statutory secure tenant did not wish that his secure tenancy should be terminated so long as the conditions set out in the order were fulfilled. His lordship explained that, in the meantime, county courts have been advised to amend Form N28 in such cases so as, in effect, not to suspend the enforcement of the order for the giving of possession on a particular date, but to fix such particular date and then to postpone it and continue the tenancy so long as the defendant complies with the conditions. So suspension of enforcement is substituted by postponement of the date for giving possession.

The appeal raised two questions; the second not arising if the first was answered in the affirmative. The first question was whether the district judge was obliged to follow the letter of Form N28 and to set out an absolute date for possession on the face of his order. The Court held that the district judge was not so obliged. After reviewing the authorities, Brooke L.J. explained that, as against squatters, owners of land who obtained an order for possession were entitled to enforce it immediately, but in the case of a former tenant the courts had a power (but not a duty) to fix a date for possession thereby postponing the effect of the order. In the latter event, the court would not in practice postpone the effect of the order for a period longer than six weeks. In the present case, however,

the court's powers were identified by statute. So it was necessary to inquire whether there was anything in ss.82 and 85 of the 1985 Act that required the court to set out an absolute date for possession on the date of the order. The Court held that there is nothing in those provisions that fettered the discretion of the district judge to make such order for postponement of possession as he thinks fit.

The second question (which now arises) is: if the district judge decides that a conditional possession order should be made against a statutory secure tenant, what form should the order take? Brooke L.J. said (para. 39) it would be both lawful and appropriate to make an order along the following lines:

"1. The defendant is to give possession of [address] to the claimant.

2. The date on which the defendant is to give possession of the property of the claimant is postponed to a date to be fixed by the court on an application by the claimant.

3. The defendant must pay the claimant £[amount] for rent and arrears and £[amount] for costs. The total judgment debt is £[amount] to be paid by instalments as specified in paragraph 4 below.

4. The claimant shall not be entitled to make an application for a date to be fixed for the giving up of possession and the termination of the defendant's tenancy so long as the defendant pays the claimant the current rent together with instalments of £[amount] per week towards the judgment debt.

5. The first payment of the current rent and the instalment must be made on or before [date].

6. Any application to fix the date on which the defendant is to give up possession may be determined on the papers without a hearing (unless the district judge considers that such a hearing is appropriate) provided that

   (a) the claimant has written to the defendant at least 14 days before making its application giving details of the current arrears and its intention to request that a date be fixed; and

   (b) a copy of that letter (and the defendant's response, if any) together with the rent account showing any transactions since the date of this order are attached to the application.

7. This order shall cease to be enforceable [on [date]] [when the judgment debt is satisfied]."

It is apparent from the terms of this specimen order that the Court was anxious to ensure that it should not be necessary for a further hearing to be held (with all the attendant expense and delay that that might involve) before a date for possession could be fixed on the application of the landlord. Brooke L.J. explained (para. 40) the landlord will obtain a fixed date as soon as the court is satisfied, from perusing the documents filed with the court, that the tenant has defaulted on the terms on which possession was postponed and there is no good reason not to fix the date for possession (by operation of s.82(2)) termination of the tenancy forthwith. His lordship stressed (para. 42) that when the court receives the landlord's request to fix a date it will have no jurisdiction to revisit the question whether it was reasonable to make a possession order at all.

Restricting statutory appeals to permission granted

In ***Gover v. Propertycare Ltd*** [2006] EWCA Civ 286; *The Times*, May 1, 2006, CA, the facts were that an Employment Tribunal (ET) held that the claimants (C) had been unfairly dismissed by the company (D) that employed them. However, the ET found that all that C had lost as a result of C's failures to conduct proper consultations in altering the terms of employment was for the period during which such consultation should have taken place and compensation was accordingly limited to an amount relevant to that period. In making such deduction in the compensation the ET saw itself as applying a doctrine to be found in the well-known case of ***Polkey v. A.E. Dayton Services Ltd*** [1988] 1 A.C. 344, HL, and elaborated in later cases. In an appeal to the Employment Appeal Tribunal (EAT) and in a further appeal to the Court of Appeal, C complained of that limitation. Upon their application for permission to appeal to the Court of Appeal on various grounds, C were given permission to appeal on the ground that the ET erred in the findings that it made as to what would have happened after proper consultation. The point was put in a variety of ways, including lack of evidence, unreliable speculation, and contradiction with findings made in arriving at the determination that C had been unfairly dismissed. In effect, this ground of appeal assumed that the ***Polkey*** jurisprudence was potentially applicable, but complained that that jurisprudence was wrongly applied.

On the morning of the opening of the appeal in the Court of Appeal, C indicated that they proposed to contend that the ET had erred for an additional, rather more fundamental reason. This reason was that, as a matter of law, the ***Polkey*** principle did not apply when the dismissal would have been unfair in any event, such that whatever fair procedure and consultation had been adopted, no employer could dismiss for the reason that his employer adopted.

The presiding lord justice, Buxton L.J. (with whom Lloyd and Richards L.JJ. agreed) noted that this further submission had not been made before the ET (or the EAT). His lordship said (para. 10) it had been the practice for all of

his time in the law, and no doubt for many years before that, that even if only as a courtesy to the court a departure from the case as put in the court below is clearly identified and permission sought for it. His lordship added that the jurisdiction of the Court of Appeal is constrained by what is in the grounds of appeal and in the grant of permission. His lordship ruled that C's further submission was not subsumed in the grounds of appeal for which permission had been granted and added that any application by C to amend the grounds of appeal to include the submission and to extend the ambit of the grant of permission to appeal accordingly would not be granted. Therefore, the issue raised by the further submission fell in limine. (However, as the Court had been drawn into an examination of the substance of the issue, the Court felt able to express the opinion that, even if it were open to C to argue it on the appeal, it should be rejected.)

In elaborating on the reasons for his conclusions on these matters Buxton L.J. said (para. 12):

"The judges of this Court now spend many hours pre-reading material before the appeal opens. The purpose of that is, amongst other things, to save the parties costs by reducing the time that has to be spent in court by their (on the evidence of the appellants' bill of costs in this case, expensive) lawyers. It makes a mockery of that process if appellants continue to consider that they are free to arrive at the door of the court with a completely new case, and take up the time of the Court in an attempt to elucidate the nature and details of the case viva voce."

In conclusion it is interesting to note that the Court expressed reservations as to the apparently accepted understanding based on the guidance given ***Hennessy v. Craigmyle & Co. Ltd*** [1986] I.C.R. 461, CA, to the effect that, in an appeal from the EAT to the Court of Appeal, the concern of the Court is not whether the decision of the EAT was right, but whether the decision of the ET was right. Buxton L.J. said (para. 8) he would be being less than frank if he did not express some reserve about that guidance, both from the point of view of jurisdiction and from the point of view of the management of the business of the Court. His lordship explained (*ibid.*):

"As to authority, this Court's jurisdiction to hear this appeal, coming as it does from a statutory tribunal, is only to be found in section 37(1) of the Employment Tribunals Act 1996, which provides for an appeal from the EAT on a question of law only. I do not see how we can in any realistic sense be hearing an appeal from the EAT if we are only concerned with whether the ET was right. As to the business of this court, the assumption that we in effect repeat the exercise already performed by the expert EAT of reviewing the decision of the ET tends in practice to impose on this Court an exercise that is inappropriate both in its nature and in its extent."

The ***Hennessy*** guidance gives support to the contention that an appellant may argue in the Court of Appeal a point that he failed to raise in the EAT, because the function of the Court is not to review the EAT but to review the ET. Buxton L.J. said (para. 9) that that reinforced his concern about the ***Hennessy*** guidance, and was a contention to which, if it should arise before him as a matter of decision, he would wish to give the most careful scrutiny.

Apparent judicial bias

Section 14 of the Supreme Court Act 1981 states that a judge shall not be incapable of acting as such in any proceedings by reason of being, as one of a class of ratepayers, taxpayers or persons of any other description, liable in common with others to pay, or contribute to, or benefit from, any rate or tax which may be increased, reduced or in any way affected by those proceedings. As is explained in the annotations in the White Book following that section (see Vol. 2 para. 9A–44.1), that section provides for circumstances in which, otherwise, a judge might be regarded as incapable of dealing with a case on the ground of partiality or prejudice.

The cases in which, in modern times, the question whether a judge should recuse himself on the ground of apparent bias are referred to in the annotations following section 14. Recent cases to be added there include ***AWG Group Ltd. v. Morrison*** [2006] EWCA Civ 6; [2006] 1 W.L.R. 1163, CA, referred to in ***CP News 03/2006***, and ***Smith v. Kvaerner Cementation Foundations Ltd*** [2006] EWCA Civ 242; 156 New L.J. 721 (2006), CA.

In the ***Smith*** case, at trial a recorder dismissed the claimant's (C) personal injury claim. Before trial, C was advised of facts giving rise to an appearance of judicial bias. After receiving advice from his counsel, C did not make an application for an adjournment and trial before another judge. Counsel had advised strongly in favour of C's continuing with the trial. The Court of Appeal allowed C's appeal and ordered re-trial. The Court held that C's decision did not amount to waiver by him of his right to complain of bias as it was not made freely and with knowledge of all the relevant information. The Court said it was not part of X's duty nor was it appropriate for him to seek to influence C.

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