CIVIL PROCEDURE NEWS

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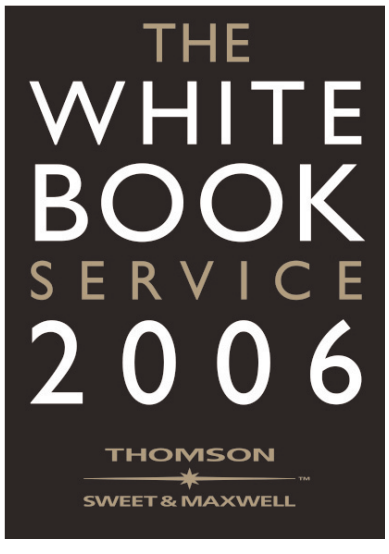

IN BRIEF

Cases

■ **DAYS HEALTHCARE UK LIMITED v. PIH-SIANG MACHINERY MANUFACTURING CO LTD** [2006] EWHC 1444 (QB), June 16, 2006, CA, unrep. (Langley J.)

Interim costs payment order—payment condition to defending detailed assessment proceedings

CPR rr.3.1(1), 3.1(3)(a), 44.3(8), 47.16, 52.3 & 52.11, Practice Direction (Appeals) paras 4.4 & 4.5—at end of trial, judge ordering defendants (D) to make interim costs payment to claimants (C) of £2m—D ignoring order—C commencing detailed assessment proceedings—C serving bill for £4.7m and D serving detailed points of dispute—costs judge refusing C's application for order that D should be permitted to defend the proceedings only on condition that they paid the interim order—held, allowing C's appeal, the court had jurisdiction to make the order (see ***Civil Procedure 2006*** Vol. 1 paras 3.1.4, 3.1.5, 52.3.8, 52.11.1, 52.11.3 & 52PD.7, and Vol. 2 para. 9A–59)

■ **HORTON v. SADLER** [2006] UKHL 27; 156 New L.J. 1024 (2006), HL

Limitation period—disapplying

Limitation Act 1980, ss.11 & 33, Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234, HL, Motor Insurers' Bureau Agreement cl. 9(1)—within primary limitation period, injured person (C) commencing claim against uninsured driver (D1)—C failing to give requisite notice to enagage MIB (D2) liability—after expiry of limitation period, C commencing duplicate proceedings against D1 and giving requisite notice—D2 joined as party and contending that claim statute barred—held, allowing C's appeal, where a claimant has issued process within the time limit, the court's discretion under s.33 to disapply s.11 may be exercised in a second action issued after the limitation period has expired—***Walkley v. Precision Forgings Ltd*** [1979] 1 W.L.R. 606, HL, departed from (see ***Civil Procedure 2006*** Vol. 2 paras 3F–164 and 8–70 to 8–72)

■ **TOTAL SPARES & SUPPLIES LTD v. ANTARES SRL** [2006] EWHC 1537 (Ch), June 27, 2006, unrep. (David Richards J.)

Non-party costs order—causation

CPR r. 48.2, Supreme Court Act 1981, s.51(3)—at trial, claimant (C) succeeding against foreign company (D)—D's principal witness (G) owning and controlling D—shortly before trial, G transferring assets of D to recently incorporated Italian company (X) and D ceasing trading—held, granting C's applications for non-party costs orders against X and G, (1) the transfer to X was not causative of any of the costs incurred by C, but (2) although causation will often be a vital factor it is no longer a necessary pre-condition to an order for costs against a non-party in X's position (see ***Civil Procedure 2006*** Vol. 1 para. 48.2.1 and Vol. 2 para. 9A–2265A)

■ **ARMSTRONG v. TIMES NEWSPAPERS LTD** [2006] EWCA Civ 519, June 13, 2006, CA, unrep. (Sir Anthony Clarke M.R., May & Dyson L.JJ.)

Libel action—preliminary issue of meaning - mode of 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—judge ruling (as C contended) that that question should be tried by judge alone ([2005] EWHC 2816 (QB), December 7, 2005, unrep.)—held, dismissing D's appeal, (1) where a libel action is to be tried by a judge without a jury, the first part of s.69(4) taken alone gives the court a discretion to order that the issue of meaning, being a question of fact, is to be tried with a jury, (2) that conclusion is not affected or moderated by the second part of s.69(4), (3) the discretion is an open discretion which does not start with any leaning towards any particular mode of trial, (4) the judge made no error of principle and his reasons in support of his conclusion were sufficient to justify it (see ***Civil Procedure 2006*** Vol. 1 paras 1.3.2 & 53PD.13.1, and Vol. 2 para. 9A–326)

■ **CORUS UK LTD v. EREWASH BOROUGH COUNCIL**, June 22, 2006, CA, unrep. (Ward, Laws & Longmore L.JJ.)

Challenge to local plan—extending time for service of claim form

CPR rr.3.1(2)(a), 7.5 & 7.6, and Sched.1, RSC O.94, r.2(1), Town and Country Planning Act 1990, s.287(4)—on August 9, 2005, local authority (D) adopting local plan—company (C) making application under s.287 challenging parts of the plan—by operation of s.287(4), six weeks period within which any such application should be made expiring on September 20, 2005—on that date, company (C) issuing Pt 8 claim form but not effecting service on D until September 23—on basis that service ought to have been effected by September 20, C applying under

r.3.1(2)(a) for extension of time for service—D contending that where (as here) an application was made for extension after the expiry of the relevant time period, extension could be granted only on the very limited grounds provided for by r.7.6 (none of which applied here) —judge rejecting D's submission and granting C's application ([2005] EWHC 2821 (Admin), December 12, 2005, unrep. (McCombe J.))—held, dismissing D's appeal, (1) in the terms of r. 2(1), the "relevant enactment" for making the application was s.287, and the "time limited" by that enactment was six weeks, (2) an application is made when the claim form is issued, (3) the six-week period for the making of an application was not to be extended, but the court may extend time for service, (4) as a matter of construction, r.7.6 is not engaged, (5) the judge was entitled to come to the conclusion he did having applied his discretion under r.3.1(2)(a) (see ***Civil Procedure 2006*** Vol. 1 paras 3.1.2, 7.6.1 & sc94.2.2)

■ **CUSTOMS AND EXCISE COMMISSIONERS v. BARCLAYS BANK PLC** [2006] UKHL 28; 156 New L.J. 1060 (2006), HL

Asset freezing order—liability of bank

CPR r.25.1(1)(f), Supreme Court Act 1981, s.37(3)—Customs and Excise (C) bringing proceedings against company (X) to recover VAT—judge granting freezing order for—1.8m—C serving copy of order on X's bank (D)—by letter to C, D acknowledging receipt—before letter received by C, D permitting X to make withdrawals from account totalling £1.2m—C obtaining judgment against X for £2.2m—judgment debt then exceeding amount in frozen account by £1.7m—C bringing claim in negligence against D—on preliminary issue, judge holding that D owed C no duty of care ([2004] EWHC 122 (Comm))—Court of Appeal allowing C's appeal ([2004] EWCA Civ 1555; [2005] 1 W.L.R. 2082, CA)—held, allowing D's appeal, (1) in the circumstances, D owed no duty of care to C, (2) asset freezing orders are only enforceable by the court's power to punish those who break its orders, (3) D had no choice but to comply with the court's order and did not assume any responsibility towards C, (4) a duty in tort might co-exist with a duty of compliance owed to the court, (5) but there was no known instance in which a non-consensual court order, without more, had been held to give rise to a duty of care owed to the party obtaining the order, (6) it would be unjust and unreasonable to hold that D should be liable (see ***Civil Procedure 2006*** Vol. 1 para. 25.1.27, and Vol. 2 para. 9A–111)

■ FEAKINS v. DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS [2006] EWCA Civ 699, June 8, 2006, CA, unrep. (Dyson, Smith & Moses L.JJ.)

Final determination of appeal—re-opening

CPR r.52.17—under European Community system applicable only to the UK, Department (D) claiming repayment of premium sums paid to farmer (C) in relation to sheep sold for export—in January 1992, C commencing proceedings against D challenging the legality of the clawback scheme—D defending, asserting the legality of the scheme and counterclaiming for £406,000 by way of clawback—in April 2000, after references to the ECJ, judge giving D summary judgment on the counterclaim—C given permission to appeal, not as to the amount (as to which, up until then, there was no dispute), but on the issue the circumstances in which exemptions from clawback could be claimed—in Court of Appeal D producing written statement of Department official explaining operation of exemptions and clawback arrangements—on October 23, 2001, Court refusing C leave to adduce further evidence and, on basis of the official's statement and other submissions, finding that the clawback forming the counterclaim was wholly attributable to C's failure to provide documentary evidence that certain sheep were entitled to exemption and dismissing appeal ([2005] EWCA Civ 1513)—subsequently, C succeeding in claim against his solicitors for professional negligence ([2005] EWHC 1931 (QB)) and awarded £330,000 damages—in course of the trial of that claim (to which D not a party) becoming apparent that official's statement previously produced to Court of Appeal contained serious inaccuracies and untrue assertions of fact—C applying under r.52.17 for permission to re-open the appeal of October 23, 2001—after reviewing position, D offering to compromise the proceedings for lesser sum than that awarded in the judgment on the counterclaim—held, granting the application, (1) the Court of Appeal, in dismissing C's application to adduce further evidence, was misled into an erroneous conclusion, (2) had it known the true position it is highly likely that the Court would have permitted C to set aside the summary judgment and permitted C to defend the counterclaim, (3) it was necessary to re-open the appeal in order to avoid real injustice, (4) it would not be right to reject the application on the basis that, were he to succeed at the re-opened appeal in setting aside the summary judgment, there was no reasonable chance he would recover more than he had already recovered in the negligence claim—***Taylor v. Lawrence*** [2002] EWCA Civ 90; [2003] Q.B. 528, CA, ref'd to (see ***Civil Procedure 2006*** Vol. 1 para. 52.17.2)

■ **KNIGHT v. BEYOND PROPERTIES PTY LTD** [2006] EWHC 1242 (Ch); 156 New L.J. 989 (2006) (Mann J.)

Passing-off claim—costs-capping order

CPR rr.3.1(2)(ll), 29.2 & 43.2, Practice Direction (Costs) Sect. 6, Supreme Court Act 1981, s.51—in passing off claim, claimant (C) instructing lawyers under CFA without ATE insurance cover—CFA providing for 100% mark up—after commencing proceedings against the defendants (D), in the allocation questionnaire C stating current costs at £48,000 and

estimating costs of getting to trial at £200,000—D stating their current costs at £35,600 and estimating costs of whole action including trial at £115,000—D applying for costs-capping order against C alleging that (1) there had been extravagant expenditure by C, and (2) there was (a) a strong indication that it would continue and (b) no reason to believe that it would stop—held, making no order on the application, (1) the court has jurisdiction to make a costs-capping order, not only in defamation cases, but also in other cases, (2) such an order should not be made unless (a) it is established on the evidence that there is a real risk of disproportionate or unreasonable costs being incurred, and (b) it is shown that the risk of such costs being incurred cannot be satisfactorily controlled by case management techniques and (in particular) the usual costs assessment after trial, (3) in this case, at this stage of the proceedings, a CFA with large mark up and no ATE insurance was not enough to justify a costs-capping order, (4) D had demonstrated a significant risk of excessive or extravagant incurring of costs by C under two particular heads of expenditure, but (5) these matters (a) could be satisfactorily dealt with by the normal post-trial costs assessment, and (b) insofar as they indicated a propensity for excessive expenditure under other heads, that too could be adequately dealt with similarly—***King v. Telegraph Group Ltd (Practice Note)*** [2004] EWCA Civ 613; [2005] 1 W.L.R. 2282, CA, ref'd to (see ***Civil Procedure 2006*** Vol. 1 paras 3.1.8, 29.2.3, 43.2.2, 43PD.6 & 44.3.5, and Vol. 2 paras 7A–38 & 9A–265)

■ **R. (EWING) v. DEPARTMENT OF CONSTITUTIONAL AFFAIRS** [2006] EWHC 504 (Admin); [2006] 2 All E.R. 993 (Sullivan J.)

Civil proceedings order—application dismissed without a hearing

CPR r.3.4, Practice Direction (Striking Out a Statement of Case) para. 7.6(3), Human Rights Act 1998, Sched.1, Pt 1, Art.6, Supreme Court Act 1981, s.42(3), Civil Procedure Act 1997, ss.1(1), 5, & Sched.1, para. 3—in December 1989, on application of Attorney General under s.42, civil proceedings order made against party (C)—subsequently, C making application to High Court under s.42(3) for leave to institute civil proceedings—High Court judge, following the procedure provided for by para. 7.6(3) and making order dismissing the application without a hearing—C given permission to bring claim for judicial review challenging para. 7.6(3) on various grounds—held, dismissing the claim (1) relevant provisions in the 1997 Act do not remove or restrict the inherent jurisdiction of the High Court exercised through the Heads of Division to issue practice directions governing the practice to be followed in the High Court, (2) s.42 and the CPR are silent as to the procedure to be adopted by the court when dealing with applications under s.42(3), (3) para. 7 fills a gap and, when considering an application, para. 7.6(3) gives the judge an unfettered discretion as to whether it should be dealt with on paper or after a hearing, (4) at common law, a party is entitled to an oral hearing where fairness requires that there should be such a hearing, but fairness does not require that there should be an oral hearing in every case, (5) para. 7.6(3) is not incompatible with Art.6, as it does not restrict access to the court to an extent that the very essence of the right is impaired—***Leigh v. Michelin Tyre plc*** [2003] EWCA Civ 1766; [2004] 1 W.L.R. 846, CA, ***R. (Hammond) v. Secretary of State for the Home Department*** [2005] UKHL 69; [2005] 3 W.L.R. 1229, HL, ***H v. UK*** (1985) 45 D.R. 281, E.Com.H.R., ref'd to (see ***Civil Procedure 2006*** Vol. 1 paras 3.4.9 & 23.8.1, and Vol. 2 para. 9A–843)

■ **SMITHKLINE BEECHAM PLC v. APOTEX EUROPE LTD** [2006] EWCA Civ 658; 156 New L.J. 952 (2006), CA (Sir Andrew Morritt C., Jacob & Moore-Bick L.JJ.)

Interim injunction—cross-undertaking—whether benefiting third party

CPR r.25.1(1)(f), Practice Direction (Injunctions) para. 5.1, Supreme Court Act 1981, s.37—following commencement of revocation proceedings against them, pharmaceutical company (C) bringing claim for patent infringement against UK company (D1) and UK-based distributor (D2)—in October 2002, C obtaining interim injunction and giving to court undertaking to compensate D1 and D2 for losses sustained thereby—two Canadian companies (X & Y), both affiliates of D1, abiding by the terms of the interim injunction and providing disclosure—at trial, judge dismissing action and revoking patent—subsequently, judge dismissing applications by D for orders enabling X and Y to recover losses caused to them by the interim injunction ([2005] EWHC 1655 (Ch); [2006] 1 W.L.R. 872)—held, dismissing D's appeal, (1) a legal entity which is not party to proceedings (a third party) does not have a claim as of right against a party who obtained a "wrongful" interim injunction which caused him expense or damage, (2) but the court has jurisdiction to require a party seeking an interim injunction to give an undertaking for the benefit of third parties affected by the injunction, (3) however, the principles about who can successfully intervene and ask for such an undertaking are far from worked out, (4) by the undertaking that they had given, C were not estopped from denying that X and Y were entitled to claim their own losses, because an inter-partes estoppel cannot operate so as to expand (or contract) a court order, (5) as a result of the interim injunction, C made greater profits than they would have done otherwise (neither losing sales nor being forced to reduce their prices by competition), (6) C's undertaking given to the court to compensate D1 and D2 provided no basis for a claim by X and Y in restitution in respect of those benefits that had

accrued to C, and (7) they had no independent claim in restitution against C—***National Australia Bank v. Bond Brewing Holdings*** [1991] V.R. 386, ref'd to (see ***Civil Procedure 2006*** Vol. 1 paras 25.1.16.1 & 25PD.5)

■ **SPECIAL EFFECTS LTD v. L'ORÉAL SA** [2006] EWHC 481 (Ch), March 17, 2006, unrep. (Sir Andrew Morritt C.)

Issue estoppel—application in trade mark cases

CPR r.63.15, Trade Marks Act 1994, ss.38 & 47—husband and wife applying to register trade mark—Registrar dismissing opposition to application by company (D)—trade mark then registered and assigned to company (C)—C bringing claim against D for infringement of the trade mark—in particulars of claim, C claiming that the dismissing of the opposition proceedings precluded D from challenging the validity of the mark on grounds of cause of action or issue estoppel, or abuse of process—in defence, D challenging validity of mark—C applying to strike out D's defence under art.6—judge ordering that this application and certain preliminary issues (including the cause of action etc issue) be tried together—held, (1) the law with regard to cause of action estoppel, as it has been developed in patents and registered design cases, applies to trade mark cases, (2) it applies, not only in cases where a person has unsuccessfully brought invalidity proceedings under s.47, but also where he has unsuccessfully opposed registration of a mark and then applied for a declaration of invalidity, (3) D were precluded by cause of action estoppel and issue estoppel from challenging the validity of C's mark on some of the grounds relied upon by them (see ***Civil Procedure 2006*** Vol. 2 para. 2F–74)

■ **W v. PORTSMOUTH HOSPITAL NHS TRUST** [2006] EWCA Civ 529, May 3, 2006, CA, unrep. (Laws, Wall & Lloyd L.JJ.)

Costs order against funded party—prerequisite for order against LSC

CPR rr.1.1, 44.3 & 44.17, Access to Justice Act 1999, s.11(1), Community Legal Service (Cost) Regulations 2000, regs 9 & 10, Community Legal Service (Cost Protection) Regulations 2000, regs 5(1)(b) & 5(3)(c)—on application of hospital (P), in exercise of inherent jurisdiction judge making declarations in relation to medical treatment of a gravely ill child—on application of child's parents (W), judge (1) refusing to discharge the declarations, and (2) ordering that the declarations should remain in force without limit of time—W's application for permission to appeal against (1) and their appeal (made with the judge's permission) against (2), both dismissed by the Court of Appeal ([2005] EWCA Civ 1181; [2005] 1 W.L.R. 3995, CA)—W applying for permission to appeal to House of Lords—subsequently, in accordance with a direction he himself had made, judge reviewing declarations and discharging them ([2005] EWHC 2293 (Fam))—P applying under s.11(1) for order against W, who were funded by the LSC, for their costs in the appeal proceedings—P contending that such an order would be a necessary prerequisite to any application pursuant to reg.10 that P might make to a costs judge for an order requiring the LSC to pay the costs—held, making a costs order against W, but specifying that the amount payable by them should be nil, (1) the fact that there had been further consideration of the declarations at first instance was no bar to the Court making an order for costs against W under s.11(1), as the "proceedings" that had been "finally decided" in favour of P within the meaning of reg. 5(1)(b) consisted of the appeal disposed of by the Court of Appeal, (2) in considering whether, but for cost protection, the Court would have made an order (reg.9(1)), the provisions r.44.3 applied, (3) but there was nothing in that provision, or in the authorities associated with it, to fetter the Court's hypothetical discretion to make an order against W for the purposes of s.11(1), (4) in particular, the Court's discretion was not restricted to circumstances in which persons in Ws' position had in some way behaved reprehensibly—Court stressing that they were not being asked (a) to make an order for costs against the LSC or (b) to decide the extent to which, if at all, the LSC should underwrite P's costs, as these were matters for the costs judge (see ***Civil Procedure 2006*** Vol. 1 paras 44.3.1 & 44.3.10, and Vol. 2 para. 7D–13, 7D–41 & 7D–51)

■ **ZAMBIA v. MEER CARE & DESAI** [2006] EWCA Civ 390, March 7, 2006, CA, unrep. (Sir Anthony Clarke M.R., May & Jacob L.JJ.)

Stay pending foreign criminal proceedings—party's right to attend trial

CPR rr.3.1(2)(f), 31.22, 32.3, 32.12 & 34.13, Human Rights Act 1998, Sched.1, Pt 1, Art.6, Supreme Court Act 1981, s.49(3)—foreign state (C) bringing proceedings to recover money against several corporations and individuals, all nationals of the state—C pleading conspiracy to injure and constructive trust based on knowing receipt and dishonest assistance—certain individual defendants (D) all subject to pending criminal prosecution in the foreign state and unable to leave that jurisdiction, having surrendered their passports as part of their bail conditions—D applying for stay of the action against them—judge refusing application ([2005] EWHC 2102 (Ch)), but making "ring-fencing" order providing for the trial to be in private, and designed to prevent documents disclosed in, and witness statements used in, the proceedings being deployed in any foreign proceedings without permission of the court—judge also proposing that Ds' evidence could be given by VCR or taken by the trial judge as an examiner in the foreign state—held, dismissing Ds' appeal, (1) cases may arise where it will be appropriate to stay civil proceedings because the claimant in those proceedings in effect is also the prosecutor in parallel criminal proceedings, (2) in this case, in the light of undertakings that C were prepared to give, there were sufficient safeguards to

ensure their compliance with the judge's order, (3) a party to civil proceedings must know what the case against him is and be able fully and properly to answer it, (4) the trial judge in this case will be able to ensure that each of the appellants (who are legally represented) will be able to do precisely that, (5) there is no authority for the proposition that a party to civil proceedings has a right to be physically present throughout (see ***Civil Procedure 2006*** Vol. 1 paras 1.3.10, 1.4.13, 3.1.7, 31.22.1, 32.12.1 & 34.13.1, and Vol. 2 paras 3D–75 & 9A–169)

Statutory Instruments

■ CIVIL COURTS (AMENDMENT) ORDER 2006 (S.I. 2006 No. 1542)

Race Relations Act 1976, s.67, County Courts Act 1984, s.2, Matrimonial and Family Proceedings Act 1984, s.33, Insolvency Act 1986, ss.117 & 374, Civil Courts Order 1983 (S.I. 1983 No. 713)—amends 1983 Order for purpose of closing Shoreditch county court and the Clerkenwell county court—provides for new county court at Farringdon London EC1 named Clerkenwell & Shoreditch county court—for purposes of s.33 new court to be divorce court and court of trial—also having jurisdiction in proceedings commenced in the closed courts, but excluded from having jurisdiction under the Insolvency Act 1986—Central London county court is assigned for the purpose of proceedings under the 1976 Act as the district for the Clerkenwell & Shoreditch county court—makes corrections consequential on the Civil Courts (Amendment No. 3) Order 1992 (S.I. 1992 No. 1810), which established the Central London county court and closed the Bloomsbury county court and Westminster county court—in force June 7, 2006 (see ***Civil Procedure 2006*** Vol. 2 para. 11–6)

IN DETAIL

Costs against non-party

In ***Total Spares & Supplies Ltd v. Antares SRL*** [2006] EWHC 1537 (Ch), June 27, 2006, unrep., a franchisee company (C) brought a claim against a foreign franchisor company (D) for damages of £1.5m for wrongful termination of a sale and distribution agreement. In their defence, D alleged breaches by C justifying termination and made a counterclaim. At trial, the judge found that certain breaches by C entitled D to terminate the agreement on six months' notice, and held D liable to C for loss of profit for that period only, amounting to £13,300. The judge also found that a businessman (G), who was the beneficial owner of 90% of D's shares, and who was D's principal witness at trial, controlled D and managed its business. As to costs, the judge ordered D to pay 55% of C's costs.

Shortly before trial (and then unbeknownst to C), on April 22, 2004, D had transferred the distribution part of its business and related assets and liabilities to a recently incorporated Italian company (X). After the costs order had been made, shareholders of D sold their shares to a Romanian company (Y) and shortly afterwards C merged with Y and ceased trading.

Under the Supreme Court Act 1981, s.51(3) and CPR r.48.2, C made applications for non-party costs orders against X and G. The application was granted.

David Richards J. noted that a non-party costs order may not be made against a party who has no connection with the proceedings in question. But his lordship held that, in this case, there was such connection as (a) the transfer to X was instigated by G and was intended to render it more difficult for C to recover any damages or costs, and (b) the overwhelming likelihood was that X was controlled by G just as D had been controlled by him. His lordship also noted that an application under r.48.2 is not an appropriate procedure for determining factual issues which require a trial for their fair determination. However, whether facts in dispute can fairly be resolved on such application depends on the nature of the evidence put before the court, and in this case they could be so resolved.

David Richards J. dealt with two further points, and in doing so indicated how the jurisdiction of the court to make a non-party costs order has been expanded in modern times. His lordship said, first, that whether an alternative remedy against the non-party whereby the costs may be recovered is available is clearly a relevant factor, but it does not preclude an order (a) if the facts can be properly determined summarily, and (b) if, on the basis of the facts and in all the circumstances, it is just to make the order. Secondly, in this case the transfer to X was not causative of any of the costs incurred by C, as D would have defended the claim in any event, but although causation will often be a vital factor it is no longer a necessary pre-condition to an order for costs against a non-party in X's position.

David Richard J. concluded that, in the circumstances, the appropriate orders were (a) that X should pay 55% of C's costs incurred after April 22, 2004, and (b) that G (who, in addition to instigating the transfer, misled the court and C as to the status of D after its merger with Y) should pay 55% of C's entire costs.

Bar to defending detailed assessment proceedings

In ***Days Healthcare UK Limited v. Pihsiang Machinery Manufacturing Co Ltd*** [2006] EWHC 1444 (QB), June 16, 2006, CA, unrep., the facts were that a UK company (C) brought proceedings against several defendants (D), including a Taiwan company (D1) and two individual owners thereof (D2 and D3), for damages for repudiation of a distribution agreement. The agreement in issue was subject to English law and contained a non-exclusive jurisdiction clause.

At trial in January 2004, C succeeded in part on their claim. The trial judge was very critical of the conduct and evidence of D. The judge ordered D to pay a sum in excess of £10m by way of damages and to pay the costs of the action, to be assessed if not agreed. The judge also ordered D to pay C an interim payment on account of costs of £2m pursuant to CPR r.44.3(8).

D made no payments to C towards the damages or the interim payment costs order. D were granted permission to appeal against the judgment to the Court of Appeal, but only on condition that D pay C the principal and interest due on the judgment sum and the interim payment costs order and, in addition, paid into court £150,000 security for the costs of the appeal. D paid nothing and the appeal was struck out on September 13, 2004. C applied under CPR Pt. 71 for D2 to give evidence as to his means. He failed to attend. Subsequently, in their absences both D2 and D3 were committed for contempt.

In an attempt to recover what was due to them, C commenced proceedings against D in Taiwan to enforce the judgment and the interim costs order. In those proceedings, which remained uncompleted, D complied with an order of the Taiwan court to provide security.

As the costs in the English proceedings had not been agreed, C commenced detailed assessment proceedings and served a bill for £4.7m. Detailed and comprehensive points of dispute were served by D. The parties estimated that the proceedings would take over three weeks of court time with C's costs likely to exceed £350,000. C applied to the costs judge for an order that, unless D paid the interim costs of £2m plus interest, a final costs certificate should be issued in the amount claimed. Principally on the ground that C's remedy lay in enforcing the interim costs order, the costs judge dismissed the application and refused C permission to appeal.

C applied to a High Court judge for permission to appeal. On this application, counsel for C relied on dicta in ***Hammond Suddard Solicitors v. Agrichem International Holdings Ltd*** [2001] EWCA Civ 2065, December 18, 2001, CA, unrep., and ***Motorola Credit Corporation v. Uzan (No. 2)*** [2003] EWCA Civ 752; [2004] 1 W.L.R. 113, CA. Counsel for D conceded that the court did have jurisdiction to make a debarring order but contended that, because of the wording of CPR r.47.16, the court had no jurisdiction to order the issue of a final costs certificate.

Langley J. granted C permission to appeal and allowed the appeal. His lordship said it was plain that D would not honour any orders made by the English court which involved payment, or of which they otherwise disapproved. This was not a case of want of means. D2 and D3 chose not to pay and challenged, not just C, but also the court, to make them do so. They would pay nothing until the legal machinery in a country where they had assets successfully executed an order against those assets. His lordship held that (1) the court's power under r.3.1(3)(a) to make payment of a sum of money into court a condition is not limited to the circumstance in which the court is being asked to make a procedural order, (2) quite apart from any specific rule (e.g. 3.1(3)(a)), the court's inherent jurisdiction to control its own proceedings was sufficient to enable it to make the order sought by C, and (3) the fact that D had provided security in Taiwan against which C may eventually execute was of little relevance.

In considering whether permission to appeal should be granted (CPR r.52.3), Langley J. said that, given the consequences at stake, the costs judge's decision could not realistically be characterised as a case management decision. In turning to CPR r.52.11(3) (circumstances in which an appeal court will allow an appeal), his lordship concluded that the costs judge's decision was wrong because he had erred in doubting his jurisdiction and in emphasising C's attempts to enforce the orders abroad, and his decision was unjust, because there a few cases of greater injustice than a case in which a party for no legitimate reason seeks to contest issues, to put his opponent to great expense, and yet to defy the outcome.

Langley J. ordered that there should be a detailed assessment, but D must not be permitted to participate further in that assessment unless by a particular date they made payment to C of the interim payment. He noted that, if D failed to comply with this condition, the assessment should take up only a small fraction of the times estimated by the parties for the hearing.

Disapplying primary limitation period

In ***Horton v. Sadler*** [2006] UKHL 27; 156 New L.J. 1024 (2006), HL, the facts were that, on April 10, 2001, two days before the expiry of the relevant primary limitation period fixed by the Limitation Act 1980, s.11, the claimant (C) brought a claim in a county court for injuries suffered in road accident caused by an uninsured driver (D1). C failed to give to the MIB the notice of claim required cl. 5(1)(a) of the Motor Insurers' Bureau Agreement, a condition precedent to MIB liability. After being joined as a defendant, the MIB served a defence denying liability because of that failure and counterclaimed for the return of an interim payment made to C. Subsequently, and after the primary limitation period imposed by s.11 had expired, C brought duplicate proceedings against D1 and this time gave the requisite notice to the MIB. After being joined as a party to these proceedings, the MIB (D2) entered a defence alleging that C's claim was statute barred.

In ruling on preliminary issues, a circuit judge held (1) that, in the first claim, D2 were under no liability and that C should repay the interim payment, and (2) that, in the second claim, (a) the binding authority of the decision of the House of Lords in ***Walkley v. Precision Forgings Ltd*** [1979] 1 W.L.R. 606, HL, made it impermissible for him to exercise the discretion given by s.33 of the 1980 Act to disapply s.11, but (b) had such authority not existed, he would have exercised the discretion in C's favour. C's appeal to the Court of Appeal was dismissed by consent ([2004] EWCA Civ 936, June 28, 2004, CA, unrep.), and the House of Lords gave C permission to appeal.

The House of Lords allowed C's appeal and remitted the matter to the county court. Their Lordships held (1) that s.33 gives the court a wide discretion to disapply the statutory limitation period in a personal injury action where it appears equitable to do so, (2) that s.33 is not subject to a technical rule that, where a claimant has issued process within the time limit, the discretion cannot apply to a second action issued after the limitation period has expired, (3) that in this case effect should be given to the exercise of the discretion in the manner which the circuit judge would have exercised had he been free to do so, (4) that the conditions for departure from previous authority (in the form of the ***Walkley*** case) were satisfied in this case.

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