CIVIL PROCEDURE NEWS

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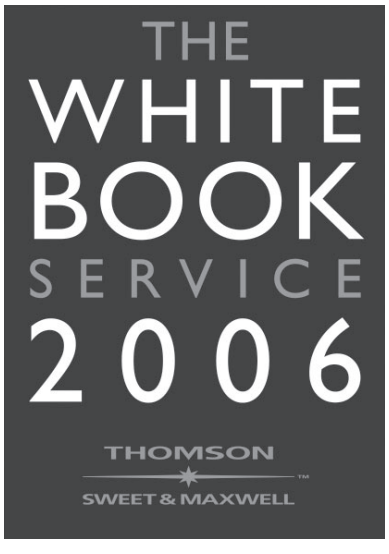

IN BRIEF

Cases

■ **CASEY v. CARTWRIGHT** [2006] EWCA Civ 1280, *The Times* October 10, 2006, CA (Keene, Dyson & Hallett L.JJ.)

Low value claim—whiplash injury—expert medical evidence

CPR rr.1.1(2)(c), 16.5, 26.8, 35.5(2) & 35.6—in personal injury claim, on causation issue defendant (D) contending that impact insufficient to cause whiplash injury to claimant (C)—C's particulars of claim supported by evidence of medical expert (X)—district judge directing (a) that D should have permission to put appropriate questions to X, and (b) that X should be permitted to give oral evidence at trial if required by D—held, dismissing D's appeal (1) a defendant wishing to raise the causation issue should satisfy certain formalities, (2) where he does so, generally the court will give him permission to rely on expert evidence relevant to it—formalities to be complied with explained (see ***Civil Procedure 2006*** Vol.1 paras 1.3.5, 26.6.2, 26.8.4, 35.5.1 & 35.6.1)

■ **NELSON v. CLEARSPRINGS (MANAGEMENT) LIMITED** [2006] EWCA Civ 1252, 156 New L.J. 1525 (2006), CA (Sir Anthony Clarke M.R., Brooke & Waller L.JJ.)

Non-service of claim form—setting aside judgment in absence of defendant

CPR rr.1.1, 3.1, 3.10, 6.5, 6.9, 13.2, 39.3 & 55.2—in possession proceedings, claim form posted to wrong address—at trial (which the defendant (D) did not attend), court giving judgment for claimant (C) —D's application to set judgment aside granted—held, dismissing C's appeal, (1) C's attempted service at the wrong address was an error of procedure within r.3.10 which the court could remedy by making an order setting aside the irregular judgment, (2) in these circumstances, r.39.3 does not apply as that provision contemplates a trial in the absence of a party who has been properly served (see ***Civil Procedure 2006*** Vol.1 paras 1.3.9, 3.1.1, 3.10.3, 6.5.4 & 39.3.7)

■ **THOMAS v. THE HOME OFFICE** [2006] EWCA Civ 1355, October 19, 2006, CA, unrep. (Jacob, Neuberger & Lloyd L.JJ.)

Service of claim form—party agreement to extend time

CPR rr.2.11, 3.8, 7.5(2), 7.6 & 52.14—in personal injury claim, before expiry of four month period of validity of claim form for service, parties agreeing to extend time for service—after expiry of that period, parties agreeing further extensions—after service, district judge granting defendant's application striking out claim on basis that claim form had been served out of time—held, dismissing the claimant's appeal, (1) by r.2.11 it is open to parties by written agreement to agree an extension of time for the service of a claim form, (2) in this case, none of the extensions agreed by the parties constituted a "written agreement of the parties" within the meaning of r.2.11 (see ***Civil Procedure 2006*** Vol.1 paras 2.11.1, 3.8.1, 7.5.1 & 52.14.1)

■ **AEROSPACE PUBLISHING LIMITED v. THAMES WATER UTILITIES LTD** [2006] EWCA Civ 717, April 27, 2006, CA, unrep. (Gage & Rix L.JJ.)

Inadequate reasons—appeal court's power to invite further reasons

CPR r.52.10, Supreme Court Act 1981 s.15—before handing down, trial judge circulating to counsel judgment giving judgment for claimants (C)—in judgment as handed down, judge declining defendant's (D) request for further reasons for certain of his conclusions—D granted permission to appeal, principally on ground that judge's conclusions as to C's losses were inadequately supported by his reasons—C applying to Court of Appeal for order inviting or directing trial judge to give further reasons—held, refusing application, (1) it may be assumed (but it is not decided) that the Court has power to make such an order, (2) such power (if it exists) might be derived, not from r.52.10, but from the inherent jurisdiction, (3) although, in a lack of reasons case the appeal court is concerned with the possibility of excessive costs, as a matter of discretion, it would not be right to exercise the power in this case as (a) the judge had already declined an invitation to give further reasons, and (b) a further request raised the risk of ex post facto rationalisation (see ***Civil Procedure 2006*** Vol.1 paras 52.10 & 40.2.5)

■ **BALMORAL GROUP LIMITED v. BOREALIS (UK) LIMITED** [2006] EWHC 2531 (Comm), October 17, 2006, unrep. (Christopher Clarke J.)

Indemnity costs—offer to settle—deficiencies in expert evidence

CPR rr.35.3, 36.20, 36.21, 44.3 & 44.5—at trial, serious flaws exposed in evidence of claimant's (C) expert witness, revealing weaknesses in C's technical case—C failing on most issues (including breach and causation) and as losing party ordered to pay defendant's (D) costs—in judgment, judge critical of C's expert evidence—D applying for costs on indemnity basis, held, (1) the reference to indemnity costs in r.36.21, and the absence of any such reference in r.36.20, show that normally a claimant who does not beat a payment in does not

have to pay indemnity costs, (2) but there can be surrounding circumstances that make continuance of the claim after the making of a payment in unjustified and such as ought to attract indemnity costs, (3) an expert, though owing duties to the court, is still the witness of the party calling him and his serious failings may make it just to order indemnity costs, (4) C's continuing with the claim after D's payment in was not so unreasonable that they should pay costs on the indemnity basis, (5) however, certain deficiencies in C's expert evidence had consequences of which the costs order should take account, (6) thus certain of the costs incurred by D in dealing with that evidence should be paid by C on the indemnity basis (see ***Civil Procedure 2006*** Vol.1 paras 1.4.11, 35.3.1, 36.20.2, 36.21.1, 44.3.10, 44.3.12, 44.5.1)

■ **BEAUMONT PREMIER PROPERTIES LTD v. JONES** [2006] EWHC 1143 (QB), March 31, 2006, unrep. (Cox J.)

Trial of quantum—application to add additional liability claim

CPR r.17.3—after recovering certain losses from his property insurers (A), landowner (C) commencing county court claim against neighbour (D) to recover uninsured losses of £13,500—claim allocated to fast track with D and C's manager (X) expected to be the only witnesses—judge giving judgment for C on liability but, because of lack of documentary evidence on matter, giving directions for future conduct of case in relation to issue of quantum of damage—in July 2004 (after time for any appeal by D had expired), C advising D that they intended to apply to amend their particulars of claim to add a claim by their insurers (A) (in the name of C under their rights of subrogation) to recover sums paid to C for his insured losses, in effect increasing damages sought to £55,000—district judge granting application—held, allowing D's appeal, (1) the district judge erred in concluding that no prejudice would be caused to D by granting C's application, made 17 months after the trial, (2) the parties had prepared for and conducted the trial in a manner appropriate for a low value fast track claim, (3) had C applied to amend at trial certainly an adjournment would have been granted and the case re-allocated to the multi-track with appropriate directions, (4) it was neither fair nor just that D, having made a commercial decision not to appeal against the trial judge's finding on liability, arrived at (at least in part) on the basis of the low value of the fast track claim then made, should have to live with the consequences of that decision when an application to amend quantum substantially upwards is made after inordinate delay for which C were entirely responsible, (5) the issues that D might have pursued on an appeal against the trial judge's finding on liability (and which D might yet pursue should an extension of time for appealing be granted) could not be described as fanciful or as wholly without merit (see ***Civil Procedure 2006*** Vol. 1 paras 17.3.5, 17.3.7 & 17.3.8)

■ **EDWARDS v. GOLDING** [2006] EWHC 1684 (QB), July 12, 2006, unrep. (Tugendhat J.)

Joinder of new defendant—setting aside default judgment—limitation defence

CPR rr.1.1, 3.1(7), 13.3, 17.4, 19.2(3), 19.5, Limitation Act 1980 ss.4A, 32(1)(b), & 32A—in 2002, election candidate (C) bringing libel claim against two defendants (D1 and D2) making allegations based on publication in March of that year—claim form never served on D1—in July 2005, by court order proceedings against D2 deemed to have been discontinued—subsequently, C applying for order (1) joining another party (D3) as defendant, and (2) disapplying under s.32A one year limitation period fixed by s.4A—on September 1, 2005, Master ordering joinder of D3, but without prejudice to any limitation defence available to him under s.4A—D3 filing acknowledgment of service but entering no defence—on November 29, 2005, judgment for C in default of defence entered and assessment of damages by judge and jury ordered—D3 applying to set aside joinder order and default judgment—held, granting the applications (1) the joinder order should be set aside because, after a relevant limitation period has expired, the court has no jurisdiction (except in personal injury and fatal accident claims) to order that a party be joined without prejudice to any limitation defence available to the new party, (2) in the circumstances, the court had jurisdiction on application notice to set aside the joinder order under r.3.1(7) and/or r.19.2(3) (rejecting C's submission that D3's only remedy was an appeal), (3) the default judgment should be set aside because, although there was no excuse for D3's failure to apply to set aside the judgment promptly, the fact that the joinder order had been made without jurisdiction constituted "some other good reason" within r.13.3(1)(b) (see ***Civil Procedure 2006*** Vol.1 paras 1.3.9, 2.3.1, 3.1.9, 13.3.1, 17.4.2,19.2.4 & 39.3(7), and Vol.2 para. 8–66)

■ **H.M. REVENUE AND CUSTOMS v. EGLETON** [2006] EWHC 2313, September 19, 2006, unrep. (Briggs J.)

Creditors' petition—freezing orders against third parties

CPR r.25.1(f), Supreme Court Act 1981 s.37(1)—Customs (C) presenting petition for winding up of company (D) owing VAT—beforehand, C obtaining on without notice application freezing orders against several parties—those parties including the sole director of D (X), a company having significant dealings with D (Y), and directors of Y (Z)—C not alleging any direct claim of its own against X, Y and Z and, although giving cross undertaking on damages, not undertaking to commence any proceedings against them—at hearing to continue orders, Y and Z contending that they should be set aside—application raising question whether petitioner in a creditors' petition for winding up of a company may obtain freezing orders against persons whose only alleged liabilities are to the company (or to the liq-

uidator under statutory claims arising only in the event of liquidation)—held, (1) the jurisdiction to grant freezing orders against third parties is not rigidly restricted by a requirement that it should be shown that, at the time when the order is sought, the third party is holding or in control of assets beneficially owned by the defendant, (2) accordingly, the court had jurisdiction to grant the freezing orders against X, Y and Z, or to continue them pending the appointment of a liquidator of D, (3) in the absence of cogent reasons, if freezing orders are to be obtained against potential judgment debtors of a company pending the making of a winding up order, they should be made on the application of a provisional liquidator rather than of a petitioning creditor, (4) although no such reasons existed in this case, exceptionally in the exercise of discretion the orders should be continued for a short period to permit, should a winding up order be made, the appointment of a provisional liquidator who may apply for freezing orders against the respondents in his own right or on behalf of D (see ***Civil Procedure 2006*** Vol.1 para. 25.1.27 and Vol.2 para. 9A–111)

■ INTENSE INVESTMENTS LTD. v. DEVELOPMENT VENTURES LTD [2006] EWHC 1628 (TCC), June 29, 2006, unrep. (Judge Peter Coulson Q.C.)

Rejection of informal offer—successful party—costs

CPR rr.36.2 & 44.3—claimants (C) bringing claim against defendants (D) for proportion of profit on sale of property to third party—D making informal offer to settle claim on basis that they paid C 50% of profit after deduction of tax—court directing that several matters be tried as preliminary issues—these issues including questions whether (1) there was a binding agreement between the parties, (2) that had not been terminated, and (3) under which D liable to pay C 50% of profit—at trial, C succeeding on these questions but D succeeding on further question as to whether, in calculating net profit, tax liability incurred by D should be deducted—in result, C in no better position than they would have been had they accepted D's informal offer—judge ordering an account—on question of costs, held (1) C's offer (though not in accordance with Pt 36) was an admissible offer within r.44.3(4)(c), (2) because of the uncertainty as to the impact of tax on net profit, C's rejection of D's offer (on the ground that they could not come to a concluded view as to its commercial merits) was reasonable, (3) in the circumstances, until an account was taken it was impossible to say which was the successful party, (4) it would be wrong to make a costs order without knowing what (if anything) C might be able to recover following its receipt of the account, (5) accordingly, the costs of the trial of the preliminary issues should be reserved until the conclusion of the proceedings—observations on disclosure of offers to judge trying preliminary issues (see ***Civil Procedure 2006*** Vol.1 paras 36.19.1, 44.3.1, 44.3.6, 44.3.8, 44.3.11 & 44.3.12)

■ O'BYRNE v. AVENTIS PASTEUR MSD LTD [2006] EWHC 2562 (QB), October 20, 2006, unrep. (Teare J.)

Joinder of defendant after limitation period—mistake in naming defendant

CPR rr.1.1 & 19.5, Limitation Act 1980 ss.11A & 35, Consumer Protection Act 1987 s.4, Council Directive 85/374/EEC Arts 7 & 11—infant (C) bringing defective product claim under Pt 1 of the 1987 Act, alleging he was damaged by defective vaccine—vaccine produced by French company (X Co) and distributed in England by another company (Y Co), a wholly-owned subsidiary of X Co—claim subject to 10 year limitation period stipulated by s.11A(3), implementing Art.11—before time had run, C commencing claim against Y Co—subsequently, having previously (before the expiry of the limitation period) (1) become aware that X Co and not Y Co were the producers of the vaccine, and (2) failed in an application to add X Co as co-defendants (because they had an arguable limitation defence), C applying under s.35 (r.19.5) to substitute X Co as defendants in the original proceedings—held, granting application, (1) under the amended particulars of claim, C wished to bring several claims against Y Co, including a claim made on the basis that Y Co were the producers of the vaccine, (2) in order to bring that claim it was, within the meaning of s.35(5), "necessary for the determination of the original action" for X Co to be substituted for Y Co as defendant, because according to both companies, the former and not the latter were the producers, (3) when he commenced the proceedings, C was under a mistake as to the identity of the party against whom he intended to proceed and, within the meaning of s.35(6)(a), gave Y Co's name "in mistake" for X Co's, (4) the fact that C was not labouring under such misapprehension when the limitation period expired, and had elected to continue to proceed against Y Co on several claims, did not alter the conclusions that the conditions in para. (5) (necessity) and para. (6) (mistake) of s.35 were satisfied, (6) in the exercise of discretion, the substitution should be made—observations on true construction of s.35(4) to (6) (see ***Civil Procedure 2006*** Vol.1 para. 19.5.7, and Vol.2 para. 8–87)

■ PREST v. MARC RICH & CO. INVESTMENT A.G [2006] EWHC 927 (Comm), March 3, 2006, unrep. (Gloster J.)

Disclosure of documents—destruction of documents—whether fair trial possible

CPR rr.3.4, 31.23 & 32.14, Practice Direction (Written Evidence) paras. 28.1 & 28.2, Sched. 1 RSC O.52, r.1—individual (C) and his company bringing claim against several defendants (D)—witness statement provided by C verified by statement of truth in accordance with r.22.1(1)(c), and C's list of disclosed documents including disclosure statement in accordance with r.31.10(5)—D alleging that C had interfered with the

administration of justice by the deliberate deletion, destruction and concealment of disclosable documents (held on computer) following the commencement of proceedings, being documents particularly relevant to D's counterclaim—on the basis of this allegation, in application made before trial, D applying (1) under r.31.23 and r.32.14 for permissions to bring contempt proceedings against C, alleging that he had made a false disclosure statement and a false statement, and (2) to commit C for contempt, on ground that he had interfered with the administration of justice—by way of relief, D seeking, respectively (1) a declaration of contempt and the striking out of C's case, and (2) the striking out of C's case under r.3.4(2) on the basis that, because of the absence of documents, a fair trial of the counterclaim was now impossible—held, granting the application in part, (1) D had satisfied the requirements for the grant of permission to bring contempt proceedings, (2) it is highly undesirable, not only for there to be satellite litigation, but also for one side's witnesses alone to be cross-examined at an interlocutory stage, without the full deployment of the other party's evidence and without the judge who hears the contempt application having available to him the full documentary and witness evidence in the case, (3) in this case, it would not be appropriate or proportionate (a) for the inquiry as to whether there had been a contempt to take place or (b) for D's strike out applications to be determined, on an interlocutory basis before trial, however (4) D should not be deprived of the opportunity to persuade the judge at trial that, in the light of the destruction of documents that they contend had taken place, and in the light of the evidence that is available at trial, a fair trial of the claim or counterclaim was impossible, accordingly (5) the permissions sought by D under r.31.23 and 32.14 should be granted and all of the contempt applications should be adjourned until trial (see ***Civil Procedure 2006*** Vol.1 paras 3.4.3, 31.23.1, 32.14.1, 32.14.2, 32PD.28 & sc52.1.16, ***Supreme Court Practice 1999*** Vol.1 para. 24/7/2)

■ ST HELENS METROPOLITAN BOROUGH COUNCIL v. BARNES [2006] EWCA Civ 1372, October 25, 2006, CA, unrep. (Tuckey, Arden & Lloyd L.JJ.)

Limitation period—bringing of action—request for issue of claim form

CPR r.7.2, Practice Direction (How to Start Proceedings—The Claim Form) paras 5.1 & 5.2, Limitation Act 1980 s.11(3)—on November 4, 2004, the day before the expiry of the relevant primary limitation period, former pupil (C) of local education authority (D) obtaining public funding to start personal injury proceedings against D—on same day, C making a request to a county court to issue a claim form as attached to the request—in accordance with para. 5.2, date of November 4 recorded on request by court as date of receipt—when issued, claim form bearing date of November 8—circuit judge holding that claim was not statute barred—held, dismissing D's appeal, (1) by operation of s.11, C's action "could not be brought" after November 5, (2) by operation of r.7.2, the proceedings were "started" after that date on November 8, (3) for the purposes of Pt I of the 1980 Act, an action is "brought", not when proceedings are "started", but when the court (being the court where proceedings should be started) receives (during its opening hours) a request to issue the claim form, (4) accordingly, the law is accurately recited in para. 5.1 (see ***Civil Procedure 2006*** Vol.1 paras 2.3.4, 7.2.1 & 7PD.5, and Vol.2 para. 8-16)

IN DETAIL

Expert evidence in low-velocity collision claims

In ***Kearsley v. Klarfeld*** [2005] EWCA Civ 1510, [2006] 2 All E.R. 303, CA, the Court of Appeal dealt with an appeal in a case in which a driver (C) brought a low value claim against another driver (D) for personal injuries arising out of a low-velocity impact car accident involving their respective vehicles (see ***CP News*** 03/2006). In giving judgment, the Court explained that the potential for low-velocity impact to cause injury (in particular, whiplash) was a matter on which experts were not agreed. Some experts take the view that, below a certain impact, injury is impossible or, at any rate, very unlikely. Others say that it can never be said definitely that this is so; there are too many imponderables. The Court expressed concern that, because of the unsettled state of expert opinion, low value claims would remain unsuited for the fast track in cases where the cause of the injury was put in issue by the defence (e.g. where the defence contended that the claimant was fabricating his injuries), and would in effect be forced into the multi-track with all of the additional costs and delay that that would entail. The Court suggested that consideration should be given to having a group of similar claims dealt with by a High Court judge so that authoritative guidance could be given on the appropriate approach to some of the generic issues that feature in them. The Court gave guidance as to the correct approach to the permissibility of expert evidence on causation in these cases, pending authoritative guidance in some test cases.

In ***Casey v. Cartwright*** [2006] EWCA Civ 1280, October 5, 2006, C.A., unrep., counsel for the appellant (the defendant) explained to the Court (Keene, Dyson & Hallett L.JJ.), that the Court's decision in ***Kearsley*** (December 6, 2005) had been interpreted by judges in the trial courts as deciding that, where a defendant showed reasonable grounds for believing that the claimant had suffered no injury, the defendant should generally be permitted to adduce his own expert on the issue whether the collision caused the claimant's injury. However, in this case, in dealing with an appeal from a case management decision of a district judge, the designated civil judge adopted a different general rule. The judge said that the starting point was that considerations of proportionality should prevail and that these cases should usually be tried on the fast track, without evidence on the causation issue. Counsel explained that since the designated civil judge's decision (April 6, 2006), in the Northern Circuit some judges had continued to follow the general approach that was adopted after the Court's decision in ***Kearsley***, whilst other judges followed the approach of the designated civil judge in the instant case. Yet other judges adopted a half-way house position and generally allowed evidence on the causation issue, but only from a single joint expert.

In the light of these submissions, the Court accepted that their attempt in ***Kearsley*** to provide guidance in order to assist in achieving a degree of consistency of approach had been unsuccessful. The Court explained (para. 29) that it is not controversial that in ordinary run-of-the-mill road traffic whiplash injury cases, there will be no need for expert medical evidence on the causation issue. The question of whether such evidence should be permitted only arises where the defendant contends that the nature of the impact was such that it was impossible or very unlikely that the claimant suffered any injury or any more than trivial injury as a result of the collision and that accordingly the claimant has fabricated the claim. It is only in such a case that the causation issue arises.

It would be unwise to attempt to paraphrase what the Court said in this case in giving the further guidance. In paras 30 to 36 the Court stated as follows:

"30 We think that it is desirable that, if a defendant wishes to raise the causation issue, he should satisfy certain formalities. In this way, the risk of confusion and delay to the proceedings should be minimised. Accordingly, where in a particular case a defendant wishes to raise the causation issue, he should notify all other parties in writing that he considers this to be a low impact case and that he intends to raise the causation issue. For the reasons set out at para 33 below, he should do so within 3 months of receipt of the letter of claim. The issue should be expressly identified in the defence, supported in the usual way by a statement of truth. Within 21 days of serving a defence raising the causation issue, the defendant should serve on the court and the other parties a witness statement which clearly identifies the grounds on which the issue is raised. Such a witness statement would be expected to deal with the defendant's evidence relating to the issue, including the circumstances of the impact and any resultant damage.

31 Upon receipt of the witness statement, the court will, if satisfied that the issue has been properly identified and raised, generally give permission for the claimant to be examined by a medical expert nominated by the defendant.

32 If upon receipt of any medical evidence served by the defendant following such examination, the court is satisfied on the entirety of the evidence submitted by the defendant that he has properly identified a case on the causation issue which has a real prospect of success, then the court will generally give the defendant permission to rely on such evidence at trial.

33 We believe that what we have just said reflects the tenor of the judgment in ***Kearsley***. There will, however, be circumstances where the judge decides that, even though the evidence submitted by the defendant shows that his case on the causation issue has real prospects of success, the overriding objective nevertheless requires permission for expert evidence to be refused. It is not possible or desirable to produce an exhaustive list of such circumstances. They include the following. First, the timing of notification by the defendant that he intends to raise the causation issue. Unless the defendant notifies the claimant of his intention to raise the issue within 3 months of receipt of the letter of claim, permission to rely on expert evidence should usually be denied to the defendant. It is important that the issue be raised at an early stage so as to avoid causing delay to the prosecution of the proceedings. The period of 3 months is consistent with para 2.11 of the Pre-Action Protocol for Personal Injury Claims which provides that a defendant be given three months to investigate and respond to a claim before proceedings are issued.

34 Secondly, if there is a factual dispute the resolution of which one way or the other is likely to resolve the causation issue, that is a factor which militates against the granting of permission to rely on expert evidence on the causation issue. In such a case, expert evidence is likely to serve little or no purpose.

35 Thirdly, there may be cases where the injury alleged and the damages claimed are so small and the nature of the expert evidence that the defendant wishes to adduce so extensive and complex that considerations of proportionality demand that permission to rely on the evidence should be refused. This must be left to the good sense of the judge. It does not detract from the general guidance given at para. 32 above.

36 We should say something about single joint experts. They have an invaluable role to play in litigation generally, especially in low value litigation. But we accept the submission of Mr Turner that, at any rate until some test cases have been decided at high court level, judges should be slow to direct that expert evidence on the causation issue be given by a single joint expert. This is because the causation issue is controversial."

Setting aside irregular judgment

In ***Nelson v. Clearsprings (Management) Limited*** [2006] EWCA Civ 1252, September 22, 2006, CA, unrep., a landlord (C) issued a claim form in a county court, claiming possession of furnished residential property. In accordance with the name and address of the defendant company (D) as stated in the claim form, the claim form was served by the court by first class post. D did not respond to the claim form in any way; they did not acknowledge service or file a defence. On the date fixed for trial, D did not attend. The trial proceeded in their absence and judgment was given for C. D applied to have the judgment set aside. They contended that they were entitled to an order to this effect as of right because, as the address on the claim form was incorrect, it had not been served on them in accordance with the CPR with the result that they had no knowledge of the proceedings before the judge gave judgment at trial. C contended that (on these assumed facts) the matter was governed by CPR r.39.3 (Failure to attend trial) and that, in order to succeed, D would have to persuade the court that the conditions in para. (5) of that rule were satisfied, in particular the condition that they had a reasonable prospect of success at trial. A district judge dealt with these rival contentions as a preliminary issue and found in favour of C. A circuit judge allowed D's appeal. The Court of Appeal (Sir Anthony Clarke M.R., Brooke & Waller L.JJ.) dismissed C's appeal.

The Court stated that, in their judgment, "the whole of rule 39.3 contemplates a trial in the absence of a party who has been served under the rules or in respect of whom service has been dispensed with", and expressed the hope that the Rules Committee may introduce a new rule to provide expressly for those cases where judgment has been entered even though the defendant has never been served with the claim form at all (even by virtue of "deemed service"). Until this comes about, the Court said that the following procedure should be followed:

1. If the defendant can show that he has not been served (or is not deemed to have been served) with the claim form at all, then he would normally be entitled to an order setting the judgment aside and to his costs in making the application.

2. If, when the claimant is served with an application to set aside such a judgment he believes that he can show that the defendant has no real prospect of successfully defending the claim, then he may apply to the court for orders dispensing with service of the claim form, permission (under CPR r.24.4(1)) to apply forthwith for summary judgment, and for summary judgment on his claim.

3. If such an application and cross-application are made the court should make such order as it considers just.

4. If the claimant can show that the defendant has been guilty of inexcusable delay since learning that the judgment has been entered against him, the court would be entitled to make no order on the defendant's application for that reason. The judgment would then stand (subject to any direction made by the court, whether in relation to statutory interest accruing due on the judgment or otherwise).

In relation to the first matter enumerated above, the Court explained (para. 48) that, while it is perhaps possible that there is no rule in the CPR which governs an application to set aside a judgment in the circumstances under consideration in this case, and that the court's power to do so stems from some more general power to set aside a judgment ex debito justitiae (see ***White v. Weston*** [1968] 2 Q.B. 647, CA), "it seems unlikely that such a comprehensive code [as the CPR] does not cover such a situation". The Court added that the situation was indeed covered by the CPR, in particular by provisions in Pt 3, and reasoned as follows: (1) C's attempted service on D at the wrong address was an "error of procedure" within the meaning of r.3.10; (2) the court was therefore empowered to make an order to remedy the error; (3) the power to make an order remedying the error in the form of an order (on D's application) setting C's judgment aside might be derived either from para. (b) of r.3.10 or from para. (m) of r.3.1(2). Nevertheless (as was explained above) the Court was of the opinion that amendments to the CPR clarifying the position were needed.

In conclusion it may be noted that the reference in the first of the matters outlined above to the possibility of a defendant showing (a) that he is not "deemed to have been served" with the claim form, as an alternative to his showing (b) that has not been served with it, would appear to be a reference to r.6.7. With respect, this seems curious. That rule provides (amongst other things) that where a claim form is served by first class post it shall be deemed to have been served on the second day after it was posted. It should be remembered that this rule does not turn bad service into good service. It simply fulfils the procedurally useful function of fixing a date for service where service is properly effected. If, as in this case, the facts are that the claim form was posted to the wrong address, then the result is that the defendant has not been served in accordance with the rules. Had the claim form been posted to the correct address, nothing in r.6.7 would have provided an alternative basis for D's arguing that the service was irregular.

Extending time limit by agreement

As one would expect (with a set of procedural rules that takes case management by the court seriously), the CPR are replete with procedural time limits. One way of ensuring that parties comply with time limits is to stipulate that they should not be permitted to vary them by agreement (thus enabling the progress of cases to drift out of the control of the court). But it would not be sensible to provide that all provisions setting time limits should be incapable of variation by party agreement, for that would cast an unnecessary burden on the courts.

So a distinction has to be drawn. In the CPR this is done by r.2.11. That Rule states that "unless these Rules or a practice direction provide otherwise or the court orders otherwise, the time specified by a rule or by the court for a person to do any act may be varied by the written agreement of the parties". (The purpose of insisting that if there is an agreement it should be in writing is obvious.) The signpost following r.2.11 gives examples of some CPR rules that expressly provide that a particular time limit cannot be varied by party agreement. The first example given is r.3.8 (Sanctions have effect unless defaulting party obtains relief). Para. (3) of that rule states that, where a rule, practice direction or court order (a) requires a party to do something within a specified time, and (b) specifies the consequences of failure to comply, the time for doing the act in question may not be extended by agreement between the parties.

Where proceedings are commenced, the first CPR time limiting provision encountered by the moving party is r.7.5 (Service of a claim form). That rule states that, after a claim form has been issued, "it must be served on the defendant". Fine, but served when? The rule goes on to state that, generally, it must be served "within 4 months after the date of issue". Now, into which category does r.7.5 fall? Is it (a) one of those provisions that stipulates that a time limit may be varied by written agreement between the parties, or (b) one that stipulates that it may not?; in particular, is it (a) one that does not specify the consequences of failure to comply with "the time for doing the act in question" (the act here being the serving of the claim form), or (b) one that does. The answer is that it falls into the first category.

So a claimant may issue his claim form and enter into a written agreement with the defendant extending beyond the four month period fixed by r.7.5, the period for which the claim form remains valid for service. This was confirmed recently by the Court of Appeal in ***Thomas v. The Home Office*** [2006] EWCA Civ 1355, October 19, 2006, CA, unrep. In this case, the claimant's claim form was issued on October 1, 2004, and should have been served by February 1, 2005, but in the event was not served until June 23, 2005. After service the defendants took the point that the claim form had been served out of time and therefore proper service had not been affected. The crucial question was whether or not each of the series of agreements between the parties to extend time was "the written agreement of the parties" within the meaning of r.2.11.

Once a claim form has been issued and served, numerous CPR provisions regulating the pre-trial process and containing time limits come into play. A surprisingly large number of these time limits may be varied by the written agreement of the parties (see ***CP News*** 1/1999). They include time limits relating to the periods within which the claimant should serve his particulars of claim and within which the defendant should file his defence.

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