CIVIL PROCEDURE NEWS

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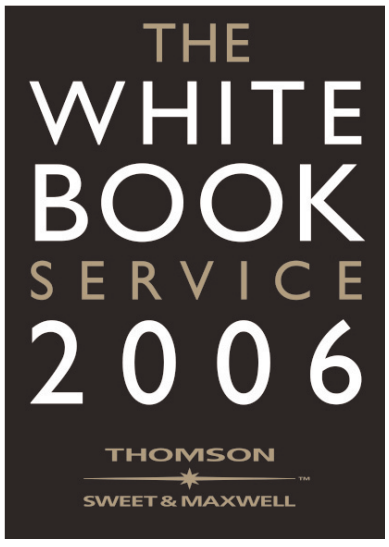

IN BRIEF

Cases

■ **DUNSTER PROPERTIES LTD v. FIRST SECRETARY OF STATE** [2006] EWHC 2079 (Admin), July 20, 2006, unrep. (Burton J.)

Planning appeal—clarification of reasons

CPR r.52.11, Town and Country Planning Act 1990 s. 288—developers (C) making revised planning application in relation to property in conservation area—application rejected by planning authority (D2)—on basis of report of inspector, Secretary of State (D1) confirming rejection—held, dismissing C's appeal, (1) the inspector's decision did not contain mutual inconsistencies and was not defective for lack of reasons, (2) the court's jurisdiction was limited to a power to affirm or quash the inspector's decision, (3) the court had no jurisdiction to request the inspector to clarify what he intended, so as to make his reasons clear (see ***Civil Procedure 2006*** Vol. 1 para. 52.11.4)

■ **OPPORTUNITY EQUITY PARTNERS LTD v. ALMEIDA** [2006] UKPC 44, October 3, 2006, P.C., unrep.

Judicial bias—active interventions in trial

CPR r.52.10(2)(c)—at trial (lasting 10 days) issues of fact strongly contested—judge giving judgment for D—Court of Appeal allowing C's appeal and directing new trial—held, allowing D's appeal (1) there was no basis for the Court of Appeal not to accept the judge's clear findings on the disputed issues of fact, (2) the judge's interventions had gone well beyond what was proper, but they were motivated by the wish to understand the evidence (which was often obscure and inconsequential) and push the trial forward, rather than by any partiality (see ***Civil Procedure 2006*** Vol. 2 para. 9–44.1)

■ **ASM SHIPPING LTD OF INDIA v. TTMI LTD OF ENGLAND** [2006] EWCA Civ 1341, October 16, 2006, CA, unrep. (Sir Anthony Clarke MR, Rix & Longmore L.JJ.)

Arbitration appeal—allegation of bias—Court's residual power to permit

CPR r.52.3, Arbitration Act 1996 ss.24, 69(8) & 73, Human Rights 1998 Sched.1 Pt 1 art. 6—shipping arbitration arising out of dispute between owners (C) and charterers (D)—arbitral panel refusing C adjournment when counsel unavailable on scheduled date—on grounds on bias, C objecting to umpire (X) continuing to sit as member of panel—X declining to recuse himself—panel making interim award and C taking it up—C applying to High Court under s.68 challenging the award—judge (1) dismissing the application, holding that although there was apparent bias C had waived their right to object to X's continuing to serve as umpire, and (2) refusing C permission to appeal—C applying to Court of Appeal for permission to appeal—held, (1) the judge's ruling and his refusal of permission to appeal were decisions under s.68, (2) without permission such decisions may not be challenged by way of appeal, even if obviously wrong, (3) the Court of appeal has a residual discretion to permit an appeal, despite the judge's refusal of permission, where that refusal can be challenged on the grounds of unfairness pursuant to Art. 6, (4) the allegation of bias had been dealt with by the judge at a public and impartial hearing and there was no apparent contravention of Art. 6 (see ***Civil Procedure 2006*** Vol. 1 paras 52.3.7 & 52.13.2, and Vol. 2 para. 2E–247)

■ **CGU INTERNATIONAL INSURANCE PLC. v. ASTRAZENECA INSURANCE CO LTD** [2006] EWCA Civ 1340, *The Times* November 3, 2006, CA (Sir Anthony Clarke MR, Rix & Longmore L.JJ.)

Arbitration appeal—review of refusal of permission to appeal

CPR r.52.3, Arbitration Act 1996 s. 69(8), Human Rights 1998 Sched. 1 Pt. 1 art. 6—in dispute between insurers (C) and re-insurers (D), parties submitting questions to arbitral tribunal as a preliminary issue—on questions of fact, arbitrators unanimous—on a question of law, by majority holding that Iowa law governed—on that question, High Court granting D leave to appeal—judge allowing appeal, holding that English law governed—judge refusing C leave to appeal and C applying to Court of Appeal for such leave—held, dismissing the application (1) under s. 69(8), in this context there is no appeal to the Court of Appeal without the permission of the High Court judge, (2) generally, where such permission is refused that refusal cannot be reviewed by the Court of Appeal, (3) the Court of appeal has a residual discretion to permit an appeal, despite the judge's refusal of permission, where that refusal can be challenged on the grounds of unfairness pursuant to Art. 6, (4) there was no basis for such a challenge in this case—***Lane v. Esdaile***, [1891] A.C. 210, HL, ref'd to (see ***Civil Procedure 2006*** Vol. 1 paras 52.3.7 & 52.13.2, and Vol. 2 paras 2E–247, 9A–50.1 & 9A–55)

■ **GALL v. CHIEF CONSTABLE OF WEST MIDLANDS** [2006] EWHC 2638 (QB), October 25, 2006, unrep. (Tugendhat J.)

Directions as to evidence—failure to comply—relief from sanction

CPR rr.3.9 & 52.11—claimant (C) (now acting in person) bringing claim for damages for assault etc against

police (D)—jury trial listed for 10 days, commencing on November 20, 2006—after various case management directions had been given (including directions as to evidence), but not fully complied with by C, C applying for permission to rely on oral and written evidence of his GP (X) as to his injuries—circuit judge applying r.3.9 and refusing application—High Court judge giving C permission to appeal—held, allowing appeal, (1) the circuit judge took into consideration matters which he should not have taken into consideration, and failed to take into consideration matters which he should have, as set out in r.3.9(1), (2) although the appeal was limited to a review of the circuit judge's decision, in the circumstances the appeal should be allowed as the decision was wrong and unjust, (3) in particular, (a) X's evidence was evidence of fact (which normally a party may adduce without permission), namely as to the injuries that he saw, (b) the directions required C to fulfil conditions over which he had no control, and (c) the trial date could still be met if relief were granted (see ***Civil Procedure 2006*** Vol. 1 para. 3.9.1)

■ **HARLOW & MILNER LTD v. TEASDALE [2006] EWHC 1708 (TCC), July 7, 2006, unrep. (Judge Peter Coulson Q.C.)**

Claim for order for sale—venue for starting claim

CPR rr.1.1 & 73.10, Practice Direction (Charging Orders, Stop Orders and Stop Notices) para. 4.2, Housing Grants Construction & Regeneration Act 1996—property owner (D) entering into contractual agreement with building company (C) for refurbishment of property—on C's application, adjudicator making award under 1996 Act against D—C obtaining charging order against D—C now applying for order for sale arising out of the charging order—held, granting the application, (1) the High Court has jurisdiction to order the sale of property to enforce a charging order, (2) r.73.10(2) provides that a claim for an order for sale should be made to the court which made the charging order, (3) in the circumstances of this case, the TCC had the requisite jurisdiction, notwithstanding para. 4.2 (which states that a claim for an order in the High Court must be started in Chancery Chambers or in a Chancery district registry), (4) where there is a conflict between a CPR rule and a practice direction provision it is the rule that must apply—***Godwin v. Swindon Borough Council***, [2001] EWCA Civ 641, [2002] 1 W.L.R. 997, CA, ***R. (Mount Cook Land Ltd.) v. Westminster City Council***, [2003] EWCA Civ 1346, [2004] C.P. Rep. 12, CA, ref'd to (see ***Civil Procedure 2006*** Vol. 1 paras 2.3.4, 73.10.1 & 73PD.4)

■ **KEEN PHILLIPS v. FIELD [2006] EWCA Civ 1524, October 26, 2006, CA, unrep. (Jonathan Parker & Moore-Bick L.JJ.)**

Relief from sanction—court acting on own initiative

CPR rr.3.1(2), 3.3, 3.8 & 3.9—accountancy firm (C) bringing claim against client (D) for professional fees—district judge dismissing C's application for summary judgment—C applying for permission to appeal—circuit judge ordering that transcript of district judge's judgment be lodged by a particular date and that, in default, permission to appeal be refused—through no fault of C, transcript lodged one day late—C making no application to extend time—at hearing, circuit judge dealing with C's application for permission to appeal and substantive appeal together—D submitting that, because of C's failure to comply with the condition, permission to appeal had already been refused by the court—judge (1) extending time for complying with the condition, (2) granting C permission to appeal, (3) allowing appeal, and (4) entering summary judgment for C—single lord justice granting D permission to appeal—held, dismissing D's appeal, (1) it may be assumed (though it is not decided) that in extending time the circuit judge was exercising the court's powers under r.3.9 to grant C relief from a sanction taking effect under r.3.8, however (2) it could not be argued that the circuit judge had no jurisdiction to extend time unless and until C made an application for relief under r.3.9, because (3) the court's general case management powers to extend time (r.3.1(2)(a)) and to act on its own initiative (r.3.3(1)) are not cut down by r.3.8(1)—***Sayers v. Clarke Walker (Practice Note)*** [2002] EWCA Civ 645, [2002] 1 W.L.R.3095, CA, ***Vinos v. Marks and Spencer plc***. [2001] 3 All E.R. 784, CA, ref'd to (see ***Civil Procedure 2006*** Vol. 1 paras 3.1.2, 3.3.1, 3.8.1 & 3.9.1)

■ **NESHEIM v. KOSA [2006] EWHC 2710 (Ch), October 4, 2006, unrep. (Briggs J.)**

Service out of jurisdiction—permission granted retrospectively

CPR rr.3.10, 7.5 & 7.6, Inheritance (Provision for Family and Dependants) Act 1975—two days before expiry of statutory time limit for beginning proceedings, widower (C) commencing claim under 1975 Act for interest in matrimonial home—claim brought against executrix and beneficiary (D) resident in Norway—at time of issue, C contemplating service within jurisdiction on D's English solicitors—after expiry of four month period for service within the jurisdiction fixed by r.7.5, without obtaining permission of court, C amending claim form, having it resealed for service out of the jurisdiction, and serving it on D in Norway—after expiry of six month period for service without the jurisdiction fixed by r.7.5, Master granting C's application for permission to serve claim form on D out of jurisdiction—D applying to judge under r.23.10 to set service aside—held, dismissing application, (1) the Master's order not merely dispensed with service, but rather gave retrospective permission for service out of the jurisdiction, so as to clothe with full legal validity the service made on D without permission, (2) the CPR (and the RSC) are silent as to whether the court's power to give permission to serve proceedings out of the jurisdiction can be exercised retrospectively in that way, but case law under the RSC made it clear that the court had such

jurisdiction as a remedy for curing a procedural defect, (3) that is a remedy for a defect which, applying considerations in furtherance of the overriding objective and the circumstances set out in r.3.9, can be used if appropriate, provided it is not used as a means of evading the conditions stated in r.7.6(3), (4) in the present case, there was no point in requiring C to apply for permission to serve out of the jurisdiction, followed by an extension of time and reservice of the claim form, as C had already achieved the objective of bringing the claim form to D's attention in fact, (5) this was plainly a case where permission to serve out of the jurisdiction, had it been sought before service, would have been granted—***Anderton v. Clwyd County Council*** [2002] 1 W.L.R. 3174, CA, ***National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd. (No. 2) (The "Ikarian Reefer")***, [2000] 1 W.L.R.603, CA, ref'd to (see ***Civil Procedure 2006*** Vol. 1 paras 3.10.1, 6.21.4 & 7.6.1)

■ **RADU v. HOUSTON** [2006] EWCA Civ 1575, November 22, 2006, CA, unrep. (Waller, Keene & Carnwath L.JJ.)

Failure to provide security for costs—application to set aside default judgment

CPR rr.1.1(2)(a), 3.1(2)(b), 25.12, 25.13 & 52.4(1) —claimant (C) bringing libel claim against editor and publishers of magazine (D)—C resident in Romania, a country due to become a Member State of the EU (possibly on January 1, 2007) when certain conditions for entry (including improvements in arrangements for enforcement of foreign judgments) satisfied—D applying for security for costs—Master (1) refusing C's application for adjournment of the hearing of this application, (2) ordering (a) that C should pay into court £125,00 by way of security, and (b) that C's claim should be struck out without further order if security not provided by due date, and (3) granting C permission to appeal on question whether the security ordered would stifle C's claim—vacation judge refusing stay of Master's order pending appeal—C not providing security and judgment in default entered in accordance with Master's order—subsequently (and after C had deposed that security had become available), on C's appeal judge (1) finding that the Master erred in refusing an adjournment, (2) reducing the required security to £80,000, but (3) refusing to set default judgment aside—held, allowing C's appeal, (1) where it is appropriate to make an unless order as a first order on an application for security for costs, the period for complying should be generous, (2) whether or not it was right to make an unless order in this case, to bring the sanction into play before the appeal could be heard was unfair to C, (3) if a court has ultimately made an unless order against a claimant, and even if judgment has been entered pursuant to it (security having not been paid), and within a short period he has come to court with the right sum, the court should be willing to consider granting relief and setting the judgment so obtained aside, however (4) in such circumstances there can be no automatic setting aside of a default judgment, as the courts cannot allow such party who could comply with the order to choose whether or not he will do so—on ground that it had not been argued before the judge, Court rejecting D's post-hearing submission requesting Court to refer back to judge question whether C deliberately flouted the Master's order—***Nasser v. United Bank of Kuwait***, [2001] EWCA Civ 556, [2001] 1 W.L.R. 1868, CA, ***Yorke Motors v. Edwards***, [1982] 1 W.L.R.444, CA, ref'd to (see ***Civil Procedure 2006*** Vol. 1 paras 1.3.6, 25.12.7, 25.12.10 & 25.13.2)

■ **STALLWOOD v. DAVID** [2006] EWHC 2600 (QB), October 25, 2006, unrep. (Teare J.)

Expert evidence—application to rely on additional expert

CPR rr.1.1, 32.1, 35.1, 35.4, 35.6 & 35.12—claimant (C) bringing substantial personal injury claim—C and defendant (D) each given permission to put in evidence of medical expert, respectively X and Y—parties exchanging experts' reports—following discussion between them, experts producing agreed note—in that note, X indicating that he had changed his opinion on C's prospects of making full recovery from whiplash injury—C not putting to X questions to clarify apparent change—C examined by third expert (Z)—at CMC circuit judge dismissing C's application to rely in addition on evidence of Z—in dealing with that application, judge frequently interrupting C's counsel and expressing opinion (based on own experience rather than on evidence in the case) on merits of C's claim—at end of hearing, judge acceding to C's submission that he should recuse himself from hearing the trial—held, allowing C's appeal, (1) expert evidence is to be "restricted to that which is reasonably required to resolve the proceedings" (r.35.1), (2) as an agreement between experts does not bind the parties (unless they expressly agree to be bound), a modification of an expert's opinion following discussion between experts cannot bind the party who instructed him, (3) the scheme of Pt. 35 does not rule out the granting of permission for a party to call a further expert, but it will be a rare case where that will be appropriate, (4) the mere fact that an expert has changed or modified his opinion following an experts' meeting cannot by itself be a reason for permitting a party who is disappointed with the change or modification of opinion to adduce expert evidence from another expert, (5) where a court is asked for permission to adduce expert evidence from a third expert in circumstances where the applicant is dissatisfied with the opinion of his own expert following the experts' discussion, it should only do so were there is good reason to suppose that the applicant's first expert has agreed with the expert instructed by the other side or has modified his opinion for reasons which cannot properly or fairly support his revised opinion, (6) if a party wishes the court to take the exceptional step of allowing additional expert evidence after his expert has changed his opinion the party will usually have to

make appropriate inquiries of the expert in order to provide the material for his application to the court, (7) the fact that r.35.6 only provides for a party to put written questions to an expert appointed by another party or to a single joint expert, does not mean that a party cannot ask questions of his own expert, (8) where good reason is shown the court will have to consider whether, having regard to all the circumstances of the case and the overriding objective to deal with cases justly, it can properly be said that further expert evidence is "reasonably required to resolve the proceedings", (9) in considering the overall justice of the case, it was relevant to consider (a) whether, if the applicant was refused permission and lost the case he would have an understandable sense of grievance judged objectively, and (b) whether, if the applicant was granted permission and won the case the respondent would have an understandable sense of grievance judged objectively, (10) applying these principles to this case, (a) there was no good reason for permitting C to rely on Z's evidence, however, (b) because of the manner in which the circuit judge dealt with the application, C would have such an understandable sense of grievance if permission were not granted, (11) therefore, in the very special circumstances of this case, dealing with the case justly required permission to be granted (see ***Civil Procedure 2006*** Vol. 1 paras 1.3.3, 32.1.1, 35.1.1, 35.4.2 & 35.12.1, and Vol. 2 para. 9A–44.1)

■ **WESTON v. GRIBBEN** [2006] EWCA Civ 1425, November 2, 2006, CA, unrep. (Sedley, Lloyd & Hallett L.JJ.)

Substitution of claimant—expiry of limitation period—new claim—mistake

CPR rr.1.1, 17.4 & 19.5, Limitation Act 1980 s. 35—claimant (C) bringing claim against notary (D1) and Foreign and Commonwealth Office (D2)—claim relating to three separate Spanish properties—C alleging (1) that he had been victim of a fraudulent property scheme, (2) that a false document on which his signature had been forged had been notarised by D1 in London, (3) that that notarisation had been confirmed by D2—one of the properties (property A) at all material times in the legal ownership, not of C, but of a Spanish company (X) (of which C sole director) with C having a beneficial interest only—after expiry of limitation period, C applying to add X as co-claimant—judge granting the application, finding that the joinder of X was necessary because the claim relating to property A (of which X was legal owner) could not properly be carried on without the joinder (r.19.5(3)(b))—judge stating (para 21) that r.19.5 "should be applied with regard to the overriding objective and read as it stands unobscured by previous authorities"—held, allowing D2's appeal, (1) C's claim in relation to property A, based on a beneficial interest, could not be carried on because (as the judge found) it was bad in law, (2) therefore the judge was wrong to allow the joinder of X under r.19.5(3)(b), (3) the substitution of X was not permitted by r.19.5(3)(a) as it would go outside the scope permitted by s. 35(6)(a) in that it would not be the substitution of one party for an existing party in respect of "any claim made in the original action", but in respect of a materially different claim, (4) in any event, C's contention that, in believing that, as sole director of X, he was entitled to bring a claim in relation to property A in his own name on X's behalf, he had made a "mistake" within s. 35(6)(a) and r.19.5(3)(a), was not borne out by the particulars of claim and was not credible—Lloyd L.J. suggesting (at para. 41) "it may be a convenient working test to ask whether you can change the identity of the claimants or, as the case may be, the defendant without significantly changing the claim" (see ***Civil Procedure 2006*** Vol. 1 para. 19.5.7, and Vol. 2 para. 8–87)

Statutory Instruments

■ **CIVIL COURTS (AMENDMENT NO. 2) ORDER 2006 (S.I. 2006 No. 2920)**

County Courts Act 1984 s. 2, Civil Courts Order 1983 (S.I. 1983 No. 713)—amends 1983 Order for purpose of closing Gravesend county court—by direction of Lord Chancellor (after consulting Lord Chief Justice) business transferred to Dartford county court—in force November 30, 2006 (see ***Civil Procedure 2006*** Vol. 2 para. 11–6)

■ **CIVIL PROCEDURE (AMENDMENT NO. 2) RULES 2006 (S.I. 2006 No. 3132)**

Civil Procedure Act 1997 s. 2—amend Civil Procedure Rules 1998 r. 5.4C—provide that, where a nonparty seeks to obtain a statement of case filed before that rule came into effect (October 2, 2006), the provisions that previously regulated the supply of court documents to a nonparty from court records shall continue to apply as if they had not been revoked-signpost attached to r.5.4C(1A) foreshadows that former rules will be set out in an addition to Practice Direction (Court Documents)—in force December 18, 2006 (see ***Civil Procedure 2006*** Vol. 1 para. 5.4 and ***Supp 2*** para 5.4C)

IN DETAIL

Additional reasons for decision

In civil proceedings where a case has been tried by a judge sitting alone, the Court of Appeal has jurisdiction to allow an appeal on the sole ground that the judge failed to give adequate reasons for his decision. Where an appeal is allowed on this ground, the Court may feel obliged to order a re-trial before a different judge.

An appeal is an expensive step for parties and one that consumes significant judicial resources. Consequently it is not surprising that thought has been given to ways in which the costs of appeals of this type could be reduced.

In ***Flannery v. Halifax Estate Agencies Ltd*** [2000] 1 W.L.R. 377, CA, two suggestions were made by the Court of Appeal. First, it was said that in cases where the party wishing to appeal on ground of lack of reasons applied to the trial judge for permission to appeal, the respondent to the application should consider inviting the judge to give his reasons, and his explanation as to why they were not set out in his judgment, for use at the permission hearing and at the hearing of the appeal if leave be granted. The other suggestion was that the appeal court should remit the matter to the trial judge with an invitation or requirement to give reasons.

In ***J.D. Williams & Co Ltd v. Michael Hyde & Associates Ltd*** [2001] P.N.L.R. 233, CA, a year after handing down his judgment in a professional negligence case, the trial judge was referred to the Flannery case and invited to amplify his reasons for preferring the evidence of one expert witness to another. The judge agreed to do so in order to avoid the unnecessary expense of a retrial in the event that the appeal turned on absence of reasons on that matter. On the appeal, Ward L.J. expressed the view that the judge ought not to have been put in that position and stated that "going back to the judge for clarification is a step I would strongly discourage".

The Flannery case inspired a large number of applications for permission to appeal on the ground of inadequate reasons. In ***English v. Emery Reimbold & Strick Ltd (Practice Note)*** [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409, CA, the Court of Appeal dealt with four such appeals. In this case the Court took up the suggestions made in the Flannery case and synthesised and amplified them. The Court recommended the following practice (para. 25):

"If an application for appeal on the ground of lack of reasons is made to the trial judge, the judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing on notice to the respondent."

Where, in an appeal from the decision of an employment tribunal to the Employment Appeal Tribunal, it is alleged that the tribunal failed in its judgment to deal with an issue at all, or to have given no reasons or not adequate reasons for a decision, the EAT may invite the tribunal to clarify, supplement or give its written reasons before proceeding to a final determination of the appeal. This practice was first adopted by the EAT in 2002 and was fully explained in ***Burns v. Royal Mail Group*** [2004] I.C.R. 1103, E.A.T. (and subsequently came to be known as "the Burns procedure"), where the EAT drew on the cases of Flannery and English, as well as on provisions in the Employment Tribunals Act 1996, to support the lawfulness of the procedure. In ***Barke v. SEETEC Business Technology Centre Ltd*** [2005] EWCA Civ 578, [2005] I.C.R. 1373, CA, on grounds slightly different to those relied upon previously, the Court of Appeal confirmed the lawfulness of the Burns procedure and gave guidance as to the circumstances in which it should be used. The Court held that adequate authority for the procedure could be found in EAT's rules of procedure, and even if no specific power could be found there, reliance could be placed on the EAT's power to regulate its own procedure.

In the English case, all of the appeals dealt with by the Court of Appeal were appeals from first instance decisions made by judges in ordinary civil proceedings and the procedure recommended by the Court has to be seen in that context. In the case of ***In re T. (A Child) (Contact: Alienation: Permission to Appeal)*** [2002] EWCA Civ 1736, [2003] 1 F.L.R. 531, CA, Arden L.J. said (para. 37) there was no reason "why the principle that a judge might be invited to amplify his reasons if they are not clear" should not equally apply in care proceedings as in ordinary civil proceedings. The establishment of, what could be called, "the English procedure" and, in a quite different context, of the Burns procedure (outlined above), raises the question whether a court dealing with a judicial review application or a statutory appeal, in which it is contended that reasons for the decision under review or appeal were not given or were inadequate, has jurisdiction to require or invite the decision-maker to provide reasons or amplify

reasons. That question has been considered in a number of contexts, both before and after the decisions of the Court of Appeal in the English case and in the Barke case.

In ***VK v. Norfolk County Council*** [2004] EWHC 2921 (Admin), [2005] E.L.R. 342, the relevant authorities were carefully reviewed by Stanley Burnton J., in particular the decision of the Court of Appeal in ***R. v. Westminster City Council, Ex p. Ermakov*** [1996] 2 All E.R. 302, CA (see also his lordship's judgment in ***Nash v. Chelsea College of Art and Design*** [2001] EWHC 538 (Admin)). The Norfolk County Council case was an appeal to the High Court against the decision of the Special Educational Needs and Disability Tribunal (SENDIST) in which it was alleged that the Tribunal's reasons were inadequate. Counsel for the education authority submitted that the Court should remit the decision under appeal to the Tribunal for it to supplement its reasons. Stanley Burnton J. noted that the Court had no statutory power to remit the appeal to the Tribunal for this purpose and no such power was to be found in CPR r.52.10 (Appeal court's powers). In his lordship's judgment, express statutory authority would be required for the High Court to have the power to compel a tribunal to supplement its reasons. However, the lack of such authority was not necessarily fatal to counsel's submission, as the Court could adjourn the hearing of the appeal and invite the Tribunal to supplement its reasons. In the event his lordship held that in the present case it would be wrong to do so and said that it would be inappropriate to do so in most appeals from the SENDIST in which inadequacy of reasons is alleged.

The point arose again in the recent case of ***Dunster Properties Limited v. First Secretary of State*** [2006] EWHC 2079 (Admin), July 20, 2006, unrep. In this case property developers appealed to the High Court against a decision of the Secretary of State's inspector on a planning application matter rejecting their appeal. The appellants argued that the inspector's reasons did not justify the conclusion he reached. The judge, Burton J. (a judge who, as President of the EAT, had been instrumental in the development of the Burns procedure), raised with the parties the question whether "this would be an occasion for an enquiry of the inspector as to what he did intend, so as to make his reasons clear: not so as to change his mind, or so as to give him a second bite of the cherry, but so as to understand whether there was in fact an inconsistency in his conclusion or whether in fact he could tell us what, by reference to his decision, his reasons for refusing the appeal in fact were." His lordship was persuaded that the statutory provisions under which this appeal was taken (Town and Country Planning Act 1990, s. 288) would not permit such a course "both because in effect the inspector is functus officio and because the only power that this court would appear to have, under the limited statutory jurisdiction given to it, is a power to quash the decision of an inspector".

Active trial management and judicial bias

In modern times, a number of cases have arisen in which it has been contended that a trial judge was disqualified by reason of the appearance of bias (i.e. "apparent" as distinct from "actual" bias) and therefore should not act, or should not have acted (see cases referred to in ***White Book*** Vol. 2 para. 9A–44.1). Generally the argument has been that, because of the relationship between the judge and lawyers, parties or witnesses, an appearance of bias arose.

But another (less common) situation is where it is argued (after trial) that the appearance of bias was given by the way in which the judge conducted himself during the trial. The dictum of Lord Greene M.R. in ***Yuill v. Yuill*** [1945] para. 15 about the judge who "descends into the arena and is liable to have his vision clouded by the dust of the conflict" has been much quoted. The traditional image of the judge is of a person who remains silent and lets the parties get on with the presentation of the case, intervening only where necessary.

The cases that have caused concern are those in which judges' interventions have taken the form either of dealing brusquely with counsel, frustrating the development of submissions, or of aggressive questioning of witnesses, preventing the witness from giving of his best, or both. Such behaviour causes concern, not simply because the judge has abandoned his traditional passive role, but because the manner in which he has chosen to play a more active role threatens the fairness of the trial. Most commonly, the connection between the judge's behaviour and the possibility of unfairness is the impression that the judge had pre-judged the issues he was required to try. Thus the argument has been that a fair-minded lay observer might reasonably apprehend from the judge's interventions that he had pre-judged the very questions he was to decide and therefore might not bring an impartial and unprejudiced mind to the resolution of those questions. Such pre-judgment may form the basis for a challenge of apparent bias (or, indeed, of actual bias).

In an extreme case, a judge's interventions in a trial may result in the losing party's appeal being allowed and a re-trial ordered. The case of ***Southwark London Borough Council v. Kofi-Adu*** [2006] EWCA Civ 281, *The Times* June 1, 2006, CA, provides a recent example. In that case the Court of Appeal stated that, 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; however that latitude is not unlimited as ultimately the process must always be the servant of the judicial function of dealing with cases justly. The Court (Laws and Jonathan Parker L.JJ. and Sir Martin Nourse) concluded that the manner in which the judge had conducted the trial in this case led to a failure on his part to discharge his judicial function. The Court stated that (1) a judge who intervenes in the course of the oral evidence of witnesses deprives himself of the advantage of calm, and dispassionate observation, (2) 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, (3) 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.

In this case, the Court of Appeal conceded that, nowadays, first instance judges "rightly tend to be very much more proactive and interventionist than their predecessors" (para. 145) and the observations made by Lord Greene (more than 60 years ago) must be read in that context. But the Court added (para. 145):

"That said, however, it remains the case that interventions by the judge *in the course of oral evidence* (as opposed to interventions during counsel's submissions) must inevitably carry the risk so graphically described by Lord Greene M.R. The greater the frequency of the interventions, the greater the risk; and where the interventions take the form of lengthy interrogation of the witnesses, the risk becomes a serious one."

The Court stressed (para. 146) that it was important to appreciate that the risk identified by Lord Greene "does not depend on appearance, or on what an objective observer of the process might think of it" (thus it is not simply a matter of apparent bias). Rather the risk is that the judge's descent into the arena "may so hamper his ability properly to evaluate and weigh the evidence before him as to impair his judgment, and may *for that reason* render the trial unfair".

Another recent case of interest is the decision of the Privy Council in ***Opportunity Equity Partners Ltd v. Almeida*** [2006] UKPC 44, October 3, 2006, P.C., unrep. In this case, the trial judge gave judgment for the defendant in a commercial case in which the terms of a remuneration agreement between the defendant and the plaintiff company who had employed him were hotly disputed. The Court of Appeal of the Cayman Islands allowed the plaintiff's appeal. The Court held that the judge's questioning of witnesses and comments were excessive and created a real danger that the trial was unfair. The Court set aside the whole of the judge's order and directed that there should be a new trial. The Privy Council allowed the defendant's appeal. Put shortly, the Board held that, while the judge had acted improperly, his conduct had not been such as to render the trial unfair, and there was no reason to suppose there was a real possibility that he was biased.

Both in the Court of Appeal and in the Privy Council, much was made of the judgment of Kirby A.-C.J. in the decision of the New South Wales Court of Appeal in ***Galea v. Galea*** (1990) 19 NSW LR 263. The Board stated that the summary of the law given there demonstrated that attitudes to judicial intervention have changed a good deal during the past 50 years and provided valuable guidance as to the principles to be applied. However, the Board also stated that the facts and circumstances which may render a trial unfair, either in whole or in part, are so multifarious that the principles may need to be applied flexibly in some circumstances (para. 95). Further, the Board stated that it was not their opinion that every case in which it is contended that a trial was unfair because of excessive judicial intervention should be analysed in terms of apparent bias (para. 93). (As was indicated above, a similar point was made by the Court of Appeal in the ***Southwark London Borough Council*** case.)

In a number of modern Australian cases (including ***Galea v. Galea***) appeal courts have dealt with problems relating to judicial bias. Generally, the level of analysis of the issues involved has been much more detailed and exacting than in comparable English cases. In ***Johnson v. Johnson*** [2000] HCA 48, (2000) 201 C.L.R. 488, a decision of the High Court of Australia, it was said (at p 493):

"At the trial level, modern judges, responding to the need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx."

In this case the High Court rejected the argument that, in his exchanges with counsel, the judge had exhibited bias. Gleeson C.J. (and three justices with whom he agreed) said (*ibid*):

"Judges, at trial or appellate level, who in exchanges with counsel express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate pre-judgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them."

In a separate judgment Kirby J. (agreeing in the result) stated (at pp.504 to 505):

"Whatever may have been the tradition in earlier times, opinions favouring silence on the part of an adjudicator during a hearing (whilst the surest means of avoiding allegations of pre-judgment) are now seen as carrying risks of an even greater injustice. Unless the adjudicator exposes the trend of his or her thinking, a party may be effectively denied justice because that party does not adduce evidence or present argument that could have settled the adjudicator's undisclosed concerns. A frank dialogue will commonly be conducive to the avoidance of oversight and the repair of misapprehensions."

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