CIVIL PROCEDURE NEWS

Issue 4/2007
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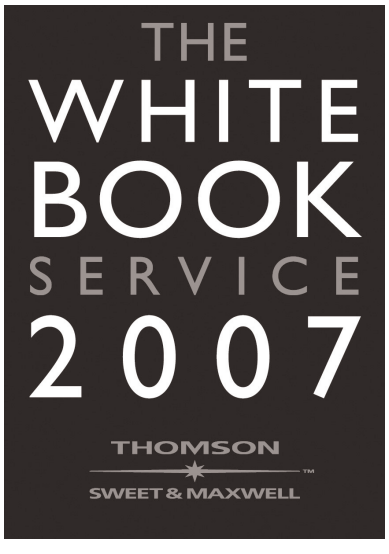

IN BRIEF

Cases

BR (IRAN) v SECRETARY OF STATE FOR THE HOME DEPARTMENT [2007] EWCA Civ 198; 157 New L.J. 438 (2007), CA (Buxton, Rix and Moses L.JJ.)

Asylum appeal—extension of time

CPR rr.3.1(1)(a), 3.9, 52.4 and 52.6, Practice Direction (Appeals) para.21.7(3)—asylum-seeker (C) applying to Asylum and Immigration Tribunal for permission to appeal to Court of Appeal—application granted, but C's lawyers failing to lodge Notice of Appeal in Court of Appeal within time limit imposed by para.21.7(3)—C applying to Court for extension of time—held, granting application, there is a presumption that, where the AIT has granted permission, the appeal ought to be heard—principles to be applied on such applications explained—application of r.3.9 doubted (see ***Civil Procedure 2007*** Vol.1 paras 3.1.2, 52.4.1, 52.6.2, 52.7.4 and 52PD.106)

NOMURA INTERNATIONAL PLC v GRANADA GROUP LIMITED [2007] EWHC 642 (Comm); March 23, 2007, unrep. (Cooke J.)

Issue of claim form—abuse of process

CPR rr.1.3, 3.4 and 16.2—in complicated and long running commercial dispute involving several companies, one company (C) made defendant in proceedings brought by another—C then issuing a claim form against a third company (D), principally for purpose of preventing limitation defence accruing to D thereafter—D applying to strike out claim form as abuse of process—held, granting the application, C was not in a position properly to identify the essence of their claim, and had no present intention of prosecuting proceedings, since it had no known basis for doing so (see ***Civil Procedure 2007*** Vol.1 paras 1.3.9, 2.3.1, 3.4.3 and 16.2.1)

7E COMMUNICATIONS LTD v VERTEX ANTENNENTECHNIK GMBH [2007] EWCA Civ 140; *The Times* March 19, 2007, CA (Sir Anthony Clarke M.R., Arden and Dyson L.JJ.)

Appeal from a county court—assignment to Court of Appeal

CPR rr.11, 52.14 and 59.6, Access to Justice Act 1999 s.57, Practice Direction (Appeals) para.2A.1—English company (C) bringing breach of contract claim against German company (D) in Mercantile List of Central London county court—following service on them abroad, D applying for declaration under r.11(1) that the English courts had no jurisdiction—judge granting application and setting service aside—judge refusing C permission to appeal but, on own initiative, directing (apparently under r.52.14) that, if C wished to apply to an appeal court for such permission, then that application should be made, not to a High Court judge, but to Court of Appeal—instead, C applying to High Court judge for permission—High Court judge (1) holding that the county court judge had jurisdiction to make the direction transferring the appeal to the Court of Appeal, (2) granting declaration that he (as a High Court judge) did not have jurisdiction to grant permission or to hear the appeal, but (3) granting C permission to appeal to Court of Appeal against that declaration—held, allowing C's appeal, (1) having refused permission to appeal, the county court judge had no jurisdiction to say where an appeal was to be heard, because until permission was obtained by C, there was and could be no appeal, (2) since he had refused permission, he had no power to direct under r.52.14 that the appeal be transferred to the Court of Appeal, (3) r.52.14 clearly distinguishes between an appeal and an application for permission to appeal, and it cannot be said that the power to direct such transfer applies, not only to appeals for which permission has been obtained, but also to appeals for which it has not—***In re Claims Direct Test Cases*** [2002] EWCA Civ 428, *The Times* April 4, 2002, CA, ref'd to (see ***Civil Procedure 2007*** Vol.1 paras 52.14.1 and 52PD.3, and Vol.2 para.9A–877)

BBC WORLDWIDE LTD v BEE LOAD LTD [2007] EWHC 134 (Comm); *The Times* March 15, 2007 (Toulson L.J.)

Summary judgment—declarations without trial

CPR rr.24.2 and 40.20—claimants (C) entering into contract with company (X), for commercial exploitation of recordings held in archives—contract containing English choice of law and exclusive jurisdiction clause—following contractual agreement between C and a third party, contract with X subsequently varied—X assigning their rights to another company (D)—C entering into yet another contract, this time with D, setting aside original contract as varied—several contracts not well drafted and commercial hopes not fulfilled—D bringing proceedings against C in American court alleging breaches of all three agreements—C bringing claim against D in High Court and applying for summary judgment in form of declarations on a number of disputed points of construction—held, granting application in part, (1) under RSC O.14A, the court had jurisdiction to determine summarily a question of construction where it was suitable for determination without a full trial, (2) in an appropriate case, the jurisdiction could be exercised in respect of claims for a declaration, (3) CPR Pt 24 superseded O.14A

(and other RSC provisions), (4) if at the end of argument the court comes to a clear view on a question of construction, the court has jurisdiction to grant summary judgment under r.24.2, on the basis that a trial would have no realistic prospect of causing it to reach a different judgment, (5) in considering whether to exercise its jurisdiction to grant a summary declaration the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose, and whether there are other special reasons for granting or refusing the declaration—***Financial Services Authority v Rourke***, *The Times* November 18, 2001, ref'd to (see ***Civil Procedure 2007*** Vol.1 paras 24.2.1 and 40.20.3)

■ **B v R** March 14, 2007, unrep. (Mr Stuart Isaacs Q.C.)

Proof of mediated agreement—without prejudice rule exception

CPR rr.1.4 and 32.1, Insolvency Act 1986 s.339—trustee in bankruptcy (C) bringing insolvency proceedings against bankrupt (D1)—C alleging that D1 sold property to purchaser (D3) at an undervalue—in defence, D3 alleging that the purchase was not from D1 but from D1's husband (D2)—shortly before trial in a county court, C and D3 engaging in mediation—on the day of the mediation no settlement arrived at—C claiming, but D3 disputing, that the proceedings were settled the following morning—in particular, when his solicitors accepted an offer made by D3's husband on D3's behalf at conclusion of the mediation—proceedings transferred to High Court and Registrar directing that question whether proceedings settled be tried as a preliminary issue—held, (1) the proceedings had not been settled, as the offer was insufficiently complete or certain to constitute a valid offer, (2) a mediation is a form of assisted without prejudice negotiation, (3) it is an exception to the without prejudice rule that it does not prevent the admission in evidence of what parties said to one another when the issue is whether such communications resulted in a concluded settlement agreement or not, (4) the fact that (in this case) such communications took place between the parties at a mediation did not confer on them a status distinct from any other without prejudice communications sufficient to take them outside the scope of the exception or otherwise to render them inadmissible at the trial of the preliminary issue—observations on desirability of a distinct privilege attaching to mediation processes—***Unilver plc. v Procter & Gamble Co*** [2000] 1 W.L.R. 2436, CA; ***Hall v Pertemps Group Ltd*** [2005] EWHC 3110 (Ch); *The Times* December 23, 2005; ***Reed Executive plc. v Reed Business Information Ltd*** [2004] EWCA Civ 887; [2004] 1 W.L.R. 3026, CA; ***Aird v Prime Meridian Ltd*** [2006] EWCA Civ 1866; *The Times* February 14, 2007, CA, ref'd to (see ***Civil Procedure 2007*** Vol.1 paras 1.4.11, 31.3.40 and 32.1.4)

■ **LES LABORATOIRES SERVIER v APOTEX INC** [2007] EWHC 591 (Pat); March 13, 2007, unrep. (Pumfrey J.)

Admission of fact—application to withdraw

CPR rr.14.1(5) and 32.18—claimants (C) bringing claim relating to patent of an active pharmaceutical ingredient with a particular crystalline form—defendants (D) seeking admission from C that alpha crystalline form claimed in the patent was same as ingredient in product marketed by C since 1989—initially, C declining to make such admission—subsequently, after reviewing documents during process of complying with disclosure requirements, C making admission sought by D—later on, after reconsideration of the documents, C concluding that there was no material on which they could properly have made the admission (which was contrary to their interests) and, shortly before trial, applying for permission to withdraw it—held, dismissing application, (1) when trial is imminent, there must be good reason why the interests of justice require that permission to withdraw should be granted, (2) the court must be satisfied that there is evidence providing plausible grounds for supposing that the admission is false in fact, (3) where there is counter evidence, throwing doubt on such evidence, it would be necessary to consider other matters, including the hardship or injustice to the parties caused by permitting the admission to stand, (4) in the present case, there was no evidence demonstrating that the admission was false (see ***Civil Procedure 2007*** Vol.1 paras 14.1.8 and 32.18.1)

■ **MCFADDENS SOLICITORS v CHANDRASEKARAN** [2007] EWCA Civ 220, February 26, 2007, unrep., CA (Laws, Scott Baker and Wilson L.JJ.)

Summary judgment—appeal limited to a "review"

CPR rr.1.2, 24.2 and 52.11—solicitors (C) bringing claim against former client (D) to recover outstanding costs and disbursements—Master concluding that C had not established that D had no real prospect of successfully defending the claim—dismissing C's application for summary judgment—on appeal, judge (1) concluding that Master had been wrong, (2) allowing C's appeal and (3) entering summary judgment for ([2006] EWHC 1357 (QB))—D granted permission to make second appeal—in principal ground of appeal, D contending that judge did not confine himself to a "review" of the Master's decision but, without notice to D, conducted a re-hearing of C's application and canvassed matters to which Master made no reference—on appeal, C conceding that their appeal to the judge was limited to a review and the judge did not invoke his exceptional power under r.52.11(1)(b) to hold a re-hearing—held, dismissing appeal, (1) the judge could fulfil his substantive task to consider whether the Master's decision was wrong only by reference to all the material that was before the Master, (2) both sides must be taken to have accepted, by implication, that no

narrower inquiry would have enabled the judge to determine C's appeal, (3) the judge did not go further than to conduct a "review" of the Masters' decision, (4) it was unfortunate that C did not expressly include in their grounds of appeal the point that D had a history of missing opportunities to articulate his case, a point which the Master had entirely failed to address but which the judge raised and regarded as important, (5) however, there was nothing D could add to that which was submitted to the judge to protect himself from that criticism—distinction between "review" and "re-hearing" considered—***E.I. Du Pont de Nemours and Co v S.T. Dupont (Note)*** [2003] EWCA Civ 1368; [2006] 1 W.L.R. 2793, CA, ref'd to (see ***Civil Procedure 2007*** Vol.1 paras 52.11.1)

■ **MYATT v NATIONAL COAL BOARD** *The Times* **March 27, 2007, CA (Dyson and Lloyd L.JJ. and Sir Henry Brooke)**

Invalid CFA—unsuccessful appeal—costs against solicitors

CPR r.48.2, Supreme Court Act 1981 s.51, Access to Justice Act 1999 s.58, Conditional Fee Agreement Regulations 2000 reg.4—employee (C) entering into CFA and bringing personal injury claim against employers (D)—claim settled—at detailed assessment, Master finding that C's solicitors (M) had failed to take reasonable steps to ascertain what before the event insurance cover C had—consequently, the CFA was unenforceable and the ATE legal expenses insurance was invalid—Court of Appeal dismissing C's appeal ([2006] EWCA Civ 1017; [2007] 1 W.L.R. 554, CA) and ordering that M be joined as parties to the appeal for the purposes of costs only—held, (1) the appeal was pursued by C for the benefit, or to a substantial degree for the benefit of, M, (2) in such circumstances, the court had jurisdiction under s.51 to make a costs order against M, (3) it was fair and just that M should be required to pay 50% of D's costs of the appeal—***Tolstoy-Miloslavsky v Aldington*** [1996] 1 W.L.R. 736, CA, ***Dymocks v Franchise Systems*** (NSW) ***Pty Ltd v Todd*** [2004] UKPC 39; [2004] 1 W.L.R. 2807, P.C.; ***Garrett v Halton BC*** [2006] EWCA Civ 1017; [2007] 1 W.L.R. 554, CA, ref'd to (see ***Civil Procedure 2007*** Vol.1 para.48.2.2, and Vol.2 para.9A–265)

■ **PALFREY v WILSON [2007] EWCA Civ 94; *The Times* March 5, 2007, CA (Tuckey, Arden and Lawrence Collins L.JJ.)**

Appeal—hearing on one only of two necessary grounds

CPR rr.1.1 and 52.10, Human Rights Act 1998 Sch.1 Art.6—in boundary dispute claim, county court judge finding that wall belonged to defendant (D) either (1) because he had paper title to it, or (2) because title had been obtained by adverse possession—accordingly, judge dismissing the claimant's (C) claim and ordering C to pay D's costs on the indemnity basis—single lord justice refusing C permission to appeal—on renewed oral application, Court (1) granting C permission to appeal, and (2) referring to the appeal court hearing the substantive appeal an application by D for permission to appeal against the costs order—at beginning of substantive appeal hearing, Court directing that argument should be heard first on the adverse possession issue—at end of that argument, Court reserving judgment on that issue and stating that it did no wish to hear argument on the paper title issue—on the costs appeal, C submitting that that appeal could not be determined without the Court first deciding the merits of the paper title issue (an issue on which a substantial proportion of the trial costs had been consumed)—held, rejecting that submission (1) if an appellant has to succeed on two grounds in order to upset the order under appeal, he takes the risk that the Court will uphold the decision on one of those grounds and decline to consider the other, (2) the Court may take such a course in the interest of saving expense, dealing with cases proportionately and expeditiously, and allocating judicial resources appropriately, (3) the Court's refusal to hear C on the paper title issue did not breach his rights under art.6 (see ***Civil Procedure 2007*** Vol.1 paras 1.3.2, 1.3.5, 1.3.7 and 52.10.1, and Vol.2 para.9A–68)

■ **TRADIGRAIN S.A. v INTERTEK TESTING SERVICES [2007] EWCA Civ 154; *The Times* March 20, 2007, CA (Laws, Carnwath and Moore-Bick L.JJ.)**

Permission to appeal—application to set aside

CPR rr.52.3 and 52.9—at trial in High Court, judge dismissing claimant's (C) substantial commercial claim—C filing appellant's notice and requesting permission to appeal from Court of Appeal—notice raising as grounds of appeal three particular issues—application for permission refused on paper but renewed orally—Court directing that application be granted generally—at hearing of substantive appeal, defendants (D) requesting Court to set aside permission to appeal on the second and third of the particular grounds—D contending that neither of the tests for granting permission as stated in r.52.3(6) had been satisfied in relation to those grounds—held, refusing request, (1) the Court has jurisdiction under r.52.9(1)(b) to set aside permission in whole or in part, but it is a jurisdiction to be exercised very sparingly and only in exceptional circumstances, (2) if D's request was to be made it ought to have been made as soon as possible after the order granting permission had been granted, (3) it was not appropriate to make such request after the parties had incurred costs in preparing to argue the merits of the appeal as a whole and after the Court had devoted preparation time for the appeal, (4) the test for granting permission to appeal is necessarily flexible and the Court's decision once made must be accepted, (5) the fact that the Court may appear to have been unduly generous to the applicant when granting permission is not a ground for seeking to have permission set aside (see ***Civil Procedure 2007*** Vol.1 paras 52.3.6 and 52.9.2)

■ **WILLIS v NICOLSON** [2007] EWCA Civ 199; March 13, 2007, CA, unrep. (Buxton, Smith and Wilson L.JJ.)

Costs capping order—test—problems

CPR r.44.3, Practice Direction (Costs) paras 6.5A and 6.6—just before end of limitation period, person (C) suffering catastrophic injuries in traffic accident bringing personal injuries claim—at separate trial of liability in July 2006, judge holding that C was one-third contributorily negligent—hearing of quantum fixed for March 2007—in September 2006, defendant (D) applying for order that C's solicitors' costs be capped—at hearing of application, C stating that his costs to date were £500,000 and estimating that further costs on quantum would be £460,000—judge ruling that C's costs incurred from July 2006 to final determination of the claim should not exceed C's estimate of the further costs—on appeal, D contending that, instead of limiting C to his estimate, the judge should have imposed a cap, either by (1) by ordering a lower limit, or (2) remitting the case to a costs judge for him to do so—held, dismissing application, (1) the test which the judge had to apply was whether there was a real risk that the further costs expended by C would be unreasonable and disproportionate, (2) the judge came to the conclusion that there was no such risk, (2) D's grounds of appeal did not challenge that conclusion (e.g. on basis that C produced no evidence justifying his estimate) and it was too late now for D to amend his grounds to do so—Court explaining practical problems arising in relation to costs capping orders but declining invitation to give general guidance as to their use in personal injury cases—***Smart v East Cheshire NHS Trust*** [2003] EWHC 2806 (QB); ***King v Telegraph Group Ltd (Practice Note)*** [2004] EWCA Civ 613; [2005] 1 W.L.R. 2282, CA, ref'd to (see ***Civil Procedure 2007*** Vol.1 paras 3.1.8, 43.2.1.2)

Statutory Instruments

■ **CIVIL COURTS (AMENDMENT) ORDER 2007 (SI 2007/786)**

Supreme Court Act 1981 s.99, Insolvency Act 1986 ss.117 and 374, Civil Courts Order 1983 (SI 1983/713)—amends Schs 1 and 3 of the 1983 Order for several purposes—establishes High Court district registry at Mold—confers jurisdiction under the 1986 Act on Mold and Bury county courts—makes transitional arrangements for insolvency proceedings being dealt with in Chester and Bolton county courts that might now be dealt with in, respectively, Mold and Bury county courts—in force April 2, 2007 (see ***Civil Procedure 2007*** Vol.2 para.11–6)

■ **CIVIL PROCEEDINGS FEES (AMENDMENT) ORDER 2007 (SI 2007/680)**

Courts Act 2003 ss.92, 98 and 108(6), Insolvency Act 1986 ss.414 and 415, Civil Proceedings (Fees) Order 2004—amends Art.4 (Exemptions, reductions, remissions and refunds) substituting £16,017 for £15,460 as maximum gross annual income above which working tax credit will not be a qualifying benefit for the purposes of exemption from court fees—in force April 6, 2007 (see ***Civil Procedure 2007*** Vol.2 para.10–5)

■ **ENDURING POWERS OF ATTORNEY (PRESCRIBED FORM) (AMENDMENT) AMENDMENT REGULATIONS 2007 (SI 2007/548)**

Enduring Powers of Attorney (Prescribed Form) Regulations 1990 (SI 1990/376), Sch., Enduring Powers of Attorney (Prescribed Form) (Amendment) Regulations 2005 (SI 2005/3116), regs.2 and 3—amends reg.3 so as to extend validity of Forms contained in Sch. before it was substituted by reg.2 from April 1, 2007, to October 1, 2007—in force March 30, 2007 (see ***Civil Procedure 2007*** Vol.2 paras 6B-429 and 6B–430)

IN DETAIL

Extension of time for appealing in asylum cases

In certain circumstances, and subject to permission requirements, an appeal may be made to the Court of Appeal from a decision of the Asylum and Immigration Tribunal (AIT). Practice Direction (Appeals) para.21.7(3) states that the appellant's notice must be filed at the Court of Appeal "within 14 days after the appellant is served with written notice of the decision to grant or refuse permission to appeal". If the AIT has granted permission to appeal the Notice of Appeal will be the formal document on which the appeal will proceed. If the AIT has refused permission the Notice will serve as a renewed application for permission, this time to the Court of Appeal (r.52.4(1)).

Under its general power to extend the time for compliance with any practice direction (recited in r.3.1(1)), in a given case the Court of Appeal may extend the 14 day limit for filing of the Notice of Appeal stipulated by para.21.7(3). An application by an appellant to extend the time limit in the circumstances to which that provision applies, must be made to the Court of Appeal (r.52.6(1)). There is authority for the proposition that, where a party fails to comply with a provision fixing a time limit for filing a Notice of Appeal and applies to the Court of Appeal for an extension of time to enable him to comply, in exercising its discretion the Court should have regard to the matters listed in r.3.9 (Relief from sanctions), and that proposition has been applied in asylum cases (e.g. ***YD (Turkey) v Secretary of State for the Home Department*** [2006] EWCA Civ 52; [2006] 1 W.L.R. 1646, CA).

In the recent case of ***BR (Iran) v Secretary of State for the Home Department*** [2007] EWCA Civ 198; 157 New L.J. 438 (2007), CA, the Court of Appeal dealt with two conjoined applications in asylum cases for extension of the time limit fixed by para.21.7(3). In one case the application to extend time was made 16 months out of time; in the other it was seven and a half months out of time. A common factor in each case was that the permission to appeal to the Court of Appeal had been given by a Senior Immigration Judge (SIJ). So these were not cases in which the applicants were seeking an extension of time for the purpose of applying to the Court for permission to appeal. Another common factor was that no blame could be attached to the individual applicants for the failure to comply with the para.21.7(3) time limit. The failure was the fault of their legal representatives.

In both cases, the Court of Appeal (Buxton, Rix and Moses L.JJ.) granted the applications and extended time for compliance with para.21.7(3). Buxton L.J. began his analysis of the issues by pointing out that applications for extension of time for appeals in asylum cases (or any other procedural issue that may arise in asylum cases) bring into opposition two principles (para.17). The first is that immigration control must be not only fair and firm but also fast. The second is that, as a party to the Refugee Convention, the United Kingdom has an international obligation to ensure that cases that justify international protection are properly investigated.

Buxton L.J. concluded that, in cases of the type under consideration, the following principles should be adopted (para.23).

First, there should be a presumption that, where the AIT has granted permission to appeal to the Court of Appeal, the appeal ought to be heard. Secondly, if a procedural fault causes the Court of Appeal to consider whether the appeal should proceed, the presumption may be displaced if it can be shown that the decision of the SIJ (granting permission to appeal) was plainly wrong, in the sense that it is clear that failure to pursue the appeal would not lead to the United Kingdom being in breach of its international obligations. Thirdly, length of delay when caused by legal representatives, should not be relevant (on this point, see also paras 18 and 21).

His lordship added that, where delay has been caused by the applicant (which was not the case in either of the cases under consideration), the Court is likely to look carefully at the light that sheds on the credibility of the assertion that the applicant has a good claim to international protection. But, at the same time, the Court will remind itself that if, after scrutiny, such a claim is established, the applicant will be entitled to international protection despite the Court's disapproval of his conductor his way of promoting his case.

Guidance on the manner in which applications for extension of time should be dealt with was given by the Court of Appeal in ***YD (Turkey) v Secretary of State for the Home Department*** (op cit). It is interesting to note that, in the instant case (where the facts were materially different), Buxton L.J. said that there were aspects of that case that caused him concern. One such aspect was the endorsement given by the Court to the proposition that r.3.9 (Relief from sanctions) applies in immigration cases. His lordship said (para.21) that the r.3.9 check-list was formulated in the context of "orthodox private litigation", and applications of it to issues arising in immigration cases tend to be artificial. Further, reliance on the private-law orientated approach of r.3.9 may imply that in cases where delay was caused, not by the applicant but by his lawyers, the former would be fixed with the faults of the latter where, as in the instant case, such fault should not be relevant.

Issuing claim form as abuse of process

In ***Nomura International plc. v Granada Group Ltd*** [2007] EWHC 642 (Comm); March 23, 2007, unrep., the facts were that X Co entered into an agreement with Nomura for the setting up of a company (Y Co) to facilitate the merger of the businesses owned by Nomura and by Grenada. Subsequently, Y Co had to be refinanced in a securitisation arrangement to which Z Co was a party. Later on Y Co went into receivership and the result was that all of the parties involved found themselves engaged in litigation.

Z Co commenced proceedings against X Co alleging that it had been induced to take up notes in the securitisation on the basis of false information as to the profitability of the businesses.

On December 15, 2005, X Co issued a claim form against Nomura but, before service, and principally because they were pre-occupied with defending the claim of Z Co against them, X Co entered into a standstill agreement with Nomura, protecting their respective positions.

On June 21, 2006, Nomura issued a claim form against several defendants including Grenada, principally for the purpose of preventing limitation defences accruing to Grenada thereafter. It was Nomura's position that they would not be able to particularise their claim against Grenada until X Co had particularised their claim against them in the other proceedings. Accordingly, Nomura sought to enter into standstill agreement with Grenada. Upon no such agreement being reached, and upon Grenada's not agreeing to an extension of time for service under r.7.6, Nomura (1) terminated the standstill agreement with X Co, and, (2) on October 17, 2006, served the claim form on Grenada.

Beforehand, on October 9, 2006, Grenada made an application under CPR r.3.4(2)(b) for an order striking out Nomura's claim form. This application was made on the ground that, in these circumstances, it was an abuse of process for Nomura to issue a claim form. Cooke J. granted the application.

The parties were at odds as to the circumstances in which originating process issued but not served should be struck out as an abuse. Cooke J. reviewed the pre-CPR cases in which the matter had been touched upon; in particular ***Steamship Mutual Underwriting Association Ltd v Trollope & Colls Ltd*** (1986) 6 Con. L.R. 11, CA; ***Barton Henderson v Merrett*** [1993] 1 Lloyd's Rep. 540 (Saville J.), and ***West Bromwich Building Society v Mander Hadley & Co*** *The Times* March 9, 1998, CA. In the last-mentioned case, Millett L.J. stated that it is an abuse of process to bring proceedings "where there is no present intention of prosecuting them and when the plaintiff is unaware of any valid basis for its claim". Cooke J. noted that none of these decisions dealt with the situation where there was some intention of prosecuting proceedings albeit that the claimant was ignorant of any valid basis for pursuing the claim.

Nomura (the claimant respondents) contended that there is a necessity for two elements before the issue of a writ could be said to be abusive. The first element is the lack of intention to serve a statement of claim, whilst the second is the absence of any reasonable evidence or grounds on which it could be served. Grenada (the defendant applicants) argued that the real point is whether the claimant knew enough and had grounds which would enable him, given appropriate time, to marshal the facts of which he knew, in a statement of case which he could properly serve on the defendant.

Cooke J. reached the following conclusions (para.37, see also para.41):

"In my judgment, when regard is had to these authorities the key question must always be whether or not, at the time of issuing a writ, the claimant was in a position properly to identify the essence of the tort or breach of contract complained of and if given appropriate time to marshal what it knew, to formulate particulars of claim. If the claimant was not in a position to do so, then the claimant could have no present intention of prosecuting proceedings, since it had no known basis for doing so. Whilst therefore the absence of present intention to prosecute proceedings is not enough to constitute an abuse of process, without the additional absence of known valid grounds for a claim, the latter carries with it, as a matter of necessity, the former. If a claimant cannot do that which is necessary to prosecute the claim by setting out the basis of it, even in a rudimentary way, a claimant has no business to issue a claim form at all 'in the hope that something may turn up'. The effect of issuing a writ or claim form in such circumstances is, so the plaintiff/claimant hopes, to stop the limitation period running and thus deprive the defendant of a potential limitation defence. The plaintiff/claimant thus, unilaterally, by its own action, seeks to achieve for itself an extension of the time allowed by statute for the commencement of an action, even though it is in no position properly to formulate a claim against the relevant defendant. That must, in my judgment, be an abuse of process and one for which there can be no remedy save that of striking out the proceedings so as to deprive the claimant of its putative advantage. The illegitimate benefit hopefully achieved can only be nullified by this means. Whatever powers may be available to the court for other abuses, if this is an abuse, there is only one suitable sanction."

His lordship then applied these principles to the facts and held that Nomura's claim form should be struck out as an abuse of process.

CPR UPDATE

Amendments to Practice Directions

By undated late additions to TSO CPR Update 44, changes are made to the following CPR Practice Directions. Paragraph and page references are to Volume 1 of ***Civil Procedure 2007***.

Para 25PD.8, p.666

Practice Direction (Interim Injunctions)
Following the coming into effect of provisions in the Fraud Act 2006, with effect from April 6, 2007, para.7.9(2) of this practice direction is substituted. The whole of para.7.9 now reads as follows:

"**7.9** There is no privilege against self incrimination in:

(1) Intellectual Property cases in respect of a "related offence" or for the recovery of a "related penalty" as defined in section 72 Supreme Court Act 1981;

(2) proceedings for the recovery or administration of any property, for the execution of any trust or for an account of any property or dealings with property in relation to—

(a) an offence under the Theft Act 1968 (see section 31 Theft Act 1968); or
(b) an offence under the Fraud Act 2006 (see section 13 of the Fraud Act 2006) or a related offence within the meaning given by section 13(4) of that Act—that is, conspiracy to defraud or any other offence involving any form of fraudulent conduct or purpose; or

(3) proceedings in which a court is hearing an application for an order under Part IV or Part V of the Children Act 1989 (see section 98 Children Act 1989)."

Paras 54.PD.1 and 54PD.17 pp.1686 and 1690

Practice Direction (Judicial Review)
The following changes came into effect on March 1, 2007.

Before para.54PD.1 insert the following heading:

"Section I—General Provisions Relating to Judicial Review"

After para.54PD.17, insert the following:

"Section II—Applications for Permission to Apply for Judicial Review in Immigration and Asylum Cases—Challenging Removal

18.1 (1) This Section applies where—

(a) a person has been served with a copy of directions for his removal from the United Kingdom by the Immigration and Nationality Directorate of the Home Office and notified that this Section applies; and
(b) that person makes an application for permission to apply for judicial review before his removal takes effect.

(2) This Section does not prevent a person from applying for judicial review after he has been removed.

(3) The requirements contained in this Section of this Practice Direction are additional to those contained elsewhere in the Practice Direction.

18.2 A person who makes an application for permission to apply for judicial review must file a claim form and a copy at court, and the claim form must—

(a) indicate on its face that this Section of the Practice Direction applies; and
(b) be accompanied by—
(i) a copy of the removal directions and the decision to which the application relates; and
(ii) any document served with the removal directions including any document which contains the Immigration and Nationality Directorate's factual summary of the case; and
(c) contain or be accompanied by the detailed statement of the claimant's grounds for bringing the claim for judicial review; or
(d) if the claimant is unable to comply with paragraph (b) or (c), contain or be accompanied by a statement of the reasons why.

(2) The claimant must, immediately upon issue of the claim, send copies of the issued claim form and accompanying documents to the address specified by the Immigration and Nationality Directorate.

(Rule 54.7 also requires the defendant to be served with the claim form within 7 days of the date of issue. Rule 6.5(8) provides that service on a Government Department must be effected on the solicitor acting for that Department, which in the case of the Immigration and Nationality Directorate is the Treasury Solicitor. The address for the Treasury Solicitor may be found in the Annex to Part 66 of these Rules.)

18.3 Where the claimant has not complied with paragraph 18.2(1)(b) or (c) and has provided reasons why he is unable to comply, and the court has issued the claim form, the Administrative Court—

(a) will refer the matter to a Judge for consideration as soon as practicable; and
(b) will notify the parties that it has done so.

18.4 If, upon a refusal to grant permission to apply for judicial review, the Court indicates that the application is clearly without merit, that indication will be included in the order refusing permission."

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