CIVIL PROCEDURE NEWS

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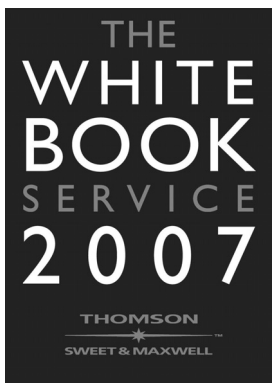

THOMSON
SWEET & MAXWELL

In Brief

Cases

■ **ADELSON v ASSOCIATED NEWSPAPERS LIMITED** [2007] EWHC 997 (QB); *The Times* May 10, 2007 (Tugendhat J.)

Defamation—substitution of party—expiry of limitation period

CPR rr.17.4 and 19.5, Limitation Act 1980 ss.32A and 35. Individual (C1) and his company (C2) bringing libel action against newspaper (D). After expiry of limitation period, on grounds of mistake within the meaning of s.35(6)(a) and r.19.5(3)(a), C1 applying to add two other companies (C3 and C4) as claimants: C2 a non-trading holding company and C3 and C4 both operating companies wholly owned by C2, trading and operating in the gambling industry. Claimants submitting (1) that addition was necessary because words complained of, if not defamatory of the activities of C2 (the holding company), were defamatory of C3 and C4 (the operating companies), and (2) on ground that law permits a non-trading company to sue for libel, that C2 should remain as a claimant. **Held**, dismissing application, (1) r.19.5(3)(a) can be utilised only for the substitution for, rather than the addition of, a party, (2) in libel a single publication referring to two persons gives rise to two separate causes of action, (3) if one new party (say C3) were substituted for C2, it would not necessarily be the case that a new cause of action had been introduced, (4) but if C3 and C4 were substituted for C2 it would be, and application would have to be made under s.35(5)(a) and r.17.4 to add the new cause of action, (5) in these circumstances, the claimants would have to elect either (a) for C2 to remain as claimant, or (b) if the substitution of a new party for C2 were to be allowed on the ground of mistake, for either C3 or C4 (but not both) to be substituted, (6) it was not in issue that there had been a mistake, in that it was incorrect to plead that C2 had traded and operated in the gambling industry, (7) but it had not been shown that C2 was named in the claim form in mistake for either C3 or C4. ***Broadhurst v Broadhurst*** [2007] EWHC 726 (Ch); March 30, 2007, unrep.; ***Morgan Est (Scotland) Ltd v Hanson Concrete Products Limited*** [2005] EWCA Civ 134; [2005] 1 W.L.R. 2557, CA; ***Weston v Gribben*** [2006] EWCA Civ 1425; November 2, 2006, unrep., CA, ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 19.5.4 to 19.5.7, and Vol.2 paras 8-84 to 8-87.)

■ **BARNETSON v FRAMLINGTON GROUP LIMITED** [2007] EWCA Civ 502; May 24, 2007, unrep., CA (Auld, Longmore and Toulson L.JJ.)

Settlement communications before commencement of proceedings—whether without prejudice

CPR r.32.4. Claimant (C) originally engaged by company (D) in March 2005, as senior officer, but remaining in dispute with D about the terms of his engagement, in particular about allotment of shares and bonuses. This dispute unresolved when, on October 28, 2005, CEO of D informing C that it was intended that his contract of employment should be terminated. In purported compliance with the early termination clauses in the contract, D terminating C's employment on December 31, 2005. During November and December 2005, C and D in negotiations, during which D offering C a bonus and towards end of which C threatening legal proceedings if dispute not speedily resolved. On April 24, 2006, C bringing claim against company (D) for wrongful dismissal and for other alleged breaches of his contract of employment. C serving witness statement in which he referred to discussions and proposals exchanged during the negotiations. D applying for order requiring C to re-serve the witness statement, omitting from it certain passages referring to the negotiations which D regarded as offending the "without prejudice" rule. Judge (1) finding that the negotiations were to prevent a dispute occurring by coming to an agreement as to C's contractual entitlement, not to compromise an extant dispute, (2) holding that the "without prejudice" rule therefore did not apply, and (3) dismissing D's application. **Held**, allowing D's appeal, (1) the public policy interest underlying the "without prejudice" rule is that of discouraging recourse to legal proceedings and of encouraging genuine attempts to settle whenever made, (2) for the rule to give full effect to this policy, a dispute may engage the rule notwithstanding that legal proceedings have not yet begun, (3) confining the operation of the rule (as the judge did) to negotiations taking place after the threat of proceedings, or by reference to some time limit set close to the commencement of proceedings, does not fully serve the public policy interest, (4) the crucial consideration is whether in the course of the negotiations the parties contemplated, or might reasonably have contemplated, legal proceedings if they could not agree, (5) in this case, the circumstances were that the negotiations arose out of a dispute as to C's contractual entitlement and took place against the backcloth of potential litigation if the dispute could not be resolved by compromise. Court observing that provisions in CPR Pt. 36 are predicated on the desirability of "without prejudice" negotiations for settlement taking place before commencement of proceedings. ***Cutts v Head*** [1984] Ch. 290, CA; ***South Shropshire District Council v Amos*** [1986] 1 W.L.R. 1271, CA; ***Rush & Tompkins Ltd v Greater London Council*** [1989] A.C. 1280, HL; ***Unilever Plc v***

The Procter & Gamble Co [2000] 1 W.L.R. 2436, CA; ***Bradford & Bingley plc v Rashid*** [2006] UKHL 37; [2006] 1 W.L.R. 2066, HL, ref'd to. (See ***Civil Procedure 2007*** Vol.1, para.31.3.40, 32.4.5 and 32.4.21.)

- **BROADHURST v BROADHURST** [2007] EWHC 726 (Ch); March 30, 2007, unrep. (Mr. Edward Bartley Jones Q.C.)

Party joinder after expiry of limitation—qualifying mistake

CPR rr.17.4, 19.2 and 19.5, **Limitation Act 1980 s.35.** Following failure of business partners' scheme for import of Japanese cars to UK for sale, New Zealand claimant (C) bringing claim against English defendant (D). C alleging breach of contract and conversion. In course of trial of preliminary issues, judge finding that scheme financed by NZ company (H) (of which C sole director and majority shareholder) and that title to vehicles remained with H. In light of judge's findings, H applying to be joined as co-claimant to pursue claim (1) for repayment of sums paid for purchase of cars, and (2) damages for conversion. H conceding that the joinder application was made after the expiry of the relevant limitation period. **Held**, dismissing application, (1) the addition or substitution of H as claimant was not "necessary" within the meaning of s.35(6) (and r.19.5(2)(b)), (2) in particular, (a) it was not the case that C's claims against D could not be maintained without the addition or substitution of H (s.35(6)(b) and r.19.5(3)(b)), and (b) C's name was not given in the original claim as claimant in mistake for H's name (s.35(6)(a) and r.19.5(3)(a)), (3) where there is a qualifying mistake as to name, s.35(6)(a) (and r.19.5(3)(a)) permits, not the addition, but only the substitution of a party. Observations on correct approach for determining qualifying mistake for these purposes and comments on inconsistencies in post-CPR authorities. ***The Sardinia Sulcis*** [1991] 1 Lloyd's Rep. 201, CA; ***Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd*** [2005] EWCA Civ 134; [2005] 1 W.L.R. 2557, CA; ***Weston v Gribben*** [2006] EWCA Civ 1425; November 2, 2006, unrep., CA. (See ***Civil Procedure 2007*** Vol.1 paras 19.5.4 to 19.5.7, and Vol.2 paras 8-84 to 8-87.) (See further "In Detail" section of this issue of ***CP News***.)

- **C. PLC. v P.** [2007] EWCA Civ 493; *The Times* May 28, 2007, CA (Longmore and Lawrence Collins L.JJ. and Sir Martin Nourse)

Search order—self-incrimination

CPR r.25.1(1)(h), **Civil Evidence Act 1968 s.14, Supreme Court Act 1981 s.72, Human Rights Act 1998 Sch.1 Pt 1 art.6.** Company (C) bringing claim against individual (D) for breach of confidence and copyright infringement and obtaining search order. Amongst other things, order requiring D to permit C to inspect information stored electronically on his premises so that any information belonging to C could be identified. D permitting search to take place, but (on legal advice) asserting privilege against self-incrimination in respect of any material which the search disclosed. Independent computer expert (W) (authorised in the order to assist in its execution) uncovering highly objectionable images of children. W applying to court for directions as to what he should do with this offending material which, in his view, constituted evidence of the committing of offences by D. D asserting that he was at all times unaware of the material. Judge directing that W pass the material to the police, but staying the order pending appeal and granting permission to appeal ([2006] EWHC 1226 (Ch); [2006] Ch. 549). **Held**, by Longmore L.J. and Sir Martin Nourse, dismissing D's appeal, (1) although, by virtue of the orders made by the judge, the offending material had to be disclosed to the solicitor supervising the search and to W, there was no privilege in that material itself, (2) the material existed independently of the order, (3) the privilege can be invoked to refuse to disclose matters (including documents or other things) which are ordinarily discoverable, (4) but independent matters coming to light in the course of executing a proper order of the court are in an altogether different category. **Held**, by Lawrence Collins L.J., agreeing in the result, (5) there was no privilege because D had not been ordered to disclose incriminating material, (6) it was not necessary to rule on the question whether there is no privilege in independent (or pre-existing) material. ***Rank Film Distributors Ltd v Video Information Centre*** [1982] A.C. 380, HL; ***Kay v Lambeth London BC*** [2006] UKHL 10; [2006] 2 A.C. 465, HL; ***Saunders v United Kingdom*** (1996) 23 EHRR 313; ***Attorney General's Reference*** (No.7 of 2000) [2001] 1 W.L.R. 1879, CA, ref'd to. (See ***Civil Procedure 2006*** Vol.1 paras 25.1.29 and 31.3.31, and Vol.2 paras 9A-337 and 9B-240.)

- **CITY & COUNTRY PROPERTIES LTD v KAMALI** [2006] EWCA Civ 1879; [2007] 1 W.L.R. 1219, CA (May, Neuberger and Wilson L.JJ.)

Service by post at place of business—defendant abroad

CPR rr.6.2(1)(b), 6.5(6), 12.3 and 13.5. Landlord (C) of commercial premises bringing county court claim against tenant (D) for debt. Claim form served by post on D at his place of business within the jurisdiction. D abroad at time of service. Shortly after D returned to the jurisdiction, C obtaining default judgment against him. District judge dismissing D's application under r.13.5 to set judgment aside. Circuit judge dismissing D's appeal, holding that the claim form had been duly served. Single lord justice granting D permission to make second appeal. **Held**, dismissing appeal, (1) it is a common law principle that a defendant may be served with originating process within

the jurisdiction only if he is present in the jurisdiction at the time of service or deemed service, (2) before the CPR came into effect, the Court of Appeal had held that that principle did not apply to provisions in the CCR as to postal service, (3) CPR rr.6.1 to 6.6 (including the postal service provisions therein) are modelled, not on the former RSC, but on the former CCR provisions, and (as did the latter provisions) have the effect of displacing the common law principle. ***Chellaram v Chellaram (No.2)*** [2002] 3 All E.R. 17; ***Rolph v Zolan*** [1993] 1 W.L.R. 1305, CA; ***Fairmays v Palmer*** [2006] EWHC 96 (Ch); January 31, 2006, unrep., ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 6.2.1.1, 6.5.3, 6.12.1, 6.13.1 and 6.17.3.)

■ **DRURY v CARNEGIE** [2007] EWCA Civ 497; May 23, 2007, unrep., CA (Dyson and Smith L.JJ.)

Retrospective extension of time for service of claim form

CPR rr.7.5 and 7.6. On April 12, 2005, media company (D1) broadcasting consumer programme in which businessman (C) criticised. On April 12, 2006, the day upon which the relevant limitation period expired, C issuing claim form for defamation naming as defendants D1 and an editor employed by D1 (D2). On last day for service fixed by r.7.5(2) (August 11, 2006), C's solicitors faxing claim form to D1, and via the same transmission purporting to effect service on D2 "at his last known place of work" (but none of the documents faxed in fact addressed to D2). By so doing, C effecting good service on D1, but not on D2. D1 serving defence admitting vicarious liability but pleading justification. At hearing on November 23, 2006, of an application issued on November 6 (14 weeks after the failed service), C (acting in person) applying under r.7.6 for retrospective extension of time for service on D2. Judge granting application. Single lord justice granting D2 permission to appeal. **Held**, allowing D2's appeal, (1) in determining whether a claimant "has taken all reasonable steps to serve the claim form but has been unable to do so" (r.7.6(3)(b)), the court is limited to taking into account steps taken by the claimant during the four month period for service allowed by r.7.5 and steps taken after that time are irrelevant, (2) the test is not whether the claimant believed that what he had done was reasonable, but whether what he had done was objectively reasonable, given the circumstances that prevailed, (3) the steps taken by C were not all that could reasonably be expected (he did nothing until the very last available day, and as he did not have D2's residential address he must have known that he would have to rely on other methods of service), (4) a claimant who leaves his efforts to effect proper service to the last moment and then, due to an unexpected problem, fails to do so, is very unlikely to persuade the court that he has taken all reasonable steps to serve in time, (5) C had not acted promptly (within r.7.6(3)(c)) in making his application for an order extending time, (6) in finding that C had acted promptly it seems that the judge was influenced by his impression that D1 and D2 were uncooperative and making it difficult for C to effect service on D2, (7) that impression was not justified as, during the four month period, D2 received no intimation that documents were about to be served on him and he did not mislead C into believing that he would waive his rights and accept service in an unauthorised way, (8) even if there had been lack of cooperation, it did not excuse or explain C's delay in issuing the application to extend time. Court observing (at para.45 per Smith L.J.) that there is no duty on an employer to assist a claimant to serve proceedings on an employee who is a potential defendant; the latter should not make life difficult for the claimant, but he is not obliged to help by giving positive assistance and he certainly is not under any obligation to forego his legal rights. ***Anderton v Clwyd County Council (No.2)*** [2002] EWCA Civ 933; [2002] 1 W.L.R. 3174, CA, ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 1.3.8 and 7.6.3.)

■ **DUNWOODY SPORTS MARKETING v PRESCOTT** [2007] EWCA Civ 461; *The Times* May 25, 2007, CA (Lawrence Collins and Toulson L.JJ.)

Substitution of claimant after judgment

CPR r.19.2. Business partnership (C) bringing claim against former partner (D) for breach of restrictive covenants in the partnership agreement, in particular for wrongful enticement of employee to leave the business. After proceedings commenced, on August 1, 2005, business and assets of C transferred to company (X). D not informed of transfer until March 3, 2006, when advised by C that they were going to apply under r.19.2(4)(a) to substitute X as claimants. D failing to comply with disclosure obligations and, on June 29, 2006, judge giving default judgment against D, granting an injunction and awarding damages ([2006] EWHC 2306 (QB)). Subsequently, on October 10, 2006, Master granting C's application made on paper and without notice for order substituting X as claimant. Single lord justice granting D permission to appeal against default judgment for purpose of arguing that the benefits of the covenants in the partnership agreement, and any claims under that agreement, had not been transferred to X. In allowing appeal in part, **held**, (1) as D had not applied for the Master's order substituting X as claimant to be set aside, the question whether such order could be made after judgment did not arise, (2) in relation to the pre-CPR rules on substitution of parties, it was held that an order could be made after judgment, (3) the court has the same power under r.19.2. ***Kooltrade Ltd v XTS Ltd*** December 10, 2001, unrep.; ***C. Inc. Plc. v L.*** [2001] 2 Lloyd's Rep. 459; ***Humber Boat Works Ltd v Owners of M.V. "Selby Paradigm"*** [2004] EWHC 1804 (Admlty); [2004] 2 Lloyd's Rep. 714, ref'd to. (See ***Civil Procedure 2007*** Vol.1, paras 1.3.9, 2.3.1 and 19.2.2.)

■ **EDWARDS v GOLDING** [2007] EWCA Civ 416; *The Times* May 22, 2007, CA (Buxton, Wilson and Moses L.JJ.)

Court's power to vary order—addition of party after limitation period

CPR rr.3.1(7) and 19.5, Limitation Act 1980 ss.4A and 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. On September 1, 2005, Master granting C's application for order joining another party (D3) as defendant. 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. On July 12, 2006, judge granting D3's application under r.3.1(7) to set aside (1) joinder order and (2) default judgment ([2006] EWHC 1684 (QB)). **Held**, dismissing C's appeal, (1) r.19.5 provides that the court may add or substitute a party only if the relevant limitation period was current when the proceedings were started, (2) under s.4A an action for libel has to be commenced within 12 months of the accrual of the cause of action, but that period may be extended under s.32A, (3) C's cause of action accrued on the date of publication of the alleged libel and not at the later date when C learned that D3 was the author, (4) accordingly, the judge was right (a) in finding that the limitation period was not current when the joinder order was made by the Master, and (b) in holding that D3 could not be joined as defendant under r.19.5, (5) the court's jurisdiction under r.3.1(7) to vary or revoke an order is not a substitute for an appeal and it is exercisable where there is additional material before the court in the form of evidence (or, possibly, argument), (6) in this case, the judge was justified in acting under r.3.1(7) (rather than requiring D3 to make an appeal out of time) because the case before him was essentially different from that which had been before the Master, (7) in doing so the judge did not usurp the power of the Court of Appeal but rather corrected a fundamental procedural error. ***Collier v Williams*** [2006] EWCA Civ 20; [2006] 1 W.L.R. 1945, CA; ***Lloyds Investment (Scandinavia) v Ager-Hanssen*** [2003] EWHC 1740 (Ch); July 15, 2003, unrep., ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 3.1.9, 19.2.4 and 40.9.3, and Vol.2, paras 8-7 and 8-65.)

■ **LAMONT v BURTON** [2007] EWCA Civ 429; 157 New L.J. 706 (2007), CA (May, Dyson and Smith L.JJ.)

Costs—trial of RTA claim—success fee—whether discretion to vary

CPR rr.44.3 and 45.16. Following road traffic accident in which he was injured, claimant (C) entering into funding arrangement as defined in r.43.2(1)(k). In response to letter from C, defendant (D) admitting liability. On June 10, 2005, C issuing and serving claim form. D filing no defence. On August 16, 2005, D making Pt 36 offer of £1,800, but this not accepted. At hearing on September 13, 2005, district judge (1) awarding C damages of £1,774.32, and (2) as to costs (a) ordering D to pay C's costs up to September 7, 2005 (the last day on which the offer could have been accepted without permission), summarily assessed at £4,550 and including a success fee of 100%, and (b) ordering C to pay D's costs incurred since that date, assessed at £721. On appeal to judge, D contending that the district judge was (1) wrong to consider himself bound by r.45.16(a) to award a success fee of 100%, and (2) wrong to reject the submission that, because C should have accepted the Pt 36 offer (whereupon the claim would have been concluded before trial), he should have exercised the general discretion as to costs (r.44.3(1)) and restricted the success fee to 12.5%. Judge dismissing D's appeal. On D's second appeal, **held**, dismissing appeal, (1) there may well be a case for providing that, where a claimant fails to better a Pt 36 offer in a case of this sort, he should be allowed the same success fee that he would have recovered if he had accepted the offer, (2) however, that is not the effect of the rules in their present form, (3) the provisions of r.45.16 are mandatory, and r.44.3 cannot be invoked to circumvent them either directly or indirectly. Court observing that the present case shows how a claimant's solicitor may be better off advising his client to reject a Pt 36 offer. (See ***Civil Procedure 2007*** Vol.1 paras 44.3.1 and 45.19.1.)

■ **MARCAN SHIPPING (LONDON) LIMITED v KEFALAS** [2007] EWCA Civ 643; May 17, 2007, unrep., CA (Pill, Keene and Moore-Bick L.JJ.)

Striking out under unless order—whether further order required

CPR rr.3.1, 3.5 and 3.8, Practice Direction (Striking Out a Statement of Case) para.1.9. Upon C's not complying with the orders as to disclosure of documents and for security of costs, judge ordering that unless C complied by July 26, C's claim should be dismissed and C should pay the defendants' (D) costs on an indemnity basis. Upon C's failure to comply, on July 28, judge "activating" unless order and granting D's application for judgment under r.3.5. C appealing, contending that striking out cannot be justified unless the breach is so serious as to prevent there being a fair trial. **Held**, dismissing appeal, on such application the court's function is limited to deciding what order should properly be made to reflect the sanction which has already taken effect. (See ***Civil Procedure 2007*** Vol.1, paras 1.3.9, 2.3.1, 3.5.1 and 3.8.1.) (See further, "In Detail" section of this issue of ***CP News***.)

■ **R. (JONES) v CEREDIGION CC** [2007] UKHL 24; *The Times* May 24, 2007, HL

Conditional grant of leave for direct appeal to House of Lords—whether appeal to Court of Appeal if direct appeal withdrawn

CPR r.52.3, Practice Directions Applicable to Civil Appeals para.4.15, Supreme Court Act 1981 s.16(1), Administration of Justice Act 1969 ss.12 and 13. High Court judge determining application for judicial review in favour of claimant (C) and quashing decision made by defendant local authority (D). Judge granting D (a) certificate under s.12(1) to apply under s.13 for leave to appeal directly to the House of Lords, and (b) permission to appeal to the Court of Appeal if, in the event, the Lords did not grant leave ("contingent" permission). On D's application under s.13, House of Lords granting D leave to appeal in relation to one of three issues on which they sought to appeal ([2006] 1 W.L.R. 1517, HL). Subsequently, D (a) withdrawing that appeal (in effect, abandoning the point), and (b) applying for permission to appeal to the Court of Appeal on one of the two issues on which the House of Lords had refused leave. Court of Appeal holding (1) that it had jurisdiction to determine D's appeal and (2) that the contingent permission was effective ([2005] EWCA Civ 986, [2005] 1 W.L.R. 3626, CA). **Held**, dismissing C's appeal (but for reasons different to that given by the Court of Appeal) (1) it is open to the Appeal Committee in response to an application for leave under s.13 to indicate that it will not receive argument on a particular point, (2) in accordance with the practice stated in para.4.15, where (as here) the Committee decides that leave to appeal should be given (in this case, restricting argument to one only of the issues appealed), it proposes such terms to the parties and invites submissions, (3) in this case, D made such submissions which the Committee considered before confirming its order in the terms previously communicated, but D then rejected what was proposed by exercising their option to withdraw the appeal, (4) in s.13(2) the words "leave is granted" must be understood to refer (a) to an unconditional grant of leave, or (b) to a grant of leave subject to conditions which are accepted or not unequivocally rejected; only then does the applicant lose his right to proceed in the Court of Appeal, (5) as the Committee's order in this case fell into neither category, C was free to pursue a full appeal in the Court of Appeal. Committee explaining that D appreciated that the terms put forward by the Committee were proposals which it resisted, but it did not invite the Committee to refuse leave to appeal if minded to adhere to them; had it done so the Committee doubtless would have accepted the invitation to refuse leave and it would have been clear that D was free to pursue an appeal on all points to the Court of Appeal. (See ***Civil Procedure 2007*** Vol.1 paras 52.0.12 and 52.3.1, and Vol.2 paras 4A-30, 9A-50.1, 9B-38 and 9B-41.1.)

■ **READER v MOLSEWORTHS BRIGHT CLEGG SOLICITORS** [2007] EWCA Civ 169; [2007] 1 W.L.R. 1082, CA (Longmore, Smith and Moses L.JJ.)

Discontinuance of personal injury claim after death—survival of dependency claim

CPR r.38.2, Fatal Accidents Act 1976 s.1, Law Reform (Miscellaneous Provisions) Act 1934. Following motor accident, father (X) bringing personal injury claim against other driver (Y). Before claim concluded, X dying and his solicitors (D) discontinuing claim. Arguable that causal link between consequences of accident and X's death. X's widow and children (C) bringing claim against D (1) for negligence (for wrongfully discontinuing the personal injury claim), which D admitted, and (2) for their dependency, which D denied. D contending that C ought to pursue their dependency claim against Y. District judge ordering that question whether, in the circumstances as a matter of law, C could bring a claim for dependency damages under the 1976 Act against Y be tried as a preliminary issue. Judge holding that, from moment of X's death, (1) there were in existence two separate causes of action (a) the personal injury claim which transferred to the widow (as administratrix), and (b) the dependency claim, and (2) the discontinuance of the former did not affect the latter. Single lord justice granting C permission to appeal. **Held**, dismissing appeal, (1) it was clear from s.1 of the 1976 Act that if a person has an existing cause of action arising from the wrongful act of another, but dies as the result of the same wrongful act, a second cause of action for the benefit of his dependants comes into being at the death, (2) at the moment of death, the existing cause of action is transmitted to the deceased's estate pursuant to the 1934 Act, (3) in this case, X's personal injury claim against D had not been satisfied before his death, (4) the discontinuance of X's personal injury claim on terms was not the same as satisfaction by judgment and, in any event, the claim was not discontinued until after X's death. (See ***Civil Procedure 2007*** Vol.1 para.38.2.1, and Vol.2 para.3F-66.1.)

Statutory Instruments

COURT FUNDS (AMENDMENT) RULES 2007 (SI 2007/729)

Court Funds Rules 1987. Omit rr.10, 12 and 45, amend rr.2, 11, 14, 15, 19, 28, 38, 40, 44 and 57, and substitute rr.25, 31 and 32. Principal effect is to make amendments resulting from the changes to CPR Pts 36 and 37 concerning payments into court brought about by the Civil Procedure (Amendment No.3) Rules (SI 2006/3435). Also amend provisions as to unclaimed funds, revoke obsolete rules, and substitute "child" and "child's" for "minor" and "minors" in r.57(3). In force April 6, 2007. (See ***Civil Procedure 2007*** Vol.2 paras 6A-22, 6A-37, 6A-39, 6A-40, 6A-44, 6A-52, 6A-66, 6A-67, 6A-73, 6A-77, 6A-79, 6A-90, 6A-93, 6A-101, 6A-105 and 6A-121.)

CHILDREN (ALLOCATION OF PROCEEDINGS) (AMENDMENT) ORDER 2007 (SI 2007/774)

Amends Children (Allocation of Proceedings) Order 1991 Sch.2 (allocating care centres to local justice areas grouped according to Region) and Sch.3 (designating certain county courts as adoption centres). Renames "Wales and Cheshire Region" as "Wales Region" and moves some of the entries from that Region to the North West Region. Makes Wrexham county court (in Wales Region) a care centre and adoption centre. In force April 2, 2007.

In Detail

Automatic Striking Out by "Unless" Order

In ***Marcan Shipping (London) Limited v Kefalas*** [2007] EWCA Civ 643; May 17, 2007, unrep., CA, Moore-Bick L.J. explained that "unless" orders (sometimes called "conditional" orders) have a long history. It was recognised at an early stage that, once the condition on which it depended had been satisfied, then the sanction threatened in the order became effective without any further order of the court. (It is for this reason that, in some jurisdictions, these orders are referred to as "springing" orders.) In ***Samuels v Linzi Dresses Ltd*** [1981] Q.B. 115, CA, an order was made against a defendant stating that his defence and counterclaim should be struck out and the plaintiff should be at liberty to sign judgment for damages to be assessed unless he served further and better particulars by a certain date. The defendant failed to fulfil the condition and the question was whether the court had jurisdiction to entertain an application by the defendant for an extension of time for complying with the condition. The authorities on the point were not ad idem. The Court of Appeal held that the court did have power to extend time (even though, strictly speaking, the order had been "sprung" and the defence and counterclaim stood struck out), but it was a power to be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored.

When Lord Woolf was conducting his "Access to Justice" inquiry, one of the points frequently put to him, particularly by people with experience as litigants in person, was that this principle was consistently honoured in the breach. Further, before the CPR came into effect, it was not uncommon for a party who had the benefit of an unless order containing a striking out sanction to go to the trouble of applying to the court for that sanction to be imposed upon his opponent's failure to fulfil the condition. As Moore-Bick L.J. explained, this led to a blurring of the distinction between the effect of the order itself and the exercise of the court's jurisdiction (confirmed in ***Samuels v Linzi Dresses Ltd***) to grant relief with the effect that, although there had been no application for an extension of time by the defaulting party, the court considered it necessary to discuss the factors that should be taken into account in deciding whether to strike out the pleading for failure to comply with the condition (e.g. ***Hytec Information Systems Ltd v Coventry City Council*** [1997] 1 W.L.R. 1666, CA).

In the CPR, r.3.4 deals expressly with the court's power to strike out a statement of case. It is provided there that the court may strike out a statement of case if it appears to the court that there has been a failure to comply with a court order (r.3.4(2)(c)). The court's power to make an unless order is referred to in r.3.1 as one of the court's general powers of management. It is provided in r.3.1(3) that, when the court makes an order, it may (a) make it subject to conditions, and (b) specify the consequence of failure to comply with the order or a condition. When these provisions are put together they confirm that the court may make an unless order containing a striking out sanction (a sanction that can have very serious consequences for a party).

Rule 3.8(1) states that, where a party has failed to comply with a court order, any sanction for failure to comply imposed by the order has effect unless the party in default applies for and obtains relief from the sanction. When the CPR came into effect, much was made of this provision, and it was stressed that it was designed to put a stop to routine breaches of the principle (identified in ***Samuels v Linzi Dresses Ltd***) that orders are made to be complied with and not to be ignored. It was explained that, in a given case, this provision could have the effect of proceedings being struck out automatically. However, in the light of the recent and bad experience that the courts had had in giving effect to the automatic strike out rules in the infamous CCR O.19, r.11, provisions enabling a party in default to obtain relief from the striking out (or any other) sanction were inserted in the new rules (see r.3.8(1) and r.3.9).

Paragraph 1.9 of Practice Direction (Striking Out a Statement of Case), the practice direction supplementing r.3.4, states that, where an order (or a rule or a practice direction) states that a statement of case "shall be struck out" or "will be struck out or dismissed", this means that the striking out or dismissal "will be automatic and that no further order of the court will be required" (see ***White Book*** para.3PD.1). (It may be noted that this paragraph was inserted as recently as October 2005, when rules (see r.3.7 and r.3.7A) for the automatic striking out of claims and counterclaims for non-payment of court fees were strengthened.)

Where a party's statement of case is automatically struck out because of his failure to comply with an unless order, his opponent may obtain judgment by complying with r.3.5 (Judgment without trial after striking out). In the ***Marcan Shipping*** case, the parties were at odds as to the effects of this rule. The facts of the case were that, in May 2004, a shipbroking company (C), under the control of a businessman (Y), brought a claim in High Court against another businessman (D1) engaged in shipping through a company (D2) operating under his direction. C claimed damages for wrongful termination of general agency agreement, alleged to have been made orally between Y and D1 in 1982. The defendants (1) pleaded (a) that there was no such agreement but C were instructed as brokers from time to time on a commission basis, and (b) if there was such agreement, they were entitled to terminate it as a result of Y's dishonesty and false representations, and (2) made a counterclaim.

Following a case management conference on October 31, 2005, the trial was fixed to begin on July 3, 2006. But on May 12, 2006, a judge (1) granted the defendants' application to amend the defence and counterclaim, (2) ordered that, by June 23, 2006, the parties should give further specific disclosure of documents put in issue by the amendments, (3) vacated the trial date, (4) directed that issues relating to liability should be determined at trial beginning on October 16, 2006, and (5) ordered that C should give additional security for defendants' costs in the sum of £80,000.

Upon C not complying with the orders as to disclosure and security, on July 21, 2006, a judge ordered that unless C complied by July 26, C's claim should be dismissed and C should pay the defendants' costs on an indemnity basis. On that date, C served a list of documents which was materially defective in that it did not include certain specific classes of documents (in particular, those relating to certain foreign proceedings in which Y had been engaged). On July 28, the defendants applied under r.3.5 for an order in the terms of the unless order made on July 21. On September 5 (by which time the missing documents had been obtained), a judge "activated" the unless order. C appealed, contending that the striking out of a claim for failure to comply with an order of the court cannot be justified unless the breach is so serious as to prevent there being a fair trial, and stressing that C's default was not deliberate or contumacious.

The Court of Appeal (Pill, Keene and Moore-Bick L.JJ.) dismissed the appeal. The Court outlined the CPR provisions referred to above and explained that it has been the position, both before and after the CPR came into effect, (a) that a failure to comply in any material respect with an unless order causes the sanction (whatever it is) to become effective without any further order of the court, but (b) the court has jurisdiction to grant relief by extending time for compliance. The decision casts doubt on what is said in para.2.3.3 of the Queen's Bench Guide (see ***White Book*** Vol.2 para.1B-11).

Put shortly, the Court held (1) that, where the sanction taking effect automatically is that of striking out, then (a) in the circumstances provided for by r.3.5(2), the party against whom the claim was made may obtain judgment by filing a request for judgment, but (b) otherwise he must make an application in accordance with Pt 23 if he wishes to obtain judgment under r.3.5 (see r.3.5(5)), (2) that on such application (a) the court's function is limited to deciding what order should properly be made to reflect the sanction which has already taken effect, and (b) the operation of the sanction does not lie in the discretion of the court, as it is only if there is an application under r.3.8 by the party whose claim was struck out or dismissed that the court is required to consider whether in all the circumstances, it is just to make an order granting relief from the sanction automatically imposed, (3) that in making a conditional (i.e. an "unless") order for striking out or dismissal a judge should consider carefully whether that sanction is appropriate in all the circumstances of the case. The key holding in the case is the second of those enumerated above.

In summarising the position, Moore-Bick L.J. said (at para.30):

> "The scheme of the Rules relating to conditional orders is in my view both clear and salutary in its effect, namely, that such orders mean what they say, that the consequences of non-compliance take effect in accordance with the terms of the order, but that the court has ample power to do justice under rule 3.8 on the application of the party in default, or, in an exceptional case, acting on its own initiative."

His lordship added (para.34):

> "In my view it should now be clearly recognised that the sanction embodied in an "unless" order in traditional form takes effect without the need for further order if the party to whom it is addressed fails to comply with it in any material respect."

This has two particular consequences:

(1) It is unnecessary, and indeed inappropriate, for a party who seeks to rely on non-compliance with an order of that kind to make an application to the court for the sanction to be imposed or, as the judge put it, "activated".

(2) The party in default must apply for relief from the sanction under r.3.8 if he wishes to escape its consequences (in which event r.3.9 comes into play). Although the court can act of its own motion, it is under no duty to do so and the party in default cannot complain if he fails to take appropriate steps to protect his own interests.

In relation to the first of these consequences, Moore-Bick L.J. conceded that in ***Carlco v Chief Constable of Dyfed-Powys Police*** [2002] EWCA Civ 1754, the Court of Appeal did proceed on the basis that, following a failure to comply with an "unless" order striking out the claim, it was for the judge to consider afresh whether to order that the claim should indeed be struck out and that such order could properly be made only if the breach was "gross", or at any rate sufficiently serious to justify such consequences. His lordship noted that, in that case, it does not appear to have occurred to the innocent party to argue, either before the judge or on the appeal, that the unless order had already taken effect.

Joinder of Claim involving New Party after Expiry of Limitation Period

Section 35(3) of the Limitation Act 1980 states that, except as provided by rules of court, no court shall allow a new claim to be made in the course of any action after the expiry of any time limit under the Act which would affect a new action to enforce that claim. Section 35(4) stipulates what rules of court may provide by way of exception in this respect. The sub-section states that rules of court may provide for allowing a new claim to be made, but only where certain conditions set out in s.35(5) are met. Now, what are those conditions?

Section 35(5) refers to two (not necessarily mutually exclusive) situations. One is the case of a claim involving a new cause of action. Here the required condition is that the court must be satisfied that the new cause of action "arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action" (s.35.5(a)). The other situation is the case of a claim involving a new party. Here the required condition is that the court must be satisfied that the addition or substitution of the new party is "necessary" for the determination of the original action (s.35.5(b)).

But, in relation to the second situation there is a further twist. Section 35(6) states that the addition or substitution of a new party shall not be regarded as "necessary" unless one of two further conditions is met. They are either (a) that the new party is substituted for a party whose name "was given in any claim made in the original action in mistake for the new party's name" (s.35(6)(a)), or (b) that any claim made in the original action cannot be maintained by or against an existing party "unless the new party is joined or substituted as plaintiff or defendant in that action" (s.35(6)(b)).

In the CPR, rules of court that provide for allowing a new claim to be made in the circumstances covered by s.35 are found in r.17.4 (Amendments to statements of claim after the end of a relevant limitation period) and r.19.5 (Special provisions about adding or substituting parties after the end of a relevant limitation period). The rules that implement s.35(6) are found in para.(3) of CPR r.19.5. The terms of the paragraph are almost identical to the sub-section. Thus, r.19.5(3) states (in part) that the addition or substitution of a party is "necessary" only if the court is satisfied that (a) the new party is to be substituted for a party who was named in the claim form "in mistake for the new party", or (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant.

In modern times, on a number of occasions the courts have had to deal with issues arising under s.35(6)(a) and r.19.5(3)(a). In what circumstances may a new party be substituted on the grounds of mistake? The question of what may or may not amount to a qualifying mistake in this context is covered in ***White Book*** commentary at para.19.5.7 (see also Vol.2 para.8-87). As is explained there, until recently the decision of the Court of Appeal in ***The Sardinia Sulcis*** [1991] 1 Lloyd's Rep. 201, CA, was regarded as the leading authority. However, what was said there was doubted by the Court of Appeal (sitting with two judges) in ***Morgan Est (Scotland) Limited v Hanson Concrete Products Ltd*** [2005] EWCA Civ 134; [2005] 1 W.L.R. 2557, CA, where a more liberal approach was adopted. The Court dealt with the matter again in ***Weston v Gribben*** [2006] EWCA Civ 1425; November 2, 2006, unrep., CA, but did so without resolving the doubts that the ***Morgan Est*** case had created. This has placed procedural judges, and judges sitting on appeals from their decisions, in some difficulty.

It has to be said, that the views of individual judges as to the application of procedural bars imposed by limitation statutes do vary. Some are quite strict about them, some more lenient. One detects in modern times a certain judicial impatience with parties who oppose applications for the substitution of parties made on grounds of qualifying mistake and it seems that the move towards a more liberal approach suggested in the ***Morgan Est*** case has struck a chord. But, clearly, it cannot be the case that any old mistake will satisfy s.35(6)(a) and r.19.5(3)(a), and it remains a matter of some surprise that the ***Morgan Est*** approach has not been seriously challenged on appeal.

The problem of qualifying mistake has arisen again at first instance in the recent case of ***Broadhurst v Broadhurst*** March 30, 2007, unrep. (The facts of this case, and the deputy judge's decision, dismissing an application for the substitution of a party as claimant on the ground of qualifying mistake, are outlined in the account of the case given in the In Brief section of this issue of ***CP News***.) The case is notable for the excellent analysis of the ***Morgan Est*** case and the ***Weston*** case, and the differences in approach evident in these cases, given by Mr Edward Bartley Jones Q.C., sitting as a deputy judge. It is particularly interesting to note that the deputy judge detected in the Weston case a somewhat more restrictive approach to the application of r.19.5(3)(a) than that expounded in the ***Morgan Est*** case. The deputy judge preferred the former approach to the latter, but explained that the outcome might well have been different had he followed the ***Morgan Est*** approach.

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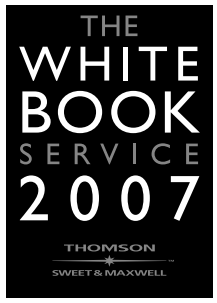

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