CIVIL PROCEDURE NEWS

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THOMSON
SWEET & MAXWELL

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Apparent judicial bias—personal injury claim—intervention by judge

CPR r.52.10(2), Human Rights Act 1989 Sch.1 Pt I Art.6.1. Following low-velocity motor collision, driver (C1) and two passengers (C2 and C3) in one vehicle bringing personal injury claims against driver of other vehicle (D). On day before trial, D admitting liability. At trial, in course of presentation of claimants' case, D contending that, at the time of the collision, C1 had only one passenger (C2) and cross-examining claimants to this effect. Before presentation of defence case, judge meeting privately with counsel and expressing various views on the progress of the case, including his opinion that, in his cross-examination of the claimants, D's counsel had not succeeded in discrediting their evidence, particularly as to the number of people in C1's vehicle and that D must be mistaken as to this matter. After hearing presentation of D's case and submissions, judge giving judgment for the claimants. Single lord justice granting D permission to appeal. Judge responding to Court's invitation to give in writing his account of events. **Held**, allowing appeal, (1) the test for apparent bias is whether a fair-minded observer, informed of all the relevant circumstances, would have concluded that there was a real possibility that the judge was biased, (2) at a trial, a judge may legitimately give assistance to the parties by telling them about the views that he is forming in his mind as the evidence goes along, (3) but it is not acceptable for a judge to form (or to give the impression of having formed) a firm view in favour of one side's credibility when the other side has not yet called evidence which is intended to impugn it, (4) in this case, the thoughts communicated by the judge were such as to suggest to a reasonable observer that his mind was all but closed against D. At Court's suggestion, counsel for claimants considering whether he was in a position to contend that the appearance of bias had been waived by D by his voluntary act of continuing with the case after the private exchanges with the judge, but in event declining to make such submission. ***Hart v Relentless Records Ltd*** [2002] EWHC 1984 (Ch); ***Project v Hutt*** (2006) UKEAT S/0065/05/RN, ref'd to. [Ed.: see further ***CP News*** Issue 10/2006.] (See ***Civil Procedure 2007*** Vol.2 para.9A-44.1.)

BOEHRINGER INGELHEIM LIMITED v VETPLUS LIMITED *[2007] EWCA* Civ 584; The Times June 27, 2007, CA (Pill, Longmore and Jacob L.JJ.)

Interim injunction—trade mark infringement—restraint of "comparative advertising"

CPR r.25.1(1)(a), Human Rights Act 1998 s.12(3), Trade Marks Directive (EC 89/104) Art.5, Trade Marks Act 1994 s.10, Comparative Advertising Directive (EC 97/55), Misleading Advertising Directive (EC 84/450) Art.3a. Two companies (C and D), each making and selling nutritional supplements for dogs, engaged in intense competition. D proposing to publish "comparative advertisement" involving use of C's trade mark, suggesting that labels on C's product not wholly accurate. Judge refusing C's application for interim injunction to restrain D from doing so (prior restraint order), but granting C permission to appeal ([2007] EWHC 972 (Ch), April 26, 2007, unrep. (Pumfrey J.)). C acknowledging that the rule against prior restraint extends to malicious falsehood and conceding that, in the circumstances of this case, a remedy would not be available to them on that basis. Instead, C seeking interim injunction on basis of D's infringement of their trade mark. **Held**, dismissing appeal, (1) in the interests of freedom of speech, the rule against prior restraint holds that the courts will not restrain the publication of a defamatory statement, whether a trade libel or a personal one, where the defendant says he is going to justify it at the trial of the action, except where the statement is obviously untruthful and libellous, (2) that rule extends (as D contended) to a claim for trade mark infringement where the claim is, in reality, a claim brought to protect the claimant's reputation, (3) but it does not extend to a case where the claim is brought, not to protect reputation, but (as here) to protect a property right, (4) the general rule is that an interim injunction may be granted if there is a serious issue to be tried and the judge thinks that the balance of convenience so requires, but this is subject to the impact of s.12(3), (5) comparative advertising within the scope of EC Directive is a permissible activity and such advertising necessarily entails the expression to others of matters of either fact or opinion or both, (6) therefore, in a case such as this, the application of the general rule is inappropriate and it is the s.12(3) approach which is applicable, (7) accordingly, an interim injunction could not be granted against D to restrain their proposed comparative advertising because (although there may be a serious issue to be tried) C had not shown that the advertising was misleading and that they would probably win a permanent injunction at trial. ***Bonnard v Perryman*** [1891] 2 Ch. 269; ***Bestobell v Bigg*** [1975] F.S.R. 421; ***Greene v Associated Newspapers Ltd*** [2004] EWCA Civ 1462; [2005] 3 W.L.R. 281, CA; ***American Cyanamid v Ethicon*** [1975] A.C. 396, HL; ***O2 Holdings Limited v Hutchison 3G UK Ltd*** [2006] EWCA Civ 1656; ***Cream Holdings Ltd v Banerjee*** [2004] UKHL 44; [2004] 1 A.C. 23, HL, ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 25.1.9 and 25.1.13, and Vol.2 para.3D–48.)

DAVIES v WM MORRISON SUPERMARKETS PLC. *[2007] EWCA* Civ 594, April 25, 2007, unrep., CA (Auld, Sedley and Leveson L.JJ.)

Application to strike out—late witness statement—adjournment

CPR rr.3.1(2)(b) and 3.4. Driver of delivery vehicle (C) commencing defamation proceedings against supermarket (D1) and an employee (D2) of D1. C alleging that libel contained in delivery note prepared by D2 and published to his (C's) employers by D1. It was inherent in C's pleaded case that at least one employee of D1 other than D2 was involved in the relevant events. D1 pleading qualified privilege. D1 also denying that D2 was involved but admitting that another (unnamed) employee of theirs was. Judge dismissing D1's application for summary judgment, and directing C to apply to amend his particulars of claim and to serve a draft reply giving particulars of D2's having been actuated by malice. D1 regarding C's draft amended and additional particulars as speculative and applying for claims against them and D2 to be struck out. At hearing of this application, judge refusing counsel for C's request for an adjournment to take instructions in the light of a further witness statement served by D1 in the course of the hearing and amplifying what D1 had previously asserted as to the wrong identification of D2 as the culprit. Judge refusing C permission to amend and granting D1's application. Single lord justice granting C permission to appeal. **Held**, allowing appeal and remitting the matter to a county court, (1) the judge erred in concluding that C could not overcome D1's and D2's pleaded defence of qualified privilege, in particular, the defence that an employee other than D2 had maliciously written or caused the defamatory words to be written, and that therefore his claim could not succeed, (2) it was not just a question of whether C could rebut that particular defence, as C's counsel was entitled to consider whether the late witness statement might provide some other support for a claim by C against D1, as his claim was in respect of at least one other (unidentified) employee of D1 (for whom D1 might also be vicariously liable) as well as D2, (3) the judge did not dismiss C's claim for pleading or technical reasons, but because he thought that an adjournment would not avail C, (4) that required him to take at face value the words of the witness statement without having given C the opportunity to deal with it on instructions. Court making observations (a) on possibility that C might be able to apply under r.19.5(3)(a) for substitution of the unnamed employee for D2 as a defendant, and (b) on propriety of D's reluctance to reveal to C the identity of that other employee. (See ***Civil Procedure 2007*** Vol.1 paras 3.1.3, 3.4.1 and 23.6.2.)

DOLPHIN QUAYS DEVELOPMENTS LTD v MILLS *[2007] EWHC* 1180 (Ch), May 17, 2007, unrep., CA (Sir Andrew Morritt C.)

Failure of receivers' claim—liability for non-party costs

CPR r.48.2, Supreme Court Act 1981 s.51, Law of Property Act 1925 s.109(2). Company (X) selling its interest in property development to another company (C) together with benefit of agreement between X and an individual (D) for the purchase of the long lease of a flat (No.78) in the development. At same time, C charging all of the property so acquired to a bank on s.109(2) terms. On June 13, 2003, bank appointing receivers (R). On November 23, 2004, C (by R) commencing claim against D for specific performance of the contract for the sale of the long lease of No.78. C (by R) unwilling to accept that the purchase price for the property (£650,000) should be paid by set-off against a debt due by X to D (as had been agreed when the contract was entered into). After accepting that D was unwilling to perform except on that basis, C (by R) selling No.78 for £495,000 and claiming against D damages for breach of contract equal to the balance of the purchase price, namely £155,000. At trial, judge rejecting this claim. D applying for order for non-party costs against R (who were then joined as additional defendants in the proceedings). **Held**, dismissing the application, (1) the question was not whether the court had jurisdiction to make a non-party costs order against receivers but whether that jurisdiction should be exercised in this case, (2) R were merely the agents of the company and had no beneficial interest in the outcome of the action, (3) this was an entirely normal case of receivers seeking to enforce a contractual right forming part of the security, (4) there existed no exceptional circumstances to justify such an order being made, (5) hardship caused to D by his inability to recover his costs from C could have been avoided if he had pursued his remedy of security for costs from D promptly (or at all). ***Knight v F.P. Special Assets Ltd*** 174 C.L.R. 178 (1992); ***Dymocks v Franchise Systems*** (NSW) ***Pty Ltd v Todd*** [2004] UKPC 39; [2004] 1 W.L.R. 2807, PC, ref'd to. (See ***Civil Procedure 2007*** Vol.1 para.48.2.1, and Vol.2 para.9A–265A.)

JAFFRAY v THE SOCIETY OF LLOYDS *[2007] EWCA* Civ 586, June 20, 2007, unrep., CA (Buxton and Moore-Bick L.JJ.)

Jurisdiction to re-open determined appeal—allegation of judgment obtained by fraud

CPR r.52.17, Practice Direction (Citation of Authorities) para.6.1. Underwriting members (C) of Lloyds (D) bringing unsuccessful claim against D. Court of Appeal dismissing C's appeal. C applying for permission to apply to Court for appeal to be re-opened. **Held**, dismissing application, (1) the application was made on the ground that the Court had been misled by misbehaviour of a party, in the form of perjury, (2) except in a case where the fraud was so clear as to be uncontestable, the Court should refuse jurisdiction. Court stating expressly that this judgment should be released

for citation under para.6.1. ***Flower v Lloyd*** (1877) 6 Ch.D. 297, CA, ***Jonesco v Beard*** [1930] A.C. 298, HL, ***Taylor v Lawrence*** [2002] EWCA Civ 90; [2003] Q.B. 528, CA, ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 2.3.7, 52.17.2 and B4–001.) (See further "In Detail" section of this issue of ***CP News***.)

■ **LAY v DREXLER** *[2007] EWCA* Civ 464; *The Times* June 20, 2007, unrep., CA (Chadwick, Laws and Evans-Lombe L.JJ.)

Business tenancy claim—withdrawal by tenant—whether costs as on discontinuance

CPR rr.44.3, 38.6 and 56.3, Landlord and Tenant Act 1954 ss.24(1) and 29(5). In August 2004, by letter business tenants (D) initiating negotiations with landlords (C) for renewal of lease expiring on March 25, 2005. Following failure of D to respond to draft new lease submitted to them by C, C serving notice of D pursuant to s.25 and, on April 20, 2005, C commencing proceedings under s.24 making claim for the grant of a new tenancy to D. On May 6, 2005, D filing acknowledgment of service indicating their intention to take a new lease but opposing terms of renewal. C's s.25 notice having effect of terminating tenancy on October 8, 2005. In November 2005, by letter D advising C that they were considering moving to new premises. On April 6, 2006, upon D giving notice to court that they no longer wanted a new lease and on May 17, 2006, court (1) acting under the mandatory provisions of s.29(5) and dismissing C's claim for a new tenancy accordingly, but (2) ordering that the proceedings should continue for the purposes of disposing of the issues (a) of the amount of the interim rent payable by D from date of termination of the tenancy until they gave up possession and (b) of costs. On June 22, 2006, on the basis that in effect the proceedings had been compromised in advance of trial, judge making no order as to costs. Single lord justice granting C permission to appeal. **Held**, allowing appeal and ordering D to pay C's costs of their claim under s.24(1), (1) by filing an acknowledgement of service, D were in effect commencing their own proceedings designed to obtain a new lease of terms more favourable than those offered by C, (2) those proceedings were terminated, not by compromise, but by D's unilateral, (3) that decision should be regarded as equivalent to a decision to discontinue and the normal costs order in such circumstances should follow, (4) D's filing of an acknowledgment of service precluded them from suggesting that C's proceedings had been commenced prematurely. ***BCT Software Solutions Limited v Brewer and Sons Ltd*** [2003] EWCA Civ 939; [2004] C.P. Rep. 2, CA; In re ***Walker Windsail Systems plc***. [2005] EWCA Civ 247; [2006] 1 W.L.R. 2194, CA, ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 38.6.1, 44.12.3 and 56.3.3, and Vol.2 paras 3B–102 and 3B–149.)

■ **POZZOLI SPA v BDMO SA** *[2007] EWCA* Civ 588, June 22, 2007, unrep., CA (Mummery, Keene and Jacob L.JJ.)

Permission to appeal rules—effect of international treaty

CPR r.52.3(6). At trial, judge (1) finding that claimant's (C) patent was invalid, and (2) holding that the defendant's (D) product did not fall within the scope of that patent ([2006] EWHC 1398 (Ch)). C applying to Court of Appeal for permission to appeal. C submitting that permission should be granted on the ground that there was a compelling reason why the appeal should be heard. In particular, C submitting that the effect of Art.32 of the TRIPS agreement, annexed to the Treaty establishing the World Trade Organisation (1994), was to require the Court to give permission on this ground, even if Court concluded that the appeal had no prospects of success, otherwise the UK would be in breach of its international obligations. **Held**, rejecting this submission, granting permission and allowing appeal, (1) Art.32 provides that an opportunity for "judicial review" of any decision to revoke or forfeit a payment "shall be made available", (2) a determination by the Court of Appeal (whether made on the papers or following oral argument or both) refusing permission to appeal on the ground that the Court considers that the appeal would have no real prospect of success is a "judicial review" as required by Art.32. (See ***Civil Procedure 2007*** Vol.1 paras 52.3.1 and 52.3.7.)

■ **S. (CHILDREN), IN RE** *The Times* July 2, 2007, CA (Thorpe and Wall L.JJ. and Hedley J.)

Judgment— inadequate reasons—counsel's duty

CPR r.52.3. In family proceedings in a county court, father (C) applying for contact with his children (A). C living with his father (X) and A living elsewhere with their mother (D), C's wife. In opposing application, D alleging that, when all parties and C had lived together, she had suffered incidents of domestic violence, sometimes instigated by X. Judge finding that majority of C's allegations made out. C applying to judge for permission to appeal, principally on ground that judge had failed to give adequate reasons for his decision. Upon judge refusing this application, C applying to Court of Appeal for such permission. **Held**, dismissing application, although the judge had failed to make specific reference to the evidence of a consultant psychologist, there was nothing in his judgment to suggest that he had deliberately ignored or rejected that evidence, (2) where, upon judgment being given, counsel believe that a judge has failed to deal with a material part of the case (e.g. the evidence of an expert), it is his responsibility to point out the alleged defect to the judge so that he may deal with it, (3) in such circumstances it is not appropriate for counsel to draw the judge's attention to the alleged insufficiency by way of an application for permission to

appeal. ***English v Emery Reimbold and Strick*** [2002] EWCA Civ 605; [2002] 1 W.L.R. 2409, CA, ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 35.0.6, 40.2.1 and 52.11.4.)

■ **WHITE v BSF CONSULTING ENGINEERS LTD** *[2007] EWCA* Civ 643, June 28, 2007, CA (Chadwick, Latham and Thomas L.JJ.)

Pleaded defence admission following pre-action admission—amendment of defence

CPR rr.1.1, 3.4(2), 14.1, 14.1A and 17.1(2), Practice Direction (Admissions) para.7.2, Pre-Action Protocol for the Construction and Engineering Disputes para.4.3, Defective Premises Act 1972 s.1, Limitation Act 1980 ss.2, 9 and 14A. Claimants (C) bringing proceedings against consulting engineers (D) under s.1 and in tort for structural damage to house. In their defence, and in pre-action correspondence, D admitting responsibility for the design of the house but, in both instances, denying liability. Subsequently, on ground that they had made a genuine mistake, and not they but another company were responsible, D applying under r.17.1 to amend defence, in effect withdrawing the admission. Judge refusing application. **Held**, allowing D's appeal, (1) the judge erred, not in his having regard to the prejudice caused to C by D's pre-action admission, but in his failing to examine critically the prejudice which was alleged, (2) weighing the prejudice which would be suffered by each party if the admission was (or was not) withdrawn, the balance fell firmly in favour of D. ***Braybrook v Basildon and Thurrock University NHS Trust*** [2004] EWHC 3436 (QB), October 7, 2004, unrep.; ***Sowerby v Charlton*** [2005] EWCA Civ 1610; [2006] 1 W.L.R. 568, CA; ***Stoke-on-Trent City Council v Walley*** [2006] EWCA Civ 1137; [2007] 1 W.L.R. 352, CA, ref'd to. (See ***Civil Procedure 2007*** Vol.1, paras 14.1.8, 14PD.7, 17.3.5 and C5–009.) (See further "In Detail" section of this issue of CP News.)

■ **WITTMAN (UK) LTD v WILLDAV ENGINEERING SA** *[2007] EWCA* Civ 521, May 10, 2007, CA, unrep. (Moore-Bick L.J.)

Permission to appeal—imposing conditions

CPR r.52.9(1)(c). English **c**ompany (C) bringing claim against a private Swiss company (D) as guarantors of payments due under contract for supply by C of equipment to an English subsidiary company of D. C's claim including allegations against D's managing director (X) personally. Trial judge giving judgment for C for sum of £405,000 and for costs (to be assessed). Amongst other things, judge finding that in the course of his evidence X gave a misleading impression about the extent of his control of D. On November 17, 2006, single lord justice granting D permission to appeal and a stay of execution pending appeal. Appeal listed for hearing on June 11, 2007. In February 2007, C applying for order requiring D to pay into court the amount of the judgment debt, together with a sum of money on account of the costs of the action, as a condition of pursuing the appeal. D's assets comprised principally of shares in other companies. **Held**, refusing application, (1) the court has a discretion to make an order of the type sought by D but will do so only where there are compelling reasons, (2) an application for the imposing of a condition should be made promptly, and where there is delay it is necessary to have regard to the consequences of that for the appellant, especially where (as here) the application comes on for hearing at a time when the appeal hearing is only a month away, (3) having obtained a stay of execution, D were not obliged to pay the judgment debt and no adverse inference could therefore be drawn from that fact that they had not done so, (4) there was little evidence to support the conclusion that, if the condition were not imposed, D would not merely refuse to cooperate in any future enforcement procedure, but would seek to take steps to puts its assets beyond reach of that process, (5) if C wished to contend that a condition should be imposed on D as a means of the court's indicating its disapproval of D's conduct of the trial, they should have raised the matter when D applied for a stay of execution, (6) in any event, this was not a case in which a condition should be imposed on an appellant for disciplinary purposes. ***Hammond Suddards Solicitors v Agrichem International Holdings*** [2002] EWCA Civ 335, ref'd to. (See ***Civil Procedure 2007*** Vol.1 para.52.9.4.)

Statutory Instruments

■ **CIVIL JURISDICTION AND JUDGMENTS REGULATIONS 2007 (SI 2007/1655)**

CPR rr.6.18, 12.11, 74.1 and 74.2. Enacted under European Communities Act 1972 s.2 and Sch.2 para.1A. Amend 16 Acts and 10 statutory instruments (including CPR) to reflect agreement between EC and Denmark applying (with modifications) Council Regulation (EC) No.44/2001 (Judgments Regulation) to Denmark. Amended legislation includes Civil Jurisdiction and Judgments Act 1982 ss.1(1) and 1(3), Civil Jurisdiction and Judgments Order 2001 Art.2(1) (also insert Art.3A after Art.3), Civil Jurisdiction and Judgments (Authentic Instruments and Court Settlements) Order 2001 Art.1(2), Community Legal Service (Financial) Regulations 2000 regs 3 and 5D. Also amends Civil Procedure Rules 1998 r.6.18 (Definitions), r.12.11 (Supplementary provisions where applications for default judgments are made), r.74.1 (Scope of Pt 74) and r.74.2 (Interpretation). In force July 1, 2007. (See ***Civil Procedure 2007*** Vol.1 paras 6.18, 12.11, 74.1 and 74.2, and Vol.2 paras 5-9, 5-191, 5-197 and 198.)

In Detail

Amendment to withdraw pleaded admission

In ***White v Greensand Homes Ltd*** [2007] EWCA Civ 643, June 28, 2007, unrep., CA, the facts were that, in December 1999, a married couple (X) purchased a property on a development site on which a house was being built by a construction company (D1). X's property was one of two adjoining properties being developed by D1 on the site. In August 2003, X noticed that their house had suffered serious structural damage. Remedial works were carried out at the cost of X's insurers (C).

In compliance with the Pre-Action Protocol for the Construction and Engineering Disputes, C sent a Letter of Claim to a firm of consulting engineers (D2) requesting copies of design and construction drawings relating to the property. In their Letter of Response of January 9, 2006, D2 admitted that they had been appointed by D1 to design the foundations of X's house, but they denied liability for any structural damage suffered.

On June 8, 2006, C (being subrogated to X's claims) commenced proceedings against D1 and D2. As against D2, C alleged that they were in breach of their duties under the Defective Premises Act 1972 s.1, and that they were negligent at common law. D1 took no part in the proceedings and judgment (under which any prospect of recovery was unlikely) was entered against them. On October 26, 2006, D2 served a defence in which the admission contained in their pre-action letter was repeated, but in which liability was again denied. However, by application notice dated February 6, 2007, D2 applied under para.(2) of CPR r.17.1 (Amendments to statements of case) for permission to file and serve an amended defence, in effect withdrawing the admission. D2 explained that, in making the pre-action admission, they had made a genuine mistake. The judge accepted that D2 had an arguable case that in fact the design work for the foundations of X's house had been carried out, not by them, but by another company (Y) (dissolved in September 2003), and that D2's responsibilities were confined to the adjoining property in the development.

The limitation position in relation to C's various claims was as follows. Any claim by C under the 1972 Act (whether against D2 or Y) became statute barred on July 7, 2006 (six months after the date of D2's pre-action admission). However, the six year limitation period for any claim in tort against Y did not begin to run until November 16, 2005 at the earliest (when C knew of the identity of Y), and therefore would not expire until November 2011.

The judge refused D's application to amend their defence by withdrawing the admission. A single lord justice granted D2 permission to appeal. The Court of Appeal (Chadwick, Latham and Thomas L.JJ.) allowed the appeal.

In summary the Court held as follows: (1) in determining the balance of prejudice to the parties, the judge had treated as material the fact that, as the limitation period for a claim by C against Y under the 1972 Act expired on July 6, 2006, by reason of D2's pre-action admission of January 9, 2006, C had lost a claim of value against Y, (2) the judge had erred in law in leaving out of account the fact that Y had been dissolved in September 2003 and at that time had no assets, (3) the judge's error lay, not in his having regard to the prejudice caused to C by D2's pre-action admission, but in his failing to examine critically the prejudice which was alleged, (4) it was necessary for the Court to set aside the judge's decision and to examine the question afresh.

In examining the matter afresh, with great clarity Chadwick L.J. analysed and described the current law relating to the withdrawal of admissions, (a) whether made (i) in pre-action correspondence between the parties only, or (ii) in a pleading only, or (b) whether made in pre-action correspondence and repeated in pleadings. The judgment will prove to be of considerable assistance to judges and practitioners. (This has become, perhaps unnecessarily so, a complicated area of the law.)

Chadwick L.J. explained that, following the decision of the Court of Appeal in ***Sowerby v Charlton*** [2005] EWCA Civ 1610; [2006] 1 W.L.R. 568, CA, a new rule, r.14.1A (Admissions made before commencement of proceedings), was inserted in CPR Pt 14 (Admissions) by the Civil Procedure (Amendment No.3) Rules 2006. The effect of this rule is to extend the provisions of r.14.1 (Admissions made after commencement of proceedings) to pre-action admissions made in the context of a response to a letter of claim under a pre-action protocol in certain limited classes of case (personal injury, clinical disputes and disease and illness claims). The rule would have no application in proceedings such as those brought by C in the present case, and in any event, could not be applied in this case as it applies only to admissions made after April 6, 2007. However, the new rule was important in the instant case to the extent that (as his lordship said) "it provides confirmation that, in cases which do not fall within the specified classes, permission to withdraw an admission made in pre-action correspondence—even when made in response to a letter of claim under a pre-action protocol—is not required".

In turning to the particular issues raised by this appeal, Chadwick L.J. stated that, were it not for the fact that D2 had

made a pre-action admission, there would be no doubt that they would be permitted, under CPR r.17.1(2), to amend their defence (filed on October 26, 2006). There would be no doubt because it could not be said that C had lost a claim against Y, either under the 1972 Act or in tort, as a result D2's pre-action admission. As explained above, there was no claim of value against Y under the 1972 Act to be had against Y (so there was nothing to lose), and the limitation period for any claim in tort against Y had not expired (so nothing was yet lost, and Y could be restored to the register and the claim pursued against insurers). The key question was whether the pre-action admission made any difference.

Chadwick L.J. drew a distinction between two situations. First, there is the situation (as in the instant case) where the court is asked to decide whether or not a party should be granted permission under r.17.1(2)(b) to amend their statement of case where the effect of the amendment sought would be to withdraw an admission made in an earlier statement of case. His lordship said that in this situation the court now must have regard to r.14.1 and to the matters listed in Practice Direction (Admissions) para.7.2 (see ***White Book*** Vol.1 para.14PD.7).

Secondly, there is the situation where the admission was made in pre-action correspondence and had not been repeated following the commencement of proceedings (in particular, where it had not been made in an earlier pleading) and the court is asked to decide whether it should allow to stand a pleading that in effect withdrew the admission. In this situation, the matter has to be approached by the court (in a case not falling within r.14.1A) in accordance with the guidance given by Smith L.J. in ***Stoke-on-Trent City Council v Walley*** [2006] EWCA Civ 1137; [2007] 1 W.L.R. 352, CA (as is explained in ***White Book*** Vol.1 paras 14.1.8 and 14.1.9). That is to say, the issue has to be determined by reference to para.(2)(b) of CPR r.3.4 (Power to strike out a statement of case), and the question for the court is whether to allow the admission to be so withdrawn would be to allow an abuse of process or a course likely to obstruct the just disposal of the proceedings. Normally, in order to establish that the withdrawal of the admission amounted to an abuse of process the claimant would have to show that his opponent had acted in bad faith.

In both of these two situations, the relative prejudice which will be suffered by each party if the admission is (or is not) withdrawn will be one of the factors (but not necessarily a conclusive one) which the court (giving effect to the overriding objective) must take into account. Fairness may require that a party who, by a pre-action admission, has led the other party to act to his detriment should not be permitted to withdraw that admission, but if the detriment is insubstantial, and the admission was ill-advised, such permission will normally be granted so that the case may be determined on the basis of the real issues in dispute.

Chadwick L.J. concluded that, in the instant case, when the prejudice which would be suffered by each party if the admission was (or was not) withdrawn was weighed, the balance fell firmly in favour of D2.

Re-opening determined appeal

In ***Taylor v Lawrence*** [2002] EWCA Civ 90; [2003] Q.B. 528, CA, it was held that the Court of Appeal has jurisdiction to re-open a determined appeal. In that case an appeal, made to the Court of Appeal from a court below, was founded on an allegation of apparent (or ostensible) bias of the trial judge. After that appeal had been dismissed, further evidence emerged which was said to demonstrate the judge's partiality to one of the parties more clearly than the evidence relied on in the original appeal. On a further application to the Court, the main issue was whether (despite the general principle of finality in judgments) the Court had jurisdiction to re-open the appeal. The Court held that it did have such jurisdiction.

Subsequently, r.52.17 was added to CPR Pt 52 (Appeals) for the purpose of regulating applications to the Court for the exercise of this novel jurisdiction. It is provided there that permission is needed to make an application, and the procedure for making such application is found in provisions added to Practice Direction (Appeals) when r.52.17 was introduced (see ***White Book*** Vol.1 para.52PD.136).

Having settled the question whether a jurisdiction to re-open determined appeals existed, the next question confronting the Court was the very different question of how that jurisdiction should be exercised. Guidance on the latter question was given in ***Taylor v Lawrence***. And the question has been canvassed by the Court in decisions subsequent to that case. Perhaps it was inevitable that, once the existence of the jurisdiction had been established, its limits would be tested and different views as to how the jurisdiction should be exercised would emerge, as the recent decision of the Court in ***Jaffray v The Society of Lloyds*** [2007] EWCA Civ 586, June 20, 2007, unrep., CA, demonstrates.

In the ***Jaffray*** case, the facts were that underwriting members (C) of Lloyds (D), on the basis of representations alleged to have been made by D, brought claim for remedies in deceit against D. At trial, the judge gave judgment for D. On C's appeal, the Court of Appeal, reversed the judge on some issues, but upheld him on others (including the issue of D's knowledge and belief at the relevant time), and dismissed C's appeal ([2002] EWCA Civ 1101).

C now asserted that further evidence had come to light, showing that the judge and the Court of Appeal had been misled by D's evidence as to the state of their knowledge and belief. C applied to the Court of Appeal for the exercise of the Court's jurisdiction to re-open determined appeals. This application was made on the ground that Court had been misled by misbehaviour, in the form of perjury, by one of the parties.

The Court (Buxton and Moore-Bick L.JJ.) dismissed the application. In summary the Court held: (1) it has long been the settled practice of the Court that the proper method of impeaching a completed judgment on the ground of fraud is by action which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires, (2) however, for present purposes the Court was prepared to accept, without deciding, that the Court has jurisdiction to re-open a determined appeal on grounds of fraud, and to go on to consider the question when, if at all, that jurisdiction should be exercised, (3) such jurisdiction (if it exists) should only be exercised in exceptional cases where there is no alternative remedy, (4) if an appeal were to be re-opened on the basis that new evidence (receivable by the Court in accordance with the normal rules) demonstrated perjury, the Court would have to undertake an inquiry of the kind that would be undertaken by a court trying a new action in which it was alleged that a judgment had been obtained by fraud, (5) except in a case that was so clear as to be uncontestable (which was not this case), the Court should refuse jurisdiction as the Court would not be equipped to undertake such inquiry nor able to give any immediate remedy.

A particularly interesting feature of this judgment is the qualification in point (2) as enumerated above. The Court stated that it was of the view that the long-settled practice (summarised in point (1) above), for which authority is provided by ***Flower v Lloyd*** (1877) 6 Ch.D. 297, CA; ***Jonesco v Beard*** [1930] A.C. 298, HL, preclude the re-opening of an appeal on grounds of fraud perpetrated on the lower court. The proper course in such circumstances being the bringing of an action to set aside the original judgment. However, the Court noted that in cases coming before the Court since ***Taylor v Lawrence***, jurisdiction to re-open appeals on grounds of fraud had been assumed. Those cases are ***Couwenbergh v Valkova*** [2004] EWCA Civ 67, ***Re Uddin*** [2005] EWCA Civ 52; [2005] 1 W.L.R. 2398, ***Pell v Express Newspapers*** [2005] EWCA Civ 46, and ***First Discount v Guinness*** [2007] EWCA Civ 378.

On this point the Court said (para.22):

> **"The issu**e, based on ***Flower v Lloyd*** and the treatment of that case in ***Taylor v Lawrence***, of whether the Court of Appeal has any jurisdiction to re-open an appeal in a case of fraud, was not addressed in any of these cases: though it is right to say that in ***Uddin***, this Court viewed the ***Taylor v Lawrence*** jurisdiction as appealing to the correction of justice, stated in very broad terms, and not limited to particular cases such as bias or fraud. How that view sat with ***Flower v Lloyd*** and ***Jonesco v Beard*** was not explored: ***Flower v Lloyd*** was not put to the Court in these terms, and the Court was not even shown ***Jonesco v Beard***."

The Court added (para.23):

> **"We ther**efore remain of the view that the ***Flower v Lloyd*** issue remains open, and in another case it will be possible to explore whether this Court indeed has any jurisdiction to re-open an appeal on grounds of fraud perpetrated on the court. We accept, with some hesitation, that that will indeed have to be in another case, despite the issue being one of jurisdiction, because, no doubt because other divisions of this Court have accepted jurisdiction in fraud cases, this preliminary point was not relied on by Lloyds in this application."

It was for these reasons that the Court in the instant case was prepared to proceed on the assumption (but by no means deciding) that it had jurisdiction to re-open a determined appeal on grounds of fraud.

In conclusion, one other interesting feature of this judgment may be noted. Counsel for the applicant argued that, since the application was being made under CPR r.52.17, the Court should start from, and apply, the plain wording of that rule, and in particular the reference in para.(1)(a) of the rule to appeals being re-opened "in order to avoid real injustice". That rule prevailed (so counsel contended) over any previous jurisprudence that might be argued to limit the jurisdiction to any particular category of cases, for instance where the earlier decision had been obtained by fraud. The Court rejected this submission (para.7), stating that rules of court, including r.52.17, cannot extend the jurisdiction of a court from that which the law otherwise provides, but can only give directions as to how existing jurisdiction should be exercised. The Court noted that, in effect, r.52.17 restricted the jurisdiction by speaking of it not being exercisable unless various conditions, including the avoidance of injustice, are fulfilled. It could not be argued that the Court should not take time with analysis of ***Taylor v Lawrence*** itself, or of the cases underlying it, but should ask itself whether the appeal should be re-opened in order to avoid real injustice "in a broadly discretionary, essentially palm-tree, frame of mind".

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