CIVIL PROCEDURE NEWS

Issue 9/2007 November 13, 2007

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THOMSON
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In Brief

Cases

O'BYRNE v AVENTIS PASTEUR SA [2007] EWCA Civ 939, October 9, 2007, CA, unrep. (Sir Anthony Clarke M.R., Arden and Moore-Bick L.JJ.)

Substitution of claimant—expiry of limitation period—whether "necessary"

CPR r.19.5, Limitation Act 1980 ss.11A and 35, Consumer Protection Act 1987 s.4, Council Directive 85/374/EEC Arts 7 and 11. Infant (C) bringing defective product claim under Pt I of the 1987 Act, alleging he was damaged by defective vaccine. Vaccine produced by French company (X Co) and distributed in England by another company (Y Co), a wholly-owned subsidiary of X Co. Claim subject to 10-year limitation period stipulated by s.11A(3), implementing Art.11. Before time had run, C commencing claim against Y Co. Subsequently, having previously (before the expiry of the limitation period) (1) become aware that X Co and not Y Co were the producers of the vaccine, and (2) failed in an application to add X Co as co-defendants (because they had an arguable limitation defence), C applying under s.35 (r.19.5) after the expiry of the limitation period to substitute X Co as defendant in the original proceedings. Judge granting application ([2006] EWHC 2562 (QB), [2007] 1 W.L.R. 757). **Held**, dismissing X Co's appeal, (1) on the true construction of s.35, where the new party is to be substituted for a party whose name has been given in a claim in the original action in mistake for the new party's name, substitution is to be regarded as "necessary" for the determination of the original action, (2) this construction accords with r.19.5, (3) insofar as there is a difference between the wording of s.35 and of r.19.5, the rule should be taken as indicating the Rule Committee's view as to the meaning of the statute. Observations on true construction of s.35(4) to (6). ***Horne-Roberts v SmithKline Beecham*** [2001] EWCA Civ 2006; [2002] 1 W.L.R. 1662, CA, ***Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd*** [2005] EWCA Civ 134; [2005] 1 W.L.R. 2557, CA; ***Adelson v Associated Newspapers Limited*** [2007] EWCA Civ 701; [2007] 4 All E.R. 330, CA, ref'd to. [Ed.: For previous proceedings in this case, see CP News Issues 03/2006 and 09/2006.] (See ***Civil Procedure 2007*** Vol.1 para.19.5.7, and Vol.2 para.8–87.)

SEAL v CHIEF CONSTABLE OF SOUTH WALES [2007] UKHL 31; [2007] 4 All E.R. 177, HL, *The Times* July 5, 2007, HL

Claim commenced without statutory permission—whether nullity or curable irregularity

CPR r. 3.4, Mental Health Act 1983 ss.2, 36 and 139, Limitation Act 1980 s.2, Human Rights Act 1998 Sch.1 Pt I art.6. In December 1997, police (D) arresting man (C) for a breach of the peace and, acting under powers conferred by the 1983 Act, removing him to a place of safety. C detained initially under s.136(2) and then s.2, before being released after just over a week. In December 2003, one day before expiry of relevant limitation period, and without first obtaining the permission of the High Court as required by s.139(2), C issuing claim form making allegations against D and claiming damages. On D's application, C's claims, insofar as they fell within s.139(1), struck out by circuit judge on ground that C had not obtained leave under s.139(2). Court of Appeal holding that the proceedings were not merely irregular but were a nullity and dismissing C's appeal ([2005] EWCA Civ 586). **Held**, dismissing C's further appeal, (1) a subject's access to the courts is not to be excluded except by clear words, (2) the words of s.139(2) are clear in their effect and have always been thought to be so, (3) their effect is to invalidate proceedings brought without meeting the leave condition, and not merely to impose a procedural requirement, (4) the effect of s.139(2) in this case did not infringe C's rights under art.6. ***Pountney v Griffiths*** [1976] A.C. 314, HL, ref'd to. (See ***Civil Procedure 2007*** Vol.1 para.3.4.1.)

EARL OF MALMESBURY v STRUTT & PARKER [2007] EWHC 2199 (QB), October 9, 2007, unrep. (Jack J.)

Judgment as to liability—request to judge to reconsider finding as to damages

CPR rr.40.2, 40.6 and 52.3. Property owners (C) engaging professional advisers (D) to advise on negotiations for lease of property for use as car park. C bringing claim against D for professional negligence. At trial, judge finding that negligence was established, although not to the extent alleged by C. At request of parties made during trial, judge not deciding sum to which C entitled by way of damages, but making certain findings relating to damages, including finding that, had D not been negligent, most likely outcome would have been that lease would have provide for a turnover rent on top of base rent, but limited to 10 per cent of turnover. Judge refusing C permission to appeal against that particular finding. Order directing inter alia that there be "a trial on the outstanding aspects of quantum needed to assess the damages" sealed on May 30, 2007. Parties falling into dispute as to whether, at trial of quantum, the sealed order would be an absolute bar to any reconsideration of the judge's finding as to turnover rent. C contending

that sealed order did not carry into effect judge's finding as to turnover rent and requesting judge to reconsider (1) his finding on that issue (with a view to increasing it to 20 per cent), or (2) his refusal of permission for C to appeal that issue. **Held**, refusing requests, (1) the sealed order provided that aspects of the amount of damages not determined by the judgment would be determined by a subsequent trial, and so provided by necessary implication that the issues as to liability and some issues as to damages had been determined by the judgment and were binding between the parties, (2) the order therefore should be treated as a bar for the purposes of the court's jurisdiction to reconsider any matter determined by the judgment, (3) if that is wrong, this was not a case in which the court should exercise its jurisdiction to re-consider judgment before order carrying it into effect sealed, (4) a judge should only exercise that jurisdiction where it is clear to him without prolonged inquiry that he reached the wrong conclusion, (5) the court's refusal of permission to appeal was incorporated in the sealed order and the court had no jurisdiction to consider any fresh application; if permission is to be granted, it must be by the Court of Appeal. Court's jurisdiction to reconsider issues on which judgment has given, before inclusion in sealed order, or not included therein, explained. ***In re Barrell Enterprises*** [1973] 1 W.L.R. 19, CA; ***Pittalis v Sherefettin*** [1986] Q.B. 868, CA; ***Robinson v Bird*** [2003] EWCA Civ 1820, December 19, 2003, CA, unrep., ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 40.2.1, 40.6.1 and 52.3.4.)

■ **JAMES v LONDON BOROUGH OF HAVERING** [2007] EWHC 2168 (QB), September 26, 2007, unrep. (Keith J.)

Default judgment entered—proceedings automatically stayed—application to lift stay

CPR rr.3.4 and 51.1, Practice Direction (Transitional Arrangements) paras 14(2) and 19(1)(2). In April 1995, claimant (C) (acting in person) and daughter (a person under disability) bringing claims for negligence in High Court against local authority (D). Default judgment on liability entered against D on September 19, 1995, purportedly in default of defence, with damages to be assessed. C not taking steps to progress claim until July 1999 when D notified of judgment and communications between C and D revived. By operation of Pt 51, claim automatically stayed on April 26, 2000. On May 16, 2000, C applying under para.19(2) for stay to be lifted. On November 6, 2000, D issuing applications (1) for judgment to be set aside, and (2) for C's claim to be struck out. For various reasons, but mainly because of C's defaults in complying with directions, applications not coming on for hearing until September 2007. Until April 2003, C acting in person but having benefit of legal assistance for part of claim thereafter. **Held**, granting D's application, (1) it would hardly be unjust to prevent C's case from proceeding if her claims were doomed to fail; conversely, it could well be unjust for the claims not to be permitted to continue (despite the inordinate and largely unexplained delay) if the claims had every chance of succeeding; (2) it followed that one of the important considerations to be taken into account in deciding whether the stay should be lifted was whether, if it were lifted, (a) the judgment in default would be set aside, and (b) the claims would then be struck out; (3) as C had not complied with the relevant rules of court as to statements of claim applying in September 1995, D were not obliged to file a defence (see RSC Ord.18, rr.2, 6 and 7, and Ord.19, r.3); consequently, the entry of judgment in default of defence was irregular and, if the stay were lifted, would have to be set aside; (4) as in several respects since June 1995 C had failed to comply with rules practice directions or court orders, if the stay were lifted C's claim would be struck out under r.3.4(2)(c). Observations on effect of steps being taken by claimant under disability without litigation friend (para.52). ***Masterman-Lister v Brutton & Co (Nos. 1 and 2)*** [2003] 1 W.L.R. 1511, CA, ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 51.1.3, 51.1.4, 51PD.14 and 51PD.19; ***Supreme Court Practice 1999*** Vol.1 paras 6/2/4, 18/2/2, 18/6/2 and 18/7/4.)

■ **LEXI HOLDINGS PLC v LUQMAN October 22, 2007, unrep. (Briggs J.)**

Service of claim form on partnership—service on one partner—last known residence

CPR rr.3.1(2)(a), 3.9, 6.4(5), 6.5(6) and 12.3. Company (C) bringing claim against several defendants, including a partnership firm (D). D consisting of two individuals (X and Y). C serving claim form on D by effecting postal service on X at two residences (or former residences) of his. At time of service on him, X serving a substantial term of imprisonment as a result of committal proceedings taken against him in his personal capacity by C. C applying for judgment against D in default of acknowledgment of service. At hearing, D contending that good service of the claim form had not been effected, and making oral application for permission to acknowledge service out of time. **Held**, dismissing C's application and granting D's application (1) the question whether the relevant time for obtaining judgment in default of acknowledgment of service has expired (see r.12.3(1)(b)) is to be addressed when the application for such judgment comes to be heard, if it is in an application made in court, or when it is dealt with administratively if not made at a hearing, (2) notwithstanding the ambiguity in r.6.5(6), the better interpretation of that provision is that, provided one partner who is sued in the name of a firm is served by post at his usual or last known residence, that is good service on the firm, and therefore upon co-partners, (4) such interpretation is consistent with the pre-CPR provisions on the matter, (5) where a partner who, to the knowledge of the claimant, is serving a substantial term of imprisonment at the time when postal service is attempted, his "usual or last known residence" is the prison in which he is incarcerated, and not the place at which he resided beforehand, (6) applying the relief from sanctions criteria (r.3.9), D's oral application for permission to acknowledge service out of time should be granted. (See ***Civil Procedure 2007*** Vol.1 paras 3.1.2, 3.9.1, 6.5.4, 12.3.1.)

MARINE RESCUE TECHNOLOGIES LTD v BURCHILL [2007] EWHC 1976 (Ch), August 15, 2007, unrep. (Warren J.)

"Unless" disclosure order—automatic strike out—relief from sanction

CPR rr.3.9 and 31.10. In September 2001, company (C1) and owners (C2) thereof bringing intellectual property claim against several defendants. Following disclosure of documents by claimants, in December 2006, one defendant (D) applying for specific disclosure. In dismissing application, judge (1) finding that there were inadequacies in the standard disclosure given, (2) directing that claimants should (a) reconsider whether they had discharged their standard disclosure obligations (particularly as to search at C2's non-business premises), and (b) give standard disclosure by January 19, 2007. As no further disclosure had been given by that date, in February 2007, D making application for claimants to provide standard disclosure. Judge making order striking out claimant's claim unless standard disclosure was given by March 5. Claimants objecting that any further search would be unreasonable and disproportionate and by due date giving no disclosure statement complying with r.31.10. On claimant's application for relief from the striking out sanction and for re-instatement of their action, **held** (1) the claim was struck out automatically on March 5, (2) the claimants had failed (a) properly to conduct the standard disclosure exercise, and (b) to explain why searches at C2's home would produce only irrelevant material and would be unreasonable, (3) in the circumstances, and after considering the r.3.9 criteria, the application should be dismissed. (See ***Civil Procedure 2007*** Vol.1 paras 3.8.1, 3.9.1 and 31.10.1.)

POOLE BOROUGH COUNCIL v HAMBRIDGE [2007] EWCA Civ 990, September 25, 2007, CA, unrep. (Pill, Buxton and Lloyd L.JJ.)

Committal order—appeal by applicant—permission required

CPR r.52.3(1)(a), Access to Justice Act 1999 s.54(1), Housing Act 1996 s.153(A), Practice Direction (Citation of Authorities) para.6.2. Local authority landlords (C) bringing possession proceedings against tenant (D). C applying for and granted anti-social behaviour injunction against D with power of arrest attached. Judge granting C possession order and continuing injunction against D. Subsequently, D committed for contempt for breach of the injunction and sentenced to 20 weeks, imprisonment. On D's application, judge (1) finding that D had purged his contempt, (2) ordering his release from imprisonment, but (3) continuing the injunction. C applying for permission to appeal against the judge's order releasing D from custody. **Held**, refusing permission, the appeal had no real prospect of success. Court explaining (a) r.52.3(1)(a) provides that where an appeal is against "a committal order" permission to appeal is not required, but (b) this provision exempts from the permission requirement only an appeal by contemnor, consequently (c) as was conceded, C's right to appeal could be exercised only with permission. Judgment released for citation under para.6.2. ***Barnet London Borough Council v Hurst (Practice Note)*** [2002] EWCA Civ 1009; [2003] 1 W.L.R. 722, CA; ***Kynaston v Carroll*** [2004] EWCA Civ 1434, October 5, 2004, CA unrep.; ***Wood v Collins*** [2006] EWCA Civ 529, *The Times* June 26, 2006, CA, ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 52.1.2, 52.3.2 and B4–001.)

PR RECORDS LTD v VINYL 2000 LTD [2007] EWHC 1721 (Ch), July 18, 2007, unrep. (Morgan J.)

Application to add non-party for costs purposes—practice

CPR rr.19.2 and 48.2, Supreme Court Act 1981 s.51(1). Company (D) owned by husband (H) and wife (W) entering into agreements with another company (C). After trading relationship had broken down, (1) a director (X) of C bringing claim against H and W to enforce agreement for transfer to him of shares in D (the "share action"), and (2) C bringing claim against D to recover money owed, and against W to enforce guarantee (the "money claim action"). Defence of both actions funded up to a sum of £110,000 from monies raised by H and W (though H was not a party to the former action) on security of their matrimonial home. At trial of both claims tried together (1) X succeeding in share action and H and W ordered to pay his costs (subsequently assessed at £16,000), and (2) in money claim action C held to be entitled to most of money claimed, W held liable on the guarantee, and D and W ordered to pay C's costs (subsequently assessed at £46,000). Judgments given in December 2003. In April 2006, in the money claim action C applying (1) under s.48.2(1)(a) for order joining H for the purposes of costs only, and (2) for order that H be liable for C's costs in that action. In September 2006, Master finding that that action was bona fide defended and dismissing application. Judge giving C permission to appeal. **Held**, allowing appeal, (1) in determining an application under r.48.2(1)(a) to add a non-party for the purposes of costs only, the judge should not attempt (in exercising his discretion) a consideration of the merits in order to see whether the applicant's claim for a costs order against that person had a real prospect of success, however (2) if the judge can see that the claim against that party for costs is bound to fail he should dismiss it summarily, (3) in the present case, it could not be argued that allowing the addition of H as a party so that the court could consider the merits of D's application for a costs order against him involved an abuse of process unless it could be said that C's delay in making the application was itself an abuse, (4) in the circumstances, that delay caused no prejudice to H. Distinctions between practice in relation to applications for wasted costs orders and for non-party costs orders considered and explained. Tests for adding parties under r.19.2 and r.48.2(1)(a) compared. ***Symphony Group Plc v Hodgson*** [1994] Q.B. 179, CA; ***Dymocks v Franchise Systems (NSW) Pty Ltd v Todd*** [2004] UKPC 39; [2004] 1 W.L.R. 2807, P.C.; ***Robertson Research International Ltd v A.B.G.***

Exploration B.V., *The Times* November 3, 1999; ***Barndeal Ltd v Richmond-upon-Thames London Borough Council*** [2005] EWHC 1377 (QB), June 30, 2005, unrep.; ***Dranez Anstalt v Hayek*** [2005] EWHC 2435 (Ch), October 11, 2005, unrep., ref'd to. (See ***Civil Procedure 2007*** Vol.1 para.48.2.1, and Vol.2 para.9A-265A.)

■ **R. (HIDE) v STAFFORDSHIRE COUNTY COUNCIL** [2007] EWHC 2441 (Admin), October 26, 2007, unrep. (Wyn Williams J.)

Wasted costs—relevance of legal representative's financial circumstances

CPR r.48.7, Supreme Court Act 1981 s.51(6). Care home resident (C) issuing claim form for judicial review of decision of local authority (D) and applying for permission to proceed. Application opposed by D. C represented by solicitor advocate (H) specialising in care home closure cases and representing numerous families in such cases. Judge refusing permission to proceed. D applying for order under s.51(6) requiring H to pay their costs. In her witness statement, H stating that a costs order against her would create a significant risk of her going bankrupt. **Held**, (1) the proceedings were doomed to failure, and were completely unnecessary, and a reasonable competent solicitor should have known as much, (2) H's behaviour throughout the proceedings was "unreasonable or negligent" (at the very least) within the meaning of s.51(7)(a), (3) H's conduct caused D to incur "wasted costs" within the meaning of r.51(6), (4) the financial circumstances of a respondent legal representative was a matter which the court may take into account in exercising its discretion whether to make a wasted costs order, (5) in the circumstances of this case, the significant risk of H becoming bankrupt would be a disproportionate consequence of her unreasonable behaviour. ***Ridehalgh v Horsefield*** [1994] Ch. 205, CA, ref'd to. (See ***Civil Procedure 2007*** Vol.1 para.48.7.3.)

■ **RUTTLE PLANT HIRE LTD v SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS** [2007] EWHC 1773 (TCC), July 16, 2007, unrep. (Jackson J.)

Trial of preliminary issues—subsequent application to amend statement of claim—whether abuse

CPR rr.1.1, 3.1(2)(e) and 17.3. Contractors (C) entering into contract with government department (D) to provide plant and labour to control animal disease outbreak. C bringing claim for £5.7m payable under the contract. At trial of several preliminary issues, both parties achieving success on certain issues and neither emerging as outright victor. Hopes that, once preliminary issues resolved, parties would be able to settle the outstanding payment issues by negotiation and agreement unfulfilled. C applying to make amendments to particulars of claim, said to be consequential on the preliminary issues judgment. D resisting some of the amendments. **Held**, granting the application, (1) the proposed amendments were consequential on the preliminary issues judgment, (2) under the rule in ***Henderson v Henderson***, the court will strike out as abusive claims which should have been raised but were not raised in the course of earlier litigation, (3) the mischief against which the rule is directed is the bringing of a second action where the first action should have sufficed, (4) the rule cannot be invoked in order to prevent a party from pleading at a late stage in litigation issues which might have been pleaded earlier, (5) there is an established body of judicial authority to guide first instance judges faced with applications to amend, and there is no need to extend the rule to that procedural sphere, (6) the amendments were necessary in order to enable the true issues between the parties to be tried, and allowing them would not conflict with the overriding objective. Judge stating (para.12): "The TCC endeavours to provide an efficient service to the business community, in particular by the prompt delivery of judgments. That process is not assisted if the parties or their lawyers then delay for months on end before dealing with consequential matters." ***Henderson v Henderson***, (1843) 3 Hare 100, [1843-60] All E.R. Rep. 378; ***Aldi Stores Ltd v WSP Group Plc*** [2007] EWHC 55 (TCC), (2007) BLR 113, ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 1.3.2, 1.4.15, 3.4.3 and 17.3.5, and Vol.2 para.9A-160.)

Statutory Instruments

■ **CIVIL PROCEEDINGS FEES (AMENDMENT) (NO.2) ORDER 2007 (SI 2007/2801)**

Courts Act 2003 ss.92, 98 and 108(6). Amends Civil Proceedings Fees (Amendment) (No.2) Order 2007 (SI 2007/2976) for purpose of making corrections to certain fees listed in Sch.1 thereto. (See CP News Issue 8/2007.) For fee number 1.1(c) the correct fee is £65; for no.1.1(d) £75; for no.11.1(e) £85; for no.1.3(c) £60; for no.1.3(d) £70; and for no.1.3(e) £80. Also omits fee no.10.6 and the heading preceding it, and amends description of fee no.5.2. In force September 28, 2007. (See ***Civil Procedure 2007*** Vol.2 para.10-5.)

Practice Directions

■ **PRACTICE DIRECTION (ADMIRALTY: ASSESSORS' REMUNERATION)** [2007] 1 W.L.R. 2508, Q.B.D.

Revokes Practice Direction (Admiralty: Assessors' Remuneration) [1994] 1 W.L.R. 599, issued on March 29, 1994 (fixing remuneration and expenses payable, in the absence of special directions in a particular case, to Trinity Masters and nautical and other assessors summoned to assist the Court). (See ***Civil Procedure 2007*** Vol.2 para.2D-134.)

In Detail

Leave to begin proceedings

In ***MacFoy v United Africa Co Ltd*** [1962] A.C. 152, P.C., Lord Denning M.R. explained that there is an essential distinction between breaches of rules of court which render proceedings voidable and those breaches which render proceedings *void*. As to the latter, his Lordship explained: "If the act is void then it is in law a *nullity*. It is not only bad, but uncurably bad. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad." As to the former, his Lordship explained: "But if an act is only *voidable*, then it is not automatically void. It is only an *irregularity* which may be waived. It is not to be avoided unless something is done to avoid. There must be an order of the court setting it aside: …"

Over 80 years before the ***MacFoy*** case, in the rules of court appended to the Judicature Act 1875 it was stated in r.1 of Order 59 as follows:

> "Non-compliance with any of these rules shall not render the proceedings in any action void unless the Court or a Judge shall so direct, but such proceedings may be set aside in whole or in part as irregular, or amended, or otherwise deal with in such manner and upon such terms as the Court or Judge shall think fit."

In interpreting this rule (hereinafter "the non-compliance rule"), the courts left open the possibility that a party's act taken not in compliance with some rules (at least in some circumstances) would be void and a nullity. That is to say, the act did not fall into the category of acts that would be void only if the court so directed. Room for manoeuvre in this respect was provided by the drawing of a distinction between mandatory and directory rules. If a rule was mandatory (or imperative), an act breaching it was void. If it was merely directory an act breaching it was voidable. For a long time the received wisdom was that rules of court were generally mandatory. The object of the non-compliance rule was to make it clear that, no matter whether a rule of court was mandatory (or arguably so) or directory, the consequence of breach should not be to render the proceeding void (unless the court of a judge directed). The rule did not render it unnecessary to distinguish between nullity and mere irregularity. But it did draw the sting of acts which were clearly or arguably void.

The 1962 Revision of the RSC sought to improve and clarify the non-compliance rule (which by then had become Ord.2, r.1) in the light of the sizeable case law on the nullity/irregularity distinction (and its consequences) that had accumulated since 1875. Before the amended rule came into effect, the decision of the Court of Appeal in the case of ***In re Pritchard*** [1963] Ch. 502, CA, attracted criticism with the result that the rule was amended and re-cast. The amended rule was more successful than its predecessor in reducing the number of occasions on which the courts were taxed with arguments about whether a particular rule of court was mandatory and as to what the consequences should be if it were. In its modern form the non-compliance rule appears in the CPR as r.3.10 (General power to rectify matters where there has been an error of procedure).

In English civil procedure, the circumstances in which a party's non-compliance with a mandatory rule (whether clearly or arguably so) occurred have always been regarded as important in determining the consequences of the breach. The time during the development of particular proceedings at which the non-compliance became apparent has always been a relevant (if not determinative) consideration. In this respect it is important to note the ancient rule that the decision of a superior court, even in excess of jurisdiction, is at the worst voidable, and is valid unless and until it is set aside. Once judgment is entered in a superior court, it is too late to argue that a party's non-compliance with a rule (whether a rule of court or a procedural rule with a different source) before judgment rendered the proceedings (or part of them) null.

Elsewhere in the law, that is to say in areas not touched by the RSC and which, necessarily, the beneficent non-compliance rule did not reach, the mandatory (void) and directory (voidable) distinction remained alive and well and caused significant problems; in particular in the field of administrative law when questions of failure to comply with procedural requirements in the purported exercise of a statutory power arose. The problem has been, as Lord Steyn explained in ***R. v Soneji*** [2005] UKHL 49; 2006 AC 340, H.L., that in legislation "Parliament casts it commands in imperative form without expressly spelling out the consequences of a failure to comply". The speech of Lord Hailsham L.C. in L***ondon & Clydesdale Estates Ltd v Aberdeen District Council*** [1980] 1 W.L.R. 182, H.L. (a compulsory purchase case), signalled a move towards a more purposive approach to the question whether a particular legislative provision was mandatory or directory.

On occasions, cases have arisen in which legislative provisions requiring that criminal or civil proceedings shall

not be brought without the authority of the court, or a particular official, or body being first obtained, have fallen for consideration. Where there is non-compliance with such a provision what are the consequences? (In a superior court, after judgment the consequences are, at worst, that the failure to comply is voidable.) In earlier times, such provisions were likely to be regarded as mandatory and any failure to comply would render the proceedings null. In the recent case of ***Seal v Chief Constable of South Wales*** [2007] UKHL 31, [2007] 4 All E.R. 177, H.L., the particular statutory provision under scrutiny was s.139(2) of the Mental Health Act 1983. That sub-section states that: "No civil proceedings shall be brought against any person [being a person exercising certain powers conferred by the 1983 Act] in any court without the leave of the High Court". A majority of the House of Lords agreed with the defendant's submission that the obtaining of such leave was a jurisdictional conditional such as to render null any proceedings brought without it, and rejected the claimant's submission that the lack of leave was an irregularity which could be rectified. (See further "In Brief" section of this issue of ***CP News***.)

Substitution of new defendant after limitation period

The facts of ***O'Byrne v Aventis Pasteur SA*** [2007] EWCA Civ 939, October 9, 2007, CA, unrep., are outlined in the "In Brief" section of this issue of CP News. As is explained there, at first instance, the judge granted the infant claimant's (C) application (made after time had run) to substitute as defendants the holding company (X Co) for the distributing company (Y Co) and X Co appealed to the Court of Appeal. (For previous proceedings in this case, see ***CP News*** Issues 03/2006 & 09/2006.)

The appealed raised two questions. The first was whether s.35 is applicable where the time limit which has expired is the 10-year final cut-off date for enforcing rights conferred pursuant to the Directive. That question was not argued before the judge, because it was accepted that he was bound by the decision of the Court of Appeal in ***Horne-Roberts v SmithKline Beecham Plc*** [2001] EWCA Civ 2006; [2002] 1 WLR 1662, CA, to hold that s.35 is so applicable. On the appeal, X Co submitted that the Court's decision in the Horne-Roberts case should not be followed in this case. In the event, and for reasons that need not be explained here, the Court rejected that submission.

The second question was, assuming that the answer to the first was "yes", whether on the proper construction of s.35, there is power to order substitution in circumstances where, although the name of the defendant was given in mistake when the action was begun, the claimant discovered his mistake before the limitation period had expired and elected at that time to pursue claims against the original defendant. On that question, before the judge the defendant argued (a) that there was no power to order substitution, and (b) if there were, in the exercise of discretion he should not make such an order. The judge rejected both submissions. On the appeal, X Co conceded that, if the judge had the power to make an order, he was entitled to make the order in the exercise of discretion. As is explained below, the Court rejected the submission that the judge had no power to order substitution, and dismissed the appeal.

As was indicated above, in this case C's application to substitute X Co for Y Co as defendant was made after the expiry of the relevant limitation period, and was made on the ground, as s.35(6) provides, that X Co, being "the new party", should be substituted for Y Co, being "a party whose name was given in any claim made in the original action in mistake for the new party's name" (see also CPR r.19.5(3)). It was accepted by X Co that the mistake made by C in this case was a mistake as to the name (or nomenclature) of the party intended to be sued and not a mistake as to its identity, and therefore was a qualifying mistake within s.35(6) (and r.19.5(3)) (see ***Adelson v Associated Newspapers Limited*** [2007] EWCA Civ 701). Usually, when an application such as that made by C in this case is made, the facts are that the applicant became aware of his mistake after the expiry of the limitation period and was driven to s.35(6) to save his claim. In this case the facts were otherwise. C became aware of the mistake before the expiry of the limitation period but made no application to the court before the period to substitute X Co for Y Co as defendant. Before the judge, it was submitted that in these circumstances it could not be said that Y Co's name was given "in mistake" for X Co's. The judge rejected this submission, and on the appeal X Co made no challenge to his ruling in this respect. The judge also rejected the submission that, in such circumstances, it could not be said (within the meaning of s.35(5)(b) and (6)) that the "substitution of the new party is necessary for the determination of the original action" (see also r.19.5(2)(b) and (3)(a)). On the appeal, X Co maintained their challenge to this aspect of the judge's ruling, but (as is explained immediately below) the Court of Appeal held against them.

Before the judge, both parties proceeded on the basis that the proper construction of subss.(4) to (6) of s.35 of the 1980 Act was that the claimant had to satisfy two conditions. The first was that the new party is to be substituted for a party whose name has been given in a claim in the original action in mistake for the new party's name, and the second was that the substitution was necessary for the determination of the original action. The judge did not accept that there are two conditions. He concluded that, on the true construction of s.35, where the new party is to be substituted for a party whose name has been given in a claim in the original action in mistake for the new party's name, substitution is to be regarded as "necessary" for the determination of the original action. The judge said that that conclusion was consistent with CPR r.19.5(3)(a) and with observation of Jacob L.J. in ***Morgan Est v Hanson Concrete*** [2005] EWCA Civ 134; [2005] 1 W.L.R. 2557, CA (at para.39).

CPR r.19.5(2) provides, among other things, that the court may add or substitute a party only if "the addition or substitution is necessary" and rule 19.5(3) provides:

> "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;
>
> (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; or
>
> (c) the original party has died or had a bankruptcy order made against him and his interest or liability has passed to the new party."

Section 35(4) states that rules of court may provide for allowing a new claim to be made "but only if" the conditions specified in subs.(5) are satisfied. Subsection(5) states that the conditions referred to in subs.(4) include, in the case of new claim involving a new party, "if the addition or substitution of the new party is necessary for the determination of the original action" (s.35(5)(b)). Then subs.(6) states:

> "The addition or substitution of a new party shall not be regarded for the purposes of subsection (5)(b) above as "necessary" for the determination of the original action unless either—
>
> (a) 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; or
>
> (b) any claim already 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."

On the appeal, counsel for X Co drew attention to the difference in wording between the section and the rule, in particular, to the difference between the expression "unless either" in s.35(6) and "only if" in r.19.5(3), and submitted that it is not permissible to use the rule as an aid to construction of the statute.

In dealing with this aspect of the appeal, Sir Anthony Clarke M.R. (with whom Arden and Moore-Bick LJJ. agreed) acknowledged the difference in wording but said no reason was discernible as to why the Rule Committee should want r.19.5 to have a different meaning to s.35. Insofar as there was a difference, the rule should be taken as indicating the Rule Committee's view as to the meaning of the statute.

The Master of the Rolls explained (para.59):

> "it seems to us that the meaning given to section 35(6) by the judge is correct having regard to the statutory language and in particular to section 35(6)(b). Thus subsection (6) provides that the addition or substitution of a new party shall not be regarded as necessary unless either (a) or (b) is satisfied; that is, unless there is a relevant mistake or an existing claim against the original party cannot be maintained without the joinder or substitution of the new party. The natural meaning of that language seems to us to be that, if there is either a mistake of a kind sufficient to satisfy (a) or the kind of necessity identified in (b), then the test of necessity in subsection (5) is satisfied, but not otherwise.

The Master of the Rolls further said (at para.60):

> "We would add that the judge's construction of the statute seems to us to be sensible, as the Rule Committee evidently thought. The proposed new party is after all protected by the fact that, even if he establishes the necessary criteria, the claimant does not have a right to have a new party added or substituted but must persuade the court to make the order in the exercise of its discretion. In the exercise of its discretion the court will of course make what it regards as the just order."

Put shortly, the Court of Appeal held that the judge was right in rejecting the contention that a claimant applying to substitute a defendant under s.35 has to satisfy two conditions, "mistake" and "necessity". In this case, as there was a qualifying mistake within s.35(6)(a), the test of necessity in s.35(5)(b) was satisfied. The judge had countenanced the possibility that he might be wrong in this respect and that he should have inquired, first, whether there was a qualifying mistake (within s.35(6)(a)), and secondly, whether the substitution of the new party was "necessary for the determination of the original action" (within s.35(5)(b)). In the Court of Appeal the first question was not a live issue. And, given the Court's holding on the main issue, it was not necessary for the Court to determine whether the judge's answer to second question was correct; nevertheless the Court did say that it was not persuaded that the judge reached the wrong conclusion on that question.

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Published by Sweet & Maxwell Ltd, 100 Avenue Road, London NW3 3PF.
ISSN 0958-9821

Typeset by Matthew Marley, email: matthew.marley@btinternet.com
Printed by St Austell Printing Company, St Austell, Cornwall

156182