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CPR rr.3.9, 52.3(2), 52.4(2), 52.6 and 52.9, Practice Direction (Appeals) paras 4.3B, 5.3 and 5.5, Practice Direction (Citation of Authorities) [2001] 1 W.L.R. 1001, CA, para.6.1. On March 23, 2007, Deputy High Court judge, handing down reserved judgment at hearing attended by solicitors, but from which counsels' attendance had been excused. (No application for permission to appeal under r.52.3(2(a) being made at this hearing.) On April 12, 2007, judge (1) making order on paper as to exchange and filing by parties of their post-judgment written submissions, and directing that they should be placed before him on first available date after April 30, 2007, so that he could consider them first on paper. Written submissions subsequently received by judge, including an application by C for permission to appeal and reply from the defendants (D) opposing it. After considering these submissions on paper, on May 21, 2007, judge making orders, including order refusing C's permission to appeal, but order not drawn up until June 4, and parties first learning about it on June 6 when it was served on them. On June 27, C filing Notice of Appeal in Court of Appeal and (1) applying under r.52.6 for extension of time for filing such Notice, and (2) applying under r.52.3(2)(b) for permission to appeal. Single lord justice (1) granting extension from 21 days after March 23 (by which time, accordance with r.52.4(2)(b), the Notice ought to have been filed) to June 27, and (2) granting permission to appeal. **Held**, dismissing D's application (made on basis of para.5.3 and on Pt 23 application notice as provided by para.5.5) to set aside the single lord justice's orders, (1) in the circumstances it was appropriate to consider C's application for permission to appeal afresh (thereby avoiding any need for the Court to consider whether there was a compelling reason within r.52.9(2) for setting aside the permission granted by the single lord justice), (2) as C had not complied with r.52.4(2), she could not be granted permission to appeal unless she was granted under r.52.6 relief in the form of an extension of time for appealing, (3) in determining whether such relief should be granted it was necessary for the Court to have regard to the "relief from sanctions" circumstances listed in r.3.9, (4) the judge and counsel for the parties embarked upon a process for the consideration of C's application to the judge for permission to appeal which was not permitted by the rules, (5) in these circumstances it could not be said that that it would not be in the interests of justice to grant C relief by extending time. Court recognising but expressing no opinion on tension between r.52.9(2) and para.5.3. Court explaining that, had the judge on May 21 granted C permission to appeal it would have been a nullity, because (1) it was not made in accordance with r.52.3(2)(a), and (2) no adjournment of "the hearing at which the decision to be appealed was made" (i.e. the handing down hearing on March 27) had been granted under para.4.3B to give C an opportunity to apply to the judge for permission. Court releasing their judgment on this appeal for citation under para.6.1. ***Jones v T Mobile (UK) Ltd*** [2004] EWCA Civ 1162; [2004] C.P. Rep. 10, CA; ***Sayers v Clarke Walker*** [2002] EWCA Civ 645; [2002] 1 W.L.R. 3095, CA; ***Smith v Brough*** [2005] EWCA Civ 261, ref'd to. (See ***Civil Procedure 2007***, Vol.1, paras 3.9.1, 52.4.1, 52.3.5, 52.6.2, 52PD.6, 52PD.17, 52PD.18 and B4-001.)

R. (GEORGE WIMPEY UK LTD) v TEWKESBURY BOROUGH COUNCIL [2008] EWCA Civ 12, January 24, 2008, CA, unrep. (Dyson and Lloyd L.JJ.)

Losing defendant not appealing—whether new party may apply for permission

CPR rr.52.1 and 52.3, Supreme Court Act 1981 s.16, Town and Country Planning Act 1990 s.287. Council (D) adopting a local plan for an area including two parcels of land (Site A and Site B) each owned, respectively, by two development companies (X and C). Under the plan, Site A allocated for residential development, but Site B not. C succeeding in bringing claim against D under s.287 to quash the decision to adopt the plan ([2007] EWHC 628 (Admin)). Upon D's deciding not to appeal, X applying to Court of Appeal for permission to do so. **Held**, granting the application, (1) although X were not party to proceedings in the court below (and were unlikely to have been joined as a party had they applied to be so), the Court had jurisdiction to entertain the application, and (2) as the appeal had real prospects of success, and as X's property interests were affected by the decision, in the exercise of discretion permission should be granted. (See ***Civil Procedure 2007*** Vol.1 paras 52.1.1 and 52.3.7, and Vol.2 para.9A-50.1.)

HALL v STONE [2007] EWCA Civ 1354, (Waller, Smith and Lloyd L.JJ.) *The Times*, February 1, 2008, CA.

Successful party—exaggerated claims allegation—effect on costs

CPR r.44.3(4). Following low velocity, rear-end collision, three claimants (C), occupants of front vehicle, bringing personal injury claim against driver of rear vehicle (D). By way of defence, D alleging (1) that the impact was so slight that it was impossible for C to have suffered any physical injuries, and (2) that they were dishonest in making any claims to have been injured at all. As pleaded by C, claim could not be allocated to the small claims track; in light of D's allegation of dishonesty, district judge allocating claim to multi-track. D's offers (not backed by payments in, and not made "without prejudice as to costs") not accepted by C. At four-day contested trial, where C sought damages for £3,500, £1,000 and £1,000, and where the main issues were whether C had brought a dishonest claim, or whether they had brought an exaggerated claim (albeit honestly), judge (1) finding D negligent, (2) rejecting any allegation of fraud or dishonesty, (3) finding some exaggeration, in that C's injuries were much less serious than alleged, (4) awarding C damages in sums of £1,000, £400 and £600 (being sums falling within the small claims jurisdiction, and the first two exceeding D's informal offers), and (5) ordering D to pay 60 per cent of C's costs. Single lord justice giving C permission to appeal against costs order. C's costs (including solicitors' success fee) in region of £80,000. C contending that they were entitled to 100 per cent of their costs. D contending that the court could take account of the offers made and of the judge's finding that C had exaggerated their claims. **Held**, allowing appeal (Waller L.J. dissenting), (1) all three claimants were entitled to be treated as successful parties, (2) para.(4)(b) of r.44.3, which requires the judge to consider whether the successful party was not wholly successful, does not mean that he can cut down the costs of such party merely because he had not done quite as well as he had hoped, (3) before a defendant may be regarded as the winner on an issue of exaggeration, that issue must be an important feature of the claim with costs consequences, (4) the judge was in error (a) to the extent that he thought that D, by succeeding only in keeping the damages down, had had partial success, and (b) in penalising C for not accepting D's "without prejudice" offers (revealed to court by C). ***Painting v Oxford University*** [2005] EWCA Civ 161; [2005] Costs L.R. 394, CA, ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 44.3.10 and 44.3.11.)

JONES v WREXHAM BOROUGH COUNCIL [2007] EWCA Civ 1356, *The Times* January 21, 2008, CA (Waller, Longmore and Hughes L.JJ.)

Whether agreement "CFA Lite"—duty of solicitors to declare interest

CPR r.43.2(3), Conditional Fee Agreement Regulations 2000 (SI 2000/692) regs 3A and 4, Law Society's Solicitors' Practice Rules r.15. On June 19, 2003, Personal injuries claimant (C), entering into loan agreement and insurance policy with claims management company (X). ATE insurance providing indemnity only in the event that C was not successful. C covered for (1) being ordered to pay the other side's costs, (2) own-side disbursements, (3) the ATE premium, and (4) any loan interest. Solicitors (S) to whom C introduced by X (1) sending CFA to C under cover of Rule 15 letter (signed by both parties), (2) advising C that X's insurance policy was appropriate, and asserting that they had no interest in recommending this particular agreement. Defendants (D) challenging enforceability of C's CFA, in particular on ground that S ought to have informed C that they might have an "interest" in recommending the insurance, and therefore failed to comply with reg.4(2)(e)(ii). District judge holding that reg.4 did not apply. Circuit judge allowing D's appeal. **Held**, allowing C's appeal, (1) if a CFA meets the tests created by reg.3A(1) it is, in the vernacular, a "CFA Lite" and the solicitor's duties in reg.4(2)(e) to advise the client on the suitability of insurance and to declare any interest in the policy recommended are removed, (2) under reg.3A(1), a CFA Lite is a CFA under which the client is liable to pay his legal representative's fees and expenses only to the extent that the sums are "recovered" in the proceedings whether "by way of costs or otherwise", (3) in this context, there is no need to place a constrained meaning on recovered "otherwise" than by way of costs, (4) if a claimant recovers costs and some disbursements from the other side, and is paid under an insurance policy in relation to some disbursements, it is a perfectly appropriate use of language to say that the claimant has "recovered" the latter disbursements under the policy, (5) the Rule 15 letter and the term in the ATE insurance providing for the recoverability of disbursements could be relied on in determining whether a CFA fell within reg.3A, (6) in this case, the CFA fell within reg.3A and reg.4 was disapplied, (7) it was an obvious inference that if S ignored X's operations manual and recommended a different policy from X's, involving cancellation of the policy already entered into with X, considerable damage would be done to the S's business relationship with X, (7) for that reason, S had an interest in the insurance, and therefore (8) if this CFA had not been a CFA Lite it would have been unenforceable for reason of S's non-compliance with reg.4(2)(e) by their failing to disclose their interest. ***Garrett v Halton Borough Council*** [2006] EWCA Civ 1017; [2007] 1 W.L.R. 554, CA, ref'd to. (See ***Civil Procedure 2007*** Vol.1 para.43.2.1.1, and Vol.2 paras 7A–47 and 7A–50.1.)

KHUDADOS v HAYDEN [2007] EWCA Civ 1316, December 13, 2007, CA, unrep. (Ward and Wilson L.JJ. and Holman J.)

Claimant's adjournment of trial application—duties of defendant's counsel

CPR rr.1.1, 1.3 and 3.1(2)(b). Hospital trust (D) serving notice of termination of contract on trainee surgeon (C) expiring on April 22, 2004. Upon C commencing High Court claim against D, judge accepting D's undertaking to extend notice until after trial (with C giving cross-undertaking in damages). Although judge also ordering expedited trial, and trial initially fixed for July 14, 2004, at C's requests case subsequently adjourned five times before coming into a list to be heard on February 27, 2006 (with an estimate of 25 to 30 days). Before then, in December 2004, expert (X) appointed by D providing report (copied to C) explaining that C suffered from a long-running medical condition and expressing opinion that C would be unfit to participate in a trial fixed for that month. On February 23, 2006, judge dismissing C's application (made by counsel), to vacate the trial date, made on grounds of C's inability to arrange trial representation. When case called on for trial, C not attending and not represented. Judge, after (1) considering informal application made by C in letter and emails (enclosing GP's letter) sent to the court on medical grounds to adjourn the hearing, and (2) after adjourning the hearing for one day to give C opportunity to respond to D's skeleton argument (drawing attention to relevant authorities) opposing the application, refusing C's application and dismissing her claim with costs ([2006] EWHC 838 (QB)). Single lord justice refusing C permission to appeal. On C's renewed application, leading counsel appearing on C's behalf. C contending (1) that the judge was wrong to conclude that there was anything in C's medical condition which rendered it impossible for her to proceed with her case, (2) that had the judge had the benefit of X's report his scepticism would have been allayed and he might have granted C a further short adjournment, (3) that D ought to have placed that report before the judge. **Held**, granting permission to appeal but dismissing appeal, (1) in all the circumstances, the judge was entitled to conclude that this was a contrived and desperate last minute attempt to obtain an adjournment when all other arguments had failed and that "enough was enough", (2) an advocate's duty to assist the court in ensuring that a case is dealt with fairly does not require him to place his own client at a substantial disadvantage by acting contrary to his interests, as whatever the scope of r.1.3 may be, it cannot extend so far as to impose upon counsel a duty in conflict with his proper duty to his client, (3) it is an advocate's duty to promote and protect fearlessly and by all proper means his client's best interests, and he would fail in that duty were he to supplement deficiencies as to evidence in the case of his client's unrepresented opponent. Observations on course that court may adopt when late applications for adjournments of trials are made on medical grounds. ***Teinaz v London Borough of Wandsworth*** [2002] EWCA Civ 1040; [2002] I.C.R. 1471, CA; ***Andreou v The Lord Chancellor's Department*** [2002] EWCA Civ 1192, [2002] I.R.L.R. 728, CA, ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 1.3.8 and 3.1.3.)

PHILLIPS v SYMES [2008] UKHL 1, *The Times* January 28, 2008, HL.

Error in service procedure abroad—power to dispense with service of claim form

CPR rr.3.10 and 6.9, Civil Jurisdiction and Judgments Act 1981 Sch.3C (Lugano Convention) Art.21, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention) Arts 2 and 3. In December 16, 2004, executors (C) issuing claim form against several defendants, including party (D) resident in Switzerland. In error, certified copy of claim form for service on D stamped "Not for service out of the jurisdiction" by court office. Nevertheless, that copy claim form, together with other necessary documents (including translation of claim form and particulars of claim) sent by English competent judicial officer to Swiss counterpart for service on D. Latter officer, upon noting stamp on the English language certified copy of the claim form, extracting that document from the parcel of documents received, and on January 19, 2005, serving remainder (including the translated documents) on D. On February 3, 2005, D instituting proceedings in Swiss court against C concerning the same cause of action. On C's application, on August 19, 2005, judge holding (1) that service of the claim form should be dispensed with (r.6.9), and (2) that the court's power to rectify errors of procedure (r.3.10) should be invoked to validate as sufficient service the documents served on D on January 19, 2005, thus giving the English court as at that date priority of jurisdiction over the Swiss court under Art.21. Court of Appeal allowing D's appeal ([2006] EWCA Civ 654; [2006] 1 W.L.R. 2598, CA). **Held**, allowing C's appeal and restoring the judge's order, (1) the court first seised of proceedings is the one before which the requirements for proceedings to become "definitely pending" are fulfilled, (2) under English law, proceedings are "definitely pending" only when they are served on the defendant (the Dresser rule), (3) under rules of court, the High Court had power to determine that the service of documents on D actually effected in January 19, 2005, constituted sufficient service for the Court then to be seised of the proceedings as "definitely pending" before it under the Dresser rule, (4) in particular, (a) the failure to serve the claim form together with the other documents was an error of procedure which by virtue of r.3.10 did not invalidate the service of proceedings out of the jurisdiction and which the court could remedy by order, and (b) in making the order pursuant to r.6.9, the judge was not thereby declaring valid and effective service which had previously been ineffective, but was holding that the service was valid and declaring that it was unnecessary to have served the English language

claim form to make it so, (5) the circumstances in this case were exceptional and the case for the court exercising its discretion in favour of C compelling. (For present purposes, there were no material differences between RSC Ord.2, r.1, and CPR r.3.10, at para.32 per Lord Brown.) ***Dresser UK Ltd v Falcongate Freight Management Ltd*** [1992] 1 Q.B. 502, CA; ***Golden Ocean Assurance Ltd v Martin*** [1990] 2 Lloyd's Rep. 215, CA (See ***Civil Procedure 2007*** Vol.1 paras 3.10.3, 6.9.1, 6.19.26, and 6.24.7, and Vol.2 para.5–176.)

- **STUART v GOLDBERG LINDE** [2007] EWCA Civ 2, *The Times* January 23, 2008, CA (Sir Anthony Clarke M.R., Sedley and Lloyd L.JJ.)

Claims not raised in earlier proceeding—whether abuse of process

CPR rr.1.1, 3.4 and 52.11(3)(a). In 1999, managing director (C) of company engaged in development projects in foreign countries negotiating with investor (D2) interested in investing in particular project. Before agreement concluded, solicitor (D1) acting for D2 giving C undertaking that he would in any event be paid $350,000 regardless of whether D2 entered into the contract. Shortly afterwards, D2 entering into the contract but, in the event, not proceeding to perform his part of the agreement. In 2000, C succeeding at contested trial of action brought by him against D1 alone to enforce the undertaking (the 2000 action). In 2005, C (acting in person) bringing action against D1 and D2. In this action (the 2005 action), C making claims (1) as against D2, for breach of contract, and (2) as against D1, for (a) inducement of breach of contract, and (b) misrepresentation. D1 applying to strike out the claims as against him on ground that, as those claims could have been raised in the 2000 action, they were an abuse of process. Master granting application and Deputy High Court judge dismissing C's appeal. Single lord justice giving C permission to make second appeal. **Held**, allowing the appeal, (1) in these circumstances, the court is required to make a broad merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention of the crucial question whether in all the circumstances, a party is misusing or abusing the process of the court, (2) in this context "merits" means not the substantive merits or otherwise of the further claim but those relevant to the question whether it is an abuse of the process of the court to bring the claim in later proceedings, rather than as part of earlier proceedings, (3) in this case the Master and the judge erred in principle, in particular in treating as relevant considerations (a) the strengths or weaknesses of the claims brought by C in the second action, and (b) his delay in bringing that action, (4) before the trial of the 2000 action (in January 2001), (a) C knew that some of D1's statements, on which he relied in the misrepresentation claim, were false, but he did not discover until after that trial that other of C's statements were also false, and also (b) C knew facts upon which the inducement claim could be based, but obtained that knowledge only at a late stage in the proceedings (upon reading D1's witness served in that action in October 2000), (5) in all the circumstances, the second action was not an abuse. Court stressing that a claimant who keeps a second claim against the same defendant up his sleeve runs a high risk of being held to have abused the court's process; moreover, putting his cards on the table does not simply mean warning the defendant that another action may be brought, but also means making it possible for the court to manage the issues so as to be fair to both sides; in that way, the underlying approach of the CPR, namely that of co-operation between the parties, robust case management and disposing of cases (including particular issues) justly, can be forwarded and not frustrated. Court explaining that, in appeals of this type, the appeal court is entitled to intervene if, notwithstanding the absence of either a mistaken inclusion or exclusion of factors or a perverse conclusion, the decision arrived at by the court below is plainly wrong. ***Johnson v Gore Wood*** [2000] UKHL 65, [2002] A.C. 1, HL; ***Aldi Stores Ltd v WSP Group Plc*** [2007] EWCA Civ 1260, *The Times*, December 4, 2007, CA, ref'd to. (See ***Civil Procedure 2007*** Vol.1 paras 1.3.7, 1.4.15, 3.4.3 and 52.11.3, and Vol.2 para.9A–160.)

- **THOMPSTONE v TAMESIDE AND GLOSSOP ACUTE SERVICES NHS TRUST** [2008] EWCA Civ 5, *The Times* January 30, 2008, CA (Waller, Buxton and Smith L.JJ.)

Periodical payments order—indexation other than by RPI

CPR r.41.8(1)(d), Damages Act 1996 s.2. In personal injury claim brought by child (C) against hospital (D), trial judge awarding substantial damages for future pecuniary loss and ordering (1) that the award should be paid by periodical payments, and (2) that the amount of payments should vary annually, not by reference to the RPI (as provided by s.2(8)), but by reference to another measure. Appeal by D conjoined with other appeals in which similar orders as to indexation made. **Held**, dismissing D's appeal, (1) nothing in the language of s.2 or r.41.8(1)(d) suggests that the court's power under s.2(9) to modify or disapply s.2(8) may be exercised only in an exceptional case. (2) where periodical payments were ordered to provide for future care of claimants suffering catastrophic injuries, indexation on the basis of ASHE 6115 (the annual survey of wages for care assistants and home carers) was appropriate. Court referring to risk of trial courts being over-burdened with expert evidence whenever issue of departure from the RPI likely to be contested and giving guidance. Court stating that, generally, expert defence evidence will not be required, but judges should have regard to the defendant's general preferences advanced on instructions. ***Flora v Wakom (Heathrow) Ltd*** [2006] EWCA Civ 1103; [2007] 1 W.L.R. 482, CA, ref'd to. (See ***Civil Procedure 2007*** Vol.1 para.41.8.2.1, and Vol.2 para.3F–48.)

In Detail

Who Can Be An Appellant?

A borough council (D) adopted a local plan which had included within it a site (Site A) owned by one development company (X), and another (Site B) owned by another company (C). Site A was allocated for residential development, but Site B was not. C issued proceedings applying under the Town and Country Planning Act 1990 s.287 to quash D's decision to adopt the plan and also for judicial review of the decision. The proceedings were served on and opposed by D. A High Court judge allowed C's application under s.287, and dismissed the judicial review claim (***R. (George Wimpey UK Ltd) v Tewkesbury Borough Council*** [2007] EWHC 628 (Admin)). D decided not to appeal.

X had followed these proceedings closely and, not surprisingly, they were disappointed at the outcome. They became aware of D's decision not to appeal. Accordingly, X served a notice of appeal, setting out detailed grounds of appeal, and sought from the Court of Appeal permission to appeal. C opposed this application on the ground that the appeal would have no real prospect of success (CPR r.52.3(6)). In addition, C took a preliminary point. They argued (1) that the Court had no jurisdiction to allow X to appeal since they were not a party to, and took no part in, the proceedings before the judge, or (2) that, if the Court had jurisdiction, it should only be exercised in exceptional circumstances and there were no such circumstances in this case. The Court of Appeal rejected these submissions and granted X permission to appeal ([2008] EWCA Civ 12, January 24, 2008, CA, unrep.).

The Access to Justice Act 1999 paved the way for substantial reforms to the law relating to civil appeals. Largely they were carried into effect by new rules of court enacted after the CPR came into effect. Such rules were inserted in the CPR as Pt 52 and came into force on May 2, 2000. Before that date, the rules relevant to appeals to the Court of Appeal were those formerly found in RSC Ord. 59, and re-enacted in Sch.1 to the CPR. In dealing with the submission as to jurisdiction made by C in this case, the Court of Appeal referred back to the law as it stood before May 2, 2000, and for convenience (but slightly inaccurately) referred to that time as "the pre-CPR era".

The Court referred to para.59/3/3 of the 1999 edition of the ***White Book*** and noted that it is said there that, in accordance with old Chancery practice (and on the basis of authority), any person may appeal by leave "if he could by any possibility have been made a party to the action by service". In this case, could X "by any possibility" have been made a party to the s.287 proceedings? It was common ground that, in the pre-CPR era, in rare circumstances a court, in the exercise of its inherent jurisdiction, could permit a party in X's position to join such proceedings. So the question became whether there was anything in CPR Pt 52 which had the effect of providing that a person affected by a decision could not in any circumstances seek permission to appeal unless he was a party to the proceedings below. Before analysing the provisions in detail (in particular, r.52.1), Dyson L.J. expressed the opinion (at para.9) that such a rule would work a real injustice, "in a case where a person who was not a party to the proceedings at first instance, but who has a real interest in their outcome, wishes to appeal, the losing party does not wish to appeal, and an appeal would have real prospects of success".

Dyson L.J. concluded that the language of r.52.1, when given its plain and ordinary interpretation, does not require an appellant to have been a party to the proceedings in the court below. His lordship added that, for two reasons, it would be surprising if the position were otherwise. First, because it would mean that the CPR rules as to whom may be an appellant would be more restrictive that the corresponding rules in the pre-CPR era. Secondly, because it would mean that there was a distinction between appellants and respondents which could not be explained (the point being that it is expressly provided in r.52.1 that the Court may permit a person who was not a party to the proceedings in the lower court to be a respondent to an appeal).

Having decided that it had jurisdiction to entertain X's application for permission to appeal, the next question for the Court was whether X should be granted permission under r.52.3. Dyson L.J. explained that, under that rule, permission may be granted where an appellate court considers that the appeal would have a real prospect of success, or that there is some other compelling reason why the appeal should be heard, but not otherwise. Further, even if the appeal court considers that an appeal would have a real prospect of success, it has a discretion to refuse permission to a person who has no real interest in the appeal, and on this basis a person who was "a mere busybody" might be refused permission. His lordship was satisfied (1) that X's appeal had a real prospect of success, and (2) that X were not "intermeddling busybodies", as the judge's decision to quash parts of the local plan affected their property interests.

In granting X permission to appeal, the Court rejected C's submission to the effect that permission should be refused because (1) X had made a tactical decision not to apply to be made a party to the proceedings in the court below, and (2) had they made such application it was highly likely that it would have failed. Dyson L.J. accepted that, as D

were defending the proceedings brought by C, and as the interests of X and D were in material respects the same, it indeed was highly likely that X would not have been joined (for the reasons given by Judge J. in ***Warren v Uttlesford District Council*** [1996] C.O.D. 262). But it did not follow that, because an application to be made a party at the first instance would have failed, an application for permission to appeal should be refused. The fact that D had decided not to appeal completely changed the landscape, and "the true analogue" was whether an application by X to be added as a party to an appeal if D had been appealing would have succeeded.

It may be noted that CPR r.40.9 states that a person who is not a party but who is "directly affected" by a judgment or order may apply to have the judgment or order set aside or varied. The scope and application of that provision is a matter for doubt (see ***White Book*** commentary in Vol.1, para.40.9.1 et seq, and note also commentary on r.3.1(7) at para.3.1.9). Rule 40.9 was not in point in the instant case, but it could be said that concept that the Court was reaching for was that the appeal court has jurisdiction to entertain an application for permission to appeal made by a person "directly affected" by the decision of a court below.

Paragraph 6.1. of ***Practice Direction (Citation of Authorities)*** [2001] 1 W.L.R. 1001, CA (see ***White Book*** Vol.1 para. B4–001) states that a judgment on an application for permission to appeal may not in future be cited before any court unless it clearly indicates that it purports to establish a new principle or to extend the present law. That indication must be present in or clearly deducible from the language used in the judgment. The Court of Appeal's judgment in this case was a judgment given on an application for permission to appeal. But it is not a judgment in which the Court purports to establish a new principle or to extend the present law, so no question of the Court's "releasing" it for citation arises. On the face of it, a prohibition on future citation is imposed on this interesting and important judgment by para.6.1, but doubtless it will be ignored.

Adjourning Permission To Appeal Applications

In ***Jackson v Marina Homes Ltd*** [2007] EWCA Civ 1404, November 13, 2007, CA, unrep., the Court of Appeal dealt with an application for extension of time for making an application to the Court for permission to appeal. That case is shortly explained in the "In Brief" section of this issue of CP News. One of the matters dealt with by the two members of the Court (Sedley L.J. and Sir Henry Brooke) in their ex tempore judgments is elaborated hereunder.

Subject to very limited exceptions, a party wishing to appeal from a judgment given by the High Court or a county court requires permission to do so. An application for permission may be made to the appeal court or to the lower court. There are time limits.

An application to the appeal court is made by filing a Notice of Appeal at that court. This must be done either within 21 days after "the date of the decision" of the lower court that the appellant wishes to appeal, or within such period as may be directed by the lower court (which may be longer or shorter than the 21 day period); that is what para.(2) of CPR r.52.4 says.

If the application is made to the lower court, it is to be made "at the hearing at which the decision to be appealed was made"; that is what para.(2)(a) of CPR r.52.3 says. Paragraph 4.6 of ***Practice Direction (Appeals)*** adds that the application should be made orally. In ***Jones v T Mobile (UK) Ltd*** [2004] EWCA Civ 1162; [2004] C.P. Rep. 10, CA, the Court of Appeal held that if an application is made to the lower court not at "the hearing" to which para.(2)(a) refers, but afterwards, and the court determines it (either by granting or refusing permission), that determination would be a nullity.

Where "at the hearing at which the decision to be appealed was made" in a lower court a party applies for permission to appeal, and the judge rules on it there and then at that hearing, without adjourning the hearing to consider the application, and refuses permission, a further application for permission to appeal may be made to the appeal court (r.52.3(3)). The time for making the further application is the 21 day period from the "date of decision" fixed by r.52.4(2). If, for the purpose of considering the application (perhaps together with other post-judgment applications made by the parties), the judge adjourns the hearing, that 21 day period runs throughout the period of the adjournment (see further below). Obviously, if in the event the judge refuses the application, the applicant is prejudiced. It is partly for this reason that the judge is given power by r.52.4(2) to direct that the 21 day period should be extended.

Paragraph (2)(a) of r.52(3) appears to be based on the assumption that the parties will be present at the hearing and will, there and then, make any application for permission to appeal. Where the judgment has not been reserved, the parties will have to make up their minds very quickly if they wish to apply to the court for permission to appeal "at the hearing at which the decision to be appealed was made".

Where judgment has been reserved and a draft judgment circulated before handing down the parties will have had a short period in which to consider whether or not to make such application. If the handing down is attended by the

parties, the application should be made there and then. If the attendance of the parties at handing down is excused, the application may be made in a written submission sent to the court before handing down.

The laudable purpose underlying these provisions is that of ensuring that appeals are dealt with quickly. It has been recognised that the pressure imposed on parties by para.(2)(a) of r.52.3 may be too great. It may lead to hasty and ill-considered applications being made to the lower court, and to unnecessary applications being made to the appeal court. Accordingly, para.4.3B of ***Practice Direction (Appeals)*** states that, where no application is made in accordance with para.(2)(a) of r.52.3, "but a party requests further time to make such application, the court may adjourn the hearing to give that party the opportunity to do so". This gives the parties some breathing space. Obviously, the court's power to adjourn may be exercised at a hearing where either an unreserved or a reserved judgment is handed down, and, in the latter event, whether or not the attendance of the parties has been excused. If the parties do not attend the request may be made by written submission.

In the above provisions there are several traps for the unwary. In ***Jackson v Marina Homes Ltd***, Sir Henry Brooke noted the difficulties that might arise (unless all involved have their wits about them) in a case where, at the end of a trial hearing (or of any hearing resulting in a judgment that may be appealable) the judge says he will reserve judgment and excuses the appearance of the parties at handing down. Sir Henry said (para.8) that if, in these circumstances, one of the parties wishes to seek permission to appeal should the decision go against him, "the judge should, after handing down judgment in an empty court, formally adjourn the hearing to give that party the opportunity to apply for permission to appeal". Then, "when he has granted or refused permission", the judge should exercise his powers under r.52.4(2) and make a direction extending the period within which Notice of Appeal should be filed at the appeal court. Sir Henry added, strictly speaking the judge should grant this extension at the time when he adjourns the hearing. Ordinarily, if the judge in the event refuses permission, he should grant an extension of a further 21 days. It would seem that, in these circumstances, "the date of the decision of the lower court" within r.52.4(2) is the date of the handing down hearing and not the date to which the hearing was adjourned (and at which the application for permission to appeal is disposed of).

It is apparent that, where a judge tells the parties that he intends to reserve judgment and that their attendance at handing down will be excused, it is wise for the parties to inform the judge then that, in the event of judgment going against their clients, they would wish to apply to him for permission to appeal. A wise judge, thus alerted, will then, at the unattended handing down hearing, adjourn the hearing for a short period to enable any such application to be made to him. It seems to be assumed that when a judge grants an adjournment in these circumstances he is acting under para.4.3B of ***Practice Direction (Appeals)*** (referred to above), but that cannot be quite right. Paragraph 4.3B speaks of the court having power to adjourn where a party requests further time to make an application for permission to appeal. To say that, where wise parties have informed the judge that, in the event of judgment going against their clients, they would wish to apply to him for permission to appeal, they have in effect made a kind of conditional request for adjournment under para.4.3B would be too contrived. The better view is that the wise judge is simply acting on his own initiative and exercising the general power to adjourn a hearing that all courts enjoy. Of course, before handing down the judge may have received a written application for permission to appeal from the losing party made by that party after receiving a copy of the draft judgment. Where the judge deals with that application at handing down, there is no need for an adjournment. Where he does not, and requires time to think further about it, there is. And where, having adjourned the hearing and having decided to refuse permission, for reasons explained above the wise judge (again acting on his own initiative) will give a direction under r.52.4(2) altering the 21 day period for filing of a Notice of Appeal in the appeal court.

It cannot be denied that too many of the provisions in CPR Pt 52 and in the practice direction supplementing that Part are convoluted or do not quite do the job intended. Part of the problem is that they were drafted with insufficient attention being paid to the great changes in modern practice relating to communications between courts and parties and to the handing down of judgments. In this electronic age, in this procedural context and in others, the traditional concept of "a hearing" has become outmoded and needs to be re-thought.

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