CIVIL PROCEDURE NEWS

Issue 5/2008 May 15, 2008

CONTENTS

THOMSON
SWEET & MAXWELL

In Brief

Cases

CINPRES GAS INJECTION LTD v MELEA LTD [2008] EWCA Civ 9, *The Times* February 29, 2008, CA (Sir Igor Judge, Jacob and Richards L.JJ.)

Doctrine of res judicata—scope of fraud exception

CPR r.3.4, Patents Act 1977 ss.7(2)(c), 12 and 37. Company (C) commencing proceedings under s.37 against individual's (L's) company (M) disputing M's ownership of patent. Judge dismissing claim on grounds of res judicata, but finding that L's employee (H) had perjured himself at earlier proceedings under s.12 brought by C against H and L. **Held**, allowing C's appeal, in the circumstances, the fraud exception to res judicata applied. Court expressing opinion that equitable bill of review procedure no longer extant. ***Odyssey Re (London) Ltd v O.I.C. Run-Off Ltd***, *The Times* March 17, 2000, CA, ref'd to. (See ***White Book 2008*** Vol.1 para.3.4.3, Vol.2 para.9A-175.)

EVANS v CIG MON CYMRU LTD [2008] EWCA Civ 390, January 18, 2008, CA, unrep. (Laws, Arden and Toulson L.JJ.)

Amendment of claim form—expiry of limitation period

CPR rr.3.4, 16.2 and 17.4, Limitation Act 1980 s.35. Claimant (C) issuing claim form in which, by error, the nature of the claim was stated as "loss and damage arising out of abuse at work". Particulars of claim supporting a case, not for abuse, but for personal injury arising out of accident. After expiry of limitation period, judge (1) granting D's application to strike out the particulars, and (2) dismissing C's application to amend claim form to accord with particulars. **Held**, allowing C's appeal, an amendment to correct such an error was not prohibited by r.17.4. (See ***White Book 2008*** Vol.1 paras 3.4.2, 16.2.1, 16.4.1 and 17.4.3.)

AL-RAWAS v PEGASUS ENERGY LTD [2008] EWHC 617 (QB), April 8, 2008, unrep. (Jack J.)

Enforcement of cross-undertakings—measure of damages

CPR rr.25.1(1)(f) and 25.1(1)(h). Claimant (C) giving cross-undertakings in damages in search and seizure orders and in freezing orders obtained in support of various foreign actions against several defendants (D). On D's application, court (1) discharging orders and awarding indemnity costs against C, (2) ruling that the undertakings should be enforced, and (3) directing an inquiry as to damages. D making claims for damages under various heads, including costs of lost management time, and general, aggravated and exemplary damages. **Held**, making awards of various amounts, (1) the assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the claimant and the defendant to the effect that the claimant would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction, (2) general damages may be awarded where orders have been wrongly obtained for the purpose of compensating the defendant for the consequences of the orders which cannot be claimed as special damages, (3) unless the particular facts make it appropriate as an exception, damages for emotional distress are not recoverable under a cross-undertaking in damages, (4) in the circumstances of this case, (a) in respect of the search and seizure orders the facts were sufficient to support an award of general damages, and the fact that the order was obtained by C's intentionally concealing from the court a material matter justified and award of aggravated damages, (b) in respect of the freezing orders, except in relation to one defendant, it was inappropriate to award any general damages, (5) subject to an exception, the undertakings in the prescribed forms for search and seizure orders and for freezing orders require claimants to accept liability for compensatory damages only, (6) the exception is where the claimant in carrying out a search order acted in breach of its terms or otherwise in a manner inconsistent with his solicitor's duties as an officer of the court, (7) as that exception did not apply in this case, the possibility of an award of exemplary damages did not arise. Principles upon which awards for lost management time should be made explained. ***Aerospace Publishing Limited v Thames Water Utilities LTD*** [2007] EWCA Civ 3; [2007] Bus L.R. 726, CA, ref'd to (See ***White Book 2008*** Vol.2 paras 15-28, 15-29 and 15-38.)

■ **COLLINS v GORDON** [2008] EWCA Civ 110, January 21, 2008, CA, unrep. (Sedley L.J. and Sir Paul Kennedy)

Vacating of trial date—"order of last resort"

CPR r.29.8, Practice Direction (The Multi-Track) para.7.4(6). In October 2003, patient (C) acting through Official Solicitor commencing personal injury claim arising out of accident on highway in 1997. In 1999, counsel (X) instructed to act for C and representing him thereafter. Defendant (D) admitting liability, valuing claim at £800,000, and making interim payments. C valuing claim at £6m. On October 18, 2007, Master directing parties to apply to Clerk of Lists by November 2, 2007, for an appointment to fix a date for trial of quantum in Trinity Term 2008. Accordingly, on November 1, 2007, but in absence of any representative of C (which absence was unexplained). Clerk fixing June 2, 2008, as date for start of trial (with an estimate of 12 days). On ground that X would be unavailable on that date, and that some of C's many expert witnesses would be unavailable for part of the expected trial period (thereby creating complications in the presentation of evidence), C applying to judge for trial date to be vacated. Judge dismissing application and refusing C permission to appeal. Single lord justice granting permission to appeal. **Held**, allowing appeal and fixing November 2008 as date for commencement of trial, (1) the conclusion reached by the judge was wholly wrong on the evidence available to him, (2) the statement in para.7.4(6) to the effect that the court will regard a postponement of trial as "an order of last resort" relates, not to the circumstance of this case, but to the situation where a party has failed to comply with case management directions. (See ***White Book 2008*** Vol.1 paras 29.7.1 and 29PD.7.)

■ **DUNLOP HAYWARDS (DHL) LTD v ERINACEOUS INSURANCE SERVICES LTD** [2008] EWHC 520 (Comm), April 1, 2008, unrep. (Field J.)

Addition of defendant—other parties making no claim against

CPR r.19.2. Subsidiaries of corporate group, a property consultant company (C1) and the purchasers (in December 2005) of C1's business (C2), bringing claim against insurance brokers (D). In December 2004, D retained by C1 to consolidate and renew professional indemnity insurance for whole group. D engaging other brokers (X) as sub-brokers to place the cover they had been instructed by C1 to procure. X placing primary layer of cover and, subject to a limiting condition, an excess layer. Upon facing professional negligence claims in relation to valuations made by their employee, claimants notifying excess insurers (Y). On ground that claims excluded by the limiting condition, Y denying liability. In their claim against D, claimants contending that D, by limiting the excess cover, had failed to fulfil their instructions. Claimants' rights of action against Y under the excess policy assigned to a building society (Z) (who were not a party to the proceedings). In their defence, D (1) disputing Y's position as to their liability to the claimants and (2) contending (a) that as a matter of construction, the liability was within the excess cover, alternatively (b) that the cover should be rectified. D bringing additional claim against X for indemnity or contribution. D applying under r.19.2 to have Y joined as defendants so that they would be bound by any decision in the action as to the true construction of the excess policy, and as to whether the policy should be rectified. **Held**, dismissing D's application, (1) no claim, whether in these proceedings or in any other action, had been made against Y seeking indemnity under the excess policy placed by X in respect of claims arising out of valuations for which the claimants were responsible, (2) further, in these proceedings, neither D nor any other party to the proceedings, was in a position to assert a claim against Y, (3) nevertheless, the court had jurisdiction under r.19.2(2) to add Y as an additional defendant, as it is not a pre-condition to the exercise of such power that an existing party must be able to bring a claim against the party sought to be joined, (4) however, in the exercise of discretion, it would not be desirable or appropriate to join Y because (a) D's rectification claim was weak, and (b) it was uncertain whether the holders of the right to make the construction claim against Y (i.e. Z) would indeed make it a when. (See ***White Book 2008*** Vol.1 para.19.2.2.)

■ **EXPERIENCE HENDRIX LLC v TIMES NEWSPAPERS LTD** [2008] EWHC 458 (Ch), March 11, 2008, unrep. (Warren J.)

Summary judgment on liability—Pt 36 offer—whether costs to be reserved

CPR rr.36.14 and 44.3, Practice Direction (Costs) para.8.5. In intellectual property claim relating to recordings, defendants (D) making offer to claimants (C) on basis that D (1) paid C a sum of money, and (2) undertook (a) not to distribute etc copies of the recordings in breach of C's rights, and (b) to destroy master and other copies of the material in its possession. C not accepting offer, but making informal counter-offer. C applying for summary judgment on liability. Judge granting application including (1) orders (a) for injunctive and declaratory relief, and (b) for delivery up of infringing material, and (2) to enable C to elect between (a) an inquiry as to damages, or (b) an account of profits, an order for disclosure. On C's application for costs, D's unaccepted offer revealed to judge (with actual sum offered redacted) and D contending that, in the light of that offer, the appropriate order was that costs should be reserved. **Held**, making order for costs and ordering interim payment of £90,000, (1) it was necessary for

C to obtain judgment on liability in order to proceed to an inquiry or account, (2) it could not be argued that it was only after quantum had been established that it would be known that the offer had been beaten, (3) C's claim was not only about money, as C had made clear that D's offer of destruction was not enough and delivery up (which was not offered by D) was required, (4) there was no reason for saying that, had D agreed to pay sum sought in C's counter-offer, C would have accepted it without the further relief sought. Observations on established practice in intellectual property cases affecting costs orders. ***Roache v News Group Newspapers LTD***, *The Times* November 19, 1992, CA; ***Island Records LTD v Tring International Plc*** [1996] 1 W.L.R. 1256; ***Brugger v Medicaid LTD*** [1996] F.S.R. 362, ref'd to. (See ***White Book 2008*** Vol.1 paras 36.14.1, 44.3.12, 44.3.15, 44PD.2.)

■ **EARL OF MALMESBURY v STRUTT AND PARKER** [2008] EWHC 424 (QB), March 18, 2008, 158 New L.J. 480 (2008) (Jack J.)

General rule as to costs—effect of obduracy and unreasonabless in mediation

CPR r.44.3. Property owners (C) engaging professional advisers (D) to advise on negotiations for lease of property for use as car park. C's claim against D for professional negligence vigorously defended. C's former solicitors (X) joined as Pt 20 defendants by D and subsequently made defendants by C. At trial on liability, judge (1) finding that negligence was established, although not to the extent alleged by C, (2) dismissing all claims against X and awarding them indemnity costs. Attempt by C and D to settle quantum by mediation unsuccessful. At trial of quantum, judge awarding C £915,000, excluding interest (as against maximum of £87m claimed). C's and D's costs put at £1.84m and £2.4m respectively. On question of costs, D submitting that there should be no order, because as C recovered a small proportion only of their claim they should not be treated as winners of the litigation. Amongst other things, D submitting that C had exaggerated their claim and that one consequence of that was that mediation of quantum was impossible. In awarding C 70 per cent of their costs in respect to the liability claim (subject to certain deductions) and 80 per cent in respect of the quantum claim, **held**, (1) the burden is on the unsuccessful party to show why the general rule of costs following the event should not apply, (2) the fact that the successful party acted unreasonably in refusing to agree to mediation is a matter to be taken into account, (3) a party who agrees to mediation, but then causes the mediation to fail by reason of his unreasonable position in the mediation, is in reality in the same position as a party who unreasonably refuses to mediate, (4) such conduct is a matter that the court can and should take into account, (4) in this case, mediation failed because of obduracy on both sides, (5) in such circumstances, it is not open to one party (here D) to claim that the failure to mediate should be taken into account in the order as to costs. Judge reviewing leading cases on circumstances in which court may or should depart from the general rule that the unsuccessful party should pay the successful party's costs (paras 37—47) and explaining principles on the effect on costs of refusals to agree to mediation (para.48). ***Halsey v Milton Keynes General NHS Trust*** [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002, CA, ref'd to. (See ***White Book 2008*** Vol.1 paras 44.3.8, 44.3.10 and 44.3.13, and Vol.2 para.14-5.)

■ **W.L. GORE and ASSOCIATES GMBH v GEOX SPA** [2008] EWHC 462 (Pat), March 5, 2008, unrep. (Lewison J.)

Case management order fixing trial date—application to vary

CPR rr.3.1(7) and 29.5. On September 26, 2007, company (C) issuing and serving on another company (D) claim form for claim to revoke four patents for processes for manufacturing shoe soles and for declarations of non-infringement. C not in business of manufacturing, but in licensing others to manufacture. On February 8, 2008, judge making consent order (with liberty to apply) containing timetable for progress of the action and including direction that trial should be fixed for date not before first mutually convenient date in or after November 2008. C, recognising that their licensees would not be able to meet their launch dates for the 2009 season if their claim against D had not been tried before November 2008, on February 21, 2008, applying to vary the order so as to provide for a trial date in July 2008. D opposing the application. **Held**, refusing application, (1) the only circumstances in which the court should exercise its power under r.3.1(7) to vary an order are (a) where the judge who made the order was misled, whether innocently or otherwise, as to the correct factual situation before him, or (b) where there has been some material change of circumstances, (2) here the judge had not been misled, (3) what had changed was C's appreciation of the commercial effects of what they had agreed to on the attitude of its licensees to committing themselves to taking up new licences, and that did not amount to a material change of circumstances, (4) further, account had to be taken of the effects that accelerating the trial date in this case would have on parties in other cases awaiting trial. ***Collier v Williams*** [2006] EWCA Civ 20; [2006] 1 W.L.R. 1945, CA; ***Lloyd's Investment (Scandinavia) Limited v Ager-Hanssen*** [203] EWHC 1740 (Ch), ref'd to (See ***White Book 2008*** Vol.1 paras 3.1.9, 29.2.2 and 29.5.1.)

KOSTIC v CHAPLIN [2007] EWHC 2909 (Ch), *The Times* January 11, 2008 (Henderson J.)

Contentious probate claim—costs payable out of estate

CPR rr.1.1(1) and 44.3(2). Son (C) bringing claim against beneficiaries (D) under his deceased father's (X) will on ground of lack of testamentary capacity. C succeeding in claim. On matter of costs, **held** (1) in a contentious probate claim (a) if a person who makes a will, or persons who are interested in the residue, have been "really the cause of the litigation", a case is made out for costs to come out of the estate, and (b) if "the circumstances lead reasonably to an investigation of the matter", the costs may be left to be borne by those who incurred them, (3) where principle (a) applies, an unsuccessful party may be awarded his costs out of the estate, (4) where principle (b) applies, the appropriate order is likely to be that each side will be left to bear its own costs, (5) in effect, these two principles may allow an unsuccessful party to submit that the general rule (stated in r.44.3(2)(a)) that costs should follow the event should not be applied and that a different order should be made (r. 44.3(2)(b)), (6) these principles have survived the CPR and are still valid, (7) in the circumstances of this case (a) a proportion of the costs incurred should be paid out of X's estate, (b) other costs should be borne by C and D, and (c) a further proportion should follow the event. ***Spiers v English*** [1907] P. 122, ref'd to. (See ***White Book 2008*** Vol.1 paras 1.3.4 and 44.3.8, and Vol.2 para.12-57).

LATIF v IMAAN INC. [2007] EWHC 3179 (Ch), December 17, 2007, unrep. (Briggs J.)

Application to set aside default judgment—whether applicant "directly affected"

CPR r.40.9. On December 6, 2007, in Chancery proceedings commenced in 2005, company (C) obtaining judgment against another company (D) for £8.9m. Judgment including declaration that, for purposes of enforcement, all D's assets, including particular London property, should be treated as subject to an equitable charge in C's favour. Beforehand, in separate Queen's Bench proceedings commenced in July 2007, trading entity (X) bringing claim against D to recover loan and, on September 18, 2007, obtaining default judgment. In addition, (1) on October 20, 2007, D purporting to grant X charge over the London property as security for the loan (being a charge capable of ranking in priority to C's beneficial interest arising out of the judgment in the Chancery proceedings), and (2) Queen's Bench Master making interim third party debt order in relation to the property. C contending that the loan and the charge were devices put in place by the principal defendant in the Chancery proceedings in order to protect assets vested in D from enforcement. Though not a party to the Queen's Bench proceedings, C applying for order setting aside X's default judgment obtained in those proceedings. **Held**, granting the application, (1) C was a person "directly affected" by the default judgment within the meaning of r.40.9, (2) C had sufficient interest in the matters recorded by the default judgment, namely the making of the loan and its non-payment, to intervene to have that judgment set aside, (3) the existence or non-existence of the loan was a highly material fact relevant to the validity or otherwise of X's charge over the property. Scope of r.40.9 explained. (See ***White Book 2008*** Vol.1 paras 40.9.1 and 40.9.5.)

LICHTER AND SCHWARZ v RUBIN [2008] EWHC 450 (Ch), *The Times* April 18, 2008 (Henderson J.)

Assets likely to be subject to freezing injunction—direction to provide information about

CPR r.25.1(1)(g). Owners of substantial London properties (C) commencing claim for account against person (D) who had acted as the managing agent of those properties for a period of 24 years, to January 16, 2008, when he was dismissed by C. C applying for an order directing D to provide information about assets which may be the subject of an application in the proceedings for a freezing injunction under (r. 25.1(1)(g)). **Held**, allowing the application in part, (1) the purpose of the interim remedy applied for is to deal with the situation where either (a) an application for a freezing injunction is on foot, or (b) where it is at least likely that there will be such an application, (2) in the latter event, a reasonable possibility (not necessarily amounting to a likelihood on the balance of probabilities), based on credible evidence, should be sufficient to satisfy the jurisdictional requirement, (3) once the court is so satisfied it has to decide whether, in the exercise of discretion, it was just and convenient in all the circumstances to make the order sought. ***Parker v C.S. Structured Credit Fund LTD*** [2003] EWHC 391 (Ch); [2003] 1 W.L.R. 1680, ref'd to. (See ***White Book 2008*** Vol.1 para.25.1.26.)

MILLS v BIRCHALL [2008] EWCA Civ 385, April 18, 2008, CA, unrep. (Mummery and Lawrence Collins L.JJ., and Munby J.)

Third party costs orders and receivers

CPR r.48.2, Supreme Court Act 1981 s.51. Company (C), by its receivers (R) appointed under a bank charge, bringing claim against individual (D) claiming damages for breach of contract. D making no application for order requiring C to provide security for his costs. At trial, judge rejecting C's claim. D applying for order for non-party costs against R (who were then joined as additional defendants in the proceedings). Judge dismissing the application (see ***Dolphin Quays Developments Limited v Mills*** [2007] EWHC 1180 (Ch); [2007] 4 All E.R. 503, outlined in *CP News*, Issue 7/2007). **Held**, dismissing D's appeal, (1) the judge had properly exercised his discretion in declining to make a costs

order against R, and there were no factors which justified interference by the Court of Appeal, (2) the absence of any impropriety or unreasonable conduct does not preclude the making of such an order, (3) the availability of security is an important factor and the exercise of discretion may be exercised more readily in favour of the successful litigant if security was not available at all, or where adequate security was not available. Relevant case law on liability of non-parties for costs generally, and on exposure of receivers and liquidators to such liability in particular, examined. ***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 ***White Book 2008*** Vol.1 para.48.2.1, and Vol.2 para.9A-203.)

RESEARCH IN MOTION UK LTD v VISTO CORPORATION [2008] EWCA Civ 153, March 6, 2008, CA, unrep. (Mummery and Jacob L.JJ. and Mann J.)

Parallel patent claims—whether English court first seised

CPR r.3.1(2)(f), Supreme Court Act 1981 s.49(3), Judgments Regulation Arts 28 and 30. Californian company (D) granted European patent. UK company (C) bringing opposition proceedings in EPO. C also (1) bringing proceedings in English court for declaration of non-infringement of that patent, and (2) later on commencing proceedings in an Italian court seeking (a) revocation of Italian parallel national patent and (b) declaration of non-infringement of that patent and other national patents (not including the UK patent). In C's English proceedings, but after commencement of C's Italian proceedings, D serving defence and counterclaim. In defence, D resisting declaration (in part) on ground that C had commenced the Italian proceedings. In counterclaim, amongst other things, D claiming damages on ground that C's claim was an abuse of process (a) of the Italian court or (b) of the English court. C applying for order staying D's counterclaim. In course of hearing, C undertaking to discontinue their claim. Judge granting application, and dismissing D's counterclaim insofar as it related to a claim for abuse of the process of the Italian court ([2007] EWHC 900 (Ch)). On appeal, **held**, dismissing appeal, (1) D's defence came after the commencement of the Italian proceedings and relied on C's taking those proceedings as part of the reason for their contending that the English court should refuse a declaration, (2) in the circumstances, it could not be contended (a) that, prior to C's discontinuance of their claim, the English court (and not the Italian court) was first seised of their counterclaim, and (b) that, therefore, the court had no jurisdiction to stay that claim, (3) the English and Italian proceedings were not "related" proceedings within the meaning of art.28(1). Court (a) explaining extent to which provisions in Judgments Regulation are not adequate for dealing with parallel claims involving intellectual property rights, and (b) commenting on tactic of party (C) worried about being sued for infringement, for purpose of preventing any immediate effective action being taken against them by the patent holder (D), bringing claim for declaration for non-infringement in a country whose legal system runs very slowly (e.g. Italy). ***Sario v Kuwait Investment Authority*** [1999] 1 A.C. 342, HL, ref'd to. (See ***White Book 2008***, Vol.1 para.3.1.7, and Vol.2 paras 5-277 and 9A-192.)

Statutory Instruments

CIVIL PROCEEDINGS FEES ORDER 2008 (SI 2008/053)

Revokes and consolidates the Civil Proceedings Fees Order 2004 (SI 2004/3121) as amended. Amends descriptions of, notes to, and amounts of certain fees, including Fees nos 1.4, 2.9, 3 and 8.10. Makes various amendments to provisions for determining whether a party is entitled to remission of a prescribed fee. In force May 1, 2008 (See ***White Book 2008*** Vol.2 para.10-1.)

BLOOD TESTS (EVIDENCE OF PATERNITY) (AMENDMENT) REGULATIONS 2008 (SI 2008/972)

Amend Blood Tests (Evidence of Paternity) Regulations 1971. Substitutes in several regulations and in Form 1 in Schedule expression "a protected party" for person "suffering from mental disorder" (and similar). Amend reg.6(2) and Pt III of Form 1 to remove the exception that a photograph is not required for a subject under the age of 12 months; reg.6(8) to require samples to be sent in tamper proof containers; reg.7(1) to require and permit dispatch of samples by tester by post "by recorded signed for delivery or international signed for delivery"; and reg.12(1) to increase sampler's fee to £37.90. Also substitutes reg.8A (Accreditation) to allow a body to be eligible for accreditation if it is accredited to the relevant standard by a body that is a signatory to an ILAC Recognised Regional Cooperation Body. Make consequential and formal amendments to Form 2 in Schedule. In force April 25, 2008 (See ***White Book 2008*** Vol.2 para.9B-1264+ et seq.)

In Detail

NON-APPELLATE RECOURSE AGAINST JUDGMENTS

The traditional common law rule was that a judgment remained in the control of the court that rendered it (the court of rendition) until the lapse of the court term. During that period the judgment was said to be in fieri and for the duration the court retained power to alter it in form or in substance. On the Chancery side, the same rule obtained but the time-scale was different. The decree became final and beyond challenge in the court of rendition, not at the end of the relevant court term, but when it was enrolled.

On both sides, special procedures for the "challenge of" or for having "recourse against" final judgments (whether given on the merits or by default) in the court of rendition (as distinct from procedures for taking an appeal against the judgment to a higher court) grew up. On the common law side there were the writs of *coram nobis* and *audita querela*, and on the equity side there were the bill of review and the bill "in the nature of a bill of review". Later on, in both jurisdictions, procedures (fairly generous in their effects) emerged enabling courts of rendition to set aside default judgments.

Among proceduralists, the extent to which courts of rendition (in particular, courts with first instance jurisdiction) should be able to grant relief from their own judgments has on occasion been a lively topic for debate. It exposes the clash of two principles: one that litigation should terminate within a reasonable time (finality of judgment), and the other that justice must be accorded to the parties. Obviously, in a given jurisdiction the matter is affected by the nature and extent of the relevant appeal jurisdiction. Where the appeal jurisdiction is broad and forgiving (as in England), the case for restricting the extent to which the court of rendition should have power to grant relief is stronger; where it is otherwise (as in most American jurisdictions), the case is weaker.

The principle that litigation must end is enforced by the doctrine of res judicata. Put broadly, that doctrine holds that a judgment upon the merits is an absolute bar to a subsequent action between the same parties (or those in privity) upon the same claim. In those legal systems where courts of rendition have jurisdiction to grant relief from their own final judgments the harsher effects of the doctrine are indirectly mitigated. In those legal systems that do not, those effects are not so mitigated with the result that the courts strain to find ways around the doctrine in order to ensure that justice is accorded to the parties and the authorities on res judicata become increasingly difficult to reconcile.

To a limited extent, despite the doctrine of res judicata, a party may attack a final judgment by bringing an independent action. The best known example is the action brought on the basis that the judgment was obtained by fraud. For obvious reasons, reliance on the opportunity to bring an independent action is likely to be less in those jurisdictions where courts of rendition have jurisdiction to grant relief from their own final judgments than in those where they do not.

In England, in modern times, there has been a revival of interest in the jurisdiction of courts of rendition to recall final judgments on the merits. The rule (traceable to the equitable rule mentioned above) is that a judgment becomes final when it is entered. Before that it may be recalled by the court (the "Barrell jurisdiction"). The relevant authorities, both ancient and modern, appear to be based on the premis that, after a judgment is entered, the court of rendition (whether a county court or the High Court) has no jurisdiction to grant relief. (See ***White Book 2008*** Vol.1 para.40.2.1.A.) Where the court of rendition is an appeal court, the court may have jurisdiction to "re-open" the appeal (see CPR r.52.17). That is a jurisdiction of very recent invention.

In the modern authorities on judgment recall (with the exception of a case about to be mentioned) one finds no suggestion that the common law writs of *coram nobis* and *audita querela*, or the equity bill of review and the bill "in the nature of a bill of review", still lurk in the bowels of English procedure, ready and able to spring to the rescue of a party done a serious injustice.

Where an aggrieved party has either abandoned or exhausted possible routes of appeal, two possible courses of action for obtaining relief are open to him. He may (1) bring a fresh action constructed in a manner which (at least arguably) will not be barred by the doctrine of res judicata, or (2) bring an independent action alleging fraud. The recent case of ***Cinpres Gas Injection LTD v Melea LTD*** [2008] EWCA Civ 9, *The Times* February 29, 2008, CA, provides an example. In this case the facts were that, in January 1991, a company (C) brought proceedings under s.12 of the Patents Act 1977 against two individuals (H and L) claiming that a patent application should proceed in its (and not in their) name. H, who had been employed, first by C and later by L, testified that he had made the invention after leaving C's employment. C failed in this claim. The patent was subsequently registered in name of L's company (M) with H named as sole inventor. Much later on, H told C that he had perjured himself in the s.12 proceedings. In

November 2003, C commenced proceedings under s.37 of the 1977 Act against M disputing M's ownership of the patent. At trial, the judge (1) found (a) that H had indeed perjured himself at the earlier proceedings, but (b) L did not know that at the time, (2) held that, by virtue of the decision in those proceedings, C's claim was res judicata, and (3) dismissed the claim accordingly ([2006] EWHC 2451 (Ch)).

The Court of Appeal (Sir Igor Judge, Jacob and Richards L.JJ.) allowed C's appeal. Put shortly, the Court held (1) a party to later proceedings may not have the benefit of the doctrine of res judicata in those proceedings where a judgment in earlier proceedings between the same parties and raising the same cause of action was obtained by the fraud of that party, (2) for the exception to apply, the fraud must be the fraud of the party, or procured by him; perjury by a "mere witness" is not enough, (3) in this case, H was a party to the earlier (s.12) proceedings, and not a mere witness, (4) further, in the circumstances, H's evidence in those proceedings should be regarded as that also of L, and H's fraud as being adopted by him, (5) accordingly, therefore, the fraud exception applied and C's s.37 claim did not fail by operation of the doctrine of res judicata.

An interesting feature of this case is that the counsel for the appellant advanced the bold argument that the former equitable jurisdiction to set aside a decision of a court of equity by the bill of review procedure still existed and was applicable in this case. As the Court of Appeal held that C's claim was not barred by the res judicata doctrine it was not necessary for the Court to decide these points. However, as they had been fully argued, the Court dealt with them (paras 78–104). The Court concluded (with some reluctance) that the jurisdiction to grant relief by way of bill of review no longer existed. The Court accepted the submission of counsel for the defendants that it was not open to the Court to hold that there was any wider rule for defeating res judicata than through the fraud exception (***Odyssey Re (London) LTD v O.I.C. Run-Off LTD*** [2000] EWCA Civ 71, March 17, 2000, CA, unrep.).

The Court said (para.100):

> "We have to say that we are not entirely happy with the position. It would make for better justice in principle for a prior decision to be impugnable on the grounds for which a bill of review once lay, namely that there was fresh evidence not discoverable by reasonable diligence, which 'entirely changes the aspect of the case' (Lord Cairns phrase in ***Phosphate Sewage v Molleson*** (1879) 4 App. Cas. 801). That appears to be the rule (or something like it) in Scotland, as noted by Lord Keith [in ***Arnold v National Westminster Bank***, [1991] 2 A.C. 93, H.L. at p 104]. No one suggests that the Scottish courts are markedly more burdened than those in England by attempts to re-litigate cases already decided. Both countries have their share (more than they would like) of such cases but the different rules do not, so far as we know, cause any significant difference between England and Wales on the one hand and Scotland on the other in either the number of such cases or their outcomes. Similarly the somewhat more liberal rule clearly applies in cases of 'issue estoppel' … without causing a mass of inconsistent judgments."

The Court added (para.102): "It is not necessary to say more about this point now other than that the whole subject of re-opening earlier decisions … could do with clarification."

The question is, to what extent should courts of rendition have power to circumvent the principle of finality of judgments for the purpose of preventing inequity in individual cases? Striking the balance is difficult enough where judgments in personam are involved; it is more difficult where (as in the *Cinpres* case) judgments in rem are involved.

Correcting errors in claim form

In ***Evans v Cig Mon Cymru LTD*** [2008] EWCA Civ 390, January 18, 2008, CA, unrep., the facts were that, within the primary limitation period, the claimant (C) commenced proceedings against his former employers (D) by issuing a claim form. In that claim form (as required by r.16.2(1)) the nature of the claim was stated, and the remedy was specified, as "loss and damage arising out of abuse at work". Within the time limit fixed by r.7.5, C served on D by post the claim form, the particulars of claim (required to be served by r.7.4) and a medical report. The letter, the particulars and the report all made and supported a case, not for abuse, but for personal injury arising out of accident.

D applied under r.3.4 for an order striking out the particulars of claim on the ground that they were irrelevant to the claim made in the claim form. Paragraphs (a) and (b) of r.16.2(1) state that the claim form must contain a concise statement of the nature of the claim and specify the remedy which the claimant sees. C's claim form complied with that provision. Paragraph (a) of r.16.4(1) states that particulars of claim (required to be served by r.7.4) must include "a concise statement of the facts on which the claimant relies". D's contention was that C's particulars of claim did not comply with that provision. The "nature of the claim" as stated in the claim form was for abuse, the "statement of the facts" set forth in the particulars of claim related to a different claim. Put shortly D's argument ran: (a) r.3.4 states that the court may strike out "a statement of case" if it appears that it "discloses no reasonable grounds for bringing

the claim", (b) in this context (and others) "a statement of case" includes "particulars of claim" (see r.2.3(1)); (c) C's particulars disclosed no reasonable grounds for bringing the claim as identified in the claim form; (d) therefore the particulars should be struck out.

As would be expected, C applied to amend the claim form to substitute "of an accident" for "of abuse". It was common ground that C had made a mistake and that, before the claim form was issued, D were aware that the claim against them was for personal injury arising out of accident. They were also aware that, at an earlier stage, C was contemplating bringing against D a claim in respect of alleged bullying at work but had subsequently decided not to pursue that claim (at least not immediately). The reasons for the mistake were clear to all.

When this case got to the Court of Appeal, Toulson L.J. said that in circumstances such as those outlined above, a court would not strike out a claimant's particulars of claim under r.3.4(2)(a); that is to say, in such circumstances a court would not exercise its discretion under that provision in favour of a defendant. The proper course would be to dismiss an application to strike out the particulars and to allow the amendment of the claim form so that there was no mismatch between the "concise statement of the nature of the claim" required by r.16.2(1)(a) to be contained in the claimant's claim form, and the "concise statement of the facts on which the claimant relies" required by r.16.4(1)(a) to be included in the claimant's particulars of claim.

However, in this case, the circumstances were not quite the same as those outlined above. The position was that, between the time when C issued his claim form and before it was served on D together with the particulars of claim, the primary limitation period relevant to C's accident claim had expired. This (so D contended) brought into play r.17.4 (Amendments to statements of case after the end of a relevant limitation period). As is well known, that rule (implementing the Supreme Court Act 1981 s.35) severely restricts the circumstances in which a court can allow an amendment to a "statement of case" having the effect of adding or substituting a "new claim". In terms, none of those circumstances applied in C's favour. Accordingly, when the applications of D and C came before the district judge, the judge accepted D's submissions and (1) held that the amendment sought by C could not be permitted under r.17.4, as to allow it would be to allow C to substitute a new claim, and (2) dismissed C's application and allowed D's application under r.3.4(2)(a) striking out C's particulars of claim. A circuit judge dismissed C's appeal. The Court of Appeal granted C permission to make a second appeal, and allowed his appeal.

In giving her reasons for allowing the appeal and reinstating C's claim, Arden L.J. stated that the crucial point was what was meant by the expression "abuse at work" in C's claim form. The usual rules of interpretation should be applied. Her ladyship explained (para.28):

"The claim form is a unilateral document which sets out the cause of action which the claimant claims to have and wants to rely upon. It must be interpreted objectively -- that is, by reference to the words according to their objective meaning. On the other hand, account must be taken of the factual matrix. That matrix would include communication between the parties made before or at the same time as the service of the claim form."

Her ladyship added (para.30):

"In my judgment, on the ordinary rules of interpretation, the court would say that the words "abuse at work" in a claim form are an obvious clerical error which can be corrected, as a matter of interpretation, to accord with their objective meaning in the context or in the light of the factual matrix—namely, accident at work."

Toulson L.J. summarised his reasons for allowing the appeal as follows (para.26):

> "In my view the just approach is to look at the totality of the documents served. These documents together set out the claimant's pleaded case. There was an obvious mismatch, but in asking whether the proposed amendment was, in truth, an amendment to raise a new cause of action or merely to clarify an internal inconsistency in the pleaded case, it is proper to look at the pleaded case as a whole. When one does so, it is clear, in my judgment, that what was sought to be done by the subsequent application to amend was not, in substance, to raise any new claim at all, but merely to correct an obvious formal error."

Both lord justices characterised C's mistake as "a clerical error", and both expressly rejected the argument that an amendment to correct such an error was prohibited by r.17.4.

Laws L.J. agreed with both judgments.

Appeals raising issues as to whether claim forms or other statements of case may be amended after limitation periods have expired are quite common in circumstances where it appears that mistakes have been made. It would not be surprising if the approach adopted by the Court in this case is much-relied upon in the future.

Civil Proceedings Fees

With effect from May 1, 2008, the Civil Proceedings Fees Order 2008 (SI 2008/1053) revokes and replaces the Civil Proceedings Fees Order 2004 (SI 2004/3121) (see ***White Book 2008*** Vol.2 para.10-1, p.2393). The structure of the new Order is the same as that of the former Order. There are three Schedules: Sch.1 (Fees to be taken), Sch.2 (Remissions and part remissions), and Sch.3 (Revocations). The text of the Order remains largely the same, but numerous minor drafting amendments have been made. The changes brought about by the new Order are explained below.

Schedule 1 (Fees to be taken)

The structure of the fees as given in Column 1 of Sch.1, and the amounts of the several fees to be taken, as listed in Column 2 of that Schedule remain the same, subject to a few exceptions.

Before noting them it should be pointed out that, in ***White Book 2008***, in relation to Fee 1.1 and Fee 1.3 (see Vol.2, para.10-12, p.2395), certain consecutive amounts given in Column 2 are incorrect, as they do not reflect amendments previously made by the Civil Proceedings Fees (Amendment) (No.2) Order 2007 (SI 2007/2801) (see CP News Issue 9/2007). In relation to Fee 1.1, £65, £75 and £85 should be substituted for £60, £70 and £80. And in relation to Fee 1.3, £60, £70 and £80 should be substituted for £65, £75 and £85.

The changes to the description of fees, notes on fees, and the amount of fees In Sch.1 made by the recent Order affect Fees 1.4, 2.9, 3, and 8.10.

Fee 1.4 (On starting proceedings for the recovery of land) (***White Book*** Vol.2, p. 2395) now stipulates a fee of £400 where proceedings are started in the High Court and, except where they are started using the Possession Claims Online website (where the fee remains at £100), £150 when started in a county court.

The description of Fee 2.9 (***White Book*** Vol.2, p. 2401) is expanded making it clear that it includes an application to suspend a warrant of possession.

Fee 3 is amended to include applications made under the Companies Act 2006 (***White Book*** ibid).

The note to Fee 8.10 (On a request for an order to recover a sum that is a specified debt) (***White Book*** Vol.2, p.2406) is amended by the addition of "or a witness statement" after "statutory declaration". This reflects the fact that CPR Pt 75 now provides for witness statements instead of statutory declarations to be filed with the court in enforcement proceedings relating to parking contraventions, where permitted by any enactment.

Schedule 2 (Remissions and part remissions)

This Schedule replaces Sch.1A of the 2004 Order (see ***White Book 2008***, Vol.2 para.10-14, p. 2409). This Schedule applies for the purpose of ascertaining whether a party is entitled to a remission or part remission of a fee prescribed by the Order. The text of the Schedule has been tidied up and (as explained immediately below) a few substantial changes made.

The definition of "child" in para.1(1) is amended. Previously the definition was: "a child of the party, living in his household, under the age of 18". The amended definition is: "a child or young person in respect of whom a party is entitled to receive child benefit in accordance with section 141, and regulations made under section 142, of the Social Security Contributions and Benefits Act 1992".

Paragraph 3 sets out the gross annual income, having regard to the number of children that the party has, for the purposes of determining whether a fee is payable by a party under the Order (see ***White Book*** Vol.2, p.2411).

The table in para.3(1) is as follows:

Column 1 *Number of children of party paying fee*	*Column 2* *Single*	*Column 3* *Couple*
no children	£12,000	£16,000
1 child	£14,735	£18,735
2 children	£17,470	£21,470
3 children	£20,205	£24,205
4 children	£22,940	£26,940

Paragraph 3(2) is amended so as to increase (from £2,470 to £2,735) the amount allowable for each additional child where the party paying the fee has more than 4 children.

Paragraph 5(3) makes provision for the calculation of a party's disposable monthly income (see ***White Book 2008*** Vol.2, p.2412). This provision is amended so as to increase the amounts that may be deducted from a party's gross monthly income for living expenses. The amount that a party may deduct rises from £279 to £296, the amount for each child of the party rises from £198 to £228 and the amount that may be deducted if the party has a partner rises from £142 to £150.

Guideline Figures For The Summary Assessment Of Costs

Appendix 2 of the Guide to the Summary Assessment of Costs contains guideline figures for hourly rates for solicitors. The current rates expired on December 31, 2007. The Senior Costs Judge announced new rates (representing an increase of 4 per cent to keep them in line with the average earnings in private sector services) to take effect from January 1, 2008.

Accordingly, the figures in para.48.49 of Vol.1 of ***White Book 2008*** (pp.1367 to 1369) for the four grades of fee earner (A to D) in the various bands and in the several London locations should be altered as follows:

	A	B	C	D
Band One (p.1367):	203	180	151	110
Band Two (p.1368):	191	168	139	105
Band Three (p.1369):	174	156	133	99
City of London	396	285	219	134
Central London	304	231	189	121
Outer London	219-256	165-219	158	116

The Senior Costs Judge has explained that the Advisory Committee on Costs is currently conducting a review of hourly rates with a view to issuing a completely new set of rates will be issued in mid-2008.

EDITOR: **Professor I. R. Scott**, University of Birmingham,
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

220380