CIVIL PROCEDURE NEWS

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Limitation Act 1980 ss.11 and 33. In two unrelated personal injury claims, claim forms issued after expiry of limitation period fixed by s.11. In each case (1) liability not in issue, and (2) application made for direction under s.33(1) disapplying s.11. In one case, judge granting s.33 application, in the other not. **Held**, dismissing defendant's appeal in former case and allowing claimant's appeal in the latter, the making of a direction under s.33, which would restore the defendant's obligation to pay damages, is only prejudicial to him if his right to a fair opportunity to defend himself has been compromised. ***Thompson v Brown*** [1981] 1 W.L.R. 744, HL; ***Hartley v Birmingham City Council*** [1992] 1 W.L.R. 968, CA, ref'd to. (See ***Civil Procedure 2008*** Vol.2 paras 8–92 and 8–93.)

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CPR r. 23.10. In action for damages, upon the defendant's (D) persistent failure to comply with disclosure order, judge making finding of contempt and imposing fine. For purpose of enforcement, on December 13, 2002, without notice claimant (C) obtaining order permitting him to issue writ of sequestration, not only over D's assets, but also over assets of company (X Co), believed by C to be owned and controlled by D. On July 21, 2004, Court of Appeal allowing D's appeal against committal order and, as a consequence, setting aside sequestration orders. X Co bringing claim against C for trespass and conversion claiming damages for the actions of the sequestrators for whom C were legally responsible. By way of defence, C pleading judicial authority. Judge holding (1) that the December 13 order had been irregularly obtained, (2) that the court had a discretion to withdraw retrospectively the judicial authority protection otherwise afforded C whilst the order subsisted, (3) that, in the circumstances, that discretion should not be exercised. Court of Appeal dismissing X Co's appeal. Court's power to set aside irregular orders obtained without notice explained. ***Nelson v Clearsprings (Management) Ltd*** [2006] EWCA Civ 1252; [2007] 1 W.L.R. 962, CA, ref'd to. (See ***Civil Procedure 2008*** Vol.1, paras 23.10.2, 25.3.5 and 52.4.4, and Vol.2 para.9A–68.)

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CFA when liability admitted—reasonable success fee

CPR r.44.5, Courts and Legal Services Act 1990 s.58, Conditional Fee Agreements Regulations 2000 regs 2 and 3, Practice Direction (Costs) paras 11.7 and 11.8, SCCO Guide Sect.20. On July 29, 2000, passenger (C) in car severely injured when car driven by her brother (D) collided with a tree. C intimating claim against D and, on February 19, 2001, D's insurers admitting liability on his behalf. C then instructing new solicitors (S) and, on May 18, 2001, C entering into CFA with S. CFA modelled on the Law Society's then standard form, and providing for success fee of 98% (including 15% to cover the cost of funding the proceedings). In July 2003, C issuing claim form. Claim settled for £680,000 plus costs. Base costs agreed at £92,500 plus VAT. On detailed assessment, D challenging calculation of the success fee and district judge allowing 70%. On D's appeal, circuit judge reducing this to 50%. On D's further appeal, **held**, allowing the appeal and substituting a success fee of 20%, (1) if, at a detailed assessment, a receiving party cannot show that the success fee has been calculated in a way which reasonably reflects the risks that have been assumed, he will not be able to satisfy the costs judge that it is recoverable, (2) there is nothing unreasonable in entering into a CFA when liability has been admitted, provided that a proper assessment is made of the inevitably much reduced risk of failure, (3) in this case, S's calculation of the success fee was flawed in certain respects, (4) for example, S over-estimated the risks of C failing to recover damages and of C rejecting and failing to recover more than a Pt 36 offer, (5) given her very serious injures, it was difficult to see how C could have failed to recover substantial damages, (6) in overall terms, a reasonable assessment of the risks to S would be 17%, yielding a success fee of 20%. Court making observations on use of CFAs where liability admitted, and on effect of CFA clauses anticipating solicitors' exposure to risks in event of client acting on their advice not to accept Pt 36 offer. (See ***Civil Procedure 2008*** Vol.1 para.44PD.5, and Vol.2 paras 1C–121, 7A–5, 7A–28, 7A–29 and 7A–58.)

■ **BREWIS v HEATHERWOOD AND WREXHAM PARK HOSPITALS NHS TRUST** [2008] EWHC 2526 (QB), October 20, 2008, unrep. (Coulson J.)

Interim payment order application—periodical payments order predictable

CPR rr.25.6, 25.7 and 41.7, Supreme Court Act 1981 s.32, Damages Act 1996 s.2(1)(a). Seriously disabled cerebral palsy victim (C) bringing negligence claim against hospital (D). D admitting liability and judgment entered for C with damages to be assessed. D making interim payments totalling £168,000. C (now aged seven) requiring 24 hour care and living in rented accommodation which had become unsuitable. Principally for purposes of enabling a single storey property to be purchased and adapted for C's particular needs, C applying (under r.25.6) for a further interim payment (IPO). Updated Schedule of Loss indicating a total damages claim of just over £5.6m, including a claim for accommodation, etc. in the sum of £560,000. **Held**, granting the application, (1) when making or approving an award for damages in the circumstances to which s.2(1) applies, a judge is required, when determining whether the award (or part of it) should be made in the form of an order for a lump sum or for periodical payments (PPO), to have regard to all the circumstances of the case, and in particular the form of award which best meets the claimant's needs (r.41.7), (2) when considering an application for an IPO, the court must not make an order for more than a reasonable proportion of "the likely amount of final judgment" (r.25.7(4)), (3) it is conceivable that (in a given case) the granting of an IPO might affect the judge's ability in giving final judgment at trial of quantum to get the balance right between the lump sum element of any damages award and the PPOs that may be necessary, (4) the correct approach on a r.25.6 application is for the court (in addition to having regard to the principles taken from the authorities applicable to IPOs generally) to identify what is likely to be awarded for general damages, past losses and interest, and then to predict the likely capitalisation of the remainder of the claims, (5) in carrying out this task, the court must endeavour to ensure that the amount of the IPO does not fetter the trial judge exercise of discretion under r.41.7, (6) further, the court should pay particular regard to the applicant's specific needs and the requirement that damages be paid as soon as reasonably practicable, (7) in the circumstances of this case, a reasonable estimate of the likely lump sum to be awarded was £1m and an IPO in the sum of £880,000 to meet C's immediate needs was appropriate. Interplay between the effects (pre-trial) of r.25.7(4) and (at trial) of r.41.7(a) considered and explained in the light of recent first instance authorities. ***Thompstone v Tameside and Glossop Acute Services NHS Trust*** [2008] EWCA Civ 5; [2008] 1 W.L.R. 2207, CA; ***Mealing v Chelsea & Westminster NHS Trust*** [2007] EWHC 3254 (QB), October 24, 2007, unrep.; ***Braithwaite v Homerton University Hospitals NHS Foundation Trust*** [2008] EWHC 353 (QB), ref'd to. [*Ed.*: see also subsequent case of ***Pitcher v Headstart Nursery Limited*** [2008] EWHC 2681 (QB), November 7, 2008, unrep.] (See ***Civil Procedure 2008*** Vol.1 para.25.7.1, and Vol.2, paras 3F–48, 9A–103 and 15–100.)

■ **CITY OF LONDON v SANCHETI** [2008] EWCA Civ 1283, *The Times*, December 1, 2008, CA (Laws, Richards and Lawrence Collins L.JJ.)

Application to stay proceedings pending arbitration—parties to agreement

CPR rr.3.1(2)(f) and 62.3, Arbitration Act 1996 s.9, UK–India Bilateral Investment Treaty Art.9. Indian national (D) taking assignment of lease under which lessors (C) and lessee submitted to non-exclusive jurisdiction of English court. C and D failing to agree renewed rent. After lease had come to an end, and D had vacated the premises, on August 9, 2006, C bringing county court claim for arrears of revised rent which D had refused to pay. D defending the claim, principally on the ground that C had not been entitled to appoint a surveyor to determine the increased rent. Previously, in May 2005, D serving notice of dispute on UK under the Treaty and notifying arbitration under Art.9. In this dispute, D making allegations against several entities. These including allegation that, as C's tenant, he had been subject to harassment and racial discrimination by C. District judge refusing D's application under s.9 for a stay of C's claim pending the determination of the dispute under the BIT arbitration. Circuit judge dismissing appeal. D renewing application for permission to make second appeal to Court of Appeal. **Held**, granting permission but dismissing appeal, (1) it was conceivable that circumstances might arise where the UK was responsible under the Treaty for the acts of a local authority (such as C), (2) the UK were parties to the arbitration agreement under the Treaty, but C were not, (3) a stay under s.9 may be obtained against a party to such agreement, or against a person claiming through or under a party, (4) but it may not be obtained against an entity that had a mere legal or commercial connection. Relationship between international arbitration under a bilateral investment treaty and national court proceedings explained. ***Roussel-Uclaf v G. D. Searle and Co Ltd*** [1978] 1 Lloyd's Rep. 225, ref'd to. (See ***Civil Procedure 2008*** Vol.1 para.3.1.7, and Vol.2 paras 2E–107 and 9A–177.)

■ **FARM ASSIST LTD v SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD & RURAL AFFAIRS** [2008] EWHC 3079 (TCC), December 12, 2008, unrep. (Ramsey J.)

Inspection of documents withheld—legal advice privilege—whether implied waiver

CPR r.31.3(1)(b). In proceedings brought by company (C) against DEFRA (D), C contending that an agreement entered into as a result of the settlement of a dispute between the parties should be set aside for economic duress. Parties agreeing that there should be standard disclosure by C of certain documents. C contending that they had the right to withhold inspection of certain other documents, in particular documents containing legal advice received by its officers before and after the settlement. D contending that, as C had put in issue the state of mind of one its officers (an issue directly relevant to the allegation of duress), there was an implied waiver of legal advice privilege (LAP). Judge giving directions for trial of that issue. **Held**, (1) the possible circumstances in which there may be an implied waiver of LAP are (a) where the nature of the proceedings themselves amount to an implied waiver, and (b) where the implied waiver is derived from a particular allegation raised in the proceedings, (2) C's waiver of LAP could not be implied, because (3) in English law, implied waiver arising from particular proceedings, or pleading allegations in those proceedings, is limited to proceedings between solicitor and client, (4) the test for implied waiver is based neither on general principles of fairness nor on relevance, (5) whilst there may be an implied waiver of LAP in proceedings between solicitor and client because of unfairness, that does not mean that wherever there is unfairness there will always be an implied waiver. ***Lillicrap v Nalder*** [1993] 1 W.L.R. 94, CA; ***Paragon Finance Plc v Freshfields*** [1999] 1 W.L.R. 1183, CA; ***Hayes v Dowding*** [1996] P.N.L.R. 578, refd to. (See ***Civil Procedure 2008*** Vol.1 para.31.3.27.)

■ **FOOTBALL ASSOCIATION PREMIER LEAGUE LTD v QC LEISURE** [2008] EWHC 2897 (Ch), November 13, 2008, unrep. (Kitchin J.)

Reference to ECJ—subsequent joinder of new parties

CPR rr.1.1, 19.2 and 68.2, EC Treaty Art.10. Licensors of rights to broadcast football matches, a Greek sub-licensee and their owner, bringing three separate actions (regarded by them as test cases) against three separate defendants dealing in or using "foreign decoder cards". Claimants alleging infringement of their rights under the Copyright Designs and Patents Act 1988 s.298, and of the copyrights in various films, etc. embodied in match coverage. Contentions of parties requiring consideration of a host of factual and legal issues, including a number of provisions of Community law. Judge ordering that certain questions should be referred to the ECJ for preliminary ruling ([2008] EWHC 1411 (Ch)). Subsequently, five other parties, including the holders of an exclusive licence for UK live broadcasts, applying under r.19.2 to be joined as co-claimants. These applications resisted by the defendants. **Held**, granting the applications, (1) the ECJ's preliminary reference procedure does not permit interventions by private parties, (2) the only parties entitled to participate (by submitting written observations or appearing at the oral hearing) are the parties to the action pending before the national court, (3) the question whether or not a person is a party must be decided according to the criteria of the national law, (4) under r.19.2(2)(a) a person may be added as a new party if it is desirable to add the new party so that the court can resolve all issues in dispute in the proceedings, (5) under that provision it does not have to be shown that there is an issue involving the new party and an existing party, (6) each applicant offered a perspective on the fundamental law and policy questions to which the reference gave rise which was different from that of the other applicants and the existing parties, (7) in the circumstances the applicants satisfied the jurisdictional requirements imposed by r.19.2(2), as it was desirable to add them as new parties because such joinder would assist the court to resolve those questions, (8) bearing in mind the duty of sincere co-operation enshrined in Art.10, and the overriding objective, it was appropriate for the court to exercise its discretion to join the applicants on terms, including terms designed to mitigate procedural disadvantages accruing to the defendants as a result of the joinder. ***Casagrande v Landeshauptstadt München (Case 9/74)*** [1974] E.C.R. 773; ***R. v Minister of Agriculture, Fisheries and Food, Ex p. S.P. Anastasiou (Pissouri)*** [1994] C.O.D. 329, ref'd to. (See ***Civil Procedure 2008*** Vol.1 paras 19.2.2 and 68.0.2, and Vol.2 paras 11–6 and 12–59.)

■ **J MURPHY & SONS LTD v JOHNSTON PRECAST LTD** [2008] EWHC 3104 (TCC), December 16, 2008, unrep. (Coulson J.)

Whether costs order should be issue-based—rate of interest on defendant's costs

CPR rr.36.14 and 44.3. Building contractors (C) bringing proceedings against other contractors (D) for breach of contract and /or breach of duty to recover £4.17m, agreed as the appropriate figure for damages. During pre-action protocol process, D making "drop hands" offer to C, and, six weeks before trial, D making Pt 36 offer of £350,000 together with costs. At trial, C wholly failing on contract terms, breach, and causation in fact and law. On the matter of costs, **held** (1) D were the successful party, and the general rule that costs should follow the event should not be displaced by an issue-based costs order, (2) whenever a losing party seeks an issue-based costs order it is not necessary for the court to

inquire whether there was any discrete issue raised by, or matter pleaded by, the successful party which added to the length of the trial sufficiently to necessitate displacement of the general rule, (3) the mere fact that the successful party was not successful on every last issue cannot, of itself, justify an issue-based order, (4) on the basis of the court's power under r.44.6(1)(g), it was appropriate to order C to pay interest on C's costs incurred from the date of commencement to trial at the rate of base rate plus 1%, (5) although, in certain circumstances, interest on costs recoverable by a successful claimant might be ordered at an enhanced rate, the court had no power under the CPR to order interest at an enhanced rate on a successful defendant's costs. ***Fleming v Chief Constable of Sussex*** [2004] EWCA Civ 643; [2005] 1 Costs L.R. 1, CA; ***Powell v Herefordshire Health Authority*** [2002] EWCA Civ 1786; [2003] 3 All E.R. 253, CA; ***Bim Kemi AB v Blackburn Chemicals Limited*** [2003] EWCA Civ 889; [2004] 2 Costs L.R. 201, CA; ***Nova Productions Limited v Mazooma Games Ltd*** [2006] EWHC 189 (Ch), February 8, 2006, unrep.; ***Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspden & Johnston*** [2002] EWCA Civ 879, June 12, 2002, CA, unrep., ref'd to. (See ***Civil Procedure 2008*** Vol.1 paras 36.14.1, 40.8.11, 44.3.14 and 44.4.3.1).

- **M. (A CHILD) (NON-ACCIDENTAL INJURY : BURDEN OF PROOF), IN RE** [2008] EWCA Civ 1261, *The Times*, December 16, 2008, CA (Sir Mark Potter P., Arden and Wall L.JJ.)

Reserved judgment—clarification of reasons—judgment remitted by Court of Appeal

CPR Pt 40 and r.52.10, Practice Direction (Reserved Judgments) para.2, Children Act 1989 s.39. At hearing in proceedings under Pt IV of the 1989 Act, local authority inviting circuit judge to make findings of fact (including circumstances of child's injuries) sufficient to satisfy the threshold criteria under s.39. Circuit judge reserving judgment and, before handing down written judgment, making it available to counsel. At handing down, judge making orders and refusing mother permission to appeal. Single lord justice granting permission to appeal on ground that the judge had made certain inconsistent findings. **Held**, (1) the passage in the judge's judgment upon which the appeal was based was capable of several different meanings, (2) in the circumstances it was appropriate to remit that paragraph to the judge for her to reconsider it in the light of the court's judgment and for her to explain in writing what she meant by it. Court stressing that the positive duty that counsel has in civil proceedings to raise with the judge at handing down, not only any alleged defect in the judge's reasoning, but also any genuine query or ambiguity which arose in his written judgment, applies also to counsel appearing in family proceedings. ***English v Emery Reimbold and Strick*** [2002] 1 W.L.R. 2409, CA; ***In re T. (A Child) (Contact : Alienation : Permission to Appeal)*** [2003] 1 F.L.R. 531, ref'd to. (See ***Civil Procedure 2008*** Vol.1 paras 40.2.1.B and 52.11.5.)

- **TANKARD v JOHN FREDERICKS PLASTICS LIMITED** [2008] EWCA Civ 1375, December 11, 2008, CA, unrep. (Sir Anthony Clarke M.R., Dyson and Jackson L.JJ.)

CFA–interests of solicitors–duty to inform client

CPR r.44.4, Conditional Fee Agreement Regulations 2000 reg.4. Solicitors (S) joining scheme under which they had (a) a right to have clients with personal injury claims referred to them, and (b) access to services facilitating the construction of conditional fee agreements (CFAs) between them and clients. Under the scheme, S agreeing that, where a CFA was entered into, any ATE insurance would be effected on a policy offered by the scheme. S's scheme membership fee capable of rebate over period according to the number of such policies issued. Before November 1, 2005, S entering into CFA with client (C) for pursuing personal injury claim against insured defendants (D) and informing C that they had no interest in recommending the scheme's ATE policy. C succeeding in claim without commencing proceedings. In costs only proceedings, district judge (1) rejecting D's submission that, on grounds that S had an interest in recommending the policy, the CFA was unenforceable, (2) making order for costs against D. Court of Appeal granting permission for D's appeal to be heard by the court as a first appeal with linked appeals raising the same issue. **Held**, dismissing appeal, (1) a CFA that failed to comply with the Regulations, including reg.4(2)(e)(ii), is unenforceable against the claimant, as the solicitor's client, and the claimant cannot recover the profit costs and success fee as party and party costs from the defendant, (2) amongst other things, reg.4(2)(e)(ii) imposes on a legal representative who recommends a particular contract of insurance for financing costs the responsibility of informing the client that the representative has an interest in doing so, (3) the purpose of reg.4(2)(e)(ii) is to ensure that the legal representative acts and gives advice independently of his own interest, (4) for these purposes, a legal representative has an interest disclosable to the client under reg.4(2)(e)(ii) if a reasonable person with knowledge of the relevant facts would think that the existence of the interest might affect the advice given to the client, (4) in the circumstances of this case, according to this test, S had no such interest, (5) this was because S's obligation in the scheme to recommend the policy arose, not as a hidden quid pro quo for the referral of a case, but as the ordinary consequence of a conventional ATE arrangement, where the concern of the underwriter was to avoid adverse selection, (6) further, once S had decided that the scheme's ATE policy was the best form of insurance for their clients, the possibility of securing a partial rebate on membership subscriptions could not realistically affect their judgment in recommending the policy to individual clients. Observations on what information a legal representative having an interest within the meaning of reg.4(2)(e)(ii) is required by reg.4(1)(a) to give to a client.

Garrett v Halton Borough Council [2006] EWCA Civ 1017; [2007] 1 W.L.R. 554, CA, ref'd to. (See ***Civil Procedure 2008*** Vol.2 paras 7A–20, 7A–31, 7A–70 and 7A–71.)

- **THOMPSTONE v TAMESIDE HOSPITAL NHS FOUNDATION TRUST** [2008] EWHC 2948 (QB), December 2, 2008, unrep. (Sir Christopher Holland)

Periodical payments order—model form of order

CPR r.41.8, Damages Act 1996 s.2. In serious personal injury claim brought by child, court exercising power under r.41.8 to award damages in the form of periodical payments during claimant's lifetime. Court setting out model order for use in such circumstances. Judge explaining that, although the model did no more than offer a precedent for adaptation to meet the particular nature of the award, departure from it in future cases would have to be justified before being approved by the court. (See ***Civil Procedure 2008*** Vol.1 para.41.8.1, and Vol.2 para.3F–44.)

Statutory Instrument

- **CIVIL PROCEDURE (AMENDMENT NO.2) RULES 2008 (SI 2008/3085)**

CPR Pt 79, Counter-Terrorism Act 2008 ss.66, 67 and 72, Civil Procedure Act 1997 s.1. Made by Lord Chancellor under s.2. Inserts in CPR Pt 79 (Financial Restrictions Proceedings under the Counter-Terrorism Act 2008). This Part contains rules about (a) proceedings in the High Court to set aside financial restrictions decisions made by HM Treasury freezing assets of individuals and organisations ("financial restrictions proceedings"), and (b) appeals to the Court of Appeal against an order of the High Court in such proceedings. Imposes on court duty to ensure that information is not disclosed contrary to the public interest. Modifies or disapplies several provisions in other CPR Parts for purpose of facilitating compliance with that duty and for other purposes, especially in Pts 1, 5, 8, 31, 32 and 52. Contains special rules for conducting hearings in private. Provides for appointment of special advocate. In force December 4, 2008. (See ***Civil Procedure 2008*** Vol.1 paras 1.3.1, 5.4C.9, 8.0.2, 31.1.2, 32.0.2, 33.0.2, 39.2.2 and 52.1.1, and Vol.2 para.9A–746.)

Civil Procedure Survey 2008—Prize Draw

Many congratulations to Mr Bill Barton of Leeds construction law specialists Barton Legal, the winner of our 2008 annual survey prize draw. He wins an iPhone.

In Detail

Prejudice to Defendant in Disapplying Limitation Period

The Limitation Act 1980 s.11 applies to certain actions including, notably, actions where damages are claimed by the claimant for negligence, nuisance or breach of duty and those damages consist of or include damages in respect of personal injuries. Section 11(5) states that the limitation period applicable to claims to which s.11 applies is (not six years but) three years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured. For these purposes, "date of knowledge" is defined by s.14. By s.33(1) the court is given power to direct in a particular case that the provisions of s.11 shall not apply. That is to say, the court may direct that the three-year limitation period shall not apply. The court may do this if it appears that it would be equitable to allow an action to proceed having regard to the degree to which the provisions of s.11 prejudice the claimant (s.33(1)(a)) and the degree to which any decision by the court under s.33(1) would prejudice the defendant (s.33(1)(b)). In acting under s.33 the court is required to have regard to all the circumstances of the case and in particular to the matters listed in s.33(3).

An intelligent lay person coming to these provisions for the first time would be pardoned for concluding that, if a court exercised its powers under s.33(1) by deciding that s.11 should be disapplied, with the result that a claim statute barred by s.11 would be permitted by a direction under s.33(1) to proceed, then necessarily the defendant would suffer prejudice within the meaning of s.33(1), and prejudice to a high degree. The lay person's point would be that such prejudice would consist of the defendant's loss of the right to raise limitation as an absolute procedural bar to the claimant's action. If s.11 applied, the defendant was only at risk of having to pay damages if he chose not to plead the procedural bar. If s.11 was disapplied, he was necessarily at some risk, the extent of which depended on the extent of the claimant's success in pursuing the claim. Surely, a court "having regard" to that would have to conclude that the power to disapply should not be exercised, unless the case was quite exceptional in some relevant respect. (The latter concession would have to be made because otherwise s.33 would be of no effect.) A lawyer would have to explain to the lay person that that is not quite the way s.33 works.

Questions as to how s.33(1)(b) should be interpreted and applied have taxed the courts on many occasions. A recent and important example is *Cain v Francis* [2008] EWCA Civ 1451, December 18, 2008, CA, unrep., a case in which the Court of Appeal dealt with appeals in two personal injury cases arising out of road accidents. The first case was one in which the claim form had been issued one year out of time; in this case the judge at first instance gave a direction under s.33(1) disapplying s.11. The second case was one in which the claim form was issued one day out of time; in this case the judge refused to give such a direction. In both cases liability was accepted by the defendants well within the limitation period. The Court of Appeal (Sir Andrew Morritt C., Smith and Maurice Kay L.JJ.) dismissed the defendant's appeal in the first case and allowed the claimant's appeal in the second.

After reviewing the relevant authorities, Smith L.J. stated (at para.57) that a long line of authority supported the proposition that, in a case where the defendant has had early notice of the claim, the accrual of a limitation defence should be regarded as a "windfall" and the prospect of its loss, by the exercise of the s.33 discretion, should be regarded as either no prejudice at all or only a slight degree of prejudice. Her ladyship added that, although the authorities seem to lead to the same result in this respect, "they do not speak with one voice as to the underlying rationale" (para.59). Further, no coherent explanation of Parliament's intention could be found within s.33 itself.

Smith L.J. expressly agreed with the Chancellor that the phrase "it would be equitable to allow the action to proceed" is the heart of s.33; "equitable" here means "fair and just". Her ladyship said that the rationale underlying s.33 "must be found in a consideration of the background to limitation as a whole" (para.63). After reviewing the history of s.11, and noting that the effect of that section was to reduce from six years to three the limitation period for the commencement of action to which it applied, her ladyship concluded that in fairness and justice a defendant only deserves to have his obligation to pay the damages due ("financial" prejudice) removed (by operation of s.11) if the passage of time has significantly diminished his opportunity to defend himself on liability and/or quantum ("forensic" prejudice). So the making of a direction under s.33, which would restore the defendant's obligation to pay damages, is only prejudicial to him if his right to a fair opportunity to defend himself has been compromised (para.69).

In summarising her reasoning in this respect Smith L.J. stated (at para.70):

"Thus, although on a literal construction of s.33(1), it appears to be relevant to the exercise of the discretion that the defendant would suffer the financial prejudice of having to pay damages if the arbitrary time limit were to be disapplied, Parliament cannot have intended that that financial prejudice, as such, should be taken into account.

That is because, in fairness and justice, the defendant ought to pay the damages if, having had a fair opportunity to defend himself, he is found liable. If having to pay the damages is not a relevant prejudice under s.33(1), it cannot be relevant either as one of the circumstances of the case."

In his judgment, Sir Andrew Morritt C. gave an analysis of the effects of s.11 and s.33 which supported the conclusions that Smith L.J. reached. The Chancellor stated (paras 79 to 81):

"79. The action can only proceed in cases to which s.11 applies if the provisions of that section are disapplied by a direction to that effect made by the court under s.33. By sub-section (1)(b) the court is required to have 'regard to the degree to which … [such a decision] … would prejudice the defendant'. Thus the prejudice is to be ascertained on the assumption that the provisions of s.11 have been disapplied by an order made under s.33. The subsection does not direct the court to have regard to the prejudice the defendant would suffer form the very act of disapplication.

80. The consequence of the disapplication of s.11 will be that there may be a trial of the claimant's claim on the merits notwithstanding the delay in commencing the proceedings. Has that delay caused prejudice to the defendant in its defence? If so, does it outweigh the prejudice to the claimant of being denied a trial at all? In addition the court will need to consider all the circumstances of the case and in particular the other aspects of the case enumerated in subsection (3).

81. In that context it does not appear to me that the loss of a limitation defence is regarded as a head of prejudice to the defendant at all; it is merely the obverse of the disapplication of s.11 which is assumed. It is this consideration which, in my view, accounts for and justifies the marked reluctance of the courts, as demonstrated by the judgments to which Smith L.J. has referred in detail, to have regard to the loss of a limitation defence."

Setting Aside Order Made Without Notice

Tombstone Limited v Raja [2008] EWCA Civ 1444, December 17, 2008, CA, unrep., was a complicated and exceptional case, but it raised some procedural issues of importance, in particular the matter of the relationship between the court's powers under the CPR and the court's inherent jurisdiction.

The facts were that, in an action for damages in which fraud was alleged, the claimant (C) obtained a freezing order relating to the defendant's (D) assets and to the assets of a company (X Co), believed by C to be owned and controlled by D. Upon D's failure to comply with the attached disclosure order, on October 11, 2002, the judge found D guilty of contempt and imposed a £200,000 fine. The judge refused to entertain D's application under r.23.10 to discharge the freezing order until he had complied with the disclosure order. On December 12, 2002, the judge (1) entered judgment for C, (2) gave directions for accounts and inquiries, and (3) for the purpose of enforcing D's compliance with the disclosure order, gave C permission to issue a writ of sequestration of D's assets.

On December 13, 2002, on an oral application of C and the sequestrators (S), made without notice to D or X Co and not supported by an application notice, the judge made an order giving C permission to issue the writ in a form amended to include the assets of X Co. Neither D nor X Co applied, either within the 7 day limit fixed by r.23.10 or subsequently, to set aside or vary this order. On December 18, the judge refused D's application to stay the sequestration. On July 21, 2004, the Court of Appeal allowed D's appeal against the judge's finding of contempt (on the ground that the finding had been wrongly made) and, as a consequence, set aside the December 13 order and the writ.

In August 2005, X Co commenced proceedings against C and S claiming compensation for losses suffered as a consequence of the freezing order and the sequestration. Subsequently, X Co amended their particulars of claim to allege that the December 13 order and the amended writ were nullities, or were irregularly obtained, with the result that C were liable for the torts of trespass and conversion. By way of defence to this claim, C pleaded that, as the order and writ were made by a High Court judge in the exercise of discretion, they were valid and effective until set aside.

At trial of X Co's claim, the judge held (1) that, for various reasons (including material non-disclosures by C), the order and writ against X Co (who were not a party to the case or accused of any contempt) had been irregularly obtained, (2) that, under the CPR, the court had a discretion to withdraw retrospectively the protection otherwise afforded C by the order and to strike out their defence of judicial authority, but (3) that in the circumstances, the discretion should not be exercised and X Co's tort claims must accordingly fail ([2007] EWHC 1743 (Ch)). The Court of Appeal granted X Co permission to appeal, but dismissed the appeal.

Put briefly, the Court of Appeal (Mummery, Dyson and Maurice Kay L.JJ.) held (1) that applications for setting aside orders made without notice are governed by r.23.10, (2) that rr.23.9 and 23.10 must be read together,

(3) that although C's application of December 13 was not supported by an application notice (as is assumed by r.23.9), and therefore no question of the service of such a notice on X Co (either before or after the hearing) arose, nevertheless X Co had a right under r.23.10 to apply to set the order aside, (4) that in the circumstances of this case, including the fact found by the judge, but contested by X Co on the appeal (see below) that D could and should have made a timely application under r.23.10 to set aside the order, there was no basis for interfering with the judge's refusal (in the exercise of discretion) to deprive C of the protection from liability to D in tort afforded by the order.

The trial judge's finding of procedural irregularity meant that he had to determine the nature of the court's power to set aside the December 13 order. X Co submitted that r.23.10 was not relevant. As indicated above, they argued that the consequence of the irregularities was that the order and writ were nullities and that the effect of setting the order aside as a nullity (in exercise of the court's inherent jurisdiction) would be to render C liable as alleged. In rejecting this submission the Court of Appeal held (1) that it would be wrong for a court to exercise its inherent jurisdiction to set aside an order if such exercise would mean that the court would adopt a different approach, and arrive at a different outcome, from that which would result from an application of rules of court (such as r.23.10), (2) that, whereas the exercise of the court's inherent jurisdiction to set aside an order made without notice might in certain circumstances involve the court's setting aside the order as of right, r.23.10 gives the court a discretion to be exercised in accordance with the overriding objective, and (3) that, where the order made on an application without notice is one which affects the rights of the affected party in an important respect (a judgment is the most obvious example), it will only be in exceptional circumstances that the discretion will not be exercised to set aside the order. In conclusion on this point it may be noted that the court was prepared to accept that the right to apply under r.23.10 to have an order made without notice set aside or varied can be lost, for example, by waiver or estoppel.

Length and Complexity of Skeleton Arguments

In *Tombstone Limited v Raja, op cit.*, the Court of Appeal drew attention to the provisions in Practice Direction (Appeals) concerning skeleton arguments, in particular to para.5.10. The court noted that the appellant's skeleton filed for the appeal had 110 pages of text plus 64 pages of Appendices. In the court's opinion the skeleton was, given the circumstances of the case, excessive in length and complexity. The court said it did not assist the court. In fact, it tended to detract from appellant's case, which was accurately and far more succinctly stated by the respondent's counsel in his written and oral responses to it.

In giving guidance on this matter the court stated (at paras 125 to 128):

"125. Practitioners who ignore practice directions on skeleton arguments (see CPR 52PD paras 5.10 "Each point should be stated as concisely as the nature of the case allows") and do so without the imposition of any formal penalty are well advised to note the risk of the court's negative reaction to unnecessarily long written submissions. The skeleton argument procedure was introduced to assist the court, as well as the parties, by improving preparations for, and the efficiency of, adversarial oral hearings, which remain central to this court's public role.

126. We remind practitioners that skeleton arguments should not be prepared as verbatim scripts to be read out in public or as footnoted theses to be read in private. Good skeleton arguments are tools with practical uses: an agenda for the hearing, a summary of the main points, propositions and arguments to be developed orally, a useful way of noting citations and references, a convenient place for making cross references, a time-saving means of avoiding unnecessary dictation to the court and laborious and pointless note-taking by the court.

127. Skeleton arguments are aids to oral advocacy. They are not written briefs which are used in some jurisdictions as substitutes for oral advocacy. An unintended and unfortunate side effect of the growth in written advocacy (written opening and closing submissions and 'speaking notes', as well as skeleton arguments) has been that too many practitioners, at increased cost to their clients and diminishing assistance to the court, burden their opponents and the court with written briefs. They are anything but brief. The result is that there is no real saving of legal costs, or of precious hearing, reading and writing time. As has happened in this case, the opponent's skeleton argument becomes longer and the judgment reflecting the lengthy written submissions tends to be longer than is really necessary to explain to the parties why they have won or lost an appeal.

128. The skeletal nature of written advocacy is in danger of being overlooked. In some cases we are weighed down by the skeleton arguments and when we dare to complain about the time they take up, we are sometimes told that we can read them 'in our own time' after the hearing. In our judgment, this is not what appellate advocacy is about, or ought to be about, in this court."

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LEGAL TAXONOMY
FROM SWEET & MAXWELL

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