CIVIL PROCEDURE NEWS

Issue 5/2009 May 12, 2009

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CPR r.52.11, Tribunals and Inquiries Act 1992 s.11, Education Act 1996 s.326. In statement under 1996 Act, LEA (D) proposing placement of child with educational needs at particular day special school. Child's mother (C) appealing to a SEND tribunal contending that child should be placed at particular residential special school. Tribunal upholding D's grounds of opposition to residential placement. C appealing to High Court on points of law pursuant to s.11. Judge dismissing appeal and refusing C permission to appeal ([2008] EWHC 2357 (Admin)). On ground that it was arguable that there was a conflict in the first instance authorities as to the obligation of a tribunal when giving reasons when dealing with expert evidence, single lord justice granting C permission to make second appeal. **Held**, dismissing the appeal, (1) decisions of expert tribunals should be respected unless it is quite clear that they have misdirected themselves in law, (2) ordinary courts should approach appeals from such tribunals with an appropriate degree of caution, particularly where what is being criticised is the rejection of expert evidence providing opinion evidence on the very point which the tribunal has to decide. Observations on risks involved in elevating into general principles statements by judges made by reference to the facts and circumstances of particular cases but taken out of context. ***W v Leeds City Council*** [2006] E.L.R. 617, CA; ***AH (Sudan) v Secretary of State for the Home Department*** [2007] UKHL 49; [2008] 1 A.C. 678, HL, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 52.0.13, 52.11.1 and 52.11.4.)

■ **LONG v NORWICH UNION INSURANCE LTD** [2009] EWHC 715 (QB), April 6, 2009, unrep. (Mackay J.)

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CPR r.41.8, Damages Act 1996 s.2. Personal injury claim settled on terms that defendant (D) should pay claimant (C) lump sum of £900,000 (with credit for interim payments made) and periodical payments at the rate of £25,000 recalculated each year. Consent order drafted in the model form recommended in the *Thompstone* case and including scheduled terms (1) requiring those acting on behalf of C to notify D immediately of her death (para.6), and (2) entitling D at annual instalment dates to require C to produce evidence that she remains alive (para.5), and making provision for future costs of C's professional deputy. In the absence of agreement on the point, C submitting to judge that clause should be added to para.5 so as to impose on D the costs incurred in providing any proof of life required by D under that term. **Held**, rejecting the submission, (1) in the model order, both paras 5 and 6 are silent as to where the costs of compliance should fall, (2) in the instant case, the para.5 costs are plainly within the province of the professional deputy, whose fees have been estimated and assessed on a global basis each year and must include such activity as the proof of life. Observations on how model order might be varied to take account of the dispute that arose in this case. ***Thompstone v Tameside Hospital NHS Foundation Trust*** [2008] EWHC 2948 (QB), ref'd to. (See ***Civil Procedure 2009*** Vol.1 para.41.8.1, and Vol.2 paras 3F–48.1 and 3F–48.60.2+.)

■ **PAULIN v PAULIN** [2009] EWCA Civ 221, March 17, 2009, CA, unrep. (Longmore, Wilson and Lawrence Collins L.JJ.)

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CPR rr.40.2 and 54.4. In ancillary proceedings, before perfection of order (under r.40.2(2)(b)) carrying into effect judgment handed down on March 18, 2008, deputy High Court judge recalling and reconsidering judgment. On May 23, 2008, judge giving judgment to reverse effect, ultimately holding that a wife's application to annul a bankruptcy order against her husband (H) should be granted. Single lord justice granting H permission to appeal for the purpose of arguing (1) that the bankruptcy order should not be annulled, and/or (2) that the order for such annulment represented an impermissible reversal of what the judge had already determined. **Held**, dismissing the appeal, (1) the judge's central conclusion that H was able to pay his debts, and his approach to the exercise of his discretion to annul the order were correct, (2) a judge has jurisdiction to reverse his decision at any time until his order is perfected (the *Barrell* jurisdiction), but not afterwards, (3) since May 2, 2000, the time for appealing runs from "the date of the decision of the lower court" (r.52.4(2)(b)), whereas previously, the time for appealing to the Court of Appeal from a decision of the High Court ran from the date on which the judgment or order of the court was perfected, (4) this change has not had the effect of abrogating the *Barell* jurisdiction, (5) the judge's decision to reconsider his decision upon the central question arising was flawed in that it was not reasoned and was not exercised in accordance with the relevant authorities, (6) however, as H did not appeal against the judge's decision to reconsider his judgment, but against the judge's ultimate (and perfected) order, it was not necessary for the court to express an opinion on what the court's reaction to an appeal by H against the judge's decision to reconsider might have been. Law in relation to *Barrell* jurisdiction explained and analysed. ***Re Barrell Enterprises*** [1973] 1 W.L.R. 19, CA; ***Hyde and South Bank Housing Association v Kain*** July 27, 1989, CA, unrep.; ***Robinson v Bird*** [2003] EWCA Civ 1820, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 40.2.1, 40.2.1.A and 40.2.1.C.)

■ **PHILLIPS v PHILLIPS** [2009] EWCA Civ 185, February 25, 2009, CA, unrep. (Lloyd and Wilson L.JJ. and Sir John Chadwick)

Late amendment of respondent's notice—appeal withdrawn—appellant's costs liability

CPR rr.44.3 and 52.5. On appeal to Court of Appeal, respondent (R) filing notice under r.52.5 on March 10, 2008, and serving first skeleton argument in November 2008. At hearing on February 25, 2009, following observations made by the Court, R applying for, and granted permission to, amend notice. Appellant (A) thereupon deciding not to pursue the appeal and Court dismissing the appeal accordingly. On the question of the costs of the appeal, **held** (1) there should be an order for costs in accordance with the general rule (r.44.3(2)(a)), (2) R ought to have taken the amended points by November 2008 at the latest, (3) the costs payable by A to R under the order should be limited to R's costs up to and including service of the respondent's notice and the costs of preparing and serving the first skeleton. (See ***Civil Procedure 2009*** Vol.1 paras 44.3.11 and 52.5.5.)

■ **R. (AHK & FM) v SECRETARY OF STATE FOR THE HOME DEPARTMENT** [2009] EWCA Civ 287, April 2, 2009, CA, unrep. (Sir Anthony Clarke M.R. and Jacob and Maurice Kay L.JJ.)

Judicial review—appointment of special advocate—procedure for

CPR r.31.19, British Nationality Act 1981 s.6 and Sch.1. Secretary of State (D) refusing applications by several individuals, including AHK (C1) and AM (C2), coming to the UK as refugees and granted indefinite leave to stay, for

British nationality (or citizenship). Applications refused on ground that C had not demonstrated good character in circumstances as to which, on public interest immunity grounds, D was not willing to disclose relevant documents (the closed material) to the individuals. In judicial review proceedings challenging these decisions brought by the individuals against D, judge making order inviting the Attorney General to appoint a special advocate (SA) to assist the court in the cases of C1 and others, but not to assist in the cases of C2 and another. Attorney General willing to appoint SAs as requested by the judge. Judge granting D and C2 permission to appeal against his order. On appeal D submitting (1) that ordinarily a judge should consider the closed material without the assistance of a SA, and (2) that a SA should only be appointed to assist the judge where it was necessary (or desirable) to do so. **Held**, allowing both appeals and ordering that all of the cases should be remitted to the judge for further consideration, (1) depending on the circumstances, it will be appropriate for a judge either to look at the closed material and decide whether or not to request the appointment of a SA or not to look at the material and to decide to make such a request, (2) the procedure adopted should accord with principles now laid down by the court, (3) they include the principle that, if the judge decides to read the material, in order to consider whether or not an SA should be appointed, D should not make submissions at that stage. Court explaining principles and their application. Extended discussion of important role of SA in counterbalancing lack of disclosure and of a full, open adversarial hearing and of compatibility of SA procedure with ECHR arts.5(4) and 6. ***Malik v Manchester Crown Court*** [2008] EWHC 1362 (Admin); ***Murungaru v Secretary of State for the Home Department*** [2008] EWCA Civ 1015; ***A, K, M, Q & G v HM Treasury*** [2008] EWCA Civ 1187; ***A v United Kingdom*** Application 3455/05, February 19, 2009, ECtHR. (See ***Civil Procedure 2009*** Vol.1 paras 31.19.1 and 76.0.2.)

■ **ROTHWELL v ROTHWELL** [2008] EWCA 1600, December 9, 2008, CA, unrep. (Thorpe & Jackson L.JJ.)

Mediation of appeal—effect on costs of appeal

CPR r.44.3. In contested ancillary relief proceedings, husband (H) filing Notice of Appeal to Court of Appeal on April 4, 2008. Following directions for oral hearing for H's application for permission to appeal, on September 10, 2008, H and wife (W) participating in mediation under Court's ADR scheme. Parties reaching clear agreement on terms including terms to the effect that the appellate proceedings should be dismissed and that a clean break order would be incorporated in the dismissal application. Subsequently, H apparently repenting of his commitment to the agreement. Single lord justice directing an oral hearing to show cause why the appeal should not be disposed of in accordance with the mediated agreement. On December 5, before oral hearing on December 9, 2008, H recommitting himself to the mediated agreement. At the hearing, Court dismissing appeal by consent on terms that an order incorporating the agreed terms will be subsequently submitted and perfected. On question of costs, **held** (1) that H should not be required to pay W's costs incurred on or after September 10, the bulk of which were incurred in the period December 5 to 9, but (2) that, in the circumstances, there should be no order for costs. Court stating that, in accordance with the principle applicable to other forms of compromise, once parties have arrived at the compromise of an appeal by mediation the court will uphold and enforce that compromise, absent some vitiating element. ***Marsden v Marsden*** [1972] Fam. 208, ref'd to. (See ***Civil Procedure 2009*** Vol.1 para.44.3.13, and Vol.2 para.14–20.)

■ **RTS FLEXIBLE SYSTEMS LTD v MOLKEREI ALOIS MULLER GMBH & CO KG** [2009] EWCA Civ 26, February 12, 2009, CA, unrep. (Waller, Moses and Hallett L.JJ.)

Appeal on new point succeeding—costs

CPR rr.36.13 and 52.12. Whilst negotiating full contractual terms, one company (C) supplying another (D) under terms of a letter of intent. After letter had expired and before draft contract executed parties falling into dispute. In claim brought by C against D, at trial of a preliminary issue, as to which C submitted that the terms of the letter of intent had continued, judge holding that a new contract had come into existence after the expiry of the letter of intent. Judge aware that Pt 36 offer had been made, but not of its quantum, reserving bulk of the costs to the trial judge, but making an order for costs on certain issues and ordering an interim payment thereof. Court of Appeal, on basis of new point raised by C (providing an answer to judge's holding that a new contract had come into being), allowing C's appeal. On questions of costs, **held**, (1) the judge's orders should not be varied, (2) as an appeal is an independent regime so far as Pt 36 is concerned, by choosing to resist C's new point without having made any offer, D must prima facie be at risk of paying the costs of the appeal, however (3) it would not be right to order D to pay the costs of C's new point when costs were expended fighting the preliminary issue on a different basis in the court below and where those costs have been reserved to the trial judge, (4) accordingly, the costs of the appeal should be reserved to the trial judge. For assistance of trial judge, court expressing view that, had it been a matter for them, they would have ordered D to pay 80 per cent of C's costs. ***HSS Hire Services Group Plc v BMB Builders Merchants Ltd*** [2005] EWCA Civ 626; [2005] 1 W.L.R. 3158, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 36.13.1 and 52.12.1.)

■ **THORNE v LASS SALT GARVIN** [2009] EWHC 100 (QB), January 28, 2009, unrep. (Wyn Williams J.)

Service of claim form by fax—whether service on defendant or legal representative

CPR rr.2.3, 6.3(1)(d), 6.7 and 6.16, Practice Direction (Service Within the United Kingdom) para. 4.1. Individual (C) issuing claim form for professional negligence action against former solicitors (D). Time for service (under pre-October 2008 version of r.7.5, as extended by a court order) expiring on June 6, 2008. At 3.15 pm on that day, C faxing claim form to D. D having no prior intimation of C's claim until receipt of the fax. On ground that they had not previously indicated willingness to accept service by fax as required by (what is now) para.4.1, D disputing validity of service. Master dismissing C's application for order validating the service. **Held**, dismissing C's appeal, (1) the claim form was not validly served, (2) at the time of purported service D could not be regarded as the legal representatives of the defendants to C's claim, (3) the fact that D would have no doubt acted for themselves had they had prior intimation of the claim was not an exceptional circumstance within (what is now) r.6.16 sufficient to warrant dispensing with service under that rule. ***Kuenyehia v International Hospital Group Limited*** [2006] EWCA Civ 21; [2006] C.P. Rep. 34, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 6.7.1 and 6.16.3.)

■ **WEAVER v LONDON QUADRANT HOUSING TRUST** [2009] EWCA Civ 235, February 17, 2009, CA, unrep. (Toulson and Elias L.JJ.)

Protective costs order—application by respondent to appeal

CPR rr.44.3 and 52.3(7), Human Rights Act 1998 s.6(3)(b). Social landlord (D) serving notice of possession on their assured tenant (C). On C's claim for judicial review (for which C funded by LSC), Divisional Court (1) holding that D should be regarded as a "public authority" for the purposes of s.6(3)(b) and making declaration to that effect, but (2) dismissing C's challenge to the notice seeking possession on the facts. Court's formal order structured so as to enable the court to grant D permission to appeal against the declaratory part of the judgment, notwithstanding that the claim for judicial review had itself been dismissed. In granting such permission, no condition imposed on D under r.52.3(7) requiring them to undertake not to pursue costs against C, if successful, or to bear the costs of both parties in the appeal. Upon LSC indicating that they would fund C for the appeal, but only on condition that they would not be liable for D's costs if D proved to be successful, C applying to Court of Appeal for protective costs order (PCO). D opposing this application. **Held**, granting the application, (1) the circumstances of this case were unusual because (a) it was a respondent, and not an applicant on the appeal, who was applying for a PCO, and (b) this was not a case in which proceedings would be discontinued if a PCO were not made, (2) therefore, it was not possible to apply the established PCO principles (as developed at common law) precisely to the circumstances, (3) a PCO can be granted at any stage in the proceedings, even at the appellate stage, (4) in principle it was appropriate for C to make the application, (5) the rules identified in the Corner House case, when applied by analogy to these special circumstances, were all in favour of a PCO being granted, (6) the appeal was being conducted in the public interest at the behest of D, not to assert a private interest of C, and the possession order against her would stand come what may. ***R. (Corner House Research) v Secretary of State for Trade and Industry*** [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600, CA; ***R. v Lord Chancellor, Ex p. Child Poverty Action Group*** [1999] 1 W.L.R. 347, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 3.1.8, 48.15.7, 54.6.3, and Vol.2 paras 3D–25 and 9A–202.)

Statutory Instrument

■ **HIGH COURT AND COUNTY COURTS JURISDICTION (AMENDMENT) ORDER 2009 (SI 2009/577)**

High Court and County Courts Jurisdiction Order 1991 (SI 1991/724). Substitutes art.4A, with consequential amendments to arts 5(1) and 9, reflecting changes made to CPR r.26.6 by Civil Procedure (Amendment No.3) Rules 2008 (SI 2008/3327) increasing value limit of fast track claims from £15,000 to £25,000, and makes transitional provision. Also amends art.8 by restricting the courts in which sums of money recoverable pursuant to an enactment as if payable under a county court order shall be enforced by way of execution against goods; in this respect reflecting amendments to CPR r.70.5 made by SI 2008/3327. Amends art.8A for purpose of restricting certain types of traffic enforcement proceedings to Northampton county court. In force April 6, 2009. (See ***Civil Procedure 2009*** Vol.2 paras 9B–935, 9B–939, 9B–943 and 9B–948.)

In Detail

CASE MANAGEMENT POWERS—IMPOSING CONDITIONS AND SPECIFYING CONSEQUENCES —"MAY" NOT "WILL"

In the "CPR Update" section of Issue 2/09 (February 19, 2009) of CP News it was explained that the Civil Procedure (Amendment No.3) Rules 2008 (SI 2008/3327) make a number of changes to the CPR (all coming into effect on April 6, 2009). The effects of the principal amendments were explained, in particular those made for the purpose of increasing the financial limit of the fast track procedure, for claims issued on or after April 6, 2009, from £15,000 to £25,000 (r.26.6) and for the purpose of making provision for applications for costs capping orders (new rr.44.18 to 44.20).

Among the amendments made by this statutory instrument, but not mentioned in Issue 2/09 was a minor amendment to para.(4) of CPR r.3.1 (The court's general powers of management) concerning parties' compliance with the new Practice Direction (Pre-Action Conduct). The amendment to this paragraph changes its effect from a discretionary to a mandatory provision.

Paragraph (4) of r.3.1 now reads, as stated in para.3.1 on p.49 of Vol.1 of the 2009 edition of the *White Book*, as follows:

"(4) Where the court gives directions it will take into account whether or not a party has complied with the Practice Direction (Pre-Action Conduct) and any relevant pre-action protocol."

The Civil Procedure (Amendment No.3) Rules 2008 were made on December 29, 2008, and laid before Parliament on January 7, 2009. Consequently, they appeared very late in the publisher's production programme for the 2009 edition of the *White Book*. Unfortunately, in the process of inserting the changes made by this statutory instrument, the substitution of "will" for "may", correctly made in para.(4) of r.3.1 (as explained above), was incorrectly made in para.(2) and para.(3) of that rule. The first of these errors is unlikely to mislead readers, but the second may cause consternation (at least temporarily).

The publishers apologise for these errors and are grateful to subscribers who have taken the trouble to point them out. They will be corrected in Supplement 1.

The correct texts are as follows.

In para.(2) of r.3.1, in the first line "may" should be substituted for "will" so that the line reads "Except where these Rules provide otherwise, the court may".

In para.(3) of r.3.1, "may" should be substituted for "will" in the first line so that, in its entirety, this provision reads as follows:

"(3) When the court makes an order, it may—

(a) make it subject to conditions, including a condition to pay a sum of money into court; and

(b) specify the consequences of failure to comply with the order or a condition."

PRACTICE DIRECTION (CROWN PROCEEDINGS)

A list of government departments authorised to be parties under the Crown Proceedings Act 1947 s.17, and addresses for service of process thereon and with accompanying Notes, is published by the Cabinet Office and is from time to time re-issued when updating is necessary.

Nowadays, in addition to being published by TSO, the list is printed as Annex 2 in Practice Direction (Crown Proceedings), supplementing CPR Pt 66 (Crown Proceedings) (see the *White Book* 2009, Vol.1 para.66PD.4, p.1801).

The list as presently appearing in Annex 2 is the one issued by the Cabinet Office on August 31, 2005. That list has been superseded by a new list issued by the Cabinet Office on February 19, 2009. This list supersedes the list published on August 19, 2005, and subsequently inserted in this Practice Direction (supplementing CPR Pt 66) as Annex 2. The new list differs significantly in certain respects for the old, and the Notes attached to it have been amplified. Presumably, in due course the new list will be inserted in Annex 2 to the Practice Direction.

SERVICE OF PARTICULARS OF CLAIM

There is a distinction between process documents (e.g. claim forms) and pleading documents (e.g. particulars of claim). Although it is not a distinction that is always maintained, it is apparent in various places in the CPR. For example, para. (1) of r.7.4 (Particulars of claim) states that particulars of claim "must (a) be contained in or served with the claim form; or (b) subject to paragraph (2) be served on the defendant within 14 days after the service of the claim form". Paragraph (2) of that rule states that particulars of claim "must be served on the defendant no later than the latest time for serving a claim form". Generally, a claim form must be served within four months after the date of issue (r.7.5) (but see further below). (Other CPR rules make different provision for the separate service of particulars; e.g rr.58.5, 59.4 and 61.3. In possession claims under Pt 55, the particulars of claim must be served with the claim form (r.55.4).)

Where the particulars of claim are not contained in or served with the claim form, and the claimant fails to comply with these time limits for serving them, in the absence of agreement between the parties the claimant will have to apply to the court for an extension of time for their service.

As is explained immediately below, r.7.4 has to be read carefully; in particular, the effect of para.(2) of the rule has to be noted.

Where the circumstances are that the latest time for serving the claim form fixed by r.7.5 was (say) May 10, and the claim form was served on May 1 and the particulars were served separately on May 14, then the clear effect of r.7.4(2) is to make service of the particulars out of time (despite the fact that they were served within 14 days of service of the claim form). This is often overlooked.

In recent times, a slight further complication has emerged here. The signpost following para.(2) of r.7.4 indicates that the meaning of the phrase "the latest time for serving a claim form" in that paragraph is to be gleaned from r.7.5. However, since its amendment by the Civil Procedure (Amendment) Rules 2008 (taking effect on October 1, 2008), r.7.5, unlike r.7.4(2), says nothing about "serving" a claim form within a particular time, but about completing a "step required" by the rule within the set time. Rule 6.14 (as amended with effect from October 1, 2008) states that where service is to be effected within the jurisdiction, a claim form served in accordance with Pt 6 is deemed to be served on the second business day after "completion of the relevant step under rule 7.5(1)". Presumably, in those circumstances, a party serving particulars of claim separately complies with r.7.4(2) if he manages to serve the particulars of claim by that day.

Rule 7.6 states that the claimant may apply for an order extending the period for compliance with r.7.5. The practical application of that rule has occasioned some difficulty and the recent amendments made to it, together with (what is now) r.6.14 (formerly r.6.7) were designed to overcome them. But it remains the case that if a claimant fails to serve a claim form in time and applies for an order extending time retrospectively the court may make such an order "only if" the conditions in r.7.6(3) are satisfied. Those conditions are (a) the court has failed to serve the claim form, or (b) the claimant has taken all reasonable steps to comply with r.7.5 but has been unable to do so, and (c) in either case, the claimant has acted promptly in making the application.

There is no express CPR provision dealing with applications for orders extending retrospectively the period for compliance with the time limits fixed by r.7.4 for service of particulars of claim in cases where they are not contained in or served with the claim form. Since the CPR came into effect, the questions (1) whether the court has power to make such an order, and (2) whether any such power (a) is restricted (by a side-wind, as it were) by the "only if" conditions in r.7.6(3), or (b) is affected by the provisions of r.3.9 (Relief from sanctions), have all fallen for consideration. These are important questions because it is obvious that a claimant may just as readily lose his claim by being prevented from serving his particulars of claim separately out of time as by being refused an application to extend time for service of his claim form.

The proposition that the court has power to extend time was not doubted in the earliest of the post-CPR cases. In *Austin v Newcastle Chronicle & Journal Ltd* [2001] EWCA Civ 834, May 18, 2001, CA, unrep., the particulars of claim were served separately after the expiry of the four month period for service of the claim form. A district judge granted the claimant's application for a retrospective extension of time; a judge allowed the defendant's appeal; the Court of Appeal granted the claimant permission to appeal and allowed his appeal. Throughout the matter was regarded as one involving the exercise by the court of its general power to extend time as recited in CPR r.3.1(2)(a).

The submissions that r.7.4(2) has the effect of abrogating the general power to extend time recited in r.3.1(2)(a), and that the strict conditions in r.7.6(3) applicable to the service of claim forms extended to service of the particulars of claim, were rejected by the Court of Appeal in *Totty v Snowden* [2001] EWCA Civ 1415; [2002] 1 W.L.R. 1384, CA. In that case the Court of Appeal explained that there were perfectly sensible reasons why there should be a strict regime in relation to extensions of time for service of claim forms and a discretionary regime in relation to extensions of time for the separate service of particulars of claim (see para.37 per Kay L.J., and para.48 per Chadwick L.J.). The

general effect of r.7.4(1)(b) is to give a claimant who has served his claim form a period of 14 further days in which to serve the particulars of claim as of right (i.e. without the need to seek the exercise of the court's discretion). But where a claimant chooses not to serve the claim form until the period for service of it has all but elapsed, the effect of r.7.4(2) is to deprive the claimant of "such part of that absolute right as takes the total period beyond the prescribed limit", with the result that the claimant has "to rely on the court's discretion if he wishes to extend that period" (at para.36 per Kay L.J.).

In *Sayers v Clarke Walker* (Practice Note) [2002] EWCA 645; [2002] 1 W.L.R. 3095, CA; [2002] 3 All E.R. 490, CA, a case in which the question was whether time for making an appeal should be extended, the Court of Appeal stated that in a case of any complexity, when a court was considering an application for an extension of time made after the time prescribed for the taking of a step in proceedings had expired, the court should follow the checklist given in CPR r.3.9. In *Price v Price* [2003] EWCA Civ 888; [2003] 3 All E.R. 911, CA, a personal injuries case concerned with an application, not for an extension of time for appealing, but for a retrospective extension of time for service of the claimant's particulars of claim, the Court of Appeal stated that the r.3.9 checklist should be applied. In this case, a judge allowed the defendant's appeal against a district judge's order granting the claimant's application for an extension and struck out the claim (under r.3.4(2)(c)). The court held that the judge had erred in failing to address his mind to a number of the most important circumstances listed in r.3.9(1). (The relevance of the checklist in these circumstances had been acknowledged previously at first instance; see e.g. *Webster v British Gas Services Ltd* [2001] 1 All E.R. (D.) 409 (Oct).) In the event the court allowed the claimant's appeal and extended time for service of the particulars of claim, thereby saving the claimant's claim. But (in exercise of its powers under r.3.1(3)(a)) the court imposed the condition that the claimant should make no claim for special or general damages other than what may be substantiated by any written report made by the claimant's medical expert before the date on which the particulars ought to have been served under the r.7.4 time limit.

In *Bournemouth & Boscombe Athletic Football Club Ltd v Lloyds TSB Bank Plc* [2003] EWCA Civ 1755, December 10, 2003, CA, unrep., the Court of Appeal again found that, in refusing a claimant's application for an extension of time for serving particulars of claim, the judge in the court below had erred in the manner in which he exercised his discretion under r.3.1(2)(a) and r.3.9. In particular, the court found that there was no satisfactory basis for the judge's conclusion that claimant's failure to comply with r.7.4 was deliberate (see r.3.9(1)(c)). The overwhelming probability was that it was due to a mistaken understanding of that rule. In the event, the court agreed with the judge's conclusion that the claimant's claim was bound to fail and should be struck out accordingly. Consequently, the court was not required to consider whether, in exercising the discretion under r.3.9 afresh, an extension of time for serving particulars of claim should be granted. However, the court stated that a court is likely to regard a finding that the claimant had intentionally failed to comply with r.7.4 as serious and as a factor of very considerable weight; but a failure due to a mistaken understanding of the effect of r.7.4 (albeit a mistake for which there may have been little or no excuse) is a much less serious finding which will be likely to carry correspondingly less weight.

In *Robert v Momentum Services Ltd* [2003] EWCA Civ 299; [2003] 1 W.L.R. 1577, CA (a case decided before *Price v Price* but not referred to in the judgment therein), the Court of Appeal held that, where a claimant, having served the claim form, had the foresight to anticipate that he will be unable to serve the particulars within time and, before time expires, applies to the court for an extension there is no reason for the court to import the r.3.9 framework by implication into r.3.1(2)(a). This is because there is a difference in principle between, on the one hand, seeking relief from a sanction imposed for failure to comply with a rule where such failure has already occurred, and on the other hand seeking an extension of time for doing something required by a rule before the time for doing it has arrived; the latter cannot sensibly be regarded as, or even closely analogous to, a relief from sanctions case. In such circumstance the discretion under r.3.1(2)(a) should be exercised by simply having regard to the overriding objective set out in r.1.1(2) (*ibid*).

Cases in which appeal courts have found that lower courts had erred in principle in granting or refusing applications for extensions of time for the separate service of particulars of claim, and have felt obliged to exercise the discretion afresh, are cases in which the lower court either failed to adopt the r.3.9 framework where it ought or applied it incorrectly. Usually, the errors identified relate to the manner in which the lower court took into account the effect which the claimant's failure to comply with r.7.4 had on each party (r.3.9(1)(h)) and the effect which the granting of relief would have on each party (r.3.9(1)(i)); see *Austin v Newcastle Chronicle & Journal Ltd*, *op cit*; *Webster v British Gas Services Ltd*, *op cit*; *Price v Price*, *op cit*.

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

Typeset by EMS Print Design
Printed by St Austell Printing Company, St Austell, Cornwall