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CPR rr.44.3, 47.16 and 52.1. Following trial at which claimants (C) succeeded in part, appeal of several defendants against judge's refusal of their application for discharge of freezing order and inquiry as to damages on C's cross-undertaking dismissed by Court of Appeal on March 13, 2009 ([2009] EWCA Civ 169). Before hearing of that appeal, Court making order requiring two appellants (D) to provide security for C's appeal costs. Security provided by bank guarantee on which C could make demand only if costs order made against D with final costs certificate issued by December 31, 2009. On disposing of the appeal, Court making costs orders in favour of C against D in respect of the costs of the appeals, and against C and in favour of D in respect of the costs of C's application to strike out the appeals and an application to adduce fresh evidence, but making no provision for the set-off of any costs. Costs judge completing detailed assessment before December 31, 2009, but declining to issue final certificate because some serious issues between the parties, particularly as to whether there should be a set-off under the Court's costs orders, remained outstanding. C's appeal costs assessed at £128,600 and D's strike out bill in sum of £255,700. C applying to Court for (1) a declaration that there was no provision in the March 13, 2009, order for any set-off, and (2) an order that a final certificate be issued forthwith. **Held**, dismissing the application, (1) the Court had no jurisdiction to grant a declaration as to the true meaning of its own orders or to direct a costs judge to issue a final certificate, (2) it was not necessary for set-off to be provided for in the Court's order as that was a matter which the costs judge could deal with, (3) a costs judge has power to grant a certificate for an outstanding balance, (4) such a certificate can result from the process of set-off pursuant to r.44.3(9), and a similar result can be achieved under r.47.16, (5) an appeal from any decision of a costs judge in this respect lay to the High Court with permission, (6) for the purpose of ensuring that they were not deprived of the opportunity of making a claim under the guarantee, C should invite the costs judge to issue a final certificate against their undertaking to make such claim and to pay into court the sums paid by the bank to await his final decision on set-off. R. ***(Burkett) v Hammersmith and Fulham LBC*** [2004] EWCA Civ 1317, October 15, 2004, CA, unrep., ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 44.3.16, 47.16.1 and 52.1.5.)

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Judgments and orders — reasons in order — apparent bias

CPR rr.3.1(7) and 40.2. In proceedings brought by individual (C) against trade union (D) in employment tribunal, papers for directions for an appeal coming before EAT judge. Papers including letter addressed to registrar requesting disclosure of judges' interests. Judge refusing that request and making order staying appeal pending reference to the tribunal of allegations of bias. That order containing statement critical of the disclosure application. C's application to vary the order by deleting that statement rejected by another judge. **Held**, granting C permission to appeal and allowing appeal, (1) the reasons for an order are to be contained in the judgment, not in the order, (2) an order should reflect the judgment and may properly relate only to the formal disposal of an appeal or application, (3) the passages in the order which set out what were in effect the judge's reasons should be entirely removed, (4) no litigant is entitled to handpick his court by demanding information which may with luck enable him to challenge a judge for bias. (See ***Civil Procedure 2009*** Vol.1 paras 3.1.9 and 40.1.1 and Vol.2 para.9A–48.)

MCDONNELL v WALKER [2009] EWCA Civ 1257, November 11, 2009 CA unrep. (Waller and Rimer L.JJ. and Sir Paul Kennedy)

Limitation period — disapplication — forensic prejudice to defendant

CPR r.7.6, Limitation Act 1980 ss.11 and 33. On April 21, 2001, car driver (C1) and his passenger (C2) injured in traffic accident in which driver of other vehicle (D) killed. In November 2001, following coroner's inquest, D's insurers admitting liability. On April 20, 2004, Cs issuing claim form limiting damages to £15,000, but their solicitors failing to serve it within four-month limit fixed by r.7.6. On October 21, 2004, Cs applying retrospectively for an extension of time for service. Upon that application being refused (on January 12, 2005) Cs instructing new solicitors with view to bringing negligence claim against their former solicitors for loss of action. On April

17, 2008, Cs commencing second action against D by claim form in which it was stated that C1 expected to recover damages of more than £300,000 and C2 more than £100,000 but less than £300,000, and in which C1 also claimed loss of earnings and future loss of earnings of over £315,000 and C2's schedule of special damages included £62,777 for loss of earnings. On December 1, 2008, deputy circuit judge granting Cs' application to disapply the provisions of s.11 under s.33. **Held**, allowing D's appeal, (1) in applying s.33 a court is required to have regard to all the circumstances of the case and, in particular, to the circumstances referred to in s.33(3), (2) a judge should not reach a decision by reference to one particular circumstance, or without regard to all the issues, but should conduct a balancing exercise at the end of an analysis of all the relevant circumstances and with regard to all the issues, taking them all into account, (3) it is important to stress that the test is not simply whether a fair trial of the issues was still possible, (4) the delay which is relevant where (as in this case) particular regard should be given to the circumstances referred to in paras (a) and (b) of s.33(3), is delay since the expiry of the limitation period (four years), but the overall delay (seven years) is relevant as part of all the circumstances of the case, (5) depending on the issues and the nature of the evidence going to them, the longer the delay the more likely and the greater the prejudice to the defendant, (6) the type of case where a defendant cannot show any forensic prejudice and for whom the limitation defence would be a complete windfall, is to be contrasted with the case where such prejudice is suffered because the defendant has not for many years been notified of a claim in any detail so as to enable investigation of it, (7) in this case the deputy judge had misdirected himself as to delay and his approach to forensic prejudice was flawed, (8) D was clearly forensically disadvantaged by a substantial period of delay by C for which there was no excuse. Authorities on s.33 reviewed. Observations on contrast between stringent terms of r.7.6 and court's discretion under s.33. ***Cain v Francis*** [2008] EWCA Civ 1451; [2009] 3 W.L.R. 551, CA; ***Horton v Sadler*** [2006] UKHL 27; [2007] 1 A.C. 307, HL, ref'd to. See further "In Detail" section of this issue of *CP News*. (See ***Civil Procedure 2009*** Vol.2 paras 8–92 and 8–93.)

■ **MOORE v TANTERA** [2009] EWCA Civ 1393, October 29, 2009, CA, unrep. (Ward and Wilson L.JJ.)

Defendant to additional claim — right to intervene in main trial

CPR rr.1.1, 20.9 and 20.13. Woman (C) on holiday in Italy suffering serious personal injuries (rendering her a paraplegic) whilst riding snowmobile. C's holiday contractually provided by English company (D1) and snowmobile hired from local supplier (D2) under arrangements organised to some extent by D1. In October 2008, C bringing claim against D1 in contract and in tort claiming damages (estimated at £3m) and, in particular, alleging that D1 was vicariously liable for inadequacy of instructions given to C by D2 as to the operation of emergency controls on the snowmobile. In defence, D1 denying that D2 acted in breach of any reasonable duty of care and alleging C's contributory negligence. D1 commencing additional claim against D2 for indemnity or contribution in respect of any liability on its part to C. At CMC for C's claim, held on April 30, 2009, Master directing that all questions of D1's liability in C's claim, including the question of C's contributory negligence, be tried first and separately. Subsequently, in defence to additional claim, D2 denying any breach of contract with D1, but otherwise this claim not proceeding expeditiously. Trial of C's liability claim fixed for November 3, 2009. C and D1 adhering to pre-trial timetable and D1 serving witness statement of D2 (their principal factual witness) on C. On October 5, 2009, by which time the additional claim had not progressed as far as a directions hearing, D2 applying to judge for permission to participate in trial of C's liability claim, in particular to be permitted by his counsel to cross-examine witnesses called by the other parties, and to call himself to give evidence on his own behalf rather than on behalf of D1. Judge refusing application, finding that, because D1 and D2 had identical interests, D2 would not be prejudiced by being refused permission to intervene in the trial. Single lord justice granting D2 permission to appeal. **Held**, allowing appeal, (1) at the trial, D2 would not be an ordinary witness, because he would be at risk of having findings of negligence made against him that could have serious consequences for him, (2) if not permitted to intervene, D2 would not be able to defend himself as he wanted to defend himself and he would not be on an equal footing, (3) fairness demanded that D2 should have a chance to defend himself, (4) the allocation of court time and court resources demanded that the court should not allow two trials if one would do. (See ***Civil Procedure 2009*** Vol.1 paras 20.9.1 and 20.13.1.)

■ **ORAMS v APOSTOLIDES** [2010] EWCA Civ 9, January 19, 2010, CA, unrep. (Pill and Lloyd L.JJ. and Sir Paul Kennedy)

Enforcement of foreign judgment — Judgments Regulation — public policy

CPR Pt 74 Sect.I, Judgments Regulation (EC) No.44/2001 art.34. Master granting judgment creditor's (C) application under r.74.3 for order that judgments of Nicosia District Court (NDC) in Republic of Cyprus (RC) (an EU Member State) in his favour against individuals (D) relating to land and obtained in default of appearance be registered in and be declared enforceable by the High Court. Land subject of the orders situated in Turkish Republic of Northern Cyprus (TRNC), an entity not recognised by the United Kingdom or by any country save

Turkey, and covering an area over which RC exercised no effective control. Judge allowing D's appeal ([2006] EWHC 2226 (QB); [2007] 1 W.L.R. 241), holding that the judgments should not be recognised, as the Regulation was of no effect in relation to matters that related to the area controlled by TRNC. Judge granting permission to appeal. Court of Appeal making order referring questions to ECJ for preliminary ruling. ECJ ruling that the suspension of the application of the *acquis communautaire* in those areas of the RC in which the Government of that Member State does not exercise effective control does not preclude the application of the Judgments Regulation (Case C-420/07). D submitting (1) that the judgments should be denied enforcement under art.34(1) as contrary to public policy, and (2) that the ECJ ruling was affected by apparent judicial bias. **Held**, allowing C's appeal, (1) it was not manifestly contrary to UK public policy to enforce the obligation under the Regulation to register the judgments, (2) the close contacts between the President of the ECJ and the government of the RC did not give rise to an appearance of bias. ***Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*** [2002] 2 A.C. 883, HL; ***Bamberski v Krombach (Case C-7/98)*** [2001] Q.B. 709, ECJ; ***Helow v Secretary of State for the Home Department*** [2008] 1 W.L.R. 2416, HL, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 74.10.5 and 74.10.6 and Vol.2 paras 9–582 and 9A–48.)

PARKINSON ENGINEERING PLC v SWAN [2009] EWCA Civ 1366, *The Times* January 13, 2010, CA, unrep. (Sedley, Lloyd and Sullivan L.JJ.)

Substitution of claimant — limitation period expired — whether substitution "necessary"

CPR r.19.5, Limitation Act 1980 s.35, Insolvency Act 1986 ss.20 and 212. On May 7, 2003, administrators (D) appointed when company (X) made subject of administration order. Subseqently, judge (1) discharging order, and (2) ordering that X be wound up. D released from liability under s.20 with effect from February 13, 2004. On April 17, 2009, liquidator (C) of X causing X to issue proceedings in the Chancery Division against D claiming damages for negligence (the original action). In defence, D pleading (amongst other things) that the claim was barred by the statutory release under s.20. In response to this, on June 3, 2009, C applying for orders (1) under r.19.5, permitting substitution of himself as claimant, and (2) under s.212, permitting him to proceed against D despite their release. Judge granting application and giving D permission to appeal. **Held**, dismissing appeal, (1) by s.35(2), a claim by C permitted under s.212 would be a new claim, because it would involve the substitution of a new party, (2) if such a claim was permitted to proceed by way of amendment to the existing proceedings, it would be deemed to have been commenced on April 17, 2009, and, in those circumstances, no six-year limitation defence would be available to D for breaches of duty and the claim would not be barred by the statutory release, (3) whereas, if C were required to commence fresh proceedings with permission under s.212, although D could not then plead statutory release, they could plead six-year limitation in response to any claim based on alleged breaches of duty before June 3, 2003, (4) the court had jurisdiction to allow C's substitution as claimant for the purpose of bringing a new claim under s.212 (assuming permission to bring such claim was granted) if it was satisfied that the substitution was necessary for the determination of the original action (s.35(5)(b) and r.19.5(2)(b)), (5) because of the availability to D of the statutory release defence, the original action against them could not succeed, (6) in those circumstances, C's substitution as a new party bringing a new (s.212) claim was necessary for the determination of that action, (7) in the new (s.212) claim the facts asserted by C were exactly the same as those asserted by X in the original action, (8) that new claim was the same claim in every respect as the original action, despite the fact that it was asserted by C on behalf of X, rather than in the name of X itself, (9) in the circumstances, the court had jurisdiction to substitute C as claimant bringing a new claim, and the judge's exercise of discretion under s.35(5)(b) and r.19.5(2)(b) permitting that substitution could not be faulted, (10) further, there was no ground for interfering with the judge's exercise of discretion under s.212. ***Merrett v Babb*** [2001] EWCA Civ 214; [2001] Q.B. 1174, CA; ***Martin v Kaisary*** [2005] EWCA Civ 594; March 16, 2005, CA, unrep.; ***Weston v Gribben*** [2006] EWCA Civ 1425; November 2, 2006, CA, unrep.; ***Adelson v Associated Newspapers Ltd*** [2007] EWCA Civ 701; [2008] 1 W.L.R. 585, CA; ***Roberts v Gill and Co*** [2008] EWCA Civ 803; [2009] 1 W.L.R. 531, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 19.5.1 and 19.5.4 and Vol.2 para.8–111.)

TETRA PAK LTD v BIDDLE & CO [2010] EWHC 54 (Ch), January 21, 2010, unrep. (Warren J.)

Particulars of claim — separate particulars for separate defendants

CPR rr.7.3, 7.4, 16.4 and 17.4, Practice Direction 16 (Statement of Case) para.3.1, Limitation Act 1980 ss.14A and 35. On July 2, 2008, several companies (C), being sponsoring employers under, and trustees of, a pension scheme, issuing claim form commencing Chancery proceedings against solicitors (D1) who had acted as advisers in relation to the scheme from 1992 to 1995 for negligence and breach of retainer, and against others, including the providers of actuarial services (D2) and a successor firm (D3). In individual letters to the several defendants sent on October 6, 2008, C offering to stay proceedings to permit activation of the relevant pre-action protocol processes. Upon D2 and D3 not agreeing to a stay, on October 27, C serving on them claim form and, in terms

restricted to the claims against D2 and D3, particulars of claim (served particulars). Letter to D1, who entered into negotiations with C for an agreed stay (in the event inconclusive), not revealing that D2 and D3 were defendants, but D1 becoming aware of this for first time when copy of claim form e-mailed to them by C on October 24. On October 31, C serving claim form on D1 and Master granting C's without notice application for order under r.7.6 extending from November 4 until November 28 time for service of the particulars of claim. On November 25, C sending to D1 (and also to D2 and D3) draft particulars of claim, these being in substance the served particulars but amended to particularise in addition claims against D1. Upon D1 refusing to agree to such amendments, and on assumption that relevant limitation period had expired, C applying under r.17.4 for permission to amend the served particulars of claim. Master ruling (1) that amendment was not required as it was open to C to serve on D1 original particulars of claim stating their case against them (with the prospect of those particulars and the served particulars being consolidated by amendment in due course), and (2) that C's submission that the amended particulars would not incorporate a new claim within s.35(1) should be rejected. D1 appealing against (1) and C making cross-appeal against (2). **Held**, dismissing the appeal and allowing the cross-appeal, (1) a claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings, (2) particulars of claim may be included in the claim form, or in a separate document served with it, or served subsequently within 14 days, (3) where there is a single defendant it is incumbent on the claimant to include in his original particulars of claim all of the claims he wishes to make pursuant to his claim form, (4) however, there is nothing in r.7.4 or para.3.1 which requires the particulars of claim (where they are not contained in the claim form) to be served in a single, composite document, and there is nothing in the CPR which requires, or leads inevitably to the conclusion, that there cannot be separate particulars of claim for separate defendants, (5) where a defendant has joined two defendants in the claim form he may serve separate particulars of claim on each, at least where (as in this case) the causes of action alleged against each are entirely distinct, but (6) separate particulars of claim cannot be served (at least without express direction from the court) where a new claim is sought to be made against a defendant (whether joint or single) on whom particulars of claim have already been served, (7) in the circumstances of his case, (a) the amendment to the served particulars would not amount to the introduction of a new cause of action for the purposes of s.35 or a new claim for the purposes of r.17.4, and (b) if C's claim against D1 was stated in separate, original particulars of claim they would not introduce a new cause of action or a new claim, (8) where amended particulars of claim assert a cause of action which did not appear in the unamended particulars a new claim is not ipso facto added or substituted. ***Steamship Mutual Underwriting Association Ltd v Trollope and Colls (City) Ltd*** (1986) 33 B.L.R. 77, CA, ref'd to. See further "In Detail" section of this issue of *CP News*. (See ***Civil Procedure 2009*** Vol.1 paras 7.4.2, 16.4.1, 16.4.5 and 17.4.4.)

Statutory Instruments

CIVIL PROCEDURE (AMENDMENT NO.2) RULES 2009 (SI 2009/3390)

Civil Procedure Rules 1998. Amend r.2.8(5) as a consequence of the new Electronic Working scheme set out in new Practice Direction 5C; amend rr.2.3(1), 6.2(d) and 48.6(6)(b) as a consequence of the new regulatory framework for the provision of legal services being introduced by the Legal Services Act 2007; amend rr.6.6, 6.7 and 6.23 to provide for service on a solicitor within any EEA state so as to comply with EC Directive 2006/123/EC on Services in the Internal Market; amend r.52.7 and revoke Sect.III of Pt 54 as a consequence of transfer of functions of AIT to the First-tier and Upper Tribunals; amend rules making reference to supplementing practice directions to accord with new system for naming them. In force February 1 and 15, 2010, and April 1, 2010. (See ***Civil Procedure 2009*** Vol.1 paras 2.3, 6.2, 48.6, 52.7 and 54.28 to 54.36.)

CIVIL COURTS (AMENDMENT NO.2) ORDER 2009 (SI 2009/3320)

Civil Courts Order 1983. Amends Sch.3 by deleting the entries relating to Nelson county court following closure of that court. In force February 1, 2010. (See ***Civil Procedure 2009*** Vol.2 paras AP–6+, AP–7 (p.2686) and AP–9 (p.2702).)

In Detail

FORENSIC PREJUDICE TO DEFENDANT IN DISAPPLYING LIMITATION PERIOD

The Limitation Act 1980 s.11 has the effect of reducing the limitation period for actions to which the section applies from six years to three years, but by s.33(1) of the Act 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).

In the recent case of *McDonnell v Walker* [2009] EWCA Civ 1257, November 11, 2009 CA unrep., where a deputy circuit judge granted the claimants' s.33 application and the Court of Appeal allowed the defendant's appeal, Waller L.J. (with whom Rimer L.J. and Sir Paul Kennedy agreed) noted that the section has been considered and reconsidered a number of times both by the House of Lords and by the Court of Appeal. (For facts and summary of this decision, see "In Brief" section of this issue of *CP News*.) Two recent decisions of the House of Lords, *Horton v Sadler* [2006] UKHL 27; [2007] 1 AC 307, HL and *A. v Hoare* [2008] UKHL 6; [2008] 1 A.C. 844, HL, had changed the landscape. Their impacts on the operation of s.33 were considered and explained by the Court of Appeal in *AB v The Nugent Care Society* [2009] EWCA Civ 827, July 29, 2009, CA, unrep., and the section received extensive analysis in the Court's earlier decision in *Cain v Francis* [2008] EWCA Civ 1451; [2009] 3 W.L.R. 551, CA (see *CP News* Issue 1/2009, January 20, 2009). Judgments in those appeals were handed down after the lower court's decision in the instant case.

In *A. v Hoare*, the House departed from its previous decision in *Stubbings v Webb* [1993] A.C. 498, HL, but the impact of that decision on the exercise of the court's powers under s.33 was not specifically relevant to the issues that arose on the McDonnell appeal. In *Horton v Sadler*, the House of Lords departed from its previous decision in *Walkley v Precision Forgings Ltd* [1979] 1 W.L.R. 606, HL, by holding that it was possible for a court to exercise its discretion under s.33, even though a claimant had brought an action prior to the expiry of the limitation period and that action had been halted for any reason. The facts in the *Horton* case were that the defendant had suffered no forensic prejudice and it would have been a windfall if he could rely on an understandable error on the part of the claimant's advisers, and thus the judge's inclination to be allowed to disapply the limitation period was given effect by the House of Lords. In the *McDonnell* case the first action brought by the claimants failed on January 1, 2005 when, after the expiry of the limitation period (and 17 months before the decision of the House of Lords in the *Horton* case), it was struck out (the claimants having failed to serve their claim form within the four-month period fixed by r.7.5 and being refused an extension under r.7.6). On April 17, 2008, the claimants commenced their second action and applied under s.33 for the disapplication of s.11, safe in the knowledge that the rule in *Walkley* no longer provided the defendant with a complete answer to that application. However, the claimants' 22-month delay between the decision in the *Horton* case and their commencement of the second action, a delay which the Court of Appeal found to be inexcusable, proved to be an important consideration in the Court's decision to allow the defendant's appeal from the deputy circuit judge's decision granting the claimants' s.33 application. Further, unlike the *Horton* case (and also the *Cain* case), this was not a case in which it could be said that the defendants suffered no forensic prejudice.

In his judgment in the *McDonnell* case, Waller L.J. detected "a slight tension" between s.33, as it is to be understood in the light of the decision of the House of Lords in the *Horton* case, and r.7.6 (Extension of time for serving a claim form), in that the rule has stringent terms which will prevent the court from extending time for service in a first action even if no forensic prejudice has been suffered by a defendant, whereas the section gives the court power to allow a second action to be commenced. His lordship explained (at [11]):

"But since the decision in *Horton* there is no doubt that there have been cases … in which time has been extended under s.33 in second actions where r.7.6 prevented an extension of time for service of a first action. Thus it cannot be said that in a r.7.6 case an extension of time for bringing a second action should never be granted, but it seems to me to be a relevant context and to at least show that it should not be easy for a claimant to commence a second action and obtain a disapplication of the limitation period under s.33."

Waller L.J. held that, in applying s.33 and granting the claimants' application, the deputy circuit judge had misdirected himself in a number of respects. His lordship's principal reason for so holding was that the judge concentrated on the 22-month delay between the decision of the House of Lords in the *Horton* case (June 16, 2006) and the commencement of the second action (April 17, 2008). His lordship said:

"The impression given by identifying that period as the most material is that it seems to suggest that provided there is no delay post-*Horton*, a claimant should be able to succeed in a disapplication of the limitation period in any second action. That totally misunderstands the effect of *Horton* where the disapplication was granted in circumstances where a defendant could show no forensic prejudice whatever. *Cain v Francis* similarly supports the disapplication in a second action where there is no forensic prejudice, but if there is forensic prejudice, then where that prejudice is caused by inexcusable delay and where there is little if any prejudice to a claimant with an action against his solicitors the position will almost certainly be different."

In *Horton* and in *Cain*, the fact that the defendant could not show any forensic prejudice and that the limitation defence would have been a complete windfall was the key feature. In the instant case, by the claimants' second action the defendant was faced with claims that were quite different in magnitude from anything notified to them before, almost seven years to the day after the accident, and where there was only a period of 17 months (from striking out of the first action to *Horton*) for which there was any kind of excuse. In his lordship's opinion, the defendant was clearly forensically disadvantaged by a substantial period of delay by the claimants for which there was no excuse (at [37]).

It is interesting to note that the solicitors for the claimants in the second action explained that the 22-month delay between the *Horton* decision and the commencement of the second action for which the claimants were responsible was caused in part by the need for them to discuss with solicitors then acting for the claimants' former solicitors the manner in which the second action might be funded. In finding that there was no excuse for that delay Waller L.J. said (at [36]):

"The solicitors discussing how that claim should be funded provides no excuse for the non-issue of the second proceedings vis a vis the defendant."

In concluding that the defendant's appeal should be allowed and the claimants' s.33 application refused, Waller .J. said (at [41]):

"Performing the balancing exercise the position appears to me to be clear. The defendant, or more accurately his insurers …, have suffered forensic prejudice as a result of not being notified of the claimants' current claim until seven years after the accident. The major part of that delay was the fault of the claimants themselves or their advisors and was inexcusable. The claimants will suffer only minor prejudice if they have to proceed against the solicitors who made the error over service of the first proceedings and some of that prejudice is their own fault. This was not a case in which it was right to disapply the limitation period."

PARTICULARS OF CLAIM WHERE MULTIPLE DEFENDANTS

There is a distinction between process (founding the court's jurisdiction and very briefly stating the claimant's claim to achieve that object) and pleadings (clarifying the matters in dispute between the parties). Under the CPR, the principal form of originating process is the claim form. The pleadings are "statements of case". In para.(1) of r.2.3 (Interpretation) it is stated that "statement of case" means "a claim form, particulars of claim where these are not included in a claim form, defence, Part 20 claim, or reply to defence". Confusingly, this definition conflates process and pleadings. This is because the definition tries to take account of the fact that a claimant's particulars of claim "may be contained in … the claim form" (r.7.4(1)(b)), but need not necessarily be contained therein. (Paragraph 3.1 of Practice Direction 16 (Statements of Case) states that the particulars claim should be set out in the claim form "if practicable".) If the particulars are contained in the claim form then, obviously, they will be served with the claim form. If they are not, they may still be served with the claim form but, alternatively, they may be served separately. But if they are to be served separately the claimant (C) must be aware that they cannot be served at any time; for the purpose of restricting unnecessary delays they must be served within the time restrictions imposed by r.7.4.

There are provisions in the CPR stipulating what C's particulars of claim must include; notably r.16.4 (Contents of the particulars of claim), and paras 3 to 9 of Practice Direction 16. C may amend his particulars of claim as provided by Pt 17 (Amendments of statements of case). If they have been served, C may amend them only with the written consent of all the other parties, or with the permission of the court (r.17.1). If the effect of C's being granted by the court permission to amend the particulars would be to enable C to add or substitute a new claim after the end of a relevant limitation period, special considerations arise (see r.17.4 and the Limitation Act 1980 s.35).

For obvious reasons, the audience that the CPR principally has in mind is a single claimant bringing proceedings against a sole defendant. Conceivably, those proceedings as pleaded by C in the particulars of claim may consist of a single claim (or cause of action) against the sole defendant or multiple claims against that defendant, perhaps with the additional claims being added to the particulars by way of amendments as permitted by the rules or by the court. It would seem to be too obvious to point out that what C could not do would be to prepare and serve his particulars

of claim, as it were, by instalments, with some claims being alleged in a first instalment and further claims be alleged in later instalments. Where there is a sole defendant it is incumbent on C to include in his particulars of claim all of the claims he wishes to make pursuant to his claim form. If C subsequently wishes to make different claims he must do so within the framework of the rules governing amendments.

Although the provisions of the CPR are stated in terms that have a single claimant bringing proceedings against a sole defendant principally in mind, it is clear that where C, for whatever reason, wants to bring a claim against more than one defendant he may do so by commencing proceedings against all of them by the one claim form. In his particulars of claim C may allege claims against the two or more defendants either jointly or severally (or perhaps some claims may be joint and others several). In the recent case of *Tetra Pak Ltd v Biddle and Co* [2010] EWHC 54 (Ch), January 21, 2010, unrep., where C brought proceedings making quite distinct claims against several defendants, one of the issues falling for determination was whether C's particulars of claim as against the several defendants had to be included in a single document, or whether they could be, as it were, bespoke, with separate particulars of claim being served on separate defendants with each making allegations targeted appropriately. (That issue was given particular point because limitation issues, not canvassed here, lurked.) The facts of this case and the judgment of Warren J. are shortly stated in the "In Brief" section of this issue of *CP News*, and need not all be repeated here. Warren J. held that there is nothing in r.7.4 or para.3.1 that requires the particulars of claim (where they are not contained in the claim form) to be served in a single, composite document, and there is nothing in the CPR which requires, or leads inevitably to the conclusion, that there cannot be separate particulars of claim for separate defendants. Where a defendant has joined two defendants in the claim form he may serve separate particulars of claim on each, at least where (as in this case) the causes of action alleged against each are entirely distinct.

PUBLICATION AND REPORTING OF CPR PRACTICE DIRECTIONS

There was a time when practice directions were made by the higher courts to whose practice they related, were signed and dated by the judge (or judges) who made them, and were published (sometimes by announcement from the bench) and generally reported (usually in the Weekly Law Reports) and from there taken into practitioners' works (such as the *White Book*). This was an admirable system, not least because everyone concerned knew what the practice directions said and had reasonable notice of what was required of them. But none of that is true today of CPR supplementing practice directions and of those directions sometimes vaguely and compendiously referred to as "other practice directions".

Sub-section (1) of the Civil Procedure Act 1997 states that practice directions may be given "in accordance with Part 1 of Schedule 2 of the Constitutional Reform Act 2005" and sub-section (2) states that they may be given "otherwise than under sub-section (1)". The effect of these provisions, which are concerned with the making of practice directions, and not with the publication and reporting, is explained in the *White Book* (see Vol.2 para.12–17). So, as to the making of practice directions, the position is tolerably clear and unexceptional. But the same cannot be said of the publication and reporting of practice directions.

The CPR (which are, of course, rules made and amended by statutory instruments) and the related practice directions and pre-action protocols are published in printed form by the Stationery Office (TSO) in a multi-volume loose-leaf publication, also available on CD-ROM, entitled *Civil Procedure Rules*, first published in 1999. This publication is updated from time to time by "Updates" (sometimes called "Supplements") (50 of them since 1999). In the Introduction to that publication it is stated:

"The printed version of this official publication is currently the authoritative version, and is provided in courts across England and Wales for use by judges and court clerks."

So if one asks the question: "How are CPR practice directions authoritatively published and reported?", the answer is, in the print version of "Civil Procedure Rules" published by the TSO. When new CPR practice directions are made, or existing ones replaced or amended, they are published in TSO CPR Updates (together with their commencement dates) and incorporated in the printed version of "Civil Procedure Rules" as appropriate. Obviously, until they are authoritatively published in that manner, although judges and practitioners may have got wind of them they cannot be sure as to the exact terms of such new, replacement or amending directions (which are never precisely dated). They might wonder whether, before such publication is effected, they can rely absolutely on the accuracy of other versions of them that may come to hand (even those with a reliable provenance).

All this would not matter much but for one thing. That is, the fact that TSO CPR Updates containing new, replacement or amending directions are sometimes published no earlier (and occasionally shortly after) the dates on which those directions come into effect. (Because Updates themselves are never precisely dated it is not always possible to tell whether or not publication beat the commencement date.) This means that the official system for publishing and reporting CPR practice directions can have the effect of giving judges and practitioners either no, or no reasonable notice, of changes. This is unsatisfactory. It is time someone did something about it.

CPR Update

AMENDMENTS TO CPR RULES

The Civil Procedure (Amendment No.2) Rules 2009 (SI 2009/3390) were issued on December 30, 2009. They amend various CPR Parts. Most of the provisions come into effect in April 2010. But some came into effect on February 1 and 15. Those in that category are set out below. Those affecting Pts 2, 6 and 48 are consequences of the new regulatory framework for the provision of legal services introduced by the Legal Services Act 2007 and came into force on February 1. Those affecting Pts 52 and 54, and which came into force on February 15, 2010, are consequences of the transfer of the functions of the Asylum and Immigration Tribunal to the First-tier and Upper Tribunals as part of the new unified tribunal structure established under the Tribunals Courts and Enforcement Act 2007.

Paragraph and page references are to the *White Book* 2009.

PART 2—APPLICATION AND INTERPRETATION OF RULES

Paragraph 2.3, p.20

In r.2.3(1), for the definition of "legal representative" substitute:

""legal representative" means a—

(a) barrister;

(b) solicitor;

(c) solicitor's employee;

(d) manager of a body recognised under section 9 of the Administration of Justice Act 1985; or

(e) person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the conduct of litigation (within the meaning of that Act),

who has been instructed to act for a party in relation to proceedings;".

PART 6—SERVICE OF DOCUMENTS

Paragraph 6.2, p.153

In r.6.2, for sub-paragraph (d) substitute:

"(d) "solicitor" includes any other person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the conduct of litigation (within the meaning of that Act)."

PART 48—COSTS—SPECIAL CASES

Paragraph 48.6, p.1346

In r.48.6(6)(b), for "or other authorised litigator (as defined in the Courts and Legal Services Act 1990)" substitute ", manager of a body recognised under section 9 of the Administration of Justice Act 1985 or a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the conduct of litigation (within the meaning of that Act)".

PART 52—APPEALS

Paragraph 52.7, p.1499

In r.52.7(b), for "Asylum and Immigration Tribunal" substitute "Immigration and Asylum Chamber of the Upper Tribunal". (For transitional purposes, r.52.7 in its unamended form is included in new Section V of Practice Direction 52—Appeals; see further below.)

PART 54—JUDICIAL AND STATUTORY REVIEW

Paragraphs 54.28 to 54.36, pp.1647 to 1654

Section III of CPR Pt 54 (rr.54.28 to 54.36) is omitted. (For transitional purposes, these provisions are transferred to new Section V of Practice Direction 52—Appeals; see further below.)

AMENDMENTS TO CPR PRACTICE DIRECTIONS

Certain amendments have been made to CPR practice directions and came into force on February 1 and 15. Generally these changes are a consequence of changes made to rules in the CPR by Civil Procedure (Amendment No.2) Rules 2009 (SI 2009/3390), as explained above. Thus, those affecting PD 32 are consequences of the new regulatory framework for the provision of legal services introduced by the Legal Services Act 2007 and came into force on February 1. Those affecting PD 52, PD 54A and PD 54B are consequences of the transfer of the functions of the Asylum and Immigration Tribunal (as explained above) and came into force on February 15, 2010. At the time of going to press, the date of publication of these amendments was unknown but it is anticipated that they will be published in forthcoming TSO CPR Update 51 (see "In Detail" section of this issue of *CP News*).

Paragraph and page references are to the *White Book* 2009.

PRACTICE DIRECTION 32—EVIDENCE

Paragraph 32PD9, pp.886 and 887

In sub-para.(1) of para.9.1, for "Commissioners for oaths," substitute "a commissioner for oaths;".

Omit sub-para.(2) of para.9.1 and the footnote to that paragraph.

For the footnote to sub-para.(3) of para.9.1, substitute:

"Sections 12 and 18 of, and Schedules 2 and 4 to, the Legal Services Act 2007."

PRACTICE DIRECTION 52—APPEALS

Paragraph 52PD.1, p.1526

For para.1.1 substitute:

"1.1 This Practice Direction is divided into five sections:

Section I — General provisions about appeals

Section II — General provisions about statutory appeals and appeals by way of case stated

Section III — Provisions about specific appeals

Section IV — Provisions about reopening appeals

Section V — Transitional provisions relating to the abolition of the Asylum and Immigration Tribunal."

Paragraph 52PD.95, pp.1563 and 1564

For para.20.1 substitute:

"**20.1** This Section of this Practice Direction provides special provisions about the appeals to which the following table refers. This section is not exhaustive and does not create, amend or remove any right of appeal."

Paragraph 52PD.96, p.1654

After r.20.3, in Table on Appeals to the Court of Appeal, for "Asylum and Immigration Tribunal" substitute "Asylum and Immigration appeals".

Paragraph 52PD.106, p.1568

The following amendments are made to para.21.7. (For transitional purposes, this paragraph is restated in its unamended form in new Section IV of Practice Direction 52; see further below.)

For para.21.7(1) substitute:

"(1) This paragraph applies to appeals from the Immigration and Asylum Chamber of the Upper Tribunal under section 13 of the Tribunals, Courts and Enforcement Act 2007."

For para.21.7(4) substitute:

"(4) The appellant must serve the appellant's notice in accordance with rule 52.4(3) on —

(a) the persons to be served under that rule; and

(b) the Immigration and Asylum Chamber of the Upper Tribunal."

For para.21.7(5) substitute:

"(5) On being served with the appellant's notice, the Immigration and Asylum Chamber of the Upper Tribunal must send to the Court of Appeal copies of the documents which were before the relevant Tribunal when it considered the appeal."

Paragraph 52PD.107, pp.1568 and 1569

Omit para.21.7A. (For transitional purposes, this omitted paragraph is restated in new Section IV of Practice Direction 52; see further below.)

Paragraph 52PD.107, p.1569

Paragraph 21.7B(1) is substituted as follows. (For transitional purposes, this paragraph is restated in its unamended form in new Section IV of Practice Direction 52; see further below.)

"(1) This paragraph applies to appeals from the Immigration and Asylum Chamber of the Upper Tribunal which —

(a) would otherwise be treated as abandoned under section 104(4A) of the Nationality, Immigration and Asylum Act 2002 (the '2002 Act'); but

(b) meet the conditions set out in section 104(4B) or section 104(4C) of the 2002 Act."

Paragraph 52PD.137, p.1594

After the last paragraph in Section IV (para.25) and the commentary thereon, insert new Section V as follows:

"Section V

Transitional Provisions relating to the abolition of the Asylum and Immigration Tribunal

(1) Rules 52.7 and 54.28 to 54.36, paragraphs 21.7, 21.7A and 21.7B of Practice Direction 52 and the whole of Practice Direction 54B in force immediately before the 15 February 2010 will continue to apply to the applications, references, orders and cases, as appropriate, set out in paragraphs 5, 7, 9, 10, 11 and 13(1)(c) of Schedule 4 to the Transfer of Functions of the Asylum and Immigration Tribunal Order 2009 as if—

(i) rule 52.7 and paragraphs 21.7 and 21.7B of Practice Direction 52 had not been amended; and

(ii) paragraph 21.7A of Practice Direction 52, rules 54.28 to 54.36 and Practice Direction 54B had not been revoked.

(2) For the purpose of service of any claim form issued before 15 February 2010 paragraph 6.2 of Practice Direction 54A shall apply with modification so that the reference in that paragraph to the Immigration and Asylum Chamber of the First-tier Tribunal shall be treated as a reference to the Asylum and Immigration Tribunal.

(3) For ease of reference, the amended and revoked provisions are reproduced below in italics: …"

(The amended and revoked rule and practice direction provisions as listed in para.(1) and referred to in para.(3) required to be retained for transitional purposes as they stood before February 15, are not printed here. They may be found in their accustomed places in the *White Book* 2009.)

PRACTICE DIRECTION 54A—JUDICIAL REVIEW

Paragraph 54APD.6, p.1656

For para.6.2 substitute:

"**6.2** Where the defendant or interested party to the claim for judicial review is—

(a) the Immigration and Asylum Chamber of the First-tier Tribunal, the address for service of the claim form is Official Correspondence Unit, PO Box 6987, Leicester, LE1 6ZX or fax number 0116 249 4240;

(b) the Crown, service of the claim form must be effected on the solicitor acting for the relevant government department as if the proceedings were civil proceedings as defined in the Crown Proceedings Act 1947.

(Practice Direction 66 gives the list published under section 17 of the Crown Proceedings Act 1947 of the solicitors

acting in civil proceedings (as defined in that Act) for the different government departments on whom service is to be effected, and of their addresses.)

(Part 6 contains provisions about the service of claim forms.)"

PRACTICE DIRECTION 54B—APPLICATIONS FOR STATUTORY REVIEW UNDER SECTION 103A OF THE NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002

Paragraphs 54BPD.1 to 54BPD.4, p.1661

This practice direction is omitted. (For transitional purposes, this omitted practice direction is restated in new Section IV of Practice Direction 52; see further above.)

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