CIVIL PROCEDURE NEWS

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Costs — interim payment on account before detailed assessment — exercise of discretion

CPR rr.44.3(8) and 47.15. In March 2005, claimant (C) succeeding at High Court trial and judge awarding costs in his favour. On basis that C then estimated his costs at £382,000, judge ordering payment of costs on account of £100,000. In August 2007, C commencing detailed assessment proceedings and serving a bill amounting to almost £500,000. Upon defendants (D) failing to serve points of dispute in appropriate time, C obtaining a default costs certificate. On January 11, 2008, district judge setting that certificate aside and directing service of points of dispute. On April 22, 2008, after points of dispute had been served, district judge refusing C's application for order for a further payment on account. Circuit judge allowing C's appeal (1) holding (a) that the test was that, if there was a sum in excess of £100,000 which the court was almost certain would be awarded ultimately by way of costs, then a further interim payment in that sum should be ordered, and (b) that the district judge had not applied that test, and (2) remitting matter to district judge for assessment of the quantum of the payment. Single lord justice granting D permission to make second appeal. **Held**, allowing appeal, (1) that the receiving party should not be kept out of moneys which will almost certainly be demonstrated to be due to him any longer than is necessary is an important consideration which normally carries significant weight but gives rise to no presumption, (2) it is a matter to be considered by the court along with all other material factors which vary from case to case when exercising the wide discretion given by r.44.3(8). ***Mars UK Ltd v Teknowledge Ltd*** [2000] F.S.R. 138; ***Dyson Ltd v Hoover Ltd. (No.4)*** [2003] EWHC 624 (Ch); [2004] 1 W.L.R. 1264, ref'd to. (See ***Civil Procedure 2010*** Vol.1 para.44.3.15.)

D MORGAN PLC v MACE & JONES [2010] EWHC 697 (TCC), March 23, 2010, unrep. (Coulson J.)

"Unless" order — striking out effective without need for further order — principles

CPR rr.1.1, 3.1 and 3.4. On April 1, 2003, claimant company (C) commencing negligence claim against professional advisers (D). On February 14, 2009, Master making order requiring C to serve on D (1) their forensic accountant's report (relevant to their claim for loss of profit) by July 29, 2009, and (2) a revised Schedule of Loss by (as parties agreed) September 13, 2009. C not complying with first part of this order. On January 12, 2010, following C's compliance with second part of order (intimating a loss of profit claim of £57 million) and transfer of claim to TCC, judge (1) fixing trial for October 4, 2010, and (2) ordering C (a) to provide answers to D's request for further information as to losses by February 9, and to (b) to serve their forensic accountant's report by February 26. In complying with first part of this order C stating that certain particulars would be provided in the forensic accountant's report. In March 2010, after failing to comply with second part of order, C applying for extension of time for their compliance to May 8, and D cross-applying for unless order requiring C to comply by April 6. **Held**, granting D's application, but not requiring C's compliance before April 21, (1) an unless order should be made only if the court has carefully considered whether the sanction of striking out is appropriate in all the circumstances of the case, (2) a court should only make an unless order with which the party in question has a reasonable prospect of complying, (3) C had failed to advance a proper explanation for their failure to comply with the judge's order, (4) in all the circumstances it was clear that only the granting of D's application would impress upon C the importance of complying with orders of the court generally and the order as to service of the report in particular, (5) in order to meet the terms of the unless order the report served will need to be a full and proper exposition of the loss of profit claim to the extent that such a claim is properly supported by C's expert. Judge stating that a claimant's substantial loss of profit claim should be properly set out in pleading form so that it can be understood and answered by the defendants, and should not be advanced by a pleading referring to a projected expert's report. ***Marcan Shipping (London) Ltd v Kefalas*** [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864, CA, ref'd to. (See ***Civil Procedure 2010*** Vol.1 para.3.4.4.1.)

GOODALE v MINISTRY OF JUSTICE [2009] EWHC B40 (QB), November 5, 2009, unrep. (Senior Master Whitaker)

Standard disclosure — duty of search — electronically stored information

CPR rr.31.6 and 31.7, Practice Direction 31 (Disclosure and Inspection) para.2A. Under GLO, numerous persons (C) bringing proceedings against Ministry of Justice (D) alleging that the detoxification regime to which they were subjected whilst inmates in prisons for which D was responsible was indiscriminate and infringed their art.3 rights. By way of defence, D pleading (1) that the decisions that were taken and the treatment that was given were matters of clinical discretion for which they are not liable, and (2) that, in any event, the treatment that was given in the

prisons which imposed it on the prisoners was reasonable. Master ordering standard disclosure. Categories of paper documents to be disclosed by D largely agreed, but, on ground that it would be disproportionate, D declining to undertake search of electronically stored information (ESI) for documents falling within r.31.6(b). Master (1) holding that it would be totally wrong to require C to accept only the disclosure of documents that exist in paper form, (2) ruling that a limited amount of disclosure of ESI confined to four key defence witnesses should be initially undertaken, and (3) recommending that, for purpose of identifying the information that D should disclose about their systems and the location of the relevant ESI, the draft ESI disclosure questionnaire (attached to his ruling) should be used. Difficulties encountered in devising search of ESI and of approach that court should take if the terms of such search cannot be agreed explained. (See ***Civil Procedure 2010*** Vol.1 paras 31.6.5 and 31.7.4.)

HUNTRESS SEARCH LTD v CANAPEUM LTD [2010] EWHC 1270 (QB), May 28 2010, unrep. (Eady J.)

Interpleader claim — order restraining claim against enforcement officer

CPR Sch.1 RSC Ord.17, rr.1 and 2, Courts Act 2003 Sch.7, High Court Enforcement Officers Regulations 2004 reg.7. In county court proceedings, claimant company (C) obtaining judgment for £4,827 together with interest and costs against defendant company (D), now in administration. Judgment transferred to High Court for purposes of execution and writ of fi fa directed to enforcement officer (X) issued. X attending at premises occupied by another company (Y), being premises adjacent to premises formerly occupied by D. X taking no notice of documents produced by Y demonstrating that, although they had acquired D's premises and equipment, they had not taken on D's liabilities and were not the debtors. For the purpose of preventing X from completing the seizure and removal of their goods, Y bringing execution process to an end by making payment of £7,900 to X. Subsequently, Y bringing interpleader claim and Master giving directions, including direction that no action be brought against X pending further order. At hearing, Master refusing X's application for relief in the form of an order under r. 2(4) restraining Y from bringing their claim. On D's appeal, **held**, dismissing appeal, (1) the nature of the appellate jurisdiction to be exercised was by way of review and not rehearing, (2) the test to be applied is whether Y had suffered a real and substantial grievance, (3) the Master was entitled to conclude that Y had such grievance in respect of the attitude and conduct of X in carrying out the execution. Observations on significance of specification in enforcement process of address for enforcement. ***Neumann v Bakeaway Ltd (Note)***, [1983] 1 W.L.R. 1016, CA, ref'd to. (See ***Civil Procedure 2010*** Vol.1 para.sc17.8.3.)

O'BYRNE v AVENTIS PASTEUR MSD LTD [2010] UKSC 23; *The Times* May 27, 2010, SC

Product liability — substitution of producer as defendant — expiry of limitation period

CPR r.19.5, Limitation Act 1980 ss.11A and 35, Consumer Protection Act 1987 s.4, Council Directive 85/374/EEC arts 3, 7 and 11. Infant (C) bringing defective product claim under Pt I of the 1987 Act, alleging that in November 1992 he was damaged by defective vaccine. Vaccine manufactured by French company (X Co) and distributed in England by another company (Y Co), a wholly-owned subsidiary of X Co. C's claim subject to 10-year limitation period stipulated by s.11A(3), implementing art.11. Shortly before time had run, C commencing claim against Y Co. alleging that they had "put into circulation" a defective product. Subsequently, upon realising that X Co and not Y Co were the producers of the vaccine, C (1) commencing fresh proceedings against X Co, and (2) applying under r.19.5 and s.35 to substitute X Co as defendants in the original proceedings. X Co contending that, as the claim against them was brought 10 years after the product had been "put into circulation", it was statute barred. High Court judge staying proceedings and referring questions to ECJ for preliminary ruling. Following receipt of rulings on reference (Case C-127/04, [2006] 1 W.L.R. 1606, ECJ), judge granting C's application to make substitution ([2006] EWHC 2562 (QB); [2007] 1 W.L.R. 757) and Court of Appeal dismissing X Co's appeal ([2007] EWCA Civ 966; [2008] 1 W.L.R. 1188, CA). House of Lords granting X Co leave to appeal and making second reference to ECJ seeking clarification of judgment on first reference ([2008] UKHL 34; [2008] 4 All E.R. 881, HL). Upon receipt of ruling on second reference (Case C-358/08, *The Times* December 9, 2009, ECJ), **held**, allowing appeal, (1) the ECJ has ruled (a) that art.11 must be interpreted as precluding national legislation which allows the substitution of one defendant for another during proceedings from being applied in a way which permits a "producer" within the meaning of art.3 to be sued after the period prescribed by art.11 as defendant in proceedings brought within that period against another person, and (b) that art.11 must be interpreted in this manner even where the failure to sue a particular producer within the relevant 10-year period had been due to some mistake on the claimant's part, (2) in these circumstances, as C now conceded, C could not use s.35 as a basis for substituting X Co for Y Co in the present proceedings, (3) the ECJ has further ruled that in such circumstances art.11 must be interpreted as not precluding a national court from holding that a producer can be substituted for wholly owned subsidiary of that producer if that court finds that the putting in circulation of the product in question was in fact determined by that producer, (4) when dealing with that issue the national court has to consider, in accordance with domestic rules of proof, whether the producer was controlling the subsidiary and determining when it put the product into circulation, (5) the fact that Y Co was a wholly owned subsidiary of X Co could of itself not be a reason for allowing X Co to be substituted as defendant on this basis but was just one factor to be taken into account. (See ***Civil Procedure 2010*** Vol.1 para.19.5.7 and Vol.2 paras 8–26 and 8–112.)

RE R. (A CHILD) [2010] EWCA Civ 303, February 9, 2010, CA, unrep. (Thorpe and Arden L.JJ.)

Permission to appeal — change of circumstances — appellant's duty to appeal court

CPR rr.1.1, 1.3, 44.3(4) and 52.3. In family proceedings, on father's (F) application for order preventing mother (M) from removing child from the jurisdiction or from his care, judge making shared residence order weighted in favour of F. Single lord justice granting M permission to appeal against the order. Subsequently, and following upon change in her living arrangements, M making application to vary judge's order and conciliation appointment on that application fixed, but Court of Appeal not informed of these developments in advance of appeal hearing. **Held**, dismissing appeal, (1) the judge fundamentally misunderstood M's position as to shared residence, (2) however, the judge's order should stand because (a) this was a paradigm case for a shared residence order, and (b) no purpose would be served by setting it aside and making an interim order in the same terms pending the hearing of the variation application. Arden L.J. stating that by not keeping the Court informed of the developments after the granting of permission to appeal, M had failed to comply with the practice of the Court. (See further "In Detail" section of this issue of *CP News*.) (See ***Civil Procedure 2010*** Vol.1 paras 1.3.3 and 52.3.2 and Vol.2 para.11–12.)

R. (SHINER) v COMMISSIONERS OF HM REVENUE & CUSTOMS [2010] EWCA Civ 558, May 26, 2010, CA, unrep. (Waller, Rix and Wilson L.JJ.)

Judicial review claim — refusal of permission to proceed — permission to appeal

CPR rr.52.15 and 54.4, EC Treaty art.56, Human Rights Act 1998 Sch.1 Pt II art.1, Tribunals, Courts and Enforcement Act 2007 s.3. After enactment of revenue legislation in 2008, HMRC (D) writing to certain tax payers advising them that tax would be payable by them for every year on which income arose under a settlement scheme set up by them in 2005 expressly for the purpose of avoiding tax. Some of these taxpayers (C) commencing proceedings for judicial review seeking (1) declarations that the retrospective application of the legislation was incompatible with art.56 (freedom to transfer capital) (the EC point) and with art.1 (protection of property) (the ECHR point), and (2) an order quashing D's decision to apply the legislation retrospectively. On June 16, 2009, judge granting C permission to continue the proceedings on the ECHR point and parties subsequently agreeing to be bound by the court's decision on that point in parallel judicial review proceedings (*R. (Huiston) v HMRC*). On June 3, 2009, same judge (1) finding that the substance of C's claim on the EC point was that the legislation was incompatible, (2) ruling that, therefore, in this respect the claim was out of time and should be dismissed. Judge stating that, in due course, all of the issues arising in these proceedings should be brought before the Tax Chamber (TC) of the First-tier Tribunal, with appeal to the Upper Tribunal (UT), but noting that neither the TC nor the UT has jurisdiction to determine the ECHR point. Subsequently, (1) judge at first instance in Huiston case dismissing claim ([2010] EWHC 97 (Admin)), but Court of Appeal granting claimants in that case permission to appeal, and (2) C applying to Court of Appeal under r.52.15(1) for permission to appeal against judge's decision of June 3. **Held**, granting C permission to apply for judicial review in the Court of Appeal under r.52.15(3) and (4) and extending time, (1) the underlying issue in relation to the EC point, raised in the instant appeal, and in relation to the ECHR point, raised in the *Huiston* appeal, was retrospectivity, (2) as to the EC point the real question was whether the correct tribunal to consider the matter first was the court or the TC, (3) that point was not a matter that was not susceptible to judicial review, (4) efficient case management suggested that the sensible course was to allow the *Huiston* appeal and C's claim for judicial review to be considered together at a hearing in the Court of Appeal confined to both points, (5) accordingly, C's application for permission to appeal against the judge's decision of June 3, 2009, should be disposed of (a) by giving C permission under r.52.15(3) to apply for judicial review, (b) by retaining those proceedings in the Court of Appeal under r.52.15(4), and (c) by listing C's claim to come on at the same time as the *Huiston* appeal. (See ***Civil Procedure 2010*** Vol.1 para.52.15.1.)

RELFO LTD v VARSANI [2010] EWCA Civ 560; 160 New L.J. 804 (2010), CA (Sir Andrew Morritt C., Etherton and Elias L.JJ.)

Service of claim form — place of service — "usual residence"

CPR rr.6.9(2) and 11. After sale by company (C) of property giving rise to tax liability of £1.4 million which remained unpaid, sum of £500,000 transferred by C to credit of account of BVI company and similar sum then immediately remitted to businessman's (D) account with Singapore branch of a bank. C going into voluntary liquidation with HMRC as major creditor and liquidator appointed. In proceedings brought in Singapore by C against D to recover the £500,000, court finding that the money had been paid away from C by its director in breach of fiduciary duty and that D knew that the money was traceable to that breach but, on ground that it amounted to an indirect enforcement of UK revenue laws, court dismissing C's claim. C thereupon commencing proceedings against D in England for the same relief. C serving claim form and particulars together by leaving them with D's father at a residence in a London suburb owned jointly by D and his wife. D learning of the existence of these documents two days later. D applying under r.11 to set aside service on the ground that the residence was not his "usual or last known residence" within the

meaning of r.6.9(2); in particular, D submitting (1) that the residence was not and never had been his residence, and (2) that he was habitually and permanently resident in Nairobi and should have been served, if the court had given C permission to do so, out of the jurisdiction in Kenya. Judge dismissing D's application ([2009] EWHC 2297 (Ch)). **Held**, dismissing D's appeal, (1) whether a defendant's use of a property is such as to enable it to be fairly described as a place at which he or she resides is a question of fact and degree, (2) on the facts, it was quite impossible to contend that D did not reside at the residence at all, (3) the critical test for determining whether a residence is a "usual" residence is the party's pattern on life, (4) the settled pattern of D's life was to visit the residence, as his family home, regularly each year, albeit not at the same time each year, but for reasonably extensive periods of time to see and stay with his family, (5) in these circumstances the judge was entitled to conclude that the residence was D's usual residence for the purposes of r.6.9. Observations on meaning of "last known residence" in r.6.9(2). ***Levene v Commissioners of Inland Revenue*** [1928] A.C. 217, HL; ***Cherney v Deripaska*** [2007] EWHC 965 (Comm); ***OJSC Oil Co Yugranfet v Abramovich*** [2008] EWHC 2613 (Comm), ref'd to. (See ***Civil Procedure 2010*** Vol.1 para.6.9.3.1.)

■ **ROBERTS v GILL & CO** [2010] UKSC 22; [2010] 2 W.L.R. 1227, SC

Amendment of pleadings to add derivative action — expiry of limitation period

CPR rr.17.4, 19.5 and 19.9, Limitation Act 1980 s.35. Man (C) and his brother (X) two of three residuary beneficiaries of their grandmother's (Y) estate. In 1996, X granted letters of administration with will annexed. In 2000, on application of C, X replaced as administrator by C's solicitor (S). During period whilst X was administrator, two firms of solicitors (D) acting for him in relation to estate transactions. In 2002, before expiry of relevant six-year limitation period, C commencing proceedings in a personal capacity against D for breach of duty of care owed to him as beneficiary, alleging that the estate had been administered on a false basis. In particular, C alleging that, although inheritance tax had not been paid in full by X, a farm property which ought therefore to have fallen into the residuary estate had been sold in 1997 and the proceeds paid to X. After negotiations between the parties, C accepting that a claim that D owed a duty of care to the beneficiaries would be difficult to sustain. Accordingly, on August 25, 2006, C applying to amend the proceedings in order to continue them both in his personal capacity and as a derivative action on behalf of Y's estate. By this time, relevant limitation periods not only for C's personal claim (the original action) but also for any claim by S as administrator had expired. Judge dismissing this application and Court of Appeal (for different reasons) dismissing C's appeal ([2008] EWCA Civ 803; [2009] 1 W.L.R. 531, CA). House of Lords granting M permission to appeal ([2009] 1 W.L.R. 1858, HL). **Held**, dismissing appeal, (1) by the proposed amendment, C sought to bring a derivative action in his own name standing in the place of S on behalf of Y's estate against third parties, (2) the court had power to allow the capacity in which C sued to be altered from personal to representative (r.17.4), (3) however, beneficiaries are entitled to sue on behalf of an estate only in special circumstances and in the instant case no such circumstances justified C's derivative claim, (4) further (a) as the derivative action would involve a new party in the form of S who would, if C's application were allowed, have to be joined as a party, and (b) as the relevant limitation period had expired, S could not be so joined unless the original action could not be maintained without it (r.19.5(3)(b)), the application would have to be refused, because (5) there was no possible basis for any suggestion that S was a necessary or proper party to the original action. ***Hayim v Citibank NA***, [1987] A.C. 730, PC, ref'd to. History and effects of s.35 and r.19.5 explained. (See further "In Detail" section of this issue of *CP News*.) (See ***Civil Procedure 2010*** Vol.1 paras 19.5.4 and 19.9.1 and Vol.2 paras 8–110 and 8–111.)

■ **SHADROKH-CIGARI v SHADROKH-CIGARI (PRACTICE NOTE)** [2010] EWCA Civ 21; [2010] 1 W.L.R. 1311, CA (Thorpe and Wall L.JJ.)

Committal for contempt — formalities to be observed

CPR Sch.1 RSC Ord.52.1. In proceedings under the Children Act 1989, on January 29, 2008, judge dismissing father's (C) applications for residence and direct contact and making several orders, including an order expressly prohibiting both parties from disclosing any documents filed in the proceedings to any other person, subject to exceptions. C applying to commit mother (M) for contempt of court in breaching the latter order. County court judge finding that M was in breach and imposing fine. **Held**, allowing M's appeal and setting aside committal order, (1) the formalities of committal proceedings are to be strictly observed, but a breach of them may be overlooked if it does not affect the justice of the case, (2) in this case, the formalities had not been observed in that the order of January 29, 2008 did not include a penal notice and contained no warning on its face that breach was a contempt capable of being punished by imprisonment, (3) given that one of the parties was in person, and neither was English, it was important that these formalities should have been observed if the order was to have penal consequences, (4) further, if the order was to have such consequences it needed to be clear on its face as to precisely what it meant, and precisely what it forbade, (5) contempt will not be established where the breach is of an order which is ambiguous, or which does not require or forbid the performance of a particular act within a particular time-frame. ***Federal Bank of the Middle East v Hadkinson*** [2000] 1 W.L.R. 1695, CA, ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras sc45.7.6 and sc52.1.4.)

In Detail

ADDITION OF DERIVATIVE CLAIM AFTER EXPIRY OF LIMITATION PERIOD

The facts of the important case of *Roberts v Gill & Co* are summarised in the "In Brief" section of this issue of *CP News*. The claimant (C), having brought a claim in a personal capacity, applied for permission to amend the proceedings, three years after the expiry of the limitation period in relation to that claim, in order to continue them both in his personal capacity and as a derivative action on behalf of an estate in which he was a beneficiary. The application was made three years after the expiry of the limitation period relevant to C's personal claim and after any claim against the defendants by the administrator of the estate was statute-barred. A judge dismissed the application. The Court of Appeal (for different reasons) dismissed C's appeal ([2008] EWCA Civ 803; [2009] 1 W.L.R. 531, CA) and the Supreme Court dismissed C's further appeal ([2010] UKSC 22, May 19, 2010, SC, unrep.).

In the Supreme Court the lead judgment was given by Lord Collins, but each of the other four justices sitting on the appeal (Lord Hope, Lord Walker, Lord Rodger and Lord Clarke) gave judgments. Lord Collins and the other four justices were agreed that a beneficiary can bring a derivative action only in special circumstances and (contrary to what the majority in the Court of Appeal had held) that the judge at first instance was right in finding that in this case there were no special circumstances and that C's application to amend should be dismissed on that ground. That was sufficient to dispose of the appeal. However, as is explained further below, Lord Collins' principal reason for dismissing C's appeal was (as the Court of Appeal had held unanimously) that the proposed amendment would involve the addition of a new party after the expiry of the limitation period relevant to C's original claim in circumstances not permitted by s.35 of the Limitation Act 1980 and CPR r.19.5. Two justices, Lord Hope and Lord Clarke, were not persuaded about this and said so in terms suggesting that they regarded the matter as remaining open for further consideration by the Supreme Court in a future appeal. And a third justice, Lord Walker, though agreeing with Lord Collins on this point stated that, as C failed on the special circumstances issue, "the Court does not have to decide the issues as to the amendment of pleadings" (at [111]).

Section 35(3) of the Act 1980 states that, except as provided by rules of court, no court shall allow a new claim to be made in the course of any action after the expiry of any time limit under the Act which would affect a new action to enforce that claim. Section 35(4) stipulates what rules of court may provide by way of exception in this respect. The subsection states that rules of court may provide for allowing a new claim to be made, but only where certain conditions set out in s.35(5) are met. Now, what are those conditions?

Section 35(5) refers to two (not necessarily mutually exclusive) situations. One is the case of a claim involving a new cause of action. Here the required condition is that the court must be satisfied that the new cause of action "arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action" (s.35.5(a)). The other situation is the case of a claim involving a new party. Here the required condition is that the court must be satisfied that the addition or substitution of the new party is "necessary" for the determination of the original action (s.35.5(b)).

However, in relation to the second situation there is a further twist. Section 35(6) states that the addition or substitution of a new party shall not be regarded as "necessary" unless one of two further conditions is met. They are either (a) that the new party is substituted for a party whose name "was given in any claim made in the original action in mistake for the new party's name" (s.35(6)(a)), or (b) that any claim made in the original action cannot be maintained by or against an existing party "unless the new party is joined or substituted as plaintiff or defendant in that action" (s.35(6)(b)).

In the CPR, rules of court that provide for allowing a new claim to be made in the circumstances covered by s.35 are found in r.17.4 (Amendments to statements of claim after the end of a relevant limitation period) and r.19.5 (Special provisions about adding or substituting parties after the end of a relevant limitation period). The rules that implement s.35(6) are found in para.(3) of CPR r.19.5. The terms of the paragraph are almost identical to the subsection. Thus, r.19.5(3) states (in part) that the addition or substitution of a party is "necessary" only if the court is satisfied that (a) the new party is to be substituted for a party who was named in the claim form "in mistake for the new party", or (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant.

In modern times, on a number of occasions the courts have had to deal with issues arising under s.35(6)(a) and r.19.5(3)(a); that is to say, with the question: in what circumstances may a new party be added or substituted on the grounds of mistake? In *Roberts v Gill & Co*, the judge at first instance, the Court of Appeal and the Supreme Court had to deal with issues arising under s.35(6)(b) and r.19.5(3)(b); that is to say, with the question: in what circumstances

may a new party be added or substituted on the ground that this is necessary because otherwise the original action cannot properly be carried on by or against the original party?

The original action brought by C was the claim he brought in a personal capacity against D (solicitors who had acted for the original administrator of the estate) for breach of duty of care owed to him as beneficiary. The new claim which C sought to bring was a derivative action in his own name standing in the place of S (the subsequent administrator) on behalf of Y's estate and brought against D. On the face of it, C's application to amend the proceedings in order to continue them both in his personal capacity and as a derivative action does not seem to involve the addition or substitution of a new party. However, both the Court of Appeal (unanimously) and the Supreme Court (by majority) held (1) that the derivative action could not be continued without the addition of S as a defendant, (2) that therefore (a) the derivative claim was a new claim involving the addition of a new party and (b) the joinder of S was governed by the provisions of s.35(6)(b) and r.19.5(3)(b), and (3) that S could not be added as defendant because it was not the case that, without such joinder, the original action (i.e. C's personal claim) could not properly be carried on against the original party (i.e. against D). The first of these holdings was made on the basis of extensive case law relating to derivative actions (and it was on this particular matter that the justices were divided). (In his detailed analysis Lord Collins stated (at [69]) that there may be circumstances in which the joinder of the administrator could be dispensed with, but the mere fact that there were special circumstances justifying the derivative action or the fact that non-joinder would defeat a limitation defence, would not be sufficient.) The other holdings turned on the terms of s.35(6)(b) and r.19.5(3)(b) as interpreted in case law and would seem to follow inexorably once the first holding is accepted.

The majority in the Supreme Court (agreeing with the Court of Appeal in this respect) rejected C's submission that the limitation problem could be overcome, and should be overcome, by taking his application to amend in two stages. As Lord Collins explained (at [70]) the argument ran as follows. First, there would be an amendment to change the capacity in which C sued from his personal capacity to a representative capacity under r.17.4(4); secondly, this would have the effect that the new claim in the representative capacity would be deemed to commence on the same date as the original action (see ss.35(1)(b) and 35(2)(a)); thirdly, the addition of S (the administrator) would be necessary because the claim in the original action (i.e. the back-dated representative claim) could not be maintained against D unless S was joined (ss.35(5)(b) and 35(6)(b)). His lordship said that this procedural device could not overcome the limitation problem. In a representative action, the administrator must be joined at the outset (at [71]).

At the commencement of his judgment in this appeal, Lord Walker observed that the law of procedure and practice "has traditionally been regarded as the province of the Court of Appeal rather than the House of Lords (or, now, the Supreme Court)" and noted that interventions into this area of the law by the highest appellate tribunal "have not always received universal approbation" (at [94]). The interpretation and application of s.35 of the 1980 Act and the related rules of court have occasioned considerable difficulty and appeals to the Court of Appeal have been numerous and show no signs of abating. It could be said that if ever the intervention of the highest appellate tribunal is justified it is where there is an opportunity to deal unequivocally and decisively with conflicting views apparent in a sizeable body of Court of Appeal case law where the arguments have been largely rehearsed, thereby bringing clarity and certainty to procedural law and significantly reducing the scope for future controversy. The amendment of pleadings issue as presented in the appeal in *Roberts v Gill & Co* did not really fall into that category of case. It may be said, with the greatest respect, that the differences of opinion on that issue apparent in the several judgments make it unlikely that this intervention will be received with universal approbation. It would be trite to explain the differences of opinion apparent in the judgments in this appeal as an example of a classic Chancery Division versus Queen's Bench Division conflict. Perhaps it just has to be accepted that in some respects the problems presented by s.35 and the related rules of court have become intractable and the prospect of resolving them by incremental case law hopeless.

CHANGE OF CIRCUMSTANCES AFTER GRANT OF PERMISSION TO APPEAL

In r.1.1 of the CPR (The overriding objective) it is stated that "dealing with the case justly" includes, so far as is practicable, "allotting to it an appropriate share of the court's resources, whilst taking into account the need to allot resources to other cases" (para.(2)(e)). The significance of this provision, including its relation to the duty of the parties "to help the court to further the overriding objective", is elaborated in the commentary found in Section 11 of Vol.2 of the *White Book* (Overriding Objective of CPR), in particular in Subsection D5 (para.11–12). Commentary found there includes notes on the allocation to cases of appeal court resources, a matter referred to directly and indirectly elsewhere in the *White Book*; for example, in commentary following r.52.3 (Permission to appeal).

The resources of a court in the form of judge time includes not only those expended in holding oral hearings and dealing with the aftermath thereof, but also those expended on pre-reading and preparation. In *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406; [2004] Q.B. 1124, CA, the judges of the Court of

Appeal undertook much more pre-reading and preparation for the appeal than usual and did this for the express purpose of reducing, by using the Court's resources in this way, the number of days needed for the oral hearing, thereby reducing significantly the costs incurred by the publicly funded parties to the appeal.

In para.11–12 in Vol.2 of the *White Book*, reference is made to authorities in which it has been stated that, partly for the purpose of husbanding court resources, it is the duty of parties and of their professional advisers immediately to inform the court (whether first instance or appeal) if a listed case is not proceeding or if there has been any development which might make it unnecessary for judgment to be delivered.

In the first paragraph of para.52.3.20 in Vol.2 of the *White Book* (following r.52.3 (Permission to appeal)) it is stated that where, after permission to appeal has been granted, the appellant's case changes, the appellant's representatives should write to the appeal court and to the other parties indicating the proposed nature of the change. The second paragraph in para.52.3.20 summarises dicta of Lawrence Collins L.J. in *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427, March 11, 2008, CA, unrep. In that case, where the appeal was to the Court of Appeal, Lawrence Collins L.J. noted that under r.52.9 an appellate court may set aside permission to appeal in whole or in part, but will only exercise its powers in this respect "where there is compelling reason to do so". That rule caters for the case where the judge granting permission was misled. In the *Walbrook* case the application notice and the skeleton argument were not misleading when they were lodged with the appeal court, but by the time the matter was considered by the judge the position had dramatically changed to the knowledge of the appellants and their advisers and one ground of appeal had become entirely academic. His lordship said that the circumstances came very close to the type of case in which the appeal court should of its own motion set aside permission to appeal even though no application has been made to that effect. His lordship added (at [49]):

"But I think it right to say that in cases of this kind it is incumbent on applicants, both before and after the grant of permission, to inform the Civil Appeals Office in writing if there have been any material changes which would affect the question of whether permission should be given or should have been given. If the reasons given by the Lord Justice show that the Lord Justice has given permission on the basis of a misapprehension of the position, the appellant should write to the Civil Appeals Office to explain the position and seek any necessary directions."

Arden L.J. drew attention to para.52.3.20 in the recent case of *Re R (A Child)* [2010] EWCA Civ 303, February 9, 2010, CA, unrep. (see "In Brief" section of this issue of *CP News*). In this case, a judge exercising the jurisdiction of the Family Division of the High Court made a shared residence order for a child in terms that were weighted in favour of the father, and the mother applied to the Court of Appeal for permission to appeal. Permission was granted on January 25, 2010. During the duration of the order the mother's circumstances had changed (she had decided to move to an address closer to the father's) and immediately after the permission was given she applied for a variation of the order. The Court of Appeal were not made aware of this application before the appeal came on for hearing on February 9, by which time a reconciliation appointment on the application had been fixed.

Arden L.J. stated that the appellant had failed to comply with the practice set out in para.52.3.20 and made some observations "in the hope that they might be taken into account should these circumstances arise again". Her ladyship said the issue of the variation application was a material change of circumstances. Had the Court been informed of it, directions, including directions for mediation, might have been given and the parties might (either by themselves or with the benefit of mediation) have agreed to the appeal being allowed by consent and for the substitution of an order in the same terms as presently to cover prior to the variation application. Her ladyship added that one of the purposes of the CPR is to ensure that each case receives an appropriate share of this court's resources while taking account of the need to allot resources to other cases. By not keeping the Court informed, the Court had lost time which might have been used for other cases waiting to be heard.

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