CIVIL PROCEDURE NEWS

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CONTENTS

In Brief

Cases

- **BLUE SPHERE GLOBAL LTD v REVENUE & CUSTOMS COMMISSIONERS** [2010] EWCA Civ 1448, December 16, 2010, CA, unrep. (Carnwath & Moses L.JJ.)

Part 36 offer by respondent to appeal from tribunal – costs consequences for unsuccessful appellant

CPR rr.2.1, 36.3 & 36.14, Practice Direction 52 para.21.6. On May 22, 2009, trading company (C) succeeding in appeal to High Court against decision on rights to repayment of input tax made by the VAT and Duties Tribunal ([2009] EWHC 1150 (Ch)). HMRC (D) appealing to Court of Appeal. In July 2, 2009, C making offer under r.36.3 to settle appeal for £1.2m. D not accepting offer. On May 12, 2010, in conjoined appeals, Court of Appeal dismissing D's appeal ([2010] EWCA Civ 517). D resisting C's application under r.36.14 for costs of the appeal on an indemnity basis from July 23, 2009, with enhanced interest thereon. **Held**, granting application, (1) r.36.3(2) expressly permits a party to make a Pt 36 offer "in appeal proceedings", (2) there is nothing in the CPR (either in r.2.1 or elsewhere) to suggest that Pt 36 does not apply to an appeal in proceedings begun under Tribunal Procedure Rules, (3) the fact that the appeal was pursued by D in the public interest did not render it unjust to give full effect to r.36.14. (See ***Civil Procedure 2010*** Vol.1 paras 2.1.3, 36.14.1 & 52PD.105, and Vol.2, para.12-6.)

- **CREMA v CENKOS SECURITIES PLC** [2011] EWCA Civ 10, January 20, 2011, CA, unrep. (Sir Andrew Morritt C., Hughes & Aikens L.JJ.)

Commercial debt interest – judgment interest – interim costs payment

CPR rr.36.14 & 44.3, Senior Courts Act 1981 s.35A, Late Payment of Commercial Debts (Interest) Act 1998 ss.4 & 5. On June 12, 2008, funds raised by broker (D) for company (X) received by X through sub-broker (C) acting under agreement with D as to fees. X refusing to pay C any fees (and becoming insolvent). With benefit of CFA, in March 2009, C bringing claim against D claiming payment for the fees becoming due on June 12, 2008. On December 30, 2009, C making Pt 36 offer. On March 16, 2010, trial judge dismissing C's claim, but on December 16, 2010, Court of Appeal allowing C's appeal ([2010] EWCA Civ 1444), giving judgment for C at least as advantageous as his Pt 36 offer. On application for costs, **held**, making interim costs payment order of £300,000, (1) C was entitled to interest under the 1998 Act from 30 days after June 12, 2008 until date of judgment in the appeal, but (2) in the exercise of discretion, C should not be awarded interest under s.35A for that 30 day period, (3) although C had beaten his offer, in the circumstances he was not entitled to full costs on an indemnity and enhanced interest basis, but should be awarded 75 per cent of his costs of the appeal and trial. Observations on question whether a court, when ordering an interim costs payment should take into account large success fee uplift. (See ***Civil Procedure 2010*** Vol.1 paras 36.14.4, 44.3.13 & 44.3.15, and Vol.2 paras. 9A-124 & 9B-1338.)

- **HACKNEY LONDON BOROUGH COUNCIL v FINDLAY** [2011] EWCA Civ 8, January 20, 2011, CA, unrep. (Arden, Wilson & Toulson L.JJ.)

Relief from sanctions – failure to attend trial – setting aside possession order

CPR rr.3.1(2)(m), 3.1(7), 3.9, 39.3(5) & 55.8, Housing Act 1985 ss.84 & 85(2), Pre-Action Protocol for Possession Claims Based on Rent Arrears. Housing authority (C) bringing possession proceedings against secure tenant (D) for non-payment of rent. At hearing, D (who was normally in receipt of housing benefit) not attending and district judge (1) finding that it was reasonable to make a possession order (s.84), and (2) giving judgment for C on basis that D could apply for stay etc. under s.85(2). D evicted by bailiffs. Before and after execution, C's housing officer intermittently in communication with D about his benefits position. District judge granting D's applications to set aside the possession order and to re-enter the premises. Circuit judge dismissing C's appeal, holding (1) that it was a matter for the discretion of the court whether to apply the "only if" criteria in r.39.3(5) to an application for relief from sanction under r.3.9, and (2) that there is no principle that the power to set aside orders should be exercised far more cautiously after execution than before. **Held**, allowing C's appeal, setting aside the circuit judge's order and remitting the matter for outstanding issues to be determined by a district judge, (1) in the absence of unusual and compelling circumstances, the court should give precedence to the provisions of r.39.3(5) above those enumerated in r.3.9, (2) in determining whether a defendant tenant had good reason for not attending a trial, the court may have regard to the provisions of the Pre-Action Protocol and best practice among social landlords, (3) in a case in which s.85(2) applies, r.39.3(5) need not be applied with the same rigour as in cases in which it does not, (4) in determining whether a possession order should be set aside, the execution of the order would be a highly relevant factor if the landlord had proceeded properly to allocate the property to another tenant,

(5) the court should not decline to exercise its powers to set aside if, in consequence, the statutory purpose in s.85(2) would be defeated, (6) if a possession order on which execution proceeded is set aside, it follows that the execution must also be set aside, with the result that there is then a further opportunity for a court to exercise its discretionary powers under s.85(2) in an appropriate case. Observations on principles (1) that, save in unusual circumstances, the execution of a possession order should bring to an end the tenant's rights, including his right to apply for an order under s.85(2), and (2) that challenges to orders should be made, not by application under r. 3.1(7), but by way of appeal. ***Forcelux Ltd v Binnie*** [2009] EWCA Civ 854, [2010] 2 C.P. 7, CA, ***Roult v North West Strategic Health Authority*** [2009] EWCA Civ 444, [2010] 1 W.L.R. 487, CA, ref'd to. (See further "In Detail" section of this issue of *CP News*.) (See ***Civil Procedure 2010*** Vol.1 paras 3.1.9, 3.9.1, 39.3.1, 39.3.7 & C11-001, and Vol.2, paras 3A-382, 3A-384 & 3A-388.)

- **MGN LTD v UNITED KINGDOM** (APPLICATION NO.39401/04), *The Times* January 20, 2011, ECtHR

Costs – success fee – freedom of expression

CPR rr.44.3 & 44.3B, Conditional Fee Agreements Order 2000 art.4, European Convention on Human Rights 1950 art.10. With benefit of CFA, individual (C) suing newspaper (D) for breach of confidence. C succeeding at trial and awarded damages £3,500) and costs. Costs including success fee amounting to £1m. On D's appeal, House of Lords holding that CFA scheme was compatible with the Convention ([2005] UKHL 61, [2005] 1 W.L.R. 3394, H.L.). On D's application, **held**, (1) the success fee scheme was not initially set up for wealthy persons such as C, whose access to justice was not restricted for financial reasons, (2) the success fee was disproportionate to the aim sought to be achieved by the scheme, (3) accordingly there had been a breach of art.10. (See ***Civil Procedure 2010*** Vol. 1 paras 44.3.11 & 44.5.4, and Vol.2 paras 3D-49, 3D-80, 7A-25, 7A-56, 11-10 & 15-41.)

- **PANKHURST v WHITE** [2010] EWCA Civ 1445, December 15, 2010, CA, unrep. (Sir Andrew Morritt C., Leveson & Jackson L.JJ.)

Part 36 offer – judgment advantageous to claimant – interest on costs

CPR r.36.14. Claimant (C) suffering catastrophic injuries in road accident bringing claim against uninsured driver (D1) with MIB as second defendant (D2). C obtaining summary judgment on liability, subject to issue of contributory negligence, and then entering into CFA with solicitors (S). In May 2006, C making Pt 36 offer to accept £3.4m and D2 rejecting it. At trial in June 2006, judge rejecting contributory negligence defence and holding that C was entitled to damages on the basis of full liability. In May 2008, shortly before quantum trial, D2 making Pt 36 offer to pay £6.8m (capitalised) and C rejecting it. Quantum trial taking place in days in June and September 2008, and in June 2009 judge giving judgment for C, awarding damages together with conventional interest and making an order (agreed by the parties) for periodic payments. (On capitalised basis, total award amounting to approximately £6.1m.) In effect, each party had "beaten" the other party's Pt 36 offer. Parties agreed that costs consequences for C of D2's beating his offer was that C should pay D2's costs of the quantum trial (to be assessed). On question of costs consequences for D2 of C's beating their offer, (1) in applying paras (a) and (b) of r.36.14(3), judge holding that C (a) should be awarded indemnity costs for 21-month period before quantum trial and enhanced interest (totalling £17,000) on special and general damages, but (b) should not be awarded interest thereunder on damages referable to future losses, and (2) in applying para. (c) of r.36.14(3), judge holding that C should not be awarded interest on costs ([2009] EWHC 311 (QB)). C appealing against holdings (1)(b) and (2). **Held**, dismissing appeal, (1) C was not entitled to interest on future losses, because a court can only make an award of enhanced interest in respect of items in the judgment which already merit some award of interest, (2) for C, the effect of the CFA agreement was that payments to S of £100,000 would have to be made out of his damages, and for D2 the effects included their paying S a success fee of £100,000, (3) these consequences were highly relevant to the question whether D2 should also have to pay interest on the indemnity costs awarded against them, (3) the judge concluded that, in the circumstances, it would be unjust to order D2 to pay such interest, (4) on the basis of the evidence before him, and the fuller information now before the Court concerning the CFA and its consequences, there was no basis for disturbing that decision. Observations on different costs consequences where claimant rejects a defendant's Pt. 36 offer and vice versa. ***McPhilemy v Times Newspapers Limited (No. 2)*** [2001] EWCA Civ 933, [2002] 1 W.L.R. 934, CA, ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 36.14.1, 36.14,3 & 36.14.4.)

- **PASEANA LTD v LEXTREX HOLDINGS LTD** [2010] EWCA Civ 1539, November 30, 2010, CA, unrep. (Maurice Kay, Hooper & Tomlinson L.JJ.)

Default judgments – application to set aside – procedure

CPR rr.1.1, 3.1(3), 3.9 & 13.3. Claimant company (C) purchasing business and assets of the defendant company (D1). Managing director and non-executive director of D1 parties to sale agreement as guarantors of any liabilities

of D1. Following completion, for short period D1 continuing to manage and accommodate the business. C commencing proceedings against D1 and the guarantors (D2) to recover sums said to be owing as a result of transactions occurring during that period. C entering judgments (1) against D1 and one guarantor in default of acknowledgment of service, and (2) against the other guarantor in default of defence. D1 going into liquidation. D2 applying under r.13.3 to have judgments against them set aside, and in their supporting witness statements asserting that they had not had notice of the proceedings. District judge dismissing applications. On appeal, circuit judge (1) not rejecting submission that draft defence indicated that D2 had a real prospect of defending the claim, but (2) finding that in their evidence they had put forward inaccurate accounts of how they had come to default, and, principally on the basis of that finding, dismissing their appeals. Following oral hearing, single lord justice granting D2 permission for second appeal. **Held**, allowing appeal on condition that D2 pay £5,000 into court, (1) inaccuracy or dishonesty in relation to a procedural matter is not an absolute bar to an application under r.13.3, (2) it was incumbent on the judge (a) to have regard, not just to r.13.3, but also to the provisions of r.3.9 and the overriding objective, and thereby (b) to consider all the circumstances of the case and the potential respective injustices as between the parties, and in doing so (c) to take into account D2's draft defence (which was substantially consistent with the case they had intimated in pre-action correspondence). ***E D & F Man Liquid Products Ltd v Patel*** [2003] EWCA Civ 472, [2003] C.P. Rep. 51, CA, ***Hussain v Birmingham City Council*** [2005] EWCA Civ 1570, April 4, 2003, CA., unrep., ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 3.1.4, 3.9.1 & 13.3.1, and Vol.2, paras 11-6 & 11-8.)

- **R. (EDWARDS) v ENVIRONMENT AGENCY (NO.2)** [2010] UKSC 57, [2011] 1 W.L.R. 79, SC.

Supreme Court – detailed assessment of costs – powers of costs officers

Supreme Court Rules 2009 rr.46, 49, 50 & 53, Practice Direction 13 para.16(1), Aarhus Convention art.9(4). Residents (C) bringing judicial review proceedings challenging decision by agency (D), arguing that D had not properly discharged statutory public consultation obligation as required by Regulations and EU Directive. In April 2008, House of Lords dismissing C's appeal and ordering C to pay the costs of the appeal ([2008] UKHL 22, [2008] 1 W.L.R. 1587, HL.). D lodging bill of costs for detailed assessment. Assessment carried out by costs officers appointed by President of Supreme Court under r.49. D appealing against the officers' decisions on preliminary issues raised on the assessment concerning the application of certain provisions in EU Directives (including issue as to whether assessment of reasonableness of costs in judicial review proceedings involves question whether the review was "prohibitively expensive" under art.9(4)). Single Justice referring matter to Panel of Justices under r.53. In referring question to ECJ for preliminary ruling, **held** by Panel, (1) the limit of the costs officers' jurisdiction under r.49(1), when read together with para.16.1, is to carry out the detailed assessment, (2) decisions as to whether the receiving party was to receive less than 100 per cent of the assessed costs were reserved to the Court in the exercise of jurisdiction that was given to it under r.49(1), (3) the officers must confine their attention to the basis of assessment prescribed by r.50, subject to any direction that might be given to them by the Court. (See ***White Book 2010***, Vol.2, para.4A-49.1.)

- **SWAIN-MASON v MILLS & REEVE** [2011] EWCA Civ 14, January 20, 2011, CA, unrep. (Lloyd, Elias & Patten L.JJ.)

Amendment of statement of case – application for permission at trial

CPR r.17.3. Under MBO, shares of businessman (X) and his daughters (C) bought by new company owned by the purchasing management. Solicitors (D) retained by X and C to advise on the transaction. On January 4, 2007, D giving letter of advice and MBO completed on January 31, 2007. On February 17, 2007, X undergoing elective medical procedure, the prospect of which was known to D before completion. X dying in the course of the procedure, with result that his proceeds of share sale suffering severe adverse tax consequences of £1.3m. In March 2009, C and X's executors commencing professional negligence claim against D, alleging that they should have advised that, in the circumstances, completion of the MBO be delayed. In May 2010, shortly after first trial date was vacated, C serving agreed amended particulars of claim to allege that D had a duty to advise X that the MBO had implications for his estate planning. At start of adjourned trial on November 24, 2010, in the light of expert evidence to the effect that the risks of the medical procedure were negligible, C applying to re-amend the particulars, this time to allege that, regardless of their knowledge of X's impending medical treatment, D had a duty to advise X as to the tax consequences. Trial judge granting permission to re-amend, subject to the condition that it be disallowed if the evidence did not support it, adjourning trial to January 17, 2011, and handing down judgment to that effect on December 6, 2009. On December 10, C having filed their supporting evidence on December 3, judge dismissing D's application for the re-amendment to be disallowed, and refusing permission to appeal. **Held**, allowing D's appeal, (1) where a very late application to amend is made by a party to raise a new and significantly different case, and is made, not on the basis of some recent disclosure or new evidence, but in circumstances where the party has had

many months in which to consider how he wants to put his case and opportunities to amend it, a heavy onus lies on him to justify it, (2) in this case, C should have been required to put forward an amendment which immediately satisfied all the obligations of a party as to proper pleading, without any need for it to be supplemented or clarified by evidence or by further information, and supported by evidence explaining why the application was made at such an extraordinarily late stage, (3) as the trial judge, in dealing with C's and D's applications, had expressed strong views on their respective cases, the trial should be continued before a different judge. ***Worldwide Corporation Ltd v GPT Ltd*** December 2, 1998, CA, unrep., ***Cobbold v Greenwich London Borough Council*** [1999] EWCA Civ 2074, August 9, 1999, CA, unrep. (See further "In Detail" section of this issue of *CP News*.) (See ***Civil Procedure 2010***, Vol.1 paras 17.3.5 & 17.3.7, and Vol.2, paras 2F-7.11, 9A-48,11-8, 12-52 & 12-57.)

- **TW v A CITY COUNCIL** [2011] EWCA Civ 17, *The Times*, January 25, 2011, CA (Sir Nicholas Wall P., Wilson & Aikens L.JJ.)

Citation of authorities – bundles of authorities

CPR r.52.2, Practice Direction 52 para.15.11, Practice Statement (Supreme Court: Judgments), [1998] 1 W.L.R. 825, para.8, Practice Direction (Judgments: Form and Citation), [2001] 1 W.L.R. 194. In allowing appeal from a county court by an intervener in care proceedings, Court of Appeal reminding practitioners (at para.7) of practice to be followed when preparing and filing bundles of authorities in accordance with para.15.11, and in particular of requirement that, if an authority referred to in an oral or written submission is reported in the Law Reports published by the Incorporated Council, it is that report that should be cited. (See ***Civil Procedure 2010*** Vol.1 paras 52.2.1, 52.12.3, 52PD.66, B1-001 & B5-001, and Vol.2 para.12-53.)

Statutes and Statutory Instruments

- **CIVIL PROCEDURE (AMENDMENT NO.4) RULES 2010** (SI 2010/3038)

CPR Pts 52 & 79, Terrorist Asset-Freezing etc. Act 2010 ss.28 & 29. Substitute Section 3 in Pt 79 so as to provide procedure for appeals under s.26 to High Court and Court of Appeal, by person whose financial and economic affairs have been restricted by their being "designated" by Treasury, against any decision to make, vary or renew such designation. These Rules made by Lord Chancellor exercising powers under s.29. Section 45(1) & Sch.1 Pt 1 of the Act also amend Pt 79. In force December 24, 2010. (See ***Civil Procedure 2010*** Vol.1 paras 79.1, 79.13 & 79.15.)

- **CIVIL PROCEDURE (AMENDMENT) RULES 2011** (SI 2011/88)

CPR Pts. 6, 45 & 78. Amends Pt 6 (Service of Documents) (with consequential amendments to rr.10.5 and 16.5) to allow as addresses for service addresses in EEA States of European lawyers and litigants in person. Adds Sect.VIII (Fixed Costs: HM Revenue and Customs) to Pt 45 (Fixed Costs), and Sect.III (Mediation Directive) to Pt 78 (European Procedures) (with consequential amendment to r.5.4C). In force April 6, 2011. (See **Civil Procedure 2010** Vol.1 paras 5.4C, 6.7, 45.44 & 78.23.)

- **TERRORIST ASSET-FREEZING ETC. ACT 2010** (2010 c. 38)

CPR Pt. 79. Section 45(1) and Sch.1 Pt 1 of 2010 Act amend title and rr.79.1, 79.6 & 79.31 for purpose of applying Pt 79 to challenges to decisions made by the Treasury under the 2010 Act, apart from designation decisions. Note also amendments made to Pt 79 by the Civil Procedure (Amendment No.4) Rules 2010 (SI 2010/3038) by Lord Chancellor exercising powers under s.29. In force December 24, 2010. (See ***Civil Procedure 2010*** Vol1 paras 79.1, 79.6 & 79.31.)

Practice Guidance

- **PRACTICE GUIDANCE (COURT PROCEEDINGS: LIVE TEXT-BASED COMMUNICATIONS)** [2011] 1 W.L.R. 61, Sen Cts (Lord Judge L.C.J.)

CPR r.39.2. Interim guidance about the use of live, text-based electronic communications from courts in the course of trials to be considered by courts, parties and their legal representatives when application made to permit such use. General principle is that court must be satisfied that such use does not pose a danger of interference to the proper administration of justice in the individual case. Applies to court proceedings which are open to the public and to those parts of proceedings which are not subject to reporting restrictions. (See ***Civil Procedure 2010*** Vol.1 para.39.2.1.)

In Detail

LATE APPLICATIONS TO AMEND PLEADINGS

The Civil Procedure Rules 1998 came into effect on April 26, 1999, implementing recommendations made by Lord Woolf in his *Access to Justice – Final Report* (July 1996). For a long period beforehand there was much hullabaloo about how there was going to be "a change in culture" and, in particular, that cases were going to be managed according to timetables laid down in advance, that trial dates were going to be fixed and adhered to, and that slack pre-trial practice by parties was not going to be tolerated. Lawyers were warned that pre-CPR authorities on rules of court dealing with familiar pre-trial matters, especially those not consistent with the new culture, would no longer be treated as guiding or binding.

Well, things did change, but not always in the ways expected. Early decisions on the CPR handed down by the Court of Appeal were carefully scrutinised for signs of the new culture at work, or not. One such case was *Cobbold v Greenwich London Borough Council* August 9, 1999, CA, unrep., a case in which a circuit judge (with the overriding objective at the forefront of his mind) dismissed an application made very shortly before the date fixed for trial by a defendant local authority for permission under CPR r.17.1 to amend their defence significantly in a disrepair case brought against them by a tenant. The Court of Appeal (on the day before the day fixed for trial) allowed the appeal. In doing so Peter Gibson L.J. (with whom Sedley L.J. agreed) said:

"The overriding objective (of the CPR) is that the court should deal with cases justly. That includes, so far as is practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed. I cannot agree with the judge when he said that there would be no prejudice to [the defendants] in not being allowed to make the amendments which they are seeking. There is a always prejudice when a party is not allowed to put forward his real case."

In large part, this dictum restates the conventional attitude of the courts to applications to amend pleadings made before the CPR came into effect. It has been relied on in many cases since. But, as is explained in para.17.3.5 of Volume 1 of the White Book 2010, it has not always been replicated accurately, with the result that it has been used to lend weight to the erroneous argument that, where there is prejudice to a party seeking an amendment, it should be allowed, when the true position is that the existence and weight of such prejudice is just one of the factors to be taken into account.

Undoubtedly the defendant's application to amend their defence in the Cobbold case was made very late in the day. However, that was through no fault of the defendants, as the position was that the county court had not informed them of the date fixed for trial. Further, the new line of defence had been known to the claimant for several months before, there was no surprise, it raised a pure point of law on facts not in dispute, and the application was made promptly after the claimant refused to consent to it.

With respect, the Cobbold case is unexceptional. What is unfortunate is the slavish and unthinking reliance placed on the dictum of Peter Gibson L.J. (referred to above) in subsequent cases (in submissions if not in judgments). The hard cases are those where applications to amend are made on the eve or at the start of trial in circumstances where the granting of the amendment will almost certainly require an adjournment of the trial, if not the vacating of the trial date.

In the recent case of *Swain-Mason v Mills & Reeve* [2011] EWCA Civ 14, January 20, 2011, CA, unrep., at the start of a trial in the Chancery Division, the defendants applied to amend their defence and the judge granted the application subject to the condition that it be disallowed if the evidence to be filed by the defendants did not support it. After the evidence was filed, the judge dismissed the claimants' application for the amendment to be disallowed. The Court of Appeal allowed the claimants' appeal. (For summary of this case, see "In Brief" section of this issue of CP News.) The Court held that where a very late application to amend is made by a party to raise a new and significantly different case, and is made, not on the basis of some recent disclosure or new evidence, but in circumstances where the party has had many months in which to consider how he wants to put his case and opportunities to amend it, a heavy onus lies on him to justify it, and that onus had not been discharged.

In giving the lead judgment of the Court, Lloyd L.J. (with whom Elias and Patten L.JJ., agreed) noted that the judge had relied upon the dictum of Peter Gibson L.J. in the Cobbold case and regarded it as unfortunate that initially he had not

had his attention drawn to the decision of the Court of Appeal in *Worldwide Corporation Ltd v GPT Ltd.* December 2, 1998, CA, unrep. (Lord Bingham L.C.J., Waller & Peter Gibson L.JJ.) This was a case was decided before the CPR came into effect, and was referred to in the March 1999 issue of CP News, but as a pre-CPR authority, was not carried forward into the White Book commentary on r.17.1 or r.17.3. (For post-CPR authorities on late amendments, see White Book 2010 Vol. 1 para.17.3.7.) In that case, Waller L.J. said:

"Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, [counsel for the applicant] has suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided. We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants requires him to be able to pursue it."

In the Swain-Mason case, Lloyd L.J. said (para.74) that the decision of the Court of Appeal in the Worldwide Corporation case, though made under the RSC and not the CPR (which came into force some five months later), "reflects the tenor of the CPR, which was no doubt in the minds of the judges, who will have been very familiar with the terms of Lord Woolf's reports that led to the reform of the rules". His lordship noted that the approach taken in that case had been endorsed in *Savings & Investment Bank Ltd v Fincken* [2003] EWCA Civ 1630, [2004] 1 W.L.R. 667, CA, by Rix L.J. who said that it demonstrates that, even before the CPR came into effect, the older view that amendments should be allowed as of right if they could be compensated in costs without injustice "had made way for a view which paid greater regard to all the circumstances which are now summed up in the overriding objective" (see also *Woods v Chaleff*, May 28, 1999, CA, unrep., referred to in White Book 2010, Vol.1, para.17.3.7). Lloyd L.J. concluded (para.78): "The approach set out in Cobbold seems to me to have been superseded in favour of one which is a good deal less relaxed about allowing late amendments".

SETTING ASIDE POSSESSION ORDERS

CPR r.39.3 states that, where a party does not attend a trial and the court gives judgment or makes an order against him, the party who failed to attend may apply for the order to be set aside. However, para.(5) of r.39.3 goes on to say that the court may grant such application "only if" the applicant acted promptly, had a good reason for not attending the trial, and has a reasonable prospect of success at the trial. In the recent case of *Hackney London Borough Council v Findlay* [2011] EWCA Civ 8, January 20, 2011, CA, unrep., counsel for the claimants explained to the Court of Appeal that, until the decision of the Court in *Forcelux Limited v Binnie*, [2009] EWCA Civ 854, [2010] H.L.R. 20, CA, the established approach adopted by courts in cases where secure tenants of social landlords applied to have possession orders obtained against them at trials conducted in their absence was to apply the r.39.3(5) criteria. Counsel submitted that the Forcelux case had heralded a new approach which had serious and adverse implications for the efficient management of social housing.

The Forcelux case was not a social housing case. The facts were that a defendant (D) was the leaseholder of flat, under a long lease at a ground rent containing a forfeiture provision for non-payment of rent or charges. D fell into arrears and the landlords (C) obtained a default judgment against D for £893 for the arrears (including £599 in respect of unpaid insurance premiums) and costs. Upon D not satisfying the judgment, C commenced possession proceedings under CPR Pt 55 and at a hearing under r.55.8 which D did not attend, a district judge granted C a possession order. After C had entered into possession, D applied to set aside the order, and to obtain relief from forfeiture. C opposed the application, principally on the ground that D had not acted promptly. A district judge applied the r.39.3(5) criteria and set the possession order aside. A circuit judge dismissed C's appeal, and the Court of Appeal dismissed C's second appeal. The important feature of the case is that the Court of Appeal held that r.39.3 was not engaged. The Court held (1) where a defendant does not appear at a "hearing" to which r.55.8 applies, and the court opts to decide the claim (r.55.8(1)(a)), the court may on the basis of the evidence before it make an order for possession, (2) however, such a process of determination and decision at such a "hearing" cannot sensibly be called a "trial", either as a matter of the ordinary use of the word or within the meaning of r.39.3, (3) consequently, the hearing before the district judge at which the possession order was granted was not a trial and the provisions of r.39.3 did not apply to D's application to set the possession order aside. The Court went on to hold that it had power under r.3.1(2)(m) to grant D the relief sought. That provision states that the court's general powers of management include the power "to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective". The Court said that r.3.1(2)

(m) was amply wide enough to give a court power to set aside a possession order if, in its discretion, it considered that the interests of justice demand it, and that in exercising that discretion it was appropriate to apply the r.3.9(1) criteria so far as relevant by way of analogy. Accordingly, the need to act promptly was not an absolute requirement imposed on D but simply a factor to be taken into account. It would appear that the factor that carried great weight with the Court in exercising its discretion in favour of D was that otherwise D would lose a valuable asset for a failure to pay a modest sum and C would thus receive a windfall.

In *Hackney London Borough Council v Findlay*, a district judge granted a housing authority a possession order against a secure tenant in circumstances in which the extended discretion granted to the court by s.85 of the Housing Act 1985 applied, that is to say, where the court could, at any time before the execution of the order, stay or suspend the execution or postpone the date of possession (see White Book 2010 Vol.2, para.3A-380). After execution, a district judge granted the tenant's applications to set aside the possession order and to re-enter the premises, and a circuit judge (with the Forcelux decision in mind) dismissed the landlord's appeal. (For summary of this case, see "In Brief" section of this issue of CP News.) On appeal to the Court of Appeal counsel for the claimant local authority submitted that the decision in the Forcelux case to the effect that the court has a wide, general discretion to set aside possession orders where defendant failed to attend trial, unfettered by the r.39.3(5) "only if" criteria was per incuriam and should not be followed. The Court rejected this submission.

In giving the lead judgment in the appeal, Arden L.J. (with whom Wilson and Toulson L.JJ. agreed) conceded that in the normal, case where a party fails to attend a hearing at which a possession order is made and subsequently applies to have it set aside, although (as counsel for the claimant conceded) the r.39.3(5) criteria do not govern, it would be wrong to regard the discretion vested in the court to grant such relief as "wide and unstructured". Her ladyship explained that it was clear from s.85 that Parliament contemplated that, save in unusual circumstances, the execution of a possession order should bring to an end the tenant's rights, including his right to apply for an order under that section. Further, generally challenges to orders should not be way of applications to amend or vary but be by way appeal as "in the interests of the proper administration of justice and the system of appeals, judges should not sit in judgment on their own orders".

Her ladyship concluded (para.24):

"Thus, in my judgment, in the absence of some unusual or highly compelling factor as in Forcelux, a court that is asked to set aside a possession order under r.3.1(2)(m) should in general apply the requirements of r.39.3(5) by analogy. This is in addition to, and not in derogation of, applying r.3.9 by analogy …. as that provision requires the court to have regard to all the circumstances in any event. However, in the absence of the unusual and compelling circumstances of a case such as Forcelux, this court should give precedence to the provisions in r.39.3(5) above those enumerated in r.3.9."

Her ladyship then explained that, even that, is subject to the qualification in the case of a secure tenant provided by s.85(2) of the 1985 Act under which the tenant is given the chance described therein of persuading a court to modify an outright possession order. It followed that the requirements of r.39.3(5) need not be applied in such a case with the same rigour as in the case of a final order that does not have this characteristic. Accordingly, the court should not decline to exercise its power to set aside a possession order if in consequence the statutory purpose in s.85(2) would be defeated.

Arden L.J. gave particular attention to the manner in which, in a social housing case, a court should approach the question whether the defendant had a good reason for not attending the proceedings in which a possession was made and said that the court can and should "have regard to the wider social context in which these cases come before the courts". In amplifying this point her ladyship said (para.24):

"Accordingly, in deciding whether the tenant has good reason for non-attendance the court can in my judgment have regard to the provisions of the Rent Arrears Pre-Action Protocol and to best practice among social landlords. It may conclude that, while in the ordinary case a defendant might have had no proper excuse for not attending a court hearing at which a possession order was made, given best practice of social landlords and the provisions of that protocol, a tenant is in fact able to provide an appropriate explanation."

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