# CIVIL PROCEDURE NEWS

Issue 4/2011 April 18, 2011

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# In Brief

## Cases

■ **BANK OF SCOTLAND v PEREIRA** [2011] EWCA Civ 241, 161 New L.J. 403 (2011) (Lord Neuberger MR, Lloyd & Gross L.JJ.)

*Defendant absent from trial – applications to set aside judgment and/or for permission to appeal*

**CPR rr.3.9, 39.3, 52.4(2) & 52.6.** Under financial scheme negotiated and arranged by businessman (X), ostensibly for the purpose of helping married couple (D2) to re-finance their business, individual (D1) purchasing residential property from D2 with bank (C) providing D1 with loan secured by charge. Upon D1 failing to make mortgage instalment payments, C discovering that the scheme was fraudulent, that D1 was merely a nominee contracting purchaser, and that D2 had continued to live in the property. C bringing possession proceedings (allocated to the multi-track) against D1 and D2. On basis that they too were victims of X's fraud, and that D1 had knowledge of it and of the misrepresentations involved, D2 (1) defending C's claim, and (2) bringing additional claims against D1 (a) for rescission of the transfer and rectification of the register (re-registering them as proprietors), and (b) for damages. D1 taking no part in the proceedings and not attending, and not represented at, the trial. On June 21, 2007, trial judge giving judgment for C on their claim and for D2 on their additional claims (with damages to be assessed). On July 8, 2009, D1 applying under r.39.3 to set aside the judgments against her on D2's additional claims. Circuit judge dismissing this application. D1 then applying for permission to appeal to the High Court against the dismissal of her r.39.3 application, and for permission to appeal out of time to the Court of Appeal against the trial judge's judgment (and for permission to adduce additional evidence). High Court judge granting D1 permission for appeal, but single lord justice on paper refusing application. Appeal transferred to the Court of Appeal upon D1 renewing her application, and both proceedings consolidated. **Held**, (1) dismissing the appeal, (a) normally, where the circumstances are that a defendant may make an application under r.39.3 and/or appeal he should apply under the rule, even where he has independent grounds of appeal, (b) it will be only in exceptional cases that a court should even consider allowing oral evidence and cross-examination on a r.39.3 application, and (c) the decision reached by the judge in this case, and the reasoning by which he reached it, were unassailable, and (2) refusing the application, (a) the dismissal of the appeal did not dispose of the application, (b) the court must consider such an application by reference to all the relevant circumstances, including the specific factors mentioned in r.3.9, (c) where the question whether to extend time for appealing is hard to resolve, the underlying merits of the applicant's substantive case can be relevant, (d) in this case, there would be little prospect of D1 succeeding in persuading the Court that, on the evidence before him, the trial judge should not have given judgment against her on the additional claims (in effect, by default, in the absence of any evidence or submissions by way of defence), in particular the judgment on D2's money claim. Principles applicable to applications for extension of time for appeal (rr.3.1(2)(a) & 52.4), and to applications to set aside judgments given in absence of a party (r.39.3), and the relationship between them, explained and guidance given (paras 24 to 48, per Lord Neuberger M.R. and paras 75 to 83 per Lloyd L.J.) (See further "In Detail" section of this issue of *CP News*). ***Sayers v Clarke Walker (Practice Note)*** [2002] EWCA Civ 654, [2002] 1 W.L.R. 3095, CA, ***Tennero Ltd v Arnold (Practice Note)*** [2006] EWHC 1530 (QB), [2007] 1 W.L.R. 1025, ***Attorney General of Zambia v Meer Care & Desai*** [2008] EWCA Civ 754, July 9, 2008, CA, unrep., ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 3.1.2, 39.3.1, 52.4.1 & 52.6.2.)

■ **BLEASDALE v FORSTER** [2011] EWHC 596 (Ch), March 16, 2011, unrep. (Henderson J.)

*Statement of case – late application for permission to plead alternative claim*

**CPR r.17.3.** Couple (C) bringing claim against individual (D) claiming damages for fraudulent misrepresentation, or alternatively for breach of contract, alleging that they were fraudulently induced by D to invest in a private company (X) founded by D. Investments taking form (1) of purchase of shares and (2) of convertible loan agreement. C alleging that they were induced to make the first investment by untrue representations made by D as to supply contract won by X. C further alleging that some draft financial statements and a cash flow statement supplied to them by D and X in relation to the second investment misrepresented X's performance and future prospects. Trial fixed for week beginning March 28, 2011, with 10 to 15 day estimate. On March 2, 2011, judge dismissing D's application for reverse summary judgment ([2011] EWHC 416 (Ch)). At adjourned case management conference on March 9, C applying to amend their particulars of claim to plead an alternative case in relation to the first investment based on an account given by D in her witness statement as to representations made by her to C relating to that investment; in particular, so as to allege that the representations so asserted were not made and that the account was untruthful. **Held**, dismissing the application, (1) in general, a claimant is free to advance alternative claims, and there are

circumstances in which a claimant may properly plead an alternative case which is based on a defendant's version of what happened, even if that version is denied by the claimant, (2) the requirement that a statement of case be verified by a statement of truth does not necessarily prevent a party from advancing a case which depends on an allegation which he believes to be untrue, so long as there is a proper evidential basis for the allegation, (3) in the circumstances, it was reasonable for C to wait for the determination of D's summary judgment application before seeking permission to amend their statement of case, (4) as the application to amend was made only shortly before trial, C must be held to the terms in which the amendment was pleaded, (5) it was not properly arguable on the basis of D's witness statement that she made the representations alleged in the proposed amendment and permission to amend should be refused on that ground. Judge noting that C might make similar application to amend at trial once the evidence was complete and D's version of events precisely clear. (See further "In Detail" section of this issue of *CP News*.) ***Binks v Securicor Omega Express Limited*** [2003] EWCA Civ 993, [2003] 1 W.L.R. 2557, CA, ***Worldwide Corporation Ltd v GPT Ltd*** [1999] EWCA Civ 1894, December 2, 1998, CA, unrep., ***Swain-Mason v Mills & Reeve*** [2011] EWCA Civ 14, *The Times* February 15, 2011, CA, ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 16.4.6, 17.1.2, 17.3.5, 17.3.7 & 22.1.8.)

■ **BP v SECRETARY OF STATE FOR THE HOME DEPARTMENT** [2011] EWCA Civ 276, March 17, 2011, CA, unrep. (Pill, Lloyd & Rimer L.JJ.)

*Judicial review claim – disposal hearing or full hearing – oral representations as to*

**CPR. rr.23.8 & 54.18, Immigration and Asylum Act 1999 s.4.** Asylum-seekers (C) commencing judicial review proceedings against Secretary of State (D) challenging decisions under s.4 (welfare support for failed asylum-seekers). Judge granting permission to proceed (and noting that a range of fact specific situations could arise under s.4). Before date fixed for hearing of their claims, (1) C granted indefinite leave to remain and (2) issue of principle arising dealt with at first instance in other proceedings (with appeal pending). On application by D, judge (1) concluding that C's claim had therefore become "academic" so far as they were concerned, (2) ordering that the trial date be vacated, and (3) directing (a) that the parties should make submissions in writing as to whether their claims should listed for disposal or proceed to a full hearing, and (b) that those submissions should be considered by a single judge on the papers. Subsequently, on papers judge rejecting C's submission that they should be permitted to make oral representations on the question whether their claims should listed for disposal or proceed to a full hearing. Single lord justice granting C permission to appeal on that particular procedural point. **Held**, allowing appeal, (1) a listing for disposal is a formality and does not include a right to an oral hearing, (2) r.54.18 states that the court "may decide" a claim for judicial review without a hearing "where all the parties agree", (3) a decision by the court that a claim for judicial review should not be decided on its merits has the effect of finally determining the claim and falls within that rule, (4) under r.23.8(c) the court may deal with an application without a hearing if the court does not consider that a hearing would be appropriate, but that provision must yield to r.54.18 so as not to allow an order to be made which amounts to determining a judicial review claim without a hearing, unless all parties agree to that manner of proceeding, (5) accordingly, parties who do not agree to their judicial review claim being decided without a hearing must be given the opportunity to address the court before their claim is finally decided. Observations on other circumstances in which civil proceedings may be determined without a hearing. ***Collier v Williams*** [2006] EWCA Civ 20, [2006] 1 W.L.R. 1945, CA, ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 54.18.1, and Vol.2 para.9A-77.)

■ **EDWARDS-TUBB v J D WETHERSPOON PLC** [2011] EWCA Civ 136, February 25, 2002, CA, unrep. (Lord Neuberger M.R., Richards & Hughes L.JJ.)

*Permission to adduce expert evidence – substitution of expert – disclosure of abandoned report*

**CPR rr.3.1(3)(a), 3.1(4), 35.4 & 35.11, Pre-action Protocol for Personal Injury Claims para.3.15, Protocol for the Instruction of Experts to give Evidence in Civil Claims para.5.** In letter of claim sent to representatives of his employers (D) intimating a personal injury claim, employee (C), in complying with para.3.15, including list (of three) medical experts whom he considered suitable to instruct. D not objecting to C's nominees, and parties proceeding on basis that, if necessary, D would instruct a separate expert. C instructing and receiving report from one expert (X), who was on the list, and then instructing and receiving report from another expert (Y), who was not. After liability had been admitted, C issuing claim form and serving it on D, together with particulars of claim and with Y's report (in which C's previous examination by another expert was noted). D applying for order to effect that, in the case management directions, the court's permission for C to call Y or to put in evidence his report, required by r.35.4, should be made subject to condition that C disclose to them X's report. Deputy district judge, granting C permission under r.35.4 to rely on Y's evidence, subject to the condition sought by D, but circuit judge discharging the condition. Single lord justice granting D permission to appeal. **Held**, allowing appeal and re-imposing the condition, (1) within Pt.35, an "expert" is a person instructed to give or prepare expert evidence "for the purpose of proceedings", (2) the expert instructed before issue of the claim form, as well as the expert appointed after issue, is instructed "for the purpose

of proceedings", (3) no party may call an expert, or put in evidence an expert's report, without the permission of the court (r.35.4(1)), (4) when granting such permission, the court may make it subject to conditions (r.3.1(3)(a)), (5) where after proceedings have been started a party has obtained the court's permission under r.35.4 to put in evidence the report of an expert, and subsequently (and before disclosing such report) applies for permission to put in evidence the report of another expert in substitution for the first report, the court may impose the condition that the first report (albeit privileged) should be disclosed to the other parties, (6) in principle there is no reason why the circumstances in which a party may discard the report of an expert appointed before issue of the claim form and substitute the report of another expert, and the consequences of that, should differ from those circumstances and consequences where he abandons the report of an expert appointed after issue of the claim form and substitutes the report of another expert, (7) accordingly, the discretionary power to impose a condition of disclosure of an earlier report is available to the court, not only when the change of expert occurs after issue of the claim form, but also where it occurs before, (8) where a party has disclosed an expert's report, any party may use that report as evidence at the trial (r.35.11), (9) where a party to whom an expert's report has been disclosed (e.g. in compliance with a condition imposed on a grant of permission to put in evidence another expert's report) wishes to so use it the court should be ready to consider requiring him to call that expert so as to ensure that that party is not presented with an unfair tactical advantage. Observations on undesirability of "expert-shopping" and on waiver of privilege as the "price" for permission to adduce evidence. ***Carlson v Townsend*** [2001] EWCA Civ 511, [2001] 1 W.L.R. 2415, CA, ***Beck v Ministry of Defence (Note)*** [2003] EWCA Civ 1043, [2005] 1 W.L.R. 2206, CA, ***Jackson v Marley Davenport Ltd*** [2004] EWCA Civ 1225, [2004] 1 W.L.R. 2926, CA, ***Vasiliou v Hajigeorgiou*** [2005] EWCA Civ 236, [2005] 1 W.L.R. 2195, CA, ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 3.1.4, 35.4.2, 35.4.3, 35.5.1, 35.11.1, 35.20, C2A-004 & C2-015.)

■ **FOX v FOUNDATION PILING GROUP LIMITED** [2011] EWCA Civ 104, January 19, 2011, CA, unrep. (Maurice Kay, Moore-Bick & Etherton L.JJ.)

*Route of appeal – jurisdiction of Court of Appeal – county court decision on costs liability – whether "final decision"*

**CPR rr.40.2(4) & 52.3, Practice Direction 52 (Appeals) para.2A.1, Access to Justice Act 1999 s.56, Access to Justice Act 1999 (Destination of Appeals) Order 2000 arts 1 & 4.** In personal injury claim started in a county court and allocated to the multi-track, parties settling issues of liability. After date for trial of quantum fixed, parties agreeing damages, but unable to agree liability for costs incurred after a particular date to the date of settlement, each maintaining that the other should pay its costs for that period. Judge deciding that outstanding issue in favour of the defendant (D). Order made incorporating (1) a consent order, giving effect to the matters agreed by the parties, and (2) a costs order, giving effect to the judge's costs liability decision. On preliminary hearing in the Court of Appeal (dealt with on the basis of written submissions and conjoined with the similar hearing in *Thorne v Courtier* [2011] EWCA Civ 104), held for the purpose of determining whether the Court had jurisdiction to entertain an appeal by the claimant (C) against the judge's costs decision, **held**, (1) by art.4, an appeal shall lie to the Court of Appeal where the decision to be appealed is a "final decision" in a claim made under Pt.7 and allocated to the multi-track, (2) when the proceedings came before the judge, the only matter to be decided was the outstanding issue as to costs liability, (3) the judge's decision finally disposed of that element of the proceedings and, indeed, disposed of the proceedings as a whole, and therefore constituted a "final decision" within art.1(2), (4) accordingly, the Court had jurisdiction to hear C's appeal. ***Tanfern Ltd v Cameron-MacDonald (Practice Note)*** [2000] 1 W.L.R. 1311, CA, ***Dooley v Parker*** [2002] EWCA Civ 96, February 7, 2002, CA, unrep., ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 40.2.7, 52.0.11 & 52PD.3.1, and Vol.2, para.9A-898 to 9A-901.)

■ **KOJIMA v HSBC BANK PLC.** [2011] EWHC 611 (Ch), March 22, 2011, unrep. (Briggs J.)

*Judgment order on admission – application to revoke order*

**CPR r.3.1(7) & 14.3, Practice Direction 14 (Admissions) para.7.** In October 2006, bank (C) bringing county court claim against borrower (D) to recover unsecured loan of £166,000. D admitting liability of £158,000, but disputing balance. At case management conference in June 2009, on C's application, district judge (1) ordering that, unless D (who was unrepresented) executed a charge for that sum over his flat, C be at liberty to enter judgment for that amount, and (2) giving directions in relation to the disputed part of C's claim. After executing the charge, in September 2009, D (now represented), on basis that he had a defence with a real prospect of success, applying (1) under r.3.1(7) for revocation of the district judge's order, and (2) for permission (a) to withdraw the admission, and (b) to amend his defence and to plead a counterclaim. Circuit judge dismissing these applications. **Held**, dismissing D's appeal, (1) grounds for the exercise of the court's power to revoke an order under r.3.1(7) may be found where the order was made on the basis of erroneous information (whether accidentally or deliberately given), or where subsequent events (unforeseen at the time) destroy the basis on which it was made, (2) however, where the order is a final order determining a case or part of a case, as distinct from a procedural or other non-final order, generally such grounds

will be displaced by the public interest in finality in litigation, (3) orders made by way of judgment on admissions fall clearly in the category of final orders, (4) in this case, the unless order in relation to the admitted sum was intended to be a final disposal of that part of C's claim and was a final order in substance, albeit perhaps not in form. Judge observing that, generally, a party's conscious choice not to deploy relevant material (whether evidence or argument) would present an almost insuperable barrier to an application under r.3.1(7). ***Lloyd's Investment (Scandinavia) Ltd v Ager-Hanssen***, [2003] EWHC 1740 (Ch), July 15, 2003, unrep., ***Collier v Williams*** [2006] EWCA Civ 20, [2006] 1 W.L.R. 1945., CA, ***Simms v Carr*** [2008] EWHC 1030 (Ch), February 7, 2008, unrep., ***Roult v North West Strategic Health Authority*** [2009] EWCA Civ 444, [2010] 1 W.L.R. 487, CA, ***Independent Trustee Services Ltd v GP Noble Trustees Ltd*** [2010] EWHC 3275 (Ch), December 14, 2010, unrep., ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 1.4.15, 3.4.3.2, 3.1.9, 14.1.8 & 14PD.7, and Vol.2 para.9A-175.)

- **R. (MEDICAL JUSTICE) v SECRETARY OF STATE FOR THE HOME DEPARTMENT** [2011] EWCA Civ 269, March 16, 2011, CA, unrep. (Lord Neuberger MR, Hooper & Rimer L.JJ.)

*Permission to appeal subject to conditions – procedure for challenging the conditions*

**CPR rr.52.3 & 52.9, Access to Justice Act 1999 s.54.** On papers, and without submissions from the Secretary of State (D), charity (C) granted permission to proceed in a claim for judicial review challenging policy of D. Judge making protective costs order limiting costs recoverable by, and costs liability of, C. At trial, judge holding in favour of C and making order for costs against D. Judge also granting D permission to appeal but on conditions (1) that the order for costs remain undisturbed, and (2) that D would pay C's costs of the appeal. On an appeal against those conditions, or on an application to vary them, **held**, dismissing the appeal and refusing the application, (1) no appeal may be made against "a decision" of a court under s.54 to give or refuse permission to appeal, (2) an order giving permission to appeal may be made subject to conditions (r.52.3(7)(b)) and in those circumstances the conditions are part of the decision, (3) r.52.9(1)(c) gives the appeal court power to vary such conditions, and applies to cases where permission has been given by the court below as well as to cases where it has been given by the appeal court, but a party who was present at the hearing where permission was given may not apply for an order that the court exercise its powers under this provision (r.52.9(3)), (4) where (as in this case) conditional permission to appeal has been given by the court below, and where r.52.9(3) applies, a prospective appellant dissatisfied with the conditions cannot appeal against them but must elect either (a) to accept the conditions, in which case he has permission to appeal (albeit on those conditions), or (b) to treat the conditional permission as a refusal and pursue a fresh application for permission to appeal to the appropriate appeal court. ***Société Eram Shipping Co Ltd v Compagnie Internationale de Navigation*** [2001] EWCA Civ 568, April 6, 2001, CA, unrep., ***King v Daltray*** [2003] EWCA Civ 808, June 4 2003, CA, unrep., ***Kuwait Airways Corporation v Iraqi Airways Company*** [2005] EWCA Civ 934, June 24, 2005, CA, unrep., ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 52.3.15 & 52.9.4, and Vol.2 para.9A-841.)

- **THORNE v COURTIER** [2011] EWCA Civ 104, January 19, 2011, CA, unrep. (Maurice Kay, Moore-Bick & Etherton L.JJ.)

*Route of appeal – jurisdiction of Court of Appeal – post-trial county court decision on construction of consent order – whether "final decision"*

**CPR rr.40.2(4) & 52.3, Practice Direction 52 (Appeals) para.2A.1, Access to Justice Act 1999 s.56, Access to Justice Act 1999 (Destination of Appeals) Order 2000 arts 1 & 4.** County court ordering that claim for possession of agricultural land started under Pt.55 should be continued under Pt.7 and allocated to the multi-track under r.26.5. Judge holding that claim had been compromised upon acceptance by defendant (D) of Pt.36 offer made by claimant (C). Terms of settlement including term that D would pay C damages for trespass. Order giving effect to judgment including provision that the proceedings be stayed save for the purposes of implementing the agreement. Parties falling into dispute as to whether the agreement required, as properly construed, that the damages were (as C submitted) at large or whether they were to be assessed (as D submitted) by reference to mesne profits. On application made by C in accordance with Pt.23, Recorder ruling on this issue and finding in favour of D and making declaration accordingly. Order drawn up giving effect to this decision. On preliminary hearing in the Court of Appeal (conjoined with the similar hearing in *Fox v Foundation Piling Group Limited*, [2011] EWCA Civ 104), held for the purpose of determining whether the Court had jurisdiction to entertain an appeal by C against the Recorder's order, **held**, (1) under art.3, the general rule is that an appeal from a decision of a county court shall lie, not to the Court of Appeal, but to the High Court, however (2) by art.4, an appeal shall lie to the Court of Appeal where the decision to be appealed is a "final decision" in a claim made under Pt.7 and allocated to the multi-track, (3) in this context, art.1(2)(c) provides that a "final decision" is a decision that would finally determine the entire proceedings, whichever way the court decided the issues before it, and art.1(3) provides that it includes such a decision made at the conclusion of part of a hearing or trial which has been split into parts, (4) in substance C's application, although in form made under Pt.23, gave rise to independent proceedings brought for the purpose of

resolving a dispute as to the meaning of a contract between him and D, (5) the Recorder's decision was a "final" decision within art.1(2)(c), (6) this conclusion was reinforced by art.1(3) because, to an extent, the circumstances in which C's application was made and dealt with could be regarded as analogous to those provided for by that provision, (7) because the issue raised by C's application was quite distinct from any of those which arose in the original proceedings, the Recorder's decision was not made under the conditions stipulated by art.4, however (8) in the circumstances it should be treated as if it came within art.4 because (a) the application was made within proceedings that complied with those conditions, and (b) it would be consistent with the purposes of that provision to do so, (9) accordingly, the Court had jurisdiction to hear C's appeal. (See ***Civil Procedure 2011*** Vol.1 paras 40.2.7, 52.0.11 & 52PD.3.1, and Vol.2, para.9A-898 to 9A-901.)

■ **WOODLAND v STOPFORD** [2011] EWCA Civ 266, March 17, 2011, CA, unrep. (Ward, Arden & Moore-Bick L.JJ.)

*Pre-action admission – permission to withdraw*

**CPR rr.1.1 & 14.1A(3), Practice Direction 14 (Admissions) para.7.2, Practice Direction (Pre-Action Conduct) para.7.1.** Individual (S) carrying on a business of providing swimming lessons and a member of a professional association for providers of such services (D). S entering into an arrangement with a junior school. On July 5, 2000, a 10-year old pupil (C) of the school one of a party of children being given lessons under this arrangement by two individuals engaged by S, one as instructor (X) and the other as lifeguard (Y), at a pool managed and staffed by a local authority. During the lesson C rescued from drowning in the pool but suffering severe brain injury as a result of the incident. In compliance with the appropriate Pre-Action Protocol, C sending letter of claim to S alleging that there was no adequate level of supervision for the lesson. C receiving reply from solicitors (Z) instructed by insurers providing block insurance for members of D, followed later, after receipt of a report of the incident from the Health and Safety Executive, by a denial of liability. C then obtaining another report from the HSE based on a further investigation of the incident in which it was concluded that there had been a delay before C was rescued and resuscitation started. On May 1, 2007, C writing again to Z, who replied on November 27, 2007, with an admission of liability. Both C and D's insurers instructing new solicitors and negotiations as to quantum carried on (during which interim payment of £5,000 made) until July 27, 2009, when admission of liability withdrawn by new solicitors for D's insurers (replacing Z). On November 25, 2009, by her litigation friend, C commencing proceedings against D for personal injury. D applying for an order that permission be given to withdraw the admission of liability pursuant to r.14.1A(5). C applying to amend claim form to add S and Y as defendants and for judgment on the pleaded pre-action admission (r.14.1A(4)(a)). Judge granting D's application. Single lord justice granting C permission to appeal. **Held**, dismissing C's appeal, (1) r.14.1A(3) confers a wide discretion on the court to allow the withdrawal of a pre-action admission and para.7.2 lists the specific factors the court must take into account in addition to the need to have regard to all the circumstances of the case, (2) in a given case, the judge's task is (a) to identify each of the factors and circumstances, and (b) to weigh them and strike the balance with a view to achieving the overriding objective, (3) in exercising his case management powers in this respect, the judge directed himself impeccably, and it could not possibly be said that he was plainly wrong in the conclusion he reached, as it was well within the range of reasonable decisions that could be made in a case of this sort, (4) this was a case where the withdrawal of the admission was prompted, not by the emergence of new evidence, but by D's realisation (after a careful re-appraisal of what was known) that those then acting on their behalf had acted in error, (5) whether or not new evidence has come to light which was not available at the time the admission was made is but one of the factors to be taken into account, and it does not follow that the court cannot permit withdrawal where there is no such evidence. ***American Reliable Insurance Company v Willis Limited*** [2008] EWHC 2677 (Comm), October 24, 2008, unrep., ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 14.1.9, 14PD.7, C1A-001, C1A-005.1.)

# Statutory Instruments

■ **CIVIL PROCEEDINGS FEES (AMENDMENT) ORDER 2011** (SI 2011/586)

Amends Civil Proceedings Fees Order 2008. Replaces Sch.1 (Fees to be Taken) which contains fees payable in civil proceedings in the county courts, the High Court and the Court of Appeal. In effect provides for the increase of fees in most cases in line with the cumulative rate of Consumer Price Index inflation since June 2009. In force April 4, 2011. (See ***Civil Procedure 2011*** Vol.2 para.10-7 et seq.)

# In Detail

## POST-JUDGMENT PROCEEDINGS WHERE DEFENDANT ABSENT FROM TRIAL

Para.(1) of CPR r.39.3 states that if no party attends the trial, the court may strike out the whole of the proceedings; if the claimant does not attend, it may strike out his claim and any defence to counterclaim; and if a defendant does not attend, it may strike out his defence or counterclaim (or both). Para.(2) of the rule states that, where the court strikes out proceedings, or any part of them, under this rule, it may subsequently restore the proceedings, or that part. And para.(3) states that, where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside. The court's powers to re-instate and set aside as given by paras (2) and (3) are to an extent restricted by para.(5) of the rule (one of the rare "only if" provisions in the CPR). That provision states that, where an application is made under para.(2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant (a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him; (b) had a good reason for not attending the trial; and (c) has a reasonable prospect of success at the trial.

Where a party attended trial, and a judgment or order was made against him, generally that party may appeal. Further, where a party did not attend trial, and a judgment or order was made against him, generally that party may appeal. Subject to a very few exceptions, the appellant will require permission to appeal. Para. (6) of CPR r.52.3 states that permission to appeal may be given "only where" (a) the court considers that the appeal would have a prospect of success; or (b) there is some other compelling reason why the appeal should be heard. Permission to appeal is requested in an appellant's notice and, generally, that notice must be filed in the appeal court within 21 days of the decision of the lower court (r.52.4(2)), but this time limit may be extended on application to the appeal court (r.52.6).

It will be apparent from what has been said above, that the defendant who did not attend trial, and against whom a judgment or order was made, may do either or both of two things (assuming he is not content to let things stand). He may apply under r.52.3 for permission to appeal (applying for an extension of time for doing so if necessary), and/or he may apply under r.39.3 to have the judgment or order set aside. Further, if he makes an application under r.39.3 and it is refused, he may apply for permission to appeal against that decision.

The effects of the procedure stated in r.39.3 (in particular of para.(5)) and the relationship between that procedure and the other post-judgment procedure open to a defendant absent from trial (application for permission to appeal) were examined by the Court of Appeal in the recent case of *Bank of Scotland v Pereira*, [2011] EWCA Civ 241, 161 New L.J. 403 (2011). (For summary of this case, see "In Brief" section of this issue of CP News.)

In this appeal, the lead judgment was given by Lord Neuberger M.R., and Lloyd L.J. gave a substantial judgment to the same effect. Gross L.J. agreed with both judgments.

Lord Neuberger M.R. noted that the interaction between the two procedures had been the subject of decisions at first instance (*Tennero Ltd v Arnold (Practice Note)* [2006] EWHC 1530 (QB), [2007] 1 W.L.R. 1025,) and in the Court of Appeal (*Attorney General of Zambia v Meer Care & Desai* [2008] EWCA Civ 754, July 9, 2008, CA, unrep.). His lordship stated that experience and common sense suggest that it may well be impossible to lay down rules to govern every situation where the absent defendant has a choice of procedure, but considered that there are six points which can at least act as guidelines in the great majority of cases (see paras 37 to 48). In his judgment, Lloyd L.J. commented on the six points (see paras 77 to 83). There are risks involved in attempting to summarise these guidance points, because in some respects they are quite elaborate and carefully qualified, but their essence may be stated as follows.

First (para.37), where the defendant (D) is seeking a new trial on the ground that he did not attend the trial, then, even though he may have other possible grounds of appeal, he should normally proceed under r.39.3, provided he reasonably believes that he can satisfy the three requirements of r.39.3(5). The fact that D wishes to raise other arguments for attacking the trial judge's decision should not preclude D proceeding under r.39.3, because that is the specific provision which applies if he did not appear at the trial (and gives him a potential right to a new trial). Further, if D has a retrial, the other arguments which he wishes to raise could be raised at the retrial (and they may be considered by the judge who hears the r.39.3 application).

Secondly (paras 38 & 39), if D concludes that he cannot establish that he had a good reason for not attending the trial and/or that he made his r.39.3 application promptly, it would obviously be silly for him to make a r.39.3 application. In such a case, D can nonetheless seek to appeal against the trial judge's decision in the same way as any other defendant.

Thirdly (paras 40 to 42), where D makes an application under r.39.3 and that application fails on the ground that he had no good reason for not attending the trial and/or that he did not make his r.39.3 application promptly, his right to appeal the trial judge's order should, in principle, be no different from what it would have been if he had not made the r.39.3 application. (Unless D appeals against the dismissal of his r.39.3 application, he would not be able to argue on any attempt to appeal the trial judge's order that the judgment should be set aside simply because it was given in his absence.) However, if D had applied for an adjournment of the trial, the fact that he had made a r.39.3 application which had failed for those reasons (or that he had not made a r.39.3 application at all), should not preclude him from arguing on an appeal that the trial judge erred in refusing his application to adjourn the trial. (It may be noted that, in relation to this guidance point Lloyd L.J. said (para.80) that in a case where there is no basis for a separate appeal, apart from the factors relevant under paras (3) and (5) of r.39.3(3), the proper course is for D apply under the rule, that it is not open to him, having applied unsuccessfully under the rule, to try again by a direct appeal, and that if, instead of applying under the rule, he appeals directly against the order the appellate court should apply the criteria laid down under the rule to the appeal.)

Fourthly (para.43), where D has made a r.39.3 application which failed on the ground that his arguments on the substantive issues would have no prospect of succeeding at any retrial, he should not normally be entitled to raise the same arguments through the medium of an appeal against the trial judge's decision. The proper course would usually be to challenge the refusal of the r.39.3 application on this ground. However, there will be exceptional cases.

Fifthly (paras 44 to 46), where D's r.39.3 application fails, he will normally be in severe difficulties in seeking to contend, by way of appeal against the trial judge's order, that he should be entitled to rely on evidence which was not before the trial judge, or that he should have a retrial. In such cases, the appellate court's approach must depend to some extent on the facts. In general, the appellate court will bear in mind not only the requirements of r.39.3, but also the application of the principles relating to the receipt of evidence not before the lower court.

Sixthly (para.47), similar considerations apply if D makes no r.39.3 application, but appeals the trial judge's decision and seeks to put in new evidence for an order for a retrial. However, as it will not have been determined whether the three requirements of r.39.3(5) have been satisfied, the appellate court may have to make that decision for itself unless it decides that D should first have applied under r.39.3 to set aside the trial judge's order (in which case the appellate court may nonetheless decide the issue itself, remit the issue to the court below as a r.39.3 application, or make some other appropriate order).

## LATE APPLICATIONS TO AMEND PLEADINGS

In the recent case of *Swain-Mason v Mills & Reeve* [2011] EWCA Civ 14, January 20, 2011, C.A., unrep., at the start of a trial in the Chancery Division, the claimants applied to amend their claim and the judge granted the application subject to the condition that it be disallowed if the evidence to be filed by the claimants did not support it. After the evidence was filed, the judge dismissed the defendant's application for the amendment to be disallowed. The Court of Appeal allowed the defendant's appeal. In Issue 02/2011 of CP News (February 15, 2011) this case was summarised in the "In Brief" section (p.4) and the Court of Appeal's judgment was explained in the "In Detail" section (p.6). Unfortunately, in the latter section it was erroneously stated (in the 7th paragraph) that the late application for leave to amend was an application for leave to amend a defence made by the defendants when in fact (as stated on p.4, and as indicated above) it was an application by the claimants to amend their claim. (The editor apologises for this error.) Following the decision of the Court of Appeal, the trial was continued before Arnold J. His lordship gave judgment for the defendants, dismissing the claimants' claim for professional negligence (see [2011] EWHC 410 (Ch), March 1, 2011, unrep.).

The decision of the Court of Appeal in the *Swain-Mason* case was referred to in *Bleasdale v Forster* [2011] EWHC 596 (Ch), March 16, 2011, unrep. (Henderson J.), where the claimants (C) made a late application for permission to add an alternative claim. The judge stated that, in the circumstances, it was reasonable for C to delay the making of their application to amend their statement of case, but as the application was made only shortly before trial, C must be held to the terms in which the amendment was pleaded. In the event the judge held that permission should not be granted as the alternative claim was not properly arguable. (For summary of this case, see "In Brief" section of this issue of CP News.)

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

Typeset by EMS Print Design
Printed by St Austell Printing Company, St Austell, Cornwall
*375096*