CIVIL PROCEDURE NEWS

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In Brief

Cases

■ **BACON v AUTOMATTIC INC** [2011] EWHC 1072 (QB), May 6, 2011, unrep. (Tugendhat J.)

Service of claim form out of jurisdiction – service by alternative method – service by e-mail

CPR rr.6.15, 6.37 & 6.40(3), Practice Direction 6B (Service Out of the Jurisdiction) para.3.1(2). Businessman (C) issuing claim form against three defendants (D) domiciled in the USA claiming Norwich Pharmacal relief for purpose of obtaining identity of person alleged by C to have published defamatory statements about him on websites operated by D. On grounds specified in para.3.1(2) (claim for an injunction), C applying under r.6.37 for permission to serve the claim form out of the jurisdiction and to effect such service by an alternative method, specifically by e-mail. At hearing of application, D not appearing and not represented. **Held**, granting the application, (1) in terms r.6.15 (Service of claim form by an alternative method), though found in Section II of CPR Pt 6 (Service of the claim form within the jurisdiction), applies to all Sections of that Part, including Section IV (Service out of the jurisdiction), (2) the power of the court to give directions about the method of service out of the jurisdiction granted by r.6.37(5)(b)(i) is not confined to the methods stipulated by r.6.40(3) but includes alternative methods, (3) under r.6.15 the court may permit service by a method not otherwise permitted by Pt 6 where it appears "that there is good reason to do so", (4) in this case D had indicated (in the case of two defendants, in correspondence, and in the case of the third, by notice on their website) that they would accept service by e-mail of any order made by the court, and it could be inferred that they would have consented to service of the claim form by that method. Judge stating that, in applications of this type, claimants should put before the court evidence as to whether service by email is permitted by the law of the country in which the claim form is to be served. ***Brown v Innovatorone Plc*** [2009] EWHC 1376 (Comm), [2010] C.P. Rep. 2, ***General Medical Council v Benjamin*** [2010] EWHC 1761 (Admin), June 15, 2010, unrep., ***Amalgamated Metal Trading Limited v Baron*** [2010] EWHC 3207 (Comm), December 21, 2010, unrep., ***Abela v Baardarani*** [2011] EWHC 116 (Ch), January 28, 2011, unrep., ***Cecil v Bayat*** [2011] EWCA Civ 135, February 18, 2011, C.A., unrep., ref'd to. See further, "In Detail" section of CP News Issue 3/2011 (March 15, 2011). (See ***Civil Procedure 2011*** Vol.1 paras 6.15.5, 6.15.7, 6.37.1, 6.37.27, 6.40.5 & 6BPD.3)

■ **BOND v DUNSTER PROPERTIES LTD** [2011] EWCA Civ 455, 161 New L.J. 634 (2011), CA. (Lord Neuberger M.R., Arden & Longmore L.JJ.)

Written judgment – excessive delay in delivering – appeal

CPR rr.40.2 & 52.10, Human Rights Act 1998 Sch.1 Pt I art.6. On June 1, 2005, father (C) commencing proceedings to recover sums paid to his son and/or his companies. D entering defence and making counterclaim. Parties in dispute as to whether there was an agreement between C and D under which D obtained loans from C to facilitate development and sale of property, and as to terms of any such agreement. In their defence, D asserting that there was such an agreement and that sums owing to C under it had not yet fallen due. Mercantile Court judge ordering trial of certain preliminary issues. At trial, in which conflicting oral and written evidence (including expert evidence) relating to strongly disputed issues of fact was tendered, and substantial written submissions received, judge making holdings in favour of D. This trial, not conducted at one continuous sitting, but adjourned from time to time between July 16, 2007, and June 6, 2009, and lasting, in total, ten sitting days. Judge handing down written judgment on April 16, 2011, 22 months after the conclusion of the trial. On ground of excessive delay in delivering judgment, C applying for permission to appeal. Judge refusing permission, but C granted permission by single lord justice to appeal against part of the judge's order. **Held**, dismissing C's appeal, (1) there is no statutory rule which provides that a judgment must be delivered within a specified time, (2) it has to be delivered within a reasonable time, and what is a reasonable may well vary according to the complexity of the legal issues, the volume and nature of the evidence and other matters, (3) the function of the Court on an appeal of this type, which is principally brought against the judge's findings of fact, is to consider whether any of those findings of fact should be set aside and a retrial ordered, (4) findings of fact are not automatically to be set aside because a judgment was seriously delayed, (5) as in any appeal on fact, the court has to ask whether the judge was plainly wrong, (6) in the case of a seriously delayed judgment there is an additional test to the effect that, where the reviewing court finds that the judge's recollection of the evidence is at fault on any material point, then (unless the error could not be due to the delay in the delivery of judgment), it will order a retrial if, having regard to the diminished importance in those circumstances of the special advantage the trial judge has in the interpretation of evidence (derived from his having seen the witnesses give their evidence), it cannot be satisfied that the judge came to the right conclusion. Court stating that, as a matter of good judicial practice and transparency, any delay beyond the reasonable period for judgments should, as a matter of courtesy, be explained by letter or email to

the parties even if they do not press for the judgment. (See further "In Detail section of this issue of CP News.) ***Goose v Wilson Sandford & Co*** [1998] T.L.R. 85, CA, ***Gardiner Fire Ltd v Jones*** *The Times* October 22, 1998, CA, ***Cobham v Frett*** [2001] 1 W.L.R. 1775, PC, ***Boodhoo v A-G of Trinidad and Tobago*** [2004] UKPC 17, [2004] 1 WLR 1689, PC, ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 40.2.5 & 52.10, and Vol.2 para.3DF-36.)

■ **CAPITA ALTERNATIVE FUND SERVICES (GUERNSEY) LTD v DRIVERS JONAS** [2011] EWHC 1228 (Comm), May 10, 2011, unrep. (Eder J.)

Amendment to statement of case – application in course of trial

CPR r.17.1(2)(b). Investment company (C) bringing claim in Commercial Court for substantial damages against commercial property consultants (D). C alleging that they had suffered losses as a result of advice given and not given by D in relation to the acquisition of a factory outlet centre. On fourth day of trial, in cross-examination of former employee (X) of D, C referring to documents disclosed by D, including a document produced by agents (Y) acting on behalf of the developer (Z). C contending that Y's document was fraudulent and dishonest, that Z were tainted by this fraud, that X should have realised this and D should have advised accordingly. Upon D submitting that these allegations had not been pleaded, C applying for permission to amend their allegations of breach of duties in their statement of case to allege that, in this respect, D had failed to undertake competent due diligence. **Held**, refusing application, (1) the amendment was to the effect that Y provided materially inaccurate and misleading statements to D and did so dishonestly in circumstances which gave rise to reasonable suspicion of dishonesty, (2) that allegation went far beyond the allegation, already pleaded, that D placed undue reliance on the views of Y, (3) the amendment made a new claim arising out of the same facts, or substantially the same facts, already pleaded, (4) where permission is sought to make a very late amendment to plead a new case, not resulting from some late disclosure or new evidence, the court is required to balance the relevant factors, (5) the court is concerned to take that into account that the claimant wishes to run the amended case and, in the ordinary course, that justice to the claimant is important, (6) but equally, the court is concerned to maintain the balance or to strike a balance and to ensure that no unfairness or at least significant unfairness is caused to the defendant in any particular case, (6) therefore, the court must focus on striking that balance between the interests of the claimants to run a claim and the interests of the defendant so that the defendant is not caused any relevant unfairness, (7) an important consideration in this case was that the thrust of C's new case involved allegations as to what Y, a third party, allegedly did some ten years ago. Observations on role of pleadings and need to guard against suggestion that they are not as important as they used to be. ***Swain-Mason v Mills & Reeve*** [2011] EWCA Civ 14, January 20, 2011, CA, unrep., ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 17.3.5 & 17.3.7.)

■ **FKI ENGINEERING LTD v STRIBOG LTD** [2011] EWCA Civ 622, May 25, 2011, CA, unrep. (Mummery, Rix & Wilson L.JJ.)

Judgments Regulation – pending related actions – discretion to stay

CPR r.3.1(2)(f), Judgments Regulation 44/2001 arts 27, 28 & 30. On January 21, 2010, company (C) commencing action in Commercial Court for unpaid purchase price for sale of assets to another company (D) claimed to be due under a business transfer agreement. On February 15, 2010, D applying for stay of the action on ground that same issues arising were under consideration in an action pending in a German court instituted by D on September 18, 2009. D submitting that as German court was "first seised" the judge had jurisdiction under art.28.1 to stay the English action in the exercise of discretion. C submitting (1) that, at the time when the English action was instituted, the two actions were not "related actions" within art.28.1, and only became so when, after that time (but before the issue of D's application for a stay), D made amendments to their claim in the German action introducing a new issue (the validity of an agreement assigning claims to C), (2) that in those circumstances, (a) the English court was "first seised" and (b) the judge had no jurisdiction to grant a stay of the English action. Judge dismissing D's application ([2010] EWHC 160 (Comm), [2010] 2 Lloyd's Rep. 524). On renewed application (following refusal by single lord justice) Court of Appeal granting D permission to appeal. **Held**, allowing D's appeal and ordering a limited stay (to enable the validity of the assignment to be determined by the German court), (1) per Mummery L.J. (a) it was common ground that if the German court was "first seised", the English Court had a discretion to grant a stay of the English action, (b) as the German action was commenced before the English action, the German court was first seised within the meaning of arts 28 and 30 and the actions were related actions within the meaning of art.28 at the date of the application for stay and at the date of the hearing of the application when the decision had to be made, (c) the fact that the actions were not related actions when the English action was commenced did not affect the chronology of deemed seisin within the meaning of art.30, or the question of which court was first seised within the meaning of art.28, or the existence or exercise of the discretion to grant a stay of the English action, (2) per Rix L.J. (a) the discretion of a court other than the court first seised to order a stay of its proceedings under art.28.1 comes into issue only when there are related and pending actions in separate member states, (b) once there are at least two actions pending in different member states, then it is possible to ask

whether they are related and also which of the courts is first seised, (c) the question whether they are related is the art.28.3 question and the question of when seisin occurs and thus which of the courts is the court first seised is the art.30 question, (d) in the instant case, the English court was the court second seised and therefore had a discretion to stay the English action. (See ***Civil Procedure 2011*** Vol.1 paras 3.1.7, 6.33.23, and Vol.2 paras 5-276 and 9A-190.)

- **KHATIB v RAMCO INTERNATIONAL** [2011] EWCA Civ 605, May 18, C.A., unrep. (Carnwath, Lloyd & Wilson L.JJ.)

Relief from sanctions – unless order striking out claim where failure to pay interlocutory costs owing

CPR r.3.9. Individual (C) commencing proceedings for contractual claim against six companies and businessman (said to be chairman and principal shareholder of them) (D). C claiming that he had generated business for D and was entitled to 10 per cent of the profits of such business as commission and seeking orders for appropriate accounts and enquiries and payment of sums found due. D defending claim and making counterclaim (which C defended) to recover loans said to have been made to C. C applying for extension of time for paying costs order made against him when an application for specific disclosure made by him was dismissed. On September 18, 2008, Master refusing application and making unless order striking out C's claim and defence to counterclaim in default of payment of the costs owing by a particular date. After C's appeal against the order refusing specific disclosure had been dismissed (the entering of judgment by D for C's failure to comply with the unless order having been suspended whilst that appeal pending), C paying costs owing (with interest) and restoring application (originally made on November 3, 2008) for relief from sanction. Judge holding that C should be relieved of the sanction striking out his defence to the counterclaim, but not of the sanction dismissing his claim ([2009] EWHC 3610 (Ch)). Single lord justice granting C limited permission to appeal. **Held**, dismissing appeal, (1) in dealing with applications under r.3.9(1) a judge (a) has to be aware of the circumstances listed therein and of the particular factors said on either side to be relevant according to the evidence and the circumstances of the particular case, and (b) must conduct an appropriate review and balancing exercise, (2) a judge's judgment would not be flawed, so that his exercise of discretion under s.3.9(1) should be set aside, where it failed to mention expressly all of the circumstances listed in the rule relevant to the facts, assigning them to one side of the balance or the other, because to require that would impose an unrealistic, inappropriate and unduly formalistic burden on judges having to determine applications for relief from sanctions at first instance, (3) in this case it was clear (a) that the judge did have in mind both the relevant legal principles and all the factual matters relied on by each party as being relevant to the exercise which he had to carry out, and (b) that he applied his mind correctly, according to the relevant principles, to the factual matters which he ought to have taken into account (or considered, or had regard to), and he came to a conclusion which cannot be shown to have been the result of a misdirection. Authorities on r. 3.9(1) reviewed and explained. ***Woodhouse v Consignia*** [2002] EWCA Civ 275, [2002] 1 W.L.R. 2558, CA, ***Hanson v Wright*** [2003] EWC Civ 1801, December 18, 2003, CA, ***CIBC Mellon Trust Co v Stolzenberg*** [2004] EWCA Civ 827, June 30, 2004, CA, unrep., ref'd to. (See ***Civil Procedure 2011*** Vol.1 para.3.9.1.)

- **MILBURN-SNELL v EVANS** [2011] EWCA Civ 577, May 25, 2011, CA, unrep. (Lord Neuberger MR, Hooper & Rimer L.JJ.)

Claim purportedly brought on behalf of intestate's estate – claim a nullity

CPR r.19.8(1). Children (C) of deceased father (X) who had died intestate commencing High Court claim against person (D) alleged to have been X's business associate. Shortly before trial D applying to strike out claim on ground that C had no title to sue. Judge granting application, holding that the claim was a nullity that must be struck out and could not be retrospectively validated by a grant of letters of administration, but giving C permission to appeal. **Held**, dismissing appeal, (1) an administrator is not entitled to sue until administration is granted, for he derives his title solely under his grant, (2) the court had no power under r. 19.8(1) to appoint persons to represent the estate. ***Ingall v Moran*** [1944] K.B. 160, CA, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2011*** Vol.1 para.19.8.2.)

- **NOTTINGHAMSHIRE & CITY OF NOTTINGHAM FIRE AUTHORITY v GLADMAN COMMERCIAL PROPERTIES** [2011] EWHC 1918 (Ch), April 20, 2011, unrep. (Peter Smith J.)

Evidence – power of court to control – application in course of trial to rely on additional witness

CPR r.1.1, 1.4, 3.1 & 32.1. Fire authority (C) and local authority (T) bringing claim against property development company (D) for specific performance of two contracts for sale of land to D. D defending claim, making Pt 20 claim against T, and claiming rescission, alleging misrepresentation by C's and T's agents in the sale particulars and contending that C and T's own documents showed that the misrepresentation was fraudulent. At trial, after ten days (the original estimate), proceedings adjourned for five weeks and when resumed, C and T making application for permission to rely on the evidence (relevant to the fraud issues) of an additional individual witness (X). Application opposed by D, on grounds that they would be prejudiced by the late delivery of the evidence

and that a further adjournment would be required if permission were granted. **Held**, granting the application, (1) it was surprising that T made a deliberate decision not to originally include X as one of their witnesses, (2) the reasons now given by T for that decision were insufficient, (3) once a trial has started it is incumbent upon the judge to ensure that it proceeds as far as possible efficiently and fairly and to finish it as quickly as possible within the confines of the CPR, (4) the most important duty of a trial judge is to enable all parties to a trial have the fullest opportunity to present their cases provided they are presented in a way which is not unfair to the other side, (5) the decision to allow late service of witness statements is a matter of discretion of the trial judge to be exercised in accordance with the principles set out in the overriding objective, (6) it was essential that C and T should be given the fullest opportunity properly and fairly to present their case to challenge the serious fraud allegation, (7) X's evidence was relevant to that allegation, (8) to continue the trial without X's evidence would be to proceed on an entirely false basis and would be a serious injustice to C and T, (9) any prejudice to D could be rectified by an adjournment, and such an adjournment (which may, in the circumstances, have to be for one to two months) would not prejudice the decision-making process. Observations on factors relevant to late applications to rely on evidence and on late applications to amend pleadings, and on comparisons between the two. ***British Sugar Plc v Cegelec Ltd*** [2004] EWCA Civ 1450, October 7, 2004, CA, unrep., ***Swain-Mason v Mills & Reeve*** [2011] EWCA Civ 14, January 20, 2011, CA, unrep., ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 1.4.2 & 32.2.5, and Vol.2 paras 11-6 & 11-8.)

WESTWOOD v KNIGHT [2011] EWPCC 011, May 11, 2011, unrep. (Judge Birss Q.C.)

Patents County Court – fixed costs – summary assessment – guidance

CPR r.44.3, Pt 45, Sect VII, Pt 63, Sect V, Costs Practice Direction Sect 25C. Claimant (C) bringing action for infringement of registered trade marks, passing off, infringement of copyright and declarations of invalidity of certain of the defendant's (D) registered trade marks. Claim transferred from High Court and proceeding under the modified procedure applicable in Patents County court. At trial judge giving judgment for the claimant (C) ([2011] EWPCC 008) and making various orders consequential on the judgment, including an order for an enquiry as to damages (or account of profits). C represented throughout. D not appearing at trial but making post-judgment written submissions. Judge refusing D permission to appeal. Judge also making an order for costs against D. In making summary assessment of C's costs under r.45.41, judge considering the court's discretion and circumstances to be taken into account when exercising its discretion (r.44.3), the fixed costs provisions in s.VII and s.25C, and the total costs payable (r.45.42(1), and giving guidance as to how the PCC will in future approach the making of summary assessment orders under his regime, including guidance on the information to be provided by the receiving party and its presentation. (See ***Civil Procedure 2011*** Vol.1 paras 45.41 & 45PD.11 and Vol.2, para.2F-17.19.1.)

Pre-action Protocol

RTA Protocol Stage 2 Fixed Costs and Disbursements

Where a claim proceeds under the procedure stated in the Pre-Action Protocol for Low Value Personal Injury Claims, and the parties reach agreement during Stage 2, the claimant must pay the defendant (by the deadline prescribed) the agreed damages; that is to say the original damages and any additional (vehicle related damages).

In addition, the claimant must pay the Stage 2 fixed costs and any unpaid Stage 1 costs and a success fee. Those fixed costs are set out in CPR r.45.29 and the success fee is calculated in accordance with r.45.31 (see Civil Procedure 2011 Vol.1 paras 45.29 & 45.31, pp.1382 & 1385).

Where there are no additional damages, these liabilities imposed on the defendant are stipulated by para.7.40 of the Protocol, and where there are additional damages, by para.7.53 (see ibid Vol.1 pp.2630 & 2631). Those paragraphs also require the defendant to pay "relevant disbursements". As printed in Civil Procedure 2011, para.7.53 states, quite correctly, that the relevant disbursements are the disbursements "allowed in accordance with r.45.30". However, para.7.40, as printed (on p.2630) states, inaccurately, that the relevant disbursements are limited to those set out in para.(2)(a) of r.45.30. The recoverable disbursements are, as would be expected, the same in both circumstances. Therefore, in para.7.40, "rule 45.30(2)(a)" should read "rule 45.30". The publishers apologise for this error.

In Detail

PERSONAL REPRESENTATIVE'S TITLE TO SUE

In *Milburn-Snell v Evans* [2011] EWCA Civ 577, May 25, 2011, CA, unrep., the facts were that, on March 7, 2007, the father (X) of the claimants (C) died intestate and on July 2, 2009, C commenced a High Court claim against a lady (D) on the basis that, as a result of a relationship between X and D, X had acquired an interest (on the principles of proprietary estoppel) in a property and a business. In their statement of claim C asserted that they were the personal representatives of X and were entitled to bring the claim on behalf of his estate. (For summary of this case, see "In Brief" section of this issue of CP News.)

D's defence put in issue C's title to sue and required them to prove their title by producing a grant of letters of administration of X's estate. On December 21, 2009, the trial was fixed for June 7, 2010. On January 28, 2011, C gave their disclosure by list, but that list did not include a grant of letters of administration. On May 28, 2010 (five clear working days before trial), D reminded C of this omission and asked for a copy of the grant. C replied saying that no grant had been obtained and asserted that they were entitled to sue without one.

D applied to the court for an order striking out the claim on the ground that C had no title to sue. The judge granted the application, holding that the claim was a nullity that must be struck out and could not be retrospectively validated by a grant of letters of administration, but gave C permission to appeal. The Court of Appeal (Lord Neuberger M.R., Hooper & Rimer L.JJ.) dismissed C's appeal. (C's claim was commenced within the relevant limitation period, and time had not run when the appeal was heard.)

In giving the lead judgment, Rimer L.J. referred to *Ingall v Moran* [1944] K.B. 160, CA. In that case, the Court of Appeal re-stated the following common law principles: (1) an executor is entitled to sue before obtaining probate, he being named in the will as executor, and the grant of probate being only a completion of his title, but (2) an administrator is not entitled to sue until administration is granted, for he derives his title solely under his grant.

Rimer L.J. said (para.16) that, since the Ingall case, it has been clear law that an action commenced by a claimant purportedly as an administrator, when the claimant does not have that capacity, is a nullity, and does not prevent the running of the statute of limitations (see also *Hilton v Sutton Steam Laundry*, [1946] 1 K.B. 65, CA).

Before the judge, and on the appeal, C argued that the court had power under CPR r.19.8(1) to order that their claim should continue. That rule states:

"Where a person who had an interest in a claim has died and that person has no personal representative the court may order –

(a) the claim to proceed in the absence of a person representing the estate of the deceased; or
(b) a person to be appointed to represent the estate of the deceased."

Specifically, it was submitted that the court had power to appoint C to represent X's estate.

Rimer L.J. said (para.22) r.19.8(1) is clearly only concerned with orders as to the representation of estates that may be made by the court for the further prosecution of proceedings that have already been started where a person who had an interest in the claim has died and no personal representative has been appointed. His lordship briefly outlined the history of the rule (tracing it to the Chancery Practice Amendment Act 1852 s.44) and noted that the provision has not been confined to circumstances where, after proceedings have been commenced, a party dies intestate and the court is requested to appoint a personal representative to represent the deceased's estate in the continuing proceedings. However, his lordship concluded that r.19.8(1) had no application to the present case because it has no role to play in correcting deficiencies in the manner in which instituted proceedings have been constituted. In further explaining the function of the rule his lordship explained (para.30):

"It certainly says nothing express to that effect and I see no reason to read it as implicitly creating any such jurisdiction. It is, I consider, concerned exclusively with giving directions for the forward prosecution towards trial of *validly* instituted proceedings when a relevant death requires their giving. In the typical case, that death will occur during their currency and will usually be of a party. More unusually, it may have preceded them. But on any basis it appears to me clear that it is no part of the function of r.19.8(1) to cure nullities and give life to proceedings such as the present which were born dead and incapable of being revived. In ordinary circumstances there is no reason why anyone with a legitimate interest in bringing a claim on behalf of an intestate's estate should not first obtain a grant of administration and so clothe himself with a title to sue. I am unable to interpret r.19.8(1) as providing an optional alternative to such ordinary course."

Section 35(7) of the Limitation Act 1980 states that, in certain circumstances, rules of court may provide for allowing a party to any action to claim relief in a new capacity in respect of a new cause of action notwithstanding that he had no title to make that claim at the date of the commencement of the action. That section was enacted following

recommendations of the Law Reform Committee in their Final Report on Limitation of Actions (Cmnd 6923, 1977) and RSC Ord.20, r.5 was amended to implement it. The relevant rule is now found in para.(4) of CPR r.17.4 (Amendments to statement of case after the end of a relevant limitation period). (For a comprehensive account of this development, see the judgment of Lord Collins in *Roberts v Gill & Co* [2010] UKSC 22, [2011] 1 A.C. 240, SC.)

In the Milburn-Snell case, s.35(7) and r.17.4(4) did not assist C, but both the judge and the Court of Appeal referred to them. The main impetus for the introduction of those provisions was the concern that injustice could arise where a widow brought an action for the benefit of her husband's estate under the Law Reform (Miscellaneous Provisions) Act 1934. If the action was brought before the widow obtained probate it would be brought without title to sue with disastrous consequences for the widow if it was struck out on this ground after time had run. (The consequences would appear to be particularly harsh if the widow could have brought an action for the benefit of herself as a dependent who had suffered damage by reason of the death of her husband under the Fatal Accidents Acts had she acted before time had run, but had failed to do so.) But, in those circumstances, the position could be retrieved if probate was granted to the widow as executor, because then the widow's title to sue on behalf of her husband's estate related back to the date of death and therefore to a date before the action was commenced. However, where the deceased died intestate and the widow was granted letters of administration in such circumstances, the title related back only to the date of the grant, a date falling after the expiry of the limitation period, with the result that the amended claim was statute barred. The original action was not capable of amendment; it was and remained, a nullity.

This distinction between the position of the widow as executor and the widow as administratrix was regarded as an unjustifiable anomaly and was removed by s.35(7) of the 1980 Act and the 1981 amendments to RSC Ord.20, r.5; but the changes in the law as to altering the capacity in which a party sues effected by those provisions were not confined to fatal accident claims.

In some accounts of the enactment of s.35(7) and, what is now, CPR r.17.4(4), it is said that this legal development "negatived" or "removed the effect of" *Ingall v Moran* and similar cases (see e.g. *Haq v Singh*, [2001] EWCA Civ 957, [2001] 1 W.L.R. 1594, CA, at para 22 per Arden L.J., and paras 29 to 32 per Pill L.J.). In the Milburn-Snell case, Rimer L.J. expressed the opinion (para 19) that such statements put the matter too broadly. The changes in the law as to altering the capacity in which a party sues effected by those provisions, though not confined to fatal accident claims, were (and are) confined to cases where a limitation period has expired. The proposition that a claim commenced by a claimant purportedly as an administrator, when the claimant does not have that capacity, is a nullity, was, and remains good law, where (as in the Milburn-Snell case itself) no issue of limitation arises. A claim which "is born dead and is a nullity" cannot be given life by amendment. (With respect, that is clearly right; without statutory assistance, the law relating to the representation of the estates of deceased persons, and in particular the dates on which the appointments of personal representatives take effect, cannot be altered by rules of court, even for the restricted purposes of determining title to sue.) Further, the mischief that s.35(7) and r.17.4(4) were principally designed to remedy was (as explained above) the apparent injustice that arose in cases in which a claimant widow, who could have sued in a personal capacity, found herself barred by time from suing at all because she had mistakenly sued in time exclusively as administratrix when she had no capacity to do so. (It was that predicament that Singleton L.J. in *Finnegan v Cementation Co Ltd* [1944] 1 K.B. 688, CA, described as a "blot on the administration of justice", and not the rule that a claim brought by a person on behalf of an intestate's estate will be a nullity if that person does not first obtain a grant of administration.)

CASE MANAGEMENT OF TRIAL OF PRELIMINARY ISSUES

In *Bond v Dunster Properties Ltd* [2011] EWCA Civ 455, 161 New L.J. 634 (2011), CA, there was a delay of 22 months between the end of the trial of preliminary issues and the delivery of judgment. In his judgment the judge made important findings of fact in favour of the defendant and the claimant appealed, submitting that the delay made those findings unreliable. The Court of Appeal (Lord Neuberger M.R., Arden & Longmore L.JJ.) dismissed the appeal, and in doing so explained the functions of the Court in appeals of this type. (For summary of this case, see "In Brief" section of this issue of CP News.)

On the appeal, the lead judgment was given by Arden L.J. In noting the decision of the judge, made with the consent of the parties, to order the separate trial of a number of preliminary issues, her ladyship observed that the adopting of such a course "is often found in the end to have delayed the resolution of an action and this case is no exception".

In his judgment (in addition to dealing shortly with the main point arising) Lord Neuberger M.R. also referred to this matter and said that in this respect and in others the proceedings seemed "to have been beset with problems" from which lessons could be learnt. His lordship's comments in this respect, found in para.105 et seq of the transcript, though provoked by the procedural history of the instant case, are mainly expressed in terms of general application and are directed at judges and practitioners alike (and are not confined to the case management of preliminary issues trials).

Separate trial of preliminary issues

On the matter of the separate trial of preliminary issues generally (noted by Arden L.J.), the Master of the Rolls said (paras 106 to 108):

"106. The first problem was that the parties agreed to the determination of preliminary issues. This appears to me to have been very unwise, given that the hearing was anticipated to last four days, and, it would seem, to involve oral evidence, much of it from parties or witnesses who could reasonably have been expected to give evidence at any subsequent hearing. By the time the preliminary issues hearing was intended to start, the proceedings would have already been on foot for nearly two years and the relevant events would have taken place nearly four years earlier.

107. While they have their value, it is notorious that preliminary issues often turn out to be misconceived, in that, while they are intended to short-circuit the proceedings, they actually increase the time and cost of resolving the underlying dispute. It would, in my judgment, require a very exceptional case, almost inevitably one where a subsequent multi-week trial was anticipated, before a preliminary issue hearing, involving witnesses and expected to last four days, could be justified.

108. … In my view, parties and their legal advisers should carefully consider the potential benefits and risks before proposing a preliminary issues hearing, and, before a judge orders such a hearing, he or she should normally test the soundness of the proposed course."

Later on in his judgment his lordship noted that much of the delay in concluding the preliminary issues hearing in the instant case was caused by the fact that there was undue concentration on the question whether the claimant had signed an agreement which, in the circumstances, was a point "plainly not determinative of the dispute between the parties" but was only relevant to the credibility of the claimant (paras 114 & 115). (See also Longmore L.J. at para. 98.)

Late disclosure of documents

Lord Neuberger M.R. noted that, in the instant case, although the start of the preliminary issues hearing had to be adjourned for three months because insufficient time had been set aside, an adjournment would have been necessary in any event because of late disclosure of documents. Further, there was a subsequent eight month adjournment because of late disclosure (of a document apparently only discovered when proceedings were well advanced). In each case, it was the defendant who was responsible for the disclosure in question.

On this problem, the Master of the Rolls said (para.110):

"In this case, the judge seems to have accepted that each late document disclosed late was genuine and that the lateness did not involve any culpability on the part of [the defendant], so it may well be that there was nothing else that could have been done. The more general point is that parties should take their disclosure obligations seriously and timeously, and should be expected to be appropriately sanctioned if they fail to comply with that obligation."

Time estimates

Lord Neuberger M.R. noted that in the instant case, a ten day hearing was held when an estimate of four days had been made and observed that it was difficult to understand how the estimate could have been so wrong. His lordship added (para.112):

"In my view, judges should be more ready than they have been actively to manage hearings which are starting to run on beyond their time estimates or in a way which is simply disproportionate to the issues at stake. I appreciate that this is much easier to say in an appellate court than it is to implement at trial, and that it may often be hard to impose time limits fairly, especially once a hearing has got under way. However, particularly where parties and their representatives can be given a fair warning, I consider that trial judges should try and control hearings when things seem to be getting out of hand – and that an appellate court should, if at all possible, support their decisions."

Discontinuous hearings

Lord Neuberger M.R. also noted that the hearing in the instant case was discontinuous, with the judge sitting over three different periods of three or four days each, and that these periods were spread over nearly eleven months. On this problem, the Master of the Rolls said (para.113):

"That can be a by-product of an under-estimate, especially when combined with late disclosure, but it is unsatisfactory from the point of view of the presentation of the respective parties' cases and from the perspective of the judge deciding the case. Where a hearing is adjourned part heard, the trial judge and the court should do their very best to ensure the gap until the hearing resumes is kept to a minimum. Legal representatives have a similar duty in this connection."

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