# CIVIL PROCEDURE NEWS

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# In Brief

## Cases

- **BRIGHTON AND HOVE BUS AND COACH CO LTD v BROOKS** [2011] EWHC 2504 (Admin), October 14, 2011, DC, unrep. (Richards L.J. & Nicola Davies J.)

*Contempt of court – interference with course of justice by false representations – false statements*

**CPR r.32.14, Sch.1 RSC Ord.52, rr.1 & 2.** Married woman (X) suffering severe brain injury when knocked down by bus. After being discharged from hospital into the care of her family in December 2005, X examined or assessed over a period of two and a half years by eight different medical and care experts appointed by the parties. On October 21, 2008, through her daughter as next friend (D1), X commencing proceedings against bus company (C) intimating a claim in excess of £2m. Subsequently, and before disclosure by C of their insurer's surveillance evidence, X examined by a further four medical experts. On each and every of the 12 examinations or assessments, X accompanied by her husband (D2) or D1 or both of them. On March 25, 2009, judgment on liability entered on the basis of a 50:50 apportionment and D1, D2 and another daughter (D3) making witness statements in support of the damages element of the claim. In mid-2009, after C's insurers had disclosed surveillance evidence disclosed to X, D1, D2 and D3 making further witness statements. A few days before trial of quantum, X's claim settled for the net sum of £40,000 (i.e. £80,000 at full liability) and, because there had been a Pt 36 offer in that amount in before the proceedings were started, X agreeing to pay all C's costs since the date of the offer, on the indemnity basis. C (in reality their insurers) applying under r. 2 to a Divisional Court of Queen's Division for permission to bring proceedings for contempt of court against D1, D2 and D3. Court granting application and giving directions for trial. C alleging that, in order to inflate X's damages, (1) all of the defendants made false statements in their witness statements without any honest belief in their truth (r.32.14), and (2) that D1 and D2 only, in the course of X's several examinations and assessments, dishonestly made false representations to the experts which were recorded in the experts' reports, in particular, as to X's mobility, thereby interfering with the due administration of justice. **Held**, dismissing the allegation that the defendants had made false statements, but upholding the allegation that D1 and D2 had made false representations, (1) in the context of r.32.14, the applicant must prove beyond reasonable doubt, in respect of each statement relied on, (a) the falsity of the statement, (b) that the statement had, or if persisted in would be likely to have, interfered with the course of justice in some material respects, and (c) that at the time it was made, the maker of the statement had no honest belief in the truth of the statement and knew of its likelihood to interfere with the course of justice, (2) the same approach is applicable to statements or representations falling outside r.32.14 but alleged to constitute a contempt under the general law, (3) that C had failed to prove to the required criminal standard that the statements by the defendants in their witness statements relied on by C were false, (4) however, on the evidence C had proved that the representations made to the experts by D1 and D2 were false in so far as they related to X's general mobility, (5) these misrepresentations, if persisted in and not discovered in time, were likely to result in a significantly higher award of damages than X was entitled to, and thereby to interfere with the course of justice, (6) C had proved that D1 and D2 no honest belief in the truth of the relevant statements and representations and that they knew of the likelihood that such statements and representations would interfere with the course of justice. ***Walton v Kirk*** [2009] EWHC 703 (QB), April 3, 2009, unrep., ref'd to. (See ***Civil Procedure 2011*** Vol.1, paras 32.14.1, sc52.1.16 & sc52.1.20.)

- **DONCASTER METROPOLITAN BOROUGH COUNCIL v WATSON** [2011] EWHC 2376 & 2498 (Fam), September 1, 2011, unrep. (Sir Nicholas Wall P.)

*Contempt of court – committal for breach of court order prohibiting publication – court's power on application to purge*

**CPR Sch.1 RSC Ord.52, r.1, Contempt of Court Act 1981 s.14.** Local authority (C) bringing care proceedings in relation to child (X) for whom C shared parental responsibility with X's mother (Y) and father. High Court making reporting restriction order prohibiting publication of certain information relating to X. Y and another person (Z) (who described herself as a "private case investigator") both named in the order. Subsequently, on August 15, 2011, on grounds that Z had breached the order by communicating information restricted by the order to an internet provider and, by emails, to a large number of third parties, President finding Z in contempt of court and, on August 22, 2011, committing Z to prison for nine months. On Z's application to purge her contempt, President (1) finding (a) that Z was very sorry for what she had done, (b) that she had done what she could to remove from the internet the offending material which she caused to be placed there, (2) accepting Z's undertaking to use her best endeavours to ensure that any further remaining offending material be removed from publication on the internet,

and (2) ordering Z's immediate release. President explaining that, on an application to purge contempt, a judge could do only one of three things (a) grant the application and order an immediate release, (b) defer the release to a stated future date, or (c) refuse the application, and cannot order immediate release on terms that the sentence be suspended for the balance of the sentence or for some other period within the two year limit fixed by s.14. President also explaining rules concerning public and private sittings of court dealing with committal applications. ***In re S. (A Child) (Identification: Restrictions on Publication)*** [2004] UKHL 47, [2005] 1 A.C. 593, HL, ***Harris v Harris*** [2001] EWCA Civ 1645, [2002] 1 F.L.R. 248, CA, ref'd to. (See ***Civil Procedure 2011*** Vol.1, para. sc52.1.19, sc52.1.41, sc52.6.1 & sc52.7.1.)

- **JSC BTA BANK v ABLYAZOV** [2011] EWHC 2506 (Comm), October 4, 2011, unrep. (Christopher Clarke J.)

*Order giving relief from sanction – application to revoke on ground that court misled*

**CPR rr.3.1(7), 3.8 & 3.9.** Bank (C) owned by foreign state bringing claim against former owner of C (D1) and others, including several off-shore companies (D2), to recover substantial sums alleged to have been unlawfully lent or misappropriated. Judge granting C freezing order with order requiring D2 to disclose information (1) as to what had become of the funds alleged to have been misappropriated and (2) as to by whom were they owned and controlled. On August 24, 2010, on C's application for an unless order, judge finding that D2 had not fully complied with the disclosure provisions and making order debarring them from defending unless they provided C with certain information, including detailed information concerning those authorised to act on their behalf. Subsequently, on basis that D2 had not complied with the unless order, C applying for judgment and D2 applying for declaration that they had so complied. D2 filing witness statements stating that they were owned and controlled by a particular businessman (X). On December 10, 2010, on hearing of these applications judge finding that there had been material non-disclosure and making various orders, including order giving some of the defendant companies relief from sanctions and leave to defend. C applying for order under r.3.1(7) revoking the order granting relief from sanctions. C contending that evidence coming to its attention subsequently proved that, by fabricated documents, D2 had misled the court and that the companies were not owned and controlled by X, but by D1's brother-in-law. **Held**, granting the application and entering judgment for C, (1) the power of the court to make an order includes a power to revoke the order (r.3.1(7)), (2) if it is to revoke its order the court must be satisfied, to the civil standard (having regard to the nature of what is alleged), that it has been misled, or that there has been a change of circumstances, the nature and extent of which is such that, having regard to all relevant considerations, the right course is to revoke the order, (3) it must also be satisfied that it can fairly reach that conclusion, (4) it will need to consider whether, before doing so, it needs to direct the trial of an issue or the cross-examination of witnesses or the production of documents, or whether the resolution of the issue must or should await the trial, (5) in this case the court had been misled as D2, in applying for relief from sanctions, had failed to give truthful information, (6) thus D2 had failed to comply with an order granting conditional relief from a sanction imposed for non-compliance with an earlier unless order, (7) that failure was very serious, (8) in the circumstances it was appropriate for the court to revoke the order giving D2 relief from sanctions, with the result that, because the sanctions in the unless order took effect, C were entitled to judgment, (9) this was subject to D2's application (made in the course of the hearing) for relief from that sanction, (10) in all the circumstances, including those listed in r.3.9, that application should be refused. Judge rejecting D2's submissions that, in deciding what order to make, the court should take into account the same factors as arise on an application to strike out a defence on the basis of non-compliance with an unless order, and should not revoke the order unless the contention that the court was not misled was fanciful, or that the lies told by D2 prevented a fair trial. ***Lloyds Investment (Scandinavia) Ltd v Ager-Hanssen*** [2003] EWHC 1740 (Ch), July 15, 2003, unrep., ***Marcan Shipping (London) Ltd v Keflas*** [2007] EWCA Civ 463, [2007] 1 W.L.R. 1864, CA, ref'd to. (See ***Civil Procedure 2011***, Vol.1 paras 3.1.9, 3.4.4.1 3.8.1 & 3.9.1.)

- **PHD MODULAR ACCESS SERVICES LTD v SEELE GMBH** [2011] EWHC 2210 (TCC), August 8, 2011, unrep. (Akenhead J.)

*Application for pre-action disclosure – prospect of proceedings between parties*

**CPR rr.1.1 & 31.16, Senior Courts Act 1981 s.33, County Courts Act 1984 s.52.** Principal contractor (D) employing scaffolding company (C) as sub-contractors. C and D falling into dispute, largely over payments for additional works claimed by C, and several determinations made by an adjudicator. C making application under r.31.16 for pre-action disclosure seeking categories of documents in very wide classes. D purporting to terminate the employment of C under the sub-contract and C ceasing work on the site. Witness statement supporting application referring to continuing adjudications and stating that "court proceedings are contemplated". **Held**, dismissing the application, (1) under r.31.16 the court may make an order for disclosure before proceedings have started only where the respondent and applicant are likely to be parties to "subsequent proceedings" and such disclosure is

"desirable" within para.(1)(d) of the rule, (2) although, in terms, the rule does not go into the likelihood of the proceedings themselves, it is not enough that they are simply a possibility, (3) there must be a real prospect, if not a certainty or likelihood, that there will be proceedings between the parties, (4) it is not sufficient that there is an issue which has arisen between the parties which might result in proceedings, (5) at the time of the hearing of this application, it could not be said that there was a realistic prospect that proceedings will be instituted. Judge stating that the court should not interfere with parties' contractual relationship where the contract itself does not as such give either party a right to documentation, and that it is important that r.31.16 should not be seen as providing procedural support for adjudication or as a tactical weapon to be utilised in adjudication. ***Black v Sumitomo Corporation*** [2001] EWCA Civ 1819, [2002] 1 W.L.R. 1562, CA, ref'd to. (See ***Civil Procedure 2011*** Vol.2 para.31.16.4, and Vol.2 paras 9A-110 & 9A-500.)

- **SHAH v HSBC PRIVATE BANK (UK) LTD** [2011] EWCA Civ 1154, October 13, 2011, CA, unrep. (Pill, Munby & Lewison L.JJ.)

*Standard disclosure of documents – what documents are to be disclosed*

**CPR r.31.6. Proceeds of Crime Act 2002 Pt.7**. Account holders (C) instructing their bank (D) to execute certain payment transactions. Employees of D suspecting that the proposed transactions involved criminal property and reporting their suspicions to D's Money Laundering Officer with the result that D made disclosures to SOCA as authorised by the 2002 Act and did not carry out C's instructions. (In the event it was established that the transactions did not concern criminal property.) C bringing claim against D for losses incurred by D's failure to carry out their instructions. By way of defence, D pleading its suspicion that C were money-laundering. On standard disclosure, D disclosing to C internal documents relevant to that defence, but redacted so as to conceal the identities of employees writing and receiving them. C applying for order that D disclose the names of those employees. (An application for specific disclosure was initiated by C but abandoned.) C contending that D's suspicions as to money laundering were not genuinely formed. Judge holding (1) that the names of the employees were relevant (rejecting D's submission that it was not required to disclose this information on standard disclosure), but (2) that on the ground of public interest immunity, D were entitled to withhold the information. C appealing to Court of Appeal against the latter holding, and D cross-appealing against the former. **Held**, allowing D's cross-appeal, and as a consequence dismissing C's appeal, (1) in order to be caught by the obligation to disclose, a document must fall within one of the categories in r.31.6, (2) the redacted material was not material on which D relied (r.31.6(a)) and on the pleadings there was no "case" put forward by C which that material might support (r.31.6(b)(iii)), (3) accordingly, the only possible category into which it fell was that it was material which adversely affected D's case (r.31.6(b)(i)), (4) at best, the disclosure of the withheld material was something that might lead to a train of inquiry that might adversely affect D's case, (5) disclosure in those circumstances might have been required under the Peruvian Guano test that applied before the CPR came into effect, but it did not meet the more stringent requirements of r.31.6, (6) by their withholding of the names of their employees D did not enjoy an unfair litigious advantage and C did not suffer an unfair litigious disadvantage. Court noting that part of a document may be withheld from disclosure under the same conditions as a whole document may be withheld. ***Taylor v Anderton*** [1995] 1 W.L.R. 447, CA, ***GE Capital Corporate Finance Group Ltd v Bankers Trust Co*** [1995] 1 W.L.R. 172, CA, ref'd to. (See ***Civil Procedure 2011*** Vol.1 para.31.6.2.)

- **SSL INTERNATIONAL PLC v TTL LIG LTD** [2011] EWCA Civ 1170, October 19, 2011, CA, unrep. (Mummery, Arden & Stanley Burnton L.JJ.)

*Service of claim form on foreign company – whether service on director within jurisdiction valid*

**CPR rr.6.5(3)(b) & 12.3**. Under a joint venture agreement governed by Indian law, UK company (C) (through a subsidiary) equal shareholders with a group of individual foreign investors (D2) in an Indian company (D1) manufacturing and supplying products to C. Under the agreement, C and D2 appointing nominee directors to board of D1. Following breakdown of commercial relationship between C and D2 in relation to D1, C commencing proceedings against D1 and D2 seeking injunctions, in effect specific performance of outstanding supply contracts, and damages. C purporting to effect service of the claim form on D1 under r.6.5(3)(b) by serving it personally at their London offices on one of the directors of D1 nominated by them. On July 21, 2011, judge refusing C's application under r.12.3 for judgment against D1 in default of acknowledgment of service ([2011] EWHC 2045 (Ch)). **Held**, dismissing C's appeal, (1) if a company does not carry on business and is not present within the jurisdiction, personal service of a claim form on it may not be effected by leaving it, as r.6.5(3)(b) states, "with a person holding a senior position within the company", (2) although, in terms, r.6.5(3)(b) is not so qualified, it is to be construed as in the pre-CPR authorities and interpreted accordingly, (3) on the evidence, C had not established even a good arguable case that D1 was carrying on business within the jurisdiction when it was purportedly served, and there was no basis for holding that D1 had waived any right to assert that it had not been validly served, (4) the purported service on D1 was

ineffective and C were not entitled to judgment against D1 in default of an acknowledgment of service. Court also dismissing appeal by C from another judge, who found that there was no good arguable case that the supply contracts were governed by English law, and who refused C permission to serve the claim form on D2 out of the jurisdiction ([2011] EWHC 1695 (Ch)). ***The Theodohos*** [1977] 2 Lloyd's Rep. 428, ***Adams v Cape Industries Plc*** [1990] 1 Ch. 433, CA, ***Rolph v Zolan*** [1993] 1 W.L.R. 1305, CA, ***Kuwait Airways Corporation v Iraqi Airways Co*** [1995] 1 W.L.R. 1147, HL, ***City & Country Properties Ltd v Kamali*** [2006] EWCA Civ 1879, [2007] 1 W.L.R. 1219, CA, ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 6.5.4 6.9.6 & 13.2.2, and Vol.2, para.12-57.)

■ **WILLIAMS v HINTON** [2011] EWCA Civ 1123, October 14, 2011, CA, unrep. (Moore-Bick & Gross L.JJ.)

*Defendant absent from trial – appeal against judgment*

**CPR rr.32.5, 35.10, 39.3 & 52.10, Human Rights Act 1998 Sch.1 Pt I art.6.1, Landlord and Tenant Act 1985 s.11, Defective Premises Act 1972 s.4, Practice Direction 35 para.3.3.** Landlord (C) bringing claim for possession of dwelling house let to tenant (D) on shorthold tenancy. D filing defence and in counterclaim alleging breaches by C of s.11 and s.4 and claiming damages for disrepair and for personal injuries. Before claim listed for hearing, D vacating the property but pursuing the counterclaim. Before trial of counterclaim, C (acting in person) making various applications to the courts, including an application to the Court of Appeal for permission to appeal against the High Court's refusal of an application to apply for judicial review of rulings as to expert evidence made in the county court proceedings. For the avoidance of doubt, judge commissioning letter to be sent to C by court officer stating that his order adjourning the trial to June 29, 2009, remained in force and that no stay of the trial had been ordered by the Court of Appeal. At trial on June 29, 2009, at which C was not represented and did not attend, judge giving judgment for D for £12,000 plus costs. C not applying to set judgment aside under r.39.3(3). Instead C applying to Court of Appeal for permission to appeal seeking orders setting aside the judgment and directing a new trial, on the grounds (1) that the judge erred, and acted in breach of C's art.6 rights (a) in deciding to determine the counterclaim in C's absence, and (b) in failing to ensure that C's filed witness statements and case were fully considered, and (2) that the judge also erred in permitting a report of the single joint expert to be admitted in evidence which was not properly verified by the statement of truth prescribed by para.3.3. **Held**, granting permission but dismissing the appeal, (1) instead of applying for permission to appeal to the Court of Appeal, C ought to have applied to the county court judge under r.39.3(3) for the judgment to be set aside as this was a paradigm case for such an application but, in the circumstances of this case, that procedural error should not prevent the appeal from being considered on its merits, (2) the judge was entitled to conclude that C was aware of the hearing date and had chosen, without any or proper explanation, not to attend, (3) the judge (a) considered C's filed witness statements, but was not obliged to do so because such statements do not become evidence except in accordance with r.32.5, and (b) paid more than adequate attention to the submissions, arguments and evidence adduced by the parties, (4) there is no requirement on a judge to set out in any particular manner or at length his views on the evidence of a party who has not attending the hearing, (5) although the declaration in X's report did not include the precise wording of para.3.3 of PD35 it did substantially comply with the essence of it and there was no error on the part of the judge in admitting the evidence. (See further "In Detail" section of this issue of CP News.) ***Bank of Scotland Plc v Pereira (Practice Note)*** [2011] EWCA Civ 241, [2011] 1 W.L.R. 2391, CA, ***Van de Hurk v The Netherlands*** (1994) 18 EHRR 481, ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 32.5.3, 35.10.2, 35PD.3, 39.3.9, 52.0.18 & 55.8.10, and Vol.2 para.3D-76.)

# Statutory Instruments

■ **CIVIL COURTS (AMENDMENT NO.3) ORDER 2011** (SI 2011/2097)

**Civil Courts Order 1983.** Amends 1983 Order by amending Sch.1 to that Order to reflect the discontinuing of 18 county courts. States transitional arrangements for transfer of proceedings to "receiving" county courts. Confers insolvency jurisdiction on Telford county court and establishes a district registry of the High Court at Telford. Makes correction to previous amending Order (SI 2011/1465) to reflect the creation of a district registry of the High Court at Workington and also clarifies that Workington county court has winding up jurisdiction. In force on various dates between September 12, to October 17, 2010 (inclusive). (See **Civil Procedure 2011** Vol.2, paras AP-6+, AP-7 & AP-9.)

# In Detail

## LITIGIOUS ADVANTAGE AND DISCLOSURE OF DOCUMENTS

The rules of court in the CPR relating to disclosure of documents largely implemented the recommendations made by Lord Woolf in the Access to Justice Reports and in certain respects marked a significant departure from those that obtained under the RSC. Under the CPR, there is no provision for "automatic" disclosure but the duty to disclose arises if, and when, and to the extent ordered by the court in exercise of its case management powers. Central to the CPR rules is the concept of "standard" disclosure and this form of disclosure is routinely directed. In exceptional cases, an application for specific discovery may be granted under r.31.12.

According to r.31.6, standard disclosure requires a party to disclose only: (a) the documents on which he relies; and (b) the documents which (i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case. It also requires the disclosure of any documents which a party is required to disclose by a relevant practice direction (r.31.6(c)). A party may withhold from disclosure a document that does not fall with any of those categories, and part of a document may be withheld from disclosure under the same conditions as a whole document may be withheld.

As was explained by Lewison L.J., in giving the lead judgment of the Court of Appeal in the recent case of *Shah v HSBC Private Bank (UK) Ltd* [2011] EWCA Civ 1154, October 13, 2011, C.A., unrep. (for summary of this case, see "In Brief" section of this issue of CP News), Lord Woolf recommended that documents which do not fall within paras (a) and (b) of r.31.6 but which fall within two other categories should not be required to be disclosed under standard disclosure. Those other two categories are: (1) documents which are relevant to the issues but which do not obviously support or undermine either side's case, including documents which, though relevant, may not be necessary for the fair disposal of the case, and (2) documents that may lead to a "train of inquiry" enabling a party to advance his own case or damage that of his opponent. (See White Book Vol.1 para.31.6.3.) Under the pre-CPR rules, as interpreted in the authorities, documents falling into those categories were documents that a party could be required to disclose. The intention was that, under the CPR, they should not be so required, subject to any order the court may make on an application for specific disclosure under r.31.12. The objective was to reduce costs. It was to be expected that this rolling back of the scope of discovery would meet some resistance, particularly from practitioners familiar with the more generous pre-CPR arrangements, and that has proved to be the case.

In the event, in the Shah case the Court held that the parts of documents disclosed by the defendants which the defendants contended they could withhold from standard disclosure, were, if anything, "train of inquiry" documents which the defendants were not required to disclose by way of standard disclosure. In doing so, the Court disagreed with the decision of the judge at first instance. In his judgment, the judge referred to one of the well-known pre-CPR authorities, that is, the decision of the Court of Appeal in *Taylor v Anderton* [1995] 1 W.L.R. 447, C.A. In the lead judgment in that appeal, Sir Thomas Bingham M.R. drew attention to RSC Ord.24, r.8, a rule which stated that, on hearing an application for an order for discovery or for discovery of particular documents, the court "shall refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs". The Master of the Rolls said that the purpose of that rule was "to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage" in the proceedings.

A test which says that, in making rulings on contested disclosure applications, the court should avoid unfair "litigious advantage" and "unfair litigious disadvantage" is attractive. The question which arises is whether it has any place in the application of the disclosure rules in Pt 31 of the CPR. There is no express mention there of disclosure being "necessary" because the proceedings could not be disposed of fairly unless the disclosure were made (or because costs would be saved if the disclosure were made). Further, the Taylor case is a pre-CPR authority, and it has been said on many occasions that, in applying CPR provisions, such authorities are not to be relied upon.

In the Shah case, Lewison L.J. noted that the judge at first instance considered that the "litigious advantage/disadvantage" test was "akin to" the test now enshrined in r.31.6. In commenting on this his lordship noted that one of the avowed intentions of the framers of the CPR was to reduce the scope of discovery in civil actions and added (at para.23):

"It is, in my judgment, dangerous to apply pre-CPR statements of the test of relevance under the old rules to the obligation to make standard disclosure under the CPR; particularly when such tests are used in substitution for the words of the relevant rule. Whether a disadvantage in not having a document produced for inspection is to be characterised as "unfair" must be decided by reference to the words of the rule itself."

In short judgments agreeing in the result, Pill L.J. and Munby L.J. said that the judge was not to be criticised for referring to the "litigious advantage/disadvantage" test. Pill L.J. stated (at para.58) that although the scope of the obligation to disclose under r.31.6 is more limited than that which prevailed under the pre-CPR rules, the purpose of that rule remains as stated by Sir Thomas Bingham M.R. in the Taylor case. Munby L.J. stated (at para.53) that the advantage and disadvantage to which the Master of the Rolls referred are now to be assessed and evaluated, not by reference to the pre-CPR scope of disclosure (which included "train of inquiry" documents etc), but by reference to the requirements of r.31.6.

## APPEAL BY DEFENDANT ABSENT FROM TRIAL

In the "In Detail" section of Issue 4/2011 (April 18, 2011) of CP News it was explained that a 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. And it was further explained that 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 *Bank of Scotland v Pereira (Practice Note)* [2011] EWCA Civ 241, [2011] 1 W.L.R. 2391, C.A., where Lord Neuberger M.R. gave elaborate and carefully qualified guidance which his lordship believed would apply to the great majority of cases where an absent defendant had a choice of procedure.

The Court of Appeal returned to this matter in the recent case of *Williams v Hinton* [2011] EWCA Civ 1123, October 14, 2011, C.A., unrep., where the Court was constituted by two judges (Moore-Bick L.J. and Gross L.J.), one of whom (the latter) had sat in the Bank of Scotland case. (For summary of this case, see "In Brief" section of this issue of CP News.)

In his judgment in the Bank of Scotland case, the first of the six of Lord Neuberger's "guideline points" is that a defendant (D) absent from trial should "normally" proceed under r.39.3, provided D reasonably believes he can satisfy the three requirements stated in para.(5) of that rule. That was so even if D wished to raise other arguments for attacking the trial judge's decision. The appellate court could still entertain D's appeal, but "it will normally require unusual facts before it should do so." So there is no absolute bar to an appeal. In that case, Gross L.J. said it was a guiding principle that an applicant cannot achieve "by the backdoor of an appeal" that which could not have been achieved, or which the applicant failed to achieve, by way of an application under r.39.3(3).

In the instant case the appellant submitted that he was not seeking any "backdoor" advantages by appealing instead of applying to have the judgment set aside. In particular, he pointed out that his application for permission to appeal was not accompanied by an application for an order under r.52.10(2) permitting him to adduce evidence which was not before the lower court (a course which would have given rise to obvious difficulty). In the Bank of Scotland case, Lloyd L.J. observed that it was "inherently unlikely" that a defendant who was absent at trial, and who chose to appeal rather than to proceed under r.39.3, would be able to persuade the Court of Appal to allow fresh evidence to be adduced "because, almost certainly, the evidence could have been adduced at trial if the party in question had attended the trial" and would therefore fail to meet the well-known *Ladd v Marshall* criteria (see White Book Vol.1 para.52.11.2). An application under r.39.3 must be supported by evidence (r.39.3(4)) directed to the issues which the court has to decide on such application, including the issue whether the applicant "has a reasonable prospect of success at the trial" (r.39.3(5)(c)). In the instant case, the appellant strengthened his submission that the course he had taken gave him no "backdoor" advantage by the further submission that it might well be easier for a party in his position to adduce evidence which was not before the trial judge on an application under r.39.3 than on an appeal.

In dealing with these matters Gross L.J. chose not to express any concluded view on that further submission but said it was fair to say that the appellant was not seeking any "backdoor" advantages by appealing instead of seeking to have the judgment set aside. Nevertheless, in his lordship's opinion, this was a case where, in accordance with the guidance given in the Bank of Scotland case, the defendant ought to have applied under r.39.3 rather than pursuing an appeal (indeed, it was a paradigm case). However, his lordship concluded that the procedural error should not deprive the appellant in this case of the opportunity of having his appeal dealt with on its merits by the Court of Appeal. His principal reason for reaching this conclusion was that the appellant applied for permission to appeal to the Court well before the Court's judgment in the Bank of Scotland case giving guidance was handed down (March 9, 2011).

# CPR Update

## AMENDMENTS TO RULES AND PRACTICE DIRECTIONS

In Issue 8/2011 (September 15, 2011) of CP News it was explained that the amendments to the CPR made by the Civil Procedure (Amendment No.2) Rules 2011 (SI 2011/1979), which were made on August 6, issued on August 12, published on August 15 (see TSO Daily List 155), and came into effect on dates in September and October 2011.

Those CPR Parts affected by these amendments are Part 6 (Service of Documents), Part 36 (Offers to Settle) and Part 79 Proceedings Under the Counter-Terrorism Act 2002 etc.). The details of those amendments were set out in Issue 8/2011 of CP News.

From a practical point of view, perhaps the most important of the amendments to the CPR made by the statutory instrument is the amendment made to r.36.14 (Costs consequences following judgment). After para.(1) of that rule a new paragraph, para.(1A), added. It states:

"For the purposes of paragraph (1), in relation to any money claim or money element of a claim, 'more advantageous' means better in money terms by any amount, however small, and 'at least as advantageous' shall be construed accordingly."

In Issue 8/2011 of CP News the purpose of this addition to r.36.14 was explained and it was noted that it applies to offers to settle made in accordance with r.36.2 on or after October 1, 2011 (a Saturday). (In the commentary on this amendment in Supplement 2, in one of the two places in which the date is referred to, it is given in error as October 2 (see para.36.14.1, p.36). Also, in that commentary, "applies to settle" should read "applies to offers to settle".)

All of the amendments made by this statutory instrument were taken in to Supplement 2 of the 2011 edition of the White Book (published on October 1, 2011).

In Issue 8/2011 of CP News it was explained that amendments to and additions to CPR practice directions, and to the RTA Protocol, were to be made by TSO CPR Updates 56 and 57. Those amendments and additions came into force on August 1, August 6, September 1, and October 1, 2011 (with the great bulk of them coming into effect on the last of those dates) and the details of them were included in Issue 8/2011 of CP News.

TSO CPR Updates 56 and 57 were published on October 26, 2011 (see TSO Daily List 208), well after the dates on which their several provisions came into effect. Little inconvenience was caused by the late publication of Update 56, as it affected only Practice Direction 51B (Automatic Orders Pilot) (see White Book 2011 Vol.1, para.51BPD.1, p.1608), and then only for the purpose of retrospectively extending the operation of the second stage of this pilot scheme from March 31, 2011, to September 30, 2011 (the second stage is further extended to March 31, 2012, by Update 57). The same cannot be said for the late publication of Update 57 which, as explained in Issue 8/2011 of CP News, contains many additions and amendments which are of importance to judges and practitioners.

All of the amendments and additions to practice directions made by Updates 56 and 57 were taken in to Supplement 2 of the 2011 edition of the White Book.

By Update 57, Form N5C (Notes for the claimant (accelerated procedure)) is deleted and new versions are made available of the following Forms:

N5B Claim form for possession of property (accelerated procedure) (assured shorthold tenancy)

N11B Defence form (accelerated procedure) (assured shorthold tenancy)

N215 Certificate of service

N242A Notice of offer to settle (Section 1 – Part 36)

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