CIVIL PROCEDURE NEWS

Issue 3/2012 March 13, 2012

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- **D. v COMMISSIONER OF POLICE OF THE METROPOLIS** [2012] EWHC 309 (QB), February 22, 2012, unrep. (Eady J.)

Breach of Convention right by public authority – extension of time for bringing proceedings – additional evidence on appeal

CPR r.52.11, Human Rights Act 1998 ss.6 & 7(5) & Sch.1 Pt.I art.3. On February 24, 2010, individual (C) bringing proceedings against police (D) under s.6 alleging that, during 2005 and 2006, they acted in a way incompatible with C's rights under art.3. Master making anonymity order. C applying under s.7(5)(b) for permission to bring proceedings after the one year period fixed by s.7(5)(a). On November 3, 2011, Master (1) finding that, by March 2009, C had knowledge of a potential claim under s.6, (2) dismissing application, and (3) giving C permission to appeal. On appeal, C applying for permission to adduce additional evidence relevant to delay in commencing proceedings. Specifically, this evidence relevant to delay between March 2009 and February 2010 in awaiting the outcome of an application to the LSC for assistance, such assistance being thought by C to be necessary for pursing application for an anonymity order taking effect from the outset of proceedings. D contending that such evidence could only be taken into account if the appeal court, having allowed the appeal, exercised the discretion in s.7.5(b) afresh. **Held**, allowing appeal, (1) the appeal was by way of review, not re-hearing, (2) the appeal court had to be satisfied that the Master's decision was wrong, (3) as the additional evidence satisfied the normal tests it should be received on the appeal, (4) that evidence could be taken into account in determining whether the Master's decision was wrong, (5) the Master was wrong to conclude that C should be penalised for waiting for a decision on funding, (6) in all the circumstances it would be equitable to extend the s. 7(5)(a) period to the date when C's proceedings were commenced. ***Dunn v Parole Board*** [2009] EWCA Civ 374, [2009] 1 W.L.R. 728, CA, ***Ladd v Marshall*** [1954] 1 W.L.R. 1489, CA, ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 52.11.1 & 52.11.2, and Vol.2 paras 3D-35 & 3D-73.)

- **HM REVENUE AND CUSTOMS COMMISSIONERS v GKN GROUP** [2012] EWCA Civ 57, *The Times* February 21, 2012, CA (Ward, Aikens & Lewison L.JJ.)

Interim payment order – conditions to be satisfied – reasons for not granting

CPR r.25.7(1). Following ruling by ECJ to effect that aspects of UK advance corporation tax contrary to Community law, companies commencing claims against Revenue (D). Court making GLO in relation to some of these claims, in particular for purpose of determining related questions of law arising out of the taxation treatment of dividends paid by UK resident parent companies out of profits received from non-UK resident subsidiaries. Following trial of test claims to determine common issues of liability (but not causation or quantification), several of the claimants in the GLO applying for interim payments. Judge making interim payment order (IPO) in favour of one company (C), one of the non-test claimants, in sum of £4.4m plus interest. (Interim payments made to other claimants also.) Upon Court of Appeal allowing C's appeal against the trial judge's decisions on various issues in the test claims ([2010] EWCA Civ 103), C voluntarily repaying £3m of the interim payment to D. Single lord justice granting D permission to appeal against the IPO. D submitting that, as a matter of principle, C not entitled under r.25.7(1) to any interim payment at all. **Held**, dismissing appeal, (1) in the case of an application for an IPO under r.25.7(1)(c) the applicant has to satisfy the court on a balance of probabilities about an event that has not in fact occurred, that is that, if the claim went to trial, he would obtain judgment (and for a substantial sum of money), (2) a claimant may make an application for an IPO in respect of a part of its total claim, (3) the fact that there has been a trial of certain issues (but not all those that would lead to a judgment for a sum of damages) is no bar to the exercise of the court's power, (4) r.25.7(1)(c) should be given the same construction as the pre-CPR rule from which it is derived (RSC Ord.29, r.11(1)(c)), (5) where the conditions are satisfied, the court should grant an IPO unless there is a sufficient specific reason not to do so, (6) in this case, the facts that C were non-test claimants, that difficult questions of law were raised, and that the trial judge had been reversed on certain issues on appeal, did not provide such sufficient reason, (7) the amount retained by C constituted a reasonable proportion of the likely amount of the final judgment within r.25.7(4). ***British & Commonwealth Holdings Plc v Quadrex Holdings Inc*** [1989] Q.B. 842, CA, ***Heidelberg Graphic Equipment Ltd v Revenue and Customs Commissioners*** [2009] EWHC 870 (Ch), [2009] S.T.C. 2334, ref'd to. (See ***Civil Procedure 2011*** Vol.1 para.25.7.1, and Vol.2 paras 12-57, 15-94, 15-99 & 15-103.)

LEVY v ELLIS-CARR [2012] EWHC 63 (Ch), January 23, 2012, unrep. (Norris J.)

Failure to attend trial – adjournment – affirming order where party lacked capacity

CPR rr.3.1, 21.3, 23.11, 39.3 & 39.5, Insolvency Act 1986 ss.283A & 333. Residential property registered in joint names of mother (M) and her son (D). D made bankrupt. By originating application, trustee (C) applying for declaration that he (as D's trustee) and M were beneficially entitled to the property in equal shares. Both D and M made respondents to this application but neither participating in the proceedings at all. On March 8, 2007, Registrar making order granting declaration and other relief. Before order put into effect, M dying intestate and C, the sole beneficiary, becoming her personal representative. In May 2010, because of doubts arising as to M's mental capacity at the time of the proceedings, C making another application against D (both in his capacity as bankrupt and as M's personal representative) for declarations and other relief, including an order affirming the order of March 8, 2007. D contending that the residential property had been held in trust for M, that no part of it fell into the bankruptcy estate, and that he should receive the entirety as the sole beneficiary. After application listed for hearing, D's request for an adjournment refused. D not attending hearing nor represented by solicitors on the record or by counsel. Registrar deciding to continue with the hearing in D's absence and giving judgment in favour of C, and making various orders including an order confirming the order of March 8, 2007. D filing notice of appeal to judge and applying for permission to appeal. **Held**, granting permission but dismissing the appeal, (1) the decision of a judge not to adjourn a trial, but to proceed with it in the absence of a party (r.39.3(1)) is a case management decision, (2) the decision must be a principled one, made with the overriding objective and (to the degree appropriate) any relevant judicial guidance in mind, (3) in this case, D had not demonstrated that he had good reason not to attend the trial, (4) there were ample grounds on which the Registrar could refuse an adjournment, (5) her exercise of discretion was not outside the generous ambit within which there is reasonable room for disagreement, (6) where a party to proceedings lacked capacity but, without any fault on anyone's part, no-one recognised that fact, under r.21.3(4) the court can regularise the position retrospectively to validate decisions made in the course of those proceedings, (7) the powers granted to the court by r.21.3(4) were available to be used by the Registrar in these insolvency proceedings for the purpose of affirming the order of March 8, 2007, and were properly exercised. Observations on relationship between CPR and Insolvency Rules 1986. See further "In Detail" section of this issue of CP News. ***Fox v Graham Group Ltd*** *The Times* August 3, 2011, ***Fitzroy Robinson Ltd v Mentmore Towers Ltd*** [2009] EWHC 3870 (TCC), [2010] C.P. Rep. 15, ***Bank of Scotland Plc v Pereira (Practice Note)***, [2011] EWCA Civ 241, [2011] 1 W.L.R. 2391, CA, ***Masterman-Lister v Brutton & Co*** [2002] EWCA Civ 1889, [200] 1 W.L.R. 1511, CA, ***De Toucy v Bonhams 1793 Ltd*** *The Times* December 10, 2011, unrep., ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 2.1.3, 3.1.3, 21.3.1, 23.11.2, 29.5.1, 39.3.1, and Vol.2 para.12-7.)

O'FARRELL v O'FARRELL [2012] EWHC 123 (QB), February 1, 2012, unrep. (Tugendhat J.)

Freezing injunctions – without notice application – exceptions to order

CPR rr.25.1(1)(f), 25.2, 25.3, 66.7 & 74.6, Practice Direction 25A paras 4.3 & 6.2, Civil Jurisdiction and Judgments Act 1982 s.5, Crown Proceedings Act 1947 s.27, Armed Forces Act 2006 s.356, Matrimonial Causes Act 1973 ss.23 & 32. In German divorce proceedings, wife (C) obtaining maintenance judgments (one for periodic payments and one for a lump sum) against husband (D). Judgments registered in QBD of High Court. In July 2010, orders permitting registration served on D (then serving in the British Army) within the jurisdiction (r.74.6). On July 27, 2011 (shortly before D due to be discharged from the Army), on C's application made without notice C granted freezing injunction and at return date order made on notice court continuing the injunction. Subsequently, parties agreeing that a sum not exceeding £3,000 of the frozen assets would be a reasonable sum for D to spend on legal advice and C conceding that, by operation of German law, sum recoverable under periodic payments judgment limited to period of three years preceding enforcement proceedings. Also, for purpose of enforcing the judgments, C applying under r.72.3 for third party debt order against executive agency (X) responsible for payment of pensions of discharged Army personnel and granted an interim order. D applying for an order that the freezing injunction be discharged or varied to make more generous provision for his spending on living expenses and legal advice. **Held**, allowing application in part, (1) C's claims were in debt and were not proprietary claims, (2) the freezing order should be varied in certain respects for the purposes of inter alia (a) reducing the value of the assets frozen to reflect the reduction of C's claims, and (b) broadening the exceptions to the order so as to permit expressly D's dealing with any of his assets in the ordinary course of business, (3) the interim third party order should be discharged because (a) a third party debt order under Pt 72 cannot be made "in respect of any money due from the Crown" (r.66.7), and (b) for these purposes X was a part of the Crown. Judge stating that C's reasons for making her application for a freezing order without notice (formal or informal) to D were deficient and expressing concern at tendency of practitioners to ignore CPR provisions as to notice. Judge considering, but in event not deciding, the questions (a) whether C might be entitled to an attachment order against X under s.27 and r.66.7(3) and effects of s.356 and s.23 on that question, and (b) whether the judgments were "financial provision orders" within s.32 and that therefore sum enforceable by C

was limited to those arrears which came due no more that 12 months before proceedings to enforce payment were commenced. ***Moat Housing Group-South Limited v Harris*** [2005] EWCA Civ 287, [2006] Q.B. 606, CA, ***ND v KP*** [2011] EWHC 457 (Fam), February 10, 2011, unrep. (Mostyn J.), ref'd to. See further "In Detail" section of this issue of CP News. (See ***Civil Procedure 2011*** Vol.1 paras 25.2.4, 25.3.5, 25APD.4 & 25APD.6, 66.7 & 72.3, and Vol.2 paras 9B-1155, 15-55 & 15-70.)

- **QBE MANAGEMENT SERVICES (UK) LTD v DYMOKE** [2012] EWHC 116 (QB), February 2, 2012, unrep. (Haddon-Cave J.)

Interim and final inunctions preventing competitive advantage – "springboard" relief

CPR rr.25.1(1)(a) & 44.4. Employees of company (D1) resigning with intention of setting up with competitor company (D2) a rival business in field of marine insurance. C commencing proceedings against D1 and D2 and granted interim injunction for purposes of (1) enforcing "garden leave" and duty of good faith and fidelity of one defendant until termination of his employment, (2) enforcing non-competition covenants of other defendants, and (3) prohibiting D2 from inducing breach of contract by those employees. This interim injunction subsequently widened to prevent defendants from obtaining a competitive advantage. At trial on January 27, 2012, judge (1) making findings in favour of C, (2) holding that where a person had obtained a "head start" as a result of his unlawful acts the court had power to grant an injunction which restrained the wrongdoer, so as to prevent him from taking advantage of that "springboard", and (3) granting a final "springboard" injunction restraining D1 until April 28, 2012, and awarding C damages of £314,000 ([2012] EWHC 80 (QB)). In post-trial proceedings for determining the form of the final order and costs, **held**, (1) in granting such relief the court should take account of all the circumstances and grant relief which it thinks is fair, just and equitable, (2) the relief should (a) should fit the facts, (b) reflect and restrain the spectrum of the unlawful activities which made up the "springboard", and (c) match the tensile strength of the "springboard" unlawfully used by the defendant, (3) by such relief the court may restrain otherwise lawful activities taking place on unlawful foundations, (4) in the circumstances, C were entitled to costs on the indemnity basis. In refusing permission to appeal, judge stating that this was a clear case for a "springboard" injunction but suggesting that there is need for further guidance from the Court of Appeal as to the scope of such relief. (See ***Civil Procedure 2011*** Vol.1, paras 25.1.10 & 44.4.3, and Vol.2 paras 9A-128 & 15-39.)

- **R. (YOUNG) v OXFORD CITY COUNCIL** [2012] EWCA Civ 46, January 12, 2012, CA, unrep. (Richards L.J.)

Protective costs order – application on an appeal

CPR r.44.3, 44.5, 52.10(2)(e) & 54.4. Householder (C) bringing judicial review claim against planning authority (D) challenging decision granting permission for development of neighbouring land. C contending that D had failed to take into account the effects of noise and to have regard to relevant planning policies, and that the grant of permission was unlawful for those and other reasons. High Court granting a protective costs order with a cap of £7,500 on C's liability for costs and a reciprocal cap of £18,000 on the costs of D and interested parties. High Court judge dismissing claim. Single lord justice granting C permission to appeal. C, acting in person, applying for a full protective costs order, leaving him with no liability in respect of the costs of the appeal. **Held**, dismissing the application, (1) the fact that the single lord justice had declined to make a protective costs in the limited form then requested in C's notice of appeal did not preclude the Court from entertaining C's application, (2) C had failed to establish that the issues he wished to raise on appeal were of general public importance and needed to be resolved in the public interest. Principles governing protective costs orders explained and applied. ***R. (Corner House Research) v Secretary of State for Trade and Industry***, [2005] EWCA Civ 192, [2005] 1 W.L.R. 2600, CA, ***R. (Compton) v Wiltshire Primary Care Trust (Practice Note)*** [2008] EWCA Civ 749, [2009] 1 W.L.R. 1346, CA, ***R. (Buglife) v Thurrock Thames Gateway Development Corporation*** [2008] EWCA Civ 1209, [2009] C.P. Rep. 8, CA, ***R. (Garner) v Elmbridge Borough Council*** [2010] EWCA Civ 1006, [2011] 3 All E.R. 418, CA, ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 48.15.7 & 54.6.3.)

- **SIMCOE v JACUZZI UK GROUP PLC** [2012] EWCA Civ 137, February 16, 2012, CA, unrep. (Lord Neuberger M.R., Hooper & McFarlane L.JJ, and assessor.)

Judgment debts – costs order – interest on

CPR rr.40.8 & 44.12(2), Civil Procedure Act 1997 ss.1 & 2, Judgments Act 1838 ss.17 & 18. County Courts Act 1984 s.74(1), County Court (Interest on Judgment Debts) Order 1991 arts 1 & 2, Civil Procedure (Modification of Enactments) Order 1998 art.3 Employee (C) retaining solicitors under a CFA and bringing personal injury claim against employers (D) in a county court. On April 16, 2010, claim compromised by way of consent order on terms that D pay P damages of £12,750 together with costs on the standard basis if not agreed. At a later date, costs formally agreed at £74,000. District judge ruling that interest on the costs should run from the date on which they were agreed (the allocatur date). **Held**, allowing C's appeal, (1) r. 40.8 states the general that interest on costs should run from

the date on which judgment is given for costs to be assessed or agreed (the incipitur date), (2) the court may order otherwise, but the fact that C's solicitors were acting under a CFA did not justify departing from the general rule, (3) in any event, in county court proceedings, the matter is governed by arts. 1 and 2 of the 1991 Order, the effect of which is to provide that interest on costs must run from the incipitur date. ***Hunt v AM Douglas (Roofing) Ltd*** [1990] 1 A.C. 398, HL, ref'd to. See further "In Detail" section of this issue of CP News. (See ***Civil Procedure 2011*** Vol.1 paras 7.0.19, 40.8.7, 40.8.11, 44.3.14 & 44.12.4, and Vol.2 para.9A-563.)

■ **STANFORD INTERNATIONAL BANK LTD v DIRECTOR OF THE SERIOUS FRAUD OFFICE** [2012] UKSC 3, February 15, 2012, SC, unrep.

Supreme Court – restraint order – appeal conditions

Supreme Court Rules r.10, Proceeds of Crime Act 2002 ss.44 & 90, Criminal Orders) Order 2005 art.11, Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (England and Wales) Appeals under Part 2) Order 2012 art.14. On February 25, 2010, in appeal proceedings, on an application by the SFO (C), Criminal Division of the Court of Appeal making a restraint order against the appellant (D) and refusing D permission to appeal to the Supreme Court. On March 24, 2010, D and C applying to Supreme Court for permission, respectively, to appeal and cross-appeal. At interim hearing, **held**, (1) since June 6, 2011, a right of appeal under art.11 of the 2005 Order to the Supreme Court has existed, (2) that right may be exercised in relation to appeals against decisions whether made before or after that date, (3) by operation of art.14 of the 2012 Order, from February 29, 2012, but not before, such right of appeal is conditional upon leave and permission requirements, (4) accordingly, in this case permission to appeal from the order of the Court of Appeal was not required. (See ***Civil Procedure 2011*** Vol.2 paras 4A-0.4 & 4A-10.1.)

■ **WIEMER v ZONE** [2012] EWHC 107 (QB), January 30, 2012, unrep. (Silber J.)

Particulars of claim – application for extension of time for service

CPR rr.1.1(2), 3.1(2)(a), 7.4 & 7.5. Following severance of business arrangements between them, claimant (C) commencing proceedings against defendant (D) for breach of fiduciary duty etc and claiming damages in region of £2.3m. Particulars of claim not served with the claim form or within the period prescribed by r. 7.4. Within that period, C applying for extension of time for serving the particulars. Application opposed by D. Master dismissing the application. High Court judge granting C permission to appeal. **Held**, allowing the appeal, (1) a court has a discretion to extend time for serving particulars of claim, (2) insofar as he doubted whether he had such discretion the Master erred, (3) the discretion should be exercised in accordance with the overriding objective, (4) the check-list set out in r. 3.9(1) is not imported into r. 3.1(2)(a) when an application for extension of time is made before the expiry of a relevant procedural time limit, (5) in the circumstances of this case the discretion should be exercised in favour of C. ***Totty v Snowden***, [2001] EWCA Civ 1415, [2002] 1 W.L.R. 1384, CA, ***Robert v Momentum Services Limited*** [2003] EWCA Civ 299, [2003] 1 W.L.R. 1577, CA, ***AEI Rediffusion Music Ltd v Phonographic Performance Ltd*** [1999] 1 W.L.R. 1507, CA, ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 3.1.2, 3.9.1 & 7.6.8, and Vol.2 para.11-8.)

Statutory Instruments

■ **CIVIL PROCEDURE (AMENDMENT) RULES 2012** (SI 2012 No.505)

CPR rr.71.2, 72.3, 73.3, Sch.2 CCR Ord.27, r.3, Practice Direction 70. Makes amendments, in addition to those made by the Civil Procedure (Amendment No.4) Rules 2011 (SI 2011/3103), consequential upon the centralisation of administrative functions for the handling of designated money claims issued under Pt 7 in the county courts. Provides that, where a judgment has been made, an application for an order to obtain information or enforcement of the judgment must be made in accordance with new provisions to be added to Practice Direction 70 (to be published in forthcoming TSO CPR Update 58). In force March 19, 2012. (See ***Civil Procedure 2011*** Vol.1 paras 71.2, 72.3, 73.3, 70PD.7 & cc27.3.)

Practice Directions

■ **PRACTICE DIRECTION – INSOLVENCY PROCEEDINGS**

Replaces all previous Practice Directions, Practice Statements and Practice Notes relating to insolvency proceedings. Consists of five Parts. Part One – General Provisions (paras 1 to 9), Part Two – Company Insolvency (paras 10 to 12), Part Three – Personal Insolvency (paras 13 to 18), Part Four – Appeals (para.19), Part Five – Applications Relating to the Remuneration of Appointees (para.20). Made by the Chancellor of the High Court. In force on February 23, 2012. (See ***Civil Procedure 2011*** Vol.2 para.3E-1 et seq.)

In Detail

INTEREST ON COUNTY COURT JUDGMENT DEBTS

Section 74 of the County Courts Act 1984 (see White Book 2011 Vol.2 para.9A-563) states that the Lord Chancellor may by Order "made with the concurrence of the Treasury" provide that sums payable under judgments or orders given or made in a county court (or recoverable as if payable under an order of a county court) shall carry interest. The section was enacted for the purpose of enabling the county courts to be granted (subject to any exceptions thought necessary) the same powers as to the awarding of interest on judgment debts etc as those exercisable by the High Court. The concurrence of the Treasury is required by s.74 not because in making an Order under that section the Lord Chancellor may stipulate when interest shall be payable on judgment debts but because in so doing he may fix the rate of interest.

The section was first enacted in 1981 (by way of an amendment to the County Courts Act 1959), but for ten years it remained a dead letter. In the Report of the Civil Justice Review Body (1988, Cm 394) it was recommended that, for the purpose of bringing county court remedies into line with the comparable High Court remedies as provided by ss.17 and 18 of the Judgments Act 1838 (thereby discouraging parties from bringing proceedings in the High Court that could be brought in a county court), the power granted to the Lord Chancellor by s.74 should be exercised. This was duly done, with the concurrence of the Treasury, by the County Court (Interest on Judgment Debts) Order 1991 (SI 1991/1184) (see White Book 2011 Vol.2 para.9B-70).

Under art.2(1) of the 1991 Order it is provided that a judgment debt carries interest "from the date on which it was given". Section 17 of the 1838 (as it then stood) was to the same effect and provided that judgment debts carried interest "from the time of entering up the judgment … until the same shall be satisfied". However, under the 1991 Order interest is payable on county court judgment debts only where the amount payable is not less than £5,000 (art.2). Further, in contrast with the position in the High Court, interest ceases to be payable as soon as enforcement proceedings (including an oral examination) are issued in a county court unless the enforcement proceedings fail to produce any result (art.4). As to the rate of interest the 1991 Order states that it shall be the rate specified for the time being in section 17 of the Judgments Act 1838 (art.5).

Under the legislation referred to above, judgment debts include sums payable under orders for costs. Further, until the CPR came into effect, it was clear that under both s.17 and art.2 of the 1991 Order interest on sums payable under orders for costs (as well as sums payable on other judgment debts) ran, not from the date when costs were agreed or assessed (the allocatur date), but from the earlier date of the order for costs (the incipitur date)

By the Civil Procedure (Modification of Enactments) Order 1998, made by the Lord Chancellor in exercise of the powers conferred on him by s.4(2) of the Civil Procedure Act 1997 (an exercise that did not require the concurrence of the Treasury) modifications were made to certain enactments "in order to facilitate the making of Civil Procedure Rules". Among them were modifications to s.17 of the Judgments Act 1838 to allow rules of court to prescribe the date from which interest on judgment debts should start to run, and to allow the court, in accordance with rules of court, to disallow interest that would otherwise be payable on a judgment debt. No modification was made by the 1998 Order to the 1991 Order (any such amendment on its own would have required the concurrence of the Treasury) or to s.74 of the 1984 Act.

The rules of court foreshadowed by the 1998 Order are contained in CPR r.40.8. That rule is faithful to the terms of s.17 of the 1838 Act as modified by the 1998 Order. However, in terms it conflicts with the 1991 Order insofar as it purports to give the court power, should it choose to do so in a given case, to depart from the rule that interest on county court judgments debts should run from the incipitur date. This conflict was brought out in the recent case of *Simcoe v Jacuzzi UK Group Plc* [2012] EWCA Civ 137, February 16, 2012, CA, unrep., where, in county court proceedings, a district judge in exercise of his powers under r.40.8(1) ruled that interest on costs payable by the defendant to the claimant should run from the date when costs were agreed or assessed (the allocatur date), and not from the earlier date of the order for costs (the incipitur date). (For summary, see "In Brief" section of this issue of CP News.)

On appeal, the claimant contended that r.40.8(1) was ineffective so far as county court judgments were concerned and submitted that, in accordance with art.2 of the 1991 Order, he was entitled to interest on costs from the earlier date. This submission raised the issue whether, as the defendants contended, r. 40.8(1) has effectively replaced or amended art.2 of the 1991 Order. In the event, the Court of Appeal (Lord Neuberger M.R., Hooper & McFarlane L.JJ.) Court did not have to deal with this issue as the Court held that, assuming that the district judge did have a discretion

under r.40.8(1) to order that interest should run from the later date, he had not exercised it properly and upheld the claimant's appeal on that ground. However, having heard full argument on the matter the Court held that r.40.8(1) could not and did not have that effect of replacing or amending art. 2 of the 1991 Order and would have upheld the claimant's appeal on that fundamental ground also. Chief among the reasons given by the Court for their decision in this respect was the fact that any amendment to art.2 of the 1991 Order would require (as s.74 of the 1984 Act states) the concurrence of the Treasury.

Before the 1997 Act came into effect, the principal statutory provision authorising the making of rules of court for the purpose of regulating and prescribing the practice and procedure in the Court of Appeal, the High Court and the Crown Court was s.84 of the Supreme Court Act 1981 (now the Senior Courts Act 1981) (see White Book 2011 Vol.2 para.9A-290+). That section (which now applies only to the making of rules to be followed in the Crown Court and the criminal division of the Court of Appeal) contains, in subs.(7), a provision first enacted as s.15(2) of the Administration of Justice Act 1925. Amongst other things, that statute transferred from the Treasury to the Lord Chancellor certain responsibilities relating to the administration of justice. Sub-section (7) states that no rules may be made under s.84 which may involve an increase in expenditure out of public funds "except with the concurrence of the Treasury". The sub-section, very sensibly, goes on to state:

"but, the validity of any rule made under this section shall not be called in question in any proceedings in any court either by the court or by any party to the proceedings on the ground only that it was a rule as to the making of which the concurrence of the Treasury was necessary and that the Treasury did not concur or are not expressed to have concurred."

As was noted by the Court of Appeal in the Simcoe case, the procedure stipulated by the 1997 Act for the making of Civil Procedure Rules does not require the concurrence of the Treasury. Nowadays any policy objective which in former times might have impelled the insertion in a particular statutory rule-making power of a Treasury concurrence requirement may be secured by the exercise of the powers which the Lord Chancellor is granted by s.3 of the 1997 Act to disallow or alter rules made by the Rule Committee.

Clearly when the CPR were brought into effect it was the intention that (as recommended in the Access to Justice Reports) the court should have a discretion under r.40.8(1) as to the periods for which interest should run not only for High Court but also for county court judgment debts. Doubtless the problem identified in the Simcoe case will be swiftly rectified. Lord Neuberger stated that the Treasury's consent "could be simply recorded, and the rule will then be valid", but declined to offer an opinion on whether such concurrence could be expressed retrospectively (para.31). The case will remain an important authority for what the Court had to say about the exercise of the discretion given by r.40.8(1).

FAILURE TO ATTEND TRIAL

Rule 39.3(1) of the CPR states that the court may proceed with a trial "in the absence of a party". This provision has a "but" in it, and suggests that, instead of proceeding with a trial, the judge may strike out the proceedings or pleadings therein. Presumably, if the judge exercises those particular powers he has decided to "proceed with a trial". In any event, r.39.3(3) states that, where a party does not attend trial and the court gives judgment or makes an order against him, the party who failed to attend may apply for the order or judgment to be set aside.

In *Bank of Scotland v Pereira (Practice Note)* [2011] EWCA Civ 241, [2011] 1 W.L.R. 2391, CA, the Court of Appeal noted that a party against whom judgment was given at a trial which he did not attend may be faced with the choice of either applying to set aside the judgment under r.39.3(3) or of mounting and appeal, or perhaps may pursue both post-trial procedural routes. (See Issue 4/2011 of CP News (April 18, 2011)). The Court stated that a party who did not avail himself of the remedy granted by r.39.3(3) cannot achieve "by the back door of an appeal" that which could not be achieved by an application under the rule. However, in a given case, there may be distinct grounds, unconnected with his absence from trial, upon which an appeal might be made.

It is not uncommon for a party to make a last-minute application to put back to a later date the date fixed for trial. Such applications tend to be described as applications to "adjourn" the trial. The description is apt where the case is called on on the trial date and the judge is faced with a request very recently conveyed to the court by a party absent on the day, perhaps by letter or 'phone call. This places the judge in a difficulty, especially where the absent party has been acting in person.

In the recent case of *Levy v Ellis-Carr* [2012] EWHC 63 (Ch), January 23, 2012, unrep., a defendant absent from a trial before a bankruptcy registrar appeal to a Chancery judge against the registrar's decisions. (For summary of this case, see "In Brief" section of this issue of CP News.) Norris J. noted that judges are daily faced with cases coming on for

hearing in which one party either writes to the court asking for an adjournment and then (without waiting for a reply) does not attend the hearing, or writes to the court simply to state that they will not be attending. Not infrequently "medical" grounds are advanced, often connected with the stress of litigation. His lordship said (para.33):

"Parties who think that they thereby compel the court not to proceed with the hearing or that their non-attendance somehow strengthens the application for an adjournment are deeply mistaken. The decision whether or not to adjourn remains one for the judge. The decision must of course be a principled one. The judge will want to have in mind CPR r. 1 and (to the degree appropriate) any relevant judicial guidance … ."

Norris J. noted that, in the instant case, the appeal by the defendant absent from trial against the judge's decision not to adjourn was limited to a review of the decision and should be allowed only if the decision was wrong or was unjust because of a serious procedural irregularity. Further his lordship said that a party who fails to attend either in person or through a representative to assist the judge in making the principled decision "cannot complain too loudly if, in the exercise of the discretion, some factor might have been given greater weight". On this point his lordship added (ibid):

"For my own part, bearing in mind the material upon which and the circumstances in which decisions about adjournments fall to be made (and in particular because the decision must be reached quickly lest it occupy the time listed for the hearing of the substantive matter and thereby in practice give a party relief to which he is not justly entitled) I do not think an appeal court should be overcritical of the language in which the decision about an adjournment has been expressed by a conscientious judge. An experienced judge may not always articulate all of the factors which have borne upon the decision. That is not an encouragement to laxity: it is intended as a recognition of the realities of busy lists."

FREEZING ORDERS – APPLICATIONS WITHOUT NOTICE

In the CPR, r.23.7 states the general rule that a copy of an application notice must be served at least three days before the court is to deal with the application. Where an interim remedy is sought, r.25.3(1) provides that the court may grant relief on an application without notice "if it appears to the court that there are good reasons for not giving notice". Paragraph (3) of r.25.3 states that, if the application is made without notice, the evidence in support of the application must state the reasons why notice has not been given. These provisions are supplemented by para.4 of Practice Direction 25A. Paragraph 4.3(3) provides that, except in cases where secrecy is essential, the applicant "should take steps to notify the respondent informally of the application".

In the recent case of *O'Farrell v O'Farrell* [2012] EWHC 123 (QB), February 1, 2012, unrep., Tugendhat J. stated that he was "shocked" at the volume of "spurious" ex-parte applications that are made in the Queen's Bench Division, and expressed the opinion that the number of occasions on which the provisions referred to above are flouted "is a matter of real concern". His lordship noted that similar concerns had been expressed by Mostyn J. as to laxity of practice in the Family Division (*ND v KP* [2011] EWHC 457 (Fam), February 10, 2011, unrep.).

Tugendhat J. explained that the giving of informal notice of an urgent application is not only an elementary requirement of justice; it may also result in a saving of costs as the parties may agree an order, thereby rendering unnecessary a second hearing on a return date. In the case before him, the applicant's reasons for making an application for a freezing order without notice (formal or informal) were deficient. (For summary of this case, see "In Brief" section of this issue of CP News.)

His lordship added (para.66):

"In these days of mobile phones and e-mails it is almost always possible to give at least informal notice of an application. And it is equally almost always possible for the judge hearing such an application to communicate with the intended defendant or respondent, either in a three way telephone call, or by a series of calls, or exchanges of e-mail. Judges do this routinely, including when on out of hours duty. Cases where no notice is required for reasons given in PD 25A para 4.3(3) are very rare indeed."

EDITOR: **Professor I. R. Scott**, University of Birmingham.
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