Practice and Procedure

Enforcing compliance with deadlines

One of the most intractable difficulties in a case management system concerns the enforcement of compliance with time limits. Whether at rule making level or when considering individual case management decisions, the court is faced with an identical dilemma. If any failure to meet a deadline, however slight, were to disqualify the defaulting litigant from remedying the defect, many cases would be decided on procedural grounds rather than on the merits. If, on the other hand, defaulting litigants were as a matter of course allowed further chances to perform their process requirements (at any rate so long as the evidence has not disappeared and the facts could still be adequately established), time limits would effectively become discretionary and the court would lose its ability to manage the litigation process. Given that neither of these options is acceptable, a compromise must be struck between them. The traditional compromise has been discretion exercisable on a case-by-case basis. This strategy proved unsatisfactory prior to the CPR, mainly because the lax enforcement of deadlines fostered a culture of poor compliance. A the same time, since complete freedom could not be tolerated, litigants were in effect encouraged to take issue with their defaulting adversaries, which in turn led to wasteful satellite litigation. It has been one of the main goals of the CPR to remedy that lamentable state of affairs by requiring the court to ensure that litigation proceeded expeditiously. This was reiterated by Lord Woolf in *Biguzzi v Rank Leisure Plc* [1999] 1 W.L.R. 1926; [1999] 4 All E.R. 934, 939, where he said that "[i]f the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant."

Whether the position under the CPR has improved, whether the court's approach to party default is different now than it was before 1999, can be gleaned not so much from general statements of the kind just mentioned as from the court's treatment of particular instances of unjustified and inexcusable delay. The picture that emerges from the recent cases discussed below is rather mixed. There is cause for concern in some respects. The court seems willing to countenance further extensions of time even where there have been repeated failures to comply with time limits culminating in breach on an unless order. Equally worrying is the growing list of cases interpreting, explaining and refining the meaning and significance of the factors mentioned in the check-

list of CPR r.3.9, which must be studied when dealing with an application for relief from sanctions. On the other hand, there is an increasing tendency to require defaulting litigants to pay money into court as a condition for receiving an extension of time for fulfilling process requirements. This is a powerful and effective tool for promoting compliance, but it is not without its own difficulties, because it could lead to further disputes and give rise to the need for further court hearings. At the same time, a more rigorous and less forgiving approach is developing in some special areas. Where the consequences of a failure to comply with a time limit are agreed by the parties and incorporated in a consent order or an undertaking to the court, the court will relieve the defaulting party of the stipulated consequence only in special cases and will not have to apply CPR r.3.9. Similarly, a fairy robust approach is now taken to applications to extend the time for service of the claim form after the expiry of the limitation period, even when the application is made before the expiry of the period for service and is therefore outside the scope of CPR r.7.6(3).

Striking out for delay

One of the factors that contributed to complexity and unpredictability under the pre-CPR system was an excess of principles, guidelines and binding court decisions on the subject of dismissal for want of prosecution. This meant that an application to strike out a claim for inordinate and inexcusable delay could involve lengthy technical arguments and protracted hearings. Some recent Court of Appeal decisions seem to approach the question of dismissal for delay in ways that are somewhat reminiscent of the pre-CPR position. Take for example *Hansom v E Rex Makin & Co* [2003] EWCA Civ 1801. An action for child abuse was brought against a local authority, but abandoned on advice of solicitors. The claimants concluded that, in the light of later decisions in other similar cases, the solicitors' advice to discontinue was misguided. They therefore brought an action for negligence against the solicitors. This action was commenced before the CPR came into force but fell under CPR r.51's automatic stay provision because it had ground to a halt between April 1999 and April 2000. The master refused to lift the stay and his decision was upheld on appeal to a judge.

The Court of Appeal reversed the decision. It accepted that the checklist of CPR r.3.9 was relevant to applications to lift a stay under CPR r.51 as it was to granting relief from any other sanction. Close attention was therefore paid to each and every one of the nine factors on the checklist. Previous court decisions were looked at regarding the meaning and significance of different items on this list. Shades of opinion inevitably emerged about interpretation. For instance, CPR r.3.9(c) requires the court to consider whether the failure to comply was "intentional". The master regarded the failure to apply for lifting the stay during the relevant period as intentional, but the judge considered that what had to be intentional was not the failure to apply lifting the stay but the failure to bring the action before the court during the relevant period, which was not intentional. A similar dispute emerged in relation to CPR r.3.9(d), which requires the court to consider whether the defaulting

party had a good explanation for the failure to comply. The master thought that there was no good explanation for the delay in applying to lift the stay. The judge agreed, but the Court of Appeal thought that what was relevant was whether there was a good explanation for the failure to bring the actions before the court in the period between April 1999 and April 2000. The Court of Appeal was of the view that while the failure to apply promptly for lifting the say was relevant under CPR r.3.9(b), it was not relevant under CPR rr.3.9(c) and (d); under these what fell to be considered was the failure to proceed with the action during the relevant period.

CPR r.3.9(h), involving a consideration of the effect that the failure to comply had on each party, also gave rise to disagreement. The master and judge both related this to the effect of the overall delay arising from the failure to prosecute the action from the time when the stay was imposed. By contrast, Mance L.J. thought that the only relevant effect was that of the failure to bring the actions before the court in the year ending in April 2000. Mance L.J. warned against double counting the same factor under different CPR r.3.9 sub-paragraphs and explained that the "effect of a failure to apply promptly to lift the resulting automatic stay and of the grant of relief by lifting such a stay after a delay are on this basis matters arising under sub-rules (b) and (i) or as general circumstances outside any specific sub-rule" ([23]).

Much attention was devoted to CPR r.3.9(h), regarding the effect to which failure to comply had on each party. Here the old concept of "prejudice" raised its head again. Did the delay prejudice the court's ability to hold a fair trial? Did the delay prejudice the defendants? Attention was devoted to the kind of prejudice that counted in this regard. Mance L.J. thought that "the prejudice found was not evidential and was not to the possibility of a fair trial process. The judge was wrong to interpret the Master as finding evidential prejudice to the defendants. The decisive prejudice in the Master's view consisted in the proceedings hanging over the defendants' heads" ([29]). On the issue of evidential prejudice Mance L.J. concluded that the "defendants are likely to have put much of their evidential case into statements or memoranda near the outset of this litigation. They have not identified any particular respect in which they have not done so or might be embarrassed. I also see no reason to differ from the Master's conclusion that, if there were to be any difficulty in recollection, it would in this case tend to assist the defendants, rather than the claimants" ([31]). Even greater attention was given to the nature of non-evidentiary prejudice that the defendant solicitors may have suffered from having the action hanging over their head. The Court of Appeal thought that the master and the judge attached to much weight to this prejudice and, furthermore, failed to give proper weight to the prejudice that the claimants would suffer if their action against the solicitors failed. In particular, Mance L.J. noted that "the measure of recovery in any successful claim against solicitors for allowing litigation to be (effectively) struck out does not derive from an exact determination of the likely outcome on the balance of probabilities, but from a percentage assessment of prospects. So the claimants, if generally successful, would still have been unlikely to recover in the present actions more than a

percentage of their maximum claims as against the relevant local authorities; and, if they were now to be remitted to a claim against their solicitors in the years 2000–02, they would be likely to suffer a further discount, by reference to their prospects of succeeding against Rex Makin and Mr Wright in relation to the events of 1993–95" ([35]).

In the result, the Court of Appeal found the master's exercise of discretion to have been faulty, allowed the appeal and lifted the stay. When one considers, however, the way in which this conclusion was reached and the reasoning followed one cannot help being reminded of the complexities of the case law generated by *Birkett v James* [1978] A.C. 297; [1977] 2 All E.R. 801, which reached a peak of refinement in *Trill v Sacher* [1993] 1 W.L.R. 1379; [1993] 1 All E.R. 961, where some 18 principles applicable to dismissal for want of prosecution were distilled, including several about the nature of "prejudice". Under the old rules any semblance of an overarching approach to litigant induced delays was lost in the detailed technical consideration of individual rules, guidelines and the relevant factors. If the CPR are to fair better, it is important to avoid the encumbering the CPR r.3.9 checklist with technical baggage. Indeed, the wording of the rule militates against treating the checklist factors as precise tests that have to be satisfied. The opening words merely say that on "an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including" those listed in sub-paras (a) to (h). Thus these factors are not technical rules, they are not precise and mutually exclusive conditions. They are merely illustrations of the kind of matters need to be considered when making a general management judgment about the conduct of the case. Perhaps conscious of this Mance L.J. observed that "at the end of the day, the right approach is to stand back and assess the significance and weight of all relevant circumstances overall, rather than to engage in some form of 'head-counting' of circumstances" ([20]).

There is one further notable aspect of this decision. A view had acquired some, albeit limited, currency that even under the CPR an action cannot be struck out for non-compliance with process requirements as long as it was still possible to hold a fair trial on the issues. This notion never carried much force, since it implied that no time-table, no case management plan, no peremptory order could be enforced as long as the evidence has not deteriorated or one of the litigant has not suffered some other serious prejudice. Mance L.J. has now largely dismissed this notion by stating:

> "27. No doubt there will be many cases where the possibility or otherwise of a fair trial is highly important to the exercise of discretion under CPR 3.9. . . . But it does not follow that, where a fair trial is still possible, relief will necessarily be granted. CPR 3.9 deals generally with relief from sanctions imposed for failure to comply with a rule, practice direction or court order. It could not be the case that, whenever such a sanction had been imposed, and however flagrant or persistent the failure, the defaulting party could have it set aside by showing that a fair trial was still possible."

Yet, if in future the court were to attach preponderate weight to the absence of evidential and other prejudice, the idea that not action should be struck out when fair trial is still possible would simply emerge in a different guise under CPR r.3.9.

Unless orders

Where there have been repeated failures to comply with deadlines, the court may issue a peremptory order directing that unless compliance is given by a certain date, the case of the defaulting litigant would be struck out. This the measure was adopted in *Carlco Ltd v Chief Constable of Dyfed Powys* [2002] EWCA Civ 1754. The claimant company was in breach of a disclosure order. A second order was made extending time for giving disclosure. That too was breached. Consequently, a third order was made giving the claimant 14 days to comply or the action would be struck out. The claimant failed to comply adequately and the judge struck out the claim. It may be recalled that under CPR r.3.8 "any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction". The claimant in this case applied for relief, so that check list of CPR r.3.9 was invoked. The Court of Appeal considered the circumstances and found that there had been more than a technical breach of the order and, furthermore, that no attempt had been made to remedy the deficiency in the eight months between the judge's order and the appeal hearing. Yet the Court of Appeal set aside the judge's striking out order because if found that the claimant had not been "guilty of gross failures to meet the specific requirements of the peremptory order" ([19]).

A ready willingness to re-visit the consequences of unless orders, it is suggested, tends to undermine the court's ability to manage cases effectively. Effective management consists in taking account of all the relevant factors of the particular case and then making the order that is appropriate, proportionate and just in the circumstances. If this is so, then both efficiency and justice require that the stipulated consequences should follow in the event of further default, bar unforeseen and unavoidable obstacles. A willingness on the part of the court to reconsider its order in the absence of a material change in the circumstances would have two consequences. First, it would give litigants the impression that the unless order is not final and that therefore failure to comply would not necessarily have the stipulated result. Second, it would oblige the court to spend yet more resources on dealing with procedural matters that do not advance the resolution on the merits.

Payment as condition for relief from sanctions or as condition to appeal

In *Carlco Ltd v Chief Constable of Dyfed Powys*, discussed above, the Court of Appeal allowed the claimant further time to fulfil its disclosure obligations but only on condition that it paid £10,000 into court as security for costs, otherwise its action would remain struck out. The power to make such order is provided by CPR r.3.1(2)(f), which allows the court to "stay the whole or part of any proceedings or judgment either generally or until a specified date or event", and by CPR r.3.1(5), which empowers the court to "order a party

to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol".

The imposition of a payment requirement as a condition for an extension of time or, indeed, for continued participation in the litigation process is increasingly used. These powers where considered in *Ali v Hudson (t/a Hudson Freeman Berg)* [2003] EWCA Civ 1793. The claimant had brought an action against the defendant, which had been struck out as disclosing no cause of action, and an order of costs was made against the claimant. The claimant, acting in person, had lodged a notice of appeal against the striking out, but the proceedings were stayed because the claimant had taken no further steps in the proceedings for over three years. The master lifted the stay, on condition that the claimant paid an amount in respect of the costs order made against him. The claimant argued that security for costs could only be ordered under the court's powers of case management on the basis of a specific finding that a party had without good reason failed to comply with a rule, practice direction or pre action protocol. The Court of Appeal rejected this argument. Clarke L.J. stated that the power under CPR r.3.1(2)(f) is independent of the power conferred by CPR r.3.1(5) and that therefore a stay may be lifted on condition of payment in even where there has not been conduct such as would justify an order under CPR r.3.1(5).

The principles for ordering the payment of security for costs were set out in *Olatawura v Abiloye* [2002] EWCA Civ 998; [2002] 4 All E.R. 903 (see also *CIBC Mellon Trust Co v Mora Hotel Corp NV* [2002] EWCA Civ 1688; [2003] 1 All E.R. 564). In particular, this decision stressed that it cannot be justified to make an order of payment in when it is known that the party in question cannot meet the condition, since this would deprive the party of access to court. As already noted, the payment condition in *Ali v Hudson* was in respect of costs ordered when his action was struck out, which was the very decision against which the claimant was seeking to appeal. Clarke L.J. referred to observations made in *Olatawura* and said:

> "40. Those principles show that the power to order security for costs in a case of this kind should be exercised with great caution. The correct general approach may be summarised as follows:
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> (i) it would only be in an exceptional case (if ever) that a court would order security for costs if the order would stifle a claim or an appeal
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> (ii) in any event,
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> (a) an order should not ordinarily be made unless the party concerned can be shown to be regularly flouting proper court procedures or otherwise to be demonstrating a want of good faith; good faith being understood to consist (as Simon Brown L.J. put it) of a will to litigate a genuine claim or defence (or appeal) as economically and expeditiously as reasonably possible in accordance with the overriding objective; and
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> (b) an order will not be appropriate in every case where a party has a weak case. The weakness of a party's case will ordinarily

> be relevant only where he has no real prospect of succeeding."

In the event the Court of Appeal decided to set aside the condition of payment security for costs because it could not be said the that claimant's conduct during the relevant period was so unreasonable as fairly to be described as regularly flouting court orders or lacking good faith.

It is clear that the device of ordering payment as a condition for further participation in the litigation process is subject to some serious limitations. Firstly, it is virtually of no use where the defaulting litigant is of limited means. Second, even where a condition of payment is properly imposed, it is not necessarily the end of the matter, since the defaulting litigant can apply for relief from the consequence of non-compliance with the condition. This is exactly what happened in *Confetti Records v Warner Music UK Ltd (Security for Costs: Extension of Time)* [2003] EWCA Civ 1748. The claimants' claim was dismissed and they were ordered to pay the costs of the proceedings. The judge made an interim order for costs in the sum of £40,000 to be paid by July 3, 2003. He then gave permission to appeal. The claimants did not comply with that order. Notice of appeal was issued. The respondents made an application for security for costs. Before the hearing of these applications, the claimants acknowledged that the defendants were entitled to security for costs. A consent order was made, which provided that by November 11 the appellants would provide security of £7,500 in respect of the appeal and would pay the £40,000 in respect of the interim costs order, together with the costs of the application. The order provided that in the event of failure to comply, the appeal would stand dismissed without further order. On November 12 (namely, after the appeal had stood dismissed by the terms of the earlier order) the appellants applied under CPR r.3.9 for relief from sanction and for an extension of time to comply with the consent order.

The Court of Appeal had regard to the matters listed in CPR r.3.9, but decided to dismiss the claimants' application and thereby effectively dismissed the appeal. One of the factors that the court considered significant in reaching this decision was that the order was a consent order. This is because a party who submits to a consent order does so in full knowledge of its consequences and the court should be slow to interfere with agreements between the parties (on this point see discussion below of *Placito v Slater* [2003] EWCA Civ 1863; [2003] 1 W.L.R. 1605). In addition the Court of Appeal was influenced by following matters: the fact that no money was tendered even at the hearing before the Court of Appeal; the fact that no application was made until after the expiry of the time for compliance; the evidence provided by the claimants about the sources to be used for making payment was inconsistent. As against this the claimants pointed out that an extension of time would not have compromised the hearing of the appeal. On this, Pill L.J. made a significant observation:

> "17. I bear in mind that the trial date can still be met, though adding the rider, which I do not suggest by any means eliminates that point, that the interests of justice do require that court lists can be relied on and that

> when dates become available other of the many waiting litigants can, given notice, be included. It is less than satisfactory, against the background to which I have referred, that the matter should remain open any longer."

A defendant who wishes to appeal a judgment under which he has been ordered to make a money payment may be required to make payment to the claimant or provide security for the costs of the appeal as condition for proceeding with an application for permission to appeal, or indeed with the appeal. A further case that illustrates the potential complications of such an order is *Hansen v Great Future International Ltd* [2003] EWCA Civ 1646; [2004] C.P. Rep. 14. The defendants were ordered by final judgment to pay a large sum of money to the claimants. It was directed that their application for permission to appeal would stay dismissed unless they made an interim payment of £1m on account of damages and a further amount as security for the costs of the appeal. The defendants applied for an extension of time for compliance with the order, and for a variation of the terms of the order. The applications were dismissed by a single lord justice without a hearing. Subsequently the defendants applied under CPR 52, r.16(6) for a reconsideration of that decision at an oral hearing. A great deal of documentary material was produced and lengthy argument was advanced, with the result that the Court of Appeal had to devote considerable time on several occasions to this matter. One aspect of this decision is, however, of considerable general importance.

CPR 52, r.4.14 provides that a request for reconsideration of a refusal of permission to appeal, made by a single judge without a hearing, must be filed within seven days after service of the notice that permission had been refused. The Practice Direction says nothing about a request for reconsideration of condition imposed on permission to appeal in the course of a decision on paper. It was held that a request for reconsideration of any aspect of a decision made by a single judge without a hearing should also be made within seven days. It was stressed that at an oral hearing the court has the power to extend time or vary the conditions decided without a hearing, if the circumstances justified it. In the event the application in *Hansen* was dismissed on the merits.

Limitations on court's power to extend time agreed in a consent order

Where a procedural time limit has been agreed by the parties or incorporated in consent order, the court's discretion to grant an extension is considerably more limited than where the time limit is imposed by a rule or court order. The simple reason for this is that whereas a court has full control over its own process, it has more limited scope for interfering with parties' voluntarily undertaken process obligations, let alone consent orders that give effect to binding contracts. Prior to the CPR, if a time limit was contained in the body of a consent order (and not just in an undertaking to the court), the court would have treated the time limit as having contractual effect between the parties and would not regard itself able to extend the time save in circumstances

in which it could interfere with a contract as a matter of substantive law (*Purcell v F C Trigell Ltd (t/a Southern Window and General Cleaning Co)* [1971] 1 Q.B. 358, at 365 and 366). In *Ropac Ltd v Inntrepreneur Pub Company (CPC) Ltd* [2001] C.P. Rep. 31, Neuberger J. expressed the view that since all court decisions in matters of process are now governed by the overriding objective, the court's power under the CPR are wider. Although there is a lot to be said for this view (see: Zuckerman, *Civil Procedure* (2003), para.22.47), the Court of Appeal has reserved judgment on this point on more than one occasion, including in the recent case of *Placito v Slater* [2003] EWCA Civ 1863; [2003] 1 W.L.R. 1605. However, this case usefully sets out the approach to be followed where a litigant has, as part of a compromise with another party, undertaken to perform a process requirement by a certain date but has failed to do so and subsequently seeks an extension of time or a variation of the order.

In *Placito v Slater* the claimant was interested in proceedings challenging a will, which were brought by his brother. When the brother proposed to discontinue his action and the claimant indicated his intention to continue the challenge, an order of compromise was made by the master whereby the claimant was joined as third defendant to the executors' application to distribute the estate in order to give an undertaking not to challenge the validity of the will unless he had commenced proceedings to that end by June 5, 2002. Upon the claimant's undertaking to that effect a consent order was made embodying the terms of the undertaking. The order accordingly stated that unless the claimant started proceedings by that date, the executors have permission to distribute the estate.

In fact proceedings were not commenced until June 11 and the claimant applied for a retrospective extension. The master held that since the deadline was imposed as a result of an agreed undertaking the application did not fall to be considered under CPR r.3.9, which deals with relief from sanctions, but under CPR r.3.4(2)(b), which deals with abuse of process. He thought that it was an abuse of process for a litigant to seek to commence proceedings in breach of an undertaking. On appeal, the judge agreed that CPR r.3.9 did not apply and held that the case fell to be decided in accordance with the principles appropriate to an application by a party to be released from an undertaking voluntarily given in compromise of proceedings. In such a situation the judge considered that the onus was upon the party applying for release to establish "special circumstances" justifying such release, having regard to the public interest in encouraging and enforcing the settlement of litigation by agreement. On this point he invoked the decision in *Eronat v Tabbah* [2002] EWCA Civ 950. The Court of Appeal agreed that the need to establish "special circumstance" constitutes the starting point.

Potter L.J. explained that three matters are of particular importance when deciding whether to release a party from an undertaking. Firstly, the course and the nature of the proceedings, in which the undertaking was given. Second, the question whether the undertaking was given to the court as an undertaking required by, or offered to, the court independently of the agreement of the

other party (as in the case of undertakings required by, or offered to, the court as the price of obtaining a particular form of relief) or was given as part of a collateral bargain between the parties. In the former case, the court is concerned primarily with questions of judicial policy and the importance of ensuring that an undertaking solemnly given to the court is observed unless and until the court sees fit to discharge or release such undertaking. By contrast, in the latter case, the court will be primarily concerned with the issue of justice as between the parties and the fact that, by granting release from or modifying the injunction, the court will deprive the beneficiary of the undertaking of the benefit of a bargain voluntarily made. Third, the court will consider the circumstances in which the application is made. In relation to both categories of undertaking mentioned above, "the question is whether there are "special circumstances" in the sense of circumstances so different from those which may properly be regarded as contemplated or intended to be governed by the undertaking at the time that it was given, that it is appropriate to release the undertaker from the burden of his undertaking" ([33)]. Potter L.J. stressed that in such situations the court is considering a question different from and outside the intended scope of CPR r.3.9.

The claimant asserted that being deprived of the right to challenge the will is quite disproportionate a consequence of a delay of some six days in commencing proceedings. But Potter L.J. was unimpressed. He said "the simplistic terms of that assertion do not seem to me to meet the difficulty that such a consequence is the very consequence which the parties must have had in mind at the time of their compromise as being the price of such a failure" ([48]). He similarly brushed aside the claimant's reliance on the right to fair trial under ECHR Art.6. He explained that there is nothing in Art.6 to prevent a litigant from freely waiving some of his procedural rights under the article. His lordship he went on to observe that claimant may well have a cause of action against his solicitors.

This decision bolsters the binding nature of undertakings given to court under compromise agreements between litigants. Litigants who have suffered form the default of their adversaries are therefore well advised to seek to incorporate an undertaking or a condition in an agreed order rather than leave the matter to the court. This, however, leaves one wondering why peremptory orders made by the court after repeated defaults, which stipulate the consequences of any further default, should be less binding, less rigorously enforceable and, therefore, entitled to lesser respect. There is nothing in CPR r.3.9 to prevent the court from adopting a similar approach. Indeed, when one looks closely at Potter L.J.'s careful and detailed judgment it is clear that he took into consideration almost the entire list of factors mentioned in that rule. He simply gave greater weight to the principle that agreements should be kept, and so, it is suggested, should court orders.

Extending the time for service of the claim form

There is one area where the rules themselves dictate rigorous enforcement of deadlines. The CPR rules on service of originating process establish a stricter regime than for most other deadlines. This regime is designed to ensure that

the process of service is not unnecessarily dragged out. The reason is obvious. Where, as is not infrequently the case, the claim form is issued near the end of the limitation period, a claimant who delays service beyond the four months period for service effectively robs the defendant of the right to peace from proceedings after the expiry of the limitation period. Thus, CPR r.7.6(3) limits the court's power to extend the period for service of the claim form where a claimant applies for an extension of time after the end of the period for service. In this situation the court may extend the time only if (a) the court had been unable to serve the claim form, or (b) the claimant had taken all reasonable steps to serve the claim form but had been unable to do so, and (c) in either case, the claimant had acted promptly in making the application. In a series of key decisions the Court of Appeal rebuffed a variety of attempts to get round these limitations. It held that after the expiry of the period for service there was no residual discretion to grant extensions under CPR r.3.10, let alone at common law. It refused to allow litigants to circumvent the limitation of CPR r.7.6 by seeking a court order dispensing with the requirement of service under CPR r.6.9, or by obtaining an order of service by an alternative method under CPR r.6.8. The more notable decisions in this line of cases are: *Vinos v Marks & Spencer Plc* [2001] 3 All E.R. 784 (CA); *Infantino v MacLean* [2001] 3 All E.R. 802 (CA); *Anderton v Clwyd CC* [2002] EWCA Civ 933; [2002] 3 All E.R. 813 (CA): *Godwin v Swindon BC* [2001] EWCA Civ 1478; [2001] 4 All E.R. 641; *Wilkey v BBC* [2002] EWCA Civ 1561; [2002] 4 All E.R. 1177 (CA).

To these must now be added *Hashtroodi v Hancock* [2004] EWCA Civ 652. In some ways the decision in this case is even more significant than in the cases just mentioned. This is because it was concerned with an application for an extension of the time to serve the claim form that was made before the expiry of the time for service, not after its expiry. Consequently, the matter did not fall to be decided under CPR r.7.6(3), which as we have just noted places serious limitations on the court's power. The Court of Appeal was therefore concerned with the principles governing applications to extend the time for service of a claim form where the application is made within the period for serving the claim form specified by CPR r.7.5 and the claim has become statute-barred within that period.

The claimant was very seriously injured in a road accident in January 2000. The claimant's solicitors (L&M) wrote a letter before action to the defendant and sent a copy to the defendant's insurers. L&M were notified by a claims management company (TCM), appointed by the insurers, that they were to manage the claim against the defendant and his insurers. Correspondence took place between L&M and TCM until November 2000 in which liability was disputed. There was then a period of silence until L&M wrote to TCM in April 2003 notifying them that a claim had been issued and asked them to nominate solicitors to receive service, adding that if they did not hear within the next seven days papers will be served on the defendant personally. Unfortunately, this letter was not sent to TCM's place of business but to their registered office. Nor did it bear the TCM reference number, which had appeared on the earlier correspondence. The letter was, therefore, sent back to

L&M. No attempt was made to effect service on the defendant personally. Instead, on May 9, one clear working day before the expiry of the validity of the claim form, L&M made an application without notice for a three weeks' extension of time for the service of the claim form. The Master allowed the application and extended time until June 3. By May 14 TCM received a letter with the correct reference and immediately notified L&M of nominated solicitors authorised to accept service. On May 23, L&M purported to serve the claim form on the nominated solicitors by DX, but it did not reach them. On May 28, L&M sent by fax to TCM and by DX to the nominated solicitors the particulars of claim and schedule. On June 2, the defendant issued an application for an order that the order of Master Tennant be set aside on the grounds that the claimant had no good grounds for extending the time for service of the claim form.

The defendant argued that an application for an extension of time before the expiry of the validity of the claim form must necessarily be supported by a good reason showing why it has not been possible to serve in time. But Dyson L.J. rejected this argument, explaining that no such condition could be implied into CPR r.7.6(2), which unlike CPR r.7.6(3) is not subject to any limitation on the court's power to grant extensions. However, it does not follow from this that the explanation of the delay is irrelevant. Far from it, since the power to grant extensions must be exercised in accordance with the overriding objective, the reason for the delay is always relevant. Its significance was explained by Dyson L.J. [19]-[20]:

> "If there is a very good reason for the failure to serve the claim form within the specified period, then an extension of time will usually be granted. Thus, where the court has been unable to serve the claim form or the claimant has taken all reasonable steps to serve the claim form, but has been unable to do so (the CPR 7.6(3) conditions), the court will have no difficulty in deciding that there is a very good reason for the failure to serve. The weaker the reason, the more likely the court will be to refuse to grant the extension.
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> If the reason why the claimant has not served the claim form within the specified period is that he (or his legal representative) simply overlooked the matter, that will be a strong reason for the court refusing to grant an extension of time for service."

The implications of this approach to the case in hand were grave. The Court of Appeal concluded that "the facts disclose that the only reason for the failure to serve the claim form within the four months' period was the incompetence of L&M" ([34]). Even if the claimant experienced difficulty serving on solicitors nominated by the defendant's insurers (which in this case was self-inflicted), there was no reason why the claim form should not have been served on the defendant himself, whose address was known all along. Dyson L.J. reminded solicitors that "a solicitor who leaves the issue of a claim form almost until the expiry of the limitation period, and then leaves service of the claim form until the expiry of the period for service is imminent courts disaster". He brushed aside the concern that a negligence claim against the solicitors might

not succeed, observing that on the contrary one could see no answer to an allegation of negligence against them. Indeed, claims for professional negligence against solicitors, who cause their client's claims to be dismissed for non-compliance with the rules, may be easier to sustain than against the original defendant, as a result of the decision in *Sharif v Garrett & Co* [2001] EWCA Civ 1269; [2002] 3 All E.R. 195 (discussed in Zuckerman, *Civil Procedure*, 10.22).

The *Hashtroodi* decision is of considerable practical significance not only because it explains the approach that the court will adopt to applications of this kind, but more generally because it spells out a much more exacting attitude to failure to comply with time limits. "If we were to grant an extension of time in the present case," Dyson L.J. explained, "it seems to us that the rule stated in CPR r.7.5 [requiring service within four months] would cease to be the general rule. Moreover, there would be a real risk that statements made by this court about the importance of the need to observe time limits would not be taken seriously. That would be most unfortunate" ([36]). By taking this stance the court was showing a determination not to revert to the pre-CPR culture, when the court could not resist the argument that it is better to grant a short extension, even after long and unjustified delays, rather than decide a case on procedural grounds. Dyson L.J. signalled a departure from the old indulgent culture by saying:

> "It is easy enough to take the view that justice requires a short extension of time to be granted even where the reason for the failure to serve is the incompetence of the claimant's solicitor, especially if the claim is substantial. But it should not be overlooked that there is a 3 year limitation period for personal injury claims, and a claimant has 4 months in which to serve his or her claim form. Moreover, the claim form does not have to contain full details of the claim. All that is required is a concise statement of the nature of the claim . . . " ([21])

Extending time for serving particulars of claim

Unlike the deadline for serving a claim form, the deadline for serving particulars of claim is not subject to the same strict regime: *Totty v Snowden*; *Hewitt v Wirrall and West Cheshire Community NHS Trust* [2001] EWCA Civ 1415; [2001] 4 All E.R. 577. Provided that the delay has been neither extensive nor deliberate, the court would be willing to grant extension even if there was no particularly good reason for the delay: *Bournemouth & Boscombe Athletic Football Club Ltd v Lloyds TSB Bank Plc* [2003] EWCA Civ 1755.

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