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Editor
KAREN WIDDICOMBE Solicitor

Managing Editor
WENDY HERRING Barrister

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Rakesh Rajani Barrister.

Nelson and another v Clearsprings (Management) Ltd

[2006] EWCA Civ 1252

COURT OF APPEAL, CIVIL DIVISION

SIR ANTHONY CLARKE MR, BROOKE AND WALLER LJJ

15 JUNE, 22 SEPTEMBER 2006

Judgment – Setting aside – Judgment after trial in absence of party – Rule of procedure dealing with applications to set aside judgments made against party who had failed to attend trial – Rule empowering court to set aside judgment only if defendant had reasonable prospects of success at trial – Whether rule applying where defendant not served with proceedings and having no knowledge of them – CPR 39.3(5).

The claimants brought possession proceedings against the defendant. The defendant's address was stated incorrectly on the claim form. The defendant did not acknowledge or respond to the claim form in any way because, it alleged, it had been unaware of the proceedings until it had learned that the trial had taken place and that judgment, including judgment for a sum of money, had been given in the claimants' favour. The defendant applied to have the judgment set aside. On the determination of a preliminary issue, which proceeded on the assumption that the claim form had not been served on the defendant in accordance with the CPR, the claimants contended that CPR 39.3[a], which dealt with applications to set aside judgments or orders made against a party who had failed to attend the trial, governed the court's jurisdiction to set aside the judgment, and that accordingly the court could set it aside only if, as required by r 39.3(5), the defendant had a reasonable prospect of success at trial. That contention was accepted by the district judge, but his decision was reversed by the circuit judge who ordered the judgment to be set aside if it were determined that the defendant had not been served with the proceedings and had had no knowledge of them before judgment had been given at trial. At a subsequent hearing, the district judge so determined and duly set aside the judgment. The first claimant appealed to the Court of Appeal against the order of the circuit judge.

Held – Where judgment was given for the claimant at trial in circumstances in which the defendant had not been served with the proceedings in accordance with the CPR and had no knowledge of them, CPR 39.3(5) did not govern an application by the defendant to set aside judgment. A conclusion to the contrary would involve disregarding the complex provisions for service of process under the CPR and holding that, notwithstanding the fact that the defendant had not been served (or deemed to have been served) with the proceedings, the burden was on him to satisfy the criteria in r 39.3(5). It was exceedingly unlikely that the CPR was intended to produce such a result. Rather, r 39.3(5) contemplated a trial in the absence of a party who had been served under the rules or in respect of whom service had been dispensed with. There was another pointer to that conclusion. If the judgment included a judgment for a sum of money, which was likely to be the aggregate of a principal sum and interest on that sum, statutory

a CPR 39.3, so far as material, is set out at [24], below

interest would be payable on the aggregate sum from the date of judgment until payment. That would be an unjust result if the judgment had been obtained without service of process and without any order dispensing with service. It followed in the instant case that the circuit judge had been correct to hold that r 39.3(5) did not apply to such a case, and accordingly the appeal would be dismissed (see [12], [35], [36], [39], [40], [42], [55], below); *Akram v Adam* [2005] 1 All ER 741 considered.

Per curiam. In a case where proceedings have not been served on the defendant and service has not been dispensed with before judgment, a court can only properly refuse to set aside a judgment where there is no prejudice to the defendant (or, possibly, to some innocent third party who has acted to his detriment in the belief that the judgment has been regularly entered). That will normally involve the claimant persuading the court that there is no prejudice in dispensing with service and that the defendant is not otherwise prejudiced. At present, it cannot be seen how that will be possible in a case where the judgment includes a money judgment of an aggregate sum inclusive of interest and costs because of liability to statutory interest on the aggregate sum. Nor can it be seen how it will be possible where the judgment orders the defendant to pay costs. However, each case depends on its own facts and there may be circumstances in which it will not be appropriate to set aside the judgment, or at any rate the whole judgment, eg when the defendant has delayed inexcusably in making his application to the court after learning that judgment has been entered against him. The judgment will then stand (subject to any direction made by the court, whether in relation to statutory interest accruing due on the judgment or otherwise). Another possibility on such an application will be for the claimant to seek an order dispensing with service and to cross-apply for summary judgment. In such a case, the court may well set aside the judgment in order to ensure that the defendant suffers no prejudice and then consider the claimant's application for summary judgment (see [48]–[51], [56], below).

Notes

For setting aside judgments obtained at a trial which the defendant failed to attend, see 10 *Halsbury's Laws* (4th edn reissue) para 1072.

Cases referred to in judgment

A/S Cathrineholm v Norequipment Trading Ltd [1972] 2 All ER 538, [1972] 2 QB 314, [1972] 2 WLR 1242, CA.
Akram v Adam [2004] EWCA Civ 1601, [2005] 1 All ER 741, [2005] 1 WLR 1762.
Al-Tobaishi v Aung (1994) Times, 10 March, CA.
Bishop (Thomas) Ltd v Helmville Ltd [1972] 1 All ER 365, [1972] 1 QB 464, [1972] 2 WLR 149, CA.
Cranfield v Bridgegrove Ltd [2003] EWCA Civ 656, [2003] 3 All ER 129, [2003] 1 WLR 2441.
Godwin v Swindon BC [2001] EWCA Civ 1478, [2001] 4 All ER 641, [2002] 1 WLR 997.
Gold Ocean Assurance Ltd v Martin, The Goldean Mariner [1990] 2 Lloyd's Rep 215, CA.
Hackney London BC v Driscoll [2003] EWCA Civ 1037, [2003] 4 All ER 1205, [2003] 1 WLR 2602.
Hashtroodi v Hancock [2004] EWCA Civ 652, [2004] 3 All ER 530, [2004] 1 WLR 3206.

Man (ED & F) Liquid Products Ltd v Patel [2003] EWCA Civ 472, (2003) Times, 18 April.
Regency Rolls Ltd v Carnall [2000] All ER (D) 1417, CA.
Vinos v Marks & Spencer plc [2001] 3 All ER 784, CA.
White v Weston [1968] 2 All ER 842, [1968] 2 QB 647, [1968] 2 WLR 1459, CA.
Willowgreen Ltd v Smithers [1994] 2 All ER 533, [1994] 1 WLR 832, CA.

Appeal

David Nelson, the first claimant in proceedings brought against the respondent, Clearsprings Management Ltd, appealed with permission of Ward LJ granted on 10 July 2005 from the order of Judge Bush in the Leeds County Court on 9 May 2005 allowing the respondent's appeal against the decision of District Judge Giles, made on the determination of a preliminary issue on 7 January 2005, that CPR 39.3(5) applied to an application by the respondent to set aside a judgment made against it by Judge Bush on 14 June 2004 following a trial which the respondent had failed to attend. The second claimant, Shirene Veronica Hanley, took no part in the appeal to the Court of Appeal. The facts are set out in the judgment of the court.

Geraint Jones QC for the appellant.
Robert Smith (instructed by *Restons*) for the respondent.

Judgment was reserved.

22 September 2006. The following judgment of the court was delivered.

SIR ANTHONY CLARKE MR.

INTRODUCTION AND BACKGROUND

[1] This is an appeal from an order of Judge Bush made in the Leeds County Court on 9 May 2005 allowing an appeal from the determination of a preliminary issue made by District Judge Giles on 7 January 2005. The preliminary issue arose in this way. On 14 May 2004 the claimants filed a claim form for possession of furnished residential property, namely No 8 Woodland Grove, Potternewton, Leeds (the property). The particulars of claim, which were dated the same date, claimed:

> '1. Immediate possession of the property together with its 5 sets of keys.
> 2. Arrears of rent due amounting at the date hereof to £6,083·88
> 3. Reparations amounting to £2,028·56
> 4. Mesne profits @ £520 a month from the date hereof to 2 April 2005 amounting to £5,521·97
> 5. Further or other relief as to the Court seems just
> 6. Costs'

The total of the money claim was £13,634·41. Both the claim form and the particulars of claim included a statement of truth. The name and address of the defendant, the respondent in this appeal, were stated on the claim form to be 'ClearSprings (Management) Ltd, 28 Brook Road, Brook Road Business Park, Rayleigh SS6 7XJ, Essex'. (We shall refer to that entity throughout as 'the respondent'.) On the front of the claim form, which is entitled 'Claim Form for

Possession of Property', it is stated that the claimant (a term that in this context means both claimants) is claiming possession of the property.

[2] The claim form was issued on 18 May 2004 and, as issued, contains the statement that 'this claim will be heard on Monday 14 June 2004 at 10.00 am'. As a result of inquiries made at our request of the Leeds County Court by Mr Reston we learned that the claim form (and particulars of claim) were approved for postal service on 20 May 2004 and that the court deemed them served on 22 May 2004. The court also issued a notice of issue directed to the appellant which stated 'Your claim was issued on 18 May 2004.' It stated that the claim would be heard on 14 June 2004.

[3] The respondent did not acknowledge or respond to the claim form in any way. The respondent's case is that it was unaware of the proceedings at any time until it learned of the judgment. The respondent's address is in fact No 26 Brook Road and not No 28 Brook Road. The correspondence shows that the claimants knew that that was the case because they had previously written to the respondent at No 26. The address on the claim form was a mistake.

THE JUDGMENT AND SUBSEQUENT APPLICATIONS

[4] The matter came before Judge Bush for trial on 14 June. The respondent did not attend and a judgment was given in the claimants' favour in the sum of £13,634·41. The order, which is entitled an order for possession, provided that the respondent do deliver five sets of keys, presumably to the claimants. On 29 June 2004 the respondent issued an application notice which stated that the respondent intended to apply for an order that the judgment entered on 14 June 2004 be set aside and that directions be given for the further conduct of the action because—

> 'we wish to rely upon the attached witness statement and we say that on the basis of the evidence contained in that the defendant has a good defence to the claim and judgment should therefore be set aside to enable the defendant to defend these proceedings.'

The attached witness statement was that of Birgit Elisabeth Kirby. The statement included evidence that the respondent's address was 26 Brook Road and that the claim form was not served at that address or indeed at any other of the respondent's addresses. Ms Kirby acknowledged that a dispute had arisen between the respondent and the claimants with regard to the property and also produced a copy of a letter dated 7 January 2003 (but in fact written on 7 January 2004) which she wrote to Emsleys of Leeds, a firm of solicitors then instructed by the claimants, asking them to serve any proceedings on the respondent's solicitors, Messrs Restons of York. We note in passing that the claim form was issued by the claimants in person and not by solicitors on their behalf. Restons still act for the respondent.

[5] In paras 9–14 of her statement Ms Kirby sets out the respondent's account of the relevant facts which the respondent says gives it a defence to the appellant's claim. We will return to the facts below. The respondent's application to set aside the judgment was also supported by a statement from Mr Reston dated 6 September 2004 which contains this paragraph:

> '(5) I also draw the Court's attention to CPR 13.2 and respectfully suggest that in this case Judgment should be set aside as of right as the Judgment has been entered irregularly as the Claim Form and Particulars of Claim were not served, having been endorsed by the Claimants with a wrong address for service.'

The application first came before District Judge Giles on 8 September 2004. The application was opened (consistently with Mr Reston's statement) as an application under CPR Pt 13. However the claimants took the point that the application could not be made under Pt 13 because the judgment was not a judgment in default. The respondent then submitted that the application was made under CPR 39.3(5). It also submitted that it was entitled to have the judgment set aside as of right. The application was adjourned to enable the claimants to prepare submissions in relation to the respondent's new case.

[6] The respondent subsequently served a statement of Caroline Newman, Ms Kirby's assistant, dated 4 October 2004 in further support of its application. Ms Newman's evidence supports the respondent's case that the claim form was not served on or received by the respondent but also states that she received the judgment in favour of the claimants on 24 June. She said that she could not say whether it was delivered by the postman or by somebody from Unit 28–30, which includes No 28.

[7] The application was relisted for 7 January 2005. The argument advanced on behalf of the respondent was that it was entitled to have the judgment set aside as of right or, to use the old expression, ex debito justitiae. The respondent relied upon the decision of this court in *White v Weston* [1968] 2 All ER 842, [1968] 2 QB 647. At the respondent's request this question was considered by the district judge as a preliminary issue. The claimants' case was that the court's jurisdiction to set aside the judgment was governed by r 39.3(5) and (on the assumed facts here) that it could only do so if the respondent 'has a reasonable prospect of success at the trial'. The assumed facts were that the claim form had not been served on the respondent in accordance with the CPR.

[8] The district judge determined the preliminary issue in favour of the claimants but gave the respondent permission to appeal. He held that the principle in *White v Weston* no longer has effect and that in order to have the judgment set aside a defendant in the position of the respondent must satisfy the provisions of r 39.3(5). He said that the effect of r 39.3(5) was that a person who has not been served with process will only be granted relief where he can show that a different result might follow if he was allowed to attend.

[9] The appeal was heard by Judge Bush on 9 May 2005. He allowed the appeal and ordered that 'if it is determined that the defendant was not served with the claim form and had no knowledge of the proceedings before judgment was given at the trial on 14 June 2004, the judgment be set aside'. He said:

> 'If, in breach of the CPR, a claimant fails to serve a defendant and the defendant is unaware of the proceedings against him, in my judgment, justification for the exercise of the court's jurisdiction must be found. It does not appear to me that r 39.3 should be construed as investing the court with jurisdiction where the defendant has not been served and has no knowledge of the proceedings. In my judgment, guidance may still therefore be obtained from *White v Weston*.'

[10] On 20 June 2005 District Judge Giles considered the question whether the assumption on which his earlier decision and that of the judge were made was correct. His answer was yes. He held that the respondent had not been served with the claim form and the respondent did not have knowledge of the

claim form before the judge gave judgment at trial on 14 June 2004. The district judge accordingly set aside the judgment pursuant to the judge's order of 9 May 2005. He made no order on an application which had been made by the appellant to dispense with service but gave directions as to the future conduct of the action. Those included the direction that the claim be listed for trial in the period between 21 November and 9 December 2005 with a provisional estimate of one day. It follows that, but for this appeal, the trial of this action would have taken place by now. The district judge further ordered the claimants to pay the respondent's costs of the application to set aside the judgment and made an interim order for the payment of costs in the sum of £4,000.

[11] The judge had refused an application for permission to appeal against his order of 9 May 2005 but on 10 July 2005 Ward LJ granted an application for permission which was made by the first claimant, Mr Nelson, but not by the second claimant Ms Hanley. It is in this way that the appellant in this appeal is Mr Nelson and Ms Hanley is not an appellant. On 1 September 2005, at a hearing at which both parties were for the first time represented by counsel, Judge Cockcroft heard an appeal from the district judge's order of 20 June 2005. It is not absolutely clear to us whether counsel acted for both claimants or indeed whether Ms Hanley was a party to the appeal. However that may be, Judge Cockcroft refused the appellant's application to stay the appeal from that order and dismissed the appeal save that the appeal from the order for costs was adjourned pending the outcome of this appeal. He reserved the costs of the appeal before him. On 7 November 2005 District Judge Giles suspended the operation of the case management directions pending the outcome of this appeal.

THE APPEAL

[12] Although the grounds of appeal have been put in various ways and there is a respondent's notice there is one central issue of principle in the appeal. It is this. Where judgment is given at a trial for a claimant against a defendant in circumstances in which the defendant was not served with the proceedings in accordance with the CPR and has no knowledge of the proceedings, is an application to set aside the judgment governed by r 39.3(5)? The district judge said that the answer was Yes, whereas the judge said that the answer was No. We put the question in this way because (as set out above) it has now been held that the respondent was not served with the claim form in accordance with the CPR and, moreover, that it was not notified of the trial date and had no knowledge of the proceedings before the trial or before judgment was given for the claimants.

[13] The appellant says that the court only has jurisdiction to set aside the judgment under r 39.3. The respondent says on the other hand that it is entitled to have the judgment set aside as of right. It says that it has such a right as a matter of law independently of the provisions of the CPR. Alternatively it says that, if the court has a discretion under the CPR, it is a discretion which can only be exercised in one way. We will consider those questions of principle first before saying a word about the position of the appellant and about the facts.

[14] Before doing so, it is we think important to note that the respondent sought the setting aside of the judgment. As we understand it, although on 20 June 2005 District Judge Giles made no order on the claimants' application to set aside service, the respondent does not now require service of the claim form.

It sensibly accepts the directions given by the district judge on that occasion which have been suspended pending the outcome of this appeal. Thus, if the appeal is dismissed, the respondent does not require service of the claim form but accepts that, in the absence of any settlement, there will be a trial of the issues raised by the particulars of claim and by the defence which the respondent served in June 2005. This is important because it means that the court is not concerned with any application either for an extension of time for the service of the claim form or for an order dispensing with service of the claim form.

BEFORE THE CPR

[15] In *Hackney London BC v Driscoll* [2003] EWCA Civ 1037, [2003] 4 All ER 1205, [2003] 1 WLR 2602, Brooke LJ summarised (at [13], [16]) the facts and judgments in *White v Weston*. In short a county court summons was purportedly served on the defendant at a previous address and he did not receive it. This court, comprising Russell and Sachs LJJ, treated the case as one in which the defendant had not been duly served with process. Judgment was given against him without his having any knowledge of the proceedings. The court held that he was entitled to have the judgment set aside as of right, ex debito justitiae, on the basis that, as Russell LJ put it ([1968] 2 All ER 842 at 846, [1968] 2 QB 647 at 659), in a passage quoted by Brooke LJ, the defect was so fundamental as to entitle the defendant to have the judgment set aside.

[16] Both Russell and Sachs LJJ discussed earlier cases which had debated whether in such or similar circumstances the judgment was a nullity or a mere irregularity. They both concluded that on either footing the defendant was entitled to have the judgment set aside. This was essentially because the defendant was a stranger to the proceedings. Russell LJ described the defendant as a stranger to the hearing at which judgment was given but, given the court's conclusion that he had not been served with the proceedings, he was a stranger to the proceedings themselves.

[17] The decision in *White v Weston* was followed subsequently over the years before the CPR came into force. It was sometimes followed on the basis of a right outside the Rules of the Supreme Court or the County Court Rules and sometimes on the basis that, although the court had a discretion, it could only be exercised in one way. An example of the first type of case is *Willowgreen Ltd v Smithers* [1994] 2 All ER 533, [1994] 1 WLR 832, where there was again no service in accordance with the rules and Nourse LJ rejected the submission that there was any discretion in the matter. It is, however, right to say that both *White v Weston* and *Willowgreen Ltd v Smithers* were county court cases and the CCR were in somewhat different terms from the RSC.

[18] As Brooke LJ observed in *Hackney London BC v Driscoll* [2003] 4 All ER 1205 at [22], [2003] 1 WLR 2602, RSC Ord 2, rr 1 and 2 abolished the old distinction between a step in the proceedings which was a nullity and a step which was an irregularity. Any failure to comply with the requirements of the rules 'whether in respect of time, place, manner, form or content or in any other respect' was to be treated as an irregularity (RSC Ord 2, r 1(1)). The court had power, by RSC Ord 2, r 1(2), to set aside the irregularity 'on such terms as to costs or otherwise as it thinks just' but, by RSC Ord 2, r 2(1), only provided that the relevant application was made within a reasonable time. In *Al-Tobaishi v Aung* (1994) Times, 10 March, in a passage also quoted by Brooke LJ, Stuart-Smith LJ, with whom Kennedy LJ agreed, said:

'Whether it is entirely right to say that there is no discretion in the matter or whether, as it seems to me, the Court of Appeal in *White v Weston* said that there may be a discretion but it can only be exercised one way, is I think immaterial. If it is an exercise of discretion, where there has been no service at all, the discretion can only be exercised one way as appears to have been the view of the court in *Gold Ocean Assurance Ltd v Martin, The Goldean Mariner* [1990] 2 Lloyd's Rep 215.'

[19] It is we think clear that, if this case had occurred before the CPR, the court would have set aside the judgment. In *Akram v Adam* [2004] EWCA Civ 1601, [2005] 1 All ER 741, [2005] 1 WLR 1762, Brooke LJ observed (at [32]) that under the pre-CPR practice there was a difference between an irregular judgment, which could be set aside as of right, and a regular judgment, where the defendant had to show that he had a defence on the merits before the court would be prepared to have the judgment set aside. This was the practical effect of the pre-CPR cases to which we have referred. The question in this appeal is whether the position is the same or different under the CPR.

THE POSITION UNDER THE CPR

[20] There have been a number of cases in this court since the CPR came into force which have touched on the problem raised by this appeal. Brooke LJ has made a major contribution to many of them but none of them is directly in point. In *Akram v Adam* [2005] 1 All ER 741 at [25], [2005] 1 WLR 1762 Brooke LJ said that he would prefer to express no views about the correct legal analysis when a 'defendant' avers that he had no notice of the proceedings at all, so that he might be regarded as a 'stranger' to them. This is such a case because, as was assumed by the judge and subsequently held to be correct, the respondent was not served with the claim form and had no knowledge of the proceedings at all until after judgment was given.

[21] Some of the cases decided under the CPR are cases in which judgment in default was given and to which Pt 13 applied and some were cases in which it was held that r 39.3(5) applied. It is not suggested that Pt 13 applies here because it is common ground that Pt 55 applies. That is because it is accepted that this is a possession claim within the meaning of r 55.1 and that Pt 55 is applicable because the claim includes a possession claim brought by a landlord (or former landlord) within r 55.2(1)(a)(i). By r 55.4 the particulars of claim had to be served with the claim form and r 55.5(1) provides that the court will fix a date for the hearing of the claim when it issues the claim form. It was pursuant to that rule that the court fixed 14 June 2004 when the claim form was issued on 18 May. By r 55.7(1) an acknowledgment of service was not required and r 55.7(3) provides that, where the defendant does not file a defence within the time specified, he may take part in any hearing but that the court may take account of his failure to serve a defence in deciding what order to make about costs. Rule 55.7(4) expressly provides that Pt 12 does not apply in a claim to which Pt 55 applies.

[22] Rule 55.8(1) provides that at any hearing fixed in accordance with r 55.5(1) (such as that fixed in this case) the court may decide the claim or give case management directions. By para (4), save in a case against trespassers (which it is agreed this is not), all witness statements must be served at least two days before the hearing and para (6) provides: 'Where the claimant serves the claim form and particulars of claim, he must produce at the hearing a certificate

of service of those documents . . .' In this case the claimants did not purport to serve the claim form or the particulars of claim because they were served by the court. By r 6.14(1), where a claim form is served by the court, the court must send the claimants a notice which will include the date on which the claim form is deemed to be served under r 6.7. Although the court's computerised record states that 'deemed service' was on 22 May 2004, we are not sure whether such a notice was sent by the court to the claimants in this case. We have only seen a notice of issue.

[23] In any event, it is clear that Pt 55 proceeds on the basis that the claim form and particulars of claim will be served in accordance with the CPR, so that the defendant will have notice of the claim and of the hearing date and will have an opportunity both to file a defence and to appear at the hearing. In this case the defendant had no such notice.

[24] The question is whether r 39.3(5) applies. Mr Jones submits on behalf of the appellant that it does. Rule 39.3 provides, so far as relevant, as follows:

'(1) The court may proceed with a trial in the absence of a party but . . . (c) if a defendant does not attend, it may strike out his defence or counterclaim (or both).

(2) Where the court strikes out proceedings, or any part of them, under this rule, it may subsequently restore the proceedings, or that part.

(3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.

(4) An application under paragraph (2) or paragraph (3) must be supported by evidence.

(5) Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant—(a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him; (b) had a good reason for not attending the trial; and (c) has a reasonable prospect of success at the trial.'

[25] Mr Jones submits that the respondent is a party who did not attend the trial and the court gave judgment against it within the meaning of r 39.3(3) and that accordingly the respondent's application to set aside the judgment is under para (3). He submits that it follows from the express terms of para (5) that the court may grant the application 'only if' the applicant satisfies the criteria in sub-paras (a), (b) and (c) of para (5). There is undoubtedly some force in that submission if attention is centred on the words of the rule.

[26] Mr Jones further relies in support of his submission upon the post-CPR decisions in this court. Most importantly, he relies upon the decision in *Akram v Adam*. The claimant issued proceedings for possession. The claim form was posted to the defendant at his usual residence and was not returned undelivered. It was held to have been properly served under r 6.5(6). The claim form contained a notification that the claim would be heard on a particular date. The defendant was however unaware of the proceedings and, unsurprisingly, he did not attend the hearing. A possession order was made against him. He subsequently learned of it and applied for an order setting aside the judgment. It appears that the application in *Akram v Adam* was made under r 13.3, presumably on the basis that a default judgment had been given

under Pt 12. Nobody drew the court's attention to the fact that the case should have been treated as a case to which Pt 55 applied, and this consideration was not noticed by anybody before judgment was given. As stated above, in the instant case it is common ground that judgment was given, not in default under Pt 12, but after a hearing under Pt 55.

[27] In *Akram v Adam* the district judge set aside the judgment but the judge allowed the claimant's appeal, with the result that the application to set aside the judgment failed. An appeal to this court was dismissed. Brooke LJ, with whom Jonathan Parker and Keene LJJ agreed, held that there had been good service of the claim form under the rules, notwithstanding the fact that the defendant was unaware of the fact, that the court had a discretion whether or not to set aside the judgment and that in all the circumstances the judge was justified in refusing to do so.

[28] In the course of his judgment Brooke LJ drew attention ([2005] 1 All ER 741 at [23], [24], [2005] 1 WLR 1762) to the judgment of Dyson LJ, giving the judgment of the court in *Cranfield v Bridgegrove Ltd* [2003] EWCA Civ 656, [2003] 3 All ER 129, [2003] 1 WLR 2441 (also known as *Smith v Hughes*), where he said this (at [102]) about the requirements of r 6.5(6):

> 'In our judgment, the position is clear. There are two conditions precedent for the operation of the provisions of r 6.5(6), namely that (a) no solicitor is acting for the party to be served, and (b) the party has not given an address for service. If those conditions are satisfied, then the rule states that the document to be sent *must* be sent or transmitted to, or left at, the place shown in the table. In the case of an individual, that means at his or her usual or last known residence. The rule is plain and unqualified. We see no basis for holding that, if the two conditions are satisfied, and the document is sent to that address, that does not amount to good service. The rule does not say that it is not good service if the defendant does not in fact receive the document. If that had been intended to be the position, the rule would have said so in terms. Nor can we see any basis for holding that, if the claimant knows or believes that the defendant is no longer living at his or her last known residence, service may not be effected by sending the claim form, or leaving it at, that address. That would be to fly in the face of the clear words of the rule. The rule is intended to provide a clear and straightforward mechanism for effecting service where the two conditions precedent to which we have referred are satisfied.'

[29] Having quoted that paragraph (among others) and referred to *White v Weston* [1968] 2 All ER 842, [1968] 2 QB 647, *Godwin v Swindon BC* [2001] EWCA Civ 1478, [2001] 4 All ER 641, [2002] 1 WLR 997, *Hackney London BC v Driscoll* [2003] 4 All ER 1205, [2003] 1 WLR 2602 and a number of other cases, Brooke LJ summarised the position under the RSC in this way ([2005] 1 All ER 741 at [31]):

> '... The position is most clearly stated in a passage in the dissenting judgment of Orr LJ in *Thomas Bishop Ltd v Helmville Ltd* [1972] 1 All ER 365 at 376–377, [1972] 1 QB 464 at 479 which was cited and expressly approved in [*A/S Cathrineholm v Norequipment Trading Ltd* [1972] 2 All ER 538, [1972] 2 QB 314] (where this court had to choose between earlier conflicting authorities):
>
> "... the point of time to be looked at in deciding whether the judgment was regularly obtained is the time when the judgment was given or signed, and if at that time there is nothing known to the court (or to the plaintiff whose duty it would be to communicate it to the court) which indicates that the relevant process has not been delivered in the ordinary course of post, it is to be deemed to have been so delivered for the purposes of that judgment, although it will be open to the defendant to apply to have the judgment set aside in the court's discretion on the ground, inter alia, that he was not served or was not served in time."'

[30] We have already referred to the distinction drawn before the CPR between a regular and an irregular judgment as explained by Brooke LJ in *Akram v Adam* [2005] 1 All ER 741 at [32], [2005] 1 WLR 1762. Brooke LJ then observed (at [33]) that the CPR rule-makers had the pitfalls of earlier practice well in mind when they made their new procedural code. He first identified the particular provisions of CPR Pt 6 and then the relevant provisions of Pt 13 as follows:

> '... Thus the new code ... (vi) made it clear that the difference between a default judgment wrongly entered (which must be set aside—see CPR 13.2) and any other default judgment (which may only be set aside if one of the conditions set out in CPR 13.3(1) are satisfied and the application was made promptly) depends on whether the procedural steps required by CPR 12.3 were or were not followed (so far as relevant in the particular circumstances) or whether the whole of the claim had been satisfied before the judgment was entered; (vii) made a special provision in CPR 13.5(2) requiring a claimant to file a request for his own judgment to be set aside, or to apply to the court for directions, if after entering judgment he subsequently has good reason to believe that the particulars of claim did not reach the defendant before he entered judgment.'

f Rule 13.5 has since been revoked. The provisions of Pt 13 are different from those of r 39.3.

[31] Brooke LJ summarised his conclusions (at [34]):

> 'In the present case on the findings of the district judge the judgment was regularly entered, because it was posted to the defendant at his usual residence and the district judge made no finding that the claim form was returned undelivered. The situation might have been different if she had found that the claimant deliberately suppressed the claim form when it arrived by post in his house. It follows that on the ordinary interpretation of the relevant provisions of the CPR, supported by the judgment of this court in [*Cranfield v Bridgegrove Ltd* [2003] 3 All ER 129, [2003] 1 WLR 2441] (see [23]–[24], above), this judgment could only be set aside as a matter of discretion pursuant to CPR 13.3, and it would not be possible to fault the way in which Judge Yelton exercised his discretion. The suggested defence had no merit at all. For completeness I would add that Mr Adam appears to have paid no rent at all since 1997, and the idea that Rent Act protection in these circumstances protects a tenant who was in fact habitually living with his sister on the other side of London is not a particularly appealing one.'

[32] Brooke LJ emphasised (at [40]), by reference to the judgment of Dyson LJ in *Hashtroodi v Hancock* [2004] EWCA Civ 652, [2004] 3 All ER 530, [2004] 1 WLR 3206, the importance of generally construing the CPR, the 'new

procedural code', without reference to the earlier case law under the RSC. Brooke LJ set out his further conclusions as follows:

> '[41] I do not see anything in the new code which contravenes art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) in the way which Mr Zuckerman suggests. A code which permits service by post to an individual at his usual or last known residence, and which allows such service to stand as good service unless it is known before a default judgment is entered that that method of service was ineffective provides for an accessible, fair and efficient way of administering justice, and these are all attributes much prized by Strasbourg jurisprudence.
>
> [42] The code gives a defendant access to a court if for some reason the prescribed method of service does not draw the proceedings to his attention before the judgment is entered. So long as the claimant has complied with the rules, the judgment is a regular one, but if the defendant can show that he has a real (and not a merely fanciful) prospect of successfully defending the claim or that there is some other good reason why the court should intervene, the court is empowered to set aside the judgment, so long as the application is made promptly, after the defendant has become aware of the proceedings.'

[33] Mr Jones submits that the reasoning in *Akram v Adam* supports his submissions. He submits that, where (through no fault of his own) a defendant is unaware of the proceedings before judgment is given, there is no distinction in principle between a case in which the defendant is served with a claim form in accordance with the CPR and a case in which the defendant is not served as a result of an error, as in the present case. In each case the defendant cannot take any step to defend himself, so that the same principles should apply to the setting aside of a judgment. In the case of a default judgment the relevant principles are set out in Pt 13 and in other cases they are set out in Pt 39.

[34] This is a case, he submits, to which r 39.3 applies and he draws attention to the decision of this court in *Vinos v Marks & Spencer plc* [2001] 3 All ER 784, in which it was held that the general words of r 3.10 could not extend to enable a court to do what another rule expressly forbade. Rule 3.10 provides that, where there has been an error of procedure such as a failure to comply with a rule or practice direction, the error does not invalidate any step taken in the proceedings unless the court so orders and the court may make an order to remedy the error. In *Vinos v Marks & Spencer plc* the court held that the court could not extend time for service under r 3.10 in circumstances where the power of the court to extend time was limited by the express provisions of r 7.6(3), which provided that the court could make such an order 'only if' certain criteria were satisfied. Mr Jones submits that the same applies here because of the expression 'only if' in r 39.3.

[35] There is undoubtedly some force in Mr Jones's submissions, especially in the light of the decision in *Akram v Adam*. However, we have reached the conclusion that they should not be accepted. The essential question is whether this is a situation to which r 39.3 applies. So far as we are aware, there is no case in which the rule has been held to apply where the defendant has not been served with proceedings in accordance with the CPR and is ignorant of them. To accede to Mr Jones's submissions involves disregarding the complex

provisions for service of process under the CPR and holding that, notwithstanding the fact that he has not been served (or deemed to have been served) with the proceedings, the burden is on the defendant to satisfy the criteria in sub-paras (a), (b) and (c) of r 39.3(5). That includes his showing that he acted promptly and that he has a reasonable prospect of success at the trial.

[36] It is, in our judgment, exceedingly unlikely that the draftsman of the CPR intended such a result. The CPR proceed on the basis that a defendant must be served in accordance with the detailed rules of service and that, if he is not served in time, the claimant must obtain an order extending the time for service under r 7.6 or an order dispensing with service under r 6.9. Rule 7.6(3) provides that, if the claimant applies for an order extending the time for service after the time specified for service, the court may make such an order only if the court has been unable to serve the claim form, or the claimant has taken all reasonable steps to serve it but has failed to do so, and, in either case, if the claimant has acted promptly in making the application. The claimants would not have been able to satisfy those criteria on the facts of this case. As to dispensing with service, it has been held that the court will not make an order dispensing with service save in an exceptional case. No application was of course made, either to extend the time for service or to dispense with service before judgment was given, because the claimants did not appreciate that they had put the wrong address on the claim form and that, as a result, neither the claim form nor the particulars of claim were served in accordance with the rules.

[37] Mr Smith submits that r 39.3(5) is intended only to provide for applications to set aside regular judgments, as that expression was previously used. It cannot have been intended to extend to irregular judgments. Otherwise, the provisions as to service would be rendered almost meaningless and the onus would be on the defendant to show that it had a reasonable prospect of success at the trial in circumstances where, if the proceedings had been served, the defendant could (and in this case would) have defended them and, if the claimants wanted summary judgment under Pt 24, the onus would have been on them to show that the defendant had no real prospect of successfully defending the claim under r 24.2(a)(ii): see *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, (2003) Times, 18 April and *Civil Procedure* (2006), vol 1, p 354 (para 14.2.5) (the White Book). Yet r 39.5(5) contains no reference to service but assumes that service was properly effected.

[38] We note that the editors of the White Book take this view. They say (vol 1, pp 1025–1026 (para 39.3.7)):

> 'Note that the wording of r.39.3(5) provides more stringent requirements than CCR O.37, r.2 which it replaced. The court no longer has a broad discretion. There is only jurisdiction to set aside a regular judgment if the party seeking to have the order set aside can satisfy all three requirements . . .'

They also note that that paragraph was quoted with approval by Simon Brown LJ in *Regency Rolls Ltd v Carnall* [2000] All ER (D) 1417. It is true, as Mr Jones observes, that Simon Brown LJ was not expressly considering the question whether the rule applied only to regular judgments but, in our judgment, the instincts of both the editors and Simon Brown LJ were correct.

[39] We do not think that the draftsman of the CPR can have intended to introduce what the editors call the more stringent requirements of r 39.3(5) into applications to set aside judgments irregularly obtained, in the sense of being

obtained without service of the claim form in accordance with the rules. In our judgment, the whole of r 39.3 contemplates a trial in the absence of a party who has been served under the rules or in respect of whom service has been dispensed with.

[40] Another pointer to this conclusion is this. If the judgment includes a judgment for a sum of money, which is likely to be the aggregate of a principal sum and interest on that sum, interest will be payable under the Judgments Act 1838 (as amended), or under an order made pursuant to s 74(1) of the County Courts Act 1984, on the aggregate sum from the date of the judgment until payment. That seems to us to be an unjust result if the judgment has been obtained without service of process and without any order dispensing with service.

[41] We note that in para 39.3.7 the editors of vol 1 of the White Book also refer to the principle in *White v Weston* [1968] 2 All ER 842, [1968] 2 QB 647 as being applicable where the claim form has not been served, so that in such a case the defendant is entitled to have the claim form set aside as of right. Whether it is correct to go so far as that seems to us to depend upon the extent of the court's discretion under other parts of the CPR but we agree with the editors that r 39.3(5) was not intended to extend to such a case. Such a case is distinguishable from *Akram v Adam* [2005] 1 All ER 741, [2005] 1 WLR 1762 because in that case there was service within the meaning of the rules whereas here there was not. A defendant like the respondent here is in a real sense a stranger to the proceedings and an application to set aside a judgment is not an application within the meaning of r 39.3(3).

[42] In all these circumstances, we have reached the conclusion that the judge was correct to hold that r 39.3(5) does not apply to a case of this kind and that the appeal must be dismissed on that basis.

[43] It does not, however, follow that under the CPR the defendant is entitled to have the judgment set aside as of right, ex debito justitiae, or indeed that, if there is a discretion it can be exercised in only one way. It was pressed upon us that such an extreme approach is inconsistent with the overriding objective of dealing with cases justly and that, on an application to set aside a judgment, (albeit irregularly obtained) a claimant might be able to demonstrate that there would be no point in setting aside the judgment and requiring the claimant to issue and serve new proceedings. Take, for instance, a case in which the claim form is served at the wrong address by mistake and in which the claimant cannot satisfy the strict criteria for extending the time for service (see r 7.6). If no question of limitation of action arises and there is no other benefit to the defendant in requiring the claimant to start fresh proceedings, it is contrary to the overriding objective that he should be required to do so to no good purpose at all. If he can show that there is no real prospect of his claim failing he should be able to obtain (or retain) his judgment in the current action.

[44] The question is whether the CPR permits such an approach. In our judgment, there are procedural ways in which to achieve that result. It was suggested in argument that there are a number of provisions of the CPR which (in combination) could be deployed to achieve it. They are rr 6.9, 3.1(2)(m), 3.1(7) and 3.10.

[45] As already stated, r 6.9 gives the court power to dispense with service. Although, again as already stated, the authorities show that the power should only be exercised in exceptional circumstances, the circumstances just described

seem to us to be capable of amounting to exceptional circumstances. Thus, it might well make sense to dispense with service and refuse to set aside the judgment in order to avoid the expense of fresh proceedings and unnecessary service. All would depend upon the circumstances of the particular case.

[46] Rule 3.1(2) sets out a list of powers which are additional to other powers in the rules or practice directions. It provides that the court has the powers in the list '[e]xcept where these Rules provide otherwise' and, after setting out a list of specific powers, provides that the court may: '(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.' Rule 3.1(7) provides: 'A power of the court under these Rules to make an order includes a power to vary or revoke the order.' Rule 3.10 (to which we referred earlier) provides:

> 'Where there has been a error of procedure such as a failure to comply with a rule or a practice direction—(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error.'

[47] It is said that r 3.1(7) does not apply because 'order' in the paragraph cannot include a judgment, that r 3.10 does not apply because purported service at an address not permitted by the rules is not an 'error of procedure' within the meaning of the rule and that r 3.1(2)(m) is not apt to remedy the position. We accept that, if an application to set aside an irregular judgment were governed by r 39.3(3) none of these rules would be relevant. Rule 3.1(2)(m) would not apply because it only applies '[e]xcept where these Rules provide otherwise'. Rule 3.10 would not apply for the reasons given in *Vinos v Marks & Spencer plc* [2001] 3 All ER 784, namely that the general words of r 3.10 could not extend to enable a court to do what another rule expressly forbade. The same principle would in our judgment apply to r 3.1(7).

[48] However, once it is held (as we have done) that r 39.3(5) does not apply to an application to set aside an irregular judgment, those principles do not apply to exclude the application of those three rules. While it is perhaps possible that there is no rule of the CPR which governs an application to set aside such a judgment and that the court's power to do so stems from some more general power to set aside a judgment ex debito justitiae, it seems unlikely that such a comprehensive code does not cover such a situation. We would hold that the attempted service at the wrong address was an 'error of procedure' within the meaning of r 3.10. The court is therefore empowered to make an order to remedy the error, and if r 3.10(b) was not thought strong enough to give the court power to make an order to the effect that an irregular judgment should be set aside, the necessary power is available under r 3.1(2)(m). We do not consider it necessary to consider the vexed question whether the word 'order' is wide enough to include 'judgment' in r 3.1(7): for the problems created by the distinctions between 'judgments' and 'orders' in the CPR see the White Book, vol 1, pp 1044–1046 (para 40.1.1).

[49] On such an application, in construing the CPR, it is not in our judgment appropriate to hold, on the true construction of the wide and unfettered discretion given by those two rules, that the discretion to set aside an irregular judgment can only be exercised in one way, namely by setting aside the judgment. There may be circumstances in which the overriding objective of dealing with cases justly, which of course expressly includes, by r 1.1(2), saving

expense and dealing with the case in ways which are proportionate, requires the discretion to be exercised differently.

[50] That is not to say that on an application to set aside a judgment in a case of this kind the just order will not almost always be to set aside the judgment. In a case where the proceedings have not been served on the defendant and service has not been dispensed with before judgment, a court could only properly refuse to set aside a judgment where there is no prejudice to the defendant (or, possibly, to some innocent third party who has acted to his detriment in the belief that the judgment was regularly entered). As we see it, that will ordinarily involve the claimant persuading the court that there is no prejudice to the defendant in dispensing with service and that the defendant is not otherwise prejudiced. We do not at present see how that will be possible in a case where the judgment includes a money judgment of an aggregate sum inclusive of interest and costs because of liability to interest on the aggregate sum under the Judgments Act 1838 or the County Courts Act 1984. Nor do we see how it will be possible where the judgment ordered the defendant to pay the costs. It was to set aside the order for costs that the defendant fought *White v Weston*. However, each case depends upon its own facts and there may be circumstances in which it will not be appropriate to set aside the judgment, or at any rate, the whole judgment, as for instance when the defendant has delayed inexcusably in making his application to the court after learning that the judgment had been entered against him.

[51] Another possibility on such an application would be for the claimant to seek an order dispensing with service and to cross-apply for summary judgment under Pt 24. In such a case, the court might very well set aside the judgment in order to ensure that the defendant suffers no prejudice and then consider the claimant's Pt 24 application. The burden of proof would then be on the claimant, where it should lie, and the defendant would not be prejudiced by the order of costs or by the effect of the Judgments Act on his liability, even assuming the liability remains the same.

THE PRESENT CASE

[52] It is startling that the issues discussed above have arisen out of the circumstances of this case, which are far from typical. As the argument proceeded it became plain that, whatever the answer to the issues raised by the application of r 39.3(5) which the claimants raised as a preliminary issue, the judgment would have to be set aside. As appears from the claim form quoted earlier, the claimants claimed possession together with rent, reparations and mesne profits. The claim for mesne profits is not easy to understand since the claim form was dated 14 May 2004, whereas mesne profits were claimed up to 2 April 2005. However that may be, it is far from clear what the appellant's claim is by contrast with the claim of the second claimant, who has not appealed against the decision of the judge.

[53] It appears to be common ground that the respondent was at one time the lessee of the property under a tenancy agreement with the owner, Maria Hunter, dated 14 November 2000. It is also common ground that the property was transferred to the second claimant by Ms Hunter in about October 2001. The respondent says that the second claimant thereupon became bound by the tenancy agreement pursuant to s 3(3) of the Landlord and Tenant (Covenants) Act 1995. The respondent's case, which is pleaded in a defence dated 21 June 2005, is that the second claimant failed to repair the property in

accordance with the terms of the tenancy agreement and that following an inspection on 7 October 2003, as it was entitled to do, by a letter to the second claimant dated 16 October 2003, it terminated the agreement with effect from 23 October 2003 under cl 4.1.3. It also says that it was entitled to determine the agreement under cll 4.1.2 and 4.1.4. Alternatively it says that, if for some reason the second claimant was not bound by the agreement, the respondent was a tenant at will and entitled to determine the tenancy. In these circumstances it is not liable to the second claimant for rent or mesne profits. It does not assert a right to possession of the property and denies the claim for reparations. It further states that the claimants retained keys to the property and that it is apparent from the particulars of claim that they entered the property at the end of October 2003.

[54] It may be that for these or other reasons the second claimant did not appeal from the decision of the judge and, as we understand it, as between the respondent and the second claimant, the action will proceed in accordance with the case management directions referred to above. The position and role of the appellant are far less clear. His case appears to be that some kind of agreement was reached between him and the respondent under which, in consideration of work being carried out to make the property habitable, the respondent agreed a new tenancy agreement with him or on his behalf at a rent of £520 a month, alternatively that the respondent is estopped from denying that it did so. It is further said that there was never a tenancy between the second claimant and the respondent at a rent of £390 a month and, in any event, that the respondent was not entitled to determine whatever tenancy there was. The problem is that it is far from clear from the particulars of claim what are said to be the rights of the appellant and what are said to be the rights of the second claimant.

[55] It is not appropriate for this court to consider any of these matters in any detail but we have no doubt that, whatever test is applied and whatever discretion is being exercised, the respondent is entitled to have the judgment set aside so that the whole matter can be determined at a trial, both as between the second claimant and the respondent and as between the appellant and the respondent. In our view that should have been plain to all at the outset and much time and money could have been saved if the district judge had been asked to consider the merits and not presented with a preliminary issue. However that may be, in the result the appeal must be dismissed on the ground that the judge was correct to hold that r 39.3(5) does not apply to an application to set aside an irregular judgment of this kind.

CONCLUDING REMARKS

[56] We hope that the Rules Committee may introduce a new rule to provide expressly for those cases where judgment has been entered even though the defendant has never been served with the claim form at all (even by virtue of 'deemed service'). Until a new rule is introduced, we believe it may be helpful if we summarise the general effect of this judgment: (i) If the defendant can show he has not been served (or is not deemed to have been served) with the claim form at all, then he would normally be entitled to an order setting the judgment aside and to his costs in making the application. (ii) If, when the claimant is served with an application to set aside such a judgment, he believes that he can show that the defendant has no real prospect of successfully defending the claim, then he may apply to the court for orders dispensing with service of the claim form, permission (under r 24.4(1)) to apply forthwith for

summary judgment, and for summary judgment on his claim. (iii) If such an application and cross-application are made the court should make such order as it considers just. (iv) If the claimant can show that the defendant has been guilty of inexcusable delay since learning that the judgment has been entered against him, the court would be entitled to make no order on the defendant's application for that reason. The judgment would then stand (subject to any direction made by the court, whether in relation to statutory interest accruing due on the judgment or otherwise).

Appeal dismissed.

Vanessa Higgins Barrister.