CP 11

England and Wales Court of Appeal (Civil Division) Decisions

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A3/1999/1052, A3/200/0220

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
(His Honour Judge Behrens
sitting as a judge of the High Court)

The Royal Courts of Justice
The Strand
London WC2A
Monday 16 October 2000

Before:

LORD JUSTICE SIMON BROWN
LORD JUSTICE RIX
LADY JUSTICE ARDEN

Between:

(1) REGENCY ROLLS LIMITED
(2) DAVID ERIC KEMP **Claimants/Respondents**
and:
MURAT ANTHONY CARNALL **Defendant/Appellant**

MR A STAFFORD QC (instructed by Bevan Ashford, 35 Colston Avenue, Bristol) appeared on behalf of the Appellant
MR J M ALLEN QC instructed by (Jordans, The Woolstapler, 8 Cheapside, Wakefield, West Yorkshire) appeared for the Respondent

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HTML VERSION OF JUDGMENT

Monday 16th October 2000

1. LADY JUSTICE ARDEN: This is an appeal from the order of His Honour Judge Behrens dated 29 September 2000, whereby he dismissed the defendant's application to set

aside the orders made by the court on certain preliminary issues on 22 March 1999. I shall refer to the defendant/appellant as "Mr Carnall". Costs were awarded against Mr Carnall on the standard basis and Mr Carnall was ordered to make an interim payment on account of the costs ordered against him on that date and also (as I shall explain) on 22 March 1999, in the sum of £50,000, although that part of the order has been stayed pending this appeal.

2. By virtue of the order of 22 March 1999, the court declared that Mr Carnall had not been appointed a director of the first claimant ("the company") and that the second claimant, Mr Kemp, had not resigned as a director of the company, and restrained Mr Carnall from involvement in the management of the company or holding himself out as a director of the company. The court also made an order that Mr Carnall should pay all the claimants' costs of the preliminary issue on an indemnity basis.

3. There are two appeals, one with the permission of the judge, against his order as to costs, and the other as to his refusal to set aside the judgment.

4. On this appeal, Mr Stafford has appeared for Mr Carnall. Mr Allen QC appeared for the respondents at the sitting of the court. He asked for an adjournment as he was indisposed. We refused, on the basis that we might not be calling upon him and that, if we did require the assistance of the respondents' counsel, we would adjourn the case to be reheard before a different constitution. We have a comprehensive skeleton argument from Mr Allen and we did not find it necessary to call upon the respondents.

5. In this action, the claimants seek damages and injunctions in respect of actions by Mr Carnell in respect of the company's property, and injunctions against further trespass. The company carries on business as a wholesale stationers. The principal shareholders of the company are, as to 50 per cent, Mr and Mrs Kemp, and as to the remaining 50 per cent, Mr Goodyear or alternatively Mr Carnall, who is said to have bought Mr Goodyear's shareholding. Prior to the events in question, the directors were Mr and Mrs Kemp. Mr Carnall claims that he bought Mr Goodyear's shares in 1995, but Mr Goodyear is now bankrupt.

6. Mr Carnall alleges that early in the morning of 7 October 1997 a meeting took place at Mr Carnall's home, at which Mr Kemp appointed Mr Carnall as a director of the company and resigned as director himself. His evidence is that Mr Kemp told him that Mrs Kemp was aware of what he was doing. Mr Kemp asked Mr Carnall to sign a form 288(a) recording Mr Carnall's appointment and a form 288(b) recording Mr Kemp's resignation which, it is said, he took away with him. It is accepted by Mr Stafford that the appointment did not give Mr Carnall any executive powers in the company; that means, as I see it, that he would not have power to dismiss employees; he would need board authority for that. The appointment would, however, have enabled him to enter upon the company's premises and to exercise his rights, for instance to inspect the company's books.

7. Mr Kemp was about to go to the United States of America on holiday, which he did on 9 October 1997. On 17 October Mr Carnall attended at the premises of the company. It is said that he then dismissed employees and started to examine the books of the company. It is further said that he opened a personal safe of Mr Kemp's and removed its contents and company property. Mr Carnall says that he found on the company's premises copies of forms 288(a) and (b), recording respectively the appointment of himself as director of the company and the resignation of Mr Kemp as a director and the company's secretary. The form 288(a) appears to bear Mr Kemp's signature as well as that of Mr Carnall, and the form 288(b) bears that of Mr Carnall as a serving director.

8. Mr Kemp was told of Mr Carnall's arrival at the premises on 17 October by telephone, and he returned immediately at, we are told, great expense and inconvenience. Rattee J granted him interlocutory relief. These proceedings were then started.

9. His Honour Judge Behrens ordered the trial of preliminary issues, which began on 21 October 1998. Mr Kemp gave his evidence. This lasted the whole of the three days set aside for the case, so that the case had to be adjourned. It could not be reheard until March 1999. On the occasion of the hearing in March 1999, Mr Allen QC and Mr Partington represented the respondents to this appeal. Mr Carnall was represented by

aside the orders made by the court on certain preliminary issues on 22 March 1999. I shall refer to the defendant/appellant as "Mr Carnall". Costs were awarded against Mr Carnall on the standard basis and Mr Carnall was ordered to make an interim payment on account of the costs ordered against him on that date and also (as I shall explain) on 22 March 1999, in the sum of £50,000, although that part of the order has been stayed pending this appeal.

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counsel, but not counsel appearing for him on this appeal.

10. I should draw attention to Article 95 in Table A appearing the First Schedule to the Companies Act 1948 (or as prescribed by Companies (Tables A-F) Regulations 1985). This article applies to the company. It provides that:

> "The director shall have power at any time, and from time to time, to appoint any person to be a director, either to fill a casual vacancy or as an addition to the existing directors. . . Any director so appointed shall hold office only until the next following annual general meeting, and shall then be eligible for re-election. . . "

11. It is accepted by Mr Stafford that, as a result, if Mr Carnall was appointed a director in October 1997 he would have retired at the next annual general meeting. As I see it, therefore, his appointment was likely to have been of a very temporary nature. It is accepted that he was not reappointed a director of the company and accordingly, as I see it, the property of the company would have to be handed back, leaving outstanding any question or issue as to whether the company had any claims for damages for what he had done prior to ceasing to being a director.

12. On 18 March 1999 Mr Carnall applied to the court for an adjournment on the ground that his solicitors had come off the record. On that occasion, Mr Carnall told the court that he would not be calling his forensic expert, Mr Frits Cohen. Mr Cohen had stated in his expert's report that it was "probable" that the form 288, recording the appointment of Mr Carnall as director, was signed by Mr Kemp. Mr Cohen later said it was "more likely than not" that it was signed by Mr Kemp, thus making his evidence on this issue less firm. His Honour Judge Behrens heard the application and refused to grant the adjournment sought.

13. On 21 March 1999 Mr Carnall was taken ill with 'flu. He remained housebound until 30 March 1999. At the resumed trial of the preliminary issues on 22 March, Mr Carnall did not attend. His Honour Judge Behrens saw a medical certificate. He was concerned about it because, among other reasons, it was signed by a person who had not personally seen Mr Carnall. The learned judge refused to adjourn the matter. He also found that Mr Carnall's non-attendance was an abuse of the process of the court, and he ordered Mr Carnall to pay indemnity costs.

14. There is no challenge to the learned judge's refusal to adjourn the matter, which in fact proceeded before the judge on that date. The claimants adduced their evidence and the judge, as I have explained, made orders in favour of the claimants on the preliminary issue.

15. I should now set out the steps which were taken by Mr Carnall after that hearing. On 25 March he contacted Pinsent Curtis, solicitors. He made an appointment for the next day, but was too ill to attend. On the next day, however, he was served with a copy of the order of His Honour Judge Behrens made on 22 March. Mr Carnall obtained legal advice from Pinsent Curtis on 29 or 30 March, and His Honour Judge Behrens found that Mr Carnall was at all times aware of of the need to act promptly. By 31 March it had become clear that Pinsent Curtis were not to be retained. The Easter holidays then intervened in the period from 2 to 5 April 1999. On 6 April Mr Carnall had contacted new solicitors, Lupton Fawcett. On 9 April he attended an appointment with Lupton Fawcett. They requested more information. On 12 April he had a further meeting with Lupton Fawcett. On 14 April Lupton Fawcett inspected the court file. On 15 April Mr Carnall provided further documents to Lupton Fawcett. On 16 April Lupton Fawcett discussed the case with leading counsel. On 21 April there was a consultation with leading counsel, and the application to set aside was issued on the same day.

16. I now return to the judgment of His Honour Judge Behrens on 29 September. In this judgment he accepted that the illness of Mr Carnall had been genuine, but he did not set the judgment aside because of the lack of promptness in making the application, and the lack of reasonable success. I will at this stage read the relevant Civil Procedure Rule, Rule 39.3:

> "(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) for an order to restore proceedings 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 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."

17. As regards a reasonable prospect of success, His Honour Judge Behrens held that this meant more than simply a triable issue. He referred to his judgment of 22 March, in which he had set out a number of factors relevant to the likelihood of Mr Kemp having appointed Mr Carnall, especially: that it was difficult to see why Mr Kemp should have appointed Mr Carnall in all the circumstances; that what he had done after the alleged meeting was inconsistent with his having appointed Mr Carnall; for instance his return in haste from the United States. His Honour Judge Behrens also relied on the fact that he had seen Mr Kemp in the witness box. As a further ground, he thought there that was a real prospect of success as to whether Article 105 applied. This provides that:

> "All acts done by any meeting of the directors or of a committee of directors or by any person acting as a director shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid. . . be as valid as if every such person had been duly appointed. . ."

18. His Honour thought that there was a reasonable prospect of success as to whether this article applied in Mr Carnall's favour; but as that point only mattered if there had been a meeting, as Mr Carnall had alleged, he did not find that that point altered his judgment that there was no reasonable prospect of success.

19. I now turn to Mr Stafford's submissions on behalf of Mr Carnall. First, he submitted that Mr Carnall had acted promptly as required by rule 39.3. He submitted that "promptly" does not mean "in the shortest possible time". He drew attention to the fact that Mr Carnall had been unrepresented after the judgment of 22 March. He needed to find solicitors whose fees he could afford and in whom he had confidence. As regards reasonable prospects of success, he submitted that Mr Carnall's case was supported by the copy forms 288 which, as I have explained, Mr Carnall alleges he obtained from the company's premises on 17 October. He also submitted that Mr Carnall's case was supported by the evidence of Mr Clarke, whose witness statement we have seen. Mr Clarke was a windowcleaner who was at Mr Carnall's house on 7 October 1999. He says in his witness statement that he saw a car answering the description of Mr Kemp's car, and a person answering Mr Kemp's description, at the premises at the time in question. Thus, Mr Stafford submits, His Honour Judge Behrens could not conclude that Mr Carnall's case had no reasonable prospects of success simply because he had heard the evidence of Mr Kemp.

20. Mr Stafford then raises the question whether there could be an appointment by virtue of the fact that, even if Mrs Kemp had not given authority, that would not be an answer to Mr Carnall's alternative case that he had been appointed as a director by Mr Kemp and that by Article 105 his actions had authenticity even if the appointment was defective. I deal with this argument below.

21. Mr Stafford also submitted that the learned judge failed to take into account the credibility of Mr Carnall, whose evidence on illness he had accepted. Of course there were distinctions to be drawn between that evidence, which was uncontested, and accepting

his evidence on contested issues. Mr Stafford stressed that Mr Carnall's case turned on questions of fact and that Mr Carnall had not had an opportunity to present his evidence.

22. The respondents accept I take this from Mr Allen's skeleton argument that Mr Carnall did have a good reason for not attending the trial. But they submit that the facts show that Mr Carnall did not make his application to set aside promptly. They also submit that there is no reasonable prospect of success. They submit that this means more than a triable issue. Here, first, there was no board resolution, or resolution of the company at a general meeting, appointing Mr Carnall as director. Secondly, they submit that a resignation had to be in writing. Thirdly, they submit that section 285 of the Company Act 1985, which is to the same effect as Article 105, could not validate the appointment. Next they submit that Mr Kemp gave evidence that he had not discussed the appointment of Mr Carnall with Mrs Kemp, and was not cross-examined about this. Mrs Kemp denied that she had ever agreed to Mr Carnall's appointment and submitted that the forms 288 (a) and (b) were not signed with the signatures of Mr Kemp.

23. It was further submitted that there was no reason for Mr and Mrs Kemp to appoint Mr Carnall as director. The Kemps had developed the company's business and it was being successfully run by them, and they were dependent upon it for their livelihood. Further, Mr Kemp did not tell anyone of Mr Carnall's appointment and Mr Carnall did not attend the premises until some ten days later. Moreover, the respondent drew attention to the fact that the evidence shows that Mr Kemp left his home at 7.30 am and arrived at the company's premises at 8.15, a journey of 45 minutes, and submitted that he could not have done this if he had stopped on the way. The respondents also rely on the actions of Mr Kemp when he heard of Mr Carnall's presence on the premises. He immediately returned from the United States. The respondents submit that Mr Carnall should not be able to rely on the forensic evidence since he would not have done so had he attended the trial in March. On the question of discretion, they rely on inordinate delay and prejudice to the defendants. They submit that Mr Carnall has no assets and there is pending a bankruptcy petition against him which is supported by creditors who have, according to the respondents, debts owing to them of £60,000. They have been assured that there is only one judgment debt now pending against Mr Carnall.

24. Having set out those submissions, I now turn to my conclusions. The first issue is whether or not the application was made promptly. Mr Stafford began his submissions by saying that promptness was a flexible concept. I think that a note of caution should be struck here. The dictionary meaning of "promptly" is "with alacrity". I have grave doubts as to whether Mr Carnall acted with the requisite degree of alacrity, but in view of my conclusion on other matters I need not decide this point.

25. I now therefore turn to the question of whether or not Mr Carnall's case has reasonable prospects of success. For this purpose I am content to assume that the expression "reasonable prospect of success" means the same thing as "real prospect of success"; that is, that it it is not a fanciful case. Nonetheless, even on this basis, in my judgment Mr Carnall's case does not have a reasonable prospect of success.

26. There are, as I have indicated, some legal questions affecting the authority of Mr Kemp to appoint Mr Carnall as director. Mr Stafford contends that Mr Allen had accepted that these issues cannot be run on the appeal but, as they are short points of law and the court indicated that they were relevant to this appeal, we asked Mr Stafford to present argument on them.

27. As is apparent from Article 95, which I read, the directors have power to appoint additional directors but, of course, any so appointed hold office only until the next annual general meeting. The first question is whether there is a reasonable prospect of success in showing that Mr Kemp had actual authority to appoint Mr Carnall as director. For this purpose there would have to be a resolution, formal or informal, of the directors; that is, Mr and Mrs Kemp. Mr Kemp denied in his evidence that Mrs Kemp had authorised the appointment of Mr Carnall. The respondents - I am referring to paragraph 42 of Mr Allen's skeleton argument - said that this evidence given by Mr Kemp was not challenged by Mr Carnall at the hearing in October 1998. Mr Stafford was not then instructed and does not know what happened and, therefore, as I see it, cannot challenge what Mr Allen has said. I will deal with this point in the circumstances. As I see it, the judge could not have found that Mrs Kemp had indeed authorised the appointment, and thus Mr Carnall would

fail to establish that there was actual authority for this appointment. It will be borne in mind that at this stage of the proceedings, when a challenge ought to have been made, Mr Carnall was represented by counsel. Of course, if there were a retrial, Mr Carnall might take a different course and challenge Mr Kemp's evidence, but this is speculation and it would not be the purpose of awarding a retrial to give Mr Carnall an opportunity to take a step that he had failed to take originally.

28. Mr Carnall's alternative case, as advanced before us, is based on ostensible authority. Mr Stafford referred to Article 105, which I have read, but there is clear authority that this cannot validate an appointment. I think I need do no more than refer to a summary of what was decided in Morris v Kanssen [1946] AC 459, which is an authority on counsel's list for this appeal. Oliver J, in a case called Re New Cedos Engineering Co Ltd [1994] 1 BCLC 797 held that Morris v Kanssen established a number of propositions: first, that the section did not validate an appointment contrary to the company's articles; second, that the section could not assist a party who had knowledge of the facts giving rise to the invalidity; third, it could not assist a party if that party was put on enquiry and did not enquire; and, finally, could not assist where there was no appointment at all. So, as I see it, Article 105 could not validate an appointment by Mr Kemp.

29. I accept that Mr Stafford's argument was slightly different. It was that Mr Kemp had ostensible authority to appoint Mr Carnall as director, but that that was not based on Article 105 or on Morris v Kanssen but on a point of law. The court has not had Mr Allen's assistance on this point, for the reason that he is indisposed. It was not previously an argument in this case, and it may be that the evidence will not go to it. It must be very doubtful that Mr Carnall could establish that he was not on notice of Mr Kemp's want of authority, if that is the position. However, I am not proposing to go into that because, as I see it, it does not arise.

30. My principal ground for concluding that there is no reasonable prospect of success is that Mr Carnall's case, as I see it, lacks the requisite degree of credibility.

31. I now refer to His Honour Judge Behrens's judgment of 22 September 1999. The first point is that, as His Honour pointed out, Mr Kemp's version, supported by the events of 7 October, is supported by the evidence of several other witnesses. I can simply summarise what the judge said. Mr Kemp denies that he went to Crag Hill Farm - that is Mr Carnall's residence - on 7 October. He said that he left his home at the usual time, 7.30. He is supported in this by his wife and Mrs Nichol, who had stayed the night. He drove to the Royal Mail sorting office, arriving at 8.05, picked up the mail and arrived at work at 8.15. He is supported in this by Mr Roberts. He took a telephone call from Mr Nichol at 8.35 and was seen at work at 8.35 by Mr Inman, at 8.40 by Mr Leith and by Mr Smith at nine o'clock. The day was a memorable one because it was the day before he went on holiday. It was also the day on which another employee, Mr Sidall, won £64,000 on a Granada Television quiz show. Mr Kemp carried out his normal duties, which included having discussions with other employees, especially Mr Roberts and Mr Inman, making telephone calls and interviewing prospective employees. He did not leave the office at all, save for a short visit to Marks & Spencer, and he did not mention to anyone that he had resigned as director or appointed Mr Carnall as director. However, the judge, having set all that out, bore in mind the possibility that the times might be a little inaccurate. He says at the foot of page 10:

> ". . . I cannot place total reliance on the times and I cannot exclude the possibility that Mr Kemp left home slightly earlier than his usual 7.30 and did not arrive at work slightly later than the time he asserts of 8.15."

32. However, it is clear, even bearing that in mind, that Mr Kemp's version of events is supported by the evidence of several other witnesses. In support of Mr Carnall's case the only evidence, apart from that of Mr Carnall himself, is that of Mr Clarke. It is an extremely limited witness statement, which I have already summarised. Mr Carnall's case is also supported by the copy forms 288(a) and (b), but there the authenticity of Mr Kemp's signatures on those forms is challenged and the forensic evidence, as I have indicated, is not of great assistance to the court since it is inconclusive on the question whether the original signatures were valid or not. As I see it, the court would gain little assistance from the forensic evidence called on both sides. There is no contemporaneous documentation as to the meeting of 7 October, and Mr Clarke is giving

evidence only as to his identifying the motorcar and a person at Mr Carnall's home, and he could be mistaken in his recollection of what he saw.

33. In addition, His Honour Judge Behrens gave five more reasons as to why he preferred Mr Kemp's version of events to that of Mr Carnall. They are set out in his judgment at page 13 onwards. He points out that, were Mr Kemp to appoint Mr Carnall, it is difficult to see how that would achieve the object of obtaining the other 50 per cent of the shares. It would in effect be putting the company under the control of Mr Carnall if Mr Carnall had indeed acquired the 50 per cent owned by Mr Goodyear, and that was the person whose ownership of the shares Mr Kemp was disputing. Second, the judge pointed out that the activities of Mr Kemp on and after 7 October were inconsistent with those of a man who had resigned his directorship. He rang the office from America and so on. Third, the judge referred to the fact that he had heard Mrs Kemp's evidence. He pointed out that of course she had not been cross-examined - her evidence was taken on the occasion when Mr Carnall was ill - but he stated that he was impressed by the way she gave her evidence. Fourthly, the judge pointed out that, having been appointed a director on 7 October 1997, Mr Carnall did nothing about it until 17 October. The judge said that:

> "He said not a word about it and took no step to act on it for ten days and he then marched into [the company]'s premises at a time when Mr Kemp was on holiday".

34. Fifthly, the judge said that the forms 288(a) and 288(b) were not the sort of forms one would expect normally to be kept by directors. There had been no change in the directors of the company since 1991, and yet the forms were, on Mr Carnall's version, available at Mr Carnall's house on the morning of 7 October and, within ten to fifteen minutes, partially completed and ready for transmission to Companies House. The judge stated at page 15 that for all those reasons he had come to the clear conclusion that Mr Kemp did not resign as director on 7 October and did not appoint Mr Carnall as director.

35. It seems to me that Mr Carnall's version of events, and particularly the matters identified by the judge, are inherently incapable of belief and could not be described, as I see it, as having a reasonable prospect of success, even on the test which excludes only fanciful cases.

36. If I had found otherwise, there would be a question of how the court should exercise its discretion. As I see it, the question of exercise of discretion does not arise, but I would record that there have been no proposals for limiting the issues or time spent at any retrial, despite an invitation in that regard by Nourse LJ when he heard the application for permission to appeal. Speaking for my part, I would be very concerned about the delay which has occurred since these matters took place and the possible prejudice to Mr and Mrs Kemp in giving evidence at the retrial, and the enormous expense that would be involved. We are informed that Mr Carnall is short of funds. That is apparent from the fact that there is a bankruptcy petition pending against him. Mr Stafford, for understandable reasons, has declined to indicate whether any judgment for damages or for costs against Mr Carnall could be paid. I should say, however, that Mr Stafford has presented the case for Mr Carnall most clearly and persuasively.

37. That leaves me only the indemnity costs appeal. It has, as I understand it, been agreed that this appeal should be allowed. I further understand that Mr Carnall accepts that he should be liable to pay the costs of the preliminary issue on a standard basis. On that basis the only question is as to the costs of that appeal. As I see it, they should follow the event and the appeal should be allowed on that basis. It seems to me that the first appeal, however, should be dismissed. The costs of the first appeal should also follow the event of the award against Mr Cornall, and the costs on each appeal should be set against each other.

38. LORD JUSTICE RIX: I agree. The account given by Mr Carnall of his appointment as a director by Mr Kemp and of Mr Kemp's own resignation as director is simply incredible, for the reasons set out at greater length by Lady Justice Arden. There is no reason why Mr Kemp should have abandoned his livelihood and business career as the managing director of his company and left his wife, who still remained a director of the company, in the lurch, so that Mr Carnall, with whom he had been in any event in dispute for some time over a 50 per cent shareholding of the company, could profit from the successful

development of the company that Mr Kemp had been running - and all without any consideration from Mr Carnall. For the rest of 7 October, and at all times thereafter, Mr Kemp behaved as though none of what Mr Carnall says occurred had occurred, and it took Mr Carnall ten days to assert his new authority.

39. On any view of the test of a reasonable prospect of success, Mr Carnall in my judgment lacks any such prospect. It was, of course, unfortunate for him that he was ill on the day of the adjourned trial, but he almost immediately knew that the trial had continued in his absence and within some three or four days had managed, even though he still remained ill, to consult solicitors. He knew he had to act with promptness, as the judge found below. With that knowledge, all he had to do, at any rate in the first instance, was to write a letter to the court saying that he had been ill and unable to attend trial, and asking the court to give him a chance to prove his disability and to request a new trial. His evidence on the merits of this defence, such as they were, was already before the court. However broadly the concept of promptness might have to be regarded, for instance in a case where the appellant has an excellent case on appeal, in my judgment Mr Carnall here on any view failed to act promptly. He took another 26 or so days to make his application.

40. But, even if he had acted promptly, his case remained an incredible one. If in these circumstances this court were to require a new trial, then the misfortunes of costs and delay which have already overwhelmed this action and, in a sense, all the litigants in it, would simply be extended and redoubled. In my judgment, all considerations of fairness and justice entail that this appeal must fail.

41. LORD JUSTICE SIMON BROWN: This appeal is against Judge Behrens' dismissal of an application by the appellant under CPR Part 39.3(3). By rule 39.3(5), such an application for an order to restore proceedings made by a party who failed to attend a trial may be granted by the court

> "only if the applicant-
>
> (a) acted promptly when he found out the court had exercised its power to strike out or to enter judgment or enter an order again him;
>
> (b) had a good reason for not attending the trial; and
>
> (c) has a reasonable prospect of success at trial."

42. Judge Behrens decided that neither precondition (a) nor (c) were satisfied. So far as precondition (c) is concerned, the judge in my view was plainly correct. I agree with all that Lady Justice Arden and Lord Justice Rix have said upon that part of the case.

43. In reality, the appellant's case on the facts was risible, so wholly inconsistent with all the probabilities, not least as to how Mr Kemp would have acted both before and after he went to the United States in October 1997, that the most cogent objective evidence would have been required before it could properly have been preferred to the opposing case presented by the respondents. There was no such cogent objective evidence available to him. Mr Clarke, the windowcleaner's, brief written statement and the very limited and tentative expert handwriting evidence (opposed as, if necessary, that would have been by the respondent's contrary expert evidence) fell far short of that. I say no more on that part of the case.

44. But I wish to touch briefly on the question of promptness. As is pointed out in the footnote 39.3.7 to the Spring 2000 Civil Procedure White Book:

> "Note that the wording of r.29.3(5) provides more stringent requirements than CCR O.37 r.2 which it replaces. 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 in r.39.3(5)."

45. This consideration must, I think, inform the court's approach to the construction of the word "promptly" in precondition (a). At first blush it might be thought that any

inappropriate delay whatever on the part of an applicant would require that he be found not to have acted promptly. Yet such a construction would carry with it the Draconian consequence that, even if he had a good, perhaps compelling, reason for not having attended the trial, and a reasonable - perhaps, indeed, excellent - prospect of success at trial, the court would still be bound to refuse him a fresh trial. I would accordingly construe "promptly" here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances. That said, I too would regard the appellant here as having failed even in that obligation. 30 days was altogether too long a delay before making this Part 39 application. Having regard to the long, and generally unsatisfactory, history of the proceedings to that point, the application plainly could, and in my judgment reasonably should, have been issued well before it was.

46. It is, however, not so much upon that ground, and still less by reference to any residual discretion in the court (which, were all three preconditions to have been satisfied, must necessarily be somewhat narrow) but rather upon the earlier ground, namely the lack of any worthwhile case on the facts, that I regard the judgment below as having been plainly correct. The appeal is accordingly dismissed.

ORDER: The substantive appeal be dismissed with an order for costs. The costs appeal be allowed with costs, to be set off against costs incurred in the substantive appeal.
(Order not part of approved judgment)