

PROCEDURE - A DISTRICT JUDGE'S PERSPECTIVE

by

District Judge Nic Madge

Nic Madge - Biographical Details

District Judge Nic Madge, sits at West London County Court. He is a Recorder. He was formerly a Partner with solicitors Bindman and Partners, heading their Housing Department. He is an editor of Civil Procedure (The White Book). He writes regularly on law and procedure, including contributions to Law Society's Gazette, New Law Journal and Legal Action. He is author of *The Housing Law Casebook*, joint author of Legal Action Group books *Defending Possession Proceedings* and *Debt and Housing Emergency Procedure*. He is a consulting editor for United Kingdom Human Rights Reports. He was formerly a member of the Law Society's Litigation Committee. He is a member of Judicial Studies Board tutor team. He was a member of Joint Working Party of the Bar and Law Society on Civil Procedure (Heilbron/Hodge) and of Lord Woolf's Housing Working Party. He is a member of Code of Guidance Working Party.

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1. Business tenancy renewals under the 1954 Act

Requirement to issue in local court

CPR 56.2(1) - unless High Court.

CPR 3.10 - error does not invalidate step taken unless the court so orders, and the court may make an order to remedy the error.

Acknowledgement of service

PD 56, para 3.6.

Completion of the standard Acknowledgement of Service form that the Court Service send out does not comply with the PD.

Post Action Protocol - Appendix D

Civil Procedure (The White Book) 2003, 56.3.4.

Stays

CPR 56.3(4)

Requirement for Acknowledgement of Service before right to a stay.

Is there a right to a stay when the grant of new tenancy opposed?

Use of the Post Action Protocol

The Post Action Protocol after 1 June 2004

Is the PAP still appropriate after the changes introduced by the Regulatory Reform (Business Tenancies) Order 2003 come into force?

Evidence

CPR 56.3(10) and (11)

PD 56 - insertion of para 3.8

2. Property Litigation Generally

Expert evidence

CPR 35.1 - duty to restrict expert evidence

Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings

CPR 35.7 - court's power to direct that evidence is to be given by a single joint expert.

Issues as to proportionality - CPR 1.1

Daniels v Walker [2000] 1 WLR 1382, CA

“one starts ... from the position that, wherever possible, a joint report is obtained.” (Lord Woolf MR)

Lord Woolf MR pointed out that, where parties have agreed to instruct an expert, it is obviously preferable that the form of instructions should be agreed if possible. But, failing agreement,

"it was perfectly proper for either separate instructions to be given by one of the parties or for supplementary instructions to be given by one of the parties.

Where a party sensibly agrees to a joint report and the report is obtained as a result of joint instructions in the manner which I have indicated, the fact that a party has agreed to adopt that course does not prevent that party being allowed facilities to obtain a report from another expert, or, if appropriate, to rely on the evidence of another expert.

In a substantial case such as this, the correct approach is to regard the instruction of an expert jointly by the parties as the first step in obtaining expert evidence on a particular issue. It is to be hoped that in the majority of cases it will not only be the first step but the last step. If, having obtained a joint expert's report, a party, for reasons which are not fanciful, wishes to obtain further information before making a decision as to whether or not there is a particular part (or indeed the whole) of the expert's report which he or she may wish to challenge, then they should, subject to the discretion of the court, be permitted to obtain that evidence.

In the majority of cases, the sensible approach will not be to ask the court straight away to allow the dissatisfied party to call a second expert. In many cases it would be wrong to make a decision until one is in a position to consider the position in the round. You cannot make generalisations, but in a case where there is a modest sum involved a court may take a more rigorous approach. It may be said in a case where there is a modest amount involved that it would be disproportionate to obtain a second report in any circumstances. At most what should be allowed is merely to put a question to the expert who has already prepared a report...

In a case where there is a substantial sum involved, one starts... from the position that, wherever possible, a joint report is obtained. If there is disagreement on that report, then there would be an issue as to whether to ask questions or whether to get your own expert's report. If questions do not resolve the matter and a party, or both parties, obtain their own expert's reports, then that will result in a decision having to be reached as to what evidence should be called. That decision should not be taken until there has been a meeting between the experts involved. It may be that agreement could then be reached; it may be that agreement is reached as a result of asking the appropriate questions. It is only as a last resort that you accept that it is necessary for oral evidence to be given by the experts before the court. The expense of cross examination of expert witnesses at the hearing, even in a substantial case, can be very expensive.

The great advantage of adopting the course of instructing a joint expert at the outset is that in the majority of cases it will have the effect of narrowing the issues. The fact that additional experts may have to be involved is regrettable, but in the majority of cases the expert issues will already have been reduced. Even if you have the unfortunate result that there are three different views as to the right outcome on a particular issue, the expense which will be incurred as result of that is justified by the prospects of it being avoided in the majority of cases."

P (a child) v Mid Kent Area Healthcare NHS Trust [2001] EWCA Civ 1703, [2002] 1 WLR 210

Sanctions

Relief from sanctions - CPR 3.9

Bonsal v Cheema 2 March 2000, CA

Meredith v Colleys Valuation Services Ltd [2001] EWCA Civ 1456

RC Residuals Ltd v Linton Fuel Oils Ltd [2002] EWCA Civ 911, [2002] 1 WLR 2782

Woodhouse v Consignia [2002] EWCA Civ 911; [2002] 1 WLR 2782

Costs

CPR 44.3 - court has a discretion, but the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party.

But the court may make a different order.

(a) Effect of failure to agree to PACT mediation?

Dennett v Railtrack plc [2002] EWCA Civ 303; [2002] 2 All ER 850

Hurst v Leeming [2002] EWHC 1051

(b) CPR Part 36 offers.

Interest on money claim (e.g. interim rent) at upto 10% above base rate

Costs on an indemnity basis

Interest on costs at up to 10% above base rate