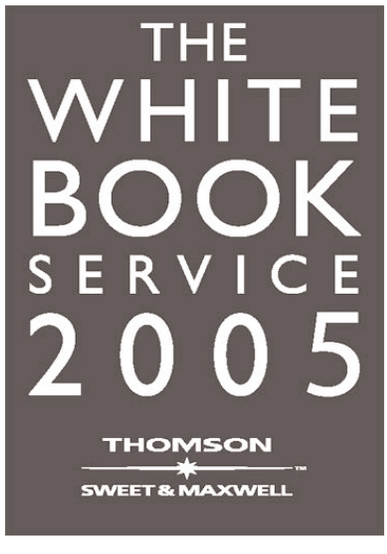
CIVIL PROCEDURE NEWS

Issue 1/2006
January 17, 2006

- Freezing orders in county court proceedings
- Judgments and orders
- Pre-action admissions
- Costs at permission stage in judicial review



IN BRIEF

Cases

■ **EWING v. OFFICE OF THE DEPUTY PRIME MINISTER** [2005] EWCA Civ 1583, December 20, 2005, CA, unrep. (Brooke, Dyson & Carnwath L.JJ.)

Judicial review—permission stage—costs of potential defendants

CPR rr.48.2, 54.4, 54.7, 54.8, 54.9, 54.11 & 54.14, Practice Direction (Striking Out a Statement of Case) paras 7.1 to 7.10, Practice Direction (Judicial Review) paras 8.5 & 8.6, Pre-Action Protocol for Judicial Review, Supreme Court Act 1981 ss.42 & 51—co-claimants issuing claim form for judicial review and applying under r.54.4 for permission to proceed—one of the co-claimants (C), who was subject to a civil proceedings order, applying retrospectively for leave under s.42 to institute the judicial review proceedings—judge dealing with the two applications together and dismissing both—C appealing against order making him liable jointly and severally with co-claimant for costs incurred by interested party in filing acknowledgment of service under r.54.8–held, dismissing the appeal, (1) in the circumstances of this case, the facts showed that C was the main instigator of the judicial review claim, (2) the costs order against him could be upheld on the established principles for making costs orders against a non-party (albeit a person subject to a civil proceedings order) (see ***Civil Procedure 2005***, Vol. 1 paras. 3.4.9, 3PD.7, 48.2.1, 54.4.2 & 54PD.8, C8–001, and Vol. 2 para. 9A–132)

■ **ROCHE v. GREATER MANCHESTER POLICE** [2005] EWCA Civ 1454, October 25, 2005, CA, unrep. (Buxton, Sedley & Jonathan Parker L.JJ.)

Further reasons for judgment—delivered after order perfected

CPR Pt 40, County Courts Act 1984 s.70—claimant (C) bringing county court proceedings against police (D) alleging wrongful arrest and claiming damages for false imprisonment and malicious prosecution—in written judgment, judge giving judgment for C with damages to be assessed—order carrying judgment into effect perfected—D filing Notice of Appeal—before permission to appeal granted by Court of Appeal, at later hearing judge giving supplementary judgment in which he made further findings against D–at appeal hearing, D submitting that supplementary judgment should be ignored—held, rejecting submission and dismissing appeal, (1) the second judgment did not in any way alter the perfected order carrying into effect the first judgment, (2) in that judgment, by rejecting contentions that were not before him previously, the trial judge was simply giving further reasons why the perfected order was valid (see ***Civil Procedure 2005***, para. 40.2.1, and Vol. 2 para. 9A–635)

■ **SCHMIDT v. WONG** [2005] EWCA Civ 1506; *The Times*, December 13, 2005, CA (Sir Anthony Clarke M.R., Brooke & Buxton L.JJ.)

Transfer of county court proceedings—application to High Court for freezing order

CPR r.25.1(1)(f), County Courts Act 1984 ss.38(1) & 42, County Court Remedies Regulations 1991 reg.3(1), High Court and County Courts Jurisdiction Order 1991 art.3—tenant (C) bringing county court claim against landlord (D) for damages for personal injuries—on grounds of lack of jurisdiction, Circuit judge refusing C's application for freezing order—on appeal, C conceding that county court had no jurisdiction but contending (for the first time) that the judge should have transferred the case and/or the application to the High Court under s.42(1)—held, dismissing appeal, (1) the CPR has not so changed the judge's role as to place upon him the responsibility for identifying the appropriate or possible form of relief where a legally represented claimant has not done so, (2) in any event, the "proceedings" within the meaning of s.42(1) which were before the judge was the negligence claim and not the application for a freezing order, (3) the judge was under no obligation to transfer those proceedings to the High Court, and (4) as the application did not constitute free-standing "proceedings" within s.42(1), under that provision the judge would not have been required to transfer the application to the High Court, (5) the procedure which C's solicitors should have adopted was to make an application for a freezing order in the High Court under art.3(1) (see ***Civil Procedure 2005***, paras 25.1.2, 25.1.9 & 25.1.27 and Vol. 2 paras 9A–543, 9A–558, 9B–82 & 9B–143)

■ **SOWERBY v. CHARLTON** [2005] EWCA Civ 1610; *The Times*, January 5, 2006, CA (Sir Anthony Clarke M.R., Brooke & May L.JJ.)

Judgment on pre-action admission—withdrawal of admission

CPR rr.14.1 & 14.3—visitor (C) to property bringing liability claim against occupier (D) for damages for personal injuries–before claim commenced, in the course of without prejudice negotiations, D admitting primary liability but asserting 50% contributory negligence—D subsequently openly admitting breach of duty—after proceedings commenced, D pleading defence putting primary liability in issue—Master (1) striking out parts of D's defence that put primary liability in issue and (purportedly applying r.14.3) giving C judgment on that issue, and (2) directing that issue of claimant's contributory negligence

be tried as a preliminary issue—High Court judge dismissing D's appeal—held, dismissing D's appeal (1) the judge and the Master erred in holding that Pt 14 applies to pre-action admissions, however (2) as D had no real prospect of successfully defending C's primary liability claim and, therefore, could not resist an application by C for summary judgment on that claim, the Master's order could be allowed to stand (see ***Civil Procedure 2005***, Vol. 1 paras 1.3.9, 14.1.1, 14.1.8 & C2A–004)

■ **B.E. STUDIOS LTD. v. SMITH & WILLIAMSON LTD**. [2005] EWHC 2730 (Ch); *The Times*, December 16, 2005 (Evans-Lombe J.)

Non-party costs order—relevance of impropriety

CPR r.48.2, Supreme Court Act 1981 s.51—trial judge dismissing claimant company's (C) claim in negligence and ordering C to pay 80% of defendant company's (D) costs on the standard basis—D applying for order that surviving director (X) of C (who was also a shareholder and loan creditor) be made liable for those costs—held, granting the application, (1) where a non-party is shown to have intervened in litigation so as to take control of the prosecution or defence of a claim, substantially for his own purposes or benefit, and the claim or defence thus taken over fails, the court has jurisdiction to order the intervener to pay the whole or part of the successful parties costs of the proceedings, notwithstanding that he was not at any material time a party to them, (2) for the court to make a non-party costs order against a director it is not necessary for the court to find that he was guilty of some impropriety in the prosecution by the company of the claim—relevant authorities reviewed—***Metalloy Supplies Ltd. v. M.A. (U.K.) Ltd***. [1997] 1 W.L.R. 1613, CA, ***Dymocks v. Franchise Systems (NSW) Pty. Ltd. v. Todd*** [2004] UKPC 39; [2004] 1 W.L.R. 2807, PC (see ***Civil Procedure 2005***, Vol.1 para. 48.2.1, and Vol. 2 para. 9A–265)

■ **CINPRES GAS INJECTION LTD. v. MELEA LTD,** *The Times*, December 21, 2005 (Pumfrey J.)

Interim injunction—applicant's duty to take full note

CPR rr.25.1(1)(a) & 25.3—in patent action, claimants granted interim injunction without notice restraining interference with witnesses by defendants (D)—at hearing on notice, in setting aside injunction judge stating (1) in applications for interim injunctions allegations against the respondent should be comprehensively set out in a witness statement which should be served as soon as practicable on the respondent, (2) counsel and solicitors have responsibility for taking full notes of what was said at the without notice hearing and they should not expect that a transcript of the hearing would be available (or would suffice if it were), (3) an application without notice is only for a very serious application where the service of notice would frustrate the purpose of the order, (4) where notice is not given it is necessary to justify the failure to the judge (see ***Civil Procedure 2005***, Vol. 1 para. 25.3.5)

■ **RIYAD BANK v. AHLI UNITED BANK (U.K.) PLC**. [2005] EWCA Civ 1419; *The Times*, December 16, 2005, CA (Waller & Dyson L.JJ.)

Fresh evidence on appeal

CPR r.52.11(2)—in claim for breach of duty of care, judge assessing damages—defendants (D) applying for permission to appeal—in this application, D applying under r.52.11(2) for permission to adduce fresh evidence—held, dismissing the evidence application, (1) as under the former rules, the Court of Appeal will not order fresh evidence unless there are special grounds, (2) the Court has to be particularly cautious where (a) an appellant is seeking (i) to reverse the judgment by attacking the judge's assessment or credibility of witnesses, or (ii) to obtain an order for a new trial, and (b) what is intended is to put in evidence further cross examination of a witness (whether expert or lay) who had been cross-examined at trial—***Ladd v. Marshall*** [1954] 1 W.L.R. 544, CA, ***Hamilton v. Al Fayed***, *The Times*, October 13, 2000, CA, unrep., ref'd to (see ***Civil Procedure 2005***, Vol. 1 paras 1.3.2 & 52.11.2)

■ **THOMSON v. O'CONNOR** [2005] EWCA Civ 1533, November 7, 2005, unrep. (Brooke, Dyson & Carnwath L.JJ.)

Adjournment of trial application—previous failures to comply with directions

CPR rr.3.1(2)(b) & 29.2, Practice Direction (The Multi-Track) para. 7.4—in July 2003, reversioners of long lease (C) bringing claim in county court against leaseholders (D) for unpaid service charges—D bringing counterclaim for damages, alleging loss of rental income because C had unreasonably withheld their consent to building alterations necessary to attract tenants—in April 2004, claim allocated to multi-track and trial window set—in September 2004, directions given for joint experts in relation to issues arising on the counterclaim and new trial window set—subsequently, court fixing March 16, 2005 as trial date—on that day, trial judge (a) granting C judgment by consent on their claim, but (b) principally because of parties' failures to comply with case management directions, refusing D's application (made with the support of C) for the adjournment of the trial of the counterclaim, and (c) dismissing the counterclaim and ordering D to pay C's costs—held, allowing the appeal, (1) the judge was entirely justified in holding that both parties were exceptionally culpable in not informing the court about problems that had arisen in complying with directions and which were bound to lead to a delay of the trial the assessment of damages on the counterclaim, (2) in this respect the parties were in breach of their duty under r.1.3 to help the court to further the overriding objective, (3) para. 7.4 should inform the way that the trial judge exercises discretion whether or not to grant an adjournment on the day of trial, but it does not dictate it, (4) by consenting to judgment on C's claim, D gave up the right to delay making any payments to C

until the set-off alleged in the counterclaim was tried, (5) in doing so, D was giving up something valuable and that was a matter (a) that the judge failed to taken into account, and (b) when taken into account, tipped the scales in favour of granting an adjournment of the trial of the counterclaim, (6) having found both parties exceptionally culpable, it was a wrong exercise of discretion to order D to pay C's costs incurred in defending the counterclaim—Brooke L.J. observing that appeal courts should support trial judges in their efforts to support trial judges so as to ensure "that litigation solicitors do not go back to the bad old days that existed before the Woolf reforms were introduced", but acknowledging that there are now plenty of indications of a tendency "for solicitors ... to ignore timetables and directions of the court" (para. 18)—***Moy v. Pettman Smith*** [2005] UKHL 7; [2005] 1 W.L.R. 581, HL, ref'd to (see ***Civil Procedure 2005***, Vol. 1 paras 3.1.3, 29.3.3, 29PD.7)

WATES CONSTRUCTION LTD. v. HGP GREENTREE ALLCHURCH EVANS LTD. [2005] EWHC 2174 (TCC), October 10, 2005, unrep. (Judge Peter Coulson Q.C.)

Discontinuance of Pt. 20 claim at trial—indemnity costs

CPR rr.38.6, 44.3 & 44.4—following collapse of building roof, property owners (C) bringing claim against construction company (D) for damages for breach of design and build contract—D, though denying claim, bringing Pt 20 claim against architects (X)—at start of trial, D discontinuing claim against X and becoming liable for X's costs under r.38.6—X submitting that their costs should be assessed on the indemnity basis—held, (1) the maintaining of a claim that the paying party knew or ought to have known was doomed to fail on the facts and on the law is conduct that may be so unreasonable as to justify an order for indemnity costs, (2) it is not necessary for it to be shown that the paying party's unnecessary or unreasonable pursuit of the litigation involved some ulterior purpose (such as commercial reasons), (3) following the exchange of expert witness statements, it ought to have been apparent to D that their allegations against X of inadequate design were unsustainable and that the damage had in fact resulted from their (D's) workmanship, (4) in the circumstances, D's conduct from thereon until discontinuance of the Pt 20 claim was sufficiently unreasonable to justify an order that the costs payable by them for that period should be on the indemnity basis—judge (a) noting that D's offer of mediation came far too late for it to have any prospect of success and (b) observing that solicitors facing costs difficulties should not try to avoid them by making belated offers of mediation, as that is not what mediation is for—***Reid Minty v. Taylor*** [2001] EWCA Civ 1723; [2002] 1 W.L.R. 2800, CA, ***Atlantic Bar & Grill v. Posthouse Hotels*** [2000] C.P. Rep. 32, ref'd to (see ***Civil Procedure 2005***, Vol. 1 para. 1.4.11, 38.6.1, 44.4.2, 44.12.1 & 44.3.13)

Statutory Instruments

CIVIL PROCEEDINGS FEES (AMENDMENT) ORDER 2005 (S.I. 2005 No. 3445)

Courts Act 2003 ss.92 & 108(6), Insolvency Act 1986 ss.414 & 415—inserts new Sched. 1 in Civil Proceedings Fees Order 2004—generally increases fees payable in High Court and county court proceedings in line with Government fee income policy for purpose of reducing significantly shortfall in achieving required 100% cost recovery target—made December 20, 2005, laid December 20, 2005, in force January 10, 2006 [Ed.: as this is the second amending statutory instrument for 2005 (see S.I. 2005 No. 473), presumably it should be entitled Civil Proceedings Fees (Amendment No. 2 Order 2005] (see ***Civil Procedure 2005***, Vol. 2 paras 10–1 & 10–13)

PROCEEDS OF CRIME ACT 2002 (LEGAL EXPENSES IN CIVIL RECOVERY PROCEEDINGS) REGULATIONS 2005 (S.I. 2005 No. 3382)

CPR rr.44.4, 47.7, 47.14, Proceeds of Crime Act 2002, Proceeds of Crime Act 2005 (External Requests and Orders) Order 2005 (S.I. 2005 No. 3181), Practice Direction (Proceeds of Crime Act 2002 Parts 5 and 8: Civil Recovery)—relates to applications to High Court for a property freezing order or an interim receiving order in proceedings for a recovery order under Pt 5 of the 2002 Act or Pt 5 of the 2002 Order—make provision relating to the assessment and payment of legal expenses out of property which is the subject of civil recovery proceedings—also specifies the hourly rates which may be allowed in respect of work done by legal representatives—made December 3, 2005, laid December 8, 2005, in force January 1, 2006 (see ***Civil Procedure 2005***, Vol. 1, para. B11–001)

TRANSFER OF FUNCTIONS (LORD CHANCELLOR AND SECRETARY OF STATE) ORDER 2005 (S.I. 2005 No. 3429)

Ministers of Crown Act 1975 s.1, Courts and Legal Services Act 1990, Human Rights Act 1998, Access to Justice Act 1999—transfers back to the Lord Chancellor certain functions transferred from the Lord Chancellor to the Secretary of State by the Secretary of State for Constitutional Affairs Order 2003 (S.I. 2003 No. 1887)—in particular, transfers functions relating to the funding of legal services under Pts 1 and 2 of the 1990 Act, under the 1999 Act, and functions relating to rules under the 1998 Act—accordingly amends various provisions in those statutes–made December 14, 2005, laid December 22, 2005, in force January, 12 2006 (see ***Civil Procedure 2005***, Vol. 2 paras 3D–4, 3D–9, 9A–869, 9B–110, 9B–112)

IN DETAIL

Pre-action admissions

Former RSC O.27, rr.1 and 2 laid down a simple procedural scheme for High Court proceedings under which a party could give notice, by his pleadings or otherwise in writing, that he admitted the truth of the whole or any part of the case of the other party. Further, he might admit facts in response to a notice to admit facts served by his opponent. In relation to county court proceedings, these rules were mirrored by CCR O.20, rr.1 and 2.

Rule 3 of RSC O.27 stated that, where facts were admitted in any of the ways mentioned in rr.1 or 2 of that Order, the opponent could apply for such judgment as he might be entitled to upon the admissions. The particular advantage of r.3 was that it enabled the party to obtain judgment without waiting for the determination of other questions between the parties. (To this extent it was innovative provision.) In effect, the rule was an early illustration of "rolling adjudication" (later much favoured in Lord Wolf's "Access to Justice" reports). It may be noted, because it becomes relevant later, that there was authority for the proposition that judgment could be obtained under RSC O.27, r.3 on an admission *made before* the action was commenced; in particular, the decision of the Court of Appeal in ***Standerwick v. Royal Ordnance Plc***., March 6, 1996, CA, unrep.

No equivalent provision to RSC O.27, r.3 was found in the CCR. However, provisions in CCR O.9 did contain a detailed procedural scheme for money claims brought by default and fixed date actions designed to enable the county courts to establish efficiently just what the defendant did or did not admit as to his to liability and indebtedness and to allocate the case to a procedural route that would enable the action to be dealt with efficiently. To a degree, the scheme was protective of defendants, but it did enable the plaintiff to obtain judgment on the basis of the defendant's admissions on the whole or part of his claim. It was a scheme designed to deal with proceedings over which the county courts had exclusive jurisdiction, and therefore had no counterpart in the RSC. Again we have an illustration of "rolling adjudication". And again it may be noted, because it also becomes relevant later, that the admissions upon which judgment could be given under this procedural scheme were admissions *made after* (and not before) the default or fixed date action had been commenced.

Throughout Lord Woolf's "Access to Justice" inquiry, this CCR procedural scheme attracted no attention. Consequently, in the long and tortuous process of drafting the Civil Procedure Rules the scheme was forgotten. Very late on in the process it dawned on those involved that a large proportion of county court debt collecting business was dealt with under the CCR O.9 provisions. They were hastily spruced up and patched into the CPR, ultimately emerging as Pt 14, without any proper regard being given to how they should relate to other CPR provisions, particularly innovative provisions dealing with admissions in pleadings.

One of the risks involved in determinedly treating the CPR as "a new procedural code", and ignoring the obvious provenance of provisions that were transported into the CPR from the RSC and the CCR without any intention that their application in practice should be changed, is that misunderstandings can arise and mistakes can be made before they are put right by authoritative decisions of the courts, arrived at after parties have incurred considerable expense. Where problems in understanding CPR provisions arise the solutions can often be revealed by a little bit of research into the RSC and CCR provisions they were intended to replace. Lawyers are reluctant to undertake and to produce the fruits of such research if they anticipate that the will be met by a tribunal likely to discount it because they are determined to believe that the CPR are "a new procedural code".

In the recent case of ***Sowerby v. Charlton*** [2005] EWCA Civ 1610; *The Times*, January 5, 2006, CA, the facts were that a visitor (C) to property brought a liability claim against the occupier (D) for damages for personal injuries. Before the claim was commenced, in the course of without prejudice negotiations, D admitted primary liability but asserted 50% contributory negligence. D subsequently openly admitted breach of duty. After proceedings had been commenced, D pleaded a defence putting primary liability in issue. In response, C pleaded D's admission. On C's application, a Master (1) struck out the parts of D's defence that put primary liability in issue and (purporting to apply r.14.3) gave C judgment on that issue, and (2) directed that the issue of claimant's contributory negligence be tried as a preliminary issue. A High Court judge dismissed D's appeal. In doing so, on the basis of ***Standerwick v. Royal Ordnance Plc***. (referred to above), and after noting the conflict in post-CPR first instance decisions, the judge rejected the submission that Pt 14 does not apply to pre-action admissions, or (2) if it does, in the circumstances, D should be able to withdraw the admission (see [2005] EWHC 949 (QB), February 23, 2005, unrep. (Judge Playford Q.C.)).

On D's further appeal to the Court of Appeal, the Court (Sir Anthony Clarke M.R., Brooke & May L.JJ.) disagreed with the judge's reasoning but, nevertheless, dismissed D's appeal. The Court said that an admission made before proceedings are begun does not come within the ambit of the scheme prescribed by Pt 14, as such an admission cannot be equated with an admission "of the whole or any part of another party's case" within r.14.1(1). It followed

that D did not require the court's permission under r.14.1(5) to withdraw the admission. On the face of it that looks like a holding in favour of the appellant. However, the Court went on to hold that, on the facts of this case, although there was clearly a very live issue on contributory negligence, D had no real prospect of successfully defending C's primary liability claim and, therefore, D could not resist an application by C for summary judgment on that claim. In these circumstances (as D conceded), the Master's judgment on primary liability could be allowed to stand.

The importance of this case is that it puts right misunderstandings about provisions in Pt 14 designed to carry forward the procedural regime formerly found in CCR O.9. As Brooke L.J. explained, Pt 14 and its supplementing practice direction are mainly concerned with the procedure for making admissions in response to money claims, and for the way in which judgment may be entered as of right (on the claimant's application) once such an admission has been made. His lordship noted that these provisions "enable a vast amount of court business to be conducted without any need for judicial involvement, culminating in the entry of judgments that pave the way to enforcement procedure".

Brooke L.J. further explained that the procedure which regulates the conduct of a defendant who is prepared to make admissions and to defend part only of a claim is contained in CPR Pt 15 and its supplementing direction and in general provisions relating to statements of case found in Pt 16. His lordship added that an admission made in accordance with these provisions "may open the way for judgment to be entered on the admission under Pt 14".

As always, Brooke L.J. was at pains to point out that the CPR constitute "a new procedural code". It was a code under which the courts had not yet had the opportunity of stating authoritatively whether the language of the successor rule to RSC O.27, r. 3, which his lordship (perhaps surprisingly) took to be r.14.1, is capable of being interpreted as including pre-action as well as post-action admissions.

With respect it may be commented that it is a pretty inept "new procedural code" which leaves that a matter for doubt. (And a set of rules that does not even mention the notice to admit facts is obviously incomplete and does not deserve to be called a "code".) Certainly, as becomes apparent if their historical context is understood, there is no doubt that the Pt 14 provisions carrying forward the former CCR O.9 rules do not apply to pre-action admissions. Such doubts that have arisen about pre-action admissions have come about because the draftsman's model for Pt 14 was not anything found in the former RSC (either in RSC O.27 or anywhere else therein), but provisions in CCR O.9. And, as explained above, RSC O.27, r.3 was not mirrored in CCR O.9, and therefore was not adequately taken care of (with necessary adjustments being made in the light of the innovative pleadings rules introduced by the CPR) in Pt 14. That is where the trouble starts.

Freezing orders in county court proceedings

Section 38(1) of the County Courts Act 1984 states that, subject to exceptions, in any proceedings in a county court the court may make an order which could be made by the High Court if the proceedings were in the High Court (***White Book***, Vol. 2, para. 9A–543). The exceptions include "any order of a prescribed kind" (s.38(3)(b)), that is to say as prescribed by Regulations made under s.38(4). Those Regulations are the County Court Remedies Regulations 1991 (Vol. 2, para. 9B–81). Regulation 3(1) states that a county court shall not grant "prescribed relief", and, according to reg.2(b) that includes an interlocutory injunction (i) restraining a party from removing from the jurisdiction of the High Court assets located within that jurisdiction, or (ii) restraining a party from dealing with assets whether located within the jurisdiction of the High Court or not (*cf.* the definition of a freezing injunction given in CPR r.25.1(1)(f)).

As further provisions in reg.3 make clear, this clog on the jurisdiction of county courts is not absolute. But the general rule is that, where a claim is brought in a county court, the court has no jurisdiction to entertain an application for interim relief in the claim in the form of a freezing order. The justification given for this when this legislative structure was laid down in 1991, following upon the very great extension of the general jurisdiction of county courts made on the basis of recommendations contained in the Report of the Review Body on Civil Justice (Cm 394, 1988) and brought about by the Courts and Legal Services Act 1990 Pt I, was that the power to grant (what were then called) *Mareva* injunctions (and also to grant *Anton Piller* orders) should be closely circumscribed and should be controlled by those of the High Court judges who specialise in such matters (*ibid.* para. 188). (Clearly things have moved on since 1991 for, nowadays, not only is it not the case that particular High Court judges are regarded as freezing order specialists, it is the case that certain Circuit judges are authorised to exercise High Court jurisdiction, including the jurisdiction to grant such orders.)

But, given the significant extension of the jurisdiction of county courts, and the intention that parties should not be discouraged from bringing claims in such courts rather that in the High Court, it was clear that a mechanism should be provided for enabling a party to a county court claim to apply to a High Court judge for a freezing injunction by way of interim relief. How was this to be done? The solution given was not obvious but is found in the High Court and County Courts Jurisdiction Order 1991. Article 3 of that Order provides that the High Court shall have jurisdiction to hear an application for an injunction made in the course of or in anticipation of proceedings in a county

court where a county court may not, by virtue of regulations under s.38(3)(b) or otherwise, grant an injunction (see Vol. 2, para. 9B–143). The jurisdiction of the High Court under art.3 to grant injunctions incidental to and in support of county court proceedings includes (but is not in terms confined to) the power to grant freezing injunctions.

In the recent case of ***Schmidt v. Wong*** [2005] EWCA Civ 1506; *The Times*, December 13. 2005, CA, the Court of Appeal had occasion during the hearing of the appeal to give consideration to the relationship of the High Court and the county courts in relation to freezing orders. The members of the Court (Sir Anthony Clarke M.R., Brooke & Buxton L.JJ.) were told that this was an area attended by some uncertainty, at least in the eyes of the profession. The Court acknowledged that the procedure was not as easy to understand as those other procedures under which the assistance of the High Court may be gained for county court proceedings (*e.g.* applications to issue a commission, request or order to examine witnesses abroad) and expressed the hope that the Civil Procedure Rules Committee would give this matter their attention. The Court offered some observations in the hope of achieving some clarification.

The Court explained that in order to invoke the High Court's assistance in this respect the claimant in the county court proceedings should make an application to the High Court in accordance with Pt 23 (issuing the application at the RCJ or the appropriate District Registry and paying the higher court fee). The application should be made returnable before a judge. In the body of the application there should appear an explanation along the following lines:

"This application is being made in the course of [in anticipation of] proceedings in the … County Court pursuant to article 3 of the High Court and County Courts Jurisdiction Order 1991, The County Court has no jurisdiction to grant the relief sought by reason of regulation 3(1) of the County Court Remedies Regulations 1991."

The Court explained that the High Court's assistance is not to be invoked by issuing a claim form in the High Court. This is because a freezing injunction cannot be extracted from the claim to which it relates and treated as a free-standing remedy.

The substantive claim in this case was in negligence for personal injuries brought by a tenant against her landlord (who was resident abroad). By the time the appeal came on, a freezing order was no longer sought. It seems that the Court doubted whether such an order would have been appropriate in this case. Speaking generally, the Court noted (para. 25) that the need to issue an application in the High Court involves more work and the payment of a higher court fee and suggested that that "should have the valuable effect of causing parties and their advisers to reflect carefully before taking that step". The Court added (*ibid.*):

"They will have to have in mind repeated warnings since the development of the Mareva jurisdiction that such orders are not to be sought, and will not be granted, as a matter of course; that particular caution should be exercised in relation to a, comparatively, modest claim; and that thought must be given to the intrusion and inconvenience of such an order, not only for the defendant but also for third parties. Those considerations are likely to be particularly pressing in cases, like the present, that are very typical county court matters."

As indicated above, nowadays it may transpire that a Circuit judge handling (or available to handle) a particular county court claim may be authorised by the Lord Chancellor to sit as a High Court judge. If, in such a case, the claimant is minded to make an application for a freezing order, might not such a judge, as the Court said in this case, "transform his court ad hoc into the High Court" and deal with the application? The Circuit judge in this case, Judge Harris Q.C., evidently thought not, and the Court of Appeal agreed with him. The Court said (para. 23):

"If the proper course had been followed, and an application issued in the High Court under article 3 of the High Court and County Courts Jurisdiction order 1991, then it might or might not have been convenient for Judge Harris to hear it as a High Court judge. That however would have been a matter for the management of the business in the District Registry in which the application was issued, and not something to be determined by Judge Harris personally."

Judgments and orders

In ***Roche v. Chief Constable of Greater Manchester Police*** [2005] EWCA Civ 1454; *The Times*, November 10, 2005, CA, the facts were that the claimant (C) alleged that he had been wrongfully arrested by police (D) and claimed for damages for false imprisonment and malicious prosecution. Although the defence pleaded to this allegation was that C had, by use of his car in a street, "deliberately and/or recklessly" assaulted police officers, it was D's case at trial that C had been lawfully arrested for deliberate assaults.

The claim was tried in a county court and in his judgment delivered on April 2, 2004, the trial judge gave judgment for C and ordered that the matter be listed before him for damages to be assessed. On the false imprisonment claim the judge found that there had been no such assault as alleged by D, and he further found that the police did not have reasonable grounds for suspecting that D had committed an assault. The judge said that he understood

that it was accepted by the parties that it followed from those findings "that the arrest was wrongful and the subsequent prosecution malicious". The judge added that, if he was wrong about what was conceded in this respect, he would hear further argument. An order carrying into effect the judge's decision was perfected.

D applied to the Court of Appeal for permission to appeal against the judge's decision. Before that application was considered by the single lord justice, on June 10, 2004, the parties appeared again before the judge. At that hearing, D submitted (as they were submitting in their Notice of Appeal) that in his judgment the judge had failed to deal with two related issues relevant to the question whether D had been wrongfully arrested. The first was whether D had recklessly assaulted the police officers. The second was whether the police had reasonable grounds for suspecting that D had assaulted persons by driving at them recklessly. At that hearing the judge delivered a second judgment in which he made further findings and rejected these submissions, thereby confirming his earlier holding rejecting the defence that D's arrest was lawful. Subsequently, in ignorance of the second judgment, the single lord justice gave D permission to appeal, partly on the ground that the judge had failed to deal with the recklessness issues. Later on, when the second judgment was drawn to his attention, the single lord justice refused D permission to challenge any of the judge's findings within the second judgment, but gave D permission to appeal on the basis that the judge should not have given the second judgment at all, granted that he had already effectively decided the case in his judgment of April 2, 2004.

When the appeal came on in the Court of Appeal (Buxton, Sedley and Jonathan Parker L.JJ.), D submitted that the Court should completely ignore the (second) judgment of June 10, 2004, and should address the appeal solely on the basis of the (first) judgment of April 2, 2004. The Court rejected this submission and dismissed the appeal. Buxton L.J. said (para. 25) the second judgment did not in any way alter the perfected order carrying into effect the first judgment. By rejecting contentions that were not before the judge before that order was made it simply gave further reasons why the order was valid. Further, if the Court confined its attention to the first judgment, and concluded that D's appeal should be allowed on the basis that the judge had failed to deal with the recklessness issues, the likely outcome would be that the Court would order that the matter should be remitted to the county court for reconsideration. In the circumstances of this case, the Court could have available to it, and without having to order it, the fruits of such further consideration in the form of the judge's second judgment (para. 27). Remitting the case to the county court would be a wholly artificial exercise, given that, in his second judgment, the judge had dealt properly and carefully with the alleged lacuna in his first judgment (para. 26).

In conclusion it may be noted that the Court did not deal with one of the matters that troubled the single lord justice; that is, whether the judge should not have given the second judgment at all.

Costs at permission stage in judicial review

In ***Ewing v. Office of the Deputy Prime Minister*** [2005] EWCA Civ 1583, December 12, 2005, CA, unrep., the Court of Appeal suggested that an opportunity should be found as soon as possible to introduce a specific rule or practice direction governing the procedure for applications for costs at the permission stage in judicial review claims, and the principles to be applied. The Court said it would be helpful if, at the same time, there could be clarification of what is required to be incorporated in the acknowledgment of service by way of "summary grounds" as required by CPR r.54.8(4) and whether it is necessary to impose the same requirement on all parties in this respect, or whether distinctions should be drawn between defendants and interested parties.

Pending any new rules or directions, the Court stated that the following procedure should be followed (*ibid.* at para. 37 *per* Carnwath L.J.):

1. where a proposed defendant or interested party wishes to seek costs at the permission stage, the acknowledgment of service should include an application for costs and should be accompanied by a schedule setting out the amount claimed;
2. the judge refusing permission should include in the refusal a decision whether to award costs in principle, and (if so) an indication of the amount which he proposes to assess summarily;
3. the claimant should be given 14 days to respond in writing and should serve a copy on the defendant;
4. the defendant shall have 7 days to reply in writing to any such response, and to the amount proposed by the judge;
5. the judge will then decide and make an award on the papers.

The Court also said that, where a claimant does not follow the Pre-Action Protocol procedure, he must expect to put his opponents to greater expense in preparing the summary of grounds and this may be reflected in any order for costs against him if permission is refused (*ibid.* at para. 54 *per* Brooke L.J.).

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Published by Sweet & Maxwell Ltd, 100 Avenue Road, London NW3 3PF.
ISSN 0958-9821

Typeset by Matthew Marley, desk top publishing and design
email: matthew.marley@btinternet.com
Printed by St Austell Printing Company, St Austell, Cornwall