CIVIL PROCEDURE NEWS

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Privacy claim – allegation of blackmail – interim injunction – anonymity orders

CPR r.39.2, Human Rights Act 1998 ss.6, 12 and Sch.1 Pt I arts 8 and 10. Individual (C) commencing proceedings against former spouse (D) for injunction restraining publication of information which C claimed to be private. On C's application, judge granting interim injunction and making orders (1) that the identity of the parties must not be disclosed (anonymity order), (2) that D disclose the identity of any journalists to whom the information protected by the injunction had been disclosed, and (3) that the application return date hearing should be in private. Upon D's making the required disclosures, order served on newspaper publishers. C making, and supporting with evidence, allegation of blackmail by D. At the return date hearing, at which D did not contest C's case by evidence or argument, C applying for the continuation of the injunction and the orders, including order prohibiting D from disclosing (or causing anyone else to disclose) any information concerning the identity of the parties or information liable to lead to their identification, save for that contained in any public judgment of the court. In judgment (delivered in public), granting the application, **held** (1) publication of the information by D would be highly damaging to C's private life and the private lives of others would be interfered with, (2) it was likely that at trial C would establish that publication should not be allowed, (3) damages would be an inadequate remedy, (4) the fact that a person is making unwarranted demands with threats to disclose does not of itself mean that that person has no right to freedom of expression, (5) where a claimant alleges blackmail the court could (a) decline to make an anonymity order, but restrict publication of the information which is the subject-matter of the action, or (b) make such order and permit publication of some of the facts of the facts about the action, including the allegation of blackmail, (6) in the circumstances of this case, in the light of information which was already in the public domain, the second course was the better, (7) the question whether a court should grant an order under r.39.2(4), or any other anonymity order, is not a matter of the judge's discretion, but is a matter of obligation under s.6 and art.8, (8) the test to be applied is whether there is sufficient general public interest in publishing a report of proceedings that identifies the party to justify any resulting curtailment of that party's art.8 rights. Observations on relevance of allegation of blackmail in civil injunction proceedings, and on reasons for granting anonymity to blackmail complainants generally. ***R. v Socialist Worker, Ex p. Attorney-General*** [1975] 1 Q.B. 637, DC; ***Interbrew SA v Financial Times Ltd*** [2002] EWCA Civ 274; [2002] 2 Lloyd's Rep. 229, CA; ***Secretary of State for Home Department v AP (No.2)*** [2010] UKSC 26; [2010] 1 W.L.R. 1652, SC; ***In re Guardian News & Media Ltd*** [2010] UKSC 1; [2010] 2 W.L.R. 325, SC; ***DFT v TFD*** [2010] EWHC 2335 (QB), September 27, 2010, unrep., ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 39.2.2, 39.2.9 and 39.2.11, and Vol.2 paras 3D–49 and 15–40.)

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Arbitration – challenge to substantive jurisdiction – person "who takes no part in proceedings" – extension of time

CPR r.1.1 and 3.9, Arbitration Act 1996 ss.67, 70, 72 and 80, Human Rights Act 1998 Sch.1 Pt I art.6. Company (D) contending that they were entitled to damages from another company (C) for breach of an alleged contract containing a GAFTA arbitration agreement. D submitting arbitration to GAFTA. By letter to GAFTA, C contending that there was no contract, and in proceedings commenced in Russian court obtaining declaration to that effect. In proceedings before the tribunal in which C took no part, tribunal concluding that there was a binding contract and in an interim award ruling that they had jurisdiction to determine the substantive dispute. In subsequent proceedings, in which C did participate, tribunal making final award, in which it acknowledged but disagreed with the Russian court's decision, and awarded D damages in sum of US$5.4m. High Court judge granting D permission to enforce that award. C commencing proceedings (1) for declaration that under s.72 there was no valid arbitration agreement, or (2) for a 14-month extension of time to make an application under s.67 challenging the interim award. Judge dismissing C's claims, but granting permission to appeal ([2009] EWHC 3318 (Comm); [2009] 1 Lloyd's Rep. 533). **Held**, dismissing appeal, (1) by s.72(1)(a), a person alleged to be a party to arbitral proceedings, "but who

takes no part in the proceedings", may question whether there is a valid arbitration agreement by proceedings in the court for a declaration or injunction or other appropriate relief, (2) where arbitration proceedings are brought against a person who considers that he has not entered into an agreement for such proceedings, that person is entitled to ignore the proceedings, and in those circumstances the function of s.72 is to ensure that he has unrestricted access to the court, (3) if, on the other hand, he participated in the proceedings, whether in relation to the jurisdiction of the arbitrators, or (as in this case) in relation to the exercise of their asserted substantive jurisdiction, and is disappointed by their decision, he can fairly be required to bring proceedings under s.67 to challenge the award within the 28-day time limit imposed by s.70(3) (which may be extended under s.80(5)), (4) there is no basis for restricting (as C contended) the words "takes no part in the proceedings" in s.72 to proceedings relating to the arbitrators' determination of their substantive jurisdiction, (5) accordingly, the judge was right to hold that the requirement in s.72 that the applicant should have taken "no part in the proceedings" meant taking no part in the tribunal's proceedings on the merits as well as in relation to its substantive jurisdiction, (6) in the circumstances, C should not be granted an extension of time for the purpose of making an application under s.67, and the judge had not erred in his exercise of discretion in this respect, (7) the judge was well aware that the effect of his decision was to preclude C from establishing in a public hearing before a court that it had not concluded a contract with D. ***Caparo Group Ltd v Fagor Arrasate Sociedad Cooperativa*** August 7, 1998, unrep. (Clarke J.); ***Kalmneft JSC v Glencore International A.G.*** [2002] 1 All E.R. 76 (Colman J.), ref'd to. (See ***Civil Procedure 2010***, Vol.2 paras 2E–269, 2E–277+, 2E–255 and 2E–292+.)

- **BROOMLEIGH HOUSING ASSOCIATION LTD v OKONKWO** [2010] EWCA Civ 1113, October 13, 2010, CA, unrep. (Carnwath, Moore-Bick and Wilson L.JJ.)

Order for oral examination of judgment debtor – exercise of discretion to commit debtor to prison for failure to comply

CPR rr.71.2 and 71.8, Practice Direction 71 para.8, Form N79A, Human Rights Act 1998 Sch.1 Pt I art.6. Housing association (C) bringing possession claim against tenant (D). C withdrawing claim on terms that D pay their costs and, in April 30, 2004, court making order to that effect. Upon D not complying with this order, C applying for order that D attend court for oral examination. Accordingly, court making order for D to attend on November 22, 2006. Upon D not attending on that occasion, on December 11, 2006, circuit judge making order committing D for prison for seven days, but suspended provided D attended on March 13, 2007. Subsequently, court granting a fresh application for oral examination order, this time requiring D to attend on November 27, 2007. D attending on that date, but examination not proceeding (apparently because D claimed that he needed more time to prepare). On November 30, 2007, on erroneous basis that D, though attending, had refused to answer questions, circuit judge making second committal order, this time suspended on terms that D attend on February 21, 2008, but C failing to serve this order on D. Subsequently, this order superseded by a further committal order made on February 12, 2009 (again reciting as reason a failure of D to attend on November 27, 2007), this time suspended so long as D attended on May 5, 2009. D attending on that date and answering questions. D applying for permission to appeal against the suspended committal orders made on November 30, 2007, and February 12, 2009. (D not appearing and not represented on the appeal.) **Held**, granting D permission to appeal and allowing appeal, (1) presumably, as a result of D's participation in the oral examination held on May 5, 2009, the suspended committal orders against which D appealed were discharged, rendering D's appeals academic, however, (2) the appeals raised some important questions and it was right that they should be heard, (3) in the circumstances provided for by r.71.8(1), the court has a discretion whether to make a committal order, but if it does make such an order, it must be suspended, (4) it appears to have become a routine practice in county courts for committal orders to be made whenever the judgment debtor has failed (even for the first time) to comply with an order under r.71.2 to attend for oral examination, (5) r.71.8 gives the court power to make a committal order, but that requires the exercise of discretion, which in turn requires consideration of the circumstances of the contempt, (6) committing a person to prison for contempt of court is a serious step, too serious to be undertaken simply as a matter of routine without enquiring into the nature of the contempt and the circumstances in which it has been committed and giving reasons, at any rate briefly, for the decision, court giving guidance on process to be followed by judge when considering whether to exercise discretion under r.71.8(2). ***Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems N.V.*** [2008] EWCA Civ 389, March 11, 2008, CA, ref'd to. See further "In Detail" section of this issue of *CP News*. (See ***Civil Procedure 2010*** Vol.1 paras 71.8.1 and 71.8.2.)

HOW ENGINEERING SERVICES LTD v SOUTHERN INSULATION (MEDWAY) LTD [2010] EWCA Civ 999, September 8, 2010, CA, unrep. (Sedley, Jacob and Aikens L.JJ.)

Interlocutory appeals threatening trial date – summary dismissal and adjournment by appeal court in vacation

CPR r.52.10, Practice Direction (Court of Appeal (Civil Division)) [1999] 1 W.L.R. 1027, CA, para.10.8. Two related actions fixed for four-week trial commencing in October 2010. In (1) the first of the two actions, (a) tenants (X) of premises bringing action against construction company (Y) for breach of contract, (b) Y bringing additional claims against sub-contractors (C) for indemnity and contribution, and (c) C bringing additional claims against specialist sub-contractors (D) for 100% contribution (alleging breach of duty of care in tort owed by D to X) (the claim for contribution), and (2) in the second action, C bringing claim for damages against D (alleging breach of duty of care in tort to protect it from financial loss arising under collateral warranties and guarantees between X and Y) (the claim for damages). In the contribution claim and in the claim for damages, D applying for summary judgment on C's claims (or striking out). In reserved judgments (on May 21 and July 23, 2010), for different reasons in each, judge dismissing both applications, but granting D permission to appeal and single lord justice directing expedition of the appeals. On August 19, appeals coming before vacation court (with two days allocated for argument and judgment). **Held**, summarily dismissing D's appeal in the contribution claim application, and adjourning their appeal in the other application (with liberty to restore), (1) both applications were in substance endeavours to establish by way of judgment on a preliminary point of law that, taking the facts pleaded against D at face value, neither the claim for contribution nor the claim for damages could succeed, because D did not owe any duty of care in tort to either X or C for the kind of loss claimed, (2) the issues of law involved were complicated, and in due course may require the attention of the Supreme Court, (3) in the circumstances, it was unlikely that the Court could give a reserved judgment before the date fixed for the commencement of trial, (4) the possibility that, by proceeding with the appeals, D might succeed on each, and therefore escape from both actions, had to be set against the possibility that, by so proceeding, the trial of the two actions (one of which involved liabilities unaffected by the issues arising on the appeals, and both of which involved possibly dispositive factual disputes) would have to be postponed at considerable cost. Court explaining that neither C nor D objected to the disposal of the appeals in the manner ordered. (See ***Civil Procedure 2010*** Vol.1 para.52.0.12, and Vol.2 para.9A–222.)

LEO PHARMA A/S v SANDOZ LIMITED [2010] EWHC 1911 (Pat); *The Times* October 6, 2010 (Floyd J.)

Sealed order – application to amend under "slip" rule – intention of court

CPR r.40.20. At end of trial of patent infringement action, judge giving judgment for claimants (C), granting injunction against the defendants (D), and making order for delivery up, disclosure and an inquiry into damages or account of profits. Judge granting D permission to appeal and staying injunction and order. Court of Appeal dismissing appeal, and leaving judge's order in place. As sealed, this order stating (para.9) that D should pay C interest at the judgment rate (8%) on sums found due from the date of the order. D disputing that para.9 formed part of the order made by the judge and applying under r.40.12 for an order correcting the order by deleting it accordingly. **Held**, dismissing the application, (1) under r.40.12 a court has power to correct typographical or other careless errors, (2) the power can also be used to make the intention of the court plain (e.g. where an order had an unintended effect inconsistent with the court's intention), (3) where a court encourages parties to agree matters of detail, a subsequent agreement as to the form of the order would plainly be within the intention of the court, (4) matters deliberately included by the parties in an order drawn up and sealed do not constitute accidental slips and omissions within the rule, (5) in this case, para.9 was not inconsistent with the court's intention. ***Bristol Myers Squibb Co. v Baker Norton Pharmaceuticals*** [2001] EWCA Civ 414; [2001] R.P.C. 45, CA, ***SmithKline Beecham v Apotex Europe Ltd*** [2005] EWHC 1655 (Ch); [2006] 1 W.L.R. 872, ref'd to. (See ***Civil Procedure 2010*** Vol.1 para.40.12.1.)

R. (C.) v SALFORD CITY COUNCIL [2010] EWHC 2325 (Admin), July 30, 2010, unrep. (Nicol J.)

Wasted costs – personal liability of solicitor

CPR r.48.7, Senior Courts Act 1981 s.51(6) and (7). Individual (C) making renewed application for permission to proceed with judicial review claim against local authority (D). At first day of hearing of the application, counsel for C in effect abandoning principal statutory basis on which claim was made and judge adjourning hearing to another day, partly because of the change of the basis of C's legal challenge. At adjourned hearing, judge dismissing application, finding that, even in its amended form, the claim was not reasonably arguable. D applying for wasted costs order against C's solicitor (X), submitting that, because the original formulation of the claim was hopelessly misconceived, their costs of the first day of the hearing, and those incurred beforehand, were wasted. X accepting that the original formulation was mistaken (reliance being placed on an inapplicable statutory provision). **Held**, dismissing the application, (1) X's

mistake showed a poor knowledge of the law but the claim, when reformulated, was not totally hopeless, (2) to an extent, X's mistake caused D to incur unnecessary costs, but (3) in all the circumstances, it would not be just to order X to pay those costs, (4) it was material to take into account that, although X's mistake had been apparent in X's pre-action correspondence with D, in responding to that correspondence D had not pointed it out. ***Ridehalgh v Horsefield*** [1994] Ch. 205, CA, ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 48.7.3 and 48.7.14, and Vol.2 para.9A–204.)

■ **R. (GARNER) v ELMBRIDGE BOROUGH COUNCIL** [2010] EWCA Civ 1006, July 29, 2010, CA, unrep. (Lloyd, Richards and Sullivan LJJ.)

Protective costs order – principles to be applied where EC EIA Directive relevant

CPR r.44.3, Senior Courts Act 1981 ss.31 and 51, Environmental Impact Assessment Directive 85/337/EEC art.10a. Local planning authority (D) granting land owners (X) and developers (Y) permission for development of land in vicinity of prominent listed building. Individual (C), a person concerned with the protection of historic buildings and with the affected building in particular, commencing judicial review claim against D challenging the decision. D and interested parties (X and Y) entering acknowledgments of service. C applying for order that he should not be required to pay the costs of D, X or Y, alternatively, for an order that his liability for costs should be capped at an amount set by the court. D and X opposing this PCO application (Y indicating that they would not seek costs against C) and contending that, if a PCO were made, a further order should be made (a reciprocal cap) limiting their costs liability in the event of C succeeding in his judicial review claim. Upon Deputy High Court judge (on paper) refusing C permission to proceed, C renewing application for permission. At hearing on March 3, 2010, where application adjourned for determination at a combined permission and substantive hearing, judge considering and refusing C's PCO application. Judge holding (1) that C's challenge did not raise issues of general public importance which the general public interest required to be resolved, and (2) that in the absence of evidence as to C's means it was impossible to determine (a) whether it would be reasonable for C to discontinue the proceedings if a PCO was refused, and (b) whether (within in art.10A) the proceedings would be "prohibitively expensive" for him ([2010] EWHC 567 (Admin)). On paper, single lord justice refusing C's application for permission to appeal. At oral hearing of C's renewed application, single lord justice granting permission. **Held**, allowing appeal, granting C's application for a PCO, (1) art.10a incorporates the principles of the Aarhus Convention into the EIA Directive, (2) where art.10a applies a court is not entitled to reject an application for a PCO on the basis that the issues raised were not of general public importance which the public interest required to be resolved, (2) the judge's approach to the "prohibitively expensive" issue, though consistent with the Corner House principles, was not consistent with art.10a, (3) the underlying purpose of the Directive would be frustrated if the court was entitled to consider that issue solely by reference to the means of a person who happened to come forward as a claimant, (4) the imposition of a reciprocal cap would not be inconsistent with art.10a, and a cap of £35,000 would be fair and reasonable in the circumstances. ***R. (Corner House Research) v The Secretary of State for Trade and Industry*** [2005] 1 W.L.R. 2600, CA; ***R. (Buglife) v Thurrock Thames Gateway Development Corp.*** [2008] EWCA Civ 1209; ***Morgan v Hinton Organics (Wessex) Ltd*** [2009] EWCA Civ 107; [2009] C.P. Rep. 26, CA, ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 48.15.7 and 54.6.3, and Vol.2 para.12–59.)

■ **RYBAK v LANGBAR INTERNATIONAL LTD** [2010] EWHC 2015 (Ch), July 9, 2010, unrep. (Morgan J.)

Disclosure and inspection – destruction of disclosable data – whether unless order complied with – relief from striking out sanction

CPR rr.3.4, 3.8, 3.9 and 31.12. Action brought by company (D) against individuals (C) settled by Tomlin order, subsequently varied by supplemental deed. Order providing for sale of property in Monaco and payment of proceeds to C. After sale of that property, C commencing proceedings against D for declarations (1) that they had satisfied the terms of the order, and (2) that the sale of the property was a bona fide transaction at full market value. D entering defence and making counterclaim, pleading that the value of the property was in excess of that realised and alleging misrepresentation. Judge dismissing C's application for summary judgment on the undervalue issue, holding that D had a real prospect of success on the point that C were under an obligation to sell at the best reasonably achievable price. Subsequently, on May 6, 2010, judge making order against C requiring C to disclose information held on computers. Upon C not cooperating in implementation of this order (which involved appointment of a joint expert to examine computer hardware), on May 20, 2010, judge making order that, unless C complied by May 28, their claim and defence to counterclaim would be struck out. After C had delivered up hardware on appointed day, on ground that nevertheless C had not complied with the unless order, D applying for order that C's claim and defence to counterclaim be stuck out and for judgment accordingly. C applying under r.3.8 for relief from sanction. **Held**, granting D's application and refusing C's application (1) in the circumstances the unless order was entirely appropriate, (2) the order required C to make available for inspection any documents contained on the relevant hardware at the date of the order, (3) any further data put upon the computers after the date of the order prior to delivery up, were also captured by the order, (4) the order did not permit the removal of data or the destruction of data after the date the order was made, (5) from the evidence

(including evidence of a computer expert and written and oral evidence of one of the claimants) it could be concluded that, by May 28, data which had existed on one of C's computers on May 6, had been destroyed, (6) accordingly the unless order had not been complied with and the sanction imposed by it took effect, (7) the breach of the order was clear and deliberate, (8) the court will not assist a litigant in destroying data and will not assist a litigant to fight a case on the limited material that that litigant chooses to make available, suppressing other material which would be material to the decision of the court. ***Arrow Nominees Inc. v Blackledge*** [2000] 2 B.C.L.C. 167, CA; ***Marcan Shipping (London) Ltd v Kefalas*** [2007] 1 W.L.R. 1864, CA; ***Tarn Insurance Services v Kirby*** [2009] EWCA Civ 19; [2009] C.P. Rep. 22, CA, ref'd to. (See ***Civil Procedure 2010*** Vol.1 paras 3.4.4.1 and 3.9.1.)

- **TRAVELERS INSURANCE COMPANY LTD v COUNTRYWIDE SURVEYORS LTD** [2010] EWHC 2455 (TCC), September 6, 2010, unrep. (Coulson J.)

Pre-action disclosure – subsequent arbitral proceedings

CPR r.31.16, Senior Courts Act 1981 s.33(2), Arbitration Act 1996 s.44(3). Company (D) providing residential surveying services facing prospect of large number of claims against them for fraudulent valuations given by employee, now dismissed. Possibility arising that underwriters (C) of D's professional indemnity insurance policy could avoid the policy for misrepresentation and/or non-disclosure under an exclusion clause. That clause designed for purpose of ensuring that the policy could not be avoided for inadvertent misrepresentation or non-disclosure, and containing within it an arbitration agreement. C making an application under r.31.16 for pre-action disclosure of documents by D. **Held**, dismissing the application, (1) in the event of D challenging C's avoiding of the policy on the ground of fraudulent intent, that dispute would come within the arbitration agreement (contrary to C's submission) and, therefore, would fall to be determined by arbitration, (2) on a proper construction of the exclusion clause, that was precisely the sort of dispute which the parties agreed would be referred to arbitration, (3) it is plain that the power to order pre-action disclosure in accordance with s.33(2) can only be invoked by an applicant who "appears to the High Court [to be] likely to be a party to subsequent proceedings in that court", (4) if the subsequent proceedings between the parties are to be referred to arbitration, the applicant would not be a party to subsequent proceedings in the High Court, (5) s.33(2), and thus r.31.16, does not apply if the underlying dispute is to be referred to arbitration, (6) s.44 does not grant to those who are likely to be parties to arbitral proceedings similar ancillary assistance to that provided by s.33(2). ***EDO Corporation v Ultra Electronics Limited*** [2009] EWHC 682 (Ch); [2009] Bus. L.R. 1306, ref'd to. (See ***Civil Procedure 2010*** Vol.1 para.31.16.4, and Vol.2 paras 2E–196 and 9A–113.)

Statutory Instrument

- **CIVIL PROCEDURE (AMENDMENT NO.3) RULES 2010 (draft)**

CPR Pt 54. Senior Courts Act 1981 ss.19(3), 31 and 66, Practice Direction 52 (Appeals) para.18. Amends r.54.10(2) and r.54.12(5) for purpose of making it clear that the High Court's jurisdiction in relation to judicial review proceedings may be exercised by a Divisional Court of the Court. Consequential amendment to para.18 to be made by TSO CPR Update 54 (forthcoming). Coming into force day after made. (See ***Supreme Court Practice 1999*** Vol.1 para.53/14/13, ***Civil Procedure 2010*** Vol.1 paras 52PD.94, 54.10.1, 54.12.1 and Vol.2 paras 9A–68 and 9A–102.)

Practice Directions

- **PRACTICE DIRECTION 31B— DISCLOSURE OF ELECTRONIC DOCUMENTS** TSO CPR Update 53 (September 2010)

CPR Pt 31. Contains provisions designed to assist parties in multi-track proceedings to reach agreement for disclosure of Electronic Documents by pre-CFM discussions, by exchange of questionnaire and other means. Contains directions as to: preservation of documents, reasonable search, keyword and automated searches, provision of electronic copies of disclosed documents. In force October 1, 2010. See further "CPR Update" section of this issue of *CP News*, and ***Civil Procedure 2010*** Supplement 2, para.31BPD.1, p.41.

- **PRACTICE DIRECTION 51E—COUNTY COURT PROVISIONAL ASSESSMENT PILOT SCHEME** TSO CPR Update 53 (September 2010)

CPR Pts 47 and 51. Introduces pilot scheme for "provisional" detailed assessment of costs where base costs claimed are £25,000 or less. Scheme to operate initially from October 1, 2010, to September 30, 2011, in the Leeds, York and Scarborough county courts. Applies Pt 47 with substantial modifications. See further "CPR Update" section of this issue of *CP News* and ***Civil Procedure 2010*** Supplement 2, para.51EPD.1, p.96.

In Detail

JUDGMENT DEBTOR COMMITTAL ORDERS

Part 71 of the CPR (Orders to Obtain Information from Judgment Debtors) was inserted by the Civil Procedure (Amendment No.4) Rules 2001 (SI 2001/2792) following an extensive consultation process during which serious criticisms of the old "oral examination" procedure emerged. The provisions of Pt 71 were designed to meet those criticisms, retaining imprisonment as the sanction of last resort, but streamlining the process, subject to appropriate protections.

CPR r.71.2 states that a judgment creditor may apply to the court for an order requiring a judgment debtor to attend court for oral examination; that is to say, to provide information about his means or information about any other matter needed to enforce the judgment. The judgment creditor must file an affidavit in accordance with r.71.5, and if the judgment debtor requests him to pay his travelling expenses he should do so (r.71.4).

If the judgment debtor fails to comply with the order, r.71.8 comes into play. That rule states as follows:

"(1) If a person against whom an order has been made under rule 71.2—

(a) fails to attend court;
(b) refuses at the hearing to take the oath or to answer any question; or
(c) otherwise fails to comply with the order,
the court will refer the matter to a High Court judge or circuit judge.

(2) That judge may, subject to paragraphs (3) and (4), make a committal order against the person.

(3) A committal order for failing to attend court may not be made unless the judgment creditor has complied with rules 71.4 and 71.5.

(4) If a committal order is made, the judge will direct that—

(a) the order shall be suspended provided that the person—
(i) attends court at a time and place specified in the order; and
(ii) complies with all the terms of that order and the original order; and
(b) if the person fails to comply with any term on which the committal order is suspended, he shall be brought before a judge to consider whether the committal order should be discharged."

The mechanism for issuing a warrant to bring a judgment debtor before a judge under r.71.4(b) is set out in Practice Direction 71 para 8. (It may be noted in passing that, by the Civil Procedure (Amendment No.5) Rules 2001 (SI 2001/4015), the words "comply with any term on which the committal order is suspended" in para.(4)(b) of r.71.8 were substituted for "attend court at that time and place".)

These rules attracted the attention of the Court of Appeal in *Islamic Investment of the Gulf (Bahamas) Ltd v Symphony Gems N.V.* [2008] EWCA Civ 389, March 11, 2008, unrep., CA (Tuckey and Rix L.JJ. and Sir Robin Auld) (see *Civil Procedure 2010* Vol.1 para.71.8.2), and again in the recent case of *Broomleigh Housing Association Ltd v Okonkwo* [2010] EWCA Civ 1113, October 13, 2010, unrep., CA. In both cases the Court expressed concern at the ways in which they were applied by courts in practice.

A short account of the latter case may be found in the "In Brief" section of this issue of *CP News* and need not be repeated here. In the *Islamic Investment* case (referred to in *Civil Procedure* Vol.1 para.71.8.2) the facts were that, upon the judgment creditor not appearing at the High Court on the due date in compliance with the r.71.2 order, a judge made a committal order in the standard form, suspended it to a particular date and gave the directions as required by r.71.8(4). The Court of Appeal held that, in the circumstances, the order should not have been made because, when he made it, the judge was not in a position to make it because at that time a court could not be satisfied on the criminal burden of proof that the debtor was not only in contempt of court but was contumaciously so, and in such a way as to entitle a court, as a matter of justice, to impose upon him an order for committal. The Court added that the making of a suspended committal order should not be regarded as a matter of form; in particular, such order should not be made for the sole purpose of ensuring that the debtor (being under threat of imprisonment) attends on the suspended date.

In the recent *Broomleigh Housing Association* case a joint judgment was given by Moore-Bick and Wilson L.JJ., and Carnwath L.J. gave a short judgment, agreeing in the result. In the joint judgment, the Court said "the power to commit a person to prison for contempt is one of the most powerful sanctions available to the court to punish those who flout its authority and to compel compliance in the future". Since it involves an interference with the liberty of

the subject "it is a power which is exercised with care and only in cases where disobedience is intentional and where in all the circumstances the order is appropriate".

After referring to r.71.8, the Court said there were two things that should be noted about the language of that rule. First, it gives the court a discretion whether to make a committal order ("the judge may make"). Secondly, if the discretion is exercised the court will suspend the order on terms that the person should comply with the order to attend court on a later specified date ("the judge will direct").

The Court explained (para.15) that it appeared from the documents in the case that judges routinely make committal orders whenever the judgment debtor has failed (even for the first time) to comply with an order under r.71.2 to attend court, provided only that personal service upon him has been established. Indeed, it has become so much a matter of routine that standard forms are used which require little more than ticking boxes and entering a figure for the period of imprisonment. The Court noted that the terms of rr.71.2, 71.3 and 71.8, when taken together, suggest that a suspended committal order is intended to be the normal, response to a failure by the judgment debtor to comply with an order to attend court for questioning, but pointed out that this was not the view taken by the Court in the *Islamic Investment* case (the effect of which "does not appear to have been widely appreciated"). That case was inconsistent with any approach which made such a response routine.

The Court added (para 17):

"Since many orders to attend are made in county courts around the country every week, and since failures to attend are not uncommon, one can understand why it should have become routine for the court to respond with suspended committal orders. Nonetheless, given that an order for committal is an order for imprisonment, it might have been thought appropriate for judges to consider the circumstances giving rise to the failure to attend before taking that step. The fact that such orders are suspended and are very rarely, if ever, enforced by imprisonment is not really a satisfactory explanation for this state of affairs: first, because a suspended order for committal is tantamount to a suspended sentence of imprisonment and second, because it is undesirable for the court to approach the making of severe orders with any degree of promiscuity just because it has an expectation, however well justified, that they are unlikely to need to be enforced."

In giving guidance, the Court suggested that, following reference to him under r.71.8(1), the judge, in determining whether to exercise his discretion to make a suspended committal order under para.(2) of that rule, has at least three options (the second of which divides into two), all of which he needs to consider. They are as follows (para.22):

"(a) If satisfied not only that the debtor was served with the order to attend but also that there is sufficient evidence before him to justify a finding to the criminal standard that the debtor's failure to attend (or refusal to take the oath and answer questions) was intentional and that in the circumstances it is appropriate to do so, he may proceed to make a suspended committal order. In our view by doing so he will not infringe the debtor's rights under Article 6 since the debtor will have an opportunity to challenge the order before it is enforced. If he does make an order, however, he must provide written reasons, at any rate briefly, for recital in the order in Form N79A for service upon the debtor. With respect to Rix L.J. [in the *Islamic Investment* case], we would not ourselves favour a reference in this context to contumacy, if only because the word is perhaps slightly arcane; nor, with respect to the writer of the commentary on r.71.8 in *Civil Procedure (2010)*, Vol.1, would we favour a reference to contumely, which speaks more of insolence than of obstinacy. But, in having regard to the circumstances, the judge will of course weigh all the evidence which suggests that there was—or was not—some extra obstinate or obstructive dimension to the debtor's intentional breach of the order.

(b) If not satisfied of the matters necessary for the making of a suspended committal order, the judge can adjourn consideration of it and, if so, can proceed in one of two ways: either

  (i) he can give directions, supported by a penal notice, for a hearing in court, including directions for the debtor (and perhaps also for the creditor) to attend; or

  (ii) he can give directions, again supported by a penal notice, for the debtor (and perhaps also for the creditor) to depose to specified matters and to file and serve the affidavit or affirmation by a specified date.

(c) Alternatively, the judge can decide there and then not to make a committal order and to proceed in a different way, probably by making a further order under r.71.2 for the debtor's attendance at court to provide information (before a court officer unless there are compelling reasons for the hearing to be before a judge: paragraph 2.2 of the Practice Direction supplementing Part 71). The further order will contain a penal notice in any event (r.71.2(7)), but the judge may favour including a recital which, in the light of the background, stresses the possible consequences of further non-attendance even more clearly to the debtor."

In a short judgment Carnwath L.J. accepted that the Court was bound by its decision in the *Islamic Investment* case, but noted that in that case it did not seem that the Court was referred specifically to the background of the reformed procedure in Pt 71, and wondered "whether the simple, modern language should be allowed to stand on its own, without the need to import historic common law rules".

CPR Update

UPDATE TO WHITE BOOK 2010 SECOND CUMULATIVE SUPPLEMENT

The Second Cumulative Supplement was published on September 27, 2010. Amongst other material, that Supplement includes Practice Direction 63 and Practice Direction 51E. For reasons explained below, the texts of those practice directions are printed again in this section of *CP News*. But first reference is made to a correction to Practice Direction 31B (also published in the Second Cumulative Supplement).

PRACTICE DIRECTION 31B (DISCLOSURE OF ELECTRONIC DOCUMENTS)

Electronic Documents Questionnaire

As was explained in the "CPR Update" section of Issue 8/2010 of *CP News* (September 13, 2010), this new practice direction supplementing CPR Pt 31 (published in TSO CPR Update 53) came into effect on October 1, 2010. The practice direction is included in the Second Cumulative Supplement to the 2010 Edition of *Civil Procedure* (see paras 31BPD.1 to 39BPD.39, pp.41 to 49).

The White Book Editors have been advised by the Ministry of Justice that, as published in TSO CPR Update 53, there is a typographical error in para.8 of the Electronic Documents Questionnaire in the Schedule to the practice direction. That paragraph appears in the Second Cumulative Supplement at para.31BPD.20, p.51, and should read as follows:

"8. If the answer to Question 6 or 7 is yes, state whether (a) attachments to e-mails (b) compressed files (c) embedded files and (d) imaged text will respond to your Keyword searches or other automated search."

PRACTICE DIRECTION 62 (ARBITRATION CLAIMS)

Applications for permission to appeal

In the "CPR Update" section of Issue 8/2010 of CP News (September 13, 2010) it was explained that, with effect from October 1, 2010, the paragraphs in Practice Direction 62 (Arbitration) dealing with applications for permission to appeal (paras 12.1 to 12.6) (see *Civil Procedure* 2010 Vol.2 para.2E–50 (pp.588 and 589) have been replaced (by TSO CPR Update 53) with much more elaborate and prescriptive paragraphs (paras 12.1 to 12.15). The reasons for these amendments and their effects were briefly explained.

In the Second Cumulative Supplement to the 2010 Edition, paras 12.6 to 12.15 were inadvertently omitted and have been included in an Erratum to Supplement Two sent to subscribers. The Publishers apologise for this omission. For the convenience of subscribers, the complete text of new paras 12.1 to 12.15 is set out again immediately below.

"Applications for permission to appeal

12.1 Where a party seeks permission to appeal to the court on a question of law arising out of an arbitration award, the arbitration claim form must, in addition to complying with rule 62.4(1)—

(1) identify the question of law;

(2) state the grounds (but not the argument) on which the party challenges the award and contends that permission should be given;

(3) be accompanied by a skeleton argument in support of the application in accordance with paragraph 12.2; and

(4) append the award.

12.2 Subject to paragraph 12.3, the skeleton argument—

(1) must be printed in 12 point font, with 1½ line spacing;

(2) should not exceed 15 pages in length; and

(3) must contain an estimate of how long the court is likely to need to deal with the application on the papers.

12.3 If the skeleton argument exceeds 15 pages in length the author must write to the court explaining why that is necessary.

12.4 Written evidence may be filed in support of the application only if it is necessary to show (insofar as that is not apparent from the award itself)—

(1) that the determination of the question raised by the appeal will substantially affect the rights of one or more of the parties;

(2) that the question is one which the tribunal was asked to determine;

(3) that the question is one of general public importance;

(4) that it is just and proper in all the circumstances for the court to determine the question raised by the appeal.

Any such evidence must be filed and served with the arbitration claim form.

12.5 Unless there is a dispute whether the question raised by the appeal is one which the tribunal was asked to determine, no arbitration documents may be put before the court other than—

(1) the award; and

(2) any document (such as the contract or the relevant parts thereof) which is referred to in the award and which the court needs to read to determine a question of law arising out of the award.

In this Practice Direction "arbitration documents" means documents adduced in or produced for the purposes of the arbitration.

12.6 A respondent who wishes to oppose an application for permission to appeal must file a respondent's notice which—

(1) sets out the grounds (but not the argument) on which the respondent opposes the application; and

(2) states whether the respondent wishes to contend that the award should be upheld for reasons not expressed (or not fully expressed) in the award and, if so, states those reasons (but not the argument).

12.7 The respondent's notice must be filed and served within 21 days after the date on which the respondent was required to acknowledge service and must be accompanied by a skeleton argument in support which complies with paragraph 12.2 above.

12.8 Written evidence in opposition to the application should be filed only if it complies with the requirements of paragraph 12.4 above. Any such evidence must be filed and served with the respondent's notice.

12.9 The applicant may file and serve evidence or argument in reply only if it is necessary to do so. Any such evidence or argument must be as brief as possible and must be filed and served within 7 days after service of the respondent's notice.

12.10 If either party wishes to invite the court to consider arbitration documents other than those specified in paragraph 12.5 above the counsel or solicitor responsible for settling the application documents must write to the court explaining why that is necessary.

12.11 If a party or its representative fails to comply with the requirements of paragraphs 12.1 to 12.9 the court may penalise that party or representative in costs.

12.12 The court will normally determine applications for permission to appeal without an oral hearing but may direct otherwise, particularly with a view to saving time (including court time) or costs.

12.13 Where the court considers that an oral hearing is required, it may give such further directions as are necessary.

12.14 Where the court refuses an application for permission to appeal without an oral hearing, it will provide brief reasons.

12.15 The bundle for the hearing of any appeal should contain only the claim form, the respondent's notice, the arbitration documents referred to in paragraph 12.5, the order granting permission to appeal and the skeleton arguments."

PRACTICE DIRECTION 51E—COUNTY COURT PROVISIONAL ASSESSMENT PILOT SCHEME

Provisional detailed costs assessments in Leeds, York and Scarborough county courts

In the "In Brief" section of Issue 8/2010 of CP News (September 13, 2010) it was explained that, with effect from October 1, 2010, this practice direction (published in TSO CPR Update 53) introduces a pilot scheme for "provisional" detailed assessment of costs where base costs claimed are £25,000 or less. The scheme carries into effect a recommendation made by Sir Rupert Jackson in *Review of Civil Litigation Costs : Final Report (December 2009)* Ch.45 para.6.1, and is to operate initially from October 1, 2010, to September 30, 2011, in the Leeds, York and Scarborough county courts. Under the scheme, CPR Pt 47 applies with substantial modifications.

This practice direction is included in the Second Cumulative Supplement to the 2010 Edition at paras 51EPD.1 to 51EPD.9 (pp.96 to 98), but as published there is not given its correct title. The Publishers apologise for this error.

For the convenience of practitioners engaged in proceedings likely to fall within the pilot scheme (and who might be confused by the error referred to above), the terms of this practice direction are set out again immediately below.

"**1.** This Practice Direction is made under rule 51.2. It provides for a pilot scheme (the County Court Provisional Assessment Pilot Scheme) to—

(1) operate from the 1 October 2010 to 30 September 2011;

(2) operate in the Leeds, York and Scarborough County Courts;

(3) apply to detailed assessment proceedings—

(a) which are commenced on or after 1 October 2010; and

(b) in which the base costs claimed are £25,000 or less.

2. Under this pilot scheme CPR Part 47 will apply with modifications. The following provisions of Part 47 and the Costs Practice Direction will continue to apply—

(1) rules 47.1, 47.2, 47.4 to 47.13, 47.14 (except paragraphs (6) and (7)), 47.15, 47.16, 47.18 and 47.19; and

(2) sections 28, 29, 31 to 39, 40 (with the exception of paragraphs 40.5 to 40.7, 40.9, 40.11 and 40.16), 41, 42, 45 and 46 of the Costs Practice Direction.

3. In cases falling within the scope of this pilot scheme, when the receiving party files the request for a detailed assessment hearing, that party must not only file the request in Form N258 together with the documents set out at paragraph 40.2 of the Costs Practice Direction but must also file with them an additional copy of the bill and a statement of the costs claimed in respect of the detailed assessment drawn on the assumption that (unless any of the following paragraphs apply) no party will subsequently request an oral hearing following a provisional assessment.

4. On receipt of the request for detailed assessment and the supporting papers, the court will within 6 weeks undertake a provisional assessment based on the information contained in the bill and supporting papers and the contentions set out in the points of dispute and any reply. No party will be permitted to attend the provisional assessment.

5. If, having commenced a provisional assessment, the court takes the view that the matter is unsuitable for a provisional assessment, the court will direct that the matter must be listed for hearing and thereafter the pilot scheme will cease to apply to it.

6. If the court completes a provisional assessment, it will send a copy of the bill as provisionally assessed to each party with a notice stating that either party may request the court to list the matter for full argument on any aspect of the provisional assessment within 21 days of receipt of the notice.

7. Unless paragraph 9 applies, either party may, within 21 days of receipt of the notice and provisionally assessed bill, request the court by letter to list the matter for an oral hearing. On receipt of a request for an oral hearing the court will fix a date for the hearing and give at least 14 days notice of the time and place of the detailed assessment hearing to all parties who are entitled to be heard.

8. Unless the court otherwise orders the costs of and incidental to an oral hearing convened under paragraph 7 above, shall be awarded as follows.

(1) Costs may be awarded to a paying party if the amount allowed is reduced to a sum which is 80% or less than the sum which had been provisionally assessed (excluding costs of the provisional assessment), or if the oral hearing was requested by a receiving party only and the amount allowed is not increased to a sum which is 120% or more than the sum which had been provisionally assessed (excluding costs of the provisional assessment).

(2) Costs may be awarded to a receiving party, if the amount allowed is increased to a sum which is 120% or more than the sum which had been provisionally assessed (excluding costs of the provisional assessment), or if the oral hearing was requested by a paying party only and the amount allowed is not reduced to a sum which is 80% or less than the sum which had been provisionally assessed (excluding costs of the provisional assessment).

(3) Where requests for an oral hearing are made by a receiving party and also by a paying party no order for the costs of and incidental to the oral hearing will be made if the amount allowed is greater than 80% but less than 120% of the sum which had been provisionally assessed (excluding costs of the provisional assessment).

9. If a party wishes to be heard only as to the amount provisionally assessed in respect of the receiving party's costs of the provisional assessment, the court will invite each side to make written submissions and the amount of the costs of the provisional assessment will be finally determined without a hearing."

REUTERS/Steve Marcus

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