CIVIL PROCEDURE NEWS

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CPR Pt.62, Arbitration Act 1996 ss.67, 69 & 70. FOSFA board of appeal, on appeal in two arbitration references by a company (C) issuing awards (1) allowing C's appeal, (2) concluding (a) that the arbitrators did have jurisdiction, (b) that the claims were not time-barred, and (c) that C's claim for damages succeeded. Respondent company (D) (1) making application to the court under s.67, and (2) applying for leave to appeal to the court under s.69. Respondent company (D) applying under s.70(7) for order requiring D to provide security for the sums awarded pending the determination of the s.67 application and the s.69 appeal. **Held**, dismissing application, as a general principle the court should not order security under s.70(7) unless the applicant can demonstrate that the challenge to the award, whether under s.67, s.68 or 69, will prejudice its ability to enforce it (e.g. by demonstrating some risk of dissipation of assets). ***Peterson Farms Inc v C & M Farming Ltd*** [2004] EWHC 121 (Comm), [2004] 1 Lloyd's Rep. 603 (Tomlinson J.), ***Tajik Aluminium Plant v Hydro Aluminium AS*** [2006] EWHC 1135 (Comm), May 15, 2006, unrep. (Morison J.), ref'd to. (See ***Civil Procedure 2011*** Vol.1 para.2E-274.)

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CPR rr.3.1(2)(f), 25.1(1)(o), 25.7(1)(b) & 44.3(8), Practice Direction 25B para.2A. In property claim, costs order made against one party (C) and judge making order under r.44.3(8) for £214,000 to be paid on account to the receiving party (D) before assessment. Subsequently, Master ordering by consent that D would pay C agreed rents on properties and that an account would be taken of past rents on other properties. Before account taken, and before the r.44.3(8) order satisfied, C applying (1) on basis that account was bound to result in a payment to him, for an interim payment under r.25.6 in an amount sufficient to enable him to satisfy that order, and (2) alternatively, under r.3.1(f) for a stay of the order. D opposing these applications. **Held**, refusing the r.25.6 application, but granting a limited stay of the r.44.3(8) order, (1) the court has a power to make an order under r.25.7(1)(b) where an order that an account be taken has been made, (2) but this will only be done where the evidence before it on the application shows that the account is "bound to result in payment to the applicant" (para.2A), (3) on the evidence it could not be said that the account was bound to result in a payment to C which would justify an interim payment, (4) the court has jurisdiction to order a stay of a r.44.3(8) order, (5) in exercising its discretion in that respect, the court may take into account matters that the paying party could have raised in opposition to the order when made and any relevant change in circumstances since. (See ***Civil Procedure 2011*** Vol.1 paras 3.1.7, 25.1.36, 25.7.1, 25BPD.2A & 44.3.15, and Vol.2 para.15-97.)

ASHBY v BIRMINGHAM CITY COUNCIL [2011] EWHC 424 (QB) *The Times* March 18, 2011 (Slade J.)

Concurrent jurisdiction of courts and employment tribunals – power to strike out claim

CPR r.3.4, Equal Pay Act 1970 s.2, Limitation Act 1980 s.2. Council employees (C) commencing claims in a county court against their employers (D) for damages for breach of their contracts of employment, specifically for failure to pay entitlements due under s.2 of the 1970 Act. On basis that claims, though within limitation period fixed by s.2 of the 1980 Act, were outside the limitation period for bringing equal pay proceedings in an employment tribunal (ET) as calculated in accordance with s.2(5) and s.2ZB of the 1970 Act, D applying for claims to be struck out. County court judge granting D's application. **Held**, allowing C's appeal, (1) claims for equal pay could be brought in the ordinary courts or in an ET, (2) s.2(3) of the 1970 Act states that a claim in respect of an equality clause may be struck out where it appears to the court that the claim "could be more conveniently disposed of separately" by an ET, (3) the fact that an ET would have no jurisdiction to determine a party's claim because it was presented out of time could be a factor affecting the convenience of the tribunal or affecting the court's exercise of the discretion to strike out under s.2(3), but was not determinative, (4) a party's reasons for not commencing proceedings in an ET within the time limit specified for such proceedings, and whether it was reasonable for him not to do so, were matters to be considered, (5) generally, if not presenting such proceedings was reasonable, the interests of justice were likely to be served by their being determined by a court with jurisdiction. ***Spiliada Maritime Corporation v Cansulex Ltd*** [1987] 460, HL, ***Clark v University of Humberside and Lincolnshire*** [2000] 1 W.L.R. 1988, CA, ***Abdulla v Birmingham City Council*** [2010] EWHC 3303 (QB), December 17, 2010, unrep., ref'd to. (See ***Civil Procedure 2011*** Vol.1 para.3.4.1.)

■ **BRIGHTON AND HOVE BUS AND COACH CO LTD v BROOKS** [2011] EWHC 806 (Admin) February 16, 2011, DC, unrep. (Toulson L.J. & Lloyd Jones J.)

Committal for contempt – power of High Court – transferred county court proceedings

CPR r.32.14, Sch.1 RSC Ord.52, r.1, Practice Direction RSC 52 and CCR 29, para.1.3, Senior Courts Act 1981 s.66. In two unrelated claims commenced in different county courts, proceedings subsequently transferred to the High Court. In each claim, after transfer one party (D) applying for permission to make an application for committal against opponent (C). In both instances, the alleged acts of contempt consisting of the making of false statements before the proceedings were transferred. Both applications listed for hearing before a Divisional Court on the preliminary issue whether a single High Court judge had jurisdiction to deal with them. **Held**, (1) para.(2) of RSC Ord.52, r.1 states (amongst other things) that where contempt of court is committed in connection with proceedings in an inferior court (e.g. a county court), then an order for committal may be made "only by a Divisional Court of the Queen's Bench Division", (2) para.(3) of the rule states that, where contempt of court is committed in connection with any proceedings in the High Court, then, subject to para.(2), an order for committal may be made by a single judge of the Division where the proceedings were assigned or subsequently transferred, (3) accordingly, a Divisional Court has exclusive jurisdiction where the contempt is committed in connection with proceedings in a county court, (4) if a contempt is committed in such proceedings and, subsequently, the proceedings are transferred from the county court concerned to the High Court, it remains the position that an order for committal for that contempt may be made only be a Divisional Court, (5) in those circumstances a single judge of the High Court Division to which the proceedings have been transferred has no jurisdiction to make such an order and might not assume jurisdiction with the consent of the parties. ***Fawdry & Co v Murfitt*** [2002] EWCA Civ 643, [2003] Q.B. 104, CA, ***Walton v Kirk*** [2009] EWHC 703 (QB), April 3, 2009, unrep. (Coulson J.), ***Barnes v Seabrook*** [2010] EWHC 1849 (Admin), July 23, 2010, DC, unrep., ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 32.14.2, sc52.1.16 & sc52.1.31, and Vol.2, paras 9A-33 & 9A-245.)

■ **BROOKES v HSBC BANK PLC** [2011] EWCA Civ 354, March 29, 2011, C.A., unrep. (Ward, Arden & Moore-Bick L.JJ.)

Discontinuance of claim – liability for costs

CPR rr.38.6 & 44.3, Consumer Credit Act 1974 s.78. Individual (C) entering into regulated agreement for running-account credit with bank (D). C, and many others similarly placed, bringing claim against D alleging that D had not complied with the notice requirements of s.78, with the consequence that the debt was unenforceable. Mercantile Court judge, in determining test cases (giving rise to questions that could conveniently be decided as preliminary issues), holding (amongst other things), that a creditor was not obliged by s.78 to provide a debtor with a copy of the original agreement between them, but could meet its obligations by other means. Subsequently, C applying to discontinue her claim and for an order for costs. Judge holding that there was no good reason for disapplying the presumption under r.38.6 that C was liable for D's costs. **Held**, dismissing appeal, (1) C's discontinuance avoided the costs of a trial, but there has to be something more than that to justify disapplying the presumption, because that is the consequence of any discontinuance, (2) C's proceedings could not be fairly characterised as proceedings brought to require D to provide information, and which were successful in that respect, but rather as proceedings brought to require D to provide information in a certain form as a basis for making good her contention that the agreement was unenforceable, (3) the interpretation of s.78 lay at the heart of C's proceedings, and they were discontinued once it was clear from the judge's decision in the test cases that they were doomed to fail. Court stating that the six principles identified by the judge, which were not in dispute, fairly summarised the effect of the relevant authorities on discontinuance costs (see [2010] EWHC 612 (QB) at para.7, [2010] 4 All E.R. 630 at p 634). ***Messih v MacMillan Williams*** [2010] EWCA Civ 844, [2010] C.P. Rep. 41, CA, ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 38.6.1 & 44.12.3.)

■ **FAVOR EASY MANAGEMENT LTD v WU** [2010] EWCA Civ 1630, November 23, 2010, C.A., unrep. (Lord Neuberger MR, Patten & Black L.JJ.)

Standard disclosure – scope – document relevant only to credit of party witness

CPR rr.31.6(b), 31.8, 31.11 & 31.12, Practice Direction 31A (Disclosure and Inspection) para.5. Company (C1) owned by a businessman (C2) bringing claim against another company (D2) and the sole director and shareholder (D1) thereof. Claimants seeking declaration that property acquired by D2 with monies provided by C2 was held on trust for C1 or, alternatively, for C2, and other relief. At relevant times, D1 employed by C2 and D1 asserting, but C2 denying, that there was a sexual relationship between them. At trial, during course of D1's cross-examination on that disputed question of fact, counsel for C2 putting to her that she had forged and sent to C2 a certificate purportedly signed by a doctor (W) stating that she was pregnant in January 2009. Upon her denying this, but admitting that she had sent C2 a certificate from another doctor (Y), counsel seeking a determination from the judge that, under her

duty to give standard disclosure imposed by r.31.6 and r.31.11, D1 should have disclosed medical records held by both doctors relevant to specific question whether she was pregnant in January 2009. Judge refusing the application. **Held**, dismissing C2's appeal (made in the course of trial), (1) the issues of whether D1 was pregnant, whether she apparently forged a medical certificate, and whether there was another certificate, were all matters which went to D1's credibility as a witness and to no other issue in the trial, (2) documents which relate purely to cross-examination of a party as to credit do not fall within the ambit of standard disclosure as required by r.31.6, (3) in this respect the law was the same as it stood before the CPR came into effect, (4) the sole purpose of C2's application was to enable his counsel to comment in his closing speech on inferences to be drawn from D1's failure to disclose the documents, (5) there was no need to have a ruling during the trial (and to interrupt the trial with an appeal) to accomplish that purpose, (6) where in the course of trial a document is mentioned and relied on, and one party asserts that another party ought to have disclosed it under the duties imposed by r.31.6 and r.31.11, the proper course is for the first party to seek an order for specific disclosure under r.31.12 (in which event the provisions of para.5 come into play). Court noting that it was arguable, but not necessary to decide, that under r.31.12 a court may order the specific disclosure of documents impugning credit. Court doubting whether the documents were or had been in D1's control (r.31.8) but prepared to determine the appeal on the basis that they fell within the ambit of Pt.31. ***Thorpe v Chief Constable of Greater Manchester Police*** [1989] 1 W.L.R. 665, CA, ref'd to. (See ***Civil Procedure 2011*** Vol.1 paras 31.6.2, 31.11.1, 31.12.1.1 & 31APD.5, and Vol.2 para.12-57.)

- **GEMSTAR-TV GUIDE INTERNATIONAL INC v STARSIGHT TELECAST INC** [2011] EWCA Civ 302, March 29, 2011, CA, unrep. (Laws, Jacob & Patten L.JJ.)

Case management – translations of foreign language documents – practice

CPR r.63.8, Practice Direction 63 para.5. In patent infringement claim brought by claimant company, in which defendant company counterclaimed for revocation, on grounds of lack of novelty, trial judge holding that patents were invalid. In Court of Appeal, C challenging judge's findings as to anticipation. In dismissing appeal, Court (1) noting (a) that the key question was whether the prior inventor's publication, initially published in a foreign language, disclosed the idea clearly and unmistakably, (b) that there were several translations of this document with disputes between the parties as to their accuracy arising, with the result (c) that a lot of expense and time was wasted before a translation was agreed, and (2) stating that (a) whenever a party relies on a document in a foreign language, disputes as to translation accuracy should be determined at an early stage, (b) the party relying on the translation should send it to the other parties with an express request for agreement within a reasonable time, (c) if the document is quite long the key passages relied on should be identified so that the other side can concentrate on these, (d) if the translation is not agreed, the court at the case management stage should normally insist upon agreement or early resolution of the dispute, if necessary by a hearing for that purpose. (See ***Civil Procedure 2011*** Vol.1 paras 2F-9.5, 2F-14.3 & 2F-22.)

- **KORASHI v ABERTAWE BR MORGANNWB UNIVERSITY LOCAL HEALTH BOARD** [2011] EWCA Civ 187, March 1, 2011, CA, unrep. (Maurice Kay, Rimer & Etherton L.JJ.)

Appeal to EAT – discretion to remit questions to tribunal – appeal against

CPR r.52.11, Employment Tribunals Act 1996 s.37. Doctor (C) commencing several employment tribunal proceedings against his former employers (D). Following dismissal by an employment tribunal (on July 17, 2009) of several claims (after an eight-week hearing), including "whistleblowing" and discrimination claims, D appealing to Employment Appeal Tribunal alleging that ET judgment was fundamentally flawed, principally on ground of insufficiency or deficiency of reasons. In accordance with guidance set out in authorities, on July 29, 2010, EAT directing ET to provide answers to a list of questions as preliminary to determination of C's appeal (the Burns/Barke procedure). Throughout, C consistently objecting to the use of that procedure in this case, and challenging its use by applying for permission to appeal to the Court of Appeal. Single lord justice granting permission, but refusing to stay the EAT's direction, with result that ET responded to it before the appeal came on and that response was available to the Court. **Held**, dismissing appeal, (1) the number and scope of the questions remitted to the ET in this case appeared to be in excess of those encountered by judges and practitioners experienced in EAT work, (2) there are dangers inherent in the procedure adopted by the EAT, and they include unreliable recollection, reconstructed reasoning, and tailored fact-finding, (3) in this case the EAT had demonstrated that it was aware of the guidance set out in the authorities and alert to the inherent dangers, (4) most, if not all, of the complaints advanced by C before the Court could still be advanced at the EAT appeal hearing of his substantive appeal, (5) the EAT's direction was a discretionary case management decision with which the Court should not interfere unless the EAT has exceeded the ambit of discretion or failed to have regard to a relevant principle. Observations on the development of the practice of remission for the amplification or augmentation of reasons in EAT appeals. ***English v. Emery Reimbold & Strick Ltd (Practice Note)*** [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409, CA, ***Burns v Royal Mail Group*** [2004] I.C.R. 1103, E.A.T., ***Barke v SEETEC Business Technology Centre*** [2005] EWCA Civ 578, [2005] I.C.R. 1373, CA, ***Woodhouse School v Webster*** [2009] EWCA Civ 91, [2009] I.C.R. 818, CA, ref'd to. (See

Civil Procedure 2011 Vol.1 paras 52.3.11, 52.11.4 & 52.11.5.)

■ **MANCHESTER CITY COUNCIL v PINNOCK (NO. 2)** [2011] UKSC 6, [2011] 2 W.L.R. 220, SC

Supreme Court – exercise of powers of the court below – orders upon judgment

SCR r.29(1), Constitutional Reform Act 2005 s.40(5). Housing authority (C) applying for possession order against demoted tenant (D) of residential premises. On December 22, 2008, county court judge (1) rejecting D's submission that art.8 of the Convention was engaged, and (2) making order requiring D to deliver up possession on January 12, 2009, but (3) giving D permission to appeal and staying enforcement. Court of Appeal dismissing D's appeal, but continuing stay of order pending D's further appeal to the Supreme Court. ([2009] EWCA Civ 852, [2010] 1 W.L.R. 713, CA). Supreme Court (1) holding that judge and Court of Appeal were wrong in holding that art.8 could not be raised by a defendant in D's position, (2) resolving to determine itself the issue of proportionality therefore arising (instead of remitting the matter to the county court), (3) further holding that, in the circumstances, D had no real prospect of relying on that issue, and (4) dismissing appeal and upholding the order of December 22, 2008 ([2010] UKSC 45, [2010] 3 W.L.R. 1441, SC). C submitting that the possession date in that order should be varied from January 12, 2009, to May 21, 2009, being the day after new legislation affecting the status of "tolerated" trespassers came into effect. D submitting that the Court had no jurisdiction to make the variation sought. **Held**, (1) by r.29(1), in relation to an appeal, the Court has all the powers of the court below and may set aside or vary any order made by that court, (2) in exercise of those powers it was appropriate for the Court to set aside the judge's order of December 22, 2008, and to make an order for possession to take effect on March 11, 2011. Court explaining that the effect of this would be to preserve D's original demoted tenancy (which had continued pending the resolution of these proceedings) but which would come to an end when possession was obtained against him pursuant to the order now made. (See ***Civil Procedure 2011*** Vol.2 para.4A-29.1.)

■ **MVF3 APS v BESTNET EUROPE LTD** [2011] EWHC 477 (Ch), March 7, 2011, unrep. (Arnold J.)

Court of Appeal – appeal pending – order of Court referring issue to trial court – effect of order

CPR rr.52.10(2)(b) & 52.11(2). Company (C) commencing proceedings against another company (D) for breach of confidence, alleging that D misused their trade secrets. Trial judge giving judgment for C and granting injunction. On July 2, 2009, judge making final order accordingly. Judge granting both parties permission to appeal against his decision as to the injunction. Judge refusing D permission to appeal against certain of his findings on questions of fact, especially findings from which inferences could be drawn on issue as to whether information used by D in their products could or could not have been obtained from the public domain and from industrial sources that were not secret, but Court of Appeal granting D permission to appeal. In this appeal, D applying for orders (1) that C be required to give further disclosure of documents relevant to a particular question of fact, and (2) that they be permitted to rely on evidence not before the judge (r.52.11(2)(b)). Court granting first application, but adjourning second. After C had given further disclosure Court, though not ruling on D's r.52.11(2)(b) application, on November 24, 2010, making order (1) referring certain questions of fact to the judge for determination (r.52.10(2)(b)), (2) directing that, for the purposes of such determination, C and D have permission to rely on certain evidence, and (3) adjourning the substantive appeal pending the trial judge's determination. At trial of remitted issues, judge noting that Court of Appeal (1) in ruling on D's further disclosure application made no finding as whether the documents sought were relevant, (2) in giving directions as to evidence made no finding as to whether D had satisfied the criteria for the admission of new evidence on appeal, and (3) though remitting questions of fact, had not (a) ordered a re-trial, or (b) disturbed any of the findings upon which the trial court's final order (of July 2, 2009) was based. In response to submissions made to judge by D at outset of hearing of remitted issues (which C did not oppose or concede), **held**, (1) the effect of the Court of Appeal's order of November 24, 2010, and the trial judge's determination of the questions remitted, were matters for the Court of Appeal at the hearing of the substantive appeal, (2) prima facie, the final order was res judicata and D were precluded by issue estoppel from challenging the judge's findings on all the material issues which led to the making of that order unless and until their appeal was successful, however (3) it was convenient to assume (a) that, in essence the Court of Appeal's order required the judge to reconsider his conclusion on a particular question of fact and, (b) that as a matter of necessary implication, that order should be taken to have set aside such issue estoppel to the extent necessary to enable the judge to perform that task. (See further "In Detail" section of this issue of CP News.) ***Hicks v Russell Jones & Walker*** [2007] EWCA Civ 844, [2009] 1 W.L.R. 487, CA, ***Koshy v DEG-Deutsche Investitions-und Entwicklungsgesellschaft mbH*** [2008] EWCA Civ 27, February 5, 2008, CA, unrep., ***Noble v Owens*** [2010] EWCA Civ 224, [2010] 1 W.L.R. 2491, CA, ***Korashi v Abertawe Bro Morgannwg University Local Health Board*** [2011] EWCA Civ 187, March 1, 2011, C.A., unrep., ref'd to. (See ***Civil Procedure 2011*** Vol.1 para.52.10.4.)

■ **OSUJI v HOLMES** [2011] EWCA Civ 476, *The Times* April 19, 2011, C.A (Ward & Pitchford L.JJ. and Sir John Chadwick)

Discontinuance of claim – whether court's permission required – interim injunction

CPR rr.2.3(3), 38.2, 38.3, 38.6 & 44.12, High Court and County Courts Jurisdiction Order 1991 art.3, Practice Direction 25A para.4.4(3). In an attempt to execute a magistrates' court order for non-domestic rate liability obtained by local authority (D2), bailiff (D1) attending ratepayer's (C) premises. C disputing liability and, upon undertaking to commence proceedings, obtaining from the out-of-hours duty judge High Court interim injunction restraining D from taking further action on the order. C commencing county court proceedings against D1 and D2 alleging that they had acted unlawfully and claiming damages for intimidation and trespass. Subsequently, C filing notice of discontinuance of the whole of this claim under r.38.3. On basis that they were entitled to their costs under r.38.6 and r.44.12, D1 submitting bill of costs for assessment. Upon default costs certificate being issued, C applying to quash certificate on grounds that, because they had not obtained the court's permission to discontinue their claim under r.38.2(2), their notice of discontinuance was a nullity and D1 were not entitled to have their costs assessed. District judge dismissing application and circuit judge dismissing C's appeal. Single lord justice granting C permission to make second appeal. **Held**, dismissing appeal, (1) under r.38.2(2)(a), a claimant must obtain the permission "of the court" if he wishes to discontinue a claim in relation to which "the court" has granted an interim injunction, (2) in this case, C's claim was a claim brought in a county court and the interim injunction had been granted, not by that court, but by the High Court, (3) as the court in which the notice of discontinuance had to be filed was not the court that had granted the interim injunction, permission to discontinue was not required by r.38.2(2)(a)(i), (4) in the circumstances, (a) C's discontinuance notice was valid and effective, and (b) r.38.6 applied, (5) further, in the High Court judge's order (which, as drafted, did not comply with para.4.4(3) of PD 25A), C's undertaking to commence proceedings, properly construed, was an undertaking to commence proceedings, not in a county court, but in the High Court. (See ***Civil Procedure 2011*** Vol.1 paras 25.1.2, 25.1.12.1, 25APD.4 & 38.2.2, and Vol.2 paras 9B-933 & 15-59.)

Statutory Instruments

■ **ACCESS TO JUSTICE ACT 1999 (DESTINATION OF APPEALS) (FAMILY PROCEEDINGS) ORDER 2011** (SI 2011/1044)

CPR Pt.52, Practice Direction 52 para.2A.1 Table 3, Access to Justice Act 1999 s.56. Provides for the routes of appeal from decisions made in family proceedings by certain levels of judge, in particular for appeals to a judge of the High Court and to a judge of a county court from decisions of district judges. Revokes S.I. 2005/3276 and replaces provisions formerly contained in other legislation. In force April 6, 2011. (See ***Civil Procedure 2011*** Vol.1, paras 52.0.11 & 52PD.3.3, and Vol.2 para.9A-847.)

■ **NON-CONTENTIOUS PROBATE FEES (AMENDMENT) ORDER 2011** (SI 2011/588)

Amends Non-Contentious Probate Fees Order 2004 (SI 2004/3120). Replaces Sched. 1 (Fees to be taken) which specifies the fees for non-contentious probate matters to be taken in the principal registry and each district registry. In effect provides for the increase of fees in most cases in line with the cumulative rate of Consumer Price Index inflation. In force April 4, 2011. (See ***Civil Procedure 2011*** Vol.2 para.6C-217+.)

In Detail

POWERS OF APPEAL COURT

Introduction

The practice and procedure to be adopted by courts with appellate jurisdiction are properly matters for rules of court to be made in the light of the legislation granting rule-making power (but not exclusively so). The powers that appellate courts may exercise in dealing with appeals are another matter. In the CPR, r.52.10 is entitled "Appeal court's powers". It is an ambitious provision. It applies to appeals handled by the county courts, by the High Court and by the civil division of the Court of Appeal (see r.52.1(1)). Rule 52.10 list various powers, but does not purport to be exhaustive. The rule lists powers that an "appeal court" has in an appeal from a "lower court", and, presumably, is therefore not concerned with appeals within a county court or within the High Court from one judge to another (see r.52.1(3)).

In a number of cases, provisions in r.52.10 have been the subject of judicial decision. In what follows, attention is focussed on recent cases dealing with para.(2) of the rule, and in particular sub-para.(b) thereof.

The background to CPR r.52.10

In the *Access to Justice : Final Report* (July 1996) Lord Woolf made no recommendation as to the powers of appeal courts, but said that "the existing rules on appeals are complex and need reviewing", and expressed the opinion that "there is scope for greater simplification and harmonisation" (Ch.14 para.40). In the *Report of the Review of the Court of Appeal (Civil Division)* (September 1997), again no recommendations as to powers were made, but it was recommended (anticipating the drafting of the CPR) that "the rules and procedures governing appeals should be reviewed to make them as straightforward and clearly expressed as possible" (para.53). Following upon these Reports the Lord Chancellor's Department issued several consultation papers, but none touched upon the powers of appeal courts. Then, in May 1999, after the CPR had come into effect, the Lord Chancellor's Department issued a consultation paper containing draft rules and practice directions relating to appeals for insertion in the CPR. These drafts sought to implement the results of the previous consultations and the recommendations previously made for simplification of the rules. Otherwise the draft rules were designed to replicate, but in simplified form, the effects of various RSC and CCR provisions re-enacted in Sch.1 and 2 of the CPR; that is to say, the effects of RSC Ord.55 (Appeals to the High Court), Ord.56 (Appeals by way of case stated (except in criminal matters), Ord.58 (Appeals from decisions by Masters, Registrars and Referees, etc), and Ord.59 (Appeals to the Court of Appeal); and the effects of CCR Ord.3, r.6 (Appeals to county court), Ord.13, r.1(10) and (11) (Appeal to circuit judge from order made by district judge on application in the course of proceedings by a district judge), and Ord.37, r.6 (Appeal of final order made by district judge to circuit judge). The draft rules included a draft for the rule that became CPR r.52.10 (Appeal court's powers). In draft the terms of that provision were more elaborate than the terms in which r.52.10 was ultimately enacted and inserted in the CPR by the Civil Procedure (Amendment) Rules 2000 (SI 2000 No.221) (with effect from May 2, 2000).

The conclusion that r.52.10 was intended simply to re-enact RSC and CCR provisions, albeit in simplified form, is inescapable. The circumstances in which appeals may go to the county courts, to the High Court and to the civil division of the Court of Appeal, the legal bases for those jurisdictions, and the powers that may be exercised in discharging them, are quite complicated. Certainly, it is unlikely that all of the "powers" could be captured in a single CPR provision such as r.52.10, and it would be wrong to assume that all of the powers listed in such a rule would be exercisable in all categories of appeal in all courts with appellate jurisdiction (or, at least, exercisable in the same manner and to the same effect). The draftsman of r.52.10 was alert to this (to an extent), as the parenthesis following para.(1) of the rule (drawing attention to r.52.1(4)) indicates.

It is submitted that, in relation to each of the appellate court powers listed in r.52.10, for each particular category of appeal it is necessary to ask: what is the legal basis for the exercise of that power in this context? In what follows, attention is confined to appeals to the Court of Appeal.

"all the powers of the lower court" "affirm, set aside or vary"

Para (1) of r.52.10 states that, in relation to an appeal, the appeal court has "all the powers of the lower court". For the purposes of appeals to the Court of Appeal, the statutory basis for that is s.15(3) of the Senior Courts Act 1981, which states that, for all purposes of or incidental to the hearing and determination of an appeal, the Court of Appeal "shall have all authority and jurisdiction of the court or tribunal from which the appeal was brought". However, it must be remembered that in relation to specific appeals this broad section may have to be read in conjunction with, and may

be cut down significantly by, statutory provisions regulating such appeals (e.g. Tribunals, Courts and Enforcement Act 2007 s.14 (Proceedings on appeal to Court of Appeal from Upper Tribunal)).

Para (2) of r.52.10 states that an appeal court has power to "affirm, set aside or vary any order or judgment made or given by the lower court" (sub-para.(a)), to "refer any claim or issue for determination by the lower court" (sub-para (b)), and to "order a new trial or hearing" (sub-para.(c)). These provisions re-state (almost in terms) the rules formerly found in CCR Ord.37, r.6 applicable to appeals in county court proceedings to circuit judges from judgments or orders of district judges, and cover much the same territory as the rules formerly found in RSC Ord.55, r.7(5) applicable to appeals to the High Court. Such provisions were within the respective statutory rule-making powers for these two categories of appeal and would remain so. (But, as explained above, r.52.10 does not apply to the former category.)

The important question which arises is this: what are the legal bases for that cluster of appellate powers in relation to other categories of appeal, in particular, in relation to appeals to the Court of Appeal?

A basis for the powers stated in sub-pares (a) and (c) of r.52.10(2) in relation to appeals to the Court of Appeal from the High Court can be found in s.17 of the Senior Courts Act 1981. Section 17(1) states that, where any cause or matter, or any issue in any cause or matter, has been tried in the High Court, any application "for a new trial thereof, or to set aside a verdict, finding or judgment therein" shall be heard and determined by the Court of Appeal. That sub-section has a long and interesting history, complicated by differences of opinion as to the extent to which verdicts of juries may be disturbed (if at all) by post-trial remedies, and as to the extent to which such remedies should lie within the jurisdiction of the trial court, or be exclusive to the appeal court, or be shared by both levels of court. Section 17(2) states, by way of exception to s.17(1), that rules of court may provide that, in cases where the trial was by judge alone and no error of the court at trial is alleged, any application for a new trial thereof, or to set aside a verdict, finding or judgment "shall be heard and determined by the High Court".

A basis for the powers stated in sub-paras (a) and (c) of r.52.10(2) in relation to appeals to the Court of Appeal from county courts can be found in s.81 of the County Courts Act 1984. Section 77 of that Act confers on parties to county court proceedings a general right of appeal to the Court of Appeal against determinations with which they are "dissatisfied". Section 81 sets forth the powers of the Court of Appeal in these circumstances. Sub-s.(1) of s.81 states that, on the hearing of an appeal, the Court of Appeal may either (a) order a new trial on such terms as the court thinks just; or (b) order judgment to be entered for any party; or (c) make a final or other order on such terms as the court thinks proper to ensure the determination on the merits of the real question in controversy between the parties.

On many occasions in the past, both in judgments in decided cases and reports of law reform bodies, it has been recognised that the exercise by the Court of Appeal of its power to order a re-trial may impose hardship, often a crippling hardship, on the parties who have to bear the costs of it, perhaps driving them into a settlement, which may or may not be satisfactory to them. Traditionally, the Court has regarded its power to order a re-trial as one to be exercised only after every possibility of itself arriving at a final judgment (for example, by receiving "fresh" evidence and taking it into account in determining disputed issues) has been explored.

"to refer any claim or issue for determination"

That leaves sub-para (b) of r.52.10(2), the provision which states that the appeal court "has power … to refer any claim or issue for determination by the lower court". On what basis may it be said that the Court of Appeal has such power? Former rules of court did not refer to any such power. And no primary legislation, including legislation granting rule-making authority, expressly confers such a power directly or indirectly. If the Court has such power, what is the scope of it, and how should it be exercised?

As was explained by Arnold J. in *MVF3 APS v Bestnet Europe Limited*, [2011] EWHC 477 (Ch), March 7, 2011, unrep., the exercise by the Court of Appeal of the power stated in r.52.10(2)(b) has been considered by that Court in three recent cases; they are *Hicks v Russell Jones & Walker* [2007] EWCA Civ 844, [2009] 1 W.L.R. 487, C.A., *Koshy v DEG-Deutsche Investitions-und Entwicklungsgesellschaft mbH* [2008] EWCA Civ 27, February 5, 2008, C.A., unrep., and *Noble v Owens* [2010] EWCA Civ 224, [2010] 1 W.L.R. 2491, C.A. In none of those cases was the provenance or the legal bases of the provision seriously considered.

Hicks v Russell Jones & Walker

The Hicks case was a professional negligence claim brought against a firm of solicitors (D) by a former client (C). D had represented C as respondents in an appeal in Chancery proceedings in which a judge had ordered a company liquidator to assign certain causes of action to C. The Court of Appeal allowed the appeal (the company liquidator proceedings appeal). In his claim against D, C alleged that D were negligent in their preparation of that appeal on his behalf, and that if they had performed their duty properly the appeal would have been dismissed, leaving him free to pursue the cause of action himself. Accordingly, C claimed damages for the loss of the opportunity to pursue the action.

The principal particular of negligence alleged was that D had failed to ensure that expert evidence as to the value of a property was obtained and adduced before the Court of Appeal to rebut the appellant's evidence (the "August 1991 valuation"). The facts were that, within a week of the appeal, D had sought, and received from leading counsel, advice on this matter and the advice was that such evidence should not be served. D's defence was that, in the circumstances it was not possible for them to arrange a conference with counsel earlier.

At trial on liability, Henderson J. held that C succeeded on liability but failed on causation ([2007] EWHC 940 (Ch), April 24, 2007, unrep.). In a reserved judgment his lordship found that D were negligent in that they failed to take proper instructions from C on the matter of the valuation rebuttal evidence and failed to obtain advice from leading counsel on that matter in good time. But his lordship further found that, had leading counsel's advice been sought in good time, it would have been to the same effect. Accordingly, the judge awarded C nominal damages but otherwise dismissed the claim and refused permission to appeal.

C's application for permission to appeal to the Court of Appeal was considered by a single lord justice, at an oral hearing at which both C and D were present. The lord justice noted the judge's findings, but concluded that arguably there was an additional relevant question which the judge had not addressed. That question was: given that D had failed to arrange a conference with leading counsel to consider the valuation evidence matter in proper time, what (if anything) ought they have done by way of obtaining further instructions from C and what consequences flowed from their not obtaining earlier instructions from C? His lordship explained that, well before the company liquidator appeal proceedings, D knew that C was keen to assemble evidence rebutting the August 1991 valuation. If they were unable through their own negligence to obtain advice from leading counsel on this matter promptly, ought they not to have discussed the matter more fully with C and prepared the evidence which they knew C wished to put before the Court of Appeal in those proceedings? His lordship concluded that it was at least arguable that D were negligent in that regard and that arguably C may have lost the appeal in the liquidator proceedings because of the failure to adduce such evidence. Accordingly his lordship granted C permission to appeal on two grounds. The first was that the judge had failed to find that D were in breach of contract in failing to obtain the expert valuation evidence in good time; and the second was that the judge had misdirected himself in failing to hold that D's breaches of contract were negligent and causative of C's failure in the Court of Appeal.

In the light of the grant of permission to appeal on these grounds, D took the view that the trial judge should be asked to make additional findings of fact on various matters which had been covered in the evidence at trial, but on which he had found it unnecessary to make any findings in view of the conclusions which he had reached, in particular the question of fact identified by the single lord justice. In D's opinion, if the points on which permission to appeal had been granted were successful, the Court either would not, or at any rate might not, be able to make necessary findings of fact itself as to what the outcome of the case would have been, and if so it would find it necessary to remit the case for a partial re-trial.

To this end, D made applications first to Henderson J. and then to the Court of Appeal for appropriate directions. When the matter came before the judge, he indicated that he would in principle be willing to give a supplemental judgment making additional findings of fact, while the case was still relatively fresh in his mind, and particularly if to do so might help to obviate the need for a partial re-trial in the event that C succeeded in establishing either or both of his grounds of appeal. However, his lordship concluded that, because the Court of Appeal was already seised of C's appeal, he should not embark on such an exercise without that Court's approval.

When D's application for directions came on for hearing in the Court of Appeal, the Court decided that it had power under r.52.10(2)(b) to direct the trial judge, in a supplemental judgment, to address the questions of fact that contingently arose in relation to the grounds on which permission to appeal had been given ([2007] EWCA Civ 844, July 12, 2007, C.A., unrep.). The Court ruled that the trial judge should be directed to give a supplemental judgment determining the following matter (reflecting the outstanding question identified by the single lord justice when granting permission to appeal):

"Given that D failed to arrange a conference with leading counsel to consider the August 1991 valuation in proper time, what (if anything) ought they have done by way of obtaining further instructions from C and what consequences followed from not obtaining earlier instructions from C?"

In his supplemental judgment ([2007] EWHC 2545 (Ch), November 5, 2011, unrep.), delivered almost seven months after his trial judgment, Henderson J. found that if D had fully explained the position to C, and specifically discussed with C the question of responding to the August 1991 valuation, D would have recommended to C that advice on the question should be sought from leading counsel and that no steps other than preparatory steps would have been taken to obtain any rebutting valuation evidence until that advice had been received. The judge further found that C would have accepted that advice.

In the light of this judgment, D submitted that the appeal no longer had any real prospect of success and sought the Court's directions. The Court accepted this submission. Accordingly, on its own motion (under r.52.9(1)(b)) the Court set aside the permission granted by the single lord justice, and dismissed the appeal ([2008] EWCA Civ 340, February 29, 2008, C.A., unrep.).

Koshy v DEG-Deutsche Investitions-und Entwicklungsgesellschaft mbH

In the Koshy case, a company (C) commenced proceedings against an individual (D) and obtained a freezing order. D's application to set aside the order on grounds of material non-disclosure was dismissed (after a 12-day hearing) and an order for costs was made against D. The trial judge dismissed the action and discharged the freezing order. The Court of Appeal granted D permission to appeal against the costs order and applied for permission to adduce fresh evidence. The grounds of appeal were that the findings of fact made by the trial judge in the main action demonstrated that, in obtaining the freezing order, C were in breach of their obligations to make full and frank disclosure. D contended that the evidence submitted by C at the hearing of his application to set aside the freezing order contained deliberate misrepresentations and that, had the facts found by the trial judge been known to the judge who heard that application, it would have been granted and the costs order would not have been made. In opposing the appeal, C argued (1) that the proper procedure for setting aside the costs order was not by way of appeal, but by application to the judge, (2) that D ought to have made such application when the freezing order was discharged, (3) that at the hearing of the application the judge would have made any necessary findings of fact about non-disclosure; (4) that the determination of such facts was not the function of the Court of Appeal.

The Court of Appeal dismissed D's appeal ([2003] EWCA Civ 1718, November 23, 2003, C.A., unrep.). The Court concluded that, in effect, D was asking the Court to interfere with the judge's exercise of discretion as to costs, and held that that could only be fairly and satisfactorily done in this case "by an application at first instance, in which the issues of fact are defined and on which evidence can be adduced about the circumstances in which the orders were made, including the order for costs" (para.24). It seems that, in the course of argument in this appeal, the Court explained to D that if a person seeks to show that a judgment has been obtained by fraud, he can proceed by way of appeal or, alternatively, by way of a fresh action. The Court further explained that such person must proceed in the latter way if, as in this case, there are disputed questions of fact. After the dismissal of his appeal, D took the Court's advice in this latter respect and commenced a fresh action (and ended up in the Court of Appeal yet again when C sought (successfully) to have that action struck out as an abuse of process; see [2008] EWCA Civ 27, February 2, 2008, C.A., unrep.).

It also seems that, in the course of argument in D's appeal, the Court explored with counsel the possibility that the Court might remit the disputed questions of fact to the judge, thereby obviating the need for D to bring a fresh action. C were prepared to agree to this course, but D was not and wished to pursue the appeal. In this respect it is likely that the Court had in mind exercising its power under r.52.10(2)(b), though no express reference was made to that provision. (Certainly, that was the explanation given by the Court of Appeal when the procedural history of the several proceedings involving C and D were recounted in the judgement given in D's second appeal to the Court of Appeal; see [2008] EWCA Civ 27, at para.45.) If it did have that power in mind, it seems that the Court did not think it could exercise it without D's consent.

Noble v Owens

The case of Noble v. Owens was explained in the "In Detail" section of CP News 4/2010 (April 6, 2010) ("New Trial of Quantum Where Fraud Alleged"). In that case the Court of Appeal took r.52.10(2)(b) at face value and held that it had power under that provision to remit an issue of fraud for trial by a High Court judge in a case where it was alleged that the trial judge had been misled by the claimant's fraud when assessing damages for personal injury. In this case the Court exercised that power, not when determining whether permission to appeal should be granted or when making orders ancillary to a grant of permission, but when determining and disposing of a contested appeal by allowing it. The issue of fraud remitted was a new issue arising out of new evidence. Further, the Court explicitly stated that, if the issue of fraud was proved to the satisfaction of the judge to whom the issue was remitted should make a re-assessment of the damages. (It was clear, as Arnold J. pointed out in the MVF3 APS case, that, in that event, the judge's original award of damages would cease to be res judicata; see further below.)

In the Noble case, the Court of Appeal was well aware of the novelty of the order it made. It was made for the best of reasons, that of avoiding the "costly and circuitous exercise" of requiring the aggrieved party to bring a fresh action alleging that the claimant's award of damages had been obtained by fraud. In retrospect the failure to investigate fully whether r.52.10(2)(b) provided a sound basis for the making of the order is understandable.

It should be noted that none of the cases outlined above was a case in which the appellant contended that the judge of the lower court, in giving his judgment, had not given adequate reasons. Consequently, in those cases the

procedure to be adopted on applications for permission to appeal set forth by the Court of Appeal in *English v Emery Reimbold & Strick (Practice Note)*, [2002] EWCA Civ 605, [2002] 1 W.L.R. 2409, C.A., was not applicable. In the English case the Court of Appeal stated that, where permission to appeal is sought from a trial judge on the ground of lack of reasons, the judge should consider whether his judgment is defective in that respect. If he concludes that it is, he should deliver a supplemental judgment; otherwise he should refuse permission. If an application for permission to appeal is made to an appeal court, the court may adjourn the application and remit the case to the trial judge with an invitation to provide additional reasons for his decision. Clearly the power of the appeal court to remit in those circumstances is an important one. It is a power based, not on statutory authority, but on art.6 of the Convention. For obvious reasons it is not encapsulated in r.52.10, and this demonstrates the point that that rule does not purport to state exhaustively the powers of appeal courts.

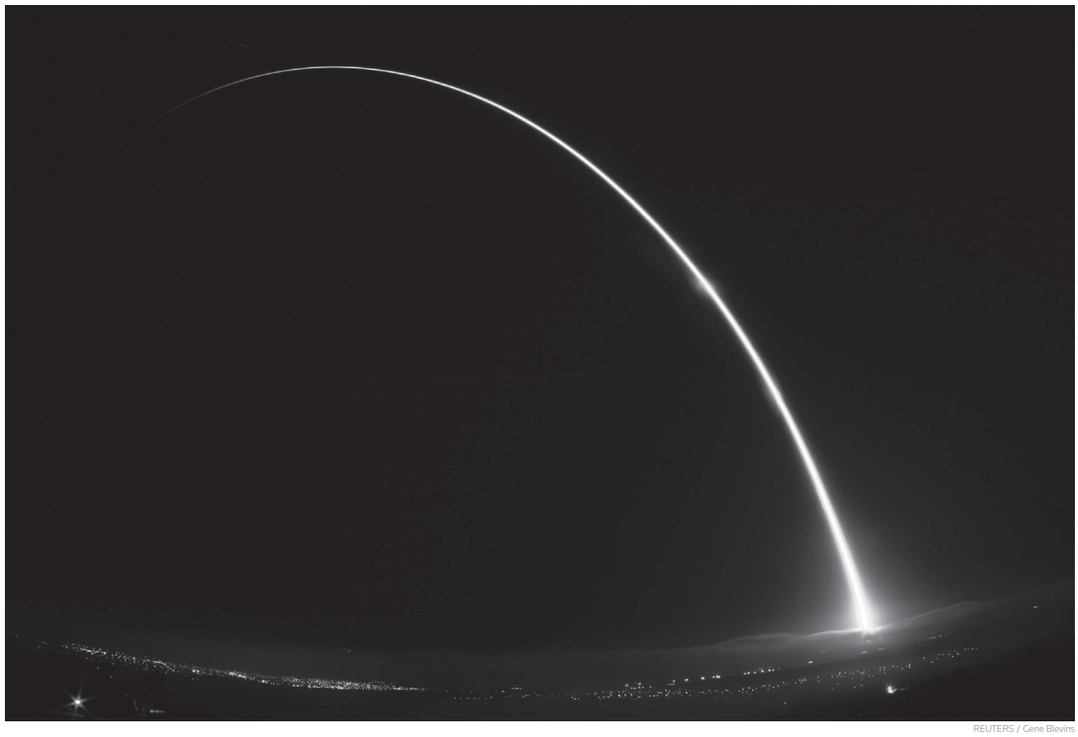
MVF3 APS v Bestnet Europe Limited

In MVF3 APS v Bestnet Europe Limited, [2011] EWHC 477 (Ch), March 7, 2011, unrep., after reviewing the above three cases, Arnold J. concluded that it is "not immediately obvious" that r.52.10(2)(b) empowers the Court of Appeal "to direct the lower court to reconsider an issue it has already decided prior to the substantive hearing of an appeal" (para.56). Nevertheless, that is exactly what the Court of Appeal did in this case. As the summary of this case in the "In Brief" section of CP News (which need not be repeated here) shows, Arnold J. doubted whether the Court of Appeal had such power under r.52.10(2)(b), but it seems that the parties did not share the judge's concerns, or at least felt it was in their interests to proceed as the Court of Appeal had directed.

It is not unusual for trial judges, in delivering trial judgments dealing with the questions of law and fact arising in the case as argued before them, to decide questions that do not really arise, given the conclusions that they have reached (contingent questions), but to do so just in case those conclusions or some of them are reversed on appeal ("If I am wrong on that, then I would have decided that."). But there must be limits. In modern times, the demands of trial judgment writing have become increasingly exacting and it would be wrong to expect judges to deal with contingent questions (especially contingent questions of fact), even the most obvious of them, as a matter of routine. (Clearly, this would aggravate the tendency towards trial judgments becoming longer, something that the Court of Appeal itself is anxious to discourage.) And it is not unusual for trial judges to deliver judgments dealing with the principal issues arising in the trial as argued, but knowing that there are outstanding issues that they will probably have to deal with in subsequent, supplemental judgments if the parties wish them to do so. The points that seem to be arising in the recent cases in which r.52.10(2)(b) is involved are whether the Court of Appeal has power at the hearing of an application for permission to appeal or (as in the *MVF3 APS* case) for permission to adduce fresh evidence on appeal, to direct a judge to give a further judgment determining contingent questions, or questions that might have been dealt with in a supplemental judgment, and if so, how should that power be exercised. In both instances, the trial judge is being asked, not to reconsider issues that he has determined (which are res judicata), but to determine issues that he did not decide. The particular problem identified by Arnold J. in the *MVF3 APS* case was that the Court's order remitting the proceedings to him seemed to direct that he should determine, not contingent or supplemental issues, but issues that he had already decided and which were res judicata. His lordship doubted whether the Court had jurisdiction to do this under r.52.10(2)(b) at a hearing held prior to the substantive hearing of an appeal (e.g. a permission or interlocutory hearing) (paras 56 to 60). If, in a given case, the Court of Appeal disposes of an appeal by reversing the holding of a trial judge on a particular issue, and the case is remitted, then of course no question of issue estoppel would arise.

Conclusion

It has been suggested above that there is no legal basis for the Court of Appeal having power, as r.52.10(2)(b) states, "to refer any claim or issue for determination by the lower court". (The Court is a creature of statute; there is no statutory basis for such power; the rule-making power provides no foundation for it; in none of the cases explained above was the question whether the power is limited to some appeal courts only explored.) Doubtless the weight of opinion amongst judges and lawyers would be that that proposition must be wrong, and if right should be ignored. But many may doubt that it should be a power exercisable at a hearing in that Court of applications for permission to appeal or on applications in pending appeals. The problems identified by Arnold J. in the *MVF3 APS* case demonstrate that it is a power that has to be used with discretion and care. Further, it will not always be the case that the exercise of the power will result in any savings in costs for the parties or in court time. Indeed, as the subsequent history of the *MVF3 APS* case itself seems to show, the consequences may be quite the reverse. (Following the delivery of the remittal judgment, from which the defendants sought permission to appeal, the Court of Appeal granted permission to appeal but dismissed the appeal; see [2011] EWCA Civ 424, April 20, 2011, C.A., unrep.)



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