CIVIL PROCEDURE NEWS

Issue 7/2012 August 14, 2012

CONTENTS

THE WHITE BOOK SERVICE 2012

SWEET & MAXWELL

In Brief

Cases

BNP PARIBAS SA v JOINT STOCK ASSET MANAGEMENT CO INGOSSTRAKH-INVESTMENTS [2012] EWCA Civ 644, May 24, 2012, CA, unrep. (Lloyd & Stanley Burnton L.JJ. and Sir Mark Potter)

Service out of jurisdiction – retrospective validation of service by an alternative method

CPR rr.6.15(2) & 6.36. French bank (C) commencing arbitral proceedings in London against Russian company (D1) in dispute arising on a guarantee. Under arbitration agreement, London office of solicitors (X) appointed as D1's agent for service of process in relation to any proceedings before the English courts, but, as a result of a variation of the agreement agreed by C and D1 before an arbitrator was appointed, this service clause no longer having effect. Upon a Russian asset management company (D2) (managing a parcel of shares in D1) commencing proceedings before a court in Moscow to invalidate the guarantee, C issuing claim form for anti-suit injunction against D1 and D2. C obtaining permission to serve the claim form on D2 out of the jurisdiction under r.6.36. Accordingly, C effecting service on D2's lawyers in Russia accordingly and also attempting to effect service on D2 at their Moscow address pursuant to Hague Convention procedures. C purporting to effect service on D1 by serving the claim form on X. D1 and D2 acknowledging service but making applications (in which X acted for both defendants) challenging jurisdiction under Pt 11 and disputing validity of service. Judge dismissing these applications ([2011] EWHC 308 (Comm)) (in the process retrospectively validating the service on X as good service on D1) and granting C interim anti-suit injunction ([2011] EWHC 3252 (Comm)). Following a decision of the Court of Appeal in another case, C conceding that the service on D2 was not good service and applying under r.6.15(2) for a retrospective declaration that steps already taken by C to bring the claim form to the attention of D2 by an alternative method (in particular, service of the claim form and amended claim form on X) constituted good service. Judge granting application but giving defendants permission to appeal ([2012] EWHC 1023 (Comm)). **Held**, dismissing the appeal, (1) the court should proceed cautiously when being asked to validate retrospectively a form of service which was not authorised by an order of the court when it was effected, (2) there has to be good reason for doing so since such an order may only be made exceptionally, (3) the mere fact that the claim form has been brought to the attention of a defendant cannot of itself amount to good reason, (4) in this case "facts relating to the proceedings" were capable of amounting to good reason and the judge had not erred in law or principle, (5) in particular, the relief sought by C required that their claim should proceed to trial at the date fixed and it was likely that the service on D2 under the Hague Convention procedure (which had still not been completed) might not be effected before that date. ***Abela v Baadarani*** [2011] EWCA Civ 1571, [2012] C.P. Rep. 11, CA, ***Cecil v Bayat*** [2011] EWCA Civ 135, [2011] 1 W.L.R. 3086, CA, ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 6.15,7 & 6.40.5.)

ENVIRONMENTAL RECYCLING TECHNOLOGIES PLC v STILLWELL [2012] EWHC 2097 (Pat), July 13, 2012, unrep. (Warren J.)

Patent revocation claim – transfer from High Court to Patents County Court

CPR rr.30.3 & 63.18, County Courts Act 1984 s.40, Copyright, Designs and Patents Act 1988 s.289(2), Practice Direction 30 para.9. On June 14, 2010, company (C) commencing claim in Patents Court for revocation of patent against individuals. Small company, to whom the individuals had assigned the patent, subsequently joined as defendants. Judge giving directions. Trial fixed for four days in December 2012. On March 28, 2012, defendants (D) making application for transfer of claim to patents county court (PCC). C opposing application. **Held**, granting the application, (1) this was a case which, in terms of its complexity, was far more appropriate for the PCC than the High Court, and financial considerations also favoured the PCC, (2) transfer applications of this sort should be made promptly, but even if made late they should be allowed if that is what the interests of justice demand, (3) delay should not defeat this application given that D were prepared to concede that costs to date should not fall within the PCC costs cap, (4) it cannot be argued that, because costs are capped in the PCC but not in the High Court, a transfer from the latter tribunal to the former "is somehow a denial of justice", (5) the fact that the party applying for transfer is a poor SME is an enormously important factor in favour of transfer, but on its own is not decisive. Extensive review of the relevant legislation and authorities and observations on role of PCC. ***Alk-Bello v Meridian Medical Technologies*** [2010] EWPCC 14, [2011] F.S.R. 13, ***Comic Enterprises Ltd v Twentieth Century Fox Film Corporation*** [2012] EWPCC 3, March 22, 2012, unrep., ref'd to. (See ***Civil Procedure 2012*** Vol.1 para.30.3.1, 30.5.1, 30PD.11.1 to 30PD.11.7, and Vol.2, paras 2F-17.11.1 & 2F-17.12.3.)

■ **FREY v LABROUCHE** [2012] EWCA Civ 881, July 3, 2012, CA, unrep. (Lord Neuberger M.R., Moses & Rimer L.JJ.)

Application to strike out – hearing of – submissions on judge's preliminary views

CPR r.3.4(2)(b). Individual (C), under terms of a trust established by his grandmother's will, having expectant reversionary interests. Significant asset in trust consisting of rights in a Liechtenstein corporation (D3). C commencing Chancery proceedings against a trustee (D1), a former trustee and the estate of another former trustee (D2), and against D3. C claiming (1) declarations as to beneficial ownership of D3 and its assets, (2) as against D1 and D2, an account, an inquiry, and an order for payment, and (3) the removal of D1 as trustee. Principally on ground that C had brought claims against them in Switzerland and Liechtenstein, defendants applying to strike out some or all of the claims against them on grounds of issue estoppel or abuse of process. On December 19, 2011, this application coming before judge (with time estimate of three days), together with further applications by C for permission to amend his statement of claim and for directions for trial (by then fixed for January 13, 2013, with a time estimate of four weeks). Beforehand, judge approving D1's retirement as trustee. At beginning of hearing, judge (1) expressing opinion (a) that what the parties required was a merits-based trial, (b) that the application was "really beyond the reach of sustained argument", and (c) that its continuation would be a waste of their money and of the court's time, and (2) after some discussion with counsel, dismissing the application and giving directions. In his judgment, judge explaining that, a claim should be struck out only in the clearest cases, that having read the papers, he was confident that no matter how much time was spent on the application, he would not be in a position to come to any concluded view, and that it would be open to the defendants to put their abuse of process arguments at trial ([2011] EWHC 3854 (Ch)). Single lord justice granting D1 and D2 permission to appeal. **Held**, allowing appeal and remitting the application to be heard by another judge, (1) where a judge has had the benefit of time to read all the papers, and to consider full written arguments, at an oral hearing of an application the judge may (a) state his provisional view that it should be rejected on a ground raised by the respondent, (b) then give the applicant a fair opportunity to persuade him otherwise, and (c) if un-persuaded by that argument, give judgment for the respondent on that ground, but (2) the judge may not dismiss the application without giving the applicant a fair opportunity to make out his case orally, because to do so would deprive the applicant of his fundamental right to a hearing, and (3) rejecting C's submission that the appeal should be dismissed because, although the judge had taken an inappropriate procedural course, he had reached the right conclusion, it would require an overwhelming case before a refusal by a judge to strike out a claim without hearing any argument could be upheld by an appellate court without even that court hearing any argument on the substantive merits. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2012***, Vol.1 paras 3.4.1 & 23.0.9.)

■ **OB v DIRECTOR OF THE SERIOUS FRAUD OFFICE** [2012] EWCA Crim 501, May 2, 2012, CA, unrep. (Gross L.J., Openshaw J. & Judge Milford QC)

Appeal in cases of contempt of court – appeal to Supreme Court

Administration of Justice Act 1960 s.13(2)(c), Proceeds of Crime Act 2002 s.41, Armed Forces Act 2006 s.378, SCUK Practice Direction 1 paras 1.2.8 & 1.2.11. Crown Court judge granting prosecutor's application to commit defendant (D) for contempt of court for breach of a restraint order made pursuant to s.41. Criminal Division of Court of Appeal dismissing D's appeal ([2012] EWCA Crim 67). On D's application to the Court for permission to appeal to the Supreme Court, Court refusing permission but certifying that their decision involved points of law of general public importance that ought to be considered by the Supreme Court. On question whether, in the circumstances, an appeal by D against the Court's decision lay to the Supreme Court (with that Court's permission), **held**, (1) rights of appeal to the Supreme Court in cases of contempt of court are provided by s.13(2), (2) before October 1, 2009, that provision expressly provided for such a right of appeal from an order or decision of the Court of Appeal (Criminal Division), (2) however, as a consequence of an amendment effected on that date by s.378 of the 2006 Act, that express reference was deleted from the sub-section and it could no longer be read as conferring that right, (3) that was an obvious drafting error and it was appropriate for the Court, applying common law principles of statutory construction, to rectify the statute by re-inserting words that provided the right. ***Inco Europe Ltd v First Choice Distribution*** [2000] 1 W.L.R. 586, HL, ref'd to. (See ***Civil Procedure 2012*** Vol.2 paras 3C-38, 3C-39, 4A-57, 4A-58 & 9B-18.)

■ **PAGE v HEWETTS SOLICITORS** [2012] EWCA Civ 805, June 15, 2012, CA, unrep. (Laws & Lewison L.JJ.)

Issuing of claim form – when action "brought" for limitation purposes

CPR rr.7.2 & 24.2, Practice Direction 7 para.5, Limitation Act 1980 ss.21 & 23. In 1998 executor (C) instructing solicitors (D1) to advise and act for him on the administration of an estate, including on the disposal of a particular property. After sale of that property in 1999 on advice of D1's employee (D2) to developer (X) through estate agents,

C suspecting that it had been sold at a gross undervalue and that D2 and X had common commercial interests. In November 2000, C making complaint to OSS. In February 2003, C receiving copy of an agreement between D2 and X. C issuing claim form against D1 and D2 bearing the date stamp February 17, 2009, alleging breach of duty, secret profit, negligence etc., and claiming an account and damages etc. On ground that C's claims were statute barred, Master granting defendants' application for summary judgment and striking out claims. Master finding (1) that time began to run for the several claims relating to the alleged sale at undervalue on or about November 23 & 25, 2000, and for the secret profit claim on February 6, 2003, and (2) that for limitation purposes, C's action was brought on February 17, 2009. Deputy judge dismissing C's appeal. Single lord justice granting C permission to appeal. **Held**, allowing appeal, (1) C's claim for an account of the alleged secret profit could "not be brought" after the six-year time limit fixed by s.23, (2) the question when an action is "brought", is a question of construction of the 1980 Act, and not of r.7.2 or para.5 of PD 7 (though they may inform the construction), (3) C's evidence was that the claim form and a request to issue were lodged with the court office no later than December 5, 2008, and submitted that they had been lost or mislaid by the office, (4) if C established that he had lodged the documents in due time his action would not be statute barred, (5) in dealing with that issue the Master and the judge applied the wrong test, (6) as this was an application for summary judgment, the question for the court was not whether it was satisfied on a balance of probabilities that the action was brought out of time, but whether C had no real prospect of showing that the court office received the documents in time. ***Barnes v St Helens Metropolitan Borough Council (Practice Note)*** [2006] EWCA Civ 1372, [2007] 1 W.L.R. 879, CA, ***Aly v Aly*** (1984) 81 L.S.G. 283, CA, ref'd to. (See ***Civil Procedure 2012*** Vol.1 para.7.2.1, and Vol.2 paras 8-6 and 12-48.)

- **R. (V.) v SECRETARY OF STATE FOR THE HOME DEPARTMENT** [2012] EWHC 1499 (Admin), May 16, 2012, unrep. (Ouseley J.)

Judicial review claim – renewed application for permission to proceed – extension of time

CPR rr.2.4, 3.1(2)(a), 3.3(5), 3.9, 23.8 & 54.12, Practice Direction 2B para.3.1, Practice Direction 23A para.11, Practice Direction (Citation of Authorities) para.6. Individual (C) applying for permission to proceed with judicial review claim against Secretary of State (D) in immigration matter in which unlawful detention alleged. Order of deputy High Court judge refusing permission made on January 19, 2012, received by C's solicitors on January 30, 2012. On February 14, 2012, after C removed from jurisdiction, C's solicitors filing on C's behalf request for reconsideration of judge's decision at an oral hearing filed, together with covering letter in which solicitors explained that the reason for failure to file that request by February 5, 2012 (i.e. within seven days of service of the order (r.54.12(4)) was their oversight. Court office advising C that, "as the file had now been closed", in the absence of D's consent "an application to re-open the file", more correctly an application for extension of time for filing a request for reconsideration, should be made. C's application for that purpose, made on February 24, 2012, opposed by D. On paper, Deputy Master dismissing the application. On C's appeal to the judge, **held**, applying the r.3.9 criteria and taking all the circumstances into account, C's appeal should be allowed. Judge commenting on several procedural issues coming to attention on this appeal; including (1) whether, where a renewal request is lodged out of time, a separate application for extension of time is required, (2) whether an application "to re-open the file" is no more than a request for extension of time, (3) whether C's application was an "interim application" in a claim for judicial review (within PD 2B para.3.1(c)) and, if not, whether the Deputy Master had jurisdiction to deal with it, (4) whether the proper method for C's challenge of the Deputy Master's decision was by way of appeal to a judge, or (by a combination of r.3.3(5), r.23.8 and PD 23A para.11), by application to set aside. Judge releasing this judgment for citation. (See ***Civil Procedure 2012*** Vol.1 paras 2.4.1, 2BPD.3, 3.1.2, 3.3.2, 3.9.1, 23.8.1, 23APD.11, 54.12.1 & B3-001, and Vol.2 para.12-55.)

- **SHLAIMOUN v MINING TECHNOLOGIES INTERNATIONAL INC** [2012] EWCA Civ 772, May 29, 2012, CA, unrep. (Lord Neuberger M.R.)

Permission to appeal application – adjournment of – security for costs

CPR rr.3.1(2)(f), 3.1(3)(a), 25.15, 31.22 & 52.3. US $2m paid by a company (C2) to another company (X), controlled by a businessman (C2), paid into C2's bank account. D, believing it to have been defrauded in the transaction, obtaining from High Court disclosure orders under which banks hosting C1's and C2's accounts were required to provide certain documents containing information about those accounts. Subsequently, D commencing proceedings in Canada against C1 and C2 for fraud etc. C1 and C2 applying to High Court to set aside disclosure order and for injunction preventing D from making use of the disclosed documents or information contained therein in the Canadian proceedings. Judge dismissing this application. On paper, single lord justice ordering that C1's and C2's application to appeal "be adjourned into court with appeal to follow if permission granted". Thereupon D applying for order for security of their costs of the appeal. **Held**, granting the application, (1) r.25.15 does not apply to an application for permission to appeal which has not been determined, even where an order such as that made by the single lord justice in this case has been made, (2) nonetheless the Court of Appeal has power, by combination of r.3.1(2)(f) and r.3.1(3)(a), in practice to grant security for costs where such application has been adjourned into court, (3) the tests to be applied are the same as those applicable

under r.25.15. Master of the Rolls stating that, except in special circumstances, permission to appeal applications should not be adjourned into court. ***Great Future International Limited v Sealand Housing Corporation*** [2003] EWCA Civ 682, ***Golubovich v Golubovich*** [2011] EWCA Civ 528, March 3, 2011, CA, unrep., ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 3.1.3, 3.1.4, 25.15.1 & 52.3.6.)

■ **SOUTHWARK LBC v OFOGBA** [2012] EWHC 1620 (QB), June 15, 2012, unrep. (Hickinbottom J.)

County court possession and arrears claims – routes of appeal

CPR rr.40.2(4), 52.14 & 55.3, Access to Justice 1999 (Destination of Appeals) Order 2000 art.4, Practice Direction 7A para.3.3, Practice Direction 52 paras 2A.2 & 2A.3. Local housing authority (C) bringing county court claim against tenant (D) for possession of property subject to secure tenancy and for rent arrears. Claim disposed of by consent order. Subsequently, on D's application, district judge restoring the proceedings, permitting amendments to defence to enable D to argue that he was not liable for certain charges imposed by C, and allocating claim to multi-track, and giving directions. After handing down reserved written judgment, trial judge making orders (1) giving C money judgment in the sum of £1,700 for rent arrears, and (2) contrary to what was indicated in the judgment, following submissions adjourning the claim for possession (with permission to apply if D did not keep up payments). D lodging notice of appeal in the High Court contending that the judge erred (1) in adjourning rather than dismissing the possession claim, and (2) in her conclusions on the issues raised in D's amended defence relevant to the money judgment. High Court judge granting D permission to appeal. On question coming before trial judge as to whether the High Court had jurisdiction to determine the second ground of appeal, **held**, (1) claims to which Section I of CPR Pt 55 apply are brought under Pt 7, (2) art.4 states that, where the decision of a county court judge to be appealed is a final decision in a claim made under Pt 7 and allocated to the multi-track, appeal lies to the Court of Appeal, (3) in this case the money judgment was a decision to which art.4 applied, but the decision to adjourn the possession claim was not, (4) accordingly, D's appeal against the first decision lay (with permission) to the Court of Appeal, and his appeal against the second to the High Court, (5) in the circumstances, D's permission to appeal to the High Court against the first decision had to be revoked, and it was appropriate (to enable all issues to be dealt with in the same appeal forum) to order that his appeal against the second decision should be transferred to the Court of Appeal. ***Scribes West Limited v Relsa Anstalt (No. 2)*** [2004] EWCA Civ 965, [2005] 1 W.L.R. 1839, CA, ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 40.2.7, 52.0.11, 52.14.1 & 55.2.4, and Vol.2 para.9A-901.)

■ **SUMMERS v FAIRCLOUGH HOMES LTD** [2012] UKSC 26, [2012] 1 W.L.R. 2004, SC

Abuse of process – court's power to strike out fraudulent or exaggerated claim

CPR r.3.4(2). Employee (C) bringing personal injuries claim against employers for injury suffered at work. At trial, judge giving judgment for C on liability with damages to be assessed. C serving schedule of loss in sum of £868,000. After D had revealed to him surveillance evidence suggesting that he had grossly exaggerated the consequences of his injuries, C serving second schedule of loss, this time in sum of £250,000, and making offer to settle. At trial of quantum, judge (1) finding that there was evidence sufficiently cogent to sustain a claim of fraud against C for exaggerating his claim, and drawing a series of inferences adverse to him, (2) rejecting D's submission that C's claim should be struck out on the ground that it was tainted by fraud and was an abuse of process, and (3) giving judgment awarding C damages of £88,000. Court of Appeal dismissing D's appeal, rejecting (on the basis of binding authority) submission that the judge had power to strike out C's claim in its entirety and should have exercised it ([2010] EWCA Civ 1300, October 7, 2010, CA, unrep.). Supreme Court granting D permission to appeal. **Held**, dismissing appeal, (1) either under the CPR, or under its inherent jurisdiction, the court has power to strike out a statement of case at any stage on the ground that it is an abuse of process of the court, (2) the language of r.3.4(2)(b) supports the existence of a jurisdiction to strike a claim out for abuse of process, even where to do so would defeat a substantive claim, (3) but a court will only exercise this jurisdiction at the end of a trial if it is satisfied that the party's abuse of process was such that he had thereby forfeited the right to have his claim determined, (4) in deciding whether or not to exercise the power the court must examine the circumstances of the case scrupulously in order to ensure that to strike out the claim is a proportionate means of achieving the aim of controlling the process of the court and deciding cases justly, (5) it will only be in the very exceptional cases that it will be just and proportionate for the court to strike out an action after a trial, (6) this was not an appropriate case in which to strike the action out instead of giving judgment for the claimant. Observations on relevance of pre-CPR authorities and on procedural means (including applications to commit for contempt of court) by which the dishonest inflation and fraudulent invention of claims may be effectively deterred. ***National Westminster Bank Plc v Rabobank Nederland*** [2006] EWHC 2959 (Comm), November 11, 2006, unrep., ***Ul-Haq v Shah*** [2009] EWCA Civ 542, [2010] 1 W.L.R. 616, CA, ***Widlake v BAA Ltd*** [2009] EWCA Civ 1256, [2010] C.P. Rep. 13, CA, ***Masood v Zahoor*** [2009] EWCA Civ 650, [2010] 1 W.L.R. 746, CA, ***South Wales Fire and Rescue Service v Smith*** [2011] EWHC 1749 (Admin), May 10, 2011, DC, unrep., ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2012*** Vol.1 para.3.4.3.6, and Vol.2, paras 3C-8 and 12-57.)

In Detail

CONTEMPT OF COURT IN CONNECTION WITH COUNTY COURT PROCEEDINGS

Contempt of court in connection with county court proceedings which is neither contempt in the face of the court, nor disobedience of an order of a county court, is punishable only by an order of committal made in the High Court in accordance with CPR Sch.1 RSC Ord.52, r.1 (*Re G (A Child) (Contempt: Committal)*, [2003] EWCA Civ 489, [2003] 1 W.L.R. 2051, CA).

As CPR r.31.13 and r.32.14 recite, proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth, including a disclosure statement, without an honest belief in its truth. Such contempts are examples of interferences with the due administration of justice in a particular case (see *Civil Procedure 2012* Vol.2, para.3C-8), and where committed may be punished by the High Court by committal orders in the exercise of the Court's inherent, and in this respect, exclusive jurisdiction (and not by a county court).

Rules contained in CPR Sch.1 RSC Ord.52 provide that proceedings for commital for contempt for interference with the due administration of justice in a particular case when brought in connection with county court proceedings must be brought in a Divisional Court of the High Court, and that no application may be made unless an application for permission has been made to, and granted by, a Divisional Court. Those rules further provide that, where the committal proceedings are brought in connection with High Court proceedings, a single judge has jurisdiction to deal with the matter, and no permission is required. However, in the latter event, where the interference with the due administration of justice complained of consists only of an allegation that the respondent made a false statement of truth or disclosure statement, then, not by operation of anything in RSC Ord.52, but by the terms of r.31.13 and r.32.14, "the permission of the court" is required, and by that is meant the permission of the single High Court judge.

By stating that "proceedings under this rule" may be brought "only with the permission of the court", both r.31.13 and r.32.14 mislead in two respects. First they give the impression that the types of contempt of court referred to are created by the rules themselves when, of course, that is not and cannot be the case. Secondly, they give the impression that a court other than a Divisional Court may grant permission for the contempt proceedings to be brought (a misunderstanding reinforced by the express words of Practice Direction 32 r.28(1)). (Both rules acknowledge that proceedings for contempt of the types may be brought, in a Divisional Court, by the Attorney General.)

So the position is that proceedings for contempts with the interference of the due administration of justice in the forms stated in r.31.13 and r.32.14, when brought in connection with county court proceedings, cannot be brought in a county court or before a High Court judge sitting alone. They must be brought in a Divisional Court and the permission of a Divisional Court is required. In the recent Supreme Court case of *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 W.L.R. 2004, SC, unrep., references were made to these rules, but in terms which suggest that the Court did not properly understand their effects. (For summary of this case, see "In Brief" section of this issue of CP News.)

In this case, the principal issues were whether a court has power to strike out a statement of case as an abuse of process after a trial at which the court has held that the defendant is liable in damages in an ascertained sum (to be quantified by trial if not agreed) and, if so, in what circumstances such a power should be exercised. In short, the Supreme Court held, contrary to Court of Appeal authority, that the court did have such power, but also held that it may be exercised only in very exceptional cases (of which the instant case was not an example).

The facts were that the claimant (C) had brought a claim in a county court against his employers (D) for injuries suffered in an accident at work. A judge gave judgment for C on liability, with damages to be assessed. Subsequently, in an amended defence, D (now armed with surveillance and other evidence) alleged that C had grossly and dishonestly exaggerated his losses and asserted that his claim should be struck out in its entirety, on the ground that it was tainted by fraud and was an abuse of process.

In his judgment on quantum, the county court judge awarded C damages significantly less than that claimed by C in his original schedule of loss, and less than that claimed in a second schedule of loss served by C after D had served their amended defence. In his judgment the judge stated that the evidence before him was "sufficiently cogent to sustain a claim of fraud" against C. However, on the ground that (in the light of Court of Appeal authority) he had no jurisdiction to do so, the judge rejected D's submission that C's claim should be struck out.

At a post-trial hearing on interest on damages and costs held by the county court judge, D applied for permission to commence contempt proceedings against C. It is not clear from the Supreme Court's judgment exactly what type of contempt proceedings D were minded to bring, or on what basis this application for permission was made to the

county court judge. (As explained above, if it was done on the basis of r.32.14 it was misconceived.) In any event, the judge refused permission. In the Supreme Court judgment, the justices said that the judge's decision in this respect was "of some significance in resolving the issues in this appeal" and that "it is important to note" that D did not challenge it, either in their appeal to the Court of Appeal or to the Supreme Court, and regarded (paras 11 and 18). (Pausing there, if whether permission should be granted was not a matter for the county court judge, D can hardly be criticised for not challenging the decision.)

The Supreme Court's remarks in this respect form the background to what the Court had to say in its judgment in this case about procedural steps which a defendant in D's position might take to protect themselves where claimants dishonestly exaggerate or fraudulently invent claims (all of which was obiter dicta). On the appeal, D submitted that, as a practical matter, the bringing by a defendant of contempt proceedings against a claimant cannot be an effective sanction for the kind of behaviour evidenced in this case. The Supreme Court rejected that submission.

In doing so, the Court drew attention to, and endorsed, the decision of a Divisional Court in *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin), May 10, 2011, DC, unrep., a case in which a claimant was alleged to have to have made both a false disclosure statement and false statements verified with a statement of truth in connection with county court proceedings in order to obtain damages for loss of earnings. In that case it was stated that, where committal for contempt proceedings are brought in a Divisional Court against persons who made "false and lying claims", that is to say, committal proceedings brought on the ground that their behaviour interfered with the due administration of justice, they should "expect to go to prison". The Divisional Court in that case added:

"The public and advisors must be aware that, however easy it is to make false claims, either in relation to liability or in relation to compensation, if found out the consequences for those tempted to do so will be disastrous. They are almost inevitably in the future going to lead to sentences of imprisonment, which will have the knock-on effect that the lives of those tempted to behave in that way, of both themselves and their families, are likely to be ruined."

The Supreme Court recognised that, where the underlying proceedings are county court proceedings (as they were in the Summers case), the contempt proceedings have to be brought in a Divisional Court but expressed the opinion that "there should be no practical difficulty in that regard" (para.58). Having said that, the Supreme Court then immediately noted that, in the instant case, D "indicated some reluctance to proceed by way of proceedings for contempt", and commented on this as follows (para.59):

"We, however, see no difficulty in proceedings by way of contempt in such cases, provided of course that the relevant facts can be proved. It was submitted in the course of argument that there might be difficulties in inviting the trial judge to hear applications for permission to bring proceedings for contempt. However, in the absence of special circumstances, we cannot see any difficulty in the trial judge hearing both the application for permission and, if permission is granted, the proceedings themselves. On the contrary, it seems to us that the trial judge is likely to be best placed to hear both. Such an approach is likely to be both the most economical and the most just way to proceed. The only circumstances in which that would not be the case would be where there was apparent bias on the part of the judge … ."

In terms that paragraph does not distinguish between the situation where the alleged interference with the due administration of justice is interference with proceedings in the High Court and where it is interference with proceedings in a county court. If the intention is that what is said in that paragraph applies in both situations, then it has to be said, with the greatest respect, that it is not correct.

As the law presently stands, where the contempt alleged is that the claimant interfered with the due administration of justice in a particular case by falsely exaggerating or fraudulently inventing a county court claim, a Divisional Court has exclusive jurisdiction, and no application for a committal order made on this basis may be made without the permission of a Divisional Court. If the relevant claim is a High Court claim, the committal application should be dealt with by a High Court judge, who may or may not be the trial judge. In that event, permission is not required, and therefore no difficulty "in the trial judge hearing both the application for permission and, if permission is granted, the proceedings themselves" arises. (However, as explained above, if the committal application is made on the specific ground that the claimant made a false statement of truth or disclosure statement, then, by operation r.31.13 and r.32.14, the permission of a High Court judge is required.)

Those are the effects of RSC Ord.52. Things will change when the new CPR rules relating to contempt of court procedures recently made by the Rule Committee and replacing that Order come into effect later this year. It is expected that those rules will reduce the circumstances in which applications to commit for contempt have to made in a Divisional Court, broadening the jurisdiction of the High Court judge sitting alone accordingly. And it is also expected that those rules will broaden considerably the circumstances in which permission to bring such applications are required, with the result that, not only applications based on r.31.13 and r.32.14, but also applications based on allegations of other forms of interference with the due administration of justice amounting to contempt, will require permission.

Consequently, it will not be uncommon for circumstances to arise in which a High Court judge dealing with an application to commit for contempt arising in connection with proceedings will be the judge who dealt with the application for permission, and also the judge who dealt with the underlying proceedings. This will give added significance to the Supreme Court dictum quoted above.

HEARING OF APPLICATIONS – ORAL ARGUMENT

In *Frey v Labrouche* [2012] EWCA Civ 881, July 3, 2012, CA, unrep., the Court of Appeal allowed an appeal by defendants whose application for an order for striking out claims against them had been refused by a judge, and did so principally on the ground that the judge had dealt with the matter peremptorily. (For summary of this case, see "In Brief" section of this issue of CP News.)

In delivering the lead judgment on this appeal, Lord Neuberger M.R. (with whom Moses and Rimer L.JJ. agreed) stated that it is clear that, where an application is brought to strike out the whole or part of a claim, the judge before whom the application is listed has a duty to consider it properly. The Master of the Rolls then explained (paras 23 & 24):

"23. In particular, the judge is bound to listen to oral argument in support of the application (unless he is satisfied by what he has read, before coming into court, that the application should be granted, in which case he could call immediately on the respondent to the application – but that is not always a wise course). Particularly where the judge has had the benefit of time to read all the papers, and to consider a full written argument on behalf of the applicant (and the respondent), he may quite properly be able to dispose of the hearing of the application far more quickly than the parties and their advisers may have expected. For instance, while again it often may be unwise to do so, the judge could (i) begin by saying that, having read the papers, his provisional view was that the application should be rejected on one of the many grounds raised by the respondent, (ii) then give the applicant a fair opportunity to disabuse him of this view through oral argument, and (iii) if the judge was unpersuaded by that argument, end the hearing by giving judgment for the respondent on the ground in question.

24. But what a judge cannot properly do, however much he believes that he has fully read and fully understood all the documents and arguments before coming into court, is to dismiss the application without giving the applicant a fair opportunity to make out his case orally. …"

Lord Neuberger explained that it was a common experience for a judge to come into court with a view, sometimes a strongly held view, as to the likely outcome of the hearing, "only to find himself of a very different view once he has heard oral argument" (para.24). It was for that reason, as well as for the reason that justice must always been seen to be done, that applicants must be given fair opportunities to make out their cases orally. It cannot be said, even in these days of full (in his lordship's opinion, sometimes overfull) written arguments, a judge need not entertain oral argument from the party whom he finds against (para.25).

This was a case in which the Court of Appeal allowed an appeal because a judge had taken, what Lord Neuberger called, "an inappropriate procedural course". The Master of the Rolls was at pains to point out that if a party is of the opinion that a judge is erring in that respect that party should make clear to the judge his objections to it, because it is only very rarely "that a party should be permitted to appeal a decision on a ground which was open to him, but he did not take, before the judge" (paras 29 and 33). In amplifying this point the Master of the Rolls stated (para.33):

"The judge, not the Court of Appeal, is the primary fact-finder and the primary controller of procedure. Hence this Court should be reluctant to interfere with a judge's finding of fact, exercise of discretion, or procedural and case-management decisions. The Court of Appeal's function in this connection is to correct what it regards as mistakes made by the judge, not to make fresh decisions. Where the judge has not had the opportunity of knowing that a decision is objected to by a party, it is hard to characterise the decision as one which can normally be appealed."

In argument on this appeal, the question whether the appellants had objected to the inappropriate procedural course taken by the judge was canvassed. It was submitted by the respondents, and the Court agreed, that it is the duty of an advocate to stand up to a judge who is proposing to take an inappropriate course, such as refusing to hear argument. In commenting on this and relating it to the facts, Lord Neuberger said (para.30):

"However, where a judge makes it clear that he is resolved on taking a certain course and that there is no prospect of a party's advocate being able to dissuade him from that course, it is hard to see what the party or his advocate can do other than to appeal against the judge's decision."

EDITOR: **Professor I. R. Scott**, University of Birmingham.
Published by Sweet & Maxwell Ltd, 100 Avenue Road, London NW3 3PF.
ISSN 0958-9821

Typeset by EMS Print Design
Printed by St Austell Printing Company, St Austell, Cornwall

430641