CIVIL PROCEDURE NEWS

Issue 8/2012 September 14, 2012

CONTENTS

In Brief

Cases

ARIF v ZAR [2012] EWCA Civ 986, July 18, 2012, CA, unrep. (Thorpe, Rimer & Patten L.JJ.)

Insolvency proceedings – transfer to Family Division

CPR rr.2.1, 3.1(7) & 30.5, Insolvency Rules 1986 rr.7.15 & 7.51A, Insolvency Act 1986 s.282, Senior Courts Act 1981 s.49(2). In divorce proceedings, wife (W) making application in Family Division for ancillary relief. By order of bankruptcy registrar exercising High Court's insolvency jurisdiction, W's husband (H) declared bankrupt on his own petition. On basis that many of H's alleged debts were shams, W making application for annulment of the order. W making application to bankruptcy court for order transferring the annulment application to the Family Division to be heard with her ancillary relief application. Bankruptcy registrar (1) refusing this application, and (2) ordering that the annulment application should be adjourned to be heard by a judge of the Chancery Division on a summary basis without cross-examination of witnesses. At CMC in the ancillary relief proceedings, in purported exercise of powers under r.3.1(7) and r.30.5, judge varying that order so as to order that the annulment application should be transferred to the Family Division. H and his trustees in bankruptcy applying to Court of Appeal for permission to appeal against that order. **Held**, granting permission and allowing the appeal, (1) the CPR apply to insolvency proceedings except so far as inconsistent with the 1986 Rules (r.7.51A), (2) by r.7.15, the circumstances in which a judge of any Division of the High Court may order the transfer to that Division of proceedings pending against an insolvent in another Division of the High Court are limited to proceedings brought to enforce a claim by or against the insolvent estate and do not include annulment applications, (3) the proper way of challenging the bankruptcy registrar's refusal to transfer the annulment application to the Family Division was by appeal to a judge of the Chancery Division. Observations on circumstances in which, for the purpose of saving costs by having a single hearing, annulment applications and ancillary relief applications should be heard together. Observations on ambit of r.3.1(7). ***Tibbles v SIG Plc*** [2012] EWCA Civ 518; [2012] C.P. Rep. 32, CA, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2012*** Vol.1 paras 3.1.9 and 30.5.1, and Vol.2 paras 9A–175 and 12–7.)

BIRMINGHAM CITY COUNCIL v LLOYD [2012] EWCA Civ 969, July 4, 2012, CA, unrep. (Lord Neuberger M.R., Longmore & Gross L.JJ.)

Possession claim – art.8 defence – procedure

CPR r.55.5, Human Rights Act 1998 Sch.1 Pt I art.8. Tenant (X) of secure weekly tenancy dying. Without knowledge of local authority landlord (C) or of X's personal representative (the public trustee (Y)), X's brother (D) moving into property. At the time, X tenant of another of C's properties, in relation to which a possession order had been suspended on terms. C deciding not to permit D to succeed X as tenant of the flat and refusing D's appeal against that decision. C serving notice to quit on Y and issuing possession proceedings against D. In his defence, D effectively accepting that he was a trespasser. At hearing date fixed by court under r.55.5, district judge allocating possession claim to multi-track and giving directions for trial. At trial of that claim, recorder refusing to make possession order against D on ground that it would be a disproportionate interference with his art.8 rights to do so. **Held**, allowing C's appeal, (1) a person who has no right under domestic law to remain in his home can in principle invoke art.8 so as to defeat a claim for possession, (2) D was not merely a trespasser in the property concerned at the time the possession order was sought, but never had had any right to occupy the premises, whether under contract or statute, (3) only in the most extraordinarily exceptional circumstances would it be right for a court to permit a person who had never been more than a trespasser to invoke art.8 as a defence against an order for possession sought by a public authority, (4) the effect of the recorder's decision in this case would involve the court's usurping of C's role as the entity responsible for allocating public housing stock. Observations on procedure that district judges should adopt in possession list cases where art.8 defences raised. ***Manchester City Council v Pinnock*** [2010] UKSC 45, [2010] 3 W.L.R. 1441, SC, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2012*** Vol.1 para.55.4.5, and Vol.2 para.3D–78.)

CEF HOLDINGS LTD v MUNDEY [2012] EWHC 1524 (QB); June 1, 2012, unrep. (Silber J.)

Application for interim relief – period of notice – duty of disclosure

CPR rr.23.7 & 25.3(1), Practice Direction 23A para.4, Practice Direction 25A para.2.2. Electrical components company (C) commencing claim against former employees and companies set up to compete with C. Amongst other things, C contending, as against the individual defendants that they were subject to valid and enforceable post-termination restraints in their contracts of employment, and as against the corporate defendants that they

were inducing their employees to act in breach of such contracts. Judge granting C's application for extensive interim relief restraining the defendants and making orders accordingly, including orders for delivery-up of documents. At hearing of that application, of which some of the defendants had short informal notice, one counsel attending to represent those defendants and making brief representations. In applying to set aside those orders on various grounds, several defendants (D) contending (amongst other things) that C failed to comply with their duty of full and frank disclosure, and that there was no adequate reason for the application being heard on short notice. **Held**, granting D's application and discharging interim orders (save as to delivery-up) for these and other reasons, (1) the fact that a respondent is represented on an urgent application for an interim injunction, appears at the hearing on short notice and makes submissions, does not release or absolve a claimant from his duty to make full and frank disclosure, (2) however, in those circumstances, there is no duty on a claimant to provide duplicate information where at the hearing the respondent deals with all the factual and legal issues in the way in which an applicant would have been obliged to have done in order to satisfy his disclosure obligations, (3) in the instant case there were a number of instances of serious non-disclosure by C, none of it deliberate, but the nature and extent of it lead to the conclusion that in the exercise of the court's discretion the interim orders should be discharged, (4) generally a without notice injunction should be granted only in circumstances where to give notice would enable the defendant to take steps to defeat the purpose of the injunction, or where there is some exceptional urgency, which means literally there is no time to give notice, (5) in the instant case the short informal notice given by C was not enough. Authorities on the duty of disclosure and the exercise of the court's discretion to set aside interim orders on the ground of non-disclosure, and on applications on short notice, reviewed and explained. ***Moat Housing Group-South Ltd v Harris*** [2005] EWCA Civ 287, [2006] Q.B. 606, CA, ***Memory Corporation Plc v Sidhu (No. 2)*** [2000] 1 W.L.R. 1443, CA, ***In re OJSC Ank Yugraneft*** [2008] EWHC 2614 (Ch), [2009] 1 B.C.L.C. 298, ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 23.7.1, 23APD.4, 25.3.2 & 25APD.2, and Vol.2 para.1B–52.)

- **DHILLON v ASIEDU** [2012] EWCA Civ 1020, July 26, 2012, CA, unrep. (Arden & Davis L.JJ. and Baron J.)

Application to adjourn trial refused – test to be applied on an appeal

CPR rr.1.1 & 3.1(2)(b), Human Rights Act 1998 Sch.1 Pt I art.6. Individual (D) purchasing business premises from another (C) and C providing 90-day loan to D to facilitate the purchase. Loan secured by charge against a domestic property owned by D. Throughout these transactions, D represented by a business partner (X). After completion, and upon loan not being repaid, for the purpose of enforcing the charge (which in the event was not registered), C commencing county court proceedings seeking possession of the domestic property. D entering defence and making counterclaim. In December 2009, court giving directions and fixing dates in May 2010 for trial. In March 2010, X dying suddenly and unexpectedly, precipitating a severe bereavement reaction in D. As a consequence trial date vacated, and in light of relevant medical evidence, parties entering into consent order under which date for exchange of witness statements postponed to December 14, 2010. On May 20, 2011, D consenting to unless order requiring her to file her witness statement by June 20, subsequently by consent extended to August 26, and then (on an unless basis) to October 7. Upon D's not complying, at the last-mentioned date court directing that D be debarred from relying on any further witness evidence at trial. Shortly before trial, which had been fixed for mid-November, D's brother appointed as her litigation friend, and, on ground that, as D had been suffering and continued to suffer from a severe mental illness, she was lacking capacity and unable to attend and give evidence, application made to adjourn the trial. Trial judge refusing application, proceeding to try claim and counterclaim, and giving judgment for C. **Held**, dismissing D's appeal, (1) the test to be applied on an appeal against a trial judge's decision refusing an adjournment is whether it was unfair, (2) fairness requires the position of all parties to be considered, and can only be determined by taking all relevant matters into account, and excluding irrelevant matters, (3) it is only where the decision of the trial judge is plainly wrong that an appellate court should interfere, (4) in the instant case, the trial judge had not (a) omitted to take into account material factors, (b) taken into account immaterial factors, (c) erred in principle or (d) come to a decision that was impermissible. Observations on steps that D's solicitors ought to have taken once the unless order took effect, instead of relying on an application to adjourn. ***Tanfern Ltd v Cameron-MacDonald (Practice Note)*** [2000] 1 W.L.R. 111, CA, ***Berezovsky v Terluk*** [2010] EWCA Civ 1345, November 25, 2010, CA, unrep., ***Albon v Naza Motor Trading Sdn Bhd (No. 5) (Practice Note)*** [2007] EWHC 2613 (Ch), [2008] 1 W.L.R. 2380, ***Aldi Stores Limited v WSP Grup Plc*** [2007] EWCA Civ 1260, [2008] 1 W.L.R. 748, CA, ref'd to. (See ***Civil Procedure 2012*** Vol.1 para.3.1.3.)

■ **HAWKSFORD TRUSTEES JERSEY LTD v STELLA GLOBAL UK LTD** [2012] EWCA Civ 987, July 19, 2012, CA, unrep. (Rix, Etherton & Patten L.JJ.)

ATE insurance for risk of incurring trial costs liability in event of opponent's appeal succeeding – recovery of premium under appeal court costs order when appeal failed

CPR rr.44.3B, 44.15 & 52.10(2), Costs Practice Direction para.19.2, Access to Justice Act 1999 s.29. Jersey company (C) acting as sole trustee of a trust (X), being a discretionary settlement set up for the benefit of an individual (Y) and members of his family. X owners of the majority of the shares in a company founded by Y, with balance of shares owned by an officer (Z) of the company. Under a share purchase agreement (SPA), C and Z agreeing to sell their shares in Y to another company (D). Parties falling into dispute about the operation of the SPA as executed, and C commencing proceedings in the Chancery Division for rectification. At trial of a particular issue, judge giving judgment for C with costs and making order for interim payment on account of costs of £200,000. Judge granting D permission to appeal. D complying with interim payment order. Before appeal heard, C purchasing ATE policy to cover their costs risks with total premium of £394,000. Policy protecting C against having to pay D's costs of the action and D's costs of the appeal if the appeal were allowed and of having to repay the interim payment in that event, and also providing C with limited cover against its own costs of the appeal. Under terms of the policy, C liable to pay premium within 20 days in event of appeal being dismissed, but incurring no liability to pay the premium at all in event of the appeal being allowed. Court of Appeal dismissing D's appeal (with consequence that C became liable to the insurers for the total ATE premium) and making order for costs against D. C's costs of the appeal estimated at £63,000, excluding the ATE premium. D submitting that, under the Court's costs order, C should not be entitled to recover from them that amount of the ATE premium (being £331,000) which represented the risk that C would have been liable for D's trial costs had D's appeal succeeded. **Held** (by majority), accepting that submission, (1) s.29 provides that where, in any proceedings, "a costs order" is made in favour a party who has taken out an insurance policy against the risk of incurring a liability "in those proceedings", the costs payable to him may include costs in respect of the premium, (2) that provision requires that the costs order has to be made in the same proceedings as the proceedings in which a costs liability may arise, (3) s.29 must be interpreted in a way that best reflected its legislative purpose, (4) accordingly the word "proceedings" therein should be given its traditional meaning, which distinguishes between proceedings at trial and on appeal, (5) the risk that the incidence of costs at trial might be changed by the costs order of the appeal court (in the event of the appeal succeeding) was not a risk of incurring costs liability in the appeal proceedings. ***Wright v Bennett***, [1948] 1 K.B. 601, CA, ***Callery v Gray (No 1)*** [2001] EWCA Civ 1117, [2001] 1 W.L.R. 2112, CA, ***Callery v Gray (No 2)*** [2001] EWCA Civ 1246, [2001] 1 W.L.R. 2142, CA, ***Callery v Gray (Nos 1 & 2)*** [2002] UKHL 28, [2002] 1 W.L.R. 2000, HL, ref'd to. (See ***Civil Procedure 2012*** Vol.1 para.44.3B.1, and Vol.2 para.9A–826+.)

■ **PEAKTONE LTD v JODDRELL** [2012] EWCA Civ 1035, July 26, 2012, CA, unrep. (Etherton, Munby & Lewison L.JJ.)

Personal injury claim against dissolved company – effect of restoration of company to register

CPR rr.3.4, 6.3 & 7.4, Companies Act 2006 ss.1029, 1030 & 1032. On March 31, 2009, company (D) struck off the Register of Companies and dissolved (pursuant to Companies Act 1985 s.652). On August 24, 2009, former employee (C) of D issuing claim form in a county court making claim against D for hearing loss injury suffered in the course of his employment by D during the period 1986 to 2004. C purporting to serve claim form and particulars of claim on D by posting them to what had been D's registered office immediately prior to its dissolution. Upon learning that D had been dissolved, and that therefore his claim was not properly constituted, on April 29, 2010, C applying to the Companies Court for an order pursuant to s.1029 that D be restored to the Register of Companies. Registrar making the order sought. On grounds that it was an abuse of process, district judge granting D's application for order striking out C's claim, but giving C permission to appeal. Circuit judge allowing C's appeal, holding that, by operation of s.1032(1), the Registrar's order had the effect of retrospectively validating C's action. Single lord justice granting D permission for second appeal. **Held**, dismissing appeal, (1) s.1029 assimilated into one procedure two different procedures (with slightly different effects) that had previously existed for the restoration of companies, (2) in terms, s.1032(1) states that the general effect of an order made by the court under s.1029 for the restoration of a company to the register is that the company "is deemed to have continued in existence as if it had not been dissolved or struck off the register", (3) before the 2006 Act came into force, that principle applied to only one of the old procedures, (4) the case law relevant to the application of the principle to that one procedure was determinative to the construction of s.1032(1), (5) accordingly, the effect of the restoration order was to preclude any reliance by D on the fact that it was dissolved at the time when the claim form was issued, (6) whilst D was dissolved, it was impossible

for C to serve the claim form and particulars of claim in accordance with r.6.3 and r.7.4, (7) the effect of the restoration order was to validate retrospectively, not only the issue of the claim form, but also its service at D's pre-dissolution registered office. ***Morris v Harris*** [1927] A.C. 252, HL, ***Tymans Ltd v Craven*** [1952] 2 Q.B. 100, CA, ***In re Workvale Ltd*** [1992] 1 W.L.R. 416, CA, ***Steans Fashions Ltd v Legal and General Assurance Society Ltd*** [1995] B.C.C. 510, CA, ***Smith v White Knight Laundry Ltd*** [2001] EWCA Civ 660, [2002] 1 W.L.R. 616, CA, ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 3.4.1, 6.3.6 & 6.3.7.)

- **SPICER v TULI** [2012] EWCA Civ 845, May 29, 2012, CA, unrep. (Lord Neuberger MR, Toulson & Lewison L.JJ.)

Possession claim dismissed by consent but not abandoned – whether second claim barred by cause of action estoppel or abuse of process

CPR rr.38.7, 40.6, 55.1 & 55.4, Practice Direction 40B para.3, Practice Direction 55A paras 2.2 and 2.6, Human Rights Act 1998 Sch.1 Pt I art.6. Bank taking charge over a flat as security for loan to a company. Receivers (C) appointed under the charge instructing solicitors to sell the property. On May 21, 2008, C commencing a possession claim against a person (D) occupying the flat alleging that her occupation was without licence or consent. D filing defence alleging that she had been a tenant of the flat since April 16, 2003, under two successive tenancy agreements. Court fixing September 25, 2008, as date for trial and giving directions for disclosure etc. Upon inspecting the documents on the day before trial, C's solicitors indicating to D's solicitors their suspicions that the agreements were not genuine, and solicitors then agreeing that the proceedings would be withdrawn to give the receivers time to investigate the position. Parties filing consent order containing an order that the proceedings in the action "be dismissed". On November 25, 2009, C commencing fresh proceedings against D for possession and for occupation charges. In these proceedings C again alleging that D was a trespasser but also making additional and alternative allegations concerning the tenancy agreement documents and their effects. D making application to strike out the proceedings on grounds (1) that, as the first action was not discontinued but dismissed, they were barred by cause of action estoppel, and (2) that they were an abuse of process. District judge dismissing application. Circuit judge dismissing D's appeal. Single lord justice granting D permission for second appeal. **Held**, dismissing the appeal, (1) there is no inflexible rule to the effect that a judgment by consent dismissing a claim invariably gives rise to a cause of action estoppel (or issue estoppel), (2) where it is clear that a claimant consenting to a judgment order was not abandoning the claim, the court is entitled to take into account those surrounding circumstances for the purpose of determining the extent of the consent given to the making of the order, and the extent of any estoppel arising from it, (3) in the circumstances of this case, the consent order dismissing the first action did not operate in the same way as a judgment on the merits of the claim and give rise to a cause of action estoppel, (4) it would be unjust not to allow C to proceed, (5) the was no abuse of process, (6) the order that the first claim be "dismissed", rather than "discontinued" was a technical error and it would be unconscionable to allow D to take advantage of it. ***Ako v Rothschild Asset Management Ltd*** [2002] EWCA Civ 236, [2002] 2 All E.R. 693, CA, ***Johnson v Gore Wood & Co (No 1)*** [2002] 2 A.C. 1, HL, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2012*** Vol.1 paras 1.4.15, 3.4.3.2, 38.7.1, 40.1.1, 40.6.1 & 40.6.3, and Vol.2 para.9A–175.)

- **THE THREE MILE INN LTD v DALEY** [2012] EWCA Civ 970, June 27, 2012, CA, unrep. (Aikens & Kitchin L.JJ.)

Order for taking evidence of party by video link – application to adjourn trial

CPR rr.1.1, 3.1(2)(b) & 32.3, Practice Direction 32 para.29.1 & Annex 3, Human Rights Act 1998 Sch.1 Pt I art.6. In July 2011, Monaco resident (C) and others making application for order removing liquidator (D). On February 24, 2012, registrar directing that C and D should attend at trial for cross-examination. Trial listed for one day in a three-day window commencing on June 26, 2012. On June 20, judge refusing C's application for an adjournment of the trial (made on grounds of his ill-health) and directing that C's evidence should be taken by video link (VCF) from Monaco (to be arranged by C's solicitors). On June 26, C applying to the Court of Appeal for permission to appeal against the judge's order. **Held**, granting permission and allowing the appeal, (1) the facts were that, on June 5, C had been forced to undergo a serious surgical procedure, and it was tolerably clear from the evidence that he was not fit to attend the trial at the time fixed and that he should remain in Monaco until after further treatment (planned for September 2012), (2) a party has a legitimate interest in attending the trial of proceedings to which he is a party and at which he will be a witness, (3) that is an aspect of the right to a fair trial and accords with the objective of ensuring that parties are on an equal footing, (4) when the taking of evidence by VCF is being considered, a judgment has to be made by the court as to whether its use will be likely to be beneficial to the efficient, fair and economical disposal of the proceedings, (5) the court should ensure that any direction that evidence should be given by VCF is made for good reason and serves a legitimate purpose, (6) a party's effective

participation in proceedings may require that he should have the opportunity, not merely to give oral evidence (whether by video link or otherwise), but also to follow the proceedings, to note developments as they occur, to listen to the evidence given by, and on behalf of, the other party, and to consult freely with his counsel and other legal advisors and to give instructions to them. (See ***Civil Procedure 2012*** Vol.1 paras 3.1.3, 32.3.1 & 32PD.29, and Vol.2 para.11–11.)

Statutory Instruments

- **CIVIL PROCEDURE (AMENDMENT NO. 2) RULES 2012** (SI 2012/2208)

Inserts in CPR new Pt 81 (Applications and proceedings in relation to contempt of court), replacing certain Orders and rules in Schs 1 and 2 (which are now omitted), and makes amendments to various rules consequential upon the introduction of this new Part. Inserts a rule in Pt 54 and amends r.52.15 to establish a procedure in respect of applications for judicial review of non-appealable decisions of the Upper Tribunal. Also inserts in Pt 54 a rule (similar to r.52.16) providing for the delegation of specified judicial powers to qualified barristers and solicitors working in the Administrative Court Office. Adds rules to Pt 63 to provide for a small claims track in a patents county court. Amends r.26.3 to make new provision for consequences that will follow where a party fails to file an allocation questionnaire by the date specified, r.27.14(2) to make cost of approved transcript recoverable in a small claims appeal, and r.52.3(4A) to extend to other judges powers presently exercisable by judges of the Court of Appeal under that rule. Makes amendments to various rules consequential upon the making of Practice Directions 52A to 52E replacing Practice Direction 52. In force October 1, 2012. (See further "CPR Update" section of this issue of CP News.) (See ***Civil Procedure 2012*** Vol.1 para.26.3, 27.14, 52.3, 52.15, 54.1, 54.7, sc52.0.1, cc29.0.1 and cc34.0.1, and Vol.2 para.2F–17.19.)

Practice Directions

- **PRACTICE DIRECTION 40F—NON-DISCLOSURE INJUNCTIONS INFORMATION COLLECTON SCHEME** (TSO CPR Update 59 (forthcoming))

CPR Part 40. Provides for the recording, and transmission to the Ministry of Justice for analysis, of certain data in relation to injunctions prohibiting publication of private or confidential information. Puts on permanent basis pilot scheme in Practice Direction 51F. Inserted in Pt 40 after PD 40E. In force October 1, 2012. (See further "CPR Update" section of this issue of CP News.) (See ***Civil Procedure 2012*** Supplement 2 para.40FPD.1.)

- **PRACTICE DIRECTION 81—APPLICATIONS AND PROCEEDINGS IN RELATION TO CONTEMPT OF COURT** (TSO CPR Update 59 (forthcoming))

CPR Part 81. Supplements Sections 2 and 4 to 8 of Pt 81. Annexes 1 and 2 contain forms for r.81.15 (proceedings under Charities Act 2011 s.336), and Annex 3 contains form of penal notice to be included in claim forms and application notices. In force October 1, 2012. (See further "CPR Update" section of this issue of CP News.) (See ***Civil Procedure 2012*** Supplement 2 para.81PD.1.)

- **PRACTICE DIRECTION 52A—APPEALS: GENERAL PROVISIONS** (TSO CPR Update 59 (forthcoming))

CPR Part 52. Destinations of appeal. Obtaining permission to appeal. Skeleton arguments. Disposing of applications and appeals by consent. Reopening appeals. Introduces related Practice Directions 52B, 52C, 52D and 52E and contains transitional provisions. In force October 1, 2012. (See further "CPR Update" section of this issue of CP News.) (See ***Civil Procedure 2012*** Supplement 2 para.52APD.1.)

In Detail

AVOIDING MULTIPLICTY OF PROCEEDINGS

In the recent case of *Arif v Zar* [2012] EWCA Civ 986, July 18, 2012, CA, unrep., the facts were that, in divorce proceedings, the wife brought proceedings in the Family Division for ancillary relief. W's husband was declared bankrupt on his own petition. W sought to have that order set aside. A bankruptcy registrar ordered that the annulment application should be heard by a judge of the Chancery Division, on a summary basis without cross-examination of witnesses. At a CMC in the ancillary relief proceedings, in purported exercise of powers under r.3.1(7), a Family Division judge varied that order so as to order that the annulment application should be transferred to the Family Division.

For the reasons outlined in the summary of this case given in the "In Brief" section of this issue of CP News, the Court of Appeal (Thorpe, Rimer & Patten L.JJ.) allowed the bankruptcy trustees' appeal against the judge's order, holding that the judge did not have jurisdiction to make the order.

In delivering the lead judgment, Patten L.J. stated that judges and registrars sitting in bankruptcy need to be alive to the real possibility that husbands (or wives) may attempt to use the protection of a bankruptcy order as a shield against the claims of their spouses for ancillary relief. His lordship added (para.21):

"Where there is credible evidence of this they should not be afraid to use the powers which they have to order full disclosure and to require the attendance and cross-examination of witnesses where this is necessary in order properly and fairly to determine the annulment application. In any such cases the more convenient course may well be to transfer the annulment application itself to be heard alongside the ancillary relief application in the Family Division where the evidence and issues are likely to be similar and costs can be saved by having a single hearing of both applications."

His lordship further explained (para.22):

"Whether this is the right course to take in any particular case will obviously depend upon the facts and will be a matter of discretion for the registrar in bankruptcy or the Chancery Division judge who is asked to make a transfer order. The court will have to balance the need to secure justice for the spouse against the need to ensure that all issues in the bankruptcy proceedings are resolved at minimum cost to the creditors. The registrar concluded in this case that the annulment application could be dealt with in a more cost effective way by the Chancery Division and, as she put it, that the proportionate administration of justice did not require a transfer of the proceedings to the Family Division."

In this case, the Family Division judge purported to exercise powers contained in CPR r.3.1(7), which he described as "unbounded". Patten L.J. stated that the judge was clearly wrong about this (para.27) and explained that the authorities confirm that, far from being unrestricted, the power of the court to vary or revoke one of its own orders is ordinarily limited to cases where there has been a material change of circumstances since the order was made or the original order can be shown to have been based on misstated facts or material non-disclosure.

ABANDONING PROCEEDINGS

In the CPR, the rules in Pt 38 set out the procedure by which a claimant may "discontinue" all or part of a claim. Before the CPR came into effect, in the RSC, rules as to discontinuance were found in Order 21, and, in the CCR, in Order 18. In RSC Order 21, but not in CCR Order 18, a distinction was made between "discontinue" and "withdraw". Thus, a plaintiff in an action begun by writ could, without the leave of the court, "discontinue" the action, or "withdraw" any particular claim made by him therein; and a defendant could "withdraw" any defence or any part of it at any time, or could "discontinue" counterclaim or "withdraw" any particular claim made by him therein (RSC Ord. 21, r.2). Actions or counterclaims were discontinued; particular claims within actions or counterclaims were withdrawn. No such subtlety (the sense of which may be gleaned from the provisions just summarised) appeared in CCR Order 18, and as the CCR rather than the RSC were the preferred model for the CPR, none appears in CPR Pt 38.

Under CPR Pt 38 a claim or part of a claim cannot be withdrawn. It may either be discontinued or it may be dismissed. If a claim is discontinued rather than dismissed, it is clear that a second action may be brought even if it arises out of the same facts as the discontinued action, although the permission of the court would be needed under r.38.7 if the action was discontinued after the defendant has served a defence.

Litigation lawyers still speak of "withdrawal", but as the recent case of *Spicer v Tuli* [2012] EWCA Civ 845, May 29, 2012, CA, unrep., illustrates, they must be careful to be clear about what they mean when they do so. As is explained in the summary of this case given in the "In Brief" section of this issue of CP News, the question for the Court of Appeal was whether, as the tenant (D) argued, the second possession claim against her brought by receivers (C) (acting for a

bank holding a charge over the property) was barred by cause of action estoppel because the first claim against her had, by a consent order, been dismissed. In the Court of Appeal, counsel for D argued that (1) an order made by consent dismissing the first action operates in the same way as a judgment on the merits of the claim, and gives rise to a cause of action estoppel; (2) the cause of action relied on in the first action was the receivers' claim to possession against D; (3) the only question relevant to that cause of action was whether C had a better right to possession than D; (4) C asserted that their right to possession derived from the charge, while D asserted that her right to possession derived from tenancy agreements which she claimed she had entered into; (5) thus the stage was set for a battle to determine which of the two asserted rights was the better one, and that directly raised the question whether the tenancy agreements were genuine, and if so whether the bank was bound by them; (6) once that action had been dismissed by consent, that cause of action was barred by a cause of action estoppel, and cannot be raised in a second action; (7) this is a rule of law, and is not a matter of discretion, to which there are only three limited exceptions (fraud, collusion, or where the construction of the order itself shows that no estoppel should arise).

In giving the lead judgment in the Court of Appeal, Lewison L.J. (with whom Lord Neuberger M.R. and Toulson L.J. agreed), said this was a formidable submission, but concluded that the first and the last steps in the argument had to be rejected. His lordship relied on and adopted the judgment of Dyson L.J. in the decision of the Court of Appeal in *Ako v Rothschild Asset Management Ltd* [2002] EWCA Civ 236, [2002] 2 All E.R. 693, CA, and held that the instant case was indistinguishable from that case. In the *Ako* case the question was whether a person who had made a claim for unfair dismissal and racial discrimination to an employment tribunal, which by order of the tribunal had been dismissed on withdrawal, could bring a second claim based on the same allegations. The Court held that, in those circumstances, a second claim could be brought. It was regarded as significant that the relevant tribunal procedural rules made no provision for discontinuance. After reviewing the relevant authorities, Dyson L.J. concluded that there is no inflexible rule to the effect "that a withdrawal or judgment by consent invariably gives rise to a cause of action or issue estoppel". If it is clear that the party withdrawing is not intending to abandon the claim or issue that is being withdrawn, "then he or she will not be barred from raising the point in subsequent proceedings unless it would be an abuse of process to permit that to occur".

In the instant case, Lewison L.J. said that the conclusion reached by Dyson L.J. was of general application and did not turn on differences between tribunal procedure (which makes no provision for discontinuance) and CPR procedure (which does). His lordship added that the approach of Dyson L.J. gained added force in the light of the right to a fair and public hearing guaranteed by art.6 of the Convention.

ARTICLE 8 DEFENCE TO POSSESSION PROCEEDINGS – PROCEDURE

In *Birmingham City Council v Lloyd* [2012] EWCA Civ 969, July 4, 2012, CA, unrep., Lord Neuberger M.R. explained that the interrelationship of domestic property law and art.8 of the Convention (Right to respect for private and family life) has been considered in a large number of cases decided by English courts and by the European Court of Human Rights, and that the conflict between the approach of the House of Lords and the approach taken by the Strasbourg court was resolved in *Manchester City Council v Pinnock* [2010] UKSC 45, [2010] 3 W.L.R. 1441, SC. Since then the law has been developed by decisions of the Supreme Court and the Court of Appeal.

The Master of the Rolls further explained that it is now clear that a person who has no right under domestic law to remain in his home can in principle invoke art.8 so as to defeat a claim for possession. In the instant case, where a local authority (C) brought possession proceedings against a person (D) occupying a flat, D served a defence which effectively accepted that he was a trespasser in the flat, but contended that he should be allowed to remain in the flat on the ground that evicting him would be a disproportionate interference with his right to respect for his home under art.8. The judge held that, to make an order for possession against D, even though he was and had always been a trespasser in the flat, would be a disproportionate interference with his Article 8 rights, and dismissed C's claim. As the summary of this case in the "In Brief" section of this issue of CP News indicates, for the reasons outlined there the Court of Appeal (Lord Neuberger M.R., Longmore & Gross L.JJ.) allowed C's appeal.

In his judgment (with which Longmore & Gross L.JJ. agreed), Lord Neuberger M.R. made some comments on the procedure followed in this case. When C's possession claim came before the district judge, the judge allocated the claim to the multi-track, ordered that a defence be served before a particular date, and ordered that the claim be listed for a one-day hearing. The Master of the Rolls noted (at para.26), that in the *Pinnock* case the Supreme Court explained that, when an art.8 defence is raised in a case coming before a district judge in a possession list, the district judge should identify the grounds on which the art.8 right is said to be based, so that it can be assessed whether there is a real prospect of the art.8 defence succeeding. His lordship said this involves "taking the facts on which the Article 8 argument is based as being correct and deciding whether, if faced with those facts, a judge could reasonably decide that an Article 8 defence would justify refusing a possession order". In his lordship's opinion, had the district judge followed that course in the instant case it would have been clear that D's art.8 defence was not maintainable and a trial would have been avoided.

CPR Update

AMENDMENTS TO RULES AND PRACTICE DIRECTIONS

The Civil Procedure (Amendment No. 2) Rules 2012 (SI 2012/2208) were laid before Parliament on August 29, 2012. As is explained below, these Rules make a number of changes to provisions in the CPR.

TSO CPR Update 59 (expected to be published during September) introduces some new practice directions and amends some existing practice directions, partly (but only partly) for the purpose of reflecting changes made to the Rules.

The amendments and additions made to existing rules and practice directions, and the new practice directions, come into effect on October 1, 2012. They will be included in Supplement 2 of the 2012 edition of the White Book, together with relevant commentary.

The new practice directions are Practice Direction 40F—Non-Disclosure Injunctions Information Collection Scheme, and Practice Direction 51H—The Mediation Service Pilot Scheme. The former puts on a permanent basis the pilot scheme in Practice Direction 51F, which is now revoked (see White Book 2012 Vol.1 paras 51.2.8 and 51FPD.1). The latter introduces a new pilot scheme which will operate at the County Court Money Claims Centre and which is designed to test a system for automatic referral to mediation.

The principal procedural matters affected by the recent statutory instrument and by forthcoming TSO CPR Update 59 relate to (1) appeals, (2) judicial review, (3) contempt of court, and (4) small claims.

Before dealing with those matters, an important matter that does not fall under any of those headings may be noted, and that is the amendment made by the statutory instrument to r.26.3 (Allocation questionnaire). Sub-rules (8) to (10) are now added to that rule to provide that the court will make such order as it considers appropriate where a party fails to file an allocation questionnaire by the specified date as well as providing for the automatic transfer of proceedings in those cases where a claim is a designated money claim issued in Northampton County Court. In addition, provision is made as regards the orders for costs that may be made in these circumstances.

APPEALS

Part 52 (Appeals) was inserted in the CPR by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221), and came into effect on May 2, 2000, together with Practice Direction 52—Appeals, first issued in March 2000.

Rules

Since then the rules have been amended on a number of occasions. By the Civil Procedure (Amendment) Rules 2012 substantial amendments are made to r.52.3 (Permission) and to r.52.15 (Judicial review appeals).

Sub-rules (4A) and (4B) were added to r. 52.3 by the Civil Procedure (Amendment) Rules 2006 (SI 2006/1689) for the purpose of enabling the Court of Appeal to make an order to the effect that a person refused permission to appeal may not request the decision to be reconsidered at a hearing. Such an order may be made if the appeal court considers that the application is "totally without merit". That sub-rule is now substituted for the purpose of extending the powers of the Court of Appeal in this respect to judges sitting at other levels in the appellate hierarchy and dealing with applications for permission to appeal; in particular to High Court judges, designated civil judges and (as defined) specialist circuit judges. It should be noted that, if an appeal court (whether the Court of Appeal or some other), refuses an application for permission to appeal, and it considers that the application is totally without merit, then r.52.10(5) takes effect. In those circumstances, the appeal court must record the fact that it considers the application to be totally without merit and must consider whether it is appropriate to make a civil restraint order (r.52.10(6)).

Amendments now made to r.52.15 deal with applications to the Court of Appeal for permission to appeal where permission to apply for judicial review of a decision of the Upper Tribunal has been refused by the High Court. This amendment, together with that now made by the addition to Pt 54 of r.54.7A, follow from the decision of the Supreme Court in *R. (Cart) v The Upper Tribunal* [2011] UKSC 28, [2001] 3 W.L.R. 107, SC (see further below).

Practice directions

Since 2000, Practice Direction 52 has been amended even more frequently than the rules in Pt 52, and some of the changes made have been substantial. In the process it has become unwieldy. Now, by TSO CPR Update 59, the practice direction is replaced entirely, not by a single practice direction, but by four.

They are:

Practice Direction 52A—Appeals: general provisions

Practice Direction 52B—Appeals in the county courts and the High Court

Practice Direction 52C—Appeals to the Court of Appeal

Practice Direction 52D—Statutory appeals and appeals subject to special provision

Practice Direction 52E—Appeals by way of case stated

This arrangement is a significant improvement. But the scope and detail of the directions remain as wide and as complicated as before.

It could be argued that Pt 52 has always been structurally flawed, because it proceeds on the assumption that there is a substantial "general part" to rules of court dealing with appeals which, once stated, would require only a modest amount of amplifying and supplementing in "special parts" dealing with the main appeal regimes; for example, appeals to the Court of Appeal, appeals to and within the High Court, and appeals to and within county courts. If it were the case that Pt 52 had to cope only with the problem of bringing together in a modernised form, and in a single CPR Part, those rules of court relevant to appeals found in the former RSC and CCR, that approach might have resulted in a reasonably elegant and coherent set of appeal rules. However, such is the complexity of the law relating to civil appeals, perhaps that was always unlikely, and, in any event, such an objective was put well beyond reach by the changes to the apportioning of appellate jurisdiction between the High Court and the Court of Appeal made by the Access to Justice Act 1999 (implementing the recommendations of the Bowman Report), which added enormously to the range of procedural twists and turns that the CPR have to anticipate and deal with (preferably in a clear and concise manner, avoiding as much repetition as possible), and which were not anticipated when the draftsmen of the original CPR initially sat down to work. (A price has been paid for the fact there is no single body of rules collected in one CPR Part dealing with appeals to the Court of Appeal and replacing former RSC Ord. 59 and related provisions.)

If wholesale restructuring of Part 52 was out of the question, then the filtering out into separate practice directions of, on the one hand, appeals in the county courts and the High Court (PD 52B), and, on the other hand, appeals to the Court of Appeal (PD 52C), building on the "general part" (in PD 52A), and the reciting of, or cross-referencing to, therein of relevant rules, is certainly a step in the right direction and the Rule Committee is to be congratulated for that.

As would be expected, most of what is contained in these five, several practice directions was found in Practice Direction 52. However, there is much re-arrangement and tidying-up and many changes of detail, in particular in Practice Direction 52C (where directions for appeals to the Court of Appeal are much elaborated), and practitioners should be alert to that.

By the Civil Procedure (Amendment No. 2) Rules 2012, a number of amendments, consequential on the replacement of Practice Direction 52 by Practice Directions 52A to 52E, are made to rules in Pt 52 and in some other CPR Parts. Further, by TSO CPR Update 59, for the same reason a number of amendments are made to practice directions supplementing Parts other that Pt 52.

Transitional provisions

The amendments to Pt 52 and the five new practice directions supplementing that Part come into force on October 1, 2012. The practice directions apply to all appeals where the appeal notice was filed, or permission to appeal was given, on or after that date (PD 52A para.8.1). An appeal court may at any time direct that, in relation to any appeal, one or more of practice directions shall apply irrespective of the date on which the appeal notice was filed or permission to appeal was given (ibid., para.8.2).

JUDICIAL REVIEW

The Civil Procedure (Amendment No. 2) Rules 2012 insert two new rules in CPR Pt 54 (Judicial Review and Statutory Review), they are, r.54.1A and r.54.7A.

Rule 54.1A provides for the delegation of specified judicial powers to qualified barristers and solicitors working in the Administrative Court Office. It fulfils, in relation to the Administrative Court, a function similar to that fulfilled by r.52.16(1) to (6A) in relation to the Court of Appeal. The Civil Procedure Rule Committee may make rules providing for the exercise of "the jurisdiction of any court within the scope of the rules by officers or other staff of the court" (Civil Procedure Rules 1997 Sch.1 para.2). CPR r.2.5 states that, where rules require or permit the court to perform "an act of a formal or administrative character", that act may be performed by a court officer. Under r.54.1A power is given to court officers to "exercise the jurisdiction of the High Court" with regard to certain matters. The powers

delegated are not of a formal or administrative character, but judicial. For that reason, delegation is restricted to court officers who are qualified barristers or solicitors. A party may request any decision of a court officer to be reviewed by a judge. The purpose of the rule is to increase the efficiency of judicial officers serving in the Administrative Court by enabling them to delegate work to court officers.

Rule 54.7A establishes a procedure for applications to the High Court for judicial review of non-appealable decisions of the Upper Tribunal. In *R. (Cart) v The Upper Tribunal* [2011] UKSC 28, [2001] 3 W.L.R. 107, SC, the Supreme Court held that such decisions were amenable to judicial review and set out the test that the High Court should apply when considering whether applications for permission to proceed in those circumstances should be granted. Rule 54.7A (Judicial review of decisions of the Upper Tribunal) was drafted in the light of that decision. The objective is to provide a process which gives a fair opportunity for challenge but which does not involve the expenditure of unnecessary judicial time on the consideration of issues already considered by the Upper Tribunal judge.

By TSO CPR Update 59, paras 19.1 and 19.2 which supplement r.54.7A are added to Practice Direction 54A.

By amendments now made to r.52.15(4) (referred to above), it is now provided that, where permission to apply for judicial review of a decision of the Upper Tribunal has been refused by the High Court, and the person seeking permission applies to the Court of Appeal for permission to appeal, that application will be determined on paper without an oral hearing.

CONTEMPT OF COURT

The Civil Procedure (Amendment No. 2) Rules 2012 insert in the CPR a new Part, Pt 81, entitled "Applications and Proceedings in Relation to Contempt of Court". This Part replaces provisions formerly found in Schs 1 and 2 of the CPR, in particular in RSC Ord. 52 (Committal), CCR Ord. 29 (Committal for Breach of Order or Undertaking) and CCR Ord. 34 (Penal and Disciplinary Provisions), and certain rules in RSC Ord. 45 (Enforcement of Judgments and Orders). As a consequence, substantial amendments are made to other rules in RSC Ord. 45 and in RSC Ord. 46 (Writs of Execution: General), and minor amendments are made to rules elsewhere in the CPR (including r.31.23, r.32.14, r.65.6, r.65.47, r.71.2 and r.71.8). The provisions of the practice direction that supplemented RSC Ord. 52 and CCR Ord. 29 (now revoked) are now found in modified form either in Pt 81 itself or in the practice direction supplementing the Part, that is Practice Direction 81—Applications and Proceedings in Relation to Contempt of Court (which is to be published in TSO CPR Update 59). As a consequence, certain amendments are made to other CPR practice directions.

It is important to notice that Pt 81 does not replace Sch.1 CCR Ord. 28 (Judgment Summonses), which contains rules regulating the power of county courts to make committal orders for the purpose of enforcing the attendance of debtors. It is expected that, in due course, these rules will be brought into Pt 81.

In r.81.1, it is said that Pt 81 "sets out the procedure in respect of contempt of court" and "applies in relation to an order requiring a person guilty of contempt or punishable by virtue of any enactment or to give security for good behaviour as it applies in relation to an order of committal". The substantive law of contempt of court is a complicated mixture of common law and statute. The jurisdictions of the High Court on the one hand and the county courts on the other are substantially different. Further, the High Court has jurisdiction to impose sanctions for contempt, not only in relation to its own proceedings, but also in relation to the proceedings of inferior courts, including the county courts and the magistrates' courts in all jurisdictions (including family proceedings). The jurisdiction of the county courts to deal with contempt and kindred offences is limited, but to an extent those courts exercise an exclusive statutory jurisdiction. (See further White Book Vol.2, Section 3C—Contempt of Court.) These jurisdictional complexities make the drafting of a single set of rules speaking to both levels of court extremely difficult (and the providing of a succinct summary of them almost impossible).

As a practical matter, the powers of the High Court and the county courts to punish or coerce persons guilty of contempt of court (both in its common law and statutory manifestations) by imposing custodial or non-custodial sanctions arise in several identifiable circumstances. Part 81 recognises this and is structured accordingly. Thus there are separate Sections providing rules to regulate committal for contempt in the face of the court (Section 5, r.81.16), for the making of a false statement of truth or disclosure statement (Section 6, rr.81.17 & 81.18), for enforcing compliance with judgments or orders (whether final or interlocutory) either by committal (Section 2, rr.81.4 to 81.11) or by issue of writ of sequestration (a High Court remedy) (Section 7, rr.81.19 to 81.27), and for interference with the due administration of justice (either in a particular case or as a continuing process) (Section 3, rr.81.12 to 81.14). Then there is a Section providing rules to regulate the exercise by the county courts of powers granted by penal, contempt and disciplinary provisions in the County Courts Act 1984 (Section 9, rr.81.33 to 81.38), and a Section devoted to the exercise by the High Court of statutory powers to punish persons certified to the Court by an inferior court, tribunal or person as being guilty of behaviour which would be contempt if done in relation to the Court (Section 4, r.81.15).

Most of these Sections are expressly supplemented by provisions in Practice Direction 81.

For the avoidance of doubt, it is made clear that Part 81 is concerned only with procedure and does not itself confer upon the court the power to make a committal order or to impose some other sanction (r.81.2(1)).

In the main, the provisions in these several Sections deal with the initial stages of the proceedings to which they relate (process (whether claim form or application), service, evidence etc). Section 8 contains general rules, dealing with the hearing and post-hearing matters. That Section applies in relation to all matters covered by Pt 81 (adapted as necessary and according to need) and is substantially supplemented by provisions in Practice Direction 81.

When proceedings for contempt of court are contemplated, care has to be taken to ensure that application is made to a court which has jurisdiction to deal with the matter, and to ensure that, within that court, it is dealt with by the appropriate "level of judiciary". Whether, in a particular instance, the High Court or a county court has jurisdiction to deal with proceedings in relation to contempt of court is not a matter that can be determined by rules of court. However, subject to restrictions imposed by statutes, questions of level of judiciary may be so determined. Consequently, in Pt 81 and Practice Direction 81 provisions stating that applications should be brought in a particular court or before a particular level of judiciary consist of a mixture of provisions, some of which do no more than conveniently recite the effects of relevant legislation, and others of which implement decisions made by the Rule Committee in the exercise of its statutory rule-making powers. A significant feature of the new Pt 81 is that it reduces the circumstances in which proceedings have to be dealt with by a Divisional Court of a High Court Division and gives the Administrative Court a larger role than heretofore.

The adoption of a "type of contempt" approach for the structuring of this Part has two disadvantages with which the rules have to cope. One is that, because the procedures for the several "types" are similar in many respects, there has to be a degree of repetition, with virtually the same provisions being repeated in several Sections. The other is that, because circumstances may arise where a person's conduct exposes him or her to liability for more than one "type" of contempt, a choice has to be made, and made clear, as to the rules of which Section of Pt 81 should prevail in that event.

Part 81 and Practice Direction 81 largely replicate the existing practice and procedure but do so in a clearer and more logical fashion. There are numerous minor improvements. The most significant innovation is the introduction of a permission to proceed step where application is made to commit for interference with the administration of justice (Section 3).

Part 81 and Practice Direction 81come into effect on October 1, 2012, and apply to all applications in relation to contempt of court that are made on or after that date. It is expressly provided that, in proceedings for committal for contempt of court "in the face of the court" the new provisions apply to all acts or omissions alleged to constitute such contempt that are alleged to have occurred on or after that date.

Heretofore, High Court and county court forms relevant to applications and proceedings in relation to contempt of court in use before the CPR came into effect and remaining in use thereafter, have been found in, respectively, Tables 2 and 3 of Practice Direction 4 (Forms). With the coming into effect of Pt 81, containing rules for such applications and proceedings in both levels of court, those forms have been brought into Table 1 of Practice Direction 4 (amended as necessary).

SMALL CLAIMS

By the statutory instrument, an amendment is made to r.27.14(2) adding the cost of any approved transcript reasonably incurred was added to the list of costs recoverable under that provision.

Further, for the purpose of providing for a small claims track in a patents county court rr.63.27 and 63.28 are inserted in CPR Pt 63 (Intellectual Property Claims). By TSO CPR Update 59, additions supplementing these new rules are made to Practice Direction 63. The jurisdiction and procedures of patents county courts were substantially revised in 2010. After that, in a series of cases, issues relating to the extent of the PCC jurisdiction and certain aspects of procedure arose (among them was the question whether PCC claims might be dealt with as small claims). Generally, claims to which Pt 63 applies, whether proceeding in the High Court or a county court, are allocated to the multi-track. By these rules provision is made for the allocation to the small claims track of claims to which Section II of Pt 63 applies, which are started in or transferred to a PCC, and which meet the conditions stated in r.63.27. Where a claim is so allocated, of the rules in Pt 63, only those referred to in r.63.28(2) apply. The provisions of CPR Pt 27 (The Small Claims Track) apply, subject to modifications (r.63.27(4)). Of the provisions of Practice Direction 63, only those referred to in para.32.2 apply.

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