CIVIL PROCEDURE NEWS

Issue 8/2013 October 25, 2013

CONTENTS

In Brief

Cases

DEUTSCHE BANK SUISSE SA v KHAN [2013] EWCA Civ 1149, July 26, 2013, CA, unrep. (Lewison L.J.)

Application without notice – full and frank disclosure

CPR r.55.10, Administration of Justice Act 1970 s.36, Mortgage Repossession (Protection of Tenants etc) Act 2010 s.2. Bank (C) as mortgagees bringing action against family (D) for possession of several tenanted residential properties subject to the mortgage (securing a debt of £60m). In February 2013, judge giving judgment for C and ordering possession to be given up by a date in June. Before that date, D applying to court under s.36 for order that possession be postponed. On July 12, judge dismissing that application. C applying for and obtaining writs of possession. On July 19 (a Friday), D filing notice of appeal to the Court of Appeal against the dismissal of their s.36 application, and applying for stay of execution. On July 23, C executing the writs of possession. On following day, after receipt by the Court of an e-mail from D's solicitors, giving an account of the circumstances of the execution, requesting urgent consideration of D's application for permission to appeal, and applying for orders restoring the status quo, on papers, single lord justice granting permission. In addition, on bases (1) that C, before obtaining writs of possession, had not served on tenants at the various properties notices required under s.2, and (2) that execution had been effected by C to forestall D's appeal, judge making mandatory order requiring possession to be restored to D. At inter partes hearing on July 26, **held**, discharging the restoration order and making order for costs on indemnity basis against D (to be added to the security), (1) in making their application, D were required to make full and frank disclosure, but they had failed in that respect, (2) in particular, D had not informed the Court (a) of matters relevant to the question whether C had served the s.2 notices and of fact that C would dispute any allegation that they had not been served, and (b) of fact that, after the hearing of July 12, their solicitor had been informed by C's solicitor that C were not prepared to stay execution voluntarily. (See ***Civil Procedure 2013*** Vol.1 para.25.3.5, and Vol.2 paras 3A–40 & 3A–1761.)

FONS HF v CORPORAL LTD [2013] EWHC 1278 (Ch), May 9, 2013, unrep. (Judge Pelling Q.C.)

Order for exchange of witness statements – extension of time for complying

CPR r.3.9. In Chancery proceedings, on November 26, 2011, district judge making case management orders, including order for exchange, by April 6, 2013, of witness statements relating to any issues of fact to be decided at trial. Date extended by agreement to April 18, 2013. Neither party complying with that order. Case listed for trial with an estimate of five days, made on assumption that substantial issues of estoppel and rectification would have to be determined. In early May 2013, parties applying for extension of time for exchanging witness statements relating to single issue of whether defendants were entitled to rely upon a legal charge. **Held**, (1) a failure to comply with a rule, direction or order is of itself a clear breach of the overriding objective, and is likely to result in severe sanctions, (2) parties should be aware that all courts at all levels are now required to take a very much stricter view of such failures, (3) in this case, the parties' behaviour had led to a risk of court resources being wasted because, had they exchanged witness statements in accordance with the district judge's orders, it would have become apparent to all at an early stage that the trial could be completed in a fraction of the time estimated, (4) nevertheless, in all the circumstances, it was appropriate to grant an extension to 4 pm on the next day, on terms that any party in default should be debarred from relying upon any evidence at trial. (See ***Civil Procedure 2013*** Vol.1 para.3.9.1.)

GLOBAL TORCH LTD v APEX GLOBAL MANAGEMENT LTD [2013] EWCA Civ 819, [2013] 1 W.L.R. 2993, CA, July 10, 2013, C.A., unrep. (Maurice Kay, Richards & Briggs L.JJ.)

Court's power to sit in private – "open justice" principle and "reputational rights"

CPR rr.5.4C & 39.2, Human Rights Act 1998 Sch.1 Pt I arts 6, 8 & 10, Companies Act 2006 s.994. Shareholder, a company (C), bringing unfair prejudice petition under s.994 for order that other shareholder company (D) purchase its shares in a third company (Z). D bringing similar petition against C. In the several proceedings, owner directors of C and owner directors of D (individual businessmen) appearing as parties. Certain of the directors making allegations and counter-allegations of egregious conduct against each other in the running of Z. Media organisation (M) applying for orders under r.5.4C(2) granting them permission to obtain from court records copies of all relevant documents. C applying (1) for order under r.5.4C(4) to prevent non-party access to court documents, and (2) for order under r.39.2(3) that the petitions be heard in private on ground that this was

necessary in the interests of justice. Judge granting M's application and dismissing C's applications ([2013] EWHC 223 (Ch)). Single lord justice granting C, and two of the directors thereof, permission to appeal. At appeal hearing, parties agreeing that if the r.39.2 appeal was dismissed the r.5.4 appeal must also fail. **Held**, dismissing the r.39.2 appeal (and therefore the r.5.4 appeal also), (1) because neither art.8 nor art.10, as such, has precedence over the other, the competing rights within them do not exist within a presumptive legal hierarchy, (2) in dealing with C's application under r.39.2, the judge had not erred in the approach he had taken to balancing the open justice principle against the appellants' reputational rights under art.8, in particular, he had not treated that principle as inherently superior, (3) on an application for departure from the open justice principle, the same principles apply, whether the proceedings are at an interim or final stage. Common law rules and Convention rights relevant to open justice explained. Court observing that applications for private hearings based on art.8 can be determined very quickly, and should not require a protracted and expensive hearing. ***In re Guardian News and Media Ltd*** [2010] UKSC 1, [2010] 2 A.C. 697, SC, ***In re S. (A Child) (Identification: Restrictions on Publication)*** [2004] UKHL 47, [2005] 1 A.C. 593, HL, ***Practice Guidance (Interim Non-disclosure Orders)*** [2012] 1 W.L.R. 1003, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2013*** Vol.1 paras 39.2.1 & 39.2.7.)

■ **HAMMERSMATCH PROPERTIES (WELWYN) LIMITED v SAINT-GOBAIN CERAMICS AND PLASTICS LIMITED** [2013] EWHC 2227 (TCC), July 24, 2013, unrep. (Ramsey J.)

Whether court should make "different" costs order – "admissible offer" a "near miss"

CPR rr. 36.14 & 44.2(4). In dilapidations claim, trial judge awarding claimants (C) £1m as damages. That award "more advantageous" (within meaning of r.36.14(1A)) than Part 36 offer made by defendants (D), in that the sum of the award and interest up to the last date for acceptance of the offer, exceeded the offer by £3,600. On question of costs, C submitting that the general rule applied and that they were entitled to their costs in full. D submitting that, in the circumstances, and in particular the circumstance of their offer and C's rejection of it, the judge should make "a different order". **Held**, (1) the circumstances to be taken into account in determining whether to make a different order include "any admissible offer" which is not an offer "to which costs consequences under Part 36 apply" (r.44.2(4)(c)), (2) it was common ground that, in this case, there was no Pt 36 offer which had automatic cost consequences, (3) in principle, D's Pt 36 offer (which failed by only a small margin to provide D with the costs protection they were seeking) came within r.44.2(4)(c), (4) however, the court should not approach r.44.2(4)(c) on the basis that it supports a special "near miss" rule that may be invoked to penalise a successful party in costs, (5) that was because, to do so, would be to seek to use r.44.2(4)(c) to give to "near miss" offers an effect similar to Pt 36 offers, and would introduce an unwelcome degree of uncertainty (similar to that which existed in relation to Pt 36 offers before r.36.14(1A) was enacted), (6) in all the circumstances, taking into account the conduct of the parties (r.44.2(4)(a)) and D's success on some issues (r.44.2(4)(b)), the appropriate order was that D should pay C 80 per cent of C's costs to be assessed on the standard basis. ***Johnsey Estates (1990) Ltd v Secretary of State for the Environment, Transport and the Regions*** [2011] EWCA Civ 535, [2001] L. & T.R. 32, CA, ***Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd*** [2008] EWHC 2280 (TCC), 122 Con L.R. 88, ref'd to. (See ***Civil Procedure 2013*** Vol.1 para.44.3.1.5, and ***Cumulative Second Supplement*** para.44n.2.)

■ **JOHNSON v BANK OF SCOTLAND** [2013] EWCA Civ 982, June 7, 2019, CA, unrep. (Lloyd, Jackson & Beatson L.JJ.)

Court of Appeal jurisdiction – whether first appeal court's findings on merits appealable

CPR rr.40.3, 52.10 & 52.11, Senior Courts Act 1981 s.16, Protection from Harassment Act 1997 s.2. In July 2011, on instructions of a bank solicitors sending customer (C) of a building society division of the bank a letter demanding immediate payment of money alleged to be owing on an account with the society, being one of several held by C. In December 2011, C commencing proceedings against D under the 1997 Act. D defending claim and district judge giving directions. In communications (before commencement of proceedings and subsequently) between, on the one hand, C (who acted in person throughout), and, on the other, the bank (D), two firms of solicitors and debt collectors acting directly or indirectly for D (and whose several communications with C were at times obviously uncoordinated and contradictory), much confusion and uncertainty arising as to whether C had withdrawn their demand or, if they had not, the precise nature of it. After filing evidence (in accordance with district judge's directions), D applying for summary judgment. At hearing on March 19, 2012, D giving undertakings that it would conduct future negotiations for the recovery of the debt said to be owing directly with C, and that debt collectors would not be involved. District judge concluding that those undertakings (in the event, not fully adhered to) in effect gave C the relief she was seeking and dismissing both C's claim for an injunction and D's application. C appealing against this decision. In giving directions, circuit judge noting that D were now willing to write off the debt, and directing that the appeal would be way of review (not rehearing) and that witnesses need not attend to

give oral evidence. Circuit judge (1) making various findings adverse to D, including finding that letters and 'phone calls from D's solicitors and debt collectors amounted to unlawful harassment of C, and (2) concluding and ordering (a) that C be granted permission to appeal, and (b) that the appeal be allowed. D granted permission to appeal to Court of Appeal. **Held** (1) the circuit judge (a) was quite right in allowing C's appeal, but (b) erred in making a positive finding of harassment, based on her reading of the bundle of documents and without having heard the oral evidence of either party and submissions on the statutory tort of harassment, (3) by operation of s.16, D's appeal was an appeal, not against the circuit judge's judgment (in which the finding of harassment was made), but against the judge's order, (4) the judge's finding of harassment did not invalidate the order, (5) accordingly, D's appeal should be dismissed. Court observing that, in disposing of the appeal, it would have been perfectly adequate for the circuit judge to have held that there was an arguable case of harassment which, if it needed to be resolved, would have to be resolved at a trial. ***Lake v Lake*** [1955] P. 336, CA, ref'd to. (See ***Civil Procedure 2013*** Vol.1 paras 40.3.1 & 52.0.13, and Vol.2 para.9A–77.)

■ **M. (CHILDREN), IN RE** [2013] EWCA Civ 1170, October 4, 2013, CA, unrep. (Longmore, Underhill & Macur L.JJ.)

Findings of fact in final order – challenge on appeal

CPR rr.40.3 & 52.10, Senior Courts Act 1981 s.16, County Courts Act 1984 s.77. In proceedings brought by a local authority (C) for the protection of children, in which a man (X) intervened, and in which allegations of his abuse of one of the children (K) were made, C seeking 12-month supervision order in their favour, and residence order in favour of the children's mother. Trial judge giving judgment for C and making the orders sought. Nevertheless, C applying for permission to appeal on ground that judge erred in not making findings against X in relation to allegations of incidents of sexual abuse made by K, or to categorise behaviour (admitted by X) as having sinister sexual overtones or abusive connotation. Single lord justice granting permission to appeal. On preliminary issue of whether the Court had jurisdiction to entertain the appeal, **held**, dismissing appeal, (1) s.77 states that, if any party to any proceedings in a county court "is dissatisfied with the determination of the judge he may appeal from it to the Court of Appeal" in such manner and subject to such conditions as may be provided by rules of court, (2) the relevant rule provides that the Court may affirm, set aside or vary "any order or judgment" made or given by the lower court (r.52.10(2)(a)), (3) thus the Court has jurisdiction to entertain "an appeal" in relation to a "judgment" or an "order" or a "determination", (4) findings of fact made by a trial judge do not comprise "determination, order or judgment" unless they (a) concern the issue upon which the determination of the whole case ultimately turns, or (b) are otherwise subject of a declaration within the order, (5) in the instant case the findings (or, rather, non-findings) of fact of which C were dissatisfied did not fall into either of those categories, (6) it did not follow that, because they were included in the body of the order, the non-findings could be challenged by C by way of appeal. Observations on proper practice for reciting in final orders findings of fact made in trial judgments, and on importance of judicial scrutiny to avoid laxity in that respect. ***In re B. (A Minor) (Split Hearings: Jurisdiction)*** [2000] 1 W.L.R. 790, CA, ***Compagnie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd*** [2002] EWCA 1142, [2003] 1 W.L.R. 307, CA, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2013*** Vol.1 paras 40.3.1 & 52.0.13, and Vol.2 paras 9A–77 & 9A–570.)

■ **MACKAY v ASHWOOD ENTERPRISES LTD** [2013] EWCA Civ 959, July 31, 2013, CA, unrep. (Lloyd, Jackson & Ryder L.JJ.)

Application without notice – court's power to make costs order

CPR rr.23.10, 44.2, & 44.10, Senior Courts Act 1981 s.51. Under a charge over land in which several parties (D) had an interest, bank (C) appointing LPA receivers (X). Subsequently, C seeking assistance of court by applying without notice to D for the appointment of X as court-appointed receivers. Judge granting application and making several orders relating to intended proceedings to be brought by X in their new capacity against D. In addition, judge making order against D for costs of the application, to be summarily assessed on paper. After assessment, D making application to set aside the costs order. Judge dismissing application, taking view that the right avenue of challenge, not only of the assessment but also of the costs order, was an appeal, and refusing D permission to appeal ([2012] EWHC 3637 (Ch)). Single lord justice granting permission to appeal. **Held**, dismissing appeal, (1) the power to make costs orders is conferred on the court in general terms by s.51, (2) the court has jurisdiction to make a costs order against a respondent to an application where notice of the application had been withheld from that party. Court noting that a person who was not served with a copy of an application notice before an order was made may apply to have the order set aside under r.23.10, and stating that the liberty to apply granted by that rule applies to all aspects of the order made, including any final costs order. (Ed.: for commentary on r.23.10 aspects of this appeal, see ***Second Cumulative Supplement*** para.23.10.1.) ***Bank of Scotland v Pereira*** [2011] EWCA Civ 241, [2011] 1 W.L.R. 2391, CA, ref'd to. (See ***Civil Procedure 2013*** Vol.1 para.44.3.1.)

■ **R. (S.) v GENERAL TEACHING COUNCIL FOR ENGLAND** [2013] EWHC 2779 (Admin), September 13, 2013, unrep. (Foskett J.)

Post-trial settlement – court's discretion to hand down reserved judgment

CPR r.40.2. School teacher (C), as a litigant in person, bringing judicial review claim to quash decision affecting C's employment made by body regulating teachers (D). Trial judge reserving judgment. Before handing down, judge providing parties with copy of his judgment ("draft judgment") and requesting editorial corrections. In part, judgment resolving certain procedural issues of general application affecting work of D. Parties then reaching settlement agreement to effect that application should be made to the judge for order (1) quashing D's decision and remitting the matter to the appropriate body on terms, and (2) directing that the draft judgment (a) should not be handed down, and (b) that disclosure of it should be restricted. **Held**, granting the application, (1) where before judgment is handed down, parties make a compromise agreement on the mutual understanding that, as a consequence of their compromise, judgment would not be handed down, that understanding is unenforceable, (2) public policy dictates that the judge should have an independent discretion to decide whether to deliver judgment or not, (3) it is not the purpose of the modern practice of circulating draft judgments to provide parties with material to help them settle their disputes, (4) it is important to guard against the danger that "powerful defendants" (e.g. regulatory agencies) be allowed to "buy off" the inconvenience of a judgment adverse to their interests by insisting that a settlement with an individual claimant will be concluded only if the judgment is not handed down, (5) in the instant case greater weight should be given to the advantages accruing to the unrepresented claimant under the settlement than to the advantages of promulgating a first instance judgment, albeit one resolving public law procedural issues likely to arise in other cases. ***Prudential Assurance Company v McBains Cooper*** [2000] 1 W.L.R. 2000, CA, ***F&C Alternative Investment Holdings Ltd v Barthelemy*** [2011] EWHC 1851 (Ch), July 14, 2011, unrep., ***Practice Statement (Supreme Court: Judgments)*** [1998] 1 W.L.R. 825, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2013*** Vol.1 para.40.2.5.)

■ **REHMAN v SECRETARY OF STATE FOR THE HOME DEPARTMENT** [2013] EWHC 2658 (Admin), May 3, 2013, DC, unrep. (Sir John Thomas PQBD & Cranston J.)

Urgent applications – practice

CPR rr.25.2 & 54.4, Practice Direction 23A para.3, Practice Direction 25A para.4, Form N463. On Monday April 8, 2013, UKBA, having considered all representations, issuing to individual (C) removal directions (in which made clear that removal would be suspended only if an injunction was obtained). C's legal representatives thereupon making further representations to UKBA. On April 15, the day before the day fixed for removal, C's solicitors (X) making application to High Court to prevent C's removal. On advice of counsel (Y), that application, when filed, not accompanied by form requesting urgent consideration. Subsequently, and in order to prevent C's removal on April 16, out of hours application made to Court by different counsel instructed by X. At adjourned with notice hearing of the application, Divisional Court stating, (1) it is improper for legal representatives of people in C's position to make, after removal directions have been given, further representations to UKBA which had no prospect of success, (2) any application to the court should be made promptly, and should be accompanied by a request for urgent consideration if necessary, so as to enable the court, if it considers there is any merit in the application, to ask the UKBA to attend, (3) it was untenable on the facts for C's legal representatives to take the view that, by serving the further representations, C's removal was still under official consideration and any application to the court did not have to be made immediately, (4) Y's advice in this case that a request for urgent consideration should not be made was conduct in serious breach of counsel's obligations to the court, (5) it was disingenuous for Y to suggest that, because further representations had been made to UKBA, the application made on April 15 was not urgent because any reasonable counsel, properly and honestly applying his or her mind to the facts, could not conceivably have come to the conclusion that, in the light of the further representations, the Home Office might agree not to remove C. Court explaining that, where an out of hours application is made, an appropriate application must be made to the court the following day, even where the court has refused to grant relief; and (as now stated in Form N463) legal representatives must give a personal undertaking to file such application and to pay the requisite fee. (See ***Civil Procedure 2013*** Vol.1 paras 23.4.1, 23APD.3, 25.2.4, 25APD.4, 54.3.4, 54.4.1 & 54.6.1.)

In Detail

RECITAL OF FINDINGS OF FACT IN FINAL ORDER

Section 16 of the Senior Courts Act 1981 states that the Court of Appeal shall have jurisdiction to hear and determine appeals "from any judgment or order of the High Court". Section 77 of the County Courts Act 1984 states that if any party to any proceedings in a county court "is dissatisfied with the determination of the judge" that party may "appeal from it" to the Court of Appeal. There are many others statutory provisions affecting the jurisdiction of the Court of Appeal, but the terms of s.16 and s.77 apply without qualification to the bulk of appeals reaching the Court.

The powers of the Court of Appeal are stated in CPR r.52.10. The Court may "affirm, set aside or vary" any "order" made by, or "judgment" given by, the lower court.

In commentary in White Book 2013 on provisions in CPR Pt 52 (Appeals), it is explained, on the basis of the decisions of the Court of Appeal in *Lake v Lake* [1955] P. 336, CA, and *Compagnie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd*, [2002] EWCA 1142, [2003] 1 W.L.R. 307, CA, that an appeal lies to that Court, not against the reasons which the lower court gave for its decision or against "the findings which it made along the way", but against "the order made". Thus a party who has been wholly successful in obtaining or (as the case may be) resisting the relief sought cannot appeal against the judgment, in order to challenge findings made. These principles were applied by the Court in the recent case of *Johnson v Bank of Scotland* [2013] EWCA Civ 982, June 7, 2013, CA. (For summary of that case, see "In Brief" section this issue of CP News.) (The reference to s.16 in that case was misplaced, as it was an appeal, not from the High Court, but from a county court.)

These propositions were also examined and applied by the Court in another recent case, that of *In re M. (Children)*, [2013] EWCA Civ 1170, October 4, 2013, CA, unrep. In that case a local authority (C) brought care proceedings for the purpose of protecting several children. A man (X) against whom allegations of abuse were made intervened. The trial judge gave judgment for C and granted the residence and supervision orders which they had sought. But the judge made no findings of fact adverse to X in relation to the allegations made against him. Consequently, no such findings were clearly recited in the order made carrying the judge's judgment into effect. C launched an appeal on the ground that the judge had erred in not making findings against X. For reasons explained in the summary of his case given in the "In Brief" section of this issue CP News, the Court of Appeal held that it had no jurisdiction to entertain the appeal. Put shortly, the Court held that because C were wholly successful in obtaining the relief they sought, they could not appeal against the findings made. As Macur L.J. (with whom Longmore, and Underhill L.JJ. agreed) explained, the jurisdiction of the Court is not wide enough "to allow scrutiny or review of unpalatable findings to a victor or third party against whom no enforceable order can be drawn" (para.19).

In care proceedings in a family court the trial may be structured in a manner which provides for the re-examination of findings of fact at first instance, thereby avoiding the need for appeals to be taken where it is arguable that errors have occurred. This procedural arrangement has evolved because, in such proceedings, it may be very helpful to separate out some factual issues for early determination (for example, where issues as to whether, and if so by whom, the child was abused). Where that is done, the trial is divided into two hearings, with certain issues of fact determined at the first. The first, "fact-finding" hearing is part of the whole process of trying the case, and once completed the case is part-heard. The central findings of fact made at a fact-finding hearing should be the subject of recitals to an order made at the conclusion of that hearing. (It is conceivable, but unlikely, that there will be no order.) But it is clear that those findings, though enshrined in an order of the court, are not "set in stone" so as to be incapable of being reconsidered at the final hearing in the light of subsequent developments (for example, where it was found as a fact that the child was abused by a certain party but later developments warrant a re-examination of that funding).

In the recent case outlined above the "non-findings" which C sought to challenge in the Court of Appeal were made at a trial hearing at which all of the outstanding issues were determined by the judge. If those findings were to be challenged it had to be (if possible) by way of appeal.

In delivering the lead judgment of the Court in this appeal Macur L.J. was critical of the structure and content of the lower court's order (apparently based on a draft submitted by counsel). Her Ladyship stressed that, if subsequent problems are to be avoided, for example, disputes as to whether certain findings are or are not incorporated in a final order as a declaration, care should be taken in the way in which findings of fact are recited in the order. Her Ladyship explained (para.25) that a recital "to indicate which findings of fact were made to found the order", recorded in a document annexed to the final order is unobjectionable and entirely good practice. However, in this case that practice had not been executed satisfactorily with the result that doubts had arisen as to what the judge had or had

not decided. This served as a reminder of the importance of "judicial scrutiny" of draft orders intended to incorporate the judgment of the court. The points made by Macur L.J. in this respect are relevant not just to care proceedings but to civil proceedings generally.

It may be noted that, in the past, the Court of Appeal has had cause to be critical of laxity in the drafting of final orders on a number of occasions. Often the orders concerned have been consent orders. Where the order carries into effect a judgment given by a judge in a contested trial, judicial scrutiny of the drafting of counsel is particularly important.

HEARINGS IN PRIVATE

The general rule is that a hearing, whether at the trial of a claim or beforehand, is to be held in public. That general rule is derived, not from rules of court, though it is stated in CPR r.39.2(1), but from the common law bolstered by art.6 of the Convention. There are well-known circumstances in which the principle of open justice yields and a court may sit in private. The exceptions are derived, not from rules of court, but from a variety of legal sources, including the common law, statute and Convention rights. Para (2) of r.39.2 contains a list of circumstances in which a court may sit in private, beginning with the quite specific circumstance that a public hearing would defeat the object of the hearing (because of publicity) (para (a)), and ending with the rather broad circumstance that the court considers a private hearing necessary in the interests of justice (para (g)).

In modern times there has been a plethora of cases in which the courts have been required to determine whether a hearing should or should not be held in private and where the relevant law has been canvassed, sometimes at enormous length. This is all very daunting for a judge surprised by an application for a private hearing where it is not obvious that it should be granted, and in need of a quick tutorial on the proper approach to adopt in order to arrive at a determination that has a reasonable prospect of being appeal proof. The judgment of Maurice Kay L.J. (with whom Richards and Briggs L.JJ. agreed) in the recent case of *Global Torch Ltd v Apex Global Management Ltd,* [2013] EWCA Civ 819, [2013] 1 W.L.R. 2993, CA, may be commended in this respect. (For summary of this case see "In Brief" section of this issue of CP News.)

This was a case in which certain parties involved in a shareholder's petition for protection against unfair prejudice applied for a private hearing, principally on the ground that, because of the allegations of serious misconduct made in the proceedings, their "reputational rights" under art.8 would be infringed were the hearing of the petition held in public. The judge refused the application and the Court of Appeal dismissed the applicants' appeal. (For summary of this case, see "In Brief" section of this issue of CP News.)

In the course of his judgment Maurice Kay L.J. stated (at para.27) that "a protracted and expensive hearing" should not be required every time a party "waves an article 8 flag" in support of an application for a private hearing. This may seem a counsel of perfection to the judge at the coal-face. However, the succinct account of the proper approach to be taken given by his lordship (in paras 13 to 22) points the way to its achievement.

On the appeal, one of the submissions made by the appellants was that there was a real distinction to be drawn between an application for the hearing of a trial in private and an application for the hearing in private of an interlocutory matter. In this respect it was submitted that, at the interlocutory stage, the open justice principle might yield to the right to privacy and protection of reputation "on the basis that the putative victim has at least an arguable case" countering allegations made against him; further the principle "can safely be mollified" at the interim stage, because, if the allegations are later found to be true at trial, publicity can follow with the result that a temporary suspension of open justice will have done no harm. Maurice Kay L.J. rejected these submissions. His lordship said (para 34):

"I can see no warrant for a general lowering of the bar. Outside the area of statutory or other established exceptions, the open justice principle has universal application except where it is strictly necessary to depart from it in the interests of justice. If an application for departure is made, it will fall to be decided by reference to the principles which I have been considering, whether the proceedings are at an interim or final stage."

His lordship explained that there will be cases where a degree of protection is necessary "on an arguable basis"; for example, so as to protect an applicant against blackmail (see *ZAM v CFW* [2013] EWHC 662 (QB)). But in such circumstances, the justification for protection is the need to avoid the full application of the open justice principle having the effect of exposing a victim to the very detriment which his cause of action is designed to prevent. If such an approach were to be extended to a case such as the present one, "it could equally be applied to countless commercial and other cases in which allegations of serious misconduct are made". That would result in a significant erosion of the open justice principle which could not be justified where, as in this case, "adequate protection exists in the form of vindication of the innocent through the judicial process to trial".

DISCRETION TO HAND DOWN JUDGMENT

Judges are under a constitutional duty to decide. A trial judge cannot say, having heard the cases of contesting parties, "I don't know, go away". Of course, parties may settle their proceedings, indeed nowadays they are placed under enormous pressures to do just that (to the extent that the civil process has become seriously distorted), thereby relieving the judge of his or her duty. The parties may settle at any time, even between the time when the trial hearing has concluded and the handing down of the judge's reserved judgment is awaited.

In many instances, by that time, the parties (or, rather their legal representatives) will have made a pretty shrewd guess as to what the judgment will contain, and this may lead to settlement negotiations being pursued with renewed energy (especially where it is feared that the judgment may contain particular decisions not wholly welcome to either party). Indeed, with the development of the modern practice under which judges circulate their judgments to parties before handing down, if they are patient the parties do not even have to guess. It is clear that, having seen, what is usually called the "draft judgment" (not a wholly satisfactory description), the parties may, before handing down, compromise the proceedings; in effect deciding the case for themselves. In those circumstances, what is to be done with the judge's judgment? It is, after all, the parties' case; if they do not want a judgment why should they be given it formally?

It is established that, in those circumstances the judge, in the exercise of discretion, may either hand down the judgment or not hand it down. A trial is a public process and, for reasons that are not easy to identify, the suppression of a judgment arouses in one misgivings. Right-thinking people are always alert to the effects that power imbalances between parties can have on settlement negotiations, at whatever stage in the civil process they are conducted. The point being that there is a risk that the weaker party may be overborne by the stronger party to the former's detriment. Perhaps this is where the unease lies. If it is the obviously stronger party who is the prime mover in requesting the judge not to hand down the judgment, the suspicion that the weaker party is being done down arises.

These musings are provoked by the recent case of *R. (S.) v General Teaching Council for England*, [2013] EWHC 2779 (Admin), September 13, 2013, unrep., where, in the event, the judge (Foskett J.) decided not to hand down judgment in judicial review proceedings. Interestingly, in doing so, the judge seems to have been strongly influenced by a desire to protect the weaker of the two parties, that is, the claimant acting in person. (For summary, see "In Brief" section of this issue of CP News.) In this case the judicial review claim raised issues concerning the interpretation of Regulations. The defendants, a regulatory body, disagreed with aspects of the judgment the judge was proposing to hand down, in particular his rulings on the issues of interpretation.

Foskett J. noted that giving a judgment that is not accepted by one party or another "is the familiar position for any judge in any case". In the Administrative Court, given the very nature of its jurisdiction, a government department will inevitably from time to time be the losing party. Usually, the department will respond to an adverse decision if it arises by, for example, (1) appealing if permission is given, (2) changing the relevant regulation or statutory provision to clarify what otherwise might not have been clear (if the issue is the construction of a regulation or statute), or (3) by modifying the practice previously adopted in the light of the terms of the judgment. Conceivably, in this case, were judgment handed down, the defendants might follow any of those courses.

In this case, the defendants suggested to the claimant that a settlement of the claim on terms favourable to her might be achieved if a condition of the settlement was that the judgment would not be handed down. The advantage to the defendants of that would be that the rulings in the judgment adverse to them could not be used as a precedent. That was not a matter of concern to the claimant. The claimant was prepared to join the defendants in an application for an order to the effect that the judgment be not handed down. Naturally the judge was concerned that the defendants, through their representatives, "should effectively seek to buy off the inconvenience of a judgment" with which they disagreed by insisting that a settlement will be concluded only if there is agreement that the judgment is not handed down, rather than by taking the normal step of appealing.

In deciding to grant the application the judge gave greater weight to the personal interests of the unrepresented claimant, to whom the substantive terms of the settlement were attractive (virtually giving her the relief she sought and avoiding the prospect of her being respondent to a possible appeal), than to the potential wider interest of promulgating a judgment that might be of value in other cases.

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

Typeset by Matthew Marley
Printed by St Austell Printing Company, St Austell, Cornwall

584321