CIVIL PROCEDURE NEWS

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CPR rr.25.1(1) & 25.3, Practice Direction 25A para.4.3, Practice Guidance (Interim Non-Disclosure Orders). Individual (C) issuing claim form claiming damages against another in tort (D). On C's application made without notice to D, on July 6, 2012, Master making order directing that on court documents the parties' names be substituted by initials. After service of particulars of claim and of defence, upon D failing to comply with order for exchange of witness statements, on C's without notice application court granting unless order on August 16, 2013. Upon D's failure to comply with that order, judgment in default entered for C with damages to be assessed. Shortly afterwards, on C's application made without notice, Master setting aside anonymity order insofar as it related to D. D applying to set default judgment aside. D also without notice applying for, and judge granting, non-disclosure order restraining C from communicating to third parties D's identity and the fact of the entering of the default judgment. At hearing of D's application to continue the non-disclosure order, **held**, dismissing the application (1) D's application was not made in accordance with the Practice Guidance and the order which D sought to continue did not accord with the Model Form annexed to that Guidance, (2) in particular, D's evidence provided no basis upon which the court could find that an interim order was necessary, (3) the fact that the Master, in granting the anonymity order, had been satisfied of the need for a derogation from the principle of open justice did not obviate the need for D to satisfy the evidence requirements for an interim disclosure order. Differences between anonymity orders and interim non-disclosure orders referred to. Judge expressing concern about failure of practitioners to comply with rules and directions relating to applications without notice. ***H v News Group Newspapers Ltd (Practice Note)*** [2011] EWCA Civ 42, [2011] 1 W.L.R. 1645, C.A., ref'd to. (See ***Civil Procedure 2013*** Vol. 1 paras 25.1.12.1, 25.1.12.5, 25.3.2, 25APD.4 & B13-001, and Vol. 2 para.15-40.)

■ **DINLER v BIFFA WASTE SERVICES LTD** [2013] EWHC 3582 (QB), October 10, 20132, unrep. (Swift J.)

Failure to comply with court orders – relief from sanction

CPR rr.1.1 & 3.9. Driver and passengers (C) in car involved in rear end collision bringing negligence claim against other driver (D). D admitting collision but denying negligence. Claim allocated to fast track and, on October 12, 2012, district judge giving standard directions. Shortly afterwards case listed for trial on April 25, 2013. Upon C not complying with certain of the directions (by dates in February and March 2013), on April 12, district making unless order in default of which claim would be struck out on April 23. At start of trial before a circuit judge, C, having not complied with the unless order, making application (opposed by D) for relief from the automatic strike out sanction. Judge granting application. D's application for permission to appeal to High Court granted by single judge. **Held**, allowing appeal, (1) the amendments to r.1.1 and r.3.9 taking effect on April 1, 2013, were intended to introduce a significant change to the attitude of the courts to non-compliance with rules and court orders so as to ensure that cases are conducted at proportionate cost to the parties and do not expend more than a proportionate amount of the court's time and resources, however (2) within the stricter regime, there remains room for the exercise of flexibility and discretion on the part of judges in the light of the circumstances of the particular case under consideration, (3) the decision whether or not to grant relief from sanctions is an exercise of discretion, involving the balancing of a number of factors which militate on one side of the argument or the other, (4) what occurred in this case was a wholesale and flagrant disregard by Cs' solicitors of the directions made by the district judge, (5) the circuit judge's attention was not directed by either party to r.3.9, either in its previous or amended forms, or to the principles that he should apply when considering the application or, indeed, to the need for evidence of support of such an application, (6) this was clearly a case in which relief from sanctions should have been refused and the judge was plainly wrong in granting such relief. ***Fons HF v Corporal Ltd*** [2013] EWHC 1278 (Ch), May 9, 2013, unrep.; Baker v Hallam [2013] EWHC 2668, July 31, 2013, unrep.; ***Mitchell v News Group Newspapers Ltd*** [2013] EWHC 2355, August 1, 2013, unrep.; ***Raayan Al Iraq Co Ltd v Trans Victory Marine Inc*** [2013] EWHC 2696 (Comm), August 23, 2013, unrep.; ***Wyche v Careforce Group plc*** [2013] EWHC 3282 (Comm), July 25, 2013, unrep., ref'd to. (See ***Civil Procedure 2013*** Vol. 1 para.3.9.1, and ***Second Cumulative Supplement*** para.3.9.1.)

■ **IPCOM GMBH & CO KG v HTC EUROPE CO LTD** [2013] EWHC 2880 (Ch), September 26, 2013, unrep. (Roth J.)

Inspection order in patent proceedings – application by non-party to set aside

CPR rr.36.19 & 40.9. Patentee (C) of patent used in mobile phones bringing infringement claim against communications companies (D). D counterclaiming for invalidity. On September 25, 2012, judge granting C's application for an

order permitting C to inspect parts of source codes relating to the modification of computer chips (which D claimed were made to avoid infringement and had that effect) and which were supplied to D by a third party (X) ([2012] EWHC 2849 (Pat)). Judge refusing D permission to appeal against this order, and no appeal made to the Court of Appeal. Subsequently, C applying for an unless order enforcing the inspection order. X, who were not parties in the proceedings, applying to have the order set aside. As a preliminary point, C submitting that X were not entitled to make the application at all since they were not parties to the proceedings and were not parties to the hearing before the judge on September 25, 2012. **Held**, rejecting that submission, (1) r.40.9 is broad enough to cover the case where a non-party seeks to contend that inspection of a document ordered against a party will involve disclosure of its confidential business secrets, at the very least in a case where that non-party's interest is sufficiently clear (as in this case) to be referred to in the order itself, and (2) that a non-party in whom the confidence rests should be able to make an application under the rule even if the party against whom inspection is ordered does not raise an objection. Judge noting that, at the hearing before the judge where the inspection order was granted, D did not seek to resist inspection on the basis of para. (3) of r.31.19 (Claim to withhold inspection), and X were not invited on that occasion to make representations under para (6)(b) of that rule. (See ***Civil Procedure 2013*** Vol.12 paras 31.19.1 & 40.9.1.)

- **JJ FOOD SERVICE LTD v ZUKHAYIR** [2013] EWCA Civ 1304, October 31, 2013, CA, unrep. (Rimer, Tomlinson & McFarlane L.JJ.)

Costs of appeal – application to limit

CPR r.52.9A. Employment tribunal dismissing claims brought by individual (C) against his former employers (D) for unfair dismissal and for disability discrimination. EAT allowing C's appeal. On February 22, 2013, single lord justice granting D permission to appeal. Rule 52.9A coming into effect on April 1, 2013. C acting in person until May 7, 2013, and from May 22, having benefit of legal aid certificate for the purposes of the appeal. On June 18, C applying for order under r.52.9A limiting any costs recoverable by D on the appeal. Single lord justice adjourning that application to the appeal hearing fixed for (and held on) July 1. On October 16, Court of Appeal handing down written judgment allowing D's appeal ([2013] EWCA Civ 1226). D applying for their costs of the appeal. C resisting any order for costs. **Held**, making order for costs in favour of D, (1) as C had not complied with the mandatory requirement that an application under r.52.9A must be made "as soon as practicable", the Court should not entertain C's application under that rule, (2) in any event, in the circumstances of the case it would not be appropriate to make an order under the rule as C's claim should never have been brought and he should not have appealed the employment tribunal's correct rejection of it. Observations on implications of C's ignorance of r.52.9A during period in which he was a litigant in person. (See ***Civil Procedure 2013 Cumulative Second Supplement*** para.52.9A.1.)

- **KING'S LYNN AND WEST NORFOLK COUNCIL v BUNNING** [2013] EWHC (QB), November 7, 2013, unrep. (Blake J.)

Application to commit for breach of order – High Court's power to grant representation order

CPR r.81.14, Legal Aid, Sentencing and Punishment of Offenders Act 2013 ss.14 & 16, Criminal Legal Aid (General) Regulations 2013 regs 9 & 21, Criminal Legal Aid (Determination by a Court and Choice of Representative) Regulations 2013 regs 4, 5 & 7. In proceedings brought by local authority (C) against occupiers of land including individual (D), C granted order restraining them from using the land. C applying to High Court under r.81.14 for permission to make application for committal order against D for breach of the order. D applying under reg.4 in writing to High Court for legal representation order under s.16. **Held**, granting D's application, the committal proceedings against D were "criminal proceedings" as defined by s.14(h) and reg.9(v), as they were proceedings that involve the determination of a criminal charge for the purposes of art.6(1) of the Convention. Observations on (1) the exclusion of reg.9(v) by reg.7(2), the confusion caused by that and the need for clarification, and (2) the lack of an appropriate form for applications under reg.4. ***Hammerton v Hammerton*** [2007] EWCA Civ 248, [2007] 2 F.L.R. 1133, CA, ref'd to. (See further "In Detail" section of this issue of *CP News*.) (See ***Civil Procedure 2013*** Vol. 1 para.81.14.1.)

- **MENGISTE v ENDOWMENT FUND** [2013] EWCA Civ 1003, August 14, 2013, CA, unrep. (Arden, Patten & McFarlane L.JJ.)

Wasted costs order – recusal application

CPR r.48.7 [r.46.8], Costs Practice Direction (CPR Pt 48) s. 53 [Practice Direction 46 para.5]. Parties who were all Ethiopian, whose relationship was governed by Ethiopian law, falling into dispute in respect of property and assets based in Ethiopia. Some of the parties (C) commencing proceedings in the Chancery Division against other of the parties (D) for compensation, principally on ground that, in legal proceedings involving them in an Ethiopian court, D had obtained judgment against them on the basis of allegations that could now be proved false. D making application for stay of the proceedings on the ground that England was not a forum conveniens. C contending that they could not obtain a fair trial in Ethiopia. At hearing, C relying on evidence of Ethiopian law

expert (X). Judge dismissing application, holding that C had not shown any cogent evidence that they could not bring their new material to the courts in Ethiopia in order to obtain a fresh trial ([2013] EWHC 599 (Ch)). In doing so, judge rejecting most of X's evidence and finding (1) that it did not comply with the relevant rules of court as to expert evidence in CPR Pt 35, (2) that X did not understand his duties as an expert to the court, and (3) that X had not been properly assisted by C's legal representatives (with the result that the evidence was lengthened). On March 20, 2013, D applying for a wasted costs order against C's solicitors (X) on the grounds that they should have withdrawn from the case in the light of the defects in the Ethiopian law evidence. X applying to the judge for an order recusing himself from hearing that application. Judge dismissing X's application and making first stage 1 wasted costs order against X ([2012] EWHC 2782 (Ch)). **Held**, allowing X's appeal against the non-recusal order, with the consequence that the Stage 1 costs order was set aside, (1) in almost every case, the judge who tried a claim or dealt with an application will be the right judge to deal with consequential issues as to costs, even if the judge made findings adverse to a party in the course of reaching his or her conclusion, and the same applies where an application is made for a wasted costs order, but (2) there can always be exceptions, (3) the test for determining whether a judge must recuse himself for apparent bias is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased, (4) the fact that it might be difficult or even impossible for another judge to hear an application for costs does not mean that the principles for recusal should be in any way tailored where an application for recusal is made in wasted costs proceedings, (5) this was an exceptional case in which there was apparent bias stemming from the facts of the case which meant that the judge should have recused himself. Observations on circumstances in which permission to appeal to Court of Appeal against an order made at the first stage of a wasted costs application should be granted. ***Bahai v Rashidian*** [1985] 1 W.L.R. 1337, CA; In ***re Freudiana Holdings Ltd***., ***The Times***, December 4, 1995, CA; ***Crabtree v. Ng***, [2011] EWCA Civ 1455, June 9, 2011, C.A., unrep., ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2013*** Vol. 1 paras 48.2.1, 48.7.14, 48.7.15 & 52.3.1, and Vol. 2 paras 9A-48 & 9A-204.)

- **NAGEH v DAVID GAME COLLEGE LTD** [2013] EWCA Civ 1340, November 4, 2013, CA, unrep. (Moore-Bick, Aikens & Vos L.JJ.)

Authenticity of document – admission

CPR r.32.19. Former employee (C) of educational institution (D1) bringing claim against D1 and its principal (D2) for damages for D1's failure to pay commissions and bonuses in amounts alleged to be due to C under an agreement in writing signed by C and D2 (the document). In their defence D1 and D2 admitting the document but making no admissions "as to the circumstances of the creation and/or execution" of it, and denying that it had the effect C attributed to it. Upon C disclosing the document relied on to them, D1 and D2 not serving notice to prove it under r.32.19. Very shortly before trial in the High Court, D2 filing witness statement putting in issue the authenticity of the document and making positive assertion that he had not signed it. At start of trial, judge refusing D1 and D2 permission to amend defence to allege that D2 did not sign the document. At trial, in their evidence C and D2 giving completely irreconcilable accounts of how the document came into existence. In his judgment, trial judge (1) finding that C and D2 were honest witnesses but rejecting C's account, (2) holding that on a balance of probabilities C had not proved that the claim was well-founded, and (3) dismissing the claim. On C's appeal to the Court of Appeal, **held**, allowing the appeal and remitting the matter to the trial court, (1) in the light of (a) the admission in the defence, (b) the failure of the defendants to challenge the authenticity of the document by notice under r.32.19, and (c) the rejection of the defendants' application to amend the defence (in effect to allege forgery), it was not open to the judge to find that the document was not what it purported to be, (4) in these circumstances the defendants could contend that the document was of no contractual effect, or did not bear the meaning which C attributed to it, but they were not entitled to dispute the authenticity of it, or to contend that they were not bound by it. (***Civil Procedure 2013*** Vol. 1 para.32.19.1.)

- **PJSC VSEUKRAINSKYI AKTSIONERNYI BANK v MAKSIMOV** [2013] EWHC 3203 (Comm), August 16, 2013, unrep. (Blair J.)

Interim remedy in support of arbitration – service out of jurisdiction

CPR rr.62(1)(b) & 62.5, Arbitration Act 1996 s.44. Foreign bank (C) bringing claim against individual (D) for interim remedies in support of London arbitration. Judge granting C injunction freezing D's assets and, as ancillary to that, granting worldwide freezing injunction restraining, amongst others, a Cypriot company (X), and granting C permission to serve X out of the jurisdiction. X becoming a party to the proceedings but not a party to the arbitration agreement. C contending that X were beneficially owned by D and judge finding good arguable case to that effect. X applying to discharge the injunction on several grounds, including ground that court had no jurisdiction to make and serve the injunction on them out of the jurisdiction. **Held**, dismissing the application, (1) under r.62.5(1)(b) the court may give

permission to serve an arbitration claim form out of the jurisdiction if the claim is for an order made in exercise by the court of its powers in support of arbitral proceedings (s.44), (2) in a proper case, there is power to order service out of the jurisdiction under r.62.5(1)(b) on a defendant, albeit the defendant is not a party to the arbitration agreement, (3) this is not a power to be exercised lightly, but where it can be demonstrated to the requisite standard that a company is owned and controlled by a party to the arbitration agreement there may be good reason for the court of the seat of the arbitration to stop that company from dissipating its assets if that would render enforcement of an eventual award nugatory. ***Vale do Rio doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd*** [2000] 2 Lloyd's Rep. 1; ***BNP Paribas v OJSC Russian Machines*** [2011] EWHC 308 (Comm), [2012] 1 Lloyd's Rep. 61; ***Tedcom Finance Ltd v Vetabet Holdings Ltd*** [2011] EWCA Civ 191, [2012] 1 C.L.C. 950, CA; ***Western Bulk Shipowning III A/S v Carbofer Maritime Trading ApS (The Western Moscow)*** [2012] EWHC 1224 (Comm), [2012] 2 Lloyd's Rep. 163, ref'd to. (See ***Civil Procedure 2013*** Vol. 2 para.2E-13.)

- **R. (BREDENKAMP) v SECRETARY OF STATE FOR FOREIGN AND COMMONWEATLH AFFAIRS** [2013] EWHC 2480 (Admin), August 9, 2013, unrep. (Dingemans J.)

Judicial review claim request for further information

CPR r.18.1. In judicial review claim, claimant (D) making extensive requests for further information from defendant (D). D resisting certain requests and C making application to the court under r.18.1. Held, accepting some requests but rejecting others, where the Administrative Court is required to determine a contested application for further information it should only direct that information should be provided when it is necessary to do so in order to resolve the matter fairly and justly. ***Tweed v Parades Commission for Northern Ireland*** [2006] UKHL 53, [2007] 1 A.C. 650, HL, ref'd to. (See further "In Detail" section of this issue of *CP News*.) (See ***Civil Procedure 2013*** Vol. 1 para.18.1.2.)

- **WILLIS v MRJ RUNDELL & ASSOCIATES LTD** [2013] EWHC 2923 (TCC), September 25, 2013, unrep. (Coulson J.)

Costs management order – court's approval of costs budgets

CPR rr.3.15 & 60.6, Practice Direction 51G para.4.1. Property owner (C) bringing proceedings against contractors (D2) and construction professionals (D1) making claims for costs of rectifying defects and for recovery of overpayments. C's claims against D2 settled, but claims against D1 proceeding. Proceedings subject to costs management pilot scheme operating in TCC (initially from October 1, 2012, but subsequently extended, and continuing in effect after April 1, 2013, in relation to extant proceedings within its scope). At first CMC held in December 2012, when claim valued at £1.6m, judge giving directions and expressing opinion that the figures in the parties' costs budgets were high and appeared disproportionate. At PTR held in July 2013, judge abandoning trial date (largely because of parties' failure to comply with directions given at CMC) and ordering CMC devoted entirely to costs management. At that hearing, although value of claim reduced to £1m, C and D1 producing costs budgets for, respectively, £897k and £703k, being sums greater than those produced at the first CMC. D1 submitting that C's estimate was disproportionate. **Held**, (1) under the Practice Direction, the court may make a costs management order (CMO) approving the costs budgets of any party, after the court has made appropriate revisions, (2) the whole point of costs management is to enable the court to make orders so as to assist the parties to keep costs to a reasonable level, however (3) in the circumstances of his case, the court should decline to make a CMO, principally because both budgets appeared to be disproportionate and unreasonable and were insufficiently detailed, further (4) because the parties had not provided the court with supporting material on which it could rely in order to come up with reasonably accurate alternative figures, it was not possible for the court to approve the budgets subject to revisions. Explanation of aspects of structure of CMOs, particularly the level of detail. (See ***Civil Procedure 2013*** Vol. 1 para.51GPD.4, and Vol. 2 para.2C-28.7, and ***Cumulative Second Supplement*** paras 3.12.1 & 3.15.2.)

Statutory Instrument

- **CIVIL LEGAL AID (REMUNERATION) (AMENDMENT) REGULATIONS 2013** (SI 2013/2877)

By Pt 1 amend Civil Legal Aid (Remuneration) Regulations 2013 (SI 2013/422) regs 7-9, Pt 2 of Sch.1, Sch.2 and Sch.5. By Pt 2 make transitional provisions. Provide for remuneration of barristers in independent practice and for enhancement of the rates payable. Make an amendment consequential to the Criminal Defence Service (Very High Cost Cases) (Funding) Order 2013 (SI 2013/2804). Provide for the rates and fees to be paid to experts, including specific provision for certain experts in clinical negligence cerebral palsy cases. In force December 2, 2013.

In Detail

LEGAL AID REPRESENTATION IN COMMITTAL APPLICATIONS

In *King's Lynn and West Norfolk Council v Bunning*, [2013] EWHC (QB), November 7, 2013, unrep., a local authority (C) obtained an order against an individual (D) and persons unknown restraining them from using certain land for residential purposes without the express grant of planning permission. That was an order "to abstain from doing an act" capable of being enforced by an order for committal under the procedure now provided for in the rules in Section 2 of CPR Pt 81. C alleged that D was in breach of the order and applied to the High Court under r.81.14 for permission to make a committal application. D set about endeavouring to obtain legal aid. On October 23, 2013, D applied to the High Court in writing for a determination that she qualified for legally aided representation.

D's application raised the question whether (put shortly) the contempt proceedings against D were proceedings for which, under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, "civil legal aid" or "criminal legal aid" is available. As is explained below, if the latter, D might apply to the High Court for legally-aided representation, but if the former D might apply to the Legal Aid Agency's Director of Legal Aid Casework for funding on the basis that the contempt proceedings against her were an "exceptional case".

In the light of this uncertainty, a High Court judge adjourned the proceedings against D and directed that the papers be served on the Legal Aid Agency and they be invited to attend at the adjourned hearing to assist the court. The adjourned proceedings came on before Blake J.

Provisions in Part 1 of the 2012 Act (ss.1-43) distinguish between civil legal aid and criminal legal aid. Section 8 defines "civil legal services". Such services are to be made available subject to two conditions. The first is that they are civil legal services as described in Part 1 of Schedule 1 to the Act. The second is that the Director of Legal Aid Casework has determined (in accordance with legislation binding on that official) that the individual qualifies for those legal services. Section 10 (Exceptional cases) states that the Director has power to provide individuals with civil legal services not included in Schedule 1 in exceptional circumstances (subject to certain conditions).

Section 14 of the 2013 Act (based on s.12(2) of the Access to Justice Act 1999) defines "criminal proceedings" as including (amongst other things) proceedings for contempt in the face of the court (s.14(g)) (which was not the class of contempt alleged against D) and proceedings "as may be prescribed" (s.14(h)). Section 15 gives the Lord Chancellor power to prescribe in regulations when "advice and assistance" must be made available to individuals in connection with criminal proceedings. (That power broadly reflects s.13(1)(b) of the 1999 Act.) Regulations made in exercise of the powers conferred on the Lord Chancellor under s.14 and s.15 are included in the Criminal Legal Aid (General) Regulations 2013 (SI 2013/9).

By reg.9 of the Regulations (implementing s.14(h)) the definition of "criminal proceedings" in s.14 is extended to include proceedings "that involve the determination of a criminal charge for the purposes of Article 6(1) of the European Convention on Human Rights" (see further below). Section 16 identifies the circumstances and conditions under which "representation for the purposes of criminal proceedings" is to be made available to an individual. Such representation is to be made available to an individual if the individual is a "specified individual in relation to the proceedings" and the Director or, as the case may be, a court has determined that the individual qualifies for representation. (It was clear in the instant case that D was "a specified individual".)

Determinations by a court that an individual qualifies for representation in accordance with s.16 are governed by s.19 and regulations made under that section, that is to say, the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013 (SI 2013/614) (the Determination Regulations). Regulation 4(2) of those Regulations states that an application for determination made to the High Court must be made "orally to the court" or "in writing to an officer of the court". In the latter circumstance, the application must be "in a form specified by the Lord Chancellor" (reg.4(3)).

In the instant case, Blake J. examined the legislation outlined above and concluded that, on D's application in writing, the High Court did have power to make a legal representation order under s.16 and that such representation was in the public interest.

His lordship held that the committal proceedings against D were "criminal proceedings" as defined by s.14(h) and reg.9(v) as they were proceedings that involve the determination of a criminal charge for the purposes of art.6(1) of the Convention. In that respect his lordship applied the decision of the Court of Appeal in *Hammerton v Hammerton*, [2007] EWCA Civ 248, where it was held, applying the Strasbourg jurisprudence, that committal proceedings are proceedings that involve the determination of a criminal charge.

However, as Blake J. explained that conclusion did not resolve the matter. There were other complications. First, it appeared that, although reg.4(2) states that an application for a determination under section could be made to an officer of the High Court, no form has been created for such purposes. D had been encouraged by the Legal Aid Agency to use Form CRM 14, but that was obviously inapposite. Clearly, that was not an insurmountable complication. The lack of a form could not govern how applications for criminal legal aid should be decided.

Secondly, difficulties were created by regs 5 and 7 of the Determination Regulations, when read together. Regulation 5 provides that, when the court makes a determination under s.16 "in accordance with any of regulations 6 to 8", the court must (a) issue a representation order recording that determination and (b) send a copy of the representation order to the individual and any provider named in the representation. Regulation 7(2) states that the High Court may make a determination under s.16 of the Act as to whether an individual qualifies for representation for the purpose of proceedings before that Court described in (a) s.14(a) to (g) of the Act. In terms that regulation excludes "criminal proceedings" as defined by s.14(h) and reg.9(v), that is to say, it excludes criminal proceedings of the type in which (on the application of the principle expounded in *Hammerton v Hammerton*) D was engaged.

If the High Court was bound by reg.5 to apply reg.7(2) it would not have power to make a legal representation order under s.16 for the legal representation of D in this case. There was an obvious conflict between, on the one hand, regs 5 and 7 of the Determination Regulations and, on the other, s.16 of the 2012 Act and the General Regulations. Blake J. held that the latter should prevail over the former.

His lordship concluded (para.27):

"I consider that the present drafting of that Regulation combined with the terms of the prescribed form CRM 14 are likely to give rise to very real difficulty within the profession in knowing how to apply for legal aid for contempt proceedings in the High Court and the judiciary in knowing how to determine such applications until the matter is clarified. I would hope that following this judgment thought can be given to making appropriate changes to both so that applicants consulting the Regulations will not also have to read this judgment to make sense of them, assuming that it has done so."

Doubtless the matter will be clarified shortly and an appropriate application form devised, and in the meantime the decision in this case will prevail.

WASTED COSTS ORDERS APPEALS

Section 51(6) of the Senior Courts Act 1981 states that in any proceedings in a county court (the High Court or the Court of Appeal Civil Division) the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any "wasted costs" or such part of them as may be determined in accordance with rules of court (see White Book 2013 Vol. 2 para.9A-204). Section 51(7) provides that, in this context, "wasted cost" means any costs incurred by a party (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay (s.51(7)). Sections 51(6) and 51(7) were enacted in 1990 following the White Paper on Legal Services (Cm 740, 1989) where it was recommended that such powers as the courts had to deal with unsatisfactory work by lawyers should be strengthened.

Before April 1, 2013, rules of court relevant to wasted costs applications were contained in CPR r.48.7, and that rule was supplemented by directions in Section 53 of the Costs Practice Direction. By the Civil Procedure (Amendment) Rules 2013 (SI 2013/262), that rule was re-enacted (with effect from that date) as r.46.8 and is supplemented by directions in para.5 of Practice Direction 46 (see Cumulative Second Supplement para.46n.8 and para.46npd.5). (Rule 46.8 and para.5 do not differ materially from their predecessors.)

As a general rule, the court will consider whether to make a wasted costs order in two stages. The Directions to that effect are now found in para.5.7 of PD 46 where it is stated (in para.5.7(a)) that, at the first stage the court must be satisfied (i) that it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made; and (ii) the wasted costs proceedings are justified notwithstanding the likely costs involved. At the second stage, the court will consider, after giving the legal representative an opportunity to make representations in writing or at a hearing, whether it is appropriate to make a wasted costs order (para.5.7(b)). The court may proceed to the second stage without first adjourning the hearing if it is satisfied that the legal representative has already had a reasonable opportunity to make representations (para.5.8).

In the years since 1990, a substantial body of case law on substantive and procedural aspects of wasted costs has been built up (as the commentary in White Book 2013 at para.48.7.1 and following shows). In *Crabtree v Ng* [2011]

EWCA Civ 1455, June 9, 2011, CA, unrep., the Court of Appeal held that normally it would be wrong for the Court to entertain an application for permission to appeal against a judge's decision made at the first stage of a wasted costs order application because, as Lord Neuberger M.R. (with whom Arden and Carnwath L.JJ. agreed) explained (para.16), "it is a far more efficient use of time for the lawyer concerned to show cause and for the application for wasted costs to be dealt with on its merits, and only then for this court to be troubled."

In the recent case of *Mengiste v Endowment Fund* [2013] EWCA Civ 1003, August 14, 2013, CA, unrep., Arden L.J. noted that, in error, that authority was not drawn to the attention of the Court when the appellant's application for permission was being considered. (For summary of that case, see "In Brief" section of this issue of CP News.) Her ladyship explained (para.68) that in almost every case the appropriate approach for the Court of Appeal to take when the argument is simply whether there were grounds for the making of a first stage order will be to refuse permission, because, if the aggrieved party is right that there were no sufficient grounds for the order, that can most conveniently be dealt with at the second stage, and the delay caused by an appeal will then be avoided. Here ladyship conceded that there had been instances in which permission had been given for first stage appeals, but that did not alter the fact that the ruling in *Crabtree v Ng* should be followed.

FURTHER INFORMATION IN JUDICIAL REVIEW CLAIMS

CPR r.18.1(a) states that the court may, at any time, order a party to clarify any matter which is in dispute in the proceedings, or give additional information in relation to any such matter.

In *R. (Bredenkamp) v Secretary of State for Foreign and Commonweatlh Affairs* [2013] EWHC 2480 (Admin), August 9, 2013, unrep. (Dingemans J.), a Zimbabwean businessman brought a judicial review claim challenging decisions made by the Secretary of State (D) which had resulted in C's assets, and those of companies owed or controlled by him, becoming the subject of a freezing order. In the claim C sought declarations relating to the legality of D's decisions. C made a large number of requests for disclosure of documents by D and for further information from D. It was apparent from the way in which those applications were made that C contemplated much more than declaratory relief, including private law proceedings against D for misfeasance in public office, data protections infringements and negligent mis-statement.

D complained about the extensive nature of the applications for documents and further information in the judicial review claim and challenged their appropriateness.

In dealing with C's applications under r.18.1, Dingemans J. (1) explained that, as a matter of current Administrative Court practice, requests for further information are very rarely sought in proceedings by way of judicial review, (2) commented that if time-consuming and expensive interim steps are to be avoided in such proceedings (as they should be) such requests should remain exceptional, and (3) concluded that, if the court is required to determine a contested application for further information it should only be provided when it is necessary to do so in order to resolve the matter fairly and justly.

In justifying this practice his lordship explained (para.11) that the Administrative Court attempts to provide hearings within a short timescale and can only expected to do that if its proceedings and procedures remain uncomplicated and properly focussed "on auditing the legality of public decision making", rather than on "determining contested historic events where extensive requests for disclosure are made and oral evidence is likely to be given". His lordship noted that the advantage of the modern procedure under which claims for damages can be combined with actions for judicial review (r.54.3(2)) is that disputes about the jurisdiction of respective courts within the High Court are avoided. His lordship explained that, in the instant case, consideration may have to be given in the future to combining the judicial review claim with any private action commenced by C against D. In that event the combined action could be transferred to the Queen's Bench Division (r.54.20), a forum better able to deal with disputes of the type that appeared to be emerging between the parties in the case and better able to ensure that costs are kept proportionate.

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