CIVIL PROCEDURE NEWS

Issue 1/2014 January 24, 2014

CONTENTS

In Brief

Cases

■ **CBS BUTLER LTD v BROWN** [2013] EWHC 3944 (QB), December 16, 2013, unrep. (Tugendhat J.)

Search orders and disclosure of documents

CPR rr.25.1(h), 31.3 & 31.6, Practice Direction 25A para.6, Practice Direction 31B para.9. Company (C) carrying on recruitment agency business issuing claim form against former employees (D) after they had set up a similar business for breach of restrictive covenants and confidentiality agreements. On August 20, 2013, judge granting C's without notice application for interim remedies, including a modified search order under which D required to permit computer forensic (X) expert to make images of storage devices on computers etc in D's possession or under their control. Search order executed and X producing report of images identified. Subsequently, on September 5, 2013, C applying for permission for X "to search the images taken pursuant to the order" by particular method (using "keywords" and "blacklist") designed to produce two categories of files, one to consist of files to be produced to both parties, and the other of files to be produced to D's solicitors only (for purpose of enabling them to determine whether such files contained irrelevant or privileged material and to make disclosure accordingly). Before hearing of this application, D entering defence and normal rules as to disclosure and inspection of documents taking effect. In dismissing application, but making order requiring D to provide standard disclosure in relation to certain images identified in X's report, **held**, (1) the search order of August 20 provided only for search and imaging for the purposes of preservation of documents, and differed from the normal order in that it provided for inspection of documents, not at the initial stage of the search itself, but at a subsequent stage, and then only if inspection was permitted by the court, (2) where a search order provides for the delivery up of a party's documents for preservation purposes it does not necessarily follow that there should subsequently be made an order which deprives that party of the opportunity of considering whether any or all of those documents should be disclosed in accordance with the normal rules as to disclosure, (3) such an order would be an intrusive order, contrary to the normal principles of justice, and should only be made when there is a paramount need to prevent a denial of justice to the applicant, that is to say, where the applicant has shown that there are substantial reasons for believing that the respondent is intending to conceal or destroy documents in breach of his obligations of disclosure under the CPR. ***Lock International Plc v Beswick*** [1989] 1 W.L.R. 1268; ***Mueller Europe Ltd v Central Roofing (South Wales) Ltd*** [2012] EWHC 3417 (TCC), [2013] T.C.L.R. 2, ref'd to. (See ***Civil Procedure 2013*** Vol. 1 paras 25.1.27, 31.6.5 & 31BPD.4, and Vol. 2 para.15-91.)

■ **DEEDS v VARIOUS RESPONDENTS** [2013] EWCA Civ 1678, November 28, 2013, CA, unrep. (Richards & Lewsion L.JJ. and Coleridge J.)

Application to set aside order–whether to be determined with or without a hearing

CPR rr.3.3, 23.8 & 52.11, Practice Direction 3C paras 4.2 & 4.6. High Court judge making general civil restraint order (GCRO) under which individual (D) required to seek the permission of a court before bringing any civil proceedings whilst order remained in force. That order made by High Court judge on own initiative and without hearing D or giving him an opportunity to be heard (r.3.3(4)). Order stating that, without first obtaining permission, D could apply (as provided by r.3.3(5)) to have the order set aside, and adding that, in that event, such application "will be heard by a High Court judge". D making application to set order aside. High Court judge (1) considering this application on paper, (2) determining without a hearing that it should be dismissed, and (3) making order accordingly. Subsequently, on ground of lack of jurisdiction, another High Court judge dismissing an application by D to set the latter order aside. Single lord justice granting D permission to appeal on ground that the dismissal of D's application under r.3.3(5) to set aside the GCRO was an unjust decision because of serious procedural error (r.52.11(3)(c)). **Held**, allowing appeal and directing that D's application should be considered at an oral hearing before a High Court judge, (1) where an application is made under r.3.3(5) by a party affected by an order to set the order aside, the question whether that party is entitled to an oral hearing of the application will depend on the nature of the order in question, (2) in a case in which a citizen's right of access to the court is impaired by the order the presumption must be in the favour of an oral hearing, (3) in the instant case, in deciding to determine D's application without a hearing, the High Court judge purported to rely on the mandatory terms of para.4.6, but erred in that respect because that provision does not apply where (as here) an application made by a person subject to a GCRO is an application that may be made without permission. Court noting that r.23.8(c) states that a court may deal with an application without a hearing if it "does not consider that a hearing would be appropriate", but stating that, given the seriousness of the order in this case and the term in it stipulating that any application to set aside "will be heard", it was not open to the High Court judge under that rule "to decide not to hear the application

orally". ***R. (Kumar) v Department of Constitutional Affairs (Practice Note)*** [2006] EWCA Civ 990, [2007] 1 W.L.R. 536, CA; ***Connah v Plymouth Hospitals NHS Trust*** [2006] EWCA Civ 1616, November 2, 2006, CA, unrep., ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2013*** paras 3.1.9.4, 3.3.2, 3CPD.4, 23.8.1 & 52.11.4.)

■ **DURRANT v CHIEF CONSTABLE OF SOMERSET & AVON** [2013] EWCA Civ 1624, December 17, 2013, CA, unrep. (Richards & Lewison L.JJ. and Coleridge J.)

Relief from procedural sanction–directions for service of witness statements–failure to comply

CPR rr.3.9 & 52.11. Individual (C), acting in person throughout, starting proceedings against police (D) making various claims including false imprisonment, assault and malicious prosecution. At CMC on March 8, 2012, Master making order giving directions. On November 19, 2012, judge allowing C's appeal and giving further directions, including direction that witness statements should be exchanged by January 21, 2013, and setting trial window as April 9 to June 28, 2013, with six day estimate. On February 26, 2013, judge extending that deadline insofar as it applied to D to March 12, 2013, subject to the condition that D "may not rely on any witness evidence other than that of witnesses whose statements have been so served". Very shortly after March 12, C receiving from D witness statements for two witnesses (evidence of A and B). On May 15, D applying for relief from sanction under r.3.9 and before hearing of that application, D re-serving on C witness statements of A and B and also serving witness statements for four other witnesses (witnesses C to F). On June 5 (five days before the start of trial) D making further r.3.9 application, so as to allow them to rely on the evidence of two more witnesses (witnesses G and H). At start of trial, judge granting both applications, and, on C's application, adjourning trial. On C's appeal to Court of Appeal against the judge's decisions, **held**, allowing appeal, (1) the sanction imposed by the order of February 26, was properly imposed and complied with the overriding objective, (2) the judge's exercise of discretion under r.3.9 was flawed, (3) the judge did not appreciate that the two considerations mentioned in r.3.9 (as amended with effect from April 1, 2013) should be given greater weight than other factors, (4) the harmful effects on the reputation of D and of D's witnesses should relief from sanction not be given were not factors that carried much weight, (5) as regards the service of the statements of witnesses C to H, D's non-compliance with the order was serious, (6) the adjournment of the trial was detrimental to the efficient conduct of litigation, (7) a failure by a judge, when applying r. 3.9, to follow the robust approach now laid down by the Court of Appeal (a) constitutes an error of principle entitling an appeal court to interfere with the judge's decision, and (b) in addition is likely to justify the appeal court's intervention on the basis that the decision is plainly wrong, (8) in the circumstances it was appropriate for the Court to exercise the r.3.9 discretion afresh, rather than to remit the matter to the judge, (9) there was no doubt that relief from sanction should be refused in relation to the evidence of witnesses C to H, (10) although D's non-compliance in relation to the evidence of A and B was capable of being characterised as "trivial", taking everything into account, and placing particular weight on D's failure to make a prompt r.3.9 application, relief from sanction should not be granted to permit D to rely on that evidence. ***Venulum Property Investments Ltd v Space Architecture Ltd*** [2013] EWJA 1242 (TCC), May 22, 2013, unrep.; ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537, November 27, 2013, CA, unrep., ref'd to. (See ***Civil Procedure 2013*** Vol. 1 para.3.9.1.)

■ **MACLENNAN v MORGAN SINDALL (INFRASTRUCTURE) PLC** [2013] EWHC 4044 (QB), December 17, 2013, unrep. (Green J.)

Pre-trial directions as to evidence of trial witnesses–limit on number of witnesses

CPR r.32.2(3). Employee (C) bringing personal injury claim against employers (D). D admitting liability, subject to 25% contributory negligence. On issues arising in relation to his claim for loss of earning (e.g. earnings comparators), C proposing to tender at trial the evidence of 43 witnesses. Quantum trial fixed for five days in March 2014. In December 2013, D applying under r.32.2(3) for order limiting the number of witnesses which C may call (in particular, to eight on the earnings comparator issue). **Held**, giving directions limiting the number of C's witnesses to an extent, and also directions as to the information to be provided in the statements of particular witnesses, (1) sub-rule (3) of r.32.2 came into effect on April 1, 2103, and must be seen in the context of that rule as a whole, (2) the sub-rule enables a court by pre-trial directions to deploy a range of powers as to the evidence of witnesses for the purposes of reducing costs and ensuring that the trial is conducted effectively, (3) the court will ordinarily consider its powers under the sub-rule after less intrusive measures for ensuring the fair and efficient conduct of the trial have been considered and rejected, (4) the powers are best exercised before any witness statements have been prepared, but may be exercised subsequently, (5) in order to minimise the risk that any directions made by a court in exercise of the powers may be seen, with the benefit of hindsight, to cause unfairness, parties should ensure that the court has the fullest possible information available to it and should cooperate in a pragmatic and sensible manner. Provenance of sub-rule (3) as noted in White Book amplified. ***Wright v Michael Wright (Supplies) Ltd*** [2013] EWCA Civ 234, March 21, 2013, CA, unrep., ref'd to. (See ***Civil Procedure 2013 Cumulative Second Supplement*** para.32.2.3.1.)

■ **R. (SMOKE CLUB LTD) v NETWORK RAIL INFRASTRUCTURE LTD** [2013] EWHC 3830 (Admin), October 29, 2013, unrep. (Ouseley J.)

Judicial review–discontinuance before permission granted–defendant's costs

CPR rr.38.3, 38.6(1), 54.12 & 54.16, Practice Direction 54A para.8.4. Individual (C) starting judicial review claim and applying for permission to proceed. Court refusing permission on paper (para.8.4) and C requesting that that decision be reconsidered at a hearing (r.54.12(3)). Shortly before that hearing, C filing notice of discontinuance (r.38.3). On matter of costs, defendants (D) submitting that they should be awarded their costs on the basis of r.38.6(1). **Held**, rejecting that submission, (1) r.38.6(1) states that, unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant, however, (2) relevant authorities establish that in judicial proceedings, save in special circumstances, unless the court orders otherwise a successful defendant may recover the costs of his acknowledgment of service, but not the costs of successfully resisting the grant of permission at a renewed permission hearing, (3) there are particular reasons for the particular rules governing costs at the paper and oral permission stage in judicial review proceedings which are reflected in authorities, (4) the general provision in r.38.6(1) must yield to those particular rules, (5) in the circumstances, the appropriate order was that C should pay D's costs of the acknowledgment of service and one third of D's subsequent costs. ***R. (Mount Cook Land Ltd) v Westminster City Council***, [2003] EWCA Civ 1346, [2004] C.P. Rep. 12, CA; ***R. (Davey) v Aylesbury Vale District Council (Practice Note)***, [2007] EWCA Civ 1166, [2008] 1 W.L.R. 878, CA, ref'd to. (See ***Civil Procedure 2013*** Vol. 1 paras 38.6.1, 44.3.7, 54.12.5 & 54.16.7.)

■ **SKY BLUE SPORTS & LEISURE LIMITED v COVENTRY CITY COUNCIL** [2013] EWHC 3366 (Admin), November 1, 2013, unrep. (Silber J.).

Judicial review–permission to proceed application–specific disclosure

CPR rr.54.4 & 54.16, Practice Direction 54A para.12.1. Local authority (D) leasing land of which they were freeholders to property management company (X) in which D were 50% shareholders. Owners and operators (C) of football club having use and occupation of the property under a lease taken from X. X obtaining default judgment against C for outstanding rent. D deciding to make loan to X to enable X to discharge its debt to their bank. D asserting that loan made to protect their interests in X which would have been seriously impaired if X had defaulted on the bank loan. C commencing judicial review claim challenging the legality of D's decision to make the loan. D disclosing to C report received by them containing much information explaining why and how the loan to X was made. On July 31, 2013, on paper judge refusing C permission to proceed. C's renewed application for permission listed to be heard by Administrative Court on the first available date for an oral permission hearing, which was November 28, 2013. Beforehand, C applying for specific disclosure by D of a documents relating to the loan and documents referred to in the report. **Held**, refusing the application, (1) the general rules governing disclosure of documents do not apply to applications for judicial review, (2) the test to be applied is whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly, (3) in the instant case the matter to be resolved was not C's substantive application but their renewed application for permission to proceed, (4) in determining whether an application has reached the threshold for granting permission the court considers, not only the material then available, but also what further material might become available before the substantive hearing, (5) permission hearings are not full-scale rehearsal for the substantive hearing but are intended to be "a quick perusal of the material then available", (6) in the instant case, C had not shown that the disclosure they sought was necessary for the renewed permission application. ***R. v Inland Revenue Commissioners, Ex p. National Federation of Self-Employed and Small Businesses Ltd*** [1982] A.C. 617, HL; ***Tweed v Parades Commission for Northern Ireland*** [2006] UKHL 53, [2007] 1 A.C. 650, HL, ref'd to. (See ***Civil Procedure 2013*** Vol. 1 paras 54.4.2, 54.16.2.1 & 54APD.12.)

■ **SMITH v SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE** [2013] EWCA Civ 1585, December 5, 2013, CA, unrep. (Longmore, Underhill & Floyd L.JJ.)

Pre-action disclosure–jurisdictional thresholds

CPR r.31.16, County Courts Act 1984 s.52. Under relevant pre-action protocol, individual (C) intimating to corporation (D) claim for damages for loss of hearing suffered in course of employment. C applying to county court under s.52 and r.31.16 for order requiring D to make pre-action disclosure of certain categories of documents. District judge granting C's application in part, but circuit judge allowing D's appeal and dismissing application. Single lord justice granting C permission for second appeal. **Held**, allowing appeal, (1) the structure of r.31.16 formally requires a two-stage approach, (2) the first stage is to establish whether the jurisdictional thresholds prescribed by heads (a) to (d) in sub-rule (3) are satisfied, (3) if they are, the court proceeds as a second stage to consider whether, as a matter of discretion, an order for disclosure should be made, (4) for the purpose of

satisfying the jurisdictional criteria in heads (a) and (b) in sub-rule (3) an applicant does not have to demonstrate an "arguable" or "prima facie" case (there is no jurisdictional "arguability threshold"). Court explaining that a party is not entitled to pre-action disclosure where there is no prospect of his being able to establish a valid claim; but in such a case disclosure could and no doubt would be refused in the exercise of discretion which arises at the second stage of the enquiry. **Kneale v Barclays Bank Plc** [2010] EWHC 1900 (Comm), [2010] C.T.L.C. 233; **Black v Sumitomo Corp** [2001] EWCA Civ 1819, [2002] 1 W.L.R. 1562, CA, ref'd to. (See **Civil Procedure 2013** Vol. 1 paras 31.16.4 & 31.16.5.)

■ **TA v AA** [2013] EWCA Civ 1661, December 19, 2013, CA, unrep. (Moses, Black & Gloster L.JJ.)

Appeal against a decision giving or refusing permission to appeal

CPR r.52.3, Senior Courts Act 1981 s.15, Access to Justice Act 1999 s.54(4), Mental Capacity Act 2005 ss.46 & 53 and Sch.A1, Human Rights Act 1998 Sch.1 Pt I arts 5(4) & 6, Court of Protection Rules 2007 rr.172, 181 & 182. Local authority (D1) making "standard authorisation" (SA) under Sch.A1 in which assessors concluded that an individual (C) was deprived of his liberty in a home where he lived under a package of care funded by (D1) but that the arrangements were proportionate and in his best interests. C's father, as a "relevant person's representative" appointed under Sch.A1, bringing proceedings in the Court of Protection (COP) against D1 under s.21A challenging the SA. Official Solicitor (OS) appointed as C's litigation friend in the proceedings. At hearing, circuit judge (1) substituting OS as applicant and making father second respondent (D2), and (2) granting OS permission to withdraw the s.21A application. D2 applying to COP for permission to appeal against the circuit judge's decisions "to a prescribed higher judge" of the COP under s.53(2) and r.172, principally on ground that, by failing to determine the legality of C's further detention, C had been denied his Convention rights under art.5(4). High Court judge sitting in the COP (being a prescribed higher judge nominated under s.46(2)(c)) dismissing that application. D2 then applying to Court of Appeal (CA) for permission to appeal against that dismissal. Single lord justice doubting whether the CA had jurisdiction to entertain the appeal and adjourning application to a hearing on notice. All parties submitting that the CA had jurisdiction, principally on ground that s.53(1), which states that an appeal lies to the CA "from any decision" of the COP, is not restricted by any rule derived from any source (e.g. s.54(4)) to the effect than an appeal may not be made from a decision refusing permission to appeal. **Held**, dismissing the application, (1) s.54(4) states that no appeal may be made against "a decision of a court under this section" to give or refuse permission to appeal, (2) that sub-section put into statutory form, in the circumstances to which s.54 applies, the principle of statutory construction derived from Lane v. Esdaile, (3) in the instant case, s.54(4) did not apply because D2 sought permission to appeal to the CA, not from a decision dismissing an application for permission to appeal to the CA, but from a decision of the COP dismissing his application for permission to appeal to a nominated judge of the COP from a judge sitting at first instance in the COP, (4) in cases coming within the principle (whether by operation of s.54(4) or otherwise), a court is bound to apply it and its application is not inconsistent with a party's right to a fair trial under art.6, (5) accordingly, the principle applies to appeals under s.53(1) with the effect that the words "an appeal lies to the Court of Appeal from any decision of the court" in that sub-section must be construed as not including a decision made by a nominated judge granting or refusing permission to appeal a decision of a circuit judge under r.172(7). Court noting that D2 made no application to the COP under r.181 for permission to appeal to the CA against the High Court judge's decision and explaining that (contrary to the parties' assumptions) such an appeal would not have been a second appeal within r.182 and therefore permission could have been granted by the High Court judge and the permission of the CA would not have been mandatory. ***Lane v Esdaile*** [1891] A.C. 210, HL; ***In re Housing of the Working Classes Act 1890, Ex p. Stevenson*** [1892] 1 Q.B. 609, CA; ***Kemper Reinsurance Co v Minister of Finance*** [2000] 1 A.C. 1, PC; ***Walsall Metropolitan Borough Council v Secretary of State for Communities and Local Government*** [2013] EWCA Civ 730, [2013] J.P.L. 1183, CA, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2013*** Vol. 1 para.52.3.8 and Vol. 2 paras 6B-405+, 9A-841 & 9A-842.)

■ **THRELFALL v ECD INSIGHT LTD** [2013] EWCA Civ 1444, October 29, 2103, CA, unrep. (Richards, Tomlinson & Lewison L.JJ.)

Company liable for costs–joint and several liability of sole director and shareholder

CPR rr.44.2 & 46.2, Senior Courts Act 1981 s.51. Former employee (C) of company (D1) bringing claim for breach of contract of employment against D1 alleging, amongst other things, that he was entitled to 20% share in equity of D1. D1 defending claim and in counterclaim alleging breaches by C of obligations of fidelity and of restrictive covenants in the contract. Because of effect that judgment for C on his equity share claim would have, D1's sole director and shareholder (D2) joined as party. Trial judge giving judgment for C on his claim. On D1's counterclaim judge holding that C was in breach of his obligation of fidelity but D1 suffered no loss thereby. On his equity share claim, C electing to take money payment rather than shares in specie. Accordingly,

judgment entered against D1 for sums of money, and against C for nominal damages. After judgment, D1 going into insolvent liquidation. C applying for order for costs against D2 on basis that D2 was jointly and severally liable with D1 for his costs of the action. On ground that D2 had not been found to have incurred any substantive liability, judge holding that there was no basis on which D2 could be made liable for costs owed by D1 to C. **Held**, allowing appeal, (1) it appears that it was common ground that C's application should, by analogy, be considered on the basis of the principles applicable where an application is made for a non-party costs order, (2) such orders are made, *ex hypothesi*, against persons who have incurred no substantive liability, (3) the judge's failure to engage with those principles vitiated her exercise of discretion and therefore it was open to the appeal court to exercise the discretion afresh, (4) where a company is a party to civil proceedings, a non-party director can be made liable for the company's costs where he can be characterised as the "real party" controlling the litigation, (5) in such circumstances, no piercing or lifting of the corporate veil is involved, (6) in the instant case, the economic realities and the manner in which D2 engaged in the proceedings taken cumulatively demonstrated that D2 controlled the proceedings and made it just to order D2 to pay C's costs. ***Goodwood Recoveries Ltd v Breen*** [2005] EWCA Civ 414, [2006] 1 W.L.R. 2723, CA; ***Systemcare UK Ltd v Services Design Technology Ltd*** [2011] EWCA Civ 546, [2012] 1 B.C.L.C. 14, CA, ref'd to. (See ***Civil Procedure 2013*** Vol. 1 para.48.2.2, and Vol. 2 para.9A-202.)

■ **SAMUDA v SECRETARY OF STATE FOR WORK & PENSIONS** [2014] EWCA Civ 1, January 2, 2014, CA, unrep. (Lewison L.J. & Sir Stanley Burnton)

Appeal to Court of Appeal from Upper Tribunal – permission to appeal

CPR r. 52.3 Tribunals, Courts and Enforcement Act 2007 ss. 10, 11 & 13. On application of mother (D2) of child, First-tier Tribunal (1) deciding that the child's father (C) was liable to pay £50 week for the maintenance of the child, and varying decision of Child Maintenance and Enforcement Commission (D1) accordingly, and (2) refusing C permission to appeal from that decision. On October 31, 2012, Upper Tribunal (UT) (1) dismissing C's application for permission to appeal, and (2) refusing C's application to set aside that decision. Subsequently, UT refusing C permission to appeal against their refusal of his application to set aside. S applying for permission to appeal to the Court of Appeal. **Held**, refusing permission, (1) a decision by the UT to refuse permission to appeal a decision of the First-tier Tribunal is an "excluded decision" by virtue of s. 13(8)(c), (2) the UT has no jurisdiction to review its decision to refuse permission to appeal to it by virtue of s. 10(1) and s. 13(8)(d)(i), (3) any purported decision of the UT to refuse to review a decision to refuse permission to appeal to it from the First-tier Tribunal is in any event an "excluded decision" by virtue of s. 13(8)(d)(i), (4) it follows that, in the instant case, the UT had no jurisdiction to review its order of October 31, 2012, (5) further, there could be no appeal to the Court of Appeal from a refusal of the UT to review its decision to refuse permission to appeal, and the Court of Appeal could not grant permission to appeal from that refusal. Court explaining that the only remedy of a party aggrieved by a decision of the UT to refuse permission to appeal is by way of judicial review, which is subject to restrictions. Under para. 6.1 of Practice Direction (Citation of Authorities), [2001] 1 W.L.R. 1001, CA, Court giving permission for this judgment to be cited. ***R. (Cart) v Upper Tribunal*** [2011] UKSC 28, [2012] 1 A.C. 663, SC, ref'd to. (See ***Civil Procedure 2013*** Vol. 1 paras. 52.15.1, 54.1.2, 54.7A.1 & B3-001, and Vol. 2 paras. 9A-51, 9A-1004+, 9A-1007 & 12-55.)

Statutory Instruments

■ **CIVIL PROCEDURE (AMENDMENT NO. 8) RULES 2013** (SI 2013/3112)

CPR r.26.11. Re-states rule that an application for a claim to be tried with a jury must be made within 28 days of service of the defence (r.26.11(1)) but creates exception to the effect that, unless at the first case management conference of a claim for libel or slander a party applies for trial with a jury and the court makes an order for such a trial, the claim must be tried by judge alone. In force January 1, 2014. (See ***Civil Procedure 2013*** Vol. 1 para.26.11.1, and Vol. 2 para.9A-546.)

■ **TAKING CONTROL OF GOODS (FEES) REGULATIONS 2014** (SI 2014/1)

Tribunals, Courts and Enforcement Act 2007 ss.62 & 90 and Sch.12. Schedule 12 provides a new statutory code (replacing distress) for taking control of goods in order to sell them to enforce the payment of debts. These Regulations make provision for recovery of fees and disbursements from debtors by enforcement agents in relation to the procedure in Sch.12. In force April 6, 2014. (See ***Civil Procedure 2013*** Vol. 2, paras 9A-1056+ & 9A-1183+.)

In Detail

SETTING ASIDE ORDERS MADE WITHOUT A HEARING

CPR r.1.4(1) states that the court must further the overriding objective (r.1.1) by actively managing cases (r.1.4(1)), and this includes dealing with "the case" without the parties needing to attend court (r.1.4(2)(j)).

Rule 23.8 (Applications which may be dealt with without a hearing) states that the court may deal with an application "without a hearing", if (a) the parties agree as to the terms of the order sought, (b) the parties agree that the court should dispose of the application without a hearing, or (c) the court does not consider that a hearing would be appropriate.

Rule 23.8 is supplemented by directions in Practice Direction 23A (Applications). Para.2.1(5) therein states that application notices should include "either a request for a hearing or a request that the application be dealt with by a judge without a hearing", and paras 2.3 to 2.5 explain what a court should do if it either agrees or disagrees with the request.

The most obvious case in which it is clearly to the advantage of all concerned for parties not to have to attend court is where r.23.8(a) applies; that is to say, where the parties are agreed as to the terms of the order sought. Where r.23.8(a) applies other provisions in the CPR may take effect, in particular those dealing with consent orders. Rule 40.6(6) states that, where a party applies for an order "in the terms agreed", the court may deal with the application without a hearing.

Where r.23.8(b) applies, that is to say, where the parties agree that the court should dispose of the application on the basis of the written evidence and submissions filed and without a hearing, the court is, of course, not obliged to take that course, but in a number of practice directions it is stated that, in particular circumstances, a court "may" or "will normally", "determine" or "deal with" applications without a hearing; see, for example, Practice Direction 19A (Addition and Substitution of Parties) para.1.2, and Practice Direction 54A (Judicial Review) para.13.

Clearly, where the court is requested to dispense with a hearing on the grounds provided for in r.23.8(b) obvious risks of injustice that may arise by the court adopting such a course need to be avoided. It is for this reason that para.11.1 of PD 23A states that, where r.23.8(b) applies "the parties should so inform the court in writing" and each should confirm that all evidence and other material on which he relies has been disclosed to the other parties to the application.

In terms, r.23.8(c) countenances circumstances in which the court may deal with an application without a hearing on the ground that the court "does not consider that a hearing would be appropriate", and (by implication) may do so even though the parties are not agreed that the court should proceed in that manner and all parties do not request it to do so. Some such circumstances are catered for in express practice direction provisions; see, for example, Practice Direction 18 (Further Information) para.5.5(1), and Practice Direction 55A (Possession Claims) para.10.8.

Para.11.2 of PD 23A states that "where rule 23.8(c) applies" the court will treat the application "as if it were proposing to make an order of its own initiative". Rule 3.3(4) states that, generally, the court may exercise its powers of its own initiative. The principal purpose of that rule is to enable the court to manage cases "actively" and without, as the rule goes on to state, "hearing the parties or giving them an opportunity to make representations". (Para.1.2 of Practice Direction 3A draws attention to the fact that the powers to strike out a statement of case (r.3.4) and to give summary judgment (r.24.2) are among those that may be exercised by the court of its own initiative.) Not surprisingly, it is expressly provided that any party affected by an order made under r.3.3(4) may apply to have it set aside (r.3.3(5)). By operation of para.11.2, a party affected by an order, not being an order made under r.3.3(4), but being one made in other circumstances where it can be said that r.23.8(c) applies, may apply to have it set aside.

The rules and practice directions referred to above are expressed in permissive terms. In Practice Direction 3C (Civil Restraint Orders), supplementing r.3.11, there are several directions stating the court's power to deal with applications without a hearing in mandatory terms. These directions state that the application "will be determined without a hearing" and apply where the court has made a civil restraint order and the person who is the subject of the order makes an application to the court in the circumstances provided for by PD 3C (see paras 2.6(3), 3.6(3) and 4.6(3)). These directions are not based on the laudable objective of making it unnecessary for parties to attend court or on r.23.8. They are unashamedly designed to prevent abuse of process and to protect against the waste of court resources likely to be caused by the forensic activities of persons who are subject to civil restraint orders.

Where a court, proceeding under r.3.3(4), of its own initiative, without hearing the parties or giving them an opportunity to make representations, makes a civil restraint order, the respondent may apply to the court under r.3.3(5) to have it set aside. They were the circumstances in the recent case of *Deeds v Various Respondents* [2013] EWCA Civ 1678, November 28, 2013, CA, unrep., where the order made was the most restrictive type of civil restraint order, that is, a general civil restraint order (GCRO). The order recited (in accordance with r.3.3(5)) that the respondent (R) had the

right to apply have it set aside (and indeed added that such an application "will be heard by a High Court judge"). R made an application to set the GCRO aside. A High Court judge dealt with it, but did so without a hearing, and refused it. The Court of Appeal (Richards & Lewsion L.JJ. and Coleridge J.) held that that was a serious procedural error within r.52.11(3)(b). R had not had the opportunity at any stage to explain orally to the court why a GCRO should not be made against him. The judge took the view, apparently commonly held but said by the Court of Appeal to be "very doubtful", that R's application fell within particular mandatory directions in PD 3A and had to be determined without a hearing. (See further summary of this case in the "In Brief" section of this issue of *CP News*.)

This judgment of the Court of Appeal throws light on the effect of r.3.3(5) generally. Where a court proceeds under r.3.3(4) and makes an order the parties are denied the opportunity to make representations. It is clear that, where a party affected by the order made applies under r.3.3(5) to set aside the order, the court may deal with that application with or without a hearing. (In the latter event the opportunity to make representations is confined to representations in writing.) The Court of Appeal stated that the question whether the applicant is entitled to a hearing of the application to set aside will depend on the nature of the order in question. The order in the Deeds case happened to be one that had the effect of restricting the party's access to the court. In those circumstances, as the Court held, the presumption must be in the favour of a hearing.

APPEAL AGAINST PERMISSION TO APPEAL DECISION

Section 54(1) of the Access to Justice Act 1999 states that rules of court may provide that any right of appeal to a county court, to the High Court or to the Court of Appeal may be exercised only with permission. Amongst other things, rules may make provision as to the court or courts which may give permission for the purposes of this section (s.54.2(b)). (See White Book 2013 Vol. 2 para.9A-841.)

Section 54(4) states that no appeal may be made "against a decision of a court under this section to give or refuse permission to appeal". That sub-section gives statutory expression to the rule in *Lane v Esdaile* for the purposes of appeals to which s.54 applies. The explanation for that is as follows.

In the case of *In re Housing of the Working Classes Act 1890, Ex p. Stevenson* [1892] 1 Q.B. 609, CA, Lord Esher MR stated that, on the basis of the authorities, in particular *Lane v Esdaile* [1891] 1 A.C. 210, HL, his lordship was prepared to lay down the general proposition that wherever power is given to a legal authority (e.g. a court or tribunal) by legislation to grant or refuse permission to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive; no appeal may be made from a decision in exercise of such a power unless the legislation expressly states otherwise. This principle of statutory construction, commonly known as "the rule in *Lane v Esdaile*", is based in the view that the purpose of permission to appeal requirements is to restrict needless and frivolous appeals. If it were the case (contrary to the rule) that appeals could be made from the grant or refusal of permission to appeal, the result would be that in attempting to achieve its objective the relevant legislative scheme would have introduced a new series of appeals with regard to permission to appeal.

The policy underlying the rule is best exemplified in those cases where the court or tribunal to which an appeal against a refusal of leave is attempted is also the legal authority to which appeal might be made were permission to be granted. That was the position in *Ex p Stevenson*. *Lane v Esdaile*, on the other hand, was a case in which the court asked to hear an appeal for permission was not the legal authority to which the party wished to appeal. In modern times, the circumstances in which provision has been made by legislation for the purpose of giving courts power to grant or refuse permission to appeal, notably by s.54, either from the decision of one court to another court, or within a court, from the decision of a judge of one level to a judge of another, have been increased. As a consequence, the rule in *Lane v Esdaile* has attained greater significance. In relation to appeals to which s.54 applies, it is given statutory form in sub-section (4).

Since 1999, the rule in *Lane v Esdaile* has been considered by the Court of Appeal in a number of cases, usually in the context of s.54 but sometimes in the context of other legislative schemes placing permission restrictions on rights of appeal (e.g. the Town and Country Planning Act 1990 s.298, and the Arbitration Act 1996 ss.68(4) and 69(8)), and in most instances the relevant authorities arising both before and after 1999, including decisions of the Privy Council, have been reviewed and explained in detail (see White Book 2013 Vol. 1 para.52.3.8, and Vol. 2 para.9A-842.) The latest example is the decision of the Court of Appeal in *TA v AA* [2013] EWCA Civ 1661, December 19, 2013, CA, unrep., where the particular statutory provision giving rise to an examination of the application of the rule was the Mental Capacity Act 2005 s.53. (For summary of that case, see "In Brief" section of his issue of *CP News*.)

EDITOR: **Professor I. R. Scott**, University of Birmingham.
Published by Sweet & Maxwell Ltd, 100 Avenue Road, London NW3 3PF.
ISSN 0958-9821
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Typeset by Matthew Marley
Printed by St Austell Printing Company, St Austell, Cornwall
591807