CIVIL PROCEDURE NEWS

Issue 2/2014 February 21, 2014

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Disclosure before proceedings start –judicial review proceedings anticipated

CPR rr.31.6, 31.16 & 54.16, Practice Direction 54A para.12.1, Senior Courts Act 1981 ss.19 & 33, Animals (Scientific Procedures) Act 1986 s.24. Under statutory scheme (1986 Act) for which Secretary of State (D) responsible, institutions conducting scientific research involving the use of animals required to obtain licences for particular programmes of experimental work ("project licences"). 1986 Act creating various criminal offences, including wrongful disclosure of confidential information provided in the course of the licensing process (s.24). Voluntary organisation (C), created for purpose of protecting animals from particular harms, contemplating bringing judicial review claim against D challenging decisions made in relation to the issuing of project licences to several institutions on ground that D had not applied the statutory scheme properly. C activating relevant Pre-Action Protocol process and requesting documents relevant to the issuing of particular project licences. Upon D not acceding to the request, C making application under r.31.16 for pre-proceedings disclosure of documents by D. D resisting application on various grounds, including the grounds (1) that r.31.16 does not apply where the contemplated proceedings is a judicial review claim, and (2) that disclosure of much of what was sought by C would involve D incurring criminal liability under s.24. **Held**, refusing the application, (1) in terms r.31.16 applies to civil proceedings generally, (2) the exclusion of any one class of proceedings from its scope would require express provision, (3) if the effect of r.31.16(3) compelled a contrary conclusion, jurisdiction to grant the relief sought by C could not be derived from the court's inherent jurisdiction, (4) the court could not make an order for specific disclosure of any document to which s.24 applied, (5) whether or not disclosure by C would attract criminal liability under s.24 the issue of confidentiality remained and that was not an issue that could sensibly be judged on a r.31.16 application, (6) generally, recourse to r.31.16 where a judicial review claim is anticipated is not desirable as in practice the provisions of Pt 54 (which contain no express and general duty of disclosure) work well without it, (7) in this case there was nothing exceptional about the anticipated proceedings which would warrant a departure from the normal procedures for judicial review, (8) C's arguments to the effect that without the disclosure sought it could not evaluate the merits of their claim were not well-founded, (9) in the circumstances, disclosure was not necessary for the fair disposal of anticipated proceedings. Observations on scope of court's inherent jurisdiction. ***Black v Sumitomo Corp*** [2001] EWCA Civ 1819, [2002] 1 W.L.R. 1562, CA, ***Tweed v Parades Commission of Northern Ireland*** [2006] UKHL 53, [2007] 1 W.L.R. 1, HL, ***Secretary of State for the Home Department v British Union for the Abolition of Vivisection*** [2008] EWCA Civ 870, [2009] 1 W.L.R. 636, CA, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2013*** Vol. 1 paras.31.16.1, 31.16.4 & 54.16.2.1, and Vol. 2 paras.9A-68 & 9A-113.)

■ **GOLDBET SPORTWETTEN GMBH v SPERINDEO (C-144/12)** [2014] I.L.Pr. 1, ECJ (3rd Ch)

European order for payment procedure–effect on jurisdiction of statement of opposition

CPR rr.78.2 & 78.5, Practice Direction 78 Annex 1, European Order for Payment Regulation 1896/2006 arts.6, 12 & 17, Judgments Regulation 44/2001 arts.5 & 24. In Austrian court, under art. 12 company (C) obtaining European order for payment against individual (D) domiciled in Italy for services to be performed in Italy under contract. D lodging a "statement of opposition" contesting merits (art.16), and subsequently pleading that the court lacked jurisdiction. On court declining jurisdiction, C appealing and submitting (amongst other things) that the court had jurisdiction under art.24, which provides that a court of a Member State before which a defendant "enters an appearance" shall have jurisdiction. Appeal court holding that as the place of performance was Italy, the Austrian courts did not have jurisdiction under art.5.1(b), but referring question whether they had jurisdiction by operation of art.24 to ECJ for preliminary ruling. **Held**, (1) art.6.1 states that, for the purposes of applying the EOP Regulation, jurisdiction is to be determined in accordance with the relevant rules of Community law, in particular the Judgments Regulation, and art.17.1 provides that, if a statement of opposition is entered in EOP proceedings, the proceedings should continue before the court of origin, (3) art.6.1, read in conjunction with art.17.1, must be interpreted as meaning that a statement of opposition that does not contain any challenge to the jurisdiction of the court of origin cannot be regarded as constituting the entering of an appearance within meaning of art.24, (4) the fact that the defendant has (as in this case) put forward in his statement of opposition arguments relating to the substance of the case are irrelevant in that regard. (See ***Civil Procedure*** Vol. 1 paras.78.2.2, 78PD.1 & 78PD.37, and Vol. 2 paras.5-270 & 5-272.)

■ **KAGALOVSKY v BALMORE INVEST LTD** [2014] EWHC 108 (QB), January 27, 2014, unrep. (Turner J.)

Notice of appeal–direction by lower court extending period for filing

CPR rr.3.1(2)(a), 3.9, 52.4 & 52.6, Practice Direction 52B paras.3.1 & 3.2. In commercial proceedings, claimants (C) making application to commit one of several defendants (D) (an individual) to prison for contempt of court, alleging his breach of successive orders of the court relating to disclosure and to the prohibition of the transfer of assets. D represented by counsel at the hearing of the application but not attending. In written judgment handed down on December 9, 2013, judge finding that, on three of six grounds relied upon by C, D was in contempt and directing that C's application be listed for a further hearing for a determination of the appropriate penalty ([2013] EWHC 3876 (QB)). On very last day for filing of any notice of appeal within period fixed by r.52.4(2)(b) (i.e. December 30), D making an application to the judge for a direction under r. 52.4(2)(a) that the period be longer. **Held**, refusing the application, (1) the absence of prejudice to C did not, of itself, entitle D to an extension of the period, (2) the fact that D's application was made before the 21-day period fixed by r.52.4(2)(b) expired (albeit just) was material to the exercise of discretion, but not determinative of it, (3) further the fact that, potentially, the decision against which D wished to appeal had serious consequences for D, as it contained conclusions upon which committal to prison was capable of being based, was also material, (4) however, the reasons put forward by D to support his decision not to file an appellant's notice in time (principally, that he should be permitted to wait and see what penalty for contempt was imposed before deciding whether to do so) did not justify the exercise of discretion in his favour. ***Robert v Momentum Services Ltd*** [2003] EWCA Civ 299, [203] 1 W.L.R. 1577, CA, ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537, [2013] 1 Costs L.R. 1008, CA, ref'd to. (See ***Civil Procedure 2013*** Vol. 1 paras.3.1.2, 52.4.1 & 52.6.2, and Vol. 2 para.3C-39.)

■ **M A LLOYD & SONS LTD v PPC INTERNATIONAL LTD** [2014] EWHC 41 (Ch), January 20, 2014, unrep. (Turner J.)

Order for sequential exchange of evidence etc–effect of first party's non-compliance

CPR rr.1.4, 3.3, 3.8, 3.9, 23.11 & 32.10, Practice Direction 23A para.2.7. Company (C) bringing claim for breach of confidentiality agreement and passing off against another company (D). On October 11, 2013, at hearing which C did not attend, judge (1) adjourning application made by C, (2) making orders requiring C to file and serve witness statements and skeleton arguments dealing with two particular matters by October 25 and D to do similarly in response by November 29, and (3) fixing case management hearing for January 30, 2014. C not complying with the order and D not responding. On December 9, D making application for an extension of time for complying with the order of October 11 insofar as it affected them. On morning of hearing of that application (January 16, 2014), C proposing to D "revised timetable" for exchange (which D, apparently, willing to support). At hearing of the application, C not attending and judge reserving judgment. Before handing down, counsel for C attending before judge and making submissions (judge, in effect, exercising power under r.23.11 to re-list D's application). In those submissions, counsel intimating that C proposed to make an application for relief from sanction under r.3.9 at the forthcoming case management hearing on January 30. **Held**, refusing relief sought on D's application, but making orders on court's own initiative, (1) the obligations imposed on D by the order of October 11 arose only in response to compliance by C with their obligations thereunder, (2) in default of C's compliance there was nothing for D to respond to and therefore no need for D to apply for an extension of time for their compliance, (3) by operation of r.32.10, because of their failure to comply with the order of October 11, C were precluded from calling at trial any intended witness or witnesses in respect of the two matters identified in that order, (4) since the burden of proof on those matters fell on C then, in the absence of evidence, its contentions in respect of them must fail unless the court was persuaded to grant relief from sanctions on any application made by C under r.3.9, (5) on the evidence as it stood, there was no realistic prospect that such relief from sanction would ever be granted, (6) in the circumstances, the proper approach was for the court to make an order of its own initiative (r.3.3(1)) debarring C from raising any issue at trial relating to either of the matters. Judge explaining that even if the parties had purported to reach a concluded agreement on a "revised timetable" for exchange it would not have been effective unless, on application, the court were to be persuaded to endorse it (r.3.8(3)). ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537, [2013] 6 Costs L.R. 1008, CA, ref'd to. (See ***Civil Procedure 2013*** Vol. 1 paras.3.3.1, 3.9.1, 23.3.11 & 32.10.2.)

■ **MURRILLS v BERLANDA** [2014] EWCA Civ 6, January 30, 2014, CA, unrep. (Kitchin & Beatson L.JJ. and Sir Stanley Burnton)

Validity of service of claim form within jurisdiction–defendant resident abroad

CPR rr.6.9 & 6.41, Practice Direction 7A para.5C. On February 21, 2012, individual (C) issuing claim form bringing professional negligence claim against cosmetic surgeon (D1) relating to events occurring in February 2009, and, on ground that they were vicariously liable, a private medical clinic (D2). Beforehand, in March 2010, D1, an Italian national resident in Italy, advising C that he was no longer associated with D2 but was available by

appointment to see patients at an address in England (address X). Claim form as issued giving D1's address as X. On June 15, 2012, judge granting C's application (1) for permission to serve the claim form without the particulars of claim, and (2) for extension of time until December 21 for service of the particulars (but making no order as to place or mode of service). C then sending claim form to D1 by post at address X and by electronic means to an e-mail address. On October 31, 2012, on basis that D1 resided out of the jurisdiction, C applying to court for permission to serve particulars of claim "and any other document in these proceedings" on D1 at an e-mail address. D1 acknowledging service and applying to strike out claim on ground that claim form had not been validly served. Judge granting application but granting C permission to appeal. On appeal C submitting (in particular) that the judge should have held that the claim form had been validly served on D1 at address X. **Held**, dismissing appeal, (1) C knew D1's residential address in Italy and should have effected service in accordance with the provisions of Sect. IV of Pt 6, in particular r.6.41, (2) it was not (and could not be) suggested that the claim form was served in Italy in accordance with those provisions, (3) within the terms of r.6.9, D1 was an individual who could be served at his "usual or last known address" within the jurisdiction, and was not an individual being sued "in the name of a business", (4) consequently, it could not be argued, on the basis that it was D1's "principal or last known place of business", that service at address X was valid service, (5) in any event, at the time of purported service at address X, C had reason to believe that D1 no longer worked there and was therefore obliged (by r.6.9(3)) to take reasonable steps to ascertain a current address, (6) this was not a case where a defendant had a place of business within the jurisdiction but was temporarily out of the jurisdiction when the claim form was served. ***City & Country Properties Ltd v Kamali***, [2006] EWCA Civ 1879, [2007] 1 W.L.R. 12119, CA, ref'd to. (See ***Civil Procedure 2013*** Vol. 1 paras.6.9.3.1 & 6.9.4.)

■ **SMITH v DONCASTER METROPOLITAN BOROUGH COUNCIL** [2014] EWCA Civ 16, January 16, 2014, CA, unrep. (Pitchford L.J. & Sir Stanley Burnton)

Committal to prison for contempt of court–application for discharge–coercive element of sentence ceasing to have purpose

CPR r.81.31. In proceedings brought against individual (D) for breach of planning restrictions, High Court judge granting local authority injunction against D in mandatory and prohibitory terms. Subsequently, C applying for order committing D to prison for breach of the injunction. Judge finding contempt allegations proved and committing D to prison for 12 months, suspended "in the event of prompt and full compliance" within 28 days. On September 13, 2013, on C's application for activation of the committal order on grounds of D's failure to comply fully with the suspension conditions, High Court judge sending D to prison for nine months. In November, 2013, D applying to be released from sentence, on ground that, as he was no longer in possession of the property (a court order having been made requiring him to give up possession) and therefore unable to rectify breaches of the injunction, the coercive element of the sentence was ineffectual. Judge refusing this application. D applying to Court of Appeal for permission to appeal. **Held**, refusing permission, (1) the prison sentence imposed had a punitive element and a coercive element, (2) where (as here) persistent failure to comply with an injunction after the imposition of a sentence of committal aggravates the gravity of the defendant's conduct, the weight to be given to the punitive element will be increased, (3) the fact that the coercive element of the sentence no longer had any purpose did not require that the sentence be discharged. ***JSC BTA Bank v Solodchenko (No. 2)*** [2011] EWCA Civ 1241, [2012] 1 W.L.R. 350, CA, ref'd to. [Ed.: this judgment not released for citation.] (See ***Civil Procedure 2013*** Vol. 1 para.81.31.4, and Vol. 2 paras.3C-39 & 3C-87.)

■ **THEVARAJAH v RIORDAN** [2014] EWCA Civ 15, January 16, 2014, CA, unrep. (Richards, Aikens & Davis L.JJ.)

Debarring order–application to revoke–relief from sanction

CPR rr.3.1 & 3.9. Individual (C) commencing proceedings against several defendants (D), including individuals and company for breach of agreement for purchase by C of various assets. C obtaining ex parte freezing injunction, subsequently continued at inter partes hearing. On C's application judge (1) finding that D's compliance with disclosure orders (included in the ex parte order and, with greater particularity, in the inter partes order) inadequate, (2) making unless order requiring D to provide specified information by particular date, and (3) giving directions for trial with estimate of eight days. C applying for declaration to the effect that, by reason of D's failure to comply with that order, the sanctions in it had come into effect with result that D were debarred from defending C's claim and that their defence and counterclaim should be struck out. By cross-application, D applying for relief from sanction under r.3.9. On August 9, 2013, judge (1) granting C's application and making debarring order, (2) refusing D's application, and (3) and giving directions for disposal of C's remaining heads of relief at date fixed for trial in October with five day estimate. Shortly before that hearing, D making second r.3.9 application for relief from sanction. After hearing lasting four days, trial judge granting that application ([2013] EWHC 3179 (Ch)) and adjourning trial to late January 2014, with eight day estimate. On C's appeal against the trial judge's decision, **held**,

allowing the appeal, (1) by making a debarring order (on August 9) the judge concerned gave effect to that judge's order dismissing D's first r.3.9 application for relief from sanction, (2) unless and until the relevant provisions of that debarring order were set aside by means of the granting of an application to vary or revoke, as provided by r.3.1(7), they were effective to bar D from defending, (3) in such circumstances, it would not be open to a court on a second r.3.9 application simply to make an order inconsistent with that made on a first application, (4) in the instant case, C's second r.3.9 application was in substance an application under r.3.1(7) and, as such, had to satisfy the known criteria for that provision were it to succeed, (5) D's application manifestly failed to satisfy those criteria and ought to have been rejected by the trial judge for that reason. ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537, [2013] 6 Costs L.R. 1008, CA, ***Woodhouse v Consignia Plc*** [2002] EWCA Civ 275, [2002] 1 W.L.R. 2558, CA, ***Tibbles v SIG Plc*** [2012] EWCA Civ 518, [2012] 1 W.L.R. 2591, CA, ref'd to. (See ***Civil Procedure 2013*** Vol. 1 paras.3.1.9, 3.1.9.1, 3.9.1 & 40.9.3.)

■ **THURSFIELD v THURSFIELD** [2013] EWCA Civ 840, [2013] C.P. Rep. 44, CA (Lloyd, Jackson & Beatson L.JJ.)

Committal order–aggravating factors–permission to appeal

CPR rr.52.3 & Sch. 1 RSC Ord. 109 r.2, Administration of Justice Act 1960 s.13, Contempt of Court Act 1981 s.14. After their divorce by order of an American court, wife (C) bringing proceedings in English court against husband (D) to enforce order made in ancillary proceedings. Court making order requiring D to disclose assets. Upon D not complying with that order, C bringing committal proceedings against D. At hearing which D did not attend (and which had been adjourned once), judge committing D to prison for 24 months. On D's appeal, **held**, dismissing appeal, (1) there was no error of principle in the judge's assessment of the appropriate remedy, (2) the judge was entitled to treat D's failure to attend the committal hearing (in the face of an order requiring him to do so) as an aggravating factor, (3) there was no merit in D's submission that the judge should have adjourned the hearing for a second time. Court noting that where an appeal is made against a committal order permission to appeal is not required and suggesting that consideration should be given to imposing, by way of exception to that rule, a permission requirement where the appellant had not submitted to the court's jurisdiction and had deliberately absented himself from the committal proceedings. (See ***Civil Procedure 2013*** Vol. 1 paras.52.1.2, 52.3.2 & sc109.2.1 and Vol. 2 paras.3C-32, 3C-39, 3C-84 & 9B-20.)

■ **WEBB RESOLUTIONS LTD v E-SURV LTD** [2014] EWHC 49 (QB), January 20, 2014, unrep. (Turner J.)

Application to extend time for permission to appeal–proper exercise of discretion

CPR rr.3.1(2)(a), 3.9, 23.11 & 52.3(5). Professional negligence claim compromised on basis that the defendant (D) would pay the claimant's (C) costs. On July 29, 2013, High Court judge on paper refusing D's application for permission to appeal against the decision of the costs judge made on detailed assessment. Notice that permission had been so refused served on D on October 10, 2013. Time for filing of any request for re-consideration of that decision at a hearing expiring on October 17 (r.52.3(5)). On November 22, D applying to another High Court judge for an extension of that time limit. At hearing not attended (understandably) by C, judge granting that application and also granting D permission to appeal. C making application (to a third High Court judge) under r.23.11 for re-listing of D's application and for order setting aside the order extending time. **Held**, granting the application and setting aside the order, (1) the seven-day time limit fixed by r.52.3(5) is unequivocally expressed in mandatory terms, (2) although r.52.3(5) does not in terms provide for a specific procedural sanction for non-compliance, applications to extend the time limit therein are to be determined in accordance with r.3.9 (as amended with effect from April 1, 2013) and the authorities thereon, (3) D's application was made five weeks after the expiry of the limit, (4) that delay was not trivial and there was no good reason for it. ***Jolly v Jay*** [2002] EWCA Civ 277, *The Times*, April 3, 2002, CA, ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537, [2013] 6 Costs L.R. 1008, CA, ref'd to. (See ***Civil Procedure 2013*** Vol. 1 paras.3.1.2, 3.3.1, 3.9.1, 23.11.3, 52.3.1 & 52.3.8.)

Statutory Instruments

■ **TAKING CONTROL OF GOODS REGULATIONS 2013** (SI 2013/1894)

Tribunals, Courts and Enforcement Act 2007 ss.62, 72 & Sch.12. Sch.12 (as implemented by s.62) provides a new statutory code in relation to enforcement by taking control of goods and selling them to enforce the payment of debts (formerly known as "distress"). These Regulations supplement the statutory code, both in relation to the taking of control of goods (Pt 2) and to their sale (Pt 3). Provision is also made for controlled goods which are securities (Pt 4), the abandonment of goods (Pt 5), and claims by third parties (Pt 6). A landlord may use the Sch. 12 procedure for commercial rent arrears recovery (CRAR) (s.72), in which event provisions in Pt 7 of the Regulations apply. In force April 6, 2014. (See further "In Detail" section of this issue of CP News.)

In Detail

ENFORCEMENT BY TAKING CONTROL OF GOODS

In the Tribunals, Courts and Enforcement Act 2007, Part 3 (ss.62 to 90) is headed "Enforcement by Taking Control of Goods" (for text of Part 3, see White Book Vol. 2 para.9A-1056+ et seq). Although the 2007 Act received the Royal Assent on July 19, 2007, Part 3 has lain dormant since. Now, seven years later, it is rumbling into life, albeit rather erratically.

The provisions in Chapter 1 (Procedure) of Part 3 of the Act (ss.62 to 70) are designed to unify the law governing the activities of "enforcement agents" when "taking control" of and selling goods, and to "modernise" most of the terminology used in various pieces of legislation where the new unified procedure will apply. In addition Chapter 2 (Rent Arrears Recovery) of Part 3 (ss.71 to 87) contains provisions abolishing the common law right to distrain for rent arrears and to replace it with a new, more limited right and a modified "out of court" regime for recovering rent arrears due under a lease of commercial premises.

The enactment of Part 3 was preceded by a White Paper entitled "Effective Enforcement", published in March 2003, which followed upon a Law Commission Report entitled "Landlord and Tenant–Distress for Tent" published in February 1991, and a Report to the Lord Chancellor by Professor J. Beatson Q.C. entitled "Independent Review of Bailiff Law" published in July 2000.

The proposed unified procedure for "taking control of goods" introduced by Chapter 1 of Part 3 is contained in Schedule 12 to the 2007 Act (for text of Schedule 12, see White Book Vol. 2 para.9A-1183+ et seq). Section 62(1) states that Schedule 12 applies "where an enactment, writ or warrant confers power to use the procedure in that Schedule". The forms of enforcement process are re-named. Thus writs of fieri facias become "writs of control", and warrants of execution and warrants of distress become "warrants of control" (s.62(4)). It is expressly provided that the power conferred by a writ of control or a warrant of control to recover sum of money, and any power conferred by a writ or warrant of possession or delivery to take control of them and sell them to recover a sum of money is exercisable only by using the Schedule 12 procedure (s.62(2)). By Schedule 13 of the 2007 Act amendments are made to over seventy statutes for the purpose of substituting in them references to the new terminology and for making it clear that the Schedule 12 procedure applies to any rights of enforcement provided for in those enactments. Among the provisions affected are sections in Part V of the County Courts Act 1981 (Enforcement of Judgments and Orders) (ss.85 to 111) many of which are substantially affected largely because their functions are now fulfilled by the Schedule 12 procedure (see White Book Vol. 2 para.9A-582 et seq). (Thus, e.g., ss.89 to 91(Seizure and custody of goods), and ss.93 to 100 (Sale of goods seized), are revoked.)

As mentioned above, Chapter 2 of the 2007 Act abolishes the common law right to distain for arrears of rent and provides new machinery for commercial rent arrears recovery. Section 72(1) states that a landlord under a lease of commercial premises "may use the procedure in Schedule 12" to recover from the tenant rent payable under the lease.

The "procedure" in Schedule 12 is not a court procedure, but a procedure directed at enforcement agents, setting out what they may and may not do and the consequences of their actions. Certain provisions in the Schedule anticipate that applications may be made to a court for particular purposes. For example, by a debtor alleging that an enforcement agent has exceeded his powers (para.66), by a third party alleging that goods taken under control are his (formerly interpleader) (para.60), by a co-owner claiming a share of proceeds (para.50(7)), and by an enforcement agent where there is a dispute as to costs and disbursement recoverable by him (para.62).

A number of provisions in Part 3 of the 2007 Act, and in Schedule 12 thereof, give the Lord Chancellor power to make Regulations. By the Tribunals, Courts and Enforcement Act 2007 (Commencement No. 9) Order 2013 (SI 2013/1739) those provisions were brought into force on July 15, 2013, for the purpose only of enabling Regulations to be made. The powers were exercised by the Lord Chancellor by the Taking Control of Goods Regulations 2013 (SI 2013/1894). Those Regulations come into effect on April 6, 2014. (It is expected that a Commencement Order bringing into effect on the same date the provisions of Part 3 generally will be made shortly.)

Some provisions in Schedule 12 give the Lord Chancellor power to fix fees and disbursements recoverable by enforcement agents acting under the Schedule 12 procedure, including when using the procedure for the purpose of commercial rent arrears recovery. The Taking Control of Goods (Fees) Regulations 2014 (SI 2014/1) were made in exercise of that power and come into effect on April 6, 2014.

The bringing into effect of Part 3 of the 2007 Act and of all of the consequential amendments made to other legislation makes necessary substantial amendments to rules in the CPR concerned with enforcement by taking control of goods and for commercial rent arrears recovery. Those amendments will come into effect on April 6, 2014. Unfortunately, the enactment of the statutory instrument effecting the necessary amendments has been delayed and, at the time of writing, no draft copy of it is in the public domain.

The need to amend rules to take account of the coming into effect of Part 3 has provided the rule committee with an opportunity to modernise the CPR in important respects. In 1988, in the Report of the Review Body on Civil Justice (Cm 394) it was recommended that a body of uniform rules covering both the High Court and the county courts should be drafted. Nothing was done about that until almost six years later when, in March 1994, the then Lord Chancellor, Lord Mackay, appointed Lord Woolf to review the rules and procedures of the High Court and the county courts, for the purpose of producing a modern set of uniform rules, and also to make recommendations "to improve access to justice and reduce the costs of litigation". The body of uniform rules produced as a consequence of Lord Woolf's "Access to Justice" inquiry (and which were enacted as the CPR in 1998) fell very far short of what members of the Review Body would have envisaged. In part this was because significant proportions of the former RSC and CCR were concerned, not with access to justice issues that attracted Lord Woolf's attention, but with the enforcement of judgments. As a result, when the CPR were enacted, large tracts of the RSC and CCR were left languishing in Schedules, in particular (in Schedule 1) RSC Orders 45 to 51 and (in Schedule 2) CCR Orders 25 to 35. Some progress towards modernising the rules in those Orders and bringing them into the main body of the CPR was made when Parts 70 and 73 were enacted and brought into force in March 25, 2002. The very slow development of the reforms eventually enacted in Part 3 of the 2007 Act, and the long delay in implementing that Part, provided justifications for postponing efforts to make further progress. As the terms of the expected statutory instrument amending the CPR will demonstrate, the bringing into effect of Part 3 removes that stumbling block.

DISCLOSURE BEFORE START OF JUDICIAL REVIEW PROCEEDINGS

Section 33(2) of the Senior Courts Act 1981 and section 52(2) of the County Courts Act 1984 (powers of court exercisable before commencement of action) are to the same effect. They state that the High Court and the county courts shall have power, on the application of a person who appears to the court "to be likely to be a party to subsequent proceedings" in the court, to order a person, also being a person who appears to the court "to be likely to be a party to the proceedings" and who, in addition, is a person likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim, (a) to disclose whether those documents are in his possession, custody or power, and (b) to produce such of those documents as are in his possession, custody or power to the applicant or the applicant's advisers (in particular legal advisers). The sections further provide that such an application is to be made in accordance with rules of court and the power is to be exercised "in such circumstances as may be specified in the rules". In the CPR, the relevant rules of court are found in r.31.16 (Disclosure before proceedings start).

As originally enacted section 33(2) and section 52(2) applied to civil proceedings that were properly described as "actions", and were limited to proceedings in which a claim in respect of personal injuries to a person or in respect of a person's death was likely to be made. In his Access to Justice Final Report (July 1996), Lord Woolf made recommendations designed to curtail disclosure of documents. But his lordship also made recommendations designed to encourage parties "to adopt a sensible and cooperative approach from the earliest stage at which a potential claim begins to materialise". One of the recommendations made in support of that strategy was that parties should be able to make pre-action applications for disclosure against potential defendants, not just in cases where claims for personal injury and wrongful death are made, but "in all cases" (ibid Ch. 12 para.48). Consequently, from the date on which the CPR came into effect, that restriction in section 33(2) and section 52(2) was removed.

Lord Woolf anticipated that "there may be some apprehension about the unforeseen consequences" of this extension of the application of section 33(2) and section 55(2). But his lordship was soothing. He explained that the removal of the restriction had to be seen in the light of recommendations he was making for the purpose of limiting the disclosure of documents expected of parties after proceedings have been commenced. (The point being that pre-action disclosure would be similarly curtailed.) Presumably, if pressed Lord Woolf would also have said that the extension of the application of section 33(2) and section 55(2) would have little impact, and therefore "unforeseen consequences" need not be feared, in proceedings where disclosure of documents after proceedings are commenced is rare; for example, as his lordship pointed out elsewhere his Final Report, "in cases administered by the Crown Office List" (now the Administrative Court) (op cit Ch. 18 para.4).

In the recent case of *British Union for the Abolition of Vivisection (BUAV) v Secretary of State for the Home Department* [2014] EWHC 43 (Admin), January 23, 2014, unrep., the question whether the High Court has jurisdiction at all to order pre-action disclosure in relation to contemplated judicial review proceedings, either under r.31.16 or under the Court's inherent jurisdiction, was raised and contested. Mr Justice Ouseley noted that there was nothing in r.31.16 or in the provisions of Part 54 (Judicial Review and Statutory Review) stating that pre-action disclosure does or does not apply to such proceedings. Neither he nor counsel knew of any case in which it had been ordered. That was surprising, but not conclusive one way or the other. As the summary of this case as given in the "In Brief" section of this issue of CP News indicates, his lordship concluded that the High Court has jurisdiction under section 33(2) and r.31.16, but it is a jurisdiction to be exercised sparingly, if at all.

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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

591808