CIVIL PROCEDURE NEWS

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DINSDALE MOORLAND SERVICES LTD v EVANS [2014] EWHC 2 (Ch), January 16, 2014, unrep. (Judge Behrens)

Order for disclosure of documents–whether compliance–sufficiency of list of documents

CPR rr.31.6 & 31.10. Family company (C) employing two individuals, one as managing director (D1) under contract containing restrictive covenants and the other as contracts manager (D2). On December 16, 2011, following disciplinary hearings, C summarily dismissing D1 and D2. On August 1, 2012, C commencing High Court proceedings for damages (alleging breach of covenant, misuse of confidential information, breach of fiduciary duty, the taking of secret profits etc) against D1 and D2, against a company (D3) formed by D2 on January 26, 2012 (and operating a business competing with C), against another company (D4) incorporated on January 6, 2011, and against an individual (D5) who was a director of, and shareholder in D4. Amongst other things, C alleging that some of D5's shares in D4 were held on trust for D1 and D2, that that interest was not disclosed to them (C) and that through that interest D1 and D2 made a secret profit. In their defences D1 and D2 contesting the lawfulness of their dismissals. In particular, D1 contending (1) that C had repudiated his contract of employment, and (2) that therefore the restrictive covenants in the contract were unenforceable, and (3) alternatively, they were unenforceable because they were too wide. On January 15, 2013, district judge directing that parties give standard disclosure by February 22. On March 18, solicitors for D1, D2 and D3 serving one list of documents. At CMC held on June 20, C making general complaint about the content of the list and submitting that, instead of one composite list, each of the three defendants should have served a separate list. District judge making unless order debarring those defendants from defending unless they gave standard disclosure by July 1. For purpose of complying with this order, lists on behalf of each defendant served on due date (identifying 278 items in total). Subsequently, on ground that the lists served were deficient in certain respects, C applying for a declaration that the defences of the three defendants had been struck out on July 1 as a result of a breach of the unless order. Amongst other things, C submitting (1) that D1's list did not include documents relating to employment contract negotiations between them and him, and (2) that these documents were fundamental to the issue of the validity of the restrictive covenants. **Held**, dismissing the application, (1) the fact that an application by C for specific disclosure might elicit further documents did not alter the fact that in compliance with the order the defendants had served lists, (2) it was plain that there were some defects in the lists, but it was not obvious from the patent deficiencies that they had been prepared in apparent but not real compliance with the obligation to give disclosure, and lack of good faith on the defendants' part could not be inferred from those deficiencies or otherwise. Judge (1) doubting whether, in the circumstances, it was appropriate for the district judge to have made the unless order (from which the defendants did not appeal), and (2) explaining that, if he had found that the defendants had not complied with the unless order, it was most unlikely that any application by them for relief from sanction would be granted. ***Realkredit Danmark A/S v York Montague Ltd*** [1999] C.P.L.R. 272, CA, *In* ***re Atrium Training Services Ltd*** [2013] EWHC 2882 (Ch), September 27, 2013, unrep, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 1 paras.31.0.4, 31.6.3 & 31.10.1.)

INTEGRAL PETROLEUM SA v SCU-FINANZ AG [2014] EWHC 702 (Comm), March 14, 2014, unrep. (Popplewell J.)

Service of document by electronic method–error of procedure–whether service invalidated

CPR rr.2.11, 3.10, 6.26, 13.2 & 58.5, Practice Direction 6A paras.4.1 & 4.2. Swiss companies entering into oil trading agreement. On February 11, 2013, buying company (C) issuing claim form commencing proceedings in Commercial Court against selling company (D) for failure to deliver. On March 21, 2013, claim form and response pack served on D at their registered address in Switzerland under r.6.33(1)(b)(iii). On April 15, 2013, D filing acknowledgment of service in which (in compliance with r.6.23(2)(b)) identity and postal address (in Paris) of D's European lawyer (X) given. From that information, C deriving e-mail address for X. By operation of r.58.5(1)(c), time for service by C on D of their particulars of claim expiring on May 14, 2013. On basis that parties may agree an extension of that time limit for a period of up to 28 days, in e-mail exchanges between C and X taking place shortly after that date, C securing D's agreement for an extension to June 6, 2013 (C having mistakenly calculated that date as effecting a full 28 day extension when in fact such an extended period would have ended on June 10). After 4.30 pm on June 10, C e-mailing particulars to X at his e-mail address in purported service and by operation of r.6.26 time of that service deemed to be the following day. On basis that D had served no defence by July 9 (28 days after

service of the particulars (rr.15.4(1)(a) & 58.10(2)), on July 17 C applying for judgment in default of defence against D and judgment for US$1m entered on same day. D applying to set judgment aside on grounds (1) that service of the particulars by e-mail was not a permitted method of service and, that, in any event, the service was 5 days out of time, alternatively (2) that D had a real prospect of defending the claim (r.13.3). **Held**, rejecting first ground but setting aside the judgment on the second ground, (1) a judgment in default of defence may only be obtained if the time for filing a defence had expired (r.12.3(2)), (2) if that condition is not satisfied the court must set aside the judgment (r.13.2), (3) in that context, the critical question was whether C's sending the particulars of claim to X by electronic means constituted, or should be deemed to constitute, service of them so as to start time running for service of the defence, (4) service of a document by electronic means is governed by r.6.20 and supplementing practice directions, (5) in the circumstances of the instant case, the conditions stipulated by the relevant rules and directions which would have enabled C to serve their particulars of claim on X by electronic means were not fulfilled, (6) within r.3.10, C's service of the particulars by e-mail was an "error of procedure" which did not invalidate the service, (7) accordingly, the service was to be treated as valid, so as to commence time running for the service of the defence, and disentitled D from invoking r.13.2, however (8) the balance of justice was in favour of setting aside the judgment under r.13.3. Examination of authorities on r.3.10 and observations on distinction between procedural errors as to service of originating process founding jurisdiction of court and as to service of other documents. ***Phillips v Nussberger*** [2008] UKHL 1, [2008] 1 W.L.R. 180, HL, ***Olafsson v Gissurarson*** [2006] EWHC 3162 (QB), [2007] 1 Lloyd's Rep. 182, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 para.3.10.3, and Vol. 2, paras.2A-10.1 & 2A-57.)

■ **JONES v SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE** [2014] EWCA Civ 363, March 27, 2014, CA, unrep. (Patten, Gloster & Sharp L.JJ.)

Recoverable disbursements–interest on

CPR r.44.2, Consumer Credit Act 1947. In lead claims industrial workers (C) bringing personal injury claims against employers. CFA agreement entered into by C with their solicitors (S) (a medium-sized firm) providing that payment of S's charges was conditional on success, but disbursements were payable by C, win or lose. In addition, C entering into disbursement funding agreement with S under which S agreed to provide C with credit to pay disbursements on terms that (1) if the claim were successful (a) the credit would be repaid by D and (b) the charge for credit (fixed at 4% above base rate) would be C's responsibility (to be paid out of moneys recovered from D), but (2) if the claim were unsuccessful the credit would be repaid by a claim on C's ATE insurers. S explaining that the agreements were exempt from the 1947 Act because they did not provide regulated credit, as C's repayment obligations were expressly contingent on recovery of interest from D and principal either from D or their ATE insurer. At trial on liability lasting more than six weeks, judge giving judgment for C and ordering D to pay C's costs. On issue of pre-judgment interest payable by D to C on disbursements of £785k incurred by C parties unable to reach agreement. On application to judge, judge ordering that the interest rate should be 4% above base rate ([2013] EWHC 1023 (QB)). On D's appeal, D (1) conceding that 4% above base rate was not an excessive or unreasonable rate of interest to charge for borrowing by claimants such as C (who were private individuals of modest means), but (2) contending (a) that in reality the claim for interest was not one made by C (who were never at risk of having to pay any interest) but was a claim made by S, (b) that the agreements were no more than a device to enable S to recover interest on disbursements they were funding at a rate of their choosing, (c) that there was no evidence before the court as to S's financial position or the rate at which they were able to borrow money or indeed that they had borrowed any money, (d) that, in those circumstances there was no evidence to displace the usual presumption (applied in the Commercial Court) that the appropriate rate of interest was 1 per cent above base rate. **Held**, dismissing appeal, (1) the purpose of the power of the court to order interest on costs, including pre-judgment interest on costs (derived from r.44.2(6)(g)), is to compensate a party who has been deprived of the use of his money, or who has had to borrow money to pay for his legal costs, (2) the court's discretion is not fettered by the statutory rate of interest, but is at large, (3) in exercising the discretion the court conducts a general appraisal of the position having regard to what is reasonable for both the paying and the receiving parties, (4) S fulfilled the role of a bank but on terms more advantageous to C than those which would have been offered by a bank, (5) the agreement between C and S was a genuine agreement which gave rise to a real liability on the part of C to pay interest in the event that they won their claims, which they did, (6) C did borrow money from S and the fact that payment of the interest was contingent on the claim being successful and damages actually being received did not render the arrangements "unreal" or "notional", (7) in assessing the interest the judge was therefore correct to have regard to the means of C rather than of S when making the order. ***F & C Alternative Investments (Holdings) Ltd v Barthelemy (No 3)***, [2012] EWCA Civ 843, [2013] 1 W.L.R. 548, CA, ***Bim Kemi AB v Blackburn Chemicals Ltd*** [2003] EWCA Civ 889, [2004] 2 Costs L.R. 201, CA, ***Fiona Trust & Holding Corporation v Privalov*** [2011] EWHC 664 (Comm), ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras.44.2.14 & 44x3.22, and Vol. 2 para.7C-93.)

■ **LAKATAMIA SHIPPING CO LTD v NOBU SU** [2014] EWHC 275 (Comm), February 13, 2014, unrep. (Hamblen J.)

Failure to comply with unless disclosure order–relief from sanction

CPR rr.2.9, 3.1, 3.6 & 3.9, Commercial Court Guide para.D19.2. In contractual claim for US$45.8m, trial fixed for October 20, 2014, with six day estimate. At CMC held on July 17, 2013, judge giving directions, including directions for standard disclosure by August 30, 2013. On November 18, 2013, date for disclosure extended by consent order to December 6, 2013, and then on the defendants' (D) application (made on December 5, 2013) opposed by the claimants (C), to Friday January 17, 2014, on "unless" terms (striking out of D's defence and counterclaim). At 5.16 pm on that day, D providing C with their list of documents but, on assumption that the list ought to have been provided by 4.30pm, on January 20, 2014, D applying under r.3.9 for relief from sanction. C (who themselves had not provided their list of documents) opposing application on various grounds, including ground that the disclosure given was deficient and therefore did not comply with the "unless" order. **Held**, granting the application, (1) an order to provide disclosure is complied with for the purposes of an "unless" order as long as a list is provided and it is not "illusory", (2) the "unless" order was reasonably to be understood as requiring compliance by 4.30pm on the due date, (3) D's non-compliance was "trivial" and the application for relief from sanction was made promptly, (4) it followed that this was a case in which relief from sanction will "normally" be granted, (5) although there was no good reason for D's failure to meet the 4.30pm deadline, there was an understandable explanation for it, (6) it is not necessary for the court to go through all the circumstances formerly stated in r. 3.9, but if there is among them a particular identified circumstance that tells in favour of or against relief then it may be relied upon, (7) in the instant case, most of those circumstances favoured the grant of relief, (8) D's non-compliance with previous orders was a relevant circumstance, but to a significant extent it had already been taken into account in the imposition of the "unless" order, (9) having regard to all the circumstances, and in the exercise of discretion, relief from sanction should be granted. Court explaining that, where an "unless" order is defective because it does not state the time of day within which the act must be done (r.2.9(1)(b)), by operation of para.D19.2 the time is 4.30pm. ***Realkredit Danmark A/S v York Montague Ltd*** [1999] C.P.L.R. 272, CA, ***Mitchell v News Group Newspapers Ltd (Practice Note)***, [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, CA, ***Dinsdale Moorland Services Ltd v Evans*** [2014] EWHC 2 (Ch), January 16, 2014, unrep., ***Newland Shipping and Forwarding Ltd v Toba Trading FZC*** [2014] EWHC 210 (Comm), February 6, 2014, unrep., ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras.2.9.1 & 40.2.6, and Vol. 2 para.2A-79, and ***Cumulative Second Supplement*** para.3.9.1.)]

■ **LAKATAMIA SHIPPING CO LTD v NOBU SU** [2014] EWHC 796 (Comm), March 20, 2014, unrep. (Hamblen J.)

Opposed relief from sanction order–order for costs

CPR rr.44.2(4) & (5). Defendants (D) in contractual claim failing to comply with disclosure order. D applying for relief from procedural sanction under r.3.9. Application opposed by claimants (C), not simply for purpose of ensuring that the court was fully apprised of the relevant facts. Both parties filing supporting evidence and extensive skeleton arguments. At hard fought half-day oral hearing, application granted by judge, finding that it was a clear case for relief ([2014] EWHC 275 (Comm)). On costs, **held**, (1) parties should conduct civil proceedings in a reasonable and realistic manner, (2) C's opposition at the hearing was unreasonable and was the cause of the substantial costs of the hearing, (3) in the circumstances (a) D should pay the costs of its application and of C's costs of its witness statements and a proportion of the costs of the hearing, but (b) the bulk of the costs of the hearing should be paid by C. (See ***Civil Procedure 2014*** Vol. 1 paras.3.9.1, 44.2.2 & 44x.3.17.)

■ **NEWLAND SHIPPING AND FORWARDING LTD v TOBA TRADING FZC** [2014] EWHC 210 (Comm), February 6, 2014, unrep. (Hamblen J.)

Failure to comply with order to serve witness statements–relief from sanction

CPR rr.3.1, 3.5, 3.7 & 3.9, Admiralty and Commercial Courts Guide para.E3.2. In action commenced by claim form issued on October 12, 2012, providers of oil products (C) bringing claim against trading company (D1) and two individuals (D2 & D3) each alleged to be an alter ego of D1. D3 not acknowledging service. On February 22, 2013, judge fixing February 24, 2014, for trial (with six day estimate) and ordering that the action be heard together and at the same time as another action (second action) by C against D1. On July 26, 2013, judge directing disclosure by September 20, 2013 (parties subsequently agreeing an extension to September 30, 2013), and exchange of witness statements by October 25, 2013. On October 29, 2013, C applying for judgment against defendants for non-compliance with court orders (r.3.4(2)(c)), in particular, for failure to serve witness statements, and to provide adequate and separate (for D1 and D3, as required by para.E3.2)) disclosure lists. At hearing on November 13, 2013, attended by D2 by video link, but neither D1 nor D3 attending or appearing, judge (1) entering judgment against D3

for US$7.2m, (2) striking out defence and counterclaim of D1 and entering judgment against D1 for same amount, and (3) ordering D2 to provide specific disclosure in accordance with a time-table with C at liberty to apply for judgment in default. On December 19, 2013, D1 and D3 applying under r.3.9 for relief from sanctions in respect of the orders made on November 13, 2013. D1 and D3 given permission to make late amendment to their application to include application under r.3.1(7) to vary or revoke the orders. **Held**, granting (in part) the application under r.3.1(7), but dismissing the application under r.3.9, (1) the amount for which judgment was ordered to be entered did not properly reflect the purchase price as stated in C's amended pleadings and should be reduced accordingly, (2) the judgment against D3 was a judgment in default of filing an acknowledgment of service and, therefore, the proper procedure for challenging it was that set out in Part 13, and not by way of r.3.9 application, (3) for the purposes of applications for relief from sanction under r.3.9 it is to be assumed that the sanction was properly imposed, (4) in considering whether relief should be granted the most important considerations are (a) the nature of the non-compliance and whether it can be characterised as trivial, and (b) whether there is a good reason why the default occurred, (5) it is not necessary for the court to go through all the circumstances formerly stated in r.3.9, but if there is among them a particular identified circumstance that tells in favour of or against relief then it may be relied upon, (6) D1's defaults were serious and could not be characterised as trivial, and there was no good reason why the defaults occurred, (7) if D1 was to have any recourse it would need to be by way of appeal. Observations on whether defendants' failure to comply with para.E3.2 could be treated as de minimis (paras.23 &73). Court explaining that, as the two actions had not been consolidated, D1's procedural failures could not constitute defaults in the second action so as to justify any order striking out of their defence and counterclaim in that action, even if those failures had some effect on the latter action (para.65). ***Tibbles v SIG plc*** [2012] EWCA Civ 518, [2012] 1 W.L.R. 2591, CA, ***Mitchell v News Group Newspapers Ltd (Practice Note)***, [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, CA, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras.3.1.9 & 3.9.1, and Vol. 2 para.2A-82.)

Practice Directions

■ **PRACTICE DIRECTION 3E–COSTS MANAGEMENT** (CPR Update 72 (forthcoming))

CPR Part 3. Replaces existing practice direction supplementing Section II as consequence of amendments made to r.3.12 and r.3.15 by the Civil Procedure (Amendment No. 4) Rules 2014 (SI 2014/867). Precedent H and Notes for Guidance annexed. In force April 22, 2014. (See further "CPR Update" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 1 para.3EPD.1.)

■ **PRACTICE DIRECTION 84–ENFORCEMENT BY TAKING CONTROL OF GOODS** (CPR Update 70)

Tribunals, Courts and Enforcement Act 2007 s. 64, Certification of Enforcement Agents Regulations 2014. With effect from April 6, 2014, CPR Update 70 adds para.2 to PD 84, supplementing rr.84.18 & 84.19, which deal with applications to the County Court for certificates to act as an enforcement agent, and the replacement of and surrender of certificates. (See ***Civil Procedure 2014*** Vol. 1 para.84PD.2, Vol. 2 para.9A-1058, and ***First Supplement*** paras.84.18 & 84.19.)

■ **PRACTICE DIRECTION 54E–PLANNING COURT** (CPR Update 71)

CPR Part 54. Supplements Section II (Planning Court) (rr.54.21 to 54.24) as inserted by the Civil Procedure (Amendment No. 3) Rules 2014 (SI 2014/610). In force April 6, 2014. (See further "CPR Update" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 1 paras.2.3.14 & 54.20.1.)

Statutory Instruments

■ **CIVIL COURTS ORDER 2014** (SI 2014/819)

Senior Courts Act 1981 s.99(1). Designates location of District Registries of High Court. Following establishment of the single County Court the district served by each District Registry is now defined by reference to the areas served by the particular "hearing centres" of the County Court as specified in this Order. In effect replaces Civil Courts Order 1983 (as amended), repealed by SI 2014/820, but the number and the locations of District Registries have not been changed. In force April 22, 2014. (See ***Civil Procedure 2014*** Vol. 2 para.AP-7.)

■ **CIVIL PROCEDURE (AMENDMENT NO. 3) RULES 2014** (SI 2014/610)

CPR Part 54. In Part 54 (Judicial Review and Statutory Review) add Section II (Planning Court) (rr.54.21 to 54.24) to provide for planning-related judicial reviews and statutory challenges ("Planning Court claim") to be dealt with in a specialist list to be known as "the Planning Court" instead of in the Administrative Court. Provide that further provision about Planning Court claims is made in Practice Direction 54E. Applies to all claims issued on or after April 6, 2014, and to claims issued before that date and transferred to the Planning Court under r. 30.5. In force April 6, 2014. (See further "CPR Update" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 1 paras.2.3.14 & 54.20.1.)

■ **CIVIL PROCEDURE (AMENDMENT NO. 4) RULES 2014** (SI 2014/867)

CPR Parts 3, 81 & 83 and seriatim. In Part 3 amend r.3.12 and r.3.15 altering scope of proceedings to which costs management rules apply and clarifying circumstances in which the court will make a costs management order. In Pt 81 amend r.81.13 and r.81.18 to enable certain permission applications to be dealt with by any High Court judge, and also makes some amendments to r.66.6 consequential upon the enactment of that Part by SI 2012/2208. Amend r.83.2 and insert r.83.2A to remedy oversights in enactment of Pt 83 by SI 2014/407. Make a series of amendments to numerous provisions consequential upon rules enacted by SI 2014/407 for the purposes of implementing bailiff and enforcement reform, and the introduction of the single County Court. Contain transitional provisions. In force April 22, 2014. (See ***Civil Procedure 2014*** Vol. 1 paras.3.12.1, 3.15.1, 66.6, 81.13.1, 81.18.2 & 83.2.1.)

■ **CRIME AND COURTS ACT 2013 (FAMILY COURT: CONSEQUENTIAL PROVISION) (NO. 2) ORDER 2014** (SI 2014/879)

Crime and Courts Act 2013 ss.58 & 59. Makes amendments to secondary legislation in consequence of the establishment of the family court. Amends CPR rr.52.3 & 52.13 and Sch. 2 CCR Ord 27 r.4. Also amends County Court Remedies Regulations 1991 reg.3(3), Blood Tests (Evidence of Paternity) Regulations 1971 Sch. 1 (Forms 1 & 2), Civil Jurisdiction and Judgments Order 2001, paras.1, 3 & 5, Court Funds Rules 2011 r.2. In force April 22, 2014. (See ***Civil Procedure 2014*** Vol. 1 paras.52.3, 52.13, cc27.4, and Vol. 2 paras.5-210+, 6A-20, 9A-79 & 9B-1263.)

■ **FAMILY COURT (CONTEMPT OF COURT) (POWERS) REGULATIONS 2014** (SI 2014/833)

Matrimonial and Family Proceedings Act 1984 ss.31E & 31H, Contempt of Court Act 1981 s.14. Limit the powers exercisable by certain judges of the family court when dealing with an individual for certain types of contempt of court in the family court. In force April 22, 2014. (See further "CPR Update" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 2 para.3C-84, p 1557.)

■ **CIVIL PROCEEDINGS FEES (AMENDMENT) ORDER 2014** (SI 2014/874)

Civil Proceedings Fees Order 2008. Amends arts. 1, 2 & 3 of the 2008 Order and replaces the entire Schedule to that Order. Increases fees payable. Removes from Fee 2 (General Fees (High Court and County Court)) fees payable on filing a directions questionnaire, receipt of a notice of allocation and filing a pre-trial checklist. Provides that if the fee (£350) has been paid for a request to reconsider at a hearing a decision on permission to bring a judicial review and permission is subsequently granted, only half of the judicial review fee (£700) is then payable (see Fee 1.9(b) & (c)). In force April 22, 2014. (See ***Civil Procedure 2014*** Vol. 2 para.10-1.)

■ **LONDON INSOLVENCY DISTRICT (COUNTY COURT AT CENTRAL LONDON) ORDER 2014** (SI 2014/818)

Insolvency Act 1986 s. 373. Revokes and in effect replaces the London Insolvency District (Central London County Court) Order 2011. As a consequence of the establishment of the "single" County Court, re-designates, in accordance with the areas served by "hearing centres" of the County Court, the area comprised in the London insolvency district for the purposes of Parts 7A to 11 of the 1986 Act which concern the insolvency of individuals. As amended by the Courts and Crime Act 2013, s.373 provides that jurisdiction in respect of Parts 7A to 11 is exercised by the High Court or the Central London County Court in respect of proceedings which are allocated to the London insolvency district and by the County Court in respect of proceedings which are allocated to any other insolvency district. In force April 22, 2014. (See ***Civil Procedure 2014*** Vol. 2 para.3E-29 & 3E-99.)

■ **HIGH COURT AND COUNTY COURT JURISDICTION (AMENDMENT) ORDER 2014** (SI 2014/821)

High Court and County Courts Jurisdiction Order 1991. Amends art. 2 (Jurisdiction), arts. 4, 4A (Allocation) and 8A (Enforcement of traffic penalties) and Schedule, and inserts arts. 6C to 6F. Confers jurisdiction on the County Court in respect of contentious probate proceedings where the net value of the estate does not exceed £30,000 (in effect replacing the County Courts Act 1984 s.32, now revoked by the Crime and Courts Act 2013 Sch.1 Pt. I para.10(3)). Increases from £25,000 to £100,000 the sum below which a claim for money (except for personal injury claims) must be started in the County Court (an increase now reflected in CPR r.16.3(5)). Amends the County Courts Act 1984 s.23(b) to remove jurisdiction of County Court to hear and determine proceedings under the Variation of Trusts Act 1958 s.1 and as consequence inserts art. 6D declaring exclusive jurisdiction of the High Court. Amends Insolvency Act 1986 s.117 and Companies Act 2006 ss.98 and 641 for purpose of conferring exclusive jurisdiction on the High Court in relation to certain proceedings to which those provisions relate and as consequence inserts arts. 6C and 6D exempting those proceedings from the operation of art. 4. Removes reference to patents county court in art. 2(7A). In force April 22, 2014. (See ***Civil Procedure 2014*** Vol. 2 paras.9A-448, 9B-930, 9B-935, 9B-943.)

In Detail

COMPLIANCE WITH DISCLOSURE ORDERS

In 1877 an English legal commentator wrote that the introduction, by the Judicature Acts, into the common law courts of the equitable principle "of enabling a plaintiff to avail himself, for the establishment of his rights, of information and evidence in the exclusive possession of the defendant" was controversial because it seemed hard "that a litigant should have the right of invoking the court to assist him in venturing into the enemy's camp in search of materials wherewith to attack him". Nevertheless, procedures for the "discovery" (or "disclosure", as we now say) of documents became established in all courts. In an article published a 100 years later Dr. F.A. Mann (a foreign-trained lawyer practising in England in the second half of the last century and a distinguished academic) said that he regarded the discovery rules in the Rules of the Supreme Court 1965 as "highly meritorious" because they rendered discovery not only possible, but also compulsory, and thus introduced into English procedure "the truly fundamental and even philosophical idea that a court should ascertain the truth – a procedure wholly alien to continental legal systems where the court is concerned, not with the truth, but with the evidence which happens to be available to the parties". (So, as the London tabloids would doubtless say, "hooray" for the Poms and "boo" to the Frogs and the Krauts.)

However, the function of the law of disclosure is not to ensure that in every case all arguably material and relevant documents are disclosed. Indeed, much of the detail in the law is directed at limiting disclosure. But for the restrictions "the cost of nearly every case would be greater than what it is about" (*Nichia Corporation v Argos Ltd* [2007] EWCA Civ 741, [2007] Bus. L.R. 1753, CA, at para.51 per Jacob L.J.). The thrust of most reforms to the law effected over the years has been to tighten the restrictions further. For reasons that are not too difficult to fathom, pre-trial disputes between parties about disclosure are common. For the courts, the frequency of such disputes is a chronic operational hazard that has to be managed. Almost invariably, allegations by one party that, during the disclosure process, another party has not complied with a rule, practice direction or court order lead to arguments about the sufficiency of compliance. Since April 1, 2013, the consequences of non-compliance with rules, practice directions or court orders generally have been more serious for defaulting parties than previously. This has given an added significance to the question of what is the proper approach for a court to adopt in determining whether or not a party has complied with a disclosure order, as is shown by recent cases, including *Dinsdale Moorland Services Ltd v Evans* [2014] EWHC 2 (Ch), January 16, 2014, unrep., and *Lakatamia Shipping Co Ltd v Nobu Su* [2014] EWHC 275 (Comm), February 13, 2014, unrep. (For summaries of these two cases see the "In Brief" section of this issue of CP News.)

In his *Access to Justice Inquiry (1996)*, Lord Woolf came to the conclusion that, although disclosure "contributes to the just resolution of disputes", the process had become "disproportionate", especially in complex cases (where large numbers of documents may have to be searched for and disclosed, though only a small number turn out to be significant). His lordship's proposed solution was to retain disclosure, but in a more limited form. When contrasted with the law as it then stood, there were two significant aspects of his recommendations. One was that parties should not be required to disclose certain categories of documents, in particular "train of inquiry" documents, and the other was that "initial disclosure" should apply only to relevant documents "of which a party is aware at the time when the obligation to disclose arises". The first recommendation was accepted and implemented in the CPR (see r.31.6). The second was not; instead of a "test of awareness" the CPR introduced a duty "to make a reasonable search" (see r.31.7).

Before the CPR came into effect, parties were required to exchange lists of documents without any order being made by the court to that effect. A party's list had to distinguish those documents which the party did not object to producing from those which he did (e.g. on grounds of privilege). By court order, the party could be required to verify the list by an affidavit or to make a further and better list and to verify it. Under the CPR, lists are exchanged in accordance with directions given by the court, they must be in the relevant practice form, and must include, by way of verification, a disclosure statement (r.31.10 & PD 31A). A direction to give disclosure is an order to give "standard disclosure" (as defined) (rr.31.5 & 31.6) and when giving such disclosure a party is required to make "a reasonable search". (Factors relevant in deciding the reasonableness of a search include those listed in r.31.7(2)). In the disclosure statement contained in the list of documents the party making disclosure verifies that he or she has "carried out a reasonable and proportionate search to locate all the documents which I am required to disclose under the order made by the court".

In his *Review of Civil Litigation Costs (2009)*, Lord Justice Jackson noted that complying with disclosure rules imposed considerable costs burdens on parties, in particular in the heavier cases, and that the position was aggravated by the costs involved in complying with the duty of search. His lordship recommended that the court's powers to make

orders limiting standard disclosure should be enhanced by the procedure now contained in paras.(2) to (8) of r.31.5. Those provisions, in cases to which they apply, require the parties to provide the court with a report (verified by a statement of truth) containing information which will enable the court to make informed case management decisions (including decisions as to search) targeted at the needs of the individual case (taking into account the overriding objective) and to make disclosure orders accordingly (see White Book 2014 Vol. 1 para.31.5.1).

To a large extent the success of disclosure procedures depends on the good faith, honesty and diligence of the parties (a truth that both Lord Woolf and Lord Justice Jackson understood) but the law has always recognised that reliance on these worthy characteristics will not be enough and that mechanisms for encouraging compliance will be required. Throughout the history of the law of disclosure the design of effective remedies for overcoming the natural tendency for parties required to give full and proper disclosure to resist doing so has been a persistent problem. Fluctuations from time to time about what the law has said as to which documents should be disclosed (the "scope" or "amplitude" of disclosure) have complicated matters. From an early stage compliance was encouraged by rules of court stating expressly that the court had power to dismiss the action of (or strike out the defence of) a party who failed to comply with rules of court dealing with discovery, and to commit for contempt a party who failed to comply with an order for discovery.

Compliance was also encouraged by the fact that the court had power to entertain applications by the party's opponent (C) for an order requiring the party (D) to verify his list of documents on affidavit, or to make further discovery. Generally, the affidavit was conclusive; the procedure under which a party may apply for further (or specific) discovery by his opponent was introduced in the late nineteenth century to overcome the hardship that could be worked by a strict application of that principle. Until the decision of the House of Lords in *British Association of Glass Bottle Manufacturers Ltd v Nettlefold* [1912] A.C. 709, HL, it was thought that where C made an application for further discovery the insufficiency in D's list of documents had to appear from the pleadings or from D's affidavit of documents itself or the documents therein referred to. However, that decision established that the insufficiencies might appear not only from the documents (or from any admission of insufficiency made by D) but also from any other source that constituted an admission of the existence of a discoverable document. Furthermore, it was not necessary to infer the existence of a particular document; it was sufficient if it appeared that D had excluded documents from his list under a misconception of the case. Beyond that, the affidavit of discovery was conclusive; C could not file affidavits to show that it was false and, in particular, cross-examination of D on his affidavit would not be permitted. So, although the decision in the British Association of Glass Bottle Manufacturers Ltd. case widened the bases upon which a party dissatisfied with his opponent's discovery list could seek to persuade the court that further discovery should be ordered, the fact that the opponent's affidavit would be conclusive prevented things from getting out of hand.

The rule that an affidavit of discovery is generally conclusive was based on the old Chancery aversion to a "conflict of affidavits". In time it came to be tested, particularly in cases where C's complaint was not as to the amplitude of D's list of documents (verified by affidavit) but as to D's claims on grounds of privilege to protection from inspection of particular discovered documents.

In *Lonrho plc v Fayed (No. 3)*, *The Times* June 24, 1993, C.A., where C's objection was as to the amplitude of D's list, it was common ground that D's original affidavit was conclusive, but it was contended by C that a further affidavit made by D in compliance with an order made by the court (on C's application) for discovery of particular documents was not, and that D could be cross-examined on that affidavit. The Court of Appeal rejected that submission. The Court held that D's further affidavit was simply a further or better affidavit provided because D's attention had been drawn to the fact that there was a prima facie case that disclosable documents other than those included in D's list existed. In delivering the judgment of the Court, Stuart-Smith L.J. reviewed all of the relevant authorities on the conclusiveness of discovery affidavits, beginning with cases decided in the 1870s, and explained relevant rules of court as they had evolved.

In *Realkredit Danmark A/S v York Montague Ltd*, [1999] C.P.L.R. 272, CA, the claimants (D) failed to file and serve their list of documents and, by consent, a judge made an unless order against them requiring them to do so by a particular date. Within time, D filed and served a list which was in proper form, which listed over 2,500 documents and ran to 186 pages, and which D was willing to verify by affidavit if required. The defendants (C) applied for an order dismissing D's claim on the ground of their failure to comply with the unless order. C's application, which was supported by lengthy affidavits, attacked the amplitude of D's list. It was submitted that D had not been sufficiently diligent and, as a result, there were very large gaps in the list and some documents were missing. A judge granted C's application and struck out D's claim. The Court of Appeal (Morritt & Tuckey L.JJ.) allowed D's appeal.

In giving the judgment of the Court Tuckey L.J. noted that although it was clear that the court had power to strike out a party's claim where there was a total failure by that party to make discovery, there was no reported case of an action

being struck out as a result of a list of documents being incomplete. In the instant case, the unless order required service of a list. In the Court's opinion the questions were (1) whether the document served by D was made in good faith, and (2) whether it could fairly be described as a list of documents. The answer to each question was "yes"; accordingly D had complied with the order. In expanding on the first question his lordship said that a court could infer lack of good faith "where it was obvious from patent deficiencies in the list that it had been prepared in apparent but not real compliance with the obligation to give discovery". (In approaching the matter in his way the Court was guided by cases concerned with the circumstances in which a court may strike out a party's claim on the ground that the party had not complied with an order for further and better particulars. The Court's reasoning was followed in *Morgans v Needham*, *The Times* November 5, 1999, C.A., a case in which all of the facts arising fell before the CPR came into effect on April 24, 1999.)

In the *Realkredit Danmark* case, Tuckey L.J. noted that it was not uncommon in cases of any complexity for both claimant and defendant to be dissatisfied with the list of documents first given by the other side. That is as true nowadays as it was in 1999, with the difference that whereas previously such disputes took place within the context of RSC Ord. 24, r.3 (Order for discovery) or r.7 (Order for discovery of particular documents), now they take place in the context of CPR r.31.5 (Disclosure) or r.31.12 (Specific disclosure). In each of these situations the dissatisfied party (C) will not be complaining about a failure by the other party (D) to serve a list of documents but about the sufficiency of it. The court may make an order under both rules, that is to say, the court may make an order requiring full and proper compliance with the extant disclosure order and an ancillary order for specific disclosure in relation to specific documents or classes of documents.

If the court is persuaded to make an order of either variety in favour of C that order may be backed by an unless order. If D fails to comply with the order his claim (or counterclaim) will be dismissed. But if in response to an order to disclose documents or specific documents (whether backed by an unless order or not) D deposes that there are no documents to be disclosed then, if the decisions of the Court of Appeal in the *Lonrho plc* case and in the *Realkredit Danmark* case remain good law, that is conclusive, however incredible that might be, and it cannot be argued that D has failed to comply with the order. However it is important to note that the court's order, especially if it is backed by an unless order, may do more than simply require the respondent to make and serve a list of documents and may impose particular conditions which, if not complied with, will result in default. Since the CPR coming into effect, it has become common for further disclosure orders made by the court to contain terms focussing on the duty of search and to impose quite detailed conditions stipulating what the respondent is expected to do. Where the order is backed by an unless order the scope for arguments as to whether the respondent has or has not fully complied with the conditions is greatly widened. And, if the respondent attests in an affidavit that he has, the question which arises is whether what he says as to how he conducted his search is, in the circumstances, conclusive. (Before the CPR came into effect, instances of the imposing of detailed search conditions were not unknown. The case of *Caribbean General Insurance Ltd v Frizzell Insurance Brokers Ltd*, [1994] 2 Lloyd's Rep. 32, CA, is a striking example, where the Court of Appeal, during an earlier period of enthusiasm for a strict approach to non-compliance, overruled a trial judge and enforced an unless order against a party who had not fully complied with such conditions.)

In the two recent cases referred to above, *Dinsdale Moorland Services Ltd v Evans* and *Lakatamia Shipping Co Ltd v Nobu Su*, and also in the cases of *Verjee v Miller* [2004] EWHC 2388 (Ch), July 30, 2014, unrep. (Mann J.) and *In re Atrium Training Services Ltd*, [2013] EWHC 2882 (Ch), September 27, 2013, unrep. (Birss J.), judges at first instance have sought and found guidance in the pre-CPR case of *Realkredit Danmark*. The decision of the Court of Appeal in that case was handed own on November 11, 1998. On April 24, 1999, the CPR came into effect. During that period the received wisdom was that in the brave, new CPR world, pre-CPR cases would no longer be authoritative. White Book editors took note; the *Realkredit Danmark* case disappeared without trace, but now it can be safely revived.

One thing that does seem to emerge from the recent cases is the importance of judges being very careful when making disclosure orders. At a pre-trial hearing, where perhaps a number of pre-trial matters are being discussed and a certain air of informality pervades, one party's complaints about another's conduct in dealing with disclosure requirements should be handled with a close eye on the rules in Part 31. In particular, careful consideration should be given to the question whether the proper course is for the complaining party to take is for him or her to make an application for specific disclosure under r.31.12. And it should go without saying that very great care should be taken before any disclosure order is backed by an unless order (see *In re Atrium Training Services Ltd*, [2013] EWHC 1562 (Ch), July 7, 2013, unrep. (Henderson J.) at para.64).

FAMILY COURT–CONTEMPT OF COURT

The power to make Family Procedure Rules includes a power to apply other rules. In exercise of that power, rules in RSC Order 52 (Committal) and CCR Order 29 (Committal for Breach of Order or Undertaking) were applied with modifications by the Family Procedure Rules 2010 (e.g. r. 11.15(1)). Those Orders, as they had been re-enacted in Schedules 1 and 2 of the CPR were omitted from those Schedules when Part 81 (Applications and Proceedings in Relation to Contempt of Court) was inserted in the CPR with effect from October 1, 2012 (by SI 2012/2208). The incorporations by reference in the FPR were not affected by that. Thus, in proceedings to which the FPR applied, rules of court in RSC Order 52 and CCR Order 29 continued to have effect after October 1, 2012, as they had done before.

As is explained in para.81.0.2 of Vol. 1 of the 2014 edition of the White Book, it was expected that, in due course, the FPR would be amended so as to incorporate by reference (with necessary modifications) rules in Part 81 of the CPR. The establishment (with effect from April 22, 2014) of the Family Court, has required substantial amendments to the FPR and the opportunity has been taken to deal with this matter. However, instead of incorporating Part 81 provisions by reference, the Family Procedure (Amendment No. 2) Rules 2014 (SI 2014/667) inserted in the FPR a new Part 37 containing free-standing rules for family proceedings on contempt and committal, modelled on the provisions contained in Part 81. The advantage of this is that it enables parties, legal representatives and judges involved in Family Court proceedings to have easier access to rules of court relevant to the important subject of applications to commit for contempt.

Jurisdiction to deal with contempt proceedings is not conferred on a court by rules of court. For sources of law as to that one has to look elsewhere; for example, to the court's inherent jurisdiction (as in the case of the High Court) or to the court's statutory jurisdiction (as in the case of the County Court).

Legislation accomplishing the establishment of the family court is found in Part 4A of the Matrimonial and Family Proceedings Act 1984, as inserted by the Crime and Courts Act 2013 s.17(3) & (6) and Sch.10 Pt 1. Part 4A consists of ss.31A to 31P. Section 31E(1) states that, in any proceedings in the family court, the court may make any order (a) which could be made by the High Court if the proceedings were in the High Court, or (b) which could be made by the county court if the proceedings were in the county court. So the Family Court inherits, as it were, the powers of the High Court and the former county courts. However, s.31H(1) states that the Lord Chancellor may by regulations made after consulting the Lord Chief Justice make provision limiting or removing, in circumstances specified in the regulations, any of the powers exercisable by the family court when dealing with a person for contempt of court. The regulations made under s.31H are the Family Law (Contempt of Court) (Powers) Regulations 2014 (S.I. 2014 No. 833).

By para.53 of Pt 2 of Sch.10 of the 2013 Act, a new sub-section is inserted in the Contempt of Court Act 1981 s.14 (penalties for contempt of court) before sub-section (5). (In White Book 2104 the text of s.14 is in Vol. 2 para.3C-84, p 1557.) The text of the new sub-section is as follows:

"(4B) The preceding provisions of this section do not apply to the family court, but—

(a) this is without prejudice to the operation of section 31E(1)(a) of the Matrimonial and Family Proceedings Act 1984 (family court has High Court's powers) in relation to the powers of the High Court that are limited or conferred by those provisions of this section, and

(b) section 31E(1)(b) of that Act (family court has county court's powers) does not apply in relation to the powers of the county court that are limited or conferred by those provisions of this section."

The 2014 Regulations state that, unless otherwise specified in the Regulations, the maximum committal powers available to judges of the family court will be the powers available to the High Court under s.14(4B) of the 1981 Act and s.31E(1)(a) of the 1984 Act. Regulations 3 to 5 limit those powers in various respects. Regulation 3 limits the committal powers exercisable by a judge of district judge level when dealing with an individual for contempt in the face of the court to a maximum period of one month. Regulation 4 limits the committal powers exercisable by a lay justice when dealing with an individual for contempt of court for breaching a judgment, order or undertaking in the family court, other than for the payment of money, to a maximum period of two months. Regulation 4 also limits the committal powers exercisable by a lay justice when dealing with an individual for contempt in the face of the court to a maximum period of one month. Regulation 5 limits the level of fine a judge of the family court, except a judge of High Court judge level, may impose when dealing with a person for contempt of court in the family court to an amount not exceeding level 5 on the standard scale. For a judge of High Court judge level there is no maximum level of fine for contempt of court.

CPR Update

STATEMENT OF VALUE OF CLAIM IN CLAIM FORM (RULE 16.3)

With effect from April 22, 2014, CPR r.16.3 (Statement of value to be included in the claim form) was amended by the Civil Procedure (Amendment) Rules 2014 (SI 2014/407). In preparing the 2014 edition, White Book editors had to work from a draft of that statutory instrument which unfortunately, in the event, proved not to be wholly accurate in what it said about the amendments to be made to r.16.3. Consequently, the text of para.(2)(b) of r.16.3, as it appears in Vol. 1 of White Book 2014 (pp 530 to 531), is also inaccurate. In particular, in para.(2)(b) the figure £100,000, which appears in two places (sub-paras (ii) and (iii)), should be (in both places) £25,000 (reflecting the upper value limit for claims allocated to the fast track under r.26.6.). When the enacted version of SI 2014/407 became available, an effort was made by editors to rectify the inaccuracy by inserting in the First Supplement to the 2014 edition appropriate corrections to sub-paras.(ii) and (iii) of para.(2)(b) (see p 9) thereof. Unfortunately, those corrections in themselves were inaccurate (incorrectly inserting the figure of £50,000 in two places). The publishers apologise for the errors in the Main Work and in the First Supplement.

The text of para.(2) of r.16.3 (which is reflected in Form N1 (Part 7 Claim Form) remains as it stood after the amendments made to the rule by the Civil Procedure (Amendment) Rules 2013 (SI 2103/262), which took effect on April 1, 2013. Thus the provision reads as follows:

"(2) The claimant must, in the claim form, state –

(a) the amount of money claimed;

(b) that the claimant expects to recover –

(i) not more than £10,000;

(ii) more than £10,000 but not more than £25,000; or

(iii) more than £25,000; or

(b) that the claimant cannot say how much is likely to be recovered."

CERTIFICATE TO ACT AS ENFORCEMENT AGENT

In the CPR Update section of Issue 3/2014 of CP News it was explained that Section IV (rr.84.17 to 84.20) was added to CPR Part 84 (Enforcement by Taking Control of Goods) by the Civil Procedure (Amendment No. 2) Rules 2014 (SI 2014/482) and came into effect on April 6, 2014, subject to transitional provisions. Those rules, together with commentary, are included in the First Supplement to the 2014 edition of the White Book (pp 10 to 13).

Practice Direction 84 (Enforcement by Taking Control of Goods) supplements the rules in Part 84 (see White Book 204 Vol. 1 para.84PD.1, p 2493). By CPR Update 70, directions are added to PD 84 supplementing the rules in Section IV. Although no specific mention is made of them, either in the rules in Section IV or in the additional directions, two new forms have been issued for proceedings to which those provisions relate; they are Form EAC1 (Application for certificate to act as an enforcement agent) and Form EAC2 (Complaint against a certificated person).

PLANNING COURT CLAIMS

The Civil Procedure (Amendment No. 3) Rules 2014 (SI 2014/610) were made on March 12, 2014, laid before Parliament on March 14, 2014, and came into force on April 6, 2014. As is indicated in the summary given in the "In Brief" section of this issue of CP News, by that statutory instrument a new specialist list is established in the High Court, to be known as "the Planning Court". This is accomplished by inserting Section II (rr.54.21 to 54.24) in CPR Part 54. These rules deal with "Planning Court claims" by which is meant (according to r.54.21) judicial review of statutory challenges which:

"(a) involves any of the following matters —

(i) planning permission, other development consents, the enforcement of planning control and the enforcement of other statutory schemes;

(ii) applications under the Transport and Works Act 1992;

(iii) wayleaves;

(iv) highways and other rights of way;

(v) compulsory purchase orders;

(vi) village greens;

(vii) European Union environmental legislation and domestic transpositions, including assessments for development consents, habitats, waste and pollution control;

(viii) national, regional or other planning policy documents, statutory or otherwise; or

(ix) any other matter the judge appointed under rule 54.22(2) considers appropriate; and

(b) has been issued or transferred to the Planning Court."

Rule 54.24 states that further provision about Planning Court claims is made in Practice Direction 54E, to be published in CPR Update 71. (For text of this Practice Direction, see below.)

BAILIFF AND ENFORCEMENT REFORM AND SINGLE COUNTY COURT

The Civil Procedure (Amendment No. 4) Rules 2014 (SI 2014/867) were made on March 28, 2014, laid before Parliament on April 1, 2014, and come into force on April 22, 2014.

Most of the amendments made to CPR provisions by this statutory instrument are consequential on rules made for the implementation of the Tribunals, Courts and Enforcement Act 2007 on bailiff and enforcement reform, and for the introduction of the single County Court. As was explained in the "CPR Update" section of Issue 3/2014 (March 24, 2014) of CP News, major amendments relevant to those matters were made by the Civil Procedure (Amendment) Rules 2014 (SI 2014/407). The amendments relating to bailiff and enforcement reform came into effect on April 6, 2014, and the amendments relating to the establishment of the single County Court on April 22, 2014.

The consequential amendments now made by SI 2014/867 ought to have been included in the earlier statutory instrument. (It is not unlikely that further consequential amendments will prove necessary.) All of the amendments made by this statutory instrument come into effect on April 22, 2014, even though some are consequential upon rules relating to bailiff and enforcement reform that came into effect on April 6, 2014. The transitional difficulties created by this difference are dealt with in r. 25 of SI 2014/867.

The substantial amendments made by SI 2014/867 are explained below under three headings: Writs and Warrants–Permission to Issue; Contempt of Court; and Costs Management.

WRITS AND WARRANTS–PERMISSION TO ISSUE

The amendments made by rr.17 and 18 of SI 2014/867 to Section II (Writs and Warrants) of Part 83 (Writs and Warrants–General Provisions) (inserted in the CPR by SI 2014/407) cannot properly be described as "consequential" as they are necessary additions made to remedy oversights, in the drafting of Part 83, of two provisions in RSC Ord. 46 (Writs of Execution: General), in particular, para.(3) of r.2 (Where permission to issue any writ of execution is necessary) and r.5 (Application for permission to issue writ of sequestration). Thus r.17 of SI 2014/867 inserts paras. (7A) and (7B) in r.83(2), and r.18 inserts (following r.83.2) r.83.2A.

In White Book 2014, r.83.2 appears in para.83.2 of Vol. 1 (p 2443). The texts of new paras (7A) and (7B) of r.83.2 and of new r.83.2A are as follows:

"(7A) Where—

(a) the court grants permission, under this rule or otherwise, for the issue of a writ of execution or writ of control ("the permission order"); and

(b) the writ is not issued within one year after the date of the permission order, the permission order will cease to have effect.

(7B) Where a permission order has ceased to have effect, the court may grant a fresh permission order."

"Application for permission to issue a writ of sequestration

83.2A. Notwithstanding anything in rule 83.2, an application for permission to issue a writ of sequestration must be made in accordance with Part 81 and in particular Section 7 of that Part."

CONTEMPT OF COURT

In CPR Part 81 (Contempt of Court), Section 3 (rr.81.12 to 81.14) contains rules dealing with committal applications in relation to interference with the administration of justice "in connection with proceedings" and Section 6 (rr.81.17 and 81.18) contains rules dealing with committal applications in relation to committal for making a false statement of

truth (r.32.14) or disclosure statement (r.31.23). By rr.12 and 13 of SI 2014/867, amendments are made to, respectively, r.81.13 and r.81.18, so as to provide that certain permission applications to which those rules refer can be made to any single judge of the High Court, rather than only to a single judge of the Queen's Bench Division. This is accomplished by substituting "High Court" for "Queen's Bench Division" in r.81.13(1)(d) and in r.81.18(3)(a). The former provision is concerned with applications for permission to commit in connection with any proceedings "in an inferior court" (which includes in this context the County Court), and the latter with applications to commit in relation to a false statement of truth or disclosure statement in connection with proceedings in the County Court. In White Book 2014, r.81.13 and r.81.18 are found, respectively in Vol. 1 at para.81.13, p 2377, and para.81.18, p 2386).

COSTS MANAGEMENT

Section II (Costs Management) was inserted in Part 3 (The Court's Case Management Powers) of the CPR by the Civil Procedure (Amendment) Rules 2013 (SI 2013/262).

As so enacted, r.3.12 (Application of this Section and the purpose of costs management) stated:

"(1) This Section and Practice Direction 3E apply to all multi-track cases commenced on or after 1st April 2013 in—

(a) a county court; or

(b) the Chancery Division or Queen's Bench Division of the High Court (except the Admiralty and Commercial Courts), unless the proceedings are the subject of fixed costs or scale costs or the court otherwise orders. This Section and Practice Direction 3E shall apply to any other proceedings (including applications) where the court so orders.

(2) The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective."

By r. 4 of the Civil Procedure (Amendment No. 2) Rules 2013 (SI 2013/515) para.(1) of r.3.12 was substituted so as to read as follows:

"(1) This Section and Practice Direction 3E apply to all multi-track cases commenced on or after 1st April 2013, except—

(a) cases in the Admiralty and Commercial Courts;

(b) such cases in the Chancery Division as the Chancellor of the High Court may direct; and

(c) such cases in the Technology and Construction Court and the Mercantile Court as the President of the Queen's Bench Division may direct,

unless the proceedings are the subject of fixed costs or scale costs or the court otherwise orders. This Section and Practice Direction 3E will apply to any other proceedings (including applications) where the court so orders."

The effect of that amendment was to extend the range of cases excepted from the application of the provisions of Section II. In exercise of their powers referred to in sub-paras.(b) and (c) of r.3.12(1), on February 18, 2013, the Chancellor of the High Court and the President of the Queen's Bench Division directed, respectively, that (a) in the Chancery Division, and (b) in the Technology and Construction Courts and in the Mercantile Courts, Section II and Practice Direction 3E shall not apply "to cases where at the date of the first case management conference the sums in dispute in the proceedings exceed £2,000,000, excluding interest and costs, except where the court so orders."

As amended, r.3.12 and the rest of Section II of Part 3, and Practice Direction 3E came into effect on April 1, 2013, but, for the Rule Committee, the extent of the exceptions to the application of Section II remained unfinished business. Following further consultation and deliberation during 2013, by r.4 of the Civil Procedure (Amendment No. 4) Rules 2014 (SI 2014/867), para.(1) of r.3.12 is again substituted, this time by two paragraphs, paras.(1) and (1A), and by r.5 an amendment is made to para (2) of r.3.15 (Costs management orders). As amended, in its entirety r.3.12 states as follows:

"(1) This Section and Practice Direction 3E apply to all Part 7 multi-track cases, except—

(a) where the claim is commenced on or after 22nd April 2014 and the amount of money claimed as stated on the claim form is £10 million or more; or

(b) where the claim is commenced on or after 22nd April 2014 and is for a monetary claim which is not quantified or not fully quantified or is for a non-monetary claim and in any such case the claim form contains a statement that the claim is valued at £10 million or more; or

(c) where the proceedings are the subject of fixed costs or scale costs or where the court otherwise orders.

(1A) This Section and Practice Direction 3E will apply to any other proceedings (including applications) where the court so orders.

(2) The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective."

Rule 25(1) of SI 2014/867 states:

"Rule 3.12(1) shall continue to have effect as if it had not been amended by these Rules in respect of any proceedings to which that rule applied and which were commenced before the date on which these Rules come into force."

On April 4, 2014, the Rule Committee announced that, in that transitional provision, the words "to which that rule applied and" are unnecessary and potentially misleading, and stressed that the plain intention is that the existing version of r.3.12(1) should govern proceedings commenced before April 22, 2014, and that the amended version should govern proceedings commenced on or after that date.

The amendment made by r. 5 of SI 2014/867 to para.(2) of r.3.15 consists of a substitution of the words "By such order the court will –". As so amended, in its entirety r.3.15 states as follows (the substituted material is indicated in italics):

"(1) In addition to exercising its other powers, the court may manage the costs to be incurred by any party in any proceedings.

(2) The court may at any time make a "costs management order". *Where costs budgets have been filed and exchanged the court will make a costs management order unless it is satisfied that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective without such an order being made. By a costs management order the court will —*

(a) record the extent to which the budgets are agreed between the parties;

(b) in respect of budgets or parts of budgets which are not agreed, record the court's approval after making appropriate revisions.

(3) If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs."

Section II of Part 3 is supplemented by Practice Direction 3E-Costs Management (see White Book 2014 Vol. 1 para.3EPD.1, p 148). As an additional consequence of the further consultation and deliberation of the Rule Committee during 2013, that Practice Direction, including Precedent H annexed to it, is entirely replaced with effect from April 22, 2014. The new version of Practice Direction 3E will be published in a forthcoming CPR Update and will be included in the Second Supplement to White Book 2014, due to be published in May 2014. The latest version of it, to hand at the time of writing, excluding Precedent H and the Note for Guidance, is set out below. It will be noted that, whereas the previous version had two sections, viz. Budget format (para 1) and Costs Management Orders (paras.2.1 to 2.9), the new version has three. In the new version, section B, which consists of para.6, and section C, which consists of paras.7.1 to 7.9, replicate respectively para 1 and paras.2.1 to 2.9 of the former version, subject to a minor amendment in para.7.1 (formerly para.2.1), made to reflect the amendment made by r.5 of SI 2014/867 to para.(2) of r.3.15 explained above. Section A (Production of Costs Budgets) (paras.1 to 5) is entirely new.

PRACTICE DIRECTION 3E–COSTS MANAGEMENT

This Practice Direction supplements Section II of CPR Part 3

A. Production of Costs Budgets

Part 7 multi-track claims with a value of less than £10 million

1 The Rules require the parties in Part 7 multi-track claims with a value of less than £10 million to file and exchange costs budgets: see rules 3.12 and 3.13.

Other cases

2 In any case where the parties are not required by rules 3.12 and 3.13 to file and exchange costs budgets, the court has a discretion to make an order requiring them to do so. That power may be exercised by the court on its own initiative or on the application of a party. Where costs budgets are filed and exchanged, the court will be in a position to consider making a costs management order: see Section C below. In all cases the court will have regard to the need for litigation to be conducted justly and at proportionate cost in accordance with the overriding objective.

3 At an early stage in the litigation the parties should consider and, where practicable, discuss whether to apply for an order for the provision of costs budgets, with a view to a costs management order being made.

4 If all parties consent to an application for an order for provision of costs budgets, the court will (other than in exceptional cases) make such an order.

5 An order for the provision of costs budgets with a view to a costs management order being made may be particularly appropriate in the following cases:

(a) unfair prejudice petitions under section 994 of the Companies Act 2006;

(b) disqualification proceedings pursuant to the Company Directors Disqualification Act 1986;

(c) applications under the Trusts of Land and Appointment of Trustees Act 1996;

(d) claims pursuant to the Inheritance (Provision for Family and Dependants) Act 1975;

(e) any Part 8 claims or other applications involving a substantial dispute of fact and/or likely to require oral evidence and/or extensive disclosure; and

(f) personal injury and clinical negligence cases where the value of the claim is £10 million or more.

B. Budget format

6 Unless the court otherwise orders, a budget must be in the form of Precedent H annexed to this Practice Direction. It must be in landscape format with an easily legible typeface. In substantial cases, the court may direct that budgets be limited initially to part only of the proceedings and subsequently extended to cover the whole proceedings. A budget must be dated and verified by a statement of truth signed by a senior legal representative of the party. In cases where a party's budgeted costs do not exceed £25,000, there is no obligation on that party to complete more than the first page of Precedent H.

(The wording for a statement of truth verifying a budget is set out in Practice Direction 22.)

C. Costs management orders

7.1 Where costs budgets are filed and exchanged, the court will generally make a costs management order under rule 3.15. If the court makes a costs management order under rule 3.15, the following paragraphs shall apply.

7.2 Save in exceptional circumstances-

(1) the recoverable costs of initially completing Precedent H shall not exceed the higher of £1,000 or 1% of the approved or agreed budget;

(2) all other recoverable costs of the budgeting and costs management process shall not exceed 2% of the approved or agreed budget.

7.3 If the budgets or parts of the budgets are agreed between all parties, the court will record the extent of such agreement. In so far as the budgets are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgets. The court's approval will relate only to the total figures for each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

7.4 As part of the costs management process the court may not approve costs incurred before the date of any budget. The court may, however, record its comments on those costs and will take those costs into account when considering the reasonableness and proportionality of all subsequent costs.

7.5 The court may set a timetable or give other directions for future reviews of budgets.

7.6 Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed.

7.7 After its budget has been approved or agreed, each party shall re-file and re-serve the budget in the form approved or agreed with re-cast figures, annexed to the order approving it or recording its agreement.

7.8 A litigant in person, even though not required to prepare a budget, shall nevertheless be provided with a copy of the budget of any other party.

7.9 If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets.

PRACTICE DIRECTION 54E–PLANNING COURT CLAIMS

This Practice Direction supplements Part 54

General

1.1 This Practice Direction applies to Planning Court claims.

How to start a Planning Court claim

2.1 Planning Court claims must be issued or lodged in the Administrative Court Office of the High Court in accordance with Practice Direction 54D.

2.2 The form must be marked the "Planning Court".

Categorisation of Planning Court claims

3.1 Planning Court claims may be categorised as "significant" by the Planning Liaison Judge.

3.2 Significant Planning Court claims include claims which—

(a) relate to commercial, residential, or other developments which have significant economic impact either at a local level or beyond their immediate locality;

(b) raise important points of law;

(c) generate significant public interest; or

(d) by virtue of the volume or nature of technical material, are best dealt with by judges with significant experience of handling such matters.

3.3 A party wishing to make representations in respect of the categorisation of a Planning Court claim must do so in writing, on issuing the claim or lodging an acknowledgment of service as appropriate.

3.4 The target timescales for the hearing of significant (as defined by paragraph 3.2) Planning Court claims, which the parties should prepare to meet, are as follows, subject to the overriding objective of the interests of justice—

(a) applications for permission to apply for judicial review are to be determined within three weeks of the expiry of the time limit for filing of the acknowledgment of service;

(b) oral renewals of applications for permission to apply for judicial review are to be heard within one month of receipt of request for renewal;

(c) applications for permission under section 289 of the Town and Country Planning Act 1990 are to be determined within one month of issue;

(d) substantive statutory applications, including applications under section 288 of the Town and Country Planning Act 1990, are to be heard within six months of issue; and

(e) judicial reviews are to be heard within ten weeks of the expiry of the period for the submission of detailed grounds by the defendant or any other party as provided in Rule 54.14.

3.5 The Planning Court may make case management directions, including a direction to any party intending to contest the claim to file and serve a summary of his grounds for doing so.

3.6 Notwithstanding the categorisation under paragraph 3.1 of a Planning Court claim as significant or otherwise, the Planning Liaison Judge may direct the expedition of any Planning Court claim if he considers it to necessary to deal with the case justly.

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