25th Anniversary

CIVIL PROCEDURE NEWS

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CONTENTS

In Brief

Cases

■ **GLOBAL TORCH LTD v APEX GLOBAL MANAGEMENT LTD (NO 2)** [2014] UKSC 64, [2014] 1 W.L.R. 4495, S.C.

Failure to comply with disclosure order formality–whether debarring order disproportionate–relevance of strength of barred defence

CPR rr.3.4 & 3.5(2), Companies (Unfair Prejudice Applications) Proceedings Rules 2009 r.2(2), Companies Act 2006 ss. 994 & 996. In pursuit of joint venture, Seychelles company (A Co) owned by Jordanian businessman (A), and BVI company (B Co) owned by Saudian Arabian Prince (B) and others, setting up English company (C Co) to develop and market internet telecommunications technology. Following serious disagreement between the adventurers, B Co issuing petition under s.994 against A Co and A seeking share purchase orders, and pecuniary and declaratory relief. Shortly afterwards, A Co issuing similar petition against B Co, B and other individuals in which pecuniary relief sought included a claim for US$6m plus interest said to be owed to A Co by B. Parties making allegations and counter-allegations of seriously unlawful misconduct in relation to the affairs of C Co. C Co joined as a nominal respondent in both petitions and Court ordering that both should be managed and heard together with single set of pleadings. At CMC on July 31, 2013, judge setting out directions in detailed order, including direction requiring all parties (save C Co) to "file and serve a statement [identifying and giving details of email accounts etc], certified by a statement of truth signed by them personally in the case of individuals and by an officer of the company in the case of the two companies". As a consequence of B's not complying with this direction, other judges making in sequence several orders having domino effect on B's defence to the US$6m claim against him, a defence which raised issue as to whether payments made by B were (as A contended) misappropriated or (as B contended) duly accounted for. Those several orders including orders (1) requiring B's personal signature to two witness statements concerning disclosure, (2) rejecting an application to vary that order, (3) imposing an unless order striking out B's defence to the second petition and debarring him from defending it in default, (4) entering judgment against B for US$6m plus interest for such default, and (5) refusing relief against sanctions. On consolidated appeals to Court of Appeal, B contending that these orders were wrongly made. Upon Court dismissing the appeal ([2014] EWCA Civ 1106) Supreme Court granting B permission to appeal. **Held**, dismissing the appeal, (1) if a party's persistence in the disobedience of a court order would lead to an unfair trial, and the disobedience continues notwithstanding the imposition of a sanction, the enforcement of the sanction is almost inevitable, (2) in a particular case, the court may be persuaded by special factors (none of which appeared in the instant case) to reconsider the original order, or the imposition or enforcement of the sanction, (3) B's default was his failure to comply with the simple obligation to give disclosure in the appropriate fashion, he had had clear opportunities to do so, had failed to comply and had no intention of doing so, (4) in these circumstances the debarring order was not disproportionate, (5) the available evidence showed that B would have a good prospect of establishing his defence that the US$6m payments were duly accounted for, (6) however, the strength of a party's case on the ultimate merits is generally irrelevant when it comes to case management issues of the sort that in this case were the subject of the orders against which B appealed, (7) where a default judgment order is made against a defendant on the claim or part of the claim against him, it is inherent in such an order that the claimant will obtain judgment for relief to which it may subsequently be shown it was not entitled, (8) in the instant case, it was possible that the issue raised in the defence which B was debarred from making would be raised at the trial of the petitions in which B and his co-parties remained engaged, but that prospect provided no basis for allowing B's appeal. (See ***Civil Procedure 2014*** Vol. 1 paras 3.4.4 & 3.5.1.)

■ **HAGUE PLANT LTD v HAGUE** [2014] EWCA Civ 1609, December 11, 2014, CA, unrep. (Briggs, Christopher Clarke & Sharp L.JJ.)

Particulars of claim–application to re-amend–proportionality

CPR rr.1.1(2)(e), 16.4, 17.3 & 38.7. From 1985 onwards, company formed in 1975 engaged in excavation and land clearance business (C) and company formed in 1985 engaged in tipping and landfill business (D1), both owned and directed by members of the same family (parents and their three children), having close, continuous and profitable business relationship. In 1986, one of the children (D2) and his wife (D3) becoming sole owners and directors of D3, and D2 running both companies thereafter. In 2005, disputes arising between the parties resulting in five separate legal proceedings, the fifth being a claim brought by C (of which two children other than D2 were the majority

shareholders and from which D2 had been removed as a director in that year) against D1, D2 and D3 alleging that D2 and D3 had preferred the interests of D1 in the two companies' business dealings. In this claim (commenced on June 23, 2011), in which C alleging misfeasance and breach of fiduciary duty and claiming £18m, in September 2012, C permitted to amend its particulars of claim. On March 5, 2014 (two and a half years later, but before any trial date fixed), after further Part 18 exchanges between the parties, judge dismissing C's application to re-amend. In doing so, judge holding (1) that the majority of the elaborate proposed re-amendments (running to 65 pages) sought to amplify or amend existing causes of action and to introduce new ones which, if allowed, would lead to further extensive judicial time being expended at the expense of other litigants and was not proportionate, and (2) that specific proposed amendments made allegations that were bound to fail or were an abuse of process, in particular, an amendment re-introducing in much more detail and to a greater extent, an allegation previously abandoned by C ([2014] EWHC 568 (Ch)). **Held**, dismissing C's appeal, (1) the judge's reference, in reaching his conclusion that the proposed amendments were disproportionate, to the principle that, in making case management decisions, a court should have regard to the need to allocate court resources appropriately, disclosed no error of law, (2) the judge was entitled to take into account the fact that, although granting C's application would not threaten a trial date, having regard to the time that had passed and the work that had been done, it was a late application in the sense that, if permitted, it would undermine and cause to be wasted work already done, cause a duplication of costs and effort, and require substantial further work and expense, (3) the judge was correct to hold that C's explanation for the re-introduction of the previously abandoned claim fell well short of what was required, (4) there is an analogy between the court's power to allow or disallow (a) under r.17.3, the re-introduction by amendment of a claim previously abandoned in the same proceedings, and (b) under r.38.7, the making of a fresh claim after discontinuance of a similar claim based on the same or substantially the same facts, (5) the relevant rules in these respects leave it to the court to decide whether to grant or refuse permission, having regard to the public interest in finality, (6) the judge erred in using the phrase "exceptional circumstances" as characteristic of the sort of explanation likely to be required in an application for permission under r.38.7, but in the circumstances that error was of no consequence. Court expressing concern about modern tendency for pleadings to be (in breach of r.16.4) of interminable length and diffuseness and to conspicuously lack precision. ***Swain-Mason v Mills & Reeve LLP (Practice Note)*** [2011] EWCA Civ 14, [2011] 1 W.L.R. 2735, 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 1.3.3, 17.3.5, 17.3.7 & 38.7.1, and Vol. 2 para.11-12.)

■ **PJSC VSEUKRAINSKYI AKTSIONERNYI BANK v MAKSIMOV** [2014] EWHC 4370 (Comm), December 19, 2014, unrep. (Hamblen J.)

Application for committal order–"technical" contempt–appropriate order for costs

CPR rr.44.2 & 81.4. In substantial commercial claim, claimant bank (C) applying to commit individual defendant (D) to prison for contempt of court for breaches of worldwide freezing orders. Judge rejecting all of the alleged grounds of contempt except two, one of which had been admitted by D on January14, 2014, and in relation to which the judge made various findings, and the other described by the judge as a "technical" contempt ([2014] EWHC 3771(Comm), November 17, 2014, unrep.). Costs incurred by C on the application amounting to £132.8k for period before January 14, and £600.8k after, and costs incurred by D in the latter period amounting to £515k. At adjourned hearing of consequential matters (at which C not represented), **held**, (1) where the pursuit of a committal application has merely led to the establishment of a technical contempt, rather than something of sufficient gravity to justify the imposition of a serious penalty, the applicant may well be ordered to pay the respondent's costs, (2) in relation to the allegations remaining to be determined at the contempt hearing D was the substantially successful party, (3) in the circumstances it was appropriate to make a costs order in favour of D requiring C to pay 80% of D's costs since January 14 (i.e. £412k) and to make payment on account of £175k. Observations on increase in incidence of disproportionate committal applications and need for courts to deter applications brought not for legitimate aims. ***Bhimji v Chatwani*** [1991] 1 W.L.R. 989, ***Adam Phones Ltd v Goldschmidt*** [1999] 4 All E.R. 486, ***Sectorguard plc v Dienne plc*** [2009] EWHC 2693 (Ch), November 3, 2009, unrep., ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 1 paras 25.1.27, 44.2.6 & 81.4.1, and Vol. 2 paras 3C-18 & 11-10.)

■ **R. (HYSAJ) v SECRETARY OF STATE FOR THE HOME DEPARTMENT** [2014] EWCA Civ 1633, December 16, 2014, CA, unrep. (Moore-Bick, Tomlinson & King L.JJ.)

Notice of appeal–extension of time for filing–exercise of discretion

CPR rr.3.1(2)(a), 3.9, 52.4 & 52.6. In three unrelated cases, in accordance with r.52.6, appellants applying to Court of Appeal (under r.3.1(2)(a)) for an extension of the 21-day period (fixed by r. 52.4(2)(b)) for filing notices of appeal to that Court against orders made by the High Court. **Held**, (1) each of the applications in the

conjoined appeals was an application for an extension of time under r.3.1(2)(a), and not formally for relief from sanction under r.3.9, (2) the Mitchell principles applied, (3) no special rules apply in appeals raising questions of public law or involving public authorities as parties, (4) applying those principles, in one case the application should be allowed, but the applications in the other two should be refused. ***Sayers v Clarke Walker (Practice Note)*** [2002] EWCA Civ 645, [2002] 1 W.L.R. 3095, CA, ***Mitchell v News Group Newspapers Ltd (Practice Note)*** [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, CA, ***Denton v TH White Ltd (Practice Note)*** [2014] EWCA Civ 906, [2014] 1 W.L.R. 3926, CA, ***Prince Abdulaziz v Apex Global Management Ltd*** [2014] UKSC 64, [2014] 1 W.L.R. 4495, SC, ***Altomart Ltd v Salford Estates (No.2) Ltd*** [2014] EWCA Civ 1408, *The Times*, December 9, 2014, CA, ***Attorney General of Trinidad and Tobago v Matthews*** [2011] UKPC 38, October 20, 2011, unrep., ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 1 paras 3.1.2 & 52.4.1.)

■ **WALSHAM CHALET PARK LTD v TALLINGTON LAKES LTD** [2014] EWCA Civ 1607, December 12, 2014, CA, unrep. (Richards, McCombe & Sharp L.JJ.)

Striking out for failure to comply with court orders–successive applications

CPR rr.1.1, 3.4, 3.9, 32.10 & 52.8. Under joint venture agreement, company (C) marketing and selling caravans and lodges located at another company's (D) site. Following termination of the agreement, C commencing claim in Mercantile Court against D (represented throughout by its director) and D filing defence and making counterclaim. At successive CMCs, judge making various orders and several outstanding applications coming before judge on December 6, 2013, including an application by D under r.3.4 to strike out C's claim for their failure to comply with previous orders (raising, amongst other things, a contested issue as to precisely when C gave disclosure) which the judge refused. D then making further similar strike out application which judge dismissed at hearing on February 7, 2014. Single lord justice granting D permission to appeal to Court of Appeal against the judge's order of December 6. D applying to Court for permission to appeal against the judge's order of February 7, and for permission to amend the grounds of appeal against the judge's order of December 6 to introduce allegation of bias against the judge. At the hearing of the appeal, D making additional submission that, by operation of r.32.10, C were debarred from calling any witnesses at the trial. **Held**, refusing permission to amend, granting D permission to appeal against the judge's order of February 7, but dismissing both appeals, (1) D's allegation of judicial bias or prejudice was totally without merit, (2) D's submissions on the effects of r.32.10 were not before the judge, it was not incumbent on the judge take a point on that rule, and it was plainly too late to advance such submissions for the first time on the appeal, (3) at the first hearing (December 6), the judge did not give D's strike out application the consideration it deserved, but at the later hearing (February 7), where D's strike out application was renewed, the judge referred back to what had happened at the earlier hearing (December 6), and the decisions made at each had to be read together, (4) the question for the judge was not whether to grant relief from procedural sanction under r.3.9, but whether to impose the sanction of a strikeout for non-compliance with court orders, (4) in a strike out application under r.3.4 the proportionality of the sanction itself is in issue, whereas an application under r.3.9 has to proceed on the basis that the sanction was properly imposed, (5) that distinction is particularly important where (as here) the sanction sought is as fundamental as a strike out, (6) the judge was right to treat the Mitchell principles as "relevant and important" and applied them correctly. ***Director General of Fair Trading v Proprietary Association of Great Britain*** [2001] 1 W.L.R. 700, CA, ***Porter v Magill*** [2001] UKHL 67, [2002] 2 A.C. 357, HL, ***Mitchell v News Group Newspapers Ltd (Practice Note)*** [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, CA, ***Denton v TH White Ltd (Practice Note)*** [2014] EWCA Civ 906, [2014] 1 W.L.R. 3926, CA, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras 3.4.4, 3.9.4 & 52.8.2, and Vol. 2 para.9A-48.)

Statutory Instruments

■ **CIVIL PROCEDURE (AMENDMENT NO. 8) RULES 2014** (SI 2014/3299)

Amend CPR. Insert in Part 74 (Enforcement of Judgments in Different Jurisdictions) new Section VI (rr.74.34 to 74.50) to make provision (with effect from January 11, 2015) in relation to the recognition and enforcement of "protection measures" (as defined by Regulation (EU) No 606/2013). (See "CPR Update" section of this issue of CP News.) Also insert new Part 87 (Applications for Writ of Habeas Corpus), replacing RSC Ord 54, and substitute Part 36 (Offers to Settle). Amend r.21.12 (Expenses incurred by a litigation friend), and r.30.3 (Criteria for a transfer order). Amend r.45.19 (Disbursements) and r.45.29I (Fixed costs) to reflect amendments made to the RTA Protocol, and amend r.45.24 (Costs consequences where failure to comply with RTA Protocol). Make various related and consequential changes elsewhere in the CPR and make corrections (with effect from January 9, 2015) to SI 2014/2948. In force, otherwise than as indicated above, on April 6, 2015, subject to transitional provisions (r.18). (See ***Civil Procedure 2014*** Vol. 1 paras 21.12, 30.3.1, 36.0.1, 45.18.2, 45.24.1, 45.29A.1 & 74.33.)

In Detail

25th ANNIVERSARY

For some years before 1999 the White Book was known as "The Supreme Court Practice" and what is now known as "CP News" was known as "Supreme Court Practice News" (SCP News). When the CPR came into effect in 1999 the White Book was re-titled "Civil Procedure" and, with effect from March of that year, SCP News was re-titled "CP News". The first edition of SCP News was published in January 1990. The publication of this issue of CP News marks the 25th anniversary of this part of the White Book Service. In each and every year ten issues have been published except in 1999, when a dozen appeared. In 1990, Sir Jack Jacob Q.C. was the General Editor of the White Book. He was (it has to be said) initially doubtful of the prospects for SCP News. He was persuaded of its value as an addition to the White Book Service by Carol Tullo, who served as a Senior Editor with the publishers before becoming Controller of Her Majesty's Stationery Office and Queen's Printer of Acts of Parliament. She was also able to persuade Professor I.R. Scott to compile and edit each issue, tasks which he has discharged ever since. He is grateful for the support he has received over the years from many "in-house" editors employed by the publishers and appreciates the help he has received from fellow White Book editors, and from White Book subscribers who have taken an interest in the SCP News and the CP News.

DISPROPORTIONATE COMMITTAL APPLICATIONS

In *PJSC Vseukrainskyi Aktsionernyi Bank* [2014] EWHC 3771(Comm), November 17, 2014, unrep., where the claimants in a substantial commercial claim applied to commit a defendant for breach of terms of a freezing order, Hamblen J. made an order for costs in favour of the defendant. (For summary of this case, see "In Brief" section of this issue of CP News.) His lordship, after noting that an increasing amount of the time of the Commercial Court is being taken up with contempt applications, said (para.22):

"Claimants should give careful consideration to proportionality in relation to the bringing and continuance of such proceedings. In appropriate cases respondents should give consideration to applying to strike out such applications for abuse of process. The court should be astute to detect when contempt proceedings are not being pursued for legitimate aims. Adverse costs orders may follow where claimants bring disproportionate contempt applications."

In making these observations his lordship drew upon and endorsed similar sentiments expressed at a little greater length by Briggs J. in *Sectorguard plc v Dienne plc* [2009] EWHC 2693 (Ch), November 3, 2009, unrep. (paras 44 to 47). In his judgment in that case Briggs J. stated that it had become established that it is an abuse of process to pursue litigation where the value to the litigant of a successful outcome is so small "as to make the exercise pointless, viewed against the expenditure of court time and the parties' time and money engaged by the undertaking" (para.44). His lordship added (para.47):

"Committal proceedings are an appropriate way, albeit as a last resort, of seeking to obtain the compliance by a party with the court's order (including undertakings contained in orders), and they are also an appropriate means of bringing to the court's attention serious rather than technical, still less involuntary, breaches of them. In my judgment the court should, in the exercise of its case management powers be astute to detect cases in which contempt proceedings are not being pursued for those legitimate ends. Indications that contempt proceedings are not so being pursued include applications relating to purely technical contempt, applications not directed at the obtaining of compliance with the order in question, and applications which, on the face of the documentary evidence, have no real prospect of success. Committal proceedings of that type are properly to be regarded as an abuse of process, and the court should lose no time in putting an end to them, so that the parties may concentrate their time and resources on the resolution of the underlying dispute between them."

Briggs J. (as he then was) also drew attention to (what is now) para.16.1(1) of Practice Direction 81 (White Book Vol. 1 para.81PD.17) which states that, on application by the respondent or on its own initiative, the court may strike out a committal application if it appears to the court (1) that the application and the evidence served in support of it disclose no reasonable ground for alleging that the respondent is guilty of a contempt of court; (2) that the application is an abuse of the court's process or, if made in existing proceedings, is otherwise likely to obstruct the just disposal of those proceedings; or (3) that there has been a failure to comply with a rule, practice direction or court order.

PERIOD FOR FILING APPELLANT'S NOTICE

In Issue 9/2014 (November 28, 2014) of CP News the "In Detail" section contained a discussion, inspired by the decision of the Court of Appeal in *Altomart Ltd v Salford Estates (No 2) Ltd*, [2014] EWCA Civ 1408, October 29, 2014, CA, unrep., of the power of that Court to extend the period, stipulated by CPR r.52.5, within which *a respondent* should file a respondent's notice, should he or she wish to do so or be required to do so. In the recent decision of the Court in *R. (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, December 16, 2014, CA, unrep., the question was whether the Court should exercise its power to extend the period, stipulated by CPR r.52.4, within which *an appellant* should file an appellant's notice. Counsel for the appellants sought to persuade the Court that the view which the Court took in the *Altomart Ltd* case of the authorities on its power to extend time periods was wrong. In particular, it was submitted (1) that it was wrong for the Court to hold, that where a respondent fails to file a respondent's notice within the period set by r.52.5(4), an "implied" (or "indirect") sanction is suffered by that party, namely that no appeal will take place if the time limit is not varied by extension, and that, in determining an application for an extension, the relief from procedural, sanctions provisions in r.3.9 apply, and (2) that it would be wrong for the Court to adopt such an approach to an application by an appellant for an extension of the period set by r.52.4(2) for filing an appellant's notice. The submission was not a novel one. However, it was given new potency by the stricter approach to the granting of relief from sanctions, heralded by the amendments made to r.3.9 (Relief from sanctions) and taking effect on April 1, 2013, leading to the development by the Court of Appeal of, what have come to be called, "the Mitchell principles" which courts must apply when considering applications for such relief (see *Mitchell v News Group Newspapers Ltd. (Practice Note)* [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, CA, *Denton v TH White Ltd (Practice Note)* [2014] EWCA Civ 906, [2014] 1 W.L.R. 3926, CA). The Court (Moore-Bick, Tomlinson and King L.JJ.), though not wholly unsympathetic to the submission, followed a well-known line of authority (traceable to *Sayers v Clarke Walker (Practice Note)* [2002] EWCA Civ 645, [2002] 1 W.L.R. 3095, CA), and rejected it.

Paragraph (1) of r.52.4 (Appellant's notice) states that, where the appellant seeks permission to appeal from the appeal court, it must be requested in the appellant's notice. Paragraph (2) states that the appellant must file the appellant's notice at the appeal court within (a) such period as may be directed by the lower court, or (b) where the court makes no such direction, 21 days after the date of the decision of the lower court that the appellant wishes to appeal. Where the lower court gives a direction it may be for a period either longer or shorter than 21 days. Rule 52.6(1) states that an application to vary the time limit for filing an appeal notice must be made to the appeal court. That provision assumes that appeal courts have power to vary time limits and a source for such power is found in r.3.1(2)(a). When Part 52 was inserted in the CPR, with effect from May 2, 2000, the time limit stated in r.52.4(2)(b) was 14 days. With effect from April 6, 2006, it was increased to 21 days (by SI 2005/3515).

As originally enacted, r.52.4 differed from the comparable rules that previously applied to appeals to the Court of Appeal from the High Court and from the county courts. Under the former rules the time limit was 28 days and time ran, in the case of an appeal from a county court, from "the date of the judgment of the order of the court below" (RSC Ord. 59, r.19), and in the case of an appeal from the High Court, from "the date on which the judgment or order appealed was sealed or otherwise perfected" (RSC Ord. 59, r.4).

Perhaps not unexpectedly, the reduction of the time limit (from 28 days to 14 days) caught some practitioners unawares. For practitioners engaged in handling appeals from the High Court a further surprise was that the start date for the running of time was "the date of the decision", and not the date on which the judgment of the order was sealed or otherwise perfected. Inevitably, this focussed attention on whether and in what circumstances the time limit for filing an appellant's notice in the appeal court may be extended. (In *Owusu v Jackson* [2002] EWCA Civ 877, [2002] I.L.Pr. 45, CA, the Court of Appeal stressed the importance of ensuring that "the date of decision" is clear and gave guidance as to how this was to be achieved where a reserved judgment was handed down in the absence of the parties.)

In *Aujla v Sanghera* [2004] EWCA Civ 121, [2004] C.P. Rep. 31, CA, the Court of Appeal explained that r.52.4(2) and r.52.6(1) must be read together. If one were to read r.52.6(1) alone, one would have the impression that only the appeal court can extend the time for filing an appellant's notice. However, in express terms r.52.4(2) gives the lower court power to extend time. The short point which arose in that case was not whether a lower court, on the application of a would-be appellant, could exercise its powers under r.52.4(2)(a) to extend the period for filing the appellant's notice as fixed by r.52.4(2)(b), but whether it could do so after the expiry of that period. The Court held that a lower court had such jurisdiction, but it was to be exercised with caution and in the light of what the Court said in its earlier decision in the case of *Sayers v Clarke Walker (Practice Note)* [2002] EWCA Civ 645, [2002] 1 W.L.R. 3095, CA, where the question was whether the Court should exercise its powers to extend the period under r.52.6(1).

Generally, an appellant requires permission to appeal, granted either by the lower court or by the appeal court. Where the appellant seeks permission from the appeal court it must be requested in the appellant's notice (r.52.4(1)). Making

an application to a lower court for permission to appeal is one thing, filing an appellant's notice in an appeal court quite another. The risk of the period fixed by r.52.4(2)(b) for filing the appellant's notice expiring before an application for permission has been made to or dealt with by a lower court may be regarded as a trap for the unwary. It is one that parties can guard against by ensuring that when judgment is given or handed down ("the date of decision") appropriate orders are sought from the judge, in particular directions made under r.52.4(2)(a) extending the period fixed by r.52.4(2)(b). (For example, in *Land and Developments Ltd v First Secretary of State* [2003] EWHC 2200 (Admin), September 15, 2003, unrep., the judge gave an oral judgment and thereupon directed that time to make an application for permission to appeal should be extended to 14 days after receipt of the transcript of the judgment.) Where a party applies to a, lower court for an extension of time for filing an appellant's notice the application must be made at the same time as the appellant applies to the lower court for permission to appeal (Practice Direction 52B para.3.1), and where the application is made after the time limit has expired it must state the reasons for the delay and "the steps taken prior to making the application" (ibid para.3.2) (for example of application of these provisions, see *Kagalovsky v Balmore Invest Limited* [2014] EWHC 108 (QB), January 27, 2014, unrep. (Turner J.)).

In the recent case of *R. (Hysaj) v Secretary of State for the Home Department*, op cit, the Court of Appeal dealt with, as conjoined appeals, three appeals in unrelated cases, and did so for the purpose of giving guidance on the approach that should now be taken to an application, made to the Court of Appeal by an appellant wishing to appeal to that Court against an order made by the High Court, for an extension of the 21-day period (fixed by r.52.4(2)(b)) for filing his or her appellant's notice.

The facts were, (1) in case 1, that (a) an individual (X) (then acting in person) successfully resisted a local authority's application for an order replacing him as his brother's "nearest relative" for the purposes of the Mental Health Act 1983, (b) on October 15, 2008, a judge made a costs order in favour of X in sum of £628.82, (c) time for filing appellant's notice in Court of Appeal expired on November 5, 2008, and (d) X filed a notice of appeal on October 7, 2014 (almost six years out of time), contending that the judge ought to have granted costs of £3,000; (2) in case 2, that (a) a claimant was granted a freezing order in support of claim brought against the defendant (Y) abroad, (2) on July 30, 2013, a judge continued the order, made an order for costs against Y (then acting in person), and refused Y permission to appeal against that order, (c) time for filing appellant's notice in Court of Appeal expired on August 20, 2013, (d) Y filed a notice of appeal on May 27, 2014 (nine months out of time) and applied for stay of execution of the costs order; and (3) in case 3, that (a) on March 26, 2014, a judge dismissed a judicial review claim brought by a legally aided individual (Z) challenging a decision depriving him of citizenship and adjourned Z's application for permission to appeal, (b) time for filing appellant's notice in Court of Appeal expired on April 16, 2014, (c) on May 2, 2014, a judge granted Z permission to appeal, and (d) Z filed an appellant's notice on May 27, 2014 (42 days out of time). In none of the three cases were directions sought at the end of the proceedings before the lower court extending time for filing an appellant's notice. (Given that they were acting in person, it is not surprising that X and Y did not do so.)

The Court granted Z's application for an order extending time, but dismissed the applications by X and Y. In giving the lead judgment, Moore-Bick L.J. noted that under r.52.4(2)(b), time runs from "the date of the decision", and held that an order adjourning an application made to the lower court for permission to appeal does not have the effect of extending the "date of decision" to the date when such application is determined. His lordship further explained that each of the applications in the conjoined appeals was an application for an extension of time under r.3.1(2)(a), and not formally for relief from sanction under r.3.9, and that the exercise of the court's discretion to extend time is one to be exercised judicially, which means that it should be exercised in a broadly similar way in similar cases.

His lordship held that it was well-established by the authorities (1) that, although r.52.4(2) imposes no sanction, an application for extending time for filing a notice of appeal should be equated with an application for relief from sanction (the doctrine of implied sanctions), and (2) that the principles to be applied in an application of the latter variety should be applied in an application of the former. His lordship further held (rejecting submissions made by Z in case 3) that no special rules apply in appeals raising questions of public law or involving public authorities as parties.

So the Mitchell principles applied to each of the three cases under appeal. In giving guidance as to how those principles should be applied in cases where a party had failed to comply with the time limit fixed by r.52.4(2)(b) or as directed by court under r.52.4(2)(a), Moore-Bick L.J. stated: (1) that whether there is good reason for an appellant's failure to file an appellant's notice in time will depend upon the particular circumstances of the case, (2) that the fact that an appellant is a litigant in person or is unable to pay for legal representation cannot be regarded as providing a good reason for such failure, and (3) that in evaluating all the circumstance of the case, (a) the nature of the proceedings and the identification of responsibility for any delay in filing the notice of appeal are factors which a court could properly take into account, as too is the importance to the public at large of the issues raised (whether public law or private law issues), but (b) only in those cases where the court "can see without much investigation" that the grounds of appeal are either very strong or very weak will the merits "have a significant part to play".

CPR Update

RECOGNITION AND ENFORCEMENT OF PROTECTION MEASURES

CPR Part 74 (Enforcement of Judgments in Different Jurisdictions) is divided into five Sections. By the Civil Procedure (Amendment No.8) Rules 2014 (SI 2014/3299), laid before Parliament on December 18, 2014, Section VI (Recognition and enforcement of protection measures) was added to Part 74 and brought into effect on January 14, 2015. This new Section (rr.74.34 to 74.50) contains rules necessary for the implementation of Regulation (EU) No. 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters, a Regulation (the "Protection Measures Regulation") coming into force on that date and having "direct effect" (see Official Journal L 181, 29.06.2013 p. 4).

The Regulation provides for the mutual recognition and enforcement between EU Member States of "protection measures", that is to say, of decisions imposing obligations on "the person causing the risk" with a view to "protecting another person, when the latter person's physical or psychological integrity may be at risk". These obligations, in particular, take one or more of the following forms: (a) a prohibition or regulation on entering the place where the protected person resides, works or regularly visits or stays; (b) a prohibition or regulation of contact in any form with the protected person, including by telephone, electronic or ordinary mail, fax or any other means; and (c) a prohibition or regulation on approaching the protected person closer than a prescribed distance. In English law, measures having these effects include injunctions under the Protection of Harassment Act 1997 which may be granted by the High Court and the County Court (see CPR Part 65, Section V), and various orders usually granted in family proceedings and which may be granted also by the Family Court (e.g. non-molestation orders, occupation orders, forced marriage protection orders). The Regulation does not apply to protection measures falling within the scope of Council Regulation (EC) No 2201/2003 of November 27, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters of parental responsibility.

Jurisdiction in relation to "incoming" protection measures for the purposes of the Regulation is conferred on the Family Court, the County Court and the High Court by reg. 3(2) the Civil Jurisdiction and Enforcement (Protection Measures) Regulations 2014 (SI 2014/3298) (made under the European Communities Act 1972 s. 2). By reg. 3(3) of that statutory instrument para.3 of Sch.1 of the Senior Courts Act 1981 (see Vol. 2 para.9A-400) was amended for the purpose of assigning to the Family Division business that comes to the High Court in relation to "incoming" protection measures. By the Family Court (Composition and Distribution of Business) (Amendment) Rules 2014 (SI 2014/3297) amendments were made to the Family Court (Composition and Distribution of Business) Rules 2014 (SI 2014/3297) to make provision in relation to the Family Court for certain proceedings under the Regulation. The implementation of the Regulation has required, not only the addition to CPR Part 74 of the rules contained in Section VI thereof, but also the addition of Part 38 (Recognition and Enforcement of Protection Measures) to the Family Procedure Rules 2010 (effected by the Family Procedure (Amendment No.4) Rules 2014 (SI 2014/3296)).

PRODUCTION CENTRE–ONLINE RESPONSE

By CPR Update 77, paras 5.2A to 5.2D (headed "Online Response") were added to Practice Direction 7C (Production Centre) (see White Book Vol. 1 para.7CPD.1). Paragraph 5.2A states that a defendant wishing to file (1) an acknowledgment of service of the claim form under Part 10; (2) a part admission under rule 14.5; (3) a defence under Part 15; or (4) subject to paragraph 5.2C, a counterclaim (to be filed together with a defence), may, instead of filing a written form, do so by completing and sending the relevant online form at *www.moneyclaim.gov.uk/web/mcol/welcome*. A hard copy must not be sent in addition (para.5.2B(1)). Paragraph 5.2C states that a defendant who files a counterclaim with their defence and who wishes to apply for a remission or part remission of fees must not use Money Claim Online and must file their defence and claim form in written form at the County Court Business Centre. A form is not filed until it is received by the Centre, whatever time it is shown to have been sent; a form received after 4 p.m. will be treated as filed on the next day the Centre is open (para.5.2B(2) & (3)).

EDITOR: **Professor I. R. Scott**, University of Birmingham.
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