CIVIL PROCEDURE NEWS

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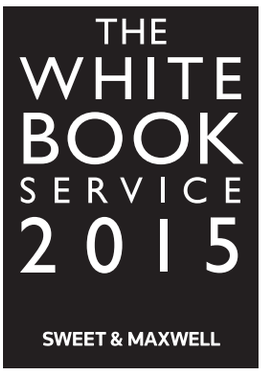

In Brief

Cases

JSC MEZHDUNARODNIY PROMYSHLENNIY BANK v PUGACHEV [2015] EWCA Civ 139, February 27, 2015, C.A., unrep. (Arden, Lewison & Christopher Clarke L.JJ.)

Freezing order–assets including interests under trusts–disclosure of information as to–fortification of cross-undertaking

CPR r.25.1(1)(g), Practice Direction 25A paras 5.1 & 6.1, Civil Jurisdiction and Judgments Act 1982 s.25, Admiralty and Commercial Courts Guide App. 5. Russian bank and its liquidator bringing proceedings in Russian court against individual (D) to recover amounts exceeding US$2.2 billion. Claimants (C) alleging that loans made to the bank had been extracted for the benefit of D and companies under his control. On C's application, on July 11, 2014, judge of Chancery Division granting freezing order against D (principally resident in London) under s.25 in aid of those proceedings and C giving cross-undertaking in damages limited to US$75m. In that order, by para.7(c) thereof, assets frozen including "any interest under any trust" (a clause in same terms as para.7(d) of the example of a freezing order adapted for use in the Commercial Court). In complying with the provision of information term of the order (para.9(1) of that example), D disclosing to C that he was "one of a class of discretionary beneficiaries" under several New Zealand based trusts. On July 25, 2014, same judge making order requiring D to provide further information about those trusts and their assets. On October 30, 2014, another judge dismissing application by trustees (T) of the trusts for discharge of the latter order. On September 19, 2015, third judge ordering that freezing order should be continued but (1) on the provision of a cross-undertaking unlimited in amount, and (2) fortified by payment in of US$25m. On appeal against the orders made on July 11 & 25, 2014, D and T submitting (1) that as C had not established "good reason to suppose" that the trust assets would be susceptible to execution, those assets could not or should not be frozen, (2) that the court had no legal power to make an order requiring the disclosure of information unless the threshold conditions for the making of a freezing order were satisfied. On appeal against the order made on September 19, C submitting (amongst other things) that the established practice is that the amount of a cross-undertaking required of a liquidator of an insolvent company should be capped. **Held**, (1) dismissing appeals of D and T, (a) the jurisdiction of the court to make a freezing order carries with it the power to make whatever ancillary orders are necessary to make the freezing order effective, (b) the assets within the scope of the freezing order granted in this case included interests in the trusts (whatever those may be), but did not include the assets of the trusts themselves, (c) there was a dispute between the parties as to whether, as C asserted, D was the effective owner of the trust assets, or, as D and T asserted, he was not, (d) on the evidence as it stood (including that of the solicitor for the trusts) it was not open to the court to conclude (as C alleged) that T simply acted at the behest of D, but issues were raised which required fuller explanation, (e) in these circumstances, although the "good reason to suppose" test for including an asset within the scope of a freezing was not met, C should not be denied the opportunity to test its assertion, (f) for that purpose the court had power to make an order requiring D to provide further information about those trusts and their assets, and in making the orders challenged by D and T, neither judge exercised his discretion in an impermissible manner, and (2) dismissing C's appeal against the order imposing an unlimited cross-undertaking, but allowing their appeal against the order for fortification, (a) it is not necessary for a defendant to show that a freezing order is likely to cause him loss before a cross-undertaking of unlimited amount is required, but (b) in the instant case, as there was virtually no evidence that D was engaged in a continuing pattern of business activity, the judge's conclusion that D was likely to suffer businesses losses as a consequence of the freezing order was not sustainable. ***JSC BTA Bank v Solodchenko*** [2010] EWCA Civ 1436, [2011] 1 W.L.R. 888, CA, ***JSC BTA Bank v Ablyazov (No 10)*** [2013] EWCA Civ 928, [2014] 1 W.L.R. 1414, CA, ***Financial Services Authority v Sinaloa Gold plc*** [2013] UKSC 11, [2013] 1 A.C. 28, SC, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2015*** Vol. 1 paras 25.1.25.10, 25.1.26, 25APD.5 & 25APD.6, and Vol. 2 paras 2A-162, 15-5, 15-27, 15-28, 15-31, 15-32, 15-54 & 15-55.)

RE v GE [2015] EWCA Civ 287, March 27, 2015, C.A., unrep. (Pitchford, Lewison & McCombe L.JJ.)

Limitation period for claim for child sexual abuse–discretionary exclusion of time limit

Limitation Act 1980 ss. 11, 14 & 33. In 2001 and again in 2006, woman (C), then aged 33 and 38 years, consulting solicitors about prospects of bringing sexual abuse claim against her father (D), alleging persistent acts of abuse between 1974 and 1982, when she was aged 6 to 14 years. On both occasions, C advised (quite properly as the law then stood) that, as her claim was excluded from the ambit of s.11, it was irretrievably statute-

barred. In 2008, following House of Lords' decision to the effect that s.11 (and with it s.33, permitting extension of the limitation period) applied to claims in respect of intentional injury, solicitors advising C that her claim was not necessarily statute-barred (assuming that time ran from June 1986 when C turned 18). C thereupon instructing them to pursue a claim and entering into CFA. Letter of claim sent to D in 2009. Claim form issued in September 2012 and served in January 2013. D entering defence denying all allegations and pleading that the claim was statute barred. On trial of that issue as a preliminary issue, Deputy High Court Judge (1) finding that C's "date of knowledge" was not later than the date of her majority (a finding not subsequently challenged), (2) refusing to exercise the court's discretion, conferred by s.33, to order that the provisions of s. 11 should not apply, and (3) dismissing the action with costs. Single lord justice granting C permission to appeal. **Held**, dismissing appeal, (1) the overriding question is whether in all the circumstances of the case (including those itemised in s.33(3)) it is "equitable" to allow the action to proceed, (2) in this context, "equitable" means fair to both parties, (3) the possibility of it still being possible for a trial to be a fair trial is a necessary but not a sufficient condition for the disapplication of the limitation period, (4) in the instant case the judge properly weighed the factors as to whether or not a fair trial was possible, (5) the extent to which a claimant can escape the consequences of a failure to meet a limitation period, or of a failure to proceed diligently in making an application under s. 33 after expiry of that period, can never be hard and fast, (6) in some cases, a claimant may be able to shelter behind error on the part of advisers, but that will not always be so, (7) in the instant case C made no effort to progress her claim for over three years after she had decided to bring it and been told that she could, (8) the delay of five years from the time when it became open for C to bring proceedings seeking leave under s.33 and the issuing of the claim form was egregious and the explanations proffered did not exonerate C from it, (9) on the evidence the judge was fully entitled to reach the conclusion that the reasons for that delay were not adequately explained. ***Das v Ganju*** [1999] P.I.Q.R. P260, CA, ***A v Hoare*** [2008] UKHL 6, [2008] 1 A.C. 844, HL, ***Cain v Francis*** [2008] EWCA Civ 1451, [2009] Q.B. 754, CA, ***B v Nugent Care Society*** [2009] EWCA Civ 827, [2010] 1 W.L.R. 516, CA, ***Sayers v Hunters*** [2012] EWCA Civ 1715, [2013] 1 W.L.R. 1695, CA, ref'd to. (See ***Civil Procedure 2015*** Vol. 2 paras 8-92, 8-94 & 11-14.)

REPUBLIC OF DJIBOUTI v BOREH [2015] EWHC 769 (Comm), March 23, 2015, unrep. (Flaux J.)

Freezing injunction–court misled at inter partes stage–discharge of

CPR r.25.1(1)(f). In Commercial Court proceedings issued in October 2012, Gulf of Aden State (C) bringing claim against businessman (D). On April 22, 2013, on basis of undertakings, C's application for freezing order adjourned. At ex parte hearing on September 11, 2013, judge making worldwide freezing injunction and proprietary injunction. Trial of claim scheduled for October 2015. In judgment handed down on November 13, 2014, judge determining that he had been misled at the time of the application for the freezing injunction. On January 9, 2015, D applying to set side the injunctions and other relief on grounds that C, through the conduct of one of its legal representatives (X), deliberately and/or recklessly misled the court in the application for the freezing order and subsequently. **Held**, setting aside the freezing injunction, other than that part which constituted a proprietary injunction, and refusing to grant a fresh injunction, (1) X had deliberately misled the court, (2) although the duty of full and frank disclosure does not apply at the inter partes stage, the court should apply the same principles by analogy when considering the duty not to mislead the court (which applies at any stage) and the consequences of a breach of that duty, (3) the authorities on the effect of a deliberate failure to make full and frank disclosure at the ex parte stage provided a useful analogy and guide in the present case, (4) those authorities show that, although discharge of an order is not automatic where there has been material non-disclosure, it would only be in exceptional circumstances that a court would not discharge an order where there had been deliberate non-disclosure or misrepresentation, (5) the fact that the deliberate misleading of the court was solely the fault of the legal representative of the party benefiting from the order would not constitute an exceptional circumstance in that context, (6) in any event, in the instant case it could not be said that the misconduct was solely and exclusively that of X (although no allegation of professional misconduct or impropriety was made against any other member of C's legal team), and there was no question of X having misled C as well as the court, (7) the deliberate misconduct of X, for which C had to take responsibility, had "an immediate and necessary relation" to the equity sued for (i.e. the freezing injunction), (8) consequently C did not come to the court "with clean hands" and, if necessary, the freezing injunction would be discharged and a fresh injunction refused on that ground. ***Congentra AG v Sixteen Thirteen Marine SA ("The Nicholas M")*** [2008] EWHC 1615 (Comm), [2009] 1 All E.R. (Comm) 479, ***Behbehani v Sale***m [1989] 1 W.L.R. 723, CA, ***St Merryn Meat Ltd v Hawkins*** [2001] C.P. Rep. 116, ***In re OJSC Ank Yugraneft*** [2008] EWHC 2614 (Ch), [2010] B.C.C. 475, ***Royal Bank of Scotland Plc v Highland Financial Partners LP*** [2013] EWCA Civ 328, [2013] 1 C.L.C. 596, CA, ref'd to. (See ***Civil Procedure 2015*** Vol. 1 paras 25.3.5 to 25.3.8 & 3.9, and Vol. 2 para.11-15.)

Practice Direction

PRACTICE DIRECTION (COMMITTAL FOR CONTEMPT OF COURT–OPEN COURT) March 26, 2015, unrep.

CPR Pt.81. Supplements provisions relating to contempt of court in the CPR and in other Rules. States practice to be followed in committal proceedings in all courts in England and Wales for ensuring compliance with the principle of open justice, in particular where a hearing or part thereof is held in private. Includes directions as to listing and publication of judgments. Supersedes *Practice Guidance (Committal Proceedings: Open Court) (No. 2)* [2013] 1 W.L.R. 1753. Made by the Lord Chief Justice. (See ***Civil Procedure 2015*** Vol. 1 paras 39.2.1 & 81.28.5, and Vol. 2 para.12-16+.)

Statutory Instruments

CIVIL PROCEDURE (AMENDMENT NO. 2) RULES 2015 (SI 2015/670)

CPR rr.21.12, 46.4, 54.8 & 54.11, Senior Courts Act s.31, Criminal Justice and Courts Act 2015 ss.84 & 87. Substitute r.21.12(1A) and amend r.46.4 to enable more streamlined approach to assessing certain costs payable by a child or protected party (with effect from April 6, 2015). Insert r.46.15 to provide for applications for costs orders against interveners as provided by s.87 (subject to commencement saving provision). For purpose of reflecting amendments made to s.31 (Applications for judicial review) by s.84 (Likelihood of substantially different outcome for applicant), amend r. 54.8 (Acknowledgement of service) and r.54.11 (Service of order giving or refusing permission) and insert r.54.11A (Permission decision where court requires a hearing) (subject to commencement saving provision). In force, subject to saving provisions, April 5, 2015. (See ***Civil Procedure 2015 Supplement 1*** Vol. 1 paras 21.12, 46.4.1, 54.8.2 & 54.11.1.)

CIVIL PROCEDURE (AMENDMENT NO. 3) RULES 2015 (SI 2015/877)

CPR Parts 76, 79, 80, 82 & 88. In Part 88 amend r.88.2(2) for purpose of making it consistent with r.88.1(3) (reference to "public interest") and r.88.24 and r.88.28 for purpose of making it clear that "relevant person" is the Secretary of State. Also amend r.88.28 (Consideration of objection) and comparable rules in Parts 76, 79, 80 and 82 to provide that they apply, not only to an objection to a proposed communication by the special advocate, but also to the form it is proposed it should take. In force March 27, 2015. (See ***Civil Procedure 2015*** Vol. 1 para.82-14, and Vol. 2 paras 3M-42, 3M-86 & 3M-136.)

CRIMINAL JUSTICE AND COURTS ACT 2015 (COMMENCEMENT NO. 1, SAVING AND TRANSITIONAL PROVISIONS) ORDER 2015 (SI 2015/778)

Criminal Justice and Courts Act 2015. Brings into effect on April 13, 2015, ss.57 to 61 (Civil proceedings relating to personal injury), s.63 (amending Administration of Justice Act 1969 ss.12 & 16), s.67 (amending Senior Courts Act 1981 s.51), s.74(2) to (4) (amending Contempt of Court Act 1981 s.8), ss.81 & 82 (amending Constitutional Reform Act 2005 ss.5 & 39), s.83 (amending Tribunals, Courts and Enforcement Act 2007 s.13), s.84(1) to (3) (amending Senior Courts Act 1981 s.31) and s.87 (interveners in judicial review proceedings and costs). Provides that the amendments made by s.84(1) to (3) and s.87 do not apply to an application for judicial review where the claim form was filed before April 13, 2015 (art.4 & Sch.2 para.6). (See ***Civil Procedure 2015*** Vol. 2 paras 3C-65, 9A-101, 9A-199, 9A-968+, 9A-981.17+, 9A-1007 & 9B-30.)

PUBLIC CONTRACTS REGULATIONS 2015 (SI 2015/102)

CPR r.54.5, Late Payment of Commercial Debts (Interest) Act 1998 s.4. Reg.116 Sch.6 para.11 amend paras (A1) and (6) of r.54.5 (Time limit for filing claim form for application for judicial review) to take account of replacement of Public Contracts Regulations 2006 by 2015 Regulations, and para. 1 amends s.4 (Period for which statutory interest runs) for a similar purpose. In force February 25, 2015. (See ***Civil Procedure 2015*** Vol. 1 para.54.5.1, and Vol. 2 para.9B-1337.)

CIVIL LEGAL AID (REMUNERATION) (AMENDMENT) REGULATIONS 2015 (SI 2015/898)

Amend Civil Legal Aid (Remuneration) Regulations 2013. Replace Civil Legal Aid (Remuneration) (Amendment) (No.3) Regulations 2014 (SI 2014/607). Make new provision for circumstances in which legal aid practitioners will be paid for their work on making an application for permission in a judicial review claim. In force March 27, 2015, subject to transitional provisions. (See further "In Detail" section of this issue of CP News.)

In Detail

SERVICE OUT WITHOUT PERMISSION–EXCLUSIVE JURISDICTION CLAUSE

In Part 6 of the CPR, r.6.33 deals with the circumstances in which the claimant may, without the permission of the court, serve the claim form on the defendant out of the United Kingdom. Unfortunately, para.(2) of the text of this rule as it appears in the 2015 edition of the White Book (Vol. 2 para.6.33, p 275) is not wholly accurate as it does not properly take into account an amendment made by the Civil Procedure (Amendment No.7) Rules 2014 (SI 2014/2948) taking effect on January 10, 2015. The correct text is set out in the "CPR Update" section of this issue of CP News. What follows is a brief explanation of the background to the amendment and its principal effect.

The purpose of r.6.33 is to save parties and courts time and effort by making it unnecessary for service of a claim form out of the jurisdiction being contingent on the obtaining of a court order permitting such service. (This is but one illustration of "the shift from order to rule" which became apparent in English procedural law during the mid-twentieth century.)

Para(2) of r.6.33 states that the claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under the Judgments Regulation. But that is subject to the negative and positive provisions in the sub-paragraphs to para.(2), which may or may not apply depending on the circumstances in which the proceedings arise and the circumstances surrounding them.

Among the negative provisions is sub-para.(a) of para.(2) which states that "no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom or any other Member State". The reason for that provision is obvious (the policy objective being that service out without permission should not be allowed where proceedings are pending in another jurisdiction).

Among the positive provisions is (what is now) sub-para.(b)(iv) of para.(2) (which was sub-para.(b)(ii) thereof) which states that "the defendant is a party to an agreement conferring jurisdiction, within article 25 of the Judgments Regulation". Again, the reason for that provision is obvious (the policy objective being that permission for service out should not be required where the parties have agreed that the English court should have jurisdiction).

Until the recent amendment to r.6.33, the negative provision referred to above trumped the positive. Thus, where the defendant was party to an agreement conferring jurisdiction on the English court, service out could not be effected without permission where proceedings between the parties concerning the same claim were pending in the courts of any other part of the United Kingdom or any other Member State. This consequence is moderated by the recent amendment made to the rule (inserting new para.(2A)). The negative proposition no longer trumps the positive if the jurisdiction conferred by the "agreement conferring jurisdiction" is "exclusive". As is explained in the next paragraph, this change reflects (albeit indirectly) recent amendments to the Judgments Regulation.

As is clear from its terms, para.(2) of r.6.33 takes effect against the background of the Judgments Regulation. With effect from January 10, 2015, Council Regulation (EU) No. 44/2001 of 22 December 2000 was replaced by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition of civil and commercial matters. Art.25 of the "recast" Judgments Regulation, referred to in sub-para. (2) of the rule, was art.23 in the former Regulation. (For complete text of the "recast", see White Book 2015 Vol. 2 para.5-249 et seq.) Provisions in the recast Judgments Regulation (by providing for a new exception to the general *lis pendens* rule) seek to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics. (See commentary in White Book 2015 Vol. 1 para.6.33.26 ("Jurisdiction agreements").) In particular, those provisions deal with the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In the prologue to the recast Judgments Regulation it is explained that, in such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings. In circumstances where the designated court is an English court, the recent addition of para. (2A) to r.6.33, and the related amendment making para.(2) subject to it, enable the claim form to be served out of the jurisdiction without permission, even though proceedings between the parties concerning the same claim are pending in a non-designated court of any other part of the United Kingdom or any other Member State.

As already noted, the text of r.6.33 as it appears in the 2015 edition of the White Book is not accurate and the correct text is set out in the "CPR Update" section of this issue of CP News. The particular error is that it does not take into account the recent addition of para.(2A) explained above.

FREEZING INJUNCTION–FURTHER INFORMATION ABOUT ASSETS

The interim remedies which may be granted by a court in civil proceedings include an order, referred to in the CPR as a "freezing injunction", restraining a party from removing from the jurisdiction assets located there, or restraining a party from dealing with any assets whether located within the jurisdiction or not (see r.25.11(f)).

Para.6 of Practice Direction 25A refers to "an example" of a freezing injunction annexed to that Practice Direction and explains that it "may be modified as appropriate in any particular case". As is noted in para.25.1.25.6 of the White Book 2015 Volume 1, an example of a freezing injunction adapted for us in the Commercial Court is contained in Appendix 5 of the Admiralty and Commercial Courts Guide (see Vol. 2 para.2A-162).

Under the heading "Provision of Information", both (what could be called) the "standard" example annexed to Practice Direction 25A and the "adapted" (or "modified") Commercial Court example contain (as para.9(1) in each) terms requiring the respondent to make and serve an affidavit informing the applicant's solicitors of all his assets "whether in his own name or not and whether solely or jointly owned" and giving "the value, location and details" of all such assets.

One significant way in which the "adapted" example differs from the "standard" example is that it contains a paragraph (para.7(d)) expressly bringing within the scope of the assets that the respondent is prohibited from removing or dealing with "any interest under any trust or similar entity" and that includes any interest "which can arise by virtue of the exercise of any power of appointment, direction or otherwise howsoever".

In the recent case of *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139, February 27, 2015, CA, unrep., the freezing injunction granted to the claimants (C) contained the disclosure and prohibition terms referred to above. (For summary of this case, see the "In Brief" section of this issue of CP News.) The defendant (D) purported to comply with those terms by making and serving an affidavit in which he stated in paras 43.1 to 43.5 in the Schedule thereof that he was "one of a class of beneficiaries" under five "New Zealand-based trusts". C were dissatisfied with this disclosure and applied for an order requiring D to provide further information. C sought and were granted a further order which required D to swear an affidavit setting out to the best of his ability:

"(i) the identity of the trustee(s), settlor(s), any protector(s), and the beneficiaries of, and any other person carrying on some or all of the functions of a protector or trustee under another title in relation to the trusts referred to in paragraphs 43.1 to 43.5 of the schedule of assets … and (ii) details of the assets which were subject to those trusts at as … 14 July 2014 (including their value and location)."

By other paragraphs in the order D was also required to supply copies of the trust deeds relating to those trusts which were in his control or which he had a right to inspect or copy.

An application by the trustees (T) of the trusts to discharge those paragraphs was refused. D appealed against the further order and T appealed against the order dismissing their application. The Court of Appeal (Arden, Lewison & Christopher Clarke L.J.) dismissed the appeals.

In giving the lead judgment Lewison L.J. explained that this was not an appeal against the original freezing order or an application to vary its terms. The question for the Court was whether, under the terms of the freezing order as made, the judge was right to order D, who had complied with para.7(d) and para.9(1) by disclosing his status as a beneficiary under discretionary trusts, to provide further information about them. The judge had concluded that the court had power to make "an ancillary order" to that effect and that such an order should be made in the instant case:

"with a view to enabling the claimants … to take a view on the true nature of the trusts, the nature of D's interests in them and to examine the question of whether any further steps need to be taken to safeguard the position."

The principal submission made by the appellants was that the underlying purpose of a freezing order is that of keeping available those assets which could be subject to some form of execution in the event of judgment being entered against the defendant. The argument ran as follows. Without more, assets held by the trustees of a discretionary trust would not be amenable to execution if judgment were entered against one of the class of potential beneficiaries at the suit of a third party. The mere fact that a defendant (being a potential beneficiary) may exercise some form of control over the trust asset would be insufficient to bring it within the scope of the freezing order. What is required is that the claimant should establish that there was "good reason to suppose" that the defendant (or someone standing

in the shoes of the defendant) could compel the application of the asset towards the satisfaction of a judgment debt. Where that is not established (so the appellants argued) a defendant's interest in trust assets could not, or should not be frozen, and any ancillary order requiring a defendant to provide further information about them would fall with it.

Lewison L.J. examined the relevant authorities and held that the terms of para.7(d) were apt to include the interest of a potential beneficiary under a discretionary trust, that such an interest was therefore caught by the prohibition on dealing with assets, and was also subject to the disclosure requirements of para.9(1). That disposed of the appellants' submission that D's interest in the trust assets could not, or should not be frozen, but left the question whether, without "good reason to suppose", the court could not, or should not, make an ancillary order of the type made in this case. Lewison L.J. held that the court had such power and that it was properly exercised. His lordship noted there was a dispute between parties about whether in reality D was in effective control of the trust assets and that, on the evidence as it stood, the court was not in a position to reach even a provisional conclusion about that issue. But the fact that the court was unable to determine at this stage of the proceedings whether the threshold test for including an asset within the scope of a freezing order was satisfied did not render the court powerless. His lordship explained (para.58):

"C does not ask that the trust assets be brought within the scope of the freezing order immediately. It asks for the opportunity to test its assertion that D is the effective owner of those assets against his (and the trustees') assertion that he is not. If its assertion is correct, it may then be in a position to apply for the scope of the freezing order to be widened. If its assertion is incorrect then an application to that effect will fail. But in my judgment the court's concern that sophisticated and wily operators should not be able to make themselves immune to the courts' orders militates against denying C that opportunity."

TRANSFER OF WINDING-UP PROCEEDINGS TO COUNTY COURT

In the Insolvency Rules 1986 (SI 1986 No. 1925), in the Third Group of Parts, Part 7 (Court Procedure and Practice) (rr.7.1 to 7.64) contains rules which apply (subject to exceptions) in relation to applications made to a court under the 1986 Rules or under the Insolvency Act 1986. Part 7 is sub-divided into eleven Parts. Of those Part 2 contains rules dealing with the transfer of proceedings between courts (rr.7.11 to 7.15). Generally, the provisions of the CPR do not apply to insolvency proceedings (see CPR r.2.1). Consequently, the rules in CPR Part 30 (Transfer) do not apply and the rules in Part 7 of the 1986 Rules apply instead.

Since their original enactment the rules in Part 7 of the 1986 Rules have been amended from time to time, mainly for the purpose of regulating the transfer of applications from the High Court to or from an appropriate part of the County Court system. The key rule is r.7.11 (General power of transfer). Para.(3) of that rule is amended, with effect from April 6, 2015, by the Insolvency (Amendment) Rules 2015 (SI 2015/443) r.13. Para.(1) of the rule enables the High Court to transfer winding-up proceedings to a specified county court hearing centre, and para.(3) limits the hearing centres to which a transfer may be made to county court hearing centres in which proceedings to wind up companies may be commenced. By the amendment now made to para.(3) it is provided, additionally, that although winding up proceedings may not be commenced in the County Court at Central London, they may be transferred to that court.

This amendment to r.7.11 is accompanied by a practice note entitled "Note on listing for the transfer of work from the registrars to the County Court sitting in Central London".

The text of r.7.11 as now amended (and as previously amended by SI 2009/642, SI 2010/686 and SI 2014/817) is set out below (with the recent amendment emphasised in italics), followed by the text of the related practice note.

"7.11.— General power of transfer

(1) Where winding-up or bankruptcy proceedings or proceedings relating to a debt relief order are pending in the High Court, the court may order them to be transferred to a specified county court hearing centre.

(2) Where winding-up or bankruptcy proceedings or proceedings relating to a debt relief order are pending in a county court hearing centre, the court may order them to be transferred either to the High Court or to another county court hearing centre.

(3) In any case where winding-up proceedings are transferred to the county court, the transfer must be to a county court hearing centre in which proceedings to wind up companies may be commenced under the Act *or to the County Court at Central London*.

(3A) In any case where bankruptcy proceedings or proceedings relating to a debt relief order are transferred to the county court, the transfer must be to a county court hearing centre in which bankruptcy proceedings may be commenced under the Act.

(4) Where winding-up or bankruptcy proceedings or proceedings relating to a debt relief order are pending in the county court, a judge of the High Court may order them to be transferred to the High Court.

(4A) Solely for the purposes of Rule 7.10D (action following application for a block transfer order)—

(a) the registrar may transfer to or from the High Court; and

(b) the district judge of the county court hearing centre to which the application is made may transfer to or from that county court hearing centre, any case in the schedule under Rule 7.10C(8).

(5) A transfer of proceedings under this Rule may be ordered—

(a) by the court of its own motion, or

(b) on the application of the official receiver, or

(c) on the application of a person appearing to the court to have an interest in the proceedings.

(6) A transfer of proceedings under this Rule may be ordered notwithstanding that the proceedings commenced before the coming into force of the Rules."

"**Note on listing for the transfer of work from the registrars to the County Court sitting in Central London**

1. All winding up petitions must be issued and listed for initial hearing in the Royal Courts of Justice sitting in the Rolls Building.

2. All bankruptcy petitions must be listed and allocated in accordance with rule 6.9A Insolvency Rules 1986.

3. Save as provided above, all High Court proceedings which are to be listed before a registrar in accordance with the Practice Direction–Insolvency Proceedings will continue to be issued and listed in the Royal Courts of Justice sitting in the Rolls Building. In each case consideration will be given by a registrar at an appropriate stage to whether the proceedings should remain in the High Court or be transferred to the County Court sitting in Central London.

4. When deciding whether proceedings which have been issued in the High Court should be transferred to the County Court sitting in Central London, the registrar should have regard to the following factors:

(a) the complexity of the proceedings;

(b) whether the proceedings raise new or controversial points of law;

(c) the likely date and length of the hearing;

(d) public interest in the proceedings;

(e) (where it is ascertainable) the amount in issue in the proceedings.

5. As a general rule, and subject to 4 (a) – (d) above, where the amount in issue in the proceedings is £100,000 or less, the proceedings should be transferred to the County Court sitting in Central London.

6. Subject to paragraph 4 (a) – (e), the following will be transferred to be heard in the County Court sitting in Central London:

(a) private examinations ordered to take place under ss. 236 or 366 Insolvency Act 1986 (but not necessarily the application for the private examination);

(b) applications to extend the term of office of an administrator (para. 76 Sch. B1 Insolvency Act 1986);

(c) applications for permission to distribute the prescribed part (para. 65(3) Sch. B1 Insolvency Act 1986);

(d) applications to disqualify a director and applications for a bankruptcy restrictions order where it appears likely that an order will be made for a period not exceeding five years.

7. With effect from 6 April 2015 the following proceedings will be issued and heard in the County Court sitting in Central London:

(a) applications for the restoration of a company to the register (s. 1029 ff. Companies Act 2006);

(b) applications to extend the period allowed for the delivery of particulars relating to a charge (s. 859F Companies Act 2006);

(c) applications to rectify the register by reason of omission or mis-statement in any statement or notice delivered to the registrar of companies (s. 859M Companies Act 2006) or to replace an instrument or debenture delivered to the registrar of companies (s. 859N Companies Act 2006)."

APPEALS FROM COURT OF PROTECTION DECISIONS

The statutory basis for the Court of Protection is provided by legislation contained in Part 2 of the Mental Capacity Act 2005 (ss.45 to 56). The jurisdiction of the Court is exercisable by persons "nominated" as provided by s.46 (The judges of the Court of Protection). Originally, the persons eligible for nomination as listed in s.46(2) were confined to the President of the Family Division, the Vice-Chancellor (now the Chancellor), a puisne judge of the High Court, a circuit judge, or a district judge.

By the Crime and Courts Act 2013, the range of persons eligible for nomination under s.46 was extended by the addition of many other ranks of the judiciary (including, for example, Recorders, High Court Masters, and tribunal judges). This amendment was one of several made to legislation affecting the deployment of the judiciary for the purpose of enabling the Lord Chief Justice to deploy judges more flexibly across different courts and tribunals of equivalent or lower status (see s.21 and Schedule 14 of the 2013 Act). The extension of the range of persons eligible for nomination as judges of the Court of Protection has made it possible for the Court to be provided with additional judicial resources, in particular for the purpose of dealing with an increase in the number of non-complex applications made to the Court.

Section 51 of the 2005 Act states expressly that rules of court may provide "for the allocation, in such circumstances as may be specified, of any specified description of proceedings to a specified judge or to specified descriptions of judges" (s.51.1(2)(c)). Rule 86 of the Court of Protection Rules 2007 was made in exercise of that particular rule-making power. By the Court of Protection (Amendment) Rules 2015 (SI 2015/548) that rule is substituted so as to provide for the extension of the range of persons eligible for nomination under s.46. As substituted the rule simply states that a practice direction may specify certain categories of case to be dealt with by "a specific judge" or "a specific class of judges". To facilitate this scheme (by an amendment to r.6) judges of the Court are classified into "Tiers". The President of the Court is classified as a "Tier 3 Judge" and so too is the Vice-President, and the Senior Judge is a "Tier 2 Judge". By the relevant practice direction other nominated judges may be included in either of these Tiers. A "Tier 1 Judge" is a judge who is neither a Tier 2 Judge nor a Tier 3 Judge.

Section 53 of the 2005 Act provides for rights of appeal from decisions made by judges of the Court of Protection. The general rule is that an appeal "from any decision" lies to the Court of Appeal (s.53(1)). As originally enacted, that section further stated that Court of Protection Rules may provide that where a decision of the court was made by a district judge, or a circuit judge, an appeal from that decision lay, not to the Court of Appeal in accordance with the general rule, but to a "prescribed higher judge" of the Court of Protection (what might be called an "internal appeal") (s.53(2)).

With the benefit of hindsight it can be seen that when the range of judicial officer holders able to sit as judges of the Court was extended by the Crime and Courts Act 2013, attention should have been given to the terms of s.53 so as to enable proper arrangements to be made by rules for internal appeals from, not only decisions of district judges or circuit judges, but also from decisions of judges of similar or lower rank who became eligible for nomination as a consequence of the amendment to s.46 made by 2013 Act. The matter has been put right by 62 of the Criminal Justice and Courts Act 2015 which substitutes sub-s. (2) of s.53 with effect from February 12, 2015. The subsection now states a follows:

"Court of Protection Rules may provide that where a decision of the court is made by a specified description of person, an appeal from the decision lies to a specified description of judge and not to the Court of Appeal."

That provision makes no express reference to judges of particular ranks (unlike its predecessor) and enables arrangements to be made by rules of court for the circumstances in which appeal lies to the Court of Appeal from a decision of a judge of the court (in accordance with the general rule stated in s.53(1) of the 2005 Act) and for those in which an appeal lies to another judge of the court (i.e. an "internal appeal"). Rules dealing with appeals are found in Part 20 of the Court of Protection Rules 2007 (rr.169 to 182). Substantial amendments have been made to that Part by the Court of Protection (Amendment) Rules 2015 (SI 2015/548), mainly but not exclusively for the purpose of making detailed arrangements for "internal appeals". Those amendments include two new rules, they are, r.171A (Destination of appeals) and s.171B (Permission to appeal–appeals to the Court of Appeal), and the re-casting of r.171 (Permission to appeal–other cases) and of r.174 (Power to treat application for permission to appeal as application for reconsideration under rule 89).

Rule 171A is the provision which determines whether, in a given case, an appeal from a decision lies to "a specified description of judge" or to the Court of Appeal. This new rule makes us of the classification of judges into "Tiers" explained above. The rule states that an appeal from a decision of a judge of the Court shall lie to the Court of Appeal in cases where it is an appeal from a decision of a Tier 3 Judge or where it is a "second" appeal. Subject to that, and

to any alternative provision made by the relevant practice direction, where the first instance judge was a Tier 1 Judge, any appeal shall be heard by a Tier 2 Judge, and where the first instance judge was a Tier 2 Judge, any appeal shall be heard by a Tier 3 Judge. It is important to notice that identifying the appropriate destination for an appeal in a given case, whether it is the Court of Appeal or a judge of "a specified description", requires recourse, not only to r.171A, but also to the practice direction supplementing Part 20 of the Court of Protection Rules.

The amendments made to Part 20 of the 2007 Rules by SI 2015/548 come into effect on April 6, 2015. They apply only where the decision or order against which it is sought to appeal (or in relation to which a reconsideration is sought) was made on or after that date.

REMUNERATION FOR CIVIL LEGAL SERVICES: JUDICIAL REVIEW

The Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 (SI 2015/898), for reasons briefly explained below, replace the Civil Legal Aid (Remuneration) (Amendment) (No.3) Regulations 2014 (SI 2014/607). They amend the Civil Legal Aid (Remuneration) Regulations 2013 (SI 2013/422) by providing for the circumstances in which the Lord Chancellor is permitted to pay remuneration for work carried out on an application for permission in a judicial review claim. In *R. (Ben Hoare Bell Solicitors) v Lord Chancellor* [2015] EWHC 523 (Admin), March 3, 2015, unrep., by a judicial review claim, several claimants, including four firms of solicitors who provide legal services in public law areas, challenged the legality of an amendment to the legal aid scheme made by the Civil Legal Aid (Remuneration) (Amendment) (No.3) Regulations 2014. That statutory instrument was made ostensibly for advancing the Government's policy of ensuring that limited legal aid resources were targeted at those judicial review cases where they are needed most. It introduced, what could broadly be described as, a "no permission, no fee" arrangement. Further it provided that there would be no entitlement to payment where permission had neither been granted nor refused, for example where the claim has been settled or withdrawn (but in such cases a discretion payment for the costs of making the application could be made). A Divisional Court (Beatson L.J. & Ouseley J.) gave judgment for the claimants, and by order dated March 19, 2015, quashed the challenged amending instrument. The Court concluded that, although its purpose was lawful, its effects under various conditions were not rationally connected to its purpose. To that extent, the Court held that the amending regulations were inconsistent with the purpose and effect of the statutory scheme under which they were made. The Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 replace the quashed instrument. They take account of the defects in it identified by the Court and came into effect on March 27, 2015.

As is stated in the Explanatory Memorandum (paras 7.4 to 7.6), new reg.5A(1) provides that legal aid practitioners will not be paid for their work on making an application for permission in a judicial review case (where the application is issued) unless certain conditions are met. As in the quashed instrument, payment will be made if: (a) permission is given or (b) permission is neither given nor refused, and the Lord Chancellor considers that it reasonable to make payment (looking at the circumstances of each individual case in the round, taking into account, in particular factors set out under 5A(1)(b)). In addition, it is now provided that legal aid practitioners will be paid for their work on making an application for permission in a judicial review case if any of the following three conditions is met: (c) the defendant withdraws the decision to which the application for judicial review relates and the withdrawal results in the court (i) refusing permission to bring judicial review proceedings, or (ii) neither refusing nor giving permission; (d) the court orders an oral hearing to consider whether to give permission to bring judicial review proceedings, or (e) the court orders a "rolled-up" hearing.

As in the quashed instrument, new reg.5A does not affect the payment of reasonable disbursements (other than Counsel's fees) such as expert fees and court fees, incurred in accordance with the contract under which the civil legal services are provided. These will continue to be paid, even if permission is not given by the court. New reg.5A also does not affect the discretion of the Lord Chancellor to make payments on account in accordance with the relevant contract.

In the Civil Legal Aid (Remuneration) Regulations 2013, reg.12 makes provision for the Lord Chancellor to make payments on account direct to barristers in independent practice. That regulation is now amended to provide that where the Lord Chancellor does not pay remuneration for the application for judicial review under reg.5A, the barrister must repay any amount paid to him or her under reg.12 for services consisting of the making of the application for judicial review.

The Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 came into force on March 27, 2015, subject to transitional provisions of some complexity (regs.3 & 4). Put generally, the amendments do not apply to "a pre-commencement application for civil legal services", an application defined as an application for civil legal services that was made before the commencement date (and as further defined in reg.4(2)), or is "a new application" (as further defined in reg.4(3)).

CPR Update

SERVICE OUT WITHOUT PERMISSION (RULE 6.33)

As was explained in the "In Detail" section of this issue of CP News, the text of r.6.33 as it appears in Vol. 2 para.6.33, p 275, of White Book 2015 is not wholly accurate, in that it omits para.(2A) and the amendment related to it in para.(2). The publishers apologise for this error. (It will be corrected in Supplement 2.) The correct texts of para.(2) and para.(2A) of the rule are as follows:

"(2) The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine under the Judgments Regulation and—

(a) subject to paragraph (2A) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom or any other Member State; and

(b)

(i) the defendant is domiciled in the United Kingdom or in any Member State;

(ii) the defendant is not a consumer, but is a party to a consumer contract within article 17 of the Judgments Regulation;

(iii) the defendant is an employer and a party to a contract of employment within article 20 of the Judgments Regulation;

(iv) the proceedings are within article 24 of the Judgments Regulation; or

(v) the defendant is a party to an agreement conferring jurisdiction, within article 25 of the Judgments Regulation.

(2A) Paragraph (2)(a) does not apply if the jurisdiction conferred by the agreement referred to in paragraph (2)(b)(v) is exclusive."

RECOGNITION AND ENFORCEMENT OF JUDGMENTS (RULES 74.4A & 74.7B)

In the "CPR Update" section of CP News Issue 9/2014 (November 28, 2014), it was explained that, as a result of the coming into effect of the "recast" Judgments Regulation, various amendments and additions were made to CPR Part 74 by the Civil Procedure (Amendment No.7) Rules 2014 (SI 2014/2948) and brought into force on January 10, 2015; in particular to Section I thereof (Enforcement in England and Wales of Judgments of Foreign Courts). The texts of the completely new rules inserted by SI 2014/2948 were set out in full in that issue of CP News, and included r.74.4A (Procedure for enforcing judgments under the Judgments Regulation) and r.74.7B (Relief against enforcement under the Judgments Regulation).

Unfortunately, the text of r.74.4A, as set out in the 2015 edition of the White Book, in Vol. 1 at para.74.4A, p. 2340, is inaccurate. The text of the rule (as was stated in CP News Issue 9/2014) is as follows:

"A person seeking the enforcement of a judgment which is enforceable under the Judgments Regulation must, except in a case falling within article 43(3) of the Regulation (protective measures), provide the documents required by article 42 of the Regulation."

Further, the text of para.(1) of r.74.7B, as set out in the 2015 edition of the White Book, in Vol. 1 at para.74.7B, p. 2351, is also inaccurate. The text of that sub-rule (again as was stated in CP News Issue 9/2014) is as follows:

"An application for relief under article 44 of the Judgments Regulation must be made—

(a) in accordance with Part 23; and

(b) to the court in which the judgment is being enforced or, if the judgment debtor is not aware of any proceedings relating to enforcement, the High Court."

The publishers apologise for these errors. The correct texts will be included in Supplement 2.

RE-ISSUE OF PRE-ACTION PROTOCOLS

The Pre-action Protocols are included in Section C of Volume 2 of White Book 2015 (p. 2715 et seq). By CPR Update 79 (unpublished as at the end of March 2015) the Pre-Action Protocols listed below were re-issued and brought into effect on April 6, 2015. The texts of these re-issued Protocols will be included in Supplement 2 to the 2015 edition of the White Book.

In some respects the amendments made are substantial. In commentary paragraphs in White Book 2015, the principal changes to all of the re-issued Protocols (with the exception of Judicial Review, where the changes are of a different order) are anticipated in commentary. (In the following list, the paragraphs containing such anticipatory commentaries are indicated in parenthesis.)

Pre-action Protocol for Personal Injury Claims (para.C2A-005)

Pre-action Protocol for the Resolution of Clinical Disputes (para.C3A-003)

Pre-action Protocol for Professional Negligence (para.C7A-002)

Pre-action Protocol for Judicial Review

Pre-action Protocol for Housing Disrepair Cases (para.C10A-002)

Pre-action Protocol for Possession Claims by Social Landlords (para.C11A-002)

Pre-action Protocol for Possession Claims Based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property (para.C12A-002)

REGISTERED DESIGN APPEALS

Sections 27 and 28 of the Registered Designs Act 1949 are printed in full in Sch.4 of the Copyright, Designs and Patents Act 1988 and govern the position of the High Court and the Appeal Tribunal (see White Book 2015 Vol. 2 paras 2F-17.2 & 2F-17.6). The Intellectual Property Act 2014 s.10(2) inserted after s.27 of the 1949 Act two new provisions, s.27A (Appeals from decision of registrar) and s.27B (Person appointed to hear and determine appeals). Section 10(2), for all remaining purposes, is brought into effect on April 6, 2015, by the Intellectual Property Act 2014 (Commencement No.4) Order 2015 (SI 2015/165). Sections 27A and 27B introduce a new route of appeal against decisions made by the registrar relating to designs. Parties affected now have a choice of using ether a person appointed by the Lord Chancellor (an "appointed person") or the High Court. This reflects the system already in place for challenging trade mark decisions of the registrar (see the Trade Marks Act 1994 ss.76 & 77).

AMENDMENTS TO PRACTICE DIRECTIONS

In White Book 2015, Practice Direction 2B (Allocation of Cases to Levels of Judiciary) appears in Vol.1 at para.2BPD-1 (p 46), and Practice Direction (Pre-Action Conduct) appears in Vol.1 at para.C1-001 (p 2724). By CPR Update 79 (made available on April 8, 2015), these two Practice Directions were substituted in revised form with effect from April 6, 2015. As substituted, the latter practice direction is re-titled as "Pre-action Conduct and Protocols". This Update also introduces a practice direction for the anticipated new electronic working pilot scheme which will operate from April 27, 2015, in the Technology and Construction Court in the High Court at the RCJ.

By Update 79 significant amendments are made (in both instances from April 6, 2015) to two other existing CPR practice directions; they are Practice Direction 6B (Service Out of the Jurisdiction), and Practice Direction 52 (Appeals to the Court of Appeal). Thus in para.3.1 of Practice Direction 6B, sub-para.(12), which states circumstances in which a claimant may serve a claim form out of the jurisdiction with the permission of the court under r.6.36 in a claim about trusts etc (see White Book 2015 Vol.1 para.6BPD-3, p 357), is replaced by two new provisions, sub-paras (12) and (12A), having the effect of bringing within para.3.1 a claim made in respect of a trust (created by the operation of a statute, or by a written instrument, or created orally and evidence in writing) which is governed by the law of England and Wales (para.12) or which provides that jurisdiction in respect of such a claim shall be conferred upon the courts of England and Wales (para.12A).

In Practice Direction 52, para.19 as it stands states that, unless the court directs otherwise, a respondent to an appeal to the Court of Appeal need not take any action when served with an appellant's notice until notified that permission to appeal has been granted (see White Book 2015 Vol.1 para.52CPD.19, p 1962). Para.19 is substituted by a new provision (Respondent's actions when served with the appellant's notice) introducing a significantly different practice, and this is accompanied by amendments to sub-para.(1) of para.20 (Respondent's costs of permission applications).

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LEGAL TAXONOMY
FROM SWEET & MAXWELL

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