CIVIL PROCEDURE NEWS

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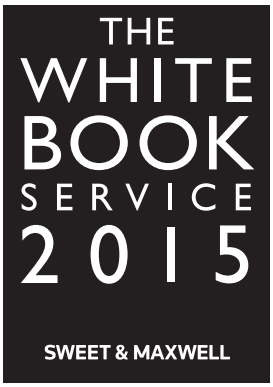

In Brief

Cases

CASHMAN v MID ESSEX HOSPITAL SERVICES NHS TRUST [2015] EWHC 1312 (QB), May 11, 2015, unrep. (Slade J. & assessor)

Award of costs on detailed assessment–entitlement to "an additional amount"

CPR r.36.17. In clinical negligence proceedings, brought by claimant (C) with benefit of CFA, C obtaining judgment and costs against hospital (D). In detailed assessment proceedings, as receiving party C putting in bill of costs for £262k. Within about five weeks of D serving points of dispute, and about seven months before the detailed assessment hearing, C making Part 36 offer to settle for £156k. At the hearing on October 21, 2014, costs judge assessing costs at £176.7k. As the costs judgment was more advantageous to C than his Part 36 offer, costs judge holding, under (what are, since April 6, 2015) paras (a), (b) and (c) respectively of r.36.17(4) (formerly r.36.14(3)), that C was entitled (1) to interest on the bill of costs at 10.5%, (2) to costs of the detailed assessment on the indemnity basis, and (3) to interest on the costs of the detailed assessment at 10.5%. But on ground that it would be unjust, principally because there had been a significant reduction in C's bill (from £262k claimed to £176.7k awarded), costs judge rejecting submission that C was entitled to "an additional amount" of £17,000 under (what is now) r.36.17(4)(d) (formerly r.36.14(3)(d)). On appeal by C to a judge (sitting with assessor), **held**, allowing appeal and ordering that C was entitled to an additional amount, (1) para.(d) of r.36.17 applies to costs proceedings in cases in which success fees are recoverable under the old CFA regime by the receiving party, (2) it is only if the court considers it unjust to do so (the disentitlement provision) that awards under paras (a) to (d) of r.36.17(4) will not be made, (3) the disentitlement provision is to be considered in relation to the payments under each of those paragraphs (the entitlement provisions), (4) a judge must not be tempted to apply that provision in a particular case because he or she thinks the regime in r.36.17(4) is harsh, (5) in considering whether it would be unjust to make an award under each of the entitlement provisions, the court is required to take into account all the circumstances of the case, including the factors in r.36.17(5) (formerly r.36.14(4)), (6) whilst a particular factor under r.36.17(5) may carry more weight when considering whether it would be unjust to make an award under the different entitlement provisions, in the instant case the costs judge gave no reason why a factor rendering it not unjust to make an award under all of the entitlement provisions but one, should be a factor rendering it unjust to make an award under that one, (7) in doing so the costs judge erred in principle. ***Downing v Peterborough & Stamford Hospitals NHS Foundation Trust*** [2014] EWHC 4216 (QB), December 12, 2014, unrep., ref'd to. (See ***Civil Procedure 2015*** Vol. 1 paras 36.17.3 & 36.17.7.)

CHINNOCK v VEALE WASBROUGH [2015] EWCA Civ 441, May 7, 2015, CA, unrep. (Longmore & Jackson L.JJ. and Roth J.)

Actions for professional negligence–whether statute barred–claimant's constructive knowledge

Limitation Act 1980 s.14A. On April 19, 2001, parent (C) of a child born in an NHS hospital (X) on April 21, 1998, and dying on December 14, 2009, issuing claim form for action against X for wrongful birth (for which primary limitation period expired on April 21, 2001). In July 2001, following receipt of adverse advice from solicitors (D1) and a barrister (D2) instructed by D1 to advise, C allowing this action to lapse (on August 12, 2001). On July 8, 2010, on the basis of advice from different solicitors, C commencing action against D1, pleading that D1 were negligent in their advice and conduct of the lapsed action, and on January 19, 2012, commencing similar action against D2. Both defendants defending and, on basis that primary limitation period for these actions had expired in July 2007, pleading limitation. Master directing (1) that both actions be managed and tried together, and (2) that questions of liability and limitation be determined as preliminary issues. At trial, judge holding (1) that, on the basis of the law as it stood in July 2001, there was no breach of duty, and (2) that the actions were statute barred ([2013] EWHC 3730 (QB)). **Held**, dismissing C's appeal, (1) the judge did not err in his findings on breach of duty, (2) in any event (for reasons different to those given by the judge) C's claims were statute barred because (a) time did not start to run against C until she knew, or ought to have known, that the advice D1 and D2 had given her was wrong in that she had a viable cause of action against X, (b) before the primary limitation period for her actions D1 and D2 expired, C did not have that knowledge but she had every opportunity to obtain it, (c) C therefore had, within the primary limitation period, constructive knowledge that the advice was wrong. Observations on relationship between sub-ss. (5) and (9) of s.14A. ***Forbes v Wandsworth Health Authority*** [1997] Q.B. 402, CA, ***Oakes v Hopcroft*** [2000] Lloyd's Rep PN 946, CA, ***Adams v Bracknell Forest Borough Council*** [2004] UKHL 29, [2005] 1 A.C. 76, HL, ***Haward v Fawcetts*** [2006] UKHL 9, [2006] 1 W.L.R. 682, HL, ref'd to. (See ***Civil Procedure 2015*** Vol. 2 paras 8-37 to 8-39.)

HARINGEY LONDON BOROUGH COUNCIL v BROWN [2015] EWCA Civ 483, May 14, 2015, CA, unrep. (Richards, Lewison & McCombe L.JJ.)

Committal application in County Court–legal representation–public funding for

CPR r.81.14, Legal Aid, Sentencing and Punishment of Offenders Act 2013 ss. 14 & 16, Criminal Legal Aid (General) Regulations 2013 reg.9(v), Criminal Legal Aid (Determination by a Court and Choice of Representative) Regulations 2013 regs. 6 to 8, Human Rights Act 1998 Sch.1 Pt. I art.6(1). In County Court proceedings for the execution of an order for possession, housing authority (C) applying for order committing tenant (D) for contempt of court for breaches of injunction. In advance of two-day hearing, solicitors for D making attempts, unsuccessful in the event, to obtain from the Legal Aid Agency (LAA) public funding for D's representation with result that D attended the hearing on November 26, 2014, with no representation and no information about the prospects of such funding. On second day of hearing, from which D absented himself (apparently for reason of ill-health), judge making order committing D to prison for 18 months. On December 3, 2014, D arrested and imprisoned. On April 16, 2015, D applying out of time for permission to appeal to the Court of Appeal. Court granting permission and, in exercise of the relevant statutory provisions, making representation order providing D with legal aid sufficient for solicitor and counsel for the appeal (and their preparation for it). **Held**, allowing appeal, quashing the committal order and the factual findings upon which it was based, and ordering the discharge of D from custody forthwith, (1) it was clear that the committal proceedings against D were "criminal proceedings" as defined in s.14(h) and reg.9(v), as they were proceedings that involved the determination of a "criminal charge" for the purposes of art.6(1), (2) regs.6 to 8 provide that the Crown Court, the High Court and the Court of Appeal (respectively) are authorised to make determinations under s.16 as to whether an individual qualifies for representation for the purposes of criminal proceedings before those courts (and in the case of the Court of Appeal, it may make determinations in respect of qualification in such proceedings before the Supreme Court on appeal before it), (3) however, there is no similar authorisation conferred upon the County Court, (4) accordingly, by virtue of s.18 it is for the Director of the LAA to make the determination in a case such as the present, (5) the ultimate (if obscure) meaning of the relevant legislation is that by one means or another, and in whatever court the committal application is made, a qualifying individual should receive public funding for legal representation, (6) in the instant case the judge ought to have made a full inquiry, adjourning the hearing if necessary, as to (a) whether D wanted legal representation, and (b) whether he had applied for the necessary funding and with what results, (7) the lack of legal representation for D before the judge (to which it seemed clear he was entitled) constituted a serious procedural flaw leading to a failure to hold a fair trial. Court (a) noting that there is no legislative provision stating in straightforward terms that applications for publicly funded representation for committal proceedings in the County Court are to be made to the Director of the LAA, (b) explaining that the proceedings in the court below went wrong because D's entitlement to legal aid was never properly understood and determined by the LAA, and (c) urging that steps be taken to ensure that at an early stage in County Court committal proceedings all concerned are aware (i) of the authority to which legal aid applications are to be made, (ii) the procedure for making such application, and (iii) what the entitlements are. ***King's Lynn and West Norfolk Council v Bunning*** [2013] EWHC 3390 (QB), [2015] 1 W.L.R. 531, ref'd to. (See ***Civil Procedure 2015*** Vol. 1 para.81.1.5.)

P. v P. [2015] EWCA Civ 447, May 6, 2015, CA, unrep. (Jackson & Black L.JJ. and Sir David Keene)

Ancillary relief proceedings–court to which application for permission to appeal should be made

CPR r.52.3, Practice Direction 52A para.4.1, Matrimonial Causes Act 1973 s.24(1)(c). On wife's (C) application for ancillary relief in divorce proceedings against husband (D), where matrimonial home owned by H's parents and subject to a post-nuptial settlement intended to keep the property within H's family estate, judge (amongst other things) varying the trust to create a fund for C ([2014] EWHC 2998 (Fam)). On learning, quite fortuitously, that the trustees (T) (who were party to the proceedings) had applied to the Court of Appeal for permission to appeal his decision, judge directing that an application for such permission should be made to him and T making such application accordingly. Judge dismissing this application ([2014] EWHC 2990 (Fam)) and, in doing so, stating that, in the field of ancillary relief, an application for permission to appeal must always be made to the judge at first instance "before an approach is made to the Court of Appeal". T then successfully pursuing their application to the Court of Appeal for permission to appeal (to which C and D were respondents). On the merits, T principally contending that the specific order made by the judge under s.24(1)(c) was wrong in that it exceeded the proper ambit of his discretion or failed to balance the relevant factors properly. Counsel also asking Court to rule on the question whether the judge was right in requiring that an application for permission to appeal should be made to him. Court of Appeal dismissing T's appeal on the merits. On the procedural question, **held**, (1) r.52.3(2) states (and has always stated) that an application for permission to appeal may be made (a) to the lower court at the hearing at which the decision to be appealed was made, or (b) to the appeal court in an appeal notice, (2) for the five reasons set out in para.52.3.4 of the White Book 2015 it is good practice for any party contemplating an appeal in the first instance to seek permission from the lower court, but that is not a mandatory requirement. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2015*** Vol. 1 para.52.3.4.)

R. (PANESAR) v CENTRAL CRIMINAL COURT [2014] EWCA Civ 1613, CA, [2015] 1 W.L.R. 2577, CA (Patten, Macur & Burnett L.JJ.)

Appeal to Court of Appeal from High Court–"criminal cause or matter"

CPR r.52.3, Senior Courts Act 1981 s.18, Criminal Justice and Police Act 2001 s.59(5)(b). Judge of Crown Court holding that the Court had jurisdiction to entertain an application by HMRC for order authorising retention of material seized in execution of search warrant of premises of several individuals (C), notwithstanding fact that the warrant had been quashed. Divisional Court granting C permission to proceed with claim for judicial review of that decision but dismissing the claim on the merits ([2014] EWHC 2821 (Admin)). C applying to Court of Appeal for permission to appeal the Divisional Court's decision. **Held**, granting permission but dismissing the appeal, (1) subject to an irrelevant exception, no appeal shall lie to the Court of Appeal from any judgment of the High Court "in any criminal cause or matter" (s. 18(1)(a)), (2) C's claim for judicial review was a "criminal cause or matter", as the underlying proceedings challenged in that claim were a criminal matter, (3) accordingly, the Court did not have jurisdiction to hear the appeal. ***Carr v Atkins*** [1987] Q.B. 963, CA, ***R. (Guardian News and Media Ltd) v City of Westminster Magistrates' Court*** [2011] EWCA Civ 1188, [2011] 1 W.L.R. 3253, CA, ref'd to. (See ***Civil Procedure 2015*** Vol. 1 para.52.0.6, and Vol. 2 para.9A-64.1.)

R. (WILLIAMS) v SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE [2015] EWHC 1202 (Admin), April 30, 2015, unrep. (Lindblom J.)

Planning decision–time limit for bringing judicial review claim

CPR rr.11(1), 11(5) & 54.5(3), Planning Act 2008 ss.114 & 118, Statutory Instruments Act 1946 ss.2(1) & 12(2), Human Rights Act 1998 Sch.1 Pt I art.6, Directive 2011/92/EU art.9. In decision letter dated Friday September 12, 2014, and sent to interested parties, Secretary of State (D) accepting recommendation of Examining Authority to approve application for development of wind farm and by statutory instrument (SI 2014/2441) made on the same date D making development consent order under s.114 carrying that decision into effect. By claim form lodged with Administrative Court on Friday October 24, 2014, individual interested party (C) bringing judicial review claim challenging the order on grounds that, in making it, D failed to comply with EU Council Directive and related Regulations. D filing acknowledgment of service (but not challenging court's jurisdiction therein) and defending the claim. High Court judge ordering that the application for permission to apply, and, if permission were granted, the claim itself, should be dealt with together at a "rolled-up" hearing. At the hearing, where full argument on the merits of the claim heard, judge reserving judgment. Before judgment handed down, judge inviting parties to make written submissions on issue (not raised in the course of the hearing but to which subsequently judge had been alerted by D) that the court had no jurisdiction to hear and determine the claim because the proceedings had not been issued until the day after the time limit set by s.118 had expired. At relevant time, s.118(1)(b) providing that a court may entertain judicial review proceedings for questioning an order granting development consent only if the claim form is filed "during" the period of 6 weeks "beginning with the day on which the order is published". **Held**, dismissing the claim, (1) the court had no jurisdiction to try the claim because (a) within the meaning of s.118(1), the order was "published" on Friday September 12, 2014, (b) the calculation of the period for challenge set by s.118(1)(b), began with and therefore included that day, (c) accordingly the six week period "during" which any claim form for judicial review had to be filed started on that day and ended on Thursday October 23, 2014, (2) the time limit in s. 118 had the force of statute, was immutable and the court had no power to extend it, (3) the provisions of s.118 did not offend the principle that the period laid down for bringing a challenge before the court must start to run only from the date on which a claimant knew, or ought to have known, of the alleged error of law in the decision impugned, (4) it could not be suggested that a statutory time limit of six weeks jeopardised a claimant's right to a fair trial under art.6, (5) once the court's jurisdiction has been challenged, however late this is done, it must resolve that issue before it does anything else, (6) in a case where the court's jurisdiction can be shown not to exist at all, a defendant who has not disputed the court's jurisdiction within the time limit fixed by s.11(4) is not to be treated under r.11(5) as having accepted that the court had jurisdiction. Judge declining invitation of parties to state what his decision on the merits of the claim would have been had the court had jurisdiction to determine it. ***R. (Blue Green London Plan) v Secretary of State for the Environment, Food and Rural Affairs*** [2015] EWHC 495 (Admin), ***Uniplex (UK) Ltd v NHS Business Services Authority* (C-406/08)** [2010] P.T.S.R. 1377, ***R. (Shah) v Immigration Appeal Tribunal*** [2004] EWCA Civ 1665, *The Times*, December 9, 2004, CA, **R. v Secretary of State for the Environment, Ex p. Kent**, *The Times*, May 12, 1989, ***Barker v Hambleton District Council*** [2012] EWCA Civ 610, [2013] P.T.S.R. 41, CA, ***Lesoochranarske Zoskupenie VLK v Ministerstvo Zivotneho Prostredia Slovenskej Republiky (C-240/09)*** [2012] Q.B. 606, ECJ, ***Matthews v Secretary of State for the Environment, Transport and the Regions*** [2001] EWHC 815 (Admin), [2002] 2 P. & C.R. 34, ref'd to. (See ***Civil Procedure 2015*** Vol. 1 paras 11.1.1, 40.2.5 & 54.5.1.)

RAWLINSON AND HUNTER TRUSTEES SA v DIRECTOR OF THE SERIOUS FRAUD OFFICE [2015] EWHC 937 (Comm), April 1, 2015, unrep. (Eder J.)

Subsequent use of disclosed documents for collateral purpose–order restricting use

CPR r.31.22. In related proceedings, individuals and companies bringing claims against SFO (D). In course of those proceedings, large number of documents disclosed by D. After settlement of these proceedings, some claimants (C) applying to the court for declaration that by operation of the exception in r.31.22(1)(a) certain documents disclosed by the SFO had in the course of interlocutory proceedings lost their "subsequent use" protection. D conceding that 26 documents identified by C had so lost protection. C not pursuing their application in respect of the remainder. By cross-application D applying for order under r.31.22(2) restricting subsequent use for a collateral purpose of the 26 documents. Judge granting cross-application, in effect re-attaching the r.31.22(1) protection. D then applying for order requiring that C, in event of their proposing to make subsequent use for a collateral purpose of any disclosed document on ground that it fell within the r.31.22(1)(a) exception, should give D notice identifying the documents to be used and the nature of such proposed use. D producing list of 550 documents of which C arguably could make subsequent use on ground that they fell within the r.31.22(1)(a) exception. D submitting that such an order was proportionate and would save costs as it would enable them to make r.31.22(2) applications restricting or prohibiting subsequent use only as and if thought necessary. C submitting that such an order was impermissible and outside the scope of r.31.22(2). **Held**, granting the application, (1) the court had power under r.31.22(2) to make the order sought, (2) the only pre-condition to the making on an order under r.31.22(2) is that the relevant document "has been disclosed", (3) the rule imposed no requirement on an applicant positively to assert that the document fell within the r.31.22(1)(a) exception, (4) in the circumstances, a proviso should be included in the order, for the purpose of protecting C's interests for the time being in the event of their giving D a notice required by the order, some restriction on D notifying any relevant third parties. (See ***Civil Procedure 2015*** Vol. 1 para.31.22.1.)

SARFRAZ v DISCLOSURE AND BARRING SERVICE [2015] EWCA Civ 544, May 22, 2015, CA, unrep. (Lord Dyson M.R. & Kitchin L.J.)

Permission to appeal to it refused by Upper Tribunal–whether right of appeal to Court of Appeal against that decision

CPR r.52.3, Senior Courts Act 1981 s.15, Tribunals, Courts and Enforcement Act 2007 ss.11 & 13, Safeguarding Vulnerable Groups Act 2006 s.4. In exercise of powers derived from the 2006 Act, Disclosure and Barring Service (D) deciding to retain name of GP (C) on barred lists. C applying to Upper Tribunal (UT) under s. 4(4) of the 2006 Act for permission to appeal against that decision to the UT in exercise of the right of appeal granted by s.11. Upon UT deciding to refuse permission, on basis that within the meaning of s.13 of the 2007 Act he had "right of appeal" to the Court of Appeal against that "decision", C applying to Court of Appeal for permission to exercise that right. D submitting that, in the circumstances, there was no jurisdiction in the Court of Appeal to grant permission. **Held**, dismissing application, (1) the question whether there is a right of appeal to a court against a refusal by a lower court or other body to grant permission to appeal must depend upon the true construction of the statutory provision which confers the right of appeal, (2) it is a principle of long-standing derived from authority that, in the absence of express statutory language to the contrary, a provision giving a court the power to grant or refuse permission to appeal should be construed as not extending to an appeal against a refusal of permission to appeal, (3) this is because the decision which it is sought to appeal will by necessary intendment exclude an appeal against the grant or refusal, notwithstanding the general language in which the statutory right of appeal is expressed, (4) accordingly there was no jurisdiction in the Court to give permission to appeal against the refusal by the UT of permission to appeal to itself. ***Lane v Esdaile*** [1891] A.C. 210, HL, ***In re Housing of the Working Classes Act 1890, Ex p. Stevenson*** [1892] 1 Q.B. 609, CA, ***Kemper Reinsurance v Minister of Finance*** [2000] 1 A.C. 1, PC, ***R. (Sinclair Gardens Investments) Ltd) v Lands Tribunal*** [2004] EWHC 1910 (Admin), [2004] 3 E.G.L.R. 15, ***The Wellcome Trust Limited v 19-22 Onslow Gardens Freehold*** [2012] EWCA Civ 1024, July 5, 2012, CA, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2015*** Vol. 1 paras 52.3.8 & 54.12.3, and Vol. 2 paras 4A-57, 4A-60, 9A-51, 9A-59, 9A-842.1, 9A-1005+ & 9A-1007.)

STOBART GROUP LTD v ELLIOTT [2015] EWCA Civ 449, May 13, 2015, CA, unrep. (Laws, Tomlinson & McCombe L.JJ.)

Failure to comply with directions as to service of evidence–relief from sanction

CPR r.3.9. Company (C) bringing claim against former employee (D) for injunction restraining D from defaming them. C obtaining interim injunction and giving cross-undertaking in damages. On ground that, because of developments in other proceedings, the proceedings had become unnecessary, C applying for permission to discontinue. On January 13, 2013, judge (1) granting application, (2) directing enquiry as to what loss (if any) was caused to D by the interim

injunction and what compensation he was entitled to recover under the cross-undertaking, and (3) giving directions for the conduct of the enquiry. At hearing on March 21, 2013, attended by D, judge giving further directions, including direction requiring D (but with which D did not comply) to file and serve by May 3, 2013, medical report in support of his claim that the interim injunction had caused or exacerbated his psychiatric disorder. At CMC on July 11, 2013, which D did not attend and at which he was not represented, judge considering communications received from D and ordering (with liberty to apply) (1) that, by September 16, 2013, D should (a) file and serve the medical report and (b) provide C's solicitors with an authorisation for his GP to release his medical reports to C's medical expert, (2) that in default of filing and serving the medical report, D would have permission to apply to strike out D's psychiatric claim, and (3) that the proceedings be re-listed for a second CMC on November 14, 2013. In the time stipulated, D failing to comply with that order and making no application to vary or discharge it, but on the day before the second CMC, D filing a psychiatric report. Following that CMC, which D attended, and in accordance with directions given by the judge at that hearing, (1) C making application for order striking out D's claim for damages, and (2) D applying for order extending time for his compliance with the judge's order of July 11, 2013. At hearing of these applications on January 9 & 10, 2014, held by a different judge to the one who had previously managed the case, and which D attended in person, judge dismissing D's application and, in consequence, dismissing his claim for damages pursuant to the cross-undertaking in damages given by C. In doing so, judge accepting that, whilst D's application was not in terms an application for relief from sanctions under r.3.9, in practice it amounted to the same because, without compliance with the order, D could adduce no expert evidence at the enquiry and without such evidence his claim for damages was bound to fail. **Held**, dismissing D's appeal, (1) the judge was correct to treat the case as one in which the court's order of July 11, 2013, by implication imposed a sanction for non-compliance, (2) the judge gave very careful consideration to all of the circumstances to which he could properly have regard, including the facts that D was not only a litigant in person but one suffering from a mental disability and that D was unable for a time to pay for a medical report, (3) the prejudice to C resulting from D's non-compliance was far from trivial, (4) the conclusion which the judge reached fell well within the range of reasonable decision making and was not a conclusion to which no judge could reasonably have come. Court noting that the judge had to deal with D's application without the benefit of decisions of the Court handed down during 2014 elaborating on the Mitchell principles, and that, in the light of that guidance, the outcome of this case would be little affected whether it was approached as involving relief from sanctions or not. ***Mitchell v News Group Newspapers Ltd (Practice Note)*** [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, CA, ***Durrant v Chief Constable of Avon and Somerset Constabulary (Practice Note)*** [2013] EWCA Civ 1624, [2014] 1 W.L.R. 4313, CA, ***Denton v T H White Ltd (Practice Note)*** [2014] EWCA Civ 906, [2014] 1 W.L.R. 3926, CA, ***Salford Estates (No.2) Ltd v Altomart Ltd (Practice Note)*** [2014] EWCA Civ 1408, [2015] 1 W.L.R. 1825, CA, ***R. (Hysaj) v Secretary of State for the Home Department*** [2014] EWCA Civ 1633, [2015] C.P. Rep. 17, CA, ref'd to. (See ***Civil Procedure 2015*** Vol. 1 paras 3.9.6.7 & 3.9.6.11.)

Practice Notes and Guidelines

- **CHANCERY MASTERS' GUIDELINES FOR THE TRANSFER OF CLAIMS** April 24, 2015, unrep. (Chief Master Marsh)

CPR rr.29.2, 30.3 & 30.5. Provides informal guidance for Chancery Masters concerning the transfer of claims out of the Chancery Division in London to (a) a Chancery District Registry outside London; (b) the County Court; (c) another Division of the High Court. Objective of guidance is to ensure that only cases which may properly be regarded as being suitable for management and trial in the Chancery Division of the High Court in London are retained there. All other claims should be transferred out. Includes in appendices CPR r. 30.3(2) and Practice Direction 29 paras 2.2 to 2.7. Issued by Chief Master and approved by the Chancellor. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2015*** Vol. 1 paras 29.2.5, 29PD.2, 30.3.1 & 30.5.3.)

- **CHIEF REGISTRAR'S UNFAIR PREJUDICE PETITION DIRECTIONS** May 1, 2015, unrep. (Chief Registrar Stephen Baister)

Practice Direction 49A, Companies (Unfair Prejudice Applications) Proceedings Rules 2009 reg.3. Case management of unfair prejudice applications. Provides that, instead of previous practice of giving an initial return date before the court (reg.3), upon the presentation of the petition the court will, of its own motion, give automatic directions, in the form attached. Amongst other things includes a direction for adjournment of petition for one hour appointment for case management and (where appropriate) costs management (PD 3E para.5(a)). Applies to petitions issued in the High Court (Rolls Building) with effect from May 1, 2015. (See ***Civil Procedure 2015*** Vol. 2 paras 1A-176, 2G-46.1 & 2G-46.5+.)

In Detail

PERMISSION TO APPEAL TO THE COURT OF APPEAL

A. Permission of lower court

By section 7 of the Courts and Legal Services Act 1990, section 18 of (what was then entitled) the Supreme Court Act 1981 (restrictions on appeals to Court of Appeal) was significantly amended so as to provide that, in any such class of case as may be prescribed by rules of court, an appeal shall lie to the Court of Appeal "only with the leave of the Court of Appeal" or with the leave of "such court or tribunal as may be specified by rules in relation to that class".

Rules extending the circumstances in which leave to appeal to the Court of Appeal, made in exercise of the powers granted by section 18 as amended, were enacted by the R.S.C. (Amendment) 1993 (SI 1993/2133) and came into effect on October 1, 1993. By that statutory instrument, rule 1B (Classes of case where leave to appeal is required) was inserted in RSC Order 59 (Appeals to the Court of Appeal). Paragraph (3) of that rule (following section 18, as amended) stated that leave to appeal to the Court of Appeal may be given "by the court or tribunal from whose decision the appeal is sought or by the Court of Appeal". (It is noteworthy that this provision did not insist that, where leave was given by the court below, it had to be given by the judge of that court who made the decision appealed.) Rule 1B had to be read with para.(4) of r.14 of RSC Order 59 (applications to Court of Appeal) which stated that wherever under the RSC an application could be made either to the court below or to the Court of Appeal (whether for leave to appeal or for some other purpose) "it shall not be made in the first instance to the Court of Appeal, except where there are special circumstances which make it impossible or impracticable to apply to the court below". (That was a rule of very long-standing, though the words of exception were added in 1965 to meet certain practical difficulties that had emerged for various reasons; e.g. because judges of the lower courts were often peripatetic or part-time.) It is notable that, as so structured, the primary legislation and the rules enabled a would-be appellant to make two applications for leave to appeal; first to the court below, and if that was unsuccessful, secondly to the Court of Appeal. But where the circumstances came within the exceptions provided for by r.14(4) the would-be appellant could apply direct to the Court of Appeal.

Section 18 stated that where rules provided that leave to appeal was required for an appeal in any particular class of case such rules may provide that leave may be granted only by the Court of Appeal itself or only by the lower court. However, the rules as made by SI 1993/2133 did not take advantage of the power to discriminate in this way and provided that in all classes of case where leave was required for the exercise of a right of appeal it may be given either by the Court of Appeal or, alternatively, by the court or tribunal below, subject to r.14(4) (which the amending rules did not disturb).

The next leap forward for requirements for leave to appeal to the Court of Appeal came after the publication of the Report of the Review of the Court of Appeal (Civil Division) (September 1997) (the Bowman Report) in which it was recommended that, subject to only a few exceptions, the requirement for leave to appeal should be extended to all appeals going to the Court of Appeal. In that Review the argument that leave to appeal to the Court of Appeal should be a matter solely for the Court and that the lower court should have no power to grant or refuse leave was considered. In the Report (where relevant research evidence was summarised) that argument was rejected, but it was recommended that the matter be kept under review (Ch. 3 para.25 et seq). Another argument considered in the Review was that r.14(4) of RSC Order 59 should be made absolute, so that a would-be appellant would be required to make an application for leave to appeal to the court below and should not be permitted to apply to the Court of Appeal except when such application was unsuccessful. In the Report that argument also was rejected (Ch. 3 para.34 et seq).

When the CPR were introduced on April 26, 1999, the previous rules in the RSC and the CCR dealing with appeals remained in force (with some minor modifications) in the Schedules to the CPR. During 1998 and 1999 the Lord Chancellor's Department conducted consultations on proposals for the consolidation of those RSC and CCR rules in a single CPR Part and on the recommendations of the Bowman Report. These exercises included the publication in July 1999 of a set of draft rules and practice directions which in due course, and after significant further amendments and considerable reduction, emerged as Part 52 (Appeals) and Practice Direction (Appeals). In the same month new primary legislation concerning permission requirements for appeals to the Court of Appeal, and paving the way for the new appeal rules, was enacted in section 54 of the Access to Justice Act 1999.

The new Part 52 was inserted in the CPR by SI 2000/221 and, together with a single supplementing Practice Direction, was brought into effect on May 2, 2000. RSC Order 59 (together with other RSC and CCR Orders dealing with

appeals) was revoked. Provisions in Part 52 implemented section 54 of the 1999 Act. In r.52.3 (Permission), para. (2) stated that an application for permission (formerly "leave") to appeal may be made (a) to the lower court at the hearing at which the decision to appeal was made, or (b) to the appeal court in an appeal notice. That rule applied to appeals, not only to the Court of Appeal, but to the County Court and to the High Court. Paragrap (2) has remained in that form ever since. Insofar as it applies to appeals to the Court of Appeal, r.52.3(2) in effect re-enacted former para. (3) of RSC Order 59, r.1B (see above). Paragraph (3) of r.52.3 stated that where the lower court refuses an application for permission to appeal, a further application for permission to appeal may be made to the appeal court. Paragraph (3) has remained in that form ever since.

It is to be noted that nothing in Part 52 (either in its draft form or as enacted) re-enacted para.(4) of r.14 of RSC Order 59 (see above). However, in Practice Direction (Appeals), under the heading "Court to which permission to appeal application should be made" paras 4.6 and 4.7 stated that an application for permission to appeal "should be made orally at the hearing at which the decision to be appealed against is made" and where no such application is made or the lower court refuses permission, an application for permission to appeal may be made to the appeal court. Those directions were open to the interpretation that they were mandatory rather than directory and that a party wishing to appeal to the Court of Appeal against a decision of a lower court had to apply initially to the lower court for permission to appeal. However, they cannot be regarded as clear directions to that effect, and certainly not as clear attempts to replicate para.(4) of r.14 of RSC Order 59, albeit in directions rather than in rule form, which was stated in mandatory terms (subject to the "impossible or impracticable" exception). What was mandatory about para.4.6 if anything was that, if application were made to the lower court, it had to be made orally. That particular requirement was inserted in an effort to make sure that a would-be appellant's right to make an application for permission to the lower court (before trying his or her luck in the Court of Appeal if necessary) was exercisable by a quick and cheap procedure which did not contribute to costs and delays. (It is noteworthy that the draft versions of paras 4.6 and 4.7 as published during the 1989 to 1999 consultation exercises conducted by the Lord Chancellor's Department, were much more explicit in encouraging would-be appellants to apply initially to the lower court in certain circumstances, and in part used language similar to that employed in para.(4) of r.14 of RSC Order 59.)

The interpretation that a party wishing to appeal to the Court of Appeal against a decision of a lower court should initially apply to the lower court for permission to appeal was promoted in the commentary on r.52.3 and paras 4.6 and 4.7 of Practice Direction (Appeals) in the White Book (first appearing in Vol. 1 of the Autumn 2000 edition in paras 52.3.3 to 52.3.5, and appearing in Vol. 1 of the 2015 edition in para.52.3.4), but it was made clear therein that there were no sanctions imposed for non-compliance. The guidance given in that commentary was endorsed by the Court of Appeal in the case of *In re T. (A Child) (Contact: Permission to Appeal)*, [2002] EWCA Civ 1736, [2003] 1 F.L.R. 531, CA, where Arden L.J. (agreeing with Thorpe L.J.) stated (para.58) that where a judgment is given by a judge of the Family Division sitting in the RCJ (whether reserved or unreserved), an application for permission to appeal should be made to him or her. Her ladyship explained that, in her experience, that was the practice normally followed in the Chancery Division.

With effect from October 1, 2012, Practice Direction 52 (Appeals) was revoked. Thereafter, in Practice Direction 52A (Appeals: General Provisions), under the heading "Where to apply for permission", para.4.1 stated (and still states) that an application for permission to appeal may be made (a) to the lower court at the hearing at which the decision to be appealed against is given (in which case the lower court may adjourn the hearing to give a party an opportunity to apply for permission to appeal); or (b) where the lower court refuses permission to appeal or where no application is made to the lower court, to the appeal court in accordance with r.52.4. By no stretch of the imagination are those directions open to the interpretation that a party wishing to appeal to the Court of Appeal against a decision of a lower court should initially apply to the lower court for permission to appeal. There is nothing mandatory about them.

In the recent case of *P v P*, [2015] EWCA Civ 447, May 6, 2015, CA, unrep., a judge sitting in the Family Division at the RCJ dealing with an application for ancillary relief in divorce proceedings ruled that an application for permission to appeal to the Court of Appeal against a decision made by a judge in such circumstances "must always be made to the judge at first instance before an approach is made to the Court of Appeal". (For summary of this case, see the "In Brief" section of this issue of CP News.) In the Court of Appeal, counsel accepted that the judge's ruling accorded with the law as it stood before October 1, 2012, but submitted that it did not accord with the law as it stood thereafter. Presumably the concession was based on the view (doubted above) that paras 4.6 and 4.7 of Practice Direction 52 stipulated that an initial application should be made to the lower court, and the submission was based on the fact that para.4.1 of Practice Direction 52A imposes no such requirement, either expressly or by implication.

In dealing with the point on the appeal Jackson L.J. was prepared to accept that analysis, even to the extent of accepting (surprisingly) that before October 1, 2012, an initial application to the lower court was "a mandatory requirement". However, his lordship held that, for the five reasons set out in the commentary in para.52.3.4 of the

White Book it was "good practice" for any party contemplating an appeal in family cases or in civil litigation in the first instance to seek permission from the lower court. Those five reasons are:

"(a) The judge below is fully seised of the matter and so the application will take minimal time. Indeed the judge may have already decided that the case raises questions fit for appeal.

(b) An application at this stage involves neither party in additional cost.

(c) No harm is done if the application fails. The litigant enjoys two bites at the cherry.

(d) If the application succeeds and the litigant subsequently decides to appeal, they avoid the expensive and time-consuming permission stage in the Appeal Court.

(e) No harm is done if the application succeeds but the litigant subsequently decides not to appeal."

In *P v P*, the judge at first instance referred to these five reasons and suggested that, where the proceedings in the lower court are conducted by a judge who is a specialist in the subject-matter of the claim, that would be an additional good reason for initially making any application for permission to appeal to the lower court.

In the Bowman Review attention was given to the question of the "success rate" of appeals, and particularly to the question whether appeals to the Court of Appeal are more successful when brought with the permission of the Court than when brought with the permission of a lower court. (In the Report of the Review it was recommended that the latter was a matter which should be monitored.) If there is a case for arguing that a party wishing to appeal to the Court of Appeal should first apply for permission to do so from the lower court (generally, or in particular classes of case), thereby in effect re-instating para.(4) of r.14 of RSC Order 59, it would be useful to know whether the consequences of that would be an increase or a decrease in the number of appeals succeeding in the Court. If it could be demonstrated, for example, that appeals made with the permission of the court below fail in a significantly different proportion of cases than those where permission is granted by the Court of Appeal, that would be cause to doubt the wisdom of re-instating para.(4) of r.14 of RSC Order 59.

B. Appeal from refusal of permission

In *Sarfraz v Disclosure and Barring Service* [2015] EWCA Civ 544, May 22, 2015, CA, unrep., a medical practitioner (C) appealed to the Upper Tribunal against a decision affecting his interests made by the Disclosure and Barring Service (an Executive Non-Governmental Public Body). C applied to the Upper Tribunal for permission to appeal to the Upper Tribunal against that decision. The Upper Tribunal refused permission. C thereupon applied to the Court of Appeal for permission to appeal to the Court against the decision of the Upper Tribunal refusing C permission to appeal to it. The Court of Appeal, constituted by two-judges (Lord Dyson M.R. & Kitchin L.J.) held that, in these circumstances, there was no jurisdiction in the Court to give permission to appeal (for summary of this case, see "In Brief" section of this issue of CP News).

As is explained in the commentary on the Access to Justice Act 1990 s.54(4) in the White Book (see Vol. 2 para.9A-842.1, p 2897), in the case of *In re Housing of the Working Classes Act 1890, Ex p. Stevenson* [1892] 1 Q.B. 609, CA, Lord Esher MR stated that, on the basis of the authorities, in particular *Lane v Esdaile* [1891] 1 A.C. 210, HL, his lordship was prepared to lay down the general proposition that wherever power is given to a legal authority (e.g. a court or tribunal) by legislation to grant or refuse permission to appeal, the decision of that authority is, "from the very nature of the thing", final and conclusive; no appeal may be made from a decision in exercise of such a power unless the legislation expressly states otherwise. As the Master of the Rolls stated in giving judgment in the *Sarfraz* case (para.10), the application of the so-called "*Lane v Esdaile* principle" is a matter which has troubled the courts on a significant number of occasions in different statutory contexts. (The principle is referred to the Supreme Court practice directions; see White Book Vol. 2 paras 4A-57 and 4A-60.

In the Tribunals, Courts and Enforcement Act 2007 (White Book Vol. 2 para.9A-1007, p 2919) section 13(1) gives a "right to appeal" from "a decision" made by the Upper Tribunal other than "an excluded decision" as defined by s.13(8). The decision of the Upper Tribunal of which C complained was not an excluded decision. C's submission was that the exceptions to the right of appeal provided by s.13(1) are set out exhaustively in s.13(8) and there is no room for a further exception, whether based on the *Lane v Esdaile* principle or on some other ground, outside s.13(8). The Court rejected that submission, holding that in the absence of clear contrary statutory language, the *Lane v Esdaile* principle applies to *any* provision which requires permission as a condition of the right to appeal (para.35). There is no support in the authorities or justification as a matter of principle for holding that the principle should only apply to decisions by tribunals of law (para.36).

TRANSFER OF CLAIMS–FROM CHANCERY DIVISION AT THE RCJ

In April, 2015, the Chief Master of the Chancery Division (Master Marsh), with the approval of the Chancellor, issued Guidelines providing "informal guidance" for Chancery Masters and Deputies concerning the transfer of claims out of the Chancery Division in London. So the "audience", as it were, for these Guidelines is not practitioners, but Masters who find themselves, in a particular case, in a position were they have power to direct that proceedings should be transferred out. It is noted in the Guidelines that Part 7 and Part 8 claims may sometimes be dealt with more efficiently by a Master rather than by transferring the claim, and in that respect draw attention to the revised version of Practice Direction 2B (Allocation of Cases to Levels of Judiciary) which came into effect on April 6, 2015 (see White Book 2015 Vol. 1 para.2BPD.1, p 46) and to a contemporaneous Guidance Note relating to trials by Chancery Masters approved by the Chancellor.

In the CPR and in Court Guides numerous provisions deal with the transfer of claims, to or from one court to another, from one Division of the High Court to another, and to and from specialist lists. In the CPR the principal source is Part 30 (Transfer) as supplemented by Practice Direction 30 and provisions therein are incorporated by reference or referred to elsewhere, for example in Ch. 13 and Appendix 13 of the Chancery Guide (see White Book 2015 Vol. 2 paras 1A-135 and 1A-251) where guidance is given on transfer of claims to and from Chancery District Registries and the County Court. The policy objectives that transfer provisions are designed to achieve are several. One of them is that of ensuring the optimum use court resources and that is the one that enervates the Chancery Masters' Guidelines. When contrasted with other common law legal systems, the English arrangements for the transfer of claims are astonishingly flexible, but then of course the degree of "forum fragmentation" that the English court system has undergone in modern times has no parallel elsewhere. The price that has been paid for this flexibility is that the relevant provisions, be they in rules of court, in practice directions, in court guides, or in practice notes such as that now issued by the Chief Master, have in combination become an interlocking and overlapping mass not easily penetrated by the judge or practitioner faced with the question whether, in a particular claim in a particular court, the claim (or perhaps merely a part of it) may or should or must be transferred "out", and if so whether "up" or "down" or "sideways", and if so, whether now or later.

The Chancery Masters' Guidelines are a further addition to this mass, albeit one that is clearly focussed and drafted in terms which show awareness of the wider context. Paragraph 5 states that consideration should be given, where relevant, to the terms of para.(2) of CPR r.30.3 (Criteria for a transfer order), and also to the directions concerning case management in the RCJ providing for transfer of claims to the County Court set out in paras 2.1 to 2.6 of Practice Direction 29 (The Multi-Track). For convenience, the texts of r.30.3(2) and of those PD 29 directions are attached to the Guidelines as Appendices. Paragraph 5 of the Guidelines also states that consideration should be given, where relevant, to Part 63 (Intellectual Property Claims). In that Part, r.63.18 (Transfer of proceedings) states that, when considering whether to transfer proceedings to or from the Intellectual Property Enterprise Court, the court will have regard to the provisions of Practice Direction 30 (see White Book Vol. 2, para.2F-17.11, p 928).

Paragraph 5 of the Guidelines further states that consideration should be given, where relevant, to Practice Direction 49A (Applications under Companies Acts and Related Legislation) (see White Book Vol. 2 para.2G-7, p 995), to Practice Direction 49B (Order Under Section 127 Insolvency Act 1986) (see ibid Vol. 2 para.2G-47, p 1008), and to Part 57 (Probate, Inheritance and Presumption of Death) (ibid Vol. 1 para.57.0.1, p 2140). Those sources contain a few provisions dealing with venue but nothing expressly dealing with the transfer of proceedings.

The text of the Chancery Master's Guidelines are set out below, excluding the two appendices which, as explained above, for convenience include the text of CPR r.30.3(2) (erroneously referred to in the Guidelines as "Part 30(3)(2)") and of paras 2.1 to 2.6 of Practice Direction 29. In White Book 2015, those provisions are found in Volume 1 at, respectively, para.30.3, p 949, and para.29PD.2, p 936, and need not be reproduced here.

"Chancery Masters' Guidelines for the Transfer of Claims

1. This document provides informal guidance for Chancery Masters and Deputies concerning the transfer of claims out of the Chancery Division in London. The guidance has been approved by The Chancellor.

2. Claims are transferred out where another court is more suitable for case management and trial of a claim. These guidelines relate to transfers to:

   (a) a Chancery District Registry outside London;

   (b) the County Court;

   (c) another Division of the High Court.

3. The objective of these guidelines is to ensure that only cases which may properly be regarded as being suitable for management and trial in the Chancery Division of the High Court in London are retained there. All other claims should be transferred out.

4. It is recognised that a decision to retain or transfer a case is an exercise of judicial discretion in accordance with the overriding objective and the other provisions of the CPR. This guidance is not intended to fetter the exercise of that discretion on a case by case basis.

5. Consideration should be given, where relevant, to:

   (a) PD29 2.1 to 2.6 (appendix 1) which provides guidance for case management within the High Court in London;

   (b) Part 30(3)(2) (appendix 2) which sets out criteria the court should take in to account when considering transfer. The criteria are not exclusive;

   (c) Part 49 and PD49A and PD49B – Specialist Proceedings;

   (d) Part 57 – Probate and Inheritance;

   (e) Part 63 – Intellectual Property.

6. Active consideration should be given at all stages of the management of a claim to the appropriate venue for the claim to be managed and tried. If a case is suitable for transfer, it is generally preferable for it to be transferred before detailed case management has taken place, leaving the receiving court to case manage the claim in accordance with its usual approach.

7. PD29 2.2 suggests that a claim with a value of less than £100,000 will generally be transferred to the County Court unless;

   (a) it is required by an enactment to be tried in the High Court, or

   (b) it falls within a specialist list, or

   (c) it falls within one of the categories specified in the list at PD29 2.6 .

8. The figure of £100,000 in PD29 2.2 accords with the current minimum value of money claims which may be issued in the High Court. The value of a claim is not a consideration which has greater weight than the other criteria set out in CPR 30(3)(2) but it is likely to be a factor with considerable influence in making a decision about transfer to the County Court or a specialist list. The figure of £100,000 mentioned in PD29 is not generally regarded as a relevant measure for money claims in the Chancery Division in London. Nor is £300,000 (the value figure beyond which court fees do not increase). Similarly, for probate and equity claims, the figures of £30,000 and £350,000 respectively are not determinative.

9. If the value of the claim is ascertainable, particular focus should be given to the possibility of transferring Part 7 claims with a value of less than £500,000. Factors which may point to retention of such claims in the High Court include:

   (a) complex facts and/or

   (b) complex or non-routine legal issues and/or

   (c) complex relief and/or

   (d) parties based outside the jurisdiction and/or

   (e) public interest or importance and/or

   (f) large numbers of parties and/or

   (g) related claim and/or

   (h) the saving of costs and/or

   (i) efficiency in the use of judicial resources .

10. The availability of a judge with the specialist skills to deal with the claim is, however, always an important consideration when considering whether or not to transfer it. There are two circuit judges at Central London County Court who are specialised in Chancery work, and the waiting times at Central London are likely to be shorter than in the High Court for a trial before a judge. The delay in having a case heard should also be a consideration when deciding whether to transfer a case to the County Court or not and regard should be had to listing information provided by Central London CC, Chancery List.

11. When making an order for transfer of a claim to Central London CC, Chancery List consideration should be given to including a direction in the order that the case is considered to be suitable for trial only by a specialist circuit judge. Such a direction is not binding on the County Court but should be taken into account.

12. PD 29 at 2.6(1), (3) and (7) indicates that professional negligence claims, fraud and undue influence claims and contentious probate claims are suitable for trial in the High Court, but it does not follow that claims within these categories should necessarily remain in the High Court. Less complex and/or lower value claims of these types are suitable for trial in Central London County Court, Chancery List. Serious cases of fraud, however, should generally remain in the High Court. Certain professional negligence claims may be better suited to the Queen's Bench Division.

13. Part 7 and Part 8 claims may sometimes be dealt with more efficiently by a Master rather than transferring the claim. Note the revised form of PD2B which came in to effect on 6 April 2015 and the Guidance Note relating to trials by Masters approved by the Chancellor.

14. Many claims under the Inheritance Act will be suitable for trial in the County Court and should generally be transferred to Central London County Court, Chancery List unless the Master is willing to try the claim and it is efficient to do so. Inheritance Act claims by a spouse will usually be suitable for transfer to the Family Division. Where there is a related Probate claim, or other Part 7 claim, the overall scope of the issues before the Court should be considered and generally all related claims should either be retained in the High Court or transferred out. The County Court limit for probate claims is £30,000, but claims well above that figure should be transferred to the County Court nonetheless.

15. Most claims under TOLATA [Trusts of Land and Appointment of Trustees Act 1996] will be suitable for transfer to the County Court.

16. Claims may only be transferred to the Commercial Court, the Mercantile Court or the TCC with the consent of the Chancellor and the senior judge in those venues (Part 30.5(4))

17. Whenever the parties and their witnesses are principally based within the area of a District Registry, the claim should normally be transferred. The place where the legal representatives are based is a relevant consideration, but no more than one factor to be taken into account.

Matthew Marsh
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