Court of Appeal

*Handley and another *v* Lake Jackson Solicitors (a firm)

Lopes *v* Croydon London Borough Council

Christie Owen & Davies Ltd *v* Awan and another

[2016] EWCA Civ 465

2016 May 3; 24 Moore-Bick, Christopher Clarke LJJ

County Court — Appeal from — Jurisdiction — Appeals to judge in County Court determined with costs orders made at time or at later hearing or in writing — Party seeking to appeal determinations including such costs orders — Where appeal lying — Applicable principles and guidance — Access to Justice Act 1999 (c 22), s 55 — CPR r 52.13 — Access to Justice Act 1999 (Destination of Appeals) Order 2000 (SI 2000/1071), art 5

Where the County Court has heard an appeal from a district judge or deputy district judge and ruled on the issues determined by him (including the validity or otherwise of the claims, the relief to be granted and the costs of the hearing before the district judge), by virtue of article 5 of the Access to Justice Act 1999 (Destination of Appeals) Order 2000[1] any appeal will lie only to the Court of Appeal. Permission must be sought from the Court of Appeal, pursuant to CPR r 52.13[2], and the second appeals test, set out in section 55(1) of the Access to Justice Act 1999[3], will apply. In respect of the costs of the appeal to the judge in the County Court, any appeal will lie to the Court of Appeal, pursuant to article 5 of the 2000 Order, but the second appeals test will not apply. It would be open to the judge in the County Court to grant permission to appeal to the Court of Appeal in respect of the costs of the appeal to the judge in the County Court and the normal test for permission will apply. It would also be open to the Court of Appeal to grant permission applying the same test. If there has not been what can properly be regarded as a hearing of the appeal, any appeal (which is almost certainly to be one on costs) is to the High Court judge and the normal test will apply (post, paras 34, 41–42, 44–47, 51, 52, 54, 55).

Where, therefore, in each of three separate cases the judge in the County Court made, or declined to make, an order for costs in respect of an appeal to him which had either been determined by a judgment of the court on its merits or withdrawn, and one of the parties applied to the Court of Appeal for permission to appeal against that order for costs, among other things—

Held, refusing permission in the first case but granting permission in the second and third cases, that in the first and third cases, since the County Court had heard the appeals and ruled on the issues, the appeals lay to the Court of Appeal; that in so far as the appeals related to the decision on costs, the "second appeals test" in section 55(1) of the Access to Justice Act 1999 did not apply; that in the second case, since the appeal had been withdrawn and the county court had not heard the appeal, the appeal against the costs of that withdrawal lay to the High Court, not the Court of Appeal; and that the second case would be therefore be remitted to the High Court and the Court of Appeal would exercise the jurisdiction of the High Court to grant permission to appeal (post, paras 65, 71, 75, 77).

[1] Access to Justice Act 1999 (Destination of Appeals) Order 2000, art 5: see post, para 35.
[2] CPR r 52.13: see post, para 33.
[3] Access to Justice Act 1999, s 55(1): see post, para 32.

A The following cases are referred to in the judgment of Christopher Clarke LJ:

Cramp v Hastings Borough Council (Note) [2005] EWCA Civ 1005; [2005] 4 All ER 1014, CA
Denton v TH White Ltd (De Laval Ltd, Part 20 defendant) (Practice Note) [2014] EWCA Civ 906; [2014] 1 WLR 3926; [2015] 1 All ER 880, CA
Jolly v Jay [2002] EWCA Civ 277; The Times, 3 April 2002, CA
R v Royal Borough of Kensington and Chelsea, Ex p Bayani (1990) 22 HLR 406, CA
B *R (M) v Croydon London Borough Council* [2012] EWCA Civ 595; [2012] 1 WLR 2607; [2012] 3 All ER 1237; [2012] LGR 822, CA
Rubric Lois King v Lane (unreported) 13 March 2012 Stadlen J
Unichi v Southwark London Borough Council [2013] EWHC 3681 (QB)

The following additional cases were cited in argument:

C *Dooley v Parker* [2002] EWCA Civ 96; [2002] CPLR 25, CA
R v Secretary of State for Social Security, Ex p Sarwar [1997] 3 CMLR 648, CA
Rikha Begum v Tower Hamlets London Borough Council [2005] EWCA Civ 340; [2005] 1 WLR 2103; [2005] LGR 503, CA
Riniker v University College London (Practice Note) [2001] 1 WLR 13, CA
Watson v Wandsworth London Borough Council [2010] EWCA Civ 1558; [2011] HLR 9, CA

D

APPLICATIONS

Handley and another v Lake Jackson Solicitors (a firm)

By a claim form the claimants, Ian Handley and Sheila Evans, brought an action against the defendant, Lake Jackson Solicitors (a firm). By a judgment dated 18 December 2012 District Judge Parfitt sitting in the
E Mayor's and City of London Court gave judgment in favour of the claimants. The defendant appealed. By order dated 30 July 2013 Judge Birtles sitting in the Mayor's and City of London Court dismissed the appeal. The defendant sought permission to appeal to the Court of Appeal but later its application was dismissed by consent. By order dated 30 October 2013 Judge Birtles ordered the defendant to pay the claimants' costs of the appeal
F summarily assessed and to make an interim payment of the costs of the action. By order dated 22 November 2013 Judge Birtles refused an application to set the order aside.

By an appellant's notice dated 24 December 2013 the defendant sought permission to appeal the order of 22 November 2013 on the ground that it was erroneous in law. The Civil Appeals Office rejected the appellant's notice for want of jurisdiction and the matter was transferred to the High
G Court. By order dated 25 February 2015 Teare J declared that the court had no jurisdiction to deal with the application for permission to appeal and transferred the matter to the Court of Appeal.

The facts are stated in the judgment of Christopher Clarke LJ.

Lopes v Croydon London Borough Council

H By an appellant's notice dated 4 June 2014 the applicant, Vanda Lopes, appealed against the decisions of the defendant, Croydon London Borough Council, dated 13 September 2013 and, on review, 13 May 2014 to refuse her application to be housed as a homeless person. On 23 July 2014 the parties agreed a consent order which provided for withdrawal of the

appeal, the vacation of the trial date and, in the light of new evidence, a fresh review decision, with written submission on costs to be filed and served. The parties appeared the next day before Judge Bailey sitting in the County Court at Central London who gave permission to withdraw the appeal and to vacate the hearing in accordance with the terms of the consent order. By order dated 30 March 2015 Judge Bailey awarded the applicant 85% of her costs of the appeal against the defendant's review decision of 13 May 2014.

By an appellant's notice dated 24 April 2015 the defendant sought permission to appeal. The grounds were, inter alia, that the judge had erred in his approach in the light of *R (M) v Croydon London Borough Council* [2012] 1 WLR 2607 by not considering whether the submission of fresh evidence at the appeal which rendered the appeal academic constituted a good reason for the applicant not to be awarded her costs. The papers were delivered to the Civil Appeals Office when the defendant intended the appeal to be to the High Court.

The facts are stated in the judgment of Christopher Clarke LJ.

Christie Owen & Davies Ltd v Awan and another

By a claim form the claimant, Christie Owen & Davies Ltd, sought to recover its fee as sole selling agent of a care home run by the defendants, Sarfaraz Awan and Isabelle Awan. Following judgment on 4 September 2009 under which the claimant recovered the fees and its costs of the action, District Judge Ayer made an order dated 8 August 2011 for the sale of the defendants' family home. A second order for sale dated 20 December 2013 related to the costs of various orders made against the defendants plus interest. The defendants appealed against those orders. By order dated 4 April 2014 Judge Davies sitting in the Luton County Court struck out the appeal for a failure to comply with an unless order.

The defendants appealed against the strike out order. By order dated 15 October 2014 Mitting J allowed the appeal against that order, remitted the appeal to another judge in the County Court and ordered that the costs of the appeal to the High Court were to follow the remitted appeal.

By order dated 25 June 2015 Judge Tolson QC sitting in County Court at Oxford on a restored hearing allowed the appeal of the defendants against the two orders for sale. The judge set aside both orders and the costs orders contained therein and on 27 July 2015 made a final order with certain costs orders in relation to the hearings. The order as to costs contained in paragraph 4 read:

> "(a) The claimant shall pay the defendants' costs of these appeals assessed in the sum of £2,000. (b) There will be no order for costs in respect of the appeal from the orders of Judge Davies dated 4 April 2014 (i e the appeal before Mitting J). (c) The order for costs made by Judge Davies on 4 April 2014 (remitted to this court by Mitting J) shall stand, namely an order that the defendants pay the claimant's costs in respect of the hearings before Judge Davies assessed at £4,500. (d) There will be no order in respect of the costs of obtaining the orders for sale (that is to say whilst the defendants are relieved of the sums of £2,815 and £1,990·08, they shall not be entitled to any order in respect of their own costs of

A opposing the orders for sale). (e) The sum of £2,815 paid by the defendants to the claimant pursuant to the first order for sale and the sum of £2,000 (at (a) above) will be set off against the sum of £4,550 payable by the defendants under (c) above. The claimant shall give credit for any balance in favour of the defendants, and the sum of £1,990·08."

By an appellant's notice dated 4 August 2015 the defendants sought
B permission to appeal against the costs order. The grounds were, inter alia, that the judge had lacked power to make the costs orders and/or erred in the exercise of his discretion at paragraph 4(c) to maintain the costs order made on 4 April 2014 by Judge Davies (which formed part of the order to strike out the defendants' application to appeal which was successfully appealed and set aside); and that as a consequence the judge had erred at
C paragraph 4(e) in wrongly offsetting the costs awarded the claimant pursuant to that costs order against the sums owed to the defendants. The defendants lodged the notice at the High Court which refused to accept jurisdiction and transferred the defendants' application to the Court of Appeal.

By directions dated 19 November 2015 and 14 March 2016 the Court of
D Appeal (Christopher Clarke LJ) directed that the three applications for permission to appeal which raised the same jurisdictional question be listed as a hearing before the Court of Appeal for permission to appeal only, on the basis that the Court of Appeal would consider (i) which court had jurisdiction and (ii) whether, if the Court of Appeal had jurisdiction, permission should be granted.

E The facts are stated in the judgment of Christopher Clarke LJ.

Mark Jackson (in person) for the defendant in the first case.

David Lintott (instructed by *Gowling WLG (UK) LLP, Birmingham*) for the defendant in the second case.

Adrian Berry (instructed by *Hansen Palomares*) for the claimant in the second case.

F *Jason Raeburn* (appearing pro bono) for the defendants in the third case.

The claimants in the first and third cases did not appear and were not represented.

The court took time for consideration.

G 24 May 2016. The following judgments were handed down.

CHRISTOPHER CLARKE LJ

1 Questions have arisen as to the correct destination for an appeal in circumstances where (a) there has been an appeal to the county court which has either been determined by a judgment of the court on its merits or withdrawn; (b) the county court has made, or declined to make, an order for
H costs in respect of the appeal; and (c) what is sought to be appealed is (or includes) the order in respect of those costs. Such an order may be made at the same time as the judge delivers judgment; or later, either at a further oral hearing or in writing after written submissions. Three cases have been listed before us for consideration where the issue of destination arises.

The three cases

Christie Owen & Davies Ltd v Awan another

2 In this case Mr and Mrs Awan were the defendants. Two district judges made orders for the sale of the defendants' family home on 8 August 2011 and 20 December 2013 respectively. These gave effect to final charging orders made on 18 May 2010 and 27 August 2013. The first order had been made by way of execution of a judgment of 4 September 2009 in favour of Christie Owen & Davies Ltd, the claimant, under which it recovered its fee as sole selling agent of a care home run by the defendants plus interest and its costs of the action. The second order related to the costs of various orders made against the defendants plus interest. The moneys due under the first order for sale have been paid. The property was to stand charged with the claimant's costs assessed at £2,815 and £1,990·08 respectively.

3 The first order for sale was made without jurisdiction because the amount owing of over £87,000 exceeded the then county court limit: see section 23(c) of the County Courts Act 1984. The first order was also made on the erroneous basis that the property was not the family home.

4 On 4 April 2014 the defendants' appeal against those orders was struck out by Judge Davies for a failure to comply with an unless order of Judge Hildyard QC of 28 March 2014, which had required the defendants to serve on or before 2 April 2004 (i) a document indicating every application Mr Awan had made; (ii) the skeleton argument and bundle used for a hearing on 5 February 2014; and (iii) a chronology in relation and issues taken in relation to [sic] the civil restraint order made, as ordered on that date. The hearing on 5 February had been a hearing attended by Mr Awan but not by anyone for the claimant. The judge heard and granted an application for a stay of the order made on 20 December 2013 (sealed on 8 January 2014) and made provision for a directions hearing on 4 April 2014.

5 Judge Davies accepted that a skeleton filed by 2 April 2014 more or less complied with, (i) albeit late. But, as she held, Mr Awan had made a deliberate choice not to file the skeleton as required. As to the chronology the defendant had failed to produce a chronology limited to events relating to the civil restraint order within the time specified, although he had turned up with one on 5 February 2014. The defendants were ordered to pay the claimant's costs of £4,550.

6 The defendants appealed against that strike out order. On 15 October 2014 Mitting J allowed their appeal and remitted "the case" to be heard in the Luton County Court by any judge other than Judge Davies. The costs of the appeal to the High Court were ordered to follow the remitted appeal. Mitting J took the view that the failure to provide the skeleton argument was significant because it was the only way of knowing whether Mr Awan had complied with his duty of candour. But the failure to provide the separate civil restraint order chronology was not. The grounds on which Mitting J allowed the appeal were that Judge Davies had not approached the case following the guidance given in *Denton v TH White Ltd (De Laval Ltd, Part 20 defendant) (Practice Note)* [2014] 1 WLR 3926 (not available to her at the time of her decision) and that if she had done so she would have reached a different conclusion.

7 On 11 June 2015 Judge Tolson QC heard the defendants' restored appeal. He gave judgment on the matter on 25 June 2015 but reserved the

question of costs. He then received written submissions. In his judgment he held that the first order for sale was made without jurisdiction and was an interference with the defendants' rights under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms in respect of their home. The second order was in respect of costs incurred by the claimant in opposing the defendants' attempt to set aside or stay an order for sale which was made without jurisdiction and on the false basis that the property was not the defendants' home; and which the defendants were entitled to have set aside. In addition, since the defendants were entitled to have the first order set aside their indebtedness to the claimant would reduce by £2,815 absent some other costs order. In those circumstances the second order for sale was also to be set aside.

8 By an order dated 27 July 2015 he allowed the appeals (for which he gave permission) from the orders for sale. He set both orders for sale aside together with the costs orders contained in them. The claimant was ordered to pay the defendants' costs of the appeals summarily assessed at £2,000. There was to be no order for the costs of the appeal before Mitting J; but the order for costs made by Judge Davies, namely an order that the defendants pay the claimant's costs assessed at £4,550, was to stand. There was to be no order in respect of the costs of obtaining the two orders for sale. The sum of £2,815 paid by the defendants to the claimant pursuant to the first order for sale and the sum of £2,000 was to be set off against the £4,550 costs which had been awarded to the claimant by Judge Davies under her order of 4 April 2014. The claimant was to give credit for any balance in favour of the defendants and for the sum of £1,990·08.

9 The judge's reasons are set out in the order. In essence they were that the hearings before Judge Davies were caused by failings on the part of the defendants in respect of which the claimant had to come to court to seek relief. There was no justification for altering the costs orders made because they were highly likely to have been made even if the appeals had not been struck out.

10 On 4 August 2015 the defendants lodged an appeal notice at the High Court for permission to appeal against paragraph 4 of Judge Tolson QC's order. The High Court staff refused to accept jurisdiction and transferred the defendants' application to the Court of Appeal.

Lopes v Croydon London Borough Council

11 Ms Lopes, who had moved to the United Kingdom in July 2012, applied to Croydon London Borough Council as homeless in August 2013. She had been living with the mother of her partner, whom I will describe as her mother-in-law, in Portugal before she moved to the UK. When in the UK she had lived in different temporary accommodation. She was interviewed by officers of the council on 20 August and 4 September 2013. At both interviews she told them, according to their notes, that her mother-in-law had not asked her to leave. At the second interview she said that her mother-in-law had said that "they needed to find a solution".

12 On 13 September 2013 the council issued a decision under section 184 of the Housing Act 1996 holding that she was not homeless as there was accommodation in Portugal which it was reasonable for her to occupy. On 22 September 2013 Ms Lopes wrote to the council saying that what she had said at interview was that her mother-in-law did not give her

an eviction letter because that was not the custom in Portugal but did ask her to leave. She invited a review of the decision because she could not go back to Portugal because "my partner's mummy does not want us there".

13 On 13 May 2014 the council issued a section 202 of the Housing Act 1996 review decision upholding the earlier section 184 decision. The decision recorded that the relevant council officer did not accept what the applicant had said in her letter of 22 September 2013 and said that he was satisfied that the family bond was sufficiently strong to enable her to return to the property.

14 On 4 June 2014 an appeal was lodged by Ms Lopes against this decision pursuant to section 204 of the Housing Act 1996. The jurisdiction of the court on appeal is limited to errors of law and the scope of the proceedings is equivalent to that of a judicial review. On 26 June 2014 Ms Lopes signed a witness statement which exhibited a letter from her mother-in-law dated 19 May 2014 stating in terms that she would not be able or prepared to accommodate Ms Lopes and that there was no place for her in the house. In her witness statement Ms Lopes said that in 2012 her mother-in-law had asked her to leave and that her partner's brother was violent and would hit her child. She said that at the first interview in August 2013 she had asked whether she should get a letter from her mother-in-law saying that she did not want her at her home, and was told not to bother as the council would investigate; and that at the second interview she had made it clear that her mother-in-law had asked her to leave.

15 On 23 July 2014 a consent order was agreed by the parties. It provided that Ms Lopes should have permission to withdraw her appeal. The hearing listed for the 24 July 2014 should be vacated. The council would issue a fresh review decision by 18 September 2014. Unhappily this order was not produced in time for the hearing on 24 July 2014 to be vacated and both parties attended. The order provided for written submissions on costs to be filed and served. These were filed in August 2014 but for some reason only reached the judge in March 2015. Each side claimed to be entitled to costs.

16 No order in respect of costs was made on those submissions until the decision of Judge Bailey was communicated to the council on 9 April 2015 by the sending of an order dated 30 March 2015. The judge awarded the applicant 85% of her costs of the section 204 appeal against the council's review decision of 13 May 2014.

17 The council filed an appellant's notice. The person delivering the papers delivered them to the Civil Appeals Office when the intention was to appeal to the High Court. The decision to appeal to the High Court was consistent with what had happened in *Unichi v Southwark London Borough Council* [2013] EWHC 3681 (QB).

Handley v Lake Jackson Solicitors (a firm)

18 The relevant sequence of events is as follows. On 18 December 2012 District Judge Parfitt gave judgment against Lake Jackson, a firm of solicitors, in favour of the claimants who were trustees of a fund.

19 By an order dated 30 July 2013 Judge Birtles, sitting in the Mayor's and City of London Court, dismissed an appeal from District Judge Parfitt's order. On 2 August 2013 Lake Jackson appealed to the Court of Appeal ("the main appeal"). The appellant's notice, which was sealed on 5 August

A 2013, contained an application for a stay. No application for a stay was ever made to Judge Birtles; nor did the Court of Appeal ever order one.

20 On 18 September 2013 Judge Birtles ordered Lake Jackson to file their comments on the claimants' schedule of costs sent to them on 18 July 2013. He ordered that, if Lake Jackson did not reply by 4 October, he would assess the costs without their input.

B **21** On Friday 4 October 2013 Lake Jackson is said to have sent a letter to the Mayor's Court expressing concern about the order of 30 September 2013 (that being the date of sealing of the order made on 18 September 2013), which it had only recently received, because "the matter was currently the subject of an appeal" and "as such we would have thought that any issues as to costs are stayed". The letter said that Mr Jackson would be attending the counter with this letter that day to ask "that this be clarified C and as to whether he should make a formal application or not." Mr Jackson did not in fact attend at the counter and the letter was apparently sent by e-mail on 7 October 2013.

22 Subsequent attempts by Lake Jackson to seek confirmation that the letter had been received met with the response that letters took up to five working days to process. After 8 October no response was given and no D further chasing took place until on 7 November 2013 Mr Jackson attended the court and was told that the letter had not been received.

23 On 30 October 2013 Judge Birtles ordered Lake Jackson to pay the claimants' costs of the appeal summarily assessed at £11,887 and ordered an interim payment of £20,000 in respect of the costs of the action as ordered by him on 30 July 2013 within 21 days.

24 On 11 November 2013 Lake Jackson applied to set aside the order E of 30 October, sealed on 5 November.

25 On 22 November 2013 Judge Birtles refused the application to set aside the order of 30 October 2013 on the grounds that neither he nor the Court of Appeal had stayed the order. That order was sealed on 3 December 2013.

26 Lake Jackson sought to appeal the order of 22 November 2013 ("the F subsidiary appeal"). The appellant's notice asked for any orders as to costs to be stayed pending the outcome of the main appeal.

27 A page attached to the appellant's notice indicates that the appellant's notice was submitted on 24 December 2013 by e-mail and resubmitted on 28 December 2013. As appears from the letter from the Civil Appeals Office of 25 June 2014 it is not at all clear that any appellant's notice had in fact been received by then.

G **28** By an order dated 7 July 2014 the appellant's notice of 5 August 2013 was dismissed at Lake Jackson's request.

29 The appellant's notice in relation to the subsidiary appeal was rejected by the Civil Appeals Office for want of jurisdiction by a letter dated 15 July 2014. The matter was transferred to the High Court.

30 On 25 February 2015 Teare J declared that the High Court had no H jurisdiction to deal with the application for permission to appeal and transferred the matter to the Court of Appeal.

31 On 18 March 2015 Master Meacher ordered Lake Jackson to file within seven days a submission as to how the Court of Appeal had jurisdiction having regard to the decision of Stadlen J in *Rubric Lois King v Lane* (unreported) 13 March 2012.

The Access to Justice Act 1999

32 Part IV, sections 54–73 of the Access to Justice Act 1999 deals with, inter alia, the reform of the system for appeals in civil and family cases. Section 55 deals with second appeals and provides:

> "(1) Where an appeal is made to a county court or the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that— (a) the appeal would raise an important point of principle or practice, or (b) there is some other compelling reason for the Court of Appeal to hear it."

33 CPR r 52.13 provides:

> "*Second appeals to the court*
> "(1) Permission is required from the Court of Appeal for any appeal to that court from a decision of the county court or the High Court which was itself made on appeal.
> "(2) The Court of Appeal will not give permission unless it considers that— (a) the appeal would raise an important point of principle or practice; or (b) there is some other compelling reason for the Court of Appeal to hear it."

34 As is apparent section 55 and CPR r 52.13 introduce a higher threshold for permission to be granted if the appeal is from a decision itself made on appeal. I call this "the second appeals test".

35 The Access to Justice Act 1999 (Destination of Appeals Order) 2000 (as amended by article 12 of the Civil Procedure (Modification of Enactments) Order 2002 (SI 2002/439), article 2 of the Civil Procedure (Modification of Enactments) Order 2003 (SI 2003/490) and section 59 of and paragraph (2) of Schedule 11 to the Constitutional Reform Act 2005), includes the following provisions:

> "*Citation, commencement and interpretation*
> "1(1) This Order may be cited as the Access to Justice Act 1999 (Destination of Appeals) Order 2000 and shall come into force on 2 May 2000.
> "(2) In this Order— (a) 'decision' includes any judgment, order or direction of the High Court or a county court . . . (c) 'final decision' means a decision of a court that would finally determine (subject to any possible appeal or detailed assessment of costs) the entire proceedings whichever way the court decided the issues before it.
> "(3) A decision of a court shall be treated as a final decision where it— (a) is made at the conclusion of part of a hearing or trial which has been split into parts; and (b) would, if made at the conclusion of that hearing or trial, be a final decision under paragraph (2)(c).
> "*Appeals from the High Court*
> "2. Subject to articles 4 and 5, an appeal shall lie to a judge of the High Court where the decision to be appealed is made by— (a) a person holding an office referred to in Part II of Schedule 2 to the Supreme Court Act 1981; (b) a district judge of the High Court; or (c) a person appointed to act as a deputy for any person holding such an office as is referred to in

A sub-paragraphs (a) and (b) or to act as a temporary additional officer in any such office.

"*Appeals from a county court*

"3(1) Subject to articles 4 and 5 and to paragraph (2), an appeal shall lie from a decision of a county court to the High Court. (2) Subject to articles 4 and 5, where the decision to be appealed is made by a district judge or deputy district judge of a county court, an appeal shall lie to a B judge of a county court.

"*Appeals in a claim allocated to the multi-track or in specialist proceedings*

"4. An appeal shall lie to the Court of Appeal where the decision to be appealed is a final decision: (a) in a claim made under Part 7 of the Civil Procedure Rules 1998 and allocated to the multi-track under those Rules; C or (b) made in proceedings under the Companies Act 1985 or the Companies Act 1989 or to which Sections I, II or III of Part 57 or any of Parts 58 to 63 of the Civil Procedure Rules 1998 apply.

"*Appeals where decision was itself made on appeal*

"5. Where— (a) an appeal is made to a county court or the High Court (other than from the decision of an officer of the court authorized to assess costs by the Lord Chancellor); and (b) on hearing the appeal the D court makes a decision, an appeal shall lie from that decision to the Court of Appeal and not to any other court."

Rubric Lois King v Lane

36 In *Rubric Lois King v Lane* (unreported) 13 March 2012 a firm of solicitors brought two actions. The first (action 337) was against Kim Lane. E The second (action 936) was against Peter Lane and Kim Lane (and others). In action 337 judgment was obtained by default. In action 936 a judgment was also obtained by default; an application to set it aside was resolved by consent and a district judge later made an order that the defendants pay some £9,000 plus about £2,600 costs and other fees. Charging orders were made in action 337 over Kim Lane's interest in one property and a similar order was made in action 936 over her interest in the same property and the F interests of another defendant in another.

37 On 15 October 2010 a payment was made by the defendants' solicitors to the claimants of £17,000 and the charges were released. There was then a dispute as to whether the £17,000 had been paid in full and final settlement of all sums outstanding in both actions or only in consideration of the release of the charges on the properties.

G **38** The defendants in action 936 issued an application that the claimant should release certain files of papers belonging to them over which the claimant solicitors asserted a lien, on the ground that no lien existed any longer in the light of the payment of £17,000. The district judge ordered a trial of an issue as to whether the £17,000 had been paid in full and final settlement and whether the claimant solicitors should release their papers to their former clients.

H **39** The claimants then made an application in action 936 for specific disclosure of the defendants' new solicitors' conveyancing file and also another document. On 14 March 2011 a deputy district judge ordered disclosure of a file referred to in the defendants' witness statement. But he declined to order disclosure of the solicitors' file in relation to the property in

which Kim Lane had an interest. A county court judge granted the claimants permission to appeal. The appeal was allowed and disclosure of the file was ordered. But the judge declined to give the claimants their costs of the appeal to him.

40 The claimants sought permission to appeal that refusal of the costs of the appeal. On the merits Stadlen J held that they had a realistic prospect of success. He then turned to the question of jurisdiction. As to that he held, at para 17, that the order refusing the successful appellants their costs was not "the substantive order of the judge in exercising his jurisdiction" but "an ancillary and distinct order from the order allowing the appeal".

41 Stadlen J considered articles 3–4 of the Access to Justice Act 1999 (Destination of Appeals) Order 2000. He held, at paras 24–25, that, although it was arguable that Judge Rundell, the county court judge, had heard an appeal and made a decision on doing so, the decision being not to order costs, that was not the correct analysis. His reasoning was that the intention behind section 55 of the Access to Justice Act was to introduce a filter on second appeals. A decision in relation to the costs of the appeal would not be a decision in relation to the matter on which an appeal was made to the county court: see para 28. Accordingly, if article 5 of the 2000 Order provided for an appeal against a costs order to go to the Court of Appeal there would be no section 55 filter applicable, even though there would be such a filter in relation to any application for permission to appeal against the substantive decision of the county court judge. That cannot have been what was contemplated by article 5. It followed that an order as to costs made in relation to an appeal which has been allowed or dismissed could not be categorised as a decision which the court makes "on hearing the appeal" within the meaning of article 5.

42 This decision is not referred to in *Civil Procedure 2015* nor in *Zuckerman, Civil Procedure Principles of Practice*, 3rd ed (2013) despite the fact that the Civil Appeals Office has been accustomed to act on the faith of it and the decision itself refers to a passage in the second edition of the book which supported the conclusion that Stadlen J reached.

Discussion

43 The language used in the 1999 Act and the 2000 Order is somewhat ambiguous. Section 55(1) applies "Where an appeal is made to a county court . . . in relation to any matter and on hearing the appeal the court makes a decision in relation to that matter . . ." That could be construed by giving a broad reading to "in relation to" on the second occasion where it appears, and to "matter". Thus a decision made by the county court in respect of the costs of an appeal to it could be said to be a decision in relation to the matter in respect of which the appeal was brought since it would be a decision in relation to the cost of arguing in the county court about whether the district judge (assuming the appeal to be from him) was right in the decision that he made about that matter. If so, the subsection would apply where there was an appeal to a county court in relation to any decision of the county court made on appeal. In each case permission to appeal to the Court of Appeal would only be able to be given by the Court of Appeal and then only if the second appeal test were satisfied. Article 5 could be said to be consistent with this since, where the decision of the county court is made on

A appeal, it provides for an appeal to lie only to the Court of Appeal where "on hearing the appeal the court makes a decision".

44 The alternative construction is that section 55(1) is applicable only in respect of the decision of the county court on the appeal to it. The subsection applies where an appeal is made to the county court "in relation to any matter". That refers to the subject matter of the appeal to the county B court, namely the decision of the district judge. When the section then refers to a decision "in relation to that matter" it refers to the decision which the county court makes as to the validity or otherwise of the decision of the district judge; and the second appeals test relates only to the decision of the county court on that issue.

45 In my judgment the latter construction is to be preferred. The broad construction gives little weight to the words "in relation to any matter" or C "in relation to that matter" which could just as well have been omitted. The fact that the words "in relation to any matter" do not appear in article 5 is, itself, an indication that their inclusion is of some significance. Further, when an appellant appeals to the county court the matter in relation to which he appeals is the decision of the district judge on the issue(s) that were before him. When the subsection speaks of "a decision in relation to that D matter" it more naturally refers to the decision of the county court in relation to the validity of the judgment and order of the district judge, rather than a decision as to the incidence of the costs of the appeal. An appeal from the former decision will be a second appeal. An appeal from the latter will not be, since the lower court will never have considered the costs of any appeal and such costs will not be a matter in relation to which the appeal is made. The construction which I prefer treats "in relation to" as having the same E reach in each case where it appears because in each case it relates to the matter the subject of the appeal namely the validity of the district judge's order.

46 CPR r 52.13, which Stadlen J did not consider, appears to apply the second appeals test to "any appeal to [the Court of Appeal] from a decision of the county court . . . which was itself made on appeal". Despite the F breadth of the language it seems to me that the rule, which was plainly intended to reflect section 55, which must take precedence, should be treated as applying the second appeals test only to the decision of the county court on the validity or otherwise of the decision of the district judge.

47 I do not however accept that article 5 of the 2000 Order is to be interpreted as applying only to decisions of the county court made in respect G of the decision of the district judge. The article is in wide terms. It does not contain the "in relation to any/that matter" phraseology of section 55. Nor can I regard the confinement of the second appeals test to the issues decided by the lower court as a sufficient ground for confining article 5 to such appeals.

48 Stadlen J held that article 5 had to be construed against the background of section 55. I am not, however, persuaded that that exercise H compels the conclusion which he reached. Section 55(1) does not lay down a route of appeal. It provides a restriction on the circumstances in which the Court of Appeal may grant permission in the case of a second appeal. It is article 5 that stipulates the Court of Appeal as the sole destination of a second appeal and it can take effect in accordance with its own terms.

49 If Stadlen J's analysis be right it would mean that, if there is an appeal to the Court of Appeal on the decision reached (on appeal) by the county court judge and the appeal relates both to his decision on the validity of what the district judge decided and as to the costs of the appeal (even if what the district judge decided was correct), there would be two appeal destinations. The appeal on the issues decided by the district judge court would go to the Court of Appeal and would have to satisfy the second appeal test. But the appeal in respect of the costs of the appeal to the county court would go to the High Court. No one can have intended such an extraordinary bifurcation.

50 It was not suggested that if the Court of Appeal overturned the decision of the county court judge and restored the decision of the district judge the incidence of the costs of the appeal before the county court would fall to be dealt with by the High Court. Such a result would be absurd. But if the suggestion is that, on the true construction of section 55, appeals in relation to the costs of the appeal do not have to meet the second appeals test and article 5 must be read down so as not to require an appeal on costs to go to the Court of Appeal, it is not wholly clear how this does not apply in circumstances where the Court of Appeal allows an appeal from the county court on the merits and has to deal with the costs of that appeal in consequence. The answer may be that all that is required is a limited reading down of article 5, but it is better not to do it at all.

51 In my view Stadlen J was in error in *Rubric Lois King v Lane* (unreported) 13 March 2012 in holding that the route of appeal was to the High Court. In that case the county court judge had allowed the appeal and declined to give the claimants their costs of it. That circumstance fell within article 5 since the judge had heard the appeal and on hearing it had made decisions (i) that the appeal should be allowed; and (ii) that the claimant should not recover its costs of the appeal.

"On hearing the appeal"

52 Article 5 applies where a county court judge makes a decision "on hearing the appeal". Such a decision may include a decision on the costs of the appeal. But there must have been what amounts to a hearing of the appeal. That will not be the case if the court has refused permission to appeal: see *Jolly v Jay* [2002] EWCA Civ 277 at [52]–[53]; or has dismissed the appeal upon the appellant seeking to withdraw it, as happened in *Unichi v Southwark London Borough Council* [2013] EWHC 3681 (QB). On the other hand, if there has been a hearing of the appeal, the article does not cease to be applicable because part of the decision on appeal is made in writing following written submissions. The court will still have heard the appeal and then made a decision. The route of appeal cannot alter according to whether or not a decision on costs was made (a) in a judgment delivered orally at the end of the hearing; (b) in a judgment delivered orally at a later date; (c) in writing as part of the judgment on all the issues; (d) in writing, but after a judgment had been delivered orally, or handed down in writing, on the issues other than costs.

53 Mr Berry for Ms Lopes submitted that the phrase "on hearing the appeal" did no more than distinguish between appeals and other sorts of claims or applications so as to provide that everything that could be called

A an appeal went to the Court of Appeal. I disagree. If that were so the draftsman could have been expected simply to omit the phrase.

54 In short, in a case where the decision of the county court was itself made on appeal from a district judge (or a deputy district judge) the position lies thus:

(i) If the county court judge has heard the appeal and ruled on the issues
B determined by the district judge (including the validity or otherwise of the claims, the relief to be granted and the costs of the hearing before the district judge), any appeal will lie only to the Court of Appeal. Permission must be sought from the Court of Appeal and the second appeals test will apply.

(ii) In respect of the costs of the appeal to the county court, any appeal will lie to the Court of Appeal.

(iii) It would be open to the county court judge to grant permission to
C appeal to the Court of Appeal in respect of the costs of the appeal to the county court and the normal test for permission will apply. It would also be open to the Court of Appeal to grant permission applying the same test.

(iv) If there has not been what can properly be regarded as a hearing of the appeal, any appeal (which is almost certainly to be one on costs) is to the High Court judge and the normal test will apply.

D **55** I regard this position as consistent with principle. It ensures that what are truly second appeals can only go the Court of Appeal and then only if they pass the second appeals test. A decision by the county court judge as to the costs of the appeal to him is not a decision which, if it goes to the Court of Appeal, will already have been reviewed once. It will not have been reviewed at all. If such an appeal must meet the second appeals test there would be a very severe restriction on appellate review of what is, in effect, an
E original decision. That would certainly conflict with one of the principles enunciated in the report to the Lord Chancellor of Sir Jeffrey Bowman Report *Review of the Court of Appeal (Civil Division)* (September 1997) that an individual who:

> "has grounds for dissatisfaction with the outcome of his or her case
F should always be able to have the case looked at by a higher court so that it can consider whether there appears to be an injustice and, if so, allow an appeal"(paragraph 3 of Chapter 2).

Destination of the three appeals

56 Applying those criteria to the three cases I reach the following
G conclusions.

57 In *Christie Owen & Davies Ltd v Awan and another* Judge Tolson QC heard the defendants' restored appeal. He made a decision to allow it and the decision on costs which the defendants now seek to challenge. These were decisions made on hearing the appeal. Article 5 applies and article 3 does not. Article 4 does not apply either since this was not a final decision made in a claim under CPR Pt 7 allocated to the
H multitrack. The appeal lies to the Court of Appeal and not to any other court, but the second appeals test does not apply to the decision on costs, particularly when part of the decision related to the costs before Mitting J and Judge Davies, neither of which were the subject matter of the appeal from the orders of the district judges.

58 In *Lopes v Croydon London Borough Council* the parties appeared before the judge with an agreed order under which the council agreed to withdraw its decision and the applicant had permission to withdraw her appeal. This was an unorthodox order. Practice Direction 52A—Appeals provides:

> "6.1. An appellant who does not wish to pursue an application or appeal may request the appeal court to dismiss the application or the appeal. If such a request is granted it will usually be subject to an order that the appellant pays the costs of the application or appeal.
>
> "6.2 If the appellant wishes to have the application or appeal dismissed without costs, his request must be accompanied by a letter signed by the respondent stating that the respondent so consents.
>
> "6.3 Where a settlement has been reached disposing of the application or appeal, the parties may make a joint request to the court for the application or appeal to be dismissed by consent. If the request is granted the application or appeal will be dismissed."

59 Nevertheless what happened was that the appeal was allowed to be withdrawn. Judge Bailey did not hear the appeal. He made an order which had the effect that he would not do so. Even if it had been dismissed that would not have amounted to a hearing of the appeal, but a dismissal of it following withdrawal. Judge Bailey then made a decision as to the incidence of costs on the withdrawal, not the hearing, of the appeal. Accordingly the appeal does not lie to the Court of Appeal and the second appeals test is not applicable.

60 I would, therefore, if Moore-Bick LJ agrees, remit the case to the High Court, and, sitting as a High Court judge, exercise the jurisdiction of the High Court to consider whether or not to grant permission to appeal.

61 In *Handley and another v Lake Jackson Solicitors (a firm)* Judge Birtles heard an appeal from District Judge Parfitt's order, ordered Lake Jackson to pay the claimants' costs of the appeal and an interim payment of the costs of the action. These were all decisions made after he had heard the appeal. The appeal lies to the Court of Appeal. In so far as the appeal is sought to be brought in respect of the order to pay the costs of the appeal summarily assessed, the second appeals test does not apply. In so far as the appeal is sought to be made against the order for an interim payment of the costs of the action it does.

Should permission to appeal be given?

Christie Owen & Davies Ltd v Awan and another

62 In my judgment the defendants have a realistic prospect of success in contending that paragraphs 4(b)(c) and (e) of the order of 27 July 2015 should be set aside.

63 As to paragraph 4(b) it seems to me well arguable that Judge Tolson QC lacked power to make an order for the costs of the appeal before Mitting J, or at the least should not have done so, because Mitting J had ordered those costs to follow the remitted application and appeal in the Luton County Court.

64 As to paragraph (c) and (e) the orders for sale were made without jurisdiction. The claimant did not realise that (nor did the court) but it was

for it to make its application to the correct court. If it had not chosen the wrong court the appeal would never have been necessary. Whilst that does not mean that all subsequent orders for costs necessarily fall away (Mitting J recorded that Mr Awan conceded as much) it was arguably unfair to allow the claimant to retain all the costs that had been awarded in its favour in respect of a case management decision striking out an appeal from orders which the court had no jurisdiction to make but which had itself been overturned on appeal. Further I regard it as highly debatable whether the same costs order would have been made if the appeal had not been struck out, in which case (a) the defendants would successfully have resisted the application to strike out; (b) the judge would have used the hearing to make orders for the management of the application for permission to appeal and the appeal.

65 I would accordingly give the defendants permission to appeal against paragraphs 4(b)(c) and (e) of the order of 27 July 2015.

Lopes v Croydon London Borough Council

66 Judge Bailey's reason for awarding costs was, in essence, that the applicant had succeeded in securing the relief that she would have obtained had she won her appeal; that it was difficult for Croydon to maintain that it had discharged its obligations to make inquiries (because it had not contacted the mother-in-law in Portugal); but there should be a discount because Ms Lopes had sought to achieve more than she could reasonably expect by seeking an order varying the review officer's decision to one that she had been determined to be homeless.

67 Croydon's case is that this was a case where new evidence was submitted after the section 202 homelessness review had been made and appealed. The applicant thus rendered the outcome of the appeal academic because in the light of the new evidence, the council would be duty bound to accept a fresh application containing the fresh information from the mother-in-law. The council would, it says, have won the appeal had it not been compromised. It agreed to carry out a fresh review in order to avoid the need for the parties to incur the costs of an appeal, only for a fresh homelessness application to be made containing the new evidence in any event. That must constitute a good reason not to award Ms Lopes her costs. If it were otherwise councils faced with legally aided applicants would find themselves having to resist appeals in order to avoid having to pay their own and the appellant's costs, and would afterwards have to accept a fresh application in any event.

68 Ms Lopes' case is that she had secured most of the relief she sought; and there was in fact material on the housing file before the final decision which showed that it was insufficient not to ask her mother-in-law directly whether she had been required to leave her home. The file note of 4 September 2013 recorded that Ms Lopes was not asked by her mother-in-law to leave but was told by her to find a solution to the difficulties caused by disagreements with her brother-in-law's partner when she moved into the flat. It was "all too much"; so when her friend suggested that she come to the UK to look for work she came to the UK and her partner and child remained at home with his mother, and, when she found work, they came to reside with her in the UK. The note records that Ms Lopes said that although her partner's mother did not ask her to leave she implied it.

69 In her letter of 22 September 2013 seeking an administrative review of the decision of 4 September that she was not homeless Ms Lopes said that what she had said at interview was that her partner's mother had not given her an eviction letter as that was not the custom in Portugal but had asked her to leave. The fact that her children and partner still stayed at the house when she came to the UK did not, she said, mean that the mother-in-law would allow her to go back with them. She could not go back to Portugal because her mother-in-law would not allow them there.

70 The council has, in my view, a realistic prospect of establishing that the judge was in error on the following basis, which is well arguable. The judge's order effectively gave the applicant her costs save for a modest deduction to take account of the fact that she had sought more than she got. However, the critical aspect of the case was that the council had declined to find that she was homeless on the strength of her own repeated statements as understood and recorded by them on 29 August and 4 September 2013 that she had not been asked to leave her mother-in-law's flat in Portugal. The scope of the inquiries required to be made is, absent perversity, for the council to decide: see *R v Kensington and Chelsea Royal London Borough Council, Ex p Bayani* (1990) 22 HLR 406 and *Cramp v Hastings Borough Council* [2005] 4 All ER 1014. The judge did not refer to these cases and does not appear to have taken them into account. The council could not be regarded as perverse in taking the applicant at her word on more than one occasion; or for remaining of the view that she could live with her mother-in-law in Portugal despite what she claimed in her letter of 22 September. In short the council was, originally and on review, entitled to make the findings that it did. What then happened was that the appeal was rendered academic by the production of the mother-in-law's letter. That could realistically be said to be good reason not to award the applicant her costs. The council should have recovered its costs subject to the costs protection provided for a legally aided litigant. At the highest there should have been no order as to costs—the default order envisaged by Stanley Burnton LJ in *R (M) v Croydon London Borough Council* [2012] 1 WLR 2607, para 77.

71 I would, accordingly, grant the council permission to appeal.

Handley v Lake Jackson Solicitors (a firm)

72 I do not regard Lake Jackson as having any realistic prospect of persuading the full court that the order of Judge Birtles made on 22 November 2013 was erroneous in law. Nor is there any compelling reason for an appeal. A fortiori it cannot satisfy the second appeals test. District Judge Parfit gave his judgment on 18 December 2012. Judge Birtles dismissed an appeal from it on 30 July 2013. Lake Jackson appealed to the Court of Appeal. It is trite law that an appeal does not operate as a stay. Judge Birtles did not grant a stay and was never asked to do so. Nor did the Court of Appeal.

73 All this should have been apparent to Mr Jackson. He has impressed upon us how matters were long delayed by the failure of Judge Birtles to approve a transcript of his judgment. But that cannot form any basis for an appeal against the order in question. Judge Birtles had by his order of 18 September 2003 given Lake Jackson the opportunity to comment on the schedule of costs and it had failed to do so. The letter of 4 October 2013 which expressed concern about that order was written on an entirely false

A premise namely that it was to be assumed that, if there was an appeal, any issues as to costs were stayed.

74 Further since the main appeal has been withdrawn there is no reason why the interim payment of the costs of the action should be stayed. Nor is there any good reason why the judge should not have awarded the claimants their costs of the appeal and summarily assessed them. The fact, as we were told, that there was a conditional fee agreement in operation such that the B real claimants in the present case are the trustees' former solicitors is neither here nor there.

75 I would refuse permission.

76 I would, if Moore-Bick LJ agrees, invite the successful parties to draw up separate orders in their cases reflecting this judgment, including, in the case of *Lopes v Croydon London Borough Council* the remittal to C the High Court and in the case of *Christie Owen & Davies Ltd v Awan* the limitation on the scope of the appeal. I would reserve the question of the costs of the application for permission. I would, also, direct that this case may be cited as authority in future cases.

MOORE-BICK LJ

77 I agree that with the conclusions Christopher Clarke LJ has reached D on the interpretation of section 55 of the Access to Justice Act 1999 and article 5 of the Access to Justice Act 1999 (Destination of Appeals) Order 2000 and with the orders he proposes.

Application for permission to appeal refused in first case.

E *Applications for permission to appeal granted in the second and third cases.*

ALISON SYLVESTER, Barrister

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