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Case No: 12180043

COURT OF PROTECTION
ON APPEAL FROM His Honour Judge CARDINAL
[2013] EWHC 1424 (COP)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 January 2014

Before :

SIR JAMES MUNBY PRESIDENT OF THE COURT OF PROTECTION

- -

Between :

RC	**Applicant**
- and -	
(1) CC (by her Litigation Friend the Official Solicitor)	
(2) X Local Authority	**Respondents**

- -
- -

Mr Adam Fullwood (instructed by Broudie Jackson and Canter) for RC
Mr Malcolm Chisholm (instructed by Steel & Shamash) for CC
Ms Jennifer Oscroft (instructed by the local authority) for X Local Authority

Hearing date: 22 October 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down in OPEN COURT

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SIR JAMES MUNBY PRESIDENT OF THE COURT OF PROTECTION

Sir James Munby, President of the Court of Protection :

1. CC is a young adult who, it is common ground, lacks capacity. She was adopted as a very young child. For many years her birth mother, RC, had indirect 'letter-box' contact with her. It stopped a few years ago. Precisely when and why is not altogether clear, though nothing turns on this for present purposes. CC lives in the area of X Local Authority. RC does not know where CC lives or the identity of X Local Authority. RC has issued an application in the Court of Protection seeking contact with CC. To make that application she needed permission: see Court of Protection Rules 2007, rule 50. Permission was given by a District Judge in accordance with rule 55(a).

The issue

2. In accordance with directions given by the court X Local Authority has filed a report by a clinical psychologist and three social worker statements by employees of X Local Authority. All relate to CC. The issue of whether they should be seen by RC came before His Honour Judge Cardinal. He delivered a reserved judgment on 8 May 2013: *RC v CC* [2013] EWHC 1424 (COP). It is published, freely accessible to all, on the BAILII website.

3. For the reasons he set out, in a judgment that is detailed and careful, Judge Cardinal concluded that although RC should be permitted to see a redacted version of the clinical psychologist's report she should not be permitted to see any of the three social worker statements. His order included a provision enabling RC's legal representatives to see the three statements "on the basis that the material contained therein is not divulged to RC without further leave of the court."

The appeal

4. Judge Cardinal refused RC permission to appeal. Her renewed application for permission, with appeal to follow in the event of permission being given, was listed before me on 22 October 2013. Before me, as before Judge Cardinal, RC was represented by Mr Adam Fullwood, CC by Mr Malcolm Chisholm, and X Local Authority by Ms Jennifer Oscroft.

5. At the outset of the hearing I gave permission to appeal in accordance with rule 173(1)(b), on the basis that, irrespective of the merits of the appeal, there was a compelling reason why the appeal should be heard, namely the need for an authoritative ruling on the very important point of principle that has been raised. At the end of the hearing I reserved judgment, which I now (30 January 2014) hand down in open court.

The law

6. Before considering Judge Cardinal's judgment in any more detail it is convenient if I first deal with the law.

7. I can start with the judgment of Lord Dyson JSC in *Al Rawi and others v Security Service and others (JUSTICE and others intervening)* [2011] UKSC 34, [2012] 1 AC 531, paras 10-12, to which Mr Fullwood took me:

> "10 There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil). First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public …
>
> 11 The open justice principle is not a mere procedural rule. It is a fundamental common law principle. In *Scott v Scott* [1913] AC 417, Lord Shaw of Dunfermline (p 476) criticised the decision of the lower court to hold a hearing in camera as constituting "a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security". Viscount Haldane LC (p 438) said that any judge faced with a demand to depart from the general rule must treat the question "as one of principle, and as turning, not on convenience, but on necessity".
>
> 12 Secondly, trials are conducted on the basis of the principle of natural justice. There are a number of strands to this. A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance."

8. None of that is at all controversial, but *Scott v Scott*, which is the classic authority on the point (and which, incidentally is the definitive statement of the principle that the Probate, Divorce and Admiralty Division, now the Family Division, stands in this respect in no different position than the other Divisions of the High Court) itself identifies a highly material exception. This is in relation to cases involving wards and what in 1913 were still referred to as lunatics; in current terminology children and adults who lack capacity.

9. I need not refer to the well-known passage in the speech of Viscount Haldane LC (437-438), though it merits reading in full. It suffices for present purposes to set out what Lord Shaw of Dunfermline said (482):

> "The three exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of justice are, first, in suits affecting wards; secondly, in lunacy proceedings; and, thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention – trade secrets – is of the essence of the cause. The first two of these cases, my Lords, depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as parens patriae. The affairs are truly private affairs; the transactions are transactions truly intra familiam; and it has long been

> recognized that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs."

In more modem times one can see this principle carried forward in the provisions of sections 12(1)(a) and 12(1)(b) of the Administration of Justice Act 1960.

10. That the special nature of the jurisdiction in wardship (as more generally now in children cases) justifies departure not merely from the principle of open justice but also from other aspects of ordinary civil procedure was recognised as long ago as 1963 and, again, at the very highest level. In *Official Solicitor to the Supreme Court v K and Another* [1965] AC 201 the House of Lords held that the disclosure to the parties of confidential reports in a wardship case was a matter of discretion for the judge, so that the child's parents, although parties, were not entitled as of right to disclosure of the reports. The later decision of the House of Lords in *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593 is to the same effect. Lord Mustill (page 615) summarised the relevant principles.

11. Each of those decisions preceded the Human Rights Act 1998. I had occasion to examine its impact in this context in *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017. After an extensive examination of both the domestic case-law and the jurisprudence of the Strasbourg court I concluded (para 64):

> "although R is entitled under Art 6 to a fair trial, and although his right to a fair trial is absolute and cannot be qualified by either the mother's or the children's or, indeed, anyone else's rights under Art 8, that does not mean that he necessarily has an absolute and unqualified right to see all the documents ... On this aspect of the matter I see nothing in subsequent Convention jurisprudence to cast any doubt on what the House of Lords said in *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593."

12. Finally on this point I refer to what Baroness Hale of Richmond JSC said in *In re A (A Child) (Family Proceedings: Disclosure of Information)* [2012] UKSC 60, [2012] 3 WLR 1484, para 18:

> "Are cases about the future care and upbringing of children any different? The whole purpose of such cases is to protect and promote the welfare of any child or children involved. So there are circumstances in which it is possible for the decision-maker to take into account material which has not been disclosed to the parties."

Having referred to both *Official Solicitor to the Supreme Court v K and Another* [1965] AC 201 and *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, she continued (para 21):

> "It will thus be seen that these principles are designed to protect the welfare of the child who is the subject of the proceedings,

> to prevent the proceedings which are there to protect the child being used as an instrument of doing harm to that child."

13. So, the jurisdiction to refuse disclosure of materials to the parties in children cases is clearly established.

14. How is the jurisdiction to be exercised? I return to what Lord Mustill said in *In re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, page 615:

> "Non-disclosure should be the exception and not the rule. The court should be rigorous in its examination of the risk and gravity of the feared harm to the child, and should order nondisclosure only when the case for doing so is compelling."

15. In *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017, having examined a number of both domestic and Strasbourg authorities, I concluded my judgment as follows (para 89):

> "Although, as I have acknowledged, the class of cases in which it may be appropriate to restrict a litigant's access to documents is somewhat wider than has hitherto been recognised, it remains the fact, in my judgment, that such cases will remain very much the exception and not the rule. It remains the fact that all such cases require the most anxious, rigorous and vigilant scrutiny. It is for those who seek to restrain the disclosure of papers to a litigant to make good their claim and to demonstrate with precision exactly which documents or classes of documents require to be withheld. The burden on them is a heavy one. Only if the case for non-disclosure is convincingly and compellingly demonstrated will an order be made. No such order should be made unless the situation imperatively demands it. No such order should extend any further than is necessary. The test, at the end of the day, is one of strict necessity. In most cases the needs of a fair trial will demand that there be no restrictions on disclosure. Even if a case for restrictions is made out, the restrictions must go no further than is strictly necessary."

As I pointed out in *Dunn v Durham County Council* [2012] EWCA Civ 1654, [2013] 1 WLR 2305, para 46, this approach, so far as I am aware, has never been challenged and has often been followed.

16. *Dunn v Durham County Council* is in fact clear authority (see paras 23, 24 and 26) that the test is, indeed, one of "strict necessity", what is "strictly necessary".

17. In a case such as this the crucial factor is, as we have seen from the passage in the speech of Lord Mustill in *In re D*, page 615, which I have already quoted, the potential *harm* to the child. Lord Mustill summarised the proper approach as follows:

> "the court should first consider whether disclosure of the material would involve a real possibility of significant harm to the child.
>
> ... If it would, the court should next consider whether the overall interests of the child would benefit from non-disclosure, weighing on the one hand the interest of the child in having the material properly tested, and on the other both the magnitude of the risk that harm will occur and the gravity of the harm if it does occur.
>
> … If the court is satisfied that the interests of the child point towards non-disclosure, the next and final step is for the court to weigh that consideration, and its strength in the circumstances of the case, against the interest of the parent or other party in having an opportunity to see and respond to the material. In the latter regard the court should take into account the importance of the material to the issues in the case."

18. Before leaving this part of the case, there are two further points to be noted. The first is that, as I put it in *Dunn v Durham County Council* (para 50):

> "disclosure is never a simply binary question: yes or no. There may be circumstances ... where a proper evaluation and weighing of the various interests will lead to the conclusion that (i) there should be disclosure but (ii) the disclosure needs to be subject to safeguards. For example, safeguards limiting the use that may be made of the documents and, in particular, safeguards designed to ensure that the release into the public domain of intensely personal information about third parties is strictly limited and permitted only if it has first been anonymised."

To the same effect, Maurice Kay LJ said (para 23) that:

> "in some cases the balance may need to be struck by a limited or restricted order which respects a protected interest by such things as redaction, confidentiality rings, anonymity in the proceedings or other such order. Again, the limitation or restriction must satisfy the test of strict necessity."

19. A related point, often commented on in the authorities, is that the position initially arrived at is never set in stone and that it may be appropriate to proceed one step at a time. This is not the occasion to discuss this in any detail. I merely draw attention, as examples, to what was said by Hale LJ, as she then was, in *Re X (Adoption: Confidential Procedure)* [2002] EWCA Civ 828, [2002] 2 FLR 476, para 28, and, most recently, by Baroness Hale JSC in *In re A (A Child) (Family Proceedings: Disclosure of Information)* [2012] UKSC 60, [2012] 3 WLR 1484, para 36.

20. Thus far, as will be appreciated, the authorities to which I have referred have mainly related to children. Do the same principles apply in cases in the Court of Protection

relating to adults? To that question there can, in my judgment, be only one sensible answer: they do. One really needs look no further than *Scott v Scott* to see that the same fundamental principles underlie both jurisdictions. If more is needed, there is, it seems to me, some support to be derived from *In re E (Mental Health Patient)* [1985] 1 WLR 245. More recently, and more to the point, there are the powerful observations of McFarlane J, as he then was, in *Enfield London Borough v SA, FA and KA* [2010] EWHC 196 (Admin), [2009] COPLR Con Vol 362, para 58, with which I respectfully agree.

21. It is apparent from *Official Solicitor to the Supreme Court v K and Another* [1965] AC 201 that disclosure limited to a party's legal representatives was already by then a recognised practice in wardship. It is mentioned by Sir Nicholas Wall P in *A County Council v SB, MA and AA* [2010] EWHC 2528 (Fam) , [2011] 1 FLR 651, para 37. There can be no doubt as to the legality of the practice: see, for example, *R (Mohammed) v The Secretary of State for Defence* [2012] EWHC 3454 (Admin). But there are obviously potential difficulties, some identified in a characteristically thoughtful discussion in the June 2013 issue of the Thirty Nine Essex Street Court of Protection Newsletter of Judge Cardinal's judgment in this case.

22. Importantly, such disclosure cannot take place without the consent of the lawyers to whom the disclosure is to be made; and they may find themselves, for reasons they may be unable to communicate to the court, unable to give such consent. Moreover, they cannot consent unless satisfied that they can do so without damage to their client's interests. As Moses LJ said in *Mohammed* (para 28):

> "The free and unencumbered ability to give and receive instructions is an important facet of open and fair trials. That ability is hampered if in some respects the lawyer is unable to disclose all the relevant evidence and material and, in that respect, the client is deprived of the opportunity to give informed instructions. But the degree to which that is of importance will vary from case to case. No lawyers should consent to such a ring unless they are satisfied they can do so without harming their client's case. But provided the legal advisers are satisfied they can safely continue to act under a restriction, the inability to communicate fully with the client will not in such circumstances undermine the fundamental principles on which a fair application for judicial review depends."

23. During the course of submissions I was taken to *Yousef v The Netherlands (Application No 33711/96)* [2003] 1 FLR 210 and *Lebbink v The Netherlands (Application No 45582/99)* [2004] 2 FLR 463. Neither, in my judgment, throws any particular light on the issues I have to decide or casts any doubt on the principles as I have set them out. So I say no more about them. *Lebbink* was relied upon by Mr Fullwood in support of his argument, before me as before Judge Cardinal, that RC has a claim to see the documents based on Article 8. That may or may not be so – I say nothing on the point – but it does not seem to me to matter. Plainly, RC's Article 6 rights are engaged. If her case based on Article 6 succeeds, RC has nothing to gain by

reliance also on Article 8. If, on the other hand, her case based on Article 6 fails, I do not see how any argument based on Article 8 could succeed.

Judge Cardinal's judgment

24. I return to Judge Cardinal's judgment.

25. So far as concerns his analysis of the law I can take matters quite shortly. After a careful survey culminating appropriately with *Dunn v Durham County Council* [2012] EWCA Civ 1654, [2013] 1 WLR 2305, Judge Cardinal concluded, correctly as we have seen, that the test he had to apply was that of "strict necessity". He summarised his approach as follows:

> "In conclusion then the Court should approach the matter this way:
>
> i The Rules and the decided cases clearly point to a presumption that there should be disclosure of all documents unless good reason to the contrary are shown – is the withholding of disclosure strictly necessary?
>
> ii Applying the test of strict necessity involves the Judge who is to decide the case reading the unredacted documents and deciding for himself whether or not the documents can be withheld.
>
> iii In deciding whether or not documents should be so withheld the Judge should bear in mind the best interests of [in this case] CC.
>
> iv In determining best interests the Judge should conduct a balancing act, weighing up [as I have done] the competing rights of the parties under Articles 6 and 8 of the European Convention.
>
> v Having done so the Court will direct accordingly but should as in PII cases keep the matter under constant review and invite further submissions if he deems it necessary."

26. In my judgment there is nothing objectionable in that approach. Judge Cardinal correctly identified the legal principles he had to apply and the approach he should adopt.

27. Earlier in his judgment, responding to a submission from Mr Fullwood (that "there should be no difference between the disclosure rules in the family court and the Court of Protection when the aim of protection is the same in both"), Judge Cardinal had said this:

> "I do not consider that just because a matter might be disclosable in a family case it follows that it is disclosable here. In any event there are cases where certain evidence is not

> disclosed in family cases – interveners are not shown all the evidence in a care application; in an adoption application the names and addresses of the adopters are normally withheld from the birth parents. A parent's address and full circumstances may be kept confidential as is a foster placement in most instances. Information revealing addresses is appropriately redacted. Moreover in a family dispute by contrast the information about family life is often the very information that all parties need to see in addressing the issues at stake. It is the domestic circumstances of a party that give rise to an argument for or against residence or contact. Here the issue is different – is it in CC's interest to recommence a family relationship with a Mother from whom the family relationship has been legally severed? It is not about the quality of CC's life with her adoptive Father."

28. Correctly understood, there is nothing objectionable in any of that. Judge Cardinal was not, as I understand him, saying that different principles apply in the two courts – and if he was he would, for reasons I have already given, have been wrong. All he was saying, as I read it, is that the *application* of the principles may differ – a very different proposition with which I entirely agree.

29. Turning to the application of principle to the facts of the case before him, Judge Cardinal succinctly identified the issue before him:

> "Should the details of CC's circumstances be fully revealed to her birth mother many years after an adoption order and when she has not seen CC since early childhood?"

He recognised that this involved consideration of CC's Article 8 rights and RC's Article 6 rights.

30. In relation to the redacted version of the clinical psychologist's report Judge Cardinal said:

> "That gives a detailed picture of CC's intellectual abilities, sets out up to date psychometric tests and their results, and draws careful conclusions about CC's wishes and feelings as to contact. If the whole of the psychological report were disclosed then it would reveal the whereabouts of CC and the psychological services with which she is engaging. In other words I do not consider anything in that report in full assists RC any further but that it potentially invades CC's present private life. RC can of course see the redacted psychological report."

31. I can see nothing objectionable in either Judge Cardinal's reasoning or his conclusion. I have myself seen the redacted version of the report (though not the full version) and it appears to provide RC with all the material she needs to be able to conduct her case. Judge Cardinal's considered view, having read the full report, was, as we have seen, that there as nothing in the full report "which assists RC any further." On the other

hand, there are – there must in the nature of things be – compelling reasons why someone in RC's position should not have disclosed to her (at least at this stage) information about CC's whereabouts and private circumstances which, but for the current litigation, she would have no right to know and no means of finding out. As Baroness Hale of Richmond JSC pointed out in *In re A (A Child) (Family Proceedings: Disclosure of Information)* [2012] UKSC 60, [2012] 3 WLR 1484, para 21, in the passage I have already quoted, the court must "prevent the proceedings which are there to protect the child being used as an instrument of doing harm to that child." I do not in fact understand Mr Fullwood to be seriously challenging Judge Cardinal's decision on this part of the case. Be that as it may, there is in my judgment no proper ground of challenge.

32. The real focus of Mr Fullwood's submissions was Judge Cardinal's refusal to allow RC to see even redacted versions of the three social work statements. Here, it seems to me, Mr Fullwood is on stronger ground.

33. I have not myself seen the documents. So I am dependent on Judge Cardinal's description:

> "I have looked with care at the three documents filed by the social worker. The first … speaks of CC's personal circumstances and reveals a deal of private information. The second does so all the more: it gives a very detailed breakdown of the social worker's relationship and work with CC and reveals much of her family circumstances, and the work done with her as an incapacitous client; the third is short but does not take the matter any further save that again it describes work with CC."

34. Judge Cardinal explained his decision in this way:

> "I do not consider that RC needs to see the social work evidence to take her application further; moreover as well as it being an invasion of an adult's right to respect for her privacy it also reveals much that could lead to her being traced. Whilst I have no evidence that RC would act improperly in abusing such information [say in an attempt to trace her] nonetheless it takes her case no further so long as her counsel can as needs be test the evidence."

He added:

> "I do not take the view at this stage that it is necessary for the unredacted psychological report nor the social worker's evidence at all to be disclosed. But, as in public interest immunity cases, I shall keep the matter under review and invite further submission on that point as the need arises."

He continued:

> "Are the Article 6 rights of RC engaged? Of course she has a right to a fair trial, of her application for contact with CC. I do not think the duty to promote equality of arms necessitates her to seeing these documents personally. She has access to the redacted psychological report and that evidence can be challenged as needs be. The social work evidence can be challenged in the manner I set out below. But she is not entitled to examine the private life of this vulnerable young woman; I am satisfied that it would be disturbing for CC for her rights to be invaded – her family is under strain. I do not consider it right for her to have to be told that private information had been divulged to a party whom in reality she does not know. It is right for the Official Solicitor in my judgment to seek to avoid any distress the knowledge of disclosure might cause CC.
>
> Accordingly it is right that RC sees the redacted psychological report alone. It is right that her counsel only sees the social work evidence but is under direction from me not to disclose it or discuss it with his client – so at least the social worker's evidence can be properly tested. I take the view that Mr Chisholm is right – by limiting disclosure in this way I am denying only that which it is strictly necessary to deny. I do not consider that the social work evidence could in any feasible way be redacted."

Discussion

35. Mr Fullwood mounts his attack on three broad fronts, on each of which, as it seems to me, Judge Cardinal's judgment is vulnerable.

36. First, Mr Fullwood submits that Judge Cardinal misdirected himself, failing in fact to apply the law as he had summarised it. He points to the passages I have set out in paragraph 34 above where Judge Cardinal says "I do not consider that RC needs to see the social work evidence" and, again, "I do not take the view at this stage that it is necessary for the … social worker's evidence … to be disclosed", submitting that this is to put the point the wrong way round. The question, he submits, and I agree, is not, is it necessary for RC to see the documents? The question is whether it is necessary (in CC's interests) that RC does *not* see the documents. Now particular phrases in a judgment are not to be torn out of context. The judgment must be read as a whole, giving it a fair and sensible reading, not a pedantic or nit-picking reading. Are these particular passages on which Mr Fullwood fastens, passages which taken on their own are wrong, saved by the rest of the judgment and, in particular, by Judge Cardinal's concluding summary quoted in paragraph 25 above? I cannot be confident.

37. Second, Mr Fullwood submits that in any event Judge Cardinal has given inadequate and unsustainable reasons to justify his conclusion. There are a number of points here. There is no differentiation between the obvious necessity to prevent the disclosure of anything that might lead to CC being identified or traced by RC and the far less obvious necessity to restrict RC's access to other personal information about CC. It is surprising, even allowing for what Judge Cardinal says are the difficulties in redacting

the material, that it is necessary that *nothing* in the three witness statements should be disclosed. After all, a large amount of sensitive personal information about CC *was* disclosed to RC in the redacted psychologist's report. What is it about *all* the information that makes it necessary not to disclose it? And how does this square with the fact that Judge Cardinal thought that RC's counsel *should* be able to see it? It may be that, with fuller explanation, Judge Cardinal's decision could be sustained, but as it stands it provides inadequate justification for such a drastic restriction of what RC can see.

38. Mr Fullwood's third complaint is that Judge Cardinal has in effect introduced a closed material procedure, which, he says, was inappropriate in this particular case and is in any event, as a matter of general principle, inappropriate in the Court of Protection. I am not sure that it is helpful to categorise what Judge Cardinal did here as a closed material procedure as that expression is more generally understood. I take him to have been doing no more than has been hallowed by long practice in these cases and now has the weighty imprimatur of Baroness Hale. Whether, on the other hand, it was appropriate in *this* case is another matter. I have already alluded to the deficiencies in Judge Cardinal's reasoning. But there is another point. As Moses LJ made clear, this is a process dependent upon counsel's agreement – an agreement which counsel for the reasons given by Moses LJ may feel unable to give and which in any event the instructions from his lay client may prevent him giving. Judge Cardinal does not seem to have explored these aspects of the matter. Nor, for that matter, does he consider other possible solutions: allowing RC to read, but not to borrow or copy, suitably redacted copies of the documents, or directing that there be disclosure to her of a document setting out the gist of what is being said by the social workers.

Conclusion

39. In the circumstances I am persuaded that the appeal should be allowed to the extent of setting aside those parts of Judge Cardinal's order which relate to the three social worker statements. Counsel were agreed that in this event the matter should be returned to Judge Cardinal to reconsider his decision and judgment in the light of this judgment.

A footnote

40. The point did not arise for decision before me, but I cannot help thinking that in an unusual case such as this it might have been better if, instead of giving RC permission in accordance with rule 55(a), the District Judge had fixed a date for the hearing of the application for permission in accordance with rule 55(c).