JUDGMENT : Master Gordon-Saker 3rd September 2004.

1. This is an application by the Legal Services Commission ("the Commission") for an order that paragraph 3 of the order dated 15th July 2004 be set aside. The application was made informally by a letter dated 6th August 2004.

2. The relief sought by the application is mistaken. It would appear that the Commission misread that part of the order which it seeks to set aside. The true objective of this application is to set aside the order in so far as it relates to the Commission and I am content to treat the letter as if it had specified that objective.

The background

3. Mrs Cafane, the Claimant, brought proceedings against the Defendant, the London Borough of Lambeth, in the Central London County Court for damages for disrepair and for the denial of her right to buy her property. For that purpose on 25th October 1999 she was granted legal aid. Following a mediation hearing in January 2003 the Defendant paid her the sum of £11,000 in satisfaction of her claim for damages for disrepair. The claim in relation to the denial of the right to buy proceeded to a 2 day trial in April 2004 at which the claim was dismissed and the Claimant was ordered to pay the Defendant?s costs subject to a determination under section 11 of the Access to Justice Act 1999. In fact the costs protection to which the Claimant would be entitled would derive from section 17 of the Legal Aid Act 1988, rather than the 1999 Act, by reason of the date of her certificate.

4. On 14th July 2004 the defendant issued an application in the following terms: *"We Steeles (Law) LLP on behalf of the Defendant intend to apply for an order that the costs be assessed and the means of the Claimant be assessed under s. 11 of the Access to Justice Act 1999 because pursuant to the Order of 20th April 2004 the Defendant received judgment in the matter providing also that the Claimant is to pay the costs of the Defendant under s.11 of the Access to Justice Act 1999."*

5. I understand that the principal target of the Defendant is the sum of ?11,000 that it paid to Mrs Cafane last year; and which the Defendant believes is still held by her solicitors, presumably to await the outcome of the assessment of their own costs. Certainly the statement of resources which has been filed by Mrs Cafane would suggest that she has no other assets, nor any surplus income.

6. The Defendant did not file a statement of resources with its application. But it did file a bill of costs in the sum of ?23,638.23, a statement of the parties to be served and a copy of a letter from the Defendant's solicitors to the Commission dated 14th July 2004 which was in the following terms: *"We confirm that we are seeking a costs order against the Commission and we ask that you take this as written notice to that effect."*

   The Commission was included in the list of parties to be served.

7. Notwithstanding the absence of a statement of resources I decided to give directions for the assessment of the Defendant's costs and for the determination of the sums, if any, that the Claimant and/or the Commission should pay to the Defendant.

8. As the statements of resources filed by public authorities often contain only one line - *"The Defendant is a local/health authority"* - I took the view that the failure to file a statement of resources was not fatal and would be of no real relevance to the task which the Court would ultimately have to perform. Even if the Defendant did not follow the practice of other public authorities and provided full details of its financial position (assuming that such information is available to it), I cannot see that in the present case - whether in relation to the claim against Mrs Cafane or in relation to the claim against the Commission - it would assist the Court to know that the Defendant had net assets of £*x* million as opposed to £*y* million or a net surplus or deficit of income of £*a* million as opposed to £*b* million.

9. In relation to the claim against the Commission, the Defendant would have to establish that it would suffer *"severe financial hardship"* unless the Commission paid its costs. Following the decision of the Court of Appeal in ***R v Greenwich London Borough Council ex parte Lovelace (No 2)*** [1992] 1 All ER 679 in practice that would mean that the Defendant would have to show some real impairment of its ability to function normally.

10. While it is presently difficult to imagine how the Defendant in the present case would establish that real impairment in relation to a bill of £23,638, it is also presently difficult to imagine how the filing of a statement of resources would assist the Court in deciding whether the Defendant had established such real impairment. The information which should be set out in a statement of resources is prescribed by regulation 2 of the Community Legal Service (Costs) Regulations 2000:

"(i) his income and capital and financial commitments during the previous year and, if applicable, those of his partner;

(ii) his estimated future financial resources and expectations and, if applicable, those of his partner; and

(iii) a declaration stating whether he, and if applicable his partner, has deliberately foregone or deprived himself of any resources or expectations, together (if applicable and as far as is practical) with details of those resources or expectations and the manner in which they have been foregone or deprived;

(iv) particulars of any application for funding made by him in connection with the proceedings; and

(v) any other facts relevant to the determination of his resources."

11. Mr Williams, who represented the Defendant, invited me to assume that the Defendant must have a good argument in relation to the claim against the Commission otherwise it would not have pursued it. I am not sure that I can share his confidence. But nor can I pre-judge arguments that have not yet been advanced. All that I can presently say is that, in view of the hurdle posed by *Lovelace*, it is difficult to see what the Defendant's argument will be.

12. I suspect that the real battlefield will be the £11,000 held by Mrs Cafane's solicitors and that the issue will be whether that should go to the Commission under the statutory charge (assuming that Mrs Cafane's costs exceeded £11,000) or whether it should go to the Defendant under this application. However, at present, that is merely speculation on my part.

13. As the directions set out in the Order of 15th July 2004 were made of the Court's own initiative, paragraph 6 provided that all parties, including the Commission, may apply by letter or otherwise to stay, vary or set aside the Order. It is under that paragraph that the Commission applies.

The Commission's argument

14. Miss Lambert, who appeared on behalf of the Commission, made two principal submissions:

(1) That the Defendant's application notice dated 14th July 2004 seeks no relief against the Commission and therefore no order can be made against the Commission.

(2) That the Defendant's failure to file a statement of resources with its application is fatal to the application. It has been the invariable practice of the Supreme Court Costs Office to dismiss "on paper" any section 11 application in which a statement of resources has not been filed and the directions that I made on 15th July fly in the face of that practice.

The Community Legal Service (Costs) Regulations 2000

15. It is common ground that although the Claimant's certificate remains governed by the 1988 Act, the procedure for seeking a determination of the Commission's liability is governed by the 2000 Regulations. Regulation 10, so far as is relevant, provides:

"(1) The following paragraphs of this regulation apply where the amount to be paid under a section 11(1) costs order, or an application for a costs order against the Commission, is to be determined under this regulation, by virtue of regulation 9(5).

(2) The receiving party may, within three months after a section 11(1) costs order is made, request a hearing to determine the costs payable to him.

(3) A request under paragraph (2) shall be accompanied by:

(a) if the section 11(1) costs order does not state the full costs, the receiving party's bill of costs, which shall comply with any requirements of relevant rules of Court relating to the form and content of a bill of costs where the Court is assessing a party?s costs;

(b) unless the conditions set out in paragraph (3A) are satisfied, a statement of resources; and

(c) if the receiving party is seeking, or, subject to the determination of the amount to be paid under the section 11(1) costs order, may seek, a costs order against the Commission, written notice to that effect.

(3A) the conditions referred to in paragraph (3)(b) above are that-

(a) the Court is determining an application for a costs order against the Commission;
(b) the costs were not incurred in a court of first instance.

(4) the receiving party shall file the documents referred to in paragraph (3) with the Court and at the same time serve copies of them:
(a) on the client, if a determination of costs payable under section 11(1) of the Act is sought; and
(b) on the Regional Director, if notice has been given under paragraph (3) (c)."

The form of the Defendant's application

16. Regulation 10(1) of the 2000 Regulations envisages *"an application for a costs order against the Commission"*. However regulation 10(2) provides that the trigger for the mechanism is to *"request a hearing to determine the costs payable"*. Regulation 10(3)(c) provides that such request shall be accompanied by written notice that the receiving party is seeking or *"may seek"*, subject to the determination of the assisted party's liability, a costs order against the Commission.

17. The application issued by the Defendant was "for an order that the costs be assessed and the means of the Claimant be assessed". I have set out the wording in full at paragraph 4 above.

18. Although not in terms *"an application for a costs order against the Commission"*, it is a request for a hearing to determine the costs payable, which is what is required by regulation 10(2). The letter to the Commission dated 14th July 2004 is written notice that the Defendant is seeking a costs order against the Commission. And by the statement of parties which was also filed the Defendant requested service of the application on the Commission.

19. Accordingly I find that, for the purposes of regulation 10(2) of the 2000 regulations, the Defendant did *"request a hearing to determine the costs payable to him*" on 14th July 2004 which was within 3 months after the costs order was made and that such request was accompanied by the written notice required by regulation 10(3)(c).

20. Accordingly, subject to the Commission's second argument, in my judgment an application for a costs order against the Commission was made within the prescribed time limit.

The need for a statement of resources

21. Miss Lambert, for the Commission, argues that regulations 10(3)(b) and 10(4) are mandatory. If the request for a hearing is not accompanied by a statement of resources, the request is of no effect. In the present case that would mean that the Defendant was now out of time for seeking an order against the Commission.

22. In support of that argument, she relies on two decisions of the Court of Appeal: ***Jones v Zahedi*** [1993] 1 WLR 1445 and ***Middleton v Middleton*** [unrep; 14th December 1994]. In both cases the procedure to be followed was that set out in the Civil Legal Aid (General) Regulations 1989, the predecessor to the 2000 Regulations (although still surviving in part).

23. In ***Jones*** the successful unassisted defendant applied for costs against the Legal Aid Board at the conclusion of the trial. The Judge adjourned the application so that the defendant could file an affidavit of costs and resources setting out the matters specified in schedule 2 to the regulations. The affidavit eventually filed was deficient, but the Judge allowed the defendant to give oral evidence at the adjourned hearing. Notwithstanding such evidence, the Judge decided that he was not satisfied that the defendant had satisfied the hardship test.

24. The defendant appealed. In giving the judgment of the Court of Appeal, Sir Thomas Bingham MR (as he the was) said (at p.1452H):
"As we read his judgment, the judge refused the application because he concluded that the defendant had not discharged the burden of showing that he would suffer severe financial hardship if an order were not made. We think he was right so to decide. ***But if he concluded that the defendant's failure to comply with the Schedule was of such significance that he could not properly make an order, then we think that decision was correct also.*** *We reached this decision with considerable regret, since it may well be that the defendant could without undue difficulty have complied with the Schedule and had he done so the judge would*

plainly have been very sympathetic to the application. As it is, we feel bound to dismiss the appeal." (emphasis added)

25. Miss Lambert relied on the words that I have emphasised as support for her submission that a failure to comply with the procedure is fatal to the process. However to my mind Lord Bingham was not stating that the failure *was* fatal but that it *may* be fatal. What he was articulating was the possibility of a failure *"of such significance"* that the judge would conclude that he could not properly make an order. That exercise must involve an assessment of the significance of the failure; not an automatic guillotine in the event of any failure.

26. In *Middleton* the issue which fell to be decided was *"whether the Court has power to grant an extension of time to an applicant under section 18 of the Legal Aid Act 1988 for costs out of the Legal Aid Fund where that applicant has failed to file the required affidavit of costs and resources within the time limit prescribed by the regulations": per* Peter Gibson LJ. The applicant had failed to file the affidavit within the 21 day time limit prescribed by regulation 142(a) of the 1989 regulations: *"within 21 days of the adjournment, the unassisted party shall file an affidavit of costs and resources (with any exhibits and supporting documents) together with a copy".*

The District Judge decided that, there being no provision to that effect in the regulations, there was no power to extend the time. On appeal Thorpe J. (as he then was) decided that the Court had an inherent jurisdiction to extend time. The Court of Appeal disagreed. *Per* Peter Gibson LJ: *"The draftsman has expressly indicated in what circumstances the Court has power to extend the time limit for the filing of an affidavit of costs and resources, and it seems to me that it would be inconsistent therewith if the Court were to retain some inherent power to do so in other circumstances? I am not aware of any authority to suggest that the Court retains an inherent power to alter the time limit set by statute or delegated legislation unless its inherent power is expressly taken away in the statute or the delegated legislation. Here, the right conferred by section 18 is purely statutory, and is not a common law right. Delegated legislation has prescribed in what circumstances and by what procedure that right is to be exercised and when and by whom extensions of time can be allowed."*

27. After referring to the decision in ***Jones v Zahedi*** and reading the passage in the judgment of Lord Bingham which I have set out above, Peter Gibson LJ continued: *"Thus this Court was accepting the submission made on behalf of the Legal Aid Board that substantial compliance with the schedule was mandatory, the reason being that it was part of a set of provisions prescribing, with some degree of particularity and stringency, the procedure for applications for compensation out of public funds.*

In my judgment, it would be inconsistent with that approach to allow an applicant to disobey the mandatory requirement of Regulation 142(a) to file his affidavit within 21 days. The matter can be tested in this way, would it have been open to the Court to allow the unsuccessful applicant in Jones v Zahedi to withdraw the deficient affidavit and to file a fresh affidavit out of time, or to file a further affidavit out of time? It is quite plain that this Court would not have thought that that was an option that was available under the Regulations."

28. Left there, it would be difficult to draw any conclusion other than that there is no power under the 2000 regulations to extend the time for filing and serving a statement of resources. The request under paragraph 10(2) "shall be accompanied by ? a statement of resources" and "the receiving party shall file the documents referred to in paragraph (3) with the Court and at the same time serve copies of them ? on the client ? and ? on the Regional Director". The regulations do not expressly empower the Court to extend time; and following *Middleton* it would seem clear that there is no inherent jurisdiction to permit an extension of time.

29. The issue raised before me comes in a different package to the issues raised before the Court of Appeal in ***Jone****s* and ***Middleton. Jones*** was an appeal from the hearing of the determination proceedings in which the learned Judge had decided that the unassisted party had not satisfied the hardship condition. ***Middleton*** was an appeal from the grant of an extension of time. In the present case the Commission is not (by this application) opposing the determination proceedings on its merits, nor opposing an application for an extension of time for service of the statement of resources. (Doubtless it would oppose the application on its merits in due course.) Rather, it is contending that the application is a nullity by reason of the failure to file or serve a statement of resources with the application. That is

rather different; and, to my mind, the difference is fundamental. It may well be that the Defendant?s application in this case is hopeless. It may even be that it plumbs the depths of hopelessness by dint of the fact that the Defendant may not be able to adduce any evidence to satisfy the hurdles which it faces. But, if the proceedings are not a nullity, the consideration of the merits of the Defendant?s application is for another occasion. The present occasion is limited to the Commission's application to strike out the application on the basis that it is a nullity - at least as against the Commission and I suspect that the same reasoning would apply in relation to the claim against Mrs Cafane.

30. Miss Lambert drew support for the Commission's contention that the application is a nullity from the words of Peter Gibson LJ in *Middleton*: "that substantial compliance with the schedule was mandatory". On that basis, she submitted that a failure to comply with the regulation 10 procedure rendered the application ineffective.

31. Mr Williams submitted that the principles to be applied in the event of procedural irregularity as set out in decisions following *Middleton* led to the conclusion that the procedure under regulation 10 should now be considered directory.

32. The principal authority on which Mr Williams relied was the decision of the Court of Appeal in ***R v Secretary of State for the Home Department ex parte Jeyeanthan*** [2000] WLR 354. Under the heading "**What should be the approach to procedural irregularities?**" Lord Woolf MR said (at page 358E):
"The issue is of general importance and has implications for the failure to observe procedural requirements outside the field of immigration. The conventional approach when there has been non-compliance with a procedural requirement laid down by a statute or regulation is to consider whether the requirement which was not complied with should be categorised as directory or mandatory. If it is categorised as directory it is usually assumed it can be safely ignored. If it is categorised as mandatory then it is usually assumed the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void or as being made without jurisdiction and of no effect. The position is more complex than this and this approach distracts attention from the important question of what the legislator should be judged to have intended should be the consequence of the non-compliance. This has to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance. In the majority of cases it provides limited, if any, assistance to inquire whether the requirement is mandatory or directory. The requirement is never intended to be optional if any word such as "shall" or "must" is used."

At page 359B he continued: *"Because of what can be the very undesirable consequences of a procedural requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity it is to be hoped that provisions intended to have this effect will be few and far between. In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation that tribunal's task will be to seek to do what is just in all the circumstances."*

After considering the speech of Lord Hailsham in ***London and Clydeside Estates Ltd v Aberdeen District Council*** [1980] 1 WLR 182, Lord Woolf continued (at page 362D): *" I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows:*

1. *Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)*
2. *Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.*
3. *If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)*

Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver."

33. Mr Williams also drew my attention to the earlier decision of the Court of Appeal in ***Howard v Secretary of State for the Environment*** [1975] 1 QB 235. The issue there was the validity of an appeal against an enforcement notice. Section 16(2) of the Town and Country Planning Act 1968 provided: *"An appeal under this section shall be made by notice in writing to the Minister, which shall indicate the grounds of the appeal and state the facts on which it is based."*

The plaintiff had delivered a formal written notice within time, but the notice had failed to state the grounds of appeal or the facts on which he relied. That information was provided only after the time limits had expired. The Court of Appeal held that the provision requiring the notice to indicate the grounds of the appeal and state the facts was directory only. Lord Denning MR considered an earlier decision of the Court of Appeal which was concerned with a different statutory provision but in similar terms. Of that decision he said at page 242E: *"I am afraid that Lord Parker C.J. there made a mistake. The section is no doubt imperative in that the notice of appeal must be in writing and must be made within the specified time. But I think it is only directory as to the contents. Take first the requirement as to the "grounds" of appeal. The section is either imperative in requiring "the grounds" to be indicated, or it is not. That must mean all or none. I cannot see any justification for the view that it is imperative as to one ground and not imperative as to the rest. If one was all that was necessary, an appellant would only have to put in one frivolous or hopeless ground and then amend later to add his real grounds. That would be a futile exercise. Then as to "stating the facts". It cannot be supposed that the appellant must at all costs state all the facts on which he bases his appeal. He has to state the facts, not the evidence: and the facts may depend on evidence yet to be obtained, and may not be fully or sufficiently known at the time when the notice of appeal is given. All things considered, it seems to me that the section, in so far as the "grounds" and "facts" are concerned, must be construed as directory only: that is, as desiring information to be given about them. It is not to be supposed that an appeal should fail altogether simply because the grounds are not indicated, or the facts stated."*

34. At page 243D Stamp LJ said: *"The purpose of imposing a limitation of time in section 16(1) is, as I see it, quite different: it is to prevent steps to enforce the enforcement notice being carried out before the time fixed has expired. The machinery of the enforcement provisions and the appeal therefrom simply would not work unless there was some fixed time put in section 16(1) to limit the time in which an appeal is to be brought. That provision is therefore imperative or mandatory and a failure to appeal within the time there limited clearly goes to the jurisdiction. The provisions of subsection (2) requiring the notice to indicate the grounds of the appeal and to state the facts on which it is based appear to me to be more in the nature of procedural matters which are directory and do not go to the jurisdiction."*

35. If the failure to file a request under regulation 10(2) within 3 months of the making of the costs order is fatal to an application against the commission, should the failure to accompany that request with a statement of resources prove similarly fatal?

36. In my judgment it should not. Applying the third question identified by Lord Woolf in ***Jeyeanthan,*** I have no hesitation in saying that it cannot have been intended that the consequences of non-compliance with regulation 10(4) should be to render the proceedings a nullity. In the present case the failure would have either no consequences at all or minimal consequences. The Commission is aware that the Defendant is a local authority. It is hard to believe that the attitude of the Commission to this application would be any different if it had a statement of the Defendant's resources.

37. Of course, in cases where the applicant for a costs order against the Commission is not a public authority or a large corporation, the Commission will need to know what the applicant is worth to assess the risks of a costs order being made and to decide whether to accede to or oppose the application. But is it necessary for that information to be provided at the moment that the request is made? In my view it is not. Miss Lambert sought to draw an analogy with personal injury litigation. The defendant will need to know the value of the case against him and a claimant "*must*" attach to his

Particulars of Claim a schedule of special damages and a medical report: CPR 16.PD4. But if he fails to do so, should the claim be a nullity? No. Invariably the Court will give the claimant an opportunity to put matters right.

38. If an applicant serves but does not file his statement of resources, or files it but does not serve it, he would be in breach of regulation 10(4). Was it intended that such failure should render the proceedings a nullity? Again, in my view the answer must be "no".

39. The consequence of treating regulation 10(4) as mandatory would be that an applicant, who had otherwise made an effective application within the time limit, would be shut out and prevented from making good his default if he can. As Lord Woolf said in ***Jeyeanthan*** the court should be slow to reach the conclusion that a procedural omission renders the proceedings a nullity.

40. As in ***Howard*** the important provision here is the 3 month time limit. The evidence to be filed with the request is "more in the nature of procedural matters".

41. In my judgment the failure to file or serve a statement of resources with the request is not fatal to the application.

42. When pressed, Mr Williams expressed some diffidence in explaining how the evidential lacuna facing the Defendant could be filled. If the Defendant were to make an application for an extension of time in which to file a statement of resources it would face the apparently insurmountable difficulty of the decision in ***Middleton.*** Of course the Defendant may take the view that it needs no evidence. It would be in no worse position than the many other public authorities who file inadequate statements of resources. Or it may be that the application really is only about that £11,000.

43. But whatever difficulty the Defendant may face eventually, in my judgment the application is not rendered a nullity by the failure to file or serve a statement of resources with the request for a hearing. Accordingly the Commission's application is dismissed.