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SUPREME COURT PRACTICE

N·E·W·S

- Admissibility of experts' joint statement
- Summary assessment of interlocutory costs
- Structure of Civil Procedure Rules

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IN BRIEF

Cases

■ ROBIN ELLIS LTD v. MALWRIGHT LTD, February 1, 1999, unrep.
RSC O. 36, r. 38 [CPR r. 35.12]—in action over building contract, parties' experts directed to meet—experts producing "interim" joint statement on valuations—judge directing preliminary trial of issue whether contract repudiated—D applying to use statement in cross-examining P's witnesses at preliminary trial—held, granting the application, the statement was not privileged (see SCP 1999, Vol.1, para. 38/39/7)

■ BURNS v. SHUTTLEHURST LTD, *The Times*, January 12, 1999, CA
Supreme Court Act 1981, s. 33(2), Third Parties (Rights against Insurers) Act 1930, RSC O. 24, r. 7A—P bringing action against D, his employers, for personal injuries—P obtaining judgment with damages to be assessed—D in liquidation and X, their insurers, refusing to indemnify them against P's claim—P proposing to bring claim against X under 1930 Act as statutory assignee—judge granting P's application under r. 7A for pre-action discovery against X—held, allowing X's appeal, P's claim against X was not a claim "in respect of personal injuries" (see SCP 1999, Vol. 1, para. 24/7A/3, and Vol. 2, para. 20A-218)

■ COMPANHIA EUROPEIA DE TRANSPORTES AEROS SA v. BRITISH AEORSPACE PLC, *The Times*, January 12, 1999, CA
RSC O. 15, r. 7, O. 20, r. 9—shortly after going into liquidation, P bringing contract action against D—L, P's majority shareholder, taking assignment of P's claim against D—judge making unless order requiring P to provide security for D's costs within 14 days and to amend writ adding L as plaintiff—P failing to comply with unless order and D applying to dismiss action—L applying for extension of time for amending writ or for an order substituting him as plaintiff—judge holding that, as the action stood dismissed because of P's failure to comply with unless order, it was too late for L to be added as plaintiff—held, dismissing P's appeal, (1) the court could in the exercise of discretion revive P's action if security were provided, however, (2) there was no prospect of this, consequently, (3) there was no action to which L could be joined (see SCP 1999, Vol. 1, paras 15/7/11, 15/7/16 & 20/9/1)

■ GIO PERSONAL INVESTMENT SERVICE LTD v. LONDON STEAMSHIP PROTECTION AND INDEMNITY ASSOCIATION LTD, *The Times*, January 13, 1999, CA
RSC O. 38, r. 2A [CPR r. 32.13]—in separate but related actions, P suing D and A suing B—at trial of first action, parties submitting lengthy written openings—after judgment, judge refusing B's application for order requiring P to supply them with copies of certain documents considered by the judge in the trial—on B's appeal, held, (1) B were not entitled to inspect documents referred to in the witness statements or the documents on the judge's reading list, but (2) they were entitled to inspect and make copies of the written opening submissions or skeleton arguments to which reference was made by the judge at trial (see SCP 1999, Vol. 1, para. 38/2A/15)

■ MILNE v. KENNEDY, *The Times*, February 11, 1999, CA.
Courts and Legal Services Act 1990, s. 28—P bringing proceedings against members of unincorporated association alleging unlawful removal from the associations' executive committee—county court judge ordering that M, a person without rights of audience, should be permitted to represent the members in the proceedings—held, allowing P's appeal, under s. 28 lay persons should be permitted to represent litigants only in exceptional circumstances and none existed here (see SCP 1999, Vol. 1, para. C-010)

■ REALKREDIT DANMARK A/S v. YORK MONTAGUE LTD, *The Times*, February 1, 1999, CA
RSC O. 24, rr. 3, 7 [CPR rr. 3.1(3), 3.4, 3.8, 3.9 & 31.12]—in complicated action with large sums at stake, judge making unless order requiring P to serve list of documents in proper form by particular date, otherwise the case should be dismissed—P serving list of 2,500 documents—D complaining that list incomplete—D applying for order striking out P's action for their failure to comply with the unless order—judge finding that the list was inadequate, that P had not compiled it in a proper and careful fashion, and granting D's application—held, allowing P's appeal, (1) where an unless order for discovery has been served in good faith, the order has been complied with, even though the list is incomplete, (2) D's remedy was to apply for a further and better list or affidavit verifying the list (r. 3) or for discovery of specific documents (r. 7) (see SCP 1999, Vol. 1, paras 18/19/7, 24/3/8 & 24/7/2)

■ SECRETARY OF STATE FOR TRADE AND INDUSTRY v. CASH, November 25, 1998, CA, unrep.
RSC O. 2, r. 1, O. 10, r. 1—P issuing originating summons seeking order disqualifying D as director—previously, D given notice by letter of P's intentions—P encountering difficulty in effecting service on D—in event, after inquiries P sending summons by post to address believed to be D's residence—after end of period of validity of summons, registrar

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IN DETAIL

Summary assessment of interlocutory costs

Rule 44.3 of the Civil Procedure Rules (CPR) states that the court has a discretion as to whether costs are payable by one party to another and as to when they are paid. Rule 44.7 states that, where the court orders a party to pay costs to another party (other than fixed costs) it may either (a) make a summary assessment of the costs and order payment of a sum of money, or (b) order detailed assessment of the costs by a costs officer (*i.e.* taxation) in accordance with the detailed rules found in Pt 47, unless any rule, practice direction or other enactment provides otherwise (see too rr. 43.3 & 43.4). The costs practice direction supplementing Pt 44 sets out the factors which will affect the court's choice under this rule. Where the court makes a costs order against a legally represented party, and the party is not present when the order is made, the party's solicitor must notify the client in writing of the costs order no later than seven days after the solicitor receives notice of the order.

In the Access to Justice Reports, it was said that existing rules of court are being flouted on a vast scale. As a result, interlocutory applications have become excessive. There are delays in obtaining dates for the hearing of such applications because the system cannot meet the level of demand. This delay in turn is used as a tactical weapon. If the new civil justice regime to be introduced by the CPR is to work it is essential for there to be an effective system of sanctions for non-compliance with rules, directions and orders. Costs have an important part to play. Costs orders are ineffective if they do not bite until the end of the case, when they can be lost among all the other orders for costs. Accordingly, it was recommended in the Access to Justice Reports that the courts should make more use of their existing powers to tax or assess costs on an interlocutory application and order them to be paid immediately. Those powers are as follows. By RSC O. 62, r. 7(4)(b) the High Court, in awarding costs to any person, has a general discretionary power to order that, instead of his taxed costs, that person shall be entitled to a gross sum. By CCR O. 38, r. 3(3D) a county court has a discretionary power to assess costs where costs are awarded on scale 2, and by CCR O. 38, rr. 17B and 19(3) a similar discretionary power where costs are awarded on scale 1 and are not included in the general costs of the action. By CCR O. 38, r. 19(1) a county court is required to assess costs without a taxation (a) where the costs are awarded on the lower scale and (b) where the costs are awarded on scale 1 and the solicitor for the receiving party so desires.

Although the existing RSC and CCR provisions have not been routinely used in interlocutory practice in the past, there is no reason why the recommendation that greater use should be made of them should not be implemented before the CPR provisions come into effect. Accordingly, on February 1, P*ractice Direction* (*Supreme Court*: *Costs*), T*he Times*, February 3, 1999, was issued. This Direction encourages judges to use the existing powers in interlocutory hearings, including summary judgment applications, where the estimated duration does not exceed one day and an order that the costs of the application should be awarded to the successful party in any event. The Direction does not apply to family proceedings in the High Court or county courts. The Direction comes into force on March 1 (but it appears that some district judges have jumped the gun) and will no longer apply after April 26, when the new rules and the supplementing costs practice direction will come into force. Paragraphs contained in section 3 of the costs practice direction supplementing Pt 44 will then supersede and replace the provisions of this Direction without materially altering their effect.

Paragraph 2 of the Practice Direction states that, at the conclusion of the hearing of every *inter partes* interlocutory application the court should consider whether or not to exercise its powers under the existing rules of court to assess summarily the amount of the costs of the application to be recoverable by one party from another. The general rule is that whenever a "costs in any event" order is made the court should make a summary assessment of costs unless there is good reason not to do so, for example, where the paying party shows substantial grounds for disputing the sum claimed for costs that could not be dealt with summarily. Where costs are assessed summarily, the court may make an order for payment by some specified date or by instalments. If no such order is made the assessed costs will be payable within 14 days of the date of the order. A summary assessment cannot not be made where any paying or receiving party is either legally aided and/or a person under a disability (see RSC O. 80, r. 1).

Obviously, if at the hearing of an *inter partes* interlocutory application the court is to make a summary assessment of costs the parties ought to be aware in advance of the hearing of the sums likely to be considered should a costs order be made against them at the hearing. Accordingly, paragraph 3 lays down the following practice which is to take effect unless the court otherwise directs.

Not later than 24 hours prior to the commencement of the hearing of every interlocutory application each party who intends to seek a "costs in any event" order has to supply every other party with a brief summary statement of the amount of the costs he will seek to recover. The failure by a party without reasonable

excuse to comply with this requirement is to be taken into account by the court in deciding what order in respect of the costs of the application should be made. The brief summary statement supplied by a party to the other parties has to state the amount and nature of any disbursements, including counsel's fees, and the amount of the solicitor's profit costs recovery of which would be sought. All amounts have to be shown net of value-added tax. If VAT is to be claimed, the amount of VAT has to be separately shown. If the solicitor's profit costs has been calculated on the basis of a rate per hour, the statement has to specify the number of hours, the rate per hour and the grade of fee earner. If the solicitor's profit costs has been calculated on any other basis the statement had to explain the basis of the calculation thereof. A model form for the brief summary statement is annexed to the Practice Direction (and copies are available for Queen's Bench and Chancery cases from the Supreme Court Accounts Office, Room E01, Royal Courts of Justice, and for county court cases from any county court.)

The rules of practice stated in the paragraph immediately above are not to apply where the parties have agreed between them the amount of the costs for which an order for payment should be made.

It should be remembered that, in the Access to Justice Reports, summary assessment of interlocutory costs was seen as a "procedural sanction" to ensure that parties complied with rules, practice directions and orders. It was not suggested that there was any need for the courts to make summary assessments as a matter of routine, even where a "costs in any event" order was appropriate. The Practice Direction states that, as a general rule, whenever a "costs in any event" order is made the court should make a summary assessment of costs "unless there is good reason not to do so". Further, even if there is no good reason for not making a summary assessment, the court may make an order suspending payment and might be persuaded to do so where a "procedural sanction" would be unnecessary, unfair or inappropriate.

Structure of the Civil Procedure Rules

The terms of reference of the inquiry conducted by Lord Woolf M.R. stated that the inquiry should produce "a single procedural code covering general High Court and county court business, with provision for specialist jurisdictions and procedures in each court". This included improving the rules of court by reducing complexity, modernising terminology, and removing unnecessary distinctions of practice and procedure. The terms of reference also stated that the aim of the inquiry was to improve access to justice and reduce the cost of litigation. The Civil Procedure Rules 1998, produced by the new rule committee established under the Civil Procedure Act 1997, were enacted in December 12 and come into force on April 24. They are designed to carry into effect the radical proposals made in the Access to Justice Reports. They constitute a "single procedural code" in name only. The former RSC and CCR cease to have effect. The structure of the CPR is complicated and unsatisfactory. It is outlined below.

The CPR are divided not into "Orders" but into "Parts". Parts 1 to 48 cover the ground covered by the earlier drafts and, in the main, it is these Parts which constitute the "single procedural code covering general High Court and county court business" referred to in the terms of reference for Lord Woolf's inquiry. Most of these Parts are supplemented by Practice Directions, also published in December 1998. These Practice Directions vary enormously in the level of detail presented. Ideally, rules should lay down procedure and practice directions should stipulate practice. The distinction between "procedure" and "practice" is not clear-cut but clear enough. Lawyers tend to feel the distinction in their bones. The distinction is not well maintained in the CPR and the supplementing practice directions. At all times, care has to be taken to read them together.

Part 49 is headed "Specialist Proceedings" and r. 49 states, blandly, that these rules shall apply to each of the proceedings listed therein as "specialist proceedings" subject to "the provisions of the relevant practice direction which applies to those proceedings". The listed "specialist proceedings" include (a) Admiralty proceedings, (b) arbitration proceedings, (c) commercial and mercantile actions, (d) Patents Court business (and certain related business), (e) Technology and Construction Court business (formerly Official Referees' business), (f) proceedings under the Companies Acts, and (g) contentious probate proceedings. In this highly unsatisfactory way provision is made within the single procedural code for (as the terms of reference of Lord Woolf's inquiry put it) "specialist jurisdictions and procedures in each court". Care has to be taken to ensure that the practice directions supplementing Pts 1 to 48 are not confused with those covering the practice and procedure to be adopted in the "specialist proceedings" as listed in Pt 49.

But that is not the end of the matter. One then comes to Pt 50, headed "Application of the Schedules". The CPR have two Schedules. Schedule 1 sets out, with modifications, certain provisions previously contained in the RSC and Schedule 2 sets out, again with modifications, certain provisions previously contained in the CCR. Indeed, in manuscript form, the two Schedules constitute two thirds of the total volume of the new rules. The bulk of the surviving RSC and CCR provisions relate to (1) proceedings in relation to land, (2) foreign proceedings and enforcement of foreign judgments, (3) the enforcement of domestic judgments and orders, (4) appeals of various kinds, and (5) proceedings under miscellaneous statutes. Important RSC and CCR Orders re-enacted (either in whole or in part) in the Schedules to the CPR and not falling in any of these five categories include RSC O. 53 (Applications for judicial review), O. 81 (Partners) and O. 82 (Defamation claims). Further, important provisions in RSC O. 15 are retained, in particular those dealing with relator actions, representative proceedings and derivative actions.

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granting P order that service had been duly effected—judge dismissing D's appeal—on D's further appeal, held, dismissing appeal, (1) in light of new evidence it should be assumed that the service had not been completed by the posting and was therefore irregular, (2) thus, the question was whether the court should exercise its discretion under O. 2, r. 1 to excuse the irregularity, (3) in the circumstances, the discretion should be exercised in P's favour, even though D's notice of the proceedings could not be inferred from the act of attempted service but from other facts (see SCP 1999, Vol. 1, paras 2/1/3, 2/1/6 & 10/1/13)

- SOUTHWARK LONDON BOROUGH COUNCIL v. NEJAD, *The Times*, January 28, 1999, CA
  CCR O. 14, r. 4, O. 38, r. 19A, RSC O. 62, r. 28(4) [CPR rr. 3.1(2)(a), 47.7 & 47.8(2)]—D applying for leave to lodge bill of costs out of time in county court taxation proceedings—district judge refusing leave and judge dismissing D's appeal—held, allowing D's further appeal, (1) in determining whether there should be an extension, the court had to consider all of the relevant factors, (2) as the result of not granting an extension would be Draconian, the court should be concerned to assess the proportionality of such penalty to D to his failure, (3) it should be remembered that, if an extension were granted, the taxing officer could punish D for the delay by not allowing certain costs, even though it had caused no prejudice to P (see SCP 1999, Vol. 1, paras 3/5/3 & 62/28/4)

- TILLEY v. BOOKER FOOD SERVICE GROUP LTD, November 3, 1998, CA, unrep.
  RSC O. 6, r. 8—after expiry of limitation period in personal injury action, D agreeing to three month extension of period of initial validity of writ for service on condition that P obtain Court order to this effect—shortly after expiry of agreed extended period, P applying for order retrospectively extending validity of writ to enable service to be effected—judge refusing application—held, allowing P's appeal, (1) there was good reason for granting an extension, and (2) in the light of the agreement between the parties, a reasonable excuse had been offered for the failure to apply for an extension before the period of validity had expired (see SCP 1999, Vol. 1, paras 6/8/6 & 6/8/9)

- WIGGINS v. RICHARD READ (TRANSPORT) LTD, *The Times*, January 14, 1999, CA
  Supreme Court Act 1981, s. 51, RSC O. 62, r. 2(4)—P, by brother as next friend, bringing action against D—at trial of preliminary issue, judge holding that P had no cause of action—judge making order for costs in favour D against X, P's parent—held, allowing X's appeal, there was a close relationship between X and P but it had not been shown that X had consciously (1) brought the action for his own rather than P's benefit, or (2) encouraged a hopeless action (*Symphony Group plc v. Hodgson* [1994] Q.B. 179, CA, ref'd to) (see SCP 1999, Vol. 1, para. 62/2/7 and Vol. 2, para. 20A-401)

- WOODFORD & ACKROYD v. BURGESS, *The Times*, February 1, 1999, CA
  RSC O. 33, r. 3 [CPR.rr. 3.1(2)(i), 28.7, 29.9 & 32.1]—in High Court action by D for solicitors' fees, D alleging professional negligence—D serving on P report of X, solicitor whom she proposed to call as an expert witness at trial—at pre-trial review, judge directing that X's evidence could not be admissible at trial because X was not properly to be characterised as an expert—held, dismissing D's appeal, (1) it is not the law that only the trial judge has jurisdiction to rule on the admissibility of an alleged expert's evidence, (2) such an issue could be dealt with, under the inherent jurisdiction, at a pre-trial review, or, under r. 3, could be tried as a preliminary issue.

Practice Directions

- PRACTICE DIRECTION (SUPREME COURT : COSTS), *The Times*, February 3, 1999
  RSC O. 62, r. 7(4)(b), CCR O. 38, r. 3(3D), O. 38, rr. 17B & 19(3)—states procedure and practice to be followed where a "costs in any event" order is to be made on an *inter partes* interlocutory application—general rule is that summary assessment of costs should be made by judge unless there is good reason not to do so—unless court makes order to contrary, such assessed costs to be payable within 24 days—party intending to seek such order required to prepare and serve brief summary statement of costs 24 hours before hearing (model form annexed)—applies to all proceedings in High Court and county courts except family proceedings—directions to apply from March 1 to April 26 (when comparable arrangements made under CPR Pts 43 to 48 and supplementing practice directions will come into effect) (see SCP 1999, Vol. 1, paras 62/7/14, C38/17B/1 & C38/19/1)

Statutory Instruments

- CIVIL PROCEDURE RULES 1998 (S.I. 1998 No. 3132)
  Civil Procedure Act 1997, s. 1—provide new procedural code, covering general county court and High Court business, with separate provision for specialist jurisdictions or procedures in either court, and appeals to the Court of Appeal—several Parts supplemented by Practice Directions and Forms—code applies to specialist jurisdictions (as defined) subject to relevant Practice Directions—Schedules 1 and 2 re-enact with modifications certain provisions of, respectively, the RSC and the CCR—implements recommendations made in the Access to Justice Reports—replaces RSC and CCR—in force April 24, 1999 (see SCP 1999, Vol. 2, para. 20A-5)

FEATURE

Admissibility of experts' joint statement

In *Robin Ellis Ltd v. Malwright Ltd*, a building contract case, directions given by the judge under RSC O. 36, r. 38 (see now CPR r. 35.12) included a direction that the parties' experts should meet on a "without prejudice" basis and agree a joint statement indicating those parts of their evidence on which they are, and those parts on which they are not, in agreement. Subsequently, it was ordered that the question whether the D had repudiated the contract should be tried as a preliminary issue. It was envisaged that preparations for the main trial would continue and it was directed that the experts should continue to meet and to produce a joint statement by November 6, 1998. The principal task of the experts was to assist the court in determining the value of the work done by P. By the due date the experts had not completed all of their discussions. However, they managed to produce a signed "interim" joint statement in which they recorded many points of agreement and some points of disagreement. Further, they identified some points on which a finding of the court would be required to enable a choice to be made between alternative valuations which they recorded. The interim joint statement also contained a paragraph in which it was stated that it had been prepared on the basis of information disclosed up to November 4 and that should further information be disclosed after that date it would be considered by the experts for the purpose of preparing a further joint statement.

The preliminary issues came on for trial in January 1999. At that trial, counsel for D indicated that he wished to use the interim joint statement prepared by the experts in cross-examination of witnesses for P. Counsel for P objected on the grounds that the statement was inadmissible in evidence; in particular, he contended that the statement was both privileged and irrelevant.

His Honour Judge Peter Bowsher, Q.C. ruled that the experts' joint statement was not privileged, even though it was said to be "interim". However, the discussions and correspondence between the experts was, and remained, privileged. His Honour also ruled that the joint statement was not binding on the parties in the same way that a contract would be binding on them. However, "the existence and terms of the joint statement as an open document may have important consequences for the parties". The judge agreed that, in the absence of express authority, experts do not have power to bind their instructing parties to an agreement reached between them as a result of joint meetings directed by the court. In this case the experts had no such express authority. The short question which arose was whether, nevertheless, the joint statement produced by the experts was an "open" document admissible in evidence. The judge held that it was. In his opinion, for an agreed joint statement to be admissible it is not necessary that it should be binding on the parties.

In giving his detailed reasons, the judge examined the nature of the "without prejudice" privilege generally and then considered the application of this privilege to meetings of experts particularly. The judge noted that the status of any agreement reached at without prejudice meeting of experts had been considered in three recent cases arising as Official Referees' business. As a result, a degree of uncertainty had arisen. Two of these cases, *Carnell Computer Technology Ltd v. Unipart Group Ltd* (1988) 45 B.L.R. 100 and *Murray Pipework Ltd v.* UIE *Scotland Ltd* (1990) 6 Const. L.J. 56, were decisions of Judge James Fox-Andrews, Q.C.. The third case, *Richard Roberts Holdings Ltd v. Douglas Smith Stimson Partnership* (1990) 47 B.L.R. 113, was a decision of Judge Newey, Q.C. Those cases were considered by the Court of Appeal in *Stanton v. Callaghan* [1998] 4 All E.R. 961, CA, a case in which the question was whether an expert witness was immune from suit in an action for negligence.

In the instant case, the judge noted that, in most of the cases in which the "without prejudice" privilege has been considered, the point of public policy either explicitly stated or implicit in the judgments has been the public interest in encouraging the settlement of disputes. Clearly, where a court orders a "without prejudice" meeting of experts the hope is that the parties will be able to settle the claim. However, if the claim cannot be settled the hope is that the litigation should be prepared for trial and fought at trial "upon issues which have been carefully limited and refined by appropriate agreements". Thus, there are two public interests involved; one is the public interest in encouraging settlements, and the other is the public interest in ensuring that actions, if fought, will be fought with less cost to the parties and to the public. These interests are related, because the pursuit of the latter objective will go far to aid the achievement of the former. In modern times, increasingly, the courts are stressing the public interest in the reduction of costs and delays and in the efficient and effective use of court resources, not only in individual cases, but generally. Further, nowadays expert witnesses are not seen as mercenaries for the parties but as helpers to the court, not only by providing expert evidence to the court, but also by playing their part in securing the efficient and effective use of court resources.

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